



Department of Political Science

Chair in Comparative Public Law

The composite “form of government” of the European Union. The relationships between EU and national executive bodies in France, Italy and Spain

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## Introduction

The choice of studying the composite “form of government” of the European Union and the relationships between EU and national executive bodies in France, Italy and Spain stems from the idea of understanding if there is a continuum in the inter-institutional relationship between the composite “form of government” of the EU and National executive bodies. Indeed, for composite “form of government” of the European Union is meant the voluntary restraint of each legal system (that of the European Union and that of each Member State) in favor of the other, with mutual recognition that takes place through relief-clauses laid down in the founding treaties and in each constitutional charter. The thesis of composite constitution is different from the others<sup>1</sup> because aims to avoid a hierarchical view of the relationships among legal orders – which is that linked to Multilevel Constitutionalism<sup>2</sup> – in favor of a vision based on mutual recognition. In this way, instead of “primacy” or “supremacy” of EU law, is preferred talk of “precedence” of EU law, highlighting that this “precedence” derives, times to times, from voluntary restraints envisaged in the Member States Constitutions, to be meant as cornerstones of the European Constitution<sup>3</sup>. However, research in this field is not easy to be done due to the difficulties to apply categories that are born inside and for the States such as that of “form of government” to the EU<sup>4</sup>.

As regard the concept of form of government is defined as the way in which the different functions of the States are distributed and organized among the different Constitutional bodies<sup>5</sup>. In the Member States of the European Union in which the “form of government”

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<sup>1</sup> Lupo, N. (2014). Parlamento Europeo e Parlamenti Nazionali Nella Costituzione "Composita" Nell'UE: le diverse letture possibili. *Rivista AIC*, [online] (3), p.2. Available at: [https://www.rivistaaic.it/images/rivista/pdf/3\\_2014\\_Lupo\\_II.pdf](https://www.rivistaaic.it/images/rivista/pdf/3_2014_Lupo_II.pdf)

<sup>2</sup> Pernice Ingolf, 2002, *Multilevel Constitutionalism in the European Union*, in *European Law Review*, 27, n. 5, pp. 511-529

<sup>3</sup> Besselink Leonard F.M., 2007, *A Composite European Constitution*, Europa Law Publishing, Groningen.

<sup>4</sup> G.T. Davies, *A Time to Mourn. How I Learned to Stop Worrying and Quite like the European Union*, 2008, Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1314696&download=yes](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1314696&download=yes)

<sup>5</sup> C. Mortati, *Le forme di governo*. Lezioni, Padova, 1973, p.3. In addition, the concept of form of government is defined as hybrid with two main features: be “interdisciplinary” and “dynamic”. Interdisciplinary because simultaneously subject of study of different categories of academics: political philosopher and sociologist, political scientists, constitutionalists. Dynamic because the determining of the concept change over time according to the variation or evolution, of the different factors that constitutes the concept. In: Spadaro, A.

is parliamentary exist a trust relationship between the Government or the Head of Government with the Parliament or between the Government or the Head of the Government and one of the Parliamentary Chamber<sup>6</sup>. The only exception to this scheme is represented by Cyprus that is a presidential system. Hence, which is the influence of this trust relationship on the system of government of the European Union? Which are the dynamics created as a consequence of the European institutional structure among its system of Government and that of its Member States?

To answer to the above research questions a study of the form of government of France, Italy and Spain had been done. Firstly, because the distinction<sup>7</sup> between form of Government and form of State<sup>8</sup> it is used, and it is present, only with regard to those countries. Secondly, because while Italy and France are founding Member States, Spain has joined the EEC only in 1986.

In this framework, in a critical way, the new economic governance has been used as case study in order to further explain how this influence among the composite European “form of government” and national executives’ bodies functions. In fact, that of the new economic governance of the European Union is a peculiar case that since the entrance into force of the Lisbon Treaty the 1<sup>st</sup> December 2009 has noticed significant changes. As regard, to coordinate economic policies in 2010 had been established the European Semester. Furthermore, “with the future of the euro area in question, the monitoring, coordination and enforcement of economic governance moves up a gear. A collection of six new laws, known as the ‘six-pack’ is agreed by EU lawmakers in September 2011”<sup>9</sup>.

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(2018). *L'evoluzione della forma di governo italiana: dal parlamentarismo rigido e razionalizzato al parlamentarismo flessibile, con supplenza presidenziale*. [online] Forumcostituzionale.it. Available at: <http://www.forumcostituzionale.it/wordpress/wp-content/uploads/2018/10/spadaro.pdf>

<sup>6</sup> The element of trust is the central element of the parliamentary “form of government”. The features of the parliamentary “form of government” are present in almost every EU Member States.

<sup>7</sup> The English expression form of government does not have an equivalent meaning given that at times is more equivalent to the notion of form of State. With reference to: MacCormick, N. (2010). *The Legal Framework: Institutional Normative Order*. [online] Oxfordscholarship.com. Available at: <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198268765.001.0001/acprof-9780198268765-chapter-1>.

<sup>8</sup> For form of State is mean the relationship between those who govern and the people.

<sup>9</sup> Commissione europea - European Commission. (2018). *Timeline: The Evolution of EU Economic Governance*. [online] Available at: [https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/timeline-evolution-eu-economic-governance\\_it](https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/timeline-evolution-eu-economic-governance_it).

To further stress the importance of balanced national budgets, in 2012 had been approved the Fiscal Compact as a part of the TSGC, making the goal of balanced budgets parts of Member States national constitutions. In 2013, with the aim to prepare common standards and a common timeline for national budgets EU lawmakers approved the “two-pack”.

The thesis is organized as follow. In the first chapter of this work it is highlighted how the “route” or to say better, the path that the European Union is following is dualistic. As regard the logic followed is twofold: the community or federal method and the intergovernmental method. To reconstruct how the executive branch of the European Union function, in the first chapter, an analysis of the Intergovernmental Institutions (The Council and the European Council) is done together with the supranational one (the Commission). Furthermore, in order to reconstruct the logics that are behind the executive branch of the Union the theories of Multilevel Governance as explained by Ingolf Pernice and Composite Constitutionalism by L.Besselink and the concept of inter-institutional balance starting from the Meroni’s doctrine are explained. After a deep analysis of the above-mentioned institution, a study of how the Economic Governance of the Union works is presented.

The second Chapter starts with considerations on the possibility to configure a European “form of government” as outlined by professor N.Lupo in his book *Dinamiche della forma di governo tra Unione europea e Stati membri*. Secondly, useful to this research had been to study the relationship among the “form of government” and the source system of the Union. After this introductory part, the following paragraphs are thoughts to study the form of governments of France, Spain and Italy for the reasons before explained. Finally, in the last chapter of the thesis the dynamics that occur among the composite “form of government” of the European Union are been analysed taking into consideration possible future evolution. Namely, proposal of reform of the Council and of the European Council are presented. In addition, special attention is given to the procedure of the so-called “*Spitzenkandidaten*” as a link between the Commission and the next European elections. As regard, the European political party system together with the proposals of reform of the European electoral law had been studied. To conclude, feasible reform regarding the economic governance of the Union and possible evolution of the interaction of the three-selected “form of government” with the composite “form of government” of the European Union is presented.

## CHAPTER 1 - The European governmental structure: The EU executive bodies post-Lisbon

## Introduction to chapter 1

The Lisbon Treaty (LT) had been adopted in 2009 to implement the European governmental system previously regulated by the Maastricht Treaty of 1992. Certainly, the LT retake many elements of the Constitutional Treaty previously failed to be ratified. The most notable difference between the Maastricht Treaty and the Lisbon treaty are in the organization of the EU decision making structure and the legislative acts amending the economic governance of the Union, namely to strengthen the Stability and Growth Pact. In this regard, the legislative acts are the “six-pack”, the “two-pack”, and the Fiscal Compact (or TSGC, Treaty on Stability Coordination and Governance in the Economic and Monetary Union). As regard, the system implemented at Maastricht, was regulated by the so called “three pillars”. Those pillars were: single market and related issues, Common Foreign and Security Policy and third, Justice and Home Affairs. The aforementioned system of three pillars “institutionalized two different methods of decision-making adopted by the European Union: the community (or federal) method regarding the first pillar and the intergovernmental (or confederal) method regarding the other two”<sup>10</sup>. Under the community method procedure, the Commission has the main role to foster cooperation between the supra-states institutions of the European Union, but it has also the important power of legislative initiative, then the Council and the European Parliament have to adopt jointly the legislative proposal. On the other hand, under the intergovernmental procedure, generally the Council acts unanimously, the Commission shares the power of initiative with the member states and the European Parliament has only a minor role (even if the power of initiative of the Commission is not recognized for the common foreign and security policy.) In other words, the Treaty of Maastricht has established an institutional differentiation that foster different decision-making regimes in different policies areas<sup>11</sup>. Anyhow, the logic of the three pillars and the deriving structure are not easily “separable in the practical functioning of the European Union”<sup>12</sup>. In fact, for instance, regarding trade policy (concerning the first pillar) and common foreign and security policy (regarding the second pillar) there is a clear overlap between these two fields. This phenomenon is called

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<sup>10</sup> Fabbrini, S. (2007). *Compound democracies*. 1st ed. Oxford: Oxford University Press, pp.176-186.

<sup>11</sup> Caporaso, J. and Rhodes, M. (2016). *The political and economic dynamics of the Eurozone crisis*. 1st ed.

<sup>12</sup> Fabbrini, S. (2007). *Op.cit*



“cross-pillarization”. The Lisbon Treaty has abolished the three pillars but has kept the two different methods. Moreover, Central union bodies – “whether intergovernmental or supranational in their institutional design”<sup>13</sup> – are likely to function differently conditional to which task they cope with and/or subject on whether they are working on a specific role in relation to “either one of the two domains of EU governance”<sup>14</sup>. To better understand how the decision-making regime of two core EU institutions (European Council, European Commission) has evolved and is working, and how the European Economic Governance works, I have divided the first chapter into several sections. In the first four sections, a general analysis of the decision-making structure together with the evolution of the intergovernmental system from Maastricht to Lisbon is provided. From section 1.5 to section 1.9 an outline of the work of the European Council and of the Council of the European Union is given. Moving further, from section 1.10 to section 1.14, an analysis of the work of the European Commission is made. Finally, section 1.15 an outline of the European Economic Governance is provided.

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<sup>13</sup> Fabbrini, S. (2007). *Op. Cit.*

<sup>14</sup> Fabbrini, S. (2007). *Ibidem.*

### **1.1) The evolution of the EU governmental system in the Treaty of Lisbon: the decision-making structure**

With the Lisbon Treaty, the Maastricht pillar structure has been abolished. Nevertheless, the two different decision-making regimes were kept; in fact, according to Fabbrini, “the formal abolishing of the pillar structure the Lisbon Treaty (LT) did, however, acknowledge the evidence of two different decision-making regimes” (one supranational and the other intergovernmental)<sup>15</sup>. For a large part of the policies concerning the single market, the Treaty lays down that integration moves forward through formal acts, the so called “integration through law”<sup>16</sup>. In order to ensure the “integration through law” the legal activity of the European Union is substantiated by regulations, directives and decisions. The former, are laws mandatory in any of their elements. Moreover, they are applicable directly in all member states. The directives are those legal acts that are binding for all member states but the “mean’s and methods” are left to the “individual member state’s control”. Finally, the decisions, are those that are legally binding but are addressed singularly<sup>17</sup>. “Therefore, in single market policies the Lisbon Treaty has institutionalized a supranational system of government, cementing a long process of distinction between the executive and the legislative branches<sup>18</sup>”.

Concerning the executive, the Lisbon Treaty has institutionalized a bicameral legislative branch, with the European Parliament (EP) representing a lower chamber than the Council of Ministers (The EP represents the electorate of the European Union with the Council representing the governments of the member states). To this respect, a particular attention has to be paid to Art. 289 paragraph one of TFEU (Treaty on the functioning of the European Union) which enshrined that: “the ordinary legislative procedure shall consist in the joint adoption by the E P and the Council of a regulation, directive or decision on a proposal from the commission<sup>19</sup>”. Hence, it underlines the growing role of the EP that has become an institution of “equal standing”<sup>20</sup> with the Council. Thus, the EP and the Council not only help the process of “integration through law” but they also “give legitimacy to the

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<sup>15</sup> Fabbrini, S. (2015). *Which European Union?* 1st ed. pp.33-49.

<sup>16</sup> Fabbrini, S. (2015). *Ibidem*.

<sup>17</sup> Fabbrini, S. (2015). *Ibidem*.

<sup>18</sup> Fabbrini, S. (2015). *Ibidem*.

<sup>19</sup> Fabbrini, S. (2015). *Ibidem*.

<sup>20</sup> Fabbrini, S. (2015). *Ibidem*.

law making-process through the representation of both voters and member states”<sup>21</sup>. “The EP exerts a power intended as a constraint on state action at EU level and reduces the degree of state control over the course of events, more especially through the EP’s power under Article 251 EC”<sup>22</sup>.

For the first time, The Lisbon Treaty has even recognized the European Council as a Union institution, chaired by a President elected “by a qualified majority” of its members for “a term of two and a half years” renewable only once. The Treaty has given to the European Council a permanent political head in order to ensure “the external representation of the Union on issues concerning its common foreign and security policy”<sup>23</sup>. In addition, the Lisbon Treaty, has a specific provision at Art. 15.1 TEU (Treaty on the European Union) that does not allow the European Council to exercise the legislative function, making clearer the distinction between the former and the Council. Following the line of its attempt, the European Council has acted as a “decision-maker of last resort”<sup>24</sup>, in the sense that it was the institution where strategic choices have been negotiated. Thanks to its informal nature, the European Council has been protected from absorption by supranational logic, acting as a supervisor of the “trialogue”, “that is the interaction between the Commission, the Council and the European Parliament”<sup>25</sup>. The Lisbon Treaty has in this way made formal an age-old practice, with the recognition of the European Council as the only institution able to get through member states inside the Union’s decision-making process<sup>26</sup>. Since the European Council does not have legislative powers and confirming the Commission as the promoter of the “general interest of the Union”, the Lisbon Treaty has even outlined a dual executive. In fact with the Lisbon Treaty the President of the European Council has become permanent and this has set a governmental framework in which the European Council “has become more than the mere institution representing the heads of state and government”<sup>27</sup> affecting the distinction between an intergovernmental European Council and a supranational Commission. Hence, the permanent presidency of European

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<sup>21</sup>Fabbrini, S. (2015). *Op. Cit.*.

<sup>22</sup> Craig, P. and De Búrca, G. (2011). *The evolution of EU law*. 2nd ed. Oxford: Oxford University Press, p.19.

<sup>23</sup> Fabbrini, S. (2015). *Ibidem*.

<sup>24</sup> Fabbrini, S. (2015). *Ibidem*.

<sup>25</sup> Fabbrini, S. (2015). *Ibidem*.

<sup>26</sup> Fabbrini, S. (2015). *Ibidem*.

<sup>27</sup> Fabbrini, S. (2015). *Ibidem*.

Council, has contributed to make it a “core institution of the Union<sup>28</sup>”. The Commission has become less supranational than expected in the sense that, with the increase of its size, due to the EU enlargements, the decision of keeping one commissioner per member state – in contrast to what was originally foreseen in the Treaty - “including its President and the High Representative of the Union for Foreign Affairs and Security policy which shall be one of its vice president” has had the “effect of diluting its traditional supranational character<sup>29</sup>”. Therefore, “the Lisbon Treaty has built a four-sided institutional framework for governing European Union policies (in the single market), with a bicameral legislature and a dual executive branch”<sup>30</sup>. Over the acts adopted by the EU Institutions the Court of Justice exercises its review.

The European Union is a system of representation and decision-making organized around the principles of the democratic separation of powers, and of checks and balances. Nevertheless, it is essential not to forget that the European Union is a democracy, but not a constitutional democracy in a strict sense. In spite of that, the European Court of Justice has functioned as a constitutional actor, laying down a set of principles that legitimized the formation of an integrated legal order – in particular, the supremacy of the EU law over national law, and, under certain conditions, the direct effect of EU law in the domestic legal systems. Thus, despite not having a formal constitution, thanks to the European Court of Justice, the European Union has become a properly “constitutionalized” regime, regulated by interstate treaties interpreted as quasi-constitutional documents.

### **1.2) The evolution of the EU governmental system post-Lisbon: The “intergovernmental Constitution”.**

The concept of “integration through law” was not the only mutation of the European Union governmental system related with the Lisbon Treaty. In fact, modification occurs even for what concern foreign policy and economic and monetary union policies (the EMU). In this respect, it is essential to underline that the common foreign and security policy (CFSP) and the EMU have been organized through the decision-making process of an intergovernmental constitution<sup>31</sup>. The intergovernmental decision-making scheme assumes

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<sup>28</sup> Fabbrini, S. (2015). *Ibidem*.

<sup>29</sup> Fabbrini, S. (2015). *Ibidem*.

<sup>30</sup> Fabbrini, S. (2015). *Ibidem*.

<sup>31</sup> Fabbrini, S. (2015). *Ibidem*.

that integration should move forward through “voluntary or consensual policy coordination between member state governments”<sup>32</sup>. Moreover, the Lisbon Treaty officially established “the intergovernmental method of policy-and decision-making”, consequently officiating a substitute integration model marked by Allerkamp: “(a) the policy entrepreneurship (coming) from some national capitals and the active involvement of the European Council in setting the overall direction of policy”; (b) “the predominance of the Council of Ministers in consolidating cooperation”; (c) “the limited marginal role of the Commission”; (d) “the exclusion of the European Parliament and the European Court of Justice from the circle of involvement”; (e) “the involvement of a distinct circle of key national policy-makers”; (f) “the adoption of special arrangements for managing cooperation, in particular the Council Secretariat”; (g) “the opaqueness of the process to national Parliaments and citizens”; (h) “the capacity on occasion to deliver substantial joint policy. In relation to foreign policy, the Lisbon Treaty has given a special role to the Foreign Affairs Council. In fact, the Foreign Affairs Council is the only Council configuration chaired for five years by the High Representative of Union for Foreign Affairs and Security Policy (HR) giving to the Foreign Affairs Council an autonomous functional structure. In addition to chair the Foreign Affairs Council, the HR (he or she), is also the vice-president of the Commission. The HR must be appointed by the European Council with the approval of the President of the Commission and this appointment must be also confirmed by the European Parliament<sup>33</sup>. The Lisbon Treaty has in addition foreseen the creation of an European External Action Service (EEAS) that is at the willingness of the HR in order to implement Union’s foreign policy. The “double” role of the HR as being both a member of a supranational institution (vice-president of the Commission) and of an intergovernmental institution (chair the Foreign Affairs Council) has been interpreted by many scholars as one of the major innovations brought by the Lisbon Treaty in order to lead foreign and security policies as near as possible to the supranational institutions.

In the same line of the policies that concern the foreign and the security field, are those concerning the economic and monetary union issues (the EMU). In fact, as well as for foreign and security policies, the policies concerning the EMU (as laid down in Maastricht), “have remained under the control of each national government, coordinating

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<sup>32</sup> Fabbrini, S. (2015). *Op. Cit.*.

<sup>33</sup> Fabbrini, S. (2015). *Ibidem*.

with the other national governments in the intergovernmental institutions set up in Brussels”<sup>34</sup>. To this point, the ECOFIN Council is the institution which monopolizes the decision-making in the economic field according to its exclusive power to take and carry out decisions regarding the economic and financial policies of the Union through the special legislative procedure. The latter, according to Art. 126.14 TFEU functions as follow: “the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the European Central Bank, adopt the appropriate provisions for implementing agreed-upon economic guidelines”<sup>35</sup>. The proposal is made by the Commission after consulting the European Parliament. Anyway, it is important to bear in mind that the Council is not tied to the European Parliament position. The logic remains intergovernmental even in the case that one or more of the member states have not respected the budget deficit (Art. 126.1; 126.2 TFEU). As a consequence the Commission’s recommendations for a member state running an excessive budget deficit get the status of a proposal, because only the ECOFIN Council can take the necessary measures. Hence, the Commission in this case has a technical role but not a decision-making one.

### 1.3) Multi-level Governance

Marks, Hooghe, and Blank claimed that integration occurred by a “polity creating process in which authority and policy-making are shared across multiple levels of government – subnational, national and supranational”<sup>36</sup>. National governments are major players in this process, but do not have a monopoly of control. Decision-making skills “are shared by actors at different level rather than monopolized by state executives”<sup>37</sup>. Political arenas are interrelated rather than hierarchically arranged. National arenas are important for the construction of state preferences, nonetheless the “multi-level model rejects the view that subnational actors are nested exclusively within them”. Promoters of multi-level governance endorse the theory with a 2-phase argument. The 1<sup>st</sup> phase contemplates the situations under which national executives could lose their “grip on power”. “A distinction is drawn between the state as an institution at a particular time”. They claim that there are

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<sup>34</sup> Fabbrini, S. (2015). *Op. Cit.*

<sup>35</sup> Fabbrini, S. (2015). *Ibidem.*

<sup>36</sup> Craig, P. and De Búrca, G. (2011). *Op. cit.* p.19.

<sup>37</sup> Craig, P. and De Búrca, G. (2011). *Ibidem.*

no goals why political actors should compulsory be stanch to giving precedence to the “state as an institution”<sup>38</sup>. Government leaders may want to allocate decision-making to the supranational level both because the political benefits compensate the expenses of the political control so foregone, or as the benefits of “shifting responsibility for unpopular decisions”. Thus, while MS could play the key role in the Treaty-making process, they do not use a monopoly of influence, and the daily control exerted by the states collectively is “less than that postulated by state centric theorists”. Hence, the ability of the “principals”, the Member States, to control the “agents”, the Commission and the ECJ, is limited by a range of factors, including the “multiplicity of principals, the mistrust that exists among them, impediments to coherent principal action, informational asymmetries between principals and agents and by unintended consequences of institutional change”. The last phase of the argument considers if policy-making is actually dominated by MS in the manner argued by state-centric theorists, or if it agrees to that postulated by multi-level governance. “In relation to policy initiation, Marks, Hooghe, and Blank conclude that “while the Council, the European Council, and the EP have circumscribed the Commission’s formal monopoly of legislative initiative, none can claim that it has reduced the position of the Commission to that of an agent”. They perceive agenda-setting as a common and challenged competence amid the four Community institutions, “rather than being monopolized by any one actor”. The equal outline of mixed competence is perceived in relation to the formulation of formal norms, particularly in the areas enclosed by co-decision, which has changed the legislative process from “a simple Council-dominated process into a complex balancing act between Council, Parliament and Commission”. A similar shape of multi-level governance is supposed in relation to implementation, where the Commission, state technocrats, national bureaucracies, and interest groups altogether play a role. From a legal point of view, there are many distinct legal reconstructions of what the EU is. For the purpose of this research, two of them will be analysed.

One that support the multi-level approach (Pernice), the other that support the composite approach (Besselink). In other words, these two legal analyses study the legal relationships among the EU and the national Parliaments with the common idea of different levels. The first of this two theory is the one formulated by Ingolf Pernice concerning the multi-level

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<sup>38</sup> Craig, P. and De Búrca, G. (2011). *Op. Cit.*

governance. Pernice started his analyses by stressing the fact that he understand the European Union as a “creature not of states, but of the citizens acting through, and represented by, their national governments in the name and on behalf of the citizens. This is how I understand democratic states. Treaties, negotiated by governments implementing the will of the people, are ratified with the authorization of national parliaments representing the people, if not directly after a referendum”<sup>39</sup>. Precise ‘integration-clauses’ provided in our ‘domestic’ constitutions permit that, opposite to usual international agreements, institutions are set, and powers are attributed on such institutions by the European Union treaties. “They open up the nation-state to a common, supranational legislative, executive and judicial authority acting with direct effect upon the rights and duties of the individual. And as people are directly affected, it was felt that there was a need to protect fundamental rights, similar and equivalent to the protection individuals are used to having against the national public authority. This is why we have, since the Treaty of Lisbon, the Charter of Fundamental Rights which is legally binding and part of the Union’s primary – or as I would say, constitutional – law”<sup>40</sup>. In addition, he added that by observing the EU treaties as such, citizens ‘constitute’ this European Union and so term themselves as ‘citizens of the Union’. They therefore give themselves a shared new ‘political and legal status’, in supplement to “their political status as citizens of their respective member states”<sup>41</sup>. The citizens are the ‘masters of the ’treaties’, “just as they are the masters of their national constitutions through their status as national citizens. In the process of making and developing the EU treaties, national governments and other institutions are tools or instruments in a constitution-making process: they make the constitution of a supranational Union that is based upon, and complementary to, the national constitutions”<sup>42</sup>. The expression ‘multilevel’ constitutionalism appears to indicate a hierarchy. However, the supranational level is taken into consideration as an extra constitutional level or, in Pernice words: “not hierarchically higher or lower than the national constitution but juxtaposed in a pluralist sense. European constitutional law is not separate from, but based upon, the national constitutions; European and national constitutional law are in many ways interwoven and interdependent; they form one system

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<sup>39</sup> Pernice, I. (2015). *Multilevel Constitutionalism and the Crisis of Democracy in Europe*.

<sup>40</sup> Pernice, I. Ibidem.

<sup>41</sup> Pernice, I. Ibidem.

<sup>42</sup> Pernice, I. Ibidem.



of law, a unity in substance producing, ideally, one legal solution in each particular case. This systemic unity is reflected in three sets of principles governing the constitutional architecture of the EU, unknown in international law contexts, but common to federal systems<sup>43</sup>”:

1. For what concern the division of powers, the principle of conferral (Article 5(2) TEU and Article 7 TFEU) and the principle of subsidiarity guarantees a partial and stable “attribution of competences” to the EU (see the system established by Articles 2 to 6 TFEU), whereas the “exercise of the powers conferred to the EU is governed by the principles of subsidiarity in a more specific sense and under the control of the national parliaments, and of proportionality” (Article 5 TEU).
2. As far as the link between EU law and domestic law concerns, “the former precedes the latter where there is conflict between the two”. National administrations, by applying EU legislation (Articles 4(3) TEU and 291(1) TFEU), and national judges, by guaranteeing real legal protection in the issues concealed by Union law (Article 19(1) subparagraph 2 TEU), “act as European agents bound by the principle of primacy in all cases as required by the principles of uniform application of Union law, effectiveness and equality before the law”.
3. To better guarantee the functioning of the system, there are exact constitutional safeguards: the “provision on common values and general principles of law (Article 2 TEU), the principle of permeability between the two constitutional levels and, in particular, specific provision for the effective protection of fundamental rights at both levels, where Union law is applied”. (Article 6(1) TEU and Article 51 Charter of Fundamental Rights).

“Consequently, the European Union can be understood – in legal terms – as a composed constitutional system founded in the will of the citizens in their capacity and status as both citizens of their respective member states and citizens of the Union. These citizens are the owners of the Union – in legal and political terms – and apart from the citizens, there is no source of legitimacy for the policies implemented by the respective institutions at each level<sup>44</sup>”. Moreover, “The recognition of the direct effect of provisions of the treaties as well

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<sup>43</sup> Pernice, I. *Op. cit.*

<sup>44</sup> Pernice, I. *Ibidem.*

as of EU directives in the case law of the European Court of Justice, since the judgment in *Van Gend & Loos*, and the development of the rights derived from the treaties from individual rights of market citizenship to civic rights of Union citizenship since the Treaty of Maastricht, allow citizens to also play a fundamental role in safeguarding European law as ‘guardians of the ’treaties’. Recognition of the ultimately political democratic status and responsibility of the citizens of the Union can be found in the provisions on the double representation of the citizens, directly in the European Parliament and indirectly in the European Council and the Council, whose members are accountable, as Article 10(2) TEU specifies, ‘either to their national parliaments, or to their citizens’. Recognition can also be found in Article 11 TEU on the participation of citizens and civil society in the EU political process and, in particular, on the citizen’s’ initiative. Finally, it is more than symbolic that Article 14 TEU on the European Parliament specifies that it is ‘composed by representatives of the Union’s citizens’, and not as in earlier times, by representatives of the peoples of the member states<sup>45</sup>”.

Moving from the multi-level approach of the European Union to the composite approach of the European Union, the latter has been postulated by Leonard F.M. Besselink. According to Besselink: “the coining of the expression ‘multilevel constitutionalism’ by Ingolf Pernice, which on some points seems to develop a more sophisticated model than the classic European law approach which emerged in the 1960s and still dominates that discipline, but which on the whole ignored the relevance of national constitutional orders within the European construct by posing rather uncritically an unconditional primacy and predominance of EC and EU law over whatever national constitutions might mean to or wish to say on European integration. What the various views hold in common, however, is the essential distinction of different ‘levels’”<sup>46</sup>. This concept intended as ‘levels’ has two effects. Firstly, the image of ‘levels’ easily spreads into the discussion about higher and lower levels. The paradigm consequently appears to be hierarchical. Furthermore, the notion of ‘levels’ proposes a relative split – “a view which is compounded by an emphasis on the ‘autonomy’ claims for the relevant constitutional orders, particularly the EC order”. Taking into consideration together both of this consideration, the model implies that the

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<sup>45</sup> Pernice, I. *Op. Cit.*

<sup>46</sup> Besselink, L.F.M., (2010). *National and constitutional identity before and after Lisbon*. *Utrecht Law Review*. 6(3), pp.36–49. DOI: <http://doi.org/10.18352/ulr.139>

levels are in a way distinct from each other, but together – “viewed from a ‘dynamic’ perspective – it essentially leads to a situation in which one level must outweigh or even supersede the other. The ‘centre of gravity’ within the system can only exist at one level at a time – the levels cannot be coextensive.<sup>47</sup>” The frequency of the multilevel method becomes apparent in the analysis of EU decision-making and the responsibility of national parliaments. The predominant doctrine of the “democratic deficit hinges critically on the ‘transfer’ of powers from one ‘level’, the national ‘level’, to another: the European ‘level’. Inherent in speaking of ‘transfer’, instead of, for instance, ‘attribution’ or, more neutrally, ‘conferral’ of powers, is the idea that once a previously national power has moved to the European level, it has somehow ‘disappeared’ at the national level. Indeed, as regards the decisional institutions, this has had as a consequence that national governments meeting through their representatives in the Council have become pivotal actors to the detriment of national parliaments, also with regard to matters which were previously – i.e. before the transfer to the European level – within the remit of national parliaments, notably legislative power. Not the parliament in the national capital, but Brussels decides”. However, Besselink in order to develop the concept of “composite constitutionalism” affirmed that the European union can be seen differently from merely in terms of separate levels. To further develop this concept, having a particular focus on the constitutional order of the European Union, the composite constitutionalism implies that it comprises not only the EU treaties and the secondary law, but also the constitutional law of the Member States. Therefore, in this view, the European Union constitutional order is identified more in terms of a composite legal order more than in the multi-level methodology. This implies that the organization is polycentric rather than hierarchical concerning both, substantive constitutional norms and institutions. That being said, here appears clear the role of the National parliaments. Indeed, as a consequence of what had been previously stated, those national parliaments are not isolated but rather are part of the EU constitutional order. In legal terms, this theory is evident if, for instance, we look at the principle of subsidiarity. “Subsidiarity is a principle which applies to the EU institutions and its agencies and other bodies, but are the national parliaments which scrutinize, determine, and hence supervise, whether the EU institutions apply it correctly”<sup>48</sup>. The above-mentioned explanation on how

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<sup>47</sup> Besselink, Lfm. (2018). *National Parliaments in the EU's Composite Constitution: a Plea for a Shift in Paradigm*.

<sup>48</sup> Besselink, Lfm. (2018), *Op. cit.*

the principle of subsidiarity is checked is confirmed by Article 6(1) of the Protocol on the application of the principles of subsidiarity and proportionality (Protocol 2<sup>49</sup>). “The significant element here, as elsewhere in the protocol, is that the parliaments (or chambers thereof) are placed in a direct relation to the European institutions. They do not address their views on a draft EU measure to their own national government, nor are their views to be transmitted by their governments, but they immediately communicate with the EU institutions. National parliaments are thus made actors with their own independent role to play within the EU constitutional system. They are made an integral part of a truly composite constitutional order”<sup>50</sup>.

#### 1.4) **Inter-institutional balance**

The EU institutions have always represented a particular case when it comes to the elaboration on the “forms of government”, by which it is meant. From the very beginning of the EEC it has been difficult to shape the main institutions inside any sorted ordering that matches those devised for its member states or nation-state in general. The very place of legislative and executive power in the Rome Treaty was tricky, and these difficulties were further worsened as new institutions, initially external to the firm letter of the Treaty, advanced in reply to a compound set of political burdens. From the very beginning of its history, institutional balance, as divergent to firm separation of powers, described the character of legislative and executive power in the EEC. The idea of institutional balance is very old. It was a pivotal element in the republican idea of democratic ordering, expressing the ideal that the form of political assembling should summarize a balance between dissimilar interests, which characterized diverse sections within civil society. This balance was imagined to be essential to guarantee that decision-making aided the public good rather than slight sectional self-interest. The notion of institutional balance was a

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<sup>49</sup> Consolidated protocols, annexes and declarations attached to the treaties of the European Union. Protocol 2, Art 6: Any national Parliament or any chamber of a national Parliament may, within eight weeks from the date of transmission of a draft legislative act, in the official languages of the Union, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers. If the draft legislative act originates from a group of Member States, the President of the Council shall forward the opinion to the governments of those Member States. If the draft legislative act originates from the Court of Justice, the European Central Bank or the European Investment Bank, the President of the Council shall forward the opinion to the institution or body concerned.

<sup>50</sup> Besselink, Lfm. (2018). *Op. cit.*

significant part of the republican discussion in the fifteenth and sixteenth centuries, influencing the desired structure of government in the Italian republics, exercising later influence in England and the embryonic United States. In Europe the first genuine reference to the institutional balance is found in the Meroni case, where the Court sees “in the balance of powers which is characteristic of the institutional structure of the community a fundamental guarantee granted by the Treaty in particular to the undertakings and associations of undertakings to which it applies.”<sup>51</sup> For the Court, the principle is a substitute for the principle of the separation of powers which, in Montesquieu’s original exposition of his philosophy, aimed to protect individuals against the abuse of power. In the absence of a separation of powers, the principle of institutional balance made it possible to guarantee that a modification of the institutional balance would not call into question the decision-making process envisaged by the treaties and the accompanying guarantees provided by the treaties<sup>52</sup>.

Institutional balance is not though self-executing. It supposes by its very kind a normative and political judgment as to “which institutions should be able to partake of legislative and executive power, and it presumes also a view as to what constitutes the appropriate balance between them<sup>53</sup>”. These normative foundations have, not surprisingly, changed over time in the EU, and continue to do so.

### 1.5) The European Council: foundation and evolution

The phase among the Rome Treaty and the single European Act (SEA) likewise was characterized by the rise of the European Council<sup>54</sup> “as a political actor”. “The Rome Treaty gave no institutional role to the heads of state, but meetings between them were common from the early 1960s. The decision to institutionalize such meetings was taken in 1974 at

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<sup>51</sup> Andenas, M. and Deipenbrock, G. (2016). *Regulating and Supervising European Financial Markets*. p.119.

<sup>52</sup> Jacquè, J. (2004). *The principle of institutional balance*. [online] Ieie.itam.mx. Available at: <http://ieie.itam.mx/docs06/Montse%20Pi/jacqu.pdf>. pagg. 383-391

<sup>53</sup> Craig, P. and De Búrca, G. *Op. Cit.*

<sup>54</sup> According to M. Telò: “Since 1974, the SEA (Single European Act) and the Maastricht Treaty of 1992, started a gradual process of integration of the European Council – as the politically leading body – within a mixed and sophisticated institutional system, merging intergovernmental and supranational rules and procedures”. In: Telò, M. (2015). *Assessing Origins, Developments and International Relevance of the European Council. Intergovernmental summits in historical and international comparison*. ERIS – European Review of International Studies, 2(2), pp.40-65. On the same point see also: Telò, M. (2004). *Dallo stato all'Europa*. Roma: Carocci.

the Paris Summit. The conclusion from the summit stated that such meetings would occur three times per year, normally outside the boundaries of the Council, but where necessary within the Council. “These meetings continued to be held during the 1970s and 1980s, even though there was no formal remit until the SEA”<sup>55</sup>.

The motivation assumed for the institutionalization of the European Council at the 1974 Paris Summit was “to ensure progress and consistency in the overall work of the Community”<sup>56</sup>. It has developed into a major institutional player in the EU, in the sense that nothing of real significance happens deprived of the “imprimatur of the European Council”. This has been so also considering the lack of Treaty basis prior to 1986, and aside the shortness of legal reference of the European Council in the Single European Act.

### 1.6) European Council (EC): route of EU policy

To the European Council was conferred Treaty recognition in the Single European Act and supposed ever-greater status for the global route of EU policy. There are only few major institutions in which the lack of connection between reference in the Treaties and the meaning of its function is more marked. The lack of “Treaty references to the European Council should not therefore lead one to doubt its importance”. The EC not only gives guidance to the whole path of European integration and undertakes main constitutional decisions, “as it did in the past”, but also has even developed to be an executive institution “in its own right”<sup>57</sup>. Moreover, The European Council is thought to be the only institution able of producing political momentum. Policy-making needs nonstop European Council involvement as otherwise collective EU action “remains unlikely”, yet the heads act without delay to play this part and use close supervision over a series of policy activities<sup>58</sup>. It progressively performed a key role in setting the “pace and shape of EU policy, establishing the parameters within which the other institutions operated, and providing a forum at the highest level for resolution of tensions between the Member States”<sup>59</sup>. This was mirrored in longer conclusions that arose from the European Council meetings, which

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<sup>55</sup> Craig, P. and De Búrca, G. (2011). *Op. cit.* pag.50

<sup>56</sup> Craig, P. and De Búrca, G. (2011). *Ibidem.*

<sup>57</sup> Puetter, U. and Fabbrini, S. (2016). *Catalysts of integration – the role of core intergovernmental forums in EU politics*. Journal of European Integration, 38(5), pp.633-642

<sup>58</sup> Puetter, U. and Fabbrini, S. (2016). *Op. cit.*

<sup>59</sup> Craig, P. and De Búrca, G. (2011). *Op. cit.* pag.55

would often contain detailed ‘action points’ for other institutional players, especially the Council and Commission.

The functions of the European Council are enlisted in Article 15 (1) TEU<sup>60</sup>. The meaning assumed in Article 15 (1) TEU focuses on the EC’s executive function. Yet the EC also exercises three important additional functions. First, it is agreed a substantial constitutional function as regard as the simplified revision procedures. “The EC agrees on the eligibility conditions for States hoping to become members of the Union<sup>61</sup>”. Secondly, the EC also has institutional functions. It can impact the structure of the EP<sup>62</sup>, as well as that of the European Commission<sup>63</sup>. In addition, the EC will implement several Council formations and fix that configuration’s presidency.<sup>64</sup> Finally as regard the institutional functions the EC shall designate the High Representative of the Union for Foreign Affairs and Security Policy<sup>65</sup>, but also the President of the European Central Bank.<sup>66</sup> “Thirdly, the European Council exercises arbitration powers and thus functions like an appeal “court” in – very – specific situations. The EC is here empowered to suspend the legislative procedure to arbitrate between the Council and the Member State claiming that the draft European law would affect fundamental aspects of its criminal justice system.<sup>67</sup>”

“The fact that the European Council possessed no direct role in the legislative process did not therefore prevent it from shaping legislative priorities and the nature of legislative initiatives<sup>68</sup>”.

The European Council performed a key role to Treaty reform, as a consequence of the fact that the initiative for the creation of an Inter-Governmental Conference (IGC) would usually come from the EC, which would also assert or amend the conclusions grasped in such negotiations. It was generally the EC that sets central changes in the institutional configuration of the Community, for example the extension of the Parliament subsequent to German unification. “It was the European Council once again that often provided the

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<sup>60</sup> The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof. It shall not exercise legislative functions.

<sup>61</sup> Art. 49 and Art. 50(2) TEU.

<sup>62</sup> Art 14(2) TEU The European Council shall adopt by unanimity, on the initiative of the European Parliament and with its consent, a decision establishing the composition of the European Parliament, respecting the principles referred to in the first subparagraph.

<sup>63</sup> Art. 17(5) TEU.

<sup>64</sup> Art. 236 TFEU.

<sup>65</sup> Art. 18(1) TEU.

<sup>66</sup> Art 283 (2) TFEU.

<sup>67</sup> Schütze, R. (2016). *European constitutional law*. 2nd ed. Cambridge: Cambridge University Press, p. 172

<sup>68</sup> Craig, P. and De Búrca, G. (2011). *Op. cit.* pag.55

focal point for significant constitutional initiatives that affected the operation of the Community and Union, such as Inter-institutional Agreements between the three major institutions<sup>69</sup>”. The EC often measured the condition of the European economy, and suggested initiatives to tackle unemployment, encourage growth, and enhance the competitiveness. It acted in the development of specific strategic policy, concerning issues “as diverse as social policy, drugs, terrorism, asylum, and immigration<sup>70</sup>”. Moreover, The EC was fully engaged in external relations, providing the pace of new entrance to the EU. Anyway, concerning the fact that the chair of the EC changed according to the rotation criteria every six months did not enrich continuity of policy, and therefore was subjected to critics.

The above-mentioned critics have brought to reforms, culminated in the Seville European Council 2002. It had been established that the six Presidencies involved, jointly with the Commission, should draft a joint proposal, which was presented to the General Affairs and External Relations Council (GAERC) for implementation by the EC “in the form of a multi-annual strategic programme lasting three years. The first such programme was produced in 2003. This three-year programme in turn led to annual operational programs submitted by the two Presidencies to the GAERC, which would then finalize the programme. This programme was itself influenced by the Commission programme, and by external events<sup>71</sup>”.

“The permanent President is elected by the European Council, according to Art 15 (5) TEU,<sup>72</sup> but cannot be elected from within the European Council as.... The period of office will be a (once renewable) term of two-and-a-half-years<sup>73</sup>. The advantages of a permanent President over a rotating presidency are considerable. First, a permanent President means more permanence. Secondly, the tasks of the President of the European Council have become far too demanding to be the subject of shared attention.

The tasks of the President are set out in Article 15(6) TEU.<sup>74</sup> The tasks of the President are not very specific. The President has primarily coordinating and representative functions.

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<sup>69</sup> Craig, P. and De Búrca, G. (2011). *Op. cit.* pag.55

<sup>70</sup> Craig, P. and De Búrca, G. (2011). *Ibidem*.

<sup>71</sup> Craig, P. and De Búrca, G. (2011). *Ibidem*.

<sup>72</sup> Art. 15 (5) TEU. The European Council shall elect its President, by a qualified majority, for a term of two and a half years, renewable once. In the event of an impediment or serious misconduct, the European Council can end the President's term of office in accordance with the same procedure.

<sup>73</sup> *Ibidem*

<sup>74</sup> The President of the European Council:



S/he represent the EC as an institution within the Union. Outside the Union, s/he ensures the external representation of the Union with regard to the Union's CFSP – a task that is however shared with the High Representative for Foreign Affairs and Security Policy”<sup>75</sup>.

### **1.7) The powers and the decision-making regime of the Council of Ministers of the European Union**

The Council does not have a permanent President. Differently to the EC, the Council works in various configurations, and the charge of chair these distinctive configurations could not be fixed to one person. One consequently mentions to the “depersonalized office of the Council 'presidency' as opposed to the President of the Council”<sup>76</sup>. The Council Presidency is regulated by Article 16(9) TEU.<sup>77</sup> The Council Presidency “shall be held by pre-established groups of 3 Member States for a Period of eighteen months”<sup>78</sup>. For what concerns this Troika of States, every member of the group will manage the corresponding Council configurations for six months<sup>79</sup>. The main exception to the circling presidency in the Council is the “Foreign Affairs Council”. In this case, the Treaty provides a special rule in Article 18 TEU – concerning the office of High Representative of the Union for Foreign Affairs and Security Policy. “The High Representative shall preside over the Foreign Affairs Council”<sup>80</sup>. The responsibilities of the Presidency are dual. Externally, it is to symbolize the Council<sup>81</sup>. Internally, it is to arrange and manage the Council meetings. “The team presidency is thereby charged to write a 'draft programme' for 18 months”<sup>82</sup>. The

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(a) shall chair it and drive forward its work;

(b) shall ensure the preparation and continuity of the work of the European Council in cooperation with the President of the Commission, and on the basis of the work of the General Affairs Council;

(c) shall endeavour to facilitate cohesion and consensus within the European Council;

(d) shall present a report to the European Parliament after each of the meetings of the European Council.

The President of the European Council shall, at his level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy.

The President of the European Council shall not hold a national office.

<sup>75</sup> Schütze, R. (2016). *Ibidem*.

<sup>76</sup> Schütze, R. (2016). *Ibidem* pag. 175

<sup>77</sup> The Presidency of Council configurations, other than that of Foreign Affairs, shall be held by Member State representatives in the Council on the basis of equal rotation, in accordance with the conditions established in accordance with Article 201b of the Treaty on the Functioning of the European Union.

<sup>78</sup> European Council Decision 2009/881 on the exercise of the Presidency of the Council [2009] OJ L 315/50, Art. 1(1).

<sup>79</sup> Art. 1(2) *Ibidem*

<sup>80</sup> Art 18(3) TEU.

<sup>81</sup> Art. 26 Council Rules of Procedure

<sup>82</sup> Schütze, R. (2016). *Op. cit.* pag. 176

single member State to embrace office will additionally establish “draft agendas for Council meetings scheduled for the next six-month period<sup>83</sup>” on the basis of the Council’s draft programme<sup>84</sup>. Finally, the (relevant) chair of each Council configuration shall draw up the “provisional agenda for each meeting.<sup>85</sup>”

The Council needs – materially – to assemble in Brussels to make decisions. The summits are separated into two parts: the first one concerning legislative activities, the second one regarding non-legislative activities. Whilst examining legislation, the Council requirement is to encounter in public<sup>86</sup>. The Commission will take part in Council meetings. Nonetheless, the Commission does not attend as an official participant of the Council and thus it is not allowed to vote. “The quorum within the Council is as low as it is theoretical<sup>87</sup>”: a majority of the members of the Council are required to enable the Council to vote<sup>88</sup>. The way in which decision-making in the Council takes place is in two main forms: “unanimous voting and majority voting”<sup>89</sup>. Unanimous voting needs the approval of all national ministers and is compulsory in the Treaties for relevant political questions. Majority voting, nevertheless, characterizes the constitutional norm. The treaties here separate between a simple and a qualified majority. “Where it is required to act by a simple majority, the Council shall act by a majority of its component’s members.<sup>90</sup>” This form of voting by majority of its components however, is rare. The Constitutional pre-setting is definitely qualified majority: “the Council shall act by a qualified majority except where the Treaties provide otherwise.<sup>91</sup>” Member States are not “sovereign equals” in the Council nonetheless would own an amount of votes that is linked with the dimension of their population. The scheme of “weighted” votes that conventionally is applied, was set as follows: Germany, France, Italy and United Kingdom possess 29 votes; Spain and Poland possess 27 votes; Romania possess 14 votes; Netherlands possess 13 votes; Belgium, Czech Republic, Greece, Hungary, Portugal possess 12 votes; Austria, Bulgaria, Sweden possess 10 votes; Croatia, Denmark, Ireland, Lithuania, Slovakia, Finland possess 7 votes;

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<sup>83</sup> Schütze, R. (2016). *Ibidem*. pag. 176

<sup>84</sup> Art 2.7 *Ibidem*

<sup>85</sup> Art 3(1) *Ibidem*

<sup>86</sup> Art. 16(8) TEU and Art. 5(1)

<sup>87</sup> Schütze, R. (2016). *Ibidem*. pag. 180

<sup>88</sup> Art 11(4) Council Rules of Procedure

<sup>89</sup> Schütze, R. (2016). *Ibidem*. pag. 180

<sup>90</sup> Art 238 (1) TFEU.

<sup>91</sup> Art 16(3) TEU.

Cyprus, Estonia, Latvia, Luxembourg, Slovenia possess 4 votes and finally Malta possess 3 votes. The qualified majority is intended to be reached at 260 votes out of 352. The increment of votes is in some ways “degressively proportional.” “Indeed, the voting ratio between the biggest and the smallest state is ten to one – a ratio that is roughly similar to the degressively proportionate system for the European Parliament<sup>92</sup>”. Decision-making in the Council used to demand a triple majority: “a majority of the weighted votes must be cast by a majority of the Member States representing a majority of the Union population. This triple majority system has exclusively governed decision-making in the Union until 1 November 2014. From that date, a completely new system of voting applies in the Council<sup>93</sup>”. This radical transformation is provided in Article 16(4) TEU, which states: “As from 1 November 2014, a qualified majority shall be defined as at least 55 % of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65 % of the population of the Union. A blocking minority must include at least four Council members, failing which the qualified majority shall be deemed attained. The other arrangements governing the qualified majority are laid down in Article 205(2) of the Treaty on the Functioning of the European Union”. This innovative Lisbon voting system eliminates the structure of weighted votes for a system that awards to each State a single vote. Secondly, this system of qualified majority voting is intended to substitute the triple majority by an easier double majority. Thirdly, the Member States have recovered the “Ioannina Compromise (IC).<sup>94</sup>” Agreeing to the IC, the Council is under an obligation – despite the formal existence of the double majority in Article 16(4) TEU – to continue deliberations, where a fourth of the States or States representing a fifth of the Union population oppose a decision. The Council is in this case under the technical responsibility to “do all in its power” to reach – within a reasonable time – a “satisfactory solution” to address the interests by the blocking MS. “This soft mechanism is complemented by a hard mechanism to limit qualified majority voting in the Council. For the Treaties also recognize – regionally limited – versions<sup>95</sup>” of the “Luxembourg Compromise”.

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<sup>92</sup> Schütze, R. (2016). *Op. cit.* pag. 181

<sup>93</sup> Schütze, R. (2016). *Op. cit.* pag. 181

<sup>94</sup> The compromise was negotiated by the MS’ foreign ministers in Ioannina (Greece) – from where it takes its name. The compromise was designed to smooth the transition from the Union of 12 to a Union of 15 MS.

<sup>95</sup> Schütze, R. (2016). *Op. cit.* pag. 183

### 1.8) The Council of the European Union: Coreper I and Coreper II

“The simple facts are the easiest to forget. The Member State representatives on the Council are just that, representatives with an important ‘day job’, most being ministers in their national governments<sup>96</sup>”. They join a Council summit for a day, two as a maximum, and afterward fly home. On the off chance that the Council was to comprehend, process, and take a view on Commission authoritative proposition it required an establishment in more ‘lasting session’ that could consult with the Commission on draft recommendations and accommodate contrasts between the Member States themselves. The authors of the Rome Treaty drew on skill from the ECSC Treaty, in which preparatory work was assumed by a Commission for the Coordination of the Council of Ministers, ‘Cocor’. Article 151 EEC certified the Council’s rules of procedure to see to a committee of representatives of Member States, the ability of which “would be decided” by the Council. A likely committee was agreed upon at the opening meeting of the Council of Foreign Ministers in 1958; the first summit of the Committee of Permanent Representatives, Coreper, was carried out the following day, and it has run into “more than 2,300 times since then” (2011)<sup>97</sup>. “It was accorded more explicit recognition in the Maastricht Treaty, and was, prior to the Lisbon Treaty, governed by Article 207(1) EC.” Coreper is controlled by high-ranking national officials and works at two levels. Coreper II is the more prominent and involves permanent representatives of ambassadorial rank. It handles with more divisive issues such as “economic and financial affairs, and external relations”, and cooperates with national governments. Coreper I is comprised of deputy permanent representatives and is accountable for matters such as “the environment, social affairs, and the internal market”. While Coreper is not allowed to take applicable decisions fully-fledged, it has nevertheless developed ‘into a veritable decision-making factory’. It will examine and assimilate draft legislative proposals from the Commission and “set the agenda for Council meetings”. “The agenda is divided into Parts A and B: the former includes items which Coreper has agreed can be adopted by the Council without discussion; the latter will cover topics which do require further discussion”<sup>98</sup>. Roughly 85 per cent of Council conclusions prepared by Coreper plummet in Part A. Several working parties—about 250—constituted of national

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<sup>96</sup> Craig, P. and De Búrca, G. (2011). *Op. cit.* pag.45

<sup>97</sup> Craig, P. and De Búrca, G. *Ibidem*

<sup>98</sup> Craig, P. and De Búrca, G. *Ibidem.* pag.45

experts, nourish into Coreper. “They are the lifeblood of the Council”. These units will study legislative proposals from the Commission and convey to Coreper or the Council. The Council similarly obtains input from other specialist committees.

It would be incorrect to depict Coreper as solely intergovernmental in its direction. Decision-making tends to get consensual, also in the case where the official voting rules require qualified majority, “and Lewis notes that from a Janus-faced perspective, they act as both, and simultaneously, state agents and supranational entrepreneurs<sup>99</sup>”. This stable perspective is significant. It does not change the circumstance that Coreper and the large number of working groups stood a ‘necessary’ progress “if the Council was to take an informed view of the meaning and merits of Commission proposals”. The Council’s capacity for input and influence “on primary legislation would have been severely limited without Coreper and the working parties, which redressed an otherwise significant informational and technical asymmetry between Council and Commission”. This was more specifically so assumed that the Council could only modify Commission proposals by unanimity. It was consequently even more vital that Commission proposals were carefully processed before being officially gave to the Council.

Today, the Council is depicted as the “federal” chamber inside the Union legislature. It is the body wherein national ministers meet. Inside the EU, the Council is the institution of the MS. “Its intergovernmental character lies in its composition”. The TEU outlines it as follows: “The Council shall consist of a representative of each MS at ministerial level, who may commit the government of the MS in question and cast its vote<sup>100</sup>”. Within the Council, every national minister consequently represents the concentrations the of his Member State. These interests might vary according to the subject matter definite in the Council. And indeed, according to the subject matter under investigation, exist different Council configurations<sup>101</sup>. And for each formation, a diverse national minister will provide his State. Though there is – legally – “but one single Council, there are – politically – ten different Councils”. The current Council formations are: General affairs; Foreign Affairs; Economic and Financial Affairs; Justice and Home Affairs; Employment, Social Policy, Health and Consumer Affairs; Competitiveness; Transport, Telecommunications and Energy; Agriculture and Fisheries; Environment; Education, Youth, Culture and Sport. The

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<sup>99</sup> Craig, P. and De Búrca, G. *Op. Cit.* pag. 46

<sup>100</sup> Art. 16 (2) TEU

<sup>101</sup> Art. 16 (6) TEU

Treaties only outline the task of the first two Council configurations. “The General Affairs Council” (GAC) has one upward and downward task. It must “prepare and ensure the following up meetings of the EC.”<sup>102</sup> For what concerned the “downward” task, it is charged to “ensure consistency in the work of different Council configurations” below the GAC.<sup>103</sup> The “Foreign Affairs Council” (FAC), on the other hand, is required to “elaborate the Union’s external action on the basis of strategic guidelines laid down by the EC and ensure that the Union’s action is consistent<sup>104</sup>”. The area of application and functional task of the other eight Council configurations is constitutionally open<sup>105</sup>.

### **1.9) The Council of the European Union’s contribution to non-legislative acts: Comitology**

The Luxembourg Accords allowed the Member States to “block measures that injuriously affected their vital interests”<sup>106</sup>. Coreper and the multitude of working parties endorsed Council contribution into the formation of primary legislation. It also quickly became evident that Member States attempted to impact over secondary norms and shaped an institutional mechanism to smooth this.

It is shared among democratic systems that primary legislation is drawn to be complemented by secondary norms, which develop the principles enclosed in the enabling statute. This is due to many reasons. Legislatures are not capable of predict all implications of primary legislation; it may not even have time, nor expertise, to report all matters in the original legislation; “and measures consequential to the original statute may have to be passed expeditiously”<sup>107</sup>. The secondary norms might be customized decisions. “They will however commonly be legislative in nature: general rules applicable to all those falling within a certain factual situation. The method by which such measures are made varies in the Member States”<sup>108</sup>. The principle in some systems is that “norms of a legislative nature should be legitimated through some degree of legislative oversight”. This standing from the ‘top’ via the legislature “may be complemented by legitimation from the ‘bottom’

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<sup>102</sup> Art 2 (3) Council Rules of Procedure

<sup>103</sup> Art. 16 (6) TEU

<sup>104</sup> *Ibidem*

<sup>105</sup> Schütze, R. (2016). *Op. cit.* pp.174; 175

<sup>106</sup> Craig, P. and De Búrca, G. *Op. cit* pag 46

<sup>107</sup> Craig, P. and De Búrca, G. *Ibidem*

<sup>108</sup> Craig, P. and De Búrca, G. *Ibidem*

through participation in rule-making by affected parties”<sup>109</sup>. “The idea in other systems is that the policymaking should take some independent power to create secondary norms, the main check is judicial review. It is significant to dismiss any impression that the primary legislation takes all matters of principle, while secondary norms adopt unimportant points of detail. This does not symbolize reality. Secondary norms might address “disputes of principle or political choice that are just as controversial as those dealt with in the primary legislation”<sup>110</sup>. This is remarkably so in the EU, which has been categorized as a regulatory legal system, where secondary protocols will frequently deal with substances of principle or political contestation. “This serves to explain the birth of the committee system known as Comitology”<sup>111</sup>. The Commission has uttered a picture of the ‘Community method’ in which it “sees itself as the Community executive with principal responsibility for the making of such secondary norms”<sup>112</sup>. The Rome Treaty offered little by means of final guidance on the formulation of secondary norms, or the circumstances that could be ascribed to this process. Political reality is nevertheless often the compound for legal development. “Comitology was born in the context of the Common Agricultural Policy (CAP)”<sup>113</sup>. It quickly became clear that management of the CAP needed comprehensive rules in ever-changing market environments. Remedy to primary legislation was unfeasible. The Member States were nonetheless wary of agreeing the Commission a blank allowance over implementing rules, “since power once delegated without encumbrance generated legally binding rules without the option for further Council oversight”<sup>114</sup>. This suspicion was amplified by frictions between Council and Commission in the mid-1960s running to the Luxembourg Accords. The establishment of the committee system also simplified interaction between national officers and resolution of divergence among the Member States, who might approve on the governing principles for an area but oppose on the more comprehensive implications thereof. “The net outcome was the birth of the management committee procedure, embodied in early agricultural regulations. The committee, composed of national representatives with expertise in the relevant area, were involved with the Commission in the deliberations leading to the secondary regulations,

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<sup>109</sup> Craig, P. and De Búrca, G. *Op. Cit.* pag 47

<sup>110</sup> Craig, P. and De Búrca, G. *Ibidem*

<sup>111</sup> Craig, P. and De Búrca, G. *Ibidem.* pag 47

<sup>112</sup> Craig, P. and De Búrca, G. *Ibidem*

<sup>113</sup> Craig, P. and De Búrca, G. *Ibidem*

<sup>114</sup> Craig, P. and De Búrca, G. *Ibidem*

which were immediately applicable, subject to the caveat that they could be returned to the Council if they were not in accord with the committee's opinion"<sup>115</sup>. The Council might then implement a dissimilar decision by qualified majority in one month. The committee methodology quickly became a typical feature of "delegation of power to the Commission". It was not too long before the more limiting version, "the regulatory committee procedure, was created: if the committee failed to deliver an opinion, or if it gave an opinion contrary to the recommended measure, the Commission would have to submit the proposal to the Council, which could then act by qualified majority"<sup>116</sup>. There was a shelter net, capable of that "if the Council did not act within three months of the measure being submitted to it, then the proposed provisions could be adopted by the Commission. The desire for greater political control reached its apotheosis in the contre-filet version of the regulatory committee procedure: the normal regulatory committee procedure applied, subject to the caveat that the Council could by simple majority prevent the Commission from acting even after the expiry of the prescribed period"<sup>117</sup>. Comitology has been ample examined by political scientists and lawyers. Rational choice institutionalists repute it as an "exemplification of their principal/agent thesis". "Member State principals delegate four functions to supranational agents: monitoring compliance; the resolution of incomplete contracts among principals; the adoption of regulations in areas where the principals would be biased or uninformed; and setting the legislative agenda so as to avoid the 'endless cycling' that would otherwise result if this power were exercised by the principals themselves"<sup>118</sup>. The principals must nonetheless guarantee insofar as possible that the negotiators do not lost from the inclinations of the principals. Consequently, on this view Comitology comprises a control mechanism for which Member State principals apply control above supranational agents. The Member State chiefs acknowledged the necessity for delegation "of power over secondary norms to the supranational agent, the Commission, but did not wish to give it a blank cheque, hence the creation of committees through which Member State preferences could be expressed, with the threat of recourse to the Council if agreement could not be reached with the Commission". It is assumed that the representatives on Comitology reflect their Member

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<sup>115</sup> Craig, P. and De Búrca, G. *Op. cit*

<sup>116</sup> Craig, P. and De Búrca, G. *Ibidem*

<sup>117</sup> Craig, P. and De Búrca, G. *Ibidem*

<sup>118</sup> Craig, P. and De Búrca, G. *Ibidem*



State exogenous preferences and bargain within the committees”<sup>119</sup>. The options of committee procedure echo the Member States’ capacity to enforce the “degree of control” that greatest suits their interests. “This view has been challenged by sociological institutionalists and constructivists”<sup>120</sup>. “They contend that decision-making within Comitology is best viewed as a form of deliberative supranationalism.” Governments might be uninformed of their inclinations on particular issues. “The national delegates on the committees will often regard themselves as a team dealing with a transnational problem and become representatives of an inter-administrative discourse characterized by mutual learning”. Comitology is shown as a network “of European and national actors, with the Commission acting as coordinator”<sup>121</sup>. The national delegates in the deliberative process are prepared to call their own inclinations into question in order to get a Community solution. There have not unexpectedly been experimental studies intended to test these rival hypotheses. Even if the formation of Comitology committees follows to the rational choice hypothesis, this does not signify “that the national representatives will necessarily always function in interstate bargaining mode”<sup>122</sup>. They might work in a manner more like to deliberative supranationalism. Nevertheless, whether they do so “may depend on the subject matter, and conclusions reached in the context of, for example, food safety committees, may not be applicable in other areas”<sup>123</sup>.

#### **1.10) The evolving role of the European Commission**

The Commission had previously usually been divergent to the indication that its “President should be elected”, be afraid of the “politicization” that could result. Its approach nevertheless transformed since that the Convention had been pondered. A key consideration predisposing the Commission for election was that this would improve the democratic legitimacy of the Commission President, “thereby strengthening his claim to be President of the Union as a whole, or at the very least providing grounds for resisting the grant of far-reaching powers to the President of the European Council”. The Commission’s involvement to the debate about the emerging “institutional architecture”

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<sup>119</sup> Craig, P. and De Búrca, G. *Op. Cit.*

<sup>120</sup> Craig, P. and De Búrca, G. *Ibidem*

<sup>121</sup> Craig, P. and De Búrca, G. *Ibidem*

<sup>122</sup> Craig, P. and De Búrca, G. *Ibidem*

<sup>123</sup> Craig, P. and De Búrca, G. *Ibidem*

for the EU was suitable, in December 2002, just afore the Convention speech on institutions was fixed to start in January 2003. Its vision for the method of choosing the Commission President featured prominently in this document<sup>124</sup>. The Commission claimed that its accountability for setting out “the general interests of the Union meant that it must derive its political legitimacy from both the European Council and the European Parliament”. It consequently endorsed convening on the European Council and the European Parliament “equivalent rights both for the appointment and for monitoring the action of the Commission”. The Commission wished-for that the Commission President would be elected by the European Parliament, issue to be approved by the European Council. The further members of the Commission would be designated by the Council, “acting by qualified majority in agreement with the Commission President, subject to approval of the full College of Commissioners by the European Parliament”.

“The European Parliament favored an indirectly elected Commission President”. It was nevertheless always uncertain whether the Member States would be ready to accept a management in which they conceded control over the “Commission Presidency to the European Parliament”. The Member States were, predictably, not disposed to concede this power.

“The ‘solution’ in the Constitutional Treaty was carried over directly into the Lisbon Treaty. Thus Article 14(1) TEU duly states that the European Parliament shall elect the President of the Commission. The retention of state power is however apparent in Article 17(7) TEU. The European Council, acting by qualified majority, after appropriate consultation, and taking account of the elections to the European Parliament, puts forward to the European Parliament the European Council’s candidate for Presidency of the Commission. This candidate shall then be elected by the European Parliament by a majority of its members. If the candidate does not get the requisite majority support, then the European Council puts forward a new candidate within one month, following the same procedure”. Consequently, although there had been some partial support for the idea that the Commission President would be directly elected, “the argument being that this would help to foster European demos, the result is that the Commission President is indirectly elected”.

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<sup>124</sup> CONV 448/02, For the European Union Peace, Freedom, Solidarity – Communication from the Commission on the Institutional Architecture, 5 December 2002, [2.3]; Peace, Freedom and Solidarity, COM (2002) 728 final

### 1.11) Commission: Size and Appointment and the “*Spitzenkandidaten*”

There had been significant discussion, regarding the overall size of the Commission, “as to whether there should continue to be one Commissioner from each state, or whether there should be an upper limit combined with rotation”. The structure and dimension of the Commission appeared notably in the Convention deliberations.

The Draft Constitution as it arose from the “Convention on the Future of Europe” expressed a compromise. It stipulated that the Commission “should consist of a College comprising the President, the Union Minister for Foreign Affairs, and thirteen Commissioners selected on the basis of a rotation system between the Member States”. These requirements suggested the view that “there should be a small Commission, with a number of Commissioners that was less than that of the Member States”. This was nonetheless undermined by the establishment that the Commission President would appoint non-voting Commissioners “from all the other Member States”. This ‘solution’ was tricky, “since it would have created a two-tier Commission, with voting and non-voting Commissioners. It was fiercely opposed by the Commission itself”, which defined the important provisions as ‘complicated, muddled and inoperable’.

“The schema in the Draft Constitutional Treaty was altered by the IGC in December 2003. The result was embodied in the Constitutional Treaty and taken over with some modification into the Lisbon Treaty. Thus, the Commission will, until 31 October 2014, consist of one national from each Member State, including the President and the High Representative for Foreign Affairs. After that date the Commission is to consist of members, including the President and the High Representative for Foreign Affairs, which correspond to two thirds of the number of Member States, unless the European Council, acting unanimously, decides to alter this number. Member States must be treated on a strictly equal footing as regards determination of the sequence of, and the time spent by their nationals as, members of the Commission, with the consequence that the difference between the total number of terms of office held by nationals of any given pair of Member States may never be more than one”.

The official appointment of the Commission is prepared by the European Council, “acting by qualified majority”, although on the basis of the endorsement fixed by the European Parliament.

The Commission is made up of one<sup>125</sup> national of each Member State as stated by Art. 17(5) TFEU.<sup>126</sup> Its members are selected “on the ground of their general competence and European commitment from persons whose independence is beyond doubt.<sup>127</sup>” The Commission’s mandate is five years. During this period, it need to be “completely independent”. Its members “shall neither seek nor take instructions from any Government or other institution, body, office or entity.<sup>128</sup>” The Member States are subject to an obligation to fulfil this independence. Infringement of the obligation of independence might carry to a Commissioner get “compulsory retired.<sup>129</sup>” The Commission configuration follows the sense of an election selection. The above-mentioned election is divided into 2 stages. In the first phase, the President of the Commission is elected<sup>130</sup>. The President will have been nominated by the European Council “taking into account the elections to the EP”, that is: in accordance with the latter’s political majority<sup>131</sup>. The designated applicant must then be “elected” by the EP. “If not confirmed by Parliament, a new candidate needs to be found by the European Council<sup>132</sup>. After the election of the Commission President begins the second stage of the selection process. By common accord with the President, the Council will adopt a list of candidate Commissioners on the basis of suggestions made by Member States<sup>133</sup>. With the list being agreed, the proposed Commission is subjected “as a body to a vote of consent by the EP”, and on the basis of this election, the Commission shall be appointed by the European Council<sup>134</sup>. This complex and compound selection process constitutes a mixture of “international” and “national” elements. The

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<sup>125</sup> This is the Commission composition due to the referendum held in June 2008 in Ireland that was contrary to the ratification of the Lisbon Treaty in the Irish legal system. Consequently, in order to held a second “positive” referendum in order to ratify the LT; MSs accepted not to modify the composition of the Commission, issue that was particularly sensitive to the Irish people, with the result of a second referendum held in 2019 with a positive outcome and the consequently ratification of the Treaty.

<sup>126</sup> As from 1 November 2014, the Commission shall consist of a number of members, including its President and the High Representative of the Union for Foreign Affairs and Security Policy, corresponding to two thirds of the number of Member States, unless the European Council, acting unanimously, decides to alter this number.

<sup>127</sup> Art. 17(3) TEU.

<sup>128</sup> Art 17 TEU *Ibidem*.

<sup>129</sup> Art. 245 TFEU and Art. 247 TFEU

<sup>130</sup> In this regard, in 2014 the election of the President of the Commission followed the procedure of the “Spitzenkandidaten”. According to this procedure, the President of the Commission had been designated by the European Council among those MEPs who were most voted in their European political parties. After the designation, the EP should approve by qualified majority voting the candidate designated. This was the procedure under which President Juncker had been elected.

<sup>131</sup> Art. 9 and Art. 10 ECSC

<sup>132</sup> Art 17(7) TEU

<sup>133</sup> Art 17(7) TEU *Ibidem* second section.

<sup>134</sup> Art 17(7) TEU *Ibidem* third section.

Commission's democratic legitimacy thus derives partly from the MS, and partly from the EP<sup>135</sup>". Bearing in mind that the President of the Parliament and the Council are designated from "within" the institution, the Commission President supports in the selection of "his" institution. This role as the "Chief" Commissioner over "his" college is undoubtedly recognized by the Treaties<sup>136</sup>. The Members of the Commission will do the obligations developed about them by the President under his authority. On the basis of this political authority, the Commission is classically called after the President.

The duties of the President are enlisted in Art. 17(6) TEU: The President of the Commission shall:

(a) lay down guidelines within which the Commission is to work; (b) decide on the internal organisation of the Commission, ensuring that it acts consistently, efficiently and as a collegiate body;

(c) appoint Vice-Presidents, other than the High Representative of the Union for Foreign Affairs and Security Policy, from among the members of the Commission. A member of the Commission shall resign if the President so requests. The High Representative of the Union for Foreign Affairs and Security Policy shall resign, in accordance with the procedure set out in Article 18(1), if the President so requests. Those powers of the President cited are formidable. First s/he can put down the political route of the Commission in the shape of strategic guidelines. This will usually occur at the opening of a President's term of office. "The presidential guidelines will subsequently be translated into the Commission's Annual Work Programme. Secondly, the President is entitled to decide on the internal organization of the Commission. Thirdly, the President can appoint Vice-Presidents from "within" the Commission. Finally, there is a fourth power not expressly mentioned in Art. 17(6) TEU: "The President shall represent the Commission". Each Commissioner is responsible for his or her portfolio. Members of the Commission will thereby be assisted by their own cabinet. And each cabinet will have an administrative head. An organizational novelty of the 2014 Commission is the idea of "project teams", which will combine various portfolios under the authority of a Vice-President of the Commission. The aim behind this administrative grouping seems to be the desire to set policy priorities from the very start, and to create more cohesion between various

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<sup>135</sup> Schütze, R. (2016). Op. cit. pag. 186-187.

<sup>136</sup> Nugent, N. (2015). *The European Commission*. 2nd ed. London: Palgrave, p.68.

ministerial portfolios<sup>137</sup>. Moreover, since 2014, for the appointment of the President of the European Commission, it had been introduced a new a procedure the so called “*Spitzenkandidaten*”. The above-mentioned procedure consists in pan-European chief candidates designated by the European political parties. Even tough, a practice like that at European level was thought even before 2014, for the sake of “arguably” strengthening the democratic nature of the EU polity. However, the nomination of Juncker as President of the European Commission with the system of the “*Spitzenkandidaten*” was not envisaged by all. Indeed, although many Heads of State or Government were in favor, there was a coalition led by the British Prime Minister which was opposed or at least reluctant to adopt the nomination of the victorious lead candidate as Commission President. In addition, there was no unanimous decision on that matter even by the European Parliament. In fact, 33 % of the Members of the European Parliament (MEP) “of the in-coming parliament represented national parties whose European umbrella parties did not nominate lead candidates<sup>138</sup>”. Moreover, the 23 percent of the MEPs were members of political groups in the EP which consciously opposed the *Spitzenkandidaten* procedure. Diffident members of the European Council for example “the German chancellor and the Swedish and Dutch prime ministers, in the end, decided to vote in favour of Juncker, and the Hungarian and British heads of government were outvoted<sup>139</sup>”. This concrete use of a qualified majority voting in the European Council “has to be recorded as a significant precedent<sup>140</sup>”. Finally, the European Parliament voted the recommended candidate by a large majority of 422 votes. However, the skepticism about this kind of procedure was not only political, but even academic. In this regard, the event of 2014 can be stuck, on the long-standing debate concerning the politicization of the EU. Two main contributors on this issue are Bartolini and Hix. “Hix contends that fostering politicisation – a process that he already perceives as ongoing – would increase the legitimacy of the EU. By furthering political competition at the EU level, citizens would be provided with policy alternatives and accountability would be enhanced. Bartolini, by contrast, discerns the politicisation of the EU as a risky endeavour that could lead to undesired consequences such as a spillover of debate

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<sup>137</sup> Schütze, R. (2016). *Op. cit.* pag. 187-188-189

<sup>138</sup> Gómez, J. and Wessels, W. (2016). *The Spitzenkandidaten Procedure: Reflecting on the Future of an Electoral Experiment*. [online] Iai.it. Available at: <http://www.iai.it/sites/default/files/iaiw1608.pdf>.

<sup>139</sup> Gómez, J. and Wessels, W. (2016). *Ibidem*.

<sup>140</sup> Wolfgang Wessels, *The European Council*., p. 80

concerning constitutional questions”. At this regard, Magnette and Papadopoulos claim that the progressive effects and the jeopardies predicted by Hix and Bartolini correspondingly, are challenged by the consensual kind of the European Union decision-making regime<sup>141</sup>. Different authors, particularly Majone<sup>142</sup> and Moravcsik<sup>143</sup>, deny the necessity of and the advantage of the promotion of EU democracy. “With regard to the EU’s alleged focus on regulative competences, the promotion of politicisation would threaten the Pareto efficiency of decisions taken at the EU level<sup>144</sup>”.

### 1.12) The Commission’s Administrative Organs

The Commission has, as like as the EP and the EC, an administrative organization subsidiary to the work of the College of Commissioners. The administrative infrastructure is shape to “assist” the Commission “in the preparation and performance of its task, and in the implementation of its priorities, and the political guidelines laid down by the President<sup>145</sup>”. It is separated in two formations “Directorates-General (DG)” and “Services”. The former are dedicated in detailed policy areas and thus work “vertically”. The latter work “horizontally” in offering specific services through policy areas. The best means to comprehend “Directorates-General” is to study them as the “Union equivalent of national ministries<sup>146</sup>”. Supervised by EU civil servants, exist currently 33 Directorates-General (DG). Notably, these Directorates-General do not compulsory match with one “Commissioner portfolio”. Although there is an express match in some areas, some Commissioner portfolios cut through the issue of two or even greater Directorates-General. Commissioners are allowed to “give instructions” to their DG, with the latter forced to “provide them with all the information on their area of activity necessary for them to exercise their responsibilities<sup>147</sup>”. Each DGs is controlled by a Director-General, who

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<sup>141</sup> Magnette, P. and Papadopoulos, Y. (2008) On the politicization of the European consociation: A middle way between Hix and Bartolini. European Governance Papers (EUROGOV) No. C-08-01, <http://www.connex-network.org/eurogov/pdf/egp-connex-C-08-01.pdf>.

<sup>142</sup> Majone, G. (1998). *Europe’s ‘Democratic Deficit’: The Question of Standards*. Oxford: European Law Journal, pp.5-28. Available at: <https://pdfs.semanticscholar.org/6835/9f48ddd18838ac09002584182433885e184f.pdf>.

<sup>143</sup> Moravcsik, A. (2002). In Defence of the ‘Democratic Deficit’: *Reassessing Legitimacy in the European Union*. *Journal of Common Market Studies*, Vol. 40, No. 4, p. 603-624

<sup>144</sup> Gómez, J. and Wessels, W. (2016). *Op. cit.*

<sup>145</sup> Art. 21 Commission Rules of Procedure.

<sup>146</sup> Schütze, R. (2016). *Op. cit.* pag. 190

<sup>147</sup> Art. 19(2) Commission Rules of Procedure

embody the main connection between Commission administration and the corresponding Commissioner(s). Each DG is separated into directorates, and every directorate is separated into units. Units are controlled by a Head of Unit and comprise the elementary organizational body inside the Commission administration.

### 1.13) Decision-making within the Commission

The Commission work as a “college”, in other words: as a collective body. The Treaties provide one single article on decision-making concerning the Commission: “The Commission shall act by a majority of its Members”<sup>148</sup>. This is too much simple and even an ambiguous picture. It is accompanied and amended by the Commission’s Rule of Procedure, which set the many decision-making processes and their voting provisions. “The Rules differentiate between four procedures<sup>149</sup>”: the “oral procedure”, the “written procedure”, the “empowerment procedure” and the “delegation procedure<sup>150</sup>”. The first two processes need an assessment by the College acting as a collective body. The oral procedure requires a Commission meeting. Reunions are “private” and confidential,<sup>151</sup> and happen, as common rule, as a minimum once a week. Commissioners must attend, but the President can discharge them from this responsibility in certain circumstances. Decisions are mainly got by tacit consensus. Though, decisions may be got by majority vote whereas it is requested by a member., The Commission Agenda is usually being separated into A-items and B-items<sup>152</sup>. To save more time, the Commission is – in some cases – allowed to “dispense with a physical meeting and decide by means of the written procedure<sup>153</sup>”. According to this procedure, a draft text is circulated to all Members of the Commission. Each Commissioner is entitled to make known any reservations within a time limit. A

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<sup>148</sup> Art. 250 TFEU

<sup>149</sup> Schütze, R. (2016). Op. cit. pag. 190

<sup>150</sup> Art. 4 Commission Rules of procedure.

<sup>151</sup> Art. 9 *Ibidem*

<sup>152</sup> Two days before the Commission College meets, the Commissioners’ “chief of cabinet” meet to discuss and resolve items in advance. The meeting of the “chiefs of cabinet”, which is chaired by the Secretary General of the Commission, thus operate like Coreper for the Council.

<sup>153</sup> Art. 12(1) Commission Rules of Procedure: “The agreements of the Members of the Commission to a draft text from one or more of its Members may be obtain by means of written procedure, provided that the approval of the Legal Service and the agreement of the department consulted in accordance with Article 23 of these Rules of Procedure has been obtained. Such approval and/or agreement may be replaced by an agreement between the Members of the Commission where a meeting of the College has decided, on a proposal from the President, to open a finalization written procedure as provided for the implementing rule.



decision is subsequently adopted if “no Member has made or maintained a request for suspension up to the time limit set for the written procedure”. The oral and the written procedure are based on the principle of “collegiality”, that is: the collective decision-taking of the Commission. By contrast, the third and fourth procedures entitle the Commission to delegate power for the adoption of “management or administrative measures” to individual officers”. According to the “empowerment procedure”, the College can delegate power to one or more Commissioners. According to the “delegation procedure”, it can even delegate power to a Director-General<sup>154</sup>”.

#### **1.14) Functions and Powers of the Commission.**

In the governmental structure of the EU the functions and corresponding powers of the European Commission are enlisted in Art. 17 TEU: The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Treaties. With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union's external representation. It shall initiate the Union's annual and multiannual programming with a view to achieving interinstitutional agreements. The provision classifies six distinctive functions. “The first three functions constitute the Commission’s core functions. First, the Commission is tasked “promote the general interest of the Union” through initiatives. It is thus to act as a “motor” of EU integration. In order to fulfill this – governmental – function, the Commission is given the (almost) exclusive right to formally propose legislation. “Union acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise”. The Commission’s prerogative to propose legislation is a fundamental characteristic of the European constitutional order. The right of initiative extends to (multi)annual programming of the Union,<sup>155</sup> and embraces the power to make proposals for law reform.

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<sup>154</sup> Schütze, R. (2016). *Op. cit.* pag. 191-192

<sup>155</sup> Art. 314(2) TFEU

The second function of the Commission is to “ensure the application” of the Treaties. This function covers a number of powers – legislative and executive in nature. The Commission may thus be entitled to apply the Treaties by adopting secondary “legislation”. These acts may be adopted directly under the Treaties;<sup>156</sup> or under powers delegated to the Commission from the Union legislature<sup>157</sup>. In certain fields the Commission might be established the executive power to affect the Treaties itself. The third purpose of the Commission is to work as protector of the Union. It will consequently “oversee the application” of EU law. The Treaties certainly allow the Commission important powers to act as “police” and “prosecutor” of the Union. The monitoring of EU law includes the power to observe and to examine infringements of EU law. In the moment in which an infringement of EU law has occurred, the Commission can carry the issue before the Court of Justice, subject to some conditions. The Treaties therefore allowed the Commission of the power to bring infringement proceedings against Member States,<sup>158</sup> and other Union institutions.<sup>159</sup>

#### **1.15) The European Economic Governance as a case study.**

Even more important in assessing the changing brought with the entrance into force of the Lisbon Treaty are the legislative acts amending the economic governance of the Union, namely to strengthen the Stability and Growth Pact. In this regard, the legislative acts are the “six-pack”, the “two-pack”, and the Fiscal Compact (or TSGC, Treaty on Stability Coordination and Governance in the Economic and Monetary Union). The “six-pack” is regulated by Directive 2011/85/EU<sup>160</sup> that lays down detailed rules for national budgets. Those rules are intended as mandatory in order to be certain that EU Governments fulfill the requirements of economic and monetary union without running excessive deficits. After the deadline for transposition in the Member States of this directive the 31/12/2013, the Commission in 2014 made a report on the quality of fiscal data<sup>161</sup> assessing “that EU

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<sup>156</sup> Art. 106(3) TFEU

<sup>157</sup> Schütze, R. (2016). *Op. cit.* pag. 192-193

<sup>158</sup> Art. 258 TFEU.

<sup>159</sup> Art. 263 TFEU.

<sup>160</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32011L0085>

<sup>161</sup> REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the quality of fiscal data reported by Member States in 2013 /\* COM/2014/0122. Retrieved at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52014DC0122>.

governments were very good at complying with reporting deadlines, but that completeness of the excessive deficit tables could be improved<sup>162</sup>". The six legislative acts also known as "six-pack" were followed by the "two-pack" in order to further improve the budgetary surveillance in the Euro area. The latter follows the scheme of the European Semester<sup>163</sup> that works as follows: "In late autumn, the European Commission publishes its annual growth survey which outlines general economic priorities for the EU for the coming year. The annual growth survey is debated by the other institutions and feeds the discussion leading up to the spring European Council. In February, the Commission publishes country reports on the overall economic and social developments in each EU country. For some countries, these include in-depth reviews. In April, EU countries present national plans. Based on a comprehensive assessment of the economic situation in each country, the Commission then proposes country-specific policy recommendations for each one. The recommendations are discussed by the Council and endorsed by the European Council in June, before being finally adopted by the national finance ministers. EU countries are expected to reflect the recommendations in their budgetary and policy plans for the subsequent year and to implement them in the coming 12 months<sup>164</sup>". For what the Fiscal Compact concerns, it is an intergovernmental agreement under which Member States must respect the budget discipline acting on their budgetary policies. Among the 28 EU countries, Croatia, United Kingdom and the Czech Republic are the only that did not sign the treaty. It strengthened the Stability and Growth Pact<sup>165</sup>, with three main objectives. The first is, to ensure national budgets are balanced or in surplus. In order to do so, Member States must keep the annual structural deficit at 0.5% of GDP or lower. Therefore, national governments must "put in place an automatic correction mechanism triggered by any departure from the balanced budget rule<sup>166</sup>". In some exceptional cases, like for instance a severe economic downturn, countries might be temporarily exempted from the balanced

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<sup>162</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:ec0021>

<sup>163</sup> "The European Semester is an annual cycle of economic and budgetary policy coordination in the EU in which guidance is provided to EU countries before they take policy decisions at national level. The guidance is provided in the context of the stability and growth pact and the macroeconomic imbalances procedure. The European Semester also serves to implement the Europe 2020 strategy" online: [https://eurlex.europa.eu/summary/glossary/european\\_semester.html](https://eurlex.europa.eu/summary/glossary/european_semester.html).

<sup>164</sup> [https://eur-lex.europa.eu/summary/glossary/european\\_semester.html](https://eur-lex.europa.eu/summary/glossary/european_semester.html)

<sup>165</sup> national deficits must not exceed 3 % of gross domestic product (GDP); national public debt must remain below 60% of GDP. Online at: [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:1403\\_3&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:1403_3&from=EN)

<sup>166</sup> [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:1403\\_3&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:1403_3&from=EN)

budget rule. The second aim of the TSGC is, “to boost the impact of recommendations made by the European Commission when euro area countries' public deficits become too large<sup>167</sup>”. Another aim of the Fiscal Compact is to improve coordination of national economic policies by requiring to the Governments to assess their “debt issuance plans in advance to the Commission and the Council of the EU<sup>168</sup>”. In addition, the TSGC also apply to the governance of the euro area for what concern the Euro Summit with the compulsory requirements to meet at least twice a year.

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<sup>167</sup> Online at: [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:1403\\_3&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:1403_3&from=EN). Note that: this intergovernmental agreement commits EU countries, when voting in the Council of the EU, to adopting the Commission's proposals and recommendations on the excessive deficit procedure unchanged - unless there is a qualified majority among them against such a decision.

<sup>168</sup> [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:1403\\_3&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:1403_3&from=EN)

CHAPTER 2 - Form of government as a contested notion. Its use at EU level and the transformation of the French, Italian and Spanish governmental systems in light of their EU membership

## PART 1 – The EU Level

### 2.1) The configurability of a European “form of government”

In spite of the effective structure of the European “form of government” as presented in the first chapter of this work, there is a huge debate over the configurability of a European “form of government” due to the uncertain nature of the European Union. The debate on the issue of the configurability of a European “form of Government”, has developed mainly on two grounds<sup>169</sup>. First, such discussion called into question the ambiguous problem of sovereignty in the field of an experience that had been considered has a non-federal statualism<sup>170</sup>. In this first family, can be included the theories about the Composite Constitution of the European Union, according to which the EU is the result of the auto limitation of each single ordering, thanks to the inclusion of special relief clause<sup>171</sup>. Those theories who identifies in the Union a constitutional ordering able to produce part of sovereign powers, seems more open, generally speaking, to discuss in terms of a European “form of government”<sup>172</sup>. On the other hand, those that, in the wake of the Maastricht-Urteil<sup>173</sup> (judgement of 12/10/1993 with which the *Bundesverfassungsgericht* affirmed the compatibility of the Maastricht Treaty with the German Constitutional order), moves from the premise of the permanence in the head of the Member States of the powers related with the sovereignty even in relation to the delegated competences of the EU, tends to think, that only in an elliptical sense the category of the “form of government” can be recalled with regards to the European Union<sup>174</sup>. A second debated issue has regarded the problem of the democratic deficit of the European Union. If it is true that the concepts of form of Government and of form of State are strictly linked, and if it is also true that the utility of

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<sup>169</sup> A. Ruggeri, *Costituzione, sovranità, diritti fondamentali, in cammino dallo Stato all’Unione europea e ritorno, ovvero la circolazione dei modelli costituzionali e adattamento dei relativi schemi teorici*, in “Federalismi”, 11, 2016, pp. 11 ss.

<sup>170</sup> P. Ridola, *Federalismo europeo e modelli federali. Spunti di riflessione sul trattato di Lisbona. L’Unione europea verso una “res publica” federalista*, in Id., *Diritto comparato e diritto costituzionale europeo*, Torino, 2010, pp. 417 ss.

<sup>171</sup> Ibrido, R. and Lupo, N. (2018). *Dinamiche della forma di governo tra Unione europea e Stati membri*. 1st ed. Bologna: il Mulino.

<sup>172</sup> A.A. Cervati, *Elementi di indeterminazione e di conflittualità nella forma di governo europea*, cit., pp. 73 ss.

<sup>173</sup> Ael.eui.eu. (1993). *Decision of the German Federal Constitutional Court of October 12, 1993*. [online] Available at: <https://ael.eui.eu/wp-content/uploads/sites/28/2013/04/06-Von-Bogdandy-German-Federal-Constitutional-Court.pdf>.

<sup>174</sup> M. Luciani, *Governo (forme di)*, in *Enciclopedia del diritto. Annali*, Milano, 2010, vol. III, pp. 538 ss.

a comparison among the “form of government” is limited to the sole pluralistic democracies<sup>175</sup>, the democratic nature of the Union seems to preconfigure as essential to the existence of a European “form of government”<sup>176</sup>.

## 2.2) “Form of Government” and system of sources of the law in the European Union.

At least, two peculiar characteristics of the source system of the EU could obstacle the configuration of an EU “form of government” in a strict sense. The first feature is represented by the principle of pluralism of the legal basis<sup>177</sup>: if to each legal basis correspond an own microcosm, both procedural and institutional, the risk is to create as many “forms of government” as the number of the same legal basis. In other words, the level of fusion and division of powers would be notably different according to the different sectors and issues on which the EU is calling to act. A second obstacle lies in the insufficiency of the concept of “form of governments” in the framework of the hierarchy of the European sources<sup>178</sup>. This would impede to the discipline of interinstitutional relations to carry out the “modelling feature” of the reality that authoritative legal doctrine has indicates such *proprium* of the concept of “form of government”<sup>179</sup>. With the aim of grasping and rationalizing the interconnections among the national institutional process and the Europeans one, a recent doctrinal line of thinking – moving from the notion of “system” proposed by the general theory of the systems – has suggested to frame the European institutional dynamics into the backdrop of a “euro national parliamentary system”. Such system would be composed by different elements in mutual interactions able to influence each other’s: some of them being of direct parliamentary matrix (EP, national and regional assembly, interparliamentary cooperation<sup>180</sup> and “method Conventions” while

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<sup>175</sup> C. Mortati, *Le forme di governo*. Lezioni, Padova, 1973, p. 3

<sup>176</sup> C. Fasone, *Sistemi di commissioni parlamentari e forme di governo*, Padova, 2012, pp. 49 ss.

<sup>177</sup> K.S.T.C. Bradley, *Powers and Procedures in the Eu Constitution: Legal Bases and the Court*, in P. Craig and G. De Burca, *The Evolution of Eu law*, 2<sup>nd</sup> edition., Oxford, 2011, pp 85 ss.

<sup>178</sup> R. Ibrido and G. Vosa, “*Forma*” e “*forme*” negli assetti di organizzazione costituzionale dell’Unione europea, in “il Filangeri”, Quaderno 2014, Napoli, 2015 pp. 187 ss.

<sup>179</sup> C. Pinelli, *Forme di Stato e forme di governo. Corso di diritto Costituzionale comparato*, 2nd edition., Napoli, 2009, pp. 145 ss.

<sup>180</sup> To mention which are those Conference for interparliamentary cooperation: Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC); The interparliamentary Conference on stability, economic coordination and governance in the European Union; The interparliamentary Conference for Common Foreign and Security Policy (PESC) and Common security and Defence Policy (PSDC).

other of governmental origins (national governments and various components of the fragmented executive of the EU)<sup>181</sup>.

On the notion of Europeanization, there is no agreement. There are several definitions and the result of the research on a specific sector are different according to the definition applied. According to Radelli<sup>182</sup>, Europeanization means those changes caused by shared norms and agreements, which are first consolidated in the political-institutional process of the EU and successively incorporated in the debates of the national and subnational politics. In other words, with the term Europeanization it is intended each modification of norms, conventions and practices introduced in the national ordering as a consequence of the influence made by the EU order. Within this framework, it can be claimed that the EU form of government and the form of Governments of its member States are mutually interconnected and influenced each other.

For the purposes of the present work, the aim is to show which relationship, if any, is in place between the EU system of government, in particular within the executive branch, and the forms of government of some of its member States, namely those of France, Spain and Italy.

### 2.3) Parliamentary scrutiny and control in the European “form of government”.

In the Constitutional traditions of the EU member States, parliamentary scrutiny represents one of the benchmarks of the relations among the legislative power and the executive power, that generally is constructed among the trust relationship<sup>183</sup>. Such prerogative, that historically dates back to the origins of the parliamentarism<sup>184</sup>, has represented a natural parameter of reference for the construction and the evolution of the European institutional architecture. Indeed, the dimension of the scrutiny has been perceived as instrumental to the strengthening of the democratic legitimation of the Union<sup>185</sup> and to the

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<sup>181</sup> Ibrido, R. and Lupo, N. (2018). *Op. cit.*

<sup>182</sup> C.M. Radelli, *Europeanization: Solution or Problem?* in M. Cini and A.K. Bourne, Palgrave Advances in European Union Studies, Basingstoke, 2006, pp 56-76.

<sup>183</sup> With the only exception of Cyprus, all the EU Member States have got a parliamentary form of government, in nature parliamentary or semi-presidential, that allowed a trust dimension between the executive power and the legislative power. With reference to M. Laver and K. Shepsle, *Cabinet Ministers and Parliamentary Government*, Cambridge, 1994, p.290.

<sup>184</sup> J.S Mill, *Considerations on representative Government*, London, 1861, p. 94

<sup>185</sup> C. Crombez, *The Democratic Deficit in the European Union: Much Ado about Nothing?*, in “European Union Politics”, 4, 2003, pp. 101 ss.



“parliamentarization” of its “form of government”<sup>186</sup>, intended as the adoption of trust modules typical of parliamentary government, in its minimal meaning<sup>187</sup>. However, the attempt of juridical “exportation”<sup>188</sup> of the forms of parliamentary scrutiny from national level to the European one has shown the tendency of being rejected due to several reasons. On one side, the parliamentary scrutiny to be exported is not well balanced, it presents a different penetration in the weave of the “forms of government” and in that of the national’s Constitutional traditions<sup>189</sup>. Furthermore, even on the procedural side of the scrutiny, this function, for its political nature, is manifested in a wide range of instruments and procedures, that are not always easily recognizable<sup>190</sup>. On the other side, the inhomogeneities of the model to be exported are fostered by several reasons that contributed to hybridize the institutional architecture of the European Union, making fireclay to the traditional schemes of parliamentarism of majoritarian kind. First of all, the representative democracy, as pillar of the EU, is nourished (Art. 10 TEU) by a double channel of parliamentary representation: the citizen’s representation in the EP, at Union level; the democratic responsibility of the Governments of the MS in front of National Parliaments<sup>191</sup>. In many European States with advanced decentralization, the representative dimension is further enriched by the presence of regional assemblies straight elective that contribute to the legislative function and are active actors of the democratic control<sup>192</sup>. Second, the European executive is fragmented<sup>193</sup> in its powers, marked by the compresence of supranational organs, such as the Commission, intergovernmental organs and

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<sup>186</sup> B. Rittberg, “No integration without Representation!”. *European integration, Parliamentary Democracy, and Two Forgotten Communities*, in *Journal of European Public Policy*, 13, 2006, pp. 1211 ss.

<sup>187</sup> On the notion of minimal parliamentary government as a system in which the Prime Minister and the Cabinet are responsible in front of the parliamentary majority and can be removed by the latter see K. Strøm, *Delegation and Accountability in Parliamentary Democracies*, in *European Journal of Political Research*, 37, 2000, p.265.

<sup>188</sup> P. Magette, *Appointing and Censuring the European Commission: The Adaptation of Parliamentary Institutions to the Community Context*, in *European Law Journal*, 7, 2001, p. 307

<sup>189</sup> On that point also M. Telò: “Overlapping levels of regulation result in an institutional construction of such a complexity as to make the European polity something profoundly different from a state polity”. In: Telò, M. (2016). *The EU from a constitutional project to a process of constitutionalization*. *European Politics and Society*, 18(3), pp.301-317.

<sup>190</sup> Ibrido, R. and Lupo, N. (2018). *Op. cit.*

<sup>191</sup> A. von Bogdandy, *The European Lesson for International Democracy: The Significance of Articles 9-12 EU Treaty for International Organizations*, in *The European Journal of International Law*, 23, 2012, pp. 315 ss.

<sup>192</sup> G. Abels and A. Eppler, *Subnational Parliaments in the Eu Multi-level Parliamentary System: Taking stock of the Post-Lisbon Era*, Innsbruck, 2016.

<sup>193</sup> D. Curtin, *Challenging Executive Dominance in European Democracy*, in *The Modern Law Review*, 77, 2014, pp. 29 ss.

“independent” organs. Because of the economic crisis, it seems to have been created a sort of executive federalism, centered on the raising role of the European Council and Euro-summits<sup>194</sup>. Third, among the two channels of parliamentary representation and fragmented European executive, the presence of several relational schemes makes difficult to assess the whole “form of government” of the Union<sup>195</sup>. The legal doctrine uses different explanatory schemes trying to explain this complex system of interaction between the different levels of parliamentary representations and the fragmented European executive that is still nowadays in between supranationalism and intergovernmentalism<sup>196</sup>. The idea of multilevel parliamentary field<sup>197</sup>, focuses mainly on the interaction among Parliaments that, at different levels, express the representation without fix hierarchies and with the overlap of their respective political background. Vice versa, other schemes (correspondent to the Composite European Constitution<sup>198</sup> and the euronational<sup>199</sup> parliamentary system) highlights the structural penetration between rules, actors and procedures of the national constitutional dimensions and the European one. Even in the differences in the approaches, all these formulas seem to stress the atypicality of the European construction that makes impossible to use the traditional schemes of the checking of majoritarian kind known by large part of the MS and focused on the use of the trust’s instruments<sup>200</sup>. To such schemes it is pitted against a new explanatory scheme, based on the regulatory nature of the European construction<sup>201</sup>. Such model sees the control as inherently linked to forms of direct democratic legitimization and of impact assessment that escape from the exclusive interaction between the legislative and the executive power. If, in a first time, the two model of majoritarian control and of the regulatory control were intended as radically alternative, now prevails a vision that put both as reciprocally functional and intrinsically complementary. Their mingling has started a new style of parliamentary politics, composed

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<sup>194</sup>F. Fabbrini, E.H. Ballin e F. Somsen, *Introduction: A New Look at the Form of Government of the European Union and the Eurozone*, Oxford, 2015.

<sup>195</sup> V. Schmidt, *Federalism and State Governance in the European Union and the United States: An Institutional Perspective*, New York, 2001.

<sup>196</sup> S. Fabbrini, *Intergovernmentalism and Its Limits: Assessing the European Union’s Answer to the Euro Crisis*, in *Comparative Political Studies*, 46, 2013.

<sup>197</sup> B. Crum e J.E. Fossum, *The Multilevel Parliamentary Field: A Framework for Theorizing Representative Democracy in the EU*, in “*European Political Science Review*”, 1, 2009.

<sup>198</sup> L. Besselink, *A Composite European Constitution*, Groningen, 2007.

<sup>199</sup> N. Lupo and A. Manzella, *il sistema parlamentare euronazionale*. Lezioni, Torino, 2014.

<sup>200</sup> G. Rizzoni, *Opposizione parlamentare e democrazia deliberativa. Ordinamenti europei a confronto*, Bologna, 2012.

<sup>201</sup> A. H  ritier, *Elements of Democratic Legitimation in Europe: An alternative perspective*.

of elements coming from national Constitutional traditions and elements own of the European experience, of organs of democratic representations and of direct democracy<sup>202</sup>.

## **PART 2 – The national level in relation to the EU**

### **2.4) Parliamentarism and rationalised parliamentarism.**

Generally speaking, any study about rationalised parliamentarism may not being said valid if it does not contain a preliminary reflection on parliamentarism. In his famous work of 1934, *La réforme du parlementarisme*, René Capitant, asked himself what is parliamentarism. The answer was: the parliamentarism is the govern of the ministers in charge. Two are the rules needed: The Government governs, the Parliament checks<sup>203</sup>. Even though, Boris Mirkine-Guetzévitch, that in 1931 had already reached the conclusions of Capitant, was reluctant to arrive at a so drastic conclusion. His last work on the topic, *L'échec du parlementarisme «rationalisé»* of 1954<sup>204</sup>, acknowledges the difficulties of define parliamentarism and observe: “Does the experts of public law and the political scientist be able to understand what Parliamentarism mean? We doubt”<sup>205</sup>. This because, according to Guetzevitch, a key feature of the constitutional and political fact is the constant evolution and thus typical of the parliamentarism is the “*divenire istituzionale*”<sup>206</sup>. Consequently, although many contemporary scholars of the “form of governments” (FoG) used the term parliamentarism as a synonym of parliamentary government<sup>207</sup>, there is at

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<sup>202</sup> Ibrido, R. and Lupo, N. (2018) *Op. Cit.*

<sup>203</sup> R. CAPITANT, *La réforme du parlementarisme*, Paris, Sirey

<sup>204</sup> B. MIRKINE-GUETZÉVITCH, *L'échec du parlementarisme «rationalisé»*, in *Revue internationale d'histoire politique et constitutionnelle*, 1954, 97 ss., trad. it. ID., *Il fallimento del parlamentarismo «razionalizzato»*, in ID., *Comparazioni teoriche e razionalizzazioni costituzionali*, Lecce, Pensa, 2009, 203 ss.

<sup>205</sup> *Ibidem*.

<sup>206</sup> *Ibidem*.

<sup>207</sup> For instance, PH. LAUVAUX, *Le parlementarisme*, Paris, PUF, 1987, 3, affirmed: «Mais en dehors des jugements de valeur [He has already quote Victor Hugo that, in “Napoléon le Petit”, lists the freedom guaranteed by the parliamentarism, defining it as «une perle»], s'impose une signification qui n'a d'autre sens qu'institutionnel: le parlementarisme, c'est le gouvernement parlementaire, quelles que soient ses modalités particulières de fonctionnement et les appréciations d'ordre politique que l'on peut porter à son sujet». But A. D'Andrea, in *L'orpello della democrazia*, Brescia, biblioFabbrica, 2015, 41, prefers keeping the distinction between “parliamentary government” and “parliamentarism”, translating in a scientific constitutional reflection the Victor Hugo's literary definition: “I would distinguish, in this case, among parliamentarism and parliamentary (FoG), being two different aspects, the former is important regarding what is inside the form of State [because, in fact, the parliamentarism is the historical phenomenon aimed at

least one difference among those two concepts. This difference is due to the fact that, the suffix “ism”, showing a movement or a tendency, highlight the dynamic nature of the former with respect to the latter. The nature of parliamentarism, as a phenomenon in constant evolution, as eternal “divenire istituzionale”, perhaps allows to avoid any *querelles* about the parliamentary government. Therefore, that of parliamentarism is a concept open and fluid. However, if we talk more specifically of rationalization of parliamentarism or rationalized parliamentarism, is evident that a large part of such fluidity is loosed, being “imprisoned” in the institutional shapes that the activity of constitutional rationalization of the power intended to build in a given historical and political moment. As a consequence, in the more confined framework of rationalized parliamentarism, the distinction among parliamentarism and rationalized parliamentarism lose his meaning, allowing to talk about rationalization of parliamentarism or of rationalization of the parliamentary “form of government” without much differences.

Even Boris Mirkine-Guetzévitch is “obliged” to identify a more determined and strict historical meaning of parliamentarism that works as a common element to all the experiences included inside the new legal phenomenon occurred in the first years after the second world war that he defined in fact as “rationalization of parliamentarism”. Such lowest common denominator is given by the “principle of parliamentarism”, that is, to say, the principle of political dependency of the minister from the parliamentary majority. This principle, that in the Constitution drafted in the early years after the second world war had been translated in the law forecast of the resignation of the Ministry as an obliged consequence of a parliamentary vote of distrust, it too typified by the written Constitutions<sup>208</sup>. The rationalized parliament instead does not include, as key element of the concept, the principle of the choice of the Minister made by the Parliament. The developed political rule of the parliamentary derivation of the cabinet, even if promptly translated into norm by some Constitution of the early years after the first world war, among which also the Austrian Constitution of 1920 (that highlighted the Kelsenian’s

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“succeed the absolute State” thanks to a progressively exploitation of parliament and of the parliamentary function]; the latter concern rather a subsequent law asset that already works inside a State oriented in a liberal fashion” and therefore concerning a “exact model of developed governmental organization”.

<sup>208</sup> B. MIRKINE-GUETZÉVITCH *Le régime parlementaire dans les récentes Constitutions européennes*, in *Revue internationale de droit comparé*, 1950, 610.

thought of the primacy of the Parliament)<sup>209</sup>, was opposed by the doctrine of the separation of powers between the executive and the legislative in the parliamentary regime<sup>210</sup>. The reasons that today justifies a survey on the meaning of the rationalized parliament are many. First of all, this concept remains one of the most contested in the history of the constitutional literature, because this concept is usually utilized in the sense of “a set of constitutional means to allow the stability of the government<sup>211</sup>”. This is not the case, both in the history of the constitutional law, as showed by a brief complete outline of the rationalized constitutionalism in the constitutions of the first years after the second world war, neither in the doctrine of Mirkine-Guetzévitch, that in fact define the constitutional set as finalized to the stability of the governments as others forms of «rationalization of the parliamentary procedure», expression that does not overlap with that of «rationalization of the parliamentarism», but relates to one of the more specific finalities which the latter can eventually utilize. Besides, it must be noted that the phenomenon of the rationalization of the parliamentarism never eclipsed. It is rather a phenomenon in continuous expansion, influenced by the awareness of the limits inside the doctrine of the rationalization of the constitutional power. The metamorphosis of rationalized parliamentarism has concerned

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<sup>209</sup> “The principle of the parliamentary government make possible that the designation of the minister, so of the chairs of the many branch of the administration, affect the people’s representation and that top democratization – considered as an exception to the rule of the separation of powers – correspond at the bases of the self-government of the communes” (H. Kelsen, *Demokratisierung der Verwaltung*, in *Zeitschrift für Verwaltung*, 1921, 5 ss., translate it. ID., La democrazia nell’amministrazione, in ID., *Il primato del parlamento*, Milano, Giuffrè, 1982, 63-64). As regard to the Austrian Constitution it must be clear that the parliamentary election of the federal Government ruled by art. 70 B-VG was even the result of a partial inspiration to the model of Helvetic directorial government. As pointed out by B. MIRKINE-GUETZÉVITCH, *Les nouvelles tendances du droit constitutionnel*, Paris, Giard et Brière, 1931 (2a ed., 1936), trad. it. ID., *Le nuove tendenze del diritto costituzionale*, in ID., *Comparazioni teoriche e razionalizzazioni costituzionali*, cit., 159: « the result [of the preliminary work about the Constitution] was a building that recalled, on the hand, the Helvetic Constitution and that, on the other hand, reflected the most advance tendency of constitutional law, as that expressed by H.Kelsen, professor at Wien University».

<sup>210</sup> M. HAURIOU, *Précis de droit constitutionnel*, 2a ed., Paris, Sirey, 1929, 368, writes: «*Le gouvernement parlementaire, ainsi compris, reste bien un cas de séparation des pouvoirs souple et ne devient pas un régime de confusion des pouvoirs. Le cabinet des ministres n’est pas un comité du Parlement*». The first that affirmed that the parliamentary government does not admit a separation «tranchée» of the executive and legislative power, and neither an overlap between the two, but only a certain reciprocal degree of dialogue, was A. ESMEIN, *Éléments de droit constitutionnel*, Larose et Forcel, Paris, 1896, 99-100. The thesis was then developed by Leon Dugult and his scholar Maurice Hauriou in a different way. F. BRUNO, *Il problema del rafforzamento dell’Esecutivo: Tosato costituente e la dottrina costituzionalistica francese della Terza Repubblica*, in M. GALIZIA (by), *Egidio Tosato costituzionalista e costituente*, Milano, Giuffrè, 2010, 379-396.

<sup>211</sup> Frau, M. (2016). *L’ATTUALITÀ DEL PARLAMETARISMO RAZIONALIZZATO*. [online] Nomos-leattualitaneldiritto.it. Available at: <http://www.nomos-leattualitaneldiritto.it/wp-content/uploads/2017/02/frau-nuova-versione-per-nomos-3-corretto2016-1-1.pdf>.

both the metagiuridic object on which judicial rationalization must intervene and the sources-acts that characterize the latter. Hence the necessity of an updated reflection.

## **2.5) The meaning of the rationalization of the form of government in the doctrine of Boris Mirkine-Guetzevitch**

Most of the scholars that, even recently, have studied the concept of rationalised parliamentarism in the work of Boris Mirkine-Guetzevitch have taken as benchmark his monography of 1931, *Les nouvelles tendances du droit constitutionnel*<sup>212</sup>, that collects a number of articles published between 1928 and 1930 on the trimestral journal *Revue du droit public et de la science politique en France et à l'étranger*. The first accomplished formulation of the concept of rationalization of parliamentarism, is in fact attributed to the homonym article *Les nouvelles tendances du droit constitutionnel* published in 1928 with the subtitle *Le problème de la rationalisation du pouvoir dans les constitutions de l'Europe d'après-guerre*<sup>213</sup>. It seems to be the more appropriate choice to start from this paper to better understand the concept of rationalization of the parliament in the doctrine of Mirkine-Guetzevitch. The first clarification to be done among the two works does not regards the definition of the rationalized parliament. The distinction concerns the vision of the role of the executive and the need of his strength, matters that are all absent from the article of 1928, in which appears easier to understand the concept of rationalized parliamentarism as “neutral”. The theoretical formulation of rationalized parliamentarism developed by Mirkine-Guetzevitch is linked to a wider phenomenon that consist in the attempt of submit to the law, namely the constitutional law, «*tout l'ensemble de la vie collective*»<sup>214</sup>. At the top of this process there is: “the judicial rationalization of the general will” (intended as “the will of the people” and not as “the will of the majority”) that is done in the constitutional text<sup>215</sup>. From that emerges the idea of “democracy expressed in judicial terms”, in a philosophical vision that combine together liberal constitutionalism,

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<sup>212</sup> B. MIRKINE-GUETZÉVITCH, *Les nouvelles tendances du droit constitutionnel*, cit. (translated. italian. ID., *Le nuove tendenze del diritto costituzionale*, cit.).

<sup>213</sup> B. MIRKINE-GUETZÉVITCH, *Les nouvelles tendances du Droit constitutionnel. Le problème de la rationalisation du pouvoir dans les constitutions de l'Europe d'après-guerre*, cit.

<sup>214</sup> B. MIRKINE-GUETZÉVITCH, *Les nouvelles tendances du Droit constitutionnel. Le problème de la rationalisation du pouvoir dans les constitutions de l'Europe d'après-guerre*, cit., 13.

<sup>215</sup> *Ibidem*.

Kelsenian's normativism and "anthropocracy"<sup>216</sup>. In his two main works of the "normativist" phase, Mirkine-Guetzévitch, in *Les Constitutions de l'Europe nouvelle* of 1928<sup>217</sup> and the coeval article *Les nouvelles tendances du droit constitutionnel*, many are the salient features of the constitutions signed among the two wars on which is based the analysis of the researcher:

the introduction of the constitutional review of the law according to the Kelsenian model (Austrian Constitution and Czech Constitution)<sup>218</sup> that he definitely associated rather, for logic coherence<sup>219</sup>, to that of the United States from which other European constitutions were inspired; the process of internationalization<sup>220</sup> of Constitutional law, so the presence of constitutional norms that tends to make binding the international law the "rationalisation of the federalism"<sup>221</sup>; the diffusion of constitutional norms that recognized and protect social rights; the inclusion of political parties in the Constitutional dictate and many others new tendencies of constitutional law. Among those tendencies there is that of constitutional rationalization of the parliamentarism, that is well studied for the first time, in the before-mentioned article *Les nouvelles tendances du droit constitutionnel* of 1928. In this article Boris Mirkine-Guetzevitch affirmed that "the principle of parliamentarism" is formulated in the constitutions of the first years after the first world war in a very "explicit way", thing that has never happened before in the constitutional texts, in which there was a generic recall to the ministerial responsibility in front of the Parliament, as in the case of the French third Republic, with reference to art. 6 of the law on the organization of powers of 1875.

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<sup>216</sup> Ibidem, with reference to T.G. MASARYK, *Les problèmes de la Démocratie. Essais politiques et sociaux*, Paris, Rivière, 1924, 56.

<sup>217</sup> B. MIRKINE-GUETZÉVITCH, *Les Constitutions de l'Europe nouvelle*, Paris, Delagrave, 1928. Second edition, 1930.

<sup>218</sup> V. M. OLIVETTI, *La giustizia costituzionale in Austria (e in Cecoslovacchia)*, in ID. T. GROPPi, *La Giustizia costituzionale in Europa*, Milano, Giuffrè, 2003, 25 ss.

<sup>219</sup> The kelsenian model of constitutional review of the laws represents, for Mirkine-Guetzévitch, l'«achèvement logique» of the process of constitutional rationalization of the power (B. MIRKINE-GUETZÉVITCH, *Les Constitutions de l'Europe nouvelle*, cit., 32-33). For the close link, between the kelsen doctrine and the buildup of the autrian Bundesgerichtshof see B. CARAVITA, *Corte «giudice a quo» e introduzione del giudizio sulle leggi*, vol. I, *La Corte costituzionale austriaca*, Padova, Cedam, 1985, 39 ss.

<sup>220</sup> The internationalization of the constitutional law has as main feature «l'introduction dans les constitutions de la force obligatoire du droit international» (B. MIRKINE-GUETZÉVITCH, *Les Constitutions de l'Europe nouvelle*, cit., 39). This core topic in the work of Mirkine-Guetzevitch, is recall in many others of his works, among many: *Droit international et droit constitutionnel*, in *Recueil des Cours de l'Académie de Droit International de La Haye*, 1931, vol. 38, 307 ss.; ID., *Le droit constitutionnel et l'organisation de la paix*, in *Recueil des Cours de l'Académie de Droit International de La Haye*, 1933, vol. 45, 667 ss.; ID., *Droit constitutionnel international*, Paris, Sirey, 1933; ID., *Les tendances internationales des nouvelles constitutions*, in *Revue générale de droit international public*, 1948, 375 ss.

<sup>221</sup> B. MIRKINE-GUETZÉVITCH, *Les nouvelles tendances du droit constitutionnel* (1928), cit., 24 ss

Hence, the rationalization of the parliamentarism consist of translation in judicial terms of the empirical principle of the parliamentarism, that for Mirkine-Guetzevitch is in the political power of the Parliament that can promote the resignation of the cabinet. Consequently, the rationalization of the parliamentarism is shown first of all, simply, in the normative forecast of the judicial obligation of the resignation of the Prime Minister due to a vote of distrust of the Parliament. This element is present in the article 54 of the German Constitution of 1919, in art. 78 of Czech Constitution of 1920, in art. 74 of the Austrian Constitution of the same year and in similar provision of other Constitutions of the post-world war period<sup>222</sup>. In addition, Mirkine-Guetzevitch identifies three specifics tendencies, or developing lines, that can be found in the first “shapes of constitutional rationalization of parliamentarism”. Those tendencies are: first, what he calls the “combination of parliamentarism with direct rule”, intended as the legislation of referendum in the Weimar Constitution<sup>223</sup>. The second tendency consists on the declaration of the “primacy of the legislative power upon the executive”, judicial phenomenon that can be find not only in the two lander, “Freistaaten” of Prussia and Bavaria where there is not Head of State, but even in the Austrian Constitutional order where such figure exists but do not decide the composition of the cabinet that is chosen by the Parliament. Mirkine-Guetzevitch endorses this vision of rationalized parliament (so the attribution to the Parliament of the power to dissolve the Cabinet) because -as he observe- the sense of contemporary parliamentarism is not in the case by which the Cabinet must obtain the trust of the majority of the Parliament but in the fact that is the majority that compose the cabinet. It is normal – he added- that the political parties are intended to obtain the majority as a goal to take the lead and build their own Cabinet. As such, the Cabinet become the executive committee of the party that has to execute the directives given by the latter. Indeed, even in the contemporary classic British and French parliamentarism, equally not rationalized, the choice of who embodies the Ministry is not anymore competence of the Head of the State. The third developing line is evident in the judicial rules that some constitutional text of the first post-world war dedicates to the process of parliamentarism. In this case, is a matter of making

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<sup>222</sup> B. MIRKINE-GUETZÉVITCH, *Les nouvelles tendances du Droit constitutionnel. Le problème de la rationalisation du pouvoir dans les constitutions de l'Europe d'après-guerre*, cit., 18.

<sup>223</sup> B. MIRKINE-GUETZÉVITCH, *Le Parlementarisme et la votation populaire dans les Constitutions d'après-guerres*, in *Revue du droit public et de la science politique en France et à l'étranger*, 1930, 35 ss.



much more difficult the procedure for the vote of distrust (that Mirkine-Guetzévitch finds in the Czech, Prussian, Austrian and Greek Constitution) made against a parliamentarism too tempestuous and against too fast falls of cabinets. This last tendency is exactly what with which sometimes is confused the notion of rationalized parliamentarism and that of rationalization of the respective procedures.

When the trust of Mirkine-Guetzevitch on the rationalized parliament started to collapse, it took shape an innovative new vision of the tendency of “modern parliamentarism” centered on the political primacy of the executive. The conflict arose between the two political powers, is today transformed into collaboration and “such collaboration is sometimes transformed into primacy of the executive”, even if – Guetzevitch’s highlight – is a “political primacy and not a legal one”. In this sense, «*le véritable régime parlementaire*» confer to the Executive “a power much bigger than those of the Executive under the principle of the separation of powers”. Indeed, the political strengthening of the Executive is a technical necessity of modern parliamentarism, because “democracy does not have to look at strict doctrine”, but to get “technical means” to answer effectively to the needs of the collectivity, means that are exclusive of the executive. In 1930 the author stresses the importance of the primacy of the political executive<sup>224</sup>. This principle, however, does not contradict his primary analysis of the parliamentarism, because it has as object, a primacy of political nature. In modern democracy the relationship among the legislative and the executive is the opposite with respect to the past, because the long division between “the Parliament against the power of the King” is nothing more than a distant memory<sup>225</sup>. The conflict among the two political power has become cooperative and “such cooperation is generally been transformed into the primacy of the executive”, but – as underlined by Guetzevitch – is a “political primacy and not a legal one”. In this sense, the parliamentary regime gives to the Executive “a strength much bigger than that of the Executive under the regime of the separation of powers”<sup>226</sup>. Indeed, the fact that the political power of the Executive is stronger than that of the legislative, is a “technical” mean of the modern parliamentarism, because “the triumphant democracy does not need

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<sup>224</sup> B. MIRKINE-GUETZÉVITCH, Les nouvelles tendances du Droit constitutionnel. Le renforcement de l'Exécutif et le régime parlementaire, cit., 490.

<sup>225</sup> Frau, M. (2016). L'ATTUALITÀ DEL PARLAMENTARISMO RAZIONALIZZATO. [online] Nomos-leattualitaneldiritto.it. Available at: <http://www.nomos-leattualitaneldiritto.it/wp-content/uploads/2017/02/frau-nuova-versione-per-nomos-3-corretto2016-1-1.pdf>

<sup>226</sup> *Ibidem*.

to look at the strict means of the law”, but of getting the “technical means “to effectively answer to the needs of the collectivity, and those means are exclusive of the Executive<sup>227</sup>. Thus, “the aim of the electoral campaign is not the parliamentary majority but is the Government”<sup>228</sup>. The political primacy of the executive neither exclude the fundamental power of control given to the Parliament and to the public opinion<sup>229</sup>. Every day “the Parliament, acting in the name of the nation, can resign the Minister”, therefore “the power of the Executive is strictly connected with the responsibility, and the execution of the mandate given by the nation through the Parliament”<sup>230</sup>. In the work of 1950, he reaffirmed the impossibility of constitutional law to resolve the problem of the stability of the governments («La stabilité gouvernementale n’est pas un problème constitutionnel»): no strict rule can be realized if the political condition needed does not exists, reason for which «*les règles constitutionnelles de la procédure parlementaire*» are intended as ineffective<sup>231</sup>. Twenty years later, Leopoldo Elia will make a political reflection almost identical calling into question the effectiveness of the constructive vote of no confidence of the German system<sup>232</sup>.

The last important work of Mirkine-Guetzevitch devoted to the study of rationalized parliamentarism, is the already quoted article *L’échec du parlementarisme « rationalisé »*, published in 1954, one year before his death. In that pages Guetzevitch reaffirmed his skepticism towards the effectiveness of the constitutional rationalizations of parliamentarism and seem to rely more on the tools of political sciences than on those of the law<sup>233</sup>. Stephane Pinon, one of the more accurate scholars to study the doctrine of Mirkine-Guetzevitch, on the one hand has never believed in the “procedures of rationalization of parliamentarism” in order to guarantee the stability of the government. On the other hand, for what generally concerns the rationalization of parliamentarism, his initial trust is undoubtful because tighten to the trust on the constitutional rationalization of

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<sup>227</sup> *Ibidem*.

<sup>228</sup> *Ibidem*.

<sup>229</sup> B. MIRKINE-GUETZÉVITCH, Les nouvelles tendances du Droit constitutionnel. Le renforcement de l’Exécutif et le régime parlementaire.

<sup>230</sup> *Ibidem*.

<sup>231</sup> B. MIRKINE-GUETZÉVITCH, Le régime parlementaire dans les récentes Constitutions européennes, cit., 612-613.

<sup>232</sup> “to conclude: or the parties remain solid and thus the “constructive distrust” is something add, or the parties dissociate themselves and thus this stability mechanism become useless” (L.Elia, forms of Govenrment).

<sup>233</sup> S. PINON, the second Mirkine-Guetzevitch is less constitutionalist of an expert of political science. He has two constitutional rules a more relative views, that considering only those, it does not clarify to much.

the power. But with the progressive “failure” of the Professor’s constitution, he even lost the initial hopes regarding the rationalized parliamentarism.

### **2.5.1) The evolution of the concept of rationalized parliamentarism**

In 1930 the Author stresses the importance of the primacy of the political executive<sup>234</sup>. This principle, however, does not contradict his first analysis of the parliamentarism, because it has as object a primacy of political nature.

As mentioned previously, one of the authors who refers to the work of Guetzevitch is Leopoldo Elia. In his work on the encyclopedia devoted to the forms of government, in which it is proposed an innovative classification of the latter based on the kind of the system of the parties, it is recalled the centrality of an element of which Guetzevitch was a precursor in order to ensure the good functioning of the parliamentary government. The ideas of Guetzevitch are even in the preliminary observations of the work of Elia, where it is affirmed that to study the forms of government “finds that in those are present all the problematic aspects concerning, the comparative constitutional law, and of the relationships between law and political sociology”.

### **2.6) The essentials feature of the French “form of government”.**

The main feature of the French “form of government”, that of being a Semipresidential system is enshrined in the French Constituon of 1958<sup>235</sup>. The concept of semipresidential “form of government” is appeared thanks to Duverger’s pen, over the 70s<sup>236</sup>. The concept is based basically on two points: First, the election by universal suffrage of the President of the Republic that is endowed of constitutional prerogatives. Secondly, the presence of the Prime Minister and of a Government responsible in front of the Parliament<sup>237</sup>. To this respect, it can be added that in a presidential system, the Head of State has the right of

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<sup>234</sup> B. MIRKINE-GUETZÉVITCH, *Les nouvelles tendances du Droit constitutionnel. Le renforcement de l’Exécutif et le régime parlementaire*, cit., 490.

<sup>235</sup> Conseil-constitutionnel.fr. (1958). [online] Available at: [https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank\\_mm/constitution/constitution.pdf](https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/constitution/constitution.pdf).

<sup>236</sup> Maurice Duverger, *La monarchie républicaine*, Paris, Robert Laffont, 1974, p. 122

<sup>237</sup> Maurice Duverger, «*Le concept de régime semi-présidentiel*», in *Les régimes semi-présidentiels*, Paris, PUF, 1986, p.7

dissolution. The use of the term semipresidentialism is therefore justified by the fact that, the executive is dualist, but under the guidance of the President<sup>238</sup>.

To sum up, the essential features of the French form of government are the following:

a) President of the Republic, that act as the chair of the State, elected, for a five years term, by direct universal suffrage, that has even the possibility of providing political guidance;

b) A government, led by a Prime Minister, nominated by the President but responsible politically in front of the Parliament, that is to say that the interrelation between the Prime Minister and the Parliament is ruled by a relationship of trust, the latter can be removed with the vote of the Parliament; c) a system of distribution of the executive power that implies a share of public function between the Head of the State and the Government, that consequently does not exclude the possibility of a political conflict between both actors when disputing about the distribution of that power. According to Douverger, the executive power in the French form of government can be represented as a two-headed eagle, in other words as a diarchic structure characterized by a real dualism in the exercise of the government functions. In the division of the executive functions, there are two competing actors both legitimized by the popular will and vote: directly the President of the Republic; indirectly – through the trust of the majority of the Parliament – the Prime Minister. Is the political context that, time by time, tip the balance in favour of one or the other actor, changing arrangements and balances of the French political system<sup>239</sup>.

## **2.7) The President of the Republic.**

The role of the President of the French Republic in the French Fifth Republic is kind of arbitration and of guardian of the correct work of the system. From 1962, the President is elected by universal suffrage, with a double turn election. The President mandate is five years. However, before 2000, the mandate was a seven years term. The change at the timing of the Presidential mandate had been necessary in order to avoid cohabitations problems between the President and the Prime minister. As mentioned above, the Constitution seems

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<sup>238</sup> Xavier Fournier, A. (2007). *Analyse Critique de la cohabitation sous la quintemme république: bilan et perspectives*. [ebook] Montréal: Université du Québec à Montréal, p.26. Available at: <https://archipel.uqam.ca/4739/1/M9950.pdf>.

<sup>239</sup> Carrozza, P., Di Giovine, A. and Ferrari, G. (2013). *Diritto costituzionale comparato*. Roma: Editori Laterza, p.108

to attribute to the President merely a function of arbitration (Art. 5)<sup>240</sup>. However, looking carefully to all the functions attributed to the President by the Constitution, and the modalities in which such functions have been used, appears evident that the President has also political functions that allows her/him to have a certain autonomy in the decision-making, features characteristic of the French system. First, S/he nominates the Prime minister and s/he can withdraw the PM from the office when he submits his resignation (Art. 8)<sup>241</sup>. Moreover, it has to be recalled that, for express constitutional provision, is the President – and not the PM – to chair the Council of Ministers (Art. 9)<sup>242</sup> and to draft the agenda. In addition, the President has the power to dismiss the National assembly (Art. 12)<sup>243</sup>. Finally, the other powers of the President are to be considered equal to those of the Heads of State of the other parliamentary “forms of governments”. For instance, the power of sign the orders and decrees, to nominate some categories of civil servants and of State’s soldiers, to accredit diplomatic members, to grant clemency, to put messages to the chambers<sup>244</sup>.

## 2.8) France and European Union.

The European decisions arise from the cooperation among a wide number of actors, within the 28 Member States. If the members of the Commission and of the European Parliament aim to make the general European interest, others defend the national interest, the regional interest or the interest of a socio-professional sector. France, as her other European partners, is represented in all of the above-mentioned levels.

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<sup>240</sup> Art. 5. *Le Président de la République veille au respect de la Constitution. Il assure, par son arbitrage, le fonctionnement régulier des pouvoirs publics ainsi que la continuité de l'État.*

*Il est le garant de l'indépendance nationale, de l'intégrité du territoire et du respect des traités.*

<sup>241</sup> Art. 8. *Le Président de la République nomme le Premier ministre. Il met fin à ses fonctions sur la présentation par celui-ci de la démission du Gouvernement.*

*Sur la proposition du Premier ministre, il nomme les autres membres du Gouvernement et met fin à leurs fonctions.*

<sup>242</sup> Art. 9. *Le Président de la République préside le conseil des ministres.*

<sup>243</sup> Art.12. *Le Président de la République peut, après consultation du Premier ministre et des présidents des assemblées, prononcer la dissolution de l'Assemblée nationale.*

*Les élections générales ont lieu vingt jours au moins et quarante jours au plus après la dissolution.*

*L'Assemblée nationale se réunit de plein droit le deuxième jeudi qui suit son élection. Si cette réunion a lieu en dehors de la période prévue pour la session ordinaire, une session est ouverte de droit pour une durée de quinze jours.*

*Il ne peut être procédé à une nouvelle dissolution dans l'année qui suit ces élections.*

<sup>244</sup> Carrozza, P., Di Giovine, A. and Ferrari, G. (2013). *Op. cit.*, pp. 109,110.

### **2.8.1) The executive branch: The President of the Republic and the Government.**

The President of the Republic establishes the general orientations of the European policy of France. It represents France at the European Council, which, at least once every six months at the summit, brings together the Heads of State and Government of the twenty-eight-member-states. The government defines and implements the European policy of France. The Prime Minister leads the European action of the Government. It provides inter-ministerial coordination to halt French positions and has, to this duty, a General Secretariat for European Affairs. The Minister responsible for European affairs deals with all matters relating to the construction of Europe: it represents the government, informs elected officials and citizens about the evolution of European issues and the position defended by the French government and it manages the French contribution to the European budget. French ministers represent France in the Council of the European Union, where they share the decision-making power with the ministers of the twenty-seven other Member States of the European Union. They sit in turn, depending on the agenda, in the general training (Ministers of Foreign Affairs and/or ministers of European Affairs) or specialized (Agriculture ministers for the common Agricultural policy, finance ministers for the currency One, ministers of labor, education etc.).

The permanent representation of France is entitled to represent the French interest in the European institutions. This is ensured by a permanent Representative and by an "embassy" to the European Union, the Permanent Representation of France (RPUE), based in Brussels.

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According to the Interdepartmental structure, expresses the positions of the French Government in the organs preparing the meetings of the Council of Ministers (COREPER), participates in the elaboration and conduction of all the policies of the European Union and inform the authorities French on the State of European affairs. It presents and explains the French positions to the members of the Commission, the European Parliament and their services.

Within the European institutions the French “employers” are appointed by the Government to the European Commission, the Court of Justice of the European Union, the European Court of Auditors, the European Central Bank and the overwhelming majority of European institutions and bodies. They are sworn to act independently of their country of origin in the interests of all the countries of the European Union.

The elected representatives of Europe, national, regional and local citizens, can be brought to play a role of representation of France in different institutions. For instance, in the European Parliament out of a total of 751 MEPs, 74 are elected in France. Working in thematic committees or plenary sessions, they take part in the European legislative and budgetary processes and control the work of other EU institutions. MEPs are mainly representatives of their European political parties and groups, but they also act on the basis of national interests. The last elections were held in France on 25 May 2014.

The French parliament: the French deputies and the Senators<sup>245</sup> follow closely, thanks to their specialized commissions, the evolution of the European construction and the EU regulation. They are consulted by the French Government on all texts in the legislative field and can vote, if they deem it appropriate, for resolutions. They have set up a committee on European Affairs in the National Assembly and in the Senate<sup>246</sup>.

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<sup>245</sup> Art. 88 section 4 The Government submits to the National Assembly and the Senate, as soon as they have been forwarded to the Council of the European Union, the drafts of European legislative acts and the other designs or proposals for acts of the European Union. In accordance with the rules laid down in the regulation of each assembly, European resolutions may be adopted, if necessary outside the sessions, on the designs or proposals referred to in the first subparagraph, as well as on any document from one of the institutions of the European Union. A commission in charge of European affairs is constituted in each parliamentary assembly. Art.88 section 5. The draft legislation authorizing the ratification of a treaty concerning the accession of a State to the European Union shall be subject to a referendum by the President of the Republic. However, by voting on a motion adopted in the same text by each assembly to the majority of three fifths, Parliament may authorise the adoption of the bill in accordance with the procedure laid down in the third subparagraph of article 89. Art.88 indent 6 The National Assembly or the Senate may give a reasoned opinion on the conformity of a draft European legislative act to the principle of subsidiarity. The opinion is sent by the President of the Assembly called to speak to the Presidents of the European Parliament, the Council and the European Commission. The Government is informed. Each assembly may lodge an appeal before the Court of Justice of the European Union against a European legislative act for breach of the principle of subsidiarity. That appeal shall be forwarded to the Court of Justice of the European Union by the Government. To this end, resolutions may be adopted, where necessary outside the sessions, in accordance with the methods of initiative and discussion laid down in the rules of each assembly. If the request is formulated by sixty deputies or sixty senators, the appeal intervenes de jure. Art. 88 indent 7 By voting on a motion adopted in the same text by the National Assembly and the Senate, Parliament may oppose to a change in the rules for adopting acts of the European Union in the cases envisaged, by virtue of the simplified revision of Treaties or civil judicial cooperation, the Treaty on European Union and the Treaty on the functioning of the European Union, as resulting from the Treaty signed in Lisbon on 13 December 2007.

<sup>246</sup> Senato.it. (2013). ShowDoc. [online] Available at: [https://www.senato.it/japp/bgt/showdoc/17/DOSSIER/0/749740/index.html?part=dossier\\_dossier1-sezione\\_sezione16](https://www.senato.it/japp/bgt/showdoc/17/DOSSIER/0/749740/index.html?part=dossier_dossier1-sezione_sezione16)

The Committee of the regions<sup>247</sup>: the twenty-four French Members (12 for the regions, 6 for the departments and 6 for the municipalities) are chosen among the elected representatives of the regional councils, the general councils and the municipalities. They will give their opinion on all the European projects involving the local authorities: transport networks, development, public health

The socio-professional organizations are consulted on the projects of Community legislation within the framework of the European Economic and Social Committee, where 24 are French representatives of families, enterprises, workers, farmers. The European social partners are negotiating European agreements (parental leave, part-time work): Business Europe (formerly UNICE), CEEP (European Centre for Enterprises with Public participation) and CES (European Trade Union Confederation)<sup>248</sup>.

### **2.8.2) General Secretariat for European Affairs.**

The main tasks of the General Secretariat of European Affairs (SGAE) are the elaboration of France's positions on European issues and the coordination of links between French administrative and governmental authorities and European institutions.

This secretariat was created in 1948 by a decree signed by Robert Schuman to coordinate the work of French administrations involved in the economic rehabilitation of France with the help of the Marshall plan. Since October 18, 2005 has replaced the former General Secretariat of the Interministerial Committee (SGCI) on matters of European Economic cooperation, superseded after the failure of the referendum on the 29 May 2005 in France. In 1951, after the signing of the Treaty of Paris (CECA), then in 1958, after the signing of the Treaty of Rome (EEC), the General Secretariat was responsible for coordinating relations between the French authorities and the bodies of the European Community. From then on, it took part in all stages of European construction.

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<sup>247</sup> Set up by the Maastricht Treaty, the Committee of the Regions is the consultative and representative body of the local and regional authorities of the European Union. There are brought the interests of territorial entities with the Commission and the Council, to which the Committee addresses opinions. The Treaty on the functioning of the European Union devotes to the Committee of the Regions its articles 305 to 307; The Treaty on the European Union Art. 13 paragraph 4.

<sup>248</sup> Toute l'Europe.eu. (2017). La représentation de la France au sein de l'Union européenne. [online] Available at: <https://www.touteurope.eu/actualite/la-representation-de-la-france-au-sein-de-l-union-europeenne.html>



The SGAE is headed by a secretary general, currently Sandrine Gaudin. The Secretary-General is assisted by three deputy Secretaries-General, one legal adviser and two counsellors to the Secretary-General. About 200 agents, from various jurisdictions, process files in their areas of expertise. The internal organisation is based on a score of thematic "sectors" corresponding to the various fields of competence of the European Union (for example, agriculture and fisheries, enlargement, the internal market) which constitute as many Expert cells. The "General Administration" sector coordinates the logistical aspects. Sandrine Gaudin was appointed on 10 November 2017 as Europe adviser to the prime Minister and on 20 November, secretary general of European Affairs. From September 2014 to September 2017, she was in charge of the Department of Bilateral affairs and business internationalization at DG *Trésor*. Since August 2017, she was head of regional economic service at the French embassy in London. Enar, senior civil administrator, Sandrine Gaudin began her career at the Ministry of Defence, the Ministry of Foreign Affairs, and then joined the Ministry of Economy and Finance when she left the ENA in 2000.

The SGAE is in France the central administrative element of the decision-making process affecting European affairs. It is a mission administration under the direct authority of the Prime Minister, responsible for coordinating and defining French positions on European subjects. The SGAE is the government's privileged adviser on European affairs. It also cooperates closely with the Secretary of State for European affairs, including the state of the cases under his jurisdiction. The SGAE liaises between the French Government and the European institutions via the permanent representation of France to the European Union in Brussels, to whom it transmits the instructions of the Government. It is the guarantor of the coherence and unity of the positions that France expresses within the EU and monitors the application of European Union law in France. Its mission extends to all areas of European competence provided for in the Treaty of Lisbon, with the exception of the common Foreign and Security Policy (CFSP), provided that this policy does not involve Community instruments. The CFSP is indeed followed by the Ministry of Foreign and European affairs. In addition to European affairs, the SGAE is also responsible for matters dealt with within the framework of the Organisation for Economic Co-operation and Development (OECD), the Codex Alimentarius (a United Nations programme to develop

standards as well as international institutions or organizations that are the subject of Community coordination (World Trade Organization, UNCTAD).

Coordination between ministries the core of the SGAE's mission is based on a simple principle: France must be able to speak with one voice within the European bodies. The General Secretariat is therefore responsible for bringing the positions of the French administrations closer to the current European dossiers in order to define the French position from the level of the working groups in Brussels. In case of discrepancies, the SGAE is responsible for making the technical arbitrations necessary. He submitted to the Prime Minister's arbitration the most politically sensitive issues.

The SGAE plays a central role in providing information to the various ministries and to the two chambers. On the one hand, it centralizes and disseminates information from the European Authorities (Council, Commission, Parliament) to the authorities concerned. They must, in fact, be able to define their position in full knowledge of the facts. On the other hand, it is responsible, within the framework of the procedure of article 88-4 of the Constitution, to ensure that any draft act of the European Union containing provisions of a legislative nature or any other document which the Government wishes to Subject to this procedure may be the subject of a preliminary examination by the French Parliament before it is adopted by the Council of the Union. It ensures coherence between the timetable for parliamentary work and the timetable for the adoption of European texts. More generally, it ensures compliance with the law on the information of the delegations of the National Assembly and the Senate for the European Union. Lastly, the SGAE keeps track of the dossiers examined by the European Parliament in liaison with the mission officials in each ministry, the permanent Representation of France to the EU and the Office of the Minister responsible for European affairs. It makes available to MEPs and French Members briefing notes on the main dossiers on the agenda of the specialized committees or plenary sessions. This written information is sometimes supplemented by the organisation of meetings with representatives of the political groups in order to facilitate the exchange of information on the technical dossiers. Since October 2011, the SGAE has provided its correspondents with an extranet to find and consult the working documents disseminated to them on the subjects concerned, as well as the main reference texts on the Sgae and the European institutions. Called Sapphire, this system allows the SGAE correspondents to arrange for any ongoing

or completed negotiations, court cases, etc., of a virtual file available at any time; Since January 11, 2013 it is now available on the Internet.

The SGAE has become a center of expertise capable of leading or facilitating an in-depth reflection on subjects engaging the future of the European Union. Indeed, the complexity of certain subjects, the apprehension of the negotiating stakes and the knowledge of the interests of the European partners make the Secretary-General the Privileged adviser of the government in this field. It works with all technical ministries and in particular with the Ministry of Foreign Affairs (both for political and legal aspects).

## 2.9) The Spanish “form of government”

The case of Spain is similar to that of France in terms of complexity of political and constitutional history and of amendments of Constitutions. This evolution has started with the “liberal charter<sup>249</sup>” signed in Cadiz in 1812, and has ended, after the democratic experiment of the second Republic of 1921 and the further, long franchist dictatorship, with the adoption of the Constitution in 1978. With the death of the dictator, the 20<sup>th</sup> of November of 1975, the real change of paradigm of Spain politics towards a democracy had started through a “transition period”, that without violent fought, has transformed into a democracy an authoritarian regime<sup>250</sup>. The 1978 Constitution had been ratified via popular referendum. The fundamental charter, in his preamble (*Título preliminar*), establish the functioning of the Spanish’s system. Spain is expressively defined in article one as a social and democratic State that foster “superior values” of his jurisdiction, liberty, justice, egalitarianism and political pluralism. The above-mentioned expression, recalling philosophical and political values, that are set as corner stone of the constitutional system, is thought to highlight that the Spanish system is intended to put together the Spanish liberal constitutional experience from which is born the rule of law, with the much more recent welfare state. Indeed, the democratic and social nature of the system, is evident by the role assigned to the parliamentary chambers that are representatives of the citizens - namely at

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<sup>249</sup> Fernández Sarasola, Ignacio, *La Constitución de Cádiz. Origen, contenido y proyección internacional*, Madrid, 2011

<sup>250</sup> Solozábal, Juan José, *La sanción y promulgación de la ley en la Monarquía parlamentaria*, Tecnos, Madrid, 1987.

the Congreso de Los Diputados – in the framework of a rationalized monarchic form of government<sup>251</sup>.

## **2.10) The “political-shape” of the State and the rationalization of the form of government**

Art. 1<sup>252</sup>, 3<sup>rd</sup> section, of the Spanish constitution proclaim that the “political-shape” of the State is the parliamentary monarchy. That singular expression has generally been explained as the attempt to use a letteral translation that does not imply nor to the monarchic form of State, nor to the monarchic form of government. The choice in favor of the monarchy seems almost incomprehensible if we consider, on the one hand, the almost obsolete nature of such “form of government” and, on the other, the fact that the king had been chosen in 1969, by the dictator Francisco Franco. Despite of such peculiar way to be selected, the King has got a profound legitimation in the Spanish jurisdiction. Among the king’s function, have to be remembered: the power to set popular consultations, both electoral and the referendum, the advance dissolution of the chambers; the appointment of the president of the government and, on his behalf, the appointment and the withdrawal of the minister, the signature and the promulgation of the laws, the enactment of the decrees approved by the Council of Minister and the presidency of that organ; the accreditation of the diplomatic corps; the promulgation of the international treaties; the charge as supreme chief of the armed forces; the appointment of the president of the supreme tribunal; the appointment of the attorney general of the State; the appointment of the judges of the Constitutional Tribunal; the power of grant clemency. Due to the parliamentary nature of the Spanish “form of government”, it is essential the relation of trust between the legislative and the executive power. The Cortes Generales<sup>253</sup> (this is the name of the bicameral parliament) are made of the Congress of the Deputes and by the Senate. The congress, constituted of

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<sup>251</sup> Carrozza, P., Di Giovine, A. and Ferrari, G. (2013). *Op. cit.* p. 196.

<sup>252</sup> Art 1. Spain is hereby established as a social and democratic State, subject to the rule of law, which advocates as the highest values of its legal order, liberty, justice, equality and political pluralism. National sovereignty is vested in the Spanish people, from whom emanate the powers of the State. The political form of the Spanish State is that of a parliamentary monarchy.

<sup>253</sup> The relations between the Government and the Cortes are estimated, in a precise form of government of which the written Constitution is only a component. To the Constitution must be added the constitutional conventions, the practices of the organ interested and the special condition of the political life, all through the presence of the political parties with reference to: Pagés, J. (2004). *Las relaciones entre el gobierno y las cortes generales*. [ebook] Revista Española de Derecho Constitucional. Available at: <https://recyt.fecyt.es/index.php/REDCons/article/view/48342>.

the whole electoral body is made of 350 members, with a mandate of 4 years in constituency that corresponds to the territory of the fifty provinces. The second chamber of the Spanish parliament, the Senate, is composed of 264 members, elected for a 4 years term, that for the four-fifths are elected by the citizens. Indeed, one-fifth of the Senate is elected by the legislative assembly of the autonomous communities, that elect a member each, plus one more member every million citizens of the regional territory. Even in Spain, as in many other social-democrat's jurisdictions, the key role of leading the political guideline is of competence of the Council of Minister.<sup>254</sup>

### **2.11) The Spanish Form of State**

The democratic nature of the Spanish jurisdiction is well reflected in the form of State, inspired by a wide decentralization of political kind. Art. 2<sup>255</sup> of the Constitution, even proclaiming the indivisible unity of the nation, allows, indeed, the right of autonomy for what concern both the nationality and the Regions. The regional authorities are not directly listed in the Constitution, but it is only envisaged their possible formations<sup>256</sup>.

### **2.12) Spain and its representation in EU institutions and bodies**

As regard the European Parliament, Spain has fifty-four MEPs out of a total of 751. At the Council of European Union participates various representatives of the Spanish Government according to the items on the agenda. The European Commissioner for Spain is Miguel Arias Cañete, that is in charge of action related to the climate and on issues regarding energy. Moreover, Spain has twenty-one representatives in the European Economic and Social Committee<sup>257</sup>. In the European Committee of the Regions Spain is represented by 20 representatives<sup>258</sup>. In order to defend the national interest at the European level, Spain as well as the other European partner has its own Permanent Representation to the

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<sup>254</sup> Carrozza, P., Di Giovine, A. and Ferrari, G. (2013). *Op. cit.* p. 198

<sup>255</sup> Art. 2 The Constitution is based on the indissoluble unity of the Spanish nation, the common and indivisible country of all Spaniards; it recognizes and guarantees the right to autonomy of the nationalities and regions of which it is composed, and the solidarity amongst them all.

<sup>256</sup> Carrozza, P., Di Giovine, A. and Ferrari, G. (2013). *Op. cit.* p.208.

<sup>257</sup> It is an advisory body, that represents the entrepreneurs, the workers and other lobbies, provides advice on the proposed legislation in order to better disclosed eventual changes on the status of labor and of welfare of the member states.

<sup>258</sup> Is the local and the regional assembly of the European Union. This advisory body provides advice on the legislative proposals, in order to guarantee that the perspective of every region is considered.

European Union in Brussel. It works, as for the other countries, as an “embassy” in which the main objective, as said above is, to guarantee that the national interests are followed with the better possible effectiveness.

### **2.13) State Secretariat for European Affairs**

To coordinate Spanish policy with the scope of the European Union, as in the case of France, it has been established a body, the State Secretariat for European Affairs. The latter is responsible for three distinct directorates: The Directorate-General for Integration and Coordination of General European Union Affairs; The Directorate-General for Coordination of the Internal Market and other European Union Policies; Directorate-General for Europe. Lastly, the State Legal Services to the Court of Justice of the European Union depend on the State Secretariat for European Affairs.

The first of the directorates mentioned, the Directorate-General for Integration and Coordination of General European Union Affairs, among other functions, is entitled to “the monitoring and coordination of the actions of the ministerial departments; the preparation of the General Affairs Council of the European Union; the monitoring and coordination of institutional issues of the European Union and, in particular, its reforms; the coordination of the Spanish position on enlargement policy and, as the case may be, of the withdrawal of Member States from the European Union, and the promotion and defense of the Spanish language in EU institutions”<sup>259</sup>. It is chair by José Pascual Marco Martínez. Martínez is a diplomat who joined the Diplomatic Service in 1983. The second of the directorates mentioned, the Directorate-General for Coordination of the Internal Market and other European Union Policies is “responsible, among other functions, for handling applications and the notification of public aid with EU institutions; general advice on EU legal affairs; the examination of legal breaches filed against the Kingdom of Spain by the European Commission, and the preparation of the Internal Market Consultative Committee. Its Director-General is Pascual Ignacio Navarro Ríos”<sup>260</sup>. He became a diplomat in 1987. The last directorate mentioned, the Directorate-General for Europe, is “responsible, among

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<sup>259</sup> Exteriores.gob.es. (2017). State Secretariat for European Affairs. [online] Available at: <http://www.exteriores.gob.es/Portal/en/Ministerio/FuncionesEstructura/Organigrama/Paginas/SecretariaDeEstadoParaLaUnionEuropea.aspx>.

<sup>260</sup> State Secretariat for European Affairs. *Op. cit.*

other functions, for proposing and implementing Spanish foreign policy in its geographic area and for proposing and monitoring Spain's position on the contentious issue of Gibraltar. Its Director-General is Juan López-Herrera Sánchez"<sup>261</sup> who became diplomat in 1989.

## **2.14) The Italian Case: The Italian Form of State and “form of Government”**

### **2.14.1) The Form of State**

The Italian form of State is a political system deployed in accordance to a representative democracy in the shape of a parliamentary Republic. The State is organized in a centralized way but with a decentralized system for the regions. Italy is a democratic Republic since 1946, when the monarchy had been abolished via a referendum and the Constituent assembly was elected in order to draft the Constitution, that had been promulgated the 1<sup>st</sup> January 1948.

### **2.14.2) The “Form of Government”**

The Italian “Form of Government” can be defined as a “weak” rationalized parliamentarism<sup>262</sup>. To this point, it is pivotal the relationship of trust between the Parliament and the Government. Generally speaking, the parliamentarism is built upon the separation among the executive power (the Government) and the legislative power (the Parliament). For what concern the former, the relevant article in the Constitution are

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<sup>261</sup> *Ibidem*.

<sup>262</sup> Serrano Pérez, M. (n.d.). IL GOVERNO IN UN SISTEMA DI PARLAMENTARISMO RAZIONALIZZATO. [online] Scienzepolitiche.unical.it. Available at: [http://scienzepolitiche.unical.it/bacheca/archivio/materiale/18/ISTITUZIONI%20DIRITTO%20PUBBLIC%20\(Corso%202013-2014\)/12.%20Prof.ssa%20MERCEDES%20SERRANO%20PEREZ.pdf](http://scienzepolitiche.unical.it/bacheca/archivio/materiale/18/ISTITUZIONI%20DIRITTO%20PUBBLIC%20(Corso%202013-2014)/12.%20Prof.ssa%20MERCEDES%20SERRANO%20PEREZ.pdf).

articles 92<sup>263</sup>, 93<sup>264</sup>, 94<sup>265</sup>, 95<sup>266</sup>, 96<sup>267</sup>. On the other hand, for what concern the latter the relevant articles of the Constitution are from Art. 55 to Art. 82. From Art 55 to Art 69 the rules of procedures of both chambers are regulated by the Constitution while from art. 70 to Art. 82 of the Constitution the rules that the legislative process must follow are presented. A leading role in ensuring the check and balances among the two bodies (the Government and the Parliament) is the one exercised by the President of the Republic. The functions

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<sup>263</sup> The Government of the Republic is made up of the President of the Council and the Ministers who together form the Council of Ministers. The President of the Republic appoints the President of the Council of Ministers and, on his proposal, the Ministers.

<sup>264</sup> Before taking office, the President of the Council of Ministers and the Ministers shall be sworn in by the President of the Republic.

<sup>265</sup> The Government must receive the confidence of both Houses of Parliament. Each House grants or withdraws its confidence through a reasoned motion voted on by roll-call. Within ten days of its formation the Government shall come before Parliament to obtain confidence. An opposing vote by one or both the Houses against a Government proposal does not entail the obligation to resign. A motion of no-confidence must be signed by at least one-tenth of the members of the House and cannot be debated earlier than three days from its presentation.

<sup>266</sup> The President of the Council conducts and holds responsibility for the general policy of the Government. The President of the Council ensures the coherence of political and administrative policies, by promoting and coordinating the activity of the Ministers. The Ministers are collectively responsible for the acts of the Council of Ministers; they are individually responsible for the acts of their own ministries. The law establishes the organisation of the Presidency of the Council, as well as the number, competence and organisation of the ministries.

<sup>267</sup> The President of the Council of Ministers and the Ministers, even if they resign from office, are subject to normal justice for crimes committed in the exercise of their duties, provided authorisation is given by the Senate of the Republic or the Chamber of Deputies, in accordance with the norms established by Constitutional Law.



and powers of the president of the Republic are enlisted under articles 83<sup>268</sup>, 84<sup>269</sup>, 85<sup>270</sup>, 86<sup>271</sup>, 87<sup>272</sup>, 88<sup>273</sup>, 89<sup>274</sup>, 90<sup>275</sup> and 91<sup>276</sup> of the Italian Constitution<sup>277</sup>.

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<sup>268</sup> According to art. 83: “The President of the Republic is elected by Parliament in joint session. Three delegates from every Region elected by the Regional Council so as to ensure that minorities are represented shall participate in the election. Valle d’Aosta has one delegate only. The election of the President of the Republic is by secret ballot with a majority of two thirds of the assembly. After the third ballot an absolute majority shall suffice”.

<sup>269</sup> Art. 84 states that: “Any citizen who has attained fifty years of age and enjoys civil and political rights can be elected President of the Republic. The office of President of the Republic is incompatible with any other office. The remuneration and entitlements of the President are established by law”.

<sup>270</sup> Art. 85: “The President of the Republic is elected for seven years. Thirty days before the expiration of the term, the President of the Chamber of Deputies shall summon a joint session of Parliament and the regional delegates to elect the new President of the Republic. During dissolution of Parliament or in the three months preceding dissolution, the election shall be held within the first fifteen days of the first sitting of a new Parliament. In the intervening time, the powers of the incumbent President are extended”.

<sup>271</sup> Art 86: “The functions of the President of the Republic, in all cases in which the President cannot perform them, shall be performed by the President of the Senate. In case of permanent incapacity or death or resignation of the President of the Republic, the President of the Chamber of Deputies shall call an election of a new President of the Republic within fifteen days, notwithstanding the longer term envisaged during dissolution of Parliament or in the three months preceding dissolution”.

<sup>272</sup> Art 87: “The President of the Republic is the Head of the State and represents national unity.

The President may send messages to Parliament. The President shall:

- – authorize the introduction to Parliament of bills initiated by the Government;
- – promulgate laws and issue decrees having the force of law, and regulations;
- – call a general referendum in the cases provided for by the Constitution;
- – appoint State officials in the cases provided for by the law;
- – accredit and receive diplomatic representatives, and ratify international

treaties which have, where required, been authorised by Parliament.

The President is the commander-in-chief of the armed forces, shall preside over the Supreme Council of Defence established by law, and shall make declarations of war as have been agreed by Parliament. The President shall preside over the High Council of the Judiciary. The President may grant pardons and commute punishments. The President shall confer the honorary distinctions of the Republic”.

<sup>273</sup> Art 88: “In consultation with the presiding officers of Parliament, the President may dissolve one or both Houses of Parliament. The President of the Republic may not exercise such right during the final six months of the presidential term, unless said period coincides in full or in part with the final six months of Parliament”.

<sup>274</sup> Art 89: “A writ of the President of the Republic shall not be valid unless signed by the proposing Minister, who shall be accountable for it. A writ having force of law and other writs issued by virtue of a law shall be countersigned by the President of the Council of Ministers”.

<sup>275</sup> Art. 90: “The President of the Republic is not responsible for the actions performed in the exercise of presidential duties, except in the case of high treason or violation of the Constitution. In such cases, the President may be impeached by Parliament in joint session, with an absolute majority of its members”.

<sup>276</sup> Art. 91: “Before taking office, the President of the Republic shall take an oath of allegiance to the Republic and pledge to uphold the Constitution before Parliament in joint session”.

<sup>277</sup> [https://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf)

#### 2.14.3) The representation of Italy in EU institutions and bodies

Among the different EU institutions, for what concern the Parliament, Italy has 73 MEPs. As well for what the Council meetings concerns, those are attended by representatives from the Italian government, depending on the issue at stake<sup>278</sup>. As regard as what the European Commission concern, the Italian commissioner is Federica Mogherini that in the commission work as the High Representative of the Union for Foreign Affairs and Security Policy and Vice-President of the European Commission. Furthermore, for what concern the ECOSOC, Italy has twenty-four representatives while it has twenty-three representatives at the European Committee of the Regions. For what concerns the Italian Permanent Representation, Italy has three different Permanent Representatives<sup>279</sup> according to three different areas of Interest (COREPER I, COREPER II, PESC-PESD).

#### 2.14.4) The Interministerial Committee on European Affairs.

The Interministerial Committee on European Affairs (CIAE) was established by Law n° 234 of 24 December 2012<sup>280</sup> (*Norme generali sulla partecipazione dell'Italia alla formazione e all'attuazione della normativa e delle politiche dell'Unione europea*) and works under the Presidency of the Council of Ministers. Its core commitment is to “agree at political level a unitary national position on EU legislative proposals and policies. The Committee’s governance is set by Decree of the President of the Republic n°118 of 26 June 2015<sup>281</sup>, which establishes that the Committee operates within the Presidency of the Council of Ministers. The CIAE is convened and chaired by the President of the Council of Ministers or, by virtue of a delegation of authority, by the Minister or State Secretary to European Affairs. Members of the Committee are the Minister of Foreign Affairs, the Minister of Economy and Finance and other Ministers with competence in the matters on the agenda. The President of the Conference of Italian regions, the President of the National Association of Italian Municipalities and the President of the Union of the Provinces of Italy also participate when matters falling within their competence are discussed. The

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<sup>278</sup><http://europa.eu/whoiswho/public/index.cfm?fuseaction=idea.hierarchy&nodeID=231059&lang=en>

<sup>279</sup><http://europa.eu/whoiswho/public/index.cfm?fuseaction=idea.hierarchy&nodeID=4281&lang=en>

<sup>280</sup> <http://www.politicheeuropee.gov.it/it/normativa/legge-24-dicembre-2012-n-234/>

<sup>281</sup><http://www.politicheeuropee.gov.it/it/normativa/approfondimenti-normativa-di-settore/decreto-del-predente-della-repubblica-26-giugno-2015-n-118/>

results of the meetings are set out in official documents (position papers) by the Department for European Policies. These positions are then supported in agreement with the Ministry of Foreign Affairs in all negotiations at European level. The CIAE's activity is supported by a Technical Committee of Evaluation (CTV) which meets regularly before the CIAE to ensure coordination at technical and administrative level<sup>282</sup>.

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<sup>282</sup><http://www.politicheeuropee.gov.it/en/minister/interministerial-committee-on-european-affairs/>

## CHAPTER 3

Reflections on future developments of the European “form of government” in light of recent debates

‘Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a *de facto* solidarity.’

Robert Schuman  
9 May 1950

### **3.1) Possible evolution of the interaction among the Council, The European Council and the "forms of government".**

As studied in the first chapter of the thesis, the Council is made up of the ministers that held meetings in different formations of the Member States of the Union, according to the issues at stake. Those ministers decide on issues related both with soft and hard law. Their decisions are strictly linked with national politics and, with the political wills of the Governments in charge in each of the Member States. Therefore, the problems that arise are many. First, might be a matter of appointment, secondly it might be a matter of political will of the majority. While in the former case, it would depend directly on the Government, in the second case, issues are more complicated. Brexit, as well as the recent events in France, the rise of VOX in Spain together with the situation in many other of the European Member States, brought to the attention the risk associated in the interconnection between national politics and the European Politics, especially in the Council where the outcomes are the results of multilateral diplomacy. As a result, would the rise of the feeling of predominance of national politics over European politics foster the role of the Council, in which countries act to defend Nationals interests? And if so, what would be the consequences on the European Union? As pointed out in the first chapter, the Lisbon Treaty has strengthened the role of the EC, even though the introduction of the system of qualified majority voting. The problem here arises in the fact that countries weight in terms of votes in the Council of the European Union are established in percentage of people who lives in that country. Therefore, bigger countries have more votes than smaller countries, and this affect the bargaining process in the Council. Consequently, the most populous States whether governed by anti-European movement could affect in a negative fashion the European Politics<sup>283</sup>. As regard to the voting procedure of the Council, as explained in the

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<sup>283</sup> To be noted that according to the November 2018 Eurobarometer report, namely Future of Europe available online at: <http://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Survey/getSurveyDetail/yearFrom/1974/yearTo/2018/surveyKy/2217> for the public opinion of people living in Germany, Sweden, Netherlands and Luxembourg the risk of political parties belonging to extremism is very high. Indeed, to the question: "What are the main risks/threats for the European Union in the coming years?" The answer is political extremism for respectively 50% of German citizens, 65% in Sweden, 58% in the Netherlands and 49% in Luxembourg.

first chapter of this thesis, since 2014 countries votes according to the system of qualified majority (QMV) following the procedure established by the LT. However, even taking into account the need of this revision to ensure the effectiveness of the Council work, this system is subject to criticism. The main critic regards the governments who held much of the votes in the Council: “Over-powerful national governments, paired with continuous bickering and inability to put aside national interests for the common good, make it frustratingly hard to progress forward on the path of harmonization and federalization. Even where unanimity isn’t needed, the current system is just one crisis away from toppling over completely. For example, there are several drawbacks to QMV. At present, population size does not automatically translate into weight percentage of a country. The weight of smaller country is adjusted so as to make them relatively over-represented in voting, ensuring that larger countries can’t dominate. But with the possibility of future enlargement towards the Western Balkans, the balance between countries will change. With percentages split amongst so many countries, gaining a sufficient majority will become harder. Consensus will thus become harder to reach, meaning that it is probable that this system will have to change soon or risk becoming unworkable<sup>284</sup>”. Moving from the possible problems related with the Council to those related with the European Council the first question is: would the Union move in a direction that would strengthen the role of the European Parliament or, it would strengthen the role of the permanent President of the European Council? To answer to this question, appears to be useful to analyze the possible scenarios on how the role of the President might be strengthened. As far as the Presidency of the EC concerns, one of the theories is that “the presidency of the European Council should be supported by adequate institutional reforms that strengthen the office so as to make it truly the President of the Union as a whole”<sup>285</sup>. Hence, in constitutional terms, give both new powers and legitimacy for the institution. This scheme must follow two paths. In the first, the presidency should be conferred with the legal capacity to make authoritative decisions and therefore to take executive economic decisions for the EMU. “The President should have the authority to set the agenda he or she believes to be in the best interest of

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<sup>284</sup> Di Franco, E. (2018). *Unanimity and QMV: How Does the Council of the EU Actually Vote?*. [online] My Country? Europe. Available at: <https://mycountryeurope.com/domestic-politics/eu-domestic-policy/unanimity-qvm-council-vote/>.

<sup>285</sup> Fabbri, F. (2015). *Austerity, the European Council, and the Institutional Future of the European Union: A Proposal to Strengthen the Presidency of the European Council*. [online] Muse.jhu.edu. Available at: <https://muse.jhu.edu/article/591642#f5-text>.

the Union—resisting pressure from the heads of state and governments (and especially the more powerful among them), rather than reflecting their preferences”<sup>286</sup>. Secondly, the presidency should be linked to a process of legitimization with an electoral process. This proposal of strengthening the role of the President of the European Council follows the logic of separation powers. Another proposal for the reform of the Council, had been presented in a recent study for the AFCO<sup>287</sup> Committee: *The Council of the EU: from the Congress of the Ambassadors to a genuine Parliamentary Chamber?* Inside this report, there are two main proposal of reform with different impact strength: one that is harder than the other. In the former case, the starting point is how to transform the Council into a genuine parliamentary chamber. Several options had been analyzed in order to reach the aim: “Pluralist representation of the Member States and a subsequent division of the voting rights given to each member. With the end of the voting points system for qualified majority votes in the Council since 2014, it would be difficult to implement such reform but not impossible. Unification of the Council through the occasional meeting of all members; Ministers participating in each formation could meet once or twice a year and thus create a Senate of the EU. A debate with the presidents of EU Institutions could be organized on this occasion/s. Unification of the Council through the creation of a single legislative body with a set number of participants with ministerial status. These participants would *de facto* have the status of deputy prime ministers in charge of European issues. Greater transparency with publicity for all kinds of meetings at the ministerial level. Regarding the European Council, a greater parliamentary feature would also require totally or partially opening up its closed-doors meetings.”<sup>288</sup> This proposal, the tougher one, is not immune to critics also inside the same reports. Indeed: “These points appear to be either anecdotal or harmful to the smooth operation of the EU. A Senate entirely composed of ministers would probably be anecdotal. The infrequency of meetings would make unlikely the development of transnational coalitions on party bases between ministers from different members. The implementation of a pluralist representation of Member States raises deep practical challenges – especially given the difference in the status and size of the

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<sup>286</sup> Fabbrini, F. (2015). *Op. Cit.*

<sup>287</sup> Europarl.europa.eu. (2019). *The Council of the EU: from the Congress of the Ambassadors to a genuine Parliamentary Chamber?* [online] Available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2019/608855/IPOL\\_STU\(2019\)608855\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2019/608855/IPOL_STU(2019)608855_EN.pdf).

<sup>288</sup> Europarl.europa.eu. (2019). *Op. cit.* p. 20

parliamentary opposition from one country to the next. It would also seriously complicate negotiations within the Council and with the Parliament – and could therefore further strengthen their informality. Creating a single legislative body with a set number of participants would be more feasible and would probably facilitate policymaking both in the Council and with other EU institutions. But the permanency of the ministers in such a Council would likely strengthen their political status. These quasi-deputy prime ministers active in Brussels would soon be considered as rivals by the prime ministers. As they would spend most of their time on EU deals, they could also be criticized for being too remote from grassroots realities.”<sup>289</sup> As mentioned previously, in the report are analyzed other proposals that are intended as softer with respect to the hard one. Those proposals would consist first “of organizing a public debate at the ministerial level at the beginning of the legislative process. The information of the public, observers, interest groups, and other EU Institutions would be enriched by such debate. The initial position of each ministerial representative would be known and could serve as a reference point throughout subsequent negotiations. There is a possibility that such public debate would create some drama and oratory performances. A parliamentary style does not always involve theatrics, but it certainly requires it from time to time. Drama and performance help people identify with their decision-makers. It is also an incentive to follow what is happening. The recommendation is also made in reaction to the generalization of first-reading agreements and the crucial role played by closed-doors trilogues. It now takes nearly two years on average to reach agreement on EU draft legislation. Given the generalization of first-reading agreements, there are no mandatory opportunities for Member States to provide their official positions during this long span of time. It is only at the very end of the process, once a draft has been extensively amended, that positions are revealed. An initial declaration of each Member State’s views would at least enable observers to be informed of the starting views. Last but not least, such reform would necessarily increase the involvement of ministers in the legislative game. At present, ministers most often become involved at a rather late stage, once negotiations have taken place within working groups and COREPERs. An obligation to publicly stake positions at the very beginning of the process would force ministers to more closely follow the issues and therefore more specifically instruct their diplomats – an incentive that can only be seen as positive from a

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<sup>289</sup> Europarl.europa.eu. (2019). *Ibidem*. p. 20



democratic perspective. There is an obvious drawback to such a proposal: the public debate could artificially develop internal conflicts within the Council. Identifying a compromise would then become more difficult. Member States could feel boxed in by the initial view they took and therefore unable to compromise. While it should not be ignored, this risk might be worth taking to democratize EU policymaking. Indeed, the Parliament followed a similar path in 2016 when its standing orders were reformed. At the time, it decided that committees' work on draft legislation should be preceded by a floor debate to provide each group with an opportunity to publicly provide its (initial) views. What has been considered good for democracy in the Parliament could also be seen as such in the Council. This report leaves open the question of whether an orientation vote should be organized at the end of this initial debate. An orientation vote is a resolution that provides an institution's the broad view on the principle of a text without considering its details and without taking a definitive position on it. Generally speaking, it is always better in parliamentary settings to link debates and votes. It avoids mere talking shops and makes debates more vibrant. But there is a danger that an initially negative Council position could politically "kill" a proposal without giving policymakers the chance to make it more acceptable through amendments"<sup>290</sup>.

3.2) Future perspective and possible scenarios on the composition of the next European Commission, particularly on the institutionalization of the "*Spitzenkandidaten*" procedure.

In 2019, at the end of the mandate of the actual European Commission, a new one will be in charge. Since the very beginning of this Commission, many things are changed. It had been the first time in which the procedure of the *Spitzenkandidat* had been used to nominate the President. Will it be used again, or a different procedure will be established? Clearly the *Spitzenkandidat* procedure is strictly linked with the next European election and thus, it will be an extremely delicate issue. Secondly the work of the Commission is strictly linked with that of the Council, institution that is in charge of setting the agenda of the Commission. That being said, the scheme of the *Spitzenkandidaten* procedure has a legal basis in Article 17.7 TFEU. Therefore, this way of procedure was foreseen by the Treaty itself. Even if the procedure is to be completed in short run-up time, the process had granted

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<sup>290</sup> Europarl.europa.eu. (2019). *Op. cit.* p. 21

further visibility to the election of the President of the Commission and in this way had legitimized the direction to a Political Commission<sup>291</sup>. “Discarding the *Spitzenkandidaten* system would be a step back in the direction of an opaquer and less inclusive decision-making system in the EU. This would neither be in line with the progressive development of the European Union of past years nor with the need for a further strengthening of its legitimization process in years to come. The experience of 2014 already enables the identification of certain characteristics that individuals selected as *Spitzenkandidaten* are likely to share. Multilingualism provides a clear advantage, and knowledge of the three working languages of the EU institutions can be considered quasi pre-requisites. Executive experience is necessary given the scope of the tasks at hand. And finally, the credibility and effectiveness of the candidate will be bolstered if they are considered by the European Council as ‘one of their peers’ – given that the Commission President also sits in the European Council. Of course, these characteristics do not, and cannot, preclude the pool of potential candidates to the position of *Spitzenkandidat*, and eventually to President of the European Commission, but they can serve to facilitate the process in the future. Given the importance of reconstituting the European Union as a Union of twenty-seven members and in light of the debate on the future of Europe that was initiated by the European Commission’s White Paper in March 2017, consideration should be given to a more ambitious move towards a fully-fledged and integrated system of EU governance”<sup>292</sup> with an appropriate legitimization process, improving the procedure on two principal way that

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<sup>291</sup> The politicization of the Commission is, according to professor N. Lupo, further evident considering the recent judgement of the Court of Justice that has recognized the power of withdrawal of the proposal of the legislative act by the former. Indeed, the professor affirmed: “It can be seen as a way of avoiding the confinement, even in the first steps of the legislative process, of the role of the Commission as “honest broker”, one clearly incompatible with a withdrawal exercised in political grounds; and as a means of bringing it closer, consistent with its recently increased politicization, to the role played by Executive in parliamentary form of government, one of the protagonists in the legislative process. At the same time, once the Commission’s power of legislative initiative is significantly reduced and strongly self-constrained in favour of the other institutions, starting with the European Council, there should be no hesitation made in clearly recognizing that the Commission also has the power of withdrawal, provided that this power is also exercised allowing some degree of involvement for the other institutions, consistent with the principle of institutional balance, which is confirmed as the fundamental constitutional principle ruling EU-decision making”. With reference to: Lupo, N. (2018). *The Commission’s Power to Withdraw Legislative Proposals and its ‘Parliamentarisation’*, *Between Technical and Political Grounds*. 1st ed. [ebook] Oxford: European Constitutional Law Review, p.331. Available at: [https://www.cambridge.org/core/services/aop-cambridge-core/content/view/7AD2D44D00849A42FA81F92A3618853B/S1574019618000226a.pdf/commissions\\_power\\_to\\_withdraw\\_legislative\\_proposals\\_and\\_its\\_parliamentarisation\\_between\\_technical\\_and\\_political\\_grounds.pdf](https://www.cambridge.org/core/services/aop-cambridge-core/content/view/7AD2D44D00849A42FA81F92A3618853B/S1574019618000226a.pdf/commissions_power_to_withdraw_legislative_proposals_and_its_parliamentarisation_between_technical_and_political_grounds.pdf).

<sup>292</sup> Ec.europa.eu. (2018). *Building on the Spitzenkandidaten Model Bolstering Europe’s Democratic Dimension*. [online] Available at: [https://ec.europa.eu/epsc/sites/epsc/files/epsc\\_-\\_road\\_to\\_sibiu\\_-\\_building\\_on\\_the\\_spitzenkandidaten\\_model.pdf](https://ec.europa.eu/epsc/sites/epsc/files/epsc_-_road_to_sibiu_-_building_on_the_spitzenkandidaten_model.pdf).

are compatible and pursuable in parallel: “Improving the existing model and Bolstering European political parties with strong links to their members at nation level”<sup>293</sup>. In the former case, “the basic tenets of the *Spitzenkandidaten* system would be preserved but practical changes would be introduced to make sure the approach has greater impact in the next elections”. In the latter, “European political parties will need to play a more pronounced role in the electoral campaign to ensure that elections to the European Parliament are about European issues. Today, they remain diverse confederations that struggle to resonate with their national constituent members. Stronger political parties, with close links to the capitals, would make the *Spitzenkandidaten* experience more valuable<sup>294</sup>”. Anyway, although the doubts linked with this issue, in the last State of the Union of the president Juncker, the objectives for the closed future had been discussed. This because, according to President Juncker: “Parliaments and Commission come and go, Europe is here to stay”<sup>295</sup>.

### 3.3) The European Political Parties system debate over transnational list and the reform of the European political law: A EU political party system?

Notwithstanding the “possibility of developing a uniform electoral process enshrined in the Treaties since 1957, European elections are still governed for the most part by national laws. The legal basis for reforming the electoral procedure is enshrined in Article 223 of the Treaty on the Functioning of the European Union (TFEU). Parliament drafts a proposal and submits it to the Council. The Council adopts its decision by unanimity, after obtaining Parliament's consent. To give its consent, Parliament needs the majority of its component Members (absolute majority). In a second phase, Member States need to approve the electoral provisions in accordance with their respective constitutional requirements. On 5 February 2015, the European Parliament's Conference of Presidents authorized the drawing up of a legislative initiative report on the reform of the electoral law of the European Union, based on Article 223(1) TFEU. On 11 November 2015, the European Parliament adopted a resolution based on the legislative initiative report prepared by the Constitutional Affairs committee (rapporteurs: Danuta Maria Hübner, EPP, Poland and Jo Leinen, S&D,

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<sup>293</sup> Ec.europa.eu. (2018) *Op. cit.*

<sup>294</sup> Ec.europa.eu. (2018) *Ibidem.*

<sup>295</sup> Ec.europa.eu. (2018). STATE OF THE UNION 2018. [online] Available at: [https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-speech\\_en\\_0.pdf](https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-speech_en_0.pdf).

Germany) on the amendment of the Act of 20 September 1976 concerning the election of the Members of the European Parliament by direct universal suffrage. The legislative initiative proposes amendments to the EU electoral law with a view to increasing the democratic dimension of the European elections and the legitimacy of the Union decision-making process. The aim is to improve the citizens' participation in the election process and to bring the Members of the European Parliament closer to their voters, in particular the youngest ones. The European Parliament proposed the following changes to the 1976 Electoral Act:

1. Visibility of European political parties: Ballot papers used in the European elections should give equal visibility to the names and logos of national parties and the European political parties to which they are affiliated.
2. Introduction of a deadline of 12 weeks before the elections for the nomination of candidates/establishment of lists at national level.
3. Introduction of a mandatory threshold for bigger EU-countries, ranging between 3 % and 5 % for the allocation of seats in single constituency Member States and constituencies comprising more than 26 seats. The 2002 Council Decision, amending the 1976 Act, authorises Member States to establish thresholds of up to 5 %. Fourteen Member States have set such thresholds by law. Yet, in two decisions (2011 and 2014), the German Constitutional Court declared the country's existing thresholds for EU elections (5 %, then 3 %) to be unconstitutional.
4. Introduction of a right to vote in European elections for all EU citizens living outside the EU. To avoid double-voting (by people with more than one citizenship or by EU citizens living abroad), Parliament wants EU countries to exchange data on voters.
5. Introduction of electronic and internet voting possibilities, as well as postal voting.
6. Introduction of a common deadline of 12 weeks for the nomination of lead candidates by the European political parties: European elections should be fought with formally endorsed, EU-wide lead candidates (*'Spitzenkandidaten'*) for the Commission presidency.
7. Creation of a cross-border joint European constituency, in which lists are headed by each political family's nominee for the post of president of the Commission.

The proposal also provides for the European Parliament to be given the right to establish the electoral period for elections to the EP, after consulting the Council. Certain national parliaments have expressed criticism of the EP proposals. Between 19 January and 18 February 2016, six chambers of four Member States submitted formal reasoned opinions amounting to eight votes. Five further chambers of four Member States submitted political contributions, which expressed criticism of alleged non-compliance with the principle of subsidiarity, or of overstretching the legal basis on which the act is to be adopted. However, the threshold of 19 votes, representing one third of the votes allocated to national parliaments – as provided under Article 7(2) of Protocol no 2 TFEU, was not met. In a letter of 8 April 2016 to the national parliaments, the President of the European Parliament replied that the EP still preferred common principles for the election procedure rather than proposing a uniform procedure, and that the procedures require approval by Member States in accordance with their respective constitutional requirements. On the side of the Council, the General Affairs Working Party discussed the European Parliament's legislative initiative during five successive Presidencies. Although delegations were able to reach agreement on a common approach to a number of provisions, several issues in the EP's proposal appeared to be unacceptable to delegations as a matter of principle and/or on legal grounds. On its meeting on 14 December 2017, Committee on Constitutional Affairs adopted an oral question to the Council asking for explanation of the reasons for a blockade to the reform of European electoral law. Moreover, in its resolution of 7 February 2018 on the composition of the European Parliament, EP called on the Council to rapidly finalise the revision of the electoral law. On 7 June 2018, the Council has approved a draft decision amending the 1976 Electoral Act. It includes provisions on possibility of different voting methods and protection of personal data; penalisation of 'double voting' by national legislation; voting in third countries; possibility of the visibility of European political parties on ballot papers and 3 weeks deadline for submission of lists before election day. One of the key provisions of EP proposal on threshold was modified so that it would apply only to constituencies (including single-constituencies Member States) which comprise more than 35 seats, with a threshold of between 2 and 5%. That provision should be implemented by 2024 EU elections at the latest. Moreover, the Council couldn't agree on establishment of joint constituency and lead candidates proposed by the Parliament. On 4 July 2018, the European Parliament gave its consent and consequently the Act was adopted

by the Council (13/07/2018). The Electoral Act will enter into force after all Member States approve it in accordance with their respective constitutional requirements”<sup>296</sup>. Therefore, it is not possible to refer to the European political formations as a “system”, in the sense of a stable and structured political asset, with a proper physiognomy and identity (organizational and ideological), autonomous enough from the original dependence on the national parties<sup>297</sup>. On the side of the Council, one of the refusals on the provision of the legislative initiative on the EU electoral law as made by the Parliament concern the creation of the transnational list<sup>298</sup>. The above-mentioned proposal originated on the debate on how to share the seats of British MEPs after “Brexit” will be effective. Indeed, the aim was to arrive to an agreement before March 2019, period in which Brexit will be effective. But not only this proposal was intended to link Brexit and vacant seats, but also to improve the European electoral system before the next May’s election and to further improve the “*Spitzenkandidat*” system. However, the EP refused to approve such reform. The EP in the February 2018<sup>299</sup> plenary session did not accept this proposal and envisaged another one: of the 73 seats released from the United Kingdom, 46 will be put to reserve for any new EU MS. The remaining 27 places will be divided among the 14<sup>th</sup> EU countries under-represented<sup>300</sup> (three are going to Italy, which goes from 73 to 76 seats). This legislative initiative had been approved by the European Council, during the meeting of 28/29 June 2018<sup>301</sup>. The resolution was motivated, even for the exigence to respect the code of “good electoral conduct”, adopted by the so called “Venice Commission”, in the point in which states the inopportunity to modify the electoral norms in the previous year before the elections. Moreover, it results evident, as a direct consequence of the adoption of that

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<sup>296</sup> European Parliament. (2018). *Legislative train schedule / European Parliament*. [online] Available at: <http://www.europarl.europa.eu/legislative-train/theme-union-of-democratic-change/file-reform-of-the-electoral-law-of-the-eu>.

<sup>297</sup> Ciancio, A. (2015). *Adriana CIANCIO, Sistema europeo dei partiti e integrazione politica nell'UE* (aprile 2015). [online] Issirfa.cnr.it. Available at: [http://www.issirfa.cnr.it/adriana-ciancio-sistema-europeo-dei-partiti-e-integrazione-politica-nell-ue-aprile-2015.html#\\_ftn21](http://www.issirfa.cnr.it/adriana-ciancio-sistema-europeo-dei-partiti-e-integrazione-politica-nell-ue-aprile-2015.html#_ftn21) [Accessed 2019].

<sup>298</sup> The proposal about transnational lists envisaged that 27 seats would be apportioned to the MS under represented (as Italy) and other 46 assigned with election based on transnational lists submitted by European political parties in a single European constituency, and that 19 would be made available for potential futures enlargements

<sup>299</sup> Europarl.europa.eu. (2018). Testi approvati - Mercoledì 7 febbraio 2018 - Composizione del Parlamento europeo - P8\_TA(2018)0029. [online] Available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0029+0+DOC+XML+V0//IT#BKMD-3>.

<sup>300</sup> Europarl.europa.eu. (n.d.). [online] Available at: <http://www.europarl.europa.eu/resources/library/media/20180123RES92302/20180123RES92302.pdf>.

<sup>301</sup> Senato.it. (n.d.). [online] Available at: <https://www.senato.it/service/PDF/PDFServer/BGT/01069085.pdf>.

resolution and in the consequent decision of the Council of June 2018, the prevalence of the national interests and of the logic of nationals' political parties over the possibility to reach a more adequate solution to the problem of integration, intended as functional to the effective consolidation of a party system genuinely supranational<sup>302</sup>.

#### 3.4) The Economic governance of the EU: state of play and a proposal of reform.

To assess the effectiveness of the system of the economic governance, recalling that it is made up of two different legislative acts<sup>303</sup> and one intergovernmental treaty<sup>304</sup> it can be useful to take a look at the: "Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the regions"<sup>305</sup>, which assesses the results of the Economic governance review of 28<sup>th</sup> November 2014. The survey conducted by the Commission started from a "key" question: "to what extent the new rules introduced by the six-pack and two-pack have been effective in achieving their objectives and to what extent they have contributed to progress in ensuring closer coordination of economic policies and sustained convergence of economic performances of the Member States, while at the same time ensuring a high level of transparency, credibility and democratic accountability?"<sup>306</sup>. With this aim, in the first part of the Communication, the Commission analyzed the effectiveness of the regulations. As regard to the TSGC, the two pack and the six pack: "the financial and economic crisis and the resulting increases in deficit and debt level in the EU required a profound reform of the Stability and Growth Pact, both in its preventive and the corrective arm. Overall, the two main objectives of the six-pack and two-pack reforms in the area of fiscal surveillance were (1) a strengthened and deepened budgetary surveillance by making it more continuous and integrated, also via an intensified sanctions mechanism; and (2) an additional surveillance for euro area Member States to ensure the correction of excessive deficits and an appropriate integration of EU policy recommendations in the national budgetary preparation. In particular, the preventive arm

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<sup>302</sup> Ibrido, R. and Lupo, N. (2018). *Dinamiche della forma di governo tra Unione europea e Stati membri*. 1st ed. Bologna: il Mulino p. 357

<sup>303</sup> The "two-pack" and the "six-pack"

<sup>304</sup> Fiscal Compact (TSGC)

<sup>305</sup> Ec.europa.eu. (2014). [online] Available at: <https://ec.europa.eu/transparency/regdoc/rep/1/2014/EN/1-2014-905-EN-F1-1.Pdf>.

<sup>306</sup> Ec.europa.eu. (2014). Ibidem. p. 3

was reinforced and made more binding. The six-pack established the concept of a significant deviation from the medium-term objective, or from the adjustment path towards it. Insufficient correction of such a deviation can eventually lead to financial sanctions for a euro area country. The requirements for the adjustment path were designed to take into account sustainability risks and the overall economic context. The expenditure benchmark was introduced to provide clearer and more operational guidance to Member States. The increased involvement and enforcement in the preventive arm reflect the importance of prudent fiscal policies during good economic times. The corrective arm was upgraded by operationalising the Treaty's debt criterion. The sanctions imposed on euro area countries non-compliant with recommendations under the Excessive Deficit Procedure were intensified. New provisions on annual nominal and structural deficit targets for the duration of the Excessive Deficit Procedure were introduced. Overall, the Stability and Growth Pact was made more flexible via the possibility to adapt the pace of fiscal consolidation both in the preventive and corrective arm in justified cases. Recognizing the extent and potential consequences of spillovers among euro area Member States' economic and budgetary situations, the Two Pack introduced additional surveillance and monitoring procedures for euro area Member States. A system of graduated monitoring by the Council and the Commission was established in order to secure a timely and durable correction of excessive deficits and to allow an early detection of the risks that a Member State does not comply with the Pact rules. This includes the analysis of euro area Member States' draft budgetary plans each autumn and the possibility for the Commission to provide autonomous recommendations to Member States with excessive deficits. It also contains the requirement for the latter countries to present Economic Partnership Programmes describing the fiscal-structural reforms that are implemented to ensure an effective and lasting correction of those deficits. As a complement to the above, the Two Pack also built on the Six Pack's Directive on budgetary frameworks and introduced further elements strengthening the fiscal frameworks of the euro area Member States: stronger emphasis on medium-term planning, better synchronised and more transparent budgeting processes, procedures to foster the use of unbiased macroeconomic forecasts for budget planning, as well as independent monitoring of compliance with fiscal rules at national level<sup>307</sup>. After this part on fiscal surveillance, the Commission continues its communication with an

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<sup>307</sup> Ec.europa.eu. (2014). *Op. Cit.* p. 4



overall assessment and move to macroeconomic-imbalances. At the end of the report the Commission concluded with the following statement: “The economic governance system has gone through profound changes in the aftermath of the financial and economic crisis. The various pieces of governance legislation have been at the core of this evolution and have significantly bolstered the existing governance setup. Overall, deficits have declined with many countries having exited the Excessive Deficit Procedure and imbalances are being corrected. However, growth is still fragile with economic challenges still being large. Due to the limited timespan since its entry into force, experience with the application of this new economic governance system has been limited and a number of specific instruments remain untested. Furthermore, the system has so far been applied in (the aftermath of) a severe financial and economic crisis, which limits the possibilities to judge the effectiveness of the system under more benign economic circumstances. Indeed, the efficiency of the system to a large extent relies in the proper working of the preventive part of it, which is precisely what remains to be proven in better economic times. This review has revealed some strengths as well as possible areas for improvement, concerning transparency and complexity of policy making, and their impact on growth, imbalances and convergence”<sup>308</sup>. To the Commission’ communication of 28<sup>th</sup> November 2014, it had been succeeded the European Parliament resolution of 24 June 2015<sup>309</sup> on the review of the economic governance framework. According to the resolution, the EP: “Welcomes the Commission Communication of 28 November 2014 on the economic governance review; considers that the assessment by the Commission gives a picture of how and to what extent the different tools and procedures have been used and implemented; Stresses that at the core of the economic governance system is the prevention of excessive deficit and debt levels and excessive macroeconomic imbalances, as well as the economic policy coordination; underlines therefore that the central question in the review is whether the EMU has been made more resilient by the new economic governance framework, notably as far as its ability to avoid a Member State to default on its debt is concerned, while contributing to closer coordination and convergence of Member States' economic policies and ensuring a high level of transparency, credibility and democratic accountability; Acknowledges that an assessment of the application of the six-pack and two-pack at this

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<sup>308</sup> Ec.europa.eu. (2014). *Ibidem*. p. 11

<sup>309</sup> Eur-lex.europa.eu. (2015). [online] Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015IP0238&from=EN>.

stage remains partial and cannot be isolated from the European Semester, the TFEU and the Fiscal Compact; Welcomes the six and two Packs' broadening of the scope of the stability and growth pact through the addition of procedures to prevent and correct macroeconomic imbalances inside and among Member States and shift the overreliance on the deficit criterion to attention to both the deficit and the overall debt, thus trying to identify and correct possible problems and preventing the emergence of crises at the earliest stage possible, while at the same time allowing flexibility in the form of clauses for structural reforms, investments and adverse business cycle conditions; recalls that flexibility cannot endanger the preventive nature of the Pact"<sup>310</sup>. Based on the latter resolution of the five Presidents, the Commission in 2017 published its white paper on the future of Europe<sup>311</sup> assessing, among many issues, the result made in the above presented proposal of reform of EU economic governance and stating what for the Junker's Commission are the steps ahead from the next European election to 2025. In this regard the Commission presented five possible scenarios up until 2025. Particularly, concerning the economic governance of the Union, the second scenario: "Nothing but the single market"<sup>312</sup> gives advice on what should be done in order to strengthen the eurozone, the EMU, and thus the economic governance: "The euro facilitates trade exchanges, but growing divergence and limited cooperation are major sources of vulnerability. This puts at risk the integrity of the single currency and its capacity to respond to a new financial crisis"<sup>313</sup>. Furthermore, in the fourth scenario (Doing less more efficiently) further emphasis in the consolidation of the euro area had been added: "steps continue to be taken to consolidate the euro area and ensure the stability of the common currency. The EU's weight in the world changes in line with its recalibrated responsibilities"<sup>314</sup>. Finally, in the fifth scenario (Doing much more together) the Commission highlighted that: "Within the euro area, but also for those Member States wishing to join, there is much greater coordination on fiscal, social and taxation matters, as well as European supervision of financial services. Additional EU financial support is made available to boost economic

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<sup>310</sup> Eur-lex.europa.eu. (2015). Ibidem

<sup>311</sup> Ec.europa.eu. (2017). *White paper on the future of Europe*. [online] Available at: [https://ec.europa.eu/commission/sites/beta-political/files/white\\_paper\\_on\\_the\\_future\\_of\\_europe\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/white_paper_on_the_future_of_europe_en.pdf).

<sup>312</sup> Ec.europa.eu. (2017). Ibidem.

<sup>313</sup> Ec.europa.eu. (2017). Op. cit.

<sup>314</sup> Ec.europa.eu. (2017). Ibidem.

development and respond to shocks at regional, sectoral and national level”<sup>315</sup>. To further develop the economic governance, in 2017 the Draft Treaty had been signed in Brussels on the democratization of the governance of the euro area<sup>316</sup> («T-DEM»). “The objective of the present draft treaty is twofold. On the one hand, it seeks to guarantee that convergence and conditionality policies, which currently are at the heart of the governance of the Euro area, are carried out by institutions which are democratically accountable, both at the European and at the national levels. On the other hand, it allows that the next necessary steps towards deepened fiscal and social convergence and economic and budgetary coordination within the Euro area, will not be decided upon without the direct involvement of the representatives of national Parliaments. The Parliamentary Assembly of the Euro area foreseen by the present draft treaty fully contributes to the governance of the Euro area. Firstly, the Assembly sets the political agenda, by taking part to the preparation of the agenda of the « Euro summit meetings» (Council of Heads of State or Government) as well as of the semi-annual work programme of the Euro Group (Council of Ministers of the Euro area). Secondly, the Assembly is endowed with legislative capacity in order to foster economic and fiscal convergence as well as sustainable growth and employment. Thirdly, the Assembly has the means to control the convergence and conditionality policies that have emerged over the last decade within the Euro area; and in the case of a disagreement between the Assembly and the Euro Group, the former has the final say on the vote of the Euro area budget, the base and rate of corporate tax, and any other legislative act foreseen by the T-Dem. For this purpose, the present draft treaty seeks to maximize the legal margins of maneuver that could allow the creation of a truly democratic system of governance for the Euro area, as a complement to the European Union treaties. In so doing, the «T- Dem» replicates the modus operandi of both the TSCG and the ESM Treaty (as validated by the Court of Justice of the European Union in its Pringle ruling from November 2012) to address the financial crisis but does so in order to engage in a democratizing effort. It seeks to demonstrate that the European project is not cast « in stone» - provided there is enough of political will to shift its orientation; it affirms that the path of the democratization of the governance of the Euro area is worth following”<sup>317</sup>. In light of the above discussed reviews

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<sup>315</sup> Ec.europa.eu. (2017). Ibidem.

<sup>316</sup> Piketty.pse.ens.fr. (2017). *T-Dem*. [online] Available at: <http://piketty.pse.ens.fr/files/T-DEM%20-%20Final%20english%20version%209march2017.pdf>

<sup>317</sup> Piketty.pse.ens.fr. (2017). *Ibidem*

of the economic governance of the Eurozone, an interesting proposal had been made by Federico Fabbrini. In his book<sup>318</sup> *Economic governance in Europe* professor Fabbrini proposed a reform of the governance of the eurozone taking into account pros and cons according to the different fields he analysed. As fiscal capacity regards, the professor considerations are about three challenges that raising a fiscal capacity will face and the possible options to overcome them. “The creation of a counter-cyclical fiscal tool at the supranational level to address asymmetry shocks in the EMU could be a way to revert the trend of centralization. First, in order to succeed, a fiscal capacity must avoid falling prey to the logic of interstate transfers, and rather be based on EU own resources. Second, if the EU is to raise new money, it must address the fact that unanimity is needed to introduce tax legislation. Third, if the EU or the Eurozone moves in the direction of introducing supranational taxation, the question of “no taxation without representation” must be dealt with”<sup>319</sup>. The second proposal the professor suggest to better implement the economic governance of the EU is in favor of “greater legislative involvement in EMU and argues that making the “Community method” central to the governance of EMU affairs could be a way to reduce the trend of judicialization. First, in order to succeed, a fiscal capacity must avoid falling prey to the logic of interstate transfers, and rather be based on EU own resources. Second, if the EU is to raise new money, it must address the fact that unanimity is needed to introduce tax legislation. Third, if the EU or the Eurozone moves in the direction of introducing supranational taxation, the question of “no taxation without representation” must be dealt with”<sup>320</sup>. Finally, the professor suggests the rethink of the “executive government” of the EU and, as analysed in paragraph 3.1 of this thesis, argues that “strengthening the executive power of the President of the European Council (or the President of the Euro Summit in the Eurozone) could be a way to reverse the trend of domination. First, a reformed presidency must be designed to match the representative deficit afflicting the EU. Second, the presidency should be popularly elected, and appropriate institutional mechanisms ought to be crafted to account for the profound asymmetries in population between the member states. Third, incentives should be conceived to gather the unanimous state support necessary to implement such a

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<sup>318</sup> Fabbrini, F. (2016). *Economic governance in Europe*. Oxford: Oxford Scholarship online.

<sup>319</sup> Fabbrini, F. (2016). *Ibidem*.

<sup>320</sup> Fabbrini, F. (2016). *Ibidem*.

constitutional reform in the treaties, thus exploiting the window of opportunity offered by the obligation to domesticate the Fiscal Compact within EU law by 2018”<sup>321</sup>.

3.5) General considerations on the feasible development in the interaction among the EU “form of Government” and the “form of Government” of France, Spain and Italy. Final considerations.

As outlined in the second chapter of this work, the choice of referring to the “form of governments” of France, Spain and Italy is firstly due to the fact that only in those jurisdictions the academic classification of “form of government” is taken into account. However, the way in which the interactions (generally intended) occurs are different from State to State. A core question for the purposes of this work is: are the Member States moving to a harmonization of the way in which the interaction occurs, or the prevailing intergovernmental logic would keep or exacerbates the differences? To answer to this question would not be easy. The first elements that need to be considered are the next European election, the outcome of which would not only impact on the composition of the EP, but also on the next European Commission as effect of the *Spitzenkandidat* procedure and, therefore, on the appointing of the next Commissioners. In this sense a vote for an anti-European political party or movement could further increase the intergovernmental logic. In order to have an idea of what could be the outcome of the next European election, would be useful to look at the Eurobarometer and on what are the voting intentions of the EU citizens. As regard to Italy, in the report of the last September<sup>322</sup>, appears that the ENF and the EFDD correspondents to the national parties *Lega* and *Movimento 5 Stelle*, that are the most Eurosceptic ones, got respectively 34% of consent for the former and 27% of consent for the latter. In Spain, the parties that have more success (according to the September report) are the PP (*Partido Popular*) and the PSOE (*Partido Socialista Obrero Español*) correspondent to the Europeans parties EPP (European People’s Party) and S&D (Party of European Socialists). Finally, in France (according to the same report) there is

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<sup>321</sup> Fabbrini, F. (2016). *Op. Cit.*

<sup>322</sup> Europarl.europa.eu. (2018). [online] Available at: [http://www.europarl.europa.eu/at-your-service/files/be-heard/eurobarometer/2018/political-landscape-developments/voting\\_intentions\\_sept2018.pdf](http://www.europarl.europa.eu/at-your-service/files/be-heard/eurobarometer/2018/political-landscape-developments/voting_intentions_sept2018.pdf).

more uncertainty without a party that got more than 20% of total votes. Notwithstanding the differences in the intentions of votes among the EU Member States, recent events such as the protest made by the “yellow’s *gilet*” in France; the rising of tension on migration issues; the application of Article 7 in Poland and Hungary seems to drive the European public opinion more in a direction that would see as winner Eurosceptic parties, hence taking an intergovernmental direction rather than a supranational one. Furthermore, this issue over the “*route*” to be followed by the European Union has never been resolved. The failure of the treaty of Rome, together with the institutionalization and the strengthening of the European Council in the LT and a weaker role of the Commission and of the EP seems like a signal of a future in which National Parliaments and National Executives would prevails over the EU supranational institutions, hence without arriving to a shared way in which the interactions among the Member States and the European form of government are made and affects each other’s.

## Conclusions

In light of what has been researched through this thesis, namely to understand which relationship is in place between the EU system of government, in particular within its composite executive branch, and the forms of government of its member States, it can be affirmed that this relationship is in fact very strong with all the EU executive bodies and this significantly affects the domestic forms of government. This interaction operates both at vertical and horizontal level. Indeed, the groups of work at the Council such as GAG (General Affairs Group) among many others and as well for Coreper, work horizontally in official meetings in Brussels to prepare the Council of Minister's work acting according to their Member States will. In other words, the preparatory works of the Council follows the logic of the European Negotiation in which diplomats of different levels try to reach a preliminary agreement before the next European Council meeting. But to prepare GAG and Coreper meetings, diplomats ask directly to their capitals which is the official position of the country on every single dossier. Much more autonomous than the Council, according to the Treaties (Article 17 TEU), is the Commission where the bi-directional influence is seen in the works of the Administrative Organs (DGs) rather than in that of the Commissioners. In the framework of the economic governance of the Union appears that the prevalent logic is the intergovernmental one and thus, the Council and the Ecofin got major power than in the past. On the one hand, this "shift of competence" exacerbates the no clear distinction among the functions and power of the intergovernmental institutions in contrast to the supranational one, on the other it appears as an undoubted drift towards a bi-directional influence among the supranational institutions of the European Union and national executives in which the tendency, at least in the economic governance, is to a predominance of the latter on the former.

As highlighted in the first chapter of this work there is no unanimous consensus both in legal and political science scholarship on the configurability of a proper European "form of government" and on what this form is. Indeed, those institutions, organization and dynamics that are proper of the parliamentary "form of government" (to be recalled that only Cyprus has a presidential system) are not easy to be transferred to the EU context. Hence it appears as more appropriate to refer to the European executive in terms of a

“fragmented”<sup>323</sup> European executive in which is still present the so called “democratic deficit”<sup>324</sup>.

Due to the scope and reach of EU law, Member States have established bodies, executive organs and parliamentary committees, to coordinate national policies and politics and with the European one. In the case of France is the General Secretariat of European Affairs (SGAE). The main tasks of the General Secretariat of European Affairs (SGAE) are the elaboration of France’s positions on European issues and the coordination between French administrative and governmental authorities and European institutions. In the case of Spain, to coordinate Spanish policy vis-à-vis the European Union, the State Secretariat for European Affairs has been established. The latter is responsible for three distinct directorates: The Directorate-General for integration and Coordination of General European Union Affairs; The Directorate-General for Integration and Coordination of the Internal Market and other European Union Policies; Directorate-General for Europe. Lastly, the State Legal Services to the Court of justice of the European Union depend on the State Secretariat for European Affairs. The last “form of government” studied in relation to the EU is Italy. In this case, The Interministerial Committee on European Affairs (CIAE) was established by Law n° 234 of 24 December 2012 (*Norme generali sulla partecipazione dell'Italia alla formazione e all'attuazione della normativa e delle politiche dell'Unione europea*) and works under the Presidency of the Council of Ministers. Its core commitment is to agree at political level a unitary national position on EU legislative proposals and policies and is composed in accordance with article two of Presidential Decree of 26 June 2015 N°118<sup>325</sup> of the Prime Minister or the Minister in charge of the

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<sup>323</sup> “To state the obvious: there is no single, comprehensive and unitary European executive institution or body that can in any meaningful way be described as an EU government in the sense that we know it from the national domain. The fragmentation is both at the political level of executive power and also in terms of the administrative apparatus” in: Curtin, D. (2014). Challenging Executive Dominance in European Democracy. *The Modern Law Review*, [online] 77(1), pp.1-32. Available at: <https://onlinelibrary.wiley.com/doi/full/10.1111/1468-2230.12054>.

<sup>324</sup> In this sense, Manzella, A. (2013). *Sui principi democratici dell'Unione europea*. 2nd ed. Napoli: Editoriale scientifica, Lezione 1 or Lupo, N. (2014). Parlamento Europeo e Parlamenti Nazionali Nella Costituzione "Composita" Nell'UE: le diverse letture possibili. *Rivista AIC*, [online] (3), p.2. Available at: [https://www.rivistaaic.it/images/rivista/pdf/3\\_2014\\_Lupo\\_II.pdf](https://www.rivistaaic.it/images/rivista/pdf/3_2014_Lupo_II.pdf) or even Fabbrini, S. (2015). *Which European Union?*. Cambridge: Cambridge University Press.

<sup>325</sup> Gazzettaufficiale.it. (2015). Gazzetta Ufficiale. [online] Available at: [http://www.gazzettaufficiale.it/atto/serie\\_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2015-08-06&atto.codiceRedazionale=15G00131&elenco30giorni=false](http://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2015-08-06&atto.codiceRedazionale=15G00131&elenco30giorni=false).



European Affairs, the Ministry of Foreign Affairs, the Minister for Economic and Financial Affairs, the Minister for Regional Affairs Tourism and Sport, the Minister for Territorial Cohesion.

To accommodate the differences among the European “form of government” and member states and to fine tune their relationships with a view to address the democratic deficit of the Union several proposals have been presented. In the case of the Council a recent report drafted for the AFCE Commission (*The Council of the EU: from the Congress of the Ambassadors to a genuine Parliamentary Chamber?*) highlights the pros and cons of hard and soft reforms of the Council in a critical way. In the former case the starting point is how to transform the Council into a genuine parliamentary chamber, in the latter intended as softer to the former are presented. Softer because it wouldn’t be a radical transformation of the Council but rather grant more visibility by organizing a public debate at the ministerial level at the beginning of the legislative process. “The information of the public, observers, interest groups, and other EU Institutions would be enriched by such debate. The initial position of each ministerial representative would be known and could serve as a reference point throughout subsequent negotiations. Such reform would necessarily increase the involvement of ministers in the legislative game. Ministers currently most often become involved at a rather late stage, once negotiations have taken place within working groups and COREPERs. An obligation to publicly stake positions at the very beginning of the process would force ministers to more closely follow the issues and therefore more specifically instruct their diplomats – an incentive that can only be seen as positive from a democratic perspective<sup>326</sup>”. A proposal of reform of the Presidency of the European Council studied in this thesis is the one made by Professor F. Fabbrini<sup>327</sup>. The proposal is the following: “the presidency of the European Council should be supported by adequate institutional reforms that strengthen the office so as to make it truly the President of the Union as a whole”<sup>328</sup>. This scheme must follow two paths. In the first, the presidency

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<sup>326</sup> Europarl.europa.eu. (2019). The Council of the EU: from the Congress of the Ambassadors to a genuine Parliamentary Chamber? [online] Available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2019/608855/IPOL\\_STU\(2019\)608855\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2019/608855/IPOL_STU(2019)608855_EN.pdf).

<sup>327</sup> Fabbrini, F. (2015). *Austerity, the European Council, and the Institutional Future of the European Union: A Proposal to Strengthen the Presidency of the European Council*. [online] Muse.jhu.edu. Available at: <https://muse.jhu.edu/article/591642#f5-text>.

<sup>328</sup> Fabbrini, F. (2015) *Ibidem*.

should be conferred with the legal capacity to make authoritative decisions and therefore to take executive economic decisions for the EMU. “The President should have the authority to set the agenda he or she believes to be in the best interest of the Union—resisting pressure from the heads of state and governments (and especially the more powerful among them), rather than reflecting their preferences”<sup>329</sup>. Secondly, the presidency should be linked to a process of legitimization with an electoral process.

With the same objective and thus to overcome the democratic deficit of the Union and to tighten its executive the second paragraph of the last chapter is devoted to analyse possible scenarios on the appointment of the next European Commission, particularly on the institutionalization of the “*Spitzenkandidaten*” procedure. Here, the link has been made with the upcoming European elections and what will happen afterwards. To further explain the impact of the next European elections and how the European “electoral law” works paragraph 3.3 deals with this matter and with issue that had been and still are at stake with regard to the European political parties and party system.

However, as explained before it is not only a matter related with the institutions of the EU, but also the specific policies at stakes do count. With this regard, the economic governance has been chosen as a paradigmatic case study because according to the logic it follows (the European Semester) for the two-pack and the provision of the TSCG (among many other) of introducing the Eurosummits at least twice a year, the role of national executives appear as prevalent to that of the Commission being the latter able only to make recommendations regarding excessive national budget deficits.

Finally, in the last paragraph 3.5 General considerations on the feasible development in the interaction among the EU “form of Government” and the “form of Government” of France, Spain and Italy are discussed in order to try to understand which will be the main logic between the intergovernmental one and the supranational one that will prevail in the future. In this respect, taking into account the last data on the voting preference of the European

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<sup>329</sup> Fabbrini, F. (2015). *Op. Cit.*

citizens<sup>330</sup>, whether it will be confirmed, the next European Parliament would be made of MEPs belonging to euro-skeptic parties. Furthermore, if confirmed, the election of the next President of the Commission via the system of the *Spitzenkandidaten* probably would have as outcome a euro-skeptic President and thus a euro-skeptic Commission thus fostering the role of the intergovernmental institution.

Therefore, it can be claimed that the influence among the composite “form of government” of the European Union and national executives’ bodies is become bi-directional. Moreover, in specific political stages national governments seeks to prevail over supranational institutions.

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<sup>330</sup> According to the Eurobarometer data of September 2018 [online] Available at: [http://www.europarl.europa.eu/at-your-service/files/be-heard/eurobarometer/2018/political-landscape-developments/voting\\_intentions\\_sept2018.pdf](http://www.europarl.europa.eu/at-your-service/files/be-heard/eurobarometer/2018/political-landscape-developments/voting_intentions_sept2018.pdf)

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## Summary

### 1.1) The evolution of the EU governmental system in the Treaty of Lisbon: the decision-making structure

With the Lisbon Treaty, the Maastricht pillar structure has been abolished but were kept the two different decision-making regimes (intergovernmental and supranational). Concerning the executive, the Lisbon Treaty has institutionalized a bicameral legislative branch, with the EP representing a lower chamber than the Council of Ministers (The European Parliament represents the electorate of the European Union and the Council representing the governments of the member states). For the first time, The Lisbon Treaty has even recognized the European Council as a Union institution, chaired by a President elected “by a qualified majority” of its members for “a term of two and a half years” renewable only once. In addition, the Lisbon Treaty, has a specific provision at Art. 15.1 TEU (Treaty on the European Union) that does not allow the European Council to exercise the legislative function, making clearer the distinction between the former and the Council. Thanks, of its informal nature, the European Council has been protected to be absorbed in the supranational logic, acting as a supervisor of the “trialogue”, “that is the interaction between the Commission, the Council and the European Parliament<sup>331</sup>”. The Lisbon Treaty has in this way has made formal an age-old practice, with the recognition of the European Council as the only institution able to get through member states inside the Union’s decision-making process<sup>332</sup>. The European Union is a system of representation and decision-making organized around the principles of the democratic separation of powers, and of checks and balances. Nevertheless, it is essential not to forget that the European Union is a democracy, but not a constitutional democracy in a strict sense. In spite of that, the European Court of Justice has functioned as a constitutional actor, laying down a set of principles that legitimized the formation of an integrated legal order – in particular, the supremacy of the EU law over national law, and, under certain conditions, the direct effect of EU law in the domestic legal systems.

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<sup>331</sup> Fabbrini, S. (2015). *Which European Union?* 1st ed. pp.33-49.

<sup>332</sup> Fabbrini, S. (2015). *Ibidem*

### 1.2) The evolution of the EU governmental system post-Lisbon: The “intergovernmental Constitution”.

The Lisbon Treaty officially established “the intergovernmental method of policy-and decision-making”, consequently officiating a substitute integration model marked by Allerkamp: “(a) the policy entrepreneurship (coming) from some national capitals and the active involvement of the European Council in setting the overall direction of policy”; (b) “the predominance of the Council of Ministers in consolidating cooperation”; (c) “the limited marginal role of the Commission”; (d) “the exclusion of the European Parliament and the European Court of Justice from the circle of involvement”; (e) “the involvement of a distinct circle of key national policy-makers”; (f) “the adoption of special arrangements for managing cooperation, in particular the Council Secretariat”; (g) “the opaqueness of the process to national Parliaments and citizens”; (h) “the capacity on occasion to deliver substantial joint policy. In relation to foreign policy, the Lisbon Treaty has given a special role to the Foreign Affairs Council, in fact, the Foreign Affairs Council is the only Council configuration chaired for five years by the High Representative of Union for Foreign Affairs and Security Policy (HR) giving to the former an autonomous functional structure. In addition to chair the Foreign Affairs Council, the HR (he or she), is even the vice-president of the Commission. The HR must be appointed by the European Council with the approval of the President of the Commission and this appointment must be also confirmed by the European Parliament<sup>333</sup>.

### 1.3) Multi-level Governance

From a legal point of view, there are many distinct legal reconstructions of what the EU is, for the purpose of this research, two of them had been analyzed. One that support the multi-level approach (Pernice), the other that support the composite approach (Besselink). Pernice, started his analyses by stressing the fact that he understand the European Union as a “creature not of states, but of the citizens acting through, and represented by, their national governments in the name and on behalf of the citizens”. The composite approach of the European Union, had been postulated by Leonard F.M. Besselink. According to Besselink: “the coining of the expression ‘multilevel constitutionalism’ by Ingolf Pernice, which on some points seems to develop a more sophisticated model than the classic

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<sup>333</sup> Fabbrini, S. (2015). *Ibidem*

European law approach which emerged in the 1960s and still dominates that discipline, but which on the whole ignored the relevance of national constitutional orders within the European construct by positing rather uncritically an unconditional primacy and predominance of EC and EU law over whatever national constitutions might mean to or wish to say on European integration. What the various views hold in common, however, is the essential distinction of different ‘levels’<sup>334</sup>.

#### 1.4) Inter-institutional balance

In Europe the first genuine reference to the institutional balance is found in the Meroni case, where the Court sees “in the balance of powers which is characteristic of the institutional structure of the community a fundamental guarantee granted by the Treaty in particular to the undertakings and associations of undertakings to which it applies.”<sup>335</sup> For the Court, the principle is a substitute for the principle of the separation of powers which, in Montesquieu’s original exposition of his philosophy, aimed to protect individuals against the abuse of power. In the absence of a separation of powers, the principle of institutional balance made it possible to guarantee to undertakings that a modification of the institutional balance would not call into question the decision-making process envisaged by the treaties and the accompanying guarantees provided by the treaties<sup>336</sup>.

#### 1.5) The European Council: foundation and evolution

The institutionalization of “the European Council at the 1974 Paris Summit was to ensure progress and consistency in the overall work of the Community”<sup>337</sup>. It has developed into a major institutional player in the EU, in the sense that nothing of real significance happens deprived of the “imprimatur of the European Council”. This is so although the lack of Treaty basis prior to 1986, and aside the shortness of legal reference of the European Council in the Single European Act.

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<sup>334</sup> Besselink, L.F.M., (2010). *National and constitutional identity before and after Lisbon*. *Utrecht Law Review*. 6(3), pp.36–49. DOI: <http://doi.org/10.18352/ulr.139>

<sup>335</sup> Andenas, M. and Deipenbrock, G. (2016). *Regulating and Supervising European Financial Markets*. p.119.

<sup>336</sup> Jacquè, J. (2004). *The principle of institutional balance*. [online] Ieie.itam.mx. Available at: <http://ieie.itam.mx/docs06/Montse%20Pi/jacqu.pdf>. pagg. 383-391

<sup>337</sup> Craig, P. and De Búrca, G. (2011). *Ibidem*.

#### 1.6) European Council (EC): route of EU policy

There are only few major institutions in which the lack of connection between reference in the Treaties and the meaning of its function is more marked. The lack of “Treaty references to the European Council should not therefore lead one to doubt its importance”. The EC not only gives guidance to the whole path of European integration and undertakes main constitutional decisions, “as it did in the past”, nonetheless has even developed to be an executive institution “in its own right”<sup>338</sup>. Moreover, The European Council is thought to be the only institution able of producing political momentum. Policy-making needs nonstop European Council involvement as otherwise collective EU action “remains unlikely”, yet the heads act without delay to play this part and use close supervision over a series of policy activities<sup>339</sup>. It progressively performed a key role in setting the “pace and shape of EU policy, establishing the parameters within which the other institutions operated, and providing a forum at the highest level for resolution of tensions between the Member States”<sup>340</sup>.

#### 1.7) The powers and the decision-making regime of the Council of Ministers of the European Union

The Council does not have a permanent President. Differently to the EC, the Council works in various configurations, and the charge of chair these distinctive configurations could not be fixed to one person. One consequently mentions to the “depersonalized office of the Council 'presidency' as opposed to the President of the Council<sup>341</sup>”. The Council Presidency “shall be held by pre-established groups of 3 Member States for a Period of eighteen months”<sup>342</sup>. For what concerns this Troika of States, every member of the group will manage the corresponding Council configurations for six months<sup>343</sup>. The main exception to the circling presidency in the Council is the “Foreign Affairs Council”. In this case, the Treaty provides a special rule in Article 18 TEU – concerning the office of High Representative of the Union for Foreign Affairs and Security Policy. The way in which

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<sup>338</sup> Puetter, U. and Fabbrini, S. (2016). *Catalysts of integration – the role of core intergovernmental forums in EU politics*. Journal of European Integration, 38(5), pp.633-642

<sup>339</sup> Puetter, U. and Fabbrini, S. (2016). *Op. cit.*

<sup>340</sup> Craig, P. and De Búrca, G. (2011). *Op. cit.* pag.55

<sup>341</sup> Schütze, R. (2016). *Op. cit.* pag. 175

<sup>342</sup> European Council Decision 2009/881 on the exercise of the Presidency of the Council [2009] OJ L 315/50, Art. 1(1).

<sup>343</sup> Art. 1(2) *Ibidem*



decision-making in the Council takes place is in two main forms: “unanimous voting and majority voting”<sup>344</sup>. Unanimous voting needs the approval of all national ministers and is compulsory in the Treaties for relevant political questions. Majority voting, nevertheless, characterizes the constitutional norm. The treaties here separate between a simple and a qualified majority. “Where it is required to act by a simple majority, the Council shall act by a majority of its component’s members.”<sup>345</sup>

#### 1.8) The Council of the European Union: Coreper I and Coreper II

The authors of the Rome Treaty drew on skill from the ECSC Treaty, in which preparatory work was assumed by a Commission for the Coordination of the Council of Ministers, ‘Cocor’. Article 151 EEC certified the Council’s rules of procedure to see to a committee of representatives of Member States, the ability of which “would be decided” by the Council. A likely committee was agreed upon at the opening meeting of the Council of Foreign Ministers in 1958; the first summit of the Committee of Permanent Representatives, Coreper, was carried out the following day, and it has run into “more than 2,300 times since then” (2011)<sup>346</sup>. “It was accorded more explicit recognition in the Maastricht Treaty, and was, prior to the Lisbon Treaty, governed by Article 207(1) EC.” Coreper is controlled by high-ranking national officials and works at two levels. Coreper II is the more relevant and involves permanent representatives of ambassadorial rank. It handles with more divisive issues such as “economic and financial affairs, and external relations”, and cooperates with national governments. Coreper I is comprised of deputy permanent representatives and is accountable for matters such as “the environment, social affairs, and the internal market”.

While Coreper is not allowed to take applicable decisions fully-fledged, it has nevertheless developed ‘into a veritable decision-making factory’. It will examine and assimilate draft legislative proposals from the Commission and “set the agenda for Council meetings”.

#### 1.9) The Council of the European Union’s contribution to non-legislative acts: Comitology

Comitology has been ample examined by political scientists and lawyers. Rational choice institutionalists repute it as an “exemplification of their principal/agent thesis”. “Member

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<sup>344</sup> Schütze, R. (2016). *Op. cit.* pag. 180

<sup>345</sup> Art 238 (1) TFEU.

<sup>346</sup> Craig, P. and De Búrca, G. *Ibidem*

State principals delegate four functions to supranational agents: monitoring compliance; the resolution of incomplete contracts among principals; the adoption of regulations in areas where the principals would be biased or uninformed; and setting the legislative agenda so as to avoid the ‘endless cycling’ that would otherwise result if this power were exercised by the principals themselves”<sup>347</sup>. The principals must nonetheless guarantee insofar as possible that the negotiators do not lost from the inclinations of the principals. Consequently, on this view Comitology comprises a control mechanism for which Member State principals apply control above supranational agents. The Member State chiefs acknowledged the necessity for delegation “of power over secondary norms to the supranational agent, the Commission, but did not wish to give it a blank cheque, hence the creation of committees through which Member State preferences could be expressed, with the threat of recourse to the Council if agreement could not be reached with the Commission”. It is assumed that the representatives on Comitology reflect their Member State exogenous preferences and bargain within the committees”<sup>348</sup>. The options of committee procedure echo the Member States’ capacity to enforce the “degree of control” that greatest suits their interests. “This view has been challenged by sociological institutionalists and constructivists”<sup>349</sup>. “They contend that decision-making within Comitology is best viewed as a form of deliberative supranationalism.” Governments might be uninformed of their inclinations on particular issues. “The national delegates on the committees will often regard themselves as a team dealing with a transnational problem and become representatives of an inter-administrative discourse characterized by mutual learning”.

#### 1.10) The evolving role of the European Commission

Article 14(1) TEU duly states that the European Parliament shall elect the President of the Commission. The retention of state power is however apparent in Article 17(7) TEU. The European Council, acting by qualified majority, after appropriate consultation, and taking account of the elections to the European Parliament, puts forward to the European Parliament the European Council’s candidate for Presidency of the Commission. This candidate shall then be elected by the European Parliament by a majority of its members.

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<sup>347</sup> Craig, P. and De Búrca, G. *Ibidem*

<sup>348</sup> Craig, P. and De Búrca, G. *Ibidem*

<sup>349</sup> Craig, P. and De Búrca, G. *Ibidem*

If the candidate does not get the requisite majority support, then the European Council puts forward a new candidate within one month, following the same procedure”. Consequently, although there had been some partial support for the idea that the Commission President would be directly elected, “the argument being that this would help to foster European demos, the result is that the Commission President is indirectly elected.

#### 1.11) Commission: Size and Appointment and the “Spitzenkandidaten”

The official appointment of the Commission is prepared by the European Council, “acting by qualified majority”, although on the basis of the endorsement fixed by the European Parliament.

The Commission is made up of one<sup>350</sup> national of each Member State as stated by Art. 17(5) TFEU.<sup>351</sup> Its members are selected “on the ground of their general competence and European commitment from persons whose independence is beyond doubt.<sup>352</sup>” The Commission’s mandate is five years. During this period, it needs to be “completely independent”. Its members “shall neither seek nor take instructions from any Government or other institution, body, office or entity.<sup>353</sup>” The Member States are subject to an obligation to fulfil this independence. Infringement of the obligation of independence might carry to a Commissioner get “compulsory retired.<sup>354</sup>” The Commission configuration follows the sense of an election selection. The above-mentioned election is divided into 2 stages. In the first phase, the President of the Commission is elected<sup>355</sup>.

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<sup>350</sup> This is the Commission composition due to the referendum held in June 2008 in Ireland that was contrary to the ratification of the Lisbon Treaty in the Irish legal system. Consequently, in order to held a second “positive” referendum in order to ratify the LT; MSs accepted not to modify the composition of the Commission, issue that was particularly sensitive to the Irish people, with the result of a second referendum held in 2019 with a positive outcome and the consequently ratification of the Treaty.

<sup>351</sup> As from 1 November 2014, the Commission shall consist of a number of members, including its President and the High Representative of the Union for Foreign Affairs and Security Policy, corresponding to two thirds of the number of Member States, unless the European Council, acting unanimously, decides to alter this number.

<sup>352</sup> Art. 17(3) TEU.

<sup>353</sup> Art 17 TEU *Ibidem*.

<sup>354</sup> Art. 245 TFEU and Art. 247 TFEU

<sup>355</sup> In this regard, in 2014 the election of the President of the Commission followed the procedure of the “Spitzenkandidaten”. According to this procedure, the President of the Commission had been designated by the European Council among those MEPs who were most voted in their European political parties. After the designation, the EP should approve by qualified majority voting the candidate designated. This was the procedure under which President Junker had been elected.

### 1.12) The Commission's Administrative Organs.

The Commission has an administrative organization. It is separated in two formations “Directorates-General (DG)” and “Services”. The former are dedicated in detailed policy areas and thus work “vertically”. The latter work “horizontally” in offering specific services through policy areas. The best means to comprehend “Directorates-General” is to study them as the “Union equivalent of national ministries<sup>356</sup>”. Supervised by EU civil servants, exist currently 33 Directorates-General (DG). Notably, these Directorates-General do not compulsory match with one “Commissioner portfolio”. Although there is an express match in some areas, some Commissioner portfolios cut through the issue of two or even greater Directorates-General. Commissioners are allowed to “give instructions” to their DG, with the latter forced to “provide them with all the information on their area of activity necessary for them to exercise their responsibilities<sup>357</sup>”. Each DGs is controlled by a Director-General, who embody the main connection between Commission administration and the corresponding Commissioner(s). Each DG is separated into directorates, and every directorate is separated into units. Units are controlled by a Head of Unit and comprise the elementary organizational body inside the Commission administration.

### 1.13) Decision-making within the Commission.

The Commission work as a “college”, in other words: as a collective body. The Treaties provide one single article on decision-making concerning the Commission: “The Commission shall act by a majority of its Members”<sup>358</sup>. This is too much simple and even an ambiguous picture. It is accompanied and amended by the Commission's Rule of Procedure, which set the many decision-making processes and their voting provisions. “The Rules differentiate between four procedures<sup>359</sup>”: the “oral procedure”, the “written procedure”, the “empowerment procedure” and the “delegation procedure<sup>360</sup>”.

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<sup>356</sup> Schütze, R. (2016). *Op. cit.* pag. 190

<sup>357</sup> Art. 19(2) Commission Rules of Procedure

<sup>358</sup> Art. 250 TFEU

<sup>359</sup> Schütze, R. (2016). *Op. cit.* pag. 190

<sup>360</sup> Art. 4 Commission Rules of procedure.

#### 1.14) Functions and Powers of the Commission.

In the governmental structure of the EU the functions and corresponding powers of the European Commission are enlisted in Art. 17 TEU: The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Treaties. With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union's external representation. It shall initiate the Union's annual and multiannual programming with a view to achieving interinstitutional agreements. The provision classifies six distinctive functions. "The first three functions constitute the Commission's core functions. First, the Commission is tasked "promote the general interest of the Union" through initiatives. It is thus to act as a "motor" of EU integration.

#### 1.15) The European Economic Governance as a case study

Even more important in assessing the changing brought with the entrance into force of the Lisbon Treaty are the legislative acts amending the economic governance of the Union, namely to strengthen the Stability and Growth Pact. In this regard, the legislative acts are the "six-pack", the "two-pack", and the Fiscal Compact (or TSGC, Treaty on Stability Coordination and Governance in the Economic and Monetary Union). The "six-pack" is regulated by Directive 2011/85/EU<sup>361</sup> that lays down detailed rules for national budgets. The six legislative acts also known as "six-pack" were followed by the "two-pack" in order to further improve the budgetary surveillance in the Euro area. For what the Fiscal Compact concerns, it is an intergovernmental agreement under which Member States must respect the budget discipline acting on their budgetary policies. Among the 28 EU countries,

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<sup>361</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32011L0085>

Croatia, United Kingdom and the Czech Republic are the only that did not sign the treaty. It strengthened the Stability and Growth Pact<sup>362</sup>.

### 2.1) The configurability of a European form of government

Nonetheless the effective structure of the European form of government as studied in the first chapter of this work, there is a huge debate over the configurability of a European form of government due to the uncertain nature of the European Union. This issue, over the configurability of a European form of Government, had been debate over two predominant grounds<sup>363</sup>. First, such discussion, called into question the ambiguous problem of sovereignty in the field of an experience that had been considered has a non-federal statualism<sup>364</sup>. A second debate issues has been regarded the problem of the democratic deficit of the European Union. If it is true that the concepts of form of Government and of form of State are strictly linked, and if it is true that the utility of a comparison among the form of government is limited to the sole pluralistic democracies<sup>365</sup>, the democratic nature of the Union seems to preconfigure as essential to the existence of a European form of government<sup>366</sup>.

### 2.2) Form of Government and source system of sources of the law in the European Union.

At least, two peculiar characteristics of the source system of the EU could obstacle the configuration of an EU form of government in a strict sense. The first feature is represented by the principle of pluralism of the legal basis<sup>367</sup>. A second obstacle lies in the recessiveness of the concept of form of governments in the framework of the hierarchy of the European sources<sup>368</sup>.

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<sup>362</sup> national deficits must not exceed 3 % of gross domestic product (GDP); national public debt must remain below 60% of GDP. Online at: [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:1403\\_3&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:1403_3&from=EN)

<sup>363</sup> A. Ruggeri, *Costituzione, sovranità, diritti fondamentali, in cammino dallo Stato all'Unione europea e ritorno, ovvero la circolazione dei modelli costituzionali e adattamento dei relativi schemi teorici*, in "Federalismi", 11, 2016, pp. 11 ss.

<sup>364</sup> P. Ridola, *Federalismo europeo e modelli federali. Spunti di riflessione sul trattato di Lisbona. L'Unione europea verso una "res publica" federalista*, in Id., *Diritto comparato e diritto costituzionale europeo*, Torino, 2010, pp. 417 ss.

<sup>365</sup> C. Mortati, *Le forme di governo*. Lezioni, Padova, 1973, p. 3

<sup>366</sup> C. Fasone, *Sistemi di commissioni parlamentari e forme di governo*, Padova, 2012, pp. 49 ss.

<sup>367</sup> K.S.T.C. Bradley, *Powers and Procedures in the Eu Constitution: Legal Bases and the Court*, in P. Craig and G. De Burca, *The Evolution of Eu law*, 2<sup>nd</sup> edition., Oxford, 2011, pp 85 ss.

<sup>368</sup> R. Ibrido and G. Vosa, "Forma" e "forme" negli assetti di organizzazione costituzionale dell'Unione europea, in "il Filangeri", Quaderno 2014, Napoli, 2015 pp. 187 ss.

### 2.3) Parliamentary scrutiny and control in the European “form of government”.

The attempt of juridical “exportation”<sup>369</sup> of the forms of parliamentary scrutiny from national level to the European one has shown the tendency of being rejected due to several reasons. On one side the parliamentary scrutiny to be exported is not homogeneous, it presents a different penetration in the weave of the forms of government and in that of the national’s Constitutional traditions<sup>370</sup>. Furthermore, even on the procedural side of the scrutiny, that function, for its political nature, its manifested in a wide range of instrument and procedure, that not always are easy to be recognized<sup>371</sup>. On the other side, the Inhomogeneities of the model to be exported is fostered by several reasons that contributed to hybridize the institutional architecture of the European Union, making fireclay to the traditional schemes of parliamentarism of majoritarian kind.

### 2.4) Parliamentarism and rationalised parliamentarisms

Boris Mirkine-Guetzévitch is “obliged” to identify a more determined and strict historical meaning of parliamentarism that work as a common element to all the experiences included inside the new legal phenomenon occurred in the first years after the second world war that he defines in fact as “rationalization of parliamentarism”. Such lowest common denominator is given by the “principle of parliamentarism”, that is to say the principle of political dependency of the minister of the parliamentary majority, that in the Constitution drafted in the early years after the second world war had been translated in the law forecast of the resignation of the Ministry as a obliged consequences of a parliamentary vote of distrust, it too typified by the written Constitutions<sup>372</sup>. The rationalized parliament instead does not include, as key element of the concept, the principle of the choice of the Minister made by the Parliament.

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<sup>369</sup> P. Magonette, *Appointing and Censuring the European Commission: The Adaptation of Parliamentary Institutions to the Community Context*, in *European Law Journal*, 7, 2001, p. 307

<sup>370</sup> On that point also M. Telo: “Overlapping levels of regulation result in an institutional construction of such a complexity as to make the European polity something profoundly different from a state polity”. In: Telo, M. (2016). *The EU from a constitutional project to a process of constitutionalization*. *European Politics and Society*, 18(3), pp.301-317.

<sup>371</sup> Ibrido, R. and Lupo, N. (2018). *Op. cit.*

<sup>372</sup> B. MIRKINE-GUETZÉVITCH *Le régime parlementaire dans les récentes Constitutions européennes*, in *Revue internationale de droit comparé*, 1950, 610.

## 2.5) The meaning of the rationalization of the form of government in the doctrine of Boris Mirkin-Guetzevitch

The theoretical formulation of rationalized parliamentarism developed by Mirkin-Guetzevitch is linked to a wider phenomenon that consists in the attempt to submit to the law, namely the constitutional law «*tout l'ensemble de la vie collective*»<sup>373</sup>. At the top of this process there is: “the judicial rationalization of the general will” (intended as “will of the people” and not as “the will of the majority”) that is done in the constitutional text<sup>374</sup>. From there emerge the idea of “democracy expressed in judicial terms”, in a philosophical vision that combines together liberal constitutionalism, Kelsenian’s normativism and “anthropocracy”<sup>375</sup>.

### 2.5.1) The evolution of the concept of rationalized parliamentarism

In 1930 the author stresses the importance of the primacy of the political executive<sup>376</sup>. This principle, however, does not contradict his primary analysis of the parliamentarism, because it has as object, a primacy of political nature. In modern democracy the relationship among the legislative and the executive is the opposite with respect to the past, because the long division between “the Parliament against the power of the King” is nothing more than a distant memory<sup>377</sup>. The conflict among the two political powers has become cooperative and “such cooperation is generally been transformed into the primacy of the executive”, but – as underline by Guetzevitch – is a “political primacy and not a legal one”. In this sense, the parliamentary regime gives to the Executive “a strength much bigger than that of the Executive under the regime of the separation of powers”<sup>378</sup>.

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<sup>373</sup> B. MIRKINE-GUETZÉVITCH, Les nouvelles tendances du Droit constitutionnel. Le problème de la rationalisation du pouvoir dans les constitutions de l'Europe d'après-guerre, cit., 13.

<sup>374</sup> Ibidem.

<sup>375</sup> Ibidem, with reference to T.G. MASARYK, Les problèmes de la Démocratie. Essais politiques et sociaux, Paris, Rivière, 1924, 56.

<sup>376</sup> B. MIRKINE-GUETZÉVITCH, Les nouvelles tendances du Droit constitutionnel. Le renforcement de l'Exécutif et le régime parlementaire, cit., 490.

<sup>377</sup> Frau, M. (2016). L'ATTUALITÀ DEL PARLAMENTARISMO RAZIONALIZZATO. [online] Nomos-leattualitaneldiritto.it. Available at: <http://www.nomos-leattualitaneldiritto.it/wp-content/uploads/2017/02/frau-nuova-versione-per-nomos-3-corretto2016-1-1.pdf>

<sup>378</sup> Ibidem.



## 2.6) The essentials feature of the French “form of Government”.

The main feature of the French form of government, that of being a Semipresidential system is enshrined in the French Constitution of 1958<sup>379</sup>. The concept of semipresidential “form of government” is appeared thanks to Duverger’s pen, over the 70s<sup>380</sup>. The concept is based basically on two points: First, the election by universal suffrage of the President of the Republic that is endowed of constitutional prerogatives. Secondly, the presence of the Prime Minister and of a Government responsible in front of the Parliament<sup>381</sup>.

## 2.7) The President of the Republic.

The role of the President of the French Republic in the French Fifth Republic is kind of arbitration and of guardian of the correct work of the system. From 1962, the President is elected by universal suffrage, with a double turn election. The President mandate is five years. However, before 2000, the mandate was a seven years term. The change at the timing of the Presidential mandate had been necessary in order to avoid cohabitations problems between the President and the Prime minister.

## 2.8) France and European Union

The European decisions arise from the cooperation among a wide number of actors, within the 28 Member States. If the members of the Commission and of the European Parliament have as aim to make the general European interest, others defend the national interest, the regional interest or the interest of a socio-professional sector. France, as his other European partners, is represented in all of the above-mentioned levels.

### 2.8.1) The executive branch: The President of the Republic and the Government

The President of the Republic establishes the general orientations of the European policy of France. It represents France at the European Council, which, at least once every six months at the summit, brings together the Heads of State and Government of the twenty-eight-member-states. The government defines and implements the European policy of

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<sup>379</sup> Conseil-constitutionnel.fr. (1958). [online] Available at: [https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank\\_mm/constitution/constitution.pdf](https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/constitution/constitution.pdf).

<sup>380</sup> Maurice Duverger, *La monarchie républicaine*, Paris, Robert Laffont, 1974, p. 122

<sup>381</sup> Maurice Duverger, «*Le concept de régime semi-présidentiel*», in *Les régimes semi-présidentiels*, Paris, PUF, 1986, p.7

France. The Prime Minister leads the European action of the Government. It provides inter-ministerial coordination to halt French positions and has, to do so, a General Secretariat for European Affairs.

#### 2.8.2) General Secretariat for European Affairs

The main tasks of the General Secretariat of European Affairs (SGAE) are the elaboration of France's positions on European issues and the coordination of links between French administrative and governmental authorities and European institutions. . Since October 18, 2005 has replaced the former General Secretariat of the Interministerial Committee (SGCI) on matters of European Economic cooperation, superseded after the failure of the referendum on the 29 May 2005 in France.

#### 2.9) The Spanish “form of government”.

With the death of the dictator, the 20<sup>th</sup> of November of 1975, the real change of paradigm of Spain politics towards a democracy had started through a “transition period”, that without violent fought, has transformed into a democracy an authoritarian regime<sup>382</sup>. The 1978 Constitution had been ratified via popular referendum. The fundamental charter, in his preamble (*Título preliminar*), establish the functioning of the Spanish’s system. Spain is expressively defined in article one as a social and democratic State that foster “superior values” of his jurisdiction, liberty, justice, egalitarianism and political pluralism.

#### 2.10) The “political-shape” of the State and the rationalization of the form of government

Art. 1<sup>383</sup>, 3<sup>rd</sup> section, of the Spanish constitution proclaim that the “political-shape” of the State is the parliamentary monarchy. Due to the parliamentary nature of the Spanish “form of government”, it is essential the relation of trust between the legislative and the executive power. The Cortes Generales<sup>384</sup> (this is the name of the bicameral parliament) are made of

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<sup>382</sup> Solozábal, Juan José, *La sanción y promulgación de la ley en la Monarquía parlamentaria*, Tecnos, Madrid, 1987.

<sup>383</sup> Art 1. Spain is hereby established as a social and democratic State, subject to the rule of law, which advocates as the highest values of its legal order, liberty, justice, equality and political pluralism. National sovereignty is vested in the Spanish people, from whom emanate the powers of the State. The political form of the Spanish State is that of a parliamentary monarchy.

<sup>384</sup> The relations between the Government and the Cortes are estimated, in a precise form of government of which the written Constitution is only a component. To the Constitution must be added the constitutional

the Congress of the Deputies and by the Senate. Even in Spain, as in many other social-democrats' jurisdictions, the key role of leading the political guideline is of competence of the Council of Ministers.<sup>385</sup>

#### 2.11) The Spanish Form of State

The democratic nature of the Spanish jurisdiction is well reflected in the form of State, inspired by a wide decentralization of political kind. Art. 2<sup>386</sup> of the Constitution, even proclaiming the indivisible unity of the nations, allows, indeed, the right of autonomy for what concern both the nationality and the Regions. The regional authorities are not directly listed in the Constitution, but it is only envisaged their possible formations<sup>387</sup>.

#### 2.12) Spain and its representation in EU institutions and bodies

As regard the European Parliament, Spain has fifty-four MEPs out of a total of 751. At the Council of European Union participates various representatives of the Spanish Government according to the items on the agenda. The European Commissioner for Spain is Miguel Arias Cañete, that is in charge of action related to the climate and on issues regarding energy. Moreover, Spain has twenty-one representatives in the European Economic and Social Committee<sup>388</sup>. In the European Committee of the Regions Spain is represented by 20 representatives<sup>389</sup>.

#### 2.13) State Secretariat for European Affairs.

To coordinate Spanish policy with the scope of the European Union, as in the case of France, it had been established a body, the State Secretariat for European Affairs. The latter

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conventions, the practices of the organ interested and the special condition of the political life, all through the presence of the political parties with reference to: Pagés, J. (2004). *Las relaciones entre el gobierno y las cortes generales*. [ebook] Revista Española de Derecho Constitucional. Available at: <https://recyt.fecyt.es/index.php/REDCons/article/view/48342>.

<sup>385</sup> Carrozza, P., Di Giovine, A. and Ferrari, G. (2013). *Op. cit.* p. 198

<sup>386</sup> Art. 2 The Constitution is based on the indissoluble unity of the Spanish nation, the common and indivisible country of all Spaniards; it recognizes and guarantees the right to autonomy of the nationalities and regions of which it is composed, and the solidarity amongst them all.

<sup>387</sup> Carrozza, P., Di Giovine, A. and Ferrari, G. (2013). *Ibidem.* p.208.

<sup>388</sup> It is an advisory body, that represents the entrepreneurs, the workers and other lobbies, provides advice on the proposed legislation in order to better disclosed eventual changes on the status of labor and of welfare of the member states.

<sup>389</sup> Is the local and the regional assembly of the European Union. This advisory body provides advice on the legislative proposals, in order to guarantee that the perspective of every region is considered.

is responsible for three distinct directorates: The Directorate-General for Integration and Coordination of General European Union Affairs; The Directorate-General for Coordination of the Internal Market and other European Union Policies; Directorate-General for Europe. Lastly, the State Legal Services to the Court of Justice of the European Union depend on the State Secretariat for European Affairs.

## 2.14) The Italian Case: The Italian Form of State and “form of Government”

### 2.14.1) The Form of State

The Italian form of State is a political system deployed in accordance to a representative democracy in the shape of a parliamentary Republic. The State is organized in a centralized way but with a decentralized system for the regions. Italy is a democratic Republic since 1946, when the monarchy had been abolished via a referendum and the Constituent assembly was elected in order to draft the Constitution, that had been promulgated the 1<sup>st</sup> January 1948.

### 2.14.2) The Form of Government

The Italian “Form of Government” can be defined as a “weak” rationalized parliamentarism<sup>390</sup>. As regards, pivotal is the relationship of trust between the Parliament and the Government. A leading role in ensuring the check and balances among the two bodies (the Government and the Parliament) is the one exercised by the President of the Republic.

### 2.14.3) The representation of Italy in EU institutions and bodies

Among the different EU institutions, for what concern the Parliament, Italy has 73 MEPs. As well for what the Council meetings concerns, those are attended by representatives from the Italian government, depending on the issue at stake<sup>391</sup>. As regard as what the European Commission concern, the Italian commissioner is Federica Mogherini that in the

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<sup>390</sup> Serrano Pérez, M. (n.d.). IL GOVERNO IN UN SISTEMA DI PARLAMENTARISMO RAZIONALIZZATO. [online] Scienzepolitiche.unical.it. Available at: [http://scienzepolitiche.unical.it/bacheca/archivio/materiale/18/ISTITUZIONI%20DIRITTO%20PUBBLICO%20\(Corso%202013-2014\)/12.%20Prof.ssa%20MERCEDES%20SERRANO%20PEREZ.pdf](http://scienzepolitiche.unical.it/bacheca/archivio/materiale/18/ISTITUZIONI%20DIRITTO%20PUBBLICO%20(Corso%202013-2014)/12.%20Prof.ssa%20MERCEDES%20SERRANO%20PEREZ.pdf).

<sup>391</sup> <http://europa.eu/whoiswho/public/index.cfm?fuseaction=idea.hierarchy&nodeID=231059&lang=en>

commission work as the High Representative of the Union for Foreign Affairs and Security Policy and Vice-President of the European Commission. Furthermore, for what concern the ECOSOC, Italy has twenty-four representatives while it has twenty-three representatives at the European Committee of the Regions.

#### 2.14.4) The Interministerial Committee on European Affairs.

The Interministerial Committee on European Affairs (CIAE) was established by Law n° 234 of 24 December 2012<sup>392</sup> (*Norme generali sulla partecipazione dell'Italia alla formazione e all'attuazione della normativa e delle politiche dell'Unione europea*) and works under the Presidency of the Council of Ministers. Its core commitment is to “agree at political level a unitary national position on EU legislative proposals and policies. The Committee’s governance is set by Decree of the President of the Republic n°118 of 26 June 2015<sup>393</sup>, which establishes that the Committee operates within the Presidency of the Council of Ministers.

#### 3.1) Possible evolution of the interaction among the Council, The European Council and the national forms of government.

As pointed out in the first chapter, the Lisbon Treaty has strengthened the role of the EC, even though the introduction of the system of qualified majority voting. The problem here arises in the fact that countries weight in terms of votes in the Council of the European Union are established in percentage of people who lives in that country. Therefore, bigger countries have more votes than smaller countries, and this affect the bargaining process in the Council. Consequently, the most populous States whether govern by anti-European movement could affect in a negative fashion the European Politics<sup>394</sup>. As regard to the voting procedure of the Council, as explain in the first chapter of this thesis, since 2014

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<sup>392</sup> <http://www.politicheeuropee.gov.it/it/normativa/legge-24-dicembre-2012-n-234/>

<sup>393</sup> <http://www.politicheeuropee.gov.it/it/normativa/approfondimenti-normativa-di-settore/decreto-delpredente-della-repubblica-26-giugno-2015-n-118/>

<sup>394</sup> To be noted that according to the November 2018 Eurobarometer report, namely Future of Europe available online at: <http://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Survey/getSurveyDetail/yearFrom/1974/yearTo/2018/surveyKy/2217> for the public opinion of people living in Germany, Sweden, Netherlands and Luxembourg the risk of political parties belonging to extremism is very high. Indeed, to the question: “What are the main risks/threats for the European Union in the coming years?” The answer is political extremism for respectively 50% of German citizens, 65% in Sweden, 58% in the Netherlands and 49% in Luxembourg.

countries votes according to the system of qualified majority (QMV) following the procedure established by the LT. Moving from the possible problems related with the Council to those related with the European Council the first question is, would the Union move in a direction that would strengthen the role of the European Parliament or, it would strengthen the role of the permanent President of the European Council? To answer to the question, appear to be useful to analyze the possible scenarios on how the role of the President might be strengthened. Another proposal for the reform of the Council, had been presented in a recent study for the AFCO<sup>395</sup> Committee: *The Council of the EU: from the Congress of the Ambassadors to a genuine Parliamentary Chamber?* Inside this report, there are two main proposal of reform one that is harder the other softer than the former.

### 3.2) Perspectives and scenarios on the appointment of the next European Commission, particularly on the institutionalization of the “Spitzenkandidaten” procedure.

In 2019, at the end of the mandate of the actual European Commission, a new one will be in charge. Since the very beginning of this Commission, many things are changed. It had been the first time in which the procedure of the *Spitzenkandidat* had been used to nominate the President. Will it be used again, or a different procedure will be established? the scheme of the Spitzenkandidaten procedure has a legal basis in Article 17.7 TFEU. Therefore, this way of procedure was foreseen by the Treaty itself. Even if the procedure is to be completed in short run-up time, the process had grant further visibility to the election of the President of the Commission and in this way had legitimize the direction to a Political Commission<sup>396</sup>.

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<sup>395</sup> Europarl.europa.eu. (2019). *The Council of the EU: from the Congress of the Ambassadors to a genuine Parliamentary Chamber?*. [online] Available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2019/608855/IPOL\\_STU\(2019\)608855\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2019/608855/IPOL_STU(2019)608855_EN.pdf).

<sup>396</sup> The politicization of the Commission is according to professor N. Lupo further evident in light of the recent judgement of the Court of Justice that has recognized the power of withdrawal of the proposal of the legislative act by the former. Indeed, the professor affirmed: “. It can be seen as a way of avoiding the confinement, even in the first steps of the legislative process, of the role of the Commission as “honest broker”, one clearly incompatible with a withdrawal exercised in political grounds; and as a means of bringing it closer, consistent with its recently increased politicization, to the role played by Executive in parliamentary form of government, one of the protagonists in the legislative process. At the same time, once the Commission’s power of legislative initiative is significantly reduced and strongly self-constrained in favour of the other institutions, starting with the European Council, there should be no hesitation made in clearly recognizing that the Commission also has the parallel of withdrawal, provided that this power is also exercised allowing some degree of involvement for the other institutions, consistent with the principle of institutional balance, which is confirmed as the fundamental constitutional principle ruling EU-decision making”. With reference to: Lupo, N. (2018).

### 3.3) The European Political Parties' system debate over transnational lists and the reform of the European "electoral law".

The Electoral Act will enter into force after all Member States approve it in accordance with their respective constitutional requirements<sup>397</sup>. Therefore, it is not possible to refer to the European political formations as a "system", in the sense of a stable and structured political asset, with a proper physiognomy and identity (organizational and ideological), enough autonomous from the original dependence on the national parties<sup>398</sup>. On the side of the Council one of the refusals on the provision of the legislative initiative on the EU electoral law as made by the Parliament concern the creation of the transnational list<sup>399</sup>.

### 3.4) The Economic governance of the EU: state of play and a proposal of reform.

In light of the discussed reviews of the economic governance of the Eurozone, an interesting proposal had been made by Federico Fabbrini. In his book<sup>400</sup> *Economic governance in Europe* professor Fabbrini proposed a reform of the governance of the eurozone considering pros and cons according to the different fields he analysed.

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*The Commission's Power to Withdraw Legislative Proposals and its 'Parliamentarisation', Between Technical and Political Grounds.* 1st ed. [ebook] Oxford: European Constitutional Law Review, p.331. Available at: [https://www.cambridge.org/core/services/aop-cambridge-core/content/view/7AD2D44D00849A42FA81F92A3618853B/S1574019618000226a.pdf/commissions\\_power\\_to\\_withdraw\\_legislative\\_proposals\\_and\\_its\\_parliamentarisation\\_between\\_technical\\_and\\_political\\_grounds.pdf](https://www.cambridge.org/core/services/aop-cambridge-core/content/view/7AD2D44D00849A42FA81F92A3618853B/S1574019618000226a.pdf/commissions_power_to_withdraw_legislative_proposals_and_its_parliamentarisation_between_technical_and_political_grounds.pdf).

<sup>397</sup> European Parliament. (2018). *Legislative train schedule* | European Parliament. [online] Available at: <http://www.europarl.europa.eu/legislative-train/theme-union-of-democratic-change/file-reform-of-the-electoral-law-of-the-eu>.

<sup>398</sup> Ciancio, A. (2015). Adriana CIANCIO, *Sistema europeo dei partiti e integrazione politica nell'UE* (aprile 2015). [online] Issirfa.cnr.it. Available at: [http://www.issirfa.cnr.it/adriana-ciancio-sistema-europeo-dei-partiti-e-integrazione-politica-nell-ue-aprile-2015.html#\\_ftn21](http://www.issirfa.cnr.it/adriana-ciancio-sistema-europeo-dei-partiti-e-integrazione-politica-nell-ue-aprile-2015.html#_ftn21) [Accessed 2019].

<sup>399</sup> The proposal about transnational lists envisaged that 27 seats would be apportioned to the MS under represented (as Italy) and other 46 assigned with election based on transnational lists submitted by European political parties in a single European constituency, and that 19 would be made available for potential futures enlargements

<sup>400</sup> Fabbrini, F. (2016). *Economic governance in Europe*. Oxford: Oxford Scholarship online.

3.5) Some remarks on the feasible developments of the interaction between the EU “form of government” and the forms of government of France, Spain and Italy. Final considerations.

The first element that need to be considered, are the next European election the outcome of which would not only impact on the composition of the EP, but as well on the next European Commission as effect of the *Spitzenkandidat* procedure and therefore, on the appointing of the next Commissioners. In this sense a vote for an anti-European political parties or movement could further increase the intergovernmental logic.