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Title

POLITICAL PARTIES IN THE EUROPEAN CONSTITUTIONAL DIMENSION

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TABLE OF CONTENT

CHAPTER II

Lisbon and beyond: the current regulation on European political parties

PART II
POLITICAL PARTIES IN THE EUROPEAN CONSTITUTIONAL ORDER: DYNAMICS

CHAPTER III

The European form of State and form of government

CHAPTER IV

European political parties in the form of government of the Union

INTRODUCTION

The present work aims at understanding the role played by European political parties within the European constitutional dimension. The EU is still far from being a State; nonetheless, its Member States have surrendered their sovereignty (or have at least permitted the exercise of power) in so many different sectors that the impact of the Union on national legal orders is comparable to that of a central State in federal countries. Over time, the EU has equipped itself with a well-functioning institutional framework, within which the European Parliament has gradually taken on an increasing importance. The members of this latter Institution are directly elected by EU citizens since 1979. Around the same time, party groups in the supranational Assembly and political internationals promoted the creation of transnational parties (that is to say federations made up of national political forces) having one goal in mind: the creation of a full-fledged European political arena, where those newly established entities could have played political parties' traditional roles: namely interests aggregation, vote structuring, mobilization of the public, organization of government and shaping of public policy. Since the beginning, however, reality seemed to be far different: party federations' contribution was limited to some minor competences exercised during the European election campaign (e.g., the approval of an electoral manifesto), in order to ensure that national parties belonging to the same political family had the same policy objectives as a lowest common denominator. Thus, many have argued that transnational parties had a mere "cosmetic role". Over the years, their potential had been recognized both by EU primary and secondary law. Since 1992, EU Treaties have included a "party article" which explicitly provided for a "constitutional mission" to be carried out by transnational political forces. In accordance with art. 10, paragraph 4, TEU (currently into force), «European political parties contribute to forming European political awareness and to expressing the will of citizens of the Union». Moreover, party federations have also been the subject of a legislative act of the Union: Regulation (EU, Euratom) n. 1141/2014, amended in 2018. This piece of legislation had the objective of ensuring a comprehensive and detailed regulation of political parties at European

level, thus addressings shortcomings in the previous basic Regulation n. 2004/2003. However, legislation alone doesn't seem to be enough to ensure that Europarties' constitutional mission could be effectively carried out. In fact, many problems lie in the area of institutional practice, where non-written rules play the lion's share.

In the light of the above, the dissertation has been divided into two parts, each of which consists of two chapters. The first part has been labeled as "static", since it has the ambition to provide a thorough assessment of the subject-Europarty from a predominantly regulatory perspective. Thus, it is devoted to a reconstruction of party federations' emergence from a diachronical perspective and to the analysis of the many problems posed by the 2014 regulation, with special regard to the respect of the values on which the EU is founded both in Europarties' internal organization and external activities. Moreover, a special focus is placed on the current democratic backsliding happening in Poland and Hungary, by virtue of the major repercussions it has on the supranational party level. Instead, the second part has been labeled as "dynamic", since it has the purpose of understanding if and how our object of study influences the functioning of the EU's form of government. For this reason, in the first place it questions the applicability of the "form of government" notion to the European Union, whose nature is also investigated. In the second place, it attempts to detect the European government, that is no easy task, since the executive power in the EU is fragmented through a number of different Institutions, each of which may exercise a portion of the mentioned power, without being the exclusive holder. In addition, by resorting to the European network party model, focus is placed on the relationships between Europarties and the major EU Institutions that play a leading role in its form of government. In particular, the existing links between party federations and political groups in the EP are analyzed, in order to understand which of the two faces prevail when it comes to policy formulation. Moreover, the study takes into account the importance of Europarties' activities in relation to the Spitzenkandidaten system for the appointment of the Head of the EU Commission. In fact, the European Parliament, following the entry into force of the Lisbon Treaty, on the basis of a broad interpretation of art. 17, paragraph 7,

TEU, has urged party federations to come up with a leading candidate for the above mentioned position. This new mechanism – which doesn't seem to have any room in primary law, but actually offered a remarkable opportunity to somehow make European elections (at least in part) truly transnational – has been actually implemented in 2014, but suffered a setback in 2019. This work aims at understanding whether European parties also contributed to the recent unexpected failure of the Spitzenkandidaten system, by looking at the intra-party selection procedures of their leading candidates (which, in some instances, have been amended in 2019). Lastly, special attention is paid to the formation of party-political patterns in intergovernmental Institutions: if, on the one hand, it is well established that parties play a role in the vertical dimension (State representatives in the Council and in the European Council are in the vast majority of cases affiliated to national political forces), on the other hand it is not yet fully clear to what extent Europarties are capable of facilitating transnational party coalitions in the cited Institutions. For this reason, the work ends with an investigation concerning Europarty summits (Leaders' conferences, pre-Council meetings, ministerial meetings and the like), which are the privileged locations for discussion among the leaders of affiliated parties, so as to understand whether they could facilitate coalitions formations among Council/European Council (but also Commission) members belonging to the same political family.

A cross- and inter-disciplinary approach has been followed, resorting to literature pertaining to different branches of social sciences, with a prevalence of European constitutional law and political science sources.

PART I
POLITICAL PARTIES IN THE EUROPEAN CONSTITUTIONAL ORDER: STATICS

Chapter I

Political parties in the European constitutional order: from the ECSC to the Lisbon Treaty

1. The origins of European political parties: political groups in the ECSC Common Assembly

1.1. The origins of the integration process: the ECSC's institutional framework and the supranationality feature

What is commonly referred to as European integration process has its origins in the Treaty of Paris, signed on April 18th 1951 by six (founding) States: Belgium, France, Germany, Italy, Luxembourg and the Netherlands[1]. By signing the above mentioned Treaty, the parties agreed to establish a European Coal and Steel Community, whose primary goal was the economic integration of the Member

[1] The Treaty was deeply inspired by the ideas of Jean Monnet and Robert Schuman, who are correctly often labeled as the "masterminds" behind the mentioned convention. The "Schuman plan" was actually presented to the public on May 9th 1950, when Schuman itself made his well-known declaration, where he stated that: «the French Government proposes that action be taken immediately on one limited but decisive point: it proposes that Franco-German production of coal and steel as a whole be placed under a common High Authority, within the framework of an organisation open to the participation of the other countries of Europe. The pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe. (…) The solidarity in production thus established will make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible». As can be easily understood, the aim of the plan was to reduce any possible conflict between France and Germany – at least at the beginning – but, as pointed out by scholars, and from a less dreamy point of view, «one central objective of the plan was to alleviate French concerns that post-war Germany would employ its regained industrial strength as a threat to French autonomy, both in economic and security terms. These concerns arose in particular against the backdrop of imminent German economic recovery and the prospect that Germany would be 'freed' from allied oversight». See I. GLOCKNER, B. RITTBERGER, *The European Coal and Steel Community (ECSC) and the European Defence Community (EDC) Treaties*, in F. LAURSEN (ed.), *Designing the European Union. From Paris to Lisbon*, London, 2012, 16.

States, with specific regard, albeit at the beginning, to the coal and steel market, which was made common by eliminating custom barriers and quantitative restrictions[2]. In order to reach this ambitious target, a complex institutional system was created: it was composed of an High Authority, an executive body made up of nine members who had the task to represent and defend the sole interest of the Community (and not their national ones) by adopting decisions, recommendations and opinions; a Special Council of Ministers, where representatives of national governments gathered together in order to (at least primarily) harmonize the work of the High Authority; a Court of Justice which on one hand ensured the observation of the law of the Community and, on the other hand, guaranteed the interpretation and application of the ECSC Treaty ; a Consultative Committee made up of representatives of producers, workers, consumers and dealers in the coal and steel sector; at last, but – as far as our study is concerned, most importantly – the institutional system provided for by the Treaty of Paris included a Common Assembly: a body composed of «representatives of the peoples of the States brought together in the community» which had a non-secondary task: that of exercising a supervisory power conferred by the Treaty itself[3]. As it can be easily inferred, the subject of the above mentioned power was the activity of the High Authority, which could be targeted by means of a motion of censure that – when carried by a two-thirds majority of the votes cast (representing a majority of the members of the Assembly) – led to the resignation of the members of the High Authority as a body[4]. Even though the High Authority could be considered as

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2 See, in this respect, art. 4 of the Treaty establishing the ECSC: « The following are recognised as incompatible with the common market for coal and steel and shall accordingly be abolished and prohibited within the Community, as provided in this Treaty: a) import and export duties, or charges having equivalent effect, and quantitative restrictions on the movement of products; b) measures or practices which discriminate between producers, between purchasers or between consumers, especially in prices and delivery terms or transport rates and conditions, and measures or practices which interfere with the purchaser's free choice of supplier; c) subsidies or aids granted by States, or special charges imposed by States, in any form whatsoever; d) restrictive practices which tend towards the sharing or exploiting of markets.

3 See in this respect art. 20 of the ECSC Treaty: «the Assembly, which shall consist of representatives of the peoples of the States brought together in the Community, shall exercise the supervisory powers which are conferred upon it by this Treaty».

4 In other words, the decision to form a "parliament" was intended to «counterbalance the High Authority with parliamentary supervision similar to that provided in the parliamentary democratic systems of the Member States». See C. SALM, *Impact of the ECSC Common Assembly on the*

fully-operational even without a(n initial) trust vote of the Common Assembly, which was not contemplated by the Treaty, nevertheless the briefly outlined institutional framework provided for in Paris had something new (and more) compared to the systems on the basis of which many existing international organization worked: put in brief, the ECSC had a supranational nature. Supranationality (as opposed to or, *rectius*, unlike internationality) is the main feature that a decision-making body has when it has been given a high degree of autonomous regulatory discretion[5]. Since the actors in this process are basically States, the regulatory discretion given to a supranational body can be considered sufficiently high when the cogency of the decisions adopted on the basis of the delegated power applies not only to the State itself as a subject of the international community, but also to phisical and legal persons that live and operate in the State itself. Otherwise said, we can speak about supranationality only when sovereign powers are delegated to an entity[6]. In the case at stake, we are no doubt in front of a supranational community, whose bodies are entitled to adopt binding decisions (without any interference from the Member States) and whose decision-making

policy, negotiation and content of the Rome Treaties, European Parliamentary Research Service Blog, 20th March 2017, available in www.epthinktank.eu.

5 This definition has been given by P.L. LINDSETH, *Supranational organizations*, in *Oxford Handbook of International Organizations*, Oxford, 2015; here, the author explains that «the key difference between a supranational organization and an international organization is not in their purported "constitutionalization" but in the degree of autonomous regulatory discretion delegated to the denationalized agent»; in this respect, «the degree of an international organization's delegated regulatory power (…) is generally less comprehensive, intrusive, and/or binding in national legal orders than in the case of a supranational organization».

6 Similarly, cfr. D. DEL BO, *Natura ed esercizio del potere sopranazionale nel trattato CECA*, in R. QUADRI, R. MONACO, A. TRABUCCHI (a cura di), *Commentario al Trattato istitutivo della Comunità europea del carbone e dell'acciaio*, Vol. 1, Milan, 1970, 5: «Sopranazionalità significa il massimo possibile svincolo delle autorità comunitarie provviste di potere decisorio dai vincoli con gli Stati membri, con le loro rappresentanze e con la loro direzione politica. (…P Perché per sopranazionalità deve considerarsi un potere completo, che si diffonde sulla totalità dei due settori di competenza della Comunità»; see also ivi, 27: «oggi ancora, e nonostante le persistenti difficoltà, l'idea dell'unità dell'Europa si presenta come realizzabile soltanto se verrà salvaguardato il principio della rinuncia parziale e contemporanea delle singole sovranità nazionali e soltanto se si darà luogo all'istituzione di un potere caratterizzato dall'esercizio della sopranazionalità». However, a different (and influential) opinion on the feasibility of a supranational State composed of various sovereign national States has been years before expressed by C. SCHMITT, *Begriff des Politischen*, 1932; italian translation *Le categorie del politico*, Bologna, 1972, 117-118 and 126; according to the author, «un mondo nel quale sia stata definitivamente accantonata e distrutta la possibilità di una lotta di questo genere (namely, the war), un globo terrestre definitivamente pacificato, sarebbe un mondo senza più la distinzione tra amico e nemico e di conseguenza un mondo senza politica».

power is supervised and controlled by an Assembly made up of «representatives of the peoples of the States».

1.1.1. Political groups as the only grouping criteria within the Common Assembly of the ECSC (art. 33 bis of the Rules of Procedure)

Our study on European political parties moves exactly from this expression, which constitutes the legal basis of the first embryonic forms of political grouping at the European level. In fact, as far as the composition of the Assembly is concerned, the Treaty (art. 21) merely specified that those representatives of the people should have been «delegates who shall be designated by the respective Parliaments from among their members in accordance with the procedure laid down by each Member State»[7]. Once designated for the very first time in 1952 by the respective national Parliaments, the first Members of the Common Assembly were allocated in the plenary following the alphabetical order[8]. This solution immediately appeared scarcely functional: the representatives often found themselves sitting next to a colleague whose political preferences were inconsistent with theirs. However, the allocation choice didn't prevent the Members of the Assembly with similar political preferences from having informal contacts; the existing – but still informal – political grouping emerged in all its potential during the second day of the first plenary session, where the President of the Assembly had to be elected. Notwithstanding the presence, among the candidates, of the German Heinrich Von Brentano, at last the Belgian socialist Paul-Henri Spaak was elected, who benefited of the support of the german socialist members of the Assembly, who decided not to vote for their compatriot[9];

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[7] According to the same article 21, the total number of delegates was distributed as follows: 36 to Germany, 14 to Belgium, 36 to France, 36 to Italy, 6 to Luxembourg, 14 to the Netherlands». Then, the Assembly was composed of 78 members designated by national Parliaments. Par. 3 of the article already invited the Assembly to «draw up proposals for elections by direct universal suffrage in accordance with a uniform procedure in all Member States».

[8] The members of the Common Assembly, then, were members of national parliaments, who therefore found themselves with a dual mandate: one in their national parliament and one in the newly established Common Assembly.

[9] J. KRUMREY, *The symbolic politics of European integration: Staging Europe*, London, 2018, 118: «the ballot revealed nascent party political dynamics: It proved that Spaak could muster the support of all Socialists, including the German Social Democrats».

this made clear that, in the future, the political discourse in the newly established Assembly would have been based on the sole political affiliation of the Members, thus getting rid of the national (or regional) membership criteria, usually adopted in other international organizations[10]. It wasn't too long before the issue was placed again in the agenda: during the second plenary session, in January 1953, the designated members of the Common Assembly engaged in a debate concerning the possibility to appoint Members to the permanent Committees ensuring representations of both the States and the different political traditions; as a matter of fact, the first draft of the interim rules of procedure (dated September 1952)[11] did not mention political groups and neither fixed any criteria concerning the appointment of representatives to the Committees[12]. Soon after, however, the abovementioned amendment proposal was made by the Rules of Procedure and Accounts Committee. In the end, the Assembly had the last word on the matter. The debate brought out a general mutual understanding on the issue: according to the Members who intervened, making national delegations the main actors in a

[10] See, for example, the United Nations General Assembly, where five 'official' UN regional groups are established: the African Group; the Asian Group; the Eastern European Group; the Latin American and Caribbean Group (GRULAC); and the Western European and Other Group (WEOG). «While some of the regional groups (for example, the Asia Group and the East European Group) may exist solely for the purposes of electing their members to UN bodies, others (such as the Africa Group) appear to function politically, with statements and initiatives taken in the name of the group». The political direction of the groups, then, rather than being based on political ideology, is based exclusively on nationality. See K.V. LAATIKAINEN, K.E. SMITH, *The multilateral politics of UN diplomacy: an introduction*, in *The Hague Journal of Diplomacy*, 12, 2-3/2017, 96-97.

[11] The interim Rules of Procedure of the Common Assembly were layed down by a Committee which was asked by the President of the High Authority (namely, the subject entitled to convene the Assembly) to draw up a proposal which would have been later taken into account by the Assembly itself, which, in any case, had "the last word" when it came to adopting its own Rules of Procedure. See what the proposal states in this respect (Italian version, 12): «L'Assemblea, in realtà, è sola competente a nominare il proprio Ufficio di Presidenza ed elaborare il proprio Regolamento interno e, conseguentemente, costituire ed organizzare il proprio Segretariato. La missione del Comitato si limitava dunque alla raccolta dei mezzi materiali indispensabili per tenere la prima sessione ed alla redazione di un progetto di Regolamento per le discussioni che si svolgeranno nel corso di questa sessione. Appena costituita, l'Assemblea prenderà in piena sovranità le decisioni necessarie al proprio funzionamento. (…) Per quanto concerne il Regolamento provvisorio, il Comitato ha tenuto, fin dall'inizio, a precisare che si trattava soltanto di un progetto che dovrà essere sottoposto ai membri dell'Assemblea, all'apertura della sessione. Nel caso, ma soltanto nel caso, in cui questo progetto avesse l'approvazione dell'Assemblea, il Regolamento provvisorio diventerebbe il testo regolatore della procedura delle discussioni fino a che un Regolamento definitivo non sarà stato elaborato».

[12] Cfr. A. KREPPEL, *The European Parliament and supranational party system. A study in institutional development*, Cambridge, 2002, 180: «The first draft of the Common Assembly's rules did not include any mention of political organizations or even the existence of ideological diversity among the members».

newly-established Assembly of a supranational entity was no less than absurd, since it would have underlined national divisions within an institutional framework whose long term goal was unifying Europe[13]. As expected, the Assembly approved the proposed text and the Rules of Procedure were amended as provided for by art. 39, second paragraph, of the Committee's original proposal, which stated that «les membres des Commissions sont élus au début de chaque session ordinaire. Les candidatures sont adressées au Bureau qui soumet à l'Assemblée des propositions qui tiennent compte d'une représentation équitable des Etats membres et des tendances politiques». As pointed out by the doctrine, «this was the first time that ideological differences between members were officially recognized, and it marked the beginning of the creation of the first supranational parliamentary parties» [14] . However, even though the acknowledgment in the Rules of Procedure of the different political traditions expressed within the Common Assembly had been no doubt a milestone in those troubled first years of the integration process, it didn't represent yet a formal inclusion of political groups as the standard grouping criteria within the Assembly. As a matter of fact, it was only during the plenary session in June 1953 that the Assembly passed a resolution which allowed the «official constitutionalisation»[15] of political groups. This crucial decision, which would have irreversibly marked the development of the European integration process, followed a debate concerning the financing of political groups that would have potentially been established shortly thereafter. The formal recognition of political groups as the only grouping criteria within the Common Assembly went through the inclusion of a new article in the Assembly's rules of procedure : art. 33 *bis*.

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[13] An account of the debate occurred during the second plenary meeting of the Common Assembly in January 1953 is briefly – albeit exhaustively – given by C. SALM, *The ECSC Common Assembly's decision to create political groups*, European Parliamentary Research Service, June 2019, available in www.europarl.europa.eu/thinktank, 4. Among those who intervened, we can list Victor-Emmanuel Preusker (liberal), Giovanni Persico and Pierre-François Vermeylen (socialists), Paul Struye (christian-democrat), all of them supporting an amendment to the interim Rules of Procedure which would have taken into account political traditions in the Committee's appointment procedure. In sum, the majority of those who participated in the debate «considered political groups to provide a way to overcome national representation, to push towards transnational representation and to develop the ECSC Common Assembly as a real supranational institution».

[14] A. KREPPEL, *op. loc. cit.*

[15] C. SALM, *The ECSC Common Assembly's decision*, cit., 5.

This provision laid down two simple criteria to be respected in order to establish (and to be recognized as) a political group[16]: first, the minimum number of members was set at nine; second, the delegates could organize themselves into groups on the basis of their political affinities[17]. It was not allowed to be member of two political groups at the same time[18]. Few but simple rules that allowed national Parliaments' delegates to present a declaration of formation shortly after[19]; thus, three political groups were established: the Christian Democratic group, with 38 members ; the Socialist group, with 23 members in total[20]; the Liberal group, which consisted of 11 members. Four gaullist members of the French National Assembly and a dutch liberal delegate decided not to join any of the established factions[21]. Soon, the groups started to develop their own organizational structures, made up – at least at the beginning – of an administrative staff and a bureau, that consisted of a chair, a vice-chair, a treasurer and a secretary general. Moreover, groups would have benefited from an overall five-million Belgian francs budget allocation, whose size was previously agreed following a heated debate which has been already mentioned in this work[22].

16 The reason behind this minimalist choice is clarified *ibidem*: «the Assembly's Rules Committee had considered it pointless to hamper the creation of political groups with overly-strict formalities and conditions».

17 On the well known problem of the ideological coherence of political groups, see E. BRESSANELLI, *The Europen Parliament after Lisbon: Policy position and ideological coherence of the political groups*, proceedings of the SISP Congress, Venice, 16-18 September 2010, available at www.sisp.it: «despite the formal requisite of the political affinities, the parliamentary rules cannot guarantee that the transnational groupings will represent coherent political cultures. Each political group defines by itself its own membership criteria, and its ideological homogeneity (or heterogeneity) will be the result of political choices, rather than legal norms.

18 Art. 33 *bis* of the Rules of Procedure stated as follows: «Les représentants peuvent s'organiser en Groupes par affinités politiques. Les Groupes sont constitués après remise au Président de l'Assemblée d'une déclaration de constitution contenant la dénomination du Groupe, la signature de ses membres et l'indication de son Bureau. Cette déclaration est publiée. Nul ne peut figurer sur la liste de plusieurs Groupes. Le nombre minimum bes membres nécessaires à la constitution d'un Groupe est fixé à neuf».

19 This declaration should include the name of the group, its executive and the signatures of its members.

20 As it can be easily inferred, the newly formed groups were expression of the most widespread political ideologies in Europe.

21 Michel Debré was among the French members who decided not to join any of the political groups. As far as communist politicians are concerned – even though they were present in the national assemblies of the six Member States – had been excluded from the European Assembly until 1969.

22 See *supra*, p. 10.

Notwithstanding the mentioned agreement on the allocation, the actual budget item for political groups was just a bit above two million Belgian francs[23]. Although financing was far below expectations, the groups were given proper facilities in the Assembly's buildings and their activities – like members' plenary speeches in the name of the group – clearly started to intensify over time, to the extent that the enhancement of political groups' influence constituted a crucial factor for the strengthening of the Common Assembly's role; as a matter of fact, the latter was given by the Treaty a mere *ex post* supervisory role on the High Authority's activity[24]; nevertheless, the delegates started a rather fruitful dialogue with the High Authority, with the explicit aim to direct its action in essential fields, such as carbon policy, investments, transports and – above all – social policy; in fact, as underlined by scholars, the latter was considered by the majority of the Members of the Assembly as a qualifying aspect of the integration process (and not merely one of its side lights)[25]; so, delegates of each group tried to influence, according to their own programmes and ideologies, the High Authority's approach to the mentioned policies. A side (and inevitable) effect of this process was a gradual clarification of the groups' political identity, which (at least at the beginning, but also later on, although with partially different dynamics) was always quite difficult to extrapolate due to the heterogeneity of the delegates' political backgrounds, even among members of the same political group[26]. The two abovementioned effects that stemmed from the rapid increase of

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23 For the parliamentary year 1953/1954, the following were the budget allocation, divided by groups: 860000 Belgian francs to the Christian Democratic group; 710000 Belgian francs to the Socialist group; 610000 Belgian francs to the Liberal group.

24 In this respect, see *supra*, fn. 4.

25 See S. GUERRIERI, *La genesi di una rappresentanza sovranazionale: la formazione dei gruppi politici all'Assemblea Comune della CECA (1952-1958)*, in *Giornale di storia costituzionale*, 1/2013, 274-275: «Il consolidamento dei gruppi politici fu un fattore cruciale nella crescita del ruolo dell'Assemblea. Il trattato CECA le aveva assegnato la funzione di esercitare una sorta di controllo a posteriori sull'attività dell'Alta Autorità. I parlamentari non si accontentarono però di questa modalità e riuscirono a stabilire un dialogo costante con l'esecutivo comunitario, cercando di indirizzarne l'azione in ambiti essenziali: la politica carboniera, gli investimenti, i trasporti e soprattutto la politica sociale. Quest'ultima era infatti considerata dalla maggioranza dell'Assemblea non come una semplice appendice dell'integrazione, bensì come un suo aspetto qualificante. Il crescente impegno dei gruppi aprì un processo di progressiva definizione della loro identità politica».

26 On the matter, see the observations made by G. VAN OUDENHOVE, *The political parties in the European Parliament: the first ten years, September 1952 - September 1962*, Leiden, 1965, 27-28: «the highest degree of uniformity is undoubtedly in the Socialist group, which, with one

the groups' activities allows the reader to understand the reasons that lie behind the establishment of political groups in the Common Assembly. One reason can be defined as traditional-emotional : since delegates in the Common Assembly were selected among members of national parliaments, it was spontaneous for them to choose political groups as the natural grouping criteria in the newly established Assembly[27]. Moreover, a large majority of the selected members was pushing for an ever greater integration within the Community and they all knew that this goal could have been reached only if a real transnational political system was actually established. The second reason behind the political grouping option may be defined as organizational-rational; as scholars underlined, it was not just tradition that led delegates to opt for this criteria, but also a question of convenience: as a matter of fact, political groups are able to reduce the negative payoffs rate that characterize assemblies where the grouping criteria is not political; in other words, delegates in the ECSC Common Assembly were fully aware of the cost linked to the coalition-making that single legislators[28] had to perform on any single issue in this scenario; the presence of political groups, instead, would have eased this process by reducing the so-called transaction costs and allowing the achievement of the political target from time to time purposed, without being forced to negotiate with other legislators[29].

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exception, is made up of representatives of the Socialist parties in each of the member States. Far less homogeneity exists in the Christian Democratic group, which combines a majority of Roman Catholics with a minority of Protestants. Each of these groups nevertheless has a certain basic unity of doctrine, i.e. the Socialist and Christian philosophies respectively. In the 'Liberals and apparentés' group, there could obviously be no degree of monolithic structure whatsoever (…) We have been unable to find any doctrinal grounds on which to account for the uniting of these divergent tendencies in a political group».

[27] As far as Italy is concerned, as an example, political groups in Parliament were formally established in 1920 (at the time, they were not yet called *gruppi parlamentari*, but rather *uffici* and they had the primary task to analyze and discuss bills, without having an internal ideological affinity yet) following a radical reform of the rules of procedure that substituted the previous organizational system. More generally, we can say that political groups were born in the liberal parliaments during the second half of the XIX century. As we will extensively say further on in this study, political grouping in the liberal assemblies were the starting point for the birth of political parties. On the subject, see at least G. AMBROSINI, *Partiti politici e gruppi parlamentari dopo la proporzionale*, Firenze, 1921.

[28] Here the term has to be understood in a broad sense, since the Common Assembly was scarcely involved in the decision making process of the ECSC, which was basically in the hands of the High Authority.

[29] Those two reasons that lie behind the decision to include political groups in the Common Assembly's Rules of Procedure have been outlined by F. SOZZI, *Partiti e sistema partitico a livello europeo*, Rome, 2013, 97 ff.

1.1.2. Intra-parliamentary and extra-parliamentary work of political groups

The creation of political groups within the Common Assembly can be surely regarded as the first step towards the rise of political parties in (and of) the European Union. However, at that moment, too many pieces were missing to allow us to clearly identify true European party politics, the most evident one being the absence of direct election of the Common Assembly's members, which would have later (fundamentally) boosted the emergence of European political parties. As far as the intra-parliamentary work is concerned, notwithstanding the soon-established practice to have the respective group viewpoints stated by duly appointed spokesmen[30], individual standpoint was the rule[31]. It should be noted that, at the time, the competence of the Community was rather limited and, due to the adoption of a functional approach to integration, it actually covered only issues of an extremely concrete nature (such as concentrations, cartels and, more generally, subjects that were somehow connected to the coal and steel market regulation), leaving aside any possible question of principle[32]; this indeed prevented the groups – at least at the very beginning – from being involved in a rough dialectical confrontation[33], even though some divergence emerged from time to time, especially when it came to the attitude showed by groups towards the High Authority, which was rather indulgent on the Christian-Democrats and

30 See G. VAN OUDENHOVE, *op. cit*., 49, where the Author states that over time «spokesmen acting on behalf of an entire group developed into an all-round practice».

31 «In the early days, the delegates in the Common Assembly spoke for the most part in an individual capacity. (…) This does not mean that no party standpoints were ever adopted. When they were, however, they could be recognised as the offshoot of a national political tendency rather than as an incipient attempt to arrive at a European-wide concept of the matter». See ivi, 46. However, over time «spokesmen acting on behalf of an entire group developed into an all-round practice» (ivi, 49).

32 However, as already noticed *supra*, the High Authority had also the chance to intervene in the matter of social policy, which is a highly politicized field; this, of course, could potentially lead to a harsh confrontation among groups with divergent political affinities.

33 The parliamentary speeches were, at the time, characterized by an extremely technical language. See S. GUERRIERI, *op. cit.*, 275: «i grandi dibattiti politici che avevano contrassegnato il Congresso dell'Aia nel 1948 (…) lasciavano il posto a modalità di confronto di natura molto più specialistica, con un linguaggio e una terminologia all'inizio non sempre facili da padroneggiare».

Liberals side and, instead, quite disapproving on the Socialists side[34]. If on the one hand the intra-parliamentary activity of the groups could be labeled as *sui generis* compared to what usually happens in national parliaments, since individual standpoints outweighed group ones and questions of values or principles were disguised as purely technical issues, on the other hand the groups' extra-parliamentary activities, although quite limited in their scope, seemed to be well-structured[35]. When we talk about extra-parliamentary activities, we are making reference to both groups' relationships with national related parties and with the public opinion. As far as the latter aspect is concerned, political groups resorted to the most widespread communication channel at the time, namely the press: when an event of particular importance occurred in the context of the Communities, groups issued press releases where their position was expressed; furthermore, the three groups felt the need to ensure the public a more regular information flow, which was entrusted to specific groups' newspapers such as the *Courrier Socialiste Européen* – which was edited by the *Service de Presse du Bureau de liaison des partis socialistes de la Communaute Europeenne et du Groupe Socialiste du Parlement Europeen* and issued *au moins une fois par mois*

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34 The High Authority, for example, was accused by socialist delegates of reducing the fiscal levy on carbon and steel companies, initially set at 0.9%; according to the groups' members, this would have reduced the resources intended for the redeployment of fired workers. See ivi, 277 ff.: «nell'intervento pronunciato in aula il 10 maggio 1955, il socialista olandese Gerard M. Nederhorst (…) criticò molto duramente l'abbassamento dell'aliquota affermando di avere "serie obiezioni contro questa politica «alla Poujade» sul piano europeo". (…) Sulla base di questa analisi, il gruppo si pronunciò in maniera molto severa il 22 giugno 1956 sull'attività dell'Alta Autorità. Senza spingersi fino alla presentazione di una mozione di censura, si contrappose esplicitamente all'indirizzo da essa seguito. (…) Di fronte all'attacco dei socialisti, i parlamentari democristiani difesero l'esecutivo comunitario, ma, usando toni più moderati, cercarono a loro volta di spronarlo a un ruolo più attivo in vari ambiti. (…) Il gruppo liberale e misto prese a sua volta le difese dell'Alta Autorità dagli attacchi dei socialisti, i quali, come si è visto, accusavano l'esecutivo comunitario proprio di difendere un paralizzante "crédo libéral" che lo conduceva a rinunciare al pieno uso di tutti i suoi strumenti di intervento». The existence of a sui generis political debate among the three groups in the Assembly is also pointed out in G. VAN OUDENHOVE, *op. cit*., 49: «While in this stage no sharp clashes occurred, the first divergent political standpoints were nevertheless discernible».

35 The reasons behind the presence of a rich – albeit *sui generis* - intra-parliamentary activity and a well-structured – albeit limited in its scope – extra-parliamentary activity are well explained ivi, 158: «Nor is this surprising in view of the totally different situation of the groups inside and outside the Parliament. In the Parliament, they possess political power that can only be turned into account by sound organisation. Outside the Parliament, on the other hand, yheir interest extends no further than the national parliaments, which as yet still determine the fate of the groups. Immediate dependence on the electorate, through direct European elections, would alter the situation radically».

– and the *Cahiers Européens*, the periodical through which the Christian-Democrats publicized the groups' initiatives and reported their delegates' speeches in the Assembly[36]. When it comes to the former aspect, namely the groups' relationships with national parties having the same ideological positions[37], the Socialist group had no doubt the most well-built framework, which originated from the recommendation adopted during the first Conference of the Socialist parties of the ECSC countries (held in January 1957), which called for the start of a permanent and organised relationship between the parties participating in the Conference and the Socialist group in the Common Assembly. On the European side, the task of harmonizing the contacts with national socialist parties was assigned to two specific offices : the Liaison Bureau and the Conference[38]. The President of the Socialist group started to visit on a regular basis the national parliamentary groups in the six capital cities of the Member States – thus carrying into effect the provision of the Socialist standing orders which made the Bureau responsible of taking care of the contacts with national groups – and also the President of the Christian Democrats followed suit[39]. Furthermore, it should not be forgotten that – even before the entry into force of the Treaty of Paris – national political parties started to organize themselves at European level, giving life to the so-called associations of political parties such as the Movement for the Socialist United States of Europe (which would have later on change its name in Europe Left Movement) and the *Nouvelles Equipes*

36 Ivi, 157-158.

37 It should be recalled here that the members of the Common Assembly (and the European Parliament after the establishment of the two new communities) were delegates that combined their mandate in Strasbourg with the mandate in their own national parliament: thus, the first link between the group and the national parties resided in the specific nature of their mandate in the Assembly.

38 The composition and the competences of the mentioned offices are outlined in G. VAN OUDENHOVE, *op. cit.*, 150-151: «The Liaison Bureau consists of a representative of each of the affiliated parties, a representative appointed by the Bureau of the Socialist International and a representative of the Socialist group in the Consultative Assembly of the Council of Europe. (…) Among the principal tasks of the Liaison Bureau are the study of all questions concerning the European Communities, the drafting of recommendations to the affiliated parties and various functions of an organisational nature. The Conference comprises the members of the Liaison Bureau, 48 delegates from the affiliated parties in the Member States and, thirdly, the members of the Socialist group in the European Parliament. (…) The aim of the Conference is in general to arrive, by orderly consultation, at a common socialist standpoint on the problems of European integration».

39 Ivi, 149-150.

Internationales (NEI, which was the usual designation of the International Union of Christian-Democrats). Political groups in the Common Assembly mantained contacts also with those entities, although declined in a less formal way: the absence of organic links is particularly evident on the Socialist side: indeed, the group was confined to send delegates to the most important meetings of the Europe Left Movement; instead, the Christian-Democrats had closer ties with the NEI, which are evident from the participation of the group's President in the meetings of the NEI's Steering Committee[40].

1.2 The legal vacuum phase: party federations from the first EU Parliament's elections to the Maastricht Treaty

1.2.1 Political groups and the birth of the European Parliament

The Treaty of Rome, signed on 25th March 1957[41], established two new European Communities ; namely, the European Economic Community (EEC) – which sought to construct a customs union and abolish obstacles to freedom of movement for persons, services and capital[42] – and the European Atomic Energy Community (EURATOM), which had the aim of coordinating research programs of the Member States to promote a pacific use of nuclear energy. As a result, the institutional framework born with the Treaty of Paris was widely redrawn: two Commissions and two Councils of Ministers were set up alongside the High Authority and the already existing Council of the ECSC. As we are interested in, the Common Assembly of the ECSC was actually replaced by a single Assembly, which constituted the sole parliamentary body of the three Communities[43]. This new parliament was convened by the President of the EEC Council of Ministers for its opening session on 19th March 1958 and the following day it decided to

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40 Ivi, 153-154.

41 The Treaty of Rome entered into force on 1st January 1958.

42 The new Treaty had an explicit target: namely, constructing a common market over a transitional period of 12 years, in three stages, ending on 31st December 1969.

43 In this respect, we can say that – notwithstanding the removal of the word "common" – the new Assembly was anyhow common…to the Communities and not anymore with regard to the sole Member States.

use, from then on, the name European Parliamentary Assembly[44]. Since, however, the German and the Dutch delegations decided to use their own terms – namely and respectively «Europees Parlement» and «Europäisches Parlement»[45] - the term European Parliament became so common that just few years later – on 30th March 1962 – the Assembly adopted a resolution in order to change its name into European Parliament[46]. As far as political groups in the new Parliament are concerned, far from being gradually unboosted, they continued to play a central role in the new Assembly. On a provisional basis, the Rules of Procedure of the ECSC Common Assembly were adopted, but soon thereafter the Bureau of the Parliament (which was composed of nine members: a President and eight Vice-Presidents) asked the Rules Committee to prepare new text, which was adopted by means of a Resolution[47]. Art. 37 of the new Rules of Procedure provided for the rules that permitted the legal recognition of the groups; compared to the formulation of the previous text, barely nothing was changed, except from the minimum membership, that was raised to seventeen. According to scholars, by doing so, «the new Parliament wanted to prevent an unlimited extension of the number of groups by making the minimum number of members sufficiently high»; in any case, «no additional groups were to be formed, as was soon evident from the fact that the newcomers applied to join one of the established (groups)»[48]. It is worthy of mention, however, the fact that delegates in the new European Parliamentary Assembly kept sitting in alphabetical order, irrespective of affiliation. The suggestion to adopt a group system of seating, such as to give the Parliament «the aspect of a painting with the groups forming large splashes of colour», came from Pierre Lapie, President of the Socialists in the Assembly. After a heated debate, mainly focused on who had to occupy the right side of the

44 The ECSC Common Assembly had met for the last time on 28th February 1958.

45 See H.G. SCHERMERS, N.M. BLOKKER, *International institutional law. Unity within diversity*, Leiden – Boston, 2011, 415.

46 The content of the Resolution seems here to take the form of an observation: «L'Assemblée – constatant que sa dénomination n'est pas identique dans les quatre langues officielles de la Communauté – décide de prendre le nom de "Parlement européen" en français et de "Parlamento europeo" en italien».

47 Resolution 20th June 1958.

48 G. VAN OUDENHOVE, *op. cit.*, 132ss. Here the author says «established parties», but we prefer to use the term "group", since the classification of parliamentary groups as "parties" is not yet commonly accepted and should be avoided when possible, since potentially misleading.

hemicycle amongst the Christian-Democrats and the Liberals, a resolution was approved: the Socialists were assigned the left side, the Christian-Democrats were given the center of the hemicycle and, finally, the Liberals (together with the *apparentés*) had to accept to sit on the right. In this new context, the well-known three traditional political groups kept holding the relatively strong position that they obtained in the previous decade[49]. As pointed out in doctrine, «in the new European Parliament, even more than in the Common Assembly, (groups) were to play a dominant part»[50]. This is partly connected to the role which the European Parliamentary Assembly was assigned by the Treaty of Rome; as a matter of fact, after years of lobbying coming from the Socialists and the Christian-Democrats in particular[51], who persistently claimed for a considerable increase of the Assembly's power, the EEC and EURATOM Treaties actually granted the European Parliament a new role, that brought it a bit closer to the traditional idea of Parliament as both legislator and watchdog of the executive power: a generalized right for the Assembly to vote a motion of censure on the Commission was provided for by the Treaties[52], together with the involvement of

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[49] Ivi, 134.

[50] Ivi, 124.

[51] See, in this respect, the Report presented by the Christian-Democrat French delegate Pierre Henry Teitgen. The report focused on the following issues: 1) Le contrôle exercé par l'Assemblée dans le cadre des dispositions actuelles du Traité; 2) Participation de l'Assemblée aux procédures de révision du Traité; 3) Rôle de l'Assemblée en ce qui concerne la politique générale des Etats membres. Finally, the Report provides for a "proposition de résolution relative aux pouvoirs de l'Assemblée Commune et à leur exercice" where we can find, among other things, a proposal to set up a «"Groupe de travail" chargé spécialement de faire rapport à l'Assemblée sur: 1) les problèmes de l'élection au suffrage universel des membres de l'Assemblée; 2) les conclusions à tirer de l'expérience acquise en ce qui concerne les pouvoirs de la Communauté dans le domaine du charbon et de l'acier et, éventuellement, l'élargissement de sa compétence». Later on, another report was presented by Gilles Gozard, a Socialist delegate in the Common Assembly, on the basis of the work made within the Groupe de Travail (Rapport Intérimaire sur certains aspects institutionnels du développement de l'intégration européenne). In the report one can read, among other things, about a «tendance à élargir les compétences actuelles de l'Assemblée, notamment en matière budgétaire. (…) en effet le droit de voter le budget est un droit fondamental des Parlements» and, moreover, also about «possibilités qui lui seraient données de confirmer la nomination des membres choisis par les gouvernements pour composer la Commission européenne»; furthermore, the report suggests to adopt the absolute majority rule, rather than a simple majority, for the adoption of motions of censure on the Commission. More on the proposals concerning the enhancement of the Common Assembly's role at the turn of the ECSC and the birth of the two new Communities can be read in the exhaustive contribution by C. SALM, *Impact of the ECSC Common Assembly*, cit., 3ss.

[52] It should be beared in mind that the competence to vote a motion of censure on the High Authority originally given to the Common Assembly of the ECSC was actually limited to the debate on the annual general report. See C. SALM, *op. loc. ult. cit*.

the Assembly – although by means of a mere consultation – in the budgetary procedure, the Parliament's formal commitment to prepare drafts concerning its members' possible future elections by means of direct universal suffrage and, finally, an ever-increasing participation of the Assembly in the legislative process through the so-called consultation procedure[53]. This moderate – albeit remarkable – broadening of the European Parliament's competences within the Communities' institutional framework was soon followed by the Merger Treaty (8 April 1965), which proceeded with the unification of the remaining bodies, thus setting up a single Council and Commission of the European Communities, introducing the single-budget principle. The European Parliament, between the '60s and the '70s, managed to carve out a significant role by adopting an interesting strategy: namely, approving resolutions which provided for amendment proposals to the wording and content of legislation (thus, without limiting itself to comments on overall directions of policy action); this rather unruly behaviour of the Parliament actually proved to be the right path towards a greater consideration by the (then) only legislator: the Council. As a matter of fact, from that moment on, the latter started to increase the frequency with which it consulted the Parliament; according to scholars, this decision can be traced back to the Communities' democratic legitimacy deficit that was perceived since then by the Institutions: by involving the Parliament in the legislative procedure, the Heads of State that were sitting in the Council believed that the Communities would have gained a more «human face»[54].

1.2.2 The path towards direct elections of the European Parliament and the formation of transnational party federations

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53 In this respect, see article 144 of the EEC Treaty and article 114 of the EURATOM Treaty; see also article 203 of the EEC Treaty and article 178 of the EURATOM Treaty; finally, see article 138 of the EEC Treaty and article 108 of the EURATOM Treaty.

54 On this topic, see extensively M. ROOS, *Far beyond the Treaties' clauses. The European Parliament's gain in power, 1952-1979*, in *Journal of Contemporary European Research*, Vol. 13, 2/2017, 1063: «including the opinion of the EP, as the citizens' representative, gave the respective legislative texts more democratic legitimacy. Ever since the Hague Summit of 1969, Member States' Heads of State and Government as well as Commission officials declared repeatedly their aim to give the Community a more "human face", and to improve its wider image; giving Community decisions a more democratic foundation certainly seemed to be helpful in this endeavour».

Political groups were responsible of the lion's share of the empowered Parliament and actually played a significant role in the process that led to the direct elections of the same Assembly; according to art. 138 of the EEC Treaty[55], which replicated the wording of art. 21 of the ECSC Treaty, «L'Assemblée élaborera des projets en vue de permettre l'élection au suffrage universel direct selon une procédure uniforme dans tous les États membres. Le Conseil statuant à l'unanimité arrêtera les dispositions dont il recommandera l'adoption par les États membres, conformément à leurs règles constitutionnelles respectives». Soon after the entry into force of the new Treaties signed in 1958, the working group established within the political affairs and institutional matters committee of the European Parliamentary Assembly presented the Dehousse Report (1960), named after its President, on the elections by direct universal suffrage of the same Assembly. The report provided for a draft convention on direct elections which had little (if not zero) effect and received no implementation nor serious consideration until the beginning of the following decade, when the issue was put again on the Institutions' agenda; nevertheless, direct elections continued to be a subject to debate on even during what has been called the «lull in the 1960s»; in this respect, just to provide an example of the ongoing debate, a group of MEPs with heterogeneous group affiliations presented a written question on direct elections to the European Parliament on 7th february 1963, calling for a fast implementation of both art. 138 of the EEC Treaty and the draft convention provided for by the Dehousse Report[56]. The demands for explanation coming from the delegates had no practical follow-up until the Hague Summit (December 1969), when the heads of state or government decided to finally revive the repeatedly delayed issue by putting few but significant words in the Final

[55] The same provision was also present in the in the EURATOM Treaty (art 108).

[56] EP written question of 7 February 1963 from Messrs Weinkamm, Schuijt, Dehousse, Dichgans, Fischbach, Kreyssig, Lücker, Margulies, Philipp, Starke, Storch and Vals on direct elections to the European Parliament. An exhaustive outline of the debate on direct elections of the European Parliament occurred during the «lull» in the 1960s can be found in F. PIODI, *Towards direct elections to the European Parliament*, in *Cardoc Journals*, 4/2009, 25ss.

communiqué of the meeting[57]; it wasn't long before a new crucial Report was presented – this once by the chairman of the then-established working group, professor Georg Vedel, at the time honorary dean of the Paris Faculty of Law and Economic Sciences – which had the task to «examine the whole corpus of problems connected with the enlargement of the powers of the European Parliament»[58]; the Vedel Report clarified that direct elections on the basis of a uniform electoral procedure could not be held as long as the Parliament did not enhance its legitimacy; thus, according to the rapporteur, notwithstanding the wording of art. 138 of the EEC Treaty, which calls for a «procédure uniforme dans tous les États membres», the first direct elections of the European Parliament must be held on the basis of a non-uniform procedure, that is to say according to different electoral laws adopted in the Member States. This would have given the Parliament more legitimacy and, for this reason, the needed authority to approve a uniform European electoral procedure[59]. The Vedel Report was followed by the Patijn Report, which provided for a new draft convention that was published on

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57 See Communiqué of the meeting of Heads of State or Government of the Member States at The Hague (1 and 2 December 1969): «The problem of the method of direct elections is still being studied by the Council of Ministers». The outcome of the Hague Summit can be seen as (at least partly) the result of the *latu sensu* "lobbying activity" of the Common Assembly first and the European Parliament soon after. In this respect see again C. SALM, *Impact of the ECSC Common Assembly*, cit., 7: «The decision to hold the first direct election was eventually taken at the summit of the Heads of State or Government in The Hague in 1969 after the Common Assembly, and later the European Parliament, had persistently lobbied for it».

58 See the introduction of the Report of the Working Party examining the problem of the extension of the powers of the European Parliament of 25 March 1972.

59 See Chapter V (The election of the European Parliament) of the Report of 25 March 1972: «If one cannot imagine a Parliament with real powers which does not draw its mandate from direct universal suffrage, it is even more difficult to imagine the election through direct universal suffrage of a Parliament without extended powers. In this way, two equally desirable objectives are making each other's implementation impossible. The only way to break the vicious circle is to refuse to let one of the two objectives depend on the achievement of the other one first. Neither has priority over the other, nor is their simultaneous achievement necessary. If any logical links exist between them, these are expressed in the fact that any progress made towards achievement of one will be a step towards achievement of the other. Moreover, experience has shown that, even without its recruitment procedure having been changed, the European Parliament has managed to acquire new and legally important budgetary powers. If, furthermore, the powers of the Parliament were increased in the way proposed in the previous Chapter, these powers would in themselves endow the Assembly with sufficient prestige to attract a good many influential parliamentarians from the Community's Member States who would be prepared to work for the introduction of direct election. The new powers would, of their very nature, constitute means of influencing events in such a way as to promote the application of Article 138 of the EEC Treaty. Finally, although it is desirable that the provisions of this article be implemented as soon as possible, it should be noted that the present mode of recruiting of the Parliament involves a certain degree of democratic legitimacy justifying the exercise of true parliamentary powers. For these reasons, the assumed precondition of Article 138 must be rejected».

13th January 1975; the document included the observations on the electoral procedure contained in the Vedel Report[60] and a remarkable number of proposals concerning direct elections to the European Parliament, such as a deadline within which voting must have occurred, set for the first Sunday of May 1980[61]. After an exhausting fight that lasted more than six months and was basically made up of resolutions put forward by a cross-group alliance, which urged the legislator to make its final decision on the draft[62], the Council finally «formalised the draft

[60] See European Parliament, Political Committee, Report concerning the adoption of the draft Convention on the election of the European Parliament by direct universal suffrage, rapporteur Schelto Patijn, 13th January 1975, Chapter II (electoral procedure), article 7: «Le Parlement européen élabore un projet de procédure électorale uniforme au plus tard avant l'année 1980. Le Conseil en arrête les dispositions à l'unanimité en recommande leur adoption aux Etats membres, en conformité de leurs dispositions constitutionnelles. Jusqu'à l'entrée en vigueur d'une procédure électorale uniforme, et sous réserve des autres dispositions de la présente convention, la procédure électorale est régie par les dispositions internes de chaque Etat membre». The commentary to art 7 included in the same Report provides for an interesting interpretation of the notion of uniform electoral procedure ex art. 138 of the EEC Treaty: «Les traités ne précisent pas quel degré d'uniformité doit atteindre une procédure électorale pour répondre à ces exigences. Au stade actuel de rapprochement les procédures de formation de la volonté politique dans les Etats membres, on peut parler de procédure uniforme dès l'instant où les élections se déroulent dans tous les Etats membres suivant des règles fondamentales communes. Outre les dispositions du présent projet de convention, citons à ce titre les principes qui régissent des élections démocratiques, c'est-à-dire qui assurent l'égalité, la liberté, l'universalité, le secret des élections et leur déroulement au suffrage direct». Thus, according to the Political Committee of the European Parliament, a uniform procedure corresponds to the compliance with common fundamental rules: equality, freedom, universality and secrecy of elections together with direct suffrage». See also F. PIODI, *op. cit*., 35: «A system common to the nine Member States, six of which had a proportional system, two a majority system and one a mixed system, seemed premature. Once the political conditions were established, a common procedure would be adopted; the draft predicted that these conditions would materialise in 1980, the date by which Parliament had to prepare a uniform electoral system. Until that time, the elections would take place based on national provisions, as had always been the case.

[61] More on the process that led to the draft convention and the Schelto Patijn report can be found in E. WHITFIELD, *40th Anniversary of the 1976 Act on direct elections to the European Parliament*, European Parliament History Series, October 2015, 2ss, available in www.europarl.europa.eu.

[62] It should be noted – especially because it's of our interest for the purpose of the research – that, following the Council's failure to act in the first instance, the expression of disillusionment and disappointment came from the political groups in the European Parliament, as pointed out *ibidem*: «The Christian-Democratic Group felt that citizens had been let down, while the Group of European Progressive Democrats claimed that the European Community was slipping backwards and that the Council was yet to find its role. The European Conservative Group expressed its disappointment but also its hope that the next Council meeting would be more successful. The Communist and Allies Group claimed the failure was no surprise but reflected the deep crisis of European policies supporting big business».

convention as the Act of 20 September 1976»[63], which was simultaneously annexed to a Decision[64].

The Council's decision of 1976 undoubtedly represents a turning point in the European integration process; as far as the emergence of European political parties is concerned, even at that time scholars were aware that direct elections to the European parliamentary assembly would have been the gateway to the political arena for transnational parties[65]. As a matter of fact, the latter made their debut in the period running from 1972 (when the Vedel Report set out the path that would have led the Parliament to its first direct elections) to 1979. The reason why political parties at European level were created exactly when direct elections to the European Parliament started to seem less unlikely is rather obvious : party establishments of the three main European political families perceived that by giving citizens' the right to vote for their representatives to the European Parliament, a truly transnational political arena could have been built; this new arena should have been ideally occupied by a dialectic between transnational parties with their own political and electoral organization, programmes and power structure, with limited dependence on national parties[66]. Following this ideal

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63 Ivi, 5.

64 76/787/ECSC, EEC, EURATOM. Decision of the representatives of the Member States meeting in the Council relating to the Act concerning the election of the representatives of the Assembly by direct universal suffrage.

65 See G. VAN OUDENHOVE, *op. cit*., 158: «Immediate dependence on the electorate, through direct European elections, would alter the situation radically. Whether this will ot give rise to European parties and what part the groups will play in the process, are two new questions which for the time being must remain unanswered». See also M. ALBERTINI, *Il Parlamento Europeo. Profilo storico, giuridico e politico*, in *Il Parlamento europeo e il problema della sua elezione a suffragio universale*, in *Quaderni della rivista Il Politico*, Milan, 1973, 33: «Vorrei (…) ripetere qui una osservazione sul significato politico di una elezione generale europea che ho già avuto occasione di fare in altra sede. Con una elezione generale europea si otterrebbe: a) lo schieramento dei partiti a livello europeo, che farebbe posare il Parlamento europeo sulla stessa base di interessi politici e di consenso pubblico di cui si valgono gli Stati. (…) Si otterrebbe, in sostanza, lo spostamento del potere, come formazione della volontà pubblica, dalle Nazioni all'Europa (…). Una situazione di questo genere può essere considerata precostituzionale perché dove si manifesta l'intervento diretto dei partiti e dei cittadini si manifesta anche la tendenza alla formazione di un assetto costituzionale».

66 See G. PRIDHAM, P. PRIDHAM, *The new European party federations and direct elections*, in *The World Today*, Vol. 35, 2/1979, 64: «The overriding stimulus behind this new stage in transnational party activity in the EC has been undoubtedly the prospect and deadline of direct elections, although the widening scope of policy activity in the Community in the 1970s as well as the growing attention given to the European Parliament as an institution during the same period have also promoted this development». In the same sense, see also D. MARQUAND, *Towards a Europe of the Parties?*, in *Political Quarterly*, 49/1978, 425ff.

pattern, three transnational party federations were formed in the abovementioned timeframe: the Confederation of the Socialist Parties of the European Community in 1974; the European People's Party – expression of the Christian-democrats – in 1976 and, finally, the Federation of European Liberal, Democrat and Reform Parties always in the same year. In 1978, the European Democratic Union was also established: it was a federation of various Christian-democratic and conservative parties, whose birth was somehow functional to national parties' electoral goals[67]. Political groups in the European Parliament undoubtedly played a role in the federations' creation process, although with a different impact depending on the political family concerned; just to quote a couple of opposed examples, the foundation of the European People's Party was literally boosted by the Christian-democratic group in the European Parliament[68], while, on the contrary, the Liberal federation «grew out of consultations within the older International»[69] .

1.2.3 Transnational party federations like 19th century's political parties and the indirect party model

The different role played by the intra-parliamentary articulation of the main political families suggests that we can only partly stick with the widely known opinion that compares European political parties to the 19th century intra-parlamentary parties[70]: in fact, the latter were expression of a single-class society (namely, the bourgeoisie), whose interest were safeguarded by the entire

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[67] Specifically, «the electoral motive has been uppermost in the formation of the European Democratic Union (EDU), which allows the British Conservatives in particular a European organizational framework for their campaign». See G. PRIDHAM, P. PRIDHAM, *op.cit.*, 69.

[68] Cfr. T. JANSEN, *The European's People Party. Origins and development*, London, 1998, 62: «The need for the EPP was above all felt by Christian Democratic deputies. In the early days they had worked together to unite as a parliamentary group in the Assembly of the Coal and Steel Community, and later in the European Parliament. As things progressed they felt a greater need for a European party organisation».

[69] G. PRIDHAM, P. PRIDHAM, *op. cit.*, 66.

[70] *Contra*, see G. GUIDI, *I gruppi parlamentari del Parlamento europeo*, Rimini, 1983, 137, who puts particular emphasis on the intra-parliamentary origin of European transnational party federations; according to the Author, the two mentioned experiences can be somehow juxtaposed, since federations – albeit at the very beginning – developed around the existing structures belonging to parliamentary groups (headquarters, staff, funding etc.).

parliamentary spectrum, since it was fully composed of representatives belonging to the same social class; this actually made the permanent extra-parliamentary political dialectic pointless and, then, political parties lived basically only within the Parliament's wall, popping up outside only during polls, in the likeness of temporary electoral committees[71]. Since those features are not observable in the case of transnational party federations, which – as we have seen – sometimes had a completely extra-parliamentary birth, we can conclude that some similarities may be found only in the case of political groups in the European Parliament, that – especially at the beginning – represented the only form of transnational party cooperation and, *latu sensu*, of intra-parliamentary party activity[72]. In the case of transnational party federations, however, we can rightly apply the duvergerian category of the «indirect party»: in fact, according to Maurice Duverger, a party can be labeled as «indirect» when, instead of immediately and directly gathering together people in order to safeguard political interests, it combines groups or communities together and, for this reason, it can be defined as a second-degree community[73]. If on the one hand the imputability of transnational party federations to the duvergerian category of «indirect parties» can hardly be doubted, on the other hand, the problems that arise from the model should not be overlooked; in fact, the same Author rightly warned the reader about the problems and the intrinsic fallacies that characterized the above mentioned category: above

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71 On the internal origin of parties during the XIX Century, see extensively M. DUVERGER, *I partiti politici*, Milan, 1961, 16ff.

72 It's precisely in this sense that the doctrine has sometimes labeled political groups in the Common Assembly (and later in the European Parliament) as "European political parties"; see in this respect M. DECARO, C. FASONE, *I partiti politici nell'ordinamento composito europeo*, VI Italian-Polish Colloquium on "the role of political parties between Constitution and practice" promoted by the University of Gdansk and the Luiss "Guido Carli" University in Rome (Gdansk, 21st-23rd June 2016), 203: «Nell'Assemblea parlamentare delle Comunità europee confluiscono quelle delle tre Autorità (CECA, CEE ed EURATOM); in essa, autoridenominatasi nel 1962 "Parlamento europeo", le famiglie politiche tradizionali diventano "organizzazioni quadro" di riferimento, come partiti politici europei: i delegati dei Parlamenti degli Stati Membri confermano, infatti, l'articolazione in gruppi politici transnazionali, ispirati a quelle famiglie di riferimento, per iniziative comuni e per l'attivazione delle procedure parlamentari».

73 M. DUVERGER, *Classe sociale, ideologia e organizzazione partitica*, in G. SIVINI (a cura di), *Sociologia dei partiti politici*, Bologna, 1971, 120: «I partiti indiretti sono partiti che, invece di unire direttamente, immediatamente, delle persone per la difesa di interessi politici, uniscono dei gruppi, delle comunità. Il partito indiretto è una comunità, una comunità di secondo grado». As may be easily understood, the Author coined this category having in mind the peculiar characteristics of political organizations created by trade unions or voluntary associations such as the British Labour party before 1914, which contemplated no individual membership, since its members were only trade unions.

all, Duverger puts emphasis on the problem concerning the nature of the actual link that connects the party and individuals who are practically never in touch with its articulations[74]. Far from being a predictable intuition, this consideration has the merit of circumscribe one of the crucial problems that would have affected the European party form from the beginning of the experience until the present days. As widely known and pointed out by the doctrine, political parties have a number of essential features and tasks to carry out; among the many that have been listed over time, six can be considered really indispensable: to foster citizens' active political participation («the integration and mobilization of the mass public»); to play a central role in the process of interests aggregation; to structure the vote (namely, to participate in elections and to direct votes in their favour) ; to recruit political leaders; to organise fragments of government; to perform a policy-making function[75]. As far as the first function is concerned – namely, the mobilization of citizens – transnational party federations were born powerless, since their own nature was far from being that of intermediate communities, that is those falling between the individual and the community-at-large; party establishment's wishful thinking at the time – that might be understood in the light of the common and transversal enthusiasm for the integration process – consisted of being optimistic in believing that by establishing second-class entities lacking any sub-European structural presence, nevertheless citizens would have been somehow involved in the supposed interests aggregation function of the newly established federations.

1.2.4 The electoral moment and the substantial powerlessness of transnational party federations

Party establishments' expectations definitely weren't met, since the first direct elections to the European Parliament by direct universal suffrage were held without transnational party federations playing a primary or at least significant role. As we already mentioned, no uniform electoral procedure was set at

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74 *Ibidem*.

75 A. KING, *Political Parties in Western Democracies. Some Skeptical Reflections*, in *Polity*, 2/1969, 120ff.

European level, so each Member State was kept responsible of managing polls; as a result, the ball remained entirely in the hands of national parties, that engaged in harsh political battles which rarely had a European connotation nor involved, as can be easily imagined, any foreign party leader[76]. Transnational party federations' contribution to the first round of voting, then, mainly consisted of preventing «any glaring discrepancies between the campaign efforts of the various parties»[77]; a standardising function – achieved by means of common slogans formulation[78] and facilitation of major speakers' exchange between countries – but nothing more than that; as correctly highlighted in scholarship: basically an «elite exercise» fully dependent on the moods of the national parties concerned[79]. So, despite the European Parliament had traditionally based its internal organization on the principle of transnationalism, its members were elected in national constituencies where local parties played the lion's share. This, however, didn't prevent federations from autonomously pursuing a para-constitutional basis, in the absence of any formal recognition by European primary law: each entity was equipped with ist own statute providing for a traditional party structure (president, vice-president, secretariat, executive organs and a congress); a common programme was set on the occasion of the first congresses[80] and, furthermore, federations relied on the existing structures

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76 However, fortunate exceptions actually existed, as pointed out by G. PRIDHAM, P. PRIDHAM, *op. cit.*, 68, who give account of an Italian Christian-Democrats festival held in Pescara in 1978 which devoted a full day to the direct elections topic, with a «round-table discussion involving Egon Klepsch, chairman of the European [Christian-Democrat] parliamentary group, as well as a mass rally with Tindemans as president of the EPP».

77 Ivi, 69.

78 In this respect, doctrine went as far as to talk about a «primarily cosmetic role». See ivi, 68. Similarly, see S. HIX, *Parties at the European level and the legitimacy of EU socio-economic policy*, in *Journal of Common Market Studies*, 4/1995, 535: «The transnational party federations which were formed prior to the EP elections have been nothing more than clearing houses, providing information, campaign materials, and organizing (poorly attended) conferences and candidate exchanges. Under the present institutional system the EP elections will only ever be "second order national contests"».

79 See again G. PRIDHAM, P. PRIDHAM, *op. loc. ult. cit*.

80 Though some difficulties occurred in the case of the Confederation of the Socialist Parties of the European Community, as pointed out ivi, 66: «The congress of the Socialist Confederation, delayed several times by insuperable difficulties between certain member parties in formulating a programme, was finally held in January [1978] and ended by issuing a common appeal to the electorate for the European campaign». Actually, the Socialist Confederation was the less…federal entity (and having chosen the term Confederation instead of Federation – as the Liberals did, for example – is the litmus test of thie different structure that the Socialists had in their mind). On this

belonging to political groups in the European Parliament, thus promoting the interchange of personnel between their secretariat and the group's administrative staff.

Even though – as seen before – federations' contribution to the first direct elections to the European Parliament was rather limited, nevertheless their statutes provided for some forward-looking norms, such as art. 2 of the Liberal federation's statute, which listed a number of targets to be attained, among which one can find not only participation in direct elections to the European Parliament, but also the achievement of common positions on European problems together with the involvement of the public in the construction of a united and liberal Europe[81]. In sum, federations were created with a clear intention to have a long-term impact on European politics (intended as citizens' participation and representation) and policy-making (understood as influence on the Community's political direction). However, in order to meet those ambitious expectations, a true quantum leap for transnational party federations was needed. As a matter of fact, up to 1979 and even in the following years, the party system at European level lived in a *latu sensu* extra-constitutional dimension, since both primary and secondary law of the European Community didn't cover the subject at all; as we already know, political grouping in the European Assembly was the only kind of transnational party cooperation taken into account at European level, but only by the Parliament's Rules of Procedure. In order to reach the mentioned goals, the nature of the link between parties and the Community had to somehow develop.

1.2.5 European institutional integration until Maastricht: European Parliament's strengthening and the creation of a Community based on the rule of law.

In practice, as we will better analyse *infra*, the relationship evolved from the *Stadium der Ignorierung* (ignoring of parties) to a gradual *verfassungsmäßigen*

topic, see *ibidem*, where the Authors point out that this anti-federal approach emerged particularly from the statute of the Confederation (which was not by chance called "rules of procedure") which «more than the others stipulates the autonomy of its member parties». The strong dependence from national party emerged also when it came to the financial issues: in fact, federations' budgets were serviced largely by contributions coming from national parties «with some assistance from the parliamentary groups».

[81] Ivi, 70.

Inkorporation (constitutional incorporation)[82], without, however, passing through other crucial issues like the much debated uniform electoral procedure, that – if implemented – would have facilitated the foundation of a pan-European political arena (the creation of which would have nevertheless required other seminal reforms, such as the introduction of transnational lists, just to mention one of them)[83]. It should be pointed out, however, that – even though the first direct elections to the European Parliament showed a remarkable number of pain points that sooner or later had to be addressed – the European Parliament as an Institution underwent a remarkable development since 1979; the first attempts to widen its competences and enhance its role in relation to the decision-making procedure can be dated back to 1987, when the Single European Act was adopted, thus marking a step forward in both the integration process and the strongly needed reduction of the democratic deficit that affected the Community since its foundation[84]. It can be said that, gradually, the Parliament «developed from the "toothless Assembly" of the European Coal and Steel Community to a genuine co-legislator with the Council in almost all policy areas»[85]. The assembly's strengthening that distinguished the ensuing decade was not followed by an alimentation of the debate concerning the future role of transnational party

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82 According to Heinrich Triepel, the relationship between parties and the State might be divided in four ideal steps: the abatement of parties (*Stadium der Bekämpfung*), the ignoring of parties (*Stadium der Ignorierung*), acknowledgement and legalization (*Periode der Anerkennung und Legalisierung*) and constitutional incorporation (*Ära der verfassungsmäßigen Inkorporation*). See H. TRIEPEL, *Die Staatsverfassung und die politischen Parteien*, 1930, now translated in italian in a volume edited by E. GIANFRANCESCO and G. GRASSO, Naples, 2015, 7ss.

83 The very first proposal concerning the creation of transnational lists for the European elections, that would have allocated seats in the European Parliament on the basis of a Community-wide electoral list can be traced back to the motion for a resolution presented by Mr. Vandemeulebroucke and Mr. Kuijpers on a uniform electoral procedure in 1984 (Doc. 2-546/84), where a series of reforms were proposed in order to overcome the objective disproportionality in the MEP's representation due to the different electoral laws present in the Member States; one of the proposals was the creation of constituencies with a minimum and maximum number of representatives, some of whom had to be part of transnational lists. On the various attempts to introcude transnational lists for the European elections, see L. DI STEFANO, *L'integrazione politica europea che (ancora) non c'è: alcune considerazioni sulla proposta di realizzare liste transnazionali per l'elezione del Parlamento europeo all'indomani della Brexit*, in *Osservatorio Costituzionale*, 2/2018, 23, fn. 2.

84 In detail, Single European Act introduced two new legislative procedures, namely the assent and cooperation procedures. The former applied to accession and association agreements with third countries; the latter was used in connection with legislation required for the completion of the internal market.

85 S. RUSSACK, *EU Parliamentary democracy: how representative?*, in *Policy Insights*, 7/2019, 2.

federations, which – however – could be at least expected, since, as scholars pointed out, no quantum leap for european political parties could have been conceivable without a strong enhancement of Parliament's role within the Community's institutional framework; however, it was also true that – on the reverse side of the medal – Parliament would have never gained a central role in the mentioned framework without the creation of a true European political arena with European political parties being its most significant players. It is precisely for this reason that, despite the initial sidelining – both on the academic and institutional side – of the debate on party federations during the decade that followed the first direct elections, the issue was put again on the agenda at the turn of the '80 and the '90s, when the integration process itself experienced a notable breakthrough[86]. As a matter of fact, at the time, the Community was at the height of its constitutionalizing process, which had been primarily carried out by the Court of Justice of the European Communities by means of its decisions, which ensured both the protection of fundamental rights as general principles and the realization of the common market by means of a uniform application and interpretation of the law[87]. Right about that time, in opinion 1/91, the judges in Luxembourg seized the opportunity to clarify the nature of the EEC Treaty, which «constitute[d] the constitutional charter of a Community based on the rule of law. As the Court of Justice has consistently held, the Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member

[86] Cfr. T. RAUNIO, *The European perspective. Transnational party groups in the 1989-1994 European Parliament*, London and New York, 1997, 15: «During the 1980s scholarly interest in transnational parties declined, but the relaunch of the integration process during the last decade has led to a renewed interest in the role of transnational party co-operation».

[87] As far as the protection of fundamental rights within the Community, see at least Court of Justice of the European Communities, case C-29/69, *Erich Stauder c. City of Ulm - Sozialamt*, [1969] ECR 419; Court of Justice of the European Communities, case C-11/70, *Internationale Handelsgesellschaft mbH c. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1970] ECR 1125; as far as the application of European law is concerned, see instead Court of Justice of the European Communities, case C-6/64, *Flaminio Costa v. ENEL* [1964] ECR 585; Court of Justice of the European Communities, case C-26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1. On general principles of the European Union, see ex plurimis A. VON BOGDANDY, *Founding principles*, in A. VON BOGDANDY, J. BAST (eds), *Principles of European constitutional law*, Oxford, 2009, 11ff.

States but also their nationals»[88]. In sum, according to the Court of Justice, the European legal order was governed by a Constitution *strictu sensu*[89]. It was in this favourable climate that another seminal step of the integration process was made in 1992, namely the conclusion of the Maastricht Treaty, that undoubtedly marked the beginning of a whole new phase in the process of creating an ever closer union among the peoples of Europe. As a matter of fact, among the several innovations, the Treaty established a new European Union founded on the Communities, provided for fundamental changes in the powers, competences and procedures of many European institutions (while founding a new one: the European Central Bank), introduced the citizenship of the Union and an agreement on social policy. Overall, in Maastricht the Community abandoned economic integration as its sole possible perspective, thus embracing a new, social, one, that was meant to mark the official, formal birth of the «Community based on the rule of law» that the Court of Justice was speaking about just few years before.

1.3 The «constituent phase». Maastricht's party article (art. 138A) and the road towards an European political parties statute

Such an occasion was seized for introducing a "party article" in the new Treaty on European Union: art. 138A[90]. According to the new provision, «political parties at European level are important as a factor for integration within the Union. They contribute to forming a European awareness and to expressing the political will of the citizens of the Union». The introduction of such an article was intended to

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88 Court of Justice of the European Communities, Opinion 1/91 (EFTA) [1991] ECR I-6079. Similarly, and even before, see Court of Justice of the European Communities, case C-294/83, *"Les Verts" v. European Parliament* [1986] ECR 1339, par. 23, where the Court labels the Treaty as a «basic constitutional charter».

89 This meant that «the normative force of European law derives no longer from the normative foundations of international law. The ultimate normative base within Europe – its "originality hypothesis" or "*Grundnorm*" – are the European treaties as such». See R. SCHÜTZE, *European constitutional law*, Cambridge, 2012, 61.

90 S. HIX, *Parties at the European level*, cit., 528: «The party article was introduced into the agenda of the Maastricht Treaty negotiations at the last minute, by Wilfried Martens – the Belgian Prime Minister and the President of the European's People Party. However, the idea has originated in the Joint Meetings of the Presidents of the three main EU party federations». This demonstrates that the inclusion of art. 138A in the Maastricht Treaty was intensely lobbied by the same Europarties, which were interested in a more profound institutionalization.

promote, within the rather weak European political system, the Copernican revolution that – albeit at first – experts in the Member States wished to get by means of the already known uniform electoral procedure, whose regulation, according to them, should have included the formal recognition of European political parties within the Community's institutional system[91]. Relying again on the useful triepelian categories describing the relationship between parties and the State, we can thereby affirm that the party article provided for by Maastricht's Treaty determined a constitutionalization of a European party dimension without any previous formal legal recognition of the same dimension (*Periode der Anerkennung und Legalisierung*), thus confirming that the triepelian model identifies ideal types rather than monolithic situations, an immutable logical sequence or a foolproof historico-political law[92]. The decision to embed a party dimension in the Treaty proved to be both far-sighted and overly optimistic: as a matter of fact, the inclusion of a party article determined an institutionalization of

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91 Proposal of the Guazzaroni Working Group (Gruppo di lavoro Guazzaroni), in Circolo europeo, *Seminario internazionale su: La legge elettorale europea del 1984*, Milan, 1982, 45ff: «La nascita di partiti politici europei non può essere il frutto di una evoluzione puramente naturale, ma che necessita di impulsi sia politici che "istituzionali" (…). La legge elettorale europea non può non farsi carico della necessità di non soltanto rispettare ma anche promuovere quella che possiamo chiamare la sperimentazione partitica, assicurando che una pluralità di strutture politiche esista e possa compiutamente esprimersi. (…) La legge elettorale europea doovrebbe quindi fare menzione dei "partiti europei" in modo da favorirne l'identificazione in una sorta di status formale e di agevolarne il ruolo, in modo sostanziale, nel corso della campagna elettorale». The Guazzaroni Working Group was made up of prominent italian scholars and experts: Enrico Boaretto, Gianni Bonvicini, Cesidio Guazzaroni, Fulco Lanchester, Gerardo Mombelli, Antonio Papisca, Enrico Vinci. On the intentions of the party article promoters, see S. HIX, *op. loc. ult. cit.*: «Among a number of arguments, the federations' Presidents emphasized that a constitutional reference to parties would establish the legal role of parties, firstly for "integration in the Union" and, secondly, as expressors of the "political will"of Europe's citizens». The approval of a uniform electoral procedure remains a mere Treaty objective also in the Maastricht Treaty. See the new formulation of art. 138, paragraph 3: «The European Parliament shall draw up proposals for elections by direct universal suffrage in accordance with a uniform procedure in all Member States. The Council shall, acting unanimously after obtaining the assent of the European Parliament, which shall act by a majority of its component members, lay down the appropriate provisions, which it shall recommend to Member States for adoption in accordance with their respective constitutional requirements».

92 See M. LUCIANI, *Partiti e forma di governo*, in *Nomos. Le attualità nel diritto*, 3/2018, 2: «Non è detto affatto, invero, che nella concreta esperienza costituzionale la *Bekämpfung*, l'*Anerkennung*, la *Legalisierung* e l'*Inkorporation* si susseguano esattamente nell'ordine in cui Triepel le ha elencate, né è detto che in una medesima fase ordinamentale esse si presentino necessariamente nella loro forma pura, essendo invece possibili commistioni di istituti o di soluzioni normative proprie dell'uno o dell'altro tipo, magari soltanto per periodi limitati o in fasi di transizione. Trattare la sistematica triepeliana come una sorta d'infallibile legge storico-politica sarebbe un errore, dunque, in mancanza di evidenze probatorie.

the existing European party federations[93]. First, the existing federations renamed themselves as "parties"[94]; second, in the immediate aftermath of the Treaty's signing, all of them experienced an internal organisational development that resulted in a deep modification of their statutes: without focusing on every single experience, it can be said that – generally speaking – the internal decision making process became more complex, new organs were established (such as the Party Leaders' Conference, which was provided for by the three main parties' statutes) and the organizational aims were better specified[95]. As scholarly pointed out, the internal organizational development of party federations was a necessary step in order «to concretise the identification of national parties with a specific set of supranational commitments»[96] and, thus, to develop those interests that would have determined the organization's preservation over time. However, organizational development alone ended up being useless or at least of little use in relation to the key objective to be achieved: namely, the creation of entities that could effectively carry out parties' traditional tasks, such as the structuring of the

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93 As far as the "institutionalization" concept is concerned, see A. PANEBIANCO, *Political parties: organization and power*, Cambridge, 1988, 53. «[Institutionalization] implies the passage from a "consumable" organization (i.e. a pure means to certain ends) to an institution. The organization slowly loses its character as a tool: it becomes valuable in and of itself, and its goals become inseparable and indistinguishable from it. (…) There are essentially two processes which develop simultaneously to bring about institutionalization: the development of interests related to the organization's preservation (those of the leaders at the different levels of the organizational pyramid); and the development of diffuse loyalties».

94 The Confederation of Socialist Parties of the EC (CSPEC) became the Party of European Socialists (PES) in November 1992; the Green Coordination became the European Federation of Green Parties (EFGP) in June 1993; the Federation of European Liberal, Democrat and Reform Parties (ELDR) became the European Liberal, Democrat and Reform Party in December 1993. See T. RAUNIO, *Political interests: the European Parliament's Party Groups*, in J. PETERSON, M. SHACKLETON (eds.), *The Institutions of the European Union*, Oxford, 2012, 352: «The constitutional recognition in the form of the Party Article in Maastricht Treaty contributed to the consolidation of Europarties. With the exception of the EPP, which had already been founded back in 1976, the other federations of national parties were quickly turned into Europarties».

95 The '90s statutes reforms are extensively described in S. HIX, C. LORD, *Political parties in the European Union*, New York, 1997, 177: «The party federations have established considerably more complex organisations since their creation. There has also been a clearer definition of when and why different voting procedures should be used: majority votes for day-to-day management, and unanimity for medium and long-term policy objectives. Finally, in the three main party federations, Party Leaders' Meetings have emerged as the main organs for coordinating policy on European issues in the domestic and European arenas. However, the EFGP does not fit this pattern. On the one hand, the Green federation is at the level of development of the other federations in the 1970s and 1980s. On the other hand, the EFGP is a fundamentally different type of party organisation altogether: based on the coordination of Green parties inside and outside the EU (like a Socialist or Liberal International, or the EUCD)».

96 S. HIX, *Parties at the European level*, cit., 542.

vote, interests aggregation and recruitment of political leaders[97]. Notwithstanding the intention that transpired from art. 138A, which entrusted European parties with some of those standard tasks («forming a European awareness» and «expressing the political will of the citizens»)[98], the EU's institutional system was (and is) shaped in a way that even direct elections to the European Parliament – the only dimension where European parties could play a (secondary) role[99] – «[didn't] lead to the "formation of government" or to the "formation of public policy"»[100] ; this is in addition to the already known deficiencies attributable to the dominance of the national dimension both during electoral terms and in the parties' internal decision making process[101]. In this sense, the inclusion of a party article in the Maastricht Treaty resulted in a overly-optimistic operation, that should have been accompanied by a (great) number of indispensable structural reforms. To be fair, however, the choice was partly far-sighted because it indirectly promoted the mentioned organizational development and, thus, an increasing (and beyond all necessary) institutionalization. And not only that: art. 138A – whose rather «unrealistic»[102] formulation openly revealed the optimistic outlook of its promoters, who viewed European parties as an integration factor notwithstanding a clear awareness about their powerlessness – was the starting point of a fruitful discussion on the future steps to be taken in the path leading to a correct collocation of European political parties in the European Union's legal order. As a matter of fact, even then scholars felt that «the full institutionalization of the party federations [would have required] a formalization of the legal

97 On political parties essential features, see *supra* fn. 75 (King).

98 In this respect, scholars have spoken about a pre-political function and a both regenerative and pedagogical mission that lies behind the formulation of art. 138A of the EC Treaty. See M. DECARO, C. FASONE, *op. cit.*, 206.

99 The other dimension where European political parties from the 90s onwards started to play a relevant role are the Party Leaders' Meetings that are usually held before European Councils. This then-novel party political dynamic will be extensively discussed and analysed in the fourth chapter of this work.

100 S. HIX, *Parties at the European level*, cit., 534.

101 All of this led scholars (*ibidem*) to affirm that «in this institutional framework, political parties will not be able to operate as the main agents linking public will and political decisions. (…) Under the present institutional system, the EP elections will only ever be "second order national contests"».

102 Ivi, 529.

framework for parties at the European level»[103]. This formalization could have followed a minimalist approach – which would have led to the strengthening of the tie between federations and political groups in the European Parliament – or a maximalist approach leading to «an EU regulation establishing European parties as legitimate organizations for the expression of supranational (…) values and interests»[104]. In order to pursue the most ambitious objective, namely the adoption of a comprehensive regulation on the matter, a strong legal basis would have been necessary; as widely supported in doctrine, since the party article didn't give any indication on issues such the nature of European political parties or the procedure to apply for funding, art. 138A was an insufficient legal basis for the adoption of a regulation that finally clarified those questions[105]. Already in 1992 – right after the Treaty was finalized (and even before the mentioned name change occurred) – the three major party federations presented a "Joint paper on the political follow-up to article 138A", which called for a "European political party statute".

1.3.1 Clarifying European political parties' constitutional mission: the "Tsatsos Report"

The turning point was few years later, in 1996, when the "Tsatsos Report" was presented. The European Parliament's Committee on Institutional Affairs – following the federations' lobbying activity relating to the approval of a general regulation on European parties – requested authorization to draw up a report on the constitutional status of the European political parties. Dimitri Tsatsos, a greek MEP and legal scholar who was at the time director of the Institute for German

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[103] Ivi, 546.

[104] *Ibidem*. Furthermore, the Author deems that: «There will need to be a translation of the Maastricht party article into a formal legal framework to facilitate the financial security and continuity of parties at the European level and to guarantee a stable position for the party federations in the EU institutional framework», thus justifying the need for a comprehensive EU regulation on political parties on the grounds that, in this way, federations would have enhanced their stability both from a financial and an institutional point of view.

[105] See F. SAITTO, *European political parties and European public space from the Maastricht Treaty to the Reg. No. 1141/2014*, in *Rivista di Diritti Comparati*, 2/2017, 29. Partly *contra*, see S. HIX, C. LORD, *Political parties*, cit., 75: « The legal basis of the Article is unclear, but parties may be able to use it to establish a legal and financial framework in the EU that is more conducive to their interests».

and European political parties law[106] – was appointed rapporteur; the document essentially had three goals: «on the one hand to stimulate political initiative, on the other to set forth and clarify the "constitutional" mission and framework defined by Article 138A of the EC Treaty (…) and the manner in which their continued development can be encouraged by the institutions of the European Union»[107]. The search for a «suitable legal form» that could allow the performance of this mission is the most important target of the Report, since it would have hopefully constituted the basis for the following normative interventions on the topic. The suggestions provided for by the Tsatsos Report stem right from the "constitutional" mission of European political parties defined by art. 138A, which entails both rights and obligations. Precisely those legal positions should constitute – according to the report – the content of a future European regulation concerning European parties. In particular, the latter should enjoy the following rights : to «voice an opinion on (…) European policy and seek representation in the European Parliament»; to have an organizational structure that copes with their constitutional mission»; to have a «constant activity in society»; to «be represented and transnationally active in at least one third of the Member States of the Union». Together with the listed rights – which, however, seem to have also an obligatory nature – the Report encloses a series of obligations that European parties should comply with; namely, they should: have an «organizational statute and a basic political programme, to which European citizens must have access»; «respect, in their programme and practical activities, the fundamental constitutional principles enshrined in the Union Treaty» and, finally, they also should «have the option of acquiring legal personality» that would ensure an institutional ability to take action. Moreover, the Tsatsos report lays the foundations for a comprehensive European party financing regulation; the issue was of vital importance, since parties «have a constitutional mission that

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106 Who, following the inclusion of a party article in the Maastricht Treaty, spoke about the existence of a «developmental law» on European political parties that was gradually emerging thanks to the federations' efforts, «according to which they rise out of parliamentary cooperation». See D. TSATSOS, *European political parties? Preliminary reflections on interpreting the Maastricht Treaty article on political parties (Article 138A of the EC Treaty)*, in *Human Rights Law Journal*, 1-3, 1995, 4.

107 European Parliament's Committee on Institutional Affairs, Report on the constitutional status of the European political parties, part II (The objective), 30 october 1996.

goes beyond acting as an association for their members (…) and can be described as "disseminating information and engaging in public debate and education"», but the European ones were actually financially dependent since their creation from their respective political groups in the European Parliament[108]. That said, the Report called for a «constitutionally irreproachable» form of party financing whose contributions should have satisfied the following criteria: being «based on explicit authorization granted by a Community legal act passed specifically for this purpose» and being «shown separately in the Community budget»; being «distributed in accordance with the principle of equality of opportunity with newly established parties given a fair chance, with account being taken of the number of Member States in which the parties are represented»; being «tied to the fulfilment of the mission at European Union level resulting from art. 138A»; being «linked to the requirement that the recipients disclose their financial circumstances»; finally, the contributions should also have given «the recipients a financial incentive to strengthen their roots in society and seek greater financial authority»[109]. The ambitious goals set in the Report should have been achieved by means of two legal acts[110], namely a «framework regulation on the legal status of European political parties» and a «regulation on financial support for European political parties from budget resources», which – however – could have been adopted in a much easier way, as the rapporteur specified, if an addition to the Treaty was endorsed, so as to amend art. 138A by inserting prescriptions aimed at clarifying the legal position of European parties in the wake of the Greek and the Austro-Italian proposals made in the same year[111]. At the same time, the

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[108] To such an extent that the same Tsatsos Report underlines that «since the major political families established their European umbrella organisations as European political parties, ways and means have been found to support their developmental work from Community resources. (…) In their present form, however, they are not clearly recognizable as such in the [European Parliament's] budget, nor is there an appropriate enabling rule for them». In this respect, see T. RAUNIO, *The European perspective*, cit. 6.

[109] All the textual quotations made so far are taken from part III (the substance of the constitutional mission) of the "Tsatsos Report".

[110] Cfr. part IV of the "Tsatsos Report" (legal forms).

[111] The Greek Government proposed to add a second paragraph to art. 138A, that read as follows: «To clarify their legal status and to improve the factual conditions for the fulfilment of their mission, legislation may be adopted pursuant to the codecision procedure». The Austrian and the Italian Governments, instead, signed a memorandum on Union citizenship which provided for a brand new article 8g that reads as follows: «Citizens of the Union shall have the right to freely

rapporteur seemed well aware that the proposals provided for by the document he was supervising would have had an impact only «if European political parties [were] to develop beyond the predominantly parliamentary umbrella organizations they [were at the time] into vigorous parties rooted in society»[112].

1.4 Implementing the party article: Regulation (EC) n. 2004/2003.

After the approval of the European Parliament's resolution which welcomed the remarks made in the Tsatsos Report, the party federations' journey towards their rooting in society has been frustrated by the lack of political will to ease this process. The path that would have led to the adoption of a uniform electoral procedure – probably the mostly needed reform to finally give federations a most prominent role, pursuant to their constitutional mission – has proved to be fraught with obstacles: crucial indications were provided for by the "Anastassopulos Report", that aimed at putting again the issue on the agenda and, in fact, resulted in both a Parliament's resolution and, above all, in a Council decision which recommended a series of provisions to be adopted by the Member States «in accordance with their respective constitutional requirements»[113]. Consequently,

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associate in the form of political parties operating at European level which are based on the principles of liberty, democracy, respect for human rights and fundamental freedoms and of the rule of law. Such parties shall contribute by democratic means to forming a European awareness and to expressing the political will of the citizens of the Union. Citizens of the Union shall have the right to participate in trade unions and other associations and groups at European level established in accordance with the legal provisions of a Member State or the Community». It's quite evident that the Austro-Italian article draws inspiration in its formulation from art. 49 of the Italian Constitution. According to the rapporteur, the Austro-Italian proposal should have been accepted as an amendment to the existing party article and shouldn't have been included separately in the Treaty. In this way «both the constitutional status of European citizenship and the constitutional mission of European political parties would [have been] strengthened».

112 Part III of the "Tsatsos Report" (the substance of the constitutional mission), paragraph 15.

113 See Council Decision 2002/772/EC amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Decision 76/787/ECSC. In particular, see the following amended versions of the Act's provisions: art. 1, par. 1: «In each Member State, members of the European Parliament shall be elected on the basis of proportional representation, using the list system or the single transferable vote»; art. 2: «In accordance with its specific national situation, each Member State may establish constituencies for elections to the European Parliament or subdivide its electoral area in a different manner, without generally affecting the proportional nature of the voting system; art. 2A: «Member States may set a minimum threshold for the allocation of seats. At national level this threshold may not exceed 5 per cent of votes cast»; art. 6, par. 2: «From the European Parliament elections in 2004, the office of member of the European Parliament shall be incompatible with that of member of a national parliament». As can be easily inferred, notwithstanding the commendable attempt to reform the

the 1999 European Parliament's elections were held again on the basis of national electoral laws and saw European parties playing the well known cosmetic role[114]. Anyway, a significant step forward in the light of the suggestions provided for by the Tsatsos Report has been made by means of two key interventions: first, the Treaty of Nice (2001) added a second paragraph to the party article (art. 191 of the EC Treaty after the Amsterdam renumbering in 1997), which then stated as follows: «The Council, acting in accordance with the procedure referred to in Article 251, shall lay down the regulations governing political parties at European level and in particular the rules regarding their funding»; in this way, following the demand coming from the EU Court of Auditors – which, the year before, claimed for the inclusion of a legal basis enabling direct financing of European political parties [115] – a clearer legal foundation for the adoption of a comprehensive regulation was set. By leveraging on the newly established provision, the Commission formulated a proposal that – if voted in a short span of time – would have allowed to celebrate the following European elections with a party regulation into force. Regulation (EC) n. 2004/2003 of the European Parliament and of the Council was finally approved on 4th November 2004 and undoubtedly represented the first attempt to lay down common ground rules on European political parties, in compliance with their constitutional mission provided for the Treaties. The 2003 regulation is a rather short piece of EU

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principles that governed European election, the Decision's provisions are far from being a uniform European electoral procedure. In this respect see the new art. 7 of the Act concerning the election of the representatives of the European Parliament: «Subject to the provisions of this Act, the electoral procedure shall be governed in each Member State by its national provisions. These national provisions, which may if appropriate take account of the specific situation in the Member States, shall not affect the essentially proportional nature of the voting system».

114 In this respect, the enlightening words from Klaus Pöhle, a political scientist who was asked to write a paper by the European Socialists, should be here recalled: «If the European political parties do not play an important role in the expression of the political will of the citizens of the European Union, but still want to act as their speakers towards the European institutions, they present themselves as a new form of political party, where citizens are no longer important but only the work of a small élite. The French Parti Socialiste proposes for this purpose the term "political cartel"». See K. PÖHLE, *Europäische Parteien – für wen un für was eigentlich?*, in *Zeitschrift für Parlamentsfragen*, 3/2000, 614. See also H-H VON ARNIM, M. SCHURIG, *The European party financing regulation*, Münster, 2004, 37: «Only with the existence of a homogeneous European election system with equal voting rights could European parties really fulfil the functions laid down in art. 191 EC. Then they could present candidates on transnational lists, could promote the integration of the Union, and express the political will of the citizens».

115 Court of Auditors Special Report 13/2000, 25th May 2000. The Court asked for the inclusion of a specific legal basis since it found «significant anomalies» in the Europarties' funding mechanism, that was strictly linked to political groups in the European Parliament.

legislation, establishing a minimalist reference framework on a single aspect of party dimension at European level, that is party funding[116]. However, she setting of common rules on this area was taken as a chance to clarify other crucial points that had been guiltily set aside until then. First of all, the nature of European political parties. According to art. 2, «political party means an association of citizens which pursues political objectives, and which is either recognised by, or established in accordance with, the legal order of at least one Member State»; furthermore, the regulation specifies that an alliance of political parties represents «a structured cooperation between at least two political parties»; finally, according to the 2003 legislation, «political party at European level means a political party or an alliance of political parties which satisfies the conditions referred to in Article 3». This latter article, then, allows us to better understand what conditions have to be met by any entity that wish to be recognized as political party at European level. First, it must have «legal personality in the Member State in which its seat is located»; then, it must be represented, in at least one quarter of the Member States, «by Members of the European Parliament or in the national Parliaments or regional Parliaments or in the regional assemblies»[117]; as an alternative to the previous requirement, the entity must have received, in the same minimum number of Member States, «at least three per cent of the votes cast in each of those Member States at the most recent European Parliament elections»; in addition, the entity who wishes to be recognized as European party «must observe, in particular in its programme and in its activities, the principles on which the European Union is founded, namely the principles of liberty,

116 Cfr. M. DECARO, C. FASONE, *op. cit.*, 208: «Questa disciplina dichiara espressamente, nel secondo considerando, di rappresentare solo l'embrione di una legge europea sugli statuti dei partiti, di considerare sperimentali alcune disposizioni e di riguardare prevalentemente il finanziamento, anch'esso oggetto di possibili modifiche». See also F. SAITTO, *op. cit.*, 35: «It [the regulation] was not very detailed and was mainly conceived to cope with the funding task».

117 According to doctrine, this provision deserves credit for strengthening the relationship between European party federations and their corresponding entities at domestic and European intra-parliamentary level: namely, national affiliated political parties and political groups in the European Parliament. See F. SOZZI, *op. cit*., 161: «Lo statuto appare anche in grado di saldare in modo più efficace che in passato le diverse componenti che operano a livello europeo, spingendole verso una maggiore cooperazione ponendo quindi le basi per una effettiva istituzionalizzazione degli europartiti. Infatti, anche se formalmente lo statuto identifica i partiti europei con le federazioni» [but, *contra*, see *infra* in the text and fn. 118] «le norme previste per la loro costituzione e per l'accesso al finanziamento impongono un collegamento con le altre due componenti».

democracy, respect for human rights and fundamental freedoms, and the rule of law»[118]; finally, «it must have participated in elections to the European Parliament, or have expressed the intention to do so». As could be easily inferred, according to Regulation n. 2004/2003, European political parties are not necessarily just party federations; and besides, a «political party» is nothing more than an «association of citizens which pursues political objectives»; both political parties and alliances could have access to funding, once proved the respect of the requirements set out in art. 3. However, the then-existing European parties were actually "party parties" which did not provide – if not in a few cases – for individual membership or direct citizens involvement. Then, according to doctrine, European political parties as framed by the 2003 Regulation were basically non-existing entities (associations of citizens that participate in the European elections) or, instead, entities whose nature did not correspond to the one outlined by art. 191 of the Treaty (since party federation did not directly participate in European elections and, then, couldn't present themselves as factors which contribute to expressing the political will of the EU citizens)[119]. Noted that the problem of the nature of European political parties seemed far from being solved by means of the 2003 intervention, it should be here recalled the main

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118 An exhaustive reconstruction of the institutional positions concerning the inclusion of a "rule of law clause" in the European party regulation can be found in J. MORIJN, *Responding to "populist" politics at EU level: Regulation 1141/2014 and beyond*, in *International Journal of Constitutional Law*, 2/2019, 624ff. In particular, it can be underlined that the EU Commission, in its original proposal (Proposal for a Council Regulation, COM(2000)898, 13th February 2001), justified the inclusion of such a clause on the basis that «a European political party must be attached to [these principles] (…) it would not be acceptable for a party that preaches restrictions on rights, intolerance or xenophobia, whether it is for or against European integration, to enjoy public financial support». On the contrary, the European Parliament in its report (rapporteur: Ursula Schleicher, A5-0167/2001, 3rd May 2001) referred to the clause as a way to «provide evidence of the democractic structure of a party». At Council level, the insertion of such a clause found the strong opposition of Austria, Italy and Denmark, whose governments were supported also by nationalist-populist parties (FPÖ, Lega Nord, Dansk Folkeparti), which felt that the inclusion of a rule of law clause was meant to outlaw them. The problem of Europarties and the respect of the values on which the EU is founded will be properly addressed *infra*.

119 See in this respect H-H VON ARNIM, M. SCHURIG, *op. cit.*, 29ff: «The question remains, whether the organisations mentioned and funded by the Regulation actually are "political parties at European level" in the sense of art. 191. For real European associations of citizens the answer will undoubtedly be positive. But unfortunately such associations of citizens do not exist and their emergence is hindered, if not prevented by the Regulation. Mentioning them therefore seems to be a diversion. What on the other hand already exists are associations of parties which are aimed at by the Regulation. Whether these party parties can be subsumed under the notion of political parties in art. 191 EC is very doubtful». Cfr. F. SAITTO, *op. cit.*, 36. Here the Author deems that art. 2 has introduced «two different types of European parties».

principles governing the access to funding from the EU general budget. According to art. 4, political parties wishing to apply with the European Parliament had to: prove the satisfaction of the already listed conditions provided for by art. 3; present «a political programme setting out the objectives of the political party at European level» and «a statute defining in particular the bodies responsible for political and financial management as well as the bodies or natural persons holding, in each of the Member States concerned, the power of legal representation». Once that is done – and bearing in mind that the European Parliament has the power (art. 5) to verify that parties keep complying with the mentioned conditions[120] – the applicant is granted access to funding, which is distributed annually as follows (art. 10): 15% in equal shares; 85% among parties which have elected members in the European Parliament, in proportion to the number of the latter[121]. According to the 2003 Regulation, financial contributions coming from the EU general budget – which may only be used to meet expenditure directly linked to the objectives set out in the parties' political programme (art. 8) – may not exceed 75% of the European party's budget (art. 10, paragraph 2). This means that the remaining 25% should have been covered by third party contributions (in compliance with the limitations provided for by art. 6, letter c)[122]. Doctrine has highlighted that the mentioned prescription led to an

120 The European Parliament's power to verify the continuing respect of the conditions set out, especially as far as the rule of law is concerned, will be further analyzed *infra*, in relation to the Regulation currently into force.

121 This specific provision actually rushed the process of European party creation, which somehow led to the establishment of federations whose member parties were only present at domestic level and represented only a small portion of the European electorate. See F. SOZZI, *op. cit.*, 162 ff. In fact, national political parties saw the new rules both as an incentive to European parties establishment and as an opportunity to have access to a new money supply channel. In this respect, see M. DECARO, C. FASONE, *op. cit.*, 207: «Il finanziamento è visto dai partiti politici nazionali come ulteriore risorsa cui poter attingere». However, see art. 7 of Regulation (EC) n. 2004/2003: «The funding of political parties at European level from the general budget of the European Union or from any other source may not be used for the direct or indirect funding of other political parties, and in particular national political parties, which shall continue to be governed by national rules».

122 «A political party at European level shall (…) not accept: anonymous donations, donations from the budgets of political groups in the European Parliament, donations from any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it, donations exceeding EUR 12000 per year and per donor from any natural or legal person other than the undertakings referred to in the third indent and without prejudice to the second subparagraph. Contributions from political parties which are members of a political party at European level shall be admissible. They may not exceed 40 % of that party's annual budget». See also recital 8 of the

increase of party federation's dependence from (bigger and stronger) national parties, whose financial power would have more easily allowed to meet the mentioned requirement[123]. Furthermore, it should be underlined that the EU legislator has correctly put a series of rules aimed at enforcing the principle of transparency; as a matter of fact, according to art. 6 of the 2003 Regulation, European parties must publish their revenues and expenditures and a statement of their assets and liabilities annually and, moreover, declare their sources of funding by providing a list specifying the donors and the donations received from each donor, with the exception of donations not exceeding EUR 500.

1.4.1 Weaknesses of the 2003 Regulation and the road to Lisbon

Regulation (EC) n. 2004/2003 had undoubted merits, since it introduced many innovations, the most significant of which are the creation of a funding framework inspired by the transparency principle, the strengthening of the link between European parties and their national and intra-parliamentary correspondings, the inclusion of a "rule of law clause" among the requirements for the access to funding and, finally, the obligation for European parties to be equipped with a statute and a political programme. However, the strengths were outweighed by the weaknesses that this piece of legislation presented; notwithstanding the good intention of enhancing the poor European political dimension by making Europarties financially autonomous, the Regulation lacked detailed provisions concerning the organization of European political parties, with specific reference to the much discussed problem of internal democracy ; moreover, no clear rules concerning the nature of Europarties was present; these deficiencies alone

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Regulation's preamble: «In accordance with Declaration No 11 on Article 191 of the Treaty establishing the European Community annexed to the Final Act of the Treaty of Nice, the funding granted pursuant to this Regulation should not be used to fund, either directly or indirectly, political parties at national level».

123 See again F. SOZZI, *op. loc. ult. cit.*: «I partiti nazionali, soprattutto quelli più forti in termini di grandezza e di risorse finanziarie, sono resi (…) determinanti per la formazione degli stessi europartiti in virtù della norma inserita nello statuto, per cui l'erogazione dei fondi pubblici è subordinata ad un cofinanziamento proveniente da altre fonti, in misura pari al 25% del totale. Tali risorse possono essere recuperate solamente a livello nazionale, sia direttamente, attraverso i contributi dei partiti nazionali (con un limite del 40% del totale) [cfr. *supra*, fn. 122], sia attraverso i contatti dei quali i partiti stessi dispongono nella società e nell'economia».

prevented any possibility to refer to a common model[124]. Essentially, this rather unambitious piece of legislation, together with the politically underdeveloped context where it was supposed to operate, was the proof of the EU's inability to carry out the constitutional mission provided for art. 191 of the EC Treaty[125]. In fact, party federations remained unable to form a European political awareness, since the 2003 Regulation by no means contributed to the embedding of Europarties in society – that was (and is) the main path to follow in order to perform an educational task aimed at fostering citizens' European consciousness – nor allowed federations to put European topics on national media's agenda. In addition, party federations – following the mentioned Regulation – didn't obtain any competence that would have allowed them to carry out the other constitutional task provided for by the Treaty, namely the expression of citizens' political will; as a matter of fact, in the first place the latter may only be legitimately expressed once citizens have made their direct contribution in the process that leads to the drawing up of the party's programme: this didn't happen, since individual membership was not contemplated by the majority of European parties[126] and national delegates' contribution to the internal will formation is not (at least generally) supported by a direct legitimation coming from his or her constituency; secondly, the expression of citizens' political will finds its deep meaning in its translation into facts: even assuming that Europarties were able to express this will, this would have never been materialized, since party federations didn't (and do not) participate in European elections (national parties, as we already know, are the key players in this arena, since both the uniform electoral procedure and transnational lists remained on paper), their role being limited – in

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124 According to A. COSSIRI, *Partiti e rappresentanza nella dimensione interna e sovranazionale*, Rome, 2018, 207, «Su questo profilo ha inciso in particolare la varietà dei modelli di partito esistenti in ambito europeo, che (…) vanno dalla tradizione inglese secondo cui quasi nulla può essere imposto dalla legge alle formazioni politiche, autonome nell'organizzarsi, fino al modello tedesco, che invece prescrive per legge ai partiti regole di organizzazione interna, circa la selezione dei candidati e i diritti degli associati».

125 Cfr. F. SAITTO, *op. cit.*, 35: «The [European parties'] democratic function in the public sphere and their role in the integration process seemed secondary».

126 Unfortunately, at the time, the situation has not changed. As pointed out by F. SOZZI, *op. cit.*, 177, «la scelta di non permettere una membership individuale è congiunta alla volontà da parte dei partiti nazionali di continuare a svolgere un ruolo preminente al loro interno. Allo stato attuale, i partiti europei costituiscono ancora una associazione di partiti e non un gruppo di individui al cui interno è la contrattazione tra partiti a dominare e non l'aspetto ideologico e programmatico».

the specific electoral framework – to preventing «any glaring discrepancies between the campaign efforts of the various parties»[127].

The mentioned deficiencies of the 2003 Regulation, the marginal role of party federations during the European turnout the same year and, finally, the uncertainties that surrounded the plan for building a political Union were all reflected in the eloquent absence of European parties from the round table talks that were supposed to lead to a Constitution for Europe[128]. As widely known, the Treaty that resulted from the work made in the 2003-2004 Intergovernmental Conference and signed in Rome on 29 October 2004 was rejected by means of a referendum in France and in the Netherlands, thus marking the first severe setback of the European integration process[129]. In the meantime, the European Union reached the peak of its enlargement process in 2004, when ten new States joined the supranational institution, and many new European party federations appeared on the stage, also as a result of the new rules on party funding[130]. In the time that

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127 See *supra*, fn. 77. Add to this the fact that the form of government (or *governance*) of the European Union is shaped in a way that the executive power does not stem from the majority in Parliament, which, for its part, is not required to vote confidence to the Commission. Thus, even if European parties could directly participate in elections, their contribution to government formation would be limited.

128 See M. DECARO, C. FASONE, *op. cit.*, 207. Here the Authors speak about an absence from the constituent debate, that was promoted during the Laeken European Council in 2001 by means of the Convention on the Future of Europe, chaired by the former French President Válery Giscard d'Estaing. The Authors deem that «il sito aperto per la consultazione, di cui i partiti politici europei potevano farsi registi, avrebbe potuto rappresentare una prima tecnologica occasione di discussione e maturazione di identità e obiettivi comuni. Si è trattato, invece, di un'ulteriore occasione mancata, anzi di un vero fallimento».

129 On this topic, with specific reference to the outcome in terms of legal-constitutional debate, see S. MANGIAMELI, *La Costituzione europea*, in F. D'AGOSTINO (a cura di), *L'Europa e il suo diritto, oggi*, Milan, 2007, 40ff.: «La crisi costituzionale che ha vissuto l'Europa (…) appare sì problematica, ma non nel senso emotivamente sostenuto dai mass media di una fine dell'Istituzione sopranazionale o, quantomeno, dell'impossibilità di dotarla di una Costituzione. (…) La questione scientifica che il diritto pubblico europeo dovrebbe porre non riguarda tanto la possibilità di un documento formale che si qualifichi "Costituzione" (…) ma il rapporto che può sussistere tra la Costituzione (materiale) europea e i Trattati, con i loro specifici contenuti». See, from a different perspective, also A. MORAVCSIK, *What can we learn from the collapse of the European constitutional project?*, in *Politische Vierteljahresschrift*, 2/2006, 219 ff.

130 On the occasion of the first call for financing, eight party federations were granted access to funding. The new ones were the European Free Alliance (EFA), the Party of the European Left (EL), the European Democratic Party (EDP) and the Alliance for Europe of the Nations (AEN) (the last one disbanded in 2009). Cfr. F. SOZZI, *op. cit*., 165: «L'introduzione dello Statuto e, ovviamente, l'opportunità di ricevere fondi per lo svolgimento delle proprie attività ha sicuramente favorito la nascita e il rafforzamento dei partiti a livello europeo, anche se altri fattori hanno influito sul loro processo di formazione. Il ruolo che l'UE ha all'interno dei Paesi membri e la necessità di trovare risposte transnazionali ai problemi economici e sociali hanno creato le

has passed between the sudden stop and the reboot of the integration process, European parties legislation was slightly amended and supplemented, while the debate on the role of party federations slowly (yet partly along the same lines) returned to prominence. On 23rd March 2006 the European Parliament – following the presentation of a new Report by the Committee on Constitutional Affairs, adopted a new resolution on European political parties, thus laying the groundwork of the future interventions on the existing legislative framework. A series of recommendations were provided for by the resolution, primarily concerning the need to fix some issues related to funding that arose during the 2003 Regulation application period (such as, for example, the obligation for the Parliament's Bureau and the Committee on Budgets to agree at the beginning of a legislature on a funding plan over several years in order to give recipients a greater degree of certainty in financial planning)[131]. Furthermore, the resolution also focuses on more general problems affecting the European party dimension and poses crucial questions regarding the establishment of «European lists of European parties for the European elections», on the role that Europarties may play «in referendums on European topics, in European Parliament elections and in the election of the Commission President» and, finally, on the role of European political youth organisations and movements, which – according to the document – «are a vital means of nurturing European awareness and shaping a European identity among the younger generations»[132]. A significant part of the suggestions

condizioni politiche per il raggiungimento di un compromesso necessario tra i diversi partiti nazionali, facendo crollare le diffidenze dei partiti anche più scettici al riguardo».

131 All the detailed proposals for improvement concerning European parties' system of funding may be found in pt. 13 of the European Parliament's Resolution on European political parties (2005/2224(INI)).

132 Ivi, pt. 14. The attention devoted to the analysis of the major deficiencies concerning the scenario where European parties operate also characterizes other sections of the Resolution, such as the one called «the political background» (placed immediately after the preamble), where the Parliament «calls for its Committee on Constitutional Affairs to consider the question of a European statute for European political parties from a legal and fiscal point of view and to draw up specific proposals to that end», in the knowledge that the time was ripe for the approval of «a genuine European party statute which goes further than the Regulation on the funding of political parties at European level, establishing their rights and obligations and enabling them to attain a legal personality based on Community law and effective in the Member States». See also M. DECARO, C. FASONE, *op. cit.*, 208: «Le riflessioni conclusive di questa Risoluzione rilanciano il ruolo dei partiti europei nel dibattito sul futuro dell'Unione per la formazione dell'opinione pubblica europea, con particolare riferimento al referendum, alle elezioni del PE e alla nomina del

coming from the European Parliament were welcomed both by Regulation (EC) n. 1524/2007, which amended the 2003 Regulation, and by Regulation (EC) n. 1525/2007, which amended Regulation (EC, EURATOM) n. 1605/2002 on the financial regulation applicable to the general budget of the European Communities. The two mentioned interventions introduced three innovations in the already existing framework: first, as far as the funding system is concerned, some important proposals put forward by the Resolution were implemented, so that Europarties could improve their planning ability and their capacity to adapt to unexpected political conditions or unforeseen changes to the agenda[133]. In addition, with the aim to support the Europarties' efforts to form a European awareness, Regulation n. 1524 provided that «The expenditure of political parties at European level may also include financing campaigns conducted by the political parties at European level in the context of the elections to the European Parliament, in which they participate (…). These appropriations shall not be used for the direct or indirect funding of national political parties or candidates»[134]. Lastly, the 2007 amendments also introduced a new legal entity named "political foundation at European level", which, according to Regulation n. 1524, «has legal personality in a Member State, is affiliated with a political party at European level, and which through its activities, within the aims and fundamental values

Presidente della Commissione, e con particolare attenzione al ruolo delle organizzazioni e dei movimenti politici giovanili».

133 See Council regulation (EC) n. 1525/2007, art. 1: «The following paragraph shall be added to Article 109 of Regulation (EC) n. 1605/2002: "4. If a political party at European level realises a surplus of income over expenditure at the end of a financial year for which it received an operating grant, part of that surplus up to 25 % of the total income for that year may, by derogation from the no-profit rule laid down in paragraph 2, be carried over to the following year provided that it is used before the end of the first quarter of this following year. For the purpose of verifying compliance with the no-profit rule, the own resources, in particular donations and membership fees, aggregated in the annual operations of a political party at European level, which exceed 15 % of the eligible costs to be borne by the beneficiary, shall not be taken into account. The second subparagraph shall not apply if the financial reserves of a political party at European level exceed 100 % of its average annual income."».

134 On the risks that lie behind this amendment, see G. LÓPEZ DE LA FUENTE, *Pluralismo político y partidos politicos europeos*, Granada, 2014, 223: «Si estudiamos el Reglamento (CE) núm 2004/2003 podemos llegar a la conclusion de que sí es posible que un partido a escala europea pueda complementar las campanha de los partidos nacionales si tienen relación con las elecciones al Parlamento Europeo. Es más, en ningún momento el Reglamento dice que los partidos políticos a escala europea deban presentarse a las elecciones con candidatos proprios, sino que en realidad lo hacen los partidos miembros que pertenecen a él. Y estos partidos miembros non son otra cosa que partidos nacionales de los Estados miembros. Esto puede crear cierta distorsión del objetivo inicialmente previsto y hacer que, en la práctica, las ayudas destinadas a los partidos a escala europea sean gestionadas por los grandes partidos nacionales».

pursued by the European Union, underpins and complements the objectives of the political party at European level»[135]; in essence, European political foundations were originally meant to be «a chance to bridge the gap between the EU and its citizens, on the one hand, and as a way to provide the Europarties, to which the foundations are affiliated, with policy-development tools, on the other»[136]. The present study, however, will focus on European political parties only, without going further into the regulation on European political foundations.

135 See Regulation (EC) n. 1524/2007, art. 1.

136 W. GAGATEK, S. VAN HECKE, *The development of European political foundations and their role in strengthening Europarties*, in *Acta Politica*, 1/2014, 87. On the possible dangers arising from the lack of a clear distinction between European foundations and Europarties, see G. LÓPEZ DE LA FUENTE, *op. cit.*, 227, where a speech by MEP Esko Seppänen is quoted: «Ambas acciones, de partidos y fundaciones, han de ser complementarias y en ningún caso solaparse. Éste es el peligro que acecha, que se creen subterfugios y que "las fundaciones se conviertan en un nuevo vehículo de propaganda"».

Chapter II

Lisbon and beyond: the current regulation on European political parties

1. Party article(s) in the new Treaties

The Lisbon Treaty, signed on 13th December 2007, marked the latest step of the European integration process[1]. In sum, it inherited the majority of the innovations which were meant to be introduced with the European Constitution in 2004[2]; however, compared to the 2004 project, the text agreed in the Portuguese capital[3] was far «more modest»[4], since the whole "constitutional narrative" was actually abandoned[5]. This sort of shyness about the European federalizing process shines through the articles devoted to Europarties both in the Treaty on European Union and in the Treaty on the Functioning of the European Union. The prescriptions originally present in art. 191 of the TEC were split into two different articles. The rules concerning the aims of European political parties formed part of art. 10, paragraph 4, of the TEU, which now states as follows: «Political parties at European level contribute to forming European political awareness and to the will

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1 On the Lisbon Treaty, see at least the contributions present in H-J. BLANKE, S. MANGIAMELI (eds.), *The European Union after Lisbon. Constitutional basis, economic order and external action*, Berlin-Heidelberg, 2012.

2 To the point that doctrine referred to the Lisbon Treaty as the «"substantial reincarnation" of the Treaty establishing a Constitution for Europe». See G. MARTINICO, O. POLLICINO, *The interaction between Europe's Legal Systems. Judicial dialogue and the creation of supranational laws*, Cheltenham-Northampton, 2012, 194.

3 Which was nevertheless rejected by the Irish citizens in the first referendum on the Treaty held in 2008. It was then approved in a second referendum the following year. Ireland had been the only Member State to hold a referendum on the Lisbon Treaty; the other States chose to ratify the Treaty by means of a vote of their national parliaments.

4 S. BINZER HOBOLT, S. BROUARD, *Contesting the European Union? Why the Dutch and the French Rejected the European Constitution*, in *Political Research Quarterly*, 2/2011, 310.

5 For example, «the language has been changed to remove many terms or references that might imply that the EU is being formed into a state-like entity». See I. COOPER, *Mapping the overlapping spheres: European constitutionalism after the Treaty of Lisbon*, paper presented for the EUSA Biannual Conference, Los Angeles, 23rd-25th April 2009, 1, available in www.aei.pitt.edu. According to the Author, «the Treaty of Lisbon's significance is that it supports one model of European constitutionalism and refutes another. The refuted model, which might be called for lack of a better term the "federal" model, imagines that EU law is inherently superior to member state law, and that it is inherently expansive in that it may continually encroach upon member state law. In the supported, pluralist model, EU law coexists with member state law on a roughly equal footing, and EU law is maintained within strict limits in relation to member state law».

of citizens of the Union»; instead, the provision originally provided for by paragraph 2 of art. 191 TEC, namely the legal basis for the approval of a comprehensive regulation on European parties, formed part of art. 224 TFEU, which now states: «The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, by means of regulations, shall lay down the regulations governing political parties at European level referred to in Article 10.4 of the Treaty on European Union and in particular the rules regarding their funding».

1.1 European awareness and will of the citizens: the importance of word positioning

As far as art. 10, paragraph 4, is concerned, the Lisbon Treaty – without repudiating the well-established top-down perspective[6] – deleted any reference to European political parties as «important (…) factor for integration within the Union». This rather incomprehensible choice – at least from the perspective of the incomplete journey of political parties in the European legal system[7] – has been immediately noted by scholars and has been interpreted by some of them in a negative sense, as an awareness of the anti-integration ideology that some Europarties were embracing[8]; other scholars gave a more neutral reading to the mentioned removal, deeming that it was a natural consequence of the inclusion of

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6 Slightly softened by the inclusion of European political parties in art. 12 (freedom of assembly and of association) of the Charter of Fundamental Rights of the European Union, which in Lisbon acquired the same legal value as the Treaties. See *infra*.

7 In this respect, see A. CIANCIO, *European party system and political integration in Europe*, in S. MANGIAMELI (ed.), *The consequences of the crisis on European integration and on the Member States*, Berlin-Heidelberg, 2017, 36: «European parties indeed would truly provide for the necessary integration factors. Indeed, consolidating a structured system of European parties, really bounded with society, would favour the creation, among European citizens, of that sense of common identity necessary to transpose everyone's national identity in a wider contest of supranational dimension. Viceversa, lacking any European-wide political association, functioning first and foremost as tools to foster, even before receiving, citizens' political will conveying it into the Institutions, it becomes difficult to identify the essential integration factor able to replace with a general sense of belonging to the Union the lack of natural cultural identifiers, e.g. a common language». The elimination was officially justified at European level as a needed removal of an evaluative expression; see in this respect A. COSSIRI, *op. cit.*, 204, fn. 8.

8 I. INGRAVALLO, *Articolo 224 TFUE*, in A. TIZZANO (a cura di), *Trattati dell'Unione europea*, II ed., Milan, 2014, 1852. Similarly, F. SAITTO, *op. cit.*, 38-39: «This choice is probably due to the idea that some European parties are clearly and openly against the integration process».

Europarties in a broader regulation concerning freedom of association according to the Charter of Fundamental Rights of the European Union (art. 12)[9]; finally, others interpreted the removal in a positive sense, as an evidence of a finally integrated Union, which is no longer in its prepolitical stage, but has rather shaped its own identity with a set of common values[10]. Moreover, art. 10, paragraph 4, TEU provides for a slightly different formulation of the Europarties' aims compared to art. 191 TEC; in fact, according to the text previously in force, political parties at European level «contribute to forming a European awareness and to expressing the political will of the citizens of the Union»; the new text, instead, states that parties «contribute to forming European political awareness and to expressing the will of citizens of the Union»; it's no longer the will of the citizens to be considered "political", but rather the European awareness, whose formation parties are obliged to foster. This could mean that, according to the Member States, European parties have a wider mission than expressing the *merely political* will of the citizens; this could imply that parties should express the *general* will of European citizens, but – as widely known – the general will corresponds to the common interest according to the constituted authority[11]; in a

9 See M.R. ALLEGRI, *I partiti politici a livello europeo fra autonomia politica e dipendenza dai partiti nazionali*, in *Federalismi.it*, 22/2013, 13-14. In any case, the Author stresses that «si tratta di una *deminutio* che non si spiega, se si considera che proprio contestualmente all'entrata in vigore del Trattato di Lisbona tanto il Parlamento europeo quanto la Commissione insistevano per un rafforzamento del ruolo dei partiti politici a livello europeo attraverso una più chiara definizione del loro stato giuridico». Art. 12 of the CFR (Freedom of assembly and of association) states as follows: «Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests. Political parties at Union level contribute to expressing the political will of the citizens of the Union». The inclusion of European parties in the Charter, which occurred since the very approval of the CFR in 2000, is not free of consequences. As a matter of fact, and as pointed out by doctrine, «Art. 12.1 CFR adds a subjective rights dimension to [the Treaty's party article]. Political parties can rely on the protections offered by art. 12.1 CFR. Possible interferences with their rights under this provision include bans and dissolutions, refusals to register a party, or regulation of their finances». T. LOCK, *Commentary to art. 12*, in M. KELLERBAUER, M. KLAMERT, J. TOMKIN (eds.), *Commentary on the EU Treaties and the Charter of fundamental rights*, Oxford, 2019, 2139.

10 M. DECARO, C. FASONE, *op. cit.*, 211: «Le modifiche possono essere interpretate come segni di una fase più matura del sistema di questi partiti in una Unione che si ritiene solidamente integrata, rispetto a quella che abbiamo indicato come fase "prepolitica" del Trattato di Maastricht; un modo per sottolineare il passo avanti del Trattato di Lisbona nella formazione di un'identità con valori comuni e nel governo dell'Unione».

11 See J-J. ROUSSEAU, *The social contract and discourses* (1762), translated with an Introduction by G.D.H. Cole, London-Toronto, 1923, 22: «The general will alone can direct the

parliamentary system of government citizens detain sovereignty, but the authority – intended as the power to express the general will – is exercised by citizens' representatives who sit in Parliament. Since the general will is expressed by means of parliamentary legislation, which is the synthesis of the different *political* positions of representatives affiliated to political parties, we can probably say that in no way parties can express citizens' (general) will, another reason being that parties would then detain sovereignty. The only citizens' will that parties can express is precisely the *political* one: as a matter of fact, parties are designed to overcome particular interests and divisions in society and to become bearers of general – although inevitably *biased* – political visions[12]. In other words, parties express one potential (and axiologically characterized) general will, that has the chance to become the will of the people only if the given position will prevail in the parliamentary discussion. If traditional political parties are not in the position to express citizens' general will, much less European political parties, whose rooting in society is weaker and whose weight in the parliamentary assembly is low and affected by the stronger relationship between MEPs and their national political parties.

The other task to be carried out by political parties, according to art. 10.4 TEU, corresponds to the contribution to the formation of a European *political*

State according to the object for which it was instituted, i.e. the common good. (…) I hold then that Sovereignty, being nothing less than the exercise of the general will, can never be alienated, and that the Sovereign, who is no less than a collective being, cannot be represented except by himself: the power indeed may be transmitted, but not the will».

12 P. RIDOLA, *L'evoluzione storico-costituzionale del partito politico*, in VV.AA., *Partiti politici e società civile a sessant'anni dall'entrata in vigore della Costituzione* (Proceedings of the XXIII AIC annual congress), Naples, 2009: «La riflessione della dottrina costituzionalistica fra gli anni Venti e Trenta del XX secolo culminò nella ricostruzione teorica del partito come "parte totale". Nel quadro di essa, il partito politico venne raffigurato come un organismo capace di superare il particolarismo della società e di farsi portatore in seno a questa di visioni politiche generali, ancorché di parte, destinate ad influire sulla direzione politica dello stato. (…) In quanto il popolo non è più configurabile come un soggetto capace di esprimere una volontà unitaria, ma solo una varietà di opinioni e di correnti politiche, il partito viene a collocarsi, nel quadro dei mutamenti delle forme di organizzazione politica della società, al centro della tensione dialettica fra il naturale pluralismo della volontà popolare e l'intrinseca spinta unificante dei processi di decisione statali». See also A. CIANCIO, *Sistema europeo dei partiti e integrazione politica nell'UE*, in *Forum di Quaderni Costituzionali*, 8/2015, 10: « Ai partiti europei, pertanto, spetta anzitutto la funzione fondamentale di catalizzazione del consenso popolare verso, ciascuno, una determinata (ossia, "di parte") idea politica di Europa».

awareness. According to an influential definition, political awareness «refers to the extent to which an individual pays attention to politics and understands what he or she has encountered. (…) Political awareness denotes intellectual or cognitive engagement with public affairs as against emotional or affective engagement or no engagement at all»[13]. By saying that European parties must contribute to forming a European political awareness, the Treaty accords them an important place in the process that should lead to an ever greater understanding of European political dynamics (i.e., European governance and policies). On the contrary, the notion of European awareness, which was featured in art. 138A (Maastricht) and its following versions until Lisbon, has a broader scope, since it implies a deep cognitive engagement which is not limited to European public affairs, but rather extends to identity formation, way beyond the narrow fence of the European Union as a supranational institution[14]; a citizen who achieves European awareness is not just intellectually engaged in EU politics and policymaking[15], but has a deep understanding of the compound process that allows him to be considered part of the European *demos*[16]. This said, the Lisbon

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13 J. R. ZALLER, *The nature and origins of mass opinion*, Cambridge, 1992, 21.

14 Besides, there was talk of "European homeland" way before the establishment of any supranational institution. *Ex multis*, see P. CALAMANDREI, *Appello all'unità europea* (1950), in P. CALAMANDREI, *Questa nostra Europa*, collection of Piero Calamandrei's essays edited by E. DI SALVATORE, Gallarate, 2020, 100: «Bisogna che i popoli divisi, per tornare ad essere una forza che conti, sentano la unità della patria europea, e in essa ricompongano ad armonia questa meravigliosa varietà di vocazioni diverse e complementari, dalla quale è sbocciata in questo continente la civiltà del mondo. Tutti i problemi dei popoli europei, oggi disorientati e sfiduciati, sono problemi di unificazione».

15 This citizen would have reached European *political* awareness.

16 See G. DELANTY, *The European heritage: history, memory and time*, in C. RUMFORD (ed.), *The SAGE Handbook of European studies*, London, 2009, 40: «The diversity of cultures within the framework of common European civilization, the attachment to common values and principles, the increasing convergence of attitudes of life, the awareness of having specific interests in common and the determination to take part in the construction of a united Europe, all give the European identity its originality and its own dynamism». On the current absence of a European *demos* in a «organic-national-cultural sense» and on the thesis of a European *demos* «based on citizenship rather than on nationality» see J.H.H. WEILER, *The Constitution of Europe. "Do the new clothes have an emperor?" and other essays on European integration*, Cambridge, 1999, 346-347. On this subject, see also D. GRIMM, *Does Europe need a Constitution?*, in *European Law Journal*, 3/1995, 296 ff.: «The absence of a European communication system, due chiefly to language diversity, has the consequence that for the foreseeable future there will be neither a European public nor a European political discourse. (…) All that is necessary is for the society to have formed an awareness of belonging together that can support majority decisions and solidarity efforts, and for it to have the capacity to communicate about its goals and problems discursively. What obstructs democracy is accordingly not the lack of cohesion of Union citizens as a people, but their weakly developed collective identity and low capacity for transnational discourse. This

amendments to the substantial content of the party article seem to be both useless and defeatist: indeed, simply by moving the word *political* from its original placement, Member States proved both the impossibility of building a European identity and the persistent uncertainty about the real tasks that Europarties must carry out. According to many, and as already written *supra*, Maastricht's art. 138A and its following versions enshrined the very constitutional mission of European political parties; this assumption is no doubt acceptable, but has to be contextualized: State Constitutions, when it comes to party dimension, traditionally take note of a bottom-up process (i.e. citizens who organize themselves into parties) and, then, usually recognize a right of association in the form of political parties[17]. On the contrary, the *sui generis* European constitutional dimension takes note of a top-down process (i.e. the creation of party federations) and, then, outlines a constitutional mission to be undertaken by Europarties. Net of the judgments on the choice to incorporate in the Treaties a party system lacking its own constitutional dimension (consisting of the connection between society and State), the Lisbon Treaty has undoubtedly marked a step backwards, since the original Europarties' constitutional mission comes out weakened and distorted.

In the light of the above, the legal basis rule – now forming part of a separate article (art. 224 TFEU) – seems to be the only provision going a step further compared to the previous versions. In fact, on the one hand it mandated the use of codecision (renamed "ordinary legislative procedure" in Lisbon) for the update of the Europarties' normative framework, thus overcoming the long-standing

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certainly means that the European democracy deficit is structurally determined. It can therefore not be removed by institutional reforms in any short term».

17 See e.g. art. 49 of the Italian Constitution, according to which «Tutti i cittadini hanno diritto di associarsi liberamente in partiti per concorrere con metodo democratico a determinare la politica nazionale». See also art. 21 of the German Grundgesetz: «Die Parteien wirken bei der politischen Willensbildung des Volkes mit. Ihre Gründung ist frei. Ihre innere Ordnung muß demokratischen Grundsätzen entsprechen. (…)» or art. 6 of the Spanish Constitution: «Los partidos políticos expresan el pluralismo político, concurren a la formación y manifestación de la voluntad popular y son instrumento fundamental para la participación política. Su creación y el ejercicio de su actividad son libres dentro del respeto a la Constitución y a la ley. Su estructura interna y funcionamiento deberán ser democráticos».

problems with unanimity in the Council and, on the other hand, it expressly referred to regulation as the legislative tool to be used in this case.

2. Towards a new regulation on the statute and funding of Europarties : the Giannakou report (2011) and the Commission's proposal

In compliance with art. 12 of Regulation (EC) n. 2004/2003 – which stated that «the European Parliament shall publish, by 15th February 2011, a report on the application of this Regulation and the activities funded. The report shall indicate, where appropriate, possible amendments to be made to the funding system» – on 5th April 2011 the MEP Marietta Giannakou, on behalf of the Committee of Constitutional Affairs, presented the mentioned report, which constituted the point of departure for the following Commission proposal. The Giannakou report provided for a series of detailed suggestions, aimed at fixing the major weaknesses that the 2003 Regulation has showed during the previous four years of implementation. The main target of the report was clearly outlined by the same MEP Giannakou during the parliamentary debate: «European political parties have not enjoyed a statute in keeping with the Lisbon Treaty and the European Union in the past, by which I mean a statute as defined in Article 10(4) of the Treaty of Lisbon. (…) This is a question of strengthening democracy, of achieving a stronger presence for citizens within the European institutions by creating such a statute»[18]. Starting from this assumption, the report set out four suggested areas of intervention[19]. First, funding provisions were addressed; according to the document, any future regulation on European parties should have

[18] Parliamentary debate on Political parties at European level and rules regarding their funding, Strasbourg, 5th April 2011. Procedure 2010/2201(INI); text: A7-0062/2011. Available at: www.europarl.europa.eu. As can be read in the same report, in pt. 3: «European political parties, as they stand, are not in a position to play this role to the full because they are merely umbrella organisations for national parties and not directly in touch with the electorate in the Member States». Cfr. G. LÓPEZ DE LA FUENTE, *op. cit.*, 231: «Se hace evidente que tras la práctica de los últimos años, la adopción de un estatuto jurídico para los partidos y sus fundaciones a escala europea basado en el Derecho de la Unión es absolutamente necesario para mejorar la gobernanza participativa y fortalecer la democracia en la Unión».

[19] Cfr. M.R. ALLEGRI, *I partiti politici a livello europeo*, cit., 14-15.

overcome the then existing «cumbersome procedures»[20], while, at the same time, counterbalancing this relaxation by «providing for sanctions in the Funding Regulation where they are currently lacking»[21]; then, the report called for more organizational convergence, which could have only been reached by establishing a «common legal and fiscal status based on EU law» and, at the same time, urged for the creation of an «authentic legal status for the European political parties and a legal personality of their own», which would have allowed Europarties to act «as representative agents of the European public interest»[22]; finally, among the most attention-grabbing proposals provided for by the report, we should mention here that concerning Europarties' internal democracy. As we read in the document, «European political parties [should] conform to the highest standards of internal party democracy (as regards the democratic election of party bodies and democratic decision-making processes, including for the selection of candidates)»[23]. The problem of parties' internal democracy has been long (and is still) debated at national level, since not every Member State of the EU formally mandates internal democracy requirements[24]; as indeed pointed out by scholars, such an imposition can be a double-edged sword: on the one hand, it presupposes the overcoming of State's neutrality towards party dimension (which tipically self-regulates without any external public interference). Since the internal organization model of a party reflects its cultural background, imposing internal democracy involves an ideological choice that may eventually lead to foster establishment parties[25]. On the other hand, however, since usually Constitutions

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20 In this respect, the report called on the Commission to propose amendments to the Financial Regulation «tailored specifically to the funding of European parties and foundations». Pts. 15-16 of the "Giannakou report".

21 Pt. 24 of the "Giannakou report": «these sanctions could take the form of financial penalties in the event of infringements of the rules concerning, for example, the transparency of donations».

22 Ivi, pts. 7-8.

23 Ivi, pt. 5.

24 The German constitutional model is the most strict when it comes to internal democracy requirements. See again art. 21 GG: «(…) Ihre innere Ordnung muß demokratischen Grundsätzen entsprechen». Also art. 6 of the Spanish Constitution makes reference to internal democracy («Su estructura interna y funcionamiento deberán ser democráticos»); on the contrary, the Italian model merely speaks of a democratic method («metodo democratico»).

25 See P. RIDOLA, *Partiti politici (voce)*, in *Enciclopedia del Diritto*, XXXII, Milan, 1982, 115-116: «L'opzione a favore della disciplina della democrazia interna ai partiti comporta inevitabilmente il superamento della neutralità dello Stato nei confronti dell'istituzione partito. (…) Poiché invero il modello organizzativo di un partito non è un figurino del tutto astratto da una

protect the freedom to associate in parties in order to let citizens participate in political processes, this functionalization implies the need for an internal democracy standard[26]; as a matter of fact, it's hard to dispute the claim that non-democratic internal processed can hardly ensure citizens' participation in political processes. This is is also the case with Europarties: even though internal democracy requirements may express a sort of ideological direction, the "constitutional" provisions on European parties are placed within the freedom of association's framework (art. 12 CFR) and, as we already know, identify a specific mission (art. 10.4 TEU) to be carried out; here again, it would seem blatantly impossible to effectively express the will of the citizens of the Union without a statute inspired by the principle of democracy (thus ensuring participation of all party actors to internal decision making processes such as candidates selection, election of party bodies etc.).

On 12th September 2012, in compliance with art. 224 TFEU and duly taking into account the suggestions coming from the Parliament's Resolution of 6th April 2011[27], the Commission finally drew up a proposal for a Regulation the statute and funding of European political parties and European political foundations. In brief, the proposal provided for a European legal status, that is a uniform legal personality based on EU law and which would have also served as a condition to receive fundings; among the requirements to obtain the provided legal status – besides the respect of high standards of governance, accountability and

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certa concezione dei rapporti fra il partito e la società, ma riflette il retroterra ideologico-culturale di quello, è indubbio che l'imposizione ai partiti di uno statuto-tipo (…) oltre a precludere alle forze politiche operanti nella società di organizzarsi in forme diverse da quelle dei partiti dell'*establishment* e ad alterare a favore di questi l'eguaglianza delle *chances*, finirebbe per dare corpo o per agire da copertura ad un limite sostanzialmente ideologico-programmatico».

[26] *Ibidem*, with specific reference to art. 49 of the Italian Constitution: «L'art. 49 configura il diritto di associazione in partiti come una situazione essenzialmente funzionale. Ove allora si ritenga che l'art. 49 lasci spazio ad interventi del legislatore, essi potrebbero sicuramente disciplinare le condizioni minime del rispetto del principio del concorso e del metodo democratico, anzitutto nella vita interna del partito».

[27] COM(2012) 499 F/1, pt. 1.2 of the explanatory memorandum: «The Commission has taken due consideration of the conclusions reached by the EP in the Giannakou report. It shares the view that European political parties and foundations have an important role to play to reinforce and foster representative democracy at EU level, and bridge the divide between EU politics and the Union's citizens»

transparency – also minimum standards of internal democracy were listed[28]. Moreover, the proposal aimed at improving flexibility in funding procedures as well as raising the threshold concerning the level of donations permitted per year and per donor; all above while expanding transparency and accountability duties, strengthening control mechanisms and increasing sanctions in the event of violations.

3. The landing point : Regulation (EU, Euratom) n. 1141/2014

The outcome of the Commission's proposal was the approval of Regulation (EU, Euratom) n. 1141/2014 (hereinafter referred as "the 2014 Regulation"). Again, European institutions involved in decision-making agreed on the adoption of a Regulation, that is the most "invasive" European legislative act, since it is directly applicable in the Member States[29]; however, as we will better see *infra*, the States' role, far from being limited to the compliance with the new rules (which, in fact, are primarily directed to Europarties), is to provide additional requirements to be fulfilled by party federations. The 2014 Regulation was initially meant to be approved before the 2014 European Parliament's elections, but, in the end, it was finalized much later than the European elections' date; its entry into force, moreover, was set for 1st January 2017, in order to give Europarties time to comply with the newly established requirements. The initial target, then, had to be

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[28] Ivi, art. 4.2: « The statutes of a European political party shall include rules on internal party democracy covering at least the following: (a) the admission, resignation and exclusion of the party's members, with the list of members annexed to it, (b) the rights and duties associated with all types of membership, including the rules guaranteeing the representation rights of all members, be they natural or legal persons, and the relevant voting rights, (c) the functioning of a general assembly, at which the representation of all members must be ensured, (d) the democratic election of and democratic decision-making processes for all other governing bodies, specifying for each its powers, responsibilities and composition, and including the modalities for the appointment and dismissal of its members and clear and transparent criteria for the selection of candidates and the election of office-holders, whose mandate must be limited in time but may be renewable, (e) the party's internal decision-making processes, in particular the voting procedures and quorum requirements, (f) its approach to transparency, notably on books, accounts and donations, privacy and the protection of personal data, (g) the procedure for amending the statutes». According to F. SAITTO, *op. cit.*, 39, the inclusion of a specific provision on internal party democracy, thus following the Giannakou's report suggestion, was «probably considered a possible strategy to cope with the democratic deficit of the EU».

[29] See M. DECARO, C. FASONE, *op. cit.*, 216: «Continua ad essere usata la fonte del regolamento, a sottolineare la importanza di una disciplina comune, senza variabili lasciate agli ordinamenti nazionali».

ideally remodulated: a party system in line with the new conditions set by the 2014 regulation, eventually amended by a new legislative act to be approved in accordance with art. 38, paragraph 2, of the same Regulation[30], was hoped to be fully operational by the time of the 2019 European elections. Actually, the Commission deemed appropriate to present a new proposal to amend few provisions of the 2014 Regulation; the European executive's intentions turned into reality soon: on 3rd May 2018, Regulation (EU, Euratom), n. 673/2018 was approved (hereinafter referred as "the 2018 Regulation") and entered into force shortly after; this new piece of legislation provided for slight (albeit no doubt relevant) adjustments to some provisions of the 2014 regulation, without changing – however – its backbone. It's precisely for this reason that we will proceed with the analysis of the European political parties' legislative framework currently into force as amended by the 2018 Regulation as a single *corpus*, but generally referring to it as the "2014 Regulation". To facilitate the understanding of the many innovations brought by the 2014 Regulation, we can here offer a tripartite division that shows its main areas of interventions: 1) Definitions and governance provisions; 2) Registration, requirements, verification of compliance; 3) funding provisions and sanctions.

3.1 Definitions

As far as definitions are concerned, the 2014 Regulation marks a step forward, clarifying some issues that were rather obscure in the previous 2003 Regulation. While the general definition of "political party" remains unchanged («an association of citizens which pursues political objectives and which is either recognized by or established in accordance with the legal order of at least one Member State»), the "alliance of political parties" category is replaced by the "political alliance" one, which appears to be larger in its scope: while the former was just a structured cooperation between two or more political parties, the latter consists of the same kind of cooperation between political parties and/or citizens.

[30] Regulation (EU, Euratom), n. 1141/2014, art. 38.1 states as follows: «Before the end of 2018, the Commission shall present a report on the application of this regulation accompanied, if appropriate, by a legislative proposal to amend this regulation».

According to some scholars, this new provisions represents a first attempt to nudge Europarties into accepting individual memberships[31]. Finally, the definition of European political party has been modified; with a warning: from a purely nominalistic perspective, at Treaty level, the old terminology ("political parties at European level") has not been changed and, since European secondary law has to be interpreted in conformity with primary law, the "official" terminology is still the one provided for by art. 10 TEU. From a substantial point of view, however, a Europarty is not anymore a «political party or an alliance of political parties which satisfies the conditions referred to in art. 3»[32], but rather a «political alliance which pursues political objectives and is registered with the Authority for European political parties and foundations established in article 6, in accordance with the conditions and procedures laid down in this Regulation»[33]; according to this new definition, in order to be recognized as a political party at European level, a political alliance must be registered. As we will better see *infra*, The 2014 Regulation establishes an Authority for European political parties whose primary activity is to manage a Register where alliances satisfying certain strict conditions are listed. Thus, meeting the requirements provided for by the Regulation is no longer sufficient, since formal registration is needed. Furthermore, only political alliances (namely, structured cooperations between parties and/or citizens) can be recognized as Europarties, where, instead, the older version of the same art. 2

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31 On the Europarties' individual membership problem and on the benefits that a general recognition of such a membership may give, see G. GRASSO, *Partiti politici europei e disciplina costituzionale nazionale*, in *Nomos. Le attualità nel diritto*, 1/2017, 9-10: «Il riconoscimento della membership individuale, a livello di partiti politici europei, è, infatti, ancora molto carente, se si pensa che, delle tre grandi famiglie politiche europee, corrispondenti al Partito popolare europeo, al Partito socialista europeo e al Partito liberale europeo, solo quest'ultimo prevede oggi la possibilità di un'autentica adesione individuale e che tale opzione è contemplata poi, tra le altre formazioni politiche, da un numero assai ridotto di statuti di altri partiti. Un rafforzamento di tale istituto, auspicato anche da importanti atti dell'Unione europea, (…) avrebbe come conseguenza una valorizzazione di tutti quei meccanismi di democrazia interna che riguardano i diritti dei singoli iscritti al partito, secondo una logica non facilmente riconducibile a quella delle associazioni politiche che compongono i partiti politici europei». See also M.R. ALLEGRI, *Ancora sui partiti politici europei: cosa c'è di nuovo in vista delle elezioni europee 2019*, in *Federalismi.it*, 9/2019, 7: «Il riferimento alla cooperazione non solo fra partiti, ma anche espressamente fra "cittadini", rappresenta una esplicita apertura verso il riconoscimento da parte dei partiti politici europei della membership non solo ai partiti nazionali, ma anche a singoli individui, novità che potrebbe nel tempo portare ad un maggiore coinvolgimento attivo dei cittadini europei, favorendo modalità di partecipazione politica di livello transnazionale».

32 Regulation (EC) n. 2004/2003, art. 2.3.

33 Regulation (EU, Euratom) n. 1141/2014, art. 2.3.

allowed also "simple" political parties (intended as associations of citizens pursuing political objectives) to be labeled as Europarties, given they satisfied the requirements provided for the 2003 Regulation. This means that, according to the Regulation currently into force, a structured cooperation between parties and/or citizens is essential. As scholarly pointed out, «structured cooperation» – an expression that can be found once more in the Treaties with regard to the Common Foreign and Security Policy (art. 42, paragraph 6, TEU) – means that the involved entities (parties and/or citizens) must have an ideal and organizational awareness that binds them together[34]. However, a question remains as to whether traditional (i.e. national) political parties already (let's say: inherently) satisfy the «structured cooperation» requirement, since political parties are no doubt entities which bring together people having exactly an ideal and organizational awareness that binds them together [35]. Even though the requirements provided for by the 2014 Regulations for Europarties might never be satisfied by a purely national party, the remaining doubts show that the new formulation of art. 2 is rather ambiguous and leaves large room for improvements.

3.2 Governance provisions

When it comes to Europarties' governance, the 2014 Regulation no doubt represents a big step forward compared to the piece of legislation previously into force, but – as already underlined by commentators – it could have done more and should have been bolder. As already pointed out *supra*, the Commission, in its proposal made on September 2012, provided for a series of rules to address Europarties' internal democracy: democratic elections of body members, democratic decision making processes, clear and transparent candidates selection procedures, just to mention few of them[36]. However, the approved Regulation makes no reference to internal democracy, but rather confines itself to «internal

34 M. DECARO, C. FASONE, *op. cit.*, 217.

35 *Contra*, see *ibidem*: «E questi soggetti non sono soltanto i partiti tradizionali che si alleano tra di loro, ma partiti che si aprono a nuove forme di alleanze con i cittadini dell'Unione, o ancora i cittadini che possono "strutturare" nuove forme di cooperazione politica, diverse dai tradizionali partiti (come i movimenti)».

36 Indicare relativi punti della proposta della Commissione del 2012

party organization», which is a different concept. This undesirable result, according to a nearly unanimous doctrine, makes the 2014 intervention a missed opportunity[37]. Art. 4 is divided in two paragraphs: each of them provides for a number of elements that a Europarty's statute must «at least» include[38]. The first paragraph focuses on formal aspects such as the name and logo, the address of the party's seat, a political programme setting out its purposes and objectives, its administrative and financial organisation and procedures, just to list a bunch of them. Leaving aside the quite relevant reference to Europarties' programmes, paragraph 2 of the same article deserves greater attention, since it provides for «internal party organization» requirements; according to this provision, Europarties' statutes must cover at least the modalities for the admission, resignation and exclusion of their members (the list of their member parties being annexed to the statutes); the rights and duties associated with all types of membership and the relevant voting rights; the powers, responsibilities and composition of their governing bodies, specifying for each the criteria for the selection of candidates; its internal decision making processes, in particular voting procedures and quorum requirements[39]. As can be easily inferred, the mentioned requirements are far from introducing an internal democracy standard for Europarties: they can be rather defined as transparency prerequisites concerning procedures[40]. In fact, a closer look reveals that Europarties just have to specify, in their statutes, things such as members' rights and duties or bodies' powers and responsibilities, without mentioning how rights and powers must be exercised, how obligations must be respected, how responsibilities can be enforced, thus

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37 See I. INGRAVALLO, *L'incerto statuto dei partiti politici europei*, in G. NESI, P. GARGIULO (a cura di), *Ferrari Bravo. Il diritto internazionale come professione*, Naples, 2015, 218. «Al riguardo, il nuovo regolamento costituisce un'occasione mancata per introdurre nella disciplina relativa ai partiti politici europei delle regole incisive sulla democrazia interna».

38 Even just the «at least» approach to the statutes' content reveals a rather shy and defeatist attitude of the 2014 legislator. See in this respect ivi, 219.

39 According to art. 4, paragraph 2, of the 2014 Regulation, together with the already mentioned elements, Europarties' statutes must also cover the following aspects: their approach to transparency, in particular in relation to bookkeeping, accounts and donations, privacy and the protection of personal data and the internal procedure for amending its statutes. By saying that Europarties must clarify their approach to transparency means that every entity may have its own approach to this extremely important principle; from this we can deduce that also an approach limited to the essential aspect of transparency is allowed and does not prevent the registration of a party. In this respect, see M.R. ALLEGRI, *Ancora sui partiti politici europei*, cit., 12.

40 In this respect, see ivi, 11.

preventing any (needed) democracy-oriented structuring of the procedures made explicit in the statutes and, at the same time, allowing registration of Europarties not complying with any internal democracy standard. Anyway, doctrine has underlined that Europarties, according to art. 3.1 lett. c) of the 2014 Regulation, must comply with the values on which the Union is founded (art. 2 TEU); one of these values, expressly set out in the provision, is democracy. So, according to those who support the mentioned interpretation, this can be enough to claim that Europarties' internal procedures must be based on the democratic principle[41]. However, as others have observed, art. 3.1 lett. c) of the 2014 Regulation states that a Europarty must respect the values provided for by art. 2 TUE «in particular in its programme and in its activities», thus clarifying that parties must show compliance when it comes to their external dimension only[42]. Others further claimed that an interpretation aimed at deducing the duty to respect democracy in internal procedures from art. 3.1 lett. c) would mean dismissing the (political) will of the European legislator, who decided not to confirm in the 2014 Regulation the internal democracy provisions contained in the Commission's proposal[43]. On the one hand, there is no question that both the Member States' intention and the 2014 legislator's will should not be misinterpreted: the former shaped the EU homogeneity clause without having in mind Europarties' internal democracy and the latter was clear in ruling out any reference to internal democracy in the approved text. On the other hand, however, one can't just appeal to the sole legislative intent criteria in order to understand whether a specific provision can

41 G. GRASSO, G. TIBERI, *Il nuovo Regolamento sullo statuto e sul finanziamento dei partiti e delle fondazioni politiche europee*, in *Quaderni Costituzionali*, 1/2015.

42 M.R. ALLEGRI, *Il nuovo Regolamento sullo statuto e sul finanziamento dei partiti politici europei: una conclusione a effetto ritardato*, in *Osservatorio Costituzionale*, 2/2014, 4: «L'unico ancoraggio esplicito dei partiti politici europei alla democrazia resta la menzione dei valori su cui si fonda l'Unione europea (art. 3 comma 1 lett. c), che però si riferisce solo al programma e all'azione del partito – quindi alla sua proiezione esterna – e non alla sua struttura interna. More recently, ID., *Ancora sui partiti politici europei*, cit., 11: «Questa interpretazione rischia di forzare indebitamente il dato normativo, posto che l'art. 2 TUE, inserendo la democrazia fra i valori su cui l'Unione è fondata, non intendeva riferire questo valore alla democrazia interna ai partiti politici europei, né alle loro modalità di funzionamento». Similarly I. INGRAVALLO, *op. cit.*, 219: «Né si può forzare il dato normativo: l'art. 2 TUE indica i valori su cui l'Unione è fondata, inserendo tra questi anche la democrazia, ma non pare corretto riferire questo valore alla democrazia interna ai partiti politici europei, né alle loro modalità di funzionamento».

43 I. INGRAVALLO, *op. loc. ult. cit.*: «Occorre (…) tener conto della poc'anzi ricordata volontà politica espressa dal legislatore europeo di elidere dal reg. 1141/2014 il riferimento alla democrazia interna avanzato dalla Commissione nella sua proposta di atto».

be applied in a given context; by resorting to literal interpretation, it should be pointed out that art. 3.1 lett. c) asks for compliance with art. 2 TEU «in particular» in Europarties' programmes and activities. This could mean that political parties at European level must respect the democratic principle not merely in their external projection, but also in their internal one.

In any case, also assuming that the respect of the values on which the Union is founded cannot extend to Europarties' internal procedures, there could be still a way to lead party federations to comply with the democratic principle in their internal projection. As a matter of fact, art. 4 states, at the very beginning and at the very end of the provision, that the statutes of Europarties must comply with the applicable law of the Member State in which it has its seat and, furthermore, that the latter may impose additional requirements for the statutes (provided those requirements are not inconsistent with the Regulation). In order to understand the implications of the mentioned provisions, we should here recall the content of art. 14 of the Regulation (headed «applicable law»), according to which Europarties are governed by the Regulation itself, but for matters it does not regulate or only partly regulate, as far as the uncovered aspects are concerned, provisions of national law of the Member State of the seat must be applied. Lastly, when nor the Regulation nor the applicable national law provide any rule, Europarties' statutes have to be applied. As we will further explore *infra*, the national level – intended as both national party politics and the law of the Member State of the seat – still plays a crucial role with respect to Europarties' internal and external activity. As far as the former is concerned, even though the 2014 legislator decided not to confirm the internal democracy provisions proposed by the Commission, they can however be applied to a Europarty, when the laws in force in the State of the seat so provide[44]. In addition, it should be noted that any violation of a national

[44] See M.R. ALLEGRI, *Il nuovo regolamento sullo statuto*, cit., 4: «È possibile che lo Stato membro in cui il partito politico ha sede pretenda di integrare lo statuto del partito con ulteriori requisiti, purché non incompatibili con il regolamento europeo (art. 4 u.c.); fra questi, non è escluso che taluni Stati membri possano esigere il rispetto della democrazia interna». This inevitably leads to what has been pointed out by G. GRASSO, R. PERRONE, *European political parties and the respect for the values on which the European Union is founded between the European legislation and the national laws*, in *European Public Law*, 4/2019, 682: «Given the importance of compliance with relevant national law of the Member State of the seat, and the potential grave consequences of violations of such law, the choice of the Member State of the seat becomes a vital matter. It is evident that choosing to have seat in a State whose law has stricter

additional requirement in accordance with art. 4, paragraph 3 could lead to a deregistration of the Europarty concerned (with major consequences that will be extensively outlined *infra*)[45]. In fact, art. 16, paragraph 3 of the 2014 Regulation provides that a political party at European level which has seriously failed to fulfil relevant obligations under national law applicable by virtue of art. 14 (see *supra*) can be subject to a deregistration procedure following a duly reasoned request addressed by the Member State of the seat to the Authority for European political parties[46]. Actually, rather then a procedure in the proper sense, in this case the Authority can directly adopt a deregistration decision, once the Member State concerned has certified that all the national remedies have been exhausted[47]. In sum, internal democracy requirements, even though not explicitly provided for by the Regulation, may be imposed by the Member State where the party has its seat;

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requirements compared to other Member States represents a great disadvantage for the party, thus it will be discouraged to make such a choice»; as a matter of fact, as the same Author diffusely points out *ibidem* and ivi, 670: «Currently, the majority of European parties hold the status of a Belgian non-profit organization, given the leniency of Belgian legislation on the matter». At the moment, not even a single Europarty has decided to have its seat in Italy. Even though some commentators, such as I. INGRAVALLO, *op. cit.*, 221-222, have underlined that the italian internal democracy requirements have been made more stringent by d.l. 149/2013 («sotto il profilo della democrazia interna ai partiti, le recenti riforme legislative italiane (…) hanno previsto una disciplina più stringente che, almeno sotto questo profilo, per i partiti politici europei aventi sede in Italia, andrà ad integrare quella posta dal reg. 1141/2014»), actually that would be true if the d.l. provisions had remained the same. Unfortunately, once converted into law (l. 13/2014), the rules providing for statutes' compliance with the fundamental principles of democracy, respect for human rights and freedoms, rule of law have been deleted and replaced by a mere reference to the respect for the Constitution and the EU legal order. For this reason, internal democracy requirements provided for italian law are (at least at the moment) not stringent at all; thus, the reference to democracy in the heading of l. 13/2014 must be traced back to the goals of political parties (i.e. their external democracy). In this respect, see again M.R. ALLEGRI, *op. loc. ult. cit*. In any case, even if the national requirements were actually more stringent than the European ones as far as internal democracy is concerned, it should be noted that the italian law establishes a voluntary registration system: only political parties interested in public funding must register and, thus, be subject to the internal organization requirements. All the other entities are not subject to any registration. On the contrary, at European level, only registered entities are officially labeled as Europarties. Against this background, a political party at European level which decides to establish its seat in Italy would not be forced to register at all and, for this reason, would not be asked to comply with the internal organization requirements. It would be treated, as all the other parties, as an unregistered association (unless it decides to subject itself to the *riconoscimento* procedure). As far as the mentioned scenarios are concerned (and to know more about the correlation between national and European legal personality) see again G. GRASSO, R. PERRONE, *op. ult. cit.*, 683ss.

[45] In this respect, see F. SAITTO, *op. cit.*, 41, where the Author states that art. 4, paragraph 3 «is relevant for the special deregistration procedure delivered at national level».

[46] According to art. 16, paragraph 3, of Regulation n. 1141/2014, the duly reasoned request «must identify precisely and exhaustively the illegal actions and the specific national requirements that have not been complied with».

[47] See art. 16, paragraph 3, lett. b), Regulation n. 1141/2014.

in this case, failure to comply with any of the national (additional) requirements could possibly lead to a deregistration of the concerned party.

3.3 Registration and deregistration of European political parties

3.3.1 Registration conditions

As we have seen, in order to be labeled as European political party, an alliance must apply for registration with the Authority, demonstrating its compliance with the conditions listed in art. 3, paragraph 1, of the 2014 Regulation. The mentioned rule provides for five requirements which have to be satisfied, provided for by letters a, b, c, d and e of the provision concerned. The applicant must have its seat in a Member State as indicated in its statute[48]; its member parties must be represented by, in at least one quarter of the Member States, members of the European parliament, of national parliaments, of regional parliaments or of regional assemblies; alternatively, the applicant or its members must have received, in at least one quarter of the Member States, at least three per cent of the votes cast in each of those Member States at the most recent elections to the European Parliament; furthermore, it is specified that member parties must not be members of another political party; as can be easlity inferred, these last conditions meet the need to ensure a real transnationality of the applicant party[49]; moreover,

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48 Regulation (EC) n. 2004/2003 provided that Europarties must have had legal personality in the Member State in which its seat was located. As we will diffusely see *infra*, having national legal personality is not anymore a requirement, since registration leads to the acquisition of a special European legal personality, which possibly replaces the national one (when existent).

49 Art. 3, paragraph 1, letter b) has been so modified by Regulation (EU, Euratom) n. 673/2018. The previous (2014) version made reference not just to member parties, but merely to «it or its members»; this led to registration of entities which were actually represented in European, national or local legislative assemblies not by member parties, but rather just by Europarties' individual members. This, as can be imagined, led to a distortion of political representativeness, with Europarties formally represented in seven Member States, while, in reality, this representation was granted just by individual members and not by their member parties. The addition of letter ba) to art. 3.1 concerning the prohibition on national parties from being members of more than one Europarty is aimed at preventing national parties from distorting Europarties' political representativeness; in other words, one national party can't be member of more Europarties at the same time, thus allowing them to satisfy the requirements provided for by art. 3.1 lett. b). In this respect, see again Regulation (EU, Euratom) n. 673/2018, recital n. 4: «in order to strengthen the link between politics at national level and at Union level and to prevent the same national party from artificially creating several European political parties with similar or identical political

the 2014 Regulation provides that the applicant must observe, in particular in its programme and in its activities, the values on which the Union is founded, as expressed in art. 2 TEU, namely respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities; in conclusion, the Regulation states that the political alliance concerned or its members must have participated in elections to the European Parliament or have publicly expressed the intention to participate in the next ones; finally, the applicant must not pursue profit goals[50].

3.3.2 The new Authority for European political parties and European political foundations

According to art. 8 of the Regulation, political alliances which deem to respect the conditions mentioned above, together with the governance requirements we have outlined in the previous paragraph, may file an application for registration with the Authority for European political parties and European political foundations, which has the task of registering, controlling and imposing sanctions to them. The establishment of the Authority is no doubt one of the major changes in Europarties regulation: according to the rules previously into force, it was the

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tendencies, members of the same national political party should not be taken into account in relation to different political alliances, for the purpose of the minimum representation requirements for those alliances to be registered as a European party. Therefore, only political parties, and no longer individuals, should be taken into account for the purpose of those minimum representation requirements». In doctrine, see M.R. ALLEGRI, *Ancora sui partiti politici europei*, cit., 5 ff. Following the entry into force of Regulation (EU, Euratom), n. 673/2018, a number of Europarties (*Alliance of European National Movements*; *Alliance for Peace and Freedom*) and foundations (*Identités & Traditions Européennes*; *Europa Terra Nostra*) have been deregistered due to supervened violation of the art. 3 requirements. In this respect, see extensively ivi, 17. In relation to those mentioned deregistrations, see G. GRASSO, R. PERRONE, *op. cit.,* 674, fn. 23: «It is to be noted that, while the list of the de-registered parties and foundations is published on the Authority's website (…), the full text of the decision is nowhere to be found, and the only reference to its motivations is contained in a press release of the Authority, concerning the implementation of the reform of Regulation n. 1141/2014 (…). This certainly does not add to the transparency of the procedures of the Authority».

[50] In the light of the above, the 2014 Regulation (as amended in 2018) provides for many changes to the 2003 framework, as far as Europarties' requirements are concerned: as we have seen, the acquisition of national legal personality is not mandatory anymore and the political representativeness conditions have also been slightly amended; moreover, when it comes to the respect of the values on which the Union is founded, the word "values" replaced "principles", that was used in 2003 (and an explicit mention of these values has been added); as far as the participation (or intention to participate) in the elections to the European Parliament, in 2014 it was specified that this intention must be expressed «publicly».

European Parliament, thus the political institution per excellence, that had the competences today entrusted to the Authority (with appropriate *caveats*, since Parliament might just verify Europarties' existing conditions, while today the requirements should be considered from a registration point of view)[51]. The Commission proposal made in 2012 still entrusted the European Parliament with verification powers[52]; however, the negotiations made during the decision making process resulted in the establishment of an independent Authority with legal personality. As already pointed out, the envisaged objective of such an introduction was reducing the «political oversight»[53] of EU institutions on the verification process, in order to ensure its neutrality and independence[54]. However, as we will extensively see *infra*, the purposed aim was not entirely achieved, since evident traces of a political oversight can still be found in the procedure provided for by art. 10 of the Regulation that will be addressed more ahead[55]. The established Authority, which is physically located in the European Parliament as is assisted by staff from one or more EU Institutions, is represented by its Director, who is appointed for a five-year non-renewable term by the European Parliament, the Council and the Commission by common accord (on the basis of his or her personal and professional qualities); the Director cannot be a member of the European Parliament, hold any electoral mandate or be a current or

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51 In this respect, see Regulation (EC), n. 2004/2003, art. 5: «The European Parliament shall verify regularly that the conditions set out in Article 3(a) and (b) continue to be met by political parties at European level. With regard to the condition specified in Article 3(c), at the request of one quarter of its members, representing at least three political groups in the European Parliament, the European Parliament shall verify, by a majority of its members, that the condition in question continues to be met by a political party at European level. Before carrying out such verification, the European Parliament shall hear the representatives of the relevant political party at European level and ask a committee of independent eminent persons to give an opinion on the subject within a reasonable period. (…) If the European Parliament finds that any of the conditions referred to in Article 3(a), (b) and (c) is no longer satisfied, the relevant political party at European level, which has for this reason forfeited this status, shall be excluded from funding under this Regulation.

52 See I. INGRAVALLO, *op. cit*., 225: «Questa Autorità non era prevista nel reg. 2004/2003, che affidava al Parlamento europeo il compito di verificare le condizioni di esistenza di un partito politico a livello europeo, né nella proposta avanzata dalla Commissione nel settembre 2012, che confermava il precedente sistema di registrazione».

53 F. SAITTO, *op. cit*., 49.

54 See M.R. ALLEGRI, *Il nuovo regolamento sullo statuto*, cit., 9: «Un sistema di controllo tanto articolato, voluto al fine di scongiurare il rischio che le decisioni affidate essenzialmente al Parlamento europeo potessero essere determinate per lo più da valutazioni di natura politica».

55 Some initial doubts were already expressed in this respect *ibidem*: «Si crea un organo dai contorni ancora incerti e soprattutto si allontanano i cittadini europei, rappresentati dal Parlamento, dal controllo relativo all'attività dei partiti politici».

former employee of a Europarty or European political foundation; plus, no conflicts of interest must be present between the Director's duty and any other official duties[56]. As pointed out in doctrine, the mentioned provision, which sets out a number of incompatibilities, in any case leaves room for a possible appointment as Director of a former member of the European Parliament, which should have been avoided for potential conflict of interests reason. Due to the Authority's power, which, when exercised, might lead to a deregistration of a Europarty and, thus, to a compression of its (and its members') rights, art. 6, paragraph 2, of the Regulation states that the Authority, in its decisions, must give full consideration to the fundamental right of freedom of association and to the need to ensure pluralism of political parties in Europe.

3.3.3 Registration procedure and the competences of the Authority

The balancing exercise demanded to the Authority appears less evident when it examines an application for registration. In fact, as required by art. 8 of the Regulation, an application must be merely accompanied by documents proving that the applicant satisfies the conditions laid down in art. 3 and by the party's statutes, containing the provision required by art. 4[57]; as far as the requirement referred to in art. 3, paragraph 1, lett. c), namely the respect of the values on which the Union is founded, the applicant must present a standard formal

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[56] In relation to the Director's independence, see G. GRASSO, R. PERRONE, *op. cit.,* 671: «Despite the attempt to make sure that the Director is fully independent from political institutions, by means of the establishment of incompatibilities and the provision that the Directors hall have no conflict of interests between his or her duty and his or her other activities, the appointment procedure of the current Director, Michael Adam, selected in August 2016, was not particularly transparent, and the curriculum vitae of the Director is still not publsihed in the Authority's website, thus it is difficult to verify the criteria that led to his appointment». Similarly M.R. ALLEGRI, *Ancora sui partiti politici europei*, cit., 12, fn. 27: «Data la natura monocratica dell'Autorità e gli ampi poteri ad essa attribuiti, sarebbe stato auspicabile un maggior livello di trasparenza circa la qualificazione e la competenza di chi è chiamato a dirigerla». See again G. GRASSO, *Partiti politici europei e disciplina costituzionale*, cit., 11, who speaks about a «regime di incompatibilità che non pare peraltro strettissimo».

[57] «Including the relevant annexes and, where applicable, the statement of the Member State of the seat referred to in art. 15, paragraph 2». The provision makes reference to a statement that may be issued by the Member State of the seat, in case it requires so. The statement certifies that the applicant has complied with all relevant national requirements for application, and that its statutes are in conformity with the applicable law referred to in the first subparagraph of art. 14, paragraph 2.

declaration where it states that it is committed to observe, in particular in its programme and in its activities, the values on which the Union is founded, as expressed in art. 2 of the Treaty on European Union. According to art. 9, paragraph 3, of the Regulation, the declaration has to be considered sufficient for the Authority to ascertain that the applicant complies with the mentioned condition[58]. More generally, at this stage, the Authority's activity must be confined to checking (within one month following receipt of the application) whether the applicant satisfies the conditions laid down in art. 3 and whether its statutes contain the provisions referred to in art. 4. Only in the event the applicant fails to meet one of these requirements, the Authority must not proceed with the registration. Both a registration and a non-registration decision (together with detailed grounds for rejection) must be published in the Official Journal of the European Union.

3.3.4 Verification of compliance with registration conditions: ordinary procedure and ad-hoc procedure

If the examination of the application ends up being no more than a formal step, on the contrary, the verification of compliance with registration conditions and requirements (art. 10 of the Regulation) represents the moment when the Authority may exercise its most pervasive powers. As a matter of fact, the former must regularly verify that the conditions provided for by art. 3 and art. 4 continue to be complied with by the registered Europarties. In this regard, two different verification procedures are identifiable: an ordinary procedure, with respect to potential infringements of the conditions provided for by art. 3, paragraph 1, lett. a), b), ba) d) e) and art. 4, paragraphs 1 and 2; an *ad hoc* procedure, in relation to a potential violation of art. 3, paragraph 1, lett. c), namely the respect of the values

58 In this respect, see J. MORIJN, *op. cit.*, 629: «As it is specified that the Authority needs only ascertain that the form is filled in, this initial step is essentially one of self-certification». See also O.M. PALLOTTA, *I partiti politici europei ai tempi della crisi dello Stato di diritto in UE: una strada lastricata di buone intenzioni*, in *Diritti comparati*, 11 October 2018, 2: «Si può dire, dunque, che vige una sorta di "presunzione iniziale" circa l'adesione del partito al nucleo valoriale dell'UE».

on which the Union is founded, as expressed in art. 2 TEU[59]. The first one is a rather simple procedure: if the Authority finds out that any of the mentioned conditions (e.g., representation in legislative assemblies in at least one quarter of the Member States) are no longer complied with, it must notify that to the Europarty concerned (art. 10, paragraph 2). The notified alliance, then, has a period of time (although not specified in the Regulation) to comply again with the conditions. In case of non compliance, art. 27, paragraph 1, lett. b) applies; according to this provision, the Authority removes an alliance from the Register by way of sanction where it is established that it no longer fulfils one or more of the conditions set out in art. 3, paragraph 1[60]. This leads to the conclusion that a failure to comply with one of the requirements set out in art. 4 (governance of European political parties) may never lead to a deregistration and this seems rather unreasonable, since governance conditions are among those that an alliance must satisfy early as the time for application: this demonstrates, if proof was needed, how little regard is shown by the current framework for governance provisions (let alone parties' internal democracy), whose violation can't be properly sanctioned.

Art. 10, paragraphs 3 and 4, provides for an *ad hoc* procedure to be used when there are doubts concerning compliance by a registered party with the values on which the Union is founded. In this case, the Authority has no competence to start the procedure; on the contrary, only the three major EU Institutions, namely the Parliament, the Council and the Commission, may lodge with the Authority a request for verification of compliance with the mentioned conditions. At the most, the Authority may inform the major Institutions (that have to indicate their intentions within two months) about relevant facts of which it became aware and

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59 With regard to this subdivision, see I. INGRAVALLO, *op. cit.*, 227 ff.

60 This provision was amended by Regulation (EU, Euratom) n. 673/2018. The original version of this article, as pointed out by G. GRASSO, R. PERRONE, *op. cit.,* 673, «remained silent about the violation of conditions set out in Article 3.1 (b) and (d), which concern conditions of European representativeness of the parties, and about the conditions set out in Article 4.1 (a), (b), (d), (e) and (f) (…) which concern the formal requirements of party (…) statutes. (…) The European legislator, however, seemingly became aware of this, and by means of Regulation no. 673/2018, amended the original provision. (…) While conditions set out in Articles 4 and 5 are still not mentioned, the amended text refers to all conditions set out in Article 3(1) and (2), including those concerning European representativeness of the organizations».

that may result in a breach of art. 3, paragraph 1, lett. c)[61]. The 2018 Regulation has slightly amended the first subparagraph of art. 10, paragraph 3, providing that the European Parliament may lodge a request with the Autority on its own initiative or following a reasoned request from a group of citizens, thus establishing a new right (let's say, a new democracy instrument) that Europeans may exercise[62]. Bearing in mind that the procedure must not be initiated within a period of two months before elections to the European Parliament[63], once the Authority receives a request for verification from one of the three entitled Institutions, it has the duty to ask a Committee of independent eminent persons for an opinion on the subject, which must be delivered within two months[64]. This group, which also played a role under Regulation n. 2004/2003[65], consists of six

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61 See Regulation (EU, Euratom) n. 1141/2014, art. 10, paragraph 3, subparagraph 2. Even in this case, however, the only bodies entitled to start the procedure are the three mentioned Institutions, which will eventually lodge a request for verification…to the Authority itself, that has previosuly informed them.

62 Later on, with a decision made on January 31st 2019, the European Parliaments' Rules of Procedure have been duly amended. Art. 223a now provides for a rather complex procedure that may lead to a verification request made by the European Parliament to the Authority: «A group of at least 50 citizens may submit a reasoned request inviting Parliament to request the verification (…). That reasoned request shall not be launched or signed by Members. It shall include substantial factual evidence showing that the European political party or European political foundation in question does not comply with the conditions (…). The President shall forward admissible requests from groups of citizens to the committee responsible for further examination. Following that examination, which should take place within four months from the President's referral, the committee responsible may, by a majority of its component members representing at least three political groups, submit a proposal to follow up the request and inform the President thereof. The group of citizens shall be informed of the outcome of the committee's examination. Upon reception of the committee proposal, the President shall communicate the request to Parliament. Following such a communication, Parliament shall, by a majority of the votes cast, decide on whether or not to lodge a request to the Authority for European political parties and European political foundations».

63 However, as pointed out by M.R. ALLEGRI, *Ancora sui partiti politici europei*, cit., 14, even though this rule has been added in order to prevent any impact on the ongoing elections, it's precisely during electoral campaigns that potential breaches of the art. 2 TUE values may emerge with greater evidence, as a consequence of parties' political propaganda.

64 This step of the procedure is the only moment when the Authority has an obligation to act (that is, to ask an opinion to the Committee of independent eminent persons). In this regard, see O.M. PALLOTTA, *op. cit*., 5: «Forse, l'unico caso in cui l'Autorità sarebbe tenuta ad attivarsi si ha nell'ipotesi di ricezione della richiesta di verifica da parte di un'Istituzione: in tal caso, l'Autorità parrebbe dover necessariamente invitare il Comitato ad emettere il parere. In caso contrario, quindi, i richiedenti potranno presentare ricorso alla Corte di Giustizia».

65 However, Regulation (EC) n. 2004/2003 provided for a more streamlined framework with regard to the Committee. His composition was also different. See art. 5, paragraph 2, subparagraphs 2 and 3: «Before carrying out such verification, the European Parliament shall hear the representatives of the relevant political party at European level and ask a committee of independent eminent persons to give an opinion on the subject within a reasonable period. The committee shall consist of three members, with the European Parliament, the Council and the

members, with the Parliament, the Commission and the Council each appointing two members, on the basis of their personal and professional qualities. The incompatibilities regime is similar to the one established for the Director of the Authority, with one difference: the Committee members must be neither officials nor other servants of the European Union. The group must be completely independent in the performance of its duties and, before issuing its opinions, it may request any relevant document and evidence from a wide range of subjects, from the same Authority to the concerned Europarty[66]. Once the opinion has been issued by the Committee, the ball is again in the Authority's court: it enjoys a rather vast discretion to decide whether to deregister the concerned party and, in the absence of explicit provisions in this sense, it can do so even when the Committee has found evidence of a violation of the condition provided for by art. 3, paragraph 1, lett c). In this regard, the only condition that the Regulation expressly sets out is the following: a deregistration decision may only be adopted in the event of manifest and serious breach of the well-known condition. Therefore, violations that can't be labeled as manifest and serious may never be sanctioned by way of deregistration[67]: this could pose some problems, since also a moderate art. 2 TEU breach could demonstrate a certain reluctance to comply with fundamental values that inform the entire EU building.

However, as doctrine has also pointed out, nowhere is specified what a serious and manifest breach consists of[68]. Some practice can be found in relation to the EU's reaction to Member States' violations of art. 2 TEU. Art. 7, paragraphs 1 and 2, TEU provides for measures to be taken by the Council in case such a

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Commission each appointing one member. The secretariat and funding of the committee shall be provided by the European Parliament.

66 See Regulation (EU, Euratom) n. 1141/2014, art. 11, which states that the Committee may ask evidence and documents to «the Authority, the European Parliament, The European political party or European political foundation concerned, other political parties, political foundations or other stakeholders, and it may request to hear their representatives».

67 See G. GRASSO, R. PERRONE, *op. cit.,* 678: «Breaches not deemed "manifest and serious" may not be sanctioned in any way, as the Authority has no other means to intervene». In the same sense M.R. ALLEGRI, *Ancora sui partiti politici europei*, cit., 14: «A parte il fatto che la terminologia utilizzata si presta a varie – e non necessariamente oggettive – interpretazioni, permane il dubbio sulle eventuali conseguenze delle violazioni "minori" dei valori ex art. 2 TUE».

68 F. SAITTO, *op. cit.*, 45: «No specific definition of "manifest and serious breach" is provided, buti t seems to recall the words used by the art. 7 TEU». See also O.M. PALLOTTA, *op. cit*., 4: «Il Regolamento non detta i criteri che permettano di qualificare in tal senso una lesione».

breach happens. The expressions used in this article are «clear risk of a serious breach» and «serious and persistent breach»; this could possibly mean that «the Regulation intended to lay down a different standard»; as highlighted by commentators, a possible key to interpreting the provision could be considering what "manifest" adds to "serious": in this sense, it has been said that «the breach should not be purely theoretical. It must have somehow materialized. It is not (…) a speculative assessment of likely implication, but a review of the seriousness of what has already occurred»[69].

3.3.5 Deregistration following the ad-hoc procedure and the EU Institutions' veto power

Once the Authority decides to deregister the non-compliant party, the former must communicate its decision to the European Parliament and the Council. As art. 10, paragraph 4, clearly states, the decision enters into force only if no objection is expressed by the European Parliament and the Council within a period of three months of the communication or if, before the expiry of that period, both Institutions have informed the Authority that they will not object. As obvious, Parliament and Council may object only on grounds related to the assessment of compliance with the values on which the Union is founded[70] and their decisions must be duly reasoned and must also be made public. The Authority's deregistration decision is published in the Official Journal of the European Union and enter into force three months following the date of its publication. As evident in the last part of the procedure outlined above, the European Parliament and the Council have the very last word, since their objection is capable of stopping the entire verification process, which ends up with a stalemate. We are dealing with a genuine veto power that EU Institutions may (still) exercise, notwithstanding the attempt to take the verification procedure out of the hands of the European Parliament. In the end, the much feared «political oversight»[71] that should have been removed thanks to the establishment of an independent Authority to monitor

69 J. MORIJN, *op. cit.*, 634.
70 According to I. INGRAVALLO, *op. cit.*, 229, this somehow limits the Institutions' discretion.
71 See *supra*, fn. 189.

Europarties, is stronger and more present than ever in the new Regulation, thus frustrating the same *ratio* of the 2014 reform[72]. The deregistration of a Europarty that according to the Authority is guilty of a manifest and serious breach of the duty to respect fundamental EU values will likely get bogged down in the Parliament's internal power relations or in the political considerations made in the Council[73]. However, it is still unclear what would happen if an objection is made by an Institution only: in fact, art. 10, paragraph 4, states that an objection may be expressed by the European Parliament *and* the Council, thus hinting that, in order to stop the verification process, both of them must express an objection[74].

3.3.6 The national sphere of influence over Europarties: the request for deregistration coming from the Member State of the seat

It is worth noting, however, that there's one case where the deregistration procedure may be initiated by an entity other than the Institution listed in art. 10, paragraph 3. Art. 16, paragraph 3, indeed, provides that if a Europarty has seriously failed to fulfil relevant obligations under national law applicable by virtue of art. 14, paragraph 2, the Member State of the seat may address to the Authority a duly reasoned request for deregistration which must precisely and

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72 In this regard, see the acceptable evaluation given by G. GRASSO, R. PERRONE, *op. cit.,* 679: «Regulation no. 1141/2014 attempted to distance itself from Regulation no. 2004/2003 by turning the procedure for deregistration of a political party or a political foundation due to violation of fundamental values of EU into an administrative one and established an independent body entitled to implement such a procedure, but failed to give the latter a real power over the ultimate outcome of the procedure, which certainly does not add to the principle of separation between politics and administration. It appears that, in these cases, in order not to be perceived just as a "paper pusher", the Authority must give proof of real independence and carefulness of judgement: only in that case there is a real chance that its decisions will be taken into proper account by political bodies entitled with the final determination of the cases».

73 G. GRASSO, G. TIBERI, *Il nuovo Regolamento sullo statuto*, cit., 202: «Ci si deve interrogare sull'opportunità (…) di permettere al Parlamento e al Consiglio di sollevare un'obiezione in merito alla decisione dell'Autorità, che potrebbe dipendere da rapporti di forza dentro al Parlamento o da accordi politici presi nel seno del Consiglio, con reciproci poteri di veto capaci di condurre ad uno stallo delle decisioni». See also O.M. PALLOTTA, *op. cit*., 5: «Permane, dunque, nel regolamento del 2014, una connotazione politica della procedura di de-registrazione, che rischia di compromettere il (giusto) tentativo di depurare la stessa da inopportune ingerenze per così dire partigiane, cui la precedente normativa (regolamento n. 2004/2003) lasciava ampio spazio».

74 See in this respect M.R. ALLEGRI, *Il nuovo regolamento sullo statuto*, cit., 8: «La norma non chiarisce quali siano le conseguenze di un'obiezione rispetto alla cancellazione di un partito dal Registro sollevata dal solo Parlamento europeo o dal solo Consiglio e non da entrambi».

exhaustively identify the illegal actions and the specific national requirements that have not been complied with. Moreover, the second subparagraph specifies that the Member State of the seat may also address a duly reasoned request when the matter relates exclusively or predominantly to elements affecting the respect of values on which the Union is founded. In this latter case, the Authority, which always has to act without undue delay, must initiate a verification procedure according to art. 10, paragraph 3 (thus, demanding an opinion to the Committee of independent eminent persons); instead, for any other matter, and when the reasoned request confirms that all national remedies have been exhausted, the Authority can proceed to deregistered the non compliant party. In sum, since the law of the Member State of the seat applies to Europarties for the parts not governed by the Regulation (and, as we know, it may also impose additional requirements for the statutes, provided their consistency with the European framework), a deregistration procedure can rightly be a result of a national applicable law violation. As pointed out by commentators, the combination of art. 4, paragraphs 1 and 2, art. 14, paragraph 2 and art. 16, paragraph 3, determines the creation of a large national sphere of influence over Europarties[75], that actually constitutes an obstacle to the creation of a truly transnational party dimension, keeping political parties at European level dependent on national law, preventing a needed harmonization and indirectly promoting an already existing *seat shopping*, which is becoming a «vital matter» for political alliances wishing to be registered[76]: given the Member States' power to initiate a deregistration procedure

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75 In this respect, see F. SAITTO, *op. cit*., 42: «It is possible to see the purpose to foster the creation of a genuine transnational party system. However, it seems still predominant the connection with the national level». However, it should be beared in mind that provisions establishing a close connection between Europarties and national law are not limited to those mentioned in the paragraph, but are extended to: art. 16, paragraph 7, according to which «the Member State (of the seat) shall ensure that the non-for profit condition laid down in Article 3 is fully respected»; art. 33 (headed "protection of personal data), paragraph 8, which states that «The Member States shall ensure that effective proportionate and dissuasive sanctions are applied for infringements of this Regulation, of Directive 95/46/EC and of the national provisions adopted pursuant thereto, and in particular for the fraudulent use of personal data». Furthermore, as pointed out by M.R. ALLEGRI, *Ancora sui partiti politici europei*, cit., 17, the Member State of the seat may always provide for additional or different requirements (once proven their consistency with the European framework) compared to those set out in the Regulation, for example in the field of registration or integration of Europarties in national administrative and control systems or in the field of internal organization, statutory clauses and responsibility.

76 G. GRASSO, R. PERRONE, *op. cit.,* 682: «It is evident that choosing to have seat in a State whose law has stricter requirements compared to other Member States represents a great

and to impose additional organizational requirements, Europarties are establishing their headquarters in European States whose party regulations are more lenient. Most of them have their seat in Belgium[77], where legislation on the matter is not particularly strict, especially as regards internal party organization[78].

3.3.7 Consequences of registration

The result of a successful application for registration is the acquisition of European legal personality (art. 15)[79]: this means that, from that moment on, the registered political alliance enjoys «legal recognition and capacity in all Member States»[80]. Under Regulation 2004/2003, the possession of legal personality in the State of the seat was required in order to have access to funding[81]; this inevitably led Europarties to establish their seat in States whose party regulations included

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disadvantage for the party, thus it will be discouraged to make such a choice». Similarly, M.R. ALLEGRI, *op. ult. cit*., 16: «Può apparire logica e opportuna per partiti e fondazioni che aspirino al riconoscimento di personalità giuridica europea la scelta di insediarsi in uno Stato in cui la disciplina nazionale sia più affine possibile a quella dettata dai regolamenti europei».

77 However, it is also possible to find Europarties (registered and non registered) which have their seats in other Member States such as France, Malta, Denmark and the Netherlands. See ivi, 683.

78 For a specific analysis of the Belgian Loi du juin 1921 sur les associations sans but lucratif, les fondations, les partis politiques européens et les fondations politiques européennes (amended in 2014 after approval of Regulation n. 1141/2014), see ivi, 682-683, where an interesting analysis on party regulation in Italy (deemed «even more lenient» compared to the Belgian one) is provided.

79 Doctrine has considered the acquisition of an European legal personality the most important result achieved by Regulation (EU Euratom) n. 1141/2014. See in this respect A. CIANCIO, *Alla ricerca della forma di governo dell'Unione europea: lo snodo dei partiti politici europei*, in R. IBRIDO, N. LUPO (a cura di), *Dinamiche della forma di governo tra Unione europea e Stati membri*, Bologna, 2019, 349: «Regolamento (…) il cui tratto saliente (…) va rinvenuto nella possibilità finalmente concessa alle formazioni politiche, che rispondano ai requisiti prescritti, di ottenere, previa registrazione presso il Parlamento, una personalità giuridica di diritto europeo, con il relativo status comune. In tal modo si è voluto favorire nei partiti europei, attraverso l'acquisizione di uno statuto unico basato sul diritto dell'Unione, l'indipendenza dalle forme giuridiche nazionali, che ne avevano finora condizionato la formazione». However, as we have seen *supra*, the mentioned independence from national legal forms has been obtained only in part.

80 See Regulation (EU, Euratom) n. 1141/2014, art. 13 and recital 18. It should be recalled here that the Italian Chamber of Deputies (Constitutional affairs and EU Policies Commissions) provided for a critical reading of the provision on European legal personality contained in the Commissions' proposal. According to the Italian legislator, since no regulation on legal persons existed in the EU legal order, it should have been made clear whether the bestowing of a European legal personality implied that the beneficiaries would have been granted an homogeneous legal subjectivity in the entire EU territory or whether, on the contrary, they would have enjoyed legal personality in each Member State according to the conditions and limits provided for by each single legal order. See I. INGRAVALLO, *op. cit*., 221, fn. 24.

81 See *supra*, Chapter I, § 1.4.

the bestowing of legal personality. With the entry into force of the 2014 Regulation this is not required anymore: if the applicant enjoyed national legal personality, the acquisition of the European one is regarded as a conversion of the former (art. 15, paragraph 3). On the contrary, and rather paradoxically, an entity which does not enjoy legal personality in the Member State of the seat, whose regulation makes no provision for this, once registered, would enjoy legal capacity and recognition also in this State[82]. However, to get the whole picture, one should read art. 15 together with art. 16 of the 2014 Regulation, which regulates termination of the European legal personality bestowed to successful applicants. According to this provision, the latter loses European legal personality upon the entry into force of a decision of the Authority to remove them from the Register. The loss of European legal personality leads to two different outcomes: the deregistered alliance may be granted national legal personality or not. In the first case, according to art. 16, paragraph 5, such acquisition must be regarded as a conversion of the European personality into the national one: thus, the alliance will fully mantain pre-existing rights and obligations. In the second case, instead, the entity must be wound up in accordance with the applicable law of the Member State of the seat. In addition, the latter may require that such winding-up be preceded by the acquisition of national legal personality (art. 16, paragraph 6). As underlined by doctrine, however, it would be quite difficult to imagine a proper succession between a Europarty enjoying European legal personality and an entity which is not granted any national legal personality. In this case, the former Europarty should perhaps be «founded again as a totally new entity» and its rights and obligations should be «terminated according to national law on winding-up of private organizations»[83]. In the light of the above, it can be stated that, notwithstanding the elimination of the bestowing of national legal personality as an existing condition for Europarties, the law of the Member State of the seat

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82 See I. INGRAVALLO, *op. cit*., 222: «Potremo quindi avere un partito che, pur non possedendo la [personalità giuridica] in base alla legislazione dello Stato membro in cui è costituito, ottenga invece la seconda, in quanto partito politico europeo, in virtù di quanto stabilito dal reg. 1141/2014. Sarebbe allora possibile, anche se paradossale, che un partito politico costituito secondo le regole italiane e non avente personalità giuridica in Italia, qualora fosse riconosciuto quale partito politico europeo in confromità con il reg. 1141/2014, acquisterebbe personalità giuridica europea e, in conseguenza di ciò, capacità giuridica anche in Italia».

83 G. GRASSO, R. PERRONE, *op. cit.,* 685.

remains an important factor to be taken into account by alliances willing to apply for registration: not only because, as we know, national law may provide for additional requirements consistent with the Regulation, but also because a national law which does not grant any legal personality to political parties could become an undesirable burden in the unlikely event of a deregistration[84].

4. Tackling Europarties' democratic backsliding: a case study

As widely known, since the matter has received a large media coverage, for many years now the European Union is facing the most challenging crisis since its foundation: in two Member States, Hungary and Poland, governments have put in place measures that, to use a highly debated term, slowly made them illiberal democracies[85]. In other words, the two ruling parties, PiS in Poland and Fidesz in Hungary, once obtained majority in Parliament, have set an entirely new political direction, which is axiologically poles apart with respect to the values on which the Union is founded. The measures adopted in Poland and Hungary (in this latter case having sometimes even constitutional rank, since Fidesz enjoys a constitutional majority of two thirds of the Parliaments' members) have been capable of dismantling the existing check and balances systems, thus endangering the principle of the separation of powers, the independence of both the judiciary and the Constitutional courts, fundamental rights' inviolability (especially in relation to minorities), media freedom and the like[86]. The European Union

84 *Ibidem*, where the Authors admit that the bestowing of legal personality under the law of the seat «remains a relevant factor that a European party will likely keep in mind in choosing the country in which to establish its seat».

85 As widely known, the term has been coined by F. ZAKARIA, *The Rise of Illiberal Democracy*, in *Foreign Affairs*, vol. 76, 1997, 22 ff..; See also ID., *The Future of Freedom. Illiberal Democracy at Home and Abroad*, New York-London, 2007. .

86 Literature on the subject is more than vast. See at least J. SAWICKI, *Democrazie illiberali? L'Europa centro-orientale tra continuità apparente della forma di governo e mutazione possibile della forma di Stato*, Milan, 2018; W. SADURSKI, *Poland's constitutional breakdown*, Oxford, 2019; L. PECH, K.L. SCHEPPELE, *Illiberalism within: Rule of law backsliding in the EU*, in *Cambridge Yearbook of European Legal Studies*, 2017; G. HALMAI, *The Fundamental Law of Hungary and the European constitutional values*, in *DPCE Online*, 2/2019; D. KOCHENOV, P. BARD, *The last soldier standing? Courts vs politicians and the rule of law crisis in the new Member States of the EU*, in *European Yearbook of Constitutional law*, The Hague, vol. 1, 2018; R. UITZ, *Can you tell when an illiberal democracy is in the making? An appeal to comparative constitutional scholarship from Hungary*, in *International Journal of Constitutional Law*, 2015.

responded to such a threat by activating the vertical EU values oversight mechanism provided for by art. 7 TEU[87], both against Poland (20th December 2017) and Hungary (12th September 2018). The procedure, however, due to its complexity, can't quite keep pace with the fast development of the democratic backsliding in the mentioned countries: the Council, in its General Affairs Council configuration, is still dealing with the Member States hearings which it is obliged to make according to art. 7, paragraph 1, TEU[88] and it doesn't seem that the deadlock is going to be broken in due course[89]. Meanwhile, on December

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87 Art. 7 TEU provides that «On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure. The Council shall regularly verify that the grounds on which such a determination was made continue to apply. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons. The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed».

88 See R. UITZ, *EU Rule of law dialogues: risks - in context*, in *Verfassungsblog*, 23rd January 2020, 1ff. Here the Author points out that the resolution passed by European Parliament on 16th January 2020 emphasizes «how the Council is visibly left behind when events are moving fast on the ground [this is why the resolution "calls on the Council (…) to ensure that hearings under Article 7(1) of the TEU also address new developments and assess risks of breaches]»: Meanwhile, Regulation (EU, Euratom) 2020/2092 has been adopted, which establishes a "rule of law conditionality" for EU funds. This result has been achieved thanks to a "compromise deal" with both Hungary and Poland. In fact, since the mentioned Member States have always remarked that they would have brought such a legislation in front of the ECJ, «the European Council declared in its December 2020 conclusions that the Commission will refrain from putting the Regulation to use or even publishing implementation guidelines before the court proceedings are finished». See P. POHJANKOSKI, *New year's predictions on rule of law litigation. The conditionality Regulation at the Court of Justice of the European Union*, in *Verfassungsblog*, 7th January 2021, 1ff. As expected, at the beginning of March 2021, both MS launched their cases, while the European Parliament has warned that it would have asked the ECJ to follow an expedited procedure under art. 133 of its Rules of Procedure. At the moment, however, the Commission is still working on the guidelines concerning the activation of the sanctions mechanism of the rule of law budget conditionality. At the end of March 2021, the EP has adopted a resolution by means of which it gives the European executive until 1 June 2021 to come up with the guidelines; otherwise it will be forced to bring the issue in front of the ECJ.

89 While, at the same time, the situation in the mentioned countries is worsening also due to the response to the Coronavirus crisis, which gave the head of the executives the chance to tighten up the restrictions on citizens' liberties and freedoms while strengthening government's discretionary

2020 Regulationn However, it should be remembered that both PiS and Fidesz are members of two regularly registered Europarties, namely and respectively the Alliance of Conservatives and Reformists in Europe (ACRE), currently known as European Conservative and Reformists Party (ECR), and the well known European People's Party (EPP). This circumstance led scholars and European law experts to monitor EPP and ACRE's activities (such as leaders' formal statements, meetings' public documents and the like) in order to assess whether, by expressing support for their Polish and Hungarian members[90], they could be blamed for breaching the values on which the Union is founded and, therefore, be possibly canceled from the Register of Europarties[91]; in order to reach a

powers. In particular, on 30th March 2020, the Hungarian Parliament has approved a law "on protecting against Coronavirus" which creates two crimes aimed at punishing «anyone who publicizes false or distorted facts that interfere with the "successful protection" of the public – or that alarm or agitate that public» and «those who break mandatory isolation orders or otherwise challenge what the Orbán government is doing to fight the virus»; according to commentators, these new criminal rules «would be permanent changes to the criminal law. They would not go away when the emergency is over». Moreover, the approved law gives Orbán a «free rein to govern directly by decree without constraint of existing law. He could "suspend the enforcement of certain laws, depart from statutory regulations and implement additional extraordinary measures by decree." (Sec 2.). The law is no more specific than this, implying that any law could be suspended or overridden as long as the emergency continues». See K.L. SCHEPPELE, *Orbán's emergency*, in *Verfassungsblog*, 29th March 2020, 1 ff. An english translation of the Hungarian Coronavirus law can be found in www.hungarianspectrum.org. The law has been soon considered inconsistent with EU law in many quarters; see J. RANKIN, *Hungarys's emergency law "incompatible with being in EU" say MEPs group*, in *The Guardian*, 31st March 2020.

90 See F. WOLKENSTEIN, *European political parties' complicity in democratic backsliding*, in *Global Constitutionalism*, 13th January 2021, 8ff. The Author deems that there was complicity between Europarties and Polish/Hungarian ruling national forces: «Complicity is essentially about contributing as a "secondary agent" to the unlawful or immoral activity of a "primary wrongdoer". This is less than committing unlawful or immoral acts jointly together with the primary wrongdoer, but more than being a mere bystander who holds no responsibility for the wrongdoing in question». In fact, «EPP MEPs were generally "less likely to emphasise the issue" of democratic backsliding in Hungary in the European Parliament, relative to the MEPs of other party groups»; moreover, «the ECR, by virtue of being a relatively small party, did not have the power to protect the Polish government from EU sanctions in the same way that the EPP (…). More relevant than the near-absence of effective protective behaviour (…) is the fact that ECR has not taken any action against the PiS».

91 Even though, as we will see *infra*, the deregistration procedure proved to be unworkable, the EPP (both the party and the group) somehow managed to get rid of Fidesz. First, the Hungarian ruling party has been suspended by the EPP's Political Assembly in March 2019. Afterwards, on March 3rd 2021, the EPP group approved some amendments to its Rules of Procedure, explicitly providing a reference to the respect of the values on which the Union is founded and facilitating suspensions of national delegations' rights. Before allowing any enforcement of the new rules, Orbán sent a letter to the Chairman of the EPP Group Manfred Weber, declaring that Fidesz MEPs are resigning their membership in the EPP group, since «the amendments (…) are clearly an hostile move against Fidesz and our voters». Few days after, on March 18th 2021, Fidesz's International Secretariat addressed another letter to the Secretary-General of the EPP (Europarty),

conclusion on this matter, one should first clarify the nature of such a verification and, then, whether the Regulation currently into force allows this kind of scrutiny. As we know, art. 3, paragraph 1, lett. c) provides that alliances willing to register must respect, in particular in their programme and activities, the values listed in art. 2 TEU. European political parties are multilevel by definition: they consist of alliances based on a structured cooperation between (national) political parties and/or citizens; this means that both their internal decision making process and the decision taken by the governing bodies are always somehow influenced by the national dimension and logic[92]; each delegate gives account to the national party he/she is affiliated with; actions taken at national level by Europarties' members may always have an impact on the supranational level[93]. That said, the horizontal EU values compliance mechanism (art. 10) may work properly only if the Authority is deemed entitled to evaluate Europarties' compliance with art. 2 TEU by means of an assessment of their attitude towards actions taken at national level by their member parties. So, the scrutiny can reach their orientation towards

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Antonio López-Istúriz White, declaring that it «no longer wishes to mantain its membership in the European People's Party».

92 In this respect, it could be useful to briefly recall the *European network party* model proposed by L. BARDI, *Parties and party system in the European Union*, in K. LUTHER, F. MÜLLER-ROMMEL (eds.), *Political parties in the new Europe: political and analytical challenges*, Oxford, 2002, 252 and echoed by L. VIVIANI, *L'Europa dei partiti. Per una sociologia dei partiti politici nel processo di integrazione europea*, Florence, 2009, 91ff. According to this theory, which somehow helps us to understand the inevitable multilevel dimension of party politics in the EU, the transnational European network party operates at two levels: the national one and the supranational one, with the latter divided in an extraparliamentary and an intraparliamentary dimension. So, it can be said that it has three faces in total. According to Bardi, we can find a party on the ground, corresponding to national parties (which play the traditional roles of political parties: selection of candidates, aggregation of citizens, elections management etc.), a party in the central office, corresponding to the Europarty (which should give the main political direction to the ground) and, finally, a party in the public office, corresponding to the political groups in the European Parliament (which can directly influence the EU decision-making process). On the intrinsic multilevel dimension of Europarties, which, derives from the multilevel dimension of the same EU as a *sui* generis international organization, see also L. D'ETTORRE, *I partiti politici europei: una ricostruzione del quadro normativo*, in *La Comunità Internazionale*, 1/2015, 86: «Benché la letteratura classica sul partito politico sia imponente, questa non aiuta completamente a inquadrare i contorni della questione del partito politico europeo. Esso è da una parte un originale modello di partito proprio perché articolato sulla multi-level dimension dell'UE o, per dirla in un altro modo, sulle caratteristiche della democrazia composita europea, e dall'altra il soggetto-motore dello european party building che si colloca all'interno di un più ampio processo di democratic institution building».

93 For a more detailed assessment of national parties' involvement in the activities of Europarties, see B. KOSOWSKA-GĄSTOŁ, *Are the Europarties real political parties? National parties' involvement in multi-level structures of European political parties*, in *Historia i Polityka*, 20/2017, 10 ff.

members' actions, but it can't be carried so far that actions taken by members at national level have a direct impact on the alliance's compliance with art. 2 TEU. It would have been so, if the first version of art. 3 provided for by the Commission in its 2012 proposal was approved; in fact, it stated that, in order to be considered a European political party, it must observe the values listed in art. 2 TEU «in its program and its activities, *and through those of its members*». As doctrine revealed, «by late January 2014, the possibility to focus not only on a Europarty as a unit, but also on its individual constitutive member national parties had disappeared»[94]. The unsubstantiated provision would have led to a possible deregistration of a Europarty simply on the basis of one of its members' non compliance with art. 2 TEU. Therefore, since a *unit approach* was preferred, such a scrutiny seems (at least apparently) not allowed under the Regulation into force, whose art. 3 formulation («in particular in its programme and in its activities») leaves room just for an assessment of the very Europarties' actions and omissions *as a whole*. However, this doesn't mean that national party dimension must not play a role in the assessment: precisely by virtue of European political parties' multilevel nature, whenever a member party shows an evident reluctance towards art. 2 TEU values in its domestic policies, the corresponding Europarty must explicitly condemn those actions and measures to avoid being accused of an art. 2 TEU violation by means of tolerance of illiberal members[95]. Art. 3, paragraph 1, lett. c) allows this kind of scrutiny. Nevertheless, a closer look reveals that the provision, by imposing the respect of EU values «in particular» in Europarties' programmes and activities[96], means that compliance (and, therefore, verification) is not limited to programmes and activities *alone*, but may be extended to other areas, such as members' programmes and activities. Thus, in principle, it cannot be ruled out that a verification procedure will be possibly initiated on the basis of

94 J. MORIJN, *op. cit.*, 628.

95 It should always be taken into account, however, that a deregistration decision may be adopted only in the event of a manifest and serious breach of the values listed in art. 2 TEU. It is doubtful whether simple tolerance of illiberal members may entail a manifest and serious breach. It could also depend on the scale of the violation: probably, an extensive limitation of fundamental rights by ruling national member parties which corresponds a complete silence on the Europarty's side might entail a manifest and serious breach of art. 2 TEU.

96 It should be noted that this formulation had been already adopted by Regulation (EC) n. 2004/2003, art. 3, paragraph 1, lett. c).

an art. 2 TEU violation coming from a member party. According to doctrine, an individualized assessment of EU values compliance for Europarties should be brought into practice for a series of reasons, such as avoiding tension with art. 7 TEU and preventing "bad apples" from seeking refuge in mainstream Europarties which would be less targeted in case of an *en bloc* approach[97].

Having in mind the *unit* approach, but also being aware of its interstices, in September 2018 two law professors have submitted requests both to the Authority for European political parties and to the European Parliament, according to art. 10, paragraph 3, of the Regulation, asking the former to initiate a verification procedure and the latter to lodge with the Authority a request for verification in relation to EPP and ACRE's compliance with the Regulation. As far as the Authority is concerned, it replied denying the existence of an obligation to undertake a verification of compliance when it is made aware of relevant facts[98]

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[97] J. MORIJN, *op. cit*., 635: «If the tendency toward an en bloc approach were to materialize, it could, if uncorrected, entrench rather than alleviate the European Parliament's "populist" problem. It could lead to a perverse impetus for illiberal actors to "seek refuge" in a "mainstream" EuPP. This is not as unlikely as one might hope as the current set-up suggests interest on both sides. The requirement for both the establishment of a Europarty and a European Parliament political group for membership to come from a quarter of Member States plays an important role here. Particularly in smaller EuPP and political groups this criterion (…) can result in making "throwing out bad apples based on Article 2 TEU issues" very unattractive». As far as the relation with art. 7 TEU is concerned, the Author states that «if the law allows addressing the fallout of illiberal action in a specific Member State based on Article 7 TEU, what could justify the Regulation disallowing this targeted approach at the EU level if the very same national political party (now a component of a Europarty) is involved? This is simply a matter of legal coherence and consistency: lower-level Union law (the Regulation) should be read in the light of the Treaty text itself (Articles 2 and 7 TEU)». However, it's not very clear why a European political party should suffer from a deregistration simply because one of its members is violating the values listed in art. 2 TEU. On the contrary, it seem far more reasonable to initiate a procedure against the same Europarty when it has shown tolerance or support with regard to its members' actions which are not compliant with art. 2 TEU. If, on the one hand, the first scenario seems less feasible according to the 2014 Regulation, the second one seems far more realistic also in the light of the provisions currently into force. As far as the former aspect is concerned, namely the danger that illiberal national parties would seek refuge in mainstream Europarties that would generally be less targeted in a *unit* scenario, this would be true if the *en bloc* approach meaned that only Europarties fully embracing illiberal positions may be subject to a verification procedure. However, we have seen how the current art. 3 formulation allows an assessment that reaches Europarties' attitude towards members' actions. This would probably prevent national illiberal parties from seeking refuge in mainstream Europarties, because even the latter might be targeted and deregistered in case of tolerance or – even more so – support of member parties' illiberal policies; there wouldn't be anymore an interest on both sides, since mainstream parties would prefer avoiding having illiberal members whose presence could lead to a deregistration procedure.

[98] Moreover, the Authority deemed that the informations provided concerning ACRE's and EPP's attitude towards their illiberal member parties «is in the public domain, being debated at national, European and international level» and, as such, «does not (…) make the Authority aware of that information». As correctly pointed out by the claimants, however, if the Authority was aware of

and underlining that it can only act on the basis of a request submitted by one of the three major EU institutions. As a matter of fact, art. 10 is quite clear in providing that «when the Authority becomes aware of facts which may give rise to doubts concerning compliance (…) it shall inform [the three major Institutions] with a view to allowing them to lodge a request for verification with the Authority». As far as European Parliament is concerned, since the request was filed according to the new rule provided for by the 2018 Regulation, that allows a group of citizens to submit a reasoned request to the Parliament aimed at initiating a verification procedure[99], the Citizens' Enquiries Unit of the Assembly responded by saying that the request couldn't be processed because Parliaments' Rules of Procedure must have been amended first: «the future rules will have to clarify (…) matters of admissibility of requests which, under the Regulation, have not yet been regulated in an exhaustive way. As an example, the term "group of citizens" requires (…) legal clarification in order to make the said procedure operational»[100]. The Rules of Procedure were amended soon after[101] and the applicants filed a single reasoned request concerning both the EPP and ACRE. However, they engaged in an unpredictable epistolary fight with the President of the European Parliament and his chief of staff on «how to identify each individual citizen who supports such a request»[102]. The President provided for a strict (and sometimes forced) interpretation of art. 223a of the Rules of Procedure. Basically, after having asked for (and obtained) the necessary signatures of those supporting

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such a situation, it would have been obliged to inform the three major EU Institutions. See A. ALEMANNO, L. PECH, *Holding European Political Parties accountable - testing the horizontal EU values compliance mechanism*, in *Verfassungsblog*, 15th May 2019, 3. See also G. GRASSO, R. PERRONE, *op. cit.,* 678, fn. 31.

99 See *supra*, fn. 199.

100 A. ALEMANNO, L. PECH, *op. cit.*, 4. The Parliament's position was contested by the Authors: «This "political discretion" herewith invoked is, however, without any legal foundation as the Regulation does not foresee any transitional regime regarding the entry into force of art. 10(3). If one were to follow the European Parliament's reasoning, it would mean asking citizens to wait until the Parliaments finds it agreeable to amend its Rules of Procedure in order to be able to exercise a right the Parliament, acting as co-legislator, previously granted to them».

101 Art. 223a provided for all the necessary explanations. More details can be found again *supra*, fn. 199.

102 G. GRASSO, *The European Ombudsman as an insurmountable roadblock?*, in *Verfassungsblog*, 15th October 2019, 2.

the request[103], the President of the Assembly demanded a «tangible proof of the explicit will» by means of a submission, within a fixed time limit, of «valid signatures» of the group of citizens concerned, leaving undefined, however, the supposedly necessary requirements[104]. The deadline expired and, in the end, the request was again deemed inadmissible. Since the applicants believed that «the way in which [the] reasoned request has been processed manifestly qualifies as an instance of maladministration», since, as European citizens, they were «left unable to exercise the right given to us by the Parliament and the Council acting as co-legislators»[105], they finally filed a complaint to the European Ombudsman in accordance with art. 228 TFEU[106], asking whether Parliament was justified in requesting proof in the form of signatures and whether it sufficiently explained how to prove that 50 citizens supported the request[107]. In its assessment, the EU Ombudsman remarkably notes that «the possibility for citizens to introduce such requests deepens the democratic nature of the EU by allowing citizens to participate more closely and intensely in a procedure aimed at ensuring that the core values of the EU are respected». However the requests made by the President of the European Parliament have been considered reasonable, proportionate and, thus, not involving any maladministration. In fact, the Ombudsman underlines that «rules should always be interpreted in light of their purpose. In light of this purpose, it is reasonable to interpret the Rules of Procedure as creating a

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103 Even though the word "signature" is not used in the 2014 Regulation as amended in 2018 and neither in art. 223a of the Parliament's Rules of Procedure.

104 A. ALEMANNO, L. PECH, *op. cit.*, 6.

105 Ivi, 7.

106 Art. 228 TFEU provides as follows: «A European Ombudsman, elected by the European Parliament, shall be empowered to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Union institutions, bodies, offices or agencies, with the exception of the Court of Justice of the European Union acting in its judicial role. He or she shall examine such complaints and report on them. In accordance with his duties, the Ombudsman shall conduct inquiries for which he finds grounds, either on his own initiative or on the basis of complaints submitted to him direct or through a Member of the European Parliament, except where the alleged facts are or have been the subject of legal proceedings. Where the Ombudsman establishes an instance of maladministration, he shall refer the matter to the institution, body, office or agency concerned, which shall have a period of three months in which to inform him of its views. The Ombudsman shall then forward a report to the European Parliament and the institution, body, office or agency concerned. The person lodging the complaint shall be informed of the outcome of such inquiries»

107 G. GRASSO, *The European Ombudsman*, cit., 2. Full text of the complaint is available at www.thegoodlobby.eu.

requirement aimed at proving that the persons making such an allegation are real persons and that they are EU citizens»[108]; more specifically, «the conclusion that a request should be signed by each citizen can also be inferred from a careful reading of Parliament's Rules of Procedure. While those rules do not explicitly state that the citizens making up the group must each sign the request, they do state that a request cannot be launched or *signed* by MEPs. This wording implies that a request should be signed by those persons who are entitled to make a request (that is, by citizens who are not MEPs)»[109]. Doctrine has criticized Ombudsman's decision: in fact, ascertaining that persons supporting a request are real EU citizens «should be done without complicating the procedure with requirements not explicitly and foreseeably established by European law»[110]; as a matter of fact, as already said, neither the Regulation nor the Rules of Procedure made any reference to signatures as essential elements to determine the identity of the citizens supporting a reasoned request according to art. 10, paragraph 3, of the Regulation.

From all this it can be inferred that the current horizontal EU values compliance mechanism has a great potential but also presents major vulnerabilities. As far as the former is concerned, we have seen how the formulation provided for by art. 3, paragraph 1, lett c) leaves room for a control of Europarties' attitude towards their illiberal member parties and, maybe, for an individualized assessment too. Instead, vulnerabilities are mainly linked to the political oversight function that EU Institutions, especially the Parliament, can still exercise. The parliamentary assembly of the European Union, in fact, has the last word as regards the activation a verification procedure (also when the latter is called for by a group of EU citizens) and also when it comes to expressing an objection to a deregistration decision of the Authority[111]. In sum, the potential seems to succumb under the

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108 EU Ombudsman, Decision in case 1501/2019/MIG on the European Parliament's decision to declare inadmissible requests to verify that two European political parties comply with core EU values, point 23.

109 EU Ombudsman, Decision in case 1501/2019/MIG, cit., point 25.

110 G. GRASSO, *The European Ombudsman*, cit., 3.

111 In this respect, see A. ALEMANNO, L. PECH, *op. cit.*, 7: «While the point of the Regulation was to outsource it to an independent authority and a committee, the EP does not seem to hesitate to "reoccupy" the values assessment. (…) One may also regret the lack of independence of an Authority of European political parties. Depite its formal autonomy, this institution has proved

weight of the vulnerabilities, which – however – we hope that will be properly (and hopefully) addressed in 2021/2022, when the Commission will publish its report on the application of the Regulation, that will likely contain proposals for amendments[112].

5. Funding, sanctions, transparency regime and judicial control

The 2014 Regulation, also by means of the 2018 amendments, provided for several changes to the funding framework established in 2003 and 2007. If the previous system subjected financing from the general budget of the EU to the respect of the conditions provided for by art. 3 and to the possession of a statute with a given content and a political programme, the rules adopted in 2014 do not just ask for registration, as one might think, but rather subject funding to another condition: namely, the possession of at least one representative in the European Parliament[113]. In this respect, art. 17, paragraph 3 specifies that a member of the European Parliament must be considered as a member of only one Europarty, which is the one to which his or her national political party is affiliated. It can be

incapable of freeing itself from the political control of the administration to which it belongs: the European Parliament. Unless it will be able to do so, the Authority may risk failing to discharge its oversight duties foreseen by the Regulation».

[112] See Regulation (EU, Euratom) n. 1141/2014, art. 39 (headed "Evaluation"): «The European Parliament shall, after consulting the Authority, publish by 31 December 2021 and every five years thereafter a report on the application of this Regulation and on the activities funded. The report shall indicate, where appropriate, possible amendments to be made to the statute and funding systems. No more than six months after the publication of the report by the European Parliament, the Commission shall present a report on the application of this Regulation in which particular attention will be paid to its implications for the position of small European political parties and European political foundations. The report shall, if appropriate, be accompanied by a legislative proposal to amend this Regulation». On the need for a profound rethink of the horizontal EU values compliance mechanism in 2021, with particular respect to the explicit introduction of an individualized assessment, see J. MORIJN, *op. loc. ult. cit.*: «If this reasoning would not be accepted in practice, there is clearly a need for the EU legislator to reconsider this once the Regulation is evaluated, scheduled for December 2021». On March 30th 2021, the EU Commission has opened a public consultation (that will last until June 22nd 2021) in order to receive feedbacks from EU citizens concerning the proposal that it is going to submit six months after publication of the EP's report. As can be read in the Commission's website, this revision «is aimed at stronger electoral representation of citizens by European political parties, and therefore greater democratic legitimacy, before the next European Parliament elections».

[113] Regulation (EU, Euratom) n. 1141/2014, art. 17, paragraph 1: «A European political party which is registered in accordance with the conditions and procedures laid down in this Regulation, which is represented in the European Parliament by at least one of its members (…) may apply for funding from the general budget of the European Union (…)».

said that the 2014 Regulation determined a shift from a financing system based on the concept of operating subsidies[114] to another based on contributions to expenditures[115]: submission of a political programme outlining the Europarties' objectives is not required anymore; as provided for by art. 17, paragraph 4, contributions shall not exceed 90% of the annual reimbursable expenditure indicated in the budget of a Europarty[116]. Reimbursable expenditures include the administrative ones, those linked to technical assistance, meetings, research, cross-border events, studies, information and publications, as well as expenditures linked to campaigns. As far as electoral campaigns are concerned, art. 21 now provides that the funding may be used to finance campaigns conducted by Europarties in the context of elections to the European Parliament in which they or their members participate. However, direct or indirect funding of other parties, and in particular national parties and candidates, is prohibited (art. 22). The procedures for access to funding have also been changed: now, the application must follow a «call for contribution or proposals». At the time of application, Europarties must comply with the obligations listed in art. 23: this means that they must have submitted to the Authority, with a copy to the Authorising Officer of the European Parliament[117], their annual financial statements and accompanying notes, covering their revenue and expenditure; an external audit report on the

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114 Cfr. Regulation (EC) n. 2004/2003, art. 8: «Appropriations received from the general budget of the European Union in accordance with this Regulation may only be used to meet expenditure directly linked to the objectives set out in the political programme referred to in Article 4(2)(b)». In order to have access to funding under Regulation n. 2004/2003, the applicant should have attached, among other things, a political programme setting out the objectives of the political party at European level (art. 4, paragraph 2, lett. b))

115 See M.R. ALLEGRI, *Ancora sui partiti politici europei*, cit., 20: «Mentre in precedenza i fondi derivanti dal bilancio generale dell'Unione venivano assegnati a partiti e fondazioni sotto forma di sovvenzioni al funzionamento, dal 1° gennaio 2017 vengono erogati sotto forma di contributi alle spese direttamente collegate agli obiettivi statutari del partito o della fondazione (le "spese rimborsabili")». See also ID., *Il nuovo regolamento sullo statuto*, cit., 6: «I partiti europei (…) non saranno più gravati dall'obbligo di presentare un programma di lavoro annuale o bilanci previsionali di funzionamento a giustificazione della richiesta di sovvenzioni, ma dovranno semplicemente giustificare *ex post* le spese sostenute».

116 This provision has been amended by Regulation (EU, Euratom) n. 673/2018, art. 1. The previous (2014) version set the limit to 85% of the annual reimbursable expenditure. Art. 17, paragraph 4, like its previous version, further provides that Europarties «may use any unused part of the Union contribution awarded to cover reimbursable expenditure within the financial year following its award. Amounts unused after that financial year shall be recovered in accordance with the Financial Regulation».

117 Who is entitled to control Europarties' compliance with obligations relating to Union funding, according to Regulation (EU, Euratom) n. 1141/2014, art. 24, paragraph 2.

annual financial statements carried out by an independent body or expert[118]; the list of donors and contributors and their corresponding donations or contributions. Once the call is closed, within three months the Authorising Officer adopts a decision. According to art. 19, paragraph 1 as amended in 2018, 10% of the available appropriations must be distributed in equal shares among the beneficiary Europarties; the remaining 90% must be distributed in proportion to Europarties' share of elected members of the European Parliament; this new proportion demonstrates a particular attention to the principle of representation (the more representatives an alliance has, the more it obtains in terms of funding), despite art. 17, paragraph 1, seemed to be content with a minimum degree of representativeness («at least one of its members»)[119] ; however, doctrine has pointed out that such a large share of appropriations distributed in proportion to Europarties' elected members could pose few problems with respect to political parties' *Chancengleichheit*[120] . Regulation 1141/2014 also provided for an impressive *corpus* of provisions addressing donations and contributions, which replaced the previous system established by means of Regulation n. 1524/2007. Now, art. 20, paragraph 1, states that Europarties may accept donations from natural or legal persons up to a value of EUR 18000 per year and per donor[121]; as we already know, a list of donors and corresponding donations must be transmitted to the Authority according to art. 23[122] and single donations exceeding

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118 Paragraph 3 of the same article specifies that the independent external bodies or experts must be selected, mandated and paid by the European Parliament. Moreover, they must be duly authorized to audit accounts under the law applicable in the Member State where they have their seat or establishment.

119 M.R. ALLEGRI, *op. loc. ult. cit*.: «Il requisito della presenza di un solo deputato eletto al Parlamento europeo corrisponde al minimo di rappresentatività politica, a dimostrazione del fatto che la qualificazione di "europeo" attribuita ad un partito politico dipende solo accidentalmente dall'esito delle elezioni europee. Tuttavia, nelle modalità di ripartizione dei finanziamenti fra i diversi partiti e fondazioni viene in questo modo recuperato il rapporto con la rappresentanza politica nel Parlamento europeo».

120 F. SAITTO, *op. cit.*, 51.

121 The previous threshold was set at EUR 12000.

122 Art. 20, paragraph 2, subparagraph 2 also provides that for donations from natural persons the value of which exceeds EUR 1500 and is below or equal to EUR 3000, the beneficiary Europarty must indicate whether the corresponding donor has given a prior written consent to publication. Under Regulation (EC) n. 2004/2003, as amended in 2007, only donations below EUR 500 could not be made public.

EUR 12000 must be immediately reported to the same Authority[123]. The Regulation currently into force also provides for an extensive number of prohibitions: among the most relevant, we can mention those regarding donations from the budgets of political groups in the European Parliament and those coming from any public authority from a Member State or a third country or from any undertaking over which such a public authority may exercise a dominant influence[124]. It should be taken into account that contributions coming from member parties are permitted, but their value must not exceed 40% of the annual budget of the beneficiary Europarty. Moreover, while donations by citizens who are members of a Europarty are subject to the EUR 18000 ceiling, this limit does not apply where the member concerned is also an elected member of the European Parliament, of a national parliament or of a national parliament or regional assembly[125]. The 2018 Regulation, moreover, provided for the involvement of the recently established European Public Prosecutor's Office (EPPO), which has the task of investigating alleged criminal offences in the context of the funding of European political parties which affect the financial interests of the Union[126].

The sanctioning system is also well regulated (art. 27). Basically, Europarties may be subject to two kind of punitive measures: deregistration and financial sanctions. As far as the former is concerned, we are already aware of the failures to comply that may lead to a verification procedure according to art. 10. However, the 2014 Regulation provides for two more cases that may be punished by means of a deregistration: when a Europarty has been found by a judgment having the

123 See, however, M.R. ALLEGRI, *op. ult. cit.*, 22: «Le informazioni pubblicate sul sito internet, però, indicano nel dettaglio solo le donazioni di importo superiore a dodicimila euro, indicando per ciascuna di esse il donatore, mentre per le donazioni di valore inferiore a tale cifra è riportata solo la somma totale degli importi percepiti, senza riferimenti all'identità dei donatori. Il livello di trasparenza è quindi complessivamente insoddisfacente».

124 Other prohibited donations according to art. 20, paragraph 5, are the anonymous ones and those coming from private entities based in a third country or from individuals from a third country who are not entitled to vote in elections to the European Parliament. Prohibited donations must be returned to the donor. If impossible, this must be reported to the Authority. Then, the Authorising Officer of the European Parliament must establish the amount receivable and authorise the recovery; the funds will then be entered as general revenue in the European Parliament section of the general budget of the EU.

125 See Regulation (EU, Euratom) n. 1141/2014, art. 20, paragraph 9.

126 «Within the meaning of Directive (EU) n. 1731/2017 of the European Parliament and of the Council». See recital 30a, introduced by Regulation (EU, Euratom) n. 673/2018. On the matter, see also A. CIANCIO, *op. ult. cit*., 351.

force of *res judicata* to have engaged in illegal activities detrimental to the financial interests of the Union[127] and where a decision to register the party is based on incorrect or misleading information for which the applicant is responsible or where such a decision has been obtained by deceit[128]. As regards financial sanctions, they must be imposed in case of non-quantifiable and quantifiable infringements[129]. The first kind of violations are to be punished by means of a sanction corresponding to a fixed percentage of the annual budget of the Europarty concerned[130]; the second are punished by means of a sanction corresponding to a fixed percentage of the amount of the irregular sums received or not reported, up to a maximum of 10% of the annual Europarty's budget[131]. It should be beared in mind, however, that pursuant to art. 29, paragraph 1, before taking a final decision relating to sanctions, the Authority or the Authorising Officer must always give the European political party an opportunity to introduce the measures required to remedy the situation within a reasonable period of time (usually not more than one month).

A transparency regime is also provided for by the 2014 Regulation, which has been also improved by the 2018 intervention. Art. 31 provides that Europarties may, in the context of elections to the European Parliament, take all appropriate measures to inform citizens of the Union of the affiliations between national political parties and candidates and the Europarties concerned. The laudable attempt to provide measures aimed at reconnecting the national and the supranational party dimension for the benefit of EU citizens' political awareness (whose formation is one of the constitutional missions of political parties at

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127 As defined in art. 106, paragraph 1, of the Financial Regulation. See Regulation (EU, Euratom) n. 1141/2014, art. 27, paragraph 1, lett. a).

128 This new case has been added by Regulation (EU, Euratom) n. 673/2018, art. 1, paragraph 9.

129 While the former are listed in detail in art. 27, paragraph 2, lett. a), the latter correspond to the acceptance of non permitted donations and contributions and to violations of the requirements concerning financing of parties and campaigns (arts. 21 and 22). See art. 27, paragraph 2, lett. b).

130 5% or 7,5% if there are concurring infringements or 20% if the infringement is repeated or 50% of the Europarty's annual budget if it has been found by a judgment having the force of res judicata to have engaged in illegal activities detrimental to the financial interests of the Union. Except the latter case, the sanction is cut by one third if the Europarty has voluntarily declared the infringement before the Authority has officially opened an investigation. See Regulation (EU, Euratom) n. 1141/2014, art. 27, paragraph 4, lett. a).

131 This fixed percentage goes from 100% to 300% on the basis of the sums received (from below EUR 50000 to more than EUR 200000). See Regulation (EU, Euratom) n. 1141/2014, art. 27, paragraph 4, lett. b).

European level) clashes with the decision to implement this attempt by giving Europarties a mere option («may take all appropriate measures»)[132]. The regime is partly rebalanced thanks to a provision laid down by the 2018 Regulation, which affirms that Europarties must include in their application [for funding] evidence demonstrating that its EU member parties have, as a rule, published in their websites, in a clearly visible and user-friendly manner, throughout the 12 months preceding the final date for submission of applications, the political programme and logo of the Europarty concerned[133]. In point of fact, the latter provision, by imposing the publication of the Europarty's logo and programme in the member parties' websites, indirectly makes art. 31 effective, since this publication may be an appropriate measure to inform EU citizens about national parties' and candidates' affiliations in the context of elections to the European Parliament. Moreover, art. 32 is specifically devoted to transparency, since it requires the creation of a specific website by the European Parliament where a great number of informations concerning Europarties must be made public, such as the non-approved applications for registration, an annual report with a table of the amounts paid to each Europarty, the name of donors and the corresponding donations[134]. Moreover, paragraph 2 of the same article provides that the European Parliament must make public the list of legal persons who are members of European political parties, as well as the total number of individual members. However (with some exceptions laid down in the same Regulation), personal data have to be excluded from publication in the website.

With regards to judicial control, art. 35 provides that decisions taken on the basis of the Regulation may be the subject of Court proceedings before the Court of Justice of the European Union, in accordance with the relevant provisions of the

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132 On this criticism, see M.R. ALLEGRI, *Il nuovo regolamento sullo statuto*, cit., 7.

133 Regulation (EU, Euratom) n. 1141/2014, art. 18, paragraph 2a.

134 Other elements that must be published in the website are: the names and statutes of all registered European political parties and European political foundations, together with the documents submitted as part of their applications for registration; the annual financial statements and external audit reports referred to in art. 23, paragraph 1; the details of and reasons for any final decisions taken by the Authority pursuant to art. 27, including, where relevant, any opinions adopted by the committee of independent eminent persons in accordance with arts. 10 and 11; the details of and reasons for any final decision taken by the Authorising Officer of the European Parliament pursuant to art. 27; a description of the technical support provided to European political parties; the evaluation report of the European Parliament on the application of this Regulation and on the funded activities referred to in art. 38.

TFEU. With specific reference to decisions taken by the Authority for European political parties, art. 6, paragraph 11, stipulates that their legality may be reviewed by the same European Court in accordance with art. 263 TFEU, since those decisions produce legal effects vis-à-vis third parties[135]. Moreover, the Court of Justice has jurisdiction in disputes relating to compensation for damage caused by the Authority (arts. 268 and 340 TFEU)[136]. Lastly, should the Authority fail to take a decision where it is required to do so by the Regulation, proceedings for failure to act may be brought before the Court of Justice pursuant to art. 265 TFEU[137]. As pointed out, however, the Authority seems obliged to act only when it is reached by a request for verification lodged by one of the three entitled EU Institutions. In such a case, the Authority is called to ask for an opinion to the Committee of independent eminent persons pursuant to art. 10, paragraph 3[138]. In all other cases, instead, the Authority enjoys a broad a discretion and, thus, any action for failure to act according to art. 265 TFEU wouldn't be admissible.

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135 Art. 263 TFEU: «The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties. (…) Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures».

136 Art. 340 TFEU, paragraph 2: «In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties».

137 Art. 265 TFEU: «Should the European Parliament, the European Council, the Council, the Commission or the European Central Bank, in infringement of the Treaties, fail to act, the Member States and the other institutions of the Union may bring an action before the Court of Justice of the European Union to have the infringement established. This Article shall apply, under the same conditions, to bodies, offices and agencies of the Union which fail to act. The action shall be admissible only if the institution, body, office or agency concerned has first been called upon to act. If, within two months of being so called upon, the institution, body, office or agency concerned has not defined its position, the action may be brought within a further period of two months. Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court that an institution, body, office or agency of the Union has failed to address to that person any act other than a recommendation or an opinion».

138 See O.M. PALLOTTA, *op. cit.*, 5: «L'unico caso in cui l'Autorità sarebbe tenuta ad attivarsi si ha nell'ipotesi di ricezione della richiesta di verifica da parte di un'Istituzione: in tal caso, l'Autorità parrebbe dover necessariamente invitare il Comitato ad emettere il parere. In caso contrario, quindi, i richiedenti potranno presentare ricorso alla Corte di Giustizia».

PART II
POLITICAL PARTIES IN THE EUROPEAN CONSTITUTIONAL ORDER: DYNAMICS

Chapter III

The European form of State and form of government

1. The legal nature of the European Union

1.1. The legal nature of the European Communities before Maastricht

Before addressing the problem concerning the meaning of the expression form of government and before analysing its applicability to the European Union, it could be useful to clarify the very nature of the EU itself. Once established the first three European Communities in 1951 and 1957 (ECSC, Euratom and EEC), doctrtine started to reflect upon the very nature of those newly born entities, whose most important characteristic – which distinguished them from the existing multilateral organizations – was that of supranationality[1]. However, a mere reference to supranationality, especially a descriptive one, wasn't enough to solve the problem of the nature of the Communities. Three were the main positions that scholars had at the time. According to the first one, the entities gave rise to an international organization (that is, an international union of States) ; their conventional origin was decisive in that respect: since the establishment of the Communities was made by means of an international treaty, their same existence was at the full disposal of the signing parties, who could have unanimously revoked the Treaties at any time[2]. The comparison with traditional international

[1] On this peculiar feature of the newly established Communities, see *supra*, chapter I, § 1.1.

[2] With respect to this first position, see R. QUADRI, *Intervento*, in *Actes officiels du Congrès international d'études sur la Communauté européenne du charbon et de l'acier (Milan-Stresa, 31 mai-9 juin 1957)*, vol. I, Milan, 1959, 380ff; G. BALLADORE PALLIERI, *Le Comunità europee e gli ordinamenti interni degli Stati membri*, in *Diritto internazionale*, 1961, 3ff. Actually these two positions – although similar – were slightly different, since the first author deemed, for

organizations was justified by resorting to aspects such as the absence of an enforcement apparatus that could have ensured the execution of Communities' acts, that was demanded to the Member States in its entirety[3]. At the opposite end of the mentioned position were the orientations that saw the Communities as partial federations or federalistic structures: according to this doctrine, the established entities were closer to States than to international organizations, since national sovereignties had been absorbed by a new common sovereignty[4]. Among those "statist" position, one in particular deserves a mention, since it stands out for its originality: the Communities might be seen as a non-territorial corporative State: namely, a new and autonomous sovereign body in relation to which a given economic activity is taken as its constituent element instead of the territory[5]; that theory implied an overcoming of the concept of national State as territorial State: the Communities, then, could have been described as a State but in a completely new and different way; on the basis of this position, Member States participated in the ECSC not as sovereign entities, but rather as entities devoid of any sovereignty – which was permanently lost – in the carbon and steel sector only. One last trend in doctrine may be regarded as a synthesis of the mentioned orientations: in fact, the Communities couldn't be regarded neither as international unions of States in the traditional sense, since their supranationality implied powers and competences which are alien to known international organizations, neither as federal States, since their member parties didn't surrender their entire sovereignty in favour of the newly established entities. So, it would have been better to give up trying to label the Communities by resorting to traditional categories: they actually could be better described as a *sui generis* model of supranational political organization, thus emphasizing both the

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example, that the Communities had no legal order at all, while the second one wasn't this peremptory, since he also admitted that the integration process actually presented features that could not be found in traditional international organizations. In this respect, see E. DI SALVATORE, *Introduzione al federalismo*, Giulianova, 2013, 96.

3 This lack led some commentators to deny the existence of an autonomous European legal order. See *supra* fn. 2.

4 See in this sense N. CATALANO, *Manuale di diritto delle Comunità europee*, Milan, 1962, 499 ff. This, however, should have led to the creation of a new State; instead, the A. deemed that the Communities gave rise to a special federalistic structure («particolare struttura di tipo federalistico»).

5 This theory can be traced back to F. BENVENUTI, *Introduzione*, in AA.VV, *Ordinamento della CECA*, Padua, 1961, 9 ff.

autonomy and the legal significance of supranationality as the essential feature of the newly founded entities[6].

1.2 The legal nature of the European Union

The entry into force of the Maastricht Treaty determined a quality shift in the integration process, that, from then on, stopped being just related to the economies of the Member States and expanded its scope to include political objectives[7]. Since that implied a modification of the same *raison d'être* of the Community, which came to assume the connotations of a Union, scholars started wondering whether the nature of the entity[8] changed too. The answer, however, didn't come from legal doctrine, but rather from the judiciary side: in fact, Germany's Federal Constitutional Court, called upon to rule on the compatibility of the law ratifying the Maastricht Treaty with the German *Grundgesetz*, stated that the Treaty on the European Union did not set up a European State, neither a Confederation, but rather a federal association of States («*Staatenverbund*») aimed at creating a stable community («*Stabilitätsgemeinschaft*»)[9]: according to this orientation, States were still «*Herren der Verträge»*, that is to say "guardians of the Treaties", and the federalistic element was exhausted into the bond that linked the parties together. Sovereignty, instead, fully remained in the hands of the Member States, notwithstanding the exercise of power (with regard to the conferred competences) was fully left to the Union. According to another position expressed by an influential doctrine, which, at least initially, was not accepted in constitutional

6 See R. MONACO, *Le Comunità sopranazionali nell'ordinamento internazionale*, in ID., *Scritti di diritto europeo*, Milan, 1972, 73. This latter position, according to recent doctrine, was the one that managed to legally frame the peculiarities of the Communities in the better way possible. See M. DI SIMONE, *Europa federata: la lenta dispersione di un'idea*, in P. CALAMANDREI, *Questa nostra Europa*, Gallarate, 2020, 126.

7 See E. DI SALVATORE, *Introduzione*, cit., 99-100. See also M. DI SIMONE, *op. cit.*, 134: «L'entrata in vigore del Trattato di Maastricht ha proiettato il cammino europeo verso uno stadio autenticamente politico», given that «si affermavano inedite finalità politiche, integrando ulteriori ambiti trascendenti la sfera economica».

8 Which actually remained questioned, despite the many attempts to put an end to the dispute.

9 BVerfG 89, 155, 181. As noted by E. DI SALVATORE, *Introduzione*, cit., 101, fn. 260, the German Federal Constitutional Court seemed to adopt the position already expressed by the German scholar P. KIRCHHOF, *Diskussionsbeitrage*, in *EuR*, 1991, 47 ff, who was also judge-rapporteur of the case.

case law at domestic and European level, the European Union could be labeled as a federal association of Constitutions («*Verfassungsverbund*»). This theory assumes that the integration process deals with different, but complementary constitutional systems (*Integrationstheorie des Konstitutionalismus*, which moves from the existence of a multilevel constitutionalism)[10]; here, the legal nature of the bond that links the Member States together is not relevant: the federalistic element lies in the same connection between constitutional orders; under this thesis, the European legal order and national Constitutions are linked by a "genetic" tie. As a consequence, the legitimacy of the constitutional European federalizing process doesn't rest upon the will of the Member States, but rather on the citizens' one[11]. Germany's Federal Constitutional Court has recently come back to the subject in its judgment concerning the European Arrest Warrant (2015). In paragraph 44 of the decision, it is stated that «the European Union is a [federal] association of sovereign states (*Staatenverbund*), of constitutions (*Verfassungsverbund*), of administrations (*Verwaltungsverbund*) and of courts (*Rechtsprechungsverbund*). This structure is ultimately based on international treaties concluded between the Member States. As "masters of the Treaties" (*Herren der Verträge*), the latter decide through national legal arrangements if and to what extent Union law is applicable and is accorded precedence in the respective national legal order»[12]. This consideration, which has a doctrinal

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10 The most prominent author supporting this position is undoubdetly Ingolf Pernice. See, among the many contributions, I. PERNICE, F. MAYER, *La Costituzione integrata dell'Europa*, in G. ZAGREBELSKY (a cura di), *Diritti e Costituzione nell'Unione europea*, Roma-Bari, 2003, 43 ff.

11 See in this respect, E. DI SALVATORE, *Introduzione*, cit., 102, where the Author gives account of Pernice's opinion on the legitimacy of the EU constitutional federalizing process.

12 BVerfG, 140, 317, par. 44: «Die Europäische Union ist ein Staaten-, Verfassungs-, Verwaltungs- und Rechtsprechungsverbund, der seine Grundlagen letztlich in völkerrechtlichen Verträgen der Mitgliedstaaten findet. Als Herren der Verträge entscheiden diese durch nationale Geltungsanordnungen darüber, ob und inwieweit das Unionsrecht im jeweiligen Mitgliedstaat Geltung und Vorrang beanspruchen kann». More recently, Germany's Federal Constitutional Court has reiterated the expressed position in the 2016 OMT judgment (BVerfG, Urteil des Zweiten Senats vom 21. Juni 2016 - 2 BvR 2728/13, paragraph 140) and, lastly, in its seminal PSPP judgment (2020). See BVerfG, Urteil des Zweiten Senats vom 5. Mai 2020 - 2 BvR 859/15, paragraph 111: «Die nach dieser Konstruktion im Grundsatz unvermeidlichen Spannungslagen sind im Einklang mit der europäischen Integrationsidee kooperativ auszugleichen und durch wechselseitige Rücksichtnahme zu entschärfen. Dies kennzeichnet die Europäische Union, die ein Staaten-, Verfassungs-, Verwaltungs- und Rechtsprechungsverbund». On this issue, see F. SAITTO, *Il Bundesverfassungsgericht e l'Europa: istanze "controdemocratiche", principio di responsabilità e difesa della democrazia rappresentativa alla luce del caso OMT*, in *Costituzionalismo.it*, 3/2016, 23 ff., spec. 26.

origin[13], leads to the conclusion that the current position of the German *Bundesverfassungsgericht* in relation to the EU's legal nature has changed a lot compared to the one expressed in the *Maastricht-Urteil*: in fact, it seems like it has gone beyond the narrow *Staatenverbund* notion, by including in the federal association also other players such as the constitutions of the Member States (thus accepting Pernice's multilevel model), administrations and even courts. This choice probably implies an intention – justified by the (somewhat uncertain) progress made by the integration process – to overcome the underlying sovereignist spirit of the Maastricht Urteil[14], thus opening up to theories which paid great importance to the dynamic component of integration[15], without ever getting too close – for obvious reasons – to acknowledge the State nature of the European Union.

2. Form of State and form of government: preliminary remarks

2.1 Origins of the notion

The first scholar who systematically recognized the difference between "State" and "government" is Jean Bodin, who deemed that, in order to identify the form of a State, one should take into account the ownership of sovereignty[16]; the form

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13 P. M. HUBER, *Bewahrung und Veränderung rechtsstaatlicher und demokratischer Verfassungsstrukturen in den internationalen Gemeinschaften - 50 Jahre nach*, in *AöR*, 1/2016, 123-124. Before being altogether applied to the EU as such, the terms *Verwaltungsverbund* and *Rechtsprechungsverbund* had already appeared in german doctrine years before. An exhaustive list of these contributions can be found in J. LUTHER, *Costituzionalizzare l'Integrationsgewalt*: *non solo querelle de l'Allemagne*, in A. BERNARDI (a cura di), *I controlimiti. Primato delle norme europee e difesa dei principi costituzionali*, Napoli, 2017, 139-140. Here, the Author also mentions an influential study by the soon-President of the BVerfG, where the relationship between the ECJ, the ECtHR and the BVerfG is described as a *Verfassungsgerichtsverbund* (here, however, the term *Verbund* is used to describe «the different techniques of cooperation between the three Courts»). See A. VOSSKUHLE, *Der europäische Verfassungsgerichtsverbund*, in *TranState Working Papers*, n. 106, 2009, 1 ff.

14 See F. SAITTO, *op. ult. cit.*, 27.

15 «che assegnava un ruolo decisivo ai giudici e alle corti». Ivi, 28.

16 J. BODIN, *Les six livres de la République*, Paris, 1576, 110, available at http://classiques.uqac.ca/classiques/bodin_jean/six_livres_republique/bodin_six_livres_republique.pdf: «il faut voir en toute République, ceux qui tiennent la souveraineté, pour juger quel est l'état: comme si la souveraineté gît en un seul Prince, nous l'appellerons Monarchie; si tout le peuple y a part, nous dirons que l'état est populaire; s'il n'y a que la moindre partie du peuple, nous jugerons que l'état est Aristocratique».

of the government, instead, is inferred from the way in which the mentioned sovereignty is exercised[17]. Over time, primarily due to the increasing demand for rights on the citizens' side and to the subsequent auto-limitation of the constituted authorities, those definitions proved to be inadequate and have been gradually improved and refined. According to a well known and influential doctrine, the form of a State stems from the objectives set by the dominant political forces, which are bearers of a general conception of associated life, and from the system of relationships and the essential structures that must implement them[18]. This means that the form of a State can still be inferred from the ownership of sovereignty, but it is also given by the way in which the latter is exercised, with particular regard to the attitude of the authority towards individuals and to the centralization or decentralization of the decision-making process. Thus, the form of a State is given by the way in which its three constitutive elements – sovereignty, people, territory – relate to each other[19]. Instead, the form of government corresponds to the organization of the supreme power[20]: in other words, one can affirm that a State has a given form of government by analyzing how the relationships between public powers are structured and by identifying the institutions that take part in determining the political direction of the State[21].:

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17 Ivi, 122-123: «Car il y a bien différence de l'état et du gouvernement: qui est une règle de police qui n'a point été touchée de personne; car l'état peut être en Monarchie, et néanmoins il sera gouverné populairement si le Prince fait part des états, Magistrats, offices, et loyers également à tous sans avoir égard à la noblesse, ni aux richesses, ni à la vertu. Il se peut faire aussi que la Monarchie sera gouvernée Aristocratiquement quand le prince ne donne les états et bénéfices qu'aux nobles, ou bien au plus vertueux seulement, ou aux plus riches; aussi la seigneurie Aristocratique peut gouverner son état populairement, distribuant les honneurs et loyers à tous les sujets également, ou bien Aristocratiquement, les distribuant aux nobles ou aux riches seulement; laquelle variété de gouverner a mis en erreur ceux qui ont mêlé les Républiques, sans prendre garde que l'état d'une République est différent du gouvernement et administration [de celle-ci]».

18 C. MORTATI, *Istituzioni di diritto pubblico*, Tomo I, Padua, 1969, 128: «Intesa la forma di stato nel senso ora accennato, quale deriva dai lineamenti essenziali impressi allo stato dal sistema dei fini posti alla sua attività per opera delle forze politiche dominanti, portatrici di una concezione generale di vita associata, nonché dal sistema dei rapporti e delle strutture fondamentali destinati a realizzarli (…)». The Author differentiates between «forme» di Stato and «tipi» di Stato: the latter «dovrebbero riguardare le figure assunte dagli stati quali risultano determinate con riguardo ai rapporti con gli altri stati, che, vertendo fra organi sovrani, si costituiscono su una base consensuale paritaria, attraverso lo strumento dell'accordo».

19 On the essential elements of the State, see at least V. CRISAFULLI, *Lezioni di diritto costituzionale*, I, Padua, 1970, 57 ff.

20 C. MORTATI, *op. loc. ult. cit.*

21 In this respect, one can say that the form of State relates to the State-community ("Stato-comunità" or "Stato ordinamento"), while the form of government relates to the State-*apparatus*

ultimately, we can say that the form of government corresponds to the manner in which State functions are allocated and organized between the various constitutional bodies[22]. The Constitution – intended as both formal and material – provides for the rules that allow the interpreter to determine, at least at first glance, the form of State and form of government of a given experience[23].

2.2. Are the form of State and form of government notions applicable to the EU?

This being cleared up, the European Union, as we have already seen[24] does not have a State nature, properly so called: doctrine is divided between those who adhere to the reasoning provided for by the *Maastricht* decision of the BVerfG, thus denying any possible juxtaposition of the EU experience with the national State (since the conferred competences do not correspond to a transfer of sovereignty, which is retained by the *Herren der Verträge*)[25] and those who, on the contrary, deem that behind the principle of conferral lies the intention to share portions of national sovereignty. Ultimately, the latter are inevitably more open to an extension of the application of Westphalian categories to the European

("Stato-apparato" or "Stato governo"): they both represent two separate aspects of the same entity, which is the State-institution. In relation to this distinction, see V. CRISAFULLI, *op. ult. cit*., 80 ff. See also P.F. GROSSI, *I diritti di libertà ad uso di lezioni*, I, 1, Turin, 1988, 99 ff.

22 C. MORTATI, *Le forme di governo. Lezioni*, Padua, 1973, 3.

23 In Italian doctrine, many authors have published contributions which provide for a classification of forms of State and/or forms of government. See at least N. BOBBIO, *La teoria delle forme di governo nella storia del pensiero politico*, Turin, 1976; more recently, see G. AMATO, F. CLEMENTI, *Forme di Stato e forme di governo*, Bologna, 2012; M. VOLPI, *Libertà e autorità. La classificazione delle forme di Stato e delle forme di governo*, Turin, 2018; C. PINELLI, *Forme di Stato e forme di governo*, Naples, 2009. Outside Italy, one of the most influential works which adopts a (partly) similar approach is M. DUVERGER, *Les grands systèmes politiques*, in ID., *Institutions politiques et droit constitutionnel*, Paris, 1955 (translated in Italian as *I sistemi politici*, Bari, 1978).

24 And net of the recent development in German constitutional case law, which, however, doesn't seem to speak in favour of a supposed State nature of the Union.

25 According to this position, conferring competences at EU level corresponds to delegating the exercise of sovereign powers: this delegation ends up being a mere renunciation to an autonomous exercise of those powers, thus allowing their joint exercise. However, according to those who adhere to this position, what has been said doesn't lead to a disintegration of the Member States' sovereignty. In this respect, see H.P. IPSEN, *Europäisches Gemeinschaftsrecht*, Tubingen, 1972, 54 ff.

integration process[26]. As a matter of fact, we have all witnessed a gradually increasing use, by judges, scholars and in the same Treaties, of the mentioned categories (e.g., primacy principle, homogeneity clause, constitutional traditions common to the Member States, constitutional identity): this undoubtely proves that the institutional actors are becoming conscious of the inadequacy of international law categories in the face of a federalizing process which has nothing to do with the ordinary development of an international organization. Irrespective of the chosen approach, however, the acceptance of a Westphalian vocabulary in the Treaties, after being introduced at European level by the Court of Justice, proves that the application of State-based categories to the EU integration process is not just the result of a "colonizing or expansionistic tendency" of constitutional doctrine[27], but rather a clear (institutional) intention to update the EU-vocabulary and, therefore, the tools for interpreting the process itself. However, it is also true that the form of State and the form of government can not be found in the mentioned toolkit provided for by the Treaties and by the case law of the Court of Justice. This is one of the reasons why their application to the European Union is a matter of dispute. A number of other concerns have also raised eyebrows: for instance, some have stressed that, since those concepts have been (and are still) mainly used within the realm of few Member States' doctrine, their application to the European dimension – which covers a whole range of different constitutional experiences – may be misleading or of little use[28]. Anyway, net of any possible "nationalistic" approach, hardly anyone will deny that – since the European Union has some elements in common with nation States – an investigation on the relationship between its territory, its people and its

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26 See, at least, A.A. CERVATI, *Elementi di indeterminatezza e di conflittualità nella forma di governo europea*, in *Annuario 1999. La Costituzione europea. Atti del XIV Convegno Annuale dell'Associazione italiana dei costituzionalisti (Perugia, 7-8-9 ottobre 1999)*, Padua, 2000, 73 ff.

27 See R. IBRIDO, *Oltre le "forme di governo". Appunti in tema di "assetti di organizzazione costituzionale" dell'Unione europea*, in *Rivista AIC*, 1/2015, 6.

28 Ivi, 11: «Occorre tenere conto che la locuzione "forma di governo", benché particolarmente familiare alla dottrina costituzionalistica italiana, è tutto sommato storicamente recente e comunque applicata in una area geografica limitata. Ma anche a voler restringere il campo alla considerazione delle sole tradizioni culturali dei Paesi dell'Unione europea, rimane il fatto che il tema della "forma di governo" è sostanzialmente sconosciuto ad alcune esperienze (…). Già questo primo dato potrebbe suggerire di evitare approcci "provinciali" o "nazionalistici" rispetto a trasformazioni costituzionali che, investendo ventotto diverse realtà nazionali, richiedono un lessico scientifico maggiormente "inclusivo"».

sovereignty (provided they are, at least in part, detectable) as well as on its institutional organization can be both useful and fruitful. It is precisely for this reason that in the present study we will make use of the "form of State" and (especially) "form of government" concepts in a judicious and thoughtful manner, that is to say, being aware of the potential dangers their use hides[29], but – at the same time – being also conscious that alternative suggested terms[30], while being undoubtely more accurate or more in line with the present conditions of the EU, share, in the end, the same object with the aforementioned traditional concepts: namely, the relationship between authority and freedom on one hand; the written and unwritten rules governing the institutional dynamics on the other hand. Since the ultimate objective of this part of the study is understanding the role played by European parties within the EU institutional dynamics – while offering some brief notes on the contribution of Europarties to the delimitation and implementation of the supreme values of the Union – we deem that a weighted use of the "form of

[29] For instance, when studying the "form of government" of the EU, one should never forget the existence of procedural connections between the European and the various national institutional settings. Approaching the form of government of the EU without taking into account this multilevel dimension of the institutional organization could lead to unfortunate outcomes in terms of research. In this respect, see the warnings coming from R. IBRIDO, N. LUPO, *Introduzione. «Forma di governo» e «indirizzo politico»: la loro discussa applicabilità all'Unione europea*, in R. IBRIDO, N. LUPO (a cura di), *Dinamiche della forma di governo tra Unione europea e Stati membri*, Bologna, 2019, 16: «Uno studio "integrato" degli assetti istituzionali dell'Ue, che includa anche le forme di governo dei suoi Stati membri, può aiutare a evidenziare le connessioni procedurali esistenti, che strutturano la complessa democrazia europea». As far as the dangers arising from the use of the "form of State" notion, see at least G.U. RESCIGNO, *Forme di Stato e forme di governo (diritto costituzionale)*, in *Enc. Giur.*, vol. XVI, Rome, 1989, 7, where the Author points out that the notion suffers from a sort of "genetic disease", since one can not identify pre-constitutional values of a given organized political community by referring to a "State", thus making the latter a anhistorical concept (while, on the contrary, the State represents only one possible way to organize a political community). Moreover, according to the Author, the notion comes from the idea of subordination of the law to the political direction of the groups in power; thus, any classification in this respect – net of its potential usefulness – has nothing to do with the law *strictu sensu*. That's why the Author prefers terms such as "political systems" (sistemi politici) or "political regimes" (regimi politici).

[30] See, e.g., R. IBRIDO, *Oltre le «forme di governo»*, cit., 14 ff, who, rather than using "forme di governo", prefers the term "assetti di organizzazione costituzionale" (that could be translated as "constitutional organization settings"), where the word "assetti" depicts «la dinamicità e la concretezza delle soluzioni istituzionali chiamate ad organizzare il processo politico. Una dinamicità che non viene invece colta dalla locuzione "forma", la quale sembra pagare un tributo eccessivo ad una concezione "law on the books" anziché "law in action" del fenomeno giuridico». The term "organizzazione costituzionale", instead, has been chosen in order to demonstrate the distance from the often used alternative "governance": the Author deems that latter is not appropriate since it implies that the European citizen may have an impact on the decision making processes only as consumer, user, worker and so on; on the contrary, it must participate in those processes as voter and member of a political (and constitutional) community.

State" and "form of government" notions, far from being just the result of a path dependency[31], could be more beneficial than detrimental (or misleading) for our purposes[32].

3. The form of State of the European Union

3.1 The axiological structure on which the system is based

If the form of a State is nothing more than the juridification of the ideological project that lies behind the relationship between authority and freedom[33], when reference is made to the form of State of the European Union, one should firstly identify the ideological project that has inspired European integration and, then, circumscribe the normative provisions that possibly make this project imperative and mandatory for both the EU and its Member States, thus understanding by what (technical) means the objective is achieved. Even though the people who inspired the European project had a clear understanding in their minds as to what values were supposed to characterize the fledgling organization, the early abandonment of the federalist approach and the adoption of a functional perspective determined the emergence of a gradualist entity, which, albeit at the beginning, was no more than a supranational organization with defined objects to be achieved (the establishment of a common market above all). As noted in the previous chapters, the Court of Justice played a crucial role in the building a

31 As noted ivi, 10: «Espressione impiegata dagli economisti per indicare la persistenza di determinati modelli concettuali malgrado la loro inefficienza, poiché i costi connessi all'elaborazione di un paradigma alternativo sono considerati ancora troppo elevati».

32 And this seems to be also the view taken in the (already cited) recent book by R. IBRIDO, N. LUPO (a cura di), *Dinamiche della forma di governo*, cit. See spec. R. IBRIDO, N. LUPO, *Introduzione*, 20-21: «Pur consapevoli della esigenza di confrontarsi con le riserve espresse in merito alla "efficienza" del concetto di forma di governo (…), in questa sede verrà confermata la formula "forma di governo" secondo la convenzione linguistica in uso nella comunità dei costituzionalisti italiani. Come è stato sostenuto, infatti, se lo scopo di un giurista non è quello di "ricercare essenze", e se nel linguaggio giuridico è necessario rassegnarsi "a un certo grado di imprecisione", il consolidamento di un determinato lemma dipende allora e innanzitutto dalla sua idoneità "a fungere da utile strumento di rappresentazione e di comunicazione", oltre che di comprensione della realtà politico-istituzionale». Here the Authors are quoting L. PEGORARO, *Forme di governo, definizioni, classificazioni*, in VV.AA, *Studi in onore di Leopoldo Elia*, Milan, 1999, 1217 ff.

33 See again C. MORTATI, *op. ult. cit.*, 135.

"Constitution" for Europe: there had been no Constituent Assembly, then, and no decisive political moment capable of translating an axiological structure into constitutional norms. Then, this process had been entirely done by means of jurisprudence[34], that gradually equipped the organization with a «constitutional "hard core" (…) which is not readily capable of transformation» and poses «certain limits to flexibility and to differentiation, some minimum degree of commitment to a basic and shared set of policies»[35]. According to doctrine, the most prominent principle[36] that inspires the whole European legal system is the rule of law[37]: originally derived from art. 220 TEC, this principle has formed (and still forms) the basis of an extensive number of important ECJ decisions, all sharing the same basic idea of law as legitimation and limit to power[38]. The presence of the rule of law principle in the Treaties, as detected by the judges in Luxembourg, has led to the progressive development of other principles and values, closely related to the former: we are referring here (at least) to democracy, fundamental rights protection and pluralism[39]. Once detected and shaped by

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34 See in this respect F. PALERMO, *La forma di Stato dell'Unione europea. Per una teoria costituzionale dell'integrazione sovranazionale*, Padua, 2005, 81 ff: «Il momento fondativo di una sia pure embrionale forma di Stato della Comunità (…) si registra successivamente, attraverso un uso evolutivo del diritto di formazione giurisprudenziale che ha prodotto una irreversibile "mutazione genetica" del sistema. (…) gradualmente giuridicizzando (…) la necessaria rispondenza, la cinghia di trasmissione, tra l'impianto assiologico in divenire e le sue garanzie, tra il dover essere e l'essere».

35 G. DE BÚRCA, *Differentiation within the core: the case of the Common Market*, in G. DE BÚRCA, J. SCOTT (eds), *Constitutional change in the EU. From uniformity to flexibility?*, Oxford, 2000, 135, cit. from F. PALERMO, *op. cit.*, 84.

36 On the difference between values and principles in the EU legal system, see M.L. FERNANDEZ ESTEBAN, *Constitutional values and principles in the Community legal order*, in *Maastricht Journal of European and Comparative Law*, 2/1995, 129 ff. According to S. MANGIAMELI, *La clausola di omogeneità nel Trattato dell'Unione europea e nella Costituzione europea*, in S. MANGIAMELI (a cura di), *L'ordinamento europeo. I principi dell'Unione*, Milan, 2006, 3, «[i valori], una volta normati, divengono naturalmente dei "principi", come tali suscettibili di interpretazione e di formare sistema».

37 F. PALERMO, *op. cit.*, 92: «Si può (…) affermare che proprio il principio di rule of law sia stato il nucleo essenziale, il nocciolo da cui si è potuta ulteriormente sviluppare una più identificabile forma di Stato dell'Unione».

38 *Ex multis*, see Court of Justice of the European Communities, case C-294/83, *"Les Verts" v. European Parliament* [1986] ECR 1339.

39 F. PALERMO, *op. cit.*, 94 ff. On democracy, see, *ex multis*, Court of Justice of the European Communities, case C-70/88, *European Parliament v. Council of the European Communities* [1990] ECR I-2041. On the protection of fundamental rights, see at least Court of Justice of the European Communities, case C-29/69, *Erich Stauder v City of Ulm - Sozialamt*, [1969] ECR 419 and case C-11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1970] ECR 1125.

European judges, the fundamental values and principles on which the Union is founded must be incorporated in the Treaties in order to express their binding nature towards both the Union and its members. As a matter of fact, the form of State – which, as we have seen, seems to be linked to the existence of a constitutional order and not necessarily to a nation State – normally has both a descriptive and a prescriptive value: reference to it may be made for the purpose of allowing a classification of a given experience (as authoritarian, socialist, democratic etc.) by analyzing its axiological structure as well as for the purpose of understanding whether and how the founding values are actually enforced[40].

3.2 The European Union's homogeneity clause

From this last viewpoint, given the quasi-federal structure of the European Union, the enforcement of the values and principle on which it is founded could have only come through a typical federal tool: an homogeneity clause[41]. This kind of clause, which has an indisputable normative nature, is normally capable of obliging federated entities to taking on a given form (of State), consistent with the one of the federal entity. The European Union, in order to ensure the prescriptive nature of its form of State, has chosen to introduce a "disguised" homogeneity

[40] See again F. PALERMO, *op. cit.*, 24: «Ciò che distingue l'approccio giuridico al tema della forma di Stato, e che ne giustifica la trattazione autonoma e soprattutto con gli strumenti del diritto costituzionale è dunque l'individuazione del carattere normativo della categoria concettuale così identificata, e la sua analisi proprio attraverso l'elemento dell'imposizione costituzionale (e della sua garanzia, politica e giuridica) della corrispondenza tra le finalità fondamentali della comunità sociale organizzata (…) e la struttura istituzionale volta a garantire tali finalità. (…) In altre parole, il concetto di forma di Stato in tanto può essere oggetto di analisi giuridica in quanto se ne ricavino contenuti (e vocazione) prescrittivi». See also S. MANGIAMELI, *La clausola di omogeneità*, cit., 5, who underlines the difference between a "deontic" (Sollen) and "existential" (Sein) meaning of homogeneity.

[41] F PALERMO, *op. cit.*, 128: «Di regola, uno degli snodi cruciali per la garanzia di un determinato sistema di valori all'interno degli ordinamenti composti (…) è rappresentato dalle clausole di omogeneità. (…) Secondo un'efficace definizione, le clausole di omogeneità prescrivono un "contenuto minimo di coincidenza strutturale e sostanziale"»; here the Author makes reference to K. STERN, *Das Staatsrecht der Bundesrepublik Deutschland*, vol. I, Munchen, 1984, 704. Another suitable definition for the homogeneity clause can be found again in S. MANGIAMELI, *op. ult. cit.*, 7: «L'omogeneità non è un prodotto reale, legato alle azioni e ai comportamenti materiali dei soggetti che agiscono in un dato contesto, ma un principio giuridico che imprime un modo di essere all'ordinamento centrale e agli ordinamenti parziali, rendendoli compatibili in un ordinamento generale». On constitutional homogeneity, see also G. DELLEDONNE, *L'omogeneità costituzionale negli ordinamenti composti*, Naples, 2017.

clause, as doctrine has labeled it[42]. As a matter of fact, art. 2 TEU doesn't require Member States to do anything: it simply spells out the values on which the Union is founded and it specifies that those values «are common to the Member States»[43]. Read in isolation, this provision doesn't seem strong enough to ensure the respect of the EU axiological structure by the Member States. However, the clause should be read in conjunction with art. 7 TEU, which provides for a sanctions regime to be applied whenever the competent Institutions determine the existence of a «serious and persistent breach by a Member State of the values referred to in art. 2 TEU»[44]. Net of the political obstacles that are showing the extent of the gap between what is written in the Treaty provisions and the intergovernmental *realpolitik* of the Union in relation to existing democratic backslidings, the introduction of a sanctioning proceeding endows the Union with an homogeneity clause properly so called, which – however – still fatally presents features that set it apart from the traditional federal paradigm; for instance, no direct judicial protection is provided in case of violation by Member States: in the end, the response to a violation of the EU's axiological structure seems to be primarily demanded to politics, with easily deducible consequences. However, it should never be forgotten that the EU is not a federal State – since no transfer of sovereignty from the Member States to a central State ever occurred – and, thus, its homogeneity clause could have never worked like the ones that can be found in federal systems. In fact, while the latter is nothing but an assertion of strength and

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42 F. PALERMO, *op. cit.*, 132.

43 Art. 2 TEU states that «The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail». It should be noted that, however, Member States are not the only addressees of the prescriptive side of the EU's form of State. Also candidates for accession to the Union must respect its axiological structure. See on this issue the first part of art. 49 TEU, paragraph 1: «Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union». It should be also taken into account that the EU's fundamental values must also be respected – at least on paper – by States which are not candidates for accession, but still are in commercial or political contact with the Union. Lastly, it should not be forgotten that, in the foreign and security policy field, according to art. 32 TEU «Member States shall ensure, through the convergence of their actions, that the Union is able to assert its interests and values on the international scene».

44 On the possible interpretation of a «serious and persistent breach» as well as of a «clear risk of a serious breach» (and, more generally, in relation to the correct interpretation of art. 7 TEU), see Chapter II, spec. § 3.3.4.

supremacy of the federal level with respect to the federated entities, the former is "an affirmation of two weaknesses by entities that are aware they are not empowered to impose anything by means of hierarchy, while being able, however, to persuade"[45]. In other words, both the EU and the Member States lack the power to impose their own axiological structure.

3.3 Homogeneity v. identity

This has led to the introduction of a rather weak homogeneity clause in the Treaties and, on the States' side, to the establishment of "counterlimits" to the integration process[46]: according to those latter doctrines – which often had a scholalrly origin and were subsequently used in constitutional case law – the prescriptive nature of the values and principles on which the Union is founded must always stop at the front of the essential nucleus of the Member States' Constitutions: put it in another way, the integration process must never undermine the constitutional identity of the Member States, which shall be identified by the sole constitutional bodies of the State concerned (more often, Constitutional Courts, since they are demanded to assess the compatibility of State laws with "osmotic" Constitutions, that is to say fundamental laws with an eye on international and European law). So, if the EU is allowed to enforce its founding values to the perimeter of the constitutional identity of the Member States[47], but at

45 See F. PALERMO, *op. cit.*, 196: «Se negli ordinamenti federali la prescrizione di omogeneità è dunque un'affermazione di forza e di supremazia del livello federale nei confronti degli Stati membri, in ambito comunitario è affermazione di due debolezze, da parte di soggetti che sanno di non poter imporre per sovraordinazione, ma soltanto convincere per persuasione».

46 As far as Italy is concerned, see at least Corte Cost., judgement of December 27th 1973 n. 183. In doctrine, see M. CARTABIA, *Principi inviolabili e integrazione europea*, Milan, 1995 and ID., *The Italian Constitutional Court and the relationship between the Italian legal system and the European Community*, in *Michigan Journal of International Law*, vol. 12/1990, 173 ff. As far as Spain is concerned, see Constitutional Court of Spain, Declaración DTC 1/1992, de 1 de julio and Declaración DTC 1/2004 de 13 de diciembre. In doctrine, see F. BALAGUER CALLEJÓN, *Primato del diritto europeo e identità costituzionale nell'esperienza spagnola*, in A. BERNARDI (a cura di), *I controlimiti. Primato delle norme europee e difesa dei principi costituzionali*, Naples, 2017, 113 ff. As far as Germany is concerned, see at least the judgement on the Treaty of Maastricht (BVerfGE 89, 155) and the judgement on the treaty of Lisbon (BVerfGE 123, 267). In doctrine, see E. DI SALVATORE, *La Germania e il processo di integrazione europea*, in ID., *Germania. Scritti di diritto costituzionale*, Giulianova, 2013, 73 ff.

47 As a matter of fact, as pointed out by S. MANGIAMELI, *La clausola di omogeneità*, cit., 8, «Gli elementi del principio di omogeneità (…) costituiscono – per la parte in cui non risultano

the same time those very values had been taken from the constitutional orders of the Member States, it follows that the form of State of the European Union cannot be understood in isolation: on the contrary, its nature can only be grasped by always bearing in mind the mentioned mutual circularity of values between the national and supranational dimension[48]; the former is at the same time the breeding ground of the values and principles mentioned by art. 2 TEU and the unsurmountable limit – with exclusive reference to the constitutional identity of the State – to the implementation of the EU's axiological structure[49]; the latter provides for the normative-ideological framework which must not be breached by Member States, but, concurrently, it must duly take into account «the national identities, inherent in [the] fundamental structures, political and constitutional, inclusive of regional and local self-government», in accordance with art. 4.2 TEU[50]. This mutual circularity of principles and values characterizes the form of

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compiutamente disciplinati nell'ordinamento – per il legislatore europeo l'adempimento di un dovere, essendo questo tenuto a disciplinare istituti e ad adottare norme in grado di dare loro un adeguato svolgimento».

48 See F. PALERMO, *op. cit.*, 217. This mutual circularity of values, however, often determines frictions, as underlined by S. MANGIAMELI, *op. ult. cit*., 18: «Si dà luogo ad una situazione di tensione tra la molteplicità e la complessità degli Stati membri e l'unitarietà cui spingerebbero le componenti dell'omogeneità».

49 On the one hand, it is not disputed that the elements of the EU homogeneity clause, once made "European", cannot be considered anymore as part of the identity of a State. In fact, as outlined ivi, 26, «l'omogeneità designa una sfera riservata intangibile da parte dell'ordinamento europeo, nel quale il comportamento dello Stato membro è, tuttavia, prescritto e consiste nel fare propri i principi di struttura indicati e di svolgerli coerentemente nell'ordinamento e nella prassi di vita dello Stato». However, the specific implementation of the mentioned principles in a State might be considered as peculiar/specific and, thus, as part of the identity of a State (e.g. the decision to adopt a given form of government while respecting the democratic principle enshrined in the homogeneity clause). See in this respect E. DI SALVATORE, *L'identità costituzionale dell'Unione europea e degli Stati membri. Il decentramento politico-istituzionale nel processo di integrazione*, Turin, 2008, 51: «Entro l'oggetto considerato dall'art. 6.3 TUE, andrebbe anche ricondotta la disciplina modale dei "principi comuni", dovendosi supporre che lo svolgimento sul piano interno di ciascuno di detti principi possa attenere ad una specificità del singolo Stato e riguardare, pertanto, finanche la sua identità».

50 This clause was originally included in the Treaty of Maastricht in order not to antagonise those who were skeptical of the upcoming quality leap in the integration process; see in this respect P. FARAGUNA, *Alla ricerca dell'identità costituzionale tra conflitti giurisdizionali e negoziazione politica*, in *Costituzionalismo.it*, 3/2016, 216, who speaks about «numerose valvole di sfogo che servono a rassicurare gli Stati membri contro la minaccia di una cancellazione dello Stato nazionale e degli interessi da questo veicolati». A comprehensive view of the most authoritative opinions in doctrine (Bleckmann, Hilf and others) concerning the notion of "national identity" as provided for by the Treaties can be found in E. DI SALVATORE, *op. ult. cit.*, 35 ff. Major legal literature deems that, in terms of content, "national identity" ex art. 4.2 TEU and "constitutional identity" as identified by national Constitutional courts are basically superimposable, since they both refer to the "value choices expressed by national Constitutions" (see in this respect M. CARTABIA, *Unità nella diversità: il rapporto tra la Costituzione europea e le Costituzioni*

State of the European Union and is actually made possibly by the integration process, which is by definition dynamic and, thus, determines an inherent precariousness/mobility of the EU form of State itself.

4. The role of Europarties within the form of State of the European Union

4.1 Europarties and representative democracy in the EU

The existence and correct functioning of a party system connotes any given constitutional experience, characterizing its form of State – understood in a broad sense, as pointed out *supra* – as politically pluralist. The form of the European non-State is, at least on paper, that of a pluralist democracy, since the EU is based on the rule of law, democracy and pluralism. Those principles, however, although expressly enshrined in the Treaties, have to be implemented both at EU and Member States level. The gradual establishment of an EU party system since art. 138A was approved in Maastricht may be considered as one of the means the EU resorted to in order to put those principles into effect. In fact, the proper functioning of a supranational party system would have certainly helped the EU in

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nazionali, Relazione al Convegno *Sul Trattato che istituisce una Costituzione per l'Unione europea*, Firenze, 18 febbraio 2005, 12. On the nature of the duty to respect national identities of the Member States, see also S. MANGIAMELI, *La clausola di omogeneità*, cit., 23-24: «Se si riflette che l'identità di uno Stato è data dagli elementi che caratterizzano la sua forma di Stato, il rispetto a cui è tenuta l'Unione comporta il vincolo per quest'ultima a lasciare nella disponibilità piena degli Stati membri tutte le scelte inerenti al loro modo di essere, a quello presente come a quello futuro». However, as pointed out by A. CANTARO, *Il rispetto delle funzioni essenziali dello Stato*, in S. MANGIAMELI (a cura di), *L'ordinamento europeo. I principi dell'Unione*, Milan, 2006, 547-548, while explaining how to interpret "national identity" from a federalistic point of view, even if we accept the above mentioned superimposition, it should be taken into account that «gli Stati sono Stati solo nel senso voluto dal diritto europeo. Il rispetto della loro identità costituzionale e della loro identità statale è quello ritenuto ottimale dalla costituzione federale al fine di tenere insieme molteplicità e complessità degli Stati membri e unità della federazione». All this helps us understand that "national identity" ex art. 4.2 TEU – i.e. national identity as circumscribed by the Union – could well be different, in practice, from "constitutional identity" as conceived by national Constitutional courts. In this regard, those scholars who talk about an "europeanization of counterlimits» are right only in part. See at least A. RUGGERI, *Trattato costituzionale,* europeizzazione *dei "controlimiti" e tecniche di risoluzione delle antinomie tra diritto comunitario e diritto interno (profili problematici)*, in S. STAIANO (a cura di), *Giurisprudenza costituzionale e principi fondamentali. Alla ricerca del nucleo duro delle Costituzioni*, Turin, 2006, 827 ff.

walking the path towards its democratization[51]: Europarties should have been the main actors of the process aimed at building the missing link between European politics and European citizens as well as between voters in EP elections and the effect of their votes[52]. Nevertheless, this hope remained as such: Europarties haven't been able to carve out an important place for themselves in the context of European integration, notwithstanding the praiseworthy attempts to provide for a detailed regulation of their action and organization. As a matter of fact, as outlined in the first chapter of this work, prescribing a «"constitutional incorporation" without, however, passing through other crucial issues like the much debated uniform electoral procedure»[53] has proved to be a wrong strategy, which had ultimately determined a growing disconnect between what is written in EU primary law and the concrete everyday political practice[54]. The latter, in fact, mercilessly shows us that what is written in art. 10.3 TEU – according to which «every citizen shall have the right to participate in the democratic life of the Union» and that is strictly linked to the subsequent provision on Europarties – is still far from being a reality, at least as far as participation by means of political parties is concerned. Europarties, in order to «express the will of the citizens of the Union» for real, should be entitled to have an impact on the political and legal processes that characterize representative democracy, on which the functioning of the Union is founded according to art. 10.1 TEU[55]. In fact, even though participatory democracy plays a crucial role in the EU's democratization process

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51 However, it should be always kept in mind that «a complete realisation of the democratic principle at an EU level presents more difficulties and challenges than at an MS level. In this sense, the constitutive diversity of the Union and its own internal complexity explain the existence of major obstacles to its execution», as underlined by J.M. PORRAS RAMÍREZ, *Art. 10 [Representative democracy]*, in H.-J. BLANKE, S. MANGIAMELI (eds.), *The Treaty on European Union (TEU)*, Berlin-Heidelberg, 2010, 433.

52 See B. DONNELLY, M. JOPP, *European political parties and democracy in the EU*, in G. BONVICINI (ed.), *Democracy in the EU and the role of the European Parliament*, Rome, 2009, 23.

53 See *supra*, chapter I, § 1.2.2.

54 And not the contrary, «as would be expected in view of the institutional progress made during the last twenty years». See G. BONVICINI, G.L. TOSATO, R. MATARAZZO, *Should European parties propose a candidate for European Commission President?*, in G. BONVICINI (ed.), *Democracy in the EU*, cit., 61.

55 See again in this respect J.M. PORRAS RAMÍREZ, *op. ult. cit.*, 439: «Treaties are aware of their importance and necessary role for the formation and running of a real European democracy. (…) So, as they are an essential channel for political participation, their contribution is determinant for the organisation and functioning of the European representative institutions».

– as the introduction of instruments such as the European Citizens' Initiative undoubtly shows[56] – representative democracy still represents the backbone of the "Community" method, that is the process which involves the use of the ordinary legislative procedure, as defined in art. 294 TFEU. Representative democracy, as widely shown in literature, can hardly work without a functioning party system[57] that channels the needs of society – after working out a synthesis of them – directly into legislative assemblies[58], thus reducing the so called transaction costs, that would be undoubtely higher in the absence of such intermediary bodies[59]. As the following parts of this study – which will focus on parties and form of

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56 On the nature of the ECI, which promotes citizens' participation in the decision making process, without, however, allowing them to force the Commission to propose a given legislation, see ultimately O.M. PALLOTTA, *«A rabbit remains a rabbit»? L'ultima parola della Corte di giustizia sull'iniziativa dei cittadini europei "One of Us" (nota a Puppinck e a. c. Commissione europea, causa C-418/18 P)*, in *Osservatorio Costituzionale*, 3/2020, 600-601: «l'introduzione dell'ICE nell'ordinamento europeo aveva l'obiettivo non già di determinare una condivisione del potere di iniziativa dell'esecutivo dell'Unione, bensì quello di "aprire" la fase iniziale del procedimento legislativo al contributo dei cittadini: un potere (*rectius*: un diritto) di «pre-iniziativa» mediante il quale suggerire (giammai imporre) alla Commissione possibili integrazioni all'agenda europea».

57 See H. KELSEN, *Essenza e valore della democrazia* (1929), in *I fondamenti della democrazia e altri saggi*, Bologna, 1970, 23-25: «solo l'illusione o l'ipocrisia può credere che la democrazia sia possibile senza i partiti politici». Contra, see S. WEIL, *Note sur la suppression générale des parties politiques* (1957), trad. it. di F. Regattin, *Manifesto per la soppressione dei partiti politici*, Rome, 2012: «La soppressione dei partiti costituirebbe un bene quasi allo stato puro. È perfettamente legittima nel principio e non pare poter produrre, a livello pratico, che effetti positivi. I candidati non direbbero agli elettori: "Ho quest'etichetta" – il che, dal punto di vista pratico, non spiega rigorosamente nulla al pubblico sul loro atteggiamento concreto relativo a problemi concreti – ma: "Penso tale, tale e tale cosa riguardo a tale, tale e tale grande problema". Gli eletti si assocerebbero e si dissocerebbero secondo il gioco naturale e mobile delle affinità. Posso facilmente essere in accordo con il signor A sul colonialismo e in disaccordo con lui sulla proprietà rurale, e avere posizioni opposte nei confronti del signor B. Se si parla di colonialismo, andrò, prima della seduta, a conversare un po' con il signor A. Se si parla di proprietà rurale, con il signor B». See also, from a partly similar perspective, A. OLIVETTI, *Democrazia senza partiti* (1949), Rome, 2013.

58 Actually, political parties' role is not limited to a mere aggregation of individual needs to be subsequently brought to parliamentary assemblies' attention. See A-K. KÖLLN, *The value of political parties to representative democracy*, in *European Political Science Review*, 4/2015, 18: «Parties not only aggregate citizen demands but they offer, and thus also articulate, something beyond individual demands. Ideology as a (more or less) coherent plan or vision of how to govern the country saves politics and policies from becoming a dispersed and possibly even contradicting set of actions».

59 See in this respect W.C. MÜLLER, *Political parties in parliamentary democracies: Making delegation and accountability work*, in *European Journal of Political Research*, 37/2000, 313: «Political parties reduce transaction costs in politics, that is, the costs of using the market mechanism, specifically in the pursuit of votes (in elections, parliamentary votes). These are "search and information costs, bargaining and decision costs, policing and enforcement costs"». Here the Author is citing the well known contribution by C.J. DAHLMAN, *The problem of externality*, in *The Journal of Law and Economics*, 1/1979, 148.

government of the EU – will demonstrate, Europarties at the moment have little (and sometimes no) impact on the political and legal processes characterizing representative democracy. As correctly pointed out in doctrine, «the reason is that the EU's axis of power is not yet centered in the EP, instead being currently focused within the institutions representing the governments of the MS and whose legitimacy is derived from their national Parliaments»[60]. And there is nothing more dangerous for the latter than this. In fact, as scholarly underlined, «if the functions parties fulfil are not adequately served, representative democracy is put at risk, as they are considered necessary for its effectiveness and legitimacy»[61]. Those primary functions have been frequently detected in doctrine and are essentially the following: stimulating citizens' active political participation («the integration and mobilization of the mass public»); playing a central role in the process of interests aggregation; structuring the vote (namely, participating in elections and directing votes in their favour); recruiting political leaders; organising fragments of government; performing a policy-making function[62]. After more than forty years from the establishment of the first European party federations, the current Europarties are still affected by the very same issues and this couldn't be more detrimental to the health of representative democracy in the EU[63].

4.1.1 The crisis of political parties: domestic and European perspectives

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60 J.M. PORRAS RAMÍREZ, *op. cit.*, 442.

61 A-K. KÖLLN, *op. ult. cit.*, 16.

62 See A. KING, *Political Parties in Western Democracies. Some Skeptical Reflections*, in *Polity*, 2/1969, 120ff. In more recent doctrine, see also R. GUNTHER, L. DIAMOND, *Types and functions of parties*, in ID. (eds.), *Political parties and democracy*, Baltimore-London, 2001, 3 ff.

63 Even the European legislator seems to be perfectly aware of the current inadquacy of Europarties in the performance of their primary task enshrined in art. 10.4 TEU (that is forming European political awareness and expressing the will of citizens of the Union), since in section 23 of the preamble of Regulation (EU, Euratom) n. 1141/2014 it makes explicit reference to the «objective for European political parties to participate fully in the democratic life of the Union and to become actors in Europe's representative democracy, in order effectively to express the views, opinions and political will of the citizens of the Union» (using wording taken from the pre-Lisbon party article, which stated that Europarties «contribute to forming a European awareness and to expressing the political will of the citizens of the Union». On this specific wording problem and on the consequences it entails, see *supra*, chapter II, § 1.1.), thus demonstrating that Europarties are still far from effectively playing the role that they have been assigned by the Treaties .

Political parties in the Member States are no doubt facing a long-standing crisis which is also threatening representative democracy at domestic level, since traditional national political forces «are often said to be self-interested, untrustworthy, corrupt, challenged by interest groups, social movements, the media and the internet as forms of political participation or communication, and insufficiently distinct from one another for voters to feel they have a meaningful choice»[64]. However, as one can easily grasp, this crisis is partly different from the one afflicting Europarties. In fact, even though some problems may appear similar or identical (greater efficiency of other forms of political representation, little presence on the ground, poor ability to aggregate interests etc.), in the former case, we are faced with intermediate bodies struggling with exogenous crisis factors: national parties have been able to succesfully carry out their role for a long period of time; for some years now, external influences such as the emergence of social media and new communication means in general, a growing demand for disintermediated politics and an increasing disaffection with representative democracy (accompanied by a marked interest in direct and participatory democracy, often advocated by populist movements) have determined a progressive obsolescence of traditional mass parties, which are forced to keep reinventing – or to give way to new parties[65] – with often

64 P. WEBB, *Political parties and democratic disconnect: a call for research*, in ID., *Democracy and political parties*, London, 2007, 11.

65 Literature on the crisis of political parties is extremely vast. See *ex multis* ID., *Political parties and democracy: the ambiguous crisis*, in *Democratization*, 5/2005, 633 ff; P. IGNAZI, *The crisis of parties and the rise of new political parties*, in *Party Politics*, 4/1996, 549 ff; with specific reference to the decline of parties' voluntary base, see P.F. WHITELEY, *Is the party over? The decline of party activism and membership across the democratic world*, in *Party Politics*, 1/2011, 21 ff; in Italian literature see at least P. IGNAZI, *Forza senza legittimità*, Rome-Bari, 2012, spec. 38 ff.: «Siamo passati ad una fase storica contrassegnata dalla fine delle grandi concentrazioni omogeneizzanti di produzione, dall'invasione capillare dei nuovi mass media, dalla crescente atomizzazione della vita quotidiana, dal declino delle appartenenze collettive e dal trionfo dell'individualismo con tinte di narcisismo. (…) La trasformazione nella gerarchia dei valori influenza tanto le dinamiche interne ai partiti, le loro logiche di funzionamento, i rapporti interni, quanto il sistema stesso dei partiti aprendo il mercato elettorale a nuove proposte e a nuove formazioni». The reasons behind the decline of traditional mass parties and the emergence of new parties have been well explained in A. PIZZORNO, *I soggetti del pluralismo. Classi, partiti, sindacati*, Bologna, 1980, 33-34: «a) Non è più necessario integrare nuove masse che si immettono nel sistema; il processo di formazione delle culture nazionali […] è praticamente concluso, lasciando sussistere forti differenze economiche e sociali, ma attutendo la coscienza collettiva di esse; b) diminuiscono di precisione e di autonomia le rivendicazioni (cioè le domande) unificabili di grandi masse; c) l'intervento dello Stato rende l'attività politica sempre più complessa e tecnica; d) i mezzi di comunicazione di massa [sostituiscono] per certi aspetti l'opera capillare permanente

disappointing results when it comes to the safeguard and promotion of representative democracy (of which they are, as we have seen, unavoidable elements)[66]. On the other hand, the crisis Europarties are experiencing is an endogenous one: in fact, it does not constitute a failure of adaptation to a new order of society, but rather the result of a political short-sightedness and nationalist approach that characterized the political classes (and parties) of the Member States, once they had to deal with the development of the integration process. This approach consisted of a marked unwillingness to create a true European party system: the ruling classes, since the emergence of the first European transnational federations during the 70's, somehow managed to avoid the approval of the necessary reforms that would have boosted the built of the mentioned system (such as the uniform electoral procedure or the establishment of transnational lists in elections to the European Parliament)[67], in the belief that any

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dei partiti. In tali condizioni, ai partiti conviene – come conseguenza di (b) – formulare domande il più possibile generiche nei loro programmi. Diventa superfluo inoltre, per effetto di (a) e (d) impiegare forze e risorse nell'opera di sollecitazione della partecipazione a livello di base», cit. from D. DELLA PORTA, *I partiti politici*, Bologna, 2001, 85.

66 One recent example may be the position of the italian Partito Democratico in relation to the constitutional reform aimed at reducing the number of parliamentary seats in both the Italian Senate and the Chamber of Deputies. Firmly against the amendments, which were in the first place endorsed and presented by the parties which supported the Conte I government (Movimento 5 Stelle and Lega), the center-left party, once become supporter of the Conte II government together with the Movimento 5 Stelle, decided to endorse the reform, voting in favour of it in the fourth (and final) reading, after having voted against in the previous three readings. This behaviour has determined many internal frictions, since the Partito Democratico has always declared its loyalty to representative democracy and to the centrality of Parliament principle, which – according to many Italian scholars – were undermined by the approved reform (which has been later confirmed by Italian citizens in the referendum held in September 2020): the PD's youth movement (GD, Giovani Democratici), for example, decided to oppose the reform on the occasion of the constitutional referendum.

67 See S. RUSSACK, *EU parliamentary democracy: how representative?*, in *CEPS Policy Insights*, 7/2019, 6: «The greatest perceived value of European elections is as a midterm poll for national elections, which is why national politicians campaign on domestic policy platforms. Hence, national political elites, in particular the national parties, have been unwilling to contribute to creating a pan-European democratic space». On the matter, see e.g. the statement made by the MEP (for the EPP) Elmar Broke in 2018, shortly after the European Parliament voted against the introduction of transnational lists in the 2019 elections, available at www.thenewfederalist.eu: «I have always been against transnational lists because of a strong, personal conviction and I have always reiterated this. I do not know a single federal, national Constitution that envisages lists on a national level. And that happens for a good reason: transnational lists are a sin against federalism. The democratic legislation is made above all by being close to the citizens, i.e. the voters. I want to be on the list for election in my own region, in Ostwestfalen-Lippe, and not on some list between Helsinki and Lisbon, where no citizen sees me as a representative. I think that citizens must vote in their own constituencies, in their own regions, and that this brings us in the European Parliament where we try to find common European interests. I have always fought for Europe out of conviction, even against my own party». See also the partly similar declaration made by another

step towards a true europeanization of the EU's political arena would have been detrimental to the interests of national political classes and to the principle of proximity, according to which the EU must deliver at the level closest to the citizens[68]. However, notwithstanding the evident differences between the crises afflicting national parties and Europarties, they both hamper the smooth functioning of representative democracy.

4.1.2 Europarties and the EU's democratic deficit

Without dwelling on the national level, whose analysis would require the start of another chapter, we can conclude by saying that Europarties may be considered as both cause and consequence of the democratic deficit of the EU: they are a consequence of the UE's lack of democratic legitimacy because the approval of essential reforms which would enhance democracy in the Union – such as the adoption of a uniform electoral procedure – would undoubtely boost the role of Europarties, since European election campaigns would be finally run in a truly European political arena[69]; they are, however, at the same time a cause of the

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MEP, Alain Lamassoure, made in the same year and on the same topic, available at www.euractiv.com: «No other country, not even federal, has applied such a system, not the U.S, not Germany. The proportional voting system already alienates voters and their representatives in regards to local constituencies. Democratic logic wants that representatives are accountable to the voters who know them. Therefore, having a national list, such as the one adopted in France for the European elections, that's already a mistake. A transnational list that's even worse».

[68] According to this view, the establisment of an EU political arena (by means of transnational lists, an uniform electoral procedure etc.) would have determined an increase of the distance between European citizens and their representatives in the European Parliament and, thus, a breach of the proximity principle. This position has been endorsed, e.g., by Manfred Weber, then leader of the EPP group in the Parliament, who declared to www.politico.eu: «We want Europe to get closer to citizens. Voters need a direct link with their MEPs. The transnational lists provide the exact opposite effect». However, *contra*, see F. WOLKENSTEIN, *Transnational partisanship vs transnational democracy*, in *Verfassungsblog*, 25 May 2018, 3: «There are likewise good reasons to doubt that the existing electoral system is doing a very good job at decreasing the distance between citizens and EU politics, given declining turnouts in European Parliament elections and an overall crisis of trust in EU institutions. So wanting to preserve the status quo, as the EPP does, makes little sense if one cares about a better representative-constituent relationship in the EU».

[69] Cfr. A. CIANCIO, *A new uniform electoral procedure to re-legitimate the process of political integration in Europe. About the EU Parliament Resolution of 11 November 2015 on the reform of the 1976 Electoral Act*, in *Federalismi.it*, 23/2015, 5: «To give effectiveness to the European democracy, unitary lists of candidates, grouped on the basis of shared European political programs elaborated by actual European political parties, should be presented to all European voters and MEPs should be elected on the basis of a uniform electoral procedure across the whole Union within transnational constituencies».

EU's democratic deficit insofar as they are proving to be unable to aggregate the interests of the Union's civil society and to bring those issues before Parliament: thus, the functioning of representative democracy in the EU is still responsibility of national parties, which are, nevertheless (and as underlined *supra*), losing their central role as interests aggregators, often giving way to other (often non-elective) forms of representation[70], and committing themselves to prevent the emergence of an internal debate on European issues. This can only lead to the weakening of EU's representative democracy, which may only work well when citizens' representatives are first selected by European intermediate bodies that operate "on the ground" - perhaps after a militancy period when the party members engage with other peers and participate in assemblies, congresses and meetings where the party positions on European topics are expressed – and then voted by EU citizens within a framework that includes at least a uniform electoral procedure, transnational lists and the introduction (and actual implementation) of needed rationalization mechanisms of the EU's form of government.

4.1.3 Europarties and the homogeneity clause

As pointed out in the previous section, however, European homogeneity – contrary to what happens in authentic federal systems – tends to work circularly: thus, if on the one hand national traditional political parties' democratic dimension – especially as far as internal democracy is concerned – has inevitably

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70 Interestingly, an EU-wide debate on European topics – something that unfortunately Europarties have never been able to concretely promote – has been boosted in recent years by the same Eurozone crisis, which unexpectedly became a major factor in the emergence of an European public sphere (although united by one fundamental trait: the revulsion towards a technocratic Union). See on this topic P. KRATOCHVÍL, Z. SYCHRA, *The end of democracy in the EU? The Eurozone crisis and the EU's democratic deficit*, in *Journal of European Integration*, 2/2019, 8: «With the advent of the crisis, even those entirely uninterested in the EU were repeatedly confronted with EU decisions that had not been much discussed before the crisis: austerity measures, tax system changes, labour market reforms, reductions of social benefits, the restructuring of the banking systems, etc. In other words, even though the EP elections have remained a second-order political contestation, they have also turned into an EU-wide plebiscite on the impact of the crisis. It is no surprise that the number of those who remained indifferent to the crisis was continuously declining. In other words, the crisis has become what the advocates of the European public sphere have long been calling for – a unifying topic discussed across national boundaries».

influenced Europarties' regulation on this topic[71], on the other hand, domestic party systems may undergo an europeanization process, where this latter term stands for a «penetration of the European rules and logics in domestic areas of politics and policy»[72]; as an example, «Europe had a direct influence on national party law during the latest rounds of accession to the Union, as the European Commission established legislation on party funding as one of the conditions for EU membership»[73]. As far as the principle of democracy is strictly concerned, however, while the statute of Europarties has mostly been inspired – inevitably, we may add – by existing national party legislation, the latter has not been influenced, at least at the moment, by the regulation on political parties at European level (but it cannot be excluded that – once this last piece of EU legislation will provide for a higher standard of democracy as far as Europarties are concerned – the corresponding provisions at national level will progressively align with European regulation): this, however, would happen not by virtue of the prescriptive nature of the homogeneity clause (except in case of sudden – and currently improbable – completion of the EU's federalizing process), but rather by means of other vertical and horizontal not-mandatory adaptation mechanisms[74]. With all of this in mind, we can see that – as far as the relationship between the

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71 See G. GRASSO, *Democrazia interna e partiti politici a livello europeo: qualche termine di raffronto per l'Italia?*, in *Politica del diritto*, 4/2010, 609 ff., spec. 613: «Le norme del diritto comunitario sui partiti politici hanno rappresentato il tentativo di trasporre e di filtrare in ambito europeo le più mature esperienze costituzionali nazionali, a partire dall'art. 21 del Grundgesetz e della Parteiengesetz del 1967».

72 See I. REZSÖHAZY, B. RIHOUZ, *The Europeanization of Party Organizations: towards a Systematic Comparative Analysis across "Greater Europe"*, Paper prepared for the 2010 ECPR Joint Sessions of workshops, Münster (Germany). Workshop on "The Europeanization of National Party Organizations", 8. According to D. CODUTI, *Regolare i partiti politici contemporanei*, Turin, 2019, 113 ff, a number of prescriptions provided for by Italian Law n. 3/2019, aimed at enhancing transparency in the context of private funding in favour of national parties, have been "inspired" by the European regulation on political parties at EU level, which has been "mirrored" («riflesso») by domestic legislation.

73 F. MOLENAAR, I. VAN BIEZEN, *The europeanization of party regulation*, Paper prepared for the 2010 ECPR Joint Sessions of workshops, Münster (Germany). Workshop on "The Europeanization of National Party Organizations", 30 ff.

74 See in this respect C.M. RADAELLI, *The domestic impact of European Union public policy: notes on concepts, methods and the challenge of empirical research*, in *Politique européenne*, 5/2001, 105 ff., spec. 120: «"Vertical" mechanisms seem to demarcate clearly the EU level (where policy is defined) and the domestic level, where policy has to be metabolized. By contrast (…) "horizontal" europeanization is a process of change triggered (…) by the diffusion of ideas and discourses about the notion of "good policy". More precisely, the "vertical" mechanisms are based on adaptational pressure; the "horizontal" mechanisms involve regulatory competition and different forms of framing».

principle of democracy and political parties in EU is concerned – the current *status quo* is rather unsatisfactory: as a matter of fact, their contribution to the correct functioning of representative democracy in EU is extremely limited; added to this is the small role of the "circular" homogeneity clause when democracy is at stake: if on the one hand constitutional traditions common to the Member States have offered a functional democratic platform to be transposed into Europarties' legislation, on the other hand, the European normative framework had little or no impact on domestic parties' democracy (with particular regard to the internal one). On the other side of the coin, however, Europarties are no doubt committed to respect the values that constitute EU's constitutional identity, amongst which the rule of law, democracy (in their internal[75] and external[76] action) and pluralism stand out. As diffusely outlined in the previous chapter, European political parties that do not comply with the principles and values of art. 2 TEU may be deregistered as Europarties following a long and – unfortunately – still too politicized procedure, thus losing a series of crucial rights, as the one that entitles registered entities to have access to funding from the general budget of the European Union, just to mention one major consequence. As also highlighted *supra*, according to some scholars, Europarties' deregistration procedure might be activated in case of breach of art. 2 TEU by national political parties that are member of a political alliance registered as Europarties; as a matter of fact, since the latter are asked to respect EU's fundamental values not just in their activities and programmes, according to this position, any forbearance of European parties towards member parties which are reluctant to align themselves with the content of the homogeneity clause should be enough to activate the procedure provided for by art. 10 of the 2014 Regulation. By adhering to this interpretation, any violation of one (ore more) values enshrined in art. 2 TEU might lead – once fulfilled certain conditions – to the application of the sanctions regime laid down in the Regulation. This means that the essential core of the EU's form of State

75 See in this regard art. 4 of Regulation (EU, Euratom) n. 1141/2014.

76 Art. 3 of Regulation (EU, Euratom) n. 1141/2014 provides that a political alliance that wishes to register as Europarty must observe the mentioned values «in particular in its programme and in its activities», thus highlighting the importance of the respect of EU's axiological structure in Europarties' external activity.

(rule of law, democracy and pluralism) is safeguarded (and implemented) also by means of legislation on European political parties. However, as one can easily guess, it's a negative form of implementation, exclusively tied to a pathologic moment, that corresponds to the violation of the homogeneity clause. This is undoubtely commendable, but insufficient for the purposes of Europarties' positive contribution to the functioning of the EU's form of State (in this respect, the distance that intervenes among Europarties and representative democracy in the Union is rather emblematic).

5. The form of government of the European Union

5.1 The detection of the "European government"

As rapidly outlined *supra,* the form of government corresponds to the manner in which State functions are allocated and organized between the various constitutional bodies. In the European constitutional dimension – which, as we know, is not a State one, but seems to lend itself to the application of State-related categories such as the form of government – the main functions are allocated between (at least[77]) four bodies, which are also Institutions of the Union: the European Parliament, The European Commission, the Council and the European Council[78]. In order to understand whether the form of government of the Union can be traced to traditional models (parliamentary, presidential, semi-presidential etc.) or whether it determines a new, excentric, model, one should analyse how the allocated competences intersect and how the fundamental goal of a constitutional democracy – namely, the limitation of power – is actually achieved in this peculiar non-State dimension. Before that, we should allay the concerns on whether a European form of government can be defined: commentators generally

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[77] As a matter of fact, some crucial "State" functions – having an executive nature – are allocated to other bodies, such as the European Central Bank, the Eurogroup, Agencies, Committees etc, but their exercise can only be partially "controlled" by the European Parliament, thus determining the emergence of a "soft accountability", as outlined in R. IBRIDO, N. LUPO, *Introduzione. «Forma di governo» e «indirizzo politico»*, cit., 22.

[78] Cf. P. PESCATORE, *L'exécutif communautaire: justification du quadripartisme institué parles traités de Paris e de Rome*, in *Cahiers de droit européen*, 1978, 388 ff.

agree that, in order to state that we are dealing with a form of government, the following elements have to be present: citizenship and freedoms; an institutional organization which covers judicial protection against restrictive measures adopted by the constituted authority; a system of sources of law[79]. Without it being necessary to engage in complex analyses, it is evident that – with appropriate caveats which are needed due to the supranational and non-State nature of the examined organization – the EU meets all the mentioned requirements and, thus, it's a quite safe assumption that it has a form of government[80]. In order to understand which one among the traditional forms gets closer to the European model, we must dwell on the competences of the major EU Institutions and on their mutual relations, as well as on the key feature of any given form of government: the accountability of the executive power to the Parliament, which is based on the trust that the majority of the Assembly expresses in favour of the government. In this perspective, the first task to be performed is the detection of the "European government", since the parliamentary assembly is way too easily identifiable. To detect the government of the Union, it is necessary to determine the body entitled with executive powers, that is to say the entity which is capable to ensure the functionality of the decision (i.e. of the approved legislation) within the system[81]. Unfortunately, there is no more difficult task. As a matter of fact, the executive power of the Union – as highlighted in doctrine – shows a tendency to fragment and split up among several entities: not only Institutions, but also agencies, committees and bodies that sometimes still have the nature of informal

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79 See, e.g., S. MANGIAMELI, *La forma di governo europea*, in ID. (a cura di), *L'esperienza costituzionale europea*, Rome, 2008, 219. However, the Author warns that «[la forma di governo] non si esaurisce soltanto nella loro presenza; infatti, una forma di governo rappresenta, in ogni caso, un sistema organizzativo nel quale devono essere assunte delle decisioni che devono essere formalizzate in norme giuridiche e, successivamente, realizzate attraverso un potere in grado – se del caso – di agire d'autorità».

80 Ivi, 223: «Si ritiene che sussistano molte delle condizioni per poter parlare di una forma di governo».

81 Ivi, 231. The Author deems that the governmental body is the one which is «in grado di assicurare la funzionalità della decisione nel sistema». According to his view, one of the "engines" of the EU system is the ECJ, thanks to the contribution it gave to the full functionality of the legal order of the (then) Community. In this respect, see again ivi, 239: «Se si guarda, però, al passato, e con una certa attenzione, ci si rende conto che il vero motore del sistema europeo è stato la Corte di Giustizia, con la sua giurisprudenza e, soprattutto, con l'affermazione del principio della prevalenza del diritto europeo». With a view on the present days, however, the Commission seems to have a "primacy role" among the Institutions of the Union (cfr. *ibidem*).

meetings as the Eurogroup. For this reason, commentators often refer to the "European government" as a "fragmented executive"[82]. From this feature stems an intrinsic difficulty of determining who is entitled with implementing powers and who is responsible of a given act of government, to such an extent that the terms "bicephalous executive power" and "bipolar government", often used by commentators[83], are no longer adequate to describe the current framework that stands before us.

5.2 The fragmented executive of the Union, between political direction and general interest protection

5.2.1 The European Commission

However, net of the extreme fragmentation that the executive power in the Union experiences nowadays, it remains true that the "engines" of the Union are basically two: the European Commission and the European Council. The former is generally deemed to be the "government" of the Union, since – already in the guise of High Authority of the European Coal and Steel Community[84] – its role is

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82 R. IBRIDO, N. LUPO, *Introduzione. «Forma di governo» e «indirizzo politico»*, cit., 22: «Il potere "esecutivo" dell'Unione europea (…) è un potere che tende, più che altrove, a frammentarsi e a disperdersi tra molteplici soggetti. Questo esecutivo "frammentato" coinvolge invece ulteriori sedi (il Consiglio europeo e il suo presidente, il Vertice Euro e l'Eurogruppo, la Banca Centrale Europea, le agenzie, i comitati, i gruppi di lavoro operanti a livello settoriale, ecc.)».

83 See e.g. M. PATRONO, *La forma di governo dell'Unione europea: una breve storia*, in *Diritto Pubblico Comparato ed Europeo*, 4/2003, 1774: «È un dato di fatto che alla guida dell'UE siede – già da gran tempo – un governo bipolare, composto da una testa politica, il Consiglio europeo, e da una testa tecnica, la Commissione». See furthermore C. DE FIORES, *Unione europea e legittimazione politica. Un ordinamento "irresponsabile"*, in *Etica & Politica*, 2/2020, 370-371: «Si evince alquanto chiaramente che l'attuazione dell'indirizzo politico dell'Unione è, ancora oggi, appannaggio pressoché esclusivo di un "governo bipolare" imperniato su un motore politico (il Consiglio [europeo]) e su un "motore tecnico" (la Commissione)». See also R. IBRIDO, *Oltre le "forme di governo"*, cit., 8: «Una parte della dottrina politologica è convinta che l'Unione, lungi dal configurare un modello di parlamentarismo federale, sarebbe approdata invece ad un "separation of power system" sulla falsariga di quello già sperimentato dalla democrazia composita statunitense. Secondo tale approccio, precisamente, l'Unione europea sarebbe guidata da un esecutivo "bicefalo" (Consiglio europeo e Commissione) e da un legislativo bicamerale (Parlamento e Consiglio)».

84 See in this respect art. 8 of the Treaty establishing the European Coal and Steel Community, which stated that «it shall be the duty of the High Authority to ensure that the objectives set out in this Treaty are attained in accordance with the provisions thereof». It should be beared in mind, in any case, that – at that time – the competences attributed by the States to the ECSC were limited to the establishment of a common market for coal and steel. Therefore, the powers the High

to ensure that the objectives set out in the Treaties are attained and that the general interest of the Union is achieved. The Treaty on the European Union, in art. 17.1, clearly defines the key competences of this Institution: «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 (…)». Since the very beginning of the integration process until present days, independence was the feature that should have characterized the members of this executive body: in fact, they are chosen «on the ground of their general competence and European commitment from persons whose independence is beyond doubt» and they «shall neither seek nor take instructions from any Government or other institution, body, office or entity» (art 17.3 TEU). These requirements are justified on the basis of the broad competences the Commission has; one of which is an exclusive prerogative of this Institution, namely the power of legislative initiative: since European legislation has to be inspired by the general interest of the Union and given this real "near-monopoly" on the right to initiate legislation[85], it comes without saying that the composition of the body must be guided by the greatest possible form of independence (as a matter of fact, packing an executive body of

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Authority had at that time cannot be easily compared to the ones of a State government. On the contrary, they seem way closer to the ones that independent authorities usually have. In this respect, see D. SPIERENBURG, R. POIDEVIN, *The history of the High Authority of the European Coal and Steel Community. Supranationality in operation*, London, 1994, 62: «The triple role of the High Authority (…) was laid down in Article 5 of the Treaty: it was to be an expert, banker and arbitrator. As an expert, it had to provide guidance and assistance for the parties concerned; as a banker, it had to "place financial resources at the disposal of companies for their investment and bear part of the cost of readaptation"; as an arbitrator, it had to "ensure the establishment, maintenance and observance of normal competitive conditions", but did not exert direct influence upon production or upon the market unless circumstances so required».

85 See art. 17.2 TEU: «Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise». Cfr. R. IBRIDO, N. LUPO, *Introduzione. «Forma di governo» e «indirizzo politico»*, cit., 39-40: «(…) al Parlamento europeo spetta esclusivamente – con un potere introdotto dal Trattato di Maastricht e a cui il Trattato di Lisbona ha aggiunto un obbligo di motivazione nel caso in cui la Commissione non dia seguito ad esso (art. 225 TFUE) – il potere di sollecitare iniziative legislative alla Commissione, che da taluni è stato qualificato come un "diritto di preiniziativa legislativa" e da altri come un "potere di iniziativa dell'iniziativa».

this kind with members of the Member States' governments would have meant complicating the process of identifying the general interest of the Union, since, otherwise, it would have been trapped by national programmes and warring political factions)[86]. As outlined by commentators, it can be said that the Commission is the formal agenda-setter of the Union: this means that the Commission has the power to "decide what to decide", i.e. to initiate legislation, while the Council and the European Parliament must bring the procedure to a conclusion, by acting as co-legislators. This, however, doesn't mean that the Commission has the political direction of the Union in its hands. Being allowed to set the political direction in a given constitutional experience means, according to an influential italian doctrine (that makes use of the term *indirizzo politico*), being able to predetermine the ultimate and most general ends – and, thus, the concrete activity – of the State action[87]. The power to initiate legislation is only one of the ways in which a (fragmented) government can predetermine the ultimate goals of

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86 On the reasons why the Commission had been attributed an exclusive competence on legislative initiative (and also on the positions against the need to concentrate the detection of the EU's general interest in the hands of one Institution only) see O.M. PALLOTTA, *«A rabbit remains a rabbit»?*, cit., 598. See again also R. IBRIDO, N. LUPO, *op. loc. ult. cit*, where the Authors explain that «soltanto un'istituzione sovranazionale sarebbe in grado di proporre una sintesi tra le posizioni degli Stati membri idonea a tenere in adeguata considerazione l'interesse (comune) europeo, evitando così la naturale tendenza degli accordi intergovernativi a condurre alla formazione di compromessi al ribasso, o che comunque privilegino gli Stati membri più forti».

87 V. CRISAFULLI, *Per una teoria giuridica dell'indirizzo politico* (1939), in ID., *Prima e dopo la Costituzione*, Naples, 2015, 41 ff: «(…) non è difficile, anzitutto, trarre in sintesi un primo concetto, per quanto ancora grezzo e suscettibile di ulteriore più rigorosa delimitazione, dell'indirizzo politico. Esso può, infatti, configurarsi non inesattamente come la predeterminazione dei fini ultimi e più generali, e quindi dei concreti atteggiamenti, dell'azione statale, ad opera dell'organo o degli organi a ciò competenti. Tale determinazione costituisce (…) il momento essenziale, il nucleo centrale e irriducibile del governo in senso oggettivo. Se governo, infatti, significa fondamentalmente direzione della vita e dell'attività statale, è necessario che esso prestabilisca anzitutto gli scopi concreti, variabili volta a volta a secondo delle circostanze, del tempo e dei luoghi, cui quella attività deve essere rivolta, ed eventualmente anche i mezzi ritenuti più idonei al migliore perseguimento degli scopi medesimi». On the emergence of the notion of indirizzo politico, that we translate here as "political direction", see also R. IBRIDO, N. LUPO, *Introduzione. «Forma di governo» e «indirizzo politico»*, cit., 30: «Si tratta di una nozione che (…) si è affacciata sulla scena – sulla base di elementi di diritto positivo, ricavati soprattutto dalla disciplina delle attribuzioni del Presidente del Consiglio e del Consiglio dei ministri vigente a partire dal decreto Ricasoli (…), e poi nel decreto Zanardelli (…) – nel corso del regime fascista: per effetto, peraltro, di un'elaborazione teorica compiuta sì in quella fase e con riferimento anzitutto a quell'esperienza, ma da dottrina di ispirazione non autoritaria e dichiaratamente concepita, sin dall'origine, per essere riferita a realtà anche diverse da quella italiana. Essa è stata poi ripresa, adattata e reiteratamente discussa all'indomani dell'entrata in vigore della Costituzione repubblicana, con un dibattito che ha posto le fondamenta della riflessione sull'assetto dei rapporti tra gli organi costituzionali e che è ancora adesso al cuore dell'analisi delle dinamiche delle forme di governo».

the (non) State; it could be said that by exercising the power of legislative initiative, the Commission is capable of realising the agenda of the EU; however, also the exercise of an informal agenda setting power is part of the determination of the political direction of the Union; and, in this respect, the Commission does not have anymore an absolute monopoly: instead, the latter now shares this prerogative with a number of other Institutions; among them distinguish the European Council, the Council and even the European Parliament[88].

5.2.2 The European Council

As far as the former is concerned, we should here recall that it is the Institution which brings together the heads of State and government of the Member States; it was first convened in 1975, but formally acquired the status of Institution of the Union only with the entry into force of the Treaty of Lisbon[89]. Doctrine has highlighted that, notwithstanding the European Council «is legally excluded from performing any legislative functions», however it still «frames the issues that will be legislated on»[90]. This clearly emerges from the wording of art. 15.1 TEU, which states that «the European Council shall provide the Union with the

88 See in this respect R. IBRIDO, N. LUPO, *Introduzione. «Forma di governo» e «indirizzo politico»*, cit., 41 ff: «La Commissione europea non è in ogni caso l'unico attore istituzionale coinvolto nell'esercizio del potere di agenda setting, che è un potere cui prendono parte altresì, pro quota, pressoché tutte le istituzioni che operano nell'Unione europea e in qualche misura anche le istituzioni dei suoi Stati Membri. Il monopolio della Commissione nel potere di agenda setting è stato anzi progressivamente eroso, specie negli anni delle due Commissioni Barroso (2004-10; 2010-14)».

89 On the origins of the European Council and on the reactions its establishment (and development, after the approval of the Single European Act) determined, see C. PINELLI, *Ipotesi sulla forma di governo dell'Unione europea*, in *Rivista trimestrale di diritto pubblico*, 2/1989, 326-327: «(…) il Consiglio Europeo è organo della cooperazione politica europea, non delle Comunità (art. 3 AUE) e la dottrina ne ha già affermato la natura di "conferenza intergovernativa", o di "riunione permanente di organi di governo degli Stati contraenti dell'Atto Unico, sottoposta al diritto internazionale": sarebbe stata così accolta "come un fatto acquisito…la posizione preminente e l'influenza determinante delle riunioni al vertice" che hanno "gravemente ridotto l'autonomia della Commissione e del Consiglio, e hanno inoltre contribuito a svuotare di efficacia le funzioni del Parlamento". Secondo altri, il silenzio sulle competenze attribuite al Consiglio europeo e sui suoi rapporti con il Consiglio della Comunità "témoigne de ce fait d'une assez grande «orthodoxie communautaire» et d'un recul de la tendance au retour à l'intergouvernemental, dont la création du Conseil européen était, qu'on veuille ou non, une sorte de symbole"».

90 S. RUSSACK, *Institutional rebalancing: the "political" Commission*, in S. BLOCKMANS (ed.), *What comes after the last chance Commission?*, Brussels, 2019, 13.

necessary impetus for its development and shall define the general political directions and priorities thereof. It shall not exercise legislative functions». If the primary task of the European Council is to give impetus to the Union and to define the general political directions (which is – at present – the best available translation for *indirizzo politico*), it follows that it cannot but have at least an informal agenda setting power. This power is concretely exercised by means of the Conclusions, which are the final documents the body issues after each meeting and that include the topics discussed and the agreements reached by the State representatives. Through the European Council's Conclusions, the Member States may «ask the Commission to investigate a problem or make proposals, urge the Council to speed up decision making, establish a new committee to draw a report on a hot topic (…), encourage Member States to coordinate their policies in a particular field and so on»[91]. In sum, the informal agenda setting power of the European Council is capable of influencing the formal agenda setting power of the Commission, that is to say the power of legislative initiative: thus, the European Council ends up being the real "engine" of the system, while the Commission is downgraded to a mere technical decision maker, that is asked to provide for the most adequate means to achieve the objectives circumscibed by the intergovernmental body[92]. This, however, must not lead us to regard the Commission as a mere command executor[93]: the content of the European Council's Conclusions is not mandatory and can be labeled as soft law[94]; this means that, albeit formally, the discretionary power of the Commission is not

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91 P. ALEXANDROVA, A. TIMMERMANS, *National interest versus the common good: The Presidency in European Council agenda setting*, in *European Journal of Political Research*, 3/2013, 319.

92 See again S. RUSSACK, *op. loc. ult. cit.*: «The European Council delineates – or even curbs – the Commission's discretionary powers, reducing its right of initiative into an executive, i.e. technical power. It has led some scholars to describe the Commission as some kind of secretariat of the European Council; a neutral agent with specialised knowledge and expertise (…); an "administrative executive" as opposed to the European Council as a "political executive" (…)».

93 See P. BOCQUILLON, M. DOBBELS, *An elephant on the 13th floor of the Berlaymont? European Council and Commission relations in legislative agenda setting*, in *Journal of European Public Policy*, 1/2014, 23: «(…) the Commission's functions go far beyond giving administrative support or providing expertise in order to translate other institutions' demands into legislative initiatives».

94 In doctrine, see e.g. A. POGGI, *"Soft law" nell'ordinamento comunitario*, in *L'integrazione dei sistemi costituzionali europeo e nazionali*, Annuario AIC 2005, Padova, 2007, who includes European Council's conclusions among other soft law acts, such as white and green books, guidelines, communications and so on.

undermined by the exercise of the European Council's informal agenda setting powers[95]. However, this is not the same as saying that the mentioned exercise has no impact at all on the Commission's discretion: it produces, for example, an effect at the level of legitimacy: as highlighted in doctrine, the Commission would hardly come up with an ambitious initiative without any backing from the European Council; at the same time, any legislative initiative which is supported by a corresponding position expressed in a European Council's Conclusion would strengthen the Commission's hand during the negotiations with the European Parliament and the Council[96]. As one can guess, the potential intertwinement of competences is a typical feature of the EU's form of government: this emerges also from the same composition of the Institutions. Take for example the European Council itself: it gathers together the heads of State and government of the Member States and its Presidency is entrusted to an individual elected by the same members of the body «by a qualified majority, for a term of two and a half years, renewable once» (art. 15.5 TEU); its composition, however, is enriched by the presence of the President of the Commission and by the High Representative of the Union for Foreign Affairs and Security Policy (art. 15.2 TEU)[97]. According to a well-established practice, also the President of the European Parliament takes part – albeit in a distinctive manner – to the European Council's work: in fact, it is allowed to give a speech at the beginning of each session, where it usually sums up the Parliament's position on the topics that will be later discussed during the actual meeting (which, however, is not open to the presence of representatives of the Parliament, not even the President itself, who is asked to leave the room after

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95 In fact, as pointed out by P. BOCQUILLON, M. DOBBELS, *op. cit.*, 26, «As the often ambiguous conclusions of the European Council leave a certain margin of interpretation, the Commission can steer the issue in its own preferred direction by playing with this ambiguity».

96 *Ibidem*: «The Commission also needs the backing of the highest political level when it wishes to put forward ambitious initiatives. An invitation by the European Council to come with new legislative proposals strengthens the Commission's hand in subsequent negotiations with the co-legislators, and is therefore often actively sought as an important source of legitimacy».

97 However, doctrine highlights that many other officials are allowed to take part to the meetings of the European Council. See in this respect P. VAN GRINSVEN, *The European Council under construction: EU top level decision making at the beginning of a new century*, in *Discussion papers in diplomacy*, 88/2003, 8: «In practice (…) more people are directly involved in the European Council negotiations. (…) over the years a growing, but still limited number of officials have been allowed into the conference room as well. The increased presence of EU officials is a direct consequence of the growing influence of the European Council over the process of European integration».

his speech). The participation of the Commission's President, which was also an established practice until it has been codified in the Treaties, is both a symptom of a cooperative characterization of the EU's form of government – whose interplays are somehow encouraged, due to its "hermaphroditism"[98], but also (where possible) regulated – and a concrete sign of openness of the leading intergovernmentalism to supranationalism; in fact, far from having just a cosmetic role, «through the various preparatory documents (memoranda, communications, reports) presented to the European Council for examination and through the influence of its President as a promotional broker during the meetings, the Commission can also try to steer summit's debates and orient their outcome»[99].

5.2.3 The co-legislators as agenda influencers

Another Institution of the Union is involved in the determination of the EU's political direction: it's the Council of the European Union, which, according to art. 16.1 TEU, exercises legislative and budgetary functions together with the European Parliament; this body gathers Member States' representatives at ministerial level (in fact, it is informally known as the Council of Ministers) and its primary function is to build the Member States' consensus on the draft legislative proposals presented by the Commission. However, it also plays a role in the agenda setting of the Union by means of its Presidency. The Council is chaired, in turn, by each Member State for a period of six months and every Presidency presents and publishes its programme, where the priorities for the upcoming semester are carefully listed. This is already one of the ways (*rectius*: the hardest way) in which the Presidency of the Council actually shapes the EU agenda[100]; however, there are a number of other instruments (mostly having a procedural nature) in the hands of the Presidency – none of which are provided for

98 Cfr., among the various contributions made by the Author on this topic, G. AMATO, *L'Unione ermafrodita*, in *Mondoperaio*, 9-10/2013, 33 ff.

99 P. BOCQUILLON, M. DOBBELS, *op. loc. ult. cit*.

100 See in this respect R. IBRIDO, N. LUPO, *Introduzione. «Forma di governo» e «indirizzo politico»*, cit., 42: «Un ruolo importante spetta infatti al Consiglio (dei ministri), specie per effetto della presidenza a rotazione semestrale, che chiama il governo dello Stato membro di turno ad indicare, per ciascuna delle formazioni del Consiglio oltre che in generale, le priorità che intende perseguire nel corso del semestre in cui il Consiglio sarà presieduto da suoi esponenti».

by the Treaties, but rather developed via informal institutional practice – that make it a full-fledged agenda shaper: take, for example, what doctrine has labeled as agenda-structuring powers; the Council is normally given the opportunity to affect the decision making process once the agenda has been already set "upstream" by the Commission; in these cases, however, the Council has still room to channel the process in the preferred direction (which normally corresponds to what is strategically useful to the State that is chairing the Council)[101]. For example, the Presidency is entitled to determine the number of meetings that must be held within a given policy field: as commentators have highlighted, «some of the more rare Council configurations are only convened when States with specific interest in this area hold the chair»[102]. Moreover – without in any way claiming to be exhaustive – the Presidency may shape the EU agenda by means of the informal meetings that it has the power to convene: «These meetings», not least because their subject can be freely set by the Presidency, «are regularly used to push for progress in the prioritized regional, socioeconomic and constitutional domains»[103]. A (very) limited agenda shaping power is also enjoyed by the European Parliament: according to art. 225 TFEU, the EU's parliamentary assembly «may request the Commission to submit any appropriate proposal on matters on which it considers that a Union act is required for the purpose of implementing the Treaties»[104]. Commentators agree that the Commission is no way obliged to present a proposal following the Parliament's

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101 To overcome this problem, which would result in a discordant Council agenda, a system known as "troika" has been established: in sum, each Presidency in office must share its strategic goals with the previous and the following one. See ivi, 42-43.

102 J. TALLBERG, *The agenda-shaping powers of the EU Council Presidency*, in *Journal of European Public Policy*, 1/2003, 10. Here the Author underlines that this happens quite rarely in relation to ministerial meetings, «since the meeting schedule at this level is more institutionalized than at the level of working groups», while in this latter case «we can expect greater variation across Presidencies».

103 *Ibidem*. Please be aware that there are even more tools which the rotating Presidency of the Council may resort to with the aim to shape the EU agenda (for example, as explained ivi, 11 ff, one should also take into account «"the second face of power" – the power of non-decision making»).

104 A similar power is also attributed to the Council by art. 241 TFEU, which states that «the Council, acting by a simple majority, may request the Commission to undertake any studies the Council considers desirable for the attainment of the common objectives, and to submit to it any appropriate proposals. If the Commission does not submit a proposal, it shall inform the Council of the reasons». On those powers, see O.M. PALLOTTA, *«A rabbit remains a rabbit»?*, cit., 595 ff.

request; however, as the cited article clearly states, in case of inertia by the Commission, it must explain the reasons behind this decision. Thus, even though the Parliament must stop where the Commission's discretion begins, the duty to state reasons forces the latter to come to terms with the issue brought to its attention by the Parliament: that's why doctrine has stated that the Parliament holds a "right to pre-legislative initiative" or a "power to initiate the initiative"[105]. In addition, in 2010 the Commission – by means of an interinstitutional framework agreement signed with the European Parliament – committed itself to report on the follow-up of Parliament's initiatives ex art. 225 TFEU within three months from the approval of the corresponding resolution and to come forward with a legislative proposal at the latest after one year from the adoption of the pre-initiative by the assembly. So, it seems like the same Commission partly self-limits its discretionary power whereas the Treaties didn't range this far.

5.3 Practice, institutional balance, sincere cooperation and the separation of powers

In the light of the above, the detection of the executive power's holder in the EU seems to be a rather complicated task: as a matter of fact – as the analysis of the agenda setting power, i.e. one of the most crucial competences of the executive, has shown us – we are really faced with a fragmented executive; the various governmental functions are exercised by a fairly high number of entities and their attribution is infrequently provided for by the Treaties; on the contrary, bodies and Institutions often take possession of executive powers by means of practice. That's another reason of no small importance why the detection of an EU government is a daunting task: any given research cannot be restricted to an analysis of primary and secondary law of the Union, but must inevitably take

[105] See, in relation to the first expression, G. CARELLA, I. INGRAVALLO, *Commento all'art. 225 TFUE*, in A. TIZZANO (a cura di), *Trattati dell'Unione europea*, Milan, 2014, 1856 ff. In relation to the second one, see R. MASTROIANNI, *L'iniziativa legislativa nel processo legislativo comunitario tra «deficit» democratico ed equilibrio interistituzionale*, in S. GAMBINO (a cura di), *Costituzione italiana e diritto comunitario*, Milan, 2002, 444.

institutional practice into consideration[106]. The key role of practice could give the (partially) mistaken impression that the form of government of the European Union is marked by instability and constant interinstitutional conflict. While the latter is no doubt more pronounced compared to nation-State forms of government, where the relationships between public powers have achieved a sound stability due to clear-cut constitutional provisions and the historical dimension of each State experience[107], nevertheless the European Union has implemented a range of normative solutions able to mitigate the otherwise inevitable frictions. Take, for example, the principles of institutional balance and horizontal sincere cooperation, now enshrined in art. 13.2 TEU[108], which states that «each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation». As

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106 That's exactly what is warned by A.A. CERVATI, *op. cit.*, 74: «La forma di governo europea si caratterizza (…) per la sua dinamicità: si tratta di una forma di governo in continua formazione e per lo studio di essa è indispensabile seguire costantemente gli sviluppi della prassi e la trasformazione delle regole. È appena il caso di aggiungere che dedicare attenzione alla prassi non equivale a ridurre il compito della scienza del diritto ad una pura e semplice esposizione di quanto accade contingentemente, ma rappresenta un'esigenza imprescindibile per chiunque voglia studiare le istituzioni giuridiche, senza che ciò comporti una rinuncia ad esprimere delle valutazioni sui processi in corso». See also ivi, 82: «A volte le stesse formulazioni dei trattati sono espressione di orientamenti prevalenti in fasi intermedie dello sviluppo del processo di integrazione e comunque vanno costantemente poste a confronto con la prassi, come si conviene ad un fenomeno istituzionale che è tuttora in evoluzione e che ha assunto le dimensioni attuali dell'ordinamento giuridico europeo». Just as an example of the importance of practice when approaching the form of government of the EU, one may mention the Council's practice of distributing rooms for the working groups' meetings as an agenda influence tool; on this topic and with particular regard to the Finnish presidency of the Council, see J. TALLBERG, *op. loc. ult. cit.*: «Since there were only seventeen meeting rooms available in the Council each day, the Finnish Presidency had to make a very concrete selection of what working groups to prioritize».

107 On this point, cf. A.A. CERVATI, *op. cit.*, 100: «(…) una cosa è fare riferimento ad un sistema di equilibri reciproci in presenza di un sistema costituzionale consolidato o accentrato intorno ad un vertice del sistema, come accadeva nell'Ancièn régime, ed altro è affidarsi ad "equilibri istituzionali" quando i rapporti tra gli organi e le stesse loro attribuzioni costituzionali siano tuttora in via di definizione, con la conseguenza che la prevedibilità degli esiti del reciproco gioco di interessi, azioni e reazioni resta in larghissima misura indeterminabile».

108 In truth and with respect to the principle of institutional balance, we are dealing with a partial positivization, since the Treaty doesn't expressly mention the principle concerned. Moreover, It should be here recalled that the principle of sincere cooperation, in its application to the relationships between the EU and its Member States, is also enshrined in art. 4.3 TEU, which states that «pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties». However, the same ECJ, even before the entry into force of the Lisbon Treaty, specified that the principle also applies to interinstitutional relationships. See Court of Justice of the European Communities, case C-65/93, *European Parliament v Council of the European Union* [1995] ECR 643.

highlighted in doctrine, «they amount to an indissoluble whole, as, in order to be consistent with the constitutional character of the EU legal order, the implementation of the principle of institutional balance requires compliance with the duty of cooperation»[109]. In fact, according to the principle of institutional balance – which has been first circumscribed by the case law of the ECJ and has long beeen standard of review of Institutional acts[110] – since the structure of the EU is founded on the division of powers[111], each Institution must act within the limits of their competences[112] (in this respect, it is strictly connected to the principle of conferral)[113], so that any possible abuse of power is prevented. However, since (at least) the executive power of the EU has a marked composite nature, in order to ensure the respect of institutional balance, the Institutions involved in possible encroachments must sincerely cooperate: interinstitutional agreements are the typical tool by means of which Institutions comply with the mentioned principle. If, however, the primary way to implement institutional balance is to be compliant with the principle of sincere cooperation, it follows that the EU can hardly be considered to be based on the separation of powers: it rather seems to be founded on a (tendential) balance of powers[114] or cooperation of

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109 P. KOUTRAKOS, *Institutional balance and sincere cooperation in treaty-making under EU law*, in *International and comparative law quarterly*, 1/2019, 6.

110 See at least Court of Justice of the European Communities, case C-9/56, *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community* [1957/1958] ECR 133 and case C-70/88, *European Parliament v Council of the European Communities* [1988] ECR 5615. See also J-P. JACQUÉ, *The principle of instututional balance*, in *Common Market Law Review*, 2/2004, 384: «The task of the Court is to ensure that this system is maintained, in order to prevent the compromises made at the time of the drafting of the treaties being called into question again. The balance to which the Court refers is therefore that established by the Treaty. Thus, it is not acceptable for one institution to extend its powers unilaterally to the detriment of another institution».

111 Ivi, 383.

112 Put it differently, «in accordance with the balance of powers between the institutions provided for by the Treaties, the practice of [an institution] cannot deprive the other institutions of a prerogative granted to them by the Treaties themselves». See Court of Justice of the European Communities, case C-149/85, *Roger Wybot v Edgar Faure and others* [1986] ECR 2391, par. 23.

113 See again P. KOUTRAKOS, *op. cit.*, 4: «As the latter governs what the EU does, the former governs what the EU institutions do in order to enable the EU to act in accordance with the powers conferred under primary law».

114 See G. DE VERGOTTINI, *La forma di governo europea*, in *XXI Secolo. Istituto della Enciclopedia Italiana Treccani*, Rome, 2009: «Tale principio, cioè quello di bilanciamento fra i vari centri istituzionali, assicura una limitazione in senso garantista e quindi una sorta di check and balances di stampo liberale. Il che è vero ma non esclude l'apparente irrazionalità delle scelte succedutesi nel tempo. Il nodo principale sta nella confusione di ruoli fra Parlamento, Consigli, Commissione, tutti coinvolti nelle scelte di indirizzo, nella formazione e, in parte, nell'attuazione

powers[115] or, for those supporting intergovernmentalism, confusion of powers[116]. Hence, Giuliano Amato in his opening speech at the European Convention in 2002 stated that «Montesquieu never visited Brussels»[117]. For this reason, commentators have stressed that the very idea of an European government could be resolved in the collaborative element or, to put it differently, in the principle of sincerity, which makes the integration process dependent on "a network of mutual self-constraints based on loyalty and fair play"[118]. Other scholars – equally aware of the importance of the collaborative element within the EU's institutional framework – have still warned against the risks that may derive from a form of government whose correct functioning is somehow dependent on "behaviours of constitutional players, on their institutional correctness and loyal cooperation"[119].

5.4 How to hold a fragmented executive responsible: control powers of the European Parliament

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della normativa primaria». See also P. CRAIG, *Institutions, power and institutional balance*, in P. CRAIG, G. DE BURCA (eds.), *The evolution of EU law*, Oxford, 2011, 41: «Institutional balance, as opposed to strict separation of powers, characterized the disposition of legislative and executive power in the EEC from the outset». See furthermore F. FABBRINI, *A principle in need of renewal? The Euro-crisis and the principle of institutional balance*, CSF research paper, July 2016, 7 (also published in *Cahiers de droit européen*, 1/2016, 285). The Author agrees that the principle of institutional balance may be regarded as «the EU's peculiar version of the principle of separation of powers». However, *contra* see G. CONWAY, *Recovering a separation of powers in the European Union*, in *European Law Journal*, 3/2011, 304, who deems that the EU institutional framework possesses no particular novelty «such as to require the exclusion of separation of powers thinking».

115 P. PONZANO, *Les institutions de l'Union*, in G. AMATO, H. BRIBOSIA, B. DE WITTE (eds.), *Genèse et destinée de la Constitution européenne - Genesis and destiny of the European Constitution*, Bruxelles, 2007, 439 ff.

116 On this perspective, see S. FABBRINI, *Executive power in the European Union: the implications of the Euro crisis*, Paper submitted at the panel on "The Changing Politics of the EU Council", EUSA 14th Biennial Conference, Boston, 5-8 March 2015, 10.

117 The statement has been later on frequently cited in doctrine. See at least C. CHEVALLIER-GOVERS, *Art. 13 [The Institutions]*, in H.-J. BLANKE, S. MANGIAMELI (eds.), *The Treaty on European Union*, cit., 564; J. ZILLER, *Separation of powers in the European Union's intertwined system of government. A Treaty based analysis for the use of political scientists and constitutional lawyers*, in *Il Politico*, 3/2008, 136, fn. 9.

118 R. IBRIDO, *Oltre le «forme di governo»*, cit., 28.

119 A.A. CERVATI, *op. loc. ult. cit.* According to the author, who writes this contribution in 1999, one of the possible solutions to the problems deriving from such an "unstable" form of government is the positivization (i.e. the codification) of behaviours and practices that determine the (then) marked instability: «L'esigenza di fissare, attraverso nuove norme scritte, le competenze ed i ruoli delle varie istanze di governo dell'Unione europea sembra perciò imprescindibile». In the following years some steps forward in this sense have been made.

Once analysed the fragmented nature of the EU's executive, we should ask ourselves how such a composite government is controlled by the parliamentary assembly of this non-State and whether the latter is capable of effectively enforce the responsibility of all components of this multifaceted power. Though, we must first cut the knot concerning the question of whether such an executive must be controlled by the European Parliament: the empowerment of the latter during the last steps of the integration process have made it a full-fledged parliamentary assembly, which actively participates in the decision making process, holds some agenda shaping powers and, above all, plays a crucial role in the appointment of the Commission; against this background, a clear intention of the Herren der Verträge to push towards a parlamentarisation of the Union emerges[120], and this inevitably entails a progressively major role of Parliament in checking that the government does not exceed the powers provided for by the Treaties. As we will further see, however, the process is anything but completed. In fact, the nature of the Parliament's control over the blurred executive of the Union cannot be juxtaposed to the one exercised by assemblies in traditional parliamentary forms of government; moreover, the governmental fragmentation implies that also the range of the monitoring functions is limited, since it cannot reach every single corner where executive competences are exercised.

5.4.1 Controlling the European Commission

First of all, it should be noted that a *sui generis* trust relationship exists between the European Parliament and the Commission, that is the only holder of executive power which is directly and formally accountable to the assembly, according to

120 See S. ILLARI, *Sulla nozione di forma di governo e l'ordinamento dell'Unione europea. Aspetti problematici del difficile cammino verso un nuovo ordine politico*, in VV.AA., *Studi in onore di Vincenzo Atripaldi*, Vol. II, Naples, 2010, 1543, where the Author highlights the «graduale assestamento dell'Assemblea, denominata Parlamento europeo, nella direzione di un'equiparazione crescente ai paradigmi tipici del parlamentarismo». According to the Author, «tale evoluzione è avvenuta spesso in via di prassi come pure nella successione degli atti normativi, in quanto ad ogni modifica dei Trattati istitutivi comunitari ha corrisposto una maggiore considerazione del Parlamento europeo, salvaguardata dalla Corte di Giustizia».

art. 17.8 TEU[121]. However, this relationship of trust is far from being close to the one existing in parliamentary States: in fact, the Commission does not receive any formal confidence vote on a political programme after its appointment; on the contrary, the approval of a motion of censure pursuant to art. 234 TFEU[122] – which is the primary instrument in the hand of the assembly to enforce the Commission's responsibility, since it determines the resignation of the Commission as a body and its replacement according to the standard procedure provided for by art. 17 TEU – requires a greater majority, equivalent to a two-thirds of the votes cast[123]. As underlined by doctrine, it follows that, unlike what happens in most of the parliamentary forms of government, once appointed, the Commission can actually free itself from the bonds of the absolute majority[124]. Then, the only moment when it would be possible to recognize the emergence of a trust relationship is the Commission's appointment procedure, which, as we will see, institutional practice has recently tried to shape in such a way as to democratize it. Since the entry into force of the Treaty of Lisbon, the procedure is provided for by art. 17.7, according to which the European Council, after appriopriate consultations and having taken into account the elections to the

121 This provision must be read in conjunction with art. 14.1 TEU, which states that «the European parliament shall (…) exercise functions of political control and consultation as laid down in the Treaties».

122 Art. 234 TFEU states that «if a motion of censure on the activities of the Commission is tabled before it, the European Parliament shall not vote thereon until at least three days after the motion has been tabled and only by open vote. If the motion of censure is carried by a two-thirds majority of the votes cast, representing a majority of the component Members of the European Parliament, the members of the Commission shall resign as a body and the High Representative of the Union for Foreign Affairs and Security Policy shall resign from duties that he or she carries out in the Commission. They shall remain in office and continue to deal with current business until they are replaced in accordance with Article 17 of the Treaty on European Union. In this case, the term of office of the members of the Commission appointed to replace them shall expire on the date on which the term of office of the members of the Commission obliged to resign as a body would have expired». The possibility for the Assembly to carry a motion of censure against the High Authority was already provided in the ECSC Treaty (art. 24), as pointed out by S. ILLARI, *op. ult. cit*., 1546.

123 Since the required majority is quite high, as underlined ivi, 1547, «nella pratica, il Parlamento [ha] fatto un uso "strategico" di questo strumento, non tanto ai fini di estendere poteri di controllo, quanto piuttosto allo scopo di indurre la Commissione a cedere su alcune significative rivendicazioni istituzionali proprie dell'intera compagine parlamentare».

124 Cf. L. SPADACINI, M. FRAU, *Governare l'Unione europea. Dinamiche e prospettive istituzionali*, Soveria Mannelli, 2006, 20. On the other side of the coin, however, the approval of a motion of censure may never determine the end of the legislature (i.e. the dissolution of the Parliament and new elections, as happens in most of the parliamentary systems when there is no chance to form a new majority in support of a government).

European Parliament, acting by qualified majority proposes to the latter a candidate for President of the Commission. This candidate, then, must be elected, as we have already noted *supra*, by absolute majority of the votes cast in the Parliament. Then, the Council[125], by common accord with the President-elect of the Commission, adopts the list of the other persons proposed by the latter as members. Those candidates must be chosen, among those suggested by the Member States, according to the criteria set out in paragraphs 3 and 5 of the same article; for example, the first rule provides that candidates must be independent, competent and must show European commitment. Once the list has been adopted, the Parliament must vote again to express its consent to the Commission as a body (President, High Representative of the Union for Foreign Affairs and Security Policy and all the other commissioners)[126]. Only at that point, the European Council, acting by qualified majority, definitively appoints the Commission. This procedure, as far as the role of the European Parliament is concerned has been enriched over time by means of practice: in fact, even though Treaties only provide that once the list of commissioners is set out by the Council, the Parliament approves the Commission as a body, actually the former started to organise confirmation hearings of nominated commissioners soon after it had been granted an active role in the overall procedure, i.e. with the approval of the Maastricht Treaty[127]. The hearings practice – which may be regarded as a transplant from the US form of government[128] – was soon codified in the

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125 After the Parliament's vote on the proposed President, the Council – in its composition of the Heads of State and Government – adopts the list of the commissioners by common accord with the President-elect. Thus, the Institutions involved in this procedure are three in total: European Council, Council (of Ministers) and European Parliament. Should it be necessary, this is a further proof of the importance of the collaborative element within the form of government of the EU.

126 It should be noted that art. 17.7, subparagraph 3, explicitly makes use of the term «vote of consent», thus avoiding the use of the more "dangerous" term «vote of confidence».

127 Which established the obligation for Member States to consult the Parliament before nominating the President of the Commission. However, we should here recall that Parliament started to informally organize confirmation hearings of nominated Presidents as early as 1981. Two years later, this practice was codified by means of the Stuttgart Solemn Declaration of the Heads of State or Government.

128 Cf. P. MAGNETTE, *Appointing and censuring the European Commission: the adaptation of parliamentary institutions to the Community context*, in *European Law Journal*, 3/2001, 297: «This is a very interesting invention, actually derived from a non-European tradition, namely that of the USA. In other words, it is a typical case of transplant of a presidential institution within a parliamentary system. It is because they are not part of the procedure of appointment and can not censure the members of the executive that American congressmen organise their hearings – to try

Parliament's rules of procedure (1993, amended in 2008)[129] and, over time, even though it was never included in the Treaties, has become a powerful tool in the hands of the representative body, which has used it in order to influence the appointment procedure whereas the profile of proposed members didn't satisfy the requirements provided for by primary law, especially as far as their competence on the assigned portfolio is concerned[130]. This codified practice, however, can hardly be juxtaposed to a confidence vote in the manner of traditional parliamentary systems: even though it presents some elements that could be read as "trust placing", actually a positive opinion on a candidate following the hearing counts as a mere *nihil obstat* and, ultimately – despite it has undoubtely contributed to the assembly's empowerment in the context of the appointment procedure – it cannot be seen as the very moment when parliamentary trust emerges. This moment could eventually correspond to the Parliament's approval of the Commission as a body, soon after the end of the hearings. In fact, this final vote is dependent on the presentation of the college of commissioners and of the Commission's programme in front of the Plenary, with the presence of the Council itself. The mentioned appointment procedure has undergone further changes by means of practice, with the aim of enhancing its democratic nature and reconnecting it, wherever possible, to the dynamics of a traditional parliamentary form of government. This goal has been pursued – but only in part achieved – by means of the Spitzenkandidat (lead candidate) process, which will be further analyzed in the following chapter. According to this procedure, Europarties, before the start of the electoral campaign, must appoint a Spitzenkandidat for the presidency of the Commission: the office, then, should be held by the candidate who is capable to obtain sufficient support in the Assembly

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and influence a President they are unable to constrain. The fact that MEPs have felt it necessary to imitate this presidential practice, though they are involved in the procedures of appointment and censure, makes it plain that they are conscious of the imbalance in the power of nomination between the European Parliament and the heads of state or government».

[129] Pursuant to the standard "dynamic" process according to which – as highlighted by S. ILLARI, *op. cit.*, 1545, fn. 23 – «gli elementi del cd. "modello parlamentare comunitario" vengono introdotti in via di prassi, per poi essere formalizzati nel regolamento interno del Parlamento europeo, riconosciuti negli accordi interistituzionali e, infine, incorporati nei Trattati».

[130] As a matter of fact, the nominated commissioners are heared by specialised committees of the European Parliaments: those hearings are normally focused on the competence of the interviewed in relation to the area where it is supposed to operate once appointed.

(normally, the one proposed by the majority party). In sum, by means of this process the Parliament has stressed the need to shift towards a presidentialization (and, inevitably, a politicization) of the Commission: in this respect, while the whole procedure has traditionally been the preserve of Member States, the Lisbon Treaty undoubtely cleared the path for the necessary changes by stating (in art. 17.7 TEU) that the European Council, before proposing a name for the Commission presidency, must take into account the results of European elections. By relying on this provision, on November 2012 the European Parliament adopted a resolution on the elections to the European Parliament in 2014, where it urged «European political parties to nominate candidates for the Presidency of the Commission and [expected] those candidates to play a leading role in the parliamentary electoral campaign, in particular by personally presenting their programme in all Member States of the Union»[131]. This new procedure was actually followed on the occasion of the 2014 elections[132] – which resulted in the nomination by the European Council of Jean Claude Juncker, Spitzenkandidat of the EPP, which obtained simple majority in the Parliament[133] – but has been discarded in 2019, when the Member States gathered in the European Council

131 European Parliament resolution of 22 November 2012 on the elections to the European Parliament in 2014 (2012/2829(RSP)), lett g), par. 1. The following year, the same Commission urged Europarties to do the same. See in this respect Commission Recommendation of 12 March 2013 on enhancing the democratic and efficient conduct of the elections to the European Parliament (2013/142/EU) and Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Preparing for the 2014 European elections: further enhancing their democratic and efficient conduct", also issued on 12 March 2013 (COM/2013/0126 final).

132 *Contra*, see K. ARMSTRONG, *Has the Spitzenkandidaten system failed and should we care?*, in *Verfassungsblog*, 04 July 2019, 2: «Yet even the experience of the Juncker nomination is hardly proof that the system "worked". Rather European leaders were caught out by a process which they struggled to control, with Angela Merkel finally giving her support to Juncker provided Martin Schulz held on to the Parliament's presidency for a bit longer».

133 Hungary and the United Kingdom voted against Juncker's nomination. It may be interesting to go back over the reasons behind this choice. In this respect, see S. ILLARI, *Osservazioni sulla pratica degli Spitzenkandidaten nel contesto della forma di governo dell'Unione europea*, in *Nomos. Le attualità nel diritto*, 3/2018, 13. The Author notes that the then-PM of the UK David Cameron «ebbe a difendere "il diritto" dei rappresentanti degli Stati europei, eletti democraticamente nei rispettivi Stati membri, di decidere il Presidente della Commissione come "principio fondamentale" dell'Unione europea. In questa prospettiva l'elezione di Jean Claude Juncker pareva al Primo Ministro inglese "un passo indietro", che faceva della Commissione europea "una creatura del Parlamento", con il rischio di farne un'istituzione politicizzata e in tal modo comprometterne l'imparzialità e l'indipendenza. Pertanto, l'impiego della nuova pratica degli Spitzenkandidaten rappresentava una perdita per tutti che, in violazione dei Trattati, avrebbe messo a repentaglio l'intera Unione».

decided, for purely political reasons, not to support Manfred Weber (lead candidate of the EPP which, again, gained the simple majority of the parliamentary seats)[134]. This intergovernmentalist show of force resulted in the nomination – and subsequent election by a "chained-up" Assembly – of Ursula Von der Leyen, who didn't run as Spitzenkandidat for any of the Europarties, as President of the EU Commission.

At this point, we must make explicit mention of another channel that allows the control of the Commission's action: namely, the subsidiarity control mechanism mentioned in art. 12 TEU and based in the Protocol (no. 2) on the application of the principles of subsidiarity and proportionality annexed to the Treaties. In this case, however, the active subject is not the European Parliament, but rather the parliamentary assemblies of the Member States, which hold the power to assess whether the supranational executive body has respected the mentioned principle when drafting a legislative act. As obvious, national parliaments may perform this control only when proposed legislation falls within the shared competence area. This supervisory power may be exercised by each Member States' parliamentary system, to which an amount of two votes (one per chamber in case of bi-cameral systems) is allocated. Those votes must be cast within eight weeks from the date of transmission of the draft European legislative act (so-called "early warning"). Whereas national parliaments' opinions which deem that the draft breaches the subsidiarity principle represent at least one third of all the votes allocated to the national Parliaments, the draft must be reviewed[135]. This means, however, that the

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134 On the political reasons behind the failure of the Spitzenkandidat process in 2019, see J-H. REESTMAN, L.F.M. BESSELINK, *Spitzenkandidaten and the European Union's system of government*, in *European Constitutional Law Review*, 4/2019, 614-615: «Political relations within the newly-elected European Parliament were important in breaking up the Spitzenkandidaten system this time. The socialists (PES) and Christian-democrats (EPP), who together had been a majority in the previous parliaments, now needed the liberals, who from ALDE were re-christened into RENEW Europe at the insistence of Macron. The liberals, prior to Macron's movement joining, had committed to the Spitzenkandidaten system (…). But things changed after the elections – the competitors of the liberals viewed Macron, probably rightly, as the puppeteer pulling the strings of change in the background of the liberal group. This was combined with opposition to the Spitzenkandidaten system voiced by more members of the European Council than were willing to support it explicitly. Unlike the political situation after the 2014 elections, the political condition of a threat of voting down a candidate proposed by the European Council who had not been a Spitzenkandidat in the elections or the threat of the rejection of the full Commission, had basically disappeared».

135 At the initiative of the Dutch government, on the occasion of the Intergovernmental Conference of 2007, a new provision was added to art. 7 of the Protocol. According to this

only effect of this control mechanism is the tightening of the decision making process[136]: the supranational executive, in fact, is entitled to «mantain, amend or withdraw the draft», with the only duty to give reasons for this decision (art. 7 of the Protocol). Nevertheless, once the draft is approved and enters into force the Member States still may bring the subsidiarity breach before the Court of Justice of the EU[137].

5.4.2 Controlling intergovernmental institutions

Once described the rules governing the relationship between European Parliament and the supranational Institution par excellence, we should ask ourselves, in order to get to grips with the form of government of the EU, whether the representative body is also capable of controlling and enforcing the responsibility of intergovernmental bodies. As far as the European Council is concerned, there is no trust relationship that bonds it to the Parliament. However, this doesn't mean

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amendment, «under the ordinary legislative procedure, where reasoned opinions on the non-compliance of a proposal for a legislative act with the principle of subsidiarity represent at least a simple majority of the votes allocated to the national Parliaments (…), the proposal must be reviewed. After such review, the Commission may decide to maintain, amend or withdraw the proposal. If it chooses to maintain the proposal, the Commission will have, in a reasoned opinion, to justify why it considers that the proposal complies with the principle of subsidiarity. This reasoned opinion, as well as the reasoned opinions of the national Parliaments, will have to be submitted to the Union legislator, for consideration in the procedure: (a) before concluding the first reading, the the legislator (the European Parliament and the Council) shall consider whether the legislative proposal is compatible with the principle of subsidiarity, taking particular account of the reasons expressed and shared by the majority of national Parliaments as well as the reasoned opinion of the Commission; (b) if, by a majority of 55 % of the members of the Council or a majority of the votes cast in the European Parliament, the legislator is of the opinion that the proposal is not compatible with the principle of subsidiarity, the legislative proposal shall not be given further consideration».

136 E. GRIGLIO, *I circuiti e i «buchi neri» del controllo parlamentare sull'esecutivo frammentato dell'Unione europea*, in R. IBRIDO, N. LUPO (a cura di), *Dinamiche della forma di governo*, cit., 226.

137 On the possible political use of this resort to the Court of Justice, see L. GIANNITI, *Il ruolo dei Parlamenti nazionali dopo il Trattato di Lisbona: un'opportunità o un problema?*, in F. BASSANINI, G. TIBERI (a cura di), *Le nuove Istituzioni europee. Commento al Trattato di Lisbona*, 2nd ed., Bologna, 2010, also published in www.astrid-online.it, 6: «Un possibile elemento di vera crisi potrebbe in questa prospettiva venire, più che dal rafforzamento del ruolo dei Parlamenti nella fase ascendente, dall'istituto del ricorso alla Corte di giustizia promosso dai governi su iniziativa dei rispettivi parlamenti; più precisamente, l'art. 8 del Protocollo sulla sussidiarietà parla di ricorsi "trasmessi dal Governo" in conformità con l'ordinamento giuridico interno, a nome del suo parlamento nazionale o di una Camera di detto parlamento. Qualche Camera potrebbe infatti fare un uso sistematico di questa possibilità, generando un contenzioso che, nelle more della definizione delle cause, potrebbe anche essere capace di ritardare senza bloccare l'attuazione del diritto comunitario.

that the latter has no means to control how the Member States exercise their political direction powers as a body. As a matter of fact, according to art. 15.6 lett. d) TEU the President of the European Council is obliged to present «a report to the European Parliament after each of the meetings of the European Council»; furthermore, pursuant to art. 235.2 TFEU, «the President of the European Parliament may be invited to be heard by the European Council». As can be easily seen, we are dealing with very mild control powers which do not match the pervasiveness of the European Council's functions in the context of the fragmented EU executive. Furthermore, as commentators have stressed, those supervisory powers are often disavowed through practice: in fact, when invited to be heard, the President of the Parliament is allowed to give his/her speech, but, as already seen *supra*, soon after is asked to leave the room so that the meeting could be resumed: this inevitably results in a limitation of the control power's range[138]. In addition, the duty to present a report to the Parliament, which weighs on the shoulders of the European Council's President, has been ignored in case of "special" or "extraordinary" meetings of the intergovernmental body[139]. Therefore, the only (indirect) parliamentary control affecting the exercise of European Council's function is the one performed by national parliaments, in line with art. 10.2, which provides that «Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens»[140]. However, the mentioned control merely covers the activity of the single Head of State or government – by assessing whether it sufficiently safeguards national interests – thus without dealing with the decisions taken by the European Council as a body.

As far as the Council is concerned, similar if not identical problems emerge: the Parliament lacks any formal prerogative and power of sanction; however, here too it holds a mild oversight power, resulting in the possibility to table written and

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138 On this practice, see A.A. CERVATI, *op. cit.*, 89, fn. 20.

139 N. LUPO, *L'europeizzazione delle forme di governo degli Stati membri: la presidenzializzazione derivante da Bruxelles*, in R. IBRIDO, N. LUPO (a cura di), *Dinamiche della forma di governo*, cit., 200.

140 Thus (wrongly) taking for granted that the all the Member States have a parliamentary (or a semipresidential) form of government.

oral questions to the Council and to ask it to initiate new policies and, furthermore, in the possibility to directly discuss in Plenary the programme of the six-months Presidency of the Council with the President itself. Moreover, it should be remembered that the High Representative for Foreign Affairs and Security Policy (or a representative), who chairs the Council in its Foreign Affairs configuration, attends plenary debates which focus on security, defense and foreign policy. The same High Representative has the duty to report twice a year to the Parliament on those policies and on their financial implication.

5.5 Cooperation as the essence of the European form of government

On the whole, by echoing a recent doctrine, we can say that the European Parliament has a para-fiduciary relationship with the Commission, that results in a control power wielded *ex ante* – the one exercised in the appointment procedure – and in another one that may be triggered *ex post*, which corresponds to the approval of a motion of censure (even though with different required majorities). This oversight function, however, is still quite distant from the trust that links governments and assemblies in traditional parliamentary forms of government; on the other side of the coin, the Parliament has an extra-fiduciary relationship with both the European Council and the Council of the European Union, which results in an extremely mild control power that, in the end, merely translates into the possibility of influencing the agenda of the intergovernmental Institutions[141]. Thus, it's no wonder that the European Parliament seems quite in trouble when facing the composite and fragmented executive of the Union. From that, we can conclude that the functioning of the European form of government inevitably hangs on the collaborative element, which is normatively expressed by the principles of institutional balance and loyal/sincere cooperation. As doctrine has correctly stated, such an articulation of legislative and executive powers requires

[141] See, in this respect, E. GRIGLIO, *op. cit*., 216 ff. The Author actually identifies, alongside the para-fiduciary and the extra-fiduciary control modules, another form, which is the regulatory one. This control module is adopted by the European Parliament towards the agencies and the administration of the EU, which are also holders of executive functions and are, thus, rightfully part of the fragmented executive of the Union. It results in a prior or subsequent supervisory power – which includes the power to appoint and dismiss non-elective directors, performance verifications and the like – which is often exercised by means of hearings, questions and inquiries.

institutional balances inspired by a strong spirit of cooperation and basically devoid of any conflict[142]. At the same time, it would be dishonest to firmly place the form of government of the EU outside the parliamentary experiences: the Assembly has been empowered at each stage of the integration process and, whereas Treaties didn't attribute further competences to the Parliament, the latter made them its own by means of practice: this testifies an intention to progressively go towards a stronger parliamentarization of the system. This goal, however, will always find an obstacle in the intergovernmental dynamics which are still predominant, since in the one hand the political direction of the organization is fully in the hands of the Heads of State and government gathered in the European Council, and in the other hand the same legislative procedure is still partly governed by State ministers in the Council of the European Union. This, combined with the extreme fragmentation of the EU's executive, makes the exercise of control powers extremely difficult. So, until (unlikely) major reforms aimed at getting rid of the all-pervading intergovernmentalism will occur, the characterisation of the EU's form of government as purely and simply parliamentary – although the Parliament has an important part in it – wouldn't be sufficient to capture its essence[143]. Thus, since the European institutional dynamics seem to hang, as we have noted, on the necessary cooperation between Institutions in order to work properly, the view that the EU is based on a collaborative form of government[144] seems to better grasp the key elements characterizing the system.

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142 A.A. CERVATI, *op. cit.*, 96.

143 In this respect, see C. DE FIORES, *op. cit.*, 375: «(…) riteniamo quanto meno forzato il tentativo – oggi sortito da parte della dottrina – di inquadrare l'attuale modello di organizzazione dell'Unione tra le forme di governo parlamentari. A meno che non si voglia un po' arditamente sostenere che oggetto della fiducia parlamentare debba, in questo caso, ritenersi non tanto il programma politico (che non c'è), ma le "intrinseche qualità di indipendenza del soggetto verso cui la valutazione si rivolge", il suo appeal europeista, il suo tasso di fedeltà agli indirizzi politici dell'Unione (così come parrebbe oggi pretendere lo stesso art. 17.3). SI tratterebbe, tuttavia, anche in questo caso, di un'ipotesi talmente anomala che esula visibilmente da quelle che sono sempre state le dinamiche di formazione dei governi nei sistemi parlamentari. Ne discende, in conclusione, che la forma di governo europea (se di forma di governo si può parlare) non è una forma di governo di tipo parlamentare».

144 R. IBRIDO, *Oltre le "forme di governo"*, cit., 27, who deems that the EU is an «assetto di organizzazione costituzionale fondato sull'elemento collaborativo», since «l'elemento collaborativo sembra esprimere a livello europeo qualcosa in più di un obbligo di cooperazione leale: in esso è racchiusa l'idea stessa di "governo" dell'Unione».

Chapter IV

European political parties in the form of government of the Union

A. European political parties and the EU's supranational Institutions

1. European political parties and European Parliament: searching for contact points

1.1 The European network party: a useful concept

In the previous chapter we have found that the European Parliament plays a crucial role – albeit different in scope from the one that Assemblies have in traditional parliamentary forms of government – in monitoring the fragmented executive of the Union and in holding it responsible. Moreover, the same Parliament seems to have a limited, but still present, impact on one of the essential powers the EU's executive has: the agenda setting. In this chapter we are going to analyse the role that Europarties play within the form of government of the Union, namely if and to what extent thay participate in the decision making processes that occur in the four key Institutions whose mutual relationships constitute the form of government of the EU. Since Europarties should be, according to art. 10.4 TEU, the main instruments to express the will of the citizens of the Union, we will start our investigation from the European Parliament, which is, according to paragraph 2 of the same article, the Institution where EU citizens are directly represented.

In order to better understand the impact Europarties have on the internal dynamics of the European Parliament, it is useful to recall a well-known doctrinal opinion, according to which, in order to grasp the essence of the European party system, its main actor should be intended as a European network party[1]: a three-faceted entity, whose components reflect the multiple levels that the European dimension

[1] L. BARDI, *Parties and party system in the European Union*, in K.R. LUTHER, F. MULLER ROMMEL, *Political parties in the new Europe*, Oxford, 2002, 293 ff.

always entails (national-supranational). In fact, national political parties may be decomposed into different dimensions on the basis of the area in which their activity has an impact[2]: thus, we will have a party on the ground, which corresponds to the party base and to the contribution made by activists and supporters; a party in the central office, which corresponds to the organized entity and its internal decision making procedures; a party in the public office, which corresponds to the associations that elected members in parliamentary institutions may form in order to better perform their functions (parliamentary groups). This same scheme may be applied, according to the mentioned doctrine, to an entity which may be labeled as European network party: this multilevel organism, then, likewise comprises a party on the ground, which, in this case, corresponds to national political parties; a party in the central office, which corresponds to the European political party understood as «political alliance which pursues political objectives and is registered with the Authority for European political parties» according to art. 2.3 Regulation n. 1141/2014; lastly, it comprises a party in the public office, which corresponds to the political group in the European Parliament as provided for by chapter 4 of the Rules of Procedure. This doctrinal position has multiple merits: on the one hand, it shows us that the party dimension at European level is inherently influenced by the incompleteness of the EU's federalizing process[3]; on the other hand, it demonstrates that a study devoted only to Europarties, without taking into consideration the "ground" and the "public

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2 R.S. KATZ, P. MAIR, *The evolution of party organizations in Europe: the three faces of party organization*, in *American Review of Politics*, 4/1993, 594: «We propose consideration of three faces of party organization. The first is the party in public office, e.g., in parliament or government. The second is the party on the ground, that is the members, activists, and so on. The third is the party central office, that is, the national leadership of the party organization which, at least in theory, is organizationally distinct from the party in public office, and which, at the same time, organizes and is usually representative of the party on the ground».

3 According to F. SOZZI, *Partiti e sistema partitico a livello europeo*, Rome, 2013, 39, the European Union may be defined as a compound polity, that is to say an entity which comprises both a vertical and an horizontal separation of powers. Echoing F. FABBRINI, *Compound democracies*, Oxford, 2007, the Author deems that «questa doppia separazione fa sì che il concetto di federalismo, da solo, non sia in grado di catturare la vera natura di questo tipo di regimi politici». When dealing with the vertical separation of powers, he further outlines that «ne deriva, da questa articolazione a più livelli, che ogni strato istituzionale è portatore di interessi territoriali e funzionali diversi e in competizione tra loro, che solo un complesso processo decisionale without government può condurre a compimento». To sum up, as underlined ivi, 58, «la struttura organizzativa e le funzioni che i partiti politici svolgono all'interno della UE rispecchiano il sistema di governance multi-level in cui si articola il sistema politico europeo e, allo stesso tempo, il processo attraverso il quale si è venuto a formare».

office" at all, would inevitably be incomplete and would not grasp the entirety of the investigated phenomenon.

1.2 European political parties and political groups in the European Parliament: searching for a hierarchy

1.2.1 Brief notes on parliamentary groups: an historical perspective

In order to understand to what extent European political parties are able to influence the decision making process that occurs inside the European parliamentary assembly, we should investigate the relationship between the former and the political groups in the same Institution. Before tackling this issue, however, we should here briefly recall how the relationship between political parties and parliamentary groups has developed over time at domestic level. The former were born, as outlined in chapter one of this work, as intraparliamentary entities with limited presence in the society: political parties in a strict sense started their activities as electoral committees aimed at bringing together consensus around one candidate, as the suffrage was gradually extended to other portions of society and those who wished to have a seat in the Assembly had to search for consensus among new eligible voters. However, most of the activities were still performed inside the Assemblies' buildings: until the appearance of the first mass parties between the end of the XIX and the beginning of the XX century, political parties could not be properly labeled as hinges between society and representative institutions; the entire system was based on the prohibition of a binding mandate and on individual representation: the few who were entitled to exercise an active electoral right were asked to choose between candidates having the same social status, who did not present themselves as part of a political entity; thus, they were elected as individuals who, once in Parliament, represented the entire nation, enjoyed a free mandate and organized themselves in intra-parliamentary groups, which, however, besides not to be regulated, were not even necessary for the system to function properly. Thus, we can say that parliamentary groups were born – as informal associations of elected members – before political

parties and that the latter somehow result from the former[4]. However, a specification is needed: those groups, especially in the beginning of the parliamentary experience in Europe, were everything but ideological associations; in fact, members of Parliaments tended to naturally cluster on the basis of geographical affinities which, over time, also became ideological like-mindedness, often reinforced by the presence of a leading figure around whom other members gathered[5]. Parliamentary groups as we are used to conceive make their first appearance in European constitutional experiences in the beginning of the XX century, once the affirmation of mass parties, together with the increasingly wide suffrage and the introduction of proportional representation voting system, proved that spontaneous or limitedly regulated grouping inside the Assembles did not resemble the complex party dynamics that was occurring outside. Case in point, the Italian parliamentary system before the major changes to the Chamber of Deputies' rules of procedure in 1920: before this reform was approved, the greatest part of parliamentary work (including the examination of legislative proposals) was made in the so-called offices (uffici): temporary committees with no predetermined competences and whose components were drawn by lot among the members of the Chamber. The 1920 reform that followed the seminal 1919 elections, which marked the electoral success of two mass parties (Partito socialista and Partito popolare), included the establishment of parliamentary groups, that were associations of at least twenty elected deputies which, however retained the name "uffici"[6]; each member of the Assembly, once elected, was asked to join a group, otherwise he would have been automatically

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4 In this respect, M. DUVERGER, *I partiti politici* [1958], Milano, 1961, 18 talks about an "electoral and parliamentary origin" of political parties.

5 See *ibidem*: «A priori, sembra che la comunanza di dottrine politiche abbia costituito il motore essenziale della formazione dei gruppi parlamentari, tuttavia i fatti non confermano sempre questa ipotesi. Spesso la vicinanza geografica o la volontà di difesa professionale sembrano aver dato il primo impulso, cui sarebbe seguita la dottrina. In alcuni paesi, i primi gruppi parlamentari furono quindi dei gruppi locali trasformatisi ulteriormente in gruppi ideologici». See also A. CIANCIO, *I gruppi parlamentari. Studio intorno a una manifestazione del pluralismo politico*, Milan, 2008, 26-27, who underlines, in relation to representative assemblies, a «naturale propensione (…) a suddividersi al loro interno in gruppi, che rispecchiano più o meno esattamente le divisioni politiche esistenti nella società. Pertanto, la creazione di raggruppamenti interni, sulla base di un idem sentire, appare circostanza strettamente connessa alla natura politica dell'organo».

6 The old "uffici" system, however, was replaced by a permanent commissions systems, whose composition must reflect the proportion of the newly established groups in the Chamber.

included in the non-inscrits group (Ufficio misto)[7]. Each group that reached the threshold of twenty deputies constituted an "ufficio", that is to say, an "institutionalised" parliamentary group. An exception to the mentioned threshold was also provided for by the reform: in fact, groups of ten or more members were also allowed to constitute an "ufficio", provided that they represented an organized existing political party[8]. In the light of the above, doctrine has stated that parliamentary groups properly so-called were "projections" or "expression" of parties in Parliament[9], unlike informal groups that were present from the earliest days of the parliamentary experience; while the intraparliamentary dynamic determined the creation of political parties in the society as electoral committees, the affirmation of new mass parties (together with other crucial

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[7] See Portale Storico della Camera dei Deputati, Le modifiche regolamentari del 1920 e del 1922, available at www.storia.camera.it: «Questa riforma del sistema elettorale evidenziava l'inidoneità del sistema di esame delle leggi attraverso gli Uffici, la cui costituzione, affidata alla sorte, non dava alle minoranze, pur costituite in partiti, la possibilità di un'equa e razionale rappresentanza; da qui la necessità di intervenire sul Regolamento al fine di delineare una procedura, che attraverso l'istituzione di apposite Commissioni permanenti competenti per materia, garantisse la corretta rappresentanza delle forze politiche. (…) La Camera risultava divisa in Gruppi politici composti da almeno venti deputati (art. 1), ciascuno dei quali, anziché essere sorteggiato in un Ufficio, era tenuto, sulla base della propria affiliazione politica, ad iscriversi ad un gruppo; in caso contrario risultava iscritto obbligatoriamente nel gruppo misto. Ogni Gruppo costituiva un Ufficio che si adunava insieme a tutti gli altri, su convocazione del Presidente della Camera, entro otto giorni dall'inizio della Legislatura; i singoli Gruppi nominavano poi, a scrutinio segreto, i propri delegati nelle singole Commissioni permanenti, articolate per materia in modo da coprire tendenzialmente ogni possibile argomento (art. 3)». On the 1920 reform, see G. AMBROSINI, *Partiti politici e gruppi parlamentari dopo la proporzionale*, Florence, 1921.

[8] Those groups, however, must have been authorized by the Council of Presidency of the Chamber of Deputies, according to art. 25 of the amended Rules of Procedure: «Entro cinque giorni dal prestato giuramento, i deputati sono tenuti a dichiarare a quale gruppo politico siano iscritti. Ciascun gruppo composto da almeno venti deputati costituisce un Ufficio. I deputati inscritti ad un gruppo, il quale non raggiunga il numero di venti, possono unirsi ad un gruppo affine, per costituire, mercé reciproco accordo, agli effetti del precedente comma, un Ufficio, purché insieme raggiungano il numero di venti. I deputati i quali o non abbiamo fatto la dichiarazione di cui al primo comma, o non appartengano ad alcun gruppo, o appartengano a gruppi che non raggiungano venti adesioni, costituiscono un unico Ufficio misto. Quando un gruppo raggiunga almeno il numero di dieci iscritti può eccezionalmente essere autorizzato a costituirsi in Ufficio dal Consiglio di Presidenza, purché questo riconosca che esso rappresenti un partito organizzato nel Paese».

[9] See, among those who deemed that groups can be defined as "projections" of parties in Parliament, C. MORTATI, *Istituzioni di diritto pubblico*, vol. I, Padua, 1975, 489; T. MARTINES, *Diritto costituzionale*, 8th ed., Milan, 1994, 308; L. PALADIN, *Diritto costituzionale*, 3rd ed., Padua, 1998, 313; Among those who defined groups as "expressions" of parties in parliamentary assemblies, see M. MAZZIOTTI DI CELSO, G.M. SALERNO, *Manuale di diritto costituzionale*, 7th ed., Padua, 2018, 366; R. BIN, G. PITRUZZELLA, *Diritto costituzionale*, 19th ed., Turin, 2018, 241. On the topic, see also R. BIN, *La disciplina dei gruppi parlamentari*, in *Associazione italiana dei costituzionalisti, Annuario 2000. Il Parlamento*, Padua, 2001, 89 ff.

factors briefly outlined above) determined the creation of "institutionalized" parliamentary groups which resembled the weight of each party that participated in the elections. According to a well known doctrine, a parliamentary group is a "union of Members of Parliament who belong to the same party and that set themselves as a political unity with a stable organization"[10]. However, history has demonstrated that – in the absence of explicit provisions in this respect – an exact correspondence between political parties which gain seats as a result of elections and parliamentary groups does not follow automatically: the existence of the free mandate principle implies that elected members of Parliament who initially joined a given group, may afterwards change group or even form a new one together with other members. Thus, it may well happen that a given group has no correspondent political party in society: in this case, the group is not a projection/expression of an external political force, but rather the legitimate consequence of the exercise of the free mandate by elected members of Parliament[11]. Of course, also the opposite may well happen: there's no guarantee that a political party which has met the threshold for the allocation of seats will form an homogeneous parliamentary group; its elected members would be free – in accordance with the prohibition on a binding mandate – to join other groups; in this case, an active political force which has gained seats in elections would not be "projected" nor "expressed" in Parliament. Thus, both the definitions of parliamentary groups as projection/expression of parties in representative Assemblies and as unions of members who belong to the same party seem to be only limitedly capable of defining the subject under investigation. Add to this the fact that the requirement of political affinity or necessary correspondence between party and group is not generally present in all the existing (at least European) parliamentary experiences[12]. In order to provide a comprehensive definition which

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10 G.U. RESCIGNO, *Gruppi parlamentari*, in *Enciclopedia del diritto*, vol. XIX, Milan, 1969, 788.

11 In the Italian experience, many parties, even in recent times, had an initial intra-parliamentary origin as groups. Only afterwards they have been also established as extraparliamentary political parties. This peculiar birth process has been defined as up-down by S. CURRERI, *Gruppi parlamentari e norme anti-transfughismo*, in V. LIPPOLIS, N. LUPO (a cura di), *Il parlamento dopo il referendum costituzionale*, Il Filangieri, Quaderno 2015-2016, Naples, 2017, 117 ff.

12 In the Italian one, for example, this requirement has never been introduced in the Rules of Procedure of the Chamber of Deputies, since the very first establishment of parliamentary groups

encompasses all the existing parliamentary experience where groups are present, it would be preferable to label parliamentary groups as institutions of the parliamentary order which have formal structure of political associations and substantial functions of parliament's bodies [13] or, alternatively, as formal associations of members of a representative assembly, which are necessary for the same chamber to function[14] (thus, without making direct reference to party links which, as we have seen, are not always required in order to form a group) .

1.2.2 Follows: the problem of the legal nature of parliamentary groups

This definition is actually helpful for cutting the knot concerning the question of the legal nature of parliamentary groups and the subsequent problem of their relationship with the correspondent political parties, where present. As far as the first problem is concerned, parliamentary groups have always suffered from a certain "ambiguity", which stems from their position in between parties and parliament: on the one hand, they are subjected to the "private" dimension of political parties as associations playing a critical role in the guise of political

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in the lower branch of Parliament in 1920 and until present days. Differently, in the Senate, such a requirement – namely the necessary correspondence between group and party – has been introduced by means of the reform of the Rules of Procedure adopted in December 2017. This change was due to the extreme proliferation of groups which didn't have a correspondent party operating in society. Now, art. 14, paragraph 4, of the Rules of Procedure of the Italian Senate states that «ciascun Gruppo dev'essere composto da almeno dieci Senatori e deve rappresentare un partito o movimento politico, anche risultante dall'aggregazione di più partiti o movimenti politici, che abbia presentato alle elezioni del Senato propri candidati con lo stesso contrassegno, conseguendo l'elezione di Senatori».

Differently, in France, for example, together with a quantitative requirement, also a qualitative requirement is provided for: groups must be established on the basis of political affinities of the members. There are, however, other European States, namely Austria, Belgium (although with some *caveats*) Germany, Greece, the Netherlands, Romania, Spain, where an explicit and mandatory correspondence between political parties and groups is demanded. See on this topic Servizio Studi del Senato della Repubblica (a cura di Francesco Marcelli), *Dai competitori elettorali ai gruppi parlamentari. Le regole ed i risultati in 11 Paesi*, January 2008, 4 ff.

[13] This is the definition provided for by V. DI CIOLO, L. CIAURRO, *Il diritto parlamentare nella teoria e nella pratica*, Milan, 1994, 236.

[14] This is, actually, a definition that can be drawn from the Rules of Procedure of the Italian Chamber of Deputies. See art. 14, paragraph 1: «I Gruppi parlamentari sono associazioni di deputati la cui costituzione avviene secondo le disposizioni recate nel presente articolo. Ai Gruppi parlamentari, in quanto soggetti necessari al funzionamento della Camera, secondo quanto previsto dalla Costituzione e dal Regolamento, sono assicurate a carico del bilancio della Camera le risorse necessarie allo svolgimento della loro attività».

actors in the public sphere; on the other hand, they are also subjected to the "public" dimension of the arena where they are demanded to play, that is to say representative assemblies. The result of a comparative analysis concerning the most trusted doctrinal and jurisprudential positions on the legal nature of parliamentary groups in continental Europe (namely, in Italy, Germany, France and Spain), we can come to the agreement that – generally speaking and net of peculiarities characterizing each domestic constitutional dimension – parliamentary groups are associations of members of parliament and bodies essential to the correct functioning of the assembly[15]: on the one hand they retain a private nature as free associations of elected members – this is why legislators are often reluctant to regulate and to impose democratic standards to groups'

15 See in this respect and with regard to the Italian experience, E. BETTINELLI, *L'irriducibile ambiguità dei gruppi parlamentari (in un sistema politico precario)*, in *Il Politico*, 2/2013, 23: «Il regolamento della Camera dei deputati ha cercato di risolvere puntualmente la tradizionale questione, che impegna da lungo tempo anche la dottrina, sulla natura giuridica dei gruppi parlamentari. Certamente, in quanto elementi indefettibili dell'organizzazione delle Camere, delineata pur a larghe maglie dalla Costituzione (agli artt. 72 e 82), essi rientrano nella categoria dei loro "organi", proprio perché partecipano allo svolgimento delle funzioni parlamentari. Ma questa qualificazione formale è stata, per lo più, ritenuta insufficiente in quanto non riesce ad illuminare l'identità effettiva dei gruppi. Cosicché assai diffusa era (e forse ancora è) l'opinione che i gruppi mantengano una "doppia" soggettività: non solo in quanto organismi parlamentari (e quindi rientranti in un'orbita giuridica pubblicistica), ma anche in quanto organismi legati indissolubilmente ad "associazioni di fatto" come i partiti di riferimento (e per questo aspetto attratti in una sfera tipicamente privatistica e contrattualistica). Si è voluto superare una tale dicotomia attraverso una nuova disposizione che definisce espressamente i gruppi parlamentari come "associazioni di deputati", costituite nei modi fissati dal regolamento medesimo. Si precisa, poi, che essi si configurano quali "soggetti necessari al funzionamento della Camera, secondo quanto previsto dalla Costituzione e dal Regolamento"». As far as france is concerned, see R. BIAGI, *I gruppi parlamentari in Francia*, in S. MERLINI (a cura di), *Rappresentanza politica, gruppi parlamentari, partiti: il contesto europeo*, Turin, 2001, 111: «Il gruppo può costituire delle associazioni di diritto privato per gestire direttamente alcune attività, ma non ha personalità giuridica, si tratta di gruppi sui generis, associazioni di fatto con fini operativi». In relation to Germany, see F. BILANCIA, *I regolamenti dei gruppi parlamentari del Bundestag*, in S. MERLINI (a cura di), *op. cit.*, 163-164: «Il § 45 della Abgeordnetengesetz stabilisce che "I membri del Parlamento possono associarsi in gruppi parlamentari. Disposizioni di dettaglio sono stabilite nel regolamento del Bundestag". A seguire, la legge descrive le Fraktionen come unioni di deputati dotate di capacità di agire in seno al Bundestag, titolari di diritti di legittimazione attiva e passiva in ambito giudiziario, ma prive di qualsivoglia potestà pubblica. (…) la legge attribuisce loro il compito principale di "collaborare allo svolgimento delle attribuzioni del Bundestag"». As far as Spain is concerned, see P. MARSOCCI, *I gruppi parlamentari in Spagna*, in S. MERLINI (a cura di), *op. cit.*, 287 and fn. 11: «Il gruppo parlamentare è anche in Spagna considerato come l'unione di deputati sulla base di affinità politiche ed ideologiche, che ha come caratteristica (non ovviamente come requisito necessario) quella di riflettere dentro le Camere i partiti politici e le loro coalizioni, purchè presenti alle elezioni nazionali. Il ruolo dei gruppi rispetto all'esercizio delle funzioni parlamentari è fondamentale»; the Author, in the footnote, refers about a doctrinal position that labels the parliamentary group as "institutional union: body of both political party and the Parliament".

internal procedures, as frequently happens with political parties – and on the other hand they inevitably acquire a public nature as Parliament's necessary bodies: without contemplating such an internal organization, representative assemblies would encounter clear obstacles: as a matter of fact, the composition of their committees – which often perform most of the Assemblies' tasks – must respect the proportion of political groups represented in the plenary; moreover, groups give a valuable contribution to the formation of Parliament's highest organs and of collective bodies other than committees[16].

1.2.3 Follows: the relationship between political parties and parliamentary groups

Following the attempt to clarify the the legal nature of parliamentary groups, we must now say few words about another problem that called on legal commentators to discuss: the relationship between groups and correspondent political parties The main question that need to be answered in this respect is: which of the two entities is the holder of the power to determine the objectives of a political force? In other words: which of the two dimensions participates in the process of interests identification that finally results in the formation of a majoritarian political direction[17]? In each European domestic constitutional experience, this relationship has developed differently; in fact, the problem is dependent upon different factors such as the soundness of the party system, the powers conferred on groups by the Rules of Procedure of the various representative assemblies, the interpretation of the free mandate principle by the case law of Constitutional courts and other major jurisdictions and so on. In States such as Spain the scale has always tipped towards political parties, that have constantly had a starring role to the detriment of parliamentary groups, which seem to be the mere expression of

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16 In this respect, see F.F. PAGANO, *La tutela del parlamentare espulso dal gruppo di appartenenza e la "suggestione" dell'autodichia*, in *Rivista AIC*, 3/2020, 84-85.

17 Cf. M.R. MAGNOTTA, *Costituzione e diritto vivente dei partiti politici*, in *Nomos. Le attualità nel diritto*, 2/2019, 11: « il corpo elettorale, i partiti e il Governo agiscono lungo un continuum nel selezionare, tra tutti quelli politicamente rilevanti, gli interessi e i bisogni più aderenti alla linea politica della maggioranza».

parties in the Cortes Generales[18]; in other experiences, such as the Italian one, various stages of this relationship may be observed: in the first place, the lack of legally guaranteed powers in the Rules of Procedure in favour of parliamentary groups resulted in a primacy of political parties, which took all the most significant decisions, not only in relation to the political objectives, but also with reference to higher offices within the groups and in Parliament (e.g., presidency of the group; committees' members nomination and even the presidency of one of the branches of Parliament)[19]. This phase, which inevitably undermined the prestige of the Assemblies for the benefit of an increasingly solid Parteienstaat, lasted until 1971, when the approval of a comprehensive reform of the Rules of Procedure of both the Chamber and the Senate allowed for a detailed specification of groups' powers, thus favouring a clearer distinction between the two entities[20];

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18 See again P. MARSOCCI, *op. cit.*, 290: «(…) dalle elezioni del 1977, che hanno segnato la fondazione della nuova democrazia, i partiti hanno praticamente occupato tutta la vita politica spagnola, prevalendo di fatto sui gruppi parlamentari. Questi, dunque, sono stati e sono l'espressione delle forze politiche organizzate all'interno delle camere, ed il loro numero corrisponde sostanzialmente al numero dei partiti». See also J.M. MORALES ARROYO, *Los grupos parlamentarios en las Cortes Generales*, Madrid, 1990.

19 See S. MERLINI, *Natura e collocazione dei gruppi parlamentari in Italia*, in ID. (a cura di), *Rappresentanza politica, gruppi parlamentari, partiti: il contesto italiano*, Turin, 2004, 6: «Il risultato di un così accentuato self-restraint è stato, come non poteva non essere, quello di consentire fino al 1993, ma anche oltre, una forte prevalenza dei partiti politici rispetto ai loro gruppi parlamentari. La mancanza di poteri giuridicamente garantiti da parte dei regolamenti parlamentari a favore delle assemblee dei gruppi e dei membri dei gruppi medesimi (protetti dai regolamenti parlamentari non all'interno del gruppo, ma solo nello svolgimento di alcune funzioni parlamentari) ha fatto sì che tutte le più significative decisioni dei gruppi parlamentari, dalla nomina del presidente a quelle riguardanti le nomine ai vertici delle commissioni, siano state assunte, per la maggior parte, dai partiti politici. In sostanza, mentre in altri ordinamenti, il rapporto fra i due soggetti indispensabili del circuito politico di maggioranza (partiti-gruppi parlamentari) è rimasto sostanzialmente equilibrato, in Italia il pendolo si è spostato sempre di più dal lato dei partiti politici, che hanno finito non soltanto per monopolizzare le decisioni riguardanti l'indirizzo politico, ma sono riusciti anche a portare al loro interno tutte le decisioni di rilievo riguardanti la formazione della classe dirigente politica in Parlamento. In questo modo è risultata minata non soltanto l'autonomia dei gruppi, ma anche l'autonomia e il prestigio dello stesso parlamento».

20 E. BETTINELLI, *op. cit.*, 28: «L'inizio di una nuova sensibilità si può far risalire all'approvazione dei regolamenti parlamentari del 1971, sintomo del "disgelo costituzionale" e dell'ammorbidimento della conventio ad excludendum (…). Almeno sotto traccia si insinua l'idea di una (graduale) emancipazione delle istituzioni parlamentari dal sistema politico esterno e dalla stessa realtà sociale al fine di preservarle, per quanto possibile, dalla crisi di legittimazione e di consenso "proattivo" che incominciava a colpire, nella stagione della contestazione, i partiti, "sostituiti" in parte da altri soggetti sociali, come i sindacati e i movimenti, più efficaci nell'organizzare mobilitazioni popolari e nel rappresentare interessi collettivi. Ed è in un simile contesto che si affaccia la tendenza a distinguere visibilmente, almeno sotto un profilo formale, i gruppi parlamentari dai corrispondenti partiti. Nei nuovi regolamenti i gruppi parlamentari perdono la qualificazione di "politici", anche se il loro ruolo politico viene alquanto potenziato, in

the beginning of the crisis of political parties – which in Italy is usually traced back to 1993, when the previous system succumbed due to the systemic corruption that the judicial system brought to light – speeded up the process towards a partial emancipation of groups from the correspondent parties and a reinforcement of the intra-institutional dimension[21]. From that point on, the determination of national politics – which should be the primary task of political parties according to art. 49 of the Italian Constitution – seemed to be rather a prerogative of single parlamentarians; in fact, the latter, by means of their decision to leave and join groups (rightly covered by the free mandate principle, but in a context of a weakened party system) could have an impact on the political direction of a State comparable to the one deriving from the action of political parties[22]. This, however, does not allow us to conclude that political parties have definitively given way to parliamentary groups when it comes to the determination of the political direction of a State. On the contrary – net of the "emancipation" processes that occurred in few States such as Italy, where the two dimensions have been distinguished thanks to both legislators' interventions and socio-political developments – in continental Europe political parties are still the indispensable hinges between electors and Institutions: especially when it comes to the early stages of the determination of the political direction, parties are still the holders of the power to circumscribe the interests that are deemed to be safeguarded. In this respect, however, parliamentary groups are also indispensable; not so much as decision makers (despite existing attempts in this respect), but rather as implementing bodies: in fact, the electoral political direction would remain a dead letter unless those bodies, placed between parties

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particolare riducendo progressivamente, negli anni '80, il ricorso al voto segreto. In qualche misura l'intento, già allora, pareva quello di rendere l'azione dei gruppi parallela rispetto ai partiti, ma non più necessariamente ad essi vincolata».

21 Cf. R. BIN, *Rappresentanza e parlamento. I gruppi parlamentari e i partiti*, in S. MERLINI (a cura di), *La democrazia dei partiti e la democrazia nei partiti*, Florence, 2009: «Lo sgretolamento della base sociale, un forzato alleggerimento delle strutture periferiche e degli apparati organizzativi causato dalla crisi dei finanziamenti, hanno indubbiamente indotto i partiti a organizzarsi nelle istituzioni parlamentari in modo più sistematico che nel passato».

22 See again E. BETTINELLI, *op. cit.*, 29: «Sono i comportamenti fluttuanti dei parlamentari, poco duttili alla disciplina di gruppo e tanto meno di partiti ormai rimasti privi dell'antica solidità e di radicamento sociale e nell'opinione pubblica, a determinare la politica nazionale, come dimostra il fenomeno imponente delle trasmigrazioni di deputati e senatori da un gruppo all'altro o nelle "componenti politiche" del gruppo misto».

and representative assemblies, are equipped with the tools that the Rules of Procedure actually make them available[23].

1.2.4. The framework regulating political groups in the European Parliament

As outlined in the first chapter of this work, since the beginning of the European integration process, the members of the parliamentary assembly organized themselves in groups on the basis of their political affinity, thus abandoning the nationality criterion and emphasizing the supranational nature of the Institution[24]. Political groups in the European Parliament[25] find their regulation in the Rules of Procedure of the EP. First, we must underline that political groups cannot be labeled – at list from a purely formal point of view – as necessary bodies of the Assembly: as a matter of fact, elected members are free to establish or to join a group; in other words, MEPs are not obliged in this respect. This is a result of the interpretation of Rule 33, paragraph 1, of the EP's Rules of Procedure, which opens Chapter IV, entirely devoted to political groups: «Members *may* form themselves into groups according to their political affinities». Paragraph 2 of the

23 S. MERLINI, *Natura e collocazione*, cit., 8: «In tema di indirizzo politico (…) la libertà di autodeterminazione dei gruppi non può non subordinarsi a quel "circuito principale dell'indirizzo politico" che inizia dai partiti, prosegue con il corpo elettorale e giunge in parlamento, per quanto riguarda la maggioranza parlamentare, con il programma che il governo deve approvare e presentare (…). Se si guarda, poi, all'evoluzione in senso bipolare del nostro sistema politico (…) si deve aggiungere che la capacità di autodeterminazione dell'indirizzo politico da parte dei gruppi parlamentari appare sempre più cedevole rispetto all'iniziativa propria dei partiti. Anzitutto, la compattazione bipolare del sistema politico italiano ha portato ad una migliore, anche se ancora largamente insufficiente, formulazione del programma elettorale ad opera dei partiti e delle coalizioni. Nel corso della legislatura, poi, l'interpretazione del "patto elettorale" proprio di ogni coalizione spetta, punto per punto, ai singoli partiti coalizzati. Le capacità dei gruppi di influire sulle questioni di indirizzo politico sembrano, perciò, limitarsi ad interventi di tipo tecnico rispetto ad obbiettivi decisi altrove. (…) Un ruolo significativo dei gruppi non sembra, dunque, esplicarsi in Italia, né nel processo di formazione della classe dirigente politica-parlamentare, né in quella di determinazione dell'indirizzo politico generale. L'importanza dei gruppi sembra, invece, essere più rilevante in quella fase intermedia di attuazione dell'indirizzo politico, determinato dai partiti, che è, inevitabilmente, più ricca di implicazioni tecnico istituzionali e che risulta essere, perciò, fortemente "normata" dai regolamenti parlamentari. Mi riferisco, qui, a tutta l'attività parlamentare di attuazione della politica legislativa che parte con la programmazione dei lavori, prosegue con la verifica del numero legale e le richieste di votazioni qualificate, con le dichiarazioni di "appropriazione" di un progetto di legge o delle relative "dichiarazioni di urgenza", e si conclude con i procedimenti d'esame dei progetti e disegni di legge in commissione ed in assemblea. Qui, a differenza di quanto avviene nella fase di determinazione dell'indirizzo politico, l'apporto dei gruppi parlamentari sembra essere essenziale (…)».

24 See *supra*, Chapter I, § 1.1.1.

25 That is how parliamentary groups at EU level are formally called.

same provisions states that «a political group shall consist of Members elected in at least one-quarter of the Member States. The minimum number of members required to form a political group shall be 23». Once the required number of MEPs come to the conclusion that a new group has to be established, the correspondent decision must be drafted in a statement notified to the President of the European Parliament. According to Rule 33, paragraph 5, of the RoP, this statement must specify the name of the group, contain a political declaration setting out the purpose of the group[26] and list the names of its members and bureau members. Moreover, the MEPs who decide to establish a group must declare in writing, in an annex of the statement mentioned above, «that they share the same political affinity». The provisions concerning the political statement and the explicit declaration concerning the members' affinity have been added to the RoP by means of a Parliament's decision adopted on 31st of January 2019, thus marking a step forward in the groups regulation. Neither the President of the EP nor any other body (e.g. the Bureau) or authority are entitled to to perform an *ex ante* assessment concerning the political affinity of group members. For this reason, doctrine has frequently remarked that there is a "presumption of affinity", which relies on the sole declarations made by the group founders[27]. However, this presumption is now somehow nuanced, since the mentioned amendments approved in 2019 oblige the founders to explicitly state that they all share the same political values and that they aim at reaching given political objectives by means of the established group. Anyway, the new rules do not absolutely imply that the EP is now entitled to perform an *ex ante* assessment on political affinity;

[26] More specifically (and according to the interpretation ex Rule 236, paragraph 5, RoP) the mentioned political declaration must set out the values that the group stands for and the main political objectives which its members intend to pursue together in the framework of the exercise of their mandate. It also has to describe the common political orientation of the group in a substantial, distinctive and genuine way.

[27] Cfr. S. BARONCELLI, *I gruppi parlamentari nell'esperienza del Parlamento europeo*, in S. MERLINI (a cura di), *Rappresentanza politica*, cit., 15: «(…) pare, dunque, che il requisito dell'esistenza delle affinità politiche vada inteso come un mero presupposto formale, tanto più che il regolamento non richiede ai membri del gruppo di sottoscrivere una dichiarazione politica comune, a guisa di quanto richiesto, ad esempio, dai regolamenti parlamentari francesi. La genericità della disposizione, infatti, legittima la costituzione di gruppi con legami ideologici inesistenti o, comunque, molto allentati». As we have seen, in recent times the EP has decided to add a new provision in the RoP, providing for a "political declaration" to be made by the founding members of the group, thus making the political affinity requirement less formal.

in fact, the latter can still be scrutinized only *ex post*, that is to say only when the same members express doubts concerning their own ideological homogeneity[28].

From what we have outlined derives that elected MEPs are totally free – both at the beginning of the first parliamentary session or throughout the legislature –to join a group or not. This freedom is undoubtedly expression of the free mandate principle, which must be applied also to members of the EP. The legal foundation of the prohibition on a binding mandate should not be found in primary law[29]; instead, it is set out again the EP's Rules of Procedure: in fact, Rule 2 states that «members shall exercise their mandate freely and independently, shall not be bound by any instructions and shall not receive a binding mandate»[30]. The decision not to join (or form) a group in the Assembly, however, is not devoid of consequences; in fact, if on the one hand political groups can be labeled as

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28 The same interpretation (ex Rule 236, paragraph 5, RoP) of Rule 33, paragraph 1 states that «Parliament need not normally evaluate the political affinity of members of a group. In forming a group together under this Rule, the Members concerned accept by definition that they have political affinity. Only when this is denied by the Members concerned is it necessary for Parliament to evaluate whether the group has been constituted in accordance with the Rules». In this respect, see also K. BRADLEY, *The European Parliament*, in R. SCHÜTZE, T. TRIDIMAS (eds.), *Oxford Principles of European Union Law*, Vol. I, Oxford, 2018, 457 ff: «Although affinity is the fundamental requirement for the constitution of a group, Parliament only evaluates its existence where the would-be group members positively deny any such affinity inter se».

29 Although some rather implicit references can be found in the Treaties. See, e.g., art. 10, paragraphs 2 and 4, TEU, where it is stated that those who are directly represented in the European Parliament are the citizens of the Union and that, as we already know, political parties at European level contribute (…) to expressing the will of the citizens of the Union. See also art. 14, paragraph 2, TUE, according to which «the European Parliament shall be composed of representatives of the Union's citizens». The free mandate principle is also mentioned in the TFEU (art. 30), in relation to members of the European Economic and Social Committee (EESC) and of the European Committee of the Regions (CoR). See in this respect S. CORSO, *Indipendenza di mandato e Unione europea: le fonti*, in P. CARETTI, M. MORISI, G. TARLI BARBIERI, *Il divieto di mandato imperativo: un principio in discussione, Ricerca 2019 del Seminario di Studi e Ricerche Parlamentari «Silvano Tosi»*, Florence, 2019, 189-190.

30 See also Decision of the European Parliament of 28 September 2005 adopting the Statute for Members of the European Parliament, art. 2, paragraph 1 and art. 3, paragraphs 1 and 2, where it is stated that members are free and independent, they must vote on an individual and personal basis and they are not bound by any instructions and are prohibited from receiving a binding mandate. Moreover, the same rules provide that agreements concerning the way in which the mandate is to be exercised are null and void. See also Act concerning the election of the representatives of the Assembly by direct universal suffrage, art. 4, paragraph, 1, which similarly states that «representatives shall vote on an individual and personal basis. They shall not be bound by any instructions and shall not receive a binding mandate». Other references, albeit implicit, to the free mandate principle, may be found, for example, in the funding provisions of Regulation n. 1141/2014 on the statute and funding of European political parties and European political foundations. As pointed out in doctrine (see again S. CORSO, *op. cit*., 201-202), all the rules concerning limits on donations to Europarties coming from sources other that the EU budget (artt. 17 ff, spec. art. 20) are justified in the light of the prohibition on a binding mandate and, thus, of the MEPs independence.

unnecessary associations of elected members of the EP, on the other hand they could be seen as "desirable" entities[31]: their existence ensure a better organization of the parliamentary work, which tend to revolve around groups (and not individual MEPs). Thus, the MEP who does not join a group becomes a non-inscrit member of the European Parliament. Unlike what happens in many Member States of the EU (Italy and Spain among the many), the European Parliament's RoP do not allow the establishment of a "non-inscrits group". The "non-inscrit" members enjoy far less privileges than those who are part of a political group: in fact, the RoP attribute several propulsive and organizational functions to political groups only: consider, for example, the allocation of key positions in Parliament's political and organizational structures, which is made in proportion to the "weight" of each group[32]. Some MEPs, in 1999, tried to leverage the (then) overly-general provision on political affinity[33], by establishing a group called Technical Group of Independents (TGI)[34]: according to the founders, the political affinity requirement had to be interpreted as purely formal: thus, they deemed that the establishment of groups made up of MEPs who just shared the intention to overcome the prohibition concerning "non-inscrits" groups was not in breach of the RoP. Actually, after few years from the setting-up of the group, the Court of First Instance of the European Union (CFI) ruled differently in

31 See in this respect A. CIANCIO, *Partiti politici e gruppi parlamentari nell'ordinamento europeo*, in *Politica del diritto*, 2/2007, 162: «La riunione dei parlamentari in gruppi (politici), in definitiva, non appare necessaria e, tuttavia, potrebbe ritenersi "auspicata" ai fini della migliore organizzazione e funzionalità parlamentare, al punto da lasciar giustificare le limitazioni di prerogative cui vanno incontro i deputati non iscritti (…)».

32 Also the financing is strictly connected to the existence of political groups in the EP, since «political groups receive higher funding for their collective staff and parliamentary activities than the non-attached MEPs». See L. TILINDYTE, *Rules on political groups in the EP*, Briefing of the EPRS – European Parliamentary Research Service, June 2019, 1.

33 Even before, there had been attempts to leverage the broad "political affinity" requirement in order to form groups made up of members who vaguely shared a common ideology (consider, e.g., the Technical Group of Independents established in 1979, which gathered together MEPs who just believed in democracy and antifascism) or who shared a mere "negative" ideology (e.g., the group called Europe of Democracies and Diversities, made up of MEPs who were against the European integration process). However, unlike the members of the Technical Group of Independents (TGI), those who were part of the two mentioned groups at least were linked by a thin ideological affinity.

34 This group was made up of the far-right French Front National, the regionalist-separatist Lega Nord of Italy, and liberal Italian Bonino List.

the landmark case *Martinez and De Gaulle v. European Parliament*[35]: the Luxembourg judges deemed that the act adopted by the EP on 14th September 1999, by which the TGI group was dissolved due to its incompatibility with the "political affinity" requirement[36], was based on a correct interpretation of the latter and was compliant with EU primary law. However, even though non-attached members enjoy less privileges than those who belong to a political group, pursuant to Rule 36 of the RoP they are provided with a Secretariat and participate in the allocation of the financing from the EP's budget[37]; moreover, they are still entitled to exercise a fair amount of rights, such as the nomination of candidates for the posts of President, Vicepresident and Quaestor of the EP (reserved – besides political groups – to a minimum number of 40 MEPs)[38], participation to the Conference of (Group) Presidents[39], right to table a legislative proposal[40], to propose amendments during Committee works[41] and, finally, participation in the oversight of other European Institutions[42]. Nevertheless, the EP's Rules of Procedure provide for a series of other rules which pose a needed constraint to the exercise of the free mandate principle, such as Rule 33, according to which MEPs may not belong to more than one political group: this seems to be

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35 Court of First Instance of the European Union, joined cases T-222/99, T-327/99 and T-329/99 *Jean-Claude Martinez and Charles de Gaulle v. European Parliament* [2001] ECR II-2823. The decision, which had been subsequently challenged before the Court of Justice (which threw out the appeal in case C-486/01 P, *Front National v. European Parliament* [2004] ECR I-6289), was extensively commented by doctrine. Among the many, see M. CARTABIA, *Gruppi politici e interna corporis del Parlamento europeo*, in *Quaderni costituzionali*, 1/2000, 191; E. GIANFRANCESCO, *I limiti alla costituzione di gruppi politici all'interno del Parlamento europeo*, in *Diritto pubblico comparato ed europeo*, 1/2002, 278 (also in A. D'ATENA, P.F. GROSSI (a cura di), *Tutela dei diritti fondamentali e costituzionalismo multilivello*, Milan, 2004); A. ALEMANNO, *Arrêt "Martinez/de Gaulle/Bonino",* in *Revue du droit de l'Union européenne*, 4/2001, 1014.

36 Following a correspondent recommendation issued by the EP's Committee on Constitutional Affairs.

37 Even though with some limitations compared to the financing allocated to political groups. As a matter of fact, non inscrits' expenditures are settled by the EP's Secretariat either through direct payments to suppliers or by means of reimbursements to the MEPs themselves. Differently, political groups are allocated their annual budget at the beginning of the year and are responsible to the EP of the expenditure's management.

38 See Rule 15 of the EP's RoP.

39 Although with no voting rights and for a maximum of one invited representative of non-inscrits. See Rule 26 of the EP's RoP.

40 See Rule 46 of the EP's RoP.

41 See Rule 2018 of the EP's RoP.

42 In relation to this latter right enjoyed also by non-attached members, see Rules 128, 129, 130, 131, 133, 136 and 183 of the EP's RoP.

a rather unfortunate wording, since the interpreter might infer that a MEP could not belong to more than one political group throughout the legislature; it would have been better to specify that the prohibition covers group memberships in a given period of time: thus, elected MEPs can not be member of more than one group at the same time; they are still free to leave a group (and join another one or become non-attached members) during the parliamentary term.

1.2.5 Europarties and political groups. Which way the scale tips?

We have already outlined that, according to a well established doctrine, parliamentary groups are seen as "expression" or "projection" of parties in Parliament. As scholars have stated, there is an "osmotic relationship" between these two entities: parties are essential in order to convey demands of society in Parliament; groups are essential in order to allow Parliament to operate in accordance with the political direction expressed in the elections[43]. If we shift this dynamic from the State dimension to the European one, it is immediately apparent that the mentioned osmosis is prevented by a major obstacle: Europarties do not participate in elections to the European Parliament; as we know, the latter are "second order national elections", where domestic political parties play the lion's share, candidates run on purely national platforms and European topics are often kept to the sidelines. Once elected, most of the members join a political group in the EP, which is (usually) the one corresponding to the Europarty which their national party is affiliated with: by way of example, a MP elected in Spain for the PSOE (Partido Socialista Obrero Español), which is member of the Europarty PES (Party of European Socialists), would generally join the S&D group (Group

43 See D. CODUTI, *Regolare i partiti politici contemporanei*, Turin, 2020, 45-46: «Se, da un lato, il partito politico consente di portare all'interno del Parlamento le istanze promananti dalla società, dall'altro, i gruppi parlamentari permettono a tale organo di operare coerentemente con l'indirizzo politico determinato – seppure indirettamente – dalle elezioni». As far as the "osmotic relationship" is concerned, the Author makes reference to A. D'ANDREA, *Partiti politici ed evoluzione della forma di governo nell'ordinamento italiano*, Relazione tenuta il 5 novembre 2005 nell'ambito del corso "Donne, politica e istituzioni. Percorsi formativi per la promozione delle pari opportunità nei centri decisionali della politica", tenuto presso l'Università degli Studi di Milano (Facoltà di Scienze politiche e Giurisprudenza), in *Forum di Quaderni Costituzionali*, not num., 2005, 2.

of the Progressive Alliance of Socialists & Democrats in the European Parliament). As we have seen, however, nothing prevents an MEP – by virtue of the free mandate principle – from joining a political group which is not expression of the transnational federation his national party is affiliated with. Once the (purely national) European elections are held, the shaping of EU's public policy is fully demanded to the supranational level: taken alone, national political parties – despite their key role when it comes to interests aggregation, selection of candidates and vote structuring – are actually powerless when it comes to influencing European decision-making processes. Since the nature of the EU is that of an integrated entity and its functioning depends on a great extent on the principle of cooperation, national political parties may have an impact on European public policies only as "components of togetherness", that is to say as elements of the two existent supranational party dimension: European political parties (party in the central office) and political groups in the European Parliament (party in the public office). Doctrine has usually distinguished four stages in the EU's policy making process: namely, agenda setting, policy formulation, policy decision and policy implementation[44]. Traditionally, political parties' primary function is policy formulation, which is performed according to the idea of the common good that each of them convey[45]. The proposals coming from parties

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[44] See J. RICHARDSON, *Policymaking in the EU. Interest, ideas and garbage cans of primeval soup*, in ID. (ed.), *European Union. Power and policy-making*, London, 1996, 3 ff.

[45] See B. LINDBERG, A. RASMUSSEN, A. WARNTJEN, *Party politics as usual? The role of political parties in EU legislative decision-making*, in *Journal of European Public Policy*, 15/2008, 1107: «[Political parties] help to aggregate and communicate policy preferences, link decision-making between different legislative bodies and hold politicians accountable. (…) The essential role of political parties in a representative democracy is their competition in repeated electoral contests, which allows voters to choose between different policy packages and to reward or punish governing parties for their legislative performance. (…) Through their party platforms, political parties aggregate wide sets of preferences held by citizens into competing policy packages». As we already know, the formal agenda setting power is allocated to the sole EU Commission, which has the power to "decide what to decide" by exercising the legislative initiative. Thus, unlike what often happens in other State constitutional experiences (where Members of Parliament are also entitled to initiate legislation), in the European constitutional dimension Parliament has no formal agenda setting powers. That is why European political parties (*rectius*: the correspondent groups in the Assembly) have practically no chance to concretely impact the agenda setting through their activity in Parliament. See in this respect ivi, 1113: «No transnational party can use agenda control powers in order to keep policy issues which divide the party from arising in the legislative decision-making process. It is the European Commission which initiates all proposals in the European legislative decision-making process, although both the EP and the Council can request proposals for legislative action. Thus, the transnational parties in the Council and the EP cannot keep issues off the agenda, even if they hold a sufficient majority

may become part of policy decisions, in the event that the majority in the decision-making body finds itself in agreement; these decision must be subsequently implemented. Thus, the objective we aim for is to understand in which proportion, at present, policy formulation "in and outside" European Parliament is allocated to Europarties and political groups in the EP. One of the methods that may be used in order to reach this goal could be the analysis of two sets of rules: on the one hand, the Rules of Procedure governing political groups in the EP; on the other hand, Europarties' statutes (and internal regulations). In fact, doctrine has often outlined that, unlike what happened in the past, when MPs' rights and duties stemmed exclusively from their immunities, prerogatives and from the free mandate principle enshrined in Constitutions, nowadays they must be searched (also) elsewhere: that is to say, in party statutes and groups' RoP[46]; only by looking at the rules provided for therein, one may become aware of the degree of autonomy of the two involved entities and, in the end, of the prevailing "face" of the party dimension. To this end, we will take into consideration party statutes and groups' RoP at EU level of the two main European political families: the socialists (PES/S&D) and the christian democrats / conservatives (EPP).

1.2.5.2 Policy formulation and "osmotic" relationships in the Groups' Rules of Procedure

As far as groups' RoP are concerned, we immediately notice that the EPP RoP include a provision according to which members of the group «define their values

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of votes within these bodies. In other words, partisan control of the legislative agenda is only possible if a political camp dominates all three legislative bodies in the EU».

[46] See S. MERLINI, *Introduzione*, in ID. (a cura di), *Rappresentanza politica*, cit., XI: «(…) che la scelta comune europea sia orientata verso un rispetto quasi assoluto della "sovranità politica" incentrata sul binomio partito-gruppo parlamentare, è dimostrato dal fatto che la vera sede dei diritti e dei doveri dei parlamentari non sta più, ormai, nelle loro immunità e prerogative o nel divieto di mandato imperativo (ripetuti tralaticiamente dalle costituzioni), ma risiede, piuttosto, negli statuti dei partiti e nel loro intreccio con gli statuti dei gruppi parlamentari. Sono, infatti, gli statuti che determinano, in primo luogo, la misura e la stessa esistenza di una reale autonomia politica dei gruppi dai partiti, e per ciò che riguarda il modo di costituzione dei loro organi dirigenti e per ciò che riguarda la pervasività dell'indirizzo e delle decisioni del partito rispetto a quelle del gruppo parlamentare. Addirittura, e a ben guardare, la stessa misura della sovranità-libertà dei singoli parlamentari nell'esercizio delle loro funzioni dipende essenzialmente dal risultato di questo intreccio fra i principi posti dagli statuti dei partiti e quelli posti, residualmente, dagli statuti dei gruppi».

and aims in line with the current election programme of the EPP» (art. 3)[47]: in this way, a first clear link between Europarty and group is established; however, this doesn't mean that members are obliged to implement the EPP's program, but simply that they must carry on their activities in accordance with the values and aims enshrined in the Europarty's programme. Such a rule doesn't seem to be present in the RoP of the S&D[48]. Differently, both the analyzed set of rules include a provision that seem to enforce (while placing some limits) the free mandate principle enshrined in the EP's RoP, by stating that members are free to dissent from the group line, under certain conditions: in the EPP case, dissenting members are asked to inform the Chairman of the group or the group's Plenary Assembly the day before the vote, but only when the dissent involves an «important question»[49] (it could be inferred from this that members are free to vote against the group line without notifying this intention to the mentioned bodies in case of "minor issues")[50]; in the S&D case, dissenting members must «give notice» (the addressees of the notification are not specified) «prior to the vote» of the «serious political reasons» which caused them to vote against the group line[51]; here, a similar interpretative issue arises, since the rule doesn't provide for any criteria that would help to distinguish serious political reasons to "less serious" ones. As far as political decisions are concerned (policy formulation, but also group line concerning proposals brought to the EP's attention), an aspect clearly emerges after the reading of the two RoP concerned: the body responsible for such decisions is in both cases the Bureau[52]. However, we must not deceive ourselves: despite the identical designation, they are two different bodies. Before focusing on the composition of the Bureau in the groups

47 We here make reference to the RoP of the Group of the European People's Party (Christian Democrats) in the European Parliament, approved in October 2013 and recently amended (March 2021).

48 We here make reference to the RoP adopted on 15th October 2014 and modified on 7th February 2017.

49 Art. 6, paragraph 1, of the EPP group's RoP.

50 It should be clarified, however, according to which criteria one can identify «important issues» and distinguish them from the less important ones.

51 Rule 36, paragraph 2, pf the S&D's RoP.

52 With the exception represented by art. 14 of the EPP group's RoP, which states, among other things, that «political decisions of major importance» must be prepared by the The Group Presidency and the Heads of National Delegations.

at stake, we must give account of the (similar) attributed competences. According to art. 16 of the EPP group's RoP, the Bureau prepares «the strategic and political decisions of the group»; Rule 29 of the S&D group's RoP foresees, among the Bureau's tasks, the «preparation of group positions for plenary sessions and in the bodies of Parliament»[53]. As said, however, the composition of the EPP's and S&D's Bureaus differs widely. In fact, the latter almost exactly matches the composition of the EPP group's Presidency; members of the S&D group's Bureau are: the President, nine Vice-Presidents and the treasurer[54]. Differently, the EPP group's Bureau has a broader composition[55], which includes, in addition to the members of the Presidency: the Heads of national delegations and an additional member for every ten members; the members of the Presidency of the Parliament belonging to the group; the Chairmen of standing committees belonging to the group; the Coordinator within each of the standing committees; the Chairman and the Secretary-General of the EPP (Europarty), if they are Members of the European Parliament. The RoP further specify that if the Chairman and the Secretary-General of the EPP are not Members of the European Parliament, they are nevertheless permanently invited *ad personam* to the meetings of the Bureau. To summarize, from reading the mentioned provisions of the main groups' RoP, at least two points emerge: first, policy formulation is demanded to bodies having the same designation (Bureau), but different composition: the EPP group's Bureau is very much larger compared to the S&D group's one; hence, in the first case the transaction costs linked to policy formulation should be way higher than the ones

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53 In fact, Rule 17, paragraph 1, of the S&D group's RoP states that «[The group] adopts a position on any text to be put to the vote in plenary sessions of Parliament». Therefore, in the light of Rule 29, this position is formerly decided by the Bureau members. Moreover, the same Rule 17 provides that the group «adopts general and specific policies». This means that the group is competent to adopt the policies, but only in accordance with the political decision taken by the Bureau. This is why the Bureau's activity is described by the same RoP of the two major groups as "preparation" of the political and strategic decisions, which must be subsequently adopted by the group.

54 Cfr. the composition of the EPP group's Presidency, as provided for by art. 11 of the group's RoP: «The Presidency shall consist of the Group Chairman and ten Vice-Chairpersons». Even though decision-making powers are also allocated to the EPP group's Presidency (see art. 12, lett. a), d) and e): «The Presidency shall be responsible for: convening and presiding over Group meetings, the meetings of the Standing Working Groups and leading the Group in plenary sittings; (…) informing the Group on strategic and political decisions it has taken at its meetings; taking decisions in urgent cases instead of the competent body; (…)»), it seems that the task of preparing strategic and political decisions is devolved upon the Bureau.

55 See art. 15 of the EPP group's RoP.

stemming from the procedure foreseen by the socialist RoP[56]; at the same time, however, by letting a relatively high number of subjects participate in the EPP group's decision making process, the policy output has an higher level of legitimacy compared to the more "centralized" process provided for by the RoP of the S&D group. Second, only in the case of the EPP group, representatives of the Europarty enjoy the right to participate in the meetings of the body which is responsible for the main political and strategic decisions to be taken by the group (including the group line with regard to issues brought to the Parliament's attention). Thus, by this route the President and the Secretary-General of the correspondent Europarty have the chance to directly influence the group's decision-making process, in the light of the determinations made by the Europarty according to the rules that will be analyzed *infra*. This influence, however, is undoubtedly limited, since the Europarty representatives' positions must be combined with those (actually, the majority) of the other Bureau members. As stated, such an influence doesn't seem possible according to the provisions of the S&D RoP. However, the latter (unlike the EPP group's RoP) include an important provision that helps strengthening the relationship between the S&D and the PES. In fact, Rule 45 states that «the President [of the group] shall at regular intervals forward a general report on the activities of the Group to the Party of European Socialists»[57]. These activity reports are usually submitted to the PES Congresses, which are held twice during each parliamentary term of the EP[58]. From the reading of the last report forwarded during the PES Congress held in Lisbon on December 2018, at least one issue emerges: even though the then-President of the S&D group Udo Bullman addressed to the PES members a discourse where political group and Europarty often blended into a single political family with not

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56 Since each «strategic and political decision» to be prepared must be negotiated between the (many) members of the EPP group's Bureau. It must be said, however, that – probably for just this reason – the group's RoP (art. 14) entrust the preparation of «political decisions of major importance» to another body of the group (with a less large composition), that is the Group Presidency and the Heads of national delegations (which is also responsible for the discussion of key and strategic issues and the deliberation of on questions of special internal relevance to the group).

57 A similar provision cannot be found in the EPP group's RoP. Nevertheless, the latter annually publishes a group's activity report, too.

58 See art. 23 of the PES Statutes adopted by the 11th PES Congress on 7th December 2018.

much differences[59], he also underlined that the place where decisions are actually taken is the European Parliament; thus, the only "face" of the European network party which is capable of impacting the decision making process and possibly influencing the agenda setting power of the Commission is the party in the public office (that is to say, the S&D political group): «As a parliamentary group, we are able to build alliances and move forward with a progressive political agenda. This is where cooperation between socialist and democrat members from all EU Member States takes place on a daily basis, creating synergies, and giving us the ability to significantly influence laws and policies». Thus, considering that the PES Congress merely «took note of the Activity Reports of the S&D group in the EP»[60], the actual value of the instrument provided for by Rule 45 of the S&D group RoP seems to be simply that of allowing a "confirmation of knowledge" of the group's activity by the Europarty[61], while, instead, it had been probably included in the group's RoP in order to enable an "osmosis" between the two supranational faces of the European network party. In conclusion (and solely in relation to groups' RoP), we can say that both the EPP and the S&D have tried to establish mechanisms that could facilitate connections between the parliamentary group and the corresponding Europarty: on the EPP's side, the participation of Europarty's representatives in the group's Bureau; on the S&D's side, the group's activity report. Both of them aim at promoting a stricter relationship between the two involved entities; and yet there is a difference: the Europarty involvement provided for by the EPP group's RoP seems to be more concrete, since it entails a direct engagement in the group's political decision-making process (something that does not happen in the S&D case: although the PES is notified of the group's

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59 See, e.g., p. 4 and 6 of the Activity Report of the Progressive Alliance of Socialists and Democrats in the European Parliament: «European citizens have been through years of economic and social crises, caused by irresponsible ultraliberal policies, aggravated by the wrong responses based on blind austerity. Clearly, back then our political family had not been visible enough, in delivering the right message and in providing answers and solutions with the necessary force»; «these are just a few examples of the important role our political family has and must continue to play in the remobilisation of progressive forces throughout Europe».

60 In accordance with art. 21, paragraph 2, of the PES statutes, which provides that «the PES Congress shall (…) discuss and take note of the report of activity submitted by its group in the European Parliament».

61 Offering besides the chance to underline the "primacy" of the political group over the Europarty, on the basis of the arena where the former operates (that is to say, where decisions are taken).

activities, its representatives are not allowed to participate in the group Bureau's meetings). So, one can distinguish a "light" Europarty involvement in group activities (S&D) and a "heavier" one (EPP), always bearing in mind that, as a rule, group bodies take decisions by simple majority[62].

1.2.5.2 Policy formulation and "osmotic" relationships in Europarties' statutes

Moving to the analysis of the two major Europarties' statutes, we may notice that the nature of the link between party in the central office and party in the public office seems to be different. The statutes of the EPP[63] (art. 3) provide that «the association is represented in the European Parliament by the Group of the European People's Party». Instead, art. 13 of the PES statutes states that «our Group, known as the Group of the Alliance of Socialists and Democrats in the European Parliament, is the parliamentary expression of the PES in the European Parliament». Although the formulations seem to be juxtaposable, the choice made by the EPP is oriented towards an emphasis on a closer relationship between group and Europarty: by saying that the EPP «is represented» in the EP by the EPP group, the statutes suggest that the political line decided by the European political party must be transferred inside the Assembly and, at the same time, that the decision taken therein must somehow affect the Europarty[64]; as a matter of fact, according to a well known passage by Max Weber, representation may be defined as «the action of certain association members [the representatives], [which] is attributed to others or is accepted by them as "legitimate" and binding

62 So, representatives of Europarties could never "take the lead" of the group. See art. 18 of the EPP group's RoP: «Except where otherwise provided for in the Rules of Procedure, a simple majority of votes cast shall be required for the decisions of all organs». See also Rule 33 of the S&D group's RoP, according to which «the Bureau shall act by a majority of the members present», and Rule 36, which provides that «except where otherwise provided for in the rules of procedure, the Group shall act by a simple majority of the votes cast».

63 Approved by the EPP Congress on the 20th-21st November 2019 in Zagreb.

64 On the possible representative function of parliamentary groups, see the recent contribution by A. GUSMAI, *I gruppi parlamentari e la concezione eurounitaria di P.A.: è possibile qualificarli «organismi di diritto pubblico»?*, in *Riv. Cammino Diritto*, 2/2021, 1 ff. However, at the most, parliamentary groups could represent electors (in addition to political parties) rather than parties themselves. This happens, for example, when a party split occurs and a new parliamentary group is formed. The latter might possibly have an indirect representative function of electors who agree with its political orientation.

on them in actual fact»[65]. In contrast, the solution adopted in the PES statutes seems more in line with the way in which parliamentary groups are traditionally considered, that is to say as mere projections of parties in Parliament, thus emphasizing their nature of Parliament's organs, holders of public functions[66]: according to this position, groups mantain relationships with the correspondent party, but without being tied to it by a representational duty; in this sense, it would be thought difficult to define groups as private organs of parties, as many commentators are still inclined to consider[67]. The closer relationship between party and group which the EPP statutes promote is also clear from reading the last paragraph of art. 3, according to which «member parties [of the EPP] oblige parlamentarians elected to the European Parliament on their list, and/or sent to the like-minded or associated Groups at the Parliamentary Assemblies of the CoE [etc.], to join the EPP groups therein», thus placing a great burden on the principle of free mandate, according to which, as we know, elected members «shall not be bound by any instructions» (Rule 2 of the EP's RoP). Both statutes agree that the Congress is the most important party organ (thus aligning themselves to the traditional internal organization of national political forces), tasked with deciding the «political program»[68] or «political guidelines»[69] of the Europarty. However, as far as party policy formulation is concerned – which is what interests us most – both statutes allocate the corresponding competence to what we can call a "strategic organ" made up of: 1) politicians playing a leading role (as presidents or presidencies members) in the same Europarty, in political groups or in national member parties; 2) representatives of member parties[70] and political groups in the EP and other assemblies such as the Committee of the Regions' or the Council of

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65 M. WEBER, *Wirtschaft und Gesellschaft*, 5th ed., Tübingen, 1980, 171; see also ID., *Economy and Society*, New York, 1968, 292. On Weber's idea of representative democracy, see extensively S. BREUER, *The Concept of democracy in Weber's political sociology*, in R. SCHROEDER (ed.), *Max Weber, democracy and modernization*, London, 1998, 1 ff.

66 See *supra,* par. 1.2.1.

67 See e.g. C. DECARO, *La struttura delle Camere*, in T. MARTINES, G. SILVESTRI, C. DE CARO, V. LIPPOLIS, R. MORETTI, *Diritto parlamentare*, 2nd ed., Milan, 2011, 114.

68 See art. 18, paragraph 1, of the EPP statutes.

69 See art. 21, paragraph 1, of the PES statutes.

70 As a general rule, full member parties are given voting rights in the mentioned organs, while associated (or observer) ones are generally admitted without voting rights. See art. 30 of the PES statutes and art. 15 of the EPP statutes.

Europe's ones. This organ is named Political Assembly by the EPP statutes and Council by the PES statutes. Both of them include among their members representatives of the corresponding political group in the EP: in the PES case, «representatives of the group (…) equal to 50% of the number of national delegations» and the S&D group President (as member of the PES Presidency) are allowed to take part in the Council; in the EPP case, besides the President of the EPP group[71], also its Vice-presidents are allowed to participate in the Political Assembly (since the whole Presidency of the group is an *ex officio* member of the organ); moreover, all the Presidents of group's national delegations (and the Secretary General of the EPP group, albeit with no voting rights) have the right to take part in the meetings. As said, these two organs are called upon to define the group's political line – which is consequently implemented by the respective Presidencies[72] ratified by the Congress – and to «contribute»[73] to the shaping of party policies, «influencing the achievement of European policy in the spirit of [their] program»[74]. Here, we have to pay attention to the wording, which is – unlike in other cases – quite weighted: statutes drafters prove to be perfectly conscious of the limited impact Europarty may have on policy formulation; thus, their activity cannot go as far as unilaterally define policies: Europarties may only aspire to give a contribution (that is to say, to somehow influence) policy shaping, since they have to "come to terms" with the other major players in the arena, that are political groups in the EP[75]. The quite marginal role played by Europarties in the policy formulation field is also witnessed by the formal acts that can be

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71 Who is also an *ex officio* member of the EPP Presidency according to art. 11 of the EPP statutes.

72 See: art. 12 of the EPP statutes: «[the Presidency's] competences consist inter alia of: ensuring the implementation of decisions taken by the Political Assembly»; art. 33, paragraph 2, of the PES statutes: «The Presidency shall implement the decisions of the Congress and of the Council and fix the political guidelines of the PES during the period between Congresses and Councils».

73 See art. 29, paragraph 1 of the PES statutes.

74 See art. 16, paragraph 1, of the EPP statutes. Moreover, according to this provision, the EPP's Political Assembly is also responsible for the stimulation and the organization of systematic relations between national parliamentary groups and member parties, in agreement with the Group of the EPP in the European Parliament».

75 Moreover, before "coming to terms" with the EP's political groups, Europarties have to deal with their own internal ideological cohesion, which is quite a great obstacle, since national member parties often tend to dig themselves into defensive positions when the party line possibly goes against national interests. This behaviour is likely to cause problems, especially when decisions in a given organ are expected to be taken by consensus.

addressed to, among others, the corresponding parliamentary group: the PES statutes, in fact, explicitly state that the Council «can adopt resolutions and recommendations to (…) its group in the European Parliament»[76]; since these soft law measures are generally intended as non-binding[77], it follows that policy proposals shaped within Europarties represent, at most, a benchmark for the formulation that is up to intraparliamentary organs. Moreover, the contribution made by group's representatives in the PES Council / EPP Political Assembly has a different weight – at least on paper – according to the voting procedure established by the statutes: art. 17, paragraph 4, of the EPP statutes provides that «all decisions shall be taken by simple majority of the votes cast by the members of the Political Assembly present», while art. 20, paragraph 3, of the PES statutes reads as follows: «[In all organs of the PES], whenever possible, policy decisions shall be taken on the basis of consensus. If a consensus cannot be reached, they shall be taken on the basis of qualified majority». The adoption of a simple-majority voting in the EPP Political Assembly, compared to the PES' preference for consensus voting, undoubtedly determines the attribution of a less prominent role to group's representatives. In addition, unlike the EPP statutes, the socialist one explicitly confers a «liaison» competence to the PES President, which is

76 Art. 29, paragraph 2, of the PES statutes. It must be said that recommendations and resolutions may also be addressed to the S&D group in the EP by the PES Congress and another distinctive PES organ, that is the Leaders' conference: a meeting of the most prominent socialist leaders in EU (PES Heads of Government, socialist party leaders etc.) which convenes at least once a year (see art. 38 of the PES statutes). On the increasing usefulness of this organ, due to the fact that it actually favoured coordination among national party leaders, see *infra*, § 4 and S. LIGHTFOOT, *Europeanizing social democracy?: The rise of the Party of European Socialists*, London-New York, 2005, 39: «While some within the PES argued that the leaders regarded these meetings as unimportant and their outcomes as inconsequential in the national arena, others asked why these obviously busy people went to the meetings if they were a waste of time. The crucial political development (…) is that the PES leaders began to take the summits and the declarations more seriously. Hix has argued that there was a significant increase in the involvement of the party elites both quantitatively and qualitatively in the PES, with the average number of party leaders' meetings increasing from less than two per year between 1985 and 1989 to over three per year between 1990 and 1994. He also stated that on average three-quarters of party leaders attended these meetings. In part, this increased attendance reflected the growing importance of the EU post-TEU, but it can also be explained by the fact that these summits had become high-profile events». The correspondent EPP body, net of some differences in the composition, is the EPP Summit.

77 In relation to the use of soft law instruments in the European legal order, see at least E. MOSTACCI, *La soft law nel sistema delle fonti: uno studio comparato*, Padua, 2008, 71 ff.

aimed at reinforcing the relationship between the Europarty and other ideologically close entities, one of which is the S&D group in the EP[78].

At the end of our analysis concerning Europarties' and political groups' policy formulation competences, we can conclude by saying that the scale no doubts tips in favour of parliamentary groups, since policy shaping by European political parties must stop, figuratively speaking, at the edge of political groups' offices in the EP: Europarties are not provided with tools capable of translating their proposals with binding effects into the institutional arena: net of their representatives' participation in the groups' Bureau meetings[79], they are merely entitled to address recommendations and resolutions to their "projections"; thus, at least in Parliament, the party in the public office plays the lion's share. Among the major political families, only PES has established a group's activity report procedure, but with little to no impact on the group's daily work (since the Europarty confines itself to "taking note" of the report itself). Plus, groups' representatives participate in Europarties' organs meetings: while this participation is aimed at encouraging the transposition of decisions taken therein into the institutional arena, it could also favour the steering of European political parties' deliberations towards a direction preferred by the parliamentary group. So, while there are no formal mechanisms ensuring that Europarties' proposals oblige their parliamentary expressions to act accordingly, political groups' representatives are nevertheless entitled to influence policy shaping occurring within European political parties. Add to this the fact that, despite the progresses

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78 Art. 37, paragraph 1, of the PES statutes: «The President, in co-operation with the Vice-Presidents and with the assistance of the Secretariat, shall ensure: (…) liaison between the PES an the parties, the group in the European Parliament and the Socialist International, the Progressive Alliance and the Global Progressive Forum». However, the provision does not specify by what means this liaison could be practically ensured. Notwithstanding this, however, doctrine has underlined that «the PES is hardly capable of really leading its parliamentary group and of truly focussing on its everyday political thinking. The group, assured of the "structuring support" of the parliamentary institution, represents (like the other groups) the most "integrated" element within the European socialist body. Furthermore, it is in a position – and in the obligation – to manage a much greater volume of transactions than that which can be dealt with by the party. Compared with the party, it therefore differs – thanks to its place at the European Parliament – by its functional superiority». See G. MOSCHONAS, *The Party of European Socialists: the difficukt "construction" of a European player*, in P. DELWIT. E. KÜLAHCI, C. VAN DE WALLE (eds.), *The Europarties. Organisation and influence*, Centre d'étude de la vie politique of the Free University of Brussels (ULB), Brussels, 2004, 117.

79 Which, as we have seem, is not always guaranteed (as in the S&D case).

made in the last decade[80], their degree of institutionalization seems much less developed compared to that of political groups: while (according to the EP's calendar) one week per month is devoted to groups' meetings to ensure their preparation for the plenary session, Europarties' organs, to put it more politely, meet less frequently: take, for example, The EPP's Political Assembly and the PES' Council, that is to say the "strategic" organs of the most prominent Europarties: the former «meets at least four times annually»[81], while the latter «shall meet in those calendar years where no Congress nor Election Congress is held»[82]. And this because, to this day, «in party federations, (…) the political centre of gravity lies with the national member parties»[83]; in other words, Europarties show the typical features of forums for dialogue and cooperation: their members ("domestic" parties) have not relinquished their "sovereignty"[84] in favour of the supranational level, which seems to precisely exhibit the traits of a coordination body; thus, we are confronted with confederations, rather than federations[85]. Sticking to the Niedermayer's tripartite division of European

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80 Among the many steps forward made in terms of Europarties' institutionalization, one can remember the employment of a permanent staff (still, however, not comparable to the staff employed by parliamentary groups, whose size is way bigger). This was made possible thanks to the introduction of direct EU subsidies in favour of European party federations in 2003. Before that time, Europarties were phisically located in the EP buildings together with political groups and the latter's staff was at the same time in the service of party federations. See E. CALOSSI, L. CICCHI, *European Parliament Political Groups and European Political Parties: Development and relationship between two faces of the EU political system*, in *Quaderni del Circolo Rosselli*, 2/2019, 17: «As for the staff, even if European political parties have progressively increased the number of their employees, these figures are still very far from those given by the Political Groups (…). In addition, we have to consider that Political Groups can also exploit EP's staff resources for some functions».

81 Art. 17, paragraph 1, of the EPP's statutes.

82 Art. 31 of the PES statutes. Even the PES Presidency, who is entitled to «fix the political guidelines of the [Europarty] during the period between Congresses and Councils» (art. 33, paragraph 1) meets occasionally, that is to say «as often as necessary, but not less than three times in each calendar year» (art. 35, paragraph 1).

83 S. VAN HECKE, W. WOLFS, *What are European political parties and what do they do?*, in S. VAN HECKE (ed.) *Reconnecting European political parties with European Union citizens*, International IDEA Discussion Paper, 6/2018, 13.

84 On the use of the sovereignty concept in relation to political parties, see again S. MERLINI, *Introduzione*, in ID. (a cura di), *Rappresentanza politica*, cit., X: «La sovranità degli Stati, che si esprime nelle costituzioni, ha dovuto fare i conti con una nuova e diversa "sovranità" propria dei soggetti (i partiti politici), che, in tuttta l'Europa contemporanea, hanno dato vita alle costituzioni vigenti».

85 Of the same opinion L. THORLAKSON, *Federalism and the European party system*, in *Journal of European Public Policy*, 3/2005, 468 ff.: «As an evolving party system, confederally

parties' development (contact stage - cooperation stage - integration stage)[86], it seems that, after almost forty years, the EU party dimension is still unable to achieve the integration stage. On the contrary, political groups in the EP seem not to be dependent on the national dimension: «from the moment they are formed, party groups operate independently of national political parties and their delegations»[87]: in this case, the whole is greater than the sum of the parts; these "parts", however, correspond to elected individuals, rather than national political parties; thus, *a fortiori*, the latter's sovereignty is limited in the context of the group[88]. We can rightly say that little has changed from the '80s, that is to say the period when the first transnational party federations were founded, when Reif and Niedermayer wrote that «generally speaking, the essential feature of the relationship between the national parties and the transnational organizations is that the parties insist on maintaining their freedom of manoeuvre in areas which they believe affect important national or party interests, with the result that there is no transfer of sovereignty from the individual parties at the national level to a European transnational level»[89]. Thus, since groups are permanent organs of the EP, while Europarties are, according to a minimalist point of view, quite "volatile" cooperation forums[90], then one can easily understands why European political parties' everyday work[91] – which could also last many weeks, because of

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constructed from national parties, the European party system faces much the same challenges for analysis as federations».

86 O. NIEDERMAYER, *Europäische Parteien? Zur grenzüberschreitenden Interaktion politischer Parteien im Rahmen der Europäischen Gemeinschaft*, Frankfurt-New York, 1983, 27. See also S.VAN HECKE, W. WOLFS, *op. cit.*, 17.

87 Ivi, 13.

88 However, since group members are elected individuals and not political parties, parliamentary groups cannot be labeled as party federations.

89 K. REIF, O. NIEDERMAYER, *The European Parliament and the political parties*, in *Journal of European Integration*, 2-3/1987, 167.

90 W. WOLFS, *Improving European political parties' connection with citizens through regulation. Carrots and sticks, rules and loopholes: how to regulate European political parties*, in S. VAN HECKE (ed.), *op. cit.*, 25-26, in relation to Europarties talks about a «rather complicated and unstable party life at the European level». On the same subject, see also P. DELWIT. E. KÜLAHCI, C. VAN DE WALLE, *The European party federations. A political player in the making?*, in P. DELWIT. E. KÜLAHCI, C. VAN DE WALLE (eds.), *The Europarties*, cit., 10: «In a minimalist way, the European federations are conceived as meeting place(s). In a maximalist way, the European federations are perceived as an arena enabling the political co-ordination amongst the partisan elite who mutually recognise each other as being part of the same political family with a view to influencing European decisions».

91 From the contacts with member parties to the relations with the press.

the sporadicity of their organs' meetings – can be (and actually is) entirely managed by their secretariat, headed by a Secretary-General[92]. The role of the groups' secretariat – albeit important – is incomparable: as a matter of fact, the reading of the relevant rules provided for by the groups' RoP reveals that, far from being entrusted with the day-to-day management of the group, the secretariats are merely responsible for "assisting" it[93]: groups have an high degree of institutionalization and their organs are fully capable of carrying on the routine activities; thus, they only need "assistance", rather than a body with extremely wide competences (as in the case of Europarties), which actually ends up *being* the very association for most of the time. So, as the relationship between Europarties and groups in the EP seems to be unbalanced on the side of the latter, at least from a formal point of view (that is to say, on the basis of the respective competences allocated by RoPs and statutes), then the only way for Europarties to influence the EP's legislative outcomes seems to be relying on a spontaneous implementation of party-shaped policies. However, we also must bear in mind that, once elected, MEPs are subject to the so-called group discipline: in case of deviation of the group line from deliberations of the respective Europarty, the decision of a reluctant MEP who votes in accordance with the latter would be indeed tolerated (in deference to the free mandate principle), but in most cases it wouldn't remain free of consequences; MEP's "disloyalty" to group discipline has usually relevant effects on both rapporteur and committee allocations: as doctrine has highlighted, both the EPP and the S&D groups «appoint rapporteurs with policy preferences close to the median position of their party groups»[94];

[92] As far as the EPP is concerned, see art. 19 of its statutes, according to which the Secretary-General is «in charge of the day-to-day management of the association»; with regard to the PES, notwithstanding art 33, paragraph 1, states that «the Presidency is the highest organ for the management of the day-to-day business of the PES», actually art. 41 provides that «the Secretary General, with the assistance of the secretariat, is in charge of the management of the party», thus "correcting the shot", since the entrustment of the Europarty's day-to-day management to an organ which convenes few times per year would have meant the possible…extinction of the entity in a rather short period of time.

[93] See Rule 47 of the S&D RoP: «The Group shall be assisted by a Secretary-General responsible for running the secretariat»; see also art. 26, paragraph 1, of the EPP group's RoP: «The secretariat shall assist the group».

[94] See See B. LINDBERG, A. RASMUSSEN, A. WARNTJEN, *op. cit.*, 1117. It must be said, however, that MEPs disloyalty occurs most of the cases when he/she disagrees with the group line for "domestic" reasons, that is to say when the mentioned line is supposed to somehow damage/undermine the interests of the State where the MEP has been elected.

moreover, «less attractive committee seats are allocated to MEPs who vote against the party [*rectius*: group] line».

In conclusion, the long-lasting preminence of the party in the public office to the detriment of the party in the central office[95] demonstrates that the opinion of the Court of Firts Instance of the European Union in *Martinez and De Gaulle v. European Parliament*, in relation to the role of political groups in the EP, was overly optimistic. In fact, according to the judges in Luxembourg, allowing the establishment of a non-inscrits group made up of elected members without political affinities would mean leading away from the goals set by the (then) art. 191 TEC, which stated that «political parties at European level are important as a factor for integration within the Union. They contribute to forming a European awareness and to expressing the political will of the citizens of the Union». This because, literally, «political groups contribute to the attainment of the political objective pursued by article 191 [T]EC, that is to say the emergence of political parties at European level»[96]. This interpretation was by then widely disputed, since it suggested a functionalist conception of political groups in the EP[97], to such an extent that the CFI was defined as a "political demiurge" rather than a jurisdictional body[98]. On the contrary, other voices in doctrine, taking the cue from the intraparliamentary origin of many national political parties, were less

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95 Which is generally confirmed in doctrine: see, e.g., E. CALOSSI, L. CICCHI, *op. cit.*, 12: «In the literature there is a general consensus in considering the relation between the two Eurostructures as an unbalanced distribution of resources and responsibilities, with the Groups in a dominant position with respect to the European political parties».

96 Court of First Instance of the European Union, joined cases T-222/99, T-327/99 and T-329/99, cit., pt. 148.

97 As organs aimed at favouring the emergence of full-fledged European political parties.

98 E. GIANFRANCESCO, *op. cit.*, 105 ff: «I gruppi politici costituiti entro il Parlamento divengono non già la proiezione all'interno delle istituzioni di una rappresentanza politica già formata ed esistente della società, ma lo strumento grazie al quale costituire la rappresentanza politica europea nella società europea. La consapevolezza, in altri termini, della perdurante debolezza della dimensione della rappresentanza politica nel sistema comunitario – nella sua dimensione più propriamente costituzionale – induce il Giudice comunitario a fare dei gruppi parlamentari i possibili fattori di aggregazione dei partiti politici europei. Sennonché, si può osservare (…) come un'operazione di questo tipo sembra essere più rispondente al modo di operare di un demiurgo della politica che di un organo giurisdizionale. Essa, in particolare, si scontra con la constatazione che, tradizionalmente, i gruppi politici all'interno delle assemblee legislative non condizionano, ma semmai sono condizionati, pur se in vario modo o misura, dall'esistenza e dal modo di operare dei partiti politici e, quindi, anche dalla loro dimensione nazionale o meno».

critical about the functionalist interpretation provided for by the CFI[99]. However, after almost twenty years from the judgment, we can say that the European Court expected too much from political groups in the EP, which have proved to be unable to foster the aggregation of full-fledged Europarties in the late stage of the integration process. As a matter of fact, Europarties were indeed a "product" of political groups: as highlighted in this work, the establishment of the former was often directly promoted and "boosted" by the latter (as in the case of the Christian-democrats). However, if on the one hand Europarties' intraparliamentary origin cannot be seriously questioned, in the other hand history has proven that political groups have lost their propulsive force in this respect[100]. Whilst national parties had been always able to emancipate themselves from their intraparliamentary origin by coming into contact with society, Europarties proved to be incapable of doing the same thing, condemning themselves to irrelevance, or nearly. For this reason (and whatever the CFI thought about), a consolidation of European political parties could never have happened thanks to EP groups' activities; on the contrary, as we have seen in these last paragraphs, groups have

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99 Among them, see A. CIANCIO, *Partiti politici e gruppi parlamentari*, cit., 163-164: «Tale riflessione non persuade nella misura in cui trascura di considerare che, sotto il profilo generale dei rapporti tra partiti e gruppi parlamentari, la conformazione di questi ultimi come proiezione in sede parlamentare di una strutturazione partitica consolidata già espressa dalla società appare come una soltanto (per quanto diffusa) fra le possibili dinamiche che intercettano l'instaurazione di quei rapporti, conoscendo del resto l'esperienza politico-istituzionale degli ordinamenti nazionali casi in cui la formazione del c.d. "partito parlamentare" ha preceduto e condizionato la genesi del partito, per così dire, "extraparlamentare". (…) Non appare pertanto singolare che anche nell'ordinamento comunitario i partiti possano avere, per dirla con Duverger, un'origine "interna" e, cioè "prettamente parlamentare", dal momento che il nucleo attorno cui si vanno sviluppando le organizzazioni partitiche europee sarebbe rappresentato dalla struttura dei gruppi parlamentari e dalla loro capacità di stimolo e coordinamento».

100 L. BARDI, *European party federations' perspectives*, in P. DELWIT. E. KÜLAHCI, C. VAN DE WALLE (eds.), *The Europarties*, cit., 316: «Europarties can in fact be expected to develop as a consequence of pressures coming either from their components in "public office", that is to say EP party groups that seek autonomous organisational structures capable of giving them direct links with civil society, or from European society, as expressed (…) by "party-on-the-ground" structures, that is to say national parties that are becoming progressively more inclined to privilege the supranational level of government. The former (…) come from institutional incentives within the EP, whereas the latter are more likely to occur as a consequence of national party elite perceptions of the EU's increased relevance than of grass-roots' demands for more Europe, a prospect denied by mass-survey trends. (…) EP institutional incentives have had, and will continue to have, important effects, but it is unlikely that these will be able to give Europarty federations a new and fundamental impulse».

progressively become the "relevant face" of the European network party[101], thus contributing to Europarties' sidelining.

2. European political parties and the EU Commission

2.1 Fluctuating fortunes of the Spitzenkandidaten system: the elections to the EP in 2014 and 2019

The enhancement of European political parties' role within the Union's form of government has been fostered by means of the Lisbon Treaty and the amendments to art. 17, paragraph 7, TEU, which now provides that: «Taking into account the elections to the European Parliament and after having held the appropriate consultations, the European Council, acting by a qualified majority, shall propose to the European Parliament a candidate for President of the Commission. This candidate shall be elected by the European Parliament by a majority of its component members». As evident, no explicit reference is made to Europarties. However, in 2012 the EP has taken advantage of the new formulation, by relying on the obligation for the European Council to take into due account the results of the elections to the Assembly of the Union, and issued a resolution urging European political parties to nominate candidates for the Presidency of the Commission. This move was actually seen by many Heads of State and Government as a barely legal attempt to acquire a competence that the Treaties actually do not attribute to neither the EP nor party federations[102]. Even though,

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101 See in this respect S. VAN HECKE, W. WOLFS, *op. cit.*, 15: «Every European election generates some disruptive effects: once the new EP is composed, the centre of activity – and, accordingly, media and public attention – shifts from the European political parties to the elected assembly and its groups».

102 Those initial reservations were subsequently (that is to say, when the Spitzenkandidaten system had already been implemented) formally rubber-stamped by the Legal Service of the Council of the European Union (that is to say the EU's legislator, together with the EP). The opinion issued by the Legal Service concerned an EP resolution (approved in 2015) on the reform of the electoral law of the European Union, setting out a proposal for a Council decision adopting the provisions amending the Act concerning the election of the members of the European Parliament by direct universal suffrage. According to the mentioned opinion, the provisions included in the proposals, aimed at institutionalising the Spitzenkandidaten process, were «highly problematic in terms of compliance with the institutional balance resulting from the Treaties. In particular, the institutionalisation of a "Spitzenkandidaten" practice based on the so-called precedent of 2014 might end up encroaching on the institutional prerogatives of the European

from a purely legal point of view, the mentioned Treaty amendments are not such as to limit the European Council's power of choice, they were approved in the view of stopping the well-known "horse trading" and backroom deals characterizing the meetings of the intergovernmental body aimed at appointing the EU Commission's President. This would have inevitably determined an impact on the inter-institutional balance, which, as we already know, is the principle governing the functioning of the European governance. By stretching the interpretation of art. 17, paragraph 7, TEU, the Assembly had the objective of further democratising the system, pushing for a full-fledged parliamentarization of the Union's form of government: the introduction of the so-called Spitzenkandidaten (lead candidates) system was all in an effort to constrain the European Council's discretion in the appointment of the EU Commission's leader[103]. This way, the head of the European executive would have been an

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Council as defined in the Treaties»; in fact, «according to Article 17.7 TEU, the prerogative to propose a candidate for President of the Commission rests with the European Council only»; «by allowing via the elections for the European Parliament a popular vote on the prospective candidates for President of the Commission, the proposal fundamentally alters the institutional balance established by the Treaties»; «the new wording of Article 17.7 TEU clearly defines the scope of the European Council's discretion, which has to be exercised taking into account the result of the elections, but is not otherwise limited. The authors of the Treaties therefore left the European Council a wide margin of appreciation, which is accentuated by the proportional character of the representation in the European Parliament (art. 14.2 TEU), and therefore of the difficulty of having clear-cut electoral results. In such circumstances, the possibility for the European Council to indicate a candidate that is not the direct expression of a political force appears to be in line not only with the wording of the provision but also with the objective of ensuring an effective election of the President of the Commission»; as far as the new wording regarding the EP's powers are concerned (art. 17.7 uses the term "elects" rather than "approves"), the EU Council's Legal Service deems that «this term is used in a non-technical way, since the intervention of the European Parliament lacks the features that are generally associated with an election (in primis the plurality of candidates). (…) Therefore, the new terminology is meant only to better reflect the political dimension of the relationship existing between the European Parliament and Commission, but it has no direct bearing on the institutional balance between the European Parliament and European Council when it comes to the appointment of the President of the Commission». These legal concerns were later shared in the European Council's informal meeting held on 23rd February 2018. At the end of the meeting, the then-president of the Institution Donald Tusk declared that «there is no automaticity in this process. The Treaty is very clear that it is the autonomous competence of the European Council to nominate the candidate, while taking into account the European elections, and having held appropriate consultations».

[103] See S.B. HOBOLT, *A vote for the President? The role of the Spitzenkandidaten in the 2014 European Parliament elections*, in *Journal of European Public Policy*, 10/2014, 1533: «The hesitation on the part of national governments is nit surprising, since the introduction of Spitzenkandidaten can be seen as a very clear attempt by the European Parliament to enhance its own influence on the selection of the Commission President. (…) The nomination of Spitzenkandidaten, however, is a way for the European Parliament of imposing its own candidate on the European Council. Providing its own candidate with the democratic legitimacy conveyed by the vote of Europe's citizens creates significant pressure on national governments to nominate

expression of the majority in Parliament (and, thus, accountable to the same Assembly); in other words, by means of the leading candidates system, European citizens would have had their say as far as the Commission's President appointment is concerned. In that time, this seemed to be the easiest path to secure the involvement of EU citizens in the processes that follow the elections to the EP. Besides, this way of proceeding is not new to the EP, since, during the entire integration process, it has showed a remarkable ability to leverage the so-called "incomplete contracts" provided for by the Treaties in order to «influence institutional change in its own interest»[104]. Notwithstanding the legal concerns that surrounded the EP's quite broad interpretation of art. 17, paragraph 7, TEU, the system was actually implemented in the view of the 2014 European elections, getting great support also by the Commission itself[105]. Five Europarties indicated their leading candidates, including EPP and PES. Since the majority of the seats in the EP was gained by the Christian-democrat Europarty, its Spitzenkandidat, Jean-Claude Juncker, was deemed to be taken into consideration by the European Council. Despite the reluctance of some Heads of State and Government[106], a variety of factors, including the EP's ability to show a firm internal cohesion[107] and the EPP's vast (and, thus, indisputable) majority in Parliament led the Spitzenkandidaten system to success: Juncker was actually the name proposed by

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the elected candidate to accept informally, if not formally, the Parliament's right to appoint the EU's executive».

104 This way of proceeding has been labeled by Farrell and Heritier as "interstitial change". In this respect, see T. CHRISTIANSEN, *After the Spitzenkandidaten: fundamental change in the EU's political system?*, in *West European Politics*, 5/2016, 994.

105 See Recommendation of the EU Commission 2013/142/EU of 12 March 2013 on enhancing the demoratic and efficient conduct of the elections to the European Parliament, preambulatory clause n. 17: « If European political parties and national parties make known the candidates for President of the Commission they support, and the candidate's programme, in the context of the elections to the European Parliament, this would make concrete and visible the link between the individual vote of a citizen of the Union for a political party in the European elections and the candidate for President of the Commission supported by that party. This should increase the legitimacy of the President of the Commission, the accountability of the Commission to the European Parliament and the European electorate and, more generally, increase the democratic legitimacy of the whole decision-making process in the Union».

106 The Hungarian and the British ones above all. In the weeks following the 2014 election, the British Prime Minister David Cameron went so far as to organise a mini-summit of conservative leaders in Sweden with the aim to convince them to oppose the election of Juncker as Commission's President.

107 Of course the EPP, but also the PES and its political group in the Assembly clearly showed intention to support the former Prime Minister of Luxembourg as Head of the EU Commission.

the Member States' representatives to the EP, which, as expected, elected the EPP's leading candidate by 422 votes in favour, 250 against and 47 abstentions. As briefly outlined in the previous chapter, on the occasion of the following elections to the EP, the same script has not been repeated. Even though an higher number of Europarties (seven) put forward a Spitzenkandidat, despite the EPP gained again the majority of the seats in the EP and notwithstanding Parliament's decision of 7th february 2018 – where it declared to be ready to reject any proposal by Member States' diverging from leading candidates' names[108] – Manfred Weber (EPP's Spitzenkandidat) was not proposed by the European Council as Head of the EU Commission. In his place, the Heads of State and Government agreed by qualified majority to indicate Ursula von der Leyen, German former Minister and CDU leading figure. The EP showed no resistance and, by (only) 383 votes in favour, 327 against and 22 abstentions, confirmed the proposal and elected Ms. von der Leyen as President of the EU Commission. Behind this choice, that officially marked (at least as for now) the failure of the Spitzenkandidaten system, there is a wide range of reasons. Among them, we can mention: the liberals' acknowledgment of the system's scarce significance if not accompanied by transnational lists[109]; Jean-Claude Juncker's declared opposition to a Commission headed by Manfred Weber[110]; the EPP's uninspiring electoral result (182 seats out of 751), which confirmed its preminence in the EP, but not with the same numbers as before; last but not least, the EPP's Spitzenkandidat's personal profile: Manfred Weber, despite having effectively led the group in the EP, didn't have any "domestic" relevant experience, neither as Head of Government nor Minister: this has actually prevented him from easily building

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[108] See European Parliament decision of 7 February 2018 on the revision of the Framework Agreement on relations between the European Parliament and the European Commission (2017/2233(ACI)), pt. 3 and 4: «The European Parliament (…) stresses that, by not adhering to the "Spitzenkandidaten" process, the European Council would also risk submitting for Parliament's approval a candidate for President of the Commission who will not have a sufficient parliamentary majority» and «warns that the European Parliament will be ready to reject any candidate in the investiture procedure of the President of the Commission who was not appointed as a "Spitzenkandidat" in the run-up to the European elections».

[109] This rather "strong" opinion, expressed by Guy Verhofstadt in an interview with the online newspaper politico.eu, subsequently led to the decision, taken by the Europarty ALDE, to indicate seven names as liberals' Spitzenkandidaten, thus contributing to the weakening of the mechanism.

[110] This position was expressed by the former leader of the EU Commission in an interview with the German newspaper Die Welt, published on 30th December 2018.

consensus among the members of the European Council[111]. Moreover, the other possible solution, that is to say the proposal of Frans Timmermans (PES' leading candidate) by the European Council, was also discarded due to the firm opposition of the Visegrad countries, justified on the basis of Timmermans' previous role as Commissioner for better regulation, the rule of law and the Charter of Fundamental Rights[112].

2.3 The role of European political parties in the leading candidates system's setback

The implementation of the Spitzenkandidaten system – which, according to some scholars, entails the formation of a "constitutional convention", at least in outline or *in fieri*[113] – sees Europarties as «gatekeepers that (pre)select the range of options that voters can choose from»[114]. As we know, European political parties have been for a long time mere cooperation forums, whose role in elections to the EP was limited to the prevention of «any glaring discrepancies between the campaign efforts of the various parties»[115]. As underlined by doctrine, they were perceived as «service providers»[116]. The introduction of leading candidates to be indicated by European parties has resulted in a significant improvement of the vote structuring function of transnational party federations[117] : since the very first

111 The reasons behind the abandonment of (*rectius*: the failure to consider) the Spitzenkandidaten system have been excellently outlined by N. LUPO, *La forma di governo dell'Unione, dopo le elezioni europee del maggio 2019*, in VV.AA., *Liber amicorum per Pasquale Costanzo. Diritto costituzionale in trasformazione*, Vol. VI, Consulta Online, 2020, 25 ff., spec. 30 ff.

112 This position allowed him to target countries (such as Poland and Hungary) which didn't show respect for the EU values.

113 See again N. LUPO, *op. ult. cit.*, 27.

114 W. WOLFS, G.-J. PUT, S. VAN HECKE, *Explaining the reform of the Europarties' selection procedures for Spitzenkandidaten*, in *Journal of European Integration*, 4th February 2021, 2.

115 See chapter I, § 1.2.4.

116 «Adoping manifestos, facilitating political dialogue and avoiding involvement in mainstream political conduct, in contrast to the national political parties. Their role was limited to the distribution of election material, the organisation of events and the preparation of Heads of State and Government summits». See S. FOTOPOULOS, *What sort of changes did the Spitzenkandidat process bring to the quality of the EU's democracy?*, in *European View*, 2/2019, 199.

117 This was also underlined by S. VAN HECKE, W. WOLFS, *What are European political parties*, cit., 18. According to the Authors, the "vote structuring" function of Europarties «[could have been improved] through Spitzenkandidaten process, EU transnational lists or Europarty labels for national member parties». At least two of these proposals (that is to say, the leading

direct European elections, candidates selection was the prerogative of national political parties; despite that's still the case as far as prospective MEPs are concerned, at least the selection of candidates for the Commission's presidency has been left to the supranational party dimension. Thus, for the first time, a clear link between voters and Europarties has been created; citizens who express their preference for a given national political force, at the same time are giving an indication as to who should hold the office of Commission's President[118]. As a consequence of the new mechanism, Spitzenkandidaten were forced to start truly transnational electoral campaigns: many of them succeeded in visiting a high number of Member States, although scholars have highlighted that most of them were inclined to visit (bigger) countries where they were already quite popular (hoping thereby to leverage this factor to increase the consensus around them) or where major language issues would not have arisen[119]. Net of the evident benefits of transnational campaigning for an emerging supranational democracy, those tours de force had to be organized by parties in the central office, that is to say transnational federations. This posed a significant burden on European political parties, both in terms of budget and human resources[120]. Nevertheless, Europarties seemed to pass the test, proving to be fully capable (notwithstanding their little training in this field) of employing professional campaigning tools, such as e-mail

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candidates system and the eurolabels for domestic parties) have been implemented, with mixed success, in the past electoral rounds.

118 At least on paper, since many polls have shown that just a minority of EU citizens who participated in the 2014 and 2019 elections were aware of the Spitzenkandidaten process. See S. FOTOPOULOS, *op. cit.*, 196: «According to a 2014 post-election Eurobarometer survey, 5% of the European citizens who exercised their right to vote mentioned that they went to the polls in order to "influence the choice of the President of the European Commission"».

119 Cfr. T. CHRISTIANSEN, *op. cit.*, 998, who, in relation to the 2014 election, observes that: «Candidates were more prone to campaign in countries where they were already known, and where there could be an expectation that their appearance would have a positive effect on the electorate. However, size – of Member States' populations and hence their share of seats in the EP – also mattered, and consequently Germany attracted by far the largest number of campaign visits, ahead of France and Belgium. The fact that there were noticeably fewer visits by the candidates of the top three parties (…) to Spain and Italy also indicates that language matters – that there are fundamental limitations to the capacity of candidates, however poliglot they may be, in a multilingual space such as European election campaigning».

120 According to Martin Selmayr, who was appointed Jean-Claude Juncker's campaign director in 2014, «day-to-day activities varied from issuing press releases and ordering/printing campaign material (e.g., posters) to organising events and accompanying Mr. Juncker to his "town hall"-style campaign rallies across the Member States». See S. FOTOPOULOS, *op. cit.*, 200.

subscription lists for periodical news updates, computerized databases and opposition research[121].

Net of the undoubted beneficial effects of the new system on both Commissions' democratic legitimacy and Europarties' role as weakest "face" of the broadest European network party, leading candidates' selection process should be analyzed, in order to understand the impact that gatekeeping operations could have had on the partial failure of the mechanism in the latest European elections. In fact, citizens' choice is *ab origine* limited by the infra-party candidates' selection. Limiting again our analysis to the two major political families in EU, compared to the *iter* followed in 2014, the Spitzenkandidaten selection process followed in 2019 has undergone some limited, albeit non secondary changes. As far as the EPP is concerned, the procedure strictly considered (adopted by the Europarty's Political Assembly on 10th April 2018) remained the same: prospective candidates need the support of their own national party and of maximum two additional EPP member parties[122] operating in countries other than the candidates' one. Once received the required support, the EPP's electoral Congress[123] elects the Spitzenkandidat by absolute majority of the delegates (not counting the abstentions)[124]. Compared to 2014, however, in 2019 the timeframe was different: the period between the opening of the candidatures and the Congress' final vote was made longer[125]; moreover, the timetable regarding the final steps of the procedure (from the candidacies' submission to the Congress' vote) was slightly modified: in 2014 it lasted from 13th February to 7th March of the same year, while in the following European electoral race, the final stage lasted from 6th September to 8th November 2018 (that is to say, the year before the elections took place). Far more meaningful were the changes to the selection procedure brought by the PES; for instance, its "Working group common

121 See again ivi, 199.

122 This "ceiling" has been set in order to avoid «a race for endorsements». See W. WOLFS, G.-J. PUT, S. VAN HECKE, *op. cit.*, 5.

123 Cfr. art. 18 of the EPP's statutes: «The Congress has the following competences: (…) electing the EPP candidate for President of the EU Commission».

124 In the second round, a simple majority is sufficient to elect the Spitzenkandidat.

125 In order to allow «a stronger involvement of the Heads of government», who showed some distrust of the leading candidates' system. See again W. WOLFS, G.-J. PUT, S. VAN HECKE, *op. cit.*, 11.

candidate", that was called to amend the relevant rules, decided to raise the threshold for candidacy submission: in 2014, the prospective Spitzenkandidat needed the support of one full member party plus at least 15% of additional member parties; in 2019 this latter percentage was increased to 25%[126]. Moreover, an internal procedure was modified: as a rule – already enforced in 2014 – after candidacies are submitted, each member party has to decide who to support in the election Congress; on the first occasion, this decision was taken "behind closed doors": each national parties elite was free to set its own internal procedure in this regard; thus, PES has decided to explicitly foresee the possibility of holding internal or open primaries in order to determine the candidate to support[127]. Despite the undoubtedly good intentions behind this new provision, only a clear obligation on member parties would have determined beneficial effects in terms of transparency and democracy; instead, many member parties, jealous of their prerogatives, lobbied to introduce primaries only as a possibility; in practice, however, the problem didn't even arise in 2019, since only one candidate (the already mentioned Frans Timmermans) stayed in the game until the end, thus making primaries (but also intra-party "horse trading") unnecessary[128].

According to recent scientific literature, the Spitzenkandidaten system's setback in 2019 can be also ascribed to the approach followed by Europarties: instead of taking advantage of the 2014 experience in order to further democratise the system, they chose inaction, or worse, to propose amendments to the leading candidate's selection procedure that made it even less inclusive than before. This wrong strategy is mainly due to intra-party dissent caused by «several "streams" or factions that each hold a different opinion on how (…) Europarties should

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126 The reason behind this choice is explained *ibidem*: «The main change of the procedure (…) was the result of an intra-party factor. It was done to make sure that only "serious" candidates that already enjoyed substantial support within the Europarty would put forward their candidature. This would limit the risk of a fierce (and thus damaging) internal contest, and ensured a lead candidate that was uncontested within the Europarty».

127 As underlined ivi, 7, fn. 2, «The use of internal primaries was also possible in 2014, although the result had to be ratified by an elected party body. The 2019 procedure included a much more explicit and detailed reference to the use of primaries».

128 A faithful reconstruction of the changes made to the selection procedures by Europarties between 2014 and 2018 can be found ivi, 5 ff, as well as in A.A. IANCU, *The demise of the Spitzenkandidaten system: decline of the EU democratization or (Euro)party process of adaptation?*, in R. CARP, C. MATIUTA (eds.), 2019 *European elections. The EU party democracy and the challenge of national populism*, Leiden, 2020, 26 ff.

develop»[129]. Stagnation or "toxic" reforms have encouraged the emergence of candidates with a marked European profile (Timmermans and Weber above all), because, generally, politicians who spent many years in the EU supranational Institutions are more likely to build a large consensus – which was all the more necessary in 2019 due to the changes in the selection procedure – among member parties of transnational federations[130]. However, this consensus proves to be rewarding only in the first phase of the run, that is to say in the Europarties' election Congresses. Instead, the European Council has usually shown distrust of purely-EU politicians with no previous major domestic experience (preferably as Head of State or Government). In fact, those who have recently held the office of Commission's President (e.g. Romano Prodi, José Barroso, Jean-Claude Juncker) had all been government leaders in their respective countries of origin and, as such, they had close connections with their European counterparts, who later gladly converged on their name as Head of the EU Commission[131].

2.4 European political parties in the EU Commission

According to art. 17, paragraphs 1 and 3, TEU «The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. (…) The members of the Commission shall be chosen on the ground of their general competence and European commitment from persons whose independence is beyond doubt. In carrying out its responsibilities, the Commission shall be completely independent [and its] members (…) shall neither seek nor take instructions from any Government or other institution, body, office or entity». The Treaty seems quite clear with regard to both the objective that the Commission

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129 W. WOLFS, G.-J. PUT, S. VAN HECKE, *op. cit.*, 2. See also ivi, 15: «Mainly intra-party dissent explains the lack of democratic reforms to the selection procedures».

130 Cfr. A.A. IANCU, *op. cit.*, 30: «Such effect was also directly connected to the centralized party competitions, requiring that candidates had previously developed support networks with other national party delegations and EU leaders (either through European party meetings or EP groups etc.)».

131 Cfr. *ibidem*: «The 2019 selection process (…) magnified the already visible evolution towards the "Euro-parliamentarisation" or "Europeanisation" of career trajectories of eligible candidates, to the detriment of ascending trajectories based on a national level validation. Such changes could only antagonize the [European] Council, which remains the last bastion of representing the national executives and the traditional model of politician at the EU-level».

must aim for (the general interest of the Union) and the main charachteristic that its members must share (independence). Thus, if only by reading primary law, it would be possible to affirm that there is no space for party politics in the EU Commission: Commissioners are independent actors exercising their functions in the sole interest of the Union. This assunption, however, must be verified in practice. As demonstrated in scientific literature, the "reality check" makes no concessions and presents us with a picture of a different Institution. Commissioners, as provided for by the Treaties, «shall be chosen from among the nationals of the Member States»; the list of the members proposed by the President-elect[132], who must select them «on the basis of the suggestions made by Member States», is finally adopted by the Council. As highlighted in doctrine, «governments predominantly appoint Commissioners affiliated to a party represented in the appointing government [and] employ their formal appointment powers to influence Commission behaviour in EU legislative politics»[133]. So, we can say that, net of what the TEU provides for, a vertical party dimension exists and that it is linked to the Commissioners' appointment procedure. Members of the EU Commission meet every week in the so-called College of Commissioners, where the Institutions' main decisions (concerning broad agenda setting and policy proposals) are taken. According to a seminal work by Egeberg, who took many interviews with top officials from the EC Secretariat General in order to understand which are the interests usually safeguarded by the Commissioners in the College, the members of the EU executive are used to play four different "roles": the Commission role; the portfolio role; the country role and, finally, the party role. In the first case, the Commissioner is actually championing the collective interest of the supranational body, as formally required; in the second case the EC member is safeguarding sectoral or functional interests, corresponding to those assigned to his/her portfolio[134]; in the third case, protected

132 That is to say, at least hopefully, the Spitzenkandidat of the majority party in the EP.

133 A. WONKA, *Decision-making dynamics in the European Commission: partisan, national or sectoral?*, in B. LINDBERG, A. RASMUSSEN, A. WARNTJEN (eds.), *The role of political parties in the European Union*, London-New York, 2010, 41.

134 In fact, each Commissioner is placed in charge of a different Directorate-General (DG). DGs are basically policy departments responsible for different policy areas (e.g., DG Competition, DG Environment etc.).

interests are those of his/her national-territorial constituency; finally in the last case, the Commissioner is defending his/her (national) party position. As one may guess, the first two scenarios are the most common; however, empirical research has shown that the national or party role are also present, while not at the same rate[135]. Another study by Wonka has added an important notch to Egeberg's analysis, by highlighting a possible transnational party scenario in the College of Commissioners, that is of particular interest for our study: according to the Author, it cannot be excluded that «Commissioners whose national parties belong to the same party family [may] agree on a transnational party position and align along transnational partisan lines in internal decision-making»[136]. However, empirical case studies have demonstrated that this scenario is unlikely to occur in a significant number of occasions[137]. This, however, doesn't mean that a transnational party "role" couldn't be played with a greater frequency in the future, especially in the light of the increasing "politicization" of the Commission due to the use of the Spitzenkandidaten system (whose implementation in 2014 has led to one of the most "political" EU executives seen in recent years)[138]. In

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135 With the exception of the party role, which in the national dimension is undoubtedly more emphasized, Egeberg sees many similarities between the College of Commissioners and national Cabinet Ministers (or Councils of Ministers) as far as "role playing" is concerned. See M. EGEBERG, *Executive politics as usual: role behaviour and conflict dimensions in the College of European Commissioners*, in *Journal of European Public Policy*, 1/2006, 13: «Commissioners' role behaviour seems to have much in common with that of national cabinet ministers; they assume multiple and competing roles whose relative weight may vary contingent upon organizational and policy area variables. Both are highly "portfolio driven", however, both are simultaneously embedded in a collegial setting that claims a certain collective responsibility of them. Moreover, Commissioners as well as cabinet ministers have their "local" community back home which imposes certain expectations on them while in office. The modest role that party political affiliation seems to play in the College may represent the biggest difference between the two. If the Commission's relationship to the European Parliament continues to grow, both as regards the appointment of Commissioners and their daily policy-making, it is reasonable to believe that more emphasis will be put on this role in future colleges».

136 A. WONKA, *op. cit.*, 43: «Commissioners may have an incentive to build stable coalitions to reap the policy benefits from such long-term co-operation. The ideological cohesiveness of national parties from the same party family may facilitate the alignment of Commissioners along partisan lines».

137 Ivi, 53: «It (…) seems unlikely that partisan political dynamics play an important role in Commission decision-making».

138 See in this respect N. NUGENT, M. RHINARD, *The "political" roles of the EU Commission*, in *Journal of European Integration*, 2/2019, 203: « Since Juncker became President, a number of occurrences have seemingly further intensified the Commission's political nature and the political roles it undertakes. These occurrences have included: the reorganisation of the internal structuring of the College of Commissioners by Juncker soon after he assumed office, which has given the College a more hierarchical structure and a greater potential for political steering via strong

fact, as underlined in doctrine, if we consider «the enhanced role assigned to the European Parliament as regards the appointment of College members and, in particular, the growing importance of the results of the European elections in this respect, we could indeed expect the party role to become more salient among Commissioners»[139]. In light of the above, the several provisions included in Europarties' statutes that allow participation of Commissioners who are affiliated with a member party in meetings of the more preminent organs of the federations (such as the EPP's Political Assembly and the PES' Council)[140] would possibly end up being of crucial importance: Europarties' meetings, in fact, would become the natural place for transnational party coalition-building in view of major decisions to be taken in the College of Commissioners.

B. European political parties and the EU's intergovernmental institutions

3. Party politics in the Council and the European Council

Scholarly literature has seldom engaged with the analysis of party cleavages in intergovernmental EU Institution. This may be justified on the basis of the widespread belief that in such organs only national interests are safeguarded and

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leadership; Juncker's frequent calls for a more "political" and less technocratic Commission, which have been made as part of a drive to acquire more policy power for the Commission in the evolution of European integration; the obvious "presidentialisation in the operation of the College under Juncker, with him clearly attempting to set a political lead and provide an overall political direction for the EU as a whole; and the constant emphasis by Juncker that his College has not only a political drive but also one that rests on a political mandate».

139 M. EGEBERG, *op. cit.*, 5-6.

140 With regard to the EPP's statutes, see e.g. art. 11, which allows the President of the European Commission (to the extent that he/she is affiliated to the EPP) to participate in the meetings of the Presidency; see also art. 15, which includes among the *ex officio* members of the Political Assembly «members of the European Commission (…), provided they belong to an ordinary member party». According to section I of the EPP's internal regulations, all the members of the EPP Presidency are also Congress members; thus, also the President of the European Commission who is affiliated to the EPP. The PES statutes provide for similar rules. See art. 22, paragraph 5, with regard to Congress members («the following are also *ex officio* delegates without the right to vote: (…) PES members of the European Commission»). See also art. 30, paragraph 4, which provides that PES members of the EU Commission are also Council *ex officio* delegates, without the right to vote. Moreover, art. 34, paragraph 3, provides that «one representative from the PES members of the European Commission» is allowed to participate, as member without voting rights, to the PES Presidency's meetings. Finally, PES members of the EU Commission, including the High Representative of the Union for Foreign Affairs and Security Policy (if he/she is also a PES member) are members of the Leaders' Conference, according to art. 39, paragraph 1, of the PES statutes.

that, as a consequence, coalitions are exclusively formed with an eye to what is best for the Member States involved. This assumption is in many respects true: since both the Council and the European Council are made up of people who hold governmental offices (Heads of State/Government or Ministers), their bargaining is primarily aimed at producing an output (be it the adoption of a "conclusion" or a legislative act) which, besides being beneficial for the EU, has a direct or indirect positive impact on the legal order of the represented State. However, the limited empirical research made on the subject has shown that, albeit to a limited extent, political ideology plays a role in also in the mentioned Institutions and party political patterns are clearly detectable. As far as the Council is concerned – which, as described in the previous chapter, gathers together State representatives at ministerial level in different "Council configurations" on the basis of the topic to be dealt with – its members are nearly always supporters of national parties ruling alone or in coalitions. According to empirical research based on governments' individual positions on adopted legislation in a nine-year span, when a given topic is brought to the Council's attention, coalition formation among competent Ministers may fall along an ideological left-right dimension (the Authors report a «clear, although weak tendency»)[141]. Moreover, this assumption is confirmed by another finding: a change in government composition tends to reflect on the behaviour of the affected country in the Council; in other words, a change in the party political platform entails a change in the Council's coalition partners (a shift from a socialist to a conservative ruling party often determines new alliances at intergovernmental level in a broader sense).

Something very similar happens in the European Council, too. Even though most of the decisions taken therein are supported by power based/interest based/culture based coalitions[142], partisan coalitions also seem to be formed[143], albeit with much

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[141] S. HAGEMANN, B. HOYLAND, *Parties in the Council?*, in B. LINDBERG, A. RASMUSSEN, A. WARNTJEN (eds.), *The role of political parties*, cit., 99 ff., spec. 100 and 110: «Centre-left governments are, on average, more likely to vote together with other centre-left governments than with governments from the centre-right».

[142] Power based coalitions are those founded on power-seeking behaviours (actors seek partners on the basis of their capacity to generate winning majorities or blocking minorities). Interest based coalitions are those founded on the same interest shared by the actors involved. Finally, culture based coalitions are formed when actors, in relation to a given topic, place particular emphasis on cultural traits such as language, history and ethnicity. See J. TALLBERG, K.M. JOHANSSON,

less frequency compared to the Council itself. This could be mainly attributable to the subjects that the European Council is called upon to deal with, that is to say institutional reforms, budgetary issues, EU enlargement, foreign policy and the like; all topics which do not favour – unlike those brought to the Council's attention[144] – a politicization along the left-right dimension. However, party cleavages are nevertheless detectable also in the Institution that sets the EU's political direction, again driven by the Head of State or Government's party affiliation, especially when socioeconomic issues or institutional appointments are at stake[145]. Nevertheless, the implementation of such party political patterns, when conceivable on the basis of the subject dealt with, face two obstacles: first, the "numbers" issue; in order to secure an outcome, European Council should be dominated by one party political family[146]; in addition, another barrier is the ideological cohesiveness among Head of State or Government "belonging" to the same European political party. As underlined in doctrine, regardless of numerical superiority, the former «do not necessarily adopt the same ideological position, just because they belong to the same transnational party. The ideological profiles

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Party politics in the European Council, in B. LINDBERG, A. RASMUSSEN, A. WARNTJEN (eds.), *The role of political parties*, cit., 119.

143 This is somehow proved also by the fact that the European Council Oversight Unit established within European Parliamentary Research Service, when issuing its reports on the European Council's composition to be addressed to MEPs and their staff, makes explicit reference to «changes in the balance between political party affiliations», paying also attention to the broader transnational party balance within the body. See, e.g., one of the last reports (February 2021) authored by Ralf Drachenberg, which, moving from recent governmental changes in Italy and Estonia, says as follows: «While Kaja Kallas (new estonian Prime Minister) comes from a different national party than her predecessor, her arrival does not change the political balance in the European Council, as both parties belong to the same European political family. Likewise, the arrival of Mario Draghi has no formal impact on the balance between political party affiliations, because, like his predecessor, he belongs to no political party and thus sits in the European Council as an independent. The European Council currently includes eleven members from the EPP, seven from Renew Europe, six from the S&D/PES, one from the ECR, and two Independent members. The Greens remain the only major political force in the European Parliament with no affiliated Head of State or Government in the European Council».

144 Which actually correspond to the content of the EU Commission's proposals, to be subsequently transposed into law. Thus, highly ideologically divisive topics are often at stake, such as socioeconomic issues.

145 An example of the implementation of party-political patterns in the European Council could be the inclusion of an employment chapter in the Amsterdam Treaty (1997), which was favoured by the existence of a large socialist majority in the Institution. See again J. TALLBERG, K.M. JOHANSSON, *op. cit.*, 125 ff.

146 It is also true, however, that a party coalition in the European Council could be formed as a "blocking" or "veto" minority.

of national parties of the same political colour vary, and the transnational parties, as a consequence, exhibit a level of heterogeneity».

4. Promoting homogeneity between same-party members of intergovernmental Institutions: Summitry of European political parties

Both the EPP and the PES started, from the end of the 70's and, in a much more stable way, during the 80's, to organize informal leaders' summits, at the beginning with no more target than allowing an exchange of view on general topics of European integration among eminent persons from national parties, and, later, with the specific aim of allowing Council and European Council members belonging to the same party family to build a common line to follow during these meetings, thus reducing (or, at least, trying to) the ideological heterogeneity that often prevents coalition formation along (transnational) party lines in those occasions. In the '90s, those meetings embarked on a path of institutionalisation: socialist and conservative summits became full-fledged Europarty bodies and the liberals followed suit. In the same period, a rise in the annual amount of meetings occured, shifting from just one to two/three per year. Nowadays, both the PES and the EPP regulate summits in their statutes or internal regulation and regularly hold summits up to four times a year. As far as the former is concerned, its statutes draw a distinction (not initially foreseen) between the Leaders' conference[147], already mentioned *supra*, and the Ministerial and pre-[European]Council meetings[148]. The Conference is actually an organ of the Europarty, capable of issuing recommendations and resolutions to other organs such as the Presidency and the Congress, as well as to the S&D group in the EP. It has a broad composition, since not just members of affiliated parties who hold governmental office participate, but also party leaders in opposition, the President of the EP and the European Council (if they are PES members) as well as PES members of the EU Commission, the President of the Socialist International and many other socialist eminent persons. It is easy to understand, then, the purpose of this organ,

147 Cf. artt. 38, 39 and 40 of the PES statutes.
148 Art. 44 of the PES statutes.

which is to enable an exchange of views which would be otherwise difficult. Differently, Ministerial and pre-Council meetings, although falling within the Europarty's summitry activities, play a different role, that is rendered explicit by the same statutes, which state that they serve to «improve the coordination of PES Heads of State and Government or Ministers and develop common positions for European Council meetings». Their composition is inevitably less broad compared to the Leaders' Conference: only governmental representatives affiliated with full member parties are allowed to participate in these preparatory meetings, while they «may welcome leaders of PES parties in opposition»[149] (as they actually do). Moreover, associated members, independent experts, civil society representatives and academics «can be invited on a permanent or ad hoc basis»[150]. The body which in the EPP corresponds to the socialist Leaders' Conference (without, however, being an organ of the Europarty) is the EPP Summit, which has a similarly broad composition, but also serves as pre-European Council meeting. It usually takes place, as written in the EPP's website «a few hours before teh European Council», it is «the most important event for the EPP», which gathers together the European Councils' members of the EPP, the Presidency of the Europarty, the EPP Vice-President of the EU Commission (representing its members in the absence of the President), Presidents of parties in national coalition governments where the Head of government is not affiliated to an EPP ordinary member, the Presidents of the largest opposition party affiliated to the EPP in each Member State, plus the other persons invited by the EPP President to take part. According to part III, lett. a) of the EPP's internal regulation, such a comprehensive body «prepares the positions to be taken by the EPP Heads of State and of Government at the European Council and issues recommendations on the strategy and political orientation of the association». Thus, besides being an homogeneity-building body, it also seems to have an influence on the strategy development and so, even (albeit indirectly) on policy formulation[151]. As a matter of fact, lett. b) of the same part explicitly states that

149 Art. 44, paragraph 4, of the PES statutes.

150 Art. 44, paragraph 3, of the PES statutes.

151 In fact, as underlined by scholars, «the EPP has also the tradition of dealing with intra-party affairs during its summits». See S. VAN HECKE, K.M. JOHANSSON, *Summitry of political*

«the President will report to the Political Assembly», which we already know as the organ on which most of policy formulation relies, «on the outcome and general direction of the EPP summit»[152]. The EPP internal regulations dedicate a whole part (V) to the EPP Ministerial meetings, which are held on relevant policy sectors proposed by the EPP Presidency[153] and aim to «improve political coordination and policy sinergy in the Council»[154]. Internal regulations further provide that, at the recommendation of the EPP President, such meetings may be chaired by Vice-Presidents of the Europarty or «other outstanding EPP political personalities (…) if they have relevant policy experience»; moreover, «on those policy areas where co-decision is required», the competent EPP Commissioner and MEPs belonging to the S&D group may be also invited to take part.

Apart from the slight differences outlined above, we can say that summitry characterizes both the EPP and the PES as the only mechanism aimed at coordinating and influencing their leaders' behaviour in both intergovernmental arenas in the EU. However, it hasn't proved to be always effective. At least two

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parties at European level: the case of the PES Leaders' Conference, in E. STETTER, K. DUFFEK, A. SKRZYPEK, *In the name of political Union – Europarties on the rise*, Foundation for European Progressive Studies and Renner Institut, 2013, 68. In relation to Europarties in general, see ivi, 69: «Party summits also function as a party body in which sensitive issues can be discussed and, if necessary, are decided. In this way, summits have become substitutes for other party bodies that cannot decide because the issue is too salient, too sensitive or too urgent».

152 If one pays attention to the wording, internal regulation here use an expression ("general direction") close to the one adopted in art. 15, paragraph 1, TEU in relation to the competences of the European Council ("political directions").

153 They actually seem to be modelled on the various Council configurations. The EPP website distinguished among the following Ministerial meetings: Foreign Affairs, chaired by David McAllister, EPP Vice-President, MEP (DE) and Simon Coveney, Minister for Foreign Affairs and Trade (IE); Defence, chaired by Jüri Luik, Minister of Defense (EE); General Affairs, chaired by Helen McEntee, Minister for European Affairs (IE), and Karoline Edtstadler, Federal Minister of State for European Affairs (AT); ECOFIN, chaired by Valdis Dombrovskis, Executive Vice-President of the European Commission (LV), and Paschal Donohoe, Minister of Finance (EI); Interior, chaired by Peter De Crem, Minister of Interior (BE), and Esteban Gonzalez Pons, MEP (ES); Justice; Agriculture, chaired by Michael Creed, Minister for Agriculture, Food and the Marine (IE); Energy, chaired Jerzy Buzek, MEP (PL); Health, chaired by Jens Spahn, Minister of Health (DE); Trade, chaired by Leo Varadkar, Deputy Prime Minister (IE).

154 See K.M. JOHANSSON, *The Emergence of Political Parties at European Level: Integration unaccomplished*, in S. GUSTAVSSON, L. OXELHEIM, L. PEHRSON (eds.), *How unified is the European Union? European integration between visions and popular legitimacy*, Heidelberg-London-New York, 2009, 163: «Meetings such as these provide an opportunity to talk in an informal and private setting about issues on the Council agenda, or any other issues of salience for the EU and its Member States. They contribute to socialisation and the establishment of personal contacts among politicians. (…) This can be an important opportunity for the Europarty (as well as the party group) to influence "its" ministers on the Council. It is important to note, however, that a Europarty cannot force a minister to follow a certain line of action on the Council of Ministers».

major obastacles have sometimes prevented ministerial and pre-Council meetings from being forum for preliminary coalition formation. One of them is endogenous: those organs/bodies have no power to oblige governmental representatives to act in accordance to the Europarty line. As stated in doctrine: «A PES Minister would often say, during the PES caucus before the Council meeting, "yes, comrade, I agree with this position" and then go into the Council meeting and vote the opposite way»[155]. The other obstacle is exogenous, since it arises from the summit members' behaviour: some of them, often affiliated with ruling parties of important Member States (e.g. the British Prime Minister Tony Blair and the German Chancellor Gerhard Schröder)[156], have boycotted those meetings for a long time. This may determine a process of emulation, since by witnessing defections, other members infer the limited importance of those venues[157]. Participation in summits, however, seems to have increased in recent years; this can be attributable to various reasons, not least the fact that they have become "high profile" events with a remarkable level of formalization and where a special attention is devoted to public relations (a "political family picture" is usually taken at the end of the summit, followed by a press conference and the publication of a rather detailed press release)[158]. So, unlike in the past, defections

155 *Ibidem*.

156 Another well-known German Chancellor, Helmut Kohl, deemed that EPP summits should have been limited to governmental representatives. Hence, he started to organize "private" meetings with his EPP counterparts in Bonn. The Europarty was somehow forced to follow this line and started to distinguish between regular EPP summits and so-called "mini summits" between governmental leaders only. This practice was soon discarded when Kohl stepped down both as Chancellor and leader of the CDU.

157 S. VAN HECKE, K.M. JOHANSSON, *op. cit*, 67.

158 Cf., as far as the PES is concerned, S. LIGHTFOOT, *op. cit*., 39-40: «The PES leaders began to take the summits and the declarations more seriously. Hix has argued that there was a significant increase in the involvement of the party elites both quantitatively and qualitatively within the PES, with the average number of party leaders' meetings increasing from less than two per year between 1985 and 1989 to over three per year between 1990 and 1994. He also stated that on average three-quarters of party leaders attended these meetings. In part, this increased attendance reflected the growing importance of the EU post-TEU, but it can also be explained by the fact that these summits had become high-profile events. The attraction of linking these meetings to the European Council was that non-governmental parties could try and put pressure on the party actors participating in the Council, while the attraction for the governmental parties was the ability to be able to form alliances with like-minded actors before the European Council bargaining». However, as far as transparency is concerned, usually Europarty summits leave few traces on paper. PES tends not to circulate minutes among summit participants (as the EPP does), but, unlike the EPP, at the end of Leaders' Conferences it releases declarations on common positions on specific topics. Cf. S. VAN HECKE, K.M. JOHANSSON, *op. cit*, 68.

nowadays are much more evident and would immediately suggest the idea of a limited intra-party cohesion. Nonetheless, potential benefits of participating seem to outweight the "costs": even though in many cases summit's functionality «is limited to taking stock of the divergent opinions on different matters within one political family»[159], they are still extremely useful both from an intra and extra party point of view: in fact, they serve as "traineeships" for newcomers (since summit's agendas now "mirror" to a large extent that of the European Council)[160], as networking arenas and as preparatory platforms for the members of intergovernmental EU Institutions; some scholars deem that this latter function makes Europarties full-fledged actors (and not merely cooperation forums) within the form of government of the Union[161]. Moreover, they are also means to show unity and cohesiveness through the (specialized) media[162], which seem to increasingly cover Europarty summits (which, on the other hand, are virtually unreported in mainstream national media).

In conclusion, one further aspect should be emphasized: even though participation of EU Commission and European Parliament's representatives bring a "supranational nuance" to Europarty summits, their marked intergovernmental character actually prevents them from playing the role of driving force for integration that some scholars would like to assign them[163]. As a matter of fact, summits allow national (ruling or opposition) party leaders to take the lead at the expense of Europarties' leaders (e.g. their Presidents) and of supranational Institutions members, thanks to the formers' capital in terms of fame and influence. This is somehow allowed by the same Europarty statutes, that often provide for a direct connection between summits and party organs responsible for

159 Ivi, 70.

160 Ivi, 68-69. Moreover, summits allow leaders of member parties in opposition to get acquainted with their potential future colleagues in the Institutions concerned. See e.g. J. SMITH, *Political parties in a global age*, in D. JOSSELIN, W. WALLACE, *Non-State actors in world politics*, New York, 2001, 69: «These occasions, like the ministerial meetings that that the PES also organizes, allow shadow ministers to become acquainted with their future Council colleagues as well. Thus by the time Gordon Brown became British Chancellor of the Exchequer he was already well-known in European Social Democratic circles. This inevitably makes the transition to office easier than it would otherwise be».

161 Since they «might ease the complex institutional set-up of the EU». See again S. VAN HECKE, K.M. JOHANSSON, *op. cit*, 71.

162 Ivi, 70.

163 G. MOSCHONAS, *op. cit.*, 119 ff.

policy shaping. The result is that national leaders who gather in Brussels in those «*quasi superimposed* body [that] acts in the name of the party – and is nominally part of the party – but in reality has (…) a great deal of autonomy in comparison to it»[164], besides being enabled to develop a common position to follow in intergovernmental Institutions, are also capable to influence Europarties' policy formulation. So, ultimately, the increasing prominence of Europarty summits demonstrates at the same time both a growing politicization of the EU – since national party leaders gather together to discuss European topics and to implement party political patterns to follow in the Institutions concerned – and the continued dependence of party federations on the domestic dimension, to such an extent that national party leaders gathered in the summit are (even formally) allowed to have a say on party policy formulation. Hence, it becomes clear why States agreed in Lisbon to get rid of the original opening clause of the party article, which stated that «political parties at European level are important as a factor for integration within the Union». This way, States were explicitly admitting that Europarties have exhausted, as for now, their propulsive thrust. They would gain it again once freed from the mentioned dependence on the national level. This further step, however, implies a transfer of "sovereign" powers (in a broad sense) from the ground to the central office, which would probably have a chance to happen only when the whole EU will embark on a new path towards federalism.

[164] Ivi, 120.

CONCLUSIONS

Many considerations could be made at the end of this work. Anyway, one question is unavoidable: in the light of both their regulation and institutional practice, are European political parties capable of fulfilling the constitutional mission assigned to them by the Treaties? The answer, unfortunately, is no. This can be blamed on both the excessive optimism that Treaty drafters have demonstrated since the first apperarance of a party article in 1992 and the "original sin" that charachterizes political parties at European level. This latter factor, which corresponds to the dependance on national entities without any possible direct contact with society, should have urged greater caution in the formulation of provisions determining the *inkorporation* of a party dimension in the constitutional order of the EU. On the contrary, it was considered that, by means of an ambitious primary regulation, European political parties would have gained the role that was owed to them in a State-like dimension such as the EU. As a matter of fact, party articles have been only capable of enabling the approval (especially once a legal basis was added to them) of a comprehensive regulation of party federations in the Union. However, even those pieces of legislation, adopted in 2003 and 2014, proved to be insufficient to that aim. Note well: Regulation 1141/2014, also as a result of the amendments made in 2018, represented an undoubted step forward for the party dimension in the EU. Thanks to this legal act, Europarties must now comply with strict transparency requirements as far as their internal organization and funding management are concerned, their transnational character has been further enhanced and some major violations may determine the deregistration of the political force by the Authority for European political parties and European political foundations. And yet, this commendable attempt to cover all the key problems concerning party federations had numerous shortcomings: from the absence of provisions concerning internal democracy, to the unexplicable revival of the much-criticised political oversight of the *ad hoc* deregistration procedure, passing through the inappropriate influence of the State of the seat, which can impose further requirements (provided they are consistent with the EU regulation). Not for

nothing, EU law on Europarties has already given proof of its limited capacity to ensure an effective regulation of the phenomenon concerned: attempts to enforce the rule of law clause against Europarties tolerating antidemocratic members have proved unsuccessful, due to the disproportionately strong position granted to European Parliament within the relevant procedures. Hopefully, many of these issues will be soon tackled, since the EU Commission is expected to formulate a new legislative proposal in 2021.

However, it would be asking a lot to expect legislation alone to solve the critical problems afflicting Europarties. As previously said, many of them arise at an institutional practice level and are intimately connected with the functioning of the EU's form of government, which is founded on sincere cooperation - institutional balance and could possibly be labeled as parliamentary, but with a blurred fragmented executive whose action can hardly be controlled by citizens' representatives. Within this kind of dynamic, which is a result of an incomplete federalizing process, political parties at European level suffer a limited ability to somehow affect decision-making processes. Their presence in the European Parliament is "filtered" through political groups: whilst this is the common rule in the majority of the Member States (and, one might say, wherever a parliamentary assembly is present, at least in tendency), at the EU level this relationship is overly unbalanced on the side of groups: this is what emerges from a combined reading of Europarties' statutes and groups' rules of procedure; in fact, there is a stronger presence of groups' representatives in party federations' bodies then vice versa, especially when it comes to organs responsible for policy formulation. Moreover, parties have no tools to somehow enforce their line inside the Parliament (with due regard to the free mandate principle) and may only rely on its spontaneous implementation. So, basically, policy formulation is almost entirely in the hands of parliamentary groups, who are also allowed to steer intra-party decision making by means of their representatives' participation in Europarty organs' meetings. This imbalance could possibly be tackled by means of targeted amendments to the EP's (and groups') rules of procedure and to federations' statutes. However, as we will further see, formal interventions cannot

resolve at their root the more inherent problems afflicting Europarties, which are linked to their very nature.

Likewise, concerns also emerge when it comes to the role played by political parties at European level in the Commission and in intergovernmental institutions of the Union. In all such cases (and for different reasons) a vertical party political pattern may be identified, which corresponds to the national party affiliation of Commissioners and Council/European Council members. Europarties, in order to have a say in those decision making bodies, should have the power to make the mentioned party political pattern horizontal. In other words, they should facilitate transnational party coalitions formation. This goal is pursued by means of the so-called "summitry" of political parties at EU level: many federations, starting from the 80's and with greater frequency (and institutionalization) over time, have organized high-level summits which gathered toghether the leaders of the national member parties. These venues, besides enabling exchange of views among prominent figures belonging to the same political family, were specifically aimed at permitting the shaping of a common party line to be followed in the above mentioned Institutions. Even though summits have proved to be an important (and maybe the most important) occasion for Europarties to play a front-line role within the form of government of the EU, their potential has been untapped, primarily due to the fact that participants are not bound by decisions taken therein in relation to the "party line": in this case, too, political parties at European level cannot but rely on spontaneous implementation, ending up being highly dependent on national representatives' political evaluations. In fact, party coalitions in such Institutions rarely occurr, while power/interest/culture-based coalitions may be encountered with far greater frequency. Moreover, summits have been often delegitimized by protracted defections of charismatic leaders (e.g., Blair, Schröder) who deemed that such meetings were useless or even counterproductive. Here too, amendments to party statutes (which, nevertheless, would be likely opposed by member parties, that always seek to safeguard their "sovereignty") could effectively target some of the shortcomings outlined above.

However, as anticipated, formal adjustments (to primary-secondary law, as well as to statutes, internal regulations and rules of procedure) could possibly improve

the situation, but, in the end, are uncapable of coming to terms with the essence of the problem, which is the (con)federal nature of political parties at European level. This "original sin" is the trademark of such entities since their establisment in the 70's and reflects the Union's "hermaphroditism", travelling parallel to it. The numerous formal changes brought by the march of the integration process have proved to be ineffective in this respect. And this because efforts were made to reform Europarties without doing the same with regard to the constitutional architecture that sustains the Union.

Thus, we can rightly answer the question whether Europarties are full-fledged political parties or not. Actually, the answer is both yes and no, on the basis of the adopted perspective. From a static perspective, which pays attention to the current constitutional architecture of the Union, party (con)federations are a fair model of political party, perfectly consistent with the present stage of the European integration process. Since the EU is still far from being a State; since its Member States are still the holders of their sovereignty (*Herren der Verträge*); since the intergovernmental method is still too crucial, then a supranational party model resembling the national ones would struggle to survive in such a context: it would be a "fish out of water". Undoubtedly, slight reforms could equip Europarties with tools to mobilize citizens, aggregate their interest and structure the vote, thus reducing the overal EU's democratic deficit; nonetheless, this wouldn't be a quantum leap for the Union as far as its very nature is concerned, and the same goes with European political parties: they would both remain compound entities, almost fully dependent on their components.

Then, from a dynamic perspective, which focuses on the ultimate goal of the integration process (that is to say the creation of a federation where State sovereignty is entirely relinquished to the center), transnational party federations may not be qualified as political parties, since the vast majority of traditional party functions cannot be exercised by these multi-faceted entities, not just for endogenous factors, but also (*rectius*: especially) for exogenous factors. For this reason, only by embarking on a process of deep reform of the Union, addressing its very nature, it would be possible to re-shape European political parties, getting rid of their "original sin". A (at this time unlikely) comprehensive sovereignty

transfer from the Member States to the Union would determine the inevitable revision of the form of goverment and a spillover effect on the compound entities such as Europarties, whose rethinking would be therefore indispensable. So, desirable adjustments (such as transnational lists or the approval of an EU-wide electoral procedure) and praiseworthy attempts such as the creation of pan-European political movements built up from below (such as "Volt") are/would be no doubt important signs of change, but are likely to be inconclusive for the purpose of creating full-fledged supranational European parties. The Conference for the Future of Europe, which will kick off in May 2021 and should end its work by spring 2022, will hardly give new impetus to the EU federalizing process, since no explicit mention to further integration, sovereignty and federalism is made, for example, in the Joint Declaration on the topic, signed by the Presidents of EU Commission, Parliament and Council. On the contrary, on the basis of official documents published so far, the Conference is in danger of being a on-off exercise aimed at merely showing the intent to closely involve citizens in the long-term discussion on the future of Europe. Its not-unlikely failure, in the opinion of many experts, could even have the opposite effect of strengthening Euroscepticism, thus banishing any prospect of reform with regard to the EU and, therefore, to its supranational party dimension.

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