

ISSN: 2036-5438

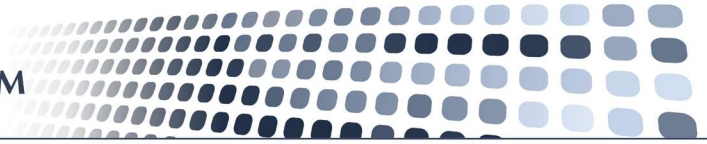
**The 2019 European Parliament elections:  
politically crucial, but without clear institutional effects**

by

Nicola Lupo\*

Perspectives on Federalism, Vol. 11, issue 1, 2019



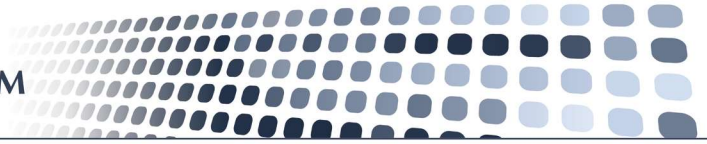


## Abstract

The elections for the European Parliament that will take place on 23-26 May 2019 will most probably disprove the second-order nature of the European elections and invert the steady decline in voter turnout, for the first time since 1979: not only the pace, but also the direction of the future process of European integration is at stake. However, the legal framework governing the electoral and democratic process in the European Union is far from unified and uncertainties and ambiguities are still existing: especially regarding the constitutional convention on the lead candidates, known as *Spitzenkandidaten*, which still appears far from consolidated and is affected by the ambiguous design of the form of government of the European Union.

## Key-words

European Parliament, European Elections, Spitzenkandidaten, Form of Government, Electoral Thresholds, Voter Turnout, Constitutional Convention, Representative Democracy



The elections for the European Parliament have traditionally been considered as second-order elections. This means that both electoral campaigns and voters' motivations have been dominated by the political dynamics existing inside each Member State. The decline of voter turnout, which regularly occurred in elections from 1979 to 2014, also showed the fallacy of the idea that the increase in the powers of the only directly elected EU institution, the European Parliament – an increase that actually took place at every revision of the treaties, from the Single Act until the Treaty of Lisbon – would have solved the democratic problems of the European Union.

Most likely the elections that will take place on 23-26 May 2019 will disprove both the second-order nature of the European elections and the steady decline in voter turnout. For the first time in the political debate at both the European and national levels, the direction and pace of the future process of European integration is at stake. Economic governance, the control of migratory flows, foreign and defence policy are all crucial topics in today's national political debates and will also be pivotal for the European Parliament elections in May. It is easy to foresee that the electoral turnout will for the first time, reverse the trend in terms of voter participation, thus exceeding the percentage of 42.62% reached in 2014 (with very high variations among the member states) (Cfr. Rozenberg 2009: 7; Franklin & Hobolt 2016: 77). This is due, paradoxically, to the conspicuous presence, in almost all the Member States, of Eurosceptic and sovereigntist political parties, as well as – to a lesser extent – to some notable but isolated attempts to give rise to authentic supranational political parties.

Of course, the legal framework governing the electoral and democratic process in the European Union is far from satisfactory and consolidated. Electoral systems, and even the actual days of the week on which voters are called to the polls, are still regulated at the national level, constantly awaiting a 'uniform' European electoral system. Presently, the electoral process must comply with common principles defined in the 'Act concerning the election of the representatives of the Assembly by direct universal suffrage',<sup>1</sup> adopted in 1976 and subsequently amended in 2002 (and again, as explained below, in 2018).

Brexit presented an opportunity to revisit an old idea to seize the UK's 73 seats and attribute all or at least part of them to a single European constituency across transnational lines (Razza 2013; Letta 2017: 137), but this was ultimately rejected. With its resolution of 7



February 2018,<sup>ii</sup> the European Parliament also rejected the option to not assign any of these 73 seats in the next elections. As often happens in Europe, a compromise was reached: 27 of these seats will be redistributed to the currently under-represented Member States, always according to the principle of digressive proportionality<sup>iii</sup> (according to which the more populous Member States are represented by a greater number of MEPs, but still in a way that ensures that each MEP from a more populous Member State represents more citizens than each MEP from a less populous Member State”); while the remaining 46 will not be assigned for the time being (also in anticipation of future new EU accessions).

The same issue of admissibility of thresholds in the electoral systems for the European Parliament gave rise to very different orientations by the constitutional courts of the Member States: the German Federal Constitutional Tribunal declared thresholds set at 5% and then at 3% unconstitutional, while the Czech Republic's Constitutional Court ruled in the opposite direction (Michel 2016: 133; Smekal & Vyhnánek 2016: 148). Indeed, a hint in favour of keeping these thresholds is now based in judgement no. 239/2018 of the Italian Constitutional Court,<sup>iv</sup> where the Court rejected the questions raised by the Council of State about the unreasonableness of the 4% threshold set in the Italian legislation. The Court stated that such thresholds are aimed at reducing fragmentation and at ‘favouring the formation of a political majority in the Assembly’ (Delledonne 2019). Likewise, the adoption, on 13 July 2018, of Council Decision 2018/994/EU, Euratom,<sup>v</sup> amending the Act of Brussels of 1976, makes it mandatory for larger Member States with constituencies electing more than 35 MEPs to set thresholds ranging from 2% to 5%. The Decision is currently subject to the approval of the Member States, according to national constitutional requirements, and if ratified it will apply from the 2024 European elections.

Above all, the constitutional convention on the lead candidates, known as *Spitzenkandidaten* that was applied during the 2014 elections, still appears far from consolidated in its fundamental characteristics and is affected by the ambiguous design of the form of government of the European Union (Schuette 2018; Navarro, Sandri & von Nositz 2018).

Indeed, that constitutional convention, laboriously conceived and developed before the 2014 elections (Peñalver Garcia & Priestley 2015) and implemented with the subsequent formation of the Commission headed by Jean-Claude Juncker, over the last few months has been formally confirmed by the main political forces, who have indicated their own



candidates for the leadership: the German Manfred Weber for the EPP (currently chairman of his political group in the EP); the Dutch Frans Timmermans for socialists (currently vice-president of the European Commission); the German Ska Keller and the Dutch Bas Eickhout for the greens (that already in 2014 had proposed a couple of lead candidates); the Czech Jan Zahradil for the conservatives; the Slovenian Violeta Tomić and the Belgian-Spanish Nico Cué for the European Left (while the Greek Yanis Varoufakis would lead another leftist party, called DiEM25). And the picture is still in progress.

Even from a purely institutional point of view, official documents have not been lacking, although they are not legally binding. On the one hand, the European Parliament's decision of 7 February 2018<sup>VI</sup> - through which the Parliament consented to the review of the framework agreement on relations with the European Commission - established the conditions that must be respected by the European Commissioners who are designated as lead candidates or in any way participate in the European elections. The decision thus recalled the obligations of confidentiality and collegiality and forbidding them to use the Commission's human or material resources, without the need to put themselves on leave. At the same time the decision warned that the European Parliament is 'ready to reject any candidate, in the investiture procedure of the President of the Commission, who has not been appointed *Spitzenkandidat* in view of the European elections'. On the other hand, the European Commission's Recommendation of 14 February 2018 invited every European political party to 'make known the candidate for the function of the President of the European Commission they support', possibly to select him/her 'in an open, inclusive and transparent way' and to announce him/her 'well ahead of the start of the electoral campaign, ideally by the end of 2018'.

However, not all the parties have complied with this invitation and there has been some dissociation. This is particularly relevant because it came from some of the figures that this convention had helped to shape, or at least to put into practice: for instance, Guy Verhofstadt, formerly *Spitzenkandidat* for the liberals in 2014, said that the convention has substantially disappeared (Hersenzhorn 2018) after the recalled rejection of the transnational lists for the European Parliament; and Juncker himself explicitly denied his support (Von Hannelore, Mühlherr & Schiltz 2018) for the prospect of a Commission chaired by Weber, thus keeping his hands free for other possible options, among which is the presidency of Michel Barnier.



The point is that the *Spitzenkandidaten* convention still has a basic ambiguity. It is not clear at all, indeed, whether the convention is analogous to a presidential system, where a sort of popular election of the President of the Commission takes place, and therefore it is necessary to verify which list, and then which lead candidate, has obtained more votes (or more seats in the EP); or whether it is comparable to parliamentary forms of government, where if a lead candidate is able to collect the majority of European Parliament's members in support of a Commission, s/he will chair.

Although the first option is often told, also because it seems to be easier to explain to citizens, the option that appears more likely, and at the same time the most correct from a legal standpoint, is indeed the second one. It is more likely because it is extremely improbable – at least if we stick to the opinion polls – for a single list alone to obtain the majority of seats in the European Parliament. It is the most correct because, as the Italian Constitutional Court recognized (in its already recalled judgment no. 239/2018), in recent years there has been an ‘undoubted transformation into a parliamentary direction of the form of government of the European Union’ (In this sense see also Poptcheva 2019; and more cautiously Shackleton 2017). Additionally, the current electoral legislation for the European Parliament in the Member States is in no way able to outline any kind of “direct” election of the President of the European Commission, which would clearly favour the largest Member States.

It might even be, that the 2019 elections would mark another discontinuity in the traditional European Union arrangements: that is, suggesting European leaders not to promise, as they have sometimes done, what is (at least as for today) impossible, and to show instead that they are more respectful of the ‘composite’ logic underlying the European Union's constitutional system. A logic based on the dynamics of the forms of government in place in the Member States, which in 27 cases out of 28 require a confidence relationship of the Government with at least one branch of the Parliament (Ibrido & Lupu 2018). A logic that relies, also with regards to the form of government of the Union, on the typical mechanisms of parliamentary democracy: being the European Council entrusted with the task of ‘taking into account the elections of the European Parliament’ (Article 17, paragraph 7, TEU) when it identifies the candidate president of the Commission who will then have to be approved by the European Parliament, by a positive vote of the majority of its members (even if the Treaties emphatically speak of ‘election’ by the European Parliament: article 14, paragraph 1, last sentence, and article 17, paragraph 7, TEU).





The democratic problems of the European Union, in order to be properly diagnosed and, hopefully, tackled, require not to promise citizens what the institutional system of the Union cannot deliver, and to clarify as much as possible the political responsibilities of each actor. It is true that the system is indeed complex, but it is not necessarily obscure and incomprehensible. In any case, European citizens will have, in late May, a decisive word. Although it will be neither the only nor the final one, as is natural in a constitutional democracy and in a parliamentary form of government.

---

\* Nicola Lupo is full professor of Public Law at LUISS Guido Carli University, Rome. He is director of the Center for Parliamentary Studies and holder on a Jean Monnet chair on 'Understanding European Representative Democracy'. He coordinates an Erasmus+ Joint Master in Parliamentary Procedures and Legislative Drafting (EUPADRA). This contribution is part of the Horizon2020 project 'Reconciling Europe with its Citizens through Democracy and Rule of Law'(RECONNECT) project. A first version of this article is also available at: <https://reconnect-europe.eu/blog/lupo-epelections-institutionaleffects/>.

<sup>I</sup> Act concerning the election of the representatives of the Assembly by direct universal suffrage, Official Journal L. 278, 8 October 1976. Available at [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:41976X1008\(01\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:41976X1008(01)&from=en).

<sup>II</sup> European Parliament resolution of 7 February 2018 on the composition of the European Parliament. Available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FTEXT%2BTA%2BP8-TA-2018-0029%2B0%2BDOC%2BXML%2BV0%2F%2FEN&language=EN>.

<sup>III</sup> Directorate General for Internal Policies of the Union, The Composition of the European Parliament, IN-DEPTH ANALYSIS for the AFCO Committee, PE583.117- February 2017. Available at [http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/583117/IPOL\\_IDA%282017%29583117\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/583117/IPOL_IDA%282017%29583117_EN.pdf).

<sup>IV</sup> Italian Constitutional Court, judgement no. 239, 25 October 2018. Available at <https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2018&numero=239>.

<sup>V</sup> COUNCIL DECISION (EU, Euratom) 2018/994 of 13 July 2018 amending the Act concerning the election of the members of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32018D0994&from=EN>.

<sup>VI</sup> European Parliament resolution of 7 February 2018 on the composition of the European Parliament. Available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FTEXT%2BTA%2BP8-TA-2018-0029%2B0%2BDOC%2BXML%2BV0%2F%2FEN&language=EN>.

## References

- Delledonne Giacomo, 2019, 'Rationalising political representation within the European Parliament: the Italian Constitutional Court rules on the threshold for the European elections', *Verfassungsblog*, 11 January 2019. Available at <https://verfassungsblog.de/rationalising-political-representation-within-the-european-parliament-the-italian-constitutional-court-rules-on-the-threshold-for-the-european-elections/>.
- Franklin Mark & Sara B. Hobolt, 2016, 'How Elections to the European Parliament Depress Turnout', in Wouter Van Der Brug & Claes H. De Vreese (eds), *(Un)intended Consequences of European Parliamentary Elections*, OUP, Oxford.
- Hersenzhorn David M., 2018, 'Guy Verhofstadt stands his ground. As Rutte and Macron work toward new political alliance, the liberal leader targets nationalists', *Politico*, 15 October 2018. Available at



<https://www.politico.eu/article/guy-verhofstadt-stands-his-ground-alde-nationalism-european-elections-spitzenkandidat/>.

- Ibrido Renato & Lupo Nicola (eds), 2018, *Dinamiche della forma di governo tra Unione europea e Stati membri*, Il mulino, Bologna.
- Letta Enrico, 2017, *Contro venti e maree. Idee sull'Europa e sull'Italia*, Il mulino, Bologna.
- Michel Bastian, 2016, 'Thresholds for the European Parliament Elections in Germany Declared Unconstitutional Twice', *European Constitutional Law Review*, XII(1): 133-147.
- Navarro Julien, Sandri Giulia & von Nostitz Felix, 2018, 'The Spitzenkandidaten System: Democratic Innovation or Window Dressing?', *Reconnect-europe*, 27 December 2018. Available at <https://reconnect-europe.eu/blog/spitzenkandidaten-system/>.
- Peñalver Garcia Nereo & Priestley Julian, 2015, *The making of a European President*, Palgrave, London.
- Poptcheva Eva-Maria, 2019, 'Parliamentary Oversight: Challenges Facing Scrutiny Classic Instruments and the Emergence of New Forms of "Steering" Scrutiny', in Costa Olivier (ed), *The European Parliament in times of EU crisis. Dynamics and Transformations*, Palgrave, Cham.
- Razza Andrea, 2013, 'Liste transnazionali e procedura elettorale uniforme: verso una "legge elettorale europea"', *Rassegna parlamentare*, LV(4): 881-908.
- Rozenberg, Olivier, 2009, 'L'influence du Parlement Européen et l'indifférence de ses électeurs: une corrélation fallacieuse?', *Politique européenne*, (2): 7-36.
- Schuette Leonard, 2018, 'European Parliament elections 2019: The litmus test for the *Spitzenkandidaten* process', *Reconnect*, 12 December 2018. Available at <https://reconnect-europe.eu/blog/spitzenkandidaten-european-parliament-elections/>.
- Shackleton Michael, 2017, 'Transforming representative democracy in the EU? The role of the European Parliament', *Journal of European Integration*, XXXIX(2): 191-205.
- Smekal Hubert & Vyhnánek Ladislav, 2016, 'Equal voting power under scrutiny: Czech Constitutional Court on the 5% threshold in the 2014 European Parliament Elections', *European Constitutional Law Review*, XII(1): 148-163.
- Von Hannelore Croll, Mülherr Silke & Schiltz Christoph B., 2018, "We shouldn't agree with the populists, but confront them instead", *Welt*, 30 December 2018. Available at <https://www.welt.de/politik/ausland/article186298844/Jean-Claude-Juncker-We-shouldn-t-agree-with-the-populists-but-confront-them-instead.html>.