

## The Form of Government of the European Union in the Composite European Constitution

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**T**HE CONCEPT OF form of government is employed very frequently in Italian constitutional law. According to the predominant definition, it refers to the norms, written and unwritten, regarding the way in which the function of political direction is distributed amongst the different constitutional bodies. It is a prescriptive concept and a necessary element of every modern constitution. However, the form of government of the European Union is not easy to identify and in search of a definition. Over the years, scholarship has proposed all the usual suspects to classify the EU's form of government: parliamentary, or at least quasi-parliamentary; semi-presidential, according to the French model; presidential, with separation of powers; and even directorial, following the Swiss example.

This contribution analyzes the different options, in light of the provisions of the Treaties, especially Articles 10, 15 and 17 TEU, taking into consideration the most recent developments regarding the relationship between the European Union's political institutions after the 2019 elections and the apparent failure of the *Spitzenkandidaten* constitutional convention. It is then argued, relying on the

concept of the composite European constitution elaborated by Leonard Besselink, that the EU's form of government can be defined only by including the forms of government of the Member States, in their common elements, among which the existence of a confidence relationship between the executive and the parliament stands out. Because of the structural intertwining between the European Union form of government and those of the Member States, the EU's form of government may be described as a 'Euro-national parliamentary system'.

### 1. The concept of 'form of government'

This contribution is based on the concept of form of government. It is a concept employed commonly in Italian constitutional law. According to the traditional and still predominant definition it refers to the way in which the power of political direction, *indirizzo politico*,<sup>1</sup> is distributed amongst the different constitutional bodies.<sup>2</sup> In other words, through the form of government, the institutional system is analyzed by trying to identify the norms – established in the Constitution, but also in institutional practice, mainly through constitutional conventions – that govern the setting up and the formation of the political direction: the way in which the main public policies are designed, in particular between the Government, the Parliament and of course the citizens in their role as voters in general elections. It also includes the more indirect influence exercised by the other constitu-

<sup>1</sup> On this notion, see V. Crisafulli, *Per una teoria giuridica dell'indirizzo politico*, in *Studi urbinati* (1939) p. 53 ff. and more recently (also for further references) C. Tripodina, 'L'"indirizzo politico" nella dottrina costituzionale al tempo del fascismo', (2018) (1) *Revista AIC*, p. 1-54; A. Morrone, 'Indirizzo politico e attività di governo. Tracce per un percorso di ricostruzione teorica', 38(1) *Quaderni costituzionali* (2018), p. 17 ff.; A. de Crescenzo, *Indirizzo politico. Una categoria tra complessità e trasformazione* (Editoriale scientifica 2020) espec. p. 27 ff. See also the chapter by Ernst Hirsch Ballin in this volume.

<sup>2</sup> See C. Mortati, *Le forme di governo. Lezioni* (Cedam 1973) p. 74 ff. On Mortati's thought see, in English language, M. Croce & M. Goldoni, *The Legacy of Pluralism: The Continental Jurisprudence of Santi Romano, Carl Schmitt, and Costantino Mortati* (Stanford University Press 2020) espec. p. 136 ff.

tional bodies, called upon to verify that the political direction so determined does not infringe the Constitution, namely the President of the Republic and the Constitutional Court.

Defining the form of government is one of the essential tasks of every constitution: in accordance with the principle of separation of powers, it is up to the constitution to determine which are the powers of each constitutional body and through which procedures each of them contributes to the setting and implementation of the general political direction. The concept is also an essential instrument for comparative constitutional law scholars, as the executive-legislative relationship is, as it is well known, one of the elements used to classify the different constitutions around the world.

Consequently, the concept of form of government usually appears as a title of at least one of the chapters of every textbook of Italian public or constitutional law, and often also as a general title of comparative constitutional or public law textbooks, in line with a tradition inaugurated by Costantino Mortati.<sup>3</sup> Since 1999, the expression has even been codified by the Italian Constitution, in Article 123, which states that the regional statutes, i.e. the fundamental charters of the fifteen ordinary regions, approved by regional law, shall lay down the regional form of government.<sup>4</sup> All this means that the concept is both a diffused heuristic instrument and part of positive law, thus substantially unavoidable.

At the same time, the concept of form of government is still rather controversial, as it oscillates between analysis and prescription, between factual and normative elements. The insertion into its definition and classification of elements that are not strictly part of the

<sup>3</sup> Mortati, n. 2 above. More recently see, among others, C. Pinelli, *Forme di Stato e forme di governo. Corso di diritto costituzionale comparato* (2nd ed., Jovene 2009); G. Amato & F. Clementi, *Forme di Stato e forme di governo* (2nd ed., Il mulino 2012); M. Volpi, *Libertà e autorità. La classificazione delle forme di Stato e delle forme di governo* (Giappichelli 2018).

<sup>4</sup> See, also for further bibliography, C. Fasone & G. Piccirilli, 'The new "form of government" in the reforms of the Italian regional system', in E. Arban, G. Martinico & F. Palermo (eds), *Federalism and Constitutional Law. The Italian Contribution to Comparative Regionalism* (Routledge 2021, in press).

institutional setting, such as the party system, also benefitting from studies of political science, has been very useful.<sup>5</sup> However, more recently there have been attempts to return to a strictly legal concept; the reasoning behind the refusal to recognize the role of the parties and of other social elements as part of the legal model (the form) is that the concept needs to be isolated in order to identify which of its elements are stable and prescriptive.<sup>6</sup>

It has been doubted whether the concept can be applied to the European Union institutional system. Many scholars have argued that because the EU does not have all the characteristics of a state and lacks a proper constitution, it would not be correct to make use of the concept of the form of government.<sup>7</sup> However, its use seems to have been ‘authorized’ recently by the Italian Constitutional Court. With regard to the relationship between the European Commission and the European Parliament, the Court in a decision regarding the thresholds for the European Parliament’s elections noted ‘the undoubted transformation of the *form of government* of the European Union towards parliamentary government’.<sup>8</sup>

<sup>5</sup> See L. Elia, ‘Forme di governo’, in *Enciclopedia del diritto*, vol. XIX (Giuffrè 1970) p. 635 ff., who explicitly relied on the theories of the party system by Duverger and Sartori. On his influence see espec. M. Volpi, ‘Le forme di governo nel pensiero di Leopoldo Elia’, (2019) (special issue) *Diritto pubblico comparato ed europeo*, p. 821 ff.

<sup>6</sup> See M. Luciani, ‘Governo (forme di)’, in *Enciclopedia del diritto. Annali*, vol. III (Giuffrè 2010) p. 538 ff., espec. 565 ff.

<sup>7</sup> The debate is summarized by R. Ibrido & N. Lupo, “‘Forma di governo’ e “indirizzo politico”: la loro discussa applicabilità all’Unione europea”, in R. Ibrido & N. Lupo (eds), *Dinamiche della forma di governo tra Unione europea e Stati membri* (Il mulino 2018) p. 9 ff., espec. 16 ff.

<sup>8</sup> See judgment no. 239/2018, par. 6.5, in the official translation provided by the Constitutional Court, emphasis added. On it see, with different positions, G. DelleDonne, “‘A Goal that applies to the European Parliament no differently from how it applies to National Parliaments’: The Italian Constitutional Court vindicates the 4% Threshold for European Elections”, 15(2) *European Constitutional Law Review* (2019), p. 376-389; A. Antonuzzo & N. Lupo, ‘The thresholds for the EP elections: the EU Electoral Act, national legislation and the case-law of Constitutional Courts’, in T. Marguery, S. Platon & H. Van Eijken (eds), *Les élections européennes 40 ans après. Bilans, enjeux et perspectives. The European Elections, 40 Years Later. Assessment, Issues and Prospects* (Bruylant 2020), p. 119-146.

## 2. The uncertain classification of the form of government of the European Union and the *Spitzenkandidaten* attempted constitutional convention

The form of government of the European Union is not easy to classify and is still in search of a definition. So much so that scholarship over the years has, legitimately, proposed for it almost all possible classifications in use for forms of government: parliamentary, or at least quasi-parliamentary;<sup>9</sup> semi-presidential, according to the French model;<sup>10</sup> presidential, or at least separation of powers;<sup>11</sup> and even directorial;<sup>12</sup> or, with a new expression, semi-parliamentary.<sup>13</sup>

<sup>9</sup> For the juxtaposition of EU institutional arrangements with a form of 'quasi-parliamentary' or 'semi-parliamentary' government, see A. Manzella, 'L'identità costituzionale dell'Unione europea', in *Studi in onore di Leopoldo Elia*, vol. II (Giuffrè 1999) p. 923 ff., espec. 949; S. Hix, *What's Wrong with the Europe Union and How to Fix It* (Polity 2008), espec. p. 155 ff.; P. Magette, 'L'Union européenne: un regime semi-parlementaire', in P. Delwit, J.M. De Waele & P. Magette (eds), *A quoi sert le Parlement européen?* (Complexe 1999), p. 25 ff.; M. Frau, 'La forma di governo dell'Unione nel trattato che adotta una Costituzione per l'Europa' in L. Spadacini & M. Frau, *Governare l'Unione europea. Dinamiche e prospettive istituzionali* (Rubbettino 2006), p. 75 ff.

<sup>10</sup> In this sense, see G. De Vergottini, 'Forma di governo dell'Unione europea', in *XXI Secolo* (Treccani 2009) available at [treccani.it/enciclopedia/forma-di-governo-dell-unione-europea\\_%28XXI-Secolo%29/](http://treccani.it/enciclopedia/forma-di-governo-dell-unione-europea_%28XXI-Secolo%29/), although showing how the treaties allow the experience to concretely opt for varied solutions. And, more recently, in the light of what happened after the 2019 EP elections, J.H. Reestman & L.F.M. Besselink, 'Editorial. Spitzenkandidaten and the European Union's system of government', 15(4) *European Constitutional Law Review* (2019), p. 609 ff., espec. 611.

<sup>11</sup> See, among others, A. Kreppel, 'Looking 'Up', 'Down' and 'Sideways': Understanding EU Institutions in Context', 34(1) *West European Politics* (2011), p. 167-179, espec. p. 169 ff., and S. Fabbrini, *Which European Union?* (Cambridge University Press 2015), espec. p. 168 ff. and p. 177 ff.

<sup>12</sup> See T.E. Frosini, 'La dimensione europea della forma di stato e di governo', 10(5) *federalismi.it* (2012), p. 1-6.

<sup>13</sup> See P. Dann, 'European Parliament and Executive Federalism: Approaching a Parliament in a Semi-Parliamentary Democracy', 9(5) *European Law Journal* (2003), p. 549 ff., espec. p. 572 ff. See also, excluding that the EU system of government belongs to any of the traditional models, D. Praino, 'A new system of government? Defining the confidence relationship of the EU model', 39(3) *Journal of European Integration* (2017), p. 319 ff., espec. 327 ff.

Between the 19th and early 20th centuries many Member States witnessed a development towards a parliamentary form of government,<sup>14</sup> which has relied more on political practice than on the text of the constitutional documents. More specifically, Italian constitutional history shows that when the Albertine Statute was in force, from 1848 to 1922, Italy's form of government was also in search of a definition, straddled as it was between a constitutional charter that provided for a pure monarchical-constitutional regime, i.e. a pure separation of the powers system, and a series of behaviours and practices that pushed in the direction of parliamentary (or 'pseudo-parliamentary')<sup>15</sup> government, characterized by the necessary confidence relationship between the Government and the Chamber of Deputies.<sup>16</sup> The form of government of early Italy thus gave rise to a tension that was never fully resolved, of which in the end the same Albertine Statute was a victim: precisely due to this ambiguity, the fascist party was able to seize power in 1922.

In the European Union, in an institutional framework at least as ambiguous as that of early Italy, the 2019 elections of the European Parliament were a kind of litmus test for the so-called *Spitzenkandidaten* mechanism.<sup>17</sup> This mechanism – a constitutional convention *in nuce* according to some, or a (precarious) 'political convention'

<sup>14</sup> As recalled by Reestman and Besselink, *Editorial*, n. 10 above, p. 609.

<sup>15</sup> See G. Maranini, *Storia del potere in Italia (1848-1967)* (2nd ed., Nuova Guaraldi 1983), espec. p. 95 ff.

<sup>16</sup> On the genesis of confidence procedures in the era of the Albertine Statute, see F. Rossi, *Saggio sul sistema politico dell'Italia liberale. Procedure fiduciarie e sistema dei partiti fra Otto e Novecento* (Rubbettino 2001), espec. p. 23 ff.; M. Belletti, *Forma di governo parlamentare e scioglimento delle Camere. Dallo Statuto Albertino alla Costituzione repubblicana* (Cedam 2008), espec. p. 91 ff.; and R. Ferrari Zumbini, 'La Torino del 1848-49 come laboratorio costituzionale: la nascita spontanea della fiducia parlamentare', (2016) (2) *Le carte e la storia*, p. 75 ff.

<sup>17</sup> In the run-up to the election see N. Lupo, 'The 2019 European Parliament elections: politically crucial, but without clear institutional effects', 11(1) *Perspectives on Federalism* (2019), p. 103 ff. In a not too dissimilar sense, speaking of a constitutional custom, currently *in statu nascendi*, see C. Curti Gialdino, 'L'elezione di Jean-Claude Juncker a presidente della Commissione europea: profili giuridico-istituzionali', in B. Caravita (ed.), *Le elezioni del Parlamento europeo del 2014* (Jovene 2015), p. 29 ff., espec. 71 ff.

according to others<sup>18</sup> – aimed at making the presidency of the European Commission dependent on a comparison between the election results of the major European political parties, who had nominated ‘lead candidates’ for that function. This mechanism, which had long been proposed in the political and doctrinal debates, found its first application in the 2014 European elections, in which the European People’s Party obtained a relative majority of votes, and the subsequent formation of the Commission presided by Jean-Claude Juncker, previously identified as the *Spitzenkandidat* of that party.<sup>19</sup>

This precarious constitutional or political convention was renewed on the eve of the 2019 elections by the European Parliament by the adoption of a special resolution<sup>20</sup> and supported by almost all the main political forces in the field. But it did not pass the test of the

<sup>18</sup> Cf. L.F.M. Besselink, ‘Introduction: A Directly Elected European Parliament’, in T. Marguery, S. Platon & H. Van Eijken (eds), *Les élections européennes 40 ans après*, cit., p. 9 ff., espec. 14.

<sup>19</sup> On the genesis of the *Spitzenkandidaten*, J. Priestley & N. Peñalver García, *The Making of a European President* (Palgrave MacMillan 2015). On its first effects: S.B. Hobolt, ‘A Vote for the President? The Role of Spitzenkandidaten in the 2014 European Parliament Elections’, 21(10) *Journal of European Public Policy* (2014), p. 1528 ff.; C. Antpöhler, ‘Enhancing European Democracy in Times of Crisis? The Proposal to Politicise the Election of the European Commission’s President’, in F. Fabbri, E. Hirsch Ballin & H. Somsen (eds), *What Form of Government for the European Union and the Eurozone* (Hart 2015), p. 217 ff.; M. Goldoni, ‘Politicising EU Lawmaking? The Spitzenkandidaten Experiment as a Cautionary Tale’, 22(3) *European Law Journal* (2016), p. 279 ff.; T. Christiansen, ‘After the Spitzenkandidaten: fundamental change in the EU’s political system?’, 39(5) *West European Politics* (2016), p. 992 ff.; H. Kassim, ‘What’s new? A first appraisal of the Juncker Commission’, 16(1) *European Political Science* (2017), p. 14 ff. After the 2019 elections: T. Christiansen & M. Shackleton, ‘Spitzenkandidaten 2.0: From experiment to routine in European elections?’, in L. De Sio, M.N. Franklin & L. Russo (eds), *The European Parliament Elections of 2019* (Luiss University Press 2019), p. 43 ff.; K. Raube, ‘From dawn to doom: the institutionalization of the Spitzenkandidaten process during European elections and its final negation’, in S. Kritzinger et al. (eds), *Assessing the 2019 European Parliament Elections* (Routledge 2020); D. Fromage, ‘The Spitzenkandidaten procedure for the election of the European Commission President: a critical view’, in T. Marguery, S. Platon & H. Van Eijken (eds), *Les élections européennes 40 ans après*, cit., p. 169 ff.

<sup>20</sup> See the Gonzales Pons resolution, adopted on 7 February 2018. See also the recommendation of 14 February 2018 of the European Commission.

post-election period. The outcome derived also from its ambiguity, between a more majoritarian reading (where the lead candidate of the party that takes the most votes or a plurality of seats is deemed ‘elected’) and one of a more consensual type (where the lead candidate who receives the backing of an absolute majority of seats in the EP is ‘elected’). Instead of one of the several *Spitzenkandidaten* that had been put in place before the elections, Ursula von der Leyen became President of the Commission.

With the so-called ‘election’ of Ursula von der Leyen as President of the Commission, held by secret ballot on 16 July 2019 (383 votes in favor, 374 being the required half-plus-one of the members), the newly elected European Parliament thus betrayed the commitment made by its predecessor not to elect anyone not included among the *Spitzenkandidaten*. Nevertheless, the fact that the President chosen has the same nationality and is of the same European political party as *Spitzenkandidat* Manfred Weber of the EPP (the party that won the largest amount of seats in the elections), together with nomination of two other *Spitzenkandidaten*, Frans Timmermans and Margrethe Vestager, in the new Commission, both as executive Vice-Presidents, has led some authors to argue that the *Spitzenkandidaten* principle instead of being ‘denied’, has merely been ‘remodelled’ into a more pragmatic and consensual reading.<sup>21</sup>

After this experience, however, how should the European Union form of government be classified? This is the question that is addressed in the following paragraphs.

### 3. The end of the European Union parliamentary form of government?

A first and superficial analysis might lead to the conclusion that the failure – or at least the suspension<sup>22</sup> – to implement the *Spitzenkan-*

<sup>21</sup> See N. Verola, *Il punto di incontro. Il negoziato nell’Unione europea* (Luiss University Press 2020), espec. p. 25 ff.

<sup>22</sup> See M. Westlake, ‘Ils ne sont pas différents, ils sont à peu près les mêmes...?’ Dynamiques interinstitutionnelles post-2019 dans l’Union européenne’, (2020, no.



*didaten* principle in 2019 and to ensure a kind of direct legitimacy to the President of the Commission, has halted the Union's evolution towards a form of parliamentary government.<sup>23</sup> This analysis has led to a reading of the form of government of the European Union in terms of a rigid separation of powers, thus accentuating the role of the European Council and the intergovernmental dimension of the Union, also in the appointment of the Commission.<sup>24</sup> This would encourage the pursuit, in the future, of a long-sustained option of disengaging the Commission from the European Parliament, qualifying it as a high-level administrative structure serving the European Council, whose President, *de iure condendo*, should be the one to be directly legitimized by the citizens at European level.<sup>25</sup>

However, the overall picture seems rather different. Instead of halting the transformation of the European Union's form of government in a parliamentary direction, the failure to implement the *Spitzenkandidaten* mechanism in 2019 seems to have accelerated and at the same time adjusted that transformation. This by veering the EU away from the 'Prime Minister' variant of the parliamentary form of government,<sup>26</sup> and consequently by abandoning the idea

637) *Revue de l'Union européenne*, p. 238 ff., spec. p. 243 ff., who quotes von der Leyen's speech on 16 July 2019, where she committed to improving the *Spitzenkandidaten* mechanism for the future.

<sup>23</sup> Cf. G.E. Vigevani, 'Dalle elezioni europee alla scelta del presidente della Commissione: brevissime note sull'evoluzione della forma di governo europea', 39(4) *Quaderni costituzionali* (2019), p. 917 ff.

<sup>24</sup> Cf. S. Fabbrini, 'Institutions and Decision-Making in the EU', in R. Coman, A. Crespy & V.A. Schmidt (eds), *Government and Politics in the Post-Crisis European Union* (Cambridge University Press 2020), p. 54 ff., espec. 65.

<sup>25</sup> This is, in particular, the option long indicated, albeit with different formulations, in S. Fabbrini, *Sdoppiamento. Una prospettiva nuova per l'Europa* (Laterza, 2017), espec. p. 155 ff.), imagining a ballot mechanism between two candidates for the post of President of the European Council (renamed 'European Presidency'), entrusted to large electors gathered in national constituencies, each equal to the number of MEPs elected in each Member State.

<sup>26</sup> In the sense of calling for an evolution of this kind, giving European citizens a second vote for the President of the European Commission, see M. Dawson, 'Should the EU Think Twice Before Dumping its Spitzenkandidaten?', *Verfassungsblog* 30

that the Prime Minister should be directly legitimized by the citizens. Instead, the European Union is opting for a form of government that is properly parliamentary, be it that it in some respects resembles a parliamentary government with a presidential corrective (considering the European Council as a sort of powerful collective head of state);<sup>27</sup> in other respects, particularly where it calls on the Commission to build its parliamentary majority measure by measure, independently from any ideological or party lines, it even seems to strike a vein of a *gouvernement d'assemblée*.<sup>28</sup>

It should not be forgotten that there are many variations in the structure of the relations between the parliament, the government and the citizens in the context of parliamentary forms of government. The degree of 'rationalization' of the parliamentary form of government<sup>29</sup> varies greatly, moving from properly semi-presidential systems to much more uncertain semi-presidentialisms;<sup>30</sup> from majority models to consensual models;<sup>31</sup> and from 'chancellorship' models to those in which the head of government is little more than a *primus inter pares*. Not everywhere 'in parliamentary systems, parliamentary

May 2019, [verfassungsblog.de/should-the-eu-think-twice-before-dumping-its-spitzenkandidaten/](https://verfassungsblog.de/should-the-eu-think-twice-before-dumping-its-spitzenkandidaten/).

<sup>27</sup> In this sense, see A. Manzella, 'Nell'emergenza, la forma di governo dell'Unione', 16(5) *Astrid-Rassegna* (2020). See also, before the 2019 elections, Praino, 'A new system of government?', cit., p. 330, referring to "a 'Council based' form of government with parliamentary features", in which "the European Council plays a relevant role in the confidence scheme".

<sup>28</sup> As argued in N. Lupo, 'La forma di governo dell'Unione, dopo le elezioni europee del maggio 2019', *Consulta Online* 9 March 2020. In a similar sense, cf. G. Vilella, *E-Democracy. Dove ci porta la democrazia digitale* (Pendragon 2020), p. 58 ff.

<sup>29</sup> On the concept of "rationalised parliamentarism" see B. Mirkin-Guetzevitch, *Les Constitutions de l'Europe Nouvelle* (Delagrave 1928), p. 13 ff. and 22 ff.

<sup>30</sup> For a recent recap see T. Raunio & T. Sedelius, *Semi-Presidential Policy-Making in Europe* (Palgrave Macmillan 2020), espec. p. 45 ff.

<sup>31</sup> Highlighting the consensual nature of European democratic dynamics, as developed in the aftermath of the 2019 elections, see M. Dawson, 'The lost Spitzenkandidaten and the future of European democracy', 26(6) *Maastricht Journal of European and Comparative Law* (2019), p. 731-735, and S. Bendjaballah, S. Novak & O. Rozenberg, 'Uni par l'adversité? Le consensus au Parlement européen', (2020, no. 637) *Revue de l'Union européenne*, cit., p. 220 ff.

elections not only determine the composition of parliament, but also of the government', and not always 'parliamentary elections also decide who becomes prime minister though not always in an equally straightforward manner, of course'.<sup>32</sup> It suffices to refer to the Italian governments formed in the last two legislative terms (since 2013) to disprove such notions.

The Von der Leyen Commission, in fact, appears to be more dependent on the internal balances of the European Parliament than previous Commissions. Of course, these internal balances of the European Parliament have their own peculiarities, and they are deeply affected not only by the political orientation of parliamentary groups, but also by the MEPs' election in the different Member States – this is not very different, however, from what is happening in federal states. Along this logic, it would certainly have benefited the good functioning of the relationship between the European Parliament and the Commission to allocate a share of the seats left free after Brexit through transnational lists. An opportunity that, as is well known, has not been seized, but which could soon resurface, and which would allow a share of MEPs to be institutionally called to take charge, similar to what is happening to the Commission, of the general interest of the Union.<sup>33</sup>

On the other hand, it is undeniable that the European Council, in the process of appointing the top positions of the European institutions, has in this case reaffirmed its role, albeit at the cost of long negotiations. Indeed, it should also be acknowledged that the 2019 European Parliament elections in itself did not provide univocal indications to appoint someone to the top of the various European institutions. If elections in a parliamentary regime give no party the absolute majority of the seats – as it happens frequently where proportional electoral systems are in place – voters are essentially restricted to

<sup>32</sup> In this sense, instead, Reestman & Besselink, 'Editorial', cit., p. 611.

<sup>33</sup> See the resolution passed by the European Parliament on 7 February 2018, which excluded the idea of the establishment of a "transnational constituency", from the borders coinciding with those of the Union, in which at least some of the 73 seats intended to be freed as a result of Brexit, were excluded.

handing out the cards and decisions are then taken by their representatives. In the case of the EU, those representatives not only are the MEPs, but also the heads of government and the heads of state convened in the European Council, who also have a popular mandate, indirectly or directly, and whose role increases when the electoral results do not designate a clear parliamentary majority – like the role of a head of state may increase in parliamentary forms of government in case of a stalemate.

The events that followed the 2019 European Parliament elections thus do indeed point to a reaffirmation of the ‘undoubted transformation of the form of government of the European Union towards parliamentary government’.<sup>34</sup> However, to see this, one needs to abandon the simplistic narrative aimed at obtaining ‘a President directly legitimized by European voters’ and recognize that in the complex democracy of the European Union, alongside the channel centered on the European elections, there is another parallel representative channel, which relies on the forms of government of the Member States (Article 10 (2) TEU). This channel obviously finds its core in the Council, in its various formations, and in the European Council, whose democratic legitimacy, as stated by the same Article, derives from parliaments and citizens of each Member State.

#### 4. The Member States’ forms of government in the composite European constitution: the Euro-national parliamentary system

That the forms of government of the Member States should be included in the qualification of the EU form of government, seems fully consistent with the approach suggested by Leonard Besselink’s concept of the *composite European constitution*.

If ‘the European constitution is more than the constitution of the organization entitled the EU’, as ‘it also includes the constitutions of

<sup>34</sup> To make use, again, of the words as employed by the Italian Constitutional Court in the already mentioned judgment No. 239 of 2018.

the Member States',<sup>35</sup> why should the form of government of the European Union be based only on the executive-legislative relation on the EU level, without including the Member States' dynamics? And why should the citizens be considered relevant in determining the general direction of the European Union only when they vote for electing the European Parliament?

If the definition of the form of government is a mandatory content of every Constitution, and this is the position taken here, then it is clear that the form of government of the European Union needs to be drawn not only from the elements deriving from the Treaties and from the behavior of the European Union institutions, but also from legal provisions and political-institutional balances existing in the Member States.

Besselink's theory has addressed not only the principles and norms that concern the sources of law (with regard to the primacy of EU law) and those that concern the protection of fundamental rights, but also aspects of the institutional life of the European Union, such as the role of national parliaments. Regarding the latter, Besselink has in particular shown how, 'while parliaments continue to operate within the prevailing multi-level paradigm, mostly thinking and acting within a level which is separate from the European Union level, the executive has long overcome this approach, and thus in many cases successfully avoids effective parliamentary oversight'.<sup>36</sup> And he argued, a bit further on in the text, that 'the notion of a composite constitution can bring a fresh look at things', because 'if national parliaments are part of a greater constitutional whole than the microcosm of the national constitutional system, then the potential role of national parliaments becomes considerably greater'.<sup>37</sup>

By widening the analysis and regarding not only the national parliaments but, more generally also the national forms of government as elements of the composite European constitution, we may

<sup>35</sup> Cf. L.F.M. Besselink, *A Composite European Constitution* (Europa Law Publishing 2007), p. 4.

<sup>36</sup> Cf. Besselink, *A Composite European Constitution*, cit., p. 18.

<sup>37</sup> Ibid.

perhaps even bring Besselink's argument a little further. In the composite European constitution, the national parliaments are not only entitled to exercise a series of European powers, but they also play a more indirect role in the Union polity. It is more broadly that the national forms of government have to be deemed as constitutive elements of the European Union's form of government. In other words, it is necessary to consider that 'under the current circumstances the democratic legitimacy of the Union is *composite* in nature'<sup>38</sup> and that the European Union and national forms of government are structurally intertwined.

If this is so, it means, on the one hand, that the general political direction of the European Union is not only determined by the inter-institutional dynamics between the European Union institutions after the elections for the European Parliament, but also by the inter-institutional dynamics in each of the Member States in the light of national elections. Additionally, on the other side, the legitimacy<sup>39</sup> and the accountability<sup>40</sup> of European Union inter-governmental institutions derive from national institutions' dynamics and, more precisely, from national forms of government.

<sup>38</sup> Cf. L.F.M. Besselink, 'The Place of National Parliaments within the European Constitutional Order', in N. Lupo & C. Fasone (eds), *Interparliamentary Cooperation in the Composite European Constitution* (Hart 2016), p. 23 ff., espec. p. 37.

<sup>39</sup> Cf. L.F.M. Besselink, 'EU Constitutionalism and National Parliaments. Insiders or Outsiders?', in D. Jančić (ed.), *National Parliaments after the Lisbon Treaty and the Euro Crisis. Resilience of Resignation?* (Oxford University Press 2017), p. 25 ff.

<sup>40</sup> It was indeed Besselink who noted that mechanisms of political accountability "functions exclusively within the national political system", and that, in the Netherlands, "the minister or under-secretary of state is asked to account for what he has done or failed to do as representative of the Netherlands in the Council": cf. Besselink, *A Composite European Constitution*, cit., p. 17. P.L. Lindseth, *Power and Legitimacy. Reconciling Europe and the Nation-State* (Oxford University Press 2010), espec. p. 21 ff., insists on the fact that the legitimacy of the European Union regulatory power is still based on the "historically constituted bodies in the nation-state". For a recent overview on mechanisms of parliamentary control and political accountability in the EU and its Member States see E. Griglio, *Parliamentary Oversight of the Executives. Tools and Procedures in Europe* (Hart 2020), espec. p. 182 ff.

Both conclusions can indeed be inferred from a provision of the Treaties which is ‘hardly even commented in EU law textbook’<sup>41</sup> or is often reduced to an obvious statement. That is Article 10(2) TEU, already referred to, which affirms 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’. In this way, the Treaties, in full consistency with the composite constitution’s approach, recognize the national forms of government as constitutive elements of the EU’s form of government, as the legitimacy and the accountability of the intergovernmental institutions, the European Council and the Council, derive from the democratic processes taking place at national level.

Of course, this is not the place for conducting a comparative analysis of the forms of government of the 27 Member States.<sup>42</sup> What can be noted, however, on the basis of a rapid survey, is that a confidence relationship between the government and at least one branch of the parliament is required in 26 of the 27 Member States of the Union.<sup>43</sup> The only exception is Cyprus, a country that has adopted a classically presidential form of government, based on the strict separation between the President, directly elected by the electoral body, and Parliament.<sup>44</sup>

<sup>41</sup> As remarked by Besselink, ‘EU Constitutionalism and National Parliaments. Insiders or Outsiders?’, cit., p. 30.

<sup>42</sup> See L.F.M. Besselink et al. (eds), *Constitutional Law of the EU Member States* (Kluwer 2014).

<sup>43</sup> See R. Ibrido, ‘L’evoluzione della forma di governo parlamentare alla luce dell’esperienza costituzionale dei sei Stati fondatori’, in R. Ibrido & N. Lupo (eds), *Dinamiche della forma di governo tra Unione europea e Stati membri*, cit., p. 57 ff.; F. Clementi, ‘La V Repubblica francese e il ciclo di razionalizzazioni degli anni Settanta’, *ivi*, p. 85 ff.; M. Olivetti, ‘Il regime parlamentare nell’Europa centro-orientale dopo il 1989’, *ivi*, p. 113 ff.

<sup>44</sup> See A. Markides, ‘The Republic of Cyprus’, in Besselink et al. (eds), *Constitutional Law of the EU Member States*, cit., p. 249 ff., espec. 277 ff. (noting that the tenure in office of ministers, although “appointed and dismissed at will by the president”, also depends on a vote of confidence or censure by the House of Representatives”).

If we add that all six founding Member States were characterized, at the time, by a parliamentary form of government, it is possible to deduce that the relation of confidence between the government and the parliament seems to be a sort of ‘constitutional tradition’ in the European Union. And that the entire institutional architecture provided for by the Treaties as well as the models for the implementation of EU law presuppose, for their orderly functioning, the existence of a confidence relationship between the parliament and the government within the Member States, in order to ensure fully, although indirectly, the legitimacy and the accountability provided by Article 10 TEU.<sup>45</sup>

Up to a certain extent, then, the involvement of the European Council in the formation process of the Commission can be explained precisely relying on the constitutional tradition of parliamentary government in the Member States, which requires some kind of connection also with the political directions determined at national level, especially when the political direction derived from the European Parliament election is not particularly self-evident.

## 5. Conclusion

In the light of the composite constitution’s approach it should be clear that the EU’s form of government, while clearly placed among the parliamentary systems, especially for what concerns the day-to-day relationship between the European Parliament and the Commission,<sup>46</sup> maintains a strong atypical position and perhaps is best qualified as a ‘Euro-national parliamentary system’.<sup>47</sup> This formula refers

<sup>45</sup> Cf. R. Ibrido & N. Lupo, “‘Forma di governo’ e “indirizzo politico”: la loro discussa applicabilità all’Unione europea”, cit., p. 24 ff. See also, more recently, J.A. Cheibub & B.E Rasch, ‘Constitutional parliamentarism in Europe, 1800–2019’, (ahead of print) *West European Politics* (2021).

<sup>46</sup> Besselink, ‘EU Constitutionalism and National Parliaments. Insiders or Outsiders?’, cit., p. 27 ff. distinguishes between “foundational legitimacy and legitimacy in the day-to-day political operation of the Union”.

<sup>47</sup> On the “Euro-national parliamentary system” cf. C. Fasone & N. Lupo, ‘Conclusion. Interparliamentary Cooperation in the Framework of a Euro-national



to an overall form of government that includes not only the confidence-like relationship between the European Parliament and the Commission, but also a series of other relationships: first and foremost, the relationships between each government and its national parliament, on which the democratic legitimacy and accountability of the European Council and the Council rely; second, the relationships between the European Union institutions and the parliaments of the Member States; and, third, the inter-parliamentary relations.<sup>48</sup>

All these four kinds of relationships matter for the European Union form of government and define it. Especially, the confidence relationships between the executives of the Member States and their national parliament help to explain, in democratic terms, the persistent and even growing role played by inter-governmental institutions in the Union. A role that, as the events that took place after the 2019 European Parliament elections have shown, cannot be easily removed by using exclusively the other legitimacy and accountability channel recognized by Article 10 (2) TEU when it recalls that ‘citizens are directly represented at Union level in the European Parliament’, and by fully exploiting the statement of Article 17(7) TEU according to which the European Council, in proposing the President of the Commission, shall take ‘into account the elections to the European Parliament’.

It is rather natural, after all, that the European Council wants to keep a say in determining the top position of the European Union institutions, including the President of the Commission and its members. Of course, the say of the European Council is not the only

Parliamentary System’, in N. Lupo & C. Fasone (eds), *Interparliamentary Cooperation in a Composite European Constitution*, cit., p. 345 ff.; N. Lupo & G. Piccirilli, ‘Introduction: the Italian Parliament and the New Role of National Parliaments in the European Union’, in N. Lupo, G. Piccirilli (eds), *The Italian Parliament in the European Union* (Hart 2017), p. 1 ff. For some criticisms to this formula, supporting the one of the “multi-level parliamentary field”, see B. Crum, ‘National Parliaments and Constitutional Transformation in the EU’, 13(4) *European Constitutional Law Review* (2017), p. 817-835.

<sup>48</sup> See A. Manzella, ‘The European Parliament and the National Parliaments as a System’, in S. Mangiameli (ed.), *The Consequences of the Crisis on European Integration and on the Member States* (Springer 2017), p. 47 ff.

one, nor necessarily the last one, but it would be strange that the institution called upon to ‘define the general political directions and priorities’ of the Union (Article 15(1) TEU) would not intervene with a substantial role also in the appointment of the President of the Commission, the institution that is entitled to ‘promote the general interest of the Union and take appropriate initiatives to that end’ (Article 17(1) TEU) and that still exercises, in a quasi-monopolist way, the power of legislative initiative.

Any evolution of the European Union democracy and of its form of government should thus include some conditioning factors deriving from the intergovernmental part of its constitution: it is through this channel, in fact, that the national forms of government, and thus also national elections, can co-define the political direction of the Union – as well as, one might add, reciprocally, the European Parliament elections could influence in many ways the political direction of some Member States.<sup>49</sup>



<sup>49</sup> For a recent case happened in Italy see N. Lupo, ‘Intertwining ‘Forms of Government’ Between Rome and Brussels: The Influence of EU Dynamics on the Handover from Conte I to Conte II Cabinet’, *RECONNECT Working Paper*, no. 13, December 2020 ([reconnect-europe.eu/wp-content/uploads/2020/12/RECONNECT\\_WP13\\_Lupo-1.pdf](https://reconnect-europe.eu/wp-content/uploads/2020/12/RECONNECT_WP13_Lupo-1.pdf)).