

**Democratic in structure, but not in performance.  
Verifying the democratic nature of the EU\***

**Diego Praino** – *Department of Public Administration and Leadership,  
Oslo and Akershus University College of Applied Sciences*

**ABSTRACT:** This paper moves from the following research question. Can the EU model of government be considered consistent with democratic values? To answer this question, the author elaborates a methodological approach based on the distinction of three concepts: structure, functioning and democratic performance of the system. The first indicates how the confidence relationship between the executive and the legislature is structured; the second describes how the political and institutional actors play their roles in practice within that structure; the third, which is deeply affected by the first two, expresses the accountability relationship between voters and forces in power, and the level of compliance of the form of government to the democratic form of State. The conclusion of this contribution is that while the EU represents a unique form of government with a structure that is consistent with democratic values, so far institutions, parties, and national governments have failed to fill this institutional structure with true democratic content.

**SUMMARY:** 1. Introduction. Form of State and form of government in the study of the EU. – 2. Three different concepts: structure, functioning, and performance. – 3. What is the structure of the EU model? – 4. To what extent is the EU consistent with democracy? – 5. Conclusion.

**1. Introduction. Form of State and form of government in the study of the EU**

The aim of this paper is to provide a methodological approach that helps verifying to what extent the EU may be considered democratic. This question is extremely topical, but it requires a method that simplifies the analysis of a complex system such as the European Union.

In order to verify whether the EU is consistent with democratic values, it is extremely important to analyse how its form of government works. The notions of form of State and government<sup>1</sup> are strictly connected and interdependent.

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\* Lavoro sottoposto a referaggio secondo le Linee Guida della Rivista.

On the one hand, the concept of form of government loses its meaning when the system studied does not present a democratic form of State. In these cases, the set of relations between constitutional bodies describes only how the State structure is organized: the former notion is “absorbed” by the latter<sup>2</sup>. On the other hand, the structure of that set of relations and the way it works in practice may affect deeply the democratic performance of the system<sup>3</sup>.

In this sense, it is possible to argue that the form of government and the way it works are excellent parameters to study democracy questions. This is why this paper focus on the EU model of government when analysing the EU democratic experience.

However, it is not easy to place the EU model of government in a specific category<sup>4</sup> and to adopt concepts such as form of government and form of State in relation to the European supranational dimension<sup>5</sup>. Firstly, it is necessary to answer whether it makes sense to study the EU using concepts that belong to the national States<sup>6</sup>.

The supranational nature of the Union and the complex way it works in practice have led some to adopt the concept of governance to describe it. This expression indicates “a method or mechanism for dealing with a broad range of problems/conflicts, in which actors regularly arrive at mutually satisfactory and binding decisions by negotiating and deliberating with each other and cooper-

<sup>1</sup> The notion of form of State concerns the relationship between citizens and those who exert power: cf., *ex multis*, G. AMATO, *Forme di Stato e forme di governo*, Bologna, 2006, 11 ff.; A. PIZZORUSSO, *Sistemi giuridici comparati*, 2nd ed., Milano, 1998, 183. The concept of democracy belongs to this dimension. Forms of government, instead, indicate in broad terms the set of relations between constitutional bodies: cf., *ex multis*, S. STAIANO, *Prolegomeni minimi a una ricerca forse necessaria su forma di governo e sistema dei partiti*, in *federalismi.it*, n. 3, 2012, 4; M. LUCIANI, *Governo (forme di)*, in *Enciclopedia del diritto*, Annali III, 2010, 540; A. DI GIOVINE, *Le forme di governo*, in P. CARROZZA, A. DI GIOVINE, G.F. FERRARI (eds.), *Diritto costituzionale comparato*, Roma-Bari, 2009, 705; M. VOLPI, *Libertà e autorità. La classificazione delle forme di Stato e delle forme di governo*, Torino, 2000, 2.

<sup>2</sup> L. ELIA, *Governo (forme di)*, in *Enciclopedia del diritto*, vol. XIX, 1970, 635.

<sup>3</sup> On the topic, A. ADSERÀ, C. BOIX, *Constitutions and Democratic Breakdowns*, in J.M. MARAVALL, I. SANCHEZ-CUENCA (eds.), *Controlling Governments: Voters, Institutions, and Accountability*, Cambridge, 2008, 247 ff., suggest that presidentialism might lead to a poor democratic performance when the absence of parliamentary confidence allows, in under-developed countries, the president to influence the voters' choices. The distinction between different types of parliamentarism suggested by L. ELIA, *Governo (forme di)*, cit., 645 ff., is based on the idea that political elements such as the party system may affect the performance of the system.

<sup>4</sup> See F. DECKER, J. SONNICKSEN, *An Alternative Approach to European Union Democratization: Re-Examining the Direct Election of the Commission President*, in *Government and Opposition*, vol. 46, n. 2, 2011, 181. On the topic, P. DANN, *European Parliament and Executive Federalism: Approaching a Parliament in a Semi-Parliamentary Democracy*, in *European Law Journal*, vol. 9, n. 5, 2003, 573, wrote that the EU is neither parliamentary nor presidential, but “semi-parliamentary”.

<sup>5</sup> T. E. FROSINI, *La dimensione europea della forma di Stato e di governo*, in *federalismi.it*, n. 5, 2012, 1 ff., suggested that the constitutional structure of the EU is characterized by a paradox. On the one hand, it is not a State, but presents a form of State; on the other hand, it has a government, but it is not a form of government. As far as the former aspect is concerned, the EU is based on the rule of law, as interpreted by the Court of Justice, and on the values mentioned in the Treaties. As for the form of government, instead, the author states that the “institutional quadrilateral” that characterizes the EU (Council, European Parliament, Commission and European Council) cannot be considered a new form of government, but simply a new way of governing.

<sup>6</sup> On the topic, R. IBRIDO, *Oltre le “forme di governo”. Appunti in tema di “assetti di organizzazione costituzionale” dell’Unione europea*, in *Rivista AIC*, n. 1, 2015, 5, wrote that it is not the study of the EU that should follow the “old” constitutional categories developed in relation to the national states; instead, the study of the latter should be updated following the process of European integration.

ating in the implementation of these decisions”<sup>7</sup>. In other words, governance describes the set of rules on the relations between the several actors that are involved in the decision-making processes<sup>8</sup>.

Several scholars prefer this expression when referring to the EU because they believe that the concept of government is too much related to the political order of the Member States and does not fit well the “diffuse” and multi-layered way in which the EU works in practice<sup>9</sup>. From this perspective, the EU institutional structure presents elements that belong both to national States (e.g. parliamentary representation) and to international organizations (such as the political negotiations carried out by the Member States, or the legislative function of the Council). Therefore, according to some, the criteria adopted to describe these dimensions should be used carefully when studying the European Union<sup>10</sup>.

Certainly, a proper study of the EU form of government should consider that the EU is not a (federal) State, but a peculiar Union with special traits<sup>11</sup>. However, this does not mean that the idea of governance should replace completely the concept of form of government.

The idea of governance can be quite vague<sup>12</sup>. It has been used by different scholars with a broad range of different meanings, and often it is not able to describe properly certain aspects of the EU system. For instance, it does not capture the essential structure of the “horizontal” inter-institutional relations<sup>13</sup>, i.e. how the main EU institutions interact as far as their origin and survival are concerned – while this aspect is strictly connected to the democratic dimension. This is why the criteria of the form of government is still a precious tool when studying the EU<sup>14</sup>.

In short, the two notions – governance and form of government – do not exclude each other, and they are both useful when studying the EU. While the expression governance refers to the complex decision-making processes that characterize the European Union, the study of the EU form of government focuses, in a narrower sense, on the inter-institutional relations. The concept of form of government had been used with this meaning also with regard to the relations among the political institutions of the EEC<sup>15</sup>.

<sup>7</sup> P.C. SCHMITTER, *Governance in the European Union. A Viable Mechanism for Future Legitimation?*, in A. BENZ, Y. PAPADOPOULOS (eds.), *Governance and Democracy: Comparing National, European and International Experiences*, London and New York, 2006, 161.

<sup>8</sup> A. MANZELLA, *Il Parlamento federatore*, in *Quad. cost.*, n. 1, 2002, 39.

<sup>9</sup> Cf. P.C. SCHMITTER, *Governance in the European Union*, cit., 158.

<sup>10</sup> For instance, see M.R. ALLEGRI, *I partiti politici a livello europeo fra autonomia politica e dipendenza dai partiti nazionali*, in *federalismi.it*, n. 22, 2013, 4.

<sup>11</sup> L. ELIA, *Prime osservazioni sulla forma di governo nella Costituzione per l'Europa*, in *Diritto pubblico*, n. 3, 2003, 757.

<sup>12</sup> On the topic, see A. BENZ, Y. PAPADOPOULOS, *Governance and Democracy: Concepts and Key Issues*, in A. BENZ, Y. PAPADOPOULOS (eds.), *Governance and Democracy*, cit., 1 ff.

<sup>13</sup> The expression “horizontal relations” is used by S. FABBRINI, *The European Union and the Puzzle of Parliamentary Government*, in *Journal of European Integration*, vol. 37, n. 5, 2015, 572.

<sup>14</sup> L. SPADACINI, M. FRAU, *Governare l'Unione europea. Dinamiche e prospettive istituzionali*, Soveria Mannelli, 2006, 79 s.

<sup>15</sup> C. PINELLI, *Ipotesi sulla forma di governo dell'Unione europea*, in *Rivista trimestrale di diritto pubblico*, 1989, 315 ss.

For the reasons mentioned above, studying the inter-institutional relations is extremely important when verifying to what extent the EU may be considered democratic. This is why this paper focuses on this aspect.

In particular, this contribution is structured as follows. Moving from the idea that the quality of the democratic form of State is strictly connected to how the form of government works, firstly I elaborate (sec. 2) a conceptual distinction between the essential structure of the system (i.e. the fundamental inter-institutional relations) and its actual functioning (i.e. how political and institutional actors work in practice). The idea is that both these aspects may affect, in different manners, the democratic performance of the system. Then I analyse the structure of the EU model, by considering both the legal sources (i.e. the Treaties) and the consequent behaviour of institutional actors (sec. 3). Finally, I verify if that structure is consistent with democratic values and I comment on which aspects of the system may lead to a poor democratic performance (sec. 4).

## ***2. Three different concepts: structure, functioning, and performance***

We may say that while the notion of governance concerns how the EU works in practice (i.e. its *functioning*), the study of its form of government analyzes the *structure* of the inter-institutional relations. This paper moves exactly from the distinction between structure and functioning of the systems<sup>16</sup>. The former describes exclusively how the confidence relationship between the executive and the legislature works<sup>17</sup>, while the latter, more generally, describes how the political and institutional actors play their roles in practice.

These factors deeply affect what we may define as the democratic performance of the system, i.e. its level of compliance with democratic values. In brief, the concept of performance describes how the structure of the model and the actual political dynamics affect the “quality of the democratic system”<sup>18</sup>.

For a system to be democratic, first of all it must present a structure that allows voters to determine, at least indirectly, the origin of the two branches of government – legislature and executive. In this sense, on the one hand a system based on separation of powers, such as presidentialism, would not be democratic if one of the two branches were not somehow chosen by the people. On the other hand, even when the executive is not elected by popular vote, the system is still consistent with democratic values if the confidence relationship that connects the two branches of government allows the executive to be involved in a channel of representative democracy, as it happens in parliamentarism.

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<sup>16</sup> This distinction is fully developed in D. PRAINO, *La definizione e il funzionamento della forma di governo nel contesto partitico*, in S. STAIANO (ed.), *Nella rete dei partiti. Trasformazione politica, forma di governo, network analysis.*, Napoli, 2014, 7 ff.

<sup>17</sup> On the use of the notion of confidence, see D. PRAINO, *A new system of government? Defining the confidence relationship of the EU model*, in *Journal of European Integration*, vol. 39, n. 3, 2017.

<sup>18</sup> Cf. L. ELIA, *Governo (forme di)*, cit., 651.

In short, the structure of the form of government and the channels of representative democracy on which it is based are the first indicators of democracy. However, also the actual functioning of the system may affect deeply its democratic performance.

On this regard, it seems correct to accept that the performance is better when political and institutional actors behave in such a way that: 1) the risk of government instability or conflicts among bodies are low<sup>19</sup>; 2) there is a real possibility that different political forces alternate in power, and thus, 3) voters can reward or punish both the majority and the opposition parties<sup>20</sup>. These are the three aspects that determine the quality of the accountability relationship between voters and forces in power, and the level of compliance of the form of government to the democratic form of State<sup>21</sup>.

It is useful to distinguish between structure and functioning when analysing the performance of the EU model, considering the complex nature of the Union. By adopting these two notions, the analysis of the democratic performance is simplified. Since these two aspects are distinct, they depend on different factors. Thus, the specific elements of the system that should be taken into account depend on which of these two dimensions is under review.

If the notion of form of government describes “the relationship between executives and legislatures”<sup>22</sup>; then the factors that should be considered when looking at the structure of the model are the relational properties<sup>23</sup> that determine the nature of that relationship. The main relational element is the type of connection between the two branches of government as far as the origin and survival of the executive is concerned. Once this type of connection is clear, then it is possible to verify if it allows all branches of government to participate in a scheme of democratic representation, and how<sup>24</sup>.

When analyzing the EU model, we should consider the relations between the Commission, the Council (of Ministers), the Parliament and the European Council. These are the institutions that ensure “consistency, effectiveness and continuity” of the Union’s policies and actions<sup>25</sup>, while carrying out, within the EU, the main “constitutional” functions (i.e. production of law and control over its implementation). The focus is how the relationship between the executive branch and the legisla-

<sup>19</sup> Cf. C. PINELLI, *Forme di Stato e forme di governo*, Napoli, 2009, 148 ff.

<sup>20</sup> Cf. L. ELIA, *Governo (forme di)*, cit., 651.

<sup>21</sup> *Ibidem*.

<sup>22</sup> J.A. CHEIBUB, Z. ELKINS, T. GINSBURG, *Beyond Presidentialism and Parliamentarism*, in *British Journal of Political Science*, vol. 44, n. 3, 2014, 515.

<sup>23</sup> Cf. R. ELGIE, *The Classification of Democratic Regime Types: Conceptual Ambiguity and Contestable Assumptions*, in *European Journal of Political Research*, vol. 33, n. 2, 1998. The author points out that the conceptual ambiguity in the studies of the forms of government derives especially from the overlapping of dispositional and relational properties, and suggests focusing on dispositional properties alone.

<sup>24</sup> This approach is consistent with the major studies on regime types. The one aspect that has been widely accepted by scholars as a distinctive element between the traditional democratic models (especially parliamentarism and presidentialism) is whether the executive needs the legislature’s trust to remain in office or not: in this sense, D.J. SAMUELS, M.S. SHUGART, *Presidents, Parties, and Prime Ministers. How the Separation of Powers Affects Party Organization and Behavior*, New York, 2010; G. SARTORI, *Comparative Constitutional Engineering. An Inquiry into Structures, Incentives, and Outcomes*, London, 1994; J.J. LINZ, *The Perils of Presidentialism*, in *Journal of Democracy*, vol. 1, n. 1, 1990, 52; D.V. VERNEY, *The Analysis of Political Systems*, Glencoe, 1959.

<sup>25</sup> Art. 13, TEU.

ture works, and whether this overall scheme allows the institutions that belong to the former to be part of a circuit of democratic representation.

As far as the functioning of the system is concerned, instead, what matters is the way political and institutional actors behave within the structure defined by the Treaties. The elements that should be considered, then, are not so much the rules on inter-institutional relations, but all those legal and political factors that determine how the decision-making processes work in practice within the EU. As said above, these aspects normally do not affect the essential structure of the system. They do that, however, when they alter the confidence relationship between the executive and the legislature. Similarly, and more importantly, they affect the democratic performance of the model when they weaken the relationship between forces in power and voters, preventing the latter to controlling the former.

Having specified that, it becomes clear that the main research question of this paper – to what extent may the EU model be considered democratic? – requires the study of these two different dimensions: structure and functioning. By adopting this approach, in the next section I will shed some light on the structure of the EU model.

### ***3. What is the structure of the EU model?***

The EU model has been studied from different perspectives, and therefore it has been considered both a system based on separation of powers and parliamentary in nature.

It is well-known that some scholars have focused on the political functions of the European Parliament and on the *Spitzenkandidaten* practice<sup>26</sup> to conclude that institutional actors should act as if they were in a parliamentary system because the institutional prerequisites for parliamentarism in the EU are already in place<sup>27</sup>, and could be fully developed “without any changes to the current treaties”<sup>28</sup>. According to these scholars, even the Member States’ role in the selection of the Commission<sup>29</sup> could be reduced in favour of parliamentary dynamics if all commissioners agreed to support the political program presented by the President of the Commission<sup>30</sup>.

Others have pointed out the separation-of-powers aspects of the EU model, questioning the parliamentary nature of that system<sup>31</sup>. Even before the establishment of the Union with the Treaty of

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<sup>26</sup> This expression indicates the emerging practice through which the European political parties present, before the elections to the European Parliament, candidates from their groups to compete for the role of President of the Commission.

<sup>27</sup> See S. HIX, *What’s Wrong with the European Union and How to Fix It*, Cambridge, 2008.

<sup>28</sup> J.H.H. WEILER, *European Parliament Elections 2014: Europe’s Fateful Choices*, in *The European Journal of International Law*, vol. 24, n. 3, 2013, 750.

<sup>29</sup> Art. 17, para. 7, second subparagraph, TEU.

<sup>30</sup> M.P. MADURO, *A New Governance for the European Union and the Euro: Democracy and Justice*, in *Yearbook of Polish European Studies*, n. 16, 2013, 137.

<sup>31</sup> A. KREPPPEL, *Looking ‘Up’, ‘Down’ and ‘Sideways’: Understanding EU Institutions in Context*, in *West European Politics*, vol. 34, n. 1, 2011, 170; S. FABBRINI, *The European Union and the Puzzle of Parliamentary Government*,

Maastricht, some authors had argued that it was necessary to develop further the doctrine of separation of powers in order to complete the integration process<sup>32</sup>.

Some authors have suggested that the EU is characterized by a bicameral legislature (Council and European Parliament)<sup>33</sup> and by a “dual executive”<sup>34</sup> (European Council and Commission). According to the Treaties, the Council and the European Parliament exercise together “legislative and budgetary functions”<sup>35</sup>; the Commission promotes the general interest of the Union, exerts coordinating, executive and management functions, and has the power to propose legislative acts<sup>36</sup>; the European Council provides the Union with the necessary impetus for its development and defines its general political directions and priorities<sup>37</sup>.

The European Council is composed of the Heads of State or government of the Member States, together with its President and the President of the Commission<sup>38</sup>. Its democratic legitimacy is not questioned, since this institution expresses the democratic dynamics that exist within the Member States (in fact, its members answer to their own national parliaments or voters).

The Commission, instead, is characterized by a complex formation process<sup>39</sup>, that involves both the European Parliament and the European Council in three stages. Firstly, taking into account the parliamentary elections, the latter proposes a candidate for President of the Commission to the former, which elects the candidate by a majority of its members. Secondly, the national governments suggest the other members of the Commission, and the Council adopts the list in agreement with the President-elect. Finally, the Commission is subject as a body to a vote of consent by the European Parliament, and the European Council appoints it with a qualified majority. In short, as far as its origin is concerned, the Commission is linked both to the European Parliament and to the European Council.

In addition, the Commission needs also a permanent support from the European Parliament, since it is “responsible” to it, and may be voted down by a parliamentary motion of censure<sup>40</sup>. The nature of the motion is controversial<sup>41</sup>, but it seems possible to argue that, even though it “is carried

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cit. Moving from the idea that the EU and the US “converge towards a common model of compound democracy”, the author has also concluded that “there are more similarities than there are differences between them”, the first one being the institutional separation of the executive from the legislature: see S. FABBRINI, *Madison in Brussels: the EU and the US as compound democracies*, in *European Political Science*, vol. 4, n. 2, 2005, 196.

<sup>32</sup> V. BOGDANOR, *The Future of the European Community: Two Models of Democracy*, in *Government and Opposition*, vol. 21, n. 2, 1986, 162.

<sup>33</sup> A. KREPPPEL, *Looking ‘Up’, ‘Down’ and ‘Sideways’*, cit., 173.

<sup>34</sup> Cf. S. FABBRINI, *Intergovernmentalism and Its Limits: Assessing the European Union’s Answer to the Euro Crisis*, in *Comparative Political Studies*, vol. 46, n. 9, 2013, 1006.

<sup>35</sup> Art. 14, para. 1, TEU.

<sup>36</sup> Art. 17, TEU.

<sup>37</sup> Art. 15, para. 1, TEU.

<sup>38</sup> Art. 15, para. 2, TEU.

<sup>39</sup> Art. 17, para. 7, TEU.

<sup>40</sup> Art. 17, para. 8, TEU; Art. 234, TFEU.

<sup>41</sup> Some scholars have argued that the Commission can be voted down only for moral misconducts, but not for mere political reasons. In this sense, see S. FABBRINI, *The European Union and the Puzzle of Parliamentary Government*, cit., 578, and F. DECKER, J. SONNICKSEN, *An Alternative Approach to European Union Democratization*, cit., 175 f.

by a two-thirds majority of the votes cast, representing a majority of the component members of the European Parliament<sup>42</sup>, this requirement belongs to the “functioning” dimension of the system<sup>43</sup>, without affecting the essential structure of the inter-institutional relations. What really matters is that the possibility of a censure creates a specific type of relationship between the European Parliament and the Commission according to which the latter cannot remain in office without the support of the former.

This second aspect (political accountability to the legislature) represents the main feature of parliamentary experiences. Formally speaking, however, the EU is not a parliamentary system. In parliamentarism, the executive is a “permanent emanation”<sup>44</sup> of the legislature: it is both “chosen by, and responsible to” it<sup>45</sup>. In particular, in parliamentary experiences the confidence relationship operates exclusively between parliament and cabinet, while in the EU model the scheme is much more complex because of the “dual” nature of the executive: the European Council plays an essential role in the Commission’s origin as well.

Even taking into account the actual behaviour of political and institutional actors<sup>46</sup>, this conclusion does not change. The actual practice is consistent with this scheme.

As far as the Commission’s origin is concerned, the national governments are fully involved in the decision-making process. A research<sup>47</sup> has shown that the members of the European Council tend to choose commissioners that have preferences like their own, and the 2014 elections has confirmed this data<sup>48</sup>. If it is true that the *Spitzenkandidaten* practice, carried out in that occasion, set a relevant precedent for the future, weakening the European Council’s position when selecting its own preferred candidates<sup>49</sup>; it is also true that the role of the European Council is still extremely significant<sup>50</sup>. On the other hand, the European Parliament has strengthened its control over the appointment of commissioners, by using the procedure of hearings<sup>51</sup>. In a sense, when candidates are

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Others have pointed out that the Commission is not an independent technocratic body anymore, but a politically accountable one: see, for instance, M.P. MADURO, *A New Governance*, cit., 137. The second perspective seems more consistent with the Treaties, since they do not specify that the censure depends on a specific misbehavior. In addition, a moral requirement would question the collective nature of the censure.

<sup>42</sup> Art. 234, para. 2, TFEU.

<sup>43</sup> It affects only how the censure mechanism works, but not its no-confidence nature. See, *supra*, sec. 2.

<sup>44</sup> L. ELIA, *Governo (forme di)*, cit., 642.

<sup>45</sup> J. GERRING, S.C. THACKER, C. MORENO, *Centripetal Democratic Governance: A Theory and Global Inquiry*, in *American Political Science Review*, vol. 99, n. 4, 2005, 571.

<sup>46</sup> Political dynamics are often an essential element to understand to which category a specific experience belongs: see G.U. RESCIGNO, *Forme di Stato e forme di governo*, in *Enciclopedia giuridica Treccani*, vol. XIV, 1989, 22.

<sup>47</sup> A. WONKA, *Technocratic and independent? The appointment of European Commissioners and its policy implications*, in *Journal of European Public Policy*, vol. 14, n. 2, 2007.

<sup>48</sup> S. FABBRINI, *The European Union and the Puzzle of Parliamentary Government*, cit., 577.

<sup>49</sup> S.B. HOBOLT, *A Vote for the President? The Role of Spitzenkandidaten in the 2014 European Parliament Elections*, in *Journal of European Public Policy*, vol. 21, n. 10, 2014, 1537.

<sup>50</sup> F. DECKER, *The Pitfalls of Parliamentarisation: Why the Procedure of Appointing the European Commission Should Be Changed*, in *European View*, vol. 13, n. 2, 2014, 320. See also G. GRASSO, *In lotta per il potere: l'impossibile sfida dei partiti politici europei?*, in *eticaeconomia.it*, 2014.

<sup>51</sup> Rule 118, Rules of Procedure of the European Parliament. On the topic, see C. MOURY, *Explaining the European Parliament’s Right to Appoint and Invest the Commission*, in *West European Politics*, vol. 30, n. 2, 2007. For instance,

approved after parliamentary hearings, they receive some sort of “trust” from the legislature – and this is formalised with the initial collective vote of consent.

Therefore, it is possible to say that the political practice has been consistent with the structure developed by the Treaties: European Council and European Parliament determine together the composition of the Commission; even if, so far, the former has been the “strongest” institution, while the latter has had a merely “confirmatory” role<sup>52</sup>.

As far as the formal accountability of the Commission to the European Parliament is concerned, it is true that the latter has never voted down the former; but it is also true that the institutional practice has never questioned the fact that the Commission needs parliamentary support. For example, political dynamics within the European Parliament (the shift of position of the socialist group) and the consequent threat of a censure led to the resignation of the Santer Commission in 1999<sup>53</sup>.

In conclusion, since the European Parliament is not the only institution that determine the origin of the Commission, then the latter cannot be interpreted as an exclusive emanation of the former. Therefore, the EU model is far from being a parliamentary system<sup>54</sup> – and neither it belongs to any of the other traditional general models<sup>55</sup>. Considering that both vertical (from the national to the supranational level) and horizontal (inter-institutional) confidence schemes<sup>56</sup> converge in the European Council, but the survival of the Commission still depends on the European Parliament, it is possible to argue that the EU model is a “Council-based form of government with parliamentary features”: the European Council plays a relevant role by linking together the national and supranational levels of government, while the European Parliament exerts political control<sup>57</sup>.

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in 2004 José Manuel Barroso had to replace some of the nominees as commissioners, since the European Parliament was threatening to reject the whole Commission; in 2014, even if supported by Juncker, Alenka Bratušek had to withdraw her candidacy as commissioner after parliamentary rejection.

<sup>52</sup> F. DECKER, *The Pitfalls of Parliamentarisation*, cit., 321.

<sup>53</sup> R. CORBETT, F. JACOBS, M. SHACKLETON, *The European Parliament*, 6th ed., London, 2005, 272 f. On the topic, S. HIX, A.G. NOURY, G. ROLAND, *Democratic Politics in the European Parliament*, Cambridge, 2007, 191, wrote that “although no final censure vote was held, in practice the Santer Commission was censured by the European Parliament”.

<sup>54</sup> Cf. S. STAIANO, *I partiti europei fuori tempo*, in *federalismi.it*, n. 15, 2012, 3.

<sup>55</sup> For a fully-developed comparative analysis, see D. PRAINO, *A new system of government?*, cit., 327. In particular, it seems plausible to argue that the EU does not represent a separation-of-powers system, since both the origin and the survival of the Commission depend on other institutions.

<sup>56</sup> Some have suggested the idea that the EU model represent a “supranational form of government”. On this topic see A.A. CERVATI, *Elementi di indeterminazione e di conflittualità nella forma di governo europea*, in AA. VV., *Annuario 1999. La Costituzione europea*, Atti del XIV Convegno annuale dell’Associazione italiana dei costituzionalisti, Padova, 2000, 73 ff. As the author explains, this peculiar system is characterized by three main aspects: 1) it differs consistently from the political models adopted at the national level (exactly because it has supranational nature); 2) it represents a dynamic process, meaning that it is still in evolution; 3) it has elements of “heterogeneity”, if compared to the other models of government. Despite its supranational nature, this model still belongs to the Constitutional-law dimension: indeed, the study of the EU involves the main principles that characterize the models adopted at national level, and therefore it cannot be inspired only by International-Law values.

<sup>57</sup> This conclusion is in D. PRAINO, *A new system of government?*, cit., 330.

This type of structure represents a distinct and unique form of government<sup>58</sup>. Is this peculiar model consistent with democratic values? This is the question explored in the next section.

#### **4. To what extent is the EU consistent with democracy?**

The issue of the democratic deficit in the EU is well-known, but still extremely topical<sup>59</sup>. It derives especially from the “bureaucratic”<sup>60</sup> nature of the EU and from the “technocratic” way in which the decision-making process are carried out in the Commission<sup>61</sup>. The essential distinction suggested in this paper – between structure and functioning of the system – might shed some light on a new way to approach this topic. The main idea is that, even if the structure of the model is consistent with democratic values, its actual functioning might lead to poor democratic performance.

It is possible to argue that the EU has been characterized by a (long) process of “democratic improvement”. For instance, the role of the European Parliament has become more and more relevant in time. If, in the beginning, this institution was a mere advisory assembly without decision-making powers, today it represents one of the two co-legislators, together with the Council, and is fully involved in the formation process of the Commission. One of the most important stages of its evolution was the introduction of universal suffrage in 1979, which has provided democratic legitimacy. In its first design, the European Parliament was composed of representatives chosen by the national parliaments among their members, and only with the Treaty of Maastricht and the establishment of the co-decision procedure it got involved in the decision-making processes of the European Union<sup>62</sup>. The Treaty of Lisbon follows this tendency, as it strengthens the role of the European Parliament in the inter-institutional dynamics<sup>63</sup> and its relationship with the voters.

However, even if the evolution of the European Parliament has derived, at least until the recent economic crisis, from “a clear trend towards a more explicit parliamentarism at the EU level”<sup>64</sup>, it has not been able to enhance the Union’s political legitimacy so far. The EU’s policy-making processes are still considered too far from citizens.

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<sup>58</sup> Even authors who see in the EU the main traits of a separation-of-powers system admit that “it seems to be more promising to look upon the EU as a compounded government of a new type”: A. BENZ, *Policy-Making and Accountability in the EU Multilevel Governance*, in ID., Y. PAPADOPOULOS (eds.), *Governance and Democracy*, cit., 100 f.

<sup>59</sup> See, for instance, the recent work by S. HENNETTE, T. PIKETTY, G. SACRISTE, A. VAUCHEZ, *Democratizzare l'Europa! Per un Trattato di democratizzazione dell'Europa*, Milano, 2017.

<sup>60</sup> T. E. FROSINI, *La dimensione europea della forma di Stato e di governo*, cit., 3.

<sup>61</sup> See, *ex multis*, G. MAJONE, *Dilemmas of European Integration*, Oxford, 2005; C.M. RADAELLI, *Technocracy in the European Union*, London, 1999; K. FEATHERSTONE, *Jean Monnet and the “Democratic Deficit” in the European Union*, in *Journal of Common Market Studies*, vol. 32, n. 2, 1994, 149 ff.

<sup>62</sup> N. LUPO, C. FASONE, *Il Parlamento Europeo e l'intervento delle associazioni italiane di interessi nelle procedure parlamentari*, in *Sinergie Rapporti di ricerca*, n. 35, 2012, 37.

<sup>63</sup> For instance, see its role in the budget procedure: Art. 314, TFEU. On the topic, P. ZICCHITTU, *La forma di governo europea alla prova dei fatti: equilibri democratici e procedura di bilancio*, in *Quad. cost.*, n. 1, 2014, 161 ff.

<sup>64</sup> E.O. ERIKSEN, J.E. FOSSUM, *Representation Through Deliberation—The European Case*, in *Constellations*, vol. 19, n. 2, 2012, 325.

The need of strengthening the Commission's political legitimacy has been pointed out by the institutions themselves before the 2014 elections. They have, for example, insisted on the *Spitzenkandidaten* practice. On the one hand, the Parliament has invited candidates to play a leading role in the parliamentary electoral campaign, and has pointed out the importance of strengthening the political legitimacy of both Parliament and Commission, especially by linking the appointment of the latter more directly to the choice of the voters<sup>65</sup>. On the other hand, the Commission, moving from the idea that the European political parties have an extremely important role in expressing the voices of citizens and that they should act as a bridge between EU politics and citizens, has stated that voters should be better informed of the affiliation between national and European parties, and that each party should nominate its candidate for President of the Commission<sup>66</sup>.

More recently, the European Parliament has elaborated 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. In particular, the EP suggests "to reform its electoral procedure in good time before the 2019 elections, with the aim of enhancing the democratic and transnational dimension of the European elections and the democratic legitimacy of the EU decision-making process [...] providing for the greatest possible degree of electoral equality and participation for Union citizens". In addition, the EP proposes to enhance "the visibility of European political parties [...] by placing their names and logos on the ballot papers, and recommends that the same should also appear on television and radio campaign broadcasts, posters and other material used in European election campaigns, especially the manifestos of national parties, since those measures would render European elections more transparent and improve the democratic manner in which they are conducted, as citizens will be able to link their vote clearly with the impact it has on the political influence of European political parties and their ability to form political groups in the European Parliament"<sup>67</sup>.

The main idea behind these documents is that the democratic significance of parliamentary elections depends mainly on the political consequences that they may have in the Commission's formation process. For this reason, it has been suggested that the development of the *Spitzenkandidaten* practice could add new dimensions to the democratic life of the European Union, enhancing transparency and legitimacy within the EU<sup>68</sup>.

This view seems to link the democratic performance of the Union to its development as a parliamentary system. However, maybe parliamentarism would be neither necessary nor sufficient to enhance the democratic performance of the EU.

It is worth explaining better this idea. It is possible to argue that the structure of the EU form of government is already consistent with democratic values. It seems that the causes of the European

<sup>65</sup> European Parliament resolution of 22 November 2012 on the elections to the European Parliament in 2014.

<sup>66</sup> COM (2013) 126 final.

<sup>67</sup> European Parliament resolution of 11 November 2015 on the reform of the electoral law of the European Union. On the topic see also G. GRASSO, *Partiti politici europei e disciplina costituzionale nazionale*, in *Nomos*, n. 1, 2017, 18.

<sup>68</sup> Cf. B. DONNELLY, M. JOPP, *European Political Parties and Democracy in the EU*, in *Democracy in the EU and the Role of the European Parliament*, Quaderno IAI English Series, n. 14, 2009, 32 ff.

democratic deficit do not derive from the complex inter-institutional scheme and from the resulting two-fold confidence relationship that characterizes the EU structure<sup>69</sup>; they derive, instead, from the manner in which actors manage politics within that structure.

As explained above, the EU model has a supranational “hybrid” nature that involves, at the same time, institutions that belong to different levels of government: one connects the national to the supranational level (European Council); some are purely European (European Parliament and Commission); others are strictly national (parliaments of the Member States)<sup>70</sup>.

This institutional scheme reflects different levels of government, but also different interests in a relationship of reciprocal cooperation: it allows that all dimensions involved in the European integration process are represented, within a balanced distribution of competences<sup>71</sup>. In this sense, the TEU specifies that: “Citizens are directly represented at Union level in the European Parliament. 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”<sup>72</sup>. In short, the EU structure is designed to represent the Member States (in the Council and in the European Council), the Union itself (in the Commission), and its citizens (in the European Parliament).

Considering that different forms of democratic accountability may derive from different institutional structures<sup>73</sup>, it becomes clear that the complex hybrid and supranational nature of the EU necessary entails a different way to interpret democratic principles<sup>74</sup>. In other words, it makes perfectly sense that the Commission’s origin and survival derives both from the European Parliament and from the European Council. In this manner, it can reflect all levels of government and all interests involved in the European integration process. In short, the EU model is based on the coexistence of two specific channels of democratic representation<sup>75</sup>, since citizens are directly represented in the European Parliament, and indirectly represented in the European Council. The Commission, as the executive of the Union, derives from both these channels.

However, if the structure of the EU model may be considered consistent with democratic values, it is also widely accepted by scholars that the EU suffers from a democratic deficit, especially after the crisis, which has “clearly weakened the democratic thrust”, shifting the centre of gravity to a

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<sup>69</sup> Cf. S. HENNETTE, T. PIKETTY, G. SACRISTE, A. VAUCHEZ, *Democratizzare l’Europa!*, cit., *passim*. The authors do not agree with this view, and criticize the institutional structure of the EU.

<sup>70</sup> Cf. N. LUPO, C. FASONE, *Il Parlamento Europeo*, cit., 40 f.

<sup>71</sup> G. STROZZI, R. MASTROIANNI, *Diritto dell’Unione europea. Parte istituzionale*, 6th ed., Torino, 2013, 66.

<sup>72</sup> Art. 10, para. 2, TEU.

<sup>73</sup> D.J. SAMUELS, M.S. SHUGART, *Presidentialism, Elections and Representation*, in *Journal of Theoretical Politics*, vol. 15, n. 1, 2003, 55.

<sup>74</sup> J.E. FOSSUM, J. POLLAK, *Which Democratic Principles for the European Union? What Deficit?*, in S. PIATTONI (ed.), *The European Union: Democratic Principles and Institutional Architectures in Times of Crisis*, Oxford, 2015, 36.

<sup>75</sup> This aspect led B. CRUM, J.E. FOSSUM, *The Multilevel Parliamentary Field: A Framework for Theorizing Representative Democracy in the EU*, in *European Political Science Review*, vol. 1, n. 2, 2009, to introduce the concept of “Multilevel Parliamentary Field”.

more intergovernmental approach<sup>76</sup>. Adopting the method suggested in this paper, it is possible to argue that the EU's democratic performance has been low because of the way actors have behaved and the political context in which they have operated (i.e. because of how the Union *functions* in practice). And this would not necessarily change if the EU had a "pure" parliamentary structure.

On the topic, many believe that the main issue is the unpolitical way of policy-making at the European level and, especially, the absence of a well-structured European party context<sup>77</sup>. Indeed, these two aspects delineate dynamics that prevent citizens from exercising public control<sup>78</sup>.

A well-functioning party system is essential for democracy<sup>79</sup>, because it is the main factor that affects the level of government stability, the frequency of gridlock situations, the real possibility of party alternation, and, in general, the relationship between voters and forces in power (which are the main parameters of democratic performance, as explained above)<sup>80</sup>. However, the EU does not have a distinct party system with fully-developed parties<sup>81</sup>, and the political forces have not been able to form a European political awareness and express the voters' will<sup>82</sup>. In short, a real contestation for political leadership and over policy is still missing<sup>83</sup>, and this specific fact, together with the dependency of the EU parties on national parties, weakens the potential of the European political dimension – despite normally “party family is far stronger than country location in determining positioning of national political parties on European integration”<sup>84</sup>.

In short, the role played by the European parties does not seem significant, and the political dynamics within the EU are led by the national political forces<sup>85</sup>. Considering the parameters mentioned above, the democratic performance of the EU seems to be low because the lack of a well-

<sup>76</sup> J.E. FOSSUM, *Democracy and differentiation in Europe*, in *Journal of European Public Policy*, vol. 22, n. 6, 2015, 806.

<sup>77</sup> J. HABERMAS, *Democracy in Europe: Why the Development of the EU into a Transnational Democracy Is Necessary and How It Is Possible: Democracy in Europe*, in *European Law Journal*, vol. 21, n. 4, 2015.

<sup>78</sup> Cf. C. LORD, *A Democratic Audit Framework*, in E.O. ERIKSEN, J.E. FOSSUM (eds.), *Rethinking Democracy and the European Union*, London and New York, 2012, 45.

<sup>79</sup> *Ibidem*, 44.

<sup>80</sup> See, *supra*, sec. 2. Cf. also M. DUVERGER, *Les partis politiques*, Paris, 1951 (Italian translation *I partiti politici*, 4th ed., Milan, 1975, 266 f.); L. ELIA, *Governo (forme di)*, cit., 651; S. MAINWARING, *Presidentialism, Multipartyism, and Democracy: The Difficult Combination*, in *Comparative Political Studies*, vol. 26, n. 2, 1993, 198 ff.

<sup>81</sup> L. BARDI, R.S. KATZ, P. MAIR, *Verso una politica europea*, in *Rivista italiana di scienza politica*, vol. 41, n. 3, 2011, 348. For an overview on European parties, see A. CIANCIO, *European parties and the process of political integration in Europe*, in *dirittifondamentali.it*, n. 2, 2016; G. GRASSO, *Partiti politici europei e disciplina costituzionale nazionale*, cit., *passim*.

<sup>82</sup> As they should have, according to Art. 10, para. 4, TEU.

<sup>83</sup> A. FOLLESDAL, S. HIX, *Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik*, in *Journal of Common Market Studies*, vol. 44, n. 3, 2006. The low turnout (42 per cent in 2014, the lowest since 1979) in parliamentary elections shows the gap between voters and EU politics: on the topic, cf. P. MAGNETTE, *Appointing and Censuring the European Commission: The Adaptation of Parliamentary Institutions to the Community Context*, in *European Law Journal*, vol. 7, n. 3, 2001, 309.

<sup>84</sup> G. MARKS, C.J. WILSON, L. RAY, *National Political Parties and European Integration*, in *American Journal of Political Science*, vol. 46, n. 3, 2002, 591.

<sup>85</sup> For this reason, A.A. Cervati, *Elementi di indeterminazione*, cit., 106, has suggested that the study of the EU model cannot underestimate national politics. The Member States condition how the EU structure works in practice, playing a decisive role in the decision-making processes.

structured party system prevents real alternation and weakens the relationship between voters and forces in power.

In this context, it has been pointed out that the strengthening of the national parliamentary assemblies might entail a further erosion of the political role of the parties represented in the European Parliament<sup>86</sup>. On this point, an author<sup>87</sup> has argued that strengthening the powers of national parliaments, and allowing representatives of national governments to stop negotiations whenever a significant political decision is being discussed, could entail the risk of “multiplying joint decision traps”. However, it seems possible to argue that it is not the role of national parties alone that jeopardizes the European Parliament’s position; but the fact that this role is played in a context where national politics win over European politics anyway, because of the lack of a true European party system.

In conclusion, if it is true that a majority-type democracy is not plausible in the European context, because there are huge obstacles<sup>88</sup>, these obstacles do not derive from the structure of the EU model (as delineated by the Treaties) because that structure is already consistent with democracy. Instead, these obstacles derive from the political behaviour of institutional actors and from the overall political context in which they operate: these seem to be the factors that lead to a poor democratic performance<sup>89</sup>.

## 5. Conclusion.

This paper moves from the idea that structure and functioning of the system are two different aspects that, even if related, depend on different factors. In short, the expression structure indicates how the confidence relationship between the executive and the legislature works (i.e. the inter-institutional relations with regard to the origin and survival of the executive); instead, the analysis of the functioning concerns how the political and institutional actors play their roles in practice. The

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<sup>86</sup> S. STAIANO, *I partiti europei fuori tempo*, cit., 5.

<sup>87</sup> S. PIATTONI, *Federalism and the European Union*, in J. LOUGHLIN, J. KINCAID, W. SWENDEN (eds.), *Routledge Handbook of Regionalism and Federalism*, London and New York, 2013, 555.

<sup>88</sup> R. BELLAMY, *Democracy Without Democracy? Can the EU’s Democratic ‘Outputs’ Be Separated from the Democratic ‘Inputs’ Provided by Competitive Parties and Majority Rule?*, in *Journal of European Public Policy*, vol. 17, n. 1, 2010, 14 ff.

<sup>89</sup> The recent events concerning the relationship between the forces in power and the judiciary in Poland, Hungary and Romania show that the interaction of these two factors – the behaviour of the institutions (in particular, the Commission failing to activate the procedure provided by Art. 7 TEU) and the political context of some Member States – may threaten the foundations of the rule of law in those systems. The Polish events are described in L. PECH, K.L. SCHEPPELE, *Poland and the European Commission, Part I: A Dialogue of the Deaf*, in *verfassungblog.de*, 2017 (from the same authors, see also Part II and III); for Hungary and Romania, see A. VON BOGDANDY, P. SONNEVEND (eds.), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania*, Oxford, 2015; see also A. FUSCO, *La crisi dell’indipendenza del giudice nelle vicende polacche, ungheresi e rumene*, in *diritti-comparati.it*, 2017.

democratic performance depends on these two dimensions and is measured by taking into account the risk of government instability, conflicts among bodies, the real possibility of political alternation, and, in general, the relationship between voters and forces in power.

Moving from this distinction, the main conclusions of this contribution are that: 1) the structure of the EU model is not parliamentary, and it does not belong to any of the traditional regime types, because it is characterized by unique features, such as the central role played by the European Council in the Commission's formation process; 2) the structure of the EU form of government, even if unique, is still consistent with democratic values, because it reflects its supranational nature characterized by several levels of government and two different channels of representation; 3) the EU's democratic deficit – that is to say, its poor democratic performance – derives not from the structure of the system, but from the way it works in practice (i.e. from its *functioning*).

This third conclusion is based on the idea that the EU lacks a complete and well-structured party system. This aspect does not belong to the structure of the system, but to how it works in practice. Indeed, it derives from the way political actors organize themselves and compete to determine the contents and the direction of the Union's actions. In the current stage, national politics prevail over European issues both because of the central role played by the national governments in determining the EU's direction, and because European parties still depend too much on their national counterparts.

In conclusion, it is possible to agree with the idea that the citizens' right to participate in the democratic life of the Union<sup>90</sup> has not been fulfilled yet because institutions, parties, and national governments have failed to fill the existing institutional structure with some political democratic content<sup>91</sup>.

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<sup>90</sup> Art. 10, para. 3, TEU.

<sup>91</sup> See S. HIX, *What's Wrong with the European Union and How to Fix It*, cit., 165.