"Democratic Deficit" in the European Union – Supranational Bodies and Democratic Legitimacy. Ideas for a Reflection

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Summary: This study tries to understand the causes and the effects of the problem of democratic deficit in the European Union (EU). The paper begins by exploring different definitions of democracy as well as the historical development of democratic political systems. It, then, analyses the European Union's decision-making institutions. In the context of future EU Treaty reforms, it considers potential remedies for the democratic deficit: there is a multitude of reasons and solutions regarding the democratic deficit in the EU, which lead to complex interpretations. Generally, academic literature on the issue of democratic deficit in EU relies on two opposing arguments. The major argument is that there is democratic deficit in the EU; the less common argument rejects this view. This study supports the major argument.

Keywords: European Union, legitimacy, democracy, representation, EU institutions, democratic deficit

1. Introduction

The issues of participation and democracy are one of the areas in which the EU has encountered major difficulties in recent years. This article intends to investigate about the discourse on the existence of a democratic deficit, with focus on the role of the European Parliament.

The concept of a *democratic deficit* in the European Union refers to the idea that EU governance is somehow lacking in democratic legitimacy.

However, the first use of the term has been attributed to David Marquand[1] in 1979. In that year, referring to the European Economic Community, the

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[1] David Ian Marquand, (born 20 September 1934) is a British academic and former Labour Party Member of Parliament (MP): *"The resulting democratic deficit would not be acceptable in*

forerunner to the European Union, Marquand criticised, in particular, the transfer of legislative powers from national governments to the European Council of Ministers. This criticism would lead to the creation of a European Parliament, provided with the faculty of approving or rejecting draft laws of the Union.

The expression *'democratic deficit'* can be understood, on one hand, as lack of democratic legitimacy of the European institutions accompanied by lack of attention towards the requests of the citizens; on the other hand, as the resulting lack of consensus and participation of European citizens to the political and legislative activities of the European Union. This can be noticed mainly in turnout rates during elections of the European Parliament.

This essay aims to fully understand the causes that led to the democratic deficit and to provide insights for further reflections. At first, it is important to highlight, according to the original decision-making model provided for in the Treaty, that the monopoly of legislative initiative was given to an executive body, the Commission, entirely devoid of democratic legitimacy.

In this sense, from a legal point of view, the democratic system could be recovered by incrementing the functions of the European Parliament. *"No integration without representation"* is the title of the last chapter of a book on the evolution of the European Parliament that compellingly evokes the shared need to find a solution to the EU's democratic deficit, firstly, by strengthening the representation of citizens[2]. According to the classical view, Parliament is the only (or, at least, the main) repository of legitimacy and democracy[3]. Thus, the strengthening of the European Parliament and the direct election of the same (1979), if followed by a strong turnout, could have eliminated the democratic deficit.

Altiero Spinelli[4], on February 10, 1977, during the debate for ratification of the Convention for the direct elections to the European Parliament, clearly expressed the aforementioned argument: *"If the word 'people' means a set of men who are and feel part of common institutions, through which they express and try to realize common commitments, with this direct election we will see the birth of the 'European people'"*. Instead, on a political level, Spinelli's prediction

a Community committed to democratic principles. Yet such a deficit would be inevitable unless the gap were somehow to be filled by the European Parliament."

2 RITTBERGER, Berthold. *Building Europe's Parliament. Democratic Representation Beyond the Nation State*. Oxford: Oxford University Press, 2005.

3 WEILER, J.H. *La trasformazione dell'Europa*. Bologna: il Mulino, 2003.

4 Altiero Spinelli (31 August 1907 – 23 May 1986) was an Italian Communist politician, political theorist and European federalist. Spinelli is referred to as one of the founding fathers of the European Union due to his co-authorship of the Ventotene Manifesto, his founding role in the European federalist movement, his strong influence on the first few decades of post-World War II European integration and, later, his role in re-launching the integration process in the 1980s.

did not happen. On the contrary, the continuous increase in the powers of the European Parliament was accompanied by "a parallel, constant decrease in the rate of participation in European elections"[5].

The latter statement is demonstrated by the following data: in 1979, the average attendance to elections was equal to 63% of those eligible to vote; in 1989, the average attendance dropped to 58.5%; in 1994, it still fell to 56.8%; in 1999, it dropped below the threshold of 50%, with percentages below 30, not only in Britain but also in the Netherlands. This negative trend continued in the 2004 and 2009 elections (43.08%). In 2014, in total, 43% of all eligible voters in the 28 Member States of the Union actually voted.

Then, throughout the history of the European integration, the question of democratic legitimacy has increasingly acquired importance. The treaties of Maastricht, Amsterdam and Nice show the implementation of a progressive advancement towards a democratic legitimacy of the institutional system in two ways: on one hand, by strengthening the powers of the Parliament with regard to the designation and control of the European Commission; on the other hand, gradually expanding the scope of application of the *co-decision procedure*.

Subsequently, with the Treaty of Lisbon, signed in 2007 and enforced in 2009, the legislative and budgetary powers of the European Parliament have been increased to ensure greater control over the Commission (a strengthened role in the procedure for appointing the President of the European Commission has also been granted to the Parliament); in addition, the co-decision procedure, which makes Parliament the co-legislator in all respects, has risen to the rank of the ordinary legislative procedure. Nonetheless, the establishment of the *citizens' initiative* ratifies the will to give effect to the democracy of the European Union by providing for a new form of direct participation to European Union policy and recognizing the importance of dialogue between the European institutions and civil society.

But how have these reforms impacted the effective reduction of the democratic deficit? In the following paragraphs the ability of the European Parliament to be an actor, able to assert effectively its prerogatives and thus to affect the process of strengthening of representative democracy in the Union, will be explored.

[5] MAJONE, Giandomenico. *Integrazione europea, tecnocrazia e deficit democratico*. [online]. Available at: http://www.osservatorioair.it.

2. The democratic gap in the European institutions

In order to better understand the democratic gap that reflects the European institutions, it is necessary to focus on which are the main institutions involved in the legislative process in the EU. In particular, there is the European Parliament, which represents the EU's citizens and it is directly elected by them; the Council of Ministers, representing the Governments of the Member States; and the European Commission, which represents the interests of Europe as a whole.

These three institutions process together, through the *ordinary legislative procedure* (former *co-decision procedure*)[6], policies and laws that are to be applied throughout the EU. In principle, the Commission proposes new legislative acts that the European Parliament and the Council should adopt[7]. The Commission and the Member States apply the rules, and then the Commission shall ensure that they are properly applied and enforced.

The European Parliament, despite the direct election since 1979, is still characterised by a serious democratic deficit that is apparent in its involvement in Council decisions adopted under a *special legislative procedure*[8]. This involve-

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[6] One of the important changes introduced by the Lisbon Treaty is the fact that *co-decision* becomes the *ordinary legislative procedure*, i.e. what used to be the exception in decision-making has become the norm for most policy areas. As defined in Article 294 of the TFEU, the co-decision procedure is the legislative process which is central to the Community's decision-making system. It is based on the principle of parity and means that neither institution (European Parliament or Council) may adopt legislation without the other's assent.

[7] MULLER-GRAFF, Peter-Christian. Direct Elections to the European Parliament. *Case Western Reserve Journal of International Law*, 1979, vol. 11, p. 3: *"Political consensus of the founders estabilished four institutions for the activities of the Community: the Assembly, the Council, the Commission and the Court of Justice. (...) the bodies were fixed according to the ideal of functions which the classical theory of the separation of powers had in mind: Assembly and Council as legislative powers, the Commission as an executive power and the Court of Justice as a judicial power"*.

Also, LODGE, Juliet. Making the Election of the European Parliament Distinctive: Towards E-Uniform Election Procedure. *European Journal of Law Reform*, 2000, vol. 2, p. 195: *"What survives however is the idea that direct participation in supra-national political life via the vehicle of direct elections is an element of EU citizenships which confirms the direct link between the EU citizen and the EU sovereign without an intermediary"*.

Also, BIGNAMI, Francesca. The Democratic Deficit in European Community rulemaking: a Call for Notice and Comment in Comitology. *Harvard International Law Journal*, 1999, vol. 40, p. 456: *"In the Community, lawmaking power is vested in the commission, council and Parliament acting togheter under a formula that depends upon the policy area as set out in the E.C. Treaty"*.

[8] The art. 289, paragraph 2 of the Treaty of Lisbon sets out a distinctive criterion providing, for special proceedings, the non-joint adoption by the Parliament and the Council of a legislative act. The provision affirms *"in the specific cases provided for by the Treaties, the adoption of a regulation, directive or decision by the European Parliament with the participation of the*

ment may consist in mere consultation or in the need of its approval of the act. In many matters that directly affect individual rights (European citizenship, family law, social policy, etc.) the Parliament has maintained an advisory role. In other matters, there is no form of participation of the EP in the legislative process (for example, on the subject of serious economic difficulties, or of direct taxation).

Another key EU organ is the Council of Ministers, which exercises, jointly with the European Parliament, legislative and budgetary functions. The essence of the deficit issue largely lies in the attribution of a legislative function to an organ representing the executive of Member States; an organ, furthermore, not subject to an effective control by European citizens represented in the European Parliament. The latter is not involved in the appointment of the President of the Council and of its formations.

Another component of the European institutional framework is the Commission, which holds a strong power of legislative initiative and it is also an executive and monitoring body. Its Commissioners are chosen among prominent personalities of the Member State of affiliation. The European Parliament participates only partially to the choice of the President of the Commission, while it is not involved in the appointment of the Vice-President (who plays a key role in drawing the EU's common foreign and security policy).

2.1. The European Commission

The European Commission[9] is probably the more representative institution of the international organization known as the European Union: it is the most visible institution in the dialectic of the relations among institutions and Member States. The Commission has always assumed the role of the "supranational"[10] institution, composed by entities acting in the mere interest of the European Union; therefore, it is representative of the interests of the Union as such.

The European Commission, in the European Union's institutional logic, holds an important position because it has the monopoly of legislative initiative in the EU; such solution, initially, had its own *ratio* because the Parliamentary Assembly of that time had no power except from that of an advisory nature: this choice gave a proactive role for development and European

Council, or by the latter with the participation of the European Parliament, shall : constitute a special legislative procedure".

9 STROZZI, Girolamo, MASTROIANNI, Roberto. *Diritto dell'Unione Europea, parte istituzionale*. Torino: G. Giappichelli Editore, 2013, pp. 109–127.

10 TSEBELIS, George, GARRETT, Geoffrey. The Institutional Foundations of Intergovernmentalism and Supranationalism in the European Union. *International Organization*, 2001, vol.55, issue 2.

integration to an entity different from the one representative of the states. Today, this monopoly of legislative initiative entrusted to the Commission is less understandable considering that the European Parliament has become a body elected by universal suffrage, it has incisive powers in its relations with the other institutions, it is a body that works like a real Parliament and then co-decides with the Council in relation to all legislative activities of the Union. The exclusion of the European Parliament from the legislative phase is no longer a good idea as this would alienate and reduce the closeness between the electorate and the elected.

The Commission, ex art. 17 TEU, is composed by citizens of the Member States; the members of the Commission shall be chosen on the ground of their general competence and European commitment from persons whose independence is beyond doubt. These criteria, however, are particularly vague and elastic. Initially, the members of the Committee were 9, all chosen by the Member States by common accord. "Common accord" meant that each State chose one member, while larger States could chose two of them. This system has been consistently applied for decades, until, with the growth of the European Community, the principle has been amended and the praxis whereby each State designates one Commissioner has been established.

What was particularly innovative, from the prospective of modernization of the system, is the Commissioners' appointment procedure which, in part, has resized the exclusive power of the states in the choice of Commissioners. This procedure is composed of various phases: first of all, the Presidential candidate is chosen by the European Council with a qualified majority, taking into account the results of the European elections. Then, the Parliament, by a majority of its component members, elects the candidate, but this election is conditioned by the choice of a person coming from a majority of the States in the European Council. Parliament can disagree about the candidate, but it cannot replace the proposal by designating another person: in this case, another proposal from the Council would be needed.

After the choice of the President begins a second phase, i.e. the choice of the other members of the Commission. This choice involves the Member States, but it must be done in common accord with the Presidential candidate. Therefore, the States suggest a person to other States, but also to the President who then must approve this proposal. Subsequently, the European Parliament which plays a particularly important role, submits all the Commissioners' candidates to a suitability test in front of competent Commissions. Therefore, the actual phase of members' appointment of the Commission and their election is attributed exclusively to the European Parliament. The latter, nonetheless, cannot choose

other members of the Commission, but it can only reject the choices made by the President and the Member States.

The approval of the European Parliament is then followed by the European Council's appointment. Nonetheless, this step is rather a formality.

Basically, even though the Commissioners are not chosen directly by European citizens, they are chosen by people who are chosen by the citizens through vote: the European Parliament through the European elections, the European Council through national elections.

2.2. The Council of Ministers

The Council of Ministers is composed by the Ministers of the Governments of the Member States who are submitted to a parliamentary control in their Member States. This implies that there is a form of indirect popular representation[11]: thus, there is no direct control of the European citizens because national parliamentary elections, which are hold to form these Governments, are not the European elections in which it is possible to propose and discuss European policy issues. The entrustment of the decision-making power to the Council means, essentially, that the States retain control of the international behaviour of this organization. Although existed, since the original texts, matters in which the Council could adopt resolutions by a majority, during the first decades of the community, the Council could deliberate especially unanimously; this meant that each State, through his representative, had the opportunity to ask a veto on a decision that was not appreciated. Obviously, that could lead to situations of crisis due to the fact that some States refused to take part in the meetings of the Council to safeguard their own interests, impeding the possibility of adopting resolutions.

2.3. The European Parliament

The analyses of the European Parliament[12] goes to the heart of the whole question of the democratic deficit in the European Union. This institute, defined as the democratic body for excellence, in fact, has no power to legislate as national parliament: notwithstanding, article 14 of the Treaty on the European Union clearly states that *the European Parliament shall, jointly with the Council, exercise legislative and budgetary functions as well as functions of political control and consultation.* As stated in the Treaties, the Commission is the only body

[11] VILLANI, Ugo. *Istituzioni di Diritto dell'Unione europea*. Bari: Cacucci editore, 2013.

[12] TESAURO, Giuseppe. *Diritto dell'Unione Europea*. CEDAM, 2012, pp. 22–28.

capable of conducting a process of law-building, while the Parliament can only approve the law or defer the same to the Commission to make changes.

However, there are exceptions to this general rule; for example, art. 223 TFEU[13] affirms that the Parliament can elaborate a project for the application of uniform rules for the election of the Parliament by direct universal suffrage. This is only a proposal power but not a deliberative one because, in the end, the decision is of the Council. In fact, this article was never implemented because there is no uniform procedure for the elections[14] of the European Parliament.

Always in accordance with art. 223 TFEU, the European Parliament, on its own initiative, with a special legislative procedure after seeking an opinion from the Commission and with the approval of the Council, shall lay down the regulations and general conditions governing the performance of the duties of its Members. This refers to the European Parliamentary statute, which contains provisions related mainly to additional immunity, and also to financial prerogatives to which MEPs are especially careful. Therefore, it is the Parliament, which writes its own statutes (this makes sense considering these are rules of a democratic body); the Commission, in this case, only has the task of writing a non-binding opinion, but requires the approval of the Council (it is the Council that must approve what the Parliament writes, negotiates, and then deliberates).

Another task of the Parliament as a legislator[15], that is, however, shared with the Council, is the adoption of regulations on the functionality of political parties at a European level. This provision has not been enforced for a long time.

The requests of the European Parliament to be involved in the legislative phase, have led to the creation of the art. 225 TFEU[16] , which incorporates, in

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[13] Art. 223 TFEU: *"The European Parliament shall draw up a proposal to lay down the provisions necessary for the election of its Members by direct universal suffrage in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States.*

The Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parlia ment, which shall act by a majority of its component Members, shall lay down the necessary provisions. These provisions shall enter into force following their approval by the Member States in accordance with their respective constitutional requirements".

[14] The European Parliament elections are held in the various Member States in accordance with procedures substantially different; the only ground rule, which dates back to an old Council decision, is that the system should be proportional, (not majoritarian): this make the European Parliament a chamber as representative as possible though not necessarily functioning whereas it is difficult to create a majority that comes from the sum of the votes of the main parties.

[15] STEUNENBERG, Bernard, THOMASSEN, Jacques. *The European Parliament: Moving toward Democracy in the EU*. Oxford: Rowman & Littlefield Publishers, 2002.

[16] Article 225 TFEU: *"The European Parliament may, acting by a majority of its component Members, request the Commission to submit any appropriate proposal on matters on which it*

substance – with some small modifications – what was first approved in Maastricht, in 1992. The article attributes to the European Parliament a proactive role on the Commission's initiative: the legislative proposal remains of the Commission, but the European Parliament may request to present *"appropriate proposals"* on the matters for which the Parliament considers useful a legislative intervention, within the competences of the EU. These requests require an absolute majority of the Members of the Parliament (if approved in Parliament, these requests have a significant value). For example, the Parliament has requested to submit a legislative proposal to harmonize national laws on the protection of pluralism of television information; or, more recently, to codify the EU administrative procedures. From a legal point of view, the main concern is which value should be attributed to these Parliament's proposals: the text of the Treaty does not provide an answer; the Lisbon Treaty added a small indication, which obliges the Commission to give reasons for any refusal to proceed with such proposals.

Another provision of considerable importance, in terms of democratic legitimacy, is article 10 TEU which states that "the functioning of the Union shall be founded on representative democracy. 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 [...]".

A more detailed analysis shows that the reference to the representativeness of the European Parliament is certainly relevant because of the many decisions that now, on the basis of the Lisbon text, must be adopted in accordance with the *ordinary legislative procedure* – substantially equivalent to the previous *co-decision*. This procedure, providing for the joint adoption of the act by the Council and the European Parliament, essentially gives to the latter a power of veto, but does not allow, in the absence of an agreement of the Council, to direct the action of the European Union according to its will, as the concept of representative democracy would require.

Furthermore, the reference to the fact that each Member of the European Council or of the Council is accountable to their respective national Parliament, does not confer democratic legitimacy to those institutions at EU level. These continue to be excluded from the political control of the European Parliament; they are the expression of the executives of their respective States and their members are politically accountable to their national parliaments in relation to

considers that a Union act is required for the purpose of implementing the Treaties. If the Commission does not submit a proposal, it shall inform the European Parliament of the reasons".

the pursuit of national interests, not of general interests of the European Union. Therefore, none of these institutions can be considered as a second chamber, democratically elected, of a bicameral parliamentary system; therefore, even though the legislative function is exercised in the European Union jointly by the European Parliament and the Council (art. 14, n. 1 and art. 16, n. 1, TEU) one cannot talk of a bicameral Parliament in a democratic system.

2.3.1. The strengthening of the European Parliament's powers

hroughout the years, there has been an increase of the European Parliament's powers. This occurred thanks to revisions of the treaties so, through the will of the States to change the system in order to extend the tasks of the European Parliament with respect to the original scheme that saw it, basically, as an advisory body.

So in the ,70's, to engrave on the enlargement of the Union's democratic basis, were strengthened the Parliament's prerogatives. This was possible only by changing the original system of parliamentarians' choice. Initially, there was the *dual mandate mechanism* so that the choice of a portion of MEPs was entrusted to the individual Parliaments of the Member States; the number of parliamentarians assigned to individual States were determined by the Treaty on the basis of population. This system was a symptom of weakness both for the lack of authoritativeness of the people who became members of the European Parliament, and for the mechanism of choice that was not of direct democracy (that would be the popular election, namely universal suffrage).

In 1979, that system was changed introducing universal suffrage. Today, the members of the European Parliament are chosen by the citizens of the Member countries. This was a turning point in respect of the powers of the European Parliament and, more generally, in respect of the progress of democracy of the system as a whole: a Parliament elected by universal suffrage has a representative force greater than a Parliament appointed by the national parliaments. Thanks to the direct universal suffrage, the elected parliamentarians are not representative of the States, but they are representative of the European people, which means that when they take possession of the seat of the European Parliament should not follow the purely national interests. It is certain that there are political groups in the European Parliament, but these groups do not move according to their nationality. The group that nowadays is more numerous is that of the parliamentarians of the European People's Party (EPP), of the centre-right. The second group is the Democratic Socialist Party, of a socialist orientation. Of course, the composition of these groups is independent from nationality. The strengthening of the powers of the European Parliament certainly happened also from the point

of view of legislative procedures, because in the ordinary legislative procedure the European Parliament holds, substantially, the same powers of the Council, as a deliberative body. In particular, following the entry into force of the Lisbon Treaty, the *co-decision procedure* has become the *ordinary legislative procedure* (article 294 TFEU). This procedure gives the European Parliament the faculty of adopting the acts, in agreement with the Council of Ministers, becoming a co-legislator (except in the cases provided in the treaties where are applied the procedures for consultation and approval). The Lisbon Treaty also extends the number of sectors covered by the co-decision procedure, thus contributing to the strengthening of the powers of the European Parliament.Other prerogatives of great importance which have increased the powers of the European Parliament concern its participation in the conclusion of international agreements, as well as its participation in the system of judicial review of the functioning of the other institutions, so to review the legality of the acts.

As regards international relations[17], the European Parliament participates, in a more effective way than the previous system, to the procedures for concluding international agreements. The EU, like any international organization, has international subjectivity[18]. In this case the international subjectivity exists, not only because in article 47 TEU is affirmed that the *Union shall have legal personality*; the assignation or not of international personality to the Union (and this is applied to any organization) is an issue that must be examined solely in the light of the principle of effectiveness: so, when certain international organizations in fact exercise the prerogatives proper to subjects of international law, such organizations are subjects of international law. In particular, thanks to the treaties, the European Union has the power to conclude international agreements with third countries or other international organizations. This power to conclude international agreements is developed and implemented through the procedures codified in the Treaty and which entail the presence of the European Parliament among the actors involved in the process of conclusion of treaties. Initially, the European Parliament could only express an opinion: for some international treaties the European Parliament should be consulted in order to express its position on a text that, however, had already been negotiated by the Commission. This

[17] FINCK, F. L'évolution de l'équilibre institutionnel de l'UE sous le prisme des relations extérieures depuis l'entrée en vigueur du Traité de Lisbonne. *RTD eur*., 2012.

[18] International subjectivity is a prerogative of the subjects of international law which, in the case of international organizations, comes from their active presence in international relations. Therefore, international subjectivity is not simply the consequence of the choice attributed by the States to create the international organization, qualifying it as with subjectivity; it is essential that this is reflected in actual conducts, including the ability of these organizations to conclude international agreements

prerogative had a little practical effect because any proposal which Parliament had been able to express at that time, hardly was then reflected in the text of the agreement. Parliament, however, even in this context, has seen an increase in its powers and this occurred thanks to the initiative of Parliament itself: in the Regulation of procedure of the European Parliament are codified some procedures which provide for the consultation of the same at the stage of negotiating international agreements, i.e. the phase in which the Commission decides the contents of them together with partners of the other Member State or other international organization.Subsequently, Parliament has succeeded in obtaining, with revisions of the treaties, powers even more important from the point of view of the incidence on the text of the treaties, both from the standpoint of negotiation (i.e. writing texts), and of the phase of conclusion of the Treaty: once a text of the treaty is completed, it is subjected to the *assent procedure* which today is called, after the entry into force of the Lisbon Treaty, *consent procedure*[19]. Then, for some types of agreements, in particular for the association agreements with third countries or for the accession agreements of a new EU Member State[20], the European Parliament has a power of veto, so that the Treaty shall enter into force after approval by the European Parliament: the contrary opinion of the European Parliament on a text of an international agreement blocks its entry into force.

Also in the field of litigation, the European Parliament has seen its powers increase; the treaties provide for judicial procedures, in order to examine and decide on the lawfulness of EU acts or deciding on inaction of the institutions.

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[19] The consent procedure (formerly assent procedure) is one of the special legislative procedures of the European Union, as established in the Lisbon Treaty. It was introduced by the Single European Act. Under this procedure, the Council of the European Union must obtain Parliament's assent before certain decisions can be made. Acceptance ("assent") requires an absolute majority of votes. The European Parliament can accept or reject the proposal but not amend it. However, the Parliament can produce an interim report making recommendations for modifications, and a conciliation has also been introduced.

[20] The Treaty on European Union has extended the scope of application of this procedure, including:

- Changes to the right of residence and transfer of citizens (free movement of persons);
- Creation of the Cohesion Fund and Structural Fund reform;
- Elaboration of uniform voting procedures for the election of the European Parliament;
- Admission of new States;
- Amendments to the Statute of the ESCB;
- Association agreements providing for specific obligations and rights, cooperation measures or spending requirements and changes to acts approved by the co-decision procedure.

Following the adoption of the Treaty of Amsterdam, sanctions imposed on an EU Member State for a serious and persistent breach of fundamental rights requires Parliament's assent under Article 7 of the EU Treaty.

In the EU's judicial system, the power to decide on the legality of the legislative function and on the legality of administrative action are both attributed to the European Court of Justice. National Courts cannot examine the legality of EU acts and if they have doubts about their validity, are obliged to request the Court of Justice to give a ruling. The European Parliament, since the beginning, was excluded among the persons entitled to have recourse before the Court of Justice in order to present the possible unlawfulness of acts; so, the EU Parliament was not included among those subjects who hold the so-called *locus standi*, i.e. that they have the power to contest the acts; the *locus standi*, to the actions for annulment was only provided for the Council and the Commission in the area of institutions, and then, under certain conditions, for the Member States and individuals. At a time when the European Parliament has increased its powers, especially in the context of participation in the legislative procedure, it has also raised the interest of the same to respect this legislative procedure. So, it happened that the European Parliament, without a legal basis provided by the Treaties, began to contest before the Court of Justice acts of the Council, considering them as adopted on the basis of an incorrect provision of the Treaties (a provision of the treaties which did not see the active participation of Parliament in the legislative procedure). The Court of Justice, at first, replied negatively basing its own ruling on the letter of the treaties, arguing that *in the absence of explicit indications in the text of the treaties on Parliament's power to contest the acts, this cannot be permitted, under penalty of violating the Treaty*. This reply, from a formal point of view, was probably incontestable; from the substantive point of view, it created institutional imbalances because the European Parliament, although did not have the *locus standi*, could be sued by the other institutions because the Treaty did not contain exhaustive provisions on the subjects that could be sued in legal proceedings. Therefore, the Council and the Commission could challenge acts of Parliament, while the latter could not appeal against the acts of the Council and the Commission. Thus, the European Parliament, in a second attempt before the Court of Justice, invoked a general principle of law, immanent in the system: *the principle of inter-institutional balance*[21], able to interpret or better to rewrite the text of a provision of the Treaty.

[21] *The principle of institutional balance* in the EU implies that each of its institutions has to act in accordance with the powers conferred on it by the Treaties, in accordance with the division of powers. The principle derives from a 1958 judgment by the Court of Justice (*the Meroni judgment*) and prohibits any encroachment by one institution on the powers of another. It is the responsibility of the Court of Justice of the European Union to ensure that this principle is respected. Put at its simplest, this refers to the relationship between the three main EU institutions: the European Parliament, the Council of the European Union and the European Commission. The dynamics between these bodies have evolved considerably over the years with the adoption of new treaties. The competences of the European Parliament, in particular, have expanded,

By judgment of 22 May 1990, the Court of Justice stated that although the Treaties contain no provision giving the Parliament the right to bring an action for annulment, it would be incompatible with the fundamental interest in the maintenance and observance of the institutional balance which they establish for it to be possible to breach the Parliament's prerogatives without that institution being able, like the other institutions, to have recourse to one of the legal remedies provided for by the Treaties which may be exercised in a certain and effective manner. Consequently, an action for annulment brought by the Parliament against an act of the Council or the Commission is admissible provided that the action seeks only to safeguard its prerogatives and that it is founded only on submissions alleging breach of them. Provided that condition is met, the Parliament's action for annulment is subject to the rules laid down in the Treaties for actions for annulment brought by the other institutions.

Initially, the Court of Justice stated that Parliament could bring an action for annulment only if it was invoked the violation of its prerogatives and not any violation of the treaties.

In accordance with the Treaties, the Parliament's prerogatives include participation in the drafting of legislative measures, in particular participation in the cooperation procedure laid down in the EEC Treaty.

Later, this condition has been cleared with the Treaty of Nice: today, the European Parliament can challenge any act of the others institutions without having to justify its interest in acting.

3. The empowering of National Parliaments

The provisions on democratic principles, grouped in title II of the TEU, are complemented with a series standards, almost all introduced by the Lisbon Treaty, for the involvement of national parliaments in the good functioning of the European Union. These rules are summarized in arts. 10 and 12 TEU and supplemented by other provisions of the TFEU and of the Protocol n. 1 annexed to the Lisbon text, on the role of national parliaments in the European Union.

First, Article 10 TEU, in addition to presenting the system of *representative democracy*, adds that even those who are not part of the Union are involved in the democratic and institutional life of the same. These subjects are added by the Treaty, in order to strengthen the democratic principle. So, it is possible to speak about the participation of national parliaments, which are involved not

giving it the right of co-decision with the Council (under the ordinary legislative procedure) in the majority of EU policy areas, as well as wider budgetary powers.

only in the process of revision of the treaties, but also in the writing of the new EU legislative sources which, according to the classical model, belongs to the competence of Parliament and the Council (referring both to the Council of Ministers and to the European Council).

Also crucial is the art. 12 (let. a) TEU, which states that National Parliaments contribute actively to the good functioning of the Union, (a) through being informed by the institutions of the Union and having draft legislative acts of the Union forwarded to them in accordance with the Protocol on the role of national Parliaments in the European Union; according to the said Protocol no. 1, 'draft European legislative acts' shall mean proposals from the Commission, initiatives from a group of Member States, initiatives from the European Parliament, requests from the Court of Justice, recommendations from the European Central Bank and requests from the European Investment Bank for the adoption of a European legislative act. These information requirements are intended to allow the national parliaments to exercise supervisory powers (and, in some cases, veto) prescribed by other provisions of the treaties.

To understand the discipline of national parliaments it is necessary to face the speech concerning the basic principles regarding the manner of exercise of the European Union's competences. It is possible to distinguish between *exclusive* and *shared competences*: the exclusive are those for which the treaties provide for a complete devolution to the European Union; the shared are those that still involve a joint attribution of competence attribution both to the Union and to the Member States. The exclusive competence is the most advanced base in the process of European integration because it represents a phase where States gives up the exercise of their powers; for the first time, the Treaty of Lisbon introduces that the number and manners of the competences conferred on the European Union may also change over time: it is not a final devolution , because States can safely change the treaties reducing the powers of the European Union rather than increase them. Instead, when the competence is shared it is necessary to understand who intervenes among individual Member States and European Union. Here, it is possible to talk about the *principle of subsidiarity* codified in art. 5 of the Treaty on European Union. This article affirms, in the third paragraph, that *in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.*

To identify the institutions that apply the principle of subsidiarity, there is a Protocol which is expressly stated in paragraph 3 of article 5 TEU: it is the

Protocol on the application of the principle of subsidiarity and proportionality[22]. In this regard, it is especially emphasized the art. 12 (let. b), TEU, according to which *National Parliaments contribute actively to the good functioning of the Union by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality*; they may send to the Presidents of the European Parliament, the Council and the Commission reasoned opinions if they consider that this principle is not respected. The effects of such reasoned opinions are those provided in the *Protocol n. 2 on the application of the principles of subsidiarity and proportionality*. This *Protocol n. 2*, modifying previous inter-institutional agreements and other Protocols, establishes the procedures for the implementation of the principles of subsidiarity and proportionality, contemplating a very incisive intervention of national parliaments. First of all, are repeated the above information requirements of National Parliaments, already provided in Protocol n. 1, respect to any proposal for a legislative act of the European Union. Such proposal, pursuant to art. 5 of Protocol n. 2, *shall be justified with regard to the principles of subsidiarity and proportionality. Any draft European legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal's financial impact and, in the case of a European framework law, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation. The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators. Draft European legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved*. Furthermore, according to article 6 of this Protocol, *any national Parliament or any chamber of a national Parliament may, within six weeks from the date of transmission of a draft European legislative act, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers*.

[22] The Protocols annexed to the treaties, as a general rule, have the same value as the treaties. They stand in the hierarchy of the sources of the European Union at the same level as the founding treaties, as primary sources (it is a text that completes what is written into the treaties assuming the same rank from the point of view of the hierarchy of sources).

Considering the only case in which the act requires the ordinary legislative procedure, if a majority of national Parliaments have forwarded such reasoned opinions, the proposal must be reviewed by the Commission. The review may lead to the maintenance, modification or withdrawal of the proposal. In case of maintenance, the Commission must explain in a reasoned opinion why it believes that the proposal complies with the principle of subsidiarity and has to refer the matter to the Council and to the European Parliament. At this point, in order to ensure that the proposal is abandoned, it is necessary that the Council or the European Parliament adopt a decision of non-compliance with the principle of subsidiarity; it is necessary the majority of 55% of its members or of the votes cast. In conclusion, with respect to the maintenance of a proposal, even with opposition from the majority of national parliaments, the last word is up to the Council or the European Parliament, each of whom, if the majorities required are not achieved, can determine that maintaining. However, if a national Parliament believes that an act of the European Union is contrary to the principle of subsidiarity can always induce its Government to present a recourse to the Court of Justice, pursuant to art. 8[23] of Protocol n. 2. The latter rule provides that a national State can present a legitimate appeal to the Court of Justice, pursuant to art. 263[24] TFEU, for violation of the principle of subsidiarity, also on behalf of its national Parliament, thus giving the latter the possibility the indirect opportunity to defend his objections to a proposal. Obviously, the European Union law cannot discuss the merits of the discipline established in each Member State about the relationship between Parliament and Government, and thus cannot impose to a State to bring an action to the Court as required by the national parliament. The art. 8 of Protocol n. 2, in fact, states that the transmission of an action by a State on behalf of its Parliament takes place *"in accordance with their legal order on behalf of their national Parliament or a chamber of it"*.

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[23] Article 8 Protocol n. 2: *The Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a European legislative act, brought in accordance with the rules laid down in Article III-365 of the Constitution by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber of it.*
In accordance with the rules laid down in the said Article, the Committee of the Regions may also bring such actions against European legislative acts for the adoption of which the Constitution provides that it be consulted.

[24] Article 263 TFEU: *The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties*.

Protocol n. 1 does not provide other cases, except from that of non-compliance with the principle of subsidiarity, whereby the national Parliaments can react, by sending a reasoned opinion, to a draft legislative act of the European Union.

The art. 12, (letter c), TEU provides that national parliaments take part, within the framework of the area of freedom, security and justice, in the evaluation mechanisms for the implementation of the Union policies in that area, in accordance with Article 70 of the Treaty on the Functioning of the European Union, and through being involved in the political monitoring of Europol and the evaluation of Eurojust's activities in accordance with Articles 88 and 85 of that Treaty.

The article 12, (letter d) TEU, affirms the national parliaments take part *in the revision procedures of the Treaties, in accordance with Article 48 of this Treaty;* this article provides for a simplified revision procedure, which concerns the possibility of excluding the unanimity requirement in favour of the adoption of the procedure of qualified majority for certain Council decisions; article 48 TUE concerns also the change, in some cases, of the Council procedure decision from the special legislative procedure to the ordinary legislative procedure. In both these cases, the European Council is required to transmit the proposed amendment to the national Parliaments and cannot adopt it if one of them notifies its opposition within six months. The silence of national Parliaments within six months allows the European Council the adoption of the amendment, which will come into force without need for further ratification or approval by Member States.

So, it is introduced, a procedure for concluding international agreements not provided for by the Constitution: this procedure could raise delicate problems of constitutionality, as has already happened in other countries with reference to the similar rule contained in the previous *Treaty for establishing a Constitution for Europe*, not entered into force.

The article 12, (letter e) TEU also mentions the right of national Parliaments to be "informed" *of applications for accession to the Union, in accordance with Article 49 TEU*.

Finally, article 12, (letter f) TEU stipulates that national Parliaments take part, together with the European Parliament, in an "inter-parliamentary cooperation" programme defined in , articles. 9 and 10 of the said Protocol n. 1, which also provide that a Conference of parliamentary committees for Union may discuss matters covered by the common foreign and security policy, without that discussions are connected to particular legal consequences.

Although the examined rules give to national Parliaments only some rights of information and control, to which are linked general powers essentially inherent in observance of the principle of subsidiarity, they present, in appearance,

positive aspects in terms of democratisation of the functioning of the European Union and of their proximity to the citizens represented in national Parliaments.

However, these rules are suitable for a less positive reading. In fact, it is the strengthening of the role of the European Parliament (acting in the general interest of the citizens of the European Union), and not of the national Parliaments (acting in the interests of the citizens of the respective Member States), the mode of democratisation of the European Union that is more coherent with the overall characteristics of the system.

The involvement of national Parliaments provided in the treaties can be seen as an implicit delegitimization of the European Parliament, to the detriment of the general interest of Europe's citizens that it represents, as well as an attempt by Member States to further put under the protection Community method, enhancing the resources at its disposal to influence the development. It should finally be noted that, although from the involvement of national Parliaments could be derived some conditioning on the activity of the respective representatives of the Member States in the Council, such conditioning will only be in the sense of safeguarding the interests of nationals represented in those parliaments. This involvement will not be worth to give democratic legitimacy to the Council, at EU level, to assimilate it to the second Chamber of a bicameral system, since that this legitimacy can only arise from the direct election of members of the Council.

4. The new "European Citizens' Initiative"

"Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen".

Article 10 (3) TEU

In addition to the representative democracy, already discussed above, in the European Union there is another principle, namely the *principle of participatory democracy*[25]: in representative democracy, the citizen delegates a member to represent him at the institutional level; in participatory democracy, instead, citizens are involved in the direct participation of democratic life, through the mechanism of the *citizens' initiative*. The new European Treaty approved in Lisbon and came into force on 1st December 2009 introduced, for the first time in the history of the EU[26], this instrument of direct participation of citizens in

[25] MARCHETTI, Maria Cristina. Democrazia e partecipazione nell'Unione Europea. Roma: FrancoAngeli, 2013.

[26] WARLEIGH, Alex (eds). *On the Path to Legitimacy? a Critical Deliberativist Perspective on the Right to the Citizens' Initiative, in Governance and Civil Society in the European Union: Normative Perspectives*. Manchester: Manchester University Press, 2007, p. 64.

Community policy. This is the first Regulation ever in the history of democracy which allows citizens of different States and nationalities to promote together transnational legislative initiative.

The article 11 (4) of the Lisbon Treaty affirms that "not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties. The procedures and conditions required for such a citizens' initiative shall be determined in accordance with the first paragraph of Article 24 of the Treaty on the Functioning of the European Union".

According to this provision not less than one million Union citizens may ask the Commission to submit any appropriate proposal on matters where they consider necessary to intervene. This is essentially a procedure that has the task of involving European citizens in the formation of legislation. This provision finds a completion, as often happens in the discipline of the treaties, in the Treaty on the functioning of the European Union where are provided further rules with respect to the application of this principle; in particular, there is art. 24 TFEU, which is only a reference that gives Parliament and the Council the power to adopt the Regulation to discipline in detail the performance of this procedure.

The task that the Treaty on the functioning attributes to the Parliament and Council is to adopt a regulation, *Regulation n. 211 of 2011*, which shall identify the various procedures necessary for carrying out the initiatives. The purpose is to avoid that the legislative proposals affect only some citizens of member countries or even one country. So, to reach the minimum of one million citizens is necessary to involve more than one State, providing a minimum of involvement and sharing within each state (at least seven states)[27].

According to this Regulation, with regard to the discipline of this procedure, first there is the creation of a Committee which should have representatives from various countries who intend to open a procedure for sharing a proposal within all Member States. After creating the Committee, the latter aims to propose the legislative initiative in an argument that members choose and then to publicize the existence of this procedure, through mechanisms of information that the law provides for and collect in the various Member countries.

Actually the problem is that of the knowledge of this procedure which could be solved with online diffusion. This not happens and, in fact, many citizens are not aware of these initiatives. For example, there was an initiative that concerned the request to the European Commission to regulate, through the rapprochement

[27] AUER, Andreas. European Citizens' Initiative. *European Constitutional Law Review*, 2005, no. 1.

directives of the laws, the rules relating to the ownership and control of the media. So, the goal was to create a single system or, at least, to bring together national laws and thus giving the possibility for citizens to have diversified sources of information of mass media. This initiative did not reach the minimum number of signatures to the Treaty stipulates, that of a million. The problem is that this mechanism is very weak and becomes even weaker on the basis of the fact that, after the creation of the Committee, after raising a number of signatures that exceeds the limit provided for in the Treaty, and after submitting the proposal, the Commission operates an admissibility exam especially with regards to the framing of the proposal within the powers of the Union (it is checked if the proposal is totally alien to the scope of the European Union).

Actually, the Treaty does not say which is the results collected from the signatures; the Regulation, however, simply affirms that if the Commission at an initial stage of procedure considers inadmissible the request of collecting signatures because, for example, is alien to the powers of the Union, in this phase it is possible to contest the decision of the European Union before the competent Court, which is the judge of the European Union, asking to cancel the position taken by the Commission in response to the request of formalization of the proposal.

Therefore, the lack of success of this procedure, which falls as a typical characteristic of the representativeness of the Union, depends from some complexities of the procedure, in large part by the lack of information and by the negative outcome due to the fact the Commission is not obliged to act upon this long procedure.

5. A challenge still open

Despite the novelties introduced with the Treaty of Lisbon, many experts have critiqued the democratic deficit in the European Union. Among these experts, *Karl Albrecht Schachtschneider*, Professor of Public Law at the University of Erlangen, affirmed that *"the European integration suffers from an irrecoverable democratic deficit. There is no "European identity" able to legitimate the employment of the sovereignty of the Union. This type of identity can only be created with a European constitution, upon which all citizens agree through a referendum"*. It is clear, therefore, that the Treaty of Lisbon did not represent an arrival point, but the beginning of a long, yet inexorable, process of legitimacy, that all European institutions will have to face. This process, however, cannot take place if not supported by European citizens, who are still in need of a strong identity and still have a feeble sense of belonging, which has actually worsened gradually due to the economic crisis and the introduction of austerity measures.

The structural reasons of the limits of such reforms are substantially two: the first concerns the fact that member States do not currently share a common vision about the potential evolution of the European Union. On one hand, are those States that wish to reinforce the prerogatives of national powers. On the other, are those that would prefer to reinforce and democratize the European institutions. The consequence of this structural situation is that only exceeding the unanimity provided for in the treaties, the current *impasse* could be escaped. The second reason is that only accomplishing the federal leap, and, thus, assuming the characteristic of a proper State (founded on the consensus and the direct legitimacy of citizens), with its prerogative of sovereignty, the Union could eliminate the democratic deficit, inherent in its nature of confederal organization. Nonetheless, the solution to the problem of the democratic deficit has been postponed from time to time at each revision of treaties. This should not surprise, and seems, to a certain extent, expectable in the current context of the European integration. As a matter of fact, the only way to actually remove the democratic deficit remains that of respecting the principle of the division of powers[28] in the context of the European Union – attributing the legislative power to a democratically elected body, which would also be in charge of the political control of the executive.

This could be entirely realized only in two ways: either conferring to the European Parliament (already elected through a direct universal suffrage) the power to have the last say in the emanation of legislative acts, also in presence of disagreements with the Council, or allowing citizens to directly elect the Council. If this was the case, the Council would turn into a representative body of the States in a sort of High Chamber, or Senate, of a bicameral federal structure, in which national and/or regional bodies are represented. These solutions, however, would inevitably lead to a change towards a federal direction, and to a consequent loss of sovereignty of the member States. Since such change has, so far, been deemed to be politically unacceptable, the problem of the democratic deficit can only be attenuated, but not completely solved.

[28] VON HIPPEL, Gottlieb. *La séparation des pouvoirs dans les Communautés Européennes*. Nancy-Saint-Nicolas-De-Port, 1965.