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European political parties and European public space from the Maastricht Treaty to the Reg. No. 1141/2014*

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1. *An introduction: political parties and representative democracy*

Without political parties, there is no representative democracy. It has been affirmed that «political parties create democracy and that modern democracy is unthinkable save in terms of the parties»[1]. At the national level, political parties compete to gain control of the

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[1] According to E.E. SCHATTSCNHEIDER, *Party Government*, New York, 1942, p. 1. On the controversial but fundamental role of political parties in a representative democracy see recently E.V. TOWFIGH, *Das Parteien-Paradox. Ein Beitrag zur Bestimmung des Verhältnisses von Demokratie und Parteien*, Tübingen, 2014.

Government. They should be classified and understood regarding their relationship with civil society[2]. From this perspective, they have historically played a crucial role to guarantee a correspondence between responsiveness and accountability. However, the question arises if the same holds true for political parties at the European level.

At the European level, the debate on the so-called "democratic deficit" is strictly connected with the absence of a true European demos and the uncertain soul of the European political community in the public sphere[3]. Coherently, Fritz W. Scharpf argued that the discussion on political legitimacy at the European level should be focused mainly on a functional perspective, rather than a democratic one[4]. Thus, Peter Lindseth considers that the European governance has not a constitutional nature, but only an administrative one, as «it has struggled to be seen as the embodiment or expression of a new political community ("Europe") capable of self-rule through institutions historically constituted for that purpose. In this critical regard, the EU is fundamentally administrative, with a ruling legitimacy still ultimately derived from the historically constituted bodies of representative government on the national level»[5].

On the contrary, Habermas argued that «there will be no remedy for the legitimation deficit without a European-wide public sphere-a network that gives citizens of all member states an equal opportunity to take part in an encompassing process of focused political

[2] See R.S. KATZ, P. MAIR, *Changing Models of Party Organization and Party Democracy: The Emergence of Cartel Party*, in *Party Politics*, 1995, pp. 5 ff.

[3] See S. HIX, *A Supranational Party System and the Legitimacy of the European Union*, in *The International Spectator*, 2002, pp. 49 ff. On the connection between European political parties and the structural and the institutional democratic deficit, see T. SCHWEITZER, *Die Europäische Parteien und ihre Finanzierung durch die Europäische Union*, Berlin, 2014, pp. 71 ff.

[4] See recently F.W. SCHARPF, *Legitimacy in the Multi-Level European Polity*, in P. Dobner, M. Loughlin (eds.), *The Twilight of Constitutionalism*, Oxford, 2010, pp. 89 ff. and ID., *The Problem Solving Capacity of Multi-Level Governance* (1997), it. trans. *Governare l'Europa*, Bologna, 2000.

[5] P. LINDSETH, *Power and Legitimacy*, Oxford, 2010, p. 1. For another interesting point of view on how it is possible to defend the «political core» of European constitutionalism, see A. SOMEK, *The Cosmopolitan Constitution*, Oxford, 2014.

communication»[6]. It was already clear to Larry Siedentop that the European Union (EU) needed "more democracy", claiming for federalism, popular participation and responsibility[7]. The problem, however, was how to achieve these goals, particularly in time of crisis[8].

It is interesting to note that, from this perspective, the lack of a sound democratic legitimacy at the European level could be a problem for the states as well. Peter Mair, for instance, has denounced the "Tocqueville Syndrome". It affects the national level of the government producing a hiatus between the real power of decision (the capacity to be responsive) and the accountability towards the electors. If national political parties used to aid in the creation of an accountable relationship between civil society and political decision, they seem no better able to reduce the gap between «responsive and responsible government», representing «one of the principle sources of the democratic malaise»[9]. Weakening the electoral body's democratic power to verify and control, the "Tocqueville Syndrome" is, at the same time, another reason for the European political weakness[10].

But what does "more democracy" mean and how can European political parties aid in the enhancing of a European democracy? It is likely that it would be erroneous to consider that participatory

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[6] J. HABERMAS, *Why Europe needs a Constitution*, in *New Left Review*, 2001, pp. 5 ff., p. 17.

[7] L. SIEDENTOP, *Democracy in Europe* (2000), it. trans. *La democrazia in Europa*, Torino, 2001.

[8] And as noted by S. PUNTSCHER RIEKMANN, *In Search of Lost Norms: Is Accountability the Solution to the Legitimacy Problems of the European Union?*, in *Comparative European Politics*, 2007, pp. 121 ff. procedures enhancing accountability could be not enough because «a legitimate democratic system is more than that, it is also about shaping a polity and a society through policy-making, it is about ideas and actions bringing about something new, about creating added value compared to the status quo ante, about constructing a common vision and narrative» (134). On the debate on the legitimacy of the EU governance, see moreover C. PINELLI, *The Discourses on Post-National Governance and the Democratic Deficit Absent an EU Government*, in *European Constitutional Law Review*, 2013, pp. 177 ff.

[9] P. MAIR, *Representative versus Responsible Government*, in *MPIfG Working Paper*, 09/8, 2009, p. 5; on the «growing tension» between responsiveness and responsibility, pp. 13 ff.

[10] P. MAIR, *Ruling the Void. The Hollowing of Western Democracy* (2013), it. trans. *Governare il vuoto. La fine della democrazia dei partiti*, Soveria Mannelli, 2016.

democracy[11] or deliberative democracy[12] can be convincing as a real alternative. Rather, both can be useful to enhance and reshape representative democracy, forming an active citizenship and a strong political community, contributing to safe "democracy"[13]. Their contribution can be essential. However, it seems not possible, at least so far, to eliminate the role of political parties in a sound contemporary representative democracy. After all, political parties are still the main tool of political participation.

The Italian Constitution confirms that assumption: «citizens has the right to freely associate in parties to contribute to determining through democratic method national policies». The subject of the sentence is the citizen, whose political right is to take part to the political process either joining or creating political parties. Moreover, the Constitution defends political pluralism, not only providing, for example, the freedom of expression (Art. 21), but granting that the "democratic method" must be respected by political parties[14]. In this framework, political parties have the responsibility to contribute to determining national policies.

The current "crisis" of representative democracy at the national level is not an easy task and cannot be analysed here[15]. However, the

[11] See C. PATEMAN, *Participation and Democratic Theory*, Cambridge, 1970. See also, R. BELLAMY, A. WARLEIGH, *From an Ethics of Integration to an Ethics of Participation: Citizenship and the Future of the European Union*, in *Millennium*, 1997, pp. 447 ff.

[12] See B. BARBER, *Strong Democracy. Participatory Politics for a New Age*, London, 1984, J.M. BESSETTE, *Deliberative Democracy: The Majority Principle in Republican Government*, in R.A. Goldwin, W.A. Schambra (eds.), *How Democratic is the Constitution*, Washington, 1980, pp. 102 ff. and, more recently, S. BESSON, J.L. MARTÍ (eds.), *Deliberative Democracy and its Discontents*, Burlington, 2006 and J.S. FISHKIN, *When the People Speak. Deliberative Democracy and Public Consultation*, Oxford, 2011. On that issue from a European perspective, recently see G. GERAPETRITIS, *Deliberative Democracy Within and Beyond the State*, in L. Papadopoulou, I. Pernice, J.H.H. Weiler (eds.), *Legitimacy Issues of the European Union in the Face of Crisis*, Baden Baden, 2017, pp. 25 ss.

[13] D. DELLA PORTA, *Can Democracy Be Saved?*, Malden, 2013.

[14] On political parties in Italy see at least P. RIDOLA, *Partiti politici*, in *Enciclopedia del diritto*, XXXII, Milano, 1982, pp. 66 ff.

[15] See for recent developments and problems of representative democracies B. MANIN, *The Principles of Representative Government*, New York, 1997.

role of political parties still appears crucial to assure a strong connection between *responsiveness* and *accountability*. Political parties at the national level are therefore a fundamental tool to link the civil society with the state in the public space[16]. Conversely, at the European level, political parties seem to play a drastically different role[17].

The structure of this paper is as follows. Firstly, it describes how the debate on the functioning of the political parties at the European level developed. Subsequently, it analyses the first legal acknowledgment of their existence in the Treaties and Regulation (Reg.) n. 2004/2003. Furthermore, the new Reg. n. 1141/2014 is explained in the context of the Treaty of Lisbon. In conclusion, some final remarks are outlined.

2. Political parties at the European level and European democracy: from the first election of the European Parliament to the Tsatsos's Report

The debate on the role and on the nature of European political parties is not new. According to Peter Mair, at the national level, parties play a double role: they have a representative and a governing function[18]. At the European level, their contribution is different. Even if it is somehow possible to identify a representative function, it is not always clear. European elections take place mainly at the national level among national parties. Furthermore, it is difficult to see a direct link between European political parties and a governmental function.

Firstly, it must be noted that parties at the European level and Parliamentary groups are different, even if deeply connected. Members

[16] K. HESSE, *Die verfassungsrechtliche Stellung der politischen Parteien im modernen Staat* (1959), in Id., *Ausgewählte Schriften*, Heidelberg, 1984, pp. 59 ff.

[17] See T. SCHWEITZER, *Die Europäische Parteien und ihre Finanzierung durch die Europäische Union*, pp. 59 ff. [see *above* ft. 3]. However, on the functions of European political parties in the European institutional framework, see F. SHIRVANI, *Das Parteienrecht und der Strukturwandel im Parteiensystem: Staats- und europarechtliche Untersuchungen zu den strukturellen Veränderungen im bundesdeutschen und europäischen Parteiensystem*, Tübingen, 2010, pp. 318 ff.

[18] P. MAIR, *Representative versus Responsible Government*, p. 5. [see *above* ft. 9].

of the European Parliament sit in political groups, not organized by nationality, but on the basis of political affiliation[19]. More precisely, it is not possible to establish a group without any political affinities among the members[20]. It is possible that some members do not belong to any political group. They are known as non-attached members. Therefore, parliamentary groups and political parties, no matter how connected practically, must be considered different juridical entities. This was confirmed in the *Les Verts* judgment by the Court of Justice[21].

It is well known, however, that since the first direct election of the European Parliament in 1979[22], the possibility to regulate political parties at the European level has been highly discussed. Nevertheless, only with the Maastricht Treaty (Art. 138A), it was finally foreseen that «political parties at European level are important as a factor for integration within the Union. They contribute to forming a European awareness and to expressing the political will of the citizens of the Union». Political parties at the European level were therefore explicitly

[19] On the juridical regulation of political groups in the European Parliament see at least, M. CARTABIA, *Gruppi politici e interna corporis del Parlamento europeo*, in *Quad. Cost.*, 2000, pp. 191 ff., A. CIANCIO, *Partiti politici e gruppi parlamentari nell'ordinamento europeo*, in *Pol. dir.*, 2007, pp. 153 ff. and more recently A. CIANCIO, *European parties and the process of political integration in Europe*, in *Dirittifondamentali.it*, 2016, pp. 3 ff. See art. 32 ff. of the Rule of Procedure of the European Parliament. On the relationships between political groups and political parties at the European level see M.R. ALLEGRI, *I partiti politici a livello europeo fra autonomia politica e dipendenza dai partiti nazionali*, in federalismi.it, 2013 and G. Grasso, *Partiti politici europei*, in *Digesto discipline pubblicistiche*, III, Milano-Torino, 2008, pp. 609 ff., § 2 and § 7.

[20] First Instance, Joined cases T-222/99, T-327/99 and T-329/99.; Judgment of the Court (Grand Chamber) of 29 June 2004 *Front national v. European Parliament.*

[21] In 1986, in the Judgement *Parti écologiste "Les Verts" v. European Parliament* (Judgment of the Court 23 april 1986 C-294/83) the decision of the Bureau of the European Parliament concerning the allocation of the appropriations was considered void.

[22] On the "party system" in this first phase, see S. HIX, *A Supranational Party System and the Legitimacy of the European Union*, p. 52 [see *above* ft. 3]. On the relations between political groups, political parties at the European level and political parties at the national level until the nineties, see R. LADRECH, *Political Parties in the European Parliament*, in J. Gaffney (ed.), *Political Parties and the European Union*, London, 1996, pp. 291 ff. In the same book, see moreover, on the three phases of transnational party cooperation until the Maastricht Treaty (1. «optimism – the birth of federations»; 2. «stagnation – the European electoral campaign»; 3. «renaissance – the negotiation and ratification of Maastricht»), S. HIX, *The transnational Party Federations*, pp. 308 ff.

considered as «an important factor for integration» and their role was «to forming a European awareness and to expressing the political will of the citizens of the Union»[23]. Nothing specifically, however, was foreseen to establish a European competence to define a European political party or to regulate the procedure to apply for funding. Therefore, Art. 138A was considered an insufficient legal basis to regulate such issues[24].

Following the Maastricht Treaty, political parties at the European level still fought for legal acknowledgment. However, they were already at the centre of the political stage. Gehlen found four steps in the development of political parties at the European level. Three of them placed before the Maastricht Treaty:[25]. Thus, during the nineties, European political parties, often confused with political groups, were an old reality. However, they still needed a legal implementation of their autonomous existence.

Dimitris Tsatsos argued that the new Art. 138A was immediately binding and that it was possible to imagine three different kinds of parties at the European level. They could have been conceivable as confederations of national parties (as *Dachorganisation* of national parties, following the *konföderatives Modell*), as associations of citizens (a *Mitgliedschaft von Unionsbürgern*, following the *föderatives Modell*) or as

[23] The *BVerfG* already affirmed that assumption in the Maastricht Urteil: «Parteien, Verbände, Presse und Rundfunk sind sowohl Medium als auch Faktor dieses Vermittlungsprozesses, aus dem heraus sich eine öffentliche Meinung in Europa zu bilden vermag (vgl. Art. 138 a EGV)» (BVerfGE 89, 155, Rn. 99).

[24] Following the principle of conferral: now art. 5 TEU.

[25] A. GEHLEN, *Europäische Parteiendemokratie? Institutionelle Voraussetzungen und Funktionsbedingungen der europäischen Parteien zur Minderung des Legitimationsdefizits der EU*, Berlin, 2005, pp. 335 ff.: «die internationalen Kooperationen seit Gründung der I. Sozialistischen Internationale, die Gründungsphase der europäischen Parteien, ihre Etablierung nach den ersten unmittelbaren Wahlen zum Europäischen Parlament und ihre Professionalisierung infolge des Maastrichter Vertragswerks». See on this historical process G. LÓPEZ DE LA FUENTE, *Pluralismo Político y Partidos Políticos Europeos*, Granada, 2014, pp. 193 ff. and T. SCHWEITZER, *Die Europäische Parteien und ihre Finanzierung durch die Europäische Union*, pp. 20 ff. [see *above* ft. 3]. For a partially different reconstruction, see G. GRASSO, *Partiti politici europei*, § 2 [see *above* ft. 19].

supranational parties such as the European Union (*supranationales Modell*).[26]

Subsequently, in 1996, the Committee on Institutional Affairs, in the so called "Tsatsos' Report", suggested the regulation of European political parties. The Committee believed that they could have been a central tool to support the European integration process[27]. Tsatsos, the rapporteur, endorsed a real "constitutional" view of the political parties, which were considered useful to cement the constitutional status of the European citizenship. The Committee expressly considered that it was necessary «to strengthen the instruments for democratic participation by citizens in the determination of Union policy» and that «without a functioning party system, a strong and robust democracy in which the citizen participates actively is inconceivable». European political parties were therefore considered necessary to guarantee «that a genuine European citizenship may emerge which monitors, discusses and influences the expression of political will at European level». With that aim, the Committee on Institutional Affairs proposed to pass a framework regulation on the legal status of European political parties and a regulation on the financial circumstances of European political parties, even without an express legal basis for that development[28].

Tsatsos spoke of a «challenge» and underlined that «political parties in the variety of forms that we encounter in Europe and all parts of the world are the outcome of a long tradition of progress towards democracy, an historical development that is still not complete even today». He added, «they are undeniably a component of European political culture. Without a functioning party system, a strong and robust democracy in which the citizen participates actively is inconceivable». It is clear from the report that without political parties,

[26] D. TSATSOS, *Europäische politische parteien?*, in *EuGRZ*, 1994, pp. 45 ff.

[27] *Report on the constitutional status of the European political parties*, 30 October 1996.

[28] The Committee on Institutional Affairs advocates that the EU should define the constitutional mission referred to in Art. 138A of the EC Treaty by means of two legal acts: a framework regulation on the legal status of European political parties and a regulation on financial support for European political parties from budget resources. Nevertheless, the Committee proposed to amend Art. 138A in order to allow a better EU Regulation.

it would have been impossible to think of a European democracy. The idea of the Committee is strictly connected to the ambition that the European integration process in the end would have generated, forging a European *demos*, a federal state or at least a real federal Union[29].

Hence, political parties were considered a necessary means not only to solve the European democratic deficit, but also to contribute «to the establishment of an ever-closer union of the peoples of Europe» and of a real supranational democracy. However, the limits of this conception were immediately evident. Firstly, it implied a top-down creation of the European political parties. They seemed not to be a genuine expression of a European civil society, but an artificial outcome of a political assessment.

Secondly, the institutional framework of the EU is different from the national one. It does not have its cornerstone in the European Parliament. The *Bundesverfassungsgericht*, for instance, has on two occasions strongly pointed out[30] that the European Parliament is neither linked by a confidence relation with the European Commission nor works following a majority/opposition scheme[31]. The idea behind this is that the European Party System is highly "collusive", even if some studies demonstrated quantitatively that this is not always so true[32].

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[29] See J.J. WEILER, *The Constitution of Europe: "Do the New Clothes Have an Emeperor" and Other Essays on European Integration*, Cambridge, 1998 and P. RIDOLA, *Diritto comparato e diritto costituzionale europeo*, Torino, 2010, *passim*.

[30] See BVerfG 2 BvC 4/10 9th November 2011 and BVerfG 2 BvE 2/13 26th February 2014.

[31] Critically on how the European democracy currently works and some possible developments, see A. HATJE, *Demokratie in der Europäische Union. Plädoyer für eine parlamentarisch verantwortliche Regierung der EU*, in *EuR*, 2015, pp. 39 ff. On the essential features of national democracy as a representative democracy see E.-W. BÖCKENFÖRDE, *Mittelbare/repräsentative Demokratie als eigentliche Form der Demokratie*, in G. Müller, R.A. Rhinow, G.Schmid, L. Wildhaber (Hrsg.), *Staatsorganisation und Staatsfunktionen im Wandel. Festschrift für Kurt Eichenberger zum 60.Geburstag*, Basel, 1982, pp. 301 ff. On the governmental structure of the EU, see R. SCHÜTZE, *European Constitutional Law*, Cambridge, 2016, pp. 148 ff. and N. LUPO, *La rappresentanza politica oggi: sfide esistenziali e nodi concettuali*, in *Percorsi costituzionali*, 2017, spec. Pp. 39 ff.

[32] See S. HIX, *A Supranational Party System and the Legitimacy of the European Union*, pp. 54 [see *above* ft. 3] ff. Hix affirms, however, that «whereas a grand coalition may have dominated the third parliament, since the mid-1990s (after the EP gained considerable power in the Maastricht Treaty), the party system in the EP has become

Consequently, it has been argued that «the main factors behind voting in the European Parliament are the policy positions of national parties»[33].

Finally, the idea that «there is only one set of institutions in Europe, which is strong enough to engage in polity building – national parliaments» was highly persuasive. They «continue to be the only structures in town which enjoy the hegemony necessary both to generate new collective visions and to bring about the corresponding transformations in the political identities of sufficient numbers of citizenry in Europe»[34]. This is coherent with the vision that EU is mainly legitimised by a «democratic intergovernamentalism», rather than a true representative democracy[35].

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increasingly competitive». That is why, like in a Presidential system, «the executive (European Commission) does not require the support of a majority in the EP to govern» and therefore «the parties that make up the Commission must build coalitions in the EP on a case-by-case basis» (56). See S. HIX, A. KREPPEL, A. NOURY, *The Party System in the European Parliament: Collusive or Competitive*, in *JCMS*, 2003, pp. 309 ff. Critically, W. GAGATEK, *The Treaty of Lisbon, the European Parliament Elections, and Europarties: A New Playing Field for 2014?*, in *Yearbook of Polish European Studies*, 14/2011, p. 203 considers European political parties electorally «irrelevant». On that topic, see moreover G. RIZZONI, *Opposizione parlamentare e democrazia deliberative*, Bologna, 2012, pp. 307 ff.

[33] S. HIX, *Parliamentary Behaviour with two Principles: Preferences, Parties, and Voting in the European Parliament*, in *AJPS*, 2002, pp. 688 ff., 696. On European political groups and their relationship with national party, see E. BRESSANELLI, *National Parties and Group Membership in the European Parliament: Ideology or Pragmatism?*, in *JEPP*, 2012, pp. 737 ff.

[34] See D. CHALMERS, *The Reconstitution of European Public Spheres*, in *European Law Journal*, 2003, pp. 127–189, 146. On the role of Parliaments connecting a weak and a strong public sphere, see N. FRASER, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, in *Social Text*, 1990, pp. 56 ff., pp. 74 ff. On the way European parliamentarism works see moreover S. PUNTSCHER RIEKMANN, *Constitutionalism and Representation*, in P. Dobner, M. Loughlin (eds.), *The Twilight of Constitutionalism*, pp. 120 ff. [see *above* ft. 4].

[35] See critically M. PATBERG, *Against Democratic Intergovernamentalism: The case for a Theory of Constitutent Power in the Global Realm*, in *ICON*, 2016, pp. 622 ff. and K.D. WOLF, *The New Raison d'État as a Problem for Democracy in World Society*, in *European Journal of International Relations*, 1999, pp. 333 ff. For an interesting reconstruction of the European institutional framework, see J. POLLACK, *Compounded Representation in the EU. No Countries for Old Parliaments*, in S. Kröger (ed.), *Political Representation in the European Union. Still democratic in times of crisis?*, London, 2014, pp. 19 ff.

This reasoning still has an important echo on the reflections on the future developments of European integration. For instance, the idea of a European *demoicracy* is to reconcile the construction of a European political integration with the Nation State. It means that it is necessary to accept that currently «we are not creating a united Europe»[36], considering as impossible in the next future the creation of a European Federal State[37]. This is not to imply that it is not possible to enhance and defend a European public and political space, for example giving importance to the interactions of National Parliaments or developing the concept of *demoicracy*. Jan-Werner Müller, for example, focused his attention to the concept of "European constitutional patriotism", arguing that national states will continue to have a central role. He claimed for a «supranational democratic experimentalism», considering it «as the very "multilevel" political architecture of today's Europe». According to Müller, «a European constitutional patriotism would find a fixed point in such a Constitution, but, more importantly, constitutional patriotism would also be a continuous engagement with its meaning as a project»[38].

Looking at that debate, it seems interesting to consider that European political parties can be helpful in the process of mutual and conflictual acknowledgment between a national and a supranational

[36] See K. NICOLAÏDIS, *The Idea of a European Demoicracy*, in J. Dickson, P. Eleftheriadis (eds.), *Philosophical foundations of European Union law*, Oxford, 2002, pp. 247 ff., p. 274. For the theoretical implications of the concept of *demoi*, see J. BOHMAN, *Democracy Across Borders: From Demos to Demoi*, London, 2007.

[37] For an interesting reconsideration of that problem see C. SCHÖNBERGER, *Die Europäische Union als Bund*, in *AöR*, 2004, pp. 81 ff. For the idea that the European integration process must be considered from the perspective of state transformation, see C.J. BICKERTON, *European Integration. From Nation-States to Member States*, Oxford, 2012.

[38] J.W. MÜLLER, *Constitutional Patriotism*, Oxford, 2007, pp. 136 ff. On possible paths of development of a European constitutional patriotism see M. KUMM, *The Idea of Thick Constitutional Patriotism and its Implication for the Role and Structure of European Legal History*, in *German Law Journal*, 2005, pp. 319 ff. On the idea that it is possible to construct the *demos* «via "democratic praxis"», see by S. HIX, *The Study of European Union II: the "New Governance Agenda and its Rival"*, in *Journal of European public Policy*, 1998, p. 53.

level, mirroring and respecting the peculiarities of the European institutional framework.

3. The new normative framework after the Treaty of Nice and the Reg. 2004/2003

In 1997, the Amsterdam Treaty did not amend Art. 138A of the Maastricht Treaty. Therefore, the lack of a positive basis for a Regulation on European political parties was still considered a good reason to wait. The new Art. 191 incorporated Art. 138A as it used to be. With the Treaty of Nice, there was a change. It added a second paragraph to the Art. 191 providing that «the Council, acting in accordance with the procedure referred to in Art. 251, shall lay down the regulations governing political parties at European level and in particular the rules regarding their funding».

Meanwhile, the absence of a regulation was a problem after an important decision of the Court of Auditors[39], which followed the quoted judgment on the funding of European political groups[40]. Funding was an old problem, but it still needed to be solved. The Court of Auditors denounced «significant anomalies» in the funding system.

[39] The Court of Auditors special report 13/2000 condemned and found illegal the funding mechanism of the European Political Parties through the Groups of the European Parliament. It was clearly stated that «The Court is aware that, since the entry into force of the Treaty of Amsterdam, Art. 191 of the Treaty establishing the European Community recognises the importance of political parties at the European level and that thought is currently being given to a legal statute for European political parties. Nevertheless, the Court considers that aid for the financing of European political parties, as for other similar groupings, cannot be taken from appropriations which are intended for the activities of the groups» (point 47). It was further added that «In view of the role ascribed to political parties at the European level by Art. 191 of the Treaty establishing the European Community and in view of the inclusion in the budget of a heading specifically for contributions to European political parties, consideration should also be given to drawing up transparent rules to be applied to the financing of these parties. This opportunity should also be used to clarify the role and activities of the groups while reaffirming that they are, primarily, internal parliamentary structures» (point 64).

[40] See *above* ft. 21.

There was not enough transparency in the financing methods and in the appropriation rules.

More specifically, it was found that some groups used part of their appropriations to finance European political parties. Even if the Court was aware that the Treaty acknowledges a certain importance to political parties at the European level, a real statute concerning their funding was still missing. Therefore, the Court considered that appropriations that are intended for the activities of the groups could not be used to finance European or national political parties.

A first proposal for a regulation was finally presented on March 22, 2001. In 2002, the European Parliament restated that it was not possible to continue avoiding to lay down a specific regulation on the funding of political parties at the European level[41]. However, two years after the publication of Special Report No. 13/2000, a proper regulation for a transparent financing system of European political parties was still not approved.

Eventually, however, Reg. 2004/2003 foresaw a regulation for political parties at the European level[42]. It was not very detailed and was mainly conceived to cope with the funding task. The democratic function in the public sphere and their role in the integration process seemed secondary. In 2005, for example, Reg. 2004/2003 was considered a clear proof of the *Demokratiedefizit* of the EU[43]. Art. 2

[41] European Parliament decision concerning discharge in respect of the implementation of the general budget of the EU for the 2000 financial year

[42] See S. ARMBRECHT, *Politische Parteien im europäischen Verfassungsverbund*, Baden Baden, 2008, pp. 201 ff.

[43] H.H. VON ARNIM, *Die neue EU-Parteienfinanzierung*, NJW, 2005, p. 253. Interesting judgments were delivered to contest the validity of that regulation. See Order of the Court of First Instance of 11 July 2005 in Case T-13/04: *Jens-Peter Bonde and Others v. European Parliament and Council of the European Union*; Case T-40/04 *Bonino and Others v Parliament and Council*; and Case T-17/04 *Front national and Others v Parliament and Council* (under appeal, Case C-338/05 P); *Case C-338/05* - Appeal brought on 19 September 2005 - *le Front National, M.F. Stirbois, B. Gollnisch, C. Lang, J.C. Martinez, Ph. Claeys, K. Dillen and M. Borghezio against the judgment delivered on 11 July 2005 by the Court of First Instance of the European Communities* (Second Chamber) in Case T-17/04 between *Le Front National and Others and the European Parliament and the Counsel of the European Union.* On these case law see, G. LÓPEZ DE LA FUENTE, *Pluralismo Político y Partidos Políticos Europeos*, p. 205 [see *above* ft. 25] and F. SHIRVANI, *Das Parteienrecht und der Strukturwandel im Parteiensystem. Staats- und*

defined what a political party at the European level is, introducing two different types of European parties. It is foreseen that a «political party at European level» means «a political party or an alliance of political parties which satisfies the conditions referred to in Art. 3».

It was clarified that, on the one hand, a «political party» means «an association of citizens which pursues political objectives, and which is either recognized by, or established in accordance with, the legal order of at least one Member State». On the other hand, an «alliance of political parties» was defined as a «structured cooperation between at least two political parties»[44].

Conditions that should have been met by a political party or an alliance of political party to be considered a political party at the European level were not strict. Firstly, the organizational statute and a program had to be explicitly laid down. Then, a political party at the European level should have had legal personality in the Member State in which its seat was located. Thirdly, a political party should have been represented, in at least one quarter of Member States or have received, in minimum one quarter of the Member States, at least three per cent of the votes cast in each of those Member States at the most recent European Parliament elections. Moreover, political parties had to observe in their program and in their activities, the principles on which the EU is founded, namely the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. Finally, a political party should have participated in elections to the European Parliament or have expressed the intention to do so[45].

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europarechtliche Untersuchungen zu den strukturellen Veränderungen im bundesdeutschen und europäischen Parteiensystem, pp. 313 ff. [see *above* ft. 17]

[44] See G. LÓPEZ DE LA FUENTE, *Pluralismo Político y Partidos Políticos Europeos*, pp. 200 ff. [see *above* ft. 25], T. SCHWEITZER, *Die Europäische Parteien und ihre Finanzierung durch die Europäische Union*, pp. 147 ff. [see *above* ft. 3] and on the *Rechtsbegriff* of political parties at the European level F. SHIRVANI, *Das Parteienrecht und der Strukturwandel im Parteiensystem. Staats- und europarechtliche Untersuchungen zu den strukturellen Veränderungen im bundesdeutschen und europäischen Parteiensystem*, pp. 305 ff. [see *above* ft. 17].

[45] See T. SCHWEITZER, *Die Europäische Parteien und ihre Finanzierung durch die Europäische Union*, pp. 147 ff. [see *above* ft. 3].

The European Parliament had the power to verify if political parties at the European level continue to meet the conditions to receive the funding from the general budget of the EU. In 2007, Reg. n. 2004/2003 was amended by Reg. n. 1524/2007, acknowledging a new legal entity named political foundations at the European level and introducing some other changes[46]. European political foundations must be affiliated with a political party at the European level[47]. The Regulation's shortcomings were immediately evident. Political parties at the European level failed in their aim to be a pivotal tool for the expression of the European citizens' political will, as the Charter of Fundamental Rights of the European Union foresaw in 2000[48].

4. The representative democracy in the Lisbon Treaty: a new role for political parties at the European level and the Giannakou Report

With the Treaty of Lisbon, Art. 10(1) TEU establishes that the «functioning of the Union shall be founded on representative democracy». Representative democracy at the European level, however, has a twofold nature. On the one hand, «Citizens are directly represented at Union level in the European Parliament». On the other hand, «Member States are represented in the European Council by their

[46] An important amendment was Art. 8 affirming that European political parties can finance European electoral campaigns: «The expenditure of political parties at European level may also include financing campaigns conducted by the political parties at European level in the context of the elections to the European Parliament, in which they participate as required in Art. 3(1)(d). In accordance with Art. 7, these appropriations shall not be used for the direct or indirect funding of national political parties or candidates».

[47] On this development, G. LÓPEZ DE LA FUENTE, *Pluralismo Político y Partidos Políticos Europeos*, pp. 222 ff. [see *above* ft. 25] and A. CIANCIO, *European parties and the process of political integration in Europe*, pp. 13-14 [see *above* ft. 19]. The new Art. 2 pointed out that a political foundation at the European level means an entity or network of entities which has legal personality in a Member State, is affiliated with a political party at the European level, and which through its activities, within the aims and fundamental values pursued by the EU, underpins and complements the objectives of the political party at the European level.

[48] Art. 12(2): «Political parties at Union level contribute to expressing the political will of the citizens of the Union».

Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens» (Art. 10(2)).

Moreover, it is foreseen that «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». It is a clear reference to some forms of participatory democracy, such as the right to petition (Art. 20; Art. 227 TFEU) or the citizens' initiative on matters where citizens consider that a legal act of the EU is required for implementing the Treaties[49] (Art. 11(4) TEU; Art. 24 TFEU).

More specifically, the new Art. 10(4) TEU and Art. 224 TFEU regulate political parties at the European level. Art. 10(4) specifies that «political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union», whereas Art. 224 foresees that «the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, by means of regulations, shall lay down the regulations governing political parties at European level referred to in Art. 10(4) of the Treaty on EU and in particular the rules regarding their funding»[50].

It is interesting to underline one significant difference from the original version of Art. 138A. As abovementioned, Art. 138A of the Maastricht Treaty used to foresee not only that political parties at the European level contribute to forming a European awareness and to expressing the political will of the citizens of the Union, but also that they were *a factor for integration*. The new Art. 10(4), otherwise, does not make any reference to their role as a factor for the integration process. This choice is probably due to the idea that some European parties are

[49] On these tools of participatory democracy, see M. MEZZANOTTE, *La democrazia diretta nei trattati dell'Unione europea*, Padova, 2015 and on the European citizens' legislative initiative A. TH. MÜLLER, *Die Europäische Bürgerinitiative als Instrument direktdemokratischer Legitimation – und die (problematische) Ausgestaltung ihrer materiellen Schranken im Sekundärrecht*, in *EuR*, 2015, pp. 169 ff.

[50] According to T. SCHWEITZER, *Die Europäische Parteien und ihre Finanzierung durch die Europäische Union*, p. 108 [see *above* ft. 3], Art. 224 TFEU does not introduce a duty to foresee a system of public funding in favour of European political parties, rather it allows the Union to regulate it.

clearly and openly against the integration process. However, as discussed below, political parties still have to comply with the principle affirmed by the Art. 2 TEU.

The path to Reg. n. 1141/2014 was long. Clear and motivated reasons to amend Reg. 2004/2003 were affirmed by the Giannakou Report[51]. It was re-affirmed that political parties – and their linked political foundations – are essential instruments of a parliamentary democracy, holding parliamentarians to account, helping to shape the political will of citizens, drawing up political programs, training and selecting candidates, maintaining dialogue with citizens and enabling citizens to express their views. Political parties and their foundations were then connected with the aim to create a «European polis».

However, it was also clear that «European political parties, as they stand, are not in a position to play this role to the full because they are merely umbrella organizations for national parties and not directly in touch with the electorate in the Member States». The Giannakou Report called for internal democracy, more detailed responsibilities and «an authentic legal status for the European political parties and a legal personality of their own, based directly on the law of the EU». According to the Report, that solution would «enable the European political parties and their political foundations to act as representative agents of the European public interest».

A first draft of a new regulation was finally presented. Moreover, a specific article was devoted to the internal democracy of political parties at the European level[52]. It was probably considered a possible strategy to cope with the democratic deficit of the EU[53]. Subsequently, Reg. n. 1141/2014 was approved with interesting innovations, but without such important references to the internal democracy of political parties.

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[51] Delivered on 18 March 2011.

[52] Art. 4 - Governance and internal democracy of European political parties of the Draft to amend the regulation on political parties - Brussels, 12.9.2012 COM(2012) 499 final. On this proposal, G. LÓPEZ DE LA FUENTE, *Pluralismo Político y Partidos Políticos Europeos*, pp. 230 ff. [see *above* ft. 25].

[53] On the first draft and the relevance of the problem concerning the internal democracy, find remarks in G. GRASSO, *Partiti politici europei e disciplina costituzionale nazionale*, in *Nomos*, 2017, pp. 6 ff.

5. «European political parties» according to the Reg. n. 1141/2014: definitions, conditions and role

In 2014, a new regulation was finally approved. It repealed Reg. 2004/2003, entering into force on 1 January 2017. The new Reg. n. 1141/2014 provides for interesting innovations. It speaks explicitly of «European political parties» and no longer merely of «political parties at European level» even if in the Treaty the second expression is the only that it is possible to find. Moreover, it explicitly foresees that political parties have the duty to respect the values indicated in the Art. 2 TEU. Subsequently, a specific European legal personality was shaped for European political parties (art. 12)[54].

More precisely, the new Regulation creates a registration procedure, conditions for the acknowledgment and establishes an Authority for European political parties and European political foundations. As discussed below, the Authority has substantial powers to verify the compliance of the European political parties to the European values and has the power to de-register European political parties (Art. 6)[55].

The definition of political party at the European level has partially changed with respect to Reg. 2004/2003. Tackling the concept of the European political party, the new Regulation affirms that it is «a political alliance which pursues political objectives and is registered with the Authority for European political parties and foundations established in Art. 6, in accordance with the conditions and procedures laid down in this Regulation».

[54] Art. 15 regulate how the European legal personality can be acquired and Art. 16 how it can be terminated.

[55] See the website http://www.appf.europa.eu/appf/en/home/welcome.html where it specified that «The Authority for European Political Parties and European Political Foundations (the "Authority") has been established for the purpose of registering, controlling and imposing sanctions on European Political Parties and European Political Foundations pursuant to Regulation (EU, Euratom) No. 1141/2014 of the European Parliament and of the Council of 22 October 2014 on the statute and funding of European political parties and European political foundations».

It is specified that a «political alliance is a structured cooperation between political parties and/or citizens» and a political party is still considered an «association of citizens which pursues political objectives, and which is either recognized by, or established in accordance with, the legal order of at least one Member State». It is important to underline that to be considered a European political party, it is necessary to be registered by the Authority and therefore to have a European legal status.

According to Art. 3, to be registered, some conditions must be met[56], whereas Art. 4 regulates the governance of European political parties. Here, it is foreseen that the statute of a European political party shall comply with the applicable law of the Member State in which it has its seat.

It shall include provisions covering mandatory requirements (for example, the program and the name) and some rules on the internal party organization (such as modality for admission resignation exclusion of its member and powers, responsibilities and composition of its governing bodies). Art. 4(3) establishes that «the Member State of the seat may impose additional requirements for the statutes, provided those additional requirements are not inconsistent with this Regulation». This provision is important because it is linked to Art. 14(2) and therefore to Art. 16(3). Thus, it is relevant for the special de-registration procedure delivered at national level (see *infra* § 5.2-5.3-5.4).

[56] «1. A political alliance shall be entitled to apply to register as a European political party subject to the following conditions: (a) it must have its seat in a Member State as indicated in its statutes; (b) it or its members must be, or be represented by, in at least one quarter of the Member States, members of the European Parliament, of national parliaments, of regional parliaments or of regional assemblies, or it or its member parties must have received, in at least one quarter of the Member States, at least three per cent of the votes cast in each of those Member States at the most recent elections to the European Parliament; (c) it must observe, in particular in its programme and in its activities, the values on which the Union is founded, as expressed in Art. 2 TEU, namely respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities; (d) it or its members must have participated in elections to the European Parliament, or have expressed publicly the intention to participate in the next elections to the European Parliament; and (e) it must not pursue profit goals».

The new system appears rather complicated. Furthermore, the relationship among European political parties and national political parties still seems highly controversial. It is possible to see the purpose to foster the creation of a genuine transnational party system. However, it seems still predominant the connection with the national level. It is clear that this is not an easy task. European parties still seem to be mainly top-down parties and "umbrella organizations", not fully accountable towards electors, who continue voting at national level for national parties. The new Authority will probably play a pivotal role. Thus, the powers and functions of this new European institution must be clarified.

5.1. The new Authority for European political parties and European political foundations

The Authority for European political parties has been established by Art. 6 of Reg. n. 1141/2014[57]. It is represented by its director[58], appointed for five years by the European Parliament, the Council and the Commission on a proposal made by a committee. Its seat is located in the European Parliament. The Authority shall establish and manage a register of European political parties.[59] It is independent and has a legal personality. The Court of Justice has the power to review the legality of the decisions of the Authority[60]. It has important powers.

[57] G. GRASSO, *Partiti politici europei e disciplina costituzionale nazionale*, p. 9 [see *above* ft. 53].

[58] Michael Adam is the Director of the Authority, appointed by the European Parliament, the Council and the European Commission (see http://www.appf.europa.eu/appf/en/legal-background.html). The Authority has been set up since the 1st September 2016.

[59] See parties registered here: http://www.appf.europa.eu/appf/en/transparency/registered-parties-and-foundations.html). Application to the Authority can be presented here http://www.appf.europa.eu/appf/en/application.html.

[60] Art. 6(11): «The Court of Justice of the European Union shall review the legality of the decisions of the Authority in accordance with Art. 263 TFEU and shall have jurisdiction in disputes relating to compensation for damage caused by the Authority in accordance with Art. 268 and 340 TFEU. Should the Authority fail to take a decision where it is required to do so by this Regulation, proceedings for failure

More specifically, it shall decide on registration and de-registration of European political parties and political foundation, regularly verifying whether the registration conditions continue to be met.

According to Art. 6, the Authority shall verify whether a European political party continues to comply with conditions laid down in Art. 3 and the governance provisions set out in accordance with points (a), (b), (d), (e) and (f) of Art. 4(1). Moreover, Art. 7(2) and Art. 8(3) Reg. n. 1141/2014 foresee that the Commission is empowered to enact delegated acts, approved in the end of 2015, concerning the Register, which shall be established and managed by the Authority[61]. Art. 8 provides for the application for registration, establishing which documents shall accompany the request. Art. 9 describes how the Authority shall examine the application and make its decision: «the application shall be examined by the Authority in order to determine whether the applicant satisfies the conditions for registration laid down in Art. 3 and whether the statutes contain the provisions required by Art. 4 and 5». The decision, must be published. It is interesting to note that according to Art. 9(3), a standard formal declaration that the applicant satisfies the conditions laid down in Art. 3 shall be considered sufficient to ascertain that the applicant complies with the conditions specified in Art. 3(1)(c).

to act may be brought before the Court of Justice of the European Union in accordance with Art. 265 TFEU».

[61] See Commission delegated regulation (EU, Euratom) 2015/2401 - 2 October 2015 on the content and functioning of the Register of European political parties and foundations http://www.epgencms.europarl.europa.eu/cmsdata/upload/97e72f3a-57974918-af4b-38c1b8232d79/2015_COM_Delegated_Act_Register_documents.pdf. Moreover, on the Register, the Commission, authorised by Art. 7(3), decided to approve an implementing regulation in accordance with the opinion of the Committee established by Art. 37 of Regulation (EU, Euratom) No. 1141/2014: Commission implementing regulation (EU) 2015/2246 of 3 December 2015 on detailed provisions for the registration number system applicable to the register of European political parties and European political foundations and information provided by standard extracts from the register.
http://www.epgencms.europarl.europa.eu/cmsdata/upload/0118a659-6abf4515-8f1e734f1b80122e/2015_COM_Implementing_Act_Register_numbers_extracts.pdf.

Moreover, Art. 9(6) imposes that «the updated list of member parties of a European political party, annexed to the party statutes in accordance with Article 4(2), shall be sent to the Authority each year». Any changes in that sense shall be communicated to the Authority within four weeks. As a matter of fact, it is important to verify any changes following which the European political party might no longer satisfy the condition laid down in Art. 3(1)(b).

Other powers and duties shall be exercised in cooperation with the Authorising Officer of the European Parliament and with the competent Member States (Art. 24 and Art. 28). In addition, the Authority has to respect the protection of personal data (Art. 33). Art. 34 and Art. 35 establish a right to be heard and a right to appeal.

5.2. The Authority and the power to control compliance with the Regulation of European political parties: procedure and limits

As abovementioned, the Authority shall continuously verify whether any of the conditions for registration laid down in Art. 3 or the governance provisions set out in points (a), (b), (d), (e) and (f) of Art. 4(1) continue to be complied with. Art. 10, however, distinguishes two different procedures. On the one hand, according to Art. 10(2), whether the Authority finds that «that any of the conditions for registration or governance provisions referred to in paragraph 1, with the exception of the conditions in Art. 3(1)(c) and Art. 3(2)(c), are no longer complied with, it shall notify the European political party or foundation concerned». On the other hand, a special procedure to verify the compliance of a European political party with the values of the Art. 2 TEU is provided. Art. 3(1)(c), in fact, establishes that a European political party «must observe, in particular in its programme and in its activities, the values on which the Union is founded, as expressed in Art. 2 TEU, namely respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities».

In that case, the procedure is highly and cautiously regulated. It must be considered, firstly, that Art. 10 foresees a temporal limit,

providing that this control shall not be initiated within a period of two months prior to elections to the European Parliament. Secondly, the Regulation establishes that decisions can only be adopted in the event of «manifest and serious breach» of the values on which the Union is founded, as expressed in Art. 2 TEU. No specific definition of «manifest and serious breach» is provided, but it seems to recall the words used by the Art. 7 TEU[62]. Subsequently, the Regulation foresees that the verification procedure may be initiated only by the European Parliament, the Council or the Commission. More specifically, either the European Parliament[63], the Council or the Commission may lodge with the Authority a request for verification. Alternatively, the Authority shall inform the European Parliament, the Council and the Commission with a view to allowing them to lodge a request for verification if there are facts that may give rise to doubts concerning compliance by a

[62] On the one hand, Art. 7(1) provides the concept of «clear risk of a serious breach by a Member State of the values referred to in Art. 2» and, on the other, Art. 7(2) uses the formula: «existence of a serious and persistent breach by a Member State of the values referred to in Art. 2». An interesting essay on the juridical meaning of Art. 7 before the entry into force of the Lisbon Treaty was delivered by F. SCHORKOPF, *Homogenität in der Europäischen Union. Ausgestaltung und Gewährleistung durch Art. 6 Abs. 1 und Art. 7 EUV*, Berlin, 2000. On the procedures foreseen after the Lisbon Treaty by the new Art. 7, see recently the debate on *Verfassungsblog* about Poland at the link http://verfassungsblog.de/tag/art-7-teu/. Moreover, on the connections between Art. 7 and the safeguards of the values of Art. 2 TEU with references to European political parties, see G. LÓPEZ DE LA FUENTE, *Pluralismo Político y Partidos Políticos Europeos*, pp. 103 ff. [see *above* ft. 25]. On the EU as the guardian of the rule of law, see M. PARODI, *L'Unione europea nel ruolo di garanzia dello stato di diritto. Prime riflessioni sul nuovo quadro giuridico introdotto dalla commissione europea*, in *federalismi.it*, 2014 and D. STRAZZARI, *La clausola di omogeneità dell'UE: connotazione costituzionale o internazionale? Riflessioni da un'analisi comparata*, in *federalismi.it*, 2014. For an interesting proposal, see A. VON BOGDANDY, C. ANTPÖHLER, J. DICKSCHEN, S. HENTREI, M. KOTTMANN, M. SMRKOLJ, *A European Response to Domestic Constitutional Crisis: Advancing the Reverse-Solange Doctrine*, in A. von Bogdandy, P. Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area*, Oxford; Portland, 2015, pp. 235 ff.

[63] Art. 223(a)(2) of the European Parliament's Rules of Procedure establishes how the European Parliament shall proceed. It is specified that the new regulation «shall only apply to European political parties and European political foundations within the meaning of Art. 2(3) and (4) of Regulation (EU, Euratom) No. 1141/2014. See also footnotes to Rules 224 and 225».

specific European political party or European political foundation with the conditions laid down in Art. 3(1)(c) (Art. 10 (3)).

Another case in which that procedure of deregistration can be followed is regulated by Art. 16(3)(a). According to that provision, «if a European political party or a European political foundation has seriously failed to fulfil relevant obligations under national law applicable by virtue of the first subparagraph of Art. 14(2), the Member State of the seat may address to the Authority a duly reasoned request for de-registration which must identify precisely and exhaustively the illegal actions and the specific national requirements that have not been complied with»[64]. Subsequently, the Authority asks a committee of independent eminent persons, which has two months to deliver its point of view[65].

5.3. The new deregistration procedure: decision and veto power

Once the Authority has evaluated the committee's opinion, it shall decide whether to deregister a European political party for a breach of the conditions set out in Art. 3(1)(c). Nevertheless, a «duly reasoned» decision to deregister a political party is still not enough. The Authority must communicate that decision to the European Parliament and the Council. It is foreseen that it can «enter into force only if no objection is expressed by the European Parliament and the Council within a period of three months of the communication of the decision to the

[64] However, it must be said that there is an important distinction to be made here. Art. 16(3)(a) affirms that the procedure delivered by Art. 10 must be followed for matters relating exclusively or predominantly to elements affecting respect for the values on which the Union is founded, as expressed in Art. 2 TEU. On the other hand, point (b) establishes that for any other matter, and when the reasoned request of the Member State concerned confirms that all national remedies have been exhausted, the Authority shall decide to remove the European political party or European political foundation concerned from the Register. Art. 14(2) foresees that «For matters not regulated by this Regulation or, where matters are only partly regulated by it, for those aspects which are not covered by it, European political parties and European political foundations shall be governed by the applicable provisions of national law in the Member State in which they have their respective seats» (see *infra* § 5.3).

[65] The committee is regulated by Art. 11 and it consists of six members. The European Parliament, the Council and the Commission each appoint two members.

European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Authority that they will not object».

If the European Parliament or the Council object, the European political party cannot be de-registered. Therefore, the Regulation confers to the European Parliament and the Council an important veto power, considering that a deregistration decision is a highly political issue and cannot be completely neutralized. With the aim to balance this veto power, the Regulation demands that any objection shall be duly reasoned and shall be made public. It is an interesting balancing and seems to confirm the struggle towards the construction of a communicative arena and a real public space in Europe. However, the procedure appears still too complex.

If there are no objections, the decision of the Authority shall be published in the Official Journal of the European Union. Detailed grounds for deregistration shall be alleged. Art. 10(6) provides that «a European political foundation shall automatically forfeit its status as such if the European political party with which it is affiliated is removed from the Register». If deregistered, a European political party loses its European legal personality and will be removed from the Register by a decision of the Authority.

It must be taken into account that there is another possible reason to deregister a European political party. Art. 14(2) foresees that «for matters not regulated by this Regulation or, where matters are only partly regulated by it, for those aspects which are not covered by it, European political parties and European political foundations shall be governed by the applicable provisions of national law in the Member State in which they have their respective seats».

As abovementioned, Art. 16(2) affirms that «if a European political party or a European political foundation has seriously failed to fulfil relevant obligations under national law applicable by virtue of the first subparagraph of Art. 14(2), the Member State of the seat may address to the Authority a duly reasoned request for de-registration which must identify precisely and exhaustively the illegal actions and the specific national requirements that have not been complied with». If the

violation concern the breach of Art. 2 TEU, the Authority shall follow the procedure provided by Art. 10 (Art. 16(3)(a)). Alternatively, Art. 16(2)(b) affirms that the Authority can directly decide to remove the European political party or European political foundation concerned from the Register «for any other matter, and when the reasoned request of the Member State concerned confirms that all national remedies have been exhausted».

5.4. The deregistration procedure: some considerations

Before analysing the new funding system of Reg. n. 1141/2014, it can be useful to compare the new deregistration procedure with the old one and try to draw some reflections on the new system. The Reg. 2004/2003 foresaw that a political party at the European level should observe, in its program and in its activities, the principles on which the EU is founded, namely the principles of liberty, democracy, respect for human rights and fundamental freedoms, as well as the rule of law (Art. 3(c)). Therefore, Art. 5 used to regulate the verification procedure. There was no Authority and the European Parliament had the power to verify that the conditions laid down in Art. 3(a) and (b) continued to be met[66].

The verification procedure related to the condition sub point (c) was different. It foresaw that the European Parliament had to verify «by a majority of its members, that the condition in question continues to be met», but only «at the request of one quarter of its members, representing at least three political groups in the European Parliament». Moreover, there were other procedural constraints. The Regulation used to affirm that it was necessary to hear «the representatives of the relevant political party at European level and ask

[66] According to them, a political party at the European level «(a) must have legal personality in the Member State in which its seat is located; (b) it must be represented, in at least one quarter of Member States, by Members of the European Parliament or in the national Parliaments or regional Parliaments or in the regional assemblies, or it must have received, in at least one quarter of the Member States, at least three per cent of the votes cast in each of those Member States at the most recent European Parliament elections».

a committee of independent eminent persons to give an opinion on the subject within a reasonable», before carrying out such verification. The main implication of the procedure was that the European political party should have been excluded from funding.

More specifically, Rule 225 of the European Parliament's Rules of Procedure implemented Art. 4-5 Reg. n. 2003/2004. The title of Art. 225 is «Powers and responsibilities of the committee responsible and of Parliament's plenary»[67]. It foresaw that, if requested by one-quarter of Parliament's Members representing at least three political groups, the President «following an exchange of views in the Conference of Presidents» should have called upon «the committee responsible to verify whether or not a political party at European level is continuing (particularly in its program and in its activities) to observe the principles upon which the European Union is founded».

Subsequently, the committee should have heard the representatives of the political party concerned. Moreover, a committee of independent eminent persons should have expressed its opinion. Eventually, there was a Parliament's vote by a majority of the votes cast on the proposal. This vote was decisive to evaluate if a political party does not observe the conditions laid down in Art. 3 of the Regulation.

From this frame, it is clear that the verification procedure was mainly a political oversight. The new Regulation, on the contrary, tries to balance a political aim, still evident by the provision of the veto power, with a technical one, personified by the Authority and tempered by the committee of eminent persons. It will be interesting to observe if the new discipline will succeed.

Eventually, some considerations should be taken into account analysing the control that the Authority shall execute on European political parties. It is well known that the European Court of Human Rights delivered a detailed test to declare, in conformity with the Convention, a political party unconstitutional. It seems a significant

[67] It is now foreseen that «Rule 225 shall remain applicable to political parties and political foundations at the European level within the meaning of Art. 2 of Regulation (EC) No. 2004/2003, for as long as they receive funding for the 2014, 2015, 2016 and 2017 budget years in application of that regulation».

indirect consequence of that ECHR's case law the recent *BVerfG*'s decision[68] on the *Nationaldemokratische Partei Deutschlands* (NPD), which is, at the moment, represented in the European Parliament.

Art. 21 Abs. 2 GG foresees that «Parties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality». In the fifties, the unconstitutionality of two German political parties was declared, mainly on ideological grounds, without considering whether they could have represented a real danger for the free democratic basic order of the German Republic[69].

The EU has not yet acceded to the European Convention for the Protection of Human Rights and Fundamental Freedoms as Art. 6(2) TEU requires[70]. However, whether the verification procedure will be

[68] BVerfG 2 BvB 1/13 vom 17. Januar 2017. The BVerfG deeply analyses the ECHR's case law on political parties, affirming that «requirements that result from the standards set out above and which need to be met to establish that a political party is unconstitutional are fully compatible (2) with the case-law of the European Court of Human Rights (ECtHR) on prohibitions of political parties, which it derived from the European Convention on Human Rights» (Rn. 607 ff.).

[69] For the case law on the Art. 21 Abs. 2 see M. MORLOK, *Art. 21 [Parteien]*, in H. Dreier (ed.), *Grundgesetz Kommentar*, Band II, Tubingen, 1998, pp. 248 ff. Critically, more recently, on the interpretation of Art. 21 Abs. 2, GG see M.J. ALTER, *Das Parteiverbot: Weltanschauungsvorsorge oder Gefahrenabwehr?*, in *AöR*, 2016, pp. 571 ff. In order to read the *Parteiverbot* armonically with the ECHR's case law more specifically see J.P. SCHAEFER, *Das Parteiverbot im Lichte der Europäischen Menschenrechtskonvention*, in *AöR*, 2016, pp. 594 ff. For a quantitative analysis focusing on how militant democracy has worked in Europe, see A. K. BOURNE, F. CASAL BÉRTOA, *Mapping "Militant Democracy": Variation in Party Ban Practices in European Democracies (1945-2015)*, in *European Constitutional Law Review*, 2017, pp. 221 ff. See moreover, for a critical comparison between principles historically developed by the *BVerfG* on the constitutional status of German political parties and the European principles regulating European political parties T. SCHWEITZER, *Die Europäische Parteien und ihre Finanzierung durch die Europäische Union*, pp. 110 ff. and more specifically on the connections between Art. 21 Abs. 2 GG and the protection of fundamental values at the European level 214 ff. [see *above* ft. 3]. For an Italian point of view, see at least S. CECCANTI, *Le democrazie protette e semi-protette da eccezione a regola. Prima e dopo le Twin Towers*, Torino, 2004 and I. NICOTRA, *Democrazia "convenzionale" e partiti antisistema*, Torino, 2007.

[70] See the controversial Opinion 2/13 (Full Court) of 18 December 2014.

conducted on a mere ideological and programmatic basis, it is possible to see some problems of legal correspondence with the ECHR's case law on political parties.

Moreover, according to Art. 10(4) TEU, it must be taken into consideration the fact that nowadays European political parties no longer have the function to be important as a factor for integration within the Union, as the Maastricht Treaty used to foresee (see §§ 2 and 4). This choice allows without any problems to consider as legally admissible if a European party is openly and programmatically against the integration process.

5.5. Funding and sanctions: «never for money, always for love»?

Analysing Reg. n. 1141/2014 makes interesting innovations apparent. Nevertheless, once more, it seems mainly devoted to regulating the funding procedure. A European political party may apply for funding only if correctly registered, represented in the EU Parliament with at least one of its members and not in a situation of exclusion referred to in Art. 106(1) of Financial Regulation[71]. Art. 17(4) foresees that financial contributions shall not exceed 85% of the annual reimbursable expenditures. Award criteria are then regulated by Art. 19, establishing that only 15% of the contributions or grants awarded in accordance with Art. 18 shall be distributed in equal shares among the beneficiary European political parties. The other 85% shall be distributed in proportion to their share of elected members. This provision could be problematic, if analysed under the lens of the principle of *Chancengleichheit* among political parties[72].

Coping with an old problem, it has been more precisely established that European political parties shall use funding from the general budget of the EU or from any other source to finance campaigns

[71] *Reg. (EU, Euratom) n. 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No. 1605/2002.*

[72] On that problem, with references to the German case law and the old Regulation, see T. SCHWEITZER, *Die Europäische Parteien und ihre Finanzierung durch die Europäische Union*, pp. 122 ff. [see *above* ft. 3].

conducted by the European political parties in the context of elections to the European Parliament in which they or their members participate (Art. 21). By contrast, it is not allowed to finance, even indirectly, national political parties (Art. 22(1)).[73] Besides public funding, donations and contributions are regulated by Art. 20, providing for quantitative limits and defining the kinds of donations not acceptable. Art. 23, finally, regulates accounts, reporting and audit obligations. According to Art. 24, the power to control is exercised in cooperation by the Authority, the Authorizing Officer of the European Parliament and the competent Member States[74] (Art. 24(2)). The Court of Auditors, finally, shall exercise its audit powers in accordance with Art. 287 TFEU (Art. 25 (3)) and the OLAF may carry out investigations.

Art. 27 regulates sanctions. They can consist either in a decision to deregister a European political party if some circumstances occur or in financial sanctions. There, it is foreseen that the Authority, in accordance with Art. 16, can remove a European political party from the Register by way of sanction. It can happen if the party in question has been found by a judgment having the force of res judicata to have engaged in illegal activities detrimental to the financial interests of the Union as defined in Art. 106(1) of the Financial Regulation.

Moreover, this can occur whether, in accordance with the procedures set out in Art. 10(2) to (5), the political party no longer fulfils one or more of the conditions set out in points (a), (c) and (e) of Art. 3(1). Eventually, the Authority shall act, where there is a request by a Member State for de-registration on grounds of serious failure to fulfil

[73] Art. 7 and 8 of the Reg. 1524/2007 already regulated that problem. However, it has been necessary to amend them. Other positive and negative limits are clearly established by Art. 22, affirming that «2. The funding of European political foundations from the general budget of the EU or from any other source shall not be used for any other purpose than for financing their tasks as listed in Art. 2(4) and to meet expenditure directly linked to the objectives set out in their statutes in accordance with Art. 5. It shall in particular not be used for the direct or indirect funding of elections, political parties, or candidates or other foundations; 3. The funding of European political parties and European political foundations from the general budget of the EU or from any other source shall not be used to finance referendum campaigns».

[74] Art. 28 regulates how the Authority, the Authorising Officer of the European Parliament and the Member States shall cooperate.

obligations under national law meets the requirements set out in Art. 16(3)(b).

Financial sanctions may be imposed by the Authority. Art. 27(2) distinguishes between non-quantifiable infringements and quantifiable infringements. On the one hand, non-quantifiable infringements can imply as sanctions a fixed percentage of the annual budget of the European political party (5% to 50%). On the other hand, in cases of quantifiable infringements, it is foreseen that the Authority shall impose a fixed percentage of the amount of the irregular sums received or not reported in accordance with the following scale, up to a maximum of 10% of the annual budget of the European political party or European political foundation concerned.

Moreover, «the Authorising Officer of the European Parliament has the power to exclude a European political party or a European political foundation from future Union funding for up to five years, or up to 10 years in cases of an infringement repeated within a five-year period, where it has been found guilty of any of the infringements listed in points (v) and (vi) of point a of paragraph 2» (art. 27 (3))[75]. Final provisions concern information to citizen (Art. 31), rules on transparency (Art. 32), protection of personal data (Art. 33), the right to be heard before the Authority or the Authorizing Officer of the European Parliament (Art. 34), the right of appeal (Art. 35).

Eventually, the Reg. n. 1141/2014 establishes some final rules concerning, for example, how the Commission can exercise its delegated powers (Art. 36); the duty of the Parliament and of the Commission to publish two reports on the application of the Reg. n. 1141/2014; the Member States' duty to ensure the Regulation (Art. 39), the abrogation

[75] It must be considered that Art. 30(2) foresees that «A European political party or European political foundation on which a sanction has been imposed for any of the infringements listed in Art. 27(1) and in points (v) and (vi) of Art. 27(2)(a) shall for that reason no longer be in compliance with Art. 18(2). As a result, the Authorising Officer of the European Parliament shall terminate the contribution or grant agreement or decision on Union funding received under this Regulation and shall recover amounts unduly paid under the contribution or grant agreement or decision, including any unspent Union funds from previous years».

of Reg. n. 2004/2003 (art. 40) and other specific provisions on the entry into force of the Regulation (art. 41).

6. Final remarks: political parties at the European Level and the emerging of a European public sphere in the light of two possible future developments

The role of European political parties can be a pivotal one in the emerging of a European public sphere. The enhancing of this sphere could be crucial to create a real European polity in a communicative integration process that will merge different public spaces shaping a single European political community[76]. That would be a crucial step for the European democracy, because «the public sphere is a precondition for the realization of popular sovereignty», since it «not only enables *autonomous opinion formation* but also empowers the citizens to *influence* the decision makers»[77].

Historically, political parties have played an important role in the *Öffentlichkeit* to enhancing the dialogue between civil society and the State[78]. They still represent a central element for a true representative democracy. The *Öffentlichkeit* could strengthen that process of democratization, since it helps in democratizing the interpretation of the Constitution involving the people in a permanent public dialogue[79].

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[76] E.O. ERIKSEN, *An Emerging European Public Sphere*, in *EJST*, 2005, pp. 341-363.

[77] E.O. ERIKSEN, *An Emerging European Public Sphere*, pp. 341-342 [see *above* ft. 76].

[78] See recently, P. RIDOLA, *Costituzione, stato e società nelle democrazie pluralistiche. Lo "spazio pubblico"*, in Id., *Stato e Costituzione in Germania*, Torino, 2016, pp. 123 ff. On the notion of civil society in different contexts and in a transnational framework J. KOCKA, *Civil society in Historical Perspective*, in J. Keane (ed.), *Civil Society: Berlin Perspectives*, New York, 2007, pp. 37 ff.; more specifically on the relationship between civil society and the state pp. 42 ff. and pp. 46 ff.

[79] See P. HÄBERLE, *Öffentlichkeit und Verfassung* (1969), in Id., *Verfassung als öffentlicher Prozeß*, Berlin, 1998, pp. 225 ff.; in the same book see also *Verfassungsinterpretation als öffentlicher Prozeß* (pp. 121 ff.) and *Die offene Gesellschaft der Verfassungsinterpreten* (1975) (pp. 155 ff.). On the concept of *Öffentlichkeit* more specifically related to the role of political parties see K. HESSE, *Die verfassungsrechtliche Stellung der politischen Parteien im modernen Staat*, pp. 83 ff. [see *above* ft. 16]. On the

Political parties at the European level, as the *BVerfG* confirmed in the Maastricht Urteil, may help in that process of engagement, even if their role in the European *Öffentlichkeit* is different. They can strengthen, however, some fundamental values, helping in defining their meaning and debating on European issues. Moreover, they can contribute in creating an interesting overlap of connections among national Parliaments and the European Parliament.

Therefore, an authentic development of a group of strong European political parties can be helpful to address the fact that traditionally a public sphere is connected to national state boundaries, by creating a communicative space among citizens and Parliaments of different member states[80]. European political parties can develop a real system of political relations among different civil societies and a true supranational public sphere, contributing to shape a European debate through mass media communication tools and by forging a political discourse[81].

It will probably not be enough to create a sound supranational democracy, but political parties could be helpful to define a clearer relation between responsiveness and accountability. In this perspective, they can be a useful tool to influence a development of the institutional framework of the EU, by creating a clearer connection between responsiveness and accountability at the European level, giving more importance to the right to vote of European citizens.

How can these aims be reached? In another historical phase of the integration process, the so called "parliamentarisation" of the EU has been important to support the formation of a real debate on the public

European *Öffentlichkeit* and the role of European political parties see F. SHIRVANI, *Das Parteienrecht und der Strukturwandel im Parteiensystem: Staats- und europarechtliche Untersuchungen zu den strukturellen Veränderungen im bundesdeutschen und europäischen Parteiensystem*, pp. 345 ff. [see *above* ft. 17] who underlines the connection between the democratic deficit and the *Öffentlichkeitdeficit*.

[80] E.O. ERIKSEN, *An Emerging European Public Sphere*, pp. 342; on the conceptualization of the public sphere beyond the nation state, pp. 348 ff. [see *above* ft. 76].

[81] E.O. ERIKSEN, *An Emerging European Public Sphere*, pp. 350 ff. [see *above* 76].

sphere in Europe. As a matter of fact, the European Parliament[82] is the only institution directly elected by the European citizens. Nowadays, however, something has changed and a new debate on the urgency to enhance a real democracy in Europe is emerging[83], focusing on a new system of structural relations among national Parliaments and European institutions[84].

From that perspective, focusing the attention more directly on the European political party system, it seems useful to analyse two different but connected processes. The first consists of the so-called indication of the *Spitzenkandidaten* in the 2014 European election.[85] The second is the proposal to amend the European electoral law. Both appear, at least theoretically, interesting tools to enhance the European political system and the European Parliament.

The so called *Spitzenkandidaten* are an interpretative innovation that occurred during the last European Parliament election[86]. According to Art. 17(7) TEU, «taking into account the elections to the European Parliament and after having held the appropriate consultations, the European Council, acting by a qualified majority,

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[82] P. RIDOLA, *The Parliamentarisation of the Institutional Architecture of the European Union Between Representative Democracy and Participatory Democracy*, in H.J. Blanke, S. Mangiameli (eds.), *Governing Europe under a Constitution*, Berlin-Heidelberg, Springer, 2006, pp. 415 ff.

[83] See for example, in a huge debate, E. BALIBAR, *Europe: crise et fin?* (2016), it. trans. *Crisi e fine dell'Europa?*, Torino, 2016 and the idea of Stéphanie Hennette, Thomas Piketty, Guillaume Sacriste and Antoine Vauchez proposing to approve a Treaty in order to democratizing the Euro Area Governance. But on the weaknesses of the European project see moreover D. CHALMERS, M. JACHTENFUCHS, C. JOERGES (eds.), *The End of the Eurocrats' Dream*, Cambridge, 2016.

[84] See, for example, the importance of the interparliamentary cooperation: N. LUPO, C. FASONE (eds.), *Interparliamentary Cooperation in the Composite European Constitution*, Oxford-Portland, 2016.

[85] On this innovation, see EDITORIAL, *Fateful Election? Investing in the Future of Europe*, in *ICON*, 2014, pp. 273 ff., pp. 275 ff.

[86] On that development see T. HOLZNER, *Das Europäische Parlament im Institutionengefüge der EU – Verabschiedung der Kräftverhältnisse infolge der Durchsetzung eines „Spitzenkandidaten" als Kommissionpresident*, in *EuR*, 2015, pp. 525 ff. and D. NICKEL, *Wahl- und Kreationsfunktionen des Europäischen Parlaments – unter besonderer Berücksichtigung der Einsetzung der Kommission*, in *EuR*, 2016, pp. 28 ff., spec. pp. 45 ff. In the nineties a similar proposal was suggested by S. HIX, *The Study of European Union II: the "New Governance Agenda and its Rival"*, pp. 52-53 [see *above* ft. 38].

shall propose to the European Parliament a candidate for President of the Commission». The candidate will then be elected by the European Parliament through a majority of its component members. Interpreting the sentence «taking into account the elections to the European Parliament» in an innovative and strong way, the European Parliament with the resolution of 22 November 2012 on the elections to the European Parliament[87] expressed the view that European political parties should have nominated candidates for the Presidency of the Commission. Those candidates should have played a leading role in the parliamentary electoral campaign[88].

The surplus value of the *Spitzenkandidaten* was in particular found in the fact that it was easier for the electoral body to identify a democratically responsible person. It could have meant a strong innovation to enhance democracy. The resolution added that the candidates should have personally presented their programme in all Member States, eventually stressing «the importance of reinforcing the political legitimacy of both Parliament and the Commission by connecting their respective elections more directly to the choice of the voters».

After that resolution, the Commission with a Recommendation on enhancing the democratic and efficient conduct of the elections to the European Parliament[89] underlined once more the potential political relevance of European political parties, by stating that «if European political parties and national parties make known the candidates for President of the Commission they support, and the candidate's programme, in the context of the elections to the European Parliament, this would make concrete and visible the link between the individual vote of a citizen of the Union for a political party in the European elections and the candidate for President of the Commission supported by that party».

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[87] P7_TA(2012)0462 (22 November 2012).

[88] On the legitimacy, limits and the implications of that choice, see T. HOLZNER, *Das Europäische Parlament im Institutionengefüge der EU – Verabschiedung der Kräftverhältnisse infolge der Durchsetzung eines „Spitzenkandidaten" als Kommissionpresident*, pp. 530 ff. [see *above* ft. 85].

[89] 12 March 2013 (2013/142/EU).

The main aim of this document was to promote the democratic legitimacy of the EU decision making process, bringing the system closer to Union citizens. In this perspective, more transparency in the electoral process could enhance the democratic legitimacy of the European Parliament.

Eventually, with a Parliament Resolution[90], it has been asked to «the European political parties to nominate their candidates for the Commission presidency sufficiently well in advance of the election for them to be able to mount a significant, European-wide campaign that concentrates on European issues that are based on the party platform and on the programme of their candidate for the Commission presidency».

Moreover, the European Parliament insisted that political parties at all levels should have adopted «democratic and transparent procedures for the selection of candidates for election to the European Parliament and for the Presidency of the Commission» and that the European political parties should have held «a series of public debates between the candidates nominated for the Commission presidency». It was finally stressed that, in this process, the candidate for Commission President put forward by the European political party that wins the most seats in the Parliament should have been the first to be considered, with a view to ascertaining his or her ability to secure the support of the necessary absolute majority in Parliament.

Beyond some critics concerning the legal basis for this innovation, it appears rather clear how strong was the commitment to the introduction of the figure of the *Spitzenkandidaten*. The Commission underlined the importance of *Spitzenkandidaten* innovation in its Report on the 2014 European Parliament elections[91]. It was considered a good tool to enhance democracy and transparency. Furthermore, important connections were underlined between the *Spitzenkandidaten* innovation and the necessity to introduce a new European electoral law, amending

[90] European Parliament resolution of 4 July 2013 on improving the practical arrangements for the holding of the European elections in 2014 (2013/2102(INI)).

[91] COM(2015) 206 final (8 May 2015).

the 1976 Act[92]. These connections were reaffirmed by the European Parliament with the Resolution adopted on 11 November 2015[93].

A more uniform European electoral law once again became a central issue. In the Recommendation of the Commission, it was moreover expressed the dissatisfaction towards the fact that elections to the European Parliament currently take place over a period of several days, as they are held on different days in different Member States. According to the Commission, it would be better to have a common European voting day with polling stations closing at the same time. Moreover, the Commission criticizes that several reports on the application of Directive 93/109/EC over the years have revealed deficiencies in the functioning of the mechanism to prevent multiple voting and candidacies and in the transmission of data among Member States.

The debate on the opportunity to amend the European electoral law is not new. Some years ago, in April 2011, the Committee on Constitutional Affairs of the European Parliament[94], proposed interesting solutions to strengthen the European Parliament and European political parties[95]. More specifically, the Committee

[92] OJ L 278, 8.10.1976 concerning the election of the members of the European Parliament by direct universal suffrage, amended by the adoption of Council Decision 2002/772/EC, Euratom. On that topic, see Art. 22, regulating the right to vote of the European citizens, Art. 223(1) and 225 TFEU.

[93] P8_TA(2015)0395, European Parliament resolution of 11 November 2015 on the reform of the electoral law of the EU (2015/2035(INL)); see below in this paragraph

[94] Report of 22 April 2011 on a proposal for a modification of the Act concerning the election of the Members of the European Parliament by direct universal suffrage of 20 September 1976 (2009/2134(INI)). The 1976 Act on the election of the representatives was amended in 2002, introducing important innovations with the Council Decision of 25 June and 23 September 2002 (2002/772/EC, Euratom). See G. CAVAGGION, *La nuova "legge elettorale" europea*, in *Research Paper – Centro studi sul federalismo*, 2016, p. 22 and A. CIANCIO, *European parties and the process of political integration in Europe*, pp. 15 ff. [see *above* ft. 19]. The Council Directive 93/109/EC of 6 December 1993 lays down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals.

[95] F. SHIRVANI, *Das Parteienrecht und der Strukturwandel im Parteiensystem: Staats- und europarechtliche Untersuchungen zu den strukturellen Veränderungen im bundesdeutschen und europäischen Parteiensystem*, pp. 334 ff. [see *above* ft. 17] underlines

considered that it could have been helpful to enhance the democratic legitimacy in the EU, creating, in a system of proportional representation, «a pan-European seat from which 25 MEPs», elected from transnational party lists[96]. At that time, however, the Plenary of the European Parliament asked for further considerations and a second Report[97] was rejected[98].

Nevertheless, in 2015, the European Parliament enacted a new more specific resolution, claiming for the reform of the electoral law for the European Parliament[99], after a new Report of the Committee on Constitutional Affairs[100]. The expressed purpose was that «the reform of the European Parliament's electoral procedure should aim to enhance the democratic and transnational dimension of the European elections and the democratic legitimacy of the Union decision-making process», considering that «the Treaty of Lisbon changed the mandate of

how important the electoral law could be in order to strengthen the European party system.

[96] See A. DUFF, *The Electoral Reform of the European Parliament: Composition, Procedure, and Legitimacy*, In-Depth Analysis for the AFCO Committee, 2015, p. 8. On the origins of that proposal, see W. GAGATEK, *The Treaty of Lisbon, the European Parliament Elections, and Europarties: A New Playing Field for 2014?*, pp. 209 ff. [see *above* ft. 32] who criticizes this possible development considering that «the creation of a pan-European constituency may in fact elevate the expectations of the role of Europarties to a level which many of them will simply not be capable of dealing with» (216). See moreover on the Duff proposal G. LÓPEZ DE LA FUENTE, *Pluralismo Político y Partidos Políticos Europeos*, pp. 153 ff. [see *above* ft. 25]. The Committee on Constitutional Affairs of the European Parliament proposed to amend the Europe electoral law in order to introduce a single European constituency through which elect a percentage of deputies (10%) already with the Recommendation of the 30th May 2002 A5-0212/2002 (Rapporteur: Josè Maria Gil-Robles Gil-Delgado): see A MAURER, *Das Europäische Parlament*, in *Jahrbuch der Europäischen Integration*, 2001/2002, pp. 59 ff., pp. 62-63.

[97] 2nd Report on a proposal for a modification of the Act concerning the election of the members of the European Parliament by direct universal suffrage of 20 September 1976 (Rapporteur A. Duff) (2009/2134(INI)).

[98] See M. NOGAJ, E.-M. POPTCHEVA, *The Reform of the Electoral Law of the European Union*, In-Depth Analysis, EPRSE, September 2015, p. 11 (available at the link http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_IDA(2015)558775).

[99] Resolution of 11 November 2015 on the reform of the electoral law of the EU (2015/2035(INL)).

[100] Rapporteur Danuta Maria Hübner and Jo Leinen.

Members of the European Parliament, making them direct representatives of the Union's citizens instead of "representatives of the peoples of the States brought together in the Community"». Criticizing all the deficiencies of the current legislation, it was affirmed that in the present situation «European political parties cannot sufficiently fulfil their constitutional mandate and "contribute to forming European political awareness and to expressing the will of citizens of the Union».

It was once more evident that a new electoral law and a strong system of European political parties were considered preconditions for a true European democracy. It was affirmed, for example, that «European political parties are best placed to "contribute to forming European political awareness" and should therefore play a stronger role in the campaigns for Parliament elections in order to improve their visibility and to show the link between a vote for a particular national party and the impact it has on the size of a European political group in the European Parliament».

Moreover, the Committee notes that «the 2014 European elections set an important precedent in this respect and have shown that nominating lead candidates increases the interest of citizens in European elections» and that «the nomination of lead candidates for the office of President of the European Commission provides a link between votes cast at national level and the European context and enables Union citizens to make informed choices between alternative political programmes; whereas the designation of lead candidates by open and transparent procedures reinforces democratic legitimacy and strengthens accountability».

The European Parliament, therefore, proposes to establish a common European voting day and to rethink the current threshold mechanism according to which each State can autonomously decide whether to introduce a threshold[101]. To that aim, the purpose is to

[101] It is foreseen to introduce a mandatory threshold: the European Parliament «suggests the introduction of an obligatory threshold, ranging between 3 % and 5 %, for the allocation of seats in single-constituency Member States and constituencies in which the list system is used and which comprise more than 26 seats; considers this measure to be important for safeguarding the functioning of the European Parliament, since it will avoid further fragmentation»

reform the 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».

European political parties are considered necessary to achieve these objectives and the Committee proposed to enhance their visibility «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».

In the annexed 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, the new Art. 1 foresees that members of the European Parliament shall be elected on the basis of proportional representation. In addition, the new Art. 2a establishes that «the Council decides by unanimity on a joint constituency in which lists are headed by each political family's candidate for the post of President of the Commission».

Among other amendments, the new Art. 3 affirms that some national states shall introduce a threshold that shall not be lower than 3% and higher than 5%[102]. The connection between the *Spitzenkandidaten* innovation and the amendment of the European electoral law was reaffirmed by the Art. 3f, which establishes that «European political parties shall nominate their candidates for the

[102] Art. 3: «For constituencies, and for single-constituency Member States, in which the list system is used and which comprise more than 26 seats, Member States shall set a threshold for the allocation of seats which shall not be lower than 3 per cent, and shall not exceed 5 per cent, of the votes cast in the constituency, or the single-constituency Member State, concerned». See the document at the link http://www.ipex.eu/IPEXLWEB/dossier/document/PE20152035.do#dossier-APP20150907.

position of President of the Commission at least 12 weeks before the start of the electoral period referred to in Art. 10(1)». However, as the so called "Legislative Train Schedule" reports, in an opinion of March 2016, the Council Legal Service affirmed that this innovation could be problematic[103].

The procedure to amend the electoral law of 1976 is still in the preparatory phase[104]. However, considering the special procedure foreseen by the Art. 223 TFEU[105], the President of the European Parliament at that time, Martin Schulz, in a letter to national Parliaments, expressly affirmed that the European Parliament «has chosen to make a proposal based on principles common to all Member States, therefore not proposing a uniform procedure»[106].

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[103] See http://www.europarl.europa.eu/legislative-train/theme-union-of-democratic-change/file-reform-of-the-electoral-law-of-the-eu where is possible to read: «According to informal sources, almost all delegations raised concerns and criticism about the different proposals included in the Parliament's legislative initiative, notably on the attempt to formalise the "lead candidate" ("Spitzenkandidat") practice. In an opinion of March 2016, the Council Legal Service (CLS) pointed to a possible impact of the proposal on the institutional balance, since the institutionalisation of the lead candidate practice "might end up encroaching on the institutional prerogatives of the European Council as defined in the Treaties" (CLS opinion, point 27). It appears that the CLS would like to keep the European Council's discretion to possibly also propose a candidate who is not the "direct expression of a political force". More generally, the CLS considered that Council is not bound by the substance of the EP proposal, when the latter acts on the basis of Art. 223 TFEU. Thus, the view of the CLS is that Council "enjoys the widest possible discretion when exercising this competence", and "is not bound by the scope or object of the European Parliament's proposal" (CLS opinion, point 7)».

[104] Some national parliaments have also expressed criticism on the EP proposals: see http://www.europarl.europa.eu/legislative-train/theme-union-of-democratic-change/file-reform-of-the-electoral-law-of-the-eu

[105] 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 Parliament, 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».

[106] M. Schulz letter of the 8th April 2016 (see http://www.ipex.eu/IPEXL-WEB/dossier/document/PE20152035.do#dossier-APP20150907).

Another important principle, however, governs how representatives are elected. From that point of view, it could be stressed that according to Art. 14(2) TEU «representation of citizens shall be degressively proportional, with a minimum threshold of six members per Member State. No Member State shall be allocated more than ninety-six seats». As is well-known, the *Bundesverfassungsgericht* did not consider this principle problematic in a constitutional perspective, because it is not referred to the national Parliament[107]. Nevertheless, the mechanism of the proportional degressivity was strongly emphasized in the Lisbon Judgment where the *BVerfG* considered that principle a clear proof of the non-representative nature of the European Parliament[108].

In conclusion, European political parties can play an important role in significant political tasks and can contribute to enhance the European political debate. Nevertheless, it is unlikely that European political parties will be the key to shape a real European *demos* and they will probably not be the solution to the European "representative" democracy's contradictions. They are different in nature from political parties at the national level and it is difficult to think that they can be considered, at the European level, «zentrale Faktoren "politischen Willensbildung des Volkes"»[109]. However, it seems reasonable to imagine that European political parties can be decisive in laying the

[107] BVerfG 2 BvR 635/95 of the 31st May 1995 where it is possible to read that «Der Grundsatz der Wahlrechtsgleichheit wird durch die gegenwärtigen Zusammensetzung des Europäischen Parlament schon darum nicht verletzt, weil diese dem Charakter der Europäischen Union als eines Verbundes souveräner Mitgliedstaaten [...] entspricht und mithin nicht an den Maßstäbe gemessen werden kann, die nach dem Grundgesetz für die Wahl eines Parlaments in der Bundesrepublik Deutschland Geltung haben».

[108] BVerfG, 2 BvE 2/08, pp. 279 ff.: «Even in the new wording of Art. 14.2 Lisbon TEU, and contrary to the claim that Art. 10.1 Lisbon TEU seems to make according to its wording, the European Parliament is not a representative body of a sovereign European people» (Rn. 280), because «it is not the European people that is represented within the meaning of Art. 10.1 Lisbon TEU but the peoples of Europe organised in their states, with their respective distribution of power brought about by democratic elections taking into account the principle of equality and pre-determined by party politics» (286).

[109] G. MANSSEN, *Die Finanzierung von politischen Parteien in Europa*, Frankfurt am Main, 2008, p. 17, quoting the Art. 21 GG.

foundations of a virtuous synergy with national political parties to ensure the strengthening of a true democratic European public space.

ABSTRACT: The article, using a historical perspective, analyses the role and the functions of European political parties. Focusing on the different nature of national political parties and European political parties, the article describes the attempts to regulate political parties at the European level as a tool to enhance European democracy and to shape a European public sphere. In this perspective, the emerging role of political parties at the European level is analysed from the first election of the European Parliament, through the Tsatsos's Report. Subsequently, the Treaty of Nice and Regulation 2004/2003 are considered. Furthermore, the article focuses on the new regulation concerning political parties at the European level by taking into consideration Regulation n. 1141/2014. Moreover, the new Authority for European political parties and European political foundations and its powers are examined. Some final remarks concern the "lead candidates" innovation and the European electoral law.

KEYWORDS: European political parties; representative democracy; Regulation n. 1141/2014; Authority for European political parties; European public sphere.

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