

# Representation in the European Parliament: Of False Problems and Real Challenges

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## Abstract

The article discusses the representative function of the European Parliament (EP) and considers several recurrent challenges that are raised against it. The article examines the criticisms that the EP is either *under-representative* – because of the principle of degressive proportionality – or *over-representative* – because of the involvement of non-Eurozone parliamentarians in the approval of Eurozone-only matters – but discards such views, also through the use of comparative law. The article, instead, explains that a challenge arises for the EP as far as *representation vs. governability* is concerned: The rules on EP elections – which are set by the 28 member states of the European Union (EU), but all conform to proportional representation (PR) – favor the former over the latter, and fundamentally depart from the rules in place at the domestic level for national elections, notably in the six largest EU member states. As the article claims, however, this state of affairs is increasingly at odds with the role that the EP plays, and will play, in the EU system of governance. As such, the article suggests that a debate on a reform of the electoral legislation of the EP ought to take place and advances some preliminary arguments in favor of a rationalization of the EU legislation on EP elections geared toward favoring a more mature political competition in the EU.

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## I. Introduction

Article 10 of the Treaty on the European Union (TEU) proclaims that

“[t]he functioning of the Union shall be founded on representative democracy. Citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.”

By vesting explicitly in the EP the role of *representing* EU citizens, as one of the two pillars on which the legitimacy of the EU rests, the EU Treaty provides a yardstick to conceptualize democracy at supranational level.<sup>1</sup> And yet much debate continues to surround the EP representative function. If the declining voters' turnout at each EP elections has been an inexhaustible source of political, pragmatic criticisms to the representative function of the EP,<sup>2</sup> several theoretical, legal arguments are recurrently voiced against the ability of the EP to function as a representative, popular assembly in the EU system of government.

The purpose of this article is to examine from a comparative constitutional perspective the representative function of the EP. Specifically, the aim is to discuss two recurrent challenges to representation in the EP, and simultaneously to identify a new challenge resulting from several recent EU constitutional developments. As the article explains, a first traditional criticism to the EP is that this institution is *under-representative*, since it fails to reflect the democratic principle of “one head, one vote” by introducing the criterion of degressive proportionality in the apportionment of EP seats among EU member states. As of late, however, the EP has been subject to a second criticism, which points in the opposite direction. Due to the increasing autonomization of the Eurozone vis-à-vis the EU as a whole, the EP has been criticized for being *over-representative*, to the extent that it empowers every member of the EP (MEP) – including those elected in non-Eurozone countries – to vote on issues which concern exclusively the Eurozone. As the article claims, these two standard criticisms to the function of representation in the EP are not convincing, since there are persuasive constitutional arguments both to justify a degressive proportional apportionment of seats

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<sup>1</sup> A. von Bogdandy, The European Lessons for International Democracy: The Significance of Articles 9-12 EU Treaty for International Organizations, EJIL 23 (2012), 315.

<sup>2</sup> See European Parliament, Turnout, available at: <<http://www.europarl.europa.eu>> (last visited 15.5.2015).

among the member states, and to empower every MEP to vote also on matters which concern the Eurozone only.

Nevertheless, there is increasingly a third challenge that the EP is facing as a result of the institutional transformations which are taking place in the EU system of governance.<sup>3</sup> This challenge does not regard the quantity of representation, but rather its quality. Every elected institution faces a choice of how to reconcile concerns for representation with concerns for governability – and electoral rules are the mechanism striking a balance between *representation vs. governability*. In the case of the EP, however, electoral rules radically privilege representation over governability concerns. As a result of the electoral laws for the elections of the EP – which are set by each of the 28 EU member states, but conform to the common principle of PR – the EP is characterized by a high degree of party fragmentation and fringe group representation. Representation in the EP therefore significantly contrasts with representation in national legislatures – especially in the six largest EU member states, in which the majority of MEPs are elected – where electoral rules constrain and channel voter preferences to ensure governmental stability. The EP electoral laws in force in the EU member states, and especially its largest ones, have ensured broad representation in the EP even to political forces that do not meet the thresholds for representation in state legislatures, and they have forced the EP to permanently work on the basis of a grand coalition between main political parties.

As the article maintains, if in the past it was possible to privilege exclusively the representative function of the EP, given its limited powers in the EU institutional system, nowadays concerns for governability should feature prominently in an institution which has moved to the center of EU governance. Since the entry into force of the Lisbon Treaty, the EP has become the necessary co-legislator in the vast majority of EU policy fields, and it has claimed an ever growing role in the appointment of the European Commission.<sup>4</sup> Moreover, although the Euro-crisis and the responses to it have often pushed the EP to the sidelines, strong pressures exist to reform the governance of Economic and Monetary Union (EMU) by grounding it in the Community Method, with a full involvement of the EP.<sup>5</sup> These institutional developments increasingly call for a rationalization of the logic of

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<sup>3</sup> See *F. Fabbrini/E. Hirsch Ballin, H. Somsen* (eds.), *What Form of Government for the European Union and the Eurozone?*, 2015.

<sup>4</sup> See *P. Craig*, *The Role of the European Parliament Under the Lisbon Treaty*, in: *S. Griller/J. Ziller* (eds.), *The Lisbon Treaty: EU Constitutionalism Without a Constitutional Treaty?*, 2008, 110.

<sup>5</sup> See *A. Maurer*, *From EMU to DEMU: The Democratic Legitimacy of the EU and the European Parliament*, IAI Working Paper No. 11/2013.

representation in the EP. Although political solutions are often invoked to address this state of affairs, electoral reform appears unavoidable in order to redefine the nature of representation in the EP and make it consistent with the role of this institution in an evolving EU constitutional architecture.

In conclusion, the article suggests that a rethinking of the rules for EP elections should take place, with a view towards introducing correctives that reduce fragmentation in the EP political system and make representation in this institution more consistent with its current, and possible future, role in EU governance. While the prospect of reform in the EU is always tricky, the article hints that a little-invasive revision of the consolidated EU Act on the election of the EP<sup>6</sup> could be considered. Even if the standard criticisms against the alleged under-representativeness or over-representativeness of the EP do not hold, the logic of representation currently at play in the EP constitutes a challenge to its further involvement in the governance of EU, and especially EMU, affairs. A limited reform of EP electoral law could improve the functionality of the EP, while maintaining it as the forum for the representation of the EU citizens, as foreseen by Article 10 TEU. The EP itself – or at least the major political groups within it – have an interest in making sure that democratic representation does not undermine political competition, and effective governance in the EU lower house. But also many states' governments – notably in the largest member states – should find solace in a reform which would bring the logic of representation at EU level closer to that existing at home.

The article is structured as follows. Section 2 discusses the criticism that the EP is under-representative due to the logic of degressive proportionality and discards this position based on arguments drawn from comparative law. Section 3 considers the opposite criticism that the EP is over-representative because of the involvement of MEPs from non-Eurozone member states in the decisions which only concern the Eurozone but rejects also this view, showing again that in comparative terms the EU case is less exceptional than what is often thought. Section 4 then discusses the relationship between representation and governability in the EP and underlines how the electoral laws in force in the EU member states for the election of the EP have fostered a dynamic of fragmentation and radicalization, which contrasts with the logic of representation existing in the national legislatures, especially of the larger EU member states. Section 5, however, shows how representation in the EP is increasingly in tension with the institutional developments oc-

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<sup>6</sup> See Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Decision 76/787/ECSC, EEC, Euratom [1976] OJ L 278/1, as amended.

curring in the EU and pushing the EP towards a more central role in EU governance and therefore suggests that a new balance between representation vs. governability in the EP should be struck, possibly through targeted amendments to the consolidated EU Act on the election of the EP. Section 6, finally, concludes.

## II. Under-Representation

A *first* conventional argument made against the representativeness of the EP is that the EP is under-representative because of the principle of degressive proportionality. The champion of this view has been the German Bundesverfassungsgericht.<sup>7</sup> Pursuant to Article 14 TEU no member state can have more than 96 seats in the 751-seats EP, and no member state can have less than 6, which means that the ratio between state population and state MEPs is not uniform throughout the EU.<sup>8</sup> In its decision on the Lisbon Treaty the Bundesverfassungsgericht ruled that the EP cannot be a truly representative body, because – due to the principle of degressive proportionality – a MEP elected in Germany (the most populous member state) would represent roughly 12 times more citizens than a MEP elected in Malta (the least populous one).<sup>9</sup> Nevertheless, this criticism does not appear to be convincing.<sup>10</sup> Leaving aside the fact that, even with a corrected proportional apportionment of seats among the member states, Germany withholds a predominant influence on the composition of the EP, so the Bundesverfassungsgericht's view stands on shaky moral grounds,<sup>11</sup> the criticism is also unsustainable in constitutional terms. The EU is a Union of states

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<sup>7</sup> BVerfGE 123, 267 (2009).

<sup>8</sup> For a discussion of the composition of the EP and the evolution in the apportionment of seats after the entry into force of the Lisbon Treaty see also *F. Fabbrini*, *La composizione del Parlamento Europeo dopo il Trattato di Lisbona*, Riv. Trimestr. Dir. Pubbl. 61 (2011), 787.

<sup>9</sup> BVerfGE 123, 267 (2009), paras. 284-285 (criticizing the fact that as “a result the weight of the vote of a citizen from a Member State with a small population may be about twelve times the weight of the vote of a citizen from a Member State with a large population”).

<sup>10</sup> See *C. Schönberger*, *Lisbon in Karlsruhe: Maastricht's Epigones at Sea*, GLJ 10 (2009), 1201, 1215.

<sup>11</sup> See *F. Fabbrini*, *States Equality vs. States Power: The Euro-Crisis, Inter-States Relations and the Challenge of Domination*, Cambridge Yearbook of European Legal Studies 17 (2015), 1, 27 (emphasizing inter alia how in the current EP, the President, *Mr. Martin Schulz*, is German, the Secretary General, *Mr. Klaus Welle*, is German, the whip of the largest parliamentary group, the right-of-center EPP, *Mr. Manfred Weber*, is German, and 5 out of the 22 parliamentary committees are chaired by German MEPs and explaining that in parliamentary systems of government larger territorial units weight more than the others).

and citizens.<sup>12</sup> In such a regime, the representation of citizens must take into account territorial boundaries.<sup>13</sup> Therefore, unless the EU becomes a unitary state – a development that the Bundesverfassungsgericht would not endorse<sup>14</sup> – it is appropriate to design constituencies for the EP elections along state lines.<sup>15</sup>

Comparative law helps to make the point.<sup>16</sup> For instance, in the US – which is no-doubt a much more federalized regime than the EU<sup>17</sup> – the constituencies for the lower house, the House of Representatives, are still based on state lines. Pursuant to the US Constitution every US state is entitled to elect *at least* one representative regardless of its population.<sup>18</sup> Because federal law sets the number of representatives at 435, the ratio between the population of a state and the representative(s) of that state is not uniform across the US. In fact, as it has been pointed out, in the US House of Representatives “the large states—those with districts approximating the national average—also are relatively underrepresented vis-à-vis the overrepresented small states.”<sup>19</sup> Moreover, while the degree of malapportionment in the EP is higher than that existing in the US House of Representatives, it is actually lower than that existing in other federal systems’ lower houses of parliaments: for instance, Argentina’s lower legislative house provides a much higher over-representation of less populated districts in proportion to more

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<sup>12</sup> Art. 10 TEU.

<sup>13</sup> See *W. van Gerven*, *The European Union: A Polity of States and People*, 2005.

<sup>14</sup> See *R. Miller*, *Germany vs. Europe: The Principle of Democracy in German Constitutional Law and the Troubled Future of European Integration*, *Va. J. Int’l L.* 54 (2013), 1.

<sup>15</sup> Unitary states may also divide their territory into sub-national constituencies for the purpose of electing representatives. See e.g. Arts. 4 and 13, § 1 Election Law (Jap.) (stating that 300 of the 480 members of the Diet are to be elected in single-member districts, to be drawn by an administrative council on the basis of the principle that the maximum disparity in the number of people in the constituents of each district be under two). However, in this case the sub-division of the national territory serves a purely administrative function. Instead, in federalism-based systems, the drawing of electoral districts reflects the fact that the states have a constitutional status, so it finds an insurmountable limit in the perimeters of the states. See e.g. Art. 24 Commonwealth of Australia Const. Act (defining the formula to calculate the number of the members of the House of Representative to be chosen in each state, and indicating that as a minimum each original state shall have at least five representatives).

<sup>16</sup> See also *J. Pollak/M. Everson/C. Lord/S. R. Schubert/P. de Wilde*, *Citizens’ Weight of Vote in Selected Federal Systems*, study commissioned by the European Parliament Constitutional Affairs Committee, April 2011, PE 453.168, 53.

<sup>17</sup> See *D. Halberstam*, *Federalism: Theory, Policy, Law*, in: M. Rosenfeld/A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, 2012, 576.

<sup>18</sup> Art. I, Sec. 2, cl 3 US Const.

<sup>19</sup> *J. W. Ladewig/M. P. Jasinski*, *On the Causes and Consequences of and Remedies for Interstate Malapportionment of the US House of Representatives*, *Perspectives on Politics* (2008), 89, 91.

populated ones,<sup>20</sup> because the 1853 Argentine Constitution ruled that founding Provinces could not have less deputies than those foreseen at the time of its enactment,<sup>21</sup> and the number of seats in the *Cámara de Diputados de la Nación* is capped by law at 256.

In addition, the alleged under-representativeness of the EP should be assessed by taking into account also the (mal)apportionment in the EU upper house: the Council. Federal systems based on asymmetrical size, in fact, need to strike a balance between large states and small states, and they conventionally achieve so by over-representing the smaller member units in the upper house.<sup>22</sup> Yet, when seen in comparative perspective, the Council of the EU appears to be characterized by a fairly limited degree of malapportionment. Until November 2014, in fact, member states are attributed in the Council a number of votes weighted on the basis of population, in a range that goes from 29 votes, for Germany, France, the United Kingdom (UK), and Italy, to 3 votes, for Malta.<sup>23</sup> Furthermore, from November 2014, the Council decides on the basis of a double majority: A qualified majority in the Council requires support by 55 % of the member states, representing at least 65 % of the EU population.<sup>24</sup> Under both regulations, the Council recognizes much more power to the larger member states than what is the case, e.g., in the US Senate, where each state has two seats,<sup>25</sup> the Brazilian Senado, where each federal unit has three seats,<sup>26</sup> or the Swiss Conseil des Etats, where cantons have either one or two votes.<sup>27</sup> Hence, considering all the above, the representativeness of the EP as the house of the EU citizens cannot be plausibly challenged by speaking about under-representation.

### III. Over-Representation

A *second* argument that has been recently raised to challenge the representative function of the EP is that this institution is allegedly over-representative. Since the eruption of the Euro-crisis, the Eurozone member

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<sup>20</sup> See *J. Rodden*, Strength in Numbers? Representation and Redistribution in the European Union, *European Union Politics* 3 (2002), 151, 155.

<sup>21</sup> See Art. 46 Arg. Const.

<sup>22</sup> See generally *R. Watts*, Comparing Federal Systems in the 1990s, 1996.

<sup>23</sup> Art. 3, Protocol No. 36 on Transitional Provisions.

<sup>24</sup> Art. 16 TEU.

<sup>25</sup> Art. I, Sec. 3, cl 1 US Const. (entitling each state to two senators).

<sup>26</sup> Art. 46, Braz. Const. (entitling each state and the federal district to three senators).

<sup>27</sup> Art. 150, Switz. Const. (entitling smaller cantons to elect one senator and larger cantons to elect two).

states have been pressed to increasingly integrate policies to manage their economic interdependencies.<sup>28</sup> Although the EP has often been sidelined in managing the responses to the Euro-crisis, in a number of areas the EU lower house has been able to make its voice heard. The EP, for instance, was instrumental in adopting EU legislation strengthening economic governance,<sup>29</sup> and establishing a new framework for banking resolution at EU level.<sup>30</sup> Moreover, the EP has engaged in an oversight of the programs of financial adjustment imposed by the troika to the EU member states which were recipient of financial assistance.<sup>31</sup> And, the EP has sought to ensure some form of accountability on the action of the European Central Bank (ECB), through hearings of the ECB President or inter-institutional agreements,<sup>32</sup> notwithstanding the fact that the ECB is an independent institution, which is not subject to parliamentary control.<sup>33</sup>

Yet, because most of these measures essentially concerned the Eurozone, rather than the EU as such, several observers have critically argued that the EP – an institution in which seat MEPs elected in the whole 28 EU member states – is not an adequate forum to manage Eurozone matters, which concern today only 19 EU countries.<sup>34</sup> In its most radical form, the criticism has resulted in a call for the establishment of a new Euro Assembly, likely to be indirectly elected by national parliaments.<sup>35</sup> Less dramatically, others

<sup>28</sup> See also *J. C. Piris*, *The Future of Europe: Towards a Two-Speed EU?*, 2011.

<sup>29</sup> See *P. Craig*, *Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications*, in: F. Fabbrini/M. Adams/P. Larouche (eds.), *The Constitutionalization of European Budgetary Constraints*, 2014, 19.

<sup>30</sup> See *F. Fabbrini*, *On Banks, Courts and International Law. The Intergovernmental Agreement on the Single Resolution Fund in Context*, *Maastricht J. Eur. & Comp. L.* 21 (2014), 444.

<sup>31</sup> See e.g. European Parliament resolution of 13.3.2014 on the enquiry on the role and operations of the Troika (ECB, Commission and IMF) with regard to the euro area programme countries, P7\_TA(2014)0239.

<sup>32</sup> See e.g. European Parliament decision of 9.10.2013 on the conclusion of an Inter-Institutional Agreement between the European Parliament and the European Central Bank on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the Single Supervisory Mechanism, P7\_TA(2013)0404.

<sup>33</sup> See *M. van der Sluis*, *Maastricht Revisited: Economic Constitutionalism, the ECB and the Bundesbank*, in: F. Fabbrini/M. Adams/P. Larouche (note 29), *The Constitutionalization of European Budgetary Constraints*, 2014, 105, 115.

<sup>34</sup> See *D. Curtin/C. Fasone*, *Differentiated Representation: Is a Flexible European Parliament Desirable?*, in: B. de Witte/E. Vos/A. Ott (eds.), *Between Flexibility and Disintegration: The State of EU Law Today*, 2015.

<sup>35</sup> See especially *J. Arthuis*, *L'avenir de la zone euro: l'intégration politique ou le chaos*, report commissioned by the French Prime Minister, 1.3.2012, available at <<http://www.ladocumentationfrancaise.fr>> (last visited 29.11.2014).



have suggested that the EP could re-organize itself to ensure a flexible composition, so that only MEPs from Eurozone member states participate and vote in those procedure which concern only the Eurozone.<sup>36</sup> So far, the EP has resisted any call in this direction. In particular, in December 2013, the EP has affirmed that

“any formal differentiation of parliamentary participation rights with regard to the origin of [MEPs] represents discrimination on grounds of nationality, the prohibition of which is a founding principle of the [EU], and violates the principle of equality of Union citizens as enshrined in Article 9 TEU.”<sup>37</sup>

Although some have stated that the EP resistance against differentiated representation will increase its marginalization from EMU governance,<sup>38</sup> in my view the position of the EP is constitutionally sound.

Before explaining why, however, let me point out that from a comparative perspective the challenge of representation faced by the EP as a result of Eurozone integration is peculiar, but not unprecedented. Rather, it reminds of a challenge that for some years now has affected the form of government of the UK, which is generally known as the “West Lothian Question”.<sup>39</sup> Following devolution, citizens in Scotland, Wales and Northern Ireland have been granted the right to vote for regional assemblies that legislate on policy matters affecting these regions. Yet, MPs elected in Scotland, Wales and Northern Ireland are still allowed to vote in Westminster (the UK Parliament) on laws that only affect *England*.<sup>40</sup> According to some, this solution has skewed the principle of representation.<sup>41</sup> So far, no measure has

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<sup>36</sup> See e.g. Dutch Council of State, report presented upon request for information, on the embedding of democratic control in the reform of economic governance in Europe to combat the economic and financial crisis, by the President of the Senate of the States General, No. W01.12.0457/I, 18.1.2013.

<sup>37</sup> Resolution of the European Parliament of 12.12.2013 on the constitutional problems of multi-tier governance in the European Union, P7\_TA(2013)0598, para. 29.

<sup>38</sup> See R. Debousse, Is the “Community Method” Still Relevant?, in: Challenges of Multi-Tier Governance in the European Union, study commissioned by the European Parliament Constitutional Affairs Committee, March 2013, PE 474.438, 85, 93.

<sup>39</sup> See generally P. Bowers, The West Lothian Question, Library House of Commons, SN/PC/2586, 18.1.2012 (explaining that the question draws its name from Mr. *Tam Dalyell*, the MP for West Lothian, who first raised it).

<sup>40</sup> See R. Hazell, The English Question, *Publius: The Journal of Federalism* 36 (2006), 37.

<sup>41</sup> See e.g. Conservative Democracy Task Force, Answering the Question: Devolution, the West Lothian Question and the Future of the Union, July 2008, available at: <<http://www.astrid-online.it>> (last visited 29.11.2014).

been adopted to change the status quo,<sup>42</sup> but following the rejection of the Scottish secession referendum, the issue has powerfully returned on the table. Given the willingness of the main UK political parties to devolve additional powers to the Scottish assembly,<sup>43</sup> UK Prime Minister *Cameron* relaunched the idea of “English votes for English laws” as a way to compensate England.<sup>44</sup> Nevertheless, several observers have criticized the excessive emphasis that is now being put on the “West Lothian Question”, in particular considering that in the UK House of Commons, the seats given to MPs elected in England amount to 533 out of 650.<sup>45</sup>

Regardless of how the UK constitutional debate will resolve, there are in my view convincing arguments to resist differentiation in the EP. On the one hand, establishing a separate Eurozone Assembly would raise critical issues. First, it would complicate even further the EU institutional architecture – adding a new representative body to a supranational regime that already has an EP, and inter-parliamentary conference of MEPs and national parliamentarians (as well as a Parliamentary Assembly, for the Council of Europe). While this could clarify the nature of the Eurozone as the bulk of a European political union, it would arguably go against the EU leaders’ pledge to simplify the EU system of governance in order to meet citizens’ concerns for an already over-complex institutional regime.<sup>46</sup> Second, if this new Assembly were to be staffed by national parliamentarians, as it has so far been suggested, this would bring back the clock to the pre-1979 era,<sup>47</sup> faulting the efforts that have been made since the introduction of direct elections for the EP to endow members of the EU lower house of a direct, rather than mediated, supranational legitimacy, separate from the national legitimacy of the members of the Council.

On the other hand, also endowing only Eurozone MEPs of voting rights would be problematic. First, because a broad majority of 492 out of 751

<sup>42</sup> See also *McKay* Commission, Report of the Commission on the Consequences of Devolution for the House of Commons, 25.3.2013, available at: <tmc.independent.gov.uk> (last visited 29.11.2014).

<sup>43</sup> See *Smith* Commission, Report for further Devolution of Power to the Scottish Parliament, 27.11.2014, available at: <https://www.smith-commission.scot> (last visited 29.11.2014).

<sup>44</sup> See *P. Wintour*, David Cameron Raises West Lothian Question after Scotland Vote: “English Votes for English Laws”, *The Guardian*, 19.9.2014, as well as the critical comment by *A. Adonis*, An English Parliament?, *The Guardian*, 19.9.2014.

<sup>45</sup> See e.g. Editorial, Playing Politics with the British Constitution, *The Financial Times*, 14.10.2014, 12 (stating that “because [England] holds 84 [%] of the UK population, [it] must be generous about the voice it affords to Scotland, Wales and Northern Ireland”).

<sup>46</sup> See Head of State and Government, Laeken Declaration on The Future of the European Union, 15.12.2001 (calling for a simplification of the EU institutional system).

<sup>47</sup> See *D. Marquand*, Parliament for Europe, 1979.

MEPs are elected in Eurozone states, there is an argument to be made in favor of involving a minority which has no veto power in decisions that affect the majority.<sup>48</sup> Moreover, taking into account that several of the EU member states which are not yet part of the Eurozone have a commitment to join it when possible,<sup>49</sup> it may be sensible to ensure that their representatives have already a voice on questions which may directly affect them in few years.<sup>50</sup> Second, although it is undeniable that Eurozone affairs have reached a particular degree of density and importance for insiders, Eurozone decisions have also a spill-over effect on outsiders: Hence, there is a point in ensuring that representatives of the outer nations have at least a voice in the decision-making process. The EU rules on enhanced cooperation exemplify this concern: Article 329 Treaty on the Functioning of the European Union (TFEU) requires that the EP *as a whole* consents to the use of enhanced cooperation and votes on legislation adopted within the framework of enhanced cooperation: This provision ensures that citizens of those states which are not parties to the enhanced cooperation have a way to check that the cooperation does not disregard their viewpoint.<sup>51</sup>

Having said that, the fact that the EP should not embrace a flexible composition *ratione monetae*, does not imply that the EP cannot find internal solutions to ensure that Eurozone concerns are duly taken into account. An option outlined in January 2014 by the former (British) MEP chairing the EP Economic and Monetary Affairs (ECON) Committee, in agreement with the other senior members of the Committee, would be to create a permanent sub-Committee within ECON, specifically tasked to debate Eurozone matters and to refer back to ECON.<sup>52</sup> The EP Rules of procedure permit the appointment of a sub-Committee, subject to the authorization of the Conference of the Presidents.<sup>53</sup> And, given the consensual nature of de-

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<sup>48</sup> See also *D. Kukovec*, Law and the Periphery, ELJ 21 (2014), 406.

<sup>49</sup> See Government of the Czech Republic, "The Czech Strategy in the EU: An Active and Intelligible Czech Republic in a United Europe", May 2015, p. 2 (indicating the government's plan to accede to the Eurozone).

<sup>50</sup> See also *S. Verhelst*, The Sense and Non-Sense of Eurozone Level Democracy, Egmont Royal Institute for International Relations Paper No. 70/2014, 14 (emphasizing that 7 of the 9 non-Eurozone member states have effectively an obligation to adopt the euro, which means that the problem will probably solve by itself).

<sup>51</sup> See *F. Fabbrini*, Enhanced Cooperation Under Scrutiny: Revisiting the Law and Practice of Multi-Speed Integration in Light of the First Involvement of the EU Judiciary, Legal Issues of Economic Integration 40 (2013), 197.

<sup>52</sup> See Letter from the Chair and Members of the Economic and Monetary Affairs Committee of the European Parliament to the President of the European Parliament, regarding the structure and modalities with the Parliament for euro area governance in the next legislature, 23.1.2014, available at <<http://sylvie-goulard.eu>> (last visited 15.5.2015).

<sup>53</sup> See EP Rules of Procedure, Rule 203.

cision-making among the main EP parliamentary groups, a political agreement within and among the political group could foresee that the sub-Committee would be composed only of Eurozone MEPs. Contrary to the proposals to differentiate the composition of the EP, this option could provide a forum for tailored parliamentary discussion on matters related to the Eurozone, while respecting the institutional integrity of the EP.<sup>54</sup> Despite the work of the Eurozone sub-Committee, it would be the ECON Committee – and ultimately the EP’s plenary – to vote on EMU issues, thus ensuring the involvement also of MEPs who were not elected in Eurozone member states.

#### IV. Representation vs. Governability

While the arguments against the alleged under-representativeness and over-representativeness of the EP do not withstand a careful scrutiny, there is however a *third* challenge of representation which in my view does affect the EP – and ought to be considered if the EP is to play a greater role in EU governance. This challenge does not concern the quantity of representation, but rather its quality. As scholars of institutions have emphasized, any elected body must maximize two conflicting concerns: representation vs. governability.<sup>55</sup> On one side, an elected institution should be able to reflect the political preferences of the electorate, and give them adequate representation. On the other, however, an elected institution should be able to govern effectively, and in order to achieve this task may introduce incentives and constraints that channel the electorate’s preferences. The mechanism whereby political regimes strike a balance between representation and governability is the electoral law: An electoral system that gives major importance to the issue of representation – e.g. by attributing seats in a legislative assembly to political parties in pure proportion to their electoral results – generally fares badly on the side of governability. Vice versa, an electoral system that is majority-ensuring – e.g. through the use of plurality voting, or threshold

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<sup>54</sup> See also C. Fasone, *European Economic Governance and Parliamentary Representation. What Place for the European Parliament?*, ELJ 20 (2014), 168 (emphasizing the “federal attitude” of the EP).

<sup>55</sup> See especially G. Sartori, *Comparative Constitutional Engineering*, 1994; A. Barbera/C. Fusaro, *Il governo delle democrazie*, 2001; M. Duverger, *Institutions politiques et droit constitutionnel*, 1978.

clauses, or smaller constituencies or run-offs – improves government stability and efficiency.<sup>56</sup>

The EP is elected according to proportional representation – which is the electoral system that most sacrifices concerns for governability.<sup>57</sup> Technically speaking, there is no single EU electoral system for the EP.<sup>58</sup> Although since the beginning of the process of European integration the EU treaty foresaw the possibility of enacting a uniform law for the election of MEPs, the words of now Article 223 TFEU have never been put into practice. The 1976 Act concerning the election of the representatives of the EP by direct universal suffrage annexed to Council Decision 76/787,<sup>59</sup> only introduced some common guidelines on the holding of EP elections, but each EU member state is endowed of its domestic law regulating voting for the EP.<sup>60</sup> Nevertheless, EU member states have all embraced PR for EP elections.<sup>61</sup> And Council Decision 2002/772 has codified the status quo by amending the 1976 Act and effectively mandating PR as the electoral system for EP elections.<sup>62</sup> While Article 2 of the Act for the election of the EP, as modified by Council Decision 2002/772, allows states to introduce sub-national constituencies, and Article 3 lets states free to set minimum thresholds for the allocation of seats, pursuant to the new Article 1 “[i]n each Member State, members of the European Parliament shall be elected on the basis of proportional representation, using the list system or the single transferable vote.”

The consolidated EU Act on EP election is addressed to the member states, and leaves to them the regulation of many aspects of EP elections – a feature which is consistent with a federalism-based arrangement for the EU,

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<sup>56</sup> As famously explained by *M. Duverger*, *Political Parties: Their Organization and Activity in the Modern State*, 1959 furthermore, the type of electoral law has major implications on the structure of the political parties, with PR rules favoring party fragmentation and rules which instead correct PR favoring majoritarian, bipolar dynamics.

<sup>57</sup> See *M. Gallagher/P. Mitchell* (eds.), *The Politics of Electoral Systems*, 2006.

<sup>58</sup> See *D. Farrell/R. Scully*, *The European Parliament: One Parliament, Several Modes of Political Representation on the Ground?*, in: *P. Mair/J. Thomassen* (eds.), *Political Representation and European Union Governance*, 2010, 36.

<sup>59</sup> See note 6.

<sup>60</sup> See European Parliament Office for the Promotion of Parliamentary Democracy, *Electoral Systems: The Link between Governance, Elected Members and Voters*, October 2011, available at: <<http://www.europarl.europa.eu>> (last visited 29.11.2014).

<sup>61</sup> European Parliament Office for the Promotion of Parliamentary Democracy (note 61).

<sup>62</sup> Council Decisions of 25.6.2002 and 23.9.2002, amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, 2002/772/EC, Euratom [2002] OJ L 283/1.

and which characterizes also elections for the US Congress.<sup>63</sup> However, the use of PR *within each member state* for EP elections – first emerged in practice and now required in EU law – has had significant effects on the nature of democratic representation in the EU lower house, producing a high degree of party fragmentation and fringe groups’ representation.<sup>64</sup> It is true that the majority of the EU member states also use PR for the election of national legislatures.<sup>65</sup> In fact, PR is constitutionally mandated in states such as the Netherlands,<sup>66</sup> and Denmark.<sup>67</sup> Nevertheless, the PR system applied for the elections of the EP profoundly differs from the electoral systems in force at the domestic level *in the six largest EU member states* – Germany, France, the UK, Italy, Spain, and Poland – which together account for the election of almost 57 % of the MEPs: 421 out of 751. Because of the apportionment of seats in the EP among states pursuant to the principle of degressive proportionality discussed above, small and medium size EU member states elect a limited number of MEPs. In these smaller states, therefore, PR elections are subject to implicit electoral constraints – due to the fact that a political party must *de facto* obtain a significant percentage of the popular votes to obtain a seat.<sup>68</sup> But in the larger EU member states, the mechanics for the election of the EP has significantly diverged from that in place for the election of national legislatures, even where PR is the rule.

To begin with, the UK and France do not adopt PR in national elections. The first has traditionally embraced the first-past-the-post system to elect representatives in Westminster.<sup>69</sup> And the second has used since 1958 (except for the election of 1986) a majority system with run offs to elect the Assemblée Nationale.<sup>70</sup> Moreover, even for those large EU member states which do have PR systems at the domestic level, there are relevant differ-

<sup>63</sup> See Art. I, Sec. 4, cl 2 US Const. (stating that “the time, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof, but the Congress may at any time by law make or alter such regulations”).

<sup>64</sup> See S. Bartolini, *Restructuring Europe*, 2005, 331.

<sup>65</sup> See also *Yumak and Sadak v. Turkey* [ECHR] judgment of 8.7.2008, para. 62 (Grand Chamber of the European Court of Human Rights reporting that currently “proportional systems are the most widely used in Europe”).

<sup>66</sup> See Sec. 53(1) Const. NL. (requiring that members of both chambers of Parliament be elected by PR).

<sup>67</sup> See Sec. 31(2) Const. Dk. (requiring members of Parliament to be elected by PR, save minor limits).

<sup>68</sup> See Camera dei Deputati, Servizio Biblioteca, *Aspetti relative alle modalità di elezione dei rappresentanti al Parlamento europeo nei paesi membri dell’UE*, Dossier di documentazione No. 4, 11.9.2014, A.C. 22/XVI.

<sup>69</sup> See generally V. Bogdanor, *The Constitution and the Party System in the Twentieth Century*, Parl. Aff. 57 (2004), 717.

<sup>70</sup> See generally B. Mathieu/M. Verpeaux, *Droit constitutionnel*, 2004, 457.

ences between the PR rules applying for national elections and those in force for EP elections. In Italy, e.g., several rounds of electoral reforms have introduced correctives to the electoral law for the Parlamento to enhance governability.<sup>71</sup> Yet, the 1979 electoral law for the EP has always remained based on a pure PR, and until 2009 it did not set any threshold requirement which political parties had to meet to gain a seat in the EP.<sup>72</sup> In Spain, whereas the electoral system for the Congreso de los Diputados is a PR system based on very small constituencies, which *de facto* creates a majoritarian dynamic,<sup>73</sup> the electoral regime for the EP follows a national-base allocation of seats which has broken the logic of two-party competition characterizing state elections.<sup>74</sup> And a similar situation occurs in Poland: While PR for the election of the Sejm operates in small multi-member constituencies, the country constitutes a single constituency for the purpose of EP elections – even though in both cases a common 5 % threshold applies to ensure the rationalization of the voting results.<sup>75</sup>

A special consideration deserves then the case of Germany. In this member state the functioning of the national electoral process had traditionally been constrained by the constitutional ban of extremist (Nazi and Communist) parties,<sup>76</sup> and by the existence of a Sperrklausel preventing political parties which did not reach at least 5 % of national votes from being represented in the Bundestag.<sup>77</sup> In fact, the German electoral law for the EP also set a Sperrklausel as a condition for representation in the EP. Yet, the German Constitutional Court has step by step dismantled such a threshold, opening the door of the EP to parties which do not pass the standard for representation at the domestic level.<sup>78</sup> First, in 2011, the Bundesverfas-

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<sup>71</sup> See lastly Legge 6.5.2015, No. 52 Disposizioni in materia di elezioni della Camera dei deputati (introducing an effective majority-ensuring system for the election of the Camera dei Deputati).

<sup>72</sup> See generally *R. D'Alimonte/C. Fusaro* (eds.), *La legislazione elettorale italiana*, 2008.

<sup>73</sup> See generally *M. Martínez Cuadrado*, *Bases, Principios y Criterios de la Reforma Electoral Española: Examen Jurídico-Constitucional*, *Rev. Est. Polit.* 34 (1983), 41.

<sup>74</sup> Compare Art. 161 (regulating elections for the Congreso de los Diputados) with Arts. 215-217 (regulating elections for the EP in Spain), *Ley Organica del Régimen Electoral General*, No. 5/1985.

<sup>75</sup> Compare Art. 196 (introducing a threshold of 5 % for national election) with Art. 335 (introducing a 5 % threshold applied across the country for EP elections in Poland), *Ustawa z dnia 5 stycznia 2011 r. – Kodeks wyborczy* (Dz.U. Nr 21, poz.11).

<sup>76</sup> See *S. Issacharoff*, *Fragile Democracies*, *Harv. L. Rev.* 120 (2007), 1405, 1430.

<sup>77</sup> See Sec. 6(6) *BundestagWahlGesetz* (BWahlG).

<sup>78</sup> See *G. Delledonne*, *Il Bundesverfassungsgericht, il Parlamento europeo e la soglia di sbarramento del 5 %: un (altro) ritorno del Sonderweg?*, *Rivista AIC* (2012), 1 and *B. Grzeszick*, *Weil nicht sein kann, was nicht sein darf: Aufhebung der 3 %-Sperrklausel im Europa-*

sungsgericht declared a 5% Sperrklausel for the EP as incompatible with the constitutional principle of democratic representation.<sup>79</sup> The Bundestag responded to the decision of the Constitutional Court by enacting a new piece of legislation introducing a new, lower Sperrklausel of just 3%. But in February 2014, just ahead of the May 2014 EP elections, the Bundesverfassungsgericht struck down also the new Sperrklausel arguing that the EP did not perform the function to form a government and thus elections for the EP could not be subject to electoral engineering constraining the voters' choices.<sup>80</sup>

The results of the latest May 2014 EP elections exemplify the implications of this state of affairs.<sup>81</sup> Although voting for EP elections remains most likely influenced by the fact that citizens regard these as "second order elections",<sup>82</sup> the lack of electoral mechanisms constraining and channeling voters' preferences in EP elections, as opposed to national elections, plausibly played an important role in EP electoral outcomes. In particular, EP elections in France and the UK saw the surge of populist, right-wing parties which are hardly represented in national legislative assemblies, while in Germany, a neo-Nazi and several other minor German parties have obtained a seat in the EP with as little as 0.6 % of the national popular votes. As a consequence, the EP continues to be characterized today by a high degree of fragmentation – with 8 political groups created among MEPs (non-attached MEPs form a 9<sup>th</sup> group).<sup>83</sup> And, as it has been the case since 1979, the EP continues to be managed by a grand coalition between the main center-left and center-right parties – the conservative people's party (EPP) and the socialists and democrats (S&D), jointly with the liberals (ALDE).<sup>84</sup>

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wahlrecht durch das BVerfG und dessen Sicht aus dem Europäischen Parlament, NVwZ 33 (2014), 537.

<sup>79</sup> See BverfGE, 2 BvC 4/10, judgment of 9.11.2011.

<sup>80</sup> See BverfGE, 2 BvE 2/13, judgment of 26.2.2014.

<sup>81</sup> See European Parliament, Result of the 2014 European Elections, available at: <<http://www.results-elections2014.eu>> (last visited 7.8.2014).

<sup>82</sup> See *K. Reif/H. Schmitt*, Nine Second-Order Elections – A Conceptual Framework for the Analysis of European Election Results, *Eur. J. Pol. Res.* 8 (1980), 3.

<sup>83</sup> See also EP Rules of Procedure, Rule 32 (stating that a political group shall include as a minimum 25 members coming from at least one-quarter of the member states).

<sup>84</sup> See generally *S. Hix/B. Højland*, *The Political System of the European Union*, 2005.



## V. Rethinking the Electoral Law for the European Parliament

As the overview of the electoral systems in force in the six largest EU member states reveals, electoral rules for national legislatures give proper consideration to the need of securing government stability and effectiveness. Instead, the elections rules set in these member states for the EP waive the concerns for governability by introducing quasi-pure PR to elect MEPs. Why is it so? For many years the conventional perception of the EP was that this was a purely representative body – with no governing tasks. Until 1992 the EP had exclusively a consultative role, and although the EP step by step managed to accrue its power, for many years it was the Cinderella of EU institutions.<sup>85</sup> In fact, for most of its existence the main struggle of the EP was to assert itself against the other EU institutions.<sup>86</sup> Nevertheless, things have now changed. Since the Lisbon Treaty, the EP is by default involved in adopting any piece of EU legislation, and although there are still areas in which the Council is the only law-maker, the role of the EP is increasingly central in the institutional system of the EU.<sup>87</sup> Despite the view of the Bundesverfassungsgericht, which struck down the Sperrklausel set by the German legislature for the EP elections on the argument that the EP does not have to form a government in the EU, the EP *does govern* the EU – by sharing power with other EU institutions. And it is therefore necessary to raise the question whether the current representative structure of the EP is the most adequate to perform the task.<sup>88</sup>

The European Parliament has shown awareness for this problem. In particular, in light of the decision of the main EU political parties to advance at the May 2014 EP elections lead candidates for the position of President of the European Commission, with the understanding that the political party “winning” the EP election was entitled to have its lead candidate appointed as Commission President, the concern for governability in the EU lower house has attracted new attention. In its November 2012 resolution on EP elections in 2014, the EP affirmed that, in view of the

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<sup>85</sup> See *P. Dann*, The Political Institutions, in: A. von Bogdandy/J. Bast (eds.), *Principles of European Constitutional Law*, 2010, 237.

<sup>86</sup> See *M. Shackleton*, The European Parliament, in: J. Peterson/M. Shackleton (eds.), *The Institutions of the European Union*, 2012, 124.

<sup>87</sup> See *B. Rittenberger*, Institutionalizing Representative Democracy in the European Union: The Case of the European Parliament, *J. Common Mkt. Stud.* 50 (2012), 18.

<sup>88</sup> See *A. Gratteri*, Parlamento e Commission: Il difficile equilibrio fra rappresentanza e governabilità nell'Unione Europea, *La Comunità Internazionale* (2014), 237.

“changing relationship between Parliament and the Commission which will stem [...] from the elections in 2014, [...] reliable majorities in Parliament will be of paramount importance for the stability of the Union’s legislative procedures and the good functioning of its executive.”<sup>89</sup>

In fact, the EP explicitly called the

“Member States to establish in their electoral law, in accordance with Article 3 of the Act concerning the election of the representatives of the Assembly by direct universal suffrage, appropriate and proportionate minimum thresholds for the allocation of seats so as to duly reflect the citizens’ choices, as expressed in the elections, while also effectively safeguarding the functionality of Parliament.”<sup>90</sup>

Following the May 2014 EP elections, the lead candidate of the EPP – which had won the highest number of seats in the EP – was eventually appointed by the European Council as President of the European Commission.<sup>91</sup> Nevertheless, because the EPP had obtained only a plurality of 29 % of the vote,<sup>92</sup> the process of selection and approval of the Commission President involved a major bargaining between the main EU parties, which resulted in a political agreement whereby the S&D lead candidate would be elected EP President,<sup>93</sup> in exchange for the S&D support to the election of the EPP lead candidate as Commission President.<sup>94</sup>

The process of parliamentarization of the European Commission has generated much controversy. Elsewhere I have raised concerns about how this process may deepen the imbalances between large vs. small states in the EU.<sup>95</sup> In fact, the strongest supporter of the parliamentarization drive has been the largest EU state: as it has been emphasized, “[s]omewhat tellingly, and indicating a certain unwillingness to embrace the concept in other Member States, the candidates have become known under their German

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<sup>89</sup> European Parliament resolution of 22.11.2012 on the elections to the European Parliament in 2014, P7\_TA(2012)0462, para. 4.

<sup>90</sup> European Parliament resolution (note 89).

<sup>91</sup> European Council Conclusions, 27.6.2014, EUCO 79/14, 11 (designating *Mr. Jean-Claude Juncker* as President of the European Commission with 26 heads of states and government in favor, and 2 against).

<sup>92</sup> See note 81.

<sup>93</sup> See European Parliament, Press release, “Martin Schulz Re-Elected President of the European Parliament”, 1.7.2014 (reporting election of *Mr. Martin Schulz* as President of the EP with 409 votes in favor).

<sup>94</sup> See European Parliament, Press release, “Parliament Elects Jean-Claude Juncker as Commission President”, 15.7.2014 (reporting election of *Mr. Jean-Claude Juncker* as President of the European Commission with 422 votes in favor, 250 against, and 47 abstained).

<sup>95</sup> See *F. Fabbrini* (note 11), 27.

name *Spitzenkandidaten* throughout the EU.”<sup>96</sup> Others have criticized the process of parliamentarization for its inconsistency with the independence of the European Commission.<sup>97</sup> And it is uncertain even whether the *Spitzenkandidaten* game will be reproduced in 2019.<sup>98</sup> Yet, if the process is to consolidate in the future, it appears that an electoral system that ensures a more effective competition between EU political parties would be necessary. It is indeed surprising that those in favor of the process of parliamentarization of the Commission have not taken notice of the fact that the PR election system in place for the EP is not conducive to such a result.<sup>99</sup> In an extreme PR system such as that in force for the EP, no political party will ever come even close to a majority, with the effect that the choice of the Commission President will be less about electoral, democratic competition, and more about post-electoral, back-door bargaining.<sup>100</sup>

Nevertheless, a debate on the relation between representation and governability in the EP is not exclusively connected to the possible parliamentarization of the EU system of governance. In fact, other institutional developments taking place in the EU, in particular as a result of the Euro-crisis, create increasing pressure to recognize political cleavages within the EU lower legislative house, beyond a simple contraposition between a grand coalition of political forces favorable towards European integration and a range of parties which simply oppose the EU.<sup>101</sup> New fissures have

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<sup>96</sup> See Editorial Comments, *After the European Elections: Parliamentary Games and Gambles*, CMLR 51 (2014), 1047 f.

<sup>97</sup> See e.g. *H. Grabbe/S. Lehn*, *The 2014 European Elections: Why a Partisan Commission President Would be Bad for the EU*, Center for European Reform, October 2013.

<sup>98</sup> See European Council Conclusions, 27.6.2014, EUCO 79/14 para. 27 (stating that to address strong concerns by the UK, “the European Council will consider the process for the appointment of the President of the European Commission for the future, respecting the European Treaties”).

<sup>99</sup> See e.g. *S. Hix*, *What’s Wrong With the European Union and How to Fix It?*, 2008, 162 (stating that the parliamentarization of the Commission “would be similar to the German system”). As explained in the text accompanying notes 76-78, in German parliamentary elections there are electoral constraints that do not exist for EP elections.

<sup>100</sup> See also *J. H. H. Weiler*, *Fateful Elections? Investing In the Future of Europe*, I.CON 12 (2014), 273, 277 (stating that the selection of the Commission President in light of the result of the fragmented results of EP elections “compromises the ability in a political sense for this or that candidate to say with authority ‘I was elected by the peoples of Europe.’”).

<sup>101</sup> See *M. Maduro*, *A New Governance for the European Union and the Euro: Democracy and Justice*, study commissioned by the European Parliament Constitutional Affairs Committee, September 2012, PE 462.484, 16 (stating that in “a democratic Europe citizens can disagree about the right policies to respond to the current economic and financial crisis. If they are not presented with alternative EU policies then the only alternative that remains for them is to be for or against Europe.”).

emerged in EU politics.<sup>102</sup> Questions such as: Should the EU strictly enforce its fiscal constraints or ensure more flexibility to EU member states facing an economic downturn?<sup>103</sup> Should the EU devolve more resources to investing in growth? But also questions such as: Should the EU exercise a tighter oversight on respect for human rights within the member states?<sup>104</sup> And should the EU promote solidarity in managing transnational migrations?, have met with different answers across national and political groups. This evolving political climate calls for a more competitive political dynamic within the EP,<sup>105</sup> even if the EU remains grounded on a constitutional logic of separation of powers.<sup>106</sup> And the need for this is even more important if the EP is to acquire growing centrality in decisions about taxing and spending in the EMU.<sup>107</sup>

Although political solutions are often invoked to address this state of affairs,<sup>108</sup> electoral reform appears unavoidable to redefine the balance between representation vs. governability in the EP. The irony of things, of course, is that the EP has neither the responsibility nor the power to change the current state of affairs. As previously mentioned, the electoral laws for the EP are made by the state legislatures (or state courts), according to guidelines agreed by state governments. Yet, the challenge of governability is a real one – and will arguably grow as the EP moves at the center stage of EMU governance. Although I am aware that rarely the “veil of ignorance”<sup>109</sup> shapes discussions about the design of electoral laws, I am therefore convinced that a serious rethinking of the electoral law for the EP would be a worthwhile effort. In this article I do not want to articulate a

<sup>102</sup> See *N. Scicluna*, Politicization Without Democratization: How the Eurozone Crisis Is Transforming EU Law and Politics, *I.CON* 12 (2014), 545.

<sup>103</sup> See e.g. the different reactions of the EPP and the S&D towards the 2014 proposal by the Italian Presidency of the Council to increase flexibility in the interpretation of EU budgetary rules. See *J. Kanter*, Italian Leader Presses His Case for Budget Relief in Europe, *The New York Times*, 2.7.2014 (reporting S&D support, and EPP + ALDE opposition, toward the proposal articulated in the EP by Italian Prime Minister *Renzi* to increase flexibility).

<sup>104</sup> See e.g. the different reactions of the EPP and the S&D to a 2013 parliamentary report calling for a tighter oversight of the human rights situation in Hungary. See *M. Feber*, European Parliament Adopts Report Criticizing State of Hungary’s Democracy, *The Wall Street Journal*, 3.7.2013, (explaining S&D + ALDE support, and EPP opposition, toward the proposal made in the so-called *Tavares* report to increase oversight on Hungary, whose governing party is a member of EPP).

<sup>105</sup> See *D. Schleicher*, What If Europe Held an Election and No One Cared?, *Harv. Int’l L. J.* 52 (2011), 110.

<sup>106</sup> See *S. Fabbrini*, Which European Union? Europe After the Euro-Crisis, 2015 (defending the logic of separation of powers in the EU).

<sup>107</sup> See also *F. Fabbrini*, Taxing and Spending in the Eurozone, *ELR* 39 (2014), 155.

<sup>108</sup> See e.g. *N. Peñalver Garcia/J. Priestley*, The Making of a European President, 2015.

<sup>109</sup> *J. Rawls*, *A Theory of Justice*, 1971, 118.

fully-fledged proposal on how the rules on EP elections could be amended and improved to face the challenge discussed above: Political scientists studying electoral systems have much greater competence and expertise than me on this. In what follows, instead, I would like to suggest from a legal point of view at what level of government could such an electoral reform be achieved, and what would be the institutional incentives to finalize it – while also emphasizing the caveats that ought to accompany any such project of reform.

Several options are available to improve governability in the EP<sup>110</sup> – and the EP Constitutional Affairs Committee (AFCO) has recently proposed in a working document of April 2015 solutions such as the introduction of “obligatory national/regional thresholds” and the creation of smaller constituencies based on common rules, which would go a long way towards introducing correctives in EP electoral law.<sup>111</sup> From the procedural perspective, member states could autonomously decide to amend their electoral laws for the EP, giving due weight to governability concerns. Nevertheless, as the example of Germany shows, domestic obstacles may trump efforts to strike a better balance between representation and governability in the EP. Plus a patchwork of different national responses may fault the goal of rationalizing the EP electoral law. An alternative strategy, thus, would be to amend Council Decision 2002/772. If correctives to the electoral system for EP election were set at EU level they would trump resistance by national courts.<sup>112</sup> At the same time, new EU legislation could restrict the application of electoral correctives to member states which elect a high number of MEPs: Currently only eight out of 28 EU member states are apportioned more than 21 seats in the EP, and states which elect 21 MEPs or less have *de facto* – even if not *de jure* – internal thresholds which limit the fragmentation of the political system, because, for mathematical reasons, if there are maximum 21 seats available in an election, a party must obtain close to 5 % of the votes in the relevant constituency to receive at least one seat.<sup>113</sup>

According to Article 223(1) TFEU, to enter into force, any amendment to the consolidated EU Act on EP election would need to be approved unanimously by the Council, after obtaining the consent of a majority of

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<sup>110</sup> See *O. Costa*, Quel sont les défis pour le Parlement européen? Législation, contrôle et organization, study commissioned by the European Parliament Constitutional Affairs Committee, PE 510.006, January 2015.

<sup>111</sup> See European Parliament Constitutional Affairs Committee, The Reform of the Electoral Law of the European Union, Working Document, 30.4.2015, PE557.068v01.00.

<sup>112</sup> See *F. Fabbrini*, After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality Between the Member States, GLJ 16 (2015), 1003.

<sup>113</sup> See note 68.

the members of the EP, and incorporated in the legal systems of the EU member states in accordance with their respective constitutional requirements. However, a well-designed reform could create the incentives to overcome these obstacles. If for example an amendment proposal were to introduce electoral correctives which apply only to the eight largest EU member states, electing more than 21 MEPs, the 20 other smaller states would have few reasons to oppose this. Larger countries, instead, would find a way through this reform to reduce the disparities existing between the electoral regime for EP elections and that for national elections, in some case overcoming the difficulties they have faced domestically to reform their electoral laws. Plus, some state governments would likely subscribe to an EU reform that chills the boomerang effect that party fragmentation and the rise of fringe groups in EP elections has produced in national elections. And the EP – or for sure the largest political groups within it – would benefit from a reform that fosters the simplification of the political spectrum.

With that said, as comparative experience shows the structures of party system in federal regimes is dependent among multiple, complex factors.<sup>114</sup> For example, while electoral law and presidential politics have exceptionally pushed, through a long and non-linear process, the US towards a two-party system,<sup>115</sup> party fragmentation remains a dominant feature of Switzerland.<sup>116</sup> If it is moreover true that more advanced societies tend to produce less competitive electoral arrangements,<sup>117</sup> it is unlikely that a reform of the consolidated EU Act on EP elections would bring about a purely bi-polar competition in the EU lower legislative house. Even if one does not share an interpretation of the EU as a paradigmatic case of a consociational polity,<sup>118</sup> the fact remains that multiple cleavages characterize the EP, and can hardly be surmised into a simple left vs. right political competition.<sup>119</sup> In this con-

<sup>114</sup> See *P. Chhibber/K. Kollman*, *The Formation of National Party Systems: Federalism and Party Competition in Canada, Great Britain, India and the United States*, 2004.

<sup>115</sup> See *R. Richie/A. Spencer*, *The Right Choice for Elections*, *U. Rich. L. Rev.* 47 (2013), 959 (explaining the 18<sup>th</sup> century origin a single-district, winner takes all, electoral system in the US and discussing how its slow consolidation despite federalism impacted on party politics).

<sup>116</sup> See *H. Kriesi/A. Trechsel*, *The Politics of Switzerland: Continuity & Change In a Consensus Democracy*, 2008, 84 (defining the Swiss party system as one of the most fragmented in Europe, due to multiple cleavages in Swiss society, federalism, and partially also as a result of the use of PR electoral systems).

<sup>117</sup> See *R. Hague/M. Harrop*, *Comparative Government and Politics*, 2013, 199 f.

<sup>118</sup> See especially *A. Lijphart*, *Patterns of Democracy*, 1999, 42 (defining the EU as a model of consensus democracy).

<sup>119</sup> See *P. Dann*, *European Parliament and Executive Federalism: Approaching a Parliament In a Semi-Parliamentary Democracy*, *ELJ* 9 (2003), 549.

text, it seems plausible to caution that representation in the EP will remain more pluralistic, and fragmented, than what is the case in national legislatures, and that therefore the logic of consensus-building (across political groups) will remain a defining feature of the EU lower house, as much as it is a feature of the EU upper house (across national groups).<sup>120</sup> Yet, it is submitted here that a modicum of rationalization in the rules for EP elections, directed at enhancing governability vis-à-vis representation concerns, may play an important role in upgrading the status of the EP, overcoming a systematic grand coalition of main center-left and center-right parties, and re-structuring the political lines of conflict at play in the EU.

## VI. Conclusion

The purpose of this article has been to examine old and new challenges to the representative function of the EP. Despite the old criticisms against the under-representativeness of the EP, and the new preoccupation with its alleged over-representativeness, this article has argued that the main challenge facing the EP may be one of electoral law. As the article explained, there are solid constitutional arguments to justify the apportionment of seats between the member states based on degressive proportionality, and to ensure the involvement of all MEPs even on decisions which concern only the Eurozone. In fact, comparative law supports this conclusion, by pointing out that the EU situation is less exceptional than what is often thought. Nevertheless, the EP is indeed facing a challenge of representation, as a result of the system of PR for the election of its members. While political regimes must reconcile representation with governability, PR heavily sacrifices the latter in the name of the former. In the six largest EU member states, in particular, MEPs are elected through PR regimes which fundamentally differ from the majority-ensuring systems in place for national elections. Yet, it is questionable whether the current logic of representation in the EP provides the most apt democratic format for an institution which is increasingly involved in the governance of EU affairs, and which aspires to acquire even greater relevance in EMU. If for long time the EP could afford to avoid the issue, today governability constitutes an important challenge. To address this state of affair, the article has suggested opening a serious debate on the electoral rules for EP elections. While many caveats must accompany any project of electoral engineering, notably in the EU, it is plausible that a tar-

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<sup>120</sup> See A. Kreppel, *The European Parliament and Supranational Party System*, 2002.

geted, little-intrusive, reform of the consolidated EU Act on EP elections could create virtuous electoral incentives to rationalize the EU political system.