# 'A Goal That Applies to the European Parliament No Differently From How It Applies to National Parliaments': The Italian Constitutional Court Vindicates the 4% Threshold for European Elections

Italian Constitutional Court, Judgment of 25 October 2018 no. 239/2018

Giacomo Delledonne*

## INTRODUCTION

The voting system for European Parliament elections is an ideal subject for testing the hypothesis that the European Union has a 'composite constitution'[1] resulting from the combination and coexistence of national and supranational legal materials. Although the EU Treaties mention the goal of adopting a uniform electoral procedure applicable in all member states (Article 223(1) TFEU), the Act concerning the election of the members of the European Parliament by direct universal suffrage (the 'Direct Elections Act') only dictates some common principles, most notably the adoption of proportional representation. It is for the member states to determine all the other aspects of the electoral voting systems

*Postdoctoral Researcher in Comparative Public Law, Institute for Law, Politics and Development (Dirpolis), Scuola superiore Sant'Anna, Pisa. Email address: giacomo.delledonne@santannapisa.it. This contribution builds on a blog post that was published on *Verfassungsblog* ('Rationalising political representation within the European Parliament: the Italian Constitutional Court rules on the threshold for the European elections', 11 January 2019, at ⟨www.verfassungsblog.de/rationalising-political-representation-within-the-european-parliament-the-italian-constitutional-court-rules-on-the-threshold-for-the-european-elections⟩, visited 14 May 2019).

[1]L.F.M. Besselink, *A Composite European Constitution/Een Samengestelde Europese Constitutie* (Europa Law Publishing 2007).

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for elections to the European Parliament. Interestingly, this state of affairs has not been significantly altered by the gradual transformation of the European Parliament from an assembly of 'representatives of the peoples of the States' (Article 137 TEC) into an institution in which EU citizens 'are directly represented at Union level' (Article 10(2) TEU): the far-reaching evolution of the European constitution has coincided with 'very modest' progress in electoral law.[2] However, the balance between national and supranational concerns has grown increasingly unstable since the first major amendment of the Direct Elections Act was approved in 2002. Attempts by the political branches to modify specific aspects of the voting system and judicial scrutiny of national voting laws for elections to the European Parliament performed by national constitutional courts testify to this growing sense of dissatisfaction.

The constitutional courts of several member states have rendered important judgments in the last few years on the constitutionality of national voting laws for elections to the European Parliament. In so doing, they have addressed at least two issues: the compatibility of those laws with constitutional principles related to elections and voting rights, on the one hand, and the nature of the European Parliament as a representative assembly that is now endowed with 'legislative and budgetary functions' (Article 14(1) TEU), on the other. Thus, national constitutional courts have not shied from actively engaging with this crucial aspect of the composite European constitution. The main issue addressed has been the constitutionality of voting thresholds, which member states are allowed to set pursuant to Article 3 of the Direct Elections Act. In this vein, the German Federal Constitutional Court struck down a 5% and later a 3% threshold in the German *Europawahlgesetz*.[3] On the first occasion, the German Court set aside a previous judgment, dating back to 1979, that had confirmed the constitutionality of a 5% threshold.[4] By contrast, the Czech

[2]S. Alonso de León, 'Four decades of the European Electoral Act: a look back and a look ahead to an unfulfilled ambition', 42 *European Law Review* (2017) p. 353 at p. 367. *See also* A. Rosas and L. Armati, *EU Constitutional Law: An Introduction* (Hart Publishing 2010) p. 116; F. Fabbrini, 'Representation in the European Parliament: Of False Problems and Real Challenges', 75 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2015) p. 823 at p. 839 (raising the question of 'whether the current representative structure of the EP is the most adequate to perform the task').

[3]German Federal Constitutional Court (*Bundesverfassungsgericht*), judgments of 9 November 2011 (BVerfGE 129, 300) and 18 December 2013 (BVerfGE 135, 259). *See* B. Michel, 'Thresholds for the European Parliament Elections in Germany Declared Unconstitutional Twice', 12 *EuConst* (2016) p. 133; G. Taylor, 'The constitutionality of election thresholds in Germany', 15 *International Journal of Constitutional Law* (2017) p. 734.

[4]German Federal Constitutional Court, judgment of 22 May 1979 (BVerfGE 51, 222). *See* D. Murswiek, 'Die Verfassungswidrigkeit der 5%-Sperrklausel im Europawahlgesetz', 29 *Juristenzeitung* (1979) p. 48.

Constitutional Court did not find the 5% threshold in the Czech Act on Elections of the European Parliament to be unconstitutional.[5]

On a different note, the case law concerning voting laws for European Parliament elections is part of a wider trend towards the 'constitutionalization of democratic politics'.[6] Among the many challenges currently faced by representative democracies, electoral laws are frequently called into question both in the political debate and before courts. This is particularly true in Italy, where the historic instability of electoral legislation[7] and a growing distrust of political elites have gone hand in hand with the emergence of a substantial body of case law from the Italian Constitutional Court (*Corte costituzionale*, 'the Constitutional Court' or the 'Court') related to electoral issues. The Constitutional Court has scrutinised not only the laws pertaining to elections to municipal assemblies and regional legislatures but also the laws for national Parliament[8] and European Parliament elections. In October 2018, the Court held that the 4% threshold in the Italian voting law for elections to the European Parliament[9] was not unconstitutional. The Court took a similar approach to its German and Czech counterparts in deciding this issue and, interestingly, explicitly mentioned their judgments in its reasoning.

The purpose of this note is to provide a contextual analysis of that judgment[10] and to consider its implications both for the domestic situation and from a comparative perspective while asserting that the judgment of the Court represents a significant contribution to the ongoing judicial conversation on the European composite order.

[5]Constitutional Court of the Czech Republic (*Ústavní soud České republiky*), judgment of 19 May 2015 (Pl. ÚS 14/14). *See* H. Smekal and L. Vyhnánek, 'Equal voting power under scrutiny: Czech Constitutional Court on the 5% threshold in the 2014 European Parliament Elections', 12 *EuConst* (2016) p. 148.

[6]R.H. Pildes, 'Elections', in M. Rosenfeld and A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) p. 529 at p. 530.

[7]*See* S. Cassese, *Governare gli italiani. Storia dello Stato* (il Mulino 2014) p. 80-82.

[8]Italian Constitutional Court, judgments no. 1/2014 and 35/2017. *See* E. Longo and A. Pin, 'Judicial Review, Election Law, and Proportionality', 6 *Notre Dame International and Comparative Law Journal* (2016) p. 101; A. Baraggia and L.P. Vanoni, 'The Italian Electoral Law Saga: Judicial Activism or Judicial Subsidiarity', *STALS Research Paper* no. 2/2017; P. Faraguna, '"Do You Ever Have One of Those Days When Everything Seems Unconstitutional?": The Italian Constitutional Court Strikes Down the Electoral Law Once Again', 13 *EuConst* (2017) p. 778.

[9]Law no. 18 of 24 January 1979, as amended by law no. 10 of 20 February 2009.

[10]An English translation of the motivation in law is available ⟨www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_239_2018_EN.pdf⟩, visited 14 May 2019.

## The antecedents: history of the impugned provisions and procedural concerns

The national 4% threshold is a recent addition to Italian voting law for elections to the European Parliament. Moreover, the history of this particular electoral law has been shaped by the interaction of national and European concerns. In this regard, the voting law(s) for elections to the European Parliament can be interpreted as a typical component of the composite European constitution. After the Direct Elections Act came into force, the Italian legislature opted for a proportional system with open lists and five macroregional constituencies: Northwest, Northeast, Centre, South, and the Isles. No threshold was specified in the earliest version of the voting electoral law, just as had been the case, until 1993, with the voting law for elections to the Chamber of Deputies.[11] The underlying purpose was to ensure, to the greatest possible extent, full symmetry between the composition of the national Parliament and the 'new' representation in the directly elected European Parliament, thus adhering to a notion of European elections as second-order elections.[12] On a different note, the adoption of pure proportional representation for the European Parliament was justified, at least in certain circles, by that parliament's lack of actual decision-making powers.[13] Only in 2009 was this voting law significantly amended: the introduction of a 4% threshold was thought desirable in the light of the ongoing evolution of the domestic party system and the transformation of the institutional framework of the Union, which made the threshold desirable in the eyes of the established Italian parties as a means of increasing their own influence – and of the Members of the European Parliament elected in Italy – in the European Parliament.[14] In sum, the move of the Italian legislature in 2009, which did not ignore domestic concerns, could also be interpreted as a reaction to the trend towards increased democratisation and parliamentarisation of the Union.

In 2010 and 2015, the Constitutional Court dismissed two questions on the constitutionality of the 4% threshold raised by, respectively, an administrative court and an ordinary court. It did so on procedural grounds, i.e. by declaring the questions inadmissible, although the reasons given were different in each

[11] *See* A. Renwick et al., 'Partisan self-interest and electoral reform: The new Italian electoral law of 2005', 28 *Electoral Studies* (2009) p. 437 at p. 438.

[12] *See* G. Troccoli, 'L'elezione a suffragio universale diretto del Parlamento europeo', 27 *Rivista trimestrale di diritto pubblico* (1977) p. 1535; S. Traversa, 'L'elezione del Parlamento a suffragio universale e la legge elettorale italiana', 27 *Rivista trimestrale di diritto pubblico* (1977) p. 1577.

[13] *See* F. Lanchester, 'Parlamento europeo: il progetto di procedura elettorale uniforme', 4 *Quaderni costituzionali* (1984) p. 148 at p. 149.

[14] *See* C. Martinelli, 'Gli sbarramenti nelle leggi elettorali per il Parlamento europeo', 29 *Quaderni costituzionali* (2009) p. 396 at p. 398-399.

case.[15] Quite interestingly, the second judgment followed a landmark decision of the Court that had struck down crucial provisions of the law of national general elections in force at the time. In judgment no. 1/2014, the Court contradicted the widespread view that procedural constraints put the national electoral law outside the scope of judicial review of legislation (*zona franca*).[16] Instead, the Court held that voters were entitled to file motions with ordinary courts for declaratory relief of violations of the fundamental right to vote, at which point the (ordinary) court could submit a question of constitutionality to the Constitutional Court if need be. Although the admissibility of such a question of constitutionality 'was problematic in many respects',[17] the Court engaged with the merits of the case and its judgment ultimately 'had an extraordinary resonance in the overall constitutional system'.[18] For the purposes of this note, it should be kept in mind, first, that the Court seemed to be indicating that there was an easily accessible procedural tool that made it possible to raise questions about the constitutionality of electoral laws in order to check their compliance with the fundamental right to vote under Article 48 of the Italian Constitution.[19] The second point, in turn, was of a substantive nature: after two decades of semi-permanent discussion about electoral reform – in which 'governability' and the need to foster it had been continuously invoked – the Constitutional Court warned about the risk of jeopardising other interests, including the constitutional principle of voting equality.

Following this ruling, a group of voters brought an action before an ordinary court in Venice, arguing that the 4% threshold in the voting law for elections to the European Parliament violated their right to cast an equal vote under Article 48(2) of the Italian Constitution and asking the ordinary court to submit a question of constitutionality to the Constitutional Court. Alternatively, they asked the ordinary court to submit a reference for a preliminary ruling to the Court of

[15]Italian Constitutional Court, judgments no. 271/2010 and 110/2015. *See* G. Piccirilli, 'Maintaining a 4% Electoral Threshold for European Elections, in order to clarify access to constitutional justice in electoral matters', 12 *EuConst* (2016) p. 164.

[16]*See* M. Siclari, 'Il procedimento in via incidentale', in R. Balduzzi and P. Costanzo (eds.), *Le zone d'ombra della giustizia costituzionale. I giudizi sulle leggi* (Giappichelli 2007) p. 11 at p. 25-27.

[17]Piccirilli, *supra* n. 15, p. 169.

[18]Piccirilli, *supra* n. 15, p. 171. *See also* G. Repetto, *Il canone dell'incidentalità costituzionale. Trasformazioni e continuità nel giudizio sulle leggi* (Editoriale Scientifica 2017) p. 25-57.

[19]'(1) Any citizen, male or female, who has attained majority, is entitled to vote. (2) The vote is personal and equal, free and secret. The exercise thereof is a civic duty. (3) The law lays down the requirements and modalities for citizens residing abroad to exercise their right to vote and guarantees that this right is effective. A constituency of Italians abroad shall be established for elections to the Houses of Parliament; the number of seats of such constituency is set forth in a constitutional provision according to criteria established by law. (4) The right to vote cannot be restricted except for civil incapacity or as a consequence of an irrevocable penal sentence or in cases of moral unworthiness as laid down by law'.

Justice of the European Union based on the alleged incompatibility of the Direct Elections Act with the Treaties and the Charter of Fundamental Rights.

In its 2015 judgment, the Constitutional Court stressed the difference between elections to the Italian Parliament and other categories of elections, including European elections, and the procedural consequences of that distinction. While the need to avoid 'review-free zones' in the legal system would seem to make actions for declaratory relief brought by ordinary voters the only conceivable procedural tool for contesting voting laws for elections to the national parliament,[20] questions about the constitutionality of the voting law for elections to the European Parliament can be raised by resorting to ordinary procedural tools: 'unlike electoral complaints arising in national parliamentary elections, electoral complaints for European Parliamentary elections do have a competent judge [i.e. the ordinary and administrative courts] for disputes involving the protection of individuals' rights'.[21] The Court thus declared the question of constitutionality inadmissible and summarily dismissed the request to submit a reference to the Court of Justice, nevertheless indicating that there was a plausible procedural path for raising the same question again.

## The facts of the case

The latest question of constitutionality regarding the 4% threshold was raised in a more traditional way, so to speak, thus escaping the procedural objections of the Constitutional Court. At the European election of 25 May 2014, the right-wing party *Fratelli d'Italia* had a 3.7% share of the vote and, consequently, failed to secure any seats in the European Parliament. Party chair Giorgia Meloni and other candidates on the party list lodged a complaint with the first-instance regional administrative court of Latium (*TAR Lazio*) and later with the *Consiglio di Stato*, i.e. the supreme administrative court of Italy.[22] In their complaint, they argued that the distribution of seats in the wake of the election had been made on the basis of an unconstitutional norm, thereby violating Articles 1(2), 3 and 48 of the Italian Constitution and, consequently, the principles of popular sovereignty, equality before the law and electoral equality. Moreover, they extensively (and approvingly) cited the recent case law of the German Constitutional Court. The *Consiglio di Stato* referred the issue of the constitutionality of the 4% threshold to the Constitutional Court, basically alleging that the impugned provision violated the principles of democracy and voting equality and struck

[20]Italian Constitutional Court, judgment no. 110/2015, para. 3.3 of the motivation in law.

[21]Piccirilli, *supra* n. 15, p. 174. This decision of the Court was criticised by many scholars: *see* e.g. S. Lieto and P. Pasquino, 'Porte che si aprono e che si chiudono. La sentenza n. 110 del 2015', 24 June 2015, at ⟨www.forumcostituzionale.it⟩, visited 14 May 2019.

[22]In Italy, claims relating to voting rights have to be raised before civil courts, whereas administrative courts scrutinise the regularity of elections.

an unreasonable balance between the interests and values at stake. Most importantly, the unreasonableness of the electoral threshold was deemed to derive from the peculiar nature of the EU institutional system, in which the Commission does not actually have to command the confidence of the Parliament throughout the duration of its term. Therefore, the 4% threshold, which represented an obvious limitation on voting equality, lacked sufficient justification. The wording of the referral decree belied the influence of the arguments and the jurisprudence of the *Bundesverfassungsgericht* in the European legal space. The underlying idea was that there is a fundamental difference between a 'proper' parliamentary democracy and the European Union's form of government. Therefore, the threshold effectively excluded a significant number of voters from representation in the European Parliament, even though the stated goal of increasing the stability of the 'executive' of the Union could not justify such a limitation. In this respect, a parallel can be drawn between this case and other recent judgments of the Constitutional Court, not only in procedural terms but also on substantive grounds; one of the great dilemmas of contemporary representative democracies is at stake, namely 'the tension between the principle of equality of votes on the one hand, and the need to ensure governability on the other'.[23] Incidentally, the huge differences between the voting systems for elections to the European Parliament in the various member states of the Union also contribute to frustrating the purpose of the impugned provision; in the absence of a uniform or strongly harmonised electoral procedure, a voting threshold in one or several member states is ultimately unable to achieve its goal. Other complainants in the proceedings before the *Consiglio di Stato* asked the Constitutional Court to submit a reference for preliminary ruling to the Court of Justice of the EU; in their view, it was hard to reconcile optional, national voting thresholds with Articles 10 and 14 TEU, according to which the European Parliament represents not the peoples of the member states but the citizens of the Union.

The Court stuck to its precedent of 2015 and ruled on the merits.

## A contextual reading of proportional representation

In the reasoning of the Court, the starting point was the need for a contextual, historicised reading of proportional representation. The impugned provision was part of a proportional electoral law and represented a limitation on perfect proportionality. According to the Court, political representation does not merely 'mirror' a society, and it is necessary to overcome the goal of a 'purely proportional registration of social and political pluralism'[24] within parliamentary assemblies. In

[23]Faraguna, *supra* n. 8, p. 789.

[24]Para. 6.2 of the motivation in law.

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order to ensure the efficiency of the decision-making process, rationalising tools and limitations on purely proportional representation can prove necessary.[25] The differences between this line of reasoning and the arguments of the German Constitutional Court are striking: the latter court strongly emphasised the need to implement voting equality fully when proportional representation is adopted. Accordingly, legislative discretion is heavily reduced, especially when it comes to derogating mechanisms like voting thresholds.[26] Some of these mechanisms might prove to be compatible with the German Basic Law at any given point in time, but a change in factual circumstances could also encourage the legislature to take action.[27] The Italian Constitutional Court, in turn, emphasised the wide discretionary power of the legislature, saying that this power should not be wielded in a 'manifestly unreasonable' manner.[28] In this respect, the Court's judgment would seem to follow the cautious course that had been set after its groundbreaking judgment no. 1/2014.[29] Leaving aside the influential German exception, this approach is quite widespread among European constitutional courts[30] and reflects a change in attitude towards proportional representation over the last few decades: such a shift can be discerned in constitutional and legislative reform and has not been without influence on the case law of constitutional courts.[31]

In the second part of its reasoning, the Court applied this general interpretive framework to the issue of the constitutionality of the 4% threshold in the voting law for elections to the European Parliament. The referral decree of the *Consiglio di Stato* proceeded from the idea that in the peculiar institutional landscape of the Union there is no need to ensure governability. In advancing that claim, the *Consiglio di Stato* made explicit reference to the case law of the German Federal Constitutional Court, in which the qualitative differences between national representative democracy and the emerging supranational democracy are repeatedly highlighted. In the motivation of its judgment, however, the Constitutional Court cited not only the German case law but also the Czech judgment of 19 May 2015, which had a completely different outcome. Furthermore, the Court

[25]Reference is made to the 'rationalisation of parliamentarism', a trend that the Franco-Russian scholar Boris Mirkine-Guetzévitch detected as early as the interwar years: *see* B. Mirkine-Guetzévitch, *Les nouvelles tendances du droit constitutionnel* (Marcel Giard 1931).

[26]BVerfGE 129, 300, 320. *See*, among others, J. Frowein, 'Die Rechtsprechung des Bundesverfassungsgerichts zum Wahlrecht', 99 *Archiv des öffentlichen Rechts* (1974) p. 72 at p. 80-84.

[27]BVerfGE 129, 300, 322.

[28]Para. 2.1.1 of the motivation in law.

[29]*See* Faraguna, *supra* n. 8, p. 791-792.

[30]*See* W. Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*, 2nd edn. (Springer 2014) at p. 213-214. In the relevant case law, *see* e.g. Constitutional Court of the Czech Republic, judgment of 2 April 1997 (Pl. ÚS 25/96), para. 2.

[31]*See* P. Carrozza, 'Governo e amministrazione', in P. Carrozza et al., *Diritto costituzionale comparato* (Laterza 2009) p. 853 at p. 907.

in some way blamed the *Consiglio di Stato* for flaws in its referral decree: voting thresholds can serve two purposes, namely ensuring governmental stability *and* the proper functioning of a representative assembly. The *Consiglio di Stato* only referred to the former. However, the purpose of improving the functioning of the European Parliament is no less important, since 'it applies to the European Parliament no differently from how it applies to national parliaments'.[32] This point most clearly reveals the differences between the Italian judgment and the two decisions of the German Court.[33] Institutional reasons might explain this difference, the most important being the different weight attached to representative democracy and popular sovereignty in the constitutional traditions of Italy and Germany. Under the Constitution of the Italian Republic, representative democracy coexists with some elements of direct democracy, and the representative component of democracy 'circulates, in multiple forms and to different extents, throughout the whole state machinery, although this is most evident when it comes to the Parliament'.[34] In Germany, there is a close link between popular sovereignty, representative democracy,[35] and the constitutional role of the *Bundestag*.[36] Furthermore, the German Court has repeatedly drawn a clear distinction between national and European democracy, whereas its Italian counterpart has refrained from doing so. According to the Italian Court, there is, at least to some extent, continuity rather than a hiatus between national and supranational democracy.

When it came to the issue of governmental stability in the Union, the Court drew conclusions from its analysis of EU primary law that were clearly different from the conclusions of the German Court in 2011 and 2014. Since the entry into force of the Lisbon Treaty, 'an unquestionable change of the form of government of the European Union'[37] has taken place. The increasing relevance of the legislative, budgetary, control, and consultative powers of the European Parliament, taken as a whole, is testimony to this trend. Furthermore, the European Parliament elects the President of the European Commission and can force the Commission to resign if a motion of censure is passed. Under such

[32]Para. 6.4 of the motivation in law.

[33]Still, the case law of the *Bundesverfassungsgericht* has served as an important source of comparative argumentation in the recent judgments of the Italian Constitutional Court on electoral issues (*see* Faraguna, *supra* n. 8, p. 789).

[34]V. Crisafulli, 'La sovranità popolare nella Costituzione italiana (note preliminari)', in *Stato popolo governo. Illusioni e delusioni costituzionali* (Giuffrè 1985) p. 89 at p. 92.

[35]*See*, among others, E.W. Böckenförde, 'Mittelbare/repräsentative Demokratie als eigentliche Form der Demokratie', in G. Müller et al. (eds.), *Staatsorganisation und Staatsfunktionen im Wandel. Festschrift für Kurt Eichenberger zum 60. Geburtstag* (Verlag Helbing & Lichtenhahn 1982) p. 301.

[36]German Federal Constitutional Court, judgment of 30 June 2009 (BVerfGE 123, 267, 340-341).

[37]Para. 6.5 of the motivation in law.

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circumstances, with a 'strengthened dialectic relationship'[38] between the European Parliament and the Commission, appropriate tools that favour the formation of a majority in Parliament are urgently needed. The 4% threshold passes the reasonableness (or proportionality) test[39] because its task is to prevent excessive party fragmentation and, consequently, to facilitate the emergence of a majority. The wide discretion accorded to the legislature is justified by the highly political nature of these choices.

In contrast to the lengthy reasoning provided by the German Constitutional Court in its two judgments of 2011 and 2014, in which the functioning of the institutional system of the EU was thoroughly scrutinised and a number of constitutional law and political science studies were cited,[40] the grounds of this judgment were presented quite cursorily. This observation emerges out of comparison not only with the typical style of the judgments of the German Court but also with the complex wording of the more recent Italian judgments addressing the constitutionality of the voting laws for elections to the national Parliament. At least to a certain extent, this might simply be the result of a poorly drafted referral decree. Moreover, unlike its German counterpart, the Constitutional Court has not given much consideration to the daily routine of the European Parliament and the way its parliamentary groups cooperate with or confront each other. Instead, it has pointed to the ongoing process of constitutional transformation that makes a plausible case for the compatibility of the electoral threshold with the Italian Constitution. In the light of the discretionary power of the legislature in this highly sensitive area, this evolution could be seen to justify the adoption of a threshold and an ensuing limitation on 'purely' proportional representation. Still, studies carried out by political scientists reveal that the need to improve the functioning of the European Parliament is confirmed by the actual functioning of political groups. On the one hand, 'in voting behaviour, the EP parties are highly cohesive, and increasingly so . . . the two main party groups in the EP – the PES and EPP – compete more than is often assumed'.[41] On the other hand, 'in the new EU-27, ideology or policy compatibility is the main factor behind group membership . . . this means that political groups are aggregations of like-minded parties, sharing – at least – similar

[38]Ibid.

[39]As regards the slow emergence of a proportionality test in the case law of the Constitutional Court, *see* Longo and Pin, *supra* n. 8, p. 115-117.

[40]Which is forbidden in Italy under Art. 118(3) of the Implementing Provisions of the Code of Civil Procedure.

[41]S. Hix et al., 'The Party System in the European Parliament: Collusive or Competitive?', 41 *Journal of Common Market Studies* (2003) p. 309 at p. 327; *see also* Z. Lefkofridi and A. Katsanidou, 'A Step Closer to a Transnational Party System? Competition and Coherence in the 2009 and 2014 European Parliament', 56 *Journal of Common Market Studies* (2018) p. 1462 at p. 1478-1479.

policy objectives'.[42] In its judgment, the Italian Court has voiced concerns that are confirmed by the daily routine of the European Parliament.

Finally, the Constitutional Court addressed an issue not really mentioned in the two judgments of the *Bundesverfassungsgericht*, with the exception of the dissenting opinion submitted by Justices Di Fabio and Mellinghoff in 2011.[43] How could one *national* electoral threshold ever live up to its alleged purpose of fostering governability if only certain member states introduced it into their own voting laws for elections to the European Parliament? The Constitutional Court once again stressed that the rationalising effort of the Italian electoral law was part of an ongoing process of transnational constitutional change, whose ultimate result should be the adoption of a uniform electoral procedure under Article 223(1) TFEU and a decisive rationalisation of the power relationships within the European Parliament. The rationale for the impugned provision is confirmed by the fact that 14 member states, including some of the larger ones like France and Poland, have adopted voting thresholds for European elections. The unspoken corollary to this argument is that implicit thresholds apply in the smaller member states, regardless of whether their electoral laws formally regulate a threshold. As the Czech Court claimed in its judgment, 'in other countries implementation of a greater number of smaller constituencies raised the natural threshold, which can be seen as proof that even despite the low level of the minimum threshold these countries continue to consider domestic integration incentives as significant'.[44] Moreover, the reform attempts currently underway at the supranational level (see below) would seem to confirm that the matter of the impugned Italian provision was not an isolated incident.

## No need for a preliminary ruling?

As mentioned above, some of the complainants in the proceedings before the *Consiglio di Stato* had asked the Italian administrative judges to refer a question to the Court of Justice of the European Union under Article 267 TFEU on the

[42]E. Bressanelli, 'National parties and group membership in the European Parliament: ideology or pragmatism', 19 *Journal of European Public Policy* (2012) p. 737 at p. 751.

[43]The two dissenting judges argued that each member state tries to limit partisan fragmentation in its own contingent of Members of the European Parliament, and that a threshold is not the only possible tool for achieving this goal. However, the decision of the Court to strike down the 5% threshold would isolate Germany and lead it to embark upon a *Sonderweg* (BVerfGE 129, 300, 352-353). The Czech Court, which treated the impugned national provisions as 'domestic implementing regulations for the [Direct Elections] Act' (Pl. ÚS 14/14, para. 47), dealt extensively with the different regulations currently in force in the various member states (paras. 48-51).

[44]Pl. ÚS 14/14, para. 50.

compatibility of voting thresholds, as currently regulated by the Direct Elections Act, with Articles 10 and 14 TEU. The lack of a straightforward obligation for all member states to introduce voting thresholds within the limits of '5 per cent of votes cast' (Article 3 of the Direct Elections Act) emphasises the regulatory role of the member states while somehow undermining the role of the European Parliament as an assembly representing the citizens of the Union rather than the peoples in the member states. This issue deserves greater attention, especially if EU citizenship is to be viewed as a new form of civic and political allegiance on a European scale, as some Advocates General of the Court of Justice have put it.[45] Keeping this in mind, the way electoral laws shape supranational political representation is crucial. However, as long as the Members of the European Parliament are elected 'in' the member states, differences between national electoral laws will remain inevitable, to some degree.

Like its German counterpart,[46] the Constitutional Court did not find it necessary to refer the question to the Court of Justice. The Constitutional Court cited both procedural and substantive grounds, first stating that since the issue had been raised by two of the complainants yet was not mentioned by the *Consiglio di Stato* in its referral decree, it was, therefore, possible to address the matter of constitutionality in terms of the compatibility of the impugned provisions with the Constitution, without considering other parameters. Second, the Court held that the Direct Elections Act was sufficiently clear and that it merely created the possibility for a member state to implement a threshold; consequently, it could not be seen as a yardstick for constitutional review.

In my view, the request to refer this matter to the Court of Justice was flawed from the outset. As mentioned above, the complainants had claimed that the Direct Elections Act was incompatible with the Lisbon Treaty. Since the Direct Elections Act is part of EU primary law, judicial review of its validity under Article 267 TFEU would be inconceivable.[47] In light of this, it was easy for the Constitutional Court to deny the request to submit a preliminary reference.

[45]Opinion of AG Poiares Maduro, delivered on 30 September 2009, Case C-135/08, *Rottmann*, para. 23; Opinion of AG Szpunar, delivered on 4 February 2016, Cases C-165/14 and C-304/14, *Rendón Marín* and *CS*, para. 117.

[46]BVerfGE 135, 259, 283.

[47]*See* J. Wouters, 'Constitutional Limits of Differentiation: the Principle of Equality', in B. De Witte et al. (eds.), *The Many Faces of Differentiation in EU Law* (Intersentia 2001) p. 301 at p. 325 and 333 (discussing the *Matthews* judgment of the European Court of Human Rights); K. Lenaerts et al., *EU Procedural Law* (Oxford University Press 2014) p. 218 and 309. *See* ECJ 28 April 1988, Joined Cases 31 and 35/86, *LAISA* v *Council*, para. 17; ECJ 7 November 1991, Case C-313/89, *Commission* v *Spain*, para. 10; ECJ 2 October 1997, Case C-259/95, *Parliament* v *Council*, para. 9; ECtHR 18 February 1999, Case No. 24833/94, *Matthews* v *United Kingdom*, para. 33.

## Conclusions: an Italian Europa-Urteil amid new reform attempts

Because of certain distinctive features of the Italian model of constitutional review – most notably, the absence of direct constitutional complaints and of questions raised by parliamentary minorities[48] – the Constitutional Court has rendered relatively few *Europa-Urteile* in which specific aspects of the supranational legal order and its institutional system have been in the spotlight. Of course, this is not the case for the relationship between EU law and domestic law, as clearly demonstrated by a substantial body of case law extending from *Costa* to *Taricco*.[49] In the light of this, the judgment of 25 October 2018 would seem to be an exception: the Court addressed crucial features of the Union's form of government in order to assess the 'reasonableness' of a legislative derogation from a strict interpretation of the concept of voting equality. The Court presented its own arguments quite concisely and hinted at an institutional evolution that is still ongoing. Unlike the *Bundesverfassungsgericht*, which has focused at great depth on the European state of affairs at a given stage, the Constitutional Court has instead drawn attention to a gradual evolutionary development, 'a rationalisation of the representation of political forces within the European parliamentary assembly'.[50] In this respect, Italy, like the other member states, bears a peculiar responsibility: although the process might be deemed incremental, the decisions of national legislatures can nonetheless be seen as necessary intermediate steps. As the Court stated, the Italian 4% threshold, just like the thresholds established by other member states, represents 'a necessary (but not sufficient) condition to pursue this goal'[51]. It is possible to detect a degree of circularity in the relationship between the piecemeal evolution gradually taking place and the wide discretionary power of national legislatures in adopting voting laws for elections to the European Parliament: the former somehow justifies the latter, with national legislatures called upon to contribute to the process. The link between these two elements – and the most relevant difference with the interpretive approach of the *Bundesverfassungsgericht* – is that both national parliaments and the European Parliament face similar challenges. On a different note, the question of constitutionality discussed here concerned an issue, i.e. voting thresholds, at which the interaction of national and supranational legal materials is at its strongest. The question of constitutionality resolved by the

[48] *See* V. Barsotti et al., *Italian Constitutional Justice in Global Context* (Oxford University Press 2016) p. 52-53.

[49] *See* e.g. G. Piccirilli, 'The "Taricco Saga": The Italian Constitutional Court continues its European Journey', 14 *EuConst* (2018) p. 814.

[50] Para. 6.6 of the motivation in law.

[51] Ibid.

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Constitutional Court in this judgment made no reference to other concerns of a more domestic nature, such as the representation of historic minorities.[52]

As mentioned above, the Constitutional Court rendered its latest judgment against a background of greater instability of the voting law(s) for elections to the European Parliament. Indeed, in chronological terms, the case in which the Italian Court issued its judgment no. 239/2018 ran parallel to the adoption of a decision that amended the Direct Elections Act.[53] Among other things, that decision introduced an obligation for the larger member states to establish voting thresholds (see below), enabled member states to permit advance voting, postal voting, and electronic and internet voting in European elections, and laid down a strong prohibition against double voting.[54] In order to further Europeanise elections, the decision empowered member states to 'allow for the display, on ballot papers, of the name or logo of the European political party to which the national political party or individual candidate is affiliated' (Article 1(3)).

The composite voting law for elections to the European Parliament has evolved along quite distinctive lines; this can only to a very limited extent be described as related to the 'semi-permanent Treaty revision process' of the 1990s and 2000s. This explains the mismatch between, rather than incompatibility of, the content of the Treaties and the content of the Direct Elections Act. Article 1 of Council Decision no. 2018/994, which was not adopted in blithe ignorance of the tension between the German legislature and Constitutional Court,[55] introduced an obligation for the larger member states to regulate voting thresholds of no less than 2% and no more than 5%. The Decision, which has not yet entered into force, was approved by 26 member states. Interestingly, Portugal's vote in favour was explicitly cast on the assumption that the mandatory threshold requirement would never apply to Portugal since Article 152(1) of the Portuguese Constitution contains a clear-cut prohibition on the establishment of voting thresholds. As this example shows, the composite nature of European electoral law is here to stay.

[52]*See* G. Tarli Barbieri, 'Il sistema elettorale per l'elezione dei membri del Parlamento europeo spettanti all'Italia: problemi e prospettive dopo la sent. 239/2018 della Corte costituzionale', 1 *Consulta OnLine* (2019) p. 20 at p. 33, ⟨www.giurcost.org/studi/index.html⟩, visited 14 May 2019.

[53]Council Decision (EU, Euratom) 2018/994 of 13 July 2018 amending the Act concerning the election of the members of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976.

[54]At the European election of 2014, the case of Giovanni di Lorenzo, a journalist with dual Italian and German citizenship who voted twice, caused some uproar.

[55]*See* F. Schulz, 'EU-Wahl: Deutsche Regierung will Sperrklausel für Kleinparteien', *Euractiv*, 4 October 2018, ⟨www.euractiv.de⟩, visited 14 May 2019.