

# **The European integration process: its effects in the principle of separation of powers set up in Member State's Constitutions**

*El proceso de integración europeo: sus efectos en el principio de separación de poderes establecido en las Constituciones de los Estados miembros*

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## **ABSTRACT**

The principle of separation of powers is currently accepted in every Democratic State. Member State's Constitutions still contemplate the classic model or definition of the principle, either directly or indirectly, although a major critic is that they do not take into account the political, social and constitutional changes that have transformed this model. In particular, the line that separates the legislature and the executive and the effects that the European integration process has had in the relation between these two powers and the aforementioned principle. The present work is focused in this last problematic, selecting as models the Constitutions of four Member States in order to examine how they regulate the separation of powers and the effects of the European integration process in these systems. The paper takes into account the effects provoked also by current fragmentation of Parliaments, which brings a new opportunity for Parliaments not only to carry out a stronger scrutiny of the government at national level, but also at the European one.

**Keywords:** European integration, Member State's Constitutions, principle of separation of powers.

**JEL Classification:** K3; K33

## RESUMEN

Actualmente, el principio de separación de poderes se acepta en todos los Estados democráticos y las Constituciones de los distintos Estados miembros de la Unión Europea siguen recogiendo la definición clásica del mismo, directa o indirectamente, aunque la principal crítica que se realiza a este respecto es que no tienen en cuenta los cambios políticos, sociales y constitucionales que han transformado a lo largo de los años esta definición. En particular, la línea que separa el poder legislativo y el ejecutivo, así como los efectos que el proceso de integración europeo ha tenido en la relación entre estos dos poderes y en el mencionado principio. El presente trabajo se centra en esta última problemática, seleccionando las Constituciones de cuatro Estados miembros como modelos para el análisis, a fin de comprobar cómo regulan el citado principio y los efectos que el proceso de integración ha tenido en dicha regulación. El trabajo tiene asimismo en cuenta los efectos provocados por la actual fragmentación de los Parlamentos, lo que brinda una nueva oportunidad para que los mismos puedan realizar un mayor control de los gobiernos no solo a nivel nacional, sino también a nivel europeo.

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**Palabras clave:** integración europea, constituciones Estados miembros, principio de separación de poderes.

**Clasificación JEL:** K3; K33.



## **1. INTRODUCTION: THE PRINCIPLE OF SEPARATION OF POWERS AND THE CURRENT REALITY**

The principle of the separation of powers is currently accepted in every Democratic State. Either directly or indirectly, Constitutions contemplate it. However, a major critic made to them is that they still contemplate the classic model or definition of the principle, not taking into account the political, social and constitutional changes occurred since Montesquieu elaborated his theory (GARCIA MACHO, 1986: 175-179). The essence of the principle, indeed, continues to be establishing limits and controls to power, in order to avoid its concentration and to guarantee the democracy and the respect of individual's rights. Nevertheless, since many years ago the doctrine has been pointing out that the relation between the legislature and the executive must be understood nowadays in a different way as it was understood when the theory of the separation of powers appeared, because the line that separates the legislative and the executive has been blurred since both are subject to the decisions of a same center: the Government/parliamentary majority.<sup>1</sup> Or at least this was the tendency until the past decade.

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In effect, one of the factors that have had a major influence in the aforementioned relation during the 20<sup>th</sup> and the beginning of the 21<sup>st</sup> Century has been the so called "Party State",<sup>2</sup> in particular when talking about the scrutiny function of the Parliament over the Government (PRESNO LINERA, 1999: 92-93). For this reason, the doctrine and the scholars had been constantly highlighting the need to talk about of an opposition "Government/parliamentary majority", on one side, and "opposition/parliamentary minority", on the other side; instead of talking about an opposition Government/Parliament (SANCHEZ NAVARRO, 1995: 224).<sup>3</sup> It was emphasized that a move from a control by the Parliament, to a control in Parliament had been produced (KOMMERS, 1997: 116).

However, since the economic crisis of 2008 a change in the traditional stability of party systems had occurred and instability is growing.<sup>4</sup> It is possible to observe how across different Member States of the European Union there has been a rise of extreme parties that have gained access to the Parliaments, and how traditional parties, that before usually achieved stable majorities (either alone or with the support of other minorities) that allowed them to conform a government, now need to form bigger coalitions or the support of more parties of the opposition to govern. Parliaments are more fragmented across Europe, with more coalition governments or governments in minority<sup>5</sup>. This is the case, for example, of Spain, Germany and France, three of the systems that are examined in the present work and that we will comment more in detail further on.

It is true that some European countries with parliamentary regimes were already used to fragmented parliaments and to the need to conform governments between different parties, either supported on coalitions, as well as on different types of pacts -wide and detailed pacts for the legislature, or less detailed ones reduced only to aspect of essential character for the State like the approval of the Budget- (ARAGÓN REYES, 2017: 19). That is the case, for example, of Denmark that usually has coalition governments that, at the same time, do not have the majority of votes in the Parliament (LAURSEN, 2001: 100; MARTÍNEZ SIERRA and PERALTA MARTÍNEZ, 1998-1999: 241); or Germany, where political parties usually have reached pacts in order to avoid instability and ungovernability (ARAGÓN REYES, 2017: 27),<sup>6</sup> although current situation has also force to the creation of bigger coalitions.<sup>7</sup> Increasingly fragmented political systems can be detected.<sup>8</sup>

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Currently, therefore, it can be said that governments cannot obtain as easily as before the validation or approval of their decisions, and negotiation is needed between more political forces in order to pass the pertinent legislation. A new opportunity for opposition opens, so they can carry out a stronger scrutiny of the government. National Parliaments have now the possibility to recover the central position that Constitutions assigns to them. However, as Aragón Reyes points out, at the same time, there is a risk that this new fragmentation hampers constantly the government's action and provokes a paralysis of the legislative activity. In the current multiparty systems, governments need to be able to carry out their task (to govern) and the opposition obviously need to be able to critic the government and control it, but both needs to pact and allow the correct functioning of the State (ARAGÓN REYES, 2017: 28-33).<sup>9</sup>

Last, another element that must be taken into account in order to understand the current relation between the legislature and the executive and the reality of the principle of separation of powers in the Member States of the European Union, is the effects produced by the integration process. As it is well known, it has implied a progressive transfer of competences from the national level to the European one. Transfer that has caused, in particular, a parallel loss of competences by National Parliaments that have seen how the central position and functions that Constitutions assigns to them have been affected (MATIA PORTILLA, 1999: 25-32; ARAGÓN REYES, GÓMEZ MONTORO, 2005: 35; LE SEUR, HERBERG, ENGLISH, 1999:135), as we will examine in the present work.<sup>10</sup> It is also necessary to analyze this reality and the transformations that it has produced, in order to understand how the integration process has also affected the principle that is being examined.

The present work is focus in the last transformation mentioned, that is, how the European integration process has also affected the principle of separation of powers. In particular, it will be examined how EU's primary legislation and EU's decision-making process alters national constitutional provisions and, specially, National Parliaments'



legislative and scrutiny functions. In order to do so, a prior analysis of how the principle of separation of powers is contemplated or regulated in some Member States' Constitutions is needed, to allow carrying out a comparative study in order to check if it can be said that the integration process has equally affected the way their Constitutions regulate the examined principle. Next, a study of the EU primary legislation and decision-making process will be tackled, paying special attention to the role that the European Council and the Council plays in the aforementioned process. Right after, how the integration process has affected the functions of the legislature and the executive at national level will be examined. And, in the last place, some conclusions and proposals of reforms would be presented, in case they are needed.

## **2. THE SEPARATION OF POWERS IN CONSTITUTIONAL TEXTS: FOUR CONSTITUTIONS OF EUROPEAN UNION MEMBER STATES AS MODELS FOR THE ANALYSIS**

As we have pointed in the introduction of the present paper, nowadays we can find references to the principle of separation of powers in many democratic Constitutions, either directly or indirectly, although a main critic that has been realized is that many of them still makes reference to the classic principle and do not clearly reflect current reality (GARCÍA MACHO, 1986: 175-179; SÁNCHEZ NAVARRO, 1995: 223).

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Each Constitution organizes the distribution of the powers of the State among different bodies, assigning to them different competences or functions, as a way to limit the power. And although each of them organizes this distribution in a different way, we can identify several elements that they have in common:

- The attribution of the sovereignty to the people and the recognition of the democratic principle.
- The separation of functions between the legislature, the executive and the judiciary, more than a strict separation of powers –except for the judiciary-, and the creation of bonds between the legislature and the executive (GARCÍA ROCA, 2000: 47).<sup>11</sup>
- The provision of incompatibilities, so the persons that participate in the functioning of one of the powers cannot be part of the other at the same time.<sup>12</sup>
- The establishment of mechanisms that guarantees the supremacy of the Constitution, in particular the mechanisms for its reform and its control through Constitutional Courts.
- The territorial distribution of power.

The majority of the member states of the European Union have a parliamentary form of government that determines the position of the Parliament within the system and its relations with the Executive, although certain factors already mentioned have altered the

central position that Constitutions assign them.<sup>13</sup> We have therefore selected the Constitutions of four Member States: three with a parliamentary form of government<sup>14</sup> and one with a semi-presidential one, in order to check how the European integration process affects the position that they assign to their National Parliaments. In particular, we have selected the cases of: Spain, since is the country of the author of the present paper, and the aim is to compare the problems that our system faces with other European models; Germany, since it is one of the reference models and is the nearest parliamentary system to the Spanish one;<sup>15</sup> Denmark, since it is a reference model as how the traditional fragmentation of the Parliament has led to its strengthening, which has allow it a better and higher participation in EU issues; and France, since it is one of the Member States with a semi-presidential form of government that, as an hybrid system between a parliamentary and a presidential system, has many characteristics of the former, so an analysis needs also to be done in order to examine how the integration process affects the separation of powers in this type of systems.

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Another example of how the integration process affected the position of the Parliament was the case of the United Kingdom, but since the country has finally left the European Union it has been considered more convenient not to include it in the present work due to the limitation of space, although certain lessons can also be drawn from the problems UK's parliamentary system faced while being a member of the EU and the solutions they adopted to tackle them<sup>16</sup>.

The selected systems are reference ones. They organize the relations between the legislature and the executive in a similar way, so they present similar problems that are also shared by other systems, specially the parliamentarian ones -that are the standard in the EU Member States as already mentioned-.

We exclude the presidential systems, since only Cyprus has one among all the Members of the EU, and since presidential regimes are based on a strict separation of powers were, as Asunción García Martínez (1988) points out, there is not a direct influence of the Government over the Parliament and the “sense of generic limitation, of the scrutiny of the power, that is born with the medieval Parliaments, is currently preserved almost intact [...]” (p. 66).

Last, since the analysis of the five elements mentioned will exceed the objectives of the present paper, we will focus our attention in the way they organize the functions of the legislature and the executive, and the relations between them.

## 2.1 Germany

As it is well known, Germany is a Federal Republic which comprises 16 *Länder* (States) with autonomy to grant themselves their own constitutional order and institutions within the competences and limits established by the Fundamental Law.<sup>17</sup> Its Constitution was



adopted on 23 May 1949,<sup>18</sup> opting for a parliamentary system of government where key functions are assigned to a strong Parliament (DEUTSCHER BUNDESTAG, 2020).

The German Basic Law (hereinafter, GBL) contemplates an express reference to the principle of separation of powers, unlike the Constitutions of other Member States like Spain -as we will examine in the following section-. In particular, Article 20.2 of the GBL establishes that all state authority derives from the people, whom exercise it through elections and voting and through specific legislative, executive and judicial bodies. But, like other systems, the German Constitution establishes also a separation of functions, with checks and balances to limit the concentration of authority, rather than a strict separation of powers.

The legislative authority resides in the *Bundestag*,<sup>19</sup> which shares it with the *Bundesrat*<sup>20</sup>. They form the Federal Legislature, whose main function is to legislate.<sup>21</sup> The executive authority is divided between the Federal President and the Federal government -the Chancellor and his or her cabinet- (KOMMERS, 1997: 115).<sup>22</sup> The Federal President performs mainly ceremonial functions,<sup>23</sup> but the Federal Executive has important functions, since it plays a dominant role in preparing legislative proposals (OETER, 2006: 146-147) and can receive delegated legislative functions within strict limits (Article 80 GBL). Besides, the Chancellor has a powerful position either before the Parliament as before the Federal President and, consequently, the system has been described as chancellor-dominated parliamentary government (SCHMIDT, 2003: 69). Finally, the judiciary resides in the judges,<sup>24</sup> independent and subject only to law.<sup>25</sup>

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Due to the parliamentary form of government in Germany, like in other parliamentary systems, there is a close link between the legislature and the executive, which maintain a relation of confidence and cooperation. The chancellor is elected by the majority in the *Bundestag* (Article 63 GBL), and his or her ministers are usually members of the Chamber. In turn, the chancellor is responsible to the legislature (OETER, 2006: 142). The chancellor has a strong position in the system, as the constructive vote of no-confidence reinforces his/her independence (KOMMERS, 1997: 117). But the Parliament is also protected from dissolution by the executive, as it can only be dissolved in two situations (Articles 63 and 68 GBL).

Another element in common with other parliamentary systems is the effects produced by the "State Party", where political parties have a determinant role in the selection of political leaders and policy making (SCHMIDT, 2003: 69).<sup>26</sup> Also, like in other parliamentary democracies, the line that separates the legislative and executive branches has been more theoretical than practical until the past decade since, under normal circumstances, the government usually had the majority in parliament, or a stable coalition that supported it in parliament (SCHWEITZER, 1995: 180). This is why the doctrine also highlighted the importance of the opposition in parliament as the most effective check of the executive branch (KOMMERS, 1997: 116).

However, this lack of structural separation between the central legislative and executive powers had been compensated by the distribution of power between the Federation and the *Länder* (CURRIE, 1994: 260). Although it is the *Bundestag* the one that adopts federal statutes, the *Bundesrat* has a suspensive veto that not always can be easily overridden by the *Bundestag*.<sup>27</sup> Besides, as the *Bundesrat* tends to be controlled by a majority of *Länder* governments controlled by opposition parties, cooperation is necessary to pass the laws (OETER, 2006: 142)<sup>28</sup>. Hence, legislation is generally the product of a consensus between the Government, the *Bundestag* and the *Bundesrat* (KOMMERS, 1997: 117).<sup>29</sup>

We must also take into account, as already mentioned in the introduction of the present work, that although in Germany mainstream parties were already used to reach agreements in order to allow stability and governability (ARAGÓN REYES, 2017: 27), the *Bundestag* is currently also more fragmented and the rise of the extreme right-wing populist party Alternative for Germany (AfD) has compelled to reach a bigger coalition to conform a government in order to create what has been called a “cordon sanitaire” against it.<sup>30</sup> Coalition that was difficult to achieve, -being even contemplated for the first time the possibility of a minority government- (BRÄUNINGER; DEBUS; MÜLLER & STECKER, 2019), and that has struggled with small issues, what weakens the government. As consequence, the traditional stability of the German system is being eroded.<sup>31</sup>

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## 2.2 Spain

According to Article 1.3 of the Spanish Constitution (hereinafter, SC), ‘The political form of the Spanish State is that of a parliamentary monarchy’. This means that the Head of State is a King or Queen, but he or she does not have any political power. And it is a parliamentary regime that, as already examined with the German case, implies a distribution of power between the executive and the legislature, between which there is a close connection and cooperation. Another characteristic of the Spanish system is that we are also in front of a composite State, where the authority is distributed between the State and the regions (*Comunidades Autónomas*) (FERRERES COMELLA, 2013: 25, 35).

The Spanish Constitution, contrary to the Constitution of the Federal Republic of Germany examined in the previous section, does not include an explicit reference to the principle of separation of powers (PUY MUÑOZ, 1998: 709-710). However, we can deduce it from different articles, and we can find regulated the different elements that we have pointed out in the introduction of the present section, which allows examining how this distribution is carried out.

The SC establishes a separation of functions between the legislature, the executive and the judiciary. In this way, the legislative power is exercised by the *Cortes Generales*



(the Spanish Parliament), which also have other two important functions: adopt the budget of the State and scrutiny the action of the Government (Article 66.2 SC). The executive power is exerted by the Government that is responsible also of conducting the domestic and foreign policy, the civil and military administration and the defense of the State. It also has the power to adopt statutory regulations (Article 97 SC) and to issue temporary legislative provisions in cases of extraordinary and urgent need (Article 87 SC). As in the German case, the key figure is the President of the Government<sup>32</sup>. He or she is selected by the *Congreso de los Diputados* (the lower House) and needs that an absolute majority of the deputies of the Congress vote in favor on a first vote to be appointed President by the King (Article 99 SC). The President can be removed if he or she loses the confidence that the House had given him or her initially, which can happen in two circumstances: when a constructive motion of censure succeeds (Articles 113 and 114.2 SC), or when the President presents a question of confidence and does not obtains the favorable vote of the simple majority of the Congress (Articles 112 and 114.1 SC). Last, the judicial power is wielded by judges and magistrates from the Judicial Power, independents, accountable for their acts and subject only to the rule of law (Article 117.1 SC).

The Spanish Constitution, hence, contemplates a separation of functions rather than a strict separation of power, in particular regarding the legislature and the executive. In the case of the legislature and the executive there is a formal separation of powers (FERRERES COMELLA, 2013: 25) but, at least until the past decade, in practice has been difficult to determine the limits of their sphere of action. Not only the Constitution provides for bonds between them, the reality of the functioning of the parliamentary form of government and the role that political parties plays on it had faded the lines of their scope of action (GARCÍA MACHO, 1986: 188). The Government, until recently, had usually had the majority in Parliament,<sup>33</sup> and had been able to obtain easily the ratification of its decisions in Parliament (RUBIO LLORENTE, 1993: 254). Therefore, the checks on the Government came from the minorities that configured the parliamentary opposition (FERRERES COMELLA, 2013: 25).

We must also take into account that members of the Government can be members of the Parliament (Article 98.4 SC)<sup>34</sup> and, although the Constitution prohibits any binding mandate of the members of the Parliament (Article 67.2) –following the classic model of the Liberal State–, the reality is that parliamentarians vote with their political parties. The so-called “Party State”, therefore, had also had its effects in the system. The scrutiny that the *Cortes Generales* can carry out is conditioned by the party discipline as already mentioned. This has been the general rule even when the party that had won the elections had needed the support of other smaller parties to get the necessary votes for the investiture. The agreement on those occasions has been reduced to the legislative program to be developed and the government had achieved the support for its policies (FERRERES COMELLA, 2013: 130).

However, the Spanish Parliament, like other Parliaments of the Member States of the UE and the German Parliament already examined, is currently more fragmented than ten years ago. The traditional two-party system that allowed the two mainstream parties (the Socialist Party and the Popular Party) to govern with a stable majority seems to have come to an end. Since the XII Legislature, as Piedad García-Escudero points out, we have moved from a quasi-two-party Congress, which supports a Government that can be identified with an absolute majority or with a sufficient majority to govern, to a fragmented Chamber with many regional Parliaments (GARCÍA-ESCUADERO MÁRQUEZ, 2018: 70). The same had happened in the following XIII and XIV Legislatures and, in the current XIV Legislature for the first time a coalition government (that integrates members of the other parties in the government) has been formed<sup>35</sup>.

The question is if this new fragmentation has increased the possibilities for a parliamentary scrutiny of the Executive. Some examples can be found to this respect (García-Escudero Márquez, 2018: 75-93):

- For the first time, a motion of censure triumphed in Spain in 2018, although the Government that emerged after it lacked the necessary support and after only nine months new general elections were convened.<sup>36</sup>
- The opposition has presented more non-governmental bills and the Government has made use, in order to avoid its passage, of the faculties of article 134.6 of the SC that envisage the previous governmental approval of any of the aforementioned when they involve an increase in credits or a decrease in budget revenue.
- The Government thinks carefully when to use its legislative initiative and which governmental bills send to the Congress, since now it cannot rely on its easy approval as previously. The same happens with the use of the figure of Royal Decrees-Law, not having been ratified two of them in the past years –something really uncommon in our parliamentary system-.
- A bigger use of the different instruments for the scrutiny of the government, like oral and written questions, non-legislative motions, etc. used by the opposition “to make visible the new composition of the Chamber”.

The current fragmentation opens new possibilities for a greater parliamentary scrutiny of the Executive and a higher protagonism of the Parliament. Even in an area where, until now, the Spanish Parliament had showed a high consensus: the European Union. A recent example has been the CETA, the Comprehensive Economic and Trade Agreement between Canada and the European Union. The parliamentary group UP-EC-EM presented an amendment proposing the non-ratification of the Agreement by the Spanish Parliament that, although it was finally rejected (García-Escudero Márquez,



2018: 95-96), shows how this pro-EU consensus is starting to change<sup>37</sup>. Since the economic crisis both government and opposition have used the plenary debates more strategically (Kölling, Molina, 2016: 355), and more parties that show an opposition to the European Union (like Podemos or Vox) have now an important representation in the current fragmented Parliament that can use the available scrutiny mechanisms to subject the Government to control.

### **2.3 France**

As it is well known, France has a semi-presidential system, an hybrid system that presents characteristics of both parliamentary and presidential systems and where we find a directly elected President that not only has mere symbolic functions, and a Prime Minister who is responsible to the parliament.

The French Constitution (hereinafter, FC) was adopted on October 4, 1958<sup>38</sup> and, with regard to the focus of this work, does not contain in any of its sections an explicit reference to the principle of separation of powers. But we can also deduce it from different articles. What the French Constitution does, like the Spanish one, is regulating the distribution of functions between the three branches: the legislature, the executive and the judiciary.

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According to the FC, the executive power is shared between the President of the Republic and the Government. The President of the Republic is the Head of the State and has, among its most important functions, the appointment of the Prime Minister and, on its recommendation, the appointment of the other members of Government (Article 8 FC); the submission to a referendum of certain Government Bills (Article 11 FC); the dissolution of the National Assembly (Article 12 FC); and the right to initiate amendments of the Constitution (Article 89 FC).

The Government determines and conducts the policy of the Nation and is accountable before the Parliament (Article 20 FC). At its head is the Prime Minister, who directs the action of the Government (Article 21 FC) and, among other functions, has legislative initiative (Article 39 FC) and the power to make regulations (Article 21 FC). The legislative power lies in the Parliament, which comprises the National Assembly and the Senate. It passes the statutes, scrutinizes the Government and assesses the public policies (Article 24 FC). The Constitution also establishes the prohibition of any binding mandate of Parliament members, but its application in practice also clash with the reality of the Party State.<sup>39</sup> And, as for the third branch, the judiciary, the French Constitution uses a more restrictive name, “judicial authority”, but it does not implies its inexistence. Judges interpret and apply the law and are totally independent (Article 64 FC).

However, the practice also altered this division of functions. The separation of functions between the President of the Republic and the Government only operates in the so-

called periods of cohabitation, when the parliamentary majority differs from the presidential one. In those cases, the Prime Minister is the real chief of the Executive and determines the policy of the Nation, as the Constitution states (Lascombe, 2010: 31). But after the reform of the term for Presidential election from seven to five years, and as presidential elections takes place before parliamentary ones, the periods of cohabitation have been avoided (Massot, n.d.: 1)<sup>40</sup>. Therefore, currently, the President of the Republic is the real chief of the Executive and the one that determines the policy of the Nation, being the Prime Minister its mere assistant and conducting the policy that the President determines. Hence, the balance of powers within the executive set in the Constitution has been modified (Lascombe, 2010: 31; Foucault, n.d.). The executive power is exercise in practice by the President, who also has the majority in the National Assembly,<sup>41</sup> obtaining this way easily the ratification of its decisions (Lascombe, 2010: 31).<sup>42</sup>

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Thence, the French Parliament has had to focus its activity in the scrutiny function, and the Government has the prominent role in the legislative function (Séguin, n.d.: 1). For this reason, in order to reinforce the Parliament, an amendment of the Constitution was accomplished in 2008, introducing several changes in the parliamentary procedure, the scrutiny function of the Parliament, the status of its members, the rights of the opposition and the relations between Parliament and Executive.<sup>43</sup> But the changes did not imply the disappearance of the rationalized parliamentarism, and it was criticized that the new provisions were conditioned by the exigency of the majority and that they did not restrain excessively the action of the Government (Verpeaux, N.D.; Foucault, N.D.).

Currently, as in other Member States of the European Union, we must also take into account the changes occurred in France's party system since the past years. The two traditional mainstream parties (Socialist and Republicans) have collapsed and their representation in the current National Assembly is far away from the one that they used to have (Kauffmann, 7 August 2019); and the rise of Macron as a new political figure has changed the previous schema of right-left blocks confrontation. Macron has created a cross-sectional block "borrowing" or "attracting" politicians and votes from the traditional left and right parties'.<sup>44</sup> However, unlike the other cases examined, as we have already mentioned the Government still counts with the majority in the Parliament since France's electoral two-round system facilitates absolute majorities or block majorities.<sup>45</sup>

## 2.4 Denmark

Denmark is a Constitutional monarchy which implies, as the Spanish case, that the powers of the monarch (the Head of the State) are limited by the Constitutional Act of Denmark (hereinafter, CAD)<sup>46</sup> and he or she does not have any independent power (Folketinget, 2014: 2).



Like in the German case, the CAD contemplates the division of powers between the three classical branches. According to Article 3 of the CAD “Legislative authority shall be vested in the King and the Folketing conjointly. Executive authority shall be vested in the King. Judicial authority shall be vested in the courts of justice”. Although the article makes reference to the monarch, in practice he or she does not have any political power, as we have already mentioned, and the functions are largely ceremonial.<sup>47</sup>

The *Folketing* (the Parliament, which is unicameral) is the legislative power and has the classic functions of Parliaments: pass the Bills, control the Government, and adopt the State Budget (Folketinget, n.d.). The Government (comprised by the Prime Minister and the Ministers appointed by the monarch) is the executive power and is in charge of executing the policies, submitting Bills to the *Folketing* for approval and representing the country before the EU and other international spheres (Legislative Council Secretariat, n.d.: 2). Last, the judicial power is vested in the Courts of justice, independent of the Government and the *Folketing* (Articles 3, 62 and 64 CAD).

The Danish system of government is known as “negative parliamentarism” since the only requisite to conform a government is that there is no a majority in the *Folketing* against it (Laursen, 2001: 99).<sup>48</sup> Unlike other parliamentary systems, it is not required a majority in the Parliament and, in practice, most of the Danish governments have been minority governments where one or more parties have supported the Government while not always forming part of it (Folketinget, 2014: 6). Coalitions, therefore, are a usual practice in Denmark. Parties know they need to negotiate and reach compromises not only to form government but also to pass legislation.

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Denmark's parliament and party system is highly fragmented,<sup>49</sup> but contrary to other countries this has been a characteristic of the Danish political system and has proved that minority governments can be viable and stable (Rasch, n.d.: 6).<sup>50</sup> The *Folketing* is a strong Parliament and parties in opposition have considerable decision-making impact (Rasch, n.d.: 18).<sup>51</sup> These characteristics of the system have led to a culture of consensus and compromise.<sup>52</sup>

### **3. EU PRIMARY LAW AND LAW-MAKING PROCESS**

The present section aims to examine the type of competences that the EU has, the role played by the main institutions in the law-making process, the procedures established for the adoption of decisions regulated in the Treaties and the main legal instruments that institutions have at their disposal. We will pay special attention to the role played by the two most important institutions: the European Council and the Council.

The EU integration process has implied a progressive transfer of competences from the national level to the European one. The TFEU contemplates three types of competences: exclusive, shared and supporting. We will focus in the two first mentioned. In the area

of exclusive competences only the Union can legislate and adopt legally binding acts, while the Member States can only implement the EU acts -unless the Union authorizes them to adopt certain acts- (Article 2.1 TFEU).<sup>53</sup> Hence, National Parliaments cannot legislate in these areas in the future, although the Union has not exercised its competence (Martín y Pérez De Nanclares, 2002: 356). In the case of shared competences, the Union and the Member States can legislate and adopt legally binding acts, but Member States will be able to do so only if the Union has not exercised its competence or if it has decided to cease exercising it -repealing a legislative act- (Article 2.2 TFEU).<sup>54</sup> Therefore, if the Union exercise the competence it displace the state competence, but only in the elements regulated by the Union, so the Member State can still regulate the areas not covered by the EU act.<sup>55</sup>

In other areas, the TFEU just contemplates a coordination role and the competence of the Union is therefore limited, remaining the competence mainly in the Member States. It is the case of economic and employment competences (Article 2.3 TFEU) and the Common Foreign Security Policy (CFSP).<sup>56</sup> But in the case of economy and employment policies, the economic crisis of 2008 has strengthen the role of the EU and the European Council has showed its leading role, proving that no important decision is adopted without its consent. We can say that the decisions adopted since the beginning of the crisis in the areas of economy and employment goes beyond a mere coordination and have had a greater influence in the economic, budgetary, fiscal and employment policies of the Member States, especially in those that faces a worst situation like Spain, Portugal, Greece and Ireland (Martínez Sierra, Ferrer Martín De Vidales, 2015).

When using these competences, the Union has at its disposal different legal instruments. We will focus in the Regulations and Directives, as they are the main instruments used when the Union wants to establish a common regulation in the EU or harmonize national legislation. Regulations have general application, are binding in its entirety and directly applicable in all Member States (Article 288 TFEU). Therefore, as a general rule they do not need that Member States adopt any measure to incorporate them and they only require administrative or judicial acts for their implementation. Hence, they affect the competence of National Parliaments, as the subject regulated is withdrawn from their sphere of competences (Matia Portilla, 1999: 25-32). The Directives are binding upon the Member States to which they are addressed, compelling them to reach a result in a determined deadline, but allowing them to choose the form and the methods to reach that result. Therefore, a Directive needs to be transposed to the national legal systems (Article 288 TFEU). But they also affect the National Parliaments competences because their role is reduced normally to the adoption of the national transposition rule. Role that in certain cases is limited to copy the directive without changing a comma, when the directives are very detailed (Molina Del Pozo, 2004: 198).<sup>57</sup>

As for the adoption of these types of instrument, the TFEU contemplates two types or procedures: the ordinary legislative procedure and the special legislative procedures. In



the ordinary legislative procedure, the European Parliament and the Council, on a proposal from the Commission, adopt jointly a regulation, a directive or a decision. In other cases, the Treaty provides the adoption of these instruments by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament. These are the special legislative procedures and the Treaty regulates more cases of acts adopted by the Council, differencing the cases in which the Council needs the approval of the European Parliament,<sup>58</sup> from the ones where it only needs to consult it.<sup>59</sup>

Therefore, through its members in the Council, Governments of the Member States can participate in the legislative process. This is of particular importance in the cases where the subject that is being regulated falls under the principle of legal reservation at the national level. The Government can participate in the regulation of these subjects at the European level, while at national level cannot (Matia Portilla, 1999: 47-52). Hence, it affects also National Parliaments competences.

Besides, the consent of the Council is always needed to adopt legislation, while the role of the European Parliament and the Commission varies depending on the area, being its role smaller when the issue affects the national sovereignty of Member States –like the CFSP- (Lelieveldt; Princen, 2011: 95-96); or when the legislative procedure is an especial one and the Council just needs to consult the Parliament.

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The main problem lies in the way the Council adopts its decisions. In general, it is the Committee of Permanent Representatives (Coreper), a body that has become a very important piece in the European decision process, the one that really adopts the decision. The COREPER examines in advanced all the items in the agenda of the Council and tries to reach an agreement. When it reaches an agreement, it is included as an A item in the agenda, which means that it can be approved by the Council without debate.<sup>60</sup> It is true that the Council can reject at any time an A item, and that only its formal adoption by the Council is what gives the decision juridical nature.<sup>61</sup> And we must also recognize that this way of organizing the works of the Council is necessary<sup>62</sup> and that it does not differ in excess of the practices used in the parliamentary regimes.<sup>63</sup> But the most important difference is that COREPER is not accountable before any parliamentary assembly<sup>64</sup> and its debates and meetings lacks of publicity.

Therefore, while at national level the decision process is carried out with publicity and parliamentary minorities can exercise their opposition role, the decision process in the Council is carried out without publicity, like at the national governments level (Matia Portilla, 1999: 28-29). And in the EU legislative process the Council is not acting as a Government, but as legislator. In democracy, the process to know how legislation is prepared and approved, and the publicity of debates, is fundamental. The legislative process in the Council does not reach the standards that exist at national level (Curtin and Meijers, 1995: 391 – 392).

The complexity of the EU decision-making process, the different committees and working groups, the special rules maintained for the CFSP, plays against transparency and, as Carol Harlow points out, without transparency there is not accountability (Harlow, 2002: 29-31).

Finally, we must also analyze the role played by the European Council in the decision-making process. The European Council has become the main political actor of the EU. No important decision is adopted without its consent. Although the TEU establishes that it cannot legislate and just contemplate for it an orientating and impetus role (Article 15.1 TEU), it has never had problems to transform its political mandates into legal ones, and the Council and the other institutions sometimes have not even changed a comma. This way, as Wert points out, it has created two stages in the decision process: a political one within it and a legal one within the Council (Werts, 2008: 33). Like this, it has altered the method for the adoption of decisions regulated in the Treaties<sup>65</sup>, not only taking the initiative but adopting also the decision when the Treaties contemplated its adoption by other institutions.<sup>66</sup>

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Hence, the European Council has always adopted the most important political initiatives, asking later the Commission to present the pertinent proposals, and the Council and the European Parliament to adopt the necessary provisions, often imposing them a deadline.<sup>67</sup> The most recent example is the role that it has played since the blast of the economic crisis in 2008. The European Council was at the forefront of all the measures adopted for the new economic governance, giving precise orientations and establishing deadlines to adopt the decisions, urging the Commission to present proposals, and the Council and the European Parliament to accelerate the works to pass the pertinent legislation.<sup>68</sup> This way of acting is not something new since, as Puetter points out, the European Council often keeps for itself the final decision and establishes procedures and working methods that affect the work of the Council and the Commission (Pueter, 2011: 3). Therefore, through its members on the European Council the Governments of the Member States can determine the most important political initiatives. It can be said, therefore, that through this way of action the role of the Executives has been also reinforced.

The main problem of this way of functioning and the role played by the European Council is that it is not subject to any political or juridical accountability<sup>69</sup>, since the TEU places the scrutiny and the political accountability within National Parliaments, as it establishes that the Members of the European Council will be “*democratically accountable either to their national Parliaments or to their citizens*” (Article 10.2 TEU). Certainly, the European Parliament has no competence to ask a Head of State or Government to resign, but it is indeed ironic that a constituted power is not accountable before the Parliament constituted within the same constitutional system but before other (Martínez Sierra; Díaz Martín, 2002: 152).



#### **4. THE EFFECTS OF THE EU INTEGRATION PROCESS IN THE FUNCTIONS OF MEMBER STATE LEGISLATIVE AND EXECUTIVE POWERS**

The present section aims to examine how the EU integration process has affected the functions of the legislature and the executive at national level, paying special attention to the scrutiny role of National Parliaments.

This process has affected mainly to National Parliaments, who have seen affected the constitutional functions that they have assigned. They have seen diminished their legislative function, as they have had to share or delegate it with the European institutions, depending on the type of competence transferred to the Union and the type of act that the EU institutions use to legislate. Delegate when the competence has been attributed exclusively to the EU, since from that moment only the EU can legislate and adopt legally binding acts (Article 2.1 TFEU); and when the legal act used is a Regulation, as it has direct effect and usually exhausts the subject that is being regulated (Matia Portilla, 1999: 25-32). Share in the case of shared competences, as National Parliaments can only regulate the areas not covered by the EU (Article 2.2 TFEU); and when the legal act used is a Directive, as they have to pass a national law to transpose it (Article 288 TFEU).

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National Parliaments have also seen affected their scrutiny function, as they cannot effectively control the activity of their Governments at the European level. Although the TEU establishes that the members of the Council and of the European Council are democratically accountable to their National Parliaments (Article 10.2 TEU), in practice they have not any mean to demand responsibility individually to its ministers, as these institutions requires a collegiate control (Martinez Sierra; Diaz Martín, 2002: 136; Kiiver, 2006: 73). And we must also take into account that the general rule provided in the Treaties for the adoption of decisions is the qualified majority voting, so the decision can be adopted although a Member State opposes to it. So, in those cases it would be illogical to ask for responsibilities to a Minister. The only adequate control is the control of the institution as a whole, and that can only be done at the European level, at the same level where the decision is adopted.<sup>70</sup>

And, as a recent last consequence, National Parliaments' budgetary powers have also been affected. Within the framework of the new European Semester, Member States must adjust their draft budgetary plans to the orientations and recommendations issued by the Council, and their implementation is supervised (EUROPEAN COUNCIL/COUNCIL OF THE EUROPEAN UNION, n.d.).<sup>71</sup> To this regard, the new rules strengthen the surveillance of euro area Member States as they must submit their draft budgetary plans for the forthcoming year to the Commission and to the Eurogroup by 15 October.<sup>72</sup> The Commission examines the draft budgetary plans and adopts an

opinion as soon as possible, and in any event by 30 November, and if it identifies particularly serious non-compliance with the budgetary policy obligations laid down in the SGP it can request the Member State to submit a revised draft budgetary plan.<sup>73</sup> After that, Member States adopt their budgetary plans at the end of the year.

Besides, the planning of annual budget legislation must now be based on multiannual fiscal planning, as Member States have to establish medium-term budgetary frameworks that include a fiscal planning horizon of at least 3 years.<sup>74</sup> As Javier Tajadura points out, these new rules limits the discretionarily of the national legislator when adopting the annual budget, transferring the center of gravity from the budget law to new rules that establish a much wider budgetary framework (Tajadura, 2012: 6).

Therefore, the State Budgets are now subject to a previous control by the European Institutions and must be coordinated with the time limits specified by the European Semester. The national budgetary process is now initiated once the proposal that the Government must submit to the Parliament has been examined by the Commission and the Council (Tajadura, 2012: 7). As García Roca and Martínez Lago points out, the budgetary cycle is affected and the role of National Parliaments is devaluated (García Roca; Martínez Lago, 2013: 46-47 and 60).<sup>75</sup> And, as Chalmers emphasizes, through this new process EU law is undermining domestic processes and the Commission is supplanting the role of a Parliament, as it is within the Commission where account for budgetary proposal is taking place first. The process besides, highlights the author, concerns few about the domestic processes that lead to the proposal, as the process before the Commission is a closed one (there is no provision for the Commission to hear the views of other interests). As consequence, the domestic parliaments are weakened and the executives reinforced, as they present a budget that has the support of the Commission, leaving National Parliaments with little choice more than ratify the draft budget presented to the EU institutions (Chalmers, 2012: 687).

Therefore, the role and position that the constitutional texts provide for National Parliaments has been altered (Matia Portilla, 1999: 38), and they do not occupy the central position that these texts contemplate -although we must take into account that the political reality has already altered this position as examined in section one of the present work-.

In order to tackle this loss of competences, and the alteration of this central position, different measures were adopted to strengthen National Parliaments participation in the European Union issues.

At the European level, mechanisms for their direct and collective participation in the decision-making procedure of the EU have been established.<sup>76</sup> Currently, their role is contemplated in Article 12 of the TEU, which establishes that they will contribute



actively to the good functioning of the Union. In order to encourage a greater involvement of National Parliaments in EU activities and to enhance their possibilities to express their views regarding EU legislation and other issues, Protocol (No 1) on the role of National Parliaments in the European Union is annexed to the Treaties. The Protocol contains the information that shall be sent to National Parliaments by the European Institutions and the period they have in order to examine the information forwarded<sup>77</sup>. The main objective is that National Parliaments can carry out a more effective control over their government's activity at the EU level. However, as we examine below, the parliamentary practice in each Member State and the way this information is used will determine if an effective control is achieved and if National Parliaments can really exercise an influence in the European construction (Martínez Sierra, 1998-1999: 272).

Protocol (No 1) also contains provisions regarding interparliamentary cooperation, establishing that the European Parliament and national Parliaments “shall together determine the organization and promotion of effective and regular interparliamentary cooperation within the Union” (Article 8). The European Parliament has adopted, to this respect, two resolutions: the first one in 2009, known as “Brok report”; the second in 2014, the “Casini report”<sup>78</sup>. With regard to the COSAC, the Protocol establishes that it “may submit any contribution it deems appropriate for the attention of the European Parliament, the Council and the Commission [...] promote the exchange of information and best practice between national Parliaments and the European Parliament, including their special committees [...] organize interparliamentary conferences on specific topics, in particular to debate matters of common foreign and security policy, including common security and defense policy” (Article 10).

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With relation to the decision-making process of the EU, the TEU establishes that National Parliaments ensures that “the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality” (Article 12.b TEU). This Protocol includes the mechanism that allows a direct participation of National Parliaments in EU issues (DELGADO-IRIBARREN, 2004: 780): the early warning system. Through this mechanism, the Treaty expressly confers to National Parliaments the control of the compliance of every draft legislative act with the principle of subsidiarity (Article 5 Protocol No 2). Besides, National Parliaments also have a direct participation in the ordinary revision procedure of the Treaties, since every amendment proposal shall be notified to them and they participate in the Convention that shall be convened to carry out the reform (Article 48.2 and 3 TEU); as well as in the simplified revision procedures (Article 48.6 TEU).

At national level, each Member State has adopted its own mechanisms but all, in general, have created parliamentary committees specialized in European Union matters as examined in section two. Mechanisms that try to allow National Parliament's

participation in the EU decision making process and to make the Government accountable for the decisions adopted at that level.<sup>79</sup> But their efficacy and efficiency depend on the constitutional structure and practice of each Member State (Camisón Yagüe, 2010:107).

In Germany, both Chambers of the Parliament participates in EU issues,<sup>80</sup> which includes: the ratification of the Treaties;<sup>81</sup> the development of EU legislation, in particular the transposition of directives and the implementation of other norms of secondary EU law;<sup>82</sup> and the control of the activity and decisions of the Executive at EU level.<sup>83</sup> Different constitutional factors of Germany's political system determine and explain how this participation is exercised, and why the German model has usually been regarded as one of the reference models and most effective ones.<sup>84</sup> The *Bundestag* and the *Bundesrat* can exercise an adequate participation in European matters but, as already examined in section 2.1, the form of government as well as the territorial organization influences the possibilities of this participation. As mentioned above, the government, at least until recently, has usually had the majority in the *Bundestag*, or a stable coalition that supported it and, consequently, has been able to rely on this majority (SCHWEITZER, 1995: 178, 180).<sup>85</sup> Therefore, when talking about the Parliament's participation in EU affairs, for the government has been also more or less easy to obtain the approval of its decisions. According to Article 23 of the GBL "the Federal Government shall take the position of the Bundestag into account during the negotiations" that lead to the adoption of EU legislation. However, a broad scope of action is generally granted to the government in order that it can negotiate at EU level and, therefore, parliamentary majority either abstains completely from drafting parliamentary resolutions, or drafts resolutions in close cooperation with the government to strengthen its negotiation position (Auel; Rittverger, 2006: 135). It must be also pointed out that, with regard to the control of the government through debates on the *Bundestag*, they allow an argumentative exchange between all the political forces represented in the Chamber. However, as Frank Wendler points out, the majority of them begins with a statement by the Federal Chancellor and concentrates mostly on European Council meetings, which "privileges the decision-making role of the Federal government" (Wendler 2017: 183-185).<sup>86</sup> Current political fragmentation, however, has begun to make the reach of coalitions and agreements a little bit more difficult, and for the Government it is being more difficult to obtain the support when talking about certain decisions adopted at the EU level. We can take as an example the huge political cost that, for mainstream parties, the answer to the eurozone crisis of 2008 had. As Patricia Daehnhardt points out, European politics have become increasingly disruptive for electoral politics in Germany and a burden for electoral success; highlighting that a future challenge for mainstream parties, and the Government specially, is how they will handle domestically European integration due to the pressure of parties like AfD (Daehnhardt, 2019). The crisis of the coronavirus and the debate of the creation of



Eurobonds is another good example, when seeing the first reactions of Angela Merkel to the proposal.

Spain also counts with a Specialized Committee in European Union issues through which the *Cortes Generales* can participate in the European Union issues<sup>87</sup>, in particular: in the ratification of the Treaties;<sup>88</sup> in the phase of development and implementation of EU legislation (in the transposition of directives and the implementation of other norms of secondary EU law);<sup>89</sup> and the control of the activity and decisions of the Executive at EU level.<sup>90</sup> However, although the specialized committee can express its opinion the Government is free to take it into account or not: there is not a negotiating mandate, like in the Danish model<sup>91</sup>, or a parliamentary scrutiny reservation, like the British system (Storini, 20005: 157).<sup>92</sup> Besides, certain decisions depend on the majority, which affects the control. For example, the specialized committee can agree the appearance of the Government before it, but it is the Bureau who decides the members of the Government or ministers that must appear,<sup>93</sup> so when there is no consensus the last decision depends on the parliamentary majority (Presno Linera, 1999: 107).

The constitutional factors of the Spanish system also influence the efficacy of the model, in particular the Spanish form of government. Until recently, the Government had usually had the majority in Parliament and had been able to obtain easily the ratification of its decisions, one of the reasons why the mechanism has always been qualified as a weak one (Piedrafita, 2014: 327). However, as in the German case, currently the Parliament is more fragmented, which opens new possibilities for a greater parliamentary scrutiny of the Executive and a higher participation of the Parliament, including the control of European Union decisions where the traditional consensus of the Spanish politics seems also to start changing.

In the case of France, the Constitution –as the German one- regulates the participation of the Republic of France and the National Assembly in the European Union (Title XV FC). Both Chambers of the Parliament can table parliamentary resolutions to give the Government their view regarding EU draft acts (Article 88.4 FC), and they can also scrutinize the Government.<sup>94</sup> In order to do so, a specialized standing committee (*La Commission des Affaires Européennes*) has also been created.<sup>95</sup> But due to the characteristics of the French political system the government can easily obtain the ratification of its decisions. As it has been analyzed in section 2.3, the French Government -unlike the other cases examined- counts with the majority in the Parliament due to France's electoral two-round system, which facilitates absolute majorities or block majorities.<sup>96</sup>

In Denmark, the factors that explains the Danish *Folketing*' strong participation in EU issues are the strong position of the Parliament, its unicameral structure and the high euroscepticism of the country.<sup>97</sup> Through the *Europaudvalget* (the specialized

committee on EU issues) the Danish *Folketing* can participate in the ratification of EU Treaties and their amendments (Article 20 DC);<sup>98</sup> in the development and implementation of EU acts;<sup>99</sup> and scrutiny the Government's activity at EU level, through the mechanism of the mandate that it can issue to the Government before every important negotiation at the EU level (Laursen, 2007: 3). Politically, the *Europaudvalget* reflects the composition of the Chamber and, as Laursen points out, it is a kind of "mini-parliament" (Laursen, 2001: 104) reflecting, therefore, the characteristic fragmentation that has strengthened the Folketing's position and, consequently, that of its specialized committee on EU issues. Besides, as already pointed out, the EU policy also creates a great controversy in Denmark and the high Euroscepticism explain the strengths of the system (Laursen, 2007: 3).

Therefore, the constitutional factors and the way parliamentary scrutiny mechanisms are regulated determines the efficacy of the scrutiny function of the Committees and, consequently, of the Parliaments. When Governments counts with the majority in the Parliament –either due to a coalition or because of the support of other minor parties-, the efficacy of the parliamentary control is minimum (Sánchez Navarro, 1997: 111-285). In current fragmented Parliaments, the possibilities for a bigger control and participation increases. The Danish case is a good example of how fragmentation can create a politic of consensus, but other Member States like Spain still needs to learn and start building it, especially if this tendency to fragmentation has come to stay.

On the contrary, the executives have been the main benefited by the European integration process. They have been the leading actors of the integration process. Through the Council and the European Council, institutions in which they are represented, they can exercise the main competences transferred to the European level. As we have seen in the third section of the present paper, every decision needs the consent of the Council. And when the subject that is being regulated falls under the principle of legal reservation at the national level, Executives gain a competence that at national level belongs to Parliament (Matia Portilla, 1999: 47-52) and, this way, the necessary debate between majorities and minorities is subtracted (Matia Portilla, 2008: 132)<sup>100</sup>.

Within the political and institutional system of the European Union there is a clear prevalence of the Governments of the Member States (Santaló I Burrull, 2005: 4-5), which is manifested through the privileged position of the Council and of the European Council.<sup>101</sup> Indeed, it is through the European Council how Executives can exercise more influence in the decision-making process at the EU level. As we have seen, no important decision is taken without its consent. It gives precise orientations and urges the institutions to adopt the pertinent legal acts, even indicating specific deadlines. Through the European Council, Member States have also recovered part of the political power that national legal systems limited and conditioned; allowing them to move to the



European level decisions that they cannot or did not want to adopt at national level (Balaguer Callejón, 2008: 75-76).

## **5. CONCLUSIONS**

From the analysis of the different questions addressed, we can conclude that the EU integration process has affected the separation of powers contemplated in the constitutional texts examined and, in particular, it has affected the legislative, scrutiny and budgetary functions of National Parliaments.

It must be recognized, indeed, that certain factors had already altered the classic definition of the separation of powers contemplated in those constitutional texts (like the effects of the Party State), blurring the line that separates the legislative and the executive. However, the increase fragmentation of Parliaments experienced during the past years can strengthen again National Parliament's position and make possible a stronger scrutiny of the government.

The integration process had also affected National Parliaments functions or competences and the position that constitutional texts assigns to them since, as examined in the present work, they have had to share or delegate their legislative functions, they cannot effectively control the activity of their Governments at the European level and, as consequence of the new rules on the European Semester, their budgetary function is weakened. In order to try to make up for this loss of competences, different mechanisms have been established but, as examined, Member States' constitutional factors and the way parliamentary scrutiny mechanisms are regulated at national level determines the efficacy of the scrutiny function of the Parliaments. Current fragmentation can, however, increase the possibilities for a bigger control and participation, and the creation of a politic of consensus.

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On the contrary, the European integration process has benefited mainly the Executives, especially through its members in the European Council. As examined, through this institution the Heads of State and Government can determine every important decision at European level via political decisions, which subsequently are transformed into legal ones. Through this institution, Executives can exercise a decisive influence in EU's decision-making process.

The main problem of this way of functioning is the constitutional and democratic deficit that the European Union presents, as it is not subject to the same constitutional guarantees that exist at national level. In particular, to the mechanisms that allows the control of the power (Balaguer Callejón, 1997: 593)<sup>102</sup>. Therefore, there would be necessary to introduce reforms at European and at national level.

At European level, strengthening European Parliament's position, giving it adequate scrutiny mechanisms over the Council and the European Council. And approximating the decision-making process to the citizens, reducing the resort to informal and flexible methods and working groups, because as Greppi points out the possibility to know who decides and how is essential to guarantee the democracy (Greppi, 2012: 118).

At national level, amending Member States' Constitutions to incorporate the consequences of European Union' membership, like France and Germany had done. And, also, establishing mechanisms that allow the strengthening of National Parliaments' participation and control in European matters; in particular, establishing mechanisms that allow the debate and confrontation of majority and opposition. The possibility of debate is the only way to exercise the right to critic and the minimum condition for the democratic quality of the political process (Greppi, 2012: 98, 118). The current fragmentation of Parliaments is a new opportunity for their strengthening and for more debate and confrontation. The Danish case serves as an example of how this type of Parliaments can achieve this goal.

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<sup>1</sup> Since, as a general rule, the Government is supported by a party, or coalition of parties, that constitute at the same time the parliamentary majority (SANCHEZ NAVARRO, 1995: 223-224). Although this tendency, as we will examine, seems to have change the past years and Parliaments are currently more fragmented. A study of the Spanish case during the XII Legislature has been carried out by Professor Piedad García-Escudero (GARCÍA-ESCUDERO MÁRQUEZ, 2018).

<sup>2</sup> Political Parties are the main actors of the political process and plays a decisive role in the life of the State (BLANCO, 2000: 36). Regarding the so called "Party State" see GARCÍA PELAYO, 1991.

<sup>3</sup> As the author points out, the political conflict is essentially turned into a struggle between the majority, which controls simultaneously the Government and the Parliament as decision body, and the minority or minorities, which constitutes the opposition.

<sup>4</sup> An analysis of these transformations across the different Members of the European Union can be found in LISI, 2019.

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<sup>5</sup> The current governments at the moment of writing the present paper can be consulted in a list elaborated by the Barcelona Centre for International Affairs (CIDOB). Retrieved on 8 April 2020 from [https://www.cidob.org/biografias\\_lideres\\_politicos/organismos/union\\_europea/cuales\\_son\\_los\\_gobiernos\\_de\\_la\\_ue\\_partidos\\_coaliciones\\_primeros\\_ministros](https://www.cidob.org/biografias_lideres_politicos/organismos/union_europea/cuales_son_los_gobiernos_de_la_ue_partidos_coaliciones_primeros_ministros)

<sup>6</sup> As the author points out, the bigger parties had always reached agreements through coalition governments that had allowed stable governments, even though a party had not achieved an absolute majority in the *Bundestag*.

<sup>7</sup> The rise of Alternative for Germany or AfD (a right-wing populist party) after the 2017 elections, led to the most difficult process of coalition formation since the post-war history. For the first time negotiations fails at a first moment, and a minority government was discussed as a real possibility. An analysis can be found in BRÄUNINGER; DEBUS; MÜLLER & STECKER, 2019.

<sup>8</sup> All across Europe far-right parties are gaining greater electoral support, and they can do a lot of damage like the chaos provoked by AfD votes in the Thuringian parliament, which helped to unseat the state's leftwing premier. MUDDE, CAS (11 February 2020).

<sup>9</sup> The author emphasizes that a full understanding of the parliamentary regime consists not only in understanding that the legislative power belongs to the Parliament and the executive power to the Government, but also in understanding that the Government directs the policy and the Parliament controls the Government. For the author, the parliamentary regime rests on not only in representative democracy, but also on a balanced division of functions between the Parliament, whose function is to control the Executive, and the latter, whose function is to govern.

<sup>10</sup> Although, as Sánchez Navarro points out, this central position had already been affected at internal level due to the current functions and role of Governments (SANCHEZ NAVARRO, 1995: 223).

<sup>11</sup> As García Roca points out, constitutional provisions have not established a strict division of functions without possible overlaps between them, placing as example the increasing normative powers of the executives.

<sup>12</sup> Except some parliamentary systems, that allows ministers of Government to have a seat at the same time in Parliament, like Germany or Spain as it will be examined further on.

<sup>13</sup> Only five member states have a semi-presidential system (France, Lithuania, Poland, Portugal and Romania) and one a presidential system (Cyprus). A list of all EU member States and candidate countries, and their forms of governments, can be consulted here: [https://www.cidob.org/biografias\\_lideres\\_politicos/organismos/union\\_europea/cuales\\_son\\_los\\_gobiernos\\_de\\_la\\_ue\\_partidos\\_coaliciones\\_primeros\\_ministros](https://www.cidob.org/biografias_lideres_politicos/organismos/union_europea/cuales_son_los_gobiernos_de_la_ue_partidos_coaliciones_primeros_ministros)

<sup>14</sup> Form of government that the majority of the Member States have.

<sup>15</sup> Since many provisions of the Spanish Constitution are inspired on the German Basic Law.

<sup>16</sup> Although the UK does not have a written Constitution, it does have a body of rules that govern the political organization and the organs and procedures through which the power is exercised, like written Constitutions do. The non-written British Constitution is a mixed or balanced constitution, as the functions and organs of government are intertwined, except in relation to law and the courts. (WRIGHT, 2000: 43-44). The legislature and the executive are linked. There is a presence of almost the whole Government in the Parliament, mainly in the Commons, where the Prime Minister and his or her ministers have a seat. The Prime Minister is the leader of the party that had won more votes in the elections, party that is able to form Government (either alone or in coalition –like after the general elections of 2010- or with the support of other parties –like in 2015-). So it is the head of the executive and the leader of the majority party, which allows the executive to obtain the ratification of its decisions easily. This is consequence of the electoral system (the first past the post) that tends to produce two-party-systems and governments controlled by large majorities. This has been the situation over more than 50 year (LE SUEUR, HERBERG, ENGLISH, 1999: 79).

<sup>17</sup>The Preamble of the German Basic Law confirms that the State is divided into federated states (*Länder*) and Article 20.1 proclaims Germany as a federal state (CURRIE, 1994: 33).

<sup>18</sup> Basic Law for the Federal Republic of Germany in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by Article 1 of the Act of 28 March 2019 (Federal Law Gazette I p. 404). Retrieved on 3 April 2020 from [https://www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.html#p0014](https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0014)

<sup>19</sup> That represents the whole people of Germany. Article 38.1 GBL.

<sup>20</sup> Where the Länder (States) are represented –through their governments- and participate in the legislation and administration of the Federation and in matters concerning the European Union. Article 50 and 51.1 GBL.

<sup>21</sup> The *Bundestag* is the supreme federal law-making body, but the *Bundesrat* has a veto on Bills (SCHWEITZER, 1995: 178).

<sup>22</sup> The Head of the State is the Federal President (*Bundespräsident*). He/She is elected by the Federal Convention, composed by the Members of the *Bundestag* and an equal number of members elected



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by the parliamentary assemblies of the *Länder* on the basis of proportional representation (Article 54 GBL), and cannot be a member of the government or of a legislative body of the Federation or of a *Land* (Article 55.1 GBL). The Federal Government consist of the Federal Chancellor (*Bundeskanzler*) and the Federal Ministers (*Bundesministern*) (Article 62 GBL)

<sup>23</sup> For example, the proposal and appointment of the Federal Chancellor (Article 63.1 and 2 GBL). But the most relevant competences are the faculty to dissolve the *Bundestag* when no Federal Chancellor obtains the majority established in the Constitution for the election (Article 63.4 GBL) or when a motion of the Federal Chancellor for a vote of confidence is not supported by the majority of the Members of the *Bundestag* (Article 68 GBL).

<sup>24</sup> Article 92 GBL.

<sup>25</sup> Article 97 GBL.

<sup>26</sup> As in other parliamentary democracies, like Spain, party-discipline is applied, and party leadership has many means to dissuade potential deviations of vote against the party in the House. In practice, the members of the Parliament observe this *Fraktionsdisziplin*, although the Constitution contemplates the representative mandate and prohibits the imperative mandate (Article 38 GBL) (SCHWEITZER, 1995: 180-181).

<sup>27</sup> Article 77 GBL. In some cases, the *Bundesrat* has an absolute veto. See, for example, Article 105.3 GBL.

<sup>28</sup> It must be taken into account that State elections are usually used as a way to articulate protest against the majority governing the *Bundestag*. Therefore, the parliamentary minority can often block or substantially modify national legislation initiated by the Federal government or the majority in the *Bundestag* (PATZELT, 2000: 26-27).

<sup>29</sup> This is particularly the case on the Bills were the *Bundesrat* has a full veto (which require its affirmative vote), since this is the case in six out of ten Bills and, in practice, most legislation on major domestic issues. Therefore, as Schmidt points out, the governance “through legislation requires in most cases the formation of a Grand Coalition of the incumbent parties and the major opposition party, and a coalition of the federal government and the majority of State governments” (SCHMIDT, 2003: 71).

<sup>30</sup> Coalition government between the Christian Democratic Union (CDU), the Christian Social Union (CSU), and the Social Democratic Party (SPD).

<sup>31</sup> Patricia Daehnhardt points out how the election winners were, in practice, the losers either for one of this two reasons: the coalition they formed was too weak or the numerical result hid the real will of the electorate since the vote was split between more parties “being the most voted party no longer ensured voter legitimacy to govern uncontestedly” (DAEHNHARDT, 2019: 113).

<sup>32</sup> The President has a clear pre-eminence within the Government since he or she is the leader of the political party (or coalition of parties) that has obtained the majority of seats in the Congress and, as Ferreres Comella points out, “the link of support between the Parliament and the Government runs through him”. When the government is based on a coalition of parties this pre-eminence can be reduced, since the President will have to include in the Government ministers from other parties and negotiate more aspects of the political dairy agenda (FERRERES COMELLA, 2013: 130). An

example can be seen in the current coalition government of PSOE and Unidas Podemos, were some tensions had already arisen. For example, the Draft Bill of the Equality Law presented to the Congress. It is soon to evaluate how this coalition is going to work and the results, since they have barely been governing a few months when the crisis of the coronavirus exploded, which has altered completely the plans of the Government.

<sup>33</sup> Either alone or through a coalition with other parties what, as Ferreres Comella points out, resulted in a “fusion of the executive branch and the party (or coalition of parties)” (FERRERES COMELLA, 2013: 35).

<sup>34</sup> See also Article 14 of the Law 50/97, of 27 of November, of the Government.

<sup>35</sup> Previously, Spain had never had a coalition government. In general, the party that won the elections just needed the support of other smaller parties to get the necessary votes for the investiture, not integrating other members of these parties in ministerial positions and reducing the agreement to the legislative program to be developed. Often nationalist parties had played the key role in these situations. (FERRERES COMELLA, 2013: 130-131). After the general elections of November 2019, Spain has for the first time a coalition government between the Socialist Party and Unidas Podemos.

52 <sup>36</sup> Regarding this motion of censure, see GARCÍA-ESCUADERO MÁRQUEZ, 2019: 101-136.

<sup>37</sup> It is true that, previously, other parties have manifested their opposition to European integration or EU policies, like Izquierda Unida with regard to the ratification of Maastricht Treaty. However, currently more parties with a critical vision regarding the European Union have a seat in the Cortes Generales and it is very likely that they will manifest their views regarding EU issues and will try to carry out a bigger control.

<sup>38</sup> An English version can be found in <http://www2.assemblee-nationale.fr/langues/welcome-to-the-english-website-of-the-french-national-assembly>

<sup>39</sup> A constitutional guarantee traditionally included in Constitutions (Spain, Germany, France, etc) but that is difficult to reconcile with the role played by political parties (TROPER, 2012: p. 662).

<sup>40</sup> Although the quinquennat does not prevent from a parliamentary majority different from the presidential one, it seriously limits the possibility. FOUCAULT (n.d.).

<sup>41</sup> Currently, the party of the candidate that wins the Presidential elections achieves the absolute majority in the National Assembly. This is explained because in the French system the central political element that must be taken into account is the election of the President of the Republic and the electoral system established, a two-round system that implies that in the second round the minority forces are aggregated, creating alliances to win in this second round (that can involve that certain candidates step down in the second round and the encourage of vote transfers); electoral system that facilitates the absolute majorities or block majorities (FOUCAULT, n.d.).

<sup>42</sup> Although, unlike the Spanish case, the membership to the Government is incompatible with any Parliamentary office (Article 23 FC), this has not impeded that the Government obtains the ratification of its decisions since parliamentary majority and presidential majority usually coincides. The French system, therefore, strongly limits parliamentary prerogatives. The characteristics of the rationalized parliamentarism and the instruments for the scrutiny, as Andrea Szukala and Olivier



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Rozenberg points out, have also contributed to strengthen the cohesion of the parliamentary majority, which is the usual rule as already explained (SZUKALA, ROZENBERG, 2001: 227).

- <sup>43</sup> Loi constitutionnelle de modernisation des institutions de la Ve République. Loi n° 2008-724 du 23 juillet 2008. JO n° 171 du 24 juillet 2008. For more information about these changes (VERPEAUX 2008: 79-92). Some of the new provisions are similar to the existing ones in Spain, for example the possibility to create committees of inquiry or the rights conferred to parliamentary groups or to a number of parliamentarians. Although in certain questions the Spanish Parliament has more instruments. For example, the Government in France stills has the priority to determine half of the agenda of the Parliament, while in Spain the Government can only include with priority an issue at a specific sitting, depending in the rest of cases of the majority that supports it in the Board of Spokesmen. An extensive analysis in (GARCIA-ESCUADERO MÁRQUEZ, 2008: 93-116).
- <sup>44</sup> Macron won the 2017' Presidential elections without the backup of any traditional or new political party. He created a new movement (En Marche) supported by hundreds of thousands of people across France disillusioned by traditional politics, creating later a new political party (La République en Marche) that achieved the absolute majority in the subsequent legislative general elections (ABOUT-FRANCE, 2020). But the current situation in France is exceptional, and the main question is what will happen when Macron leaves and who will replace him.
- <sup>45</sup> See supra note 41. In the 2017 elections, La République en Marche obtained the absolute majority in the National Assembly, with its allies of Mouvement Démocrate. The results can be consulted in [https://www.interieur.gouv.fr/Elections/Les-resultats/Legislatives/elecresult\\_legislatives-2017/\(path\)/legislatives-2017//FE.html](https://www.interieur.gouv.fr/Elections/Les-resultats/Legislatives/elecresult_legislatives-2017/(path)/legislatives-2017//FE.html) In 2012, the Socialist Party, together with other three left parties, achieved also the absolute majority. The results can be consulted in [https://www.interieur.gouv.fr/Elections/Les-resultats/Legislatives/elecresult\\_LG2012/\(path\)/LG2012/FE.html](https://www.interieur.gouv.fr/Elections/Les-resultats/Legislatives/elecresult_LG2012/(path)/LG2012/FE.html)
- <sup>46</sup> An English version can be consulted in <https://www.thedanishparliament.dk/en/democracy/the-constitutional-act-of-denmark>
- <sup>47</sup> Appointing the Prime Minister and other Ministers; signing Acts of Parliament into law to be countersigned by a Minister; etc. (FOLKETINGET, 2014: 3)
- <sup>48</sup> The CAD does not contemplate any provisions regarding the investiture, like in the Spanish case. It only contemplates that if the *Folketing* passes a vote of no confidence in the Prime Minister, the Government must resign or call an election (Article 15.2 CAD) (FOLKETINGET, 2014: 7).
- <sup>49</sup> This fragmentation is consequence of the electoral system, which seeks to ensure an equal representation of the different options of the electorate and the highest degree of proportionality among the parties that meet the thresholds established. (FOLKETINGET, 2011: 4 and 7).
- <sup>50</sup> As Rasch points out, minority governments have been dominant in Scandinavia (Denmark, Norway and Sweden).
- <sup>51</sup> Sometimes, parties prefer to stay as strong opposition, instead of entering a coalition government. (KIIVER, 2006: 65).
- <sup>52</sup> For more information regarding consensus and policy-making in Denmark see (JØRGENSEN, 2002).
- <sup>53</sup> Consolidated version of the Treaty on the Functioning of the European Union, OJ C326, Volume 55, 26 October 2012.

<sup>54</sup> And Declaration 18, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007.

<sup>55</sup> Protocol nº 25 on the exercise of shared competences.

<sup>56</sup> Chapter 2, Title V TEU. Consolidated version of the Treaty on European Union, *OJ* C326, Volume 55, 26 October 2012.

<sup>57</sup> Besides, the majority of the States delegate their transposition to the executives (BELLIDO BARRIONUEVO, 2003: 171).

<sup>58</sup> For example, Article 49 TEU.

<sup>59</sup> For example, Article 21.3 TFEU.

<sup>60</sup> See articles 3.6 and 19.2 of the Council rules of procedure (Council Decision of 1 December 2009 adopting the Council's Rules of Procedure, *OJUE* L 325, 11 December 2009)

<sup>61</sup> The Court of Justice pointed out that the COREPER is just an auxiliary body of the Council that prepare its works and execute its mandates, which does not enable it to exercise a decision power. See Judgment of the Court of 19 March 1996, *Commission of the European Communities v Council of the European Union*, Case C-25/94, European Court Reports 1996 Page I-01469, §25, 26, 27. Although, it can be said that it has acquired that power *de facto* (PONZANO, 2000: 24).

<sup>62</sup> As ministers cannot carry out all the tasks necessary for the adoption of a decision.

<sup>63</sup> For example, the committees that prepares the meetings of the ministers or the parliamentary committees.

<sup>64</sup> It is not accountable to the European Parliament, neither to National Parliaments. And it is not subject to a judicial control, as it concerns only to the Council and the Commission (MANGAS MARTIN, 1980: 50).

<sup>65</sup> Where, as a general rule, the Commission initiates and the European Parliament and the Council adopt the act jointly through the ordinary legislative procedure. See. Art. 294 TFEU.

<sup>66</sup> For example, according to the previous article 214.2 of the TEC, it was the Council, meeting in its composition of Heads of State and Government, the one charged to nominate the person it intended to appoint as President of the Commission. But in practice the political decision for the person to nominate was adopted by the European Council and, after that, it was activated the procedure established in the Treaty. This was the case of the nomination of Barroso in 2009, the European Council took its decision at its meeting in June, and later it was activated the procedure of article 214.2 TEC. See European Council Conclusions 18-19 June 2009, p. 4. Another example is the process for the establishment of the European Monetary System, carried out entirely by the European Council (WERTS, 2008: 34).

<sup>67</sup> As Wert points out, like this the European Council watches the progress and the decision process in the EU institutions (WERTS, 2008: 171).

<sup>68</sup> For example, in its meeting of March 2010, the European Council asked its President to establish a task force to present to the Council measures to reach the objective of an improved crisis resolution framework and better budgetary discipline. After, in its meeting of June 2010, it agreed a series of orientations on budgetary discipline and macro-economic surveillance, and invited the Task Force



and the Commission to develop them and make them operational. And in October of the same year the European Council endorsed the recommendations presented by the Task Force and called for a fast adoption of the needed legislation to implement many of the recommendations for the summer of 2011. See European Council Conclusions, 25/26 March 2010, point 7; 17 June 2010, points 11 to 13; and 28/29 October 2010, point 1. And all this, despite that according to article 121.2 of the TFEU the European Council is only responsible of discussing a conclusion on the broad guidelines of the economic policies of the Member States and of the Union. But, as we can see, the priorities are established by the European Council in its spring summit, on which basis the ECOFIN begins the formal procedure contemplated in Article 121.2 of the TFEU (DASHWOOD, 2000: 92).

<sup>69</sup> For more information see (MARTÍNEZ SIERRA, 2000).

<sup>70</sup> However, the European Parliament lacks of adequate mechanisms to control the Council and the European Council, since the only effective mechanism that is has available (the motion of censure) is only contemplated for the control of the Commission (MARTÍNEZ SIERRA, 2004: 50; MARTÍNEZ SIERRA, 2001: 212; SANTONASTASO, 2004: 52).

<sup>71</sup> See EUROPEAN COUNCIL/COUNCIL OF THE EUROPEAN UNION, “How the European Semester Works”, in <http://www.consilium.europa.eu/en/policies/european-semester/how-european-semester-works/>, accessed: 25 April 2020.

<sup>72</sup> See art. 6 Regulation (EU) No 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area, **OJ L 140, 27 May 2013**.

<sup>73</sup> *Ibid.* art. 7.

<sup>74</sup> See arts. 5 and 9 of the Council Directive 2011/85/EU, of 8 November 2011 (*OJ L306*, 23 November 2011).

<sup>75</sup> With the new rules they have to approve the budgets almost without questioning.

<sup>76</sup> For more information see CAMISÓN YAGÜE, 2010.

<sup>77</sup> The Protocol also contains provisions regarding the cooperation between the European Parliament and National Parliaments (Title II).

<sup>78</sup> For more information with regard to this reports see EUROPEAN PARLIAMENT (n.d.).

<sup>79</sup> For a vision of the different systems see (SMITH, 1996).

<sup>80</sup> According to Article 23 of the GBL, the *Bundestag* and the *Länder* -through the *Bundesrat*- participates in European Union' issues.

<sup>81</sup> That must obtain the favorable vote of the Parliament. Article 23.1 *in fine* establishes that the “establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law or make such amendments or supplements possible” must be carried out through a Bill.

<sup>82</sup> The Parliament participates both in the ascending as well as in the descending phase of the EU legislation. That is, in the ascending phase through the opinions that it can provide to the Executive, which must take them into account during the negotiations in which it participates at EU level. In the descending phase, through the transposition of directives and the other EU acts that require implementation (CAMISÓN YAGÜE, 2010: 65-66).

<sup>83</sup> Through the ordinary instruments for the scrutiny of the Executive (questions, debates, committees), or through the mechanisms specifically contemplated to control the Executive's activity at EU level. (CAMISÓN YAGÜE, 2010: 60-62, 221); (MARTÍNEZ SIERRA; DÍAZ MARTÍN, 2002: 129 – 164).

<sup>84</sup> An extensive analysis can be found in (CAMISÓN YAGÜE, 2010).

<sup>85</sup> Majority that is reproduced within all the committees (standing or ad hoc), since they 'mirror' the composition of the majorities and minorities in Parliament at any given time and, therefore, when voting on resolutions, bills, treaties, etc. the government can count with its majority and the opposition, as a rule, is in a minority.

<sup>86</sup> The author also points out how governing parties "are in a dominant position through the combination of the opening speech and proportional time during debate", and how the formation of a Grand Coalition further restricts the amount of time allocated to the rest of the parties in the parliamentary opposition.

<sup>87</sup> Although, contrary to the German case, our Constitution does not contain a specific provision (MARTINEZ SIERRA, 2007: 33).

<sup>88</sup> They must be ratified by an organic law that requires an absolute majority in the Congress of Deputies (art. 93 SC). They can also participate in the Convention that must be convened for the ordinary revision procedure of the Treaties (art. 48.2 TEU), and in the special revision procedures (art. 48.7 TEU).

<sup>89</sup> The Parliament participates both in the ascending as well as in the descending phase of the EU legislation. That is, in the ascending phase through the opinions regarding the legislative proposals of the EU that it can provide to the Executive, although the Government is free to take them into account or not, since there is not a negotiating mandate or a parliamentary scrutiny reservation like in other Parliaments. To this respect, the Council of State on a report on 2006 recommended an amendment of the SC in order to incorporate the Spanish Parliament's participation in the European Union issues and, in particular, a mechanism which allowed its participation in the EU's decision-making process which included the Government's obligation to take into account the *Cortes Generales* opinion (CONSEJO DE ESTADO, 2006: 111). And, in the descending phase, through the transposition of directives and the other EU acts that require implementation. Although, as in other Member States, when talking about the Directives its participation is really limited since, on one side, due to their detailed character, little more than pass the national transposition bill –copying the text of the Directive when this one is very detailed- is done; and, on the other side, transposition is also in general delegated to the Executive, that has more means at its disposal. Regarding this problematic see (MOLINA DEL POZO, 2004: 198; MATIA PORTILLA, 1999: 36; BELLIDO BARRIONUEVO, 2003: 171).

<sup>90</sup> Through the ordinary instruments for the scrutiny of the Executive (questions, debates, committees), or through the mechanisms specifically contemplated to control the Executive's activity at EU level. The Specialized Committee on EU issues can scrutiny the activity of the Executive within the Council, since the Government must inform the Committee regarding the decisions and agreements adopted, and its members must appear before the Committee when it agrees it in order to give account of the results of a Council meeting; and it can also control the activity of the Executive within the European Council, since the President of the Government must also appear after the summits. See Articles 3 and 4 of the Bill regulating the Specialized Committee (Ley 8/1994, de 19 de mayo, por la que se regula la Comisión Mixta para la Unión Europea. BOE nº 120, de 20 de mayo de 1994).



## The European integration process: its effects in the principle of separation of powers set up in Member State's Constitutions

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- <sup>91</sup> See section 2.4 of the present paper.
- <sup>92</sup> For more information about the British system see HOUSE OF COMMONS, 2009.
- <sup>93</sup> See art. 2 of the consolidated version of Act 8/1994, regulating the Joint Committee (BOE-A-1994-11418).
- <sup>94</sup> Although the parliamentary control before and after Council and European Council meetings is based on informal practices (FROMAGE, 2017: 168). An analysis of the participation of the French Parliament in EU issues can be consulted in SZUKALA AND ROZENBERG, 2001: 223-250.
- <sup>95</sup> For more information see ASSEMBLÉE NATIONALE, n.d.
- <sup>96</sup> See supra note 41. In the 2017 elections, La République en Marche obtained the absolute majority in the National Assembly, with its allies of Mouvement Démocrate. The results can be consulted in [https://www.interieur.gouv.fr/Elections/Les-resultats/Legislatives/elecresult\\_legislatives-2017/\(path\)/legislatives-2017//FE.html](https://www.interieur.gouv.fr/Elections/Les-resultats/Legislatives/elecresult_legislatives-2017/(path)/legislatives-2017//FE.html) In 2012, the Socialist Party, together with other three left parties, achieved also the absolute majority. The results can be consulted in [https://www.interieur.gouv.fr/Elections/Les-resultats/Legislatives/elecresult\\_LG2012/\(path\)/LG2012/FE.html](https://www.interieur.gouv.fr/Elections/Les-resultats/Legislatives/elecresult_LG2012/(path)/LG2012/FE.html)
- <sup>97</sup> Constitutional factors that also explains the efficacy of the system, more than the mechanisms that have been established. To this respect see MARTÍNEZ SIERRA, PERALTA MARTÍNEZ, 1998-1999: 245; KIIVER, 2006: 66. EU policy creates great controversy in Denmark and its citizens had always been skeptic regarding higher integration, which has also reinforced the *Europaudvalget* (LAURSEN, 2007: 3).
- <sup>98</sup> In practice, there is a political agreement for carrying out a referendum for any amendment, although there is the necessary majority in Parliament (LAURSEN, 2001: 102-103).
- <sup>99</sup> Through the transposition of Directives mainly, although like in other Member States it is the Government the one that as a general rule carries out the transposition and the *Folketing* limits itself to control that the transposition is correct (LAURSEN, 2003: 102-103).
- <sup>100</sup> As the author points out, the objective of the legal reservation is to guarantee that certain issues are regulated by the Parliament in order that minorities can take part in their regulation, and to make possible a debate between majorities and minorities that allows confronting the different positions. Debate that is essential in any democratic State.
- <sup>101</sup> Indeed, since the Lisbon Treaty reform included the European Council within the institutional framework of the EU, the intergovernmental characteristics of the system have been reinforced since now the Member States are represented in two institutions: in the Council, at the level of the Ministers, and in the European Council, at the level of Head of State and Government (MANGAS MARTÍN, 2004: 8). And we must take into account that when the European Council decides by vote, only the Heads of State and Government have right to vote, the President of the European Council and the President of the Commission does not take part (Article 235.1 TFEU).
- <sup>102</sup> To this respect, as the author points out, it is not only necessary the strengthening of the European Parliament, but also an authentic European Constitution that limits the European legislator to ensure the respect of the rights of the citizens and the minorities (BALAGUER CALLEJÓN, 1997: 593-594).

