***THE DUAL EXECUTIVE OF THE EUROPEAN UNION:***

***A COMPARATIVE FEDERALISM’S APPROACH[[1]](#footnote-1)***

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**Abstract**

The paper analyses the relations between the European Council and the Commission in both single market policies (regulated by a supranational decision-making regime) and in policies traditionally close to core state powers (regulated by an intergovernmental decision-making regime). The European Council behaves as a collective head of state in the supranational constitution with the Commission acting as a governing institution, while it behaves as a collective head of government in the intergovernmental constitution with the Commission acting as an administrative institution. However, in the former case, we have a dual executive in a quasi-separated system of government, whereas in the latter case we have a dual executive in a confusion of powers system. On the basis of the comparative federalism’s literature, and in particular of the experience of the US federal union, the paper thus discusses a reform’s proposal for locating the dual executive in a governmental structure more coherent with the democratic criteria of a union of states.

**Key words**

EU dual executive, European Council, Commission, separation of powers, institutional reform.

**Introduction**

The decision-making structure of the European Union (EU) has changed dramatically after 60 years of integration. The process of institutionalization of the EU has led to a basic differentiation between two decision-making regimes, one dealing with issues of low political salience regarding the single market and the other dealing with policies of high domestic political salience which entered the EU agenda after the end of the Cold War. The Maastricht Treaty of 1992 was the turning point for this differentiation. The Treaty introduced three distinct pillars, or decision-making regimes, the supranational pillar for the single market and the two intergovernmental pillars of Common Foreign and Security Policy (CFSP) and Justice and Home Affairs policy (JHA). Through that Treaty it was formally recognised that the EU could proceed in the integration process into new areas for its member states provided that their governments were guaranteed an exclusive decision-making role thanks to the strengthening of the intergovernmental institutions. The differentiation of the decision-making regimes was further consolidated with the start of the Economic and Monetary Union (EMU) or Eurozone in 1994, the economic policy side of which was put under the control of the intergovernmental institutions, whereas the monetary policy side was assigned to the full control of a supranational institution, i.e. the European Central Bank or ECB.

The Lisbon Treaty abolished the division into pillars which was formalised at Maastricht, nonetheless it preserved the distinction between different decision-making regimes in relation to various European policies. It strengthened the supranational decision-making model for single market policies (also known as the Community Method, Dehousse 2011) and it institutionalized an intergovernmental decision-making model for policies traditionally close to core state powers (Genschel and Jachtenfuchs 2014). Moreover, the Treaty introduced important institutional innovations that are crucial for this paper. It brought the main intergovernmental institution, the European Council of heads of state and government (henceforth, the Heads), within the legal order of the EU. Since its foundation in 1974, in fact, the European Council had operated as an informal institution, unconstrained by the EU’s legal order (Wessels 2016). With the Lisbon Treaty, not only was the European Council fully recognised as a European institution, but it was also separated from the Council of ministers (henceforth, the Council), becoming a fully executive institution. TEU, art. 15(1) states that: “The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof. It shall not exercise legislative functions”. TEU art. 15(5) adds: “The European Council shall elect its President, by a qualified majority, for a term of two and a half years, renewable once”. Thus, with the Lisbon Treaty, the European Council became the highest political institution of the EU, chaired by a permanent president and no longer by the prime minister of the rotating biannual presidency. The ministers of the member state holding the biannual presidency continue to preside the sector-based work of the Council, but not the Foreign Affairs Council (FAC) and the informal Council of ministers of economy and finance of the Eurozone (the so-called Eurogroup) which have their own presidents elected for five years.

 It can be said that the Lisbon Treaty formalised a dual decision-making system or dual constitutional regimes (Fabbrini 2015a). It institutionalised a *supranational constitution* to regulate policies connected to the single market. And, at the same time, it institutionalised an *intergovernmental constitution* to decide matters which are politically sensitive for member states. In the former case, an institutional quadrilateral was promoted, based on a bicameral legislative structure (the Council, since it is the chamber which represents governments in the form of sectorial ministers, and the European Parliament or EP, since it is the chamber representing European citizens) and a dual executive (the European Council and the Commission with a commissioner for each member state). In the latter case, the decision-making process is largely controlled by the two intergovernmental institutions, the European Council and the Council, with limited or subordinate participation by the supranational institutions of the Commission and the EP. The two systems, and their different methods of taking decisions, have developed in parallel. However, with the post-2008 explosion of multiple crises in policy fields under the intergovernmental constitution, the two systems have started to collide. In particular, a competition between, on one side, the Commission and its president and, on the other, the European Council and its president has emerged with regard to the institution and official that should have the last word in the policy-making process.

The paper aims to analyse the nature of the dual executive emerged in the EU, using a comparative federalism’s perspective*.* Its focus will thus be on the relationship between the European Council and the Commission (and their respective presidents), within the larger context of inter-institutional relations. The paper argues that the European Council behaves as a collective head of state in the supranational constitution, while it behaves as a collective head of government in the intergovernmental constitution. However, if in the supranational constitution there operates a dual executive in which the Commission and its president are more influential than the European Council and its president, at the same time in the intergovernmental constitution there operates a dual executive in which the European Council and its president are not only more important than the Commission and its president, but also act outside a system of inter-institutional balancing. If in the former case there is a dual executive in a quasi-separated system of government, in the latter case there is a dual executive in a confusion of powers system. This EU’s executive structure reminds a semi-presidential government. In the latter, the executive is dual because one head of the executive is the president of the republic, elected directly by the citizens in a constituency which corresponds to the whole country, and the other head is the prime minister who must be able to benefit from the direct or indirect support of the national assembly’s majority*.* As Elgie (1999; 2011) showed, the relations between the president and the prime minister might vary significantly across cases and across time. However, in neither case of semi-presidential governments there is separation of powers between the executive and the legislature, as there is instead in the EU supranational setting, or confusion of powers between the executive and the legislature, as there is instead in the EU intergovernmental setting. Although the analogy with semi-presidentialism is justifiable, for avoiding conceptual stretching I will use the concept of dual executive rather than of semi-presidential executive in the analysis of the EU’s executive structure. Indeed, the latter’ structure and evolution can better be analysed using comparative federalism’s literature, in particular the literature on federations by aggregation of previously independent states, like the United States or US and Switzerland. Both polities epitomize the type of the federal union, empirically and conceptually distinct from the type of the federal state, expression of a federation by disaggregation of a previously unitary state (like Germany, Austria, Belgium in Europe, or Canada, Australia and India, outside of Europe). The different genetic formation of the two types have introduced different incentives in their institutional logic, decentralized in federal unions and centralized in federal states. Federal unions, because of the demographic asymmetry and national differentiation of their constituent states, have adopted a form or another of multiple separation of power systems (a system that prevents centralizing pressures); whereas federal states, because based on limited demographic asymmetry and relatively homogeneous cultural identity of their constituent units, have adopted a form or another of fusion of power systems at the horizontal level (i.e., parliamentary government with its centralizing bias) and cooperative relations between levels of government at the vertical level (that promote coordination from the centre). Because the EU is an aggregation of previously independent states, the comparison will thus be with the federal unions, the US in particular.

Here, I will proceed as follows. First, I will define the decision-making system in the supranational constitution and, second, in the intergovernmental constitution; third, I will analyse the incongruities of the inter-institutional relations supporting the decision-making process in the two constitutions; and, fourth, I will advance a proposal to make the dual executive system more effective and legitimate.

**The dual executive in quasi-separation of powers**

Regarding the regulatory policies of the single market, the Lisbon Treaty formalized a quadrilateral institutional system which has the features of a separation of powers system of government. The executive power is dual but the Commission and its president (due both to the prerogative of monopolizing legislative initiative and to the technical competences which they have available) are more influential than the European Council and its president. Albeit the European Council has been recognised to have an executive role, this concerns the definition of the EU’s long-term strategies, as well as resolving inter-state conflicts which could block the functioning of the market, not the daily decisions to be taken. Nevertheless, the European Council is no longer (as it was before the Lisbon Treaty) the highest form of the Council. It is a kind of collegial head of state of the EU, the umpire of last resort for unsolvable disputes which may emerge between the member states of the EU. Indeed, in areas of exclusive competence of the EU such as competition policy, the Commission has maintained its full decision-making independence. For instance, on 30 August 2016, the Competition commissioner ordered Apple to pay a “bill” of up to 13 billion euros ($14.5 billion) in taxes plus interest to the Irish government after ruling that a special scheme to route profits through Ireland was illegal state aid, a bill that the Irish government said it did not want to enforce. However, the Commission has the power to decide on state aid regardless of national government views, although the Council, according to TFEU, art. 108 (2) “may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the internal market”, a possibility that never materialized. At the same time, in this constitution, the legislative co-decision-making role of the Council and of the EP is established as the ordinary legislative procedure to approve European laws (regulations and directives). A bicameral legislature that has the power to approve or refute the executive’s proposals. Here we have a system of government since the roles and functions of the various institutions are sufficiently specified. It is a separate system of government since no one institution depends on the political backing of the others to function as such.

Certainly, with the choice of the so-called *spitzenkandidaten,* the parliamentary parties triedto free the election of the president of the Commission from the control of the European Council (Christiansen 2016). While TEU, art. 14(1), states that the European parliament “shall elect the President of the Commission”, the proposal should, however, come from the European Council. In the elections for the EP of May 2014, the biggest European parties identified a ‘top candidate’ as the possible president of the Commission, should (obviously) one or other of them win the relative majority (plurality) of the votes for the election of the European parliamentarians (MEPs). The European People’s Party, which had indicated the Luxembourg politician Jean-Claude Juncker as its *spitzenkandidaten,* having obtained the greatest number of seats in those elections, therefore proposed the latter as president of the Commission. This proposal was accompanied by the warning to the European Council, from the main parliamentary parties, that the EP would not vote for any other candidate as president of the Commission. Since the vote of the EP is necessary to confirm the choice of the European Council, the warning had the desired effect. The European Council indicated Juncker as candidate to the presidency of the Commission, then putting that name to the EP (Garcia and Priestley 2015). However, that of the European Council was only a partial surrender. Indeed, the choice of the other 27 members of the Commission did not follow the electoral logic used for the president of the Commission. The commissioners were indicated by the European Council (albeit consulting the newly elected president of the Commission), for voting by the EP, on the bases of strictly national rather than party political considerations. In fact, unlike in the past, a majority of commissioners had previously held key positions in their respective national governments. Just think that of the 27 commissioners appointed, five had been prime ministers, two deputy prime ministers, one a secretary of state, three European parliamentarians, one the leader of the conservatives in the House of Lords, and six were previous European commissioners. Many spoke of it being a quasi-intergovernmental Commission.

However, although the Commission and its president are voted by the EP, they cannot be compared to a parliamentary government and its prime minister (Fabbrini 2015b). The EP can dismiss the Commission on the grounds of not respecting governmental ethics (it has done that only once, in March 1999, Moury 2007), and not on the grounds of political disagreement, nor can the Commission dissolve the EP, since the latter has a five-year mandate established by the Treaty. Moreover, the members of the EP cannot be also commissioners, being incompatible the membership in the two institutions. In short, there is no relationship of political confidence between the parliamentary majority and the Commission, although there is political consonance between them. In this constitution, the EP (which was, at the start of the integration process, little more than a parliamentary assembly consisting of members appointed by the national parliaments) has acquired equal legislative standing with the Council, motivating wisely and doggedly its requests for institutional influence with the fact of being the only institution directly elected (since 1979) by the citizens of the individual member states of the EU (Rittberger 2003). At the same time, however, the increased influence of the EP has challenged the Commission’s role of establishing the agenda as the main supranational institution (Kreppel and Oztas 2016). Moreover, the EP, by imposing co-decision making as the ordinary procedure of the EU in single market policies, has given legitimacy to the legislative process, removing it from the exclusive influence of the member state ministers of the Council. Finally, because in all the regulatory policies linked to the common market the EU operates through the approval of legislative provisions (regulations and directives), the European Court of Justice (ECJ) can exercise its supervisory role (Craig 2011). The outcome is a governmental system based on the distinction between legislative, executive and judicial institutions, as is required in democratic systems of government of a federal type.

**Intergovernmental predominance and confusion of powers**

The Lisbon Treaty has also constitutionalised an intergovernmental model of decision-making. Since Maastricht, with the extension of integration to politically salient policy areas for member states, governments placed those areas in institutional contexts which were strictly controlled by them. Whereas single market policies have limited electoral effects on incumbent national governments, the same cannot be said for the management of the economic (budgetary and fiscal) policy of the EMU or for the asylum and migration policies located under the jurisdiction of JHA or for the security policy of the CFSP. In crisis conditions, the management of these policies can have significant distributive effects at the national level. This is why, these policies, once national governments agreed to Europeanize them, were framed within a decision-making system with limited supranational influence (by the Commission and the EP). For these policies, the aforementioned decision-making system was replaced by an institutional arrangement based mainly on the European Council and the Council (Puetter 2014). An institutional arrangement whose purpose is that of facilitating the voluntary coordination of the policies of member states, but not their legal integration at supranational level. Indeed, in these policies, there has developed a process of integration without supra-nationalization (Fabbrini and Puetter 2016).

Let us start from foreign and security policy (CFSP). TEU, art. 24(1) is explicit in stating that “the adoption of legislative acts shall be excluded”. Albeit introducing the important innovation of the High Representative for foreign and security policy (HR) who is the permanent president (for 5 years) of the FAC and at the same time a vice-president of the Commission, the Lisbon Treaty did not change the intergovernmental logic established by the Treaty of Maastricht for foreign policy. The coordination must take place (TEU, art. 25) through decisions consisting of “actions and positions” which, once adopted, the member states *voluntarily* undertake to respect. In this decision-making regime, the Commission, through its vice-president, must act as technical support to the FAC, but may not exercise any political role (which is the responsibility of the European Council). At the same time, the EP must be consulted, but it is not allowed to exercise any checking and balancing role on foreign policy-making. And since common foreign and security policy is taken through decisions, and not legislative acts, the ECJ is excluded from exercising significant judicial supervision (Fabbrini 2014).

This is also true for the EU’s economic policy. Decisions are the responsibility solely of the Council of economic and finance ministers (known as the ECOFIN Council), which may recommend the adoption of corrective measures by a member state, even if TEU, art. 126(6) recognises to the Commission the role in activating the procedure, for example, for excessive budget deficits on the part of a member state. In any case, the Commission may make a *proposal* or a *recommendation,* but it is again the responsibility of the ECOFIN Council to decide whether to proceed or not in conformity with the Commission’s proposals. This is even more true for the measures which concern member states of the Eurozone (Title VIII, Chapter 4), where the decision-making role of the Eurogroup is institutionalised (Puetter 2006). This is the group of finance ministers of the countries which have adopted the euro, led by a permanent president for 5 years (elected by the other ministers and accountable to them). The economic policy enshrined by the Lisbon Treaty is based mainly on measures of voluntary coordination among the member states, with the result that the Lisbon Treaty centralised, with the euro, management of the single currency (through the supranational role of the ECB) and at the same time decentralised to the member states of the Eurozone all the (fiscal and budgetary) policies connected to the single currency (Fabbrini 2013). Both the Stability and Growth Pact (which covers all the member states) and the measures relating to the euro are decided by the ECOFIN Council (and therefore by the finance ministers of the Eurozone meeting in the Eurogroup), with a technical support role for the Commission, a very marginal controlling role for the EP, and limited judicial supervision by the ECJ.

With the deepening of the integration process there has been constant growth in the role of governments (through the European Council) (Bickerton *et al.* 2015). The European Council has gradually distanced itself from the Council, taking on a purely executive function, indicating through the Conclusions of its meetings the goal to be achieved and the agenda to be followed for the policy concerned (Carammia *et al.* 2016), leaving to the Council and the Commission the task of implementing its political decisions. Thus, the growth of the role of the European Council has led to a downsizing of the role of the Council, which was at the beginning of the integration process the intergovernmental institution *par excellence* (Hayes-Renshaw and Wallace 2006). Moreover, through the permanent president of the European Council, the Heads have provided continuity to their executive action. Continuity epitomized by the growing number of meetings held by the European Council during the post-2008 crises. If the Lisbon Treaty, TEU, Art. 15(3), envisages that it “meets twice every six months”, during those crises the European Council has ended up meeting on a quasi-monthly basis (between 2010 and 2016, on average 7 meetings each year, to which must be added the equally frequent meetings of the Heads of the countries of the Eurozone). During the financial or the migration or the security crises, the Commission was not the driving force of the integration process, even if it was clear that its technical skills were essential in order to translate the decisions taken by the European Council into operational measures.

**Inter-institutional relations between separation and confusion**

If it is possible to argue that the supranational constitutional model justifies a system of government marked by an (albeit contradictory) separation of powers among the four institutions which participate in the decision-making process, the intergovernmental constitutional model has come to be based on the centralisation of decision-making in the European Council and the Council of ministers in a context of a confusion of powers. The supranational EU has moved towards the system of inter-institutional checks and balances, structured around reciprocally separate institutions as in a federal union like the US (Fabbrini 2010), while the intergovernmental EU has operated instead in a context of a confusion of powers. The difference between the two decision-making models also concerns their way of taking decisions. In the supranational constitution, the Council and the EP vote (on the proposals submitted by the Commission) through majoritarian criteria (qualified majority in the former, absolute majority in the latter), with the European Council acting as solver of last resort. On the contrary, in the intergovernmental constitution, the European Council and the Council take decisions not only through unanimity’s criteria but also having mainly a political (not legal) character. As such, they are prevented from being legislatively approved by the EP and judicially reviewed by the ECJ. The European Council (and the Euro Summit) has *to inform* the EP on its decisions, but it does not need the EP’s approval of them. It is questionable whether we can consider as legitimate a decision taken by the European Council or the Council in the name of the whole EU and its citizens, when not only do the members of those institutions benefit solely from national legitimisation, but also because their decisions are bereft of checks and balances that only the EP can provide (Dawson 2015).

The intergovernmental constitution is an unprecedented celebration of a confusion of powers which would have left the French Baron of Montesquieu or the American James Madison bewildered. Consider the following aspects. The ECOFIN Council or the Eurogroup are legislative institutions which, nonetheless, have executive functions. This is true also for the (five-year) president of the Eurogroup, who at the same time carries out both legislative and executive functions. This confusion would not be resolved by the proposal to create a European minister of finance, holding the double-hat of president of the ECOFIN Council and vice-president of the Commission (Enderlein and Haas 2015; Schauble 2012). Such a minister would have a combined executive and legislative role, chairing the Council that should control her. It is the same with the HR, who is a vice-president of the Commission (an executive body) and at the same time president (for five years) of the FAC (a formation of the Council of ministers, a theoretically legislative body). At the same time, the Commission, although it is an executive body, is not institutionally linked to the European Council, which is an executive institution. The European Council’s works are prepared by the General Secretariat of the Council, an institution which is, in its turn, legislative. The Council (which is primarily a legislative institution) and the European Council (which is primarily an executive institution) continue to overlap in operational terms though the General Secretariat of the Council. The EP has no power to sanction the choices of the European Council, choices that are supposed to be checked by national parliaments (Neyer 2015). Moreover, in the case of decisions by the Euro Summit or Eurogroup, the EP cannot distinguish internally between representatives elected in countries of the Eurozone and representatives elected in countries which are not part of the Eurozone. Since the EP represents, with the Lisbon Treaty, the citizens of the EU, and no longer the citizens of the single member states of the EU as was the case with the Maastricht Treaty, this has inevitably complicated its internal differentiation.

The institutional confusion of the intergovernmental constitution has already generated dramatic implications at national level. The decision-making monopoly of the intergovernmental institutions has encouraged a process of centralisation which has ended up blurring (if not cancelling) the distinction between the national and the European levels. The blurring has made difficult, for the member states, to question the policy’s choices of the intergovernmental institutions of Brussels. Indeed, if the decisions in Brussels are taken by bodies consisting also of their prime minister or minister, then it is unthinkable that a national parliament (whose majority is expressed in that prime minister or minister) can call into question the decisions taken. The subsidiarity clause has been emptied. The national citizens negatively affected by the European Council’s decisions have thus been deprived of institutional channels to convey their dissent. Moreover, having no firewalls between the national and the European levels, the intergovernmental constitution makes it possible for a national cough to be transformed in a European Council bronchitis. One has only to think to what might happen if anti-EU leaders, winning national elections, come to constitute a majority within the European Council. That is why the crisis of the EU has ended up being of an institutional nature. Under the pressure of events, national governments, coordinating through and within the European Council and Council, have taken control of the decision-making process, seeking solutions regularly challenged owing to their ineffectiveness (because the unanimity’s criteria does not help in reaching decisions in difficult times) and illegitimacy (because each member of the European Council or the Euro Summit is responsible to their own national parliament, and yet the institutions deliver European and not national decisions). The intergovernmental system does not meet any of the democratic criteria ordering the functioning of either federal unions or federal states (Fabbrini 2017).

It seems clear that the EU has not found a solution to the clash between the two constitutions and their institutional logics. The supranational constitution has guaranteed a certain balance between the intergovernmental and supranational institutions, but in policies with limited political impact. For this reason, that constitution has not assigned a governmental role to the European Council, to recognise it instead with the function of being the ultimate arbiter for disagreements between states (a kind of collegial head of states or crisis solver of last resort). In its turn, the intergovernmental constitution, having assigned the decision on politically sensitive policies to the European Council, assumed to be controlled by national parliaments, has ended up not only in reducing the role of supranational institutions such as the Commission and the EP but also in obscuring the distinction between national and European politics. In sum, the intergovernmental constitution is based on a system of a confusion of powers which has proven barely effective and illegitimate.

**Federalism back in: fusion of powers**

The analytical description of the functioning of the executive power of the EU has raised two problems that deserve to be discussed. First, the coexistence of the supranational and intergovernmental constitutions has generated a regular contrast between them, opposing in particular the European Council and the Commission. Second, the confusion of powers between the executive and legislative functions, in the intergovernmental constitution, makes impossible to consider the latter a democratic system. Both problems would require a different institutional architecture for being solved. Indeed, a democratic union of states, exactly as democratic nation states, cannot sustain internal constitutional incongruences and confusion of powers. For finding a solution to these problems, the comparative federalism’s literature can offer important methodological clues.

Before identifying a new architecture for the EU’s executive power, it is necessary to come to terms with the governmental role acquired by national governments through the European Council in politically salient policy fields. If it is true that the difficulties in responding to the multiple crises have made it clear that the European Council (and this is also true for the Euro Summit) is unable to guarantee effectiveness and legitimacy to its action; it is also true that without the involvement of the Heads it would have been difficult to deal with those crises. At the same time, the Heads have had to acknowledge the necessary role of the Commission, whose expertise has been crucial for tackling most policy issues. If it is true that, during the multiple crises, the European Council and its president have taken on the role of the political body of the EU, leaving more strictly technical duties to the Commission, it is also true that facing crises with interstate distributive effects, that political role has weakened by internal divisions. The stalemate induced by those divisions has been thus overcome by unilateral initiatives of the governments of the larger and stronger member, imposing their agenda on the other governments states (as it was in the case of the deal with Turkey, in order to block the influx of Syrian refugees in northern Europe, promoted first by Germany and then recognized by the European Council on Spring 2016) (Fabbrini 2016b). More in general, one might argue that the dual executive is the result of a double systemic need, to express, with the president of the Commission, the preferences of the EP and, with the president of the European Council, those of the governments of the member states.

Although the European Council has come to play a political role, nevertheless that role has not met significant institutional constraints. If the European Council is the elephant in the executive power’s room, how should it be handled? For answering, it is preliminary to distinguish between federations by disaggregation (or *federal states*) and federations by aggregation (or *federal unions).* The former are based on a manageable (demographic) symmetry and (cultural) differentiation between their constituent units, whereas the latter have had to solve the puzzle of keeping on board of the federation highly asymmetrical and nationally differentiated constituent units. In the former case, it has been possible to solve the puzzle of the executive power parliamentarizing it. In the latter case, the asymmetry and differentiation between member states have prevented any centralization of governmental power in the only popular chamber of the legislature. Unaware of this basic distinction between federations, the standard answer to the question of democratizing executive power in the EU was and continues to be that of taking the elephant out of the room. Based on the parliamentary experience of federal states like Germany (or Belgium, Canada, Australia, but also Austria where the popular election of the president of the Republic does not affect the parliamentary character of the executive power), that answer implies that the presidencies of the European Council and of the Commission are merged into the latter, something which is not prohibited by the Lisbon Treaty, thus moving towards a unified presidency accountable primarily to the EP. This would require that the sole chamber representing the states would be the Council (of which the European Council would return to being a formation). The Council would play an important role in policies of concern to the member states, although it would be the EP to have the prerogative to vote up or down the Commission and its president. This parliamentary strategy is clear and familiar to European citizens. Indeed, in the European political tradition, democratization of executive power has consisted in bringing “the king into the parliament”. However, this strategy has political and structural flaws in dealing with the organization of executive power in a union of states. Politically, leaders of states with powerful national identities and consolidated configurations of power would find it hard to accept to be reduced to the status of minister-presidents or prime ministers of a German *Lander* or a Canadian province. Moreover, these leaders, through the institutionalization of the European Council’s executive role, have acquired a prominent power in the EU’s decision-making process. It seems difficult to rob an institution of a role once it has been routinized. Structurally, as indicated by the comparative federalism’s literature, unions of asymmetric (demographically) and differentiated (nationally) states cannot adopt parliamentary solutions for their decision-making system. The efficient secret of parliamentary government, to use the famous formula elaborated by the British scholar and journalist Walter Bagehot (1826-1877), consists in the fusion of powers between the parliamentary majority and its cabinet. Parliamentary government centralizes governmental power also in federations. It is the only *Bundestag* to have the power to give political confidence to the German Chancellor (or to withdraw it), it is the only House of Commons to have the power to give confidence to the Canadian prime minister (or to withdraw it). Federations by disaggregation can have parliamentary government because the asymmetry and the heterogeneity of their constituent units are politically manageable. Indeed, all the federations by disaggregation of the democratic world have adopted parliamentary system at the horizontal level. However, none of the two federations by aggregation (US and Switzerland) have adopted a parliamentary system of government but different forms of separation of powers. The EU is genetically similar to federations by aggregation than disaggregation, having structural problems to solve similar to the those of the former than the latter. To move towards democratisation of executive power in the EU, it is thus necessary to follow a post-parliamentary road. In particular, in the case of the EU, it is necessary to acknowledge, for the Heads, a role in the structuring of the decision-making process, but not so direct as currently happens in the intergovernmental EU. At the same time, it is necessary to acknowledge, for the Commission, a role in the elaboration and implementation of political decisions, given its nature of administrative body relatively independent rom national governments.

**Federalism back in: separation of powers**

The two federations by aggregation of the democratic world have solved differently the puzzle of their executive power, although in both federations the latter is separated from legislative power. Whereas separation means that the two (executive and legislative) powers are not connected by a relation of reciprocal political confidence. In fact, both the monocratic US president and the seven members Swiss Federal Council, although formed through different electoral procedures, do not depend on the confidence of the US Federal Congress or Swiss Federal Assembly for operating and staying in power. Considering this comparative context of separation of powers, it seems unlikely that the EU might move in direction of a collegial executive of the Swiss type, nominated by both the EP and the Council of Minister, but then institutionally independent from them. The ‘magic formula’ used in Switzerland for composing the collegial executive (the so called *directorial system* through which balancing territorial and partisan representation within it) seems to replicate of a much larger union of states as the EU. Here, in order to find a solution to the puzzle of executive power, two options may be considered, of course both based on the separation of executive from legislative power. A first option, similar to the US *presidential system,* involves the popular (not direct) election of the president of the Commission (in the sense of a *unitary executive power*), an election which might be integrated either by the transformation of the European Council into the higher formation of the Council or in its formalization as notary’s institution (a sort of collegial head of state of the Union). In the latter case, the European Council would continue to meet periodically (twice every six months, as envisaged by the Lisbon Treaty for the current European Council). A variant of this unitary model of executive power (as envisaged by the *Rome Manifesto* made public in occasion of the 60th anniversary of the Rome Treaties, <https://www.romemanifesto.eu/>) is the transformation of the European Council in a sort of Senate, a substitute of the Council of Ministers, a legislative institution checking and balancing, with the EP, the president of the Commission (i.e, the president of the Union).

A second option instead acknowledges the dual nature of the executive power of the EU, advancing towards the democratization of the role of president of the European Council without changing the structure of the relations between the president of the Commission and the EP (as envisioned by the strategy of the *spitzenkandidaten*). This result can be obtained by expanding the electoral base of the president of the European Council, thus politicising their role (Goldoni 2016), as well as strengthening the power of checks and balances of the bicameral legislature (and of the EP in particular). In this perspective, the president of the Commission could preserve their technical role as head of the EU administration and the executive would preserve its dual nature (*dual executive system*). The strategies to strengthen the decision-making authority of the president of the European Council can vary. Nonetheless, their objective should be clear: promote the president’s political independence from the Heads without excluding the latter from the electoral process aimed at choosing him/her (and, thus, from the deliberative process of the future dual executive). With the Lisbon Treaty, the president of the European Council is elected by a qualified majority of the members of the latter (and is then controlled by them, so much so that the president does not have voting power in that body). The alternative cannot be the direct election of the president, a strategy unable to reconcile the differences in member state populations as well as distinctions in member state national identities. Any direct election would lead to the permanent hegemony of the most populous states. However, it is necessary to give popular legitimacy to the president as the head of the dual executive.

In this case, the strategy to be followed could be that of the electoral college: the members of the European Council select two candidates for the role of president of the latter, on the basis of assessments which are both sectional and political (i.e. that take into consideration the geographical origin of the candidates and their political position). The two candidates are then subject to the vote of presidential electors organised in national electoral colleges. Each electoral college consists of a number of presidential electors equivalent to the number of seats in the EP held by that country. The means of electing the presidential electors must be established by the individual member states, although one might expect that the choice will be in favour of the popular election of the presidential electors running on behalf of one or the other candidate. Since the distribution of the seats in the EP takes into account the population of each individual member state, but with an over-representation of small and medium-size member states (due to the criterion of *degressive proportionality*), the compound nature of the EU is (in some way) respected, but above all the separation of powers between the executive and legislature is preserved (for the very reason that the EP and its members have no role in the electoral process, because the candidates are voted by presidential electors who will go back to their occupation after voting). The two candidates will undertake their electoral campaign by putting forward their program in the member states. Since there is no quorum set for votes in order to legitimate the election, the person elected as president of the European Council will be the candidate, between the two candidates put forward, who must of necessity obtain the absolute majority of the votes of the presidential electors of the various national electoral colleges (thus guaranteeing their political legitimacy). Because the colleges will be immediately dissolved after the election of the president, the president then must account to the bicameral legislature (as well as to the European Council), not to those who elected him or her.

The European Council would continue to meet periodically (twice every six months), convened by the president with the Commission’s president, for discussing on the strategies and proposals the dual executive aims to submit to the bicameral legislature*.* The European Council will be involved in the deliberation taking place within the dual executive, but its decision-making power will be highly curtailed. As shown by the experience of the other two federal unions, it is crucial to disconnect member state politics and supranational decision-making in order to prevent that a cough in a national capital becomes a bronchitis in Brussels. However, because the EU is based on much rooted and powerful states than those founding the US and Switzerland, it seems necessary to recognize a role to national governments, something it appeared unnecessary in the US and Switzerland. In this proposal, national governments play a role at the beginning of the political process constituting the head of the executive power (short-listening the two candidates for the role of the president of the European Council) and at the end of the decision-making process of the executive power (discussing its president’s strategies and proposals). In this latter stage, the European Council should not have veto power on the president’s proposals, or it could exercise that power only through the qualified majority of 2/3 of its members. In its turn, the Commission would act as the administrative structure of the executive, with the individual commissioners chosen by the president and approved by the legislature. At the end of the day, there will be a dual executive system, constituted by the two presidents, leaded by the one selected through the national electoral colleges, functionally supported by the Commission and politically advised by the European Council, accountable as such to the bicameral legislature.

**A federal union’s perspective on the dual executive**

In this context, it should be necessary to strengthen the operational link between the president of the European Council and the president of the Commission, as in a formal system of dual executive. It would fall to the Commission, and not to the General Secretariat of the Council of ministers, to support the works of the dual executive, to prepare the meeting of the European Council, to help the president of the latter and its own president to submit proposals to the legislature. The procedure to nominate the president of the Commission may formally remain the same, i.e. ending with the vote of the EP, although it would be responsibility of the president-elect of the European Council (more than of the latter) to indicate the person for the role of the Commission’s president. However, that relationship cannot take on the characteristics of a relation based on political confidence, as in semi-presidential governments. Rather the parliamentary vote must have the characteristics of ‘advise and consent’as happens in separation of powers systems of federal unions (approving the president and the individual commissioners and not the Commission as a whole)*.* In addition, some commissioners (such as those responsible for foreign and security policy or justice and home affairs policy or for economic and financial policy) might be confirmed by the Council and the others by the EP. The commissioners would not have the status of minsters, as in parliamentary system of governments, but rather the status of members of the dual executive, operating under the supervision of the two presidents, and responsible to the EU legislature for only EU-level policies.

The executive will therefore consist of two heads, with distinct legitimisations. The legitimisation of the president of the European Council will derive first from the national governments (which decide the short list of the two candidates in competition) and then from the national electoral colleges (which choose from the short list), while the legitimisation of the president of the Commission will derive from the EP. At the same time, the legitimisation of the commissioners who make up the operational structure of the dual executive must combine the wishes of the two presidents with the preferences of the bicameral legislature. Which of the two heads (president of the European Council or president of the Commission) of the dual executive will be predominant in specific policies will depend on the nature of the latter, as well as on their respective personalities. One might expect that president of the European Council will claim full control of the strategic policies, whereas the president of the Commission will have larger rooms of manoeuvring in the regulatory and highly technical policies of the single market. However, it will be the president of the European Council to represent the Union externally and internally, whereas the president of the Commission will behave as a sort of prime minister in charge of the administrative structure of the Commission. Citizens will have the possibility, with the, albeit indirect, election of the president of the European Council, to influence the choices of the supranational executive, exactly as they can influence those choices by taking part in the elections for the EP from which the support for the president of the European Commission will derive. The necessary competition between the two presidents can prevent centralising temptations even within the executive power.

Once the executive and its dual composition have been formalized, then it will fall to the Council and to the EP to exercise control over the proposals and the choices which it will put forward, control which will be all the more effective the more the two legislative chambers are not bound by a relation of political confidence with the dual executive. An effective executive requires adequate checks and balances by the legislature: by the EP on the policy choices relating mainly to the single market and by the Council on strategic policies for member states. For this reason, it is necessary for the Council to provide a stable and plenary structure (while today it is a transient body representing the sectorial ministers of the member states). Moreover, the bicameral legislature should be equipped with an autonomous budget (90 per cent of its resources continue to depend on transfers from the states) and with the power to put forward laws (the Commission has currently the monopoly of legislative initiative). The EU has indeed come to be characterised for having adopted (with the 1979 direct election of the EP) the principle of representation without taxation (Fabbrini 2016b), which is as undemocratic as its opposite (i.e. taxation without representation)*.* Thebicameral legislature must be able to have available instead an autonomous budget, limited but not bound by previous agreements between the states, deriving from taxation which is independent from national financial transfers. Without autonomous (even if limited) resources and the competence to use them according to democratic discretion, the EP (and for that matter, the Council) would have no political weight. The European commissioner of finance should manage, through the approval of the bicameral legislature, Union’s financial resources, not intruding in the management of national budgets. The politicisation of the president of the European Council would allow the Commission to maintain its technical and administrative character. The Commission would take on the characteristics of an administration of civil servants engaged in implementing decisions put forward by the dual executive and approved by the bicameral legislature. The dual executive could help to combine politics with administration, electoral consensus with policy competences.

**Conclusion**

The paper has shown thatthe process of integration has led to the structuring of a complex and contradictory decision-making system in the EU. With the extension of integration to politically salient policy areas for member states, governments have placed those areas in institutional contexts distinct from those which regulate the numerous policies linked to the single market. The Lisbon Treaty has institutionalised two basic and different decision-making regimes, on the one hand, for single market policies and, on the other, for CFSP, JHA and economic policy for the Eurozone, *inter alia*. In both regimes, executive power has a dual nature. However, the former decision-making system has evolved towards a sort of quasi-separation of powers institutional framework, with the Commission acting as the main governmental institution. On the contrary, the latter decision-making system has evolved towards a plain-confusion of powers institutional framework, with the European Council acting as the main governmental institution. Whereas in the supranational constitution, the Commission’s proposals are submitted to the bicameral legislature, in the intergovernmental constitution the political decisions of the European Council are not submitted to the control of the EP (the EP might be informed but it has not sanctioning power on those decisions)

This differentiated decision-making structure has generated a permanent tension between the two constitutional settings supporting it. For this reason, the paper has advanced a reform proposal, based on a comparative federalism’s approach, to deal with the incongruities of the EU governmental structure. In particular, following the experience of federal unions (i.e. federations by aggregation like the US and Switzerland), the paper has argued the necessity to find an original solution to the puzzle of the executive power in the context of separation of power system. After removing the distinction between the two constitutions and correspondent policy areas, the EU should adopt a governmental system (in all policy fields) based on acknowledgement of the political role of the European Council and the executive role of the Commission, thus strengthening the popular legitimation of the president of the former and confirming the parliamentary legitimation of the president of the latter institution, operating under the control of a bicameral legislature. What has emerged as dual executive by accident should be transformed into a dual executive in a separation of power system by design. In this executive’s architecture, the European Council should play a role in short-listening the two candidates for the presidential role, thus supervising (but not vetoing) the strategies pursued by the winning one. The direct connection between national and European politics should be severed, without however expulsing the Heads from participating to the strategic deliberation of the dual executive. At the same time, a dual executive should operate within an institutional architecture structured on a separation of powers between the executive (and its two heads) and the legislature (and its two chambers). The EU should reform in the direction of an original model of dual executive system, operating in a context of separation of powers where the executive proposes but the legislature disposes. Thus, from a comparative federalism’s perspective, the EU as a union of asymmetric and differentiated states cannot adopt a form of parliamentary government as done by federal states (or federations by disaggregation), because centralization of governmental power is incompatible with differences in population and identity between its member states. In order to keep on board asymmetrical and differentiated member states, decision-making power should be diffused, not concentrated. Separation of powers is the strategy for making this diffusion possible. At the same time, the exercise of decision-making power should not be exposed to member state national governments, nor should be subtracted to the checks and balances that guarantee its democratic exercise. Looking at the experience of federal unions (or federations by aggregation) might thus help to solve the puzzle of setting up an executive power for a union of states which aims to be democratically run.

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