JUDGMENT NO. 239 YEAR 2018

In this case, the Court heard a referral order from the Council of State questioning a provision that imposed a 4 percent qualifying threshold on lists standing within elections for the European Parliament, arguing that it impinged upon the principles of representative voting and equality in voting, notwithstanding the absence of any compelling general interest that could justify it. The Court restated its settled position that "the provision for qualifying thresholds along with the manner of their application […] are typical manifestations of the discretion of a legislator that wishes to avoid fragmented political representation, and to promote governability". The Court noted that the specific threshold clauses in question served the dual purpose of stability of government and the proper functioning of the parliamentary assembly. In view of these purposes, the Court held that the Italian legislator had not acted in breach of its discretion in setting the 4 percent threshold.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 21(1) no. 1-*bis* and no. 2, and of Article 22(1) of Law no. 18 of 24 January 1979 (Election of the members of the European Parliament allocated to Italy), as in force following the amendments introduced by Article 1 of Law no. 10 of 20 February 2009 (Amendments to Law no. 18 of 24 January 1979 concerning the election of the members of the European Parliament allocated to Italy), initiated by the Fifth Division of the Council of State within the proceedings pending between Giorgia Meloni and others and the National Central Electoral Office and others by the referral order of 23 August 2016, registered as no. 93 in the Register of Referral Orders 2017 and published in the *Official Journal* of the Republic no. 27, first special series 2017.

Considering the entries of appearance by Giorgia Meloni and others, Lorenzo Fontana, Nicola Caputo, the PD - Partito Democratico [Democratic Party] and others, the Alternativa Popolare [Popular Alternative], formerly the Nuovo Centrodestra [New Centre-Right] - NCD, and the intervention by the President of the Council of Ministers;

having heard the judge rapporteur Daria de Pretis at the public hearing of 23 October 2018;

having heard Counsel Federico Tedeschini and Counsel Elisabetta Rampelli for Giorgia Meloni and others, Counsel Felice Carlo Besostri for Marco Scurria and another, Counsel Luca Tozzi for Lorenzo Fontana, Enzo Perrettini for the Alternativa Popolare (formerly Nuovo Centrodestra - NCD), Counsel Antonio Lamberti for Nicola Caputo, Counsel Vincenzo Cerulli Irelli for the PD - Partito Democratico and others, and State Counsel [*Avvocato dello Stato*] Massimo Salvatorelli for the President of the Council of Ministers.

[omitted]

Conclusions on points of law

1.– The Fifth Division of the Council of State has raised questions concerning the constitutionality of Article 21(1), no. 1-*bis* and no. 2, and of Article 22 of Law no. 18 of 24 January 1979 (Election of the members of the European Parliament allocated to Italy), as in force following the amendments introduced by Article 1 of Law no. 10 of

20 February 2009 (Amendments to Law no. 18 of 24 January 1979 concerning the election of the members of the European Parliament allocated to Italy), due to the violation of Articles 1(2), 3 and 48(2) of the Constitution.

The first of the two contested articles provides, insofar as is of interest for these proceedings, that the National Electoral Office: "1-*bis*) shall identify the lists that have obtained, at national level, at least 4 percent of the valid votes cast; 2) shall distribute the seats amongst the lists falling under no. 1-*bis* in proportion with the electoral result of each list". Article 22 provides that "after receiving the notices provided for under the penultimate paragraph of the previous Article from the National Electoral Office, the district electoral office shall proclaim the candidates elected, up to the limit of the number of seats to which each list is entitled, following the ranking provided for under Article 20, no. 4".

The Council of State questions the imposition of a qualifying threshold of 4 percent, which has been set as a prerequisite for eligibility for the proportional distribution of seats within elections of members of the European Parliament allocated to Italy, and considers in particular that the contested provisions: a) limit "unreasonably and without justification the democratic control mechanism consisting in the attribution of full value to each vote", thereby violating Article 1(2) of the Constitution; b) regulate "in an unreasonable manner the various interests and values in play" without there being apparent "any adequate rationale to justify this in the pursuit of concomitant goals in the general interest" (thus violating Article 3 of the Constitution); c) result in "the substantial exclusion of broad sections of the electorate from political representation without this being justified – and in some sense "offset" – by the stated goal of thereby increasing the stability of the elected bodies, which govern with the confidence of Parliament", and thereby violate the principle of equality in voting (laid down by Article 48 of the Constitution).

2.– As a preliminary matter, this Court is required to examine the objections of inadmissibility raised by some of the private parties who have entered an appearance in the proceedings.

2.1.– In particular, Lorenzo Fontana (a candidate elected from the Lega Nord list), objects that the questions raised are inadmissible on various grounds.

2.1.1.– First and foremost, Mr Fontana considers that the questions are inadmissible "due to a violation of legislative discretion". In his words, "the determination of the electoral formulae and systems is an area in which the political nature of the legislative choice is expressed with the utmost clarity"; consequently, "it may only be challenged within constitutionality proceedings if it is manifestly unreasonable". In this case, it is asserted that the principle of reasonableness has not been violated; in addition, no "constitutionally informed solution" is available, as the Court cannot act in place of the legislator by making a substantially "additive" ruling, such as that requested – again according to counsel for the private party – by the referring court.

The objection is unfounded.

This Court has repeatedly asserted that the legislator enjoys broad discretion in the choice of the electoral system, provided that the exercise of that discretion does not result in the adoption of manifestly unreasonable legislation (*ex plurimis*, Judgments no. 35 of 2017, no. 193 of 2015, no. 275 and no. 1 of 2014, no. 271 of 2010, Order no. 260 of 2002). The identification of the electoral system that is considered to be most suitable within the relevant historical and political context is not, therefore, entirely exempt from

constitutional review, and the choice may indeed be challenged where it is manifestly unreasonable. This Court is therefore required to satisfy itself that "the balance between constitutionally significant interests has not been struck in such a manner as to cause one of these interests to be sacrificed or impaired to an excessive degree, such as to render it incompatible with the requirements of the Constitution" (Judgment no. 1 of 2014).

This means that the questions raised by the Council of State are admissible, having charged this Court with the task of ascertaining whether the choice made by the Italian legislator is flawed on the grounds that it is manifestly unreasonable, a task that does not in any way undermine the discretion of the legislator over electoral matters. It must also be observed that, in contrast to the assertions made by the party, the referring court does not seek a ruling that is "substantively additive" or that replaces the currently applicable threshold clause with an alternative that is considered to be reasonable, but limits itself to asserting the contrast between the contested legislation and the provisions of the Constitution mentioned above. The objection under examination must therefore be rejected.

2.1.2.– Should it be considered that the referring court intended to request a ruling with merely repealing effect, the same party argues that the questions raised would be inadmissible for a further reason, specifically due to what is considered to be an "evident contradiction" within the actions of the referring court, which has challenged only the provision of national law imposing the 4 percent threshold clause (Law no. 18 of 1979) and not also the supranational proviso contained in the Brussels Act (annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976 concerning the election of the representatives of the European Parliament by direct universal suffrage), implemented by Law no. 150 of 6 April 1977 (Approval and implementation of the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, signed in Brussels on 20 September 1976, annexed to the Decision of the Council of the European Communities adopted in Brussels on the same day) which, according to counsel, allows for the imposition of a threshold clause of up to 5 percent.

This objection is also unfounded.

It must be considered, in fact, that the qualifying threshold for the election of members of the European Parliament was introduced into the Italian legal system by Law no. 10 of 2009 and not by Law no. 150 of 1977, which implemented the Brussels Act. The original text of this Act did not in fact provide for any threshold, which was by contrast governed by Council Decision 2002/772/EC, Euratom of 25 June 2002 and of 23 September 2002 amending the Brussels Act. More specifically, Decision 2002/772/EC/Euratom replaced the original Article 2 of the 1976 Act with Articles 2, 2-*bis* and 2-*ter*. Moreover, it is Article 2-*bis* which provides that "[m]ember States may set a minimum threshold for the allocation of seats" and that "[a]t national level this threshold may not exceed 5 per cent of votes cast".

Decision 2002/772/EC, Euratom thus allowed the Member States to introduce a threshold clause, setting its maximum level; the Italian legislator, in turn, decided to avail itself of this possibility by amending Law no. 18 of 1979 and providing, by Law no. 10 of 2009, for a threshold of 4 percent of the valid votes cast. The Council of State is thus correct in challenging the provisions of Law no. 18 of 1979, as amended by Law no. 10 of 2009.

2.2.– Further objections to admissibility were raised by Nicola Caputo (a candidate elected in the "PD - Partito Democratico" list).

2.2.1.– As a preliminary matter, it is asserted that the questions do not have interlocutory status, as already asserted within proceedings before the referring court.

The objection is unfounded.

According to the settled case law of this Court, questions raised within proceedings initiated against administrative acts are admissible, even if they are only challenged on the grounds that the law applied is unconstitutional (*ex multis*, Order no. 361 of 2004 concerning precisely a case in which the annulment of acts carried out in relation to elections was requested; Judgments no. 89 of 2018, no. 16 of 2017 and no. 242 of 2011, Order no. 138 of 2017). Within these proceedings, any decision to accept the questions would not be capable of "providing the full relief sought", as the administrative court would in any case then have to annul – in this specific case, in relation to this aspect – the proclamation of the candidates elected and to allocate to the "Fratelli d'Italia – AN" list (along with any other lists excluded from the allocation) the seats that would have fallen to it had there been no qualifying threshold.

2.2.2.– For the reasons set out above, the further objection raised by Mr Caputo concerning the lack of interest of the claimants in the proceedings before the lower body are also unfounded. The party refers in this regard to Judgment no. 1 of 2014 of this Court, according to which the annulment of an electoral law does not impinge upon any elections that have already been held, which matter becomes final with the proclamation of the candidates elected. However, in these proceedings, since the questions of constitutionality have been raised following a challenge to the proclamation itself before the administrative courts, the elections have not thereby become final, with the result that the potential annulment of the electoral law will have an impact on the outcome to the administrative proceedings. The possibility of the elections being partially annulled also renders irrelevant the further arguments made by Caputo (section 3.2 of *The facts of the case*).

2.2.3.– As regards the objection, which was formulated within the administrative proceedings at first instance and has been reiterated within the proceedings before this Court, that the action is inadmissible due to the failure to challenge the calling of European elections along with the acceptance of the lists, it is manifestly unfounded. In fact, according to the arguments made by the claimants at first instance, they did not suffer any detriment from the above-mentioned calling of elections and the acceptance of lists, and it must hence be excluded that they were under any duty to challenge such acts, a duty such as to preclude the possibility of challenging the proclamation of elected candidates due to flaws inherent within the proclamation itself – a challenge that was later actually made – on the grounds that, on the basis of the contested legislation, no seat had been allocated to the claimants' list.

2.3.– Finally, in its written statement filed shortly before the hearing (but not in its entry of appearance, in which it by contrast asks that the questions be accepted), Alternativa Popolare (formerly Nuovo Centro Destra - NCD) objects that the questions are inadmissible on the grounds that they lack interlocutory status, substantially reiterating the same arguments that were made regarding that issue within the proceedings ruled on by Judgment no. 110 of 2015.

The objection is unfounded for the reasons set out above in section 2.2.1 regarding the similar arguments made by Nicola Caputo. It must be added to the statements made by counsel for Alternativa Popolare that the questions at issue in these proceedings were

not raised within proceedings seeking the issue of a declaratory ruling, but rather within litigation arising following the challenge by Giorgia Meloni and other persons of the proclamation of the elected candidates. Consequently, the question does not lack interlocutory status.

3.– Again as a preliminary matter, it must be noted that Giorgia Meloni and other persons have raised further questions of constitutionality within their submissions, which differ from those raised by the Council of State.

These questions are inadmissible as private parties cannot extend the *thema decidendum* established in the referral order (*ex multis*, Judgments no. 161, no. 33, no. 14, no. 12 and no. 4 of 2018; Order no. 96 of 2018).

4.– In the written statement filed on 28 September 2018, the appellants within proceedings before the lower court Marco Marsilio and Marco Scurria asked this Court – in the event that "the reasons stated in the referral order should, contrary to all reasonable expectations, not be convincing" – to make a reference for a preliminary ruling to the Court of Justice of the European Union in order to verify the compatibility with the treaties of "optional, variable and national qualifying thresholds" not provided for as part of a uniform procedure under Article 223 of the Treaty on the Functioning of the European Union (TFEU), as amended by Article 2 of the Treaty of Lisbon of 13 December 2007 and ratified by Law no. 130 of 2 August 2008. The parties rely on Articles 10 and 14 of the Treaty on European Union (TEU), signed in Maastricht on 7 February 1992, entered into force on 1 November 1993, which purportedly vests the European Parliament with a "new nature" (of representative of the citizens of the Union and no longer of the peoples of the Member States).

The request must be rejected.

It was alleged, before the referring court, that there was a contrast between the European electoral measure and the provisions of the treaties. However, having found that the contested Italian legislative provisions were consistent with the European electoral measure, the Council of State "deferred until the merits stage an examination of the arguments by which the appellants question the compatibility of the 'Brussels Act' with the subsequently established principles and provisions set forth in the Treaty of Lisbon", and raised questions concerning the constitutionality of Article 21(1) no. 1-*bis* and no. 2 along with Article 22 of Law no. 18 of 1979 with exclusive reference to Articles 1, 3 and 48 of the Constitution, without therefore making any reference to the provisions of European Union treaties.

For this reason, the question concerning the compatibility with the treaties of thresholds that are "optional, variable and national" need not be answered before ruling on the question of constitutionality which this Court has been called upon to consider. This is moreover asserted by the private parties themselves, where they seek a preliminary reference to the Court of Justice of the European Union only in the event that "the reasons stated in the referral order should, contrary to all reasonable expectations, not be convincing", thus placing the 'European' aspect in a subordinate, and not preliminary, position vis-à-vis the question of constitutionality.

It must in any case be recalled that this Court has already asserted, in Judgment no. 110 of 2015, in relation to the same question concerning the consistency of the European electoral measure with the treaties, that "[n]o preliminary question need be put to the Court of Justice, as there are no doubts of any type as to the precise meaning of the provision of European Union law invoked, and moreover as that provision does not in any way supplement the constitutional provision, as is by contrast required within

the case law of this Court for the purpose of establishing such a relationship of preliminary status (Orders no. 207 of 2013 and no. 103 of 2008)".

5.– Before examining the merits of the questions raised, it is necessary to supplement the account of the legislative framework, offered in summary form in section 2.1.2, by noting that, whilst these proceedings were pending, Council Decision 2018/994/EU, Euratom, of 13 July 2018 amending the Act concerning the election of the members of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976, was adopted on the basis of Article 223 TFEU.

The new decision establishes an obligation for the larger Member States to provide for a qualifying threshold within the law governing European elections (of between 2 and 5 percent). In particular, Article 3 of the Brussels Act, as amended by the Decision 2018/994, provides as follows: "1. Member States may set a minimum threshold for the allocation of seats. At national level, this threshold may not exceed 5 per cent of valid votes cast. 2. Member States in which the list system is used shall set a minimum threshold for the allocation of seats for constituencies which comprise more than 35 seats. This threshold shall not be lower than 2 per cent, and shall not exceed 5 per cent, of the valid votes cast in the constituency concerned, including a single-constituency Member State. 3. Member States shall take the measures necessary to comply with the obligation set out in paragraph 2 no later than in time for the elections to the European Parliament which follow the first ones taking place after the entry into force of Council Decision (EU, Euratom) 2018/994".

That decision is "subject to approval by the Member States in accordance with their respective constitutional requirements" (Article 2(1)), which approval has not yet been granted, and after completion of the procedures necessary for that purpose, notice must be given by the Member States to the General Secretariat of the Council.

5.1.– On the assumption that, whilst it has not yet entered into force, Decision 2018/994/EU, Euratom will not be without influence on the matter under examination – due to its legislative nature, the fact that it establishes an obligation and the consequences that it would have for any ruling accepting the question of constitutionality before this Court, in terms of limiting its temporal effect – State Counsel has asked the Court to consider whether it would be appropriate to remit the case file to the referring court "for a re-examination of the issue of relevance".

The request cannot be accepted due to reasons stated in part by State Counsel himself.

First and foremost, as noted above, Decision 2018/994/EU, Euratom has not yet been approved by the Member States and, by the express provision of Article 2(2), will only enter into force "on the first day after the last notification". Secondly, the questions raised within these proceedings concern the legislation in force prior to the adoption of Decision 2018/994/EU, Euratom, which means that, were they to be accepted, a consequence could be the partial annulment of the proclamation of the candidates elected in 2014 (which has been challenged by the claimants within the proceedings at first instance before the Lazio Regional Administrative Court). Since, therefore, the Decision cited is not relevant within the proceedings before the referring court, there is, in any case, no reason to remit the case file to the referring court.

6.– On the merits, the questions raised by the Council of State are unfounded.

6.1.– The challenges brought may be examined together. Whilst invoking three separate provisions of the Constitution (Articles 1, 3 and 48 of the Constitution), the

referring court in fact essentially objects that the contested legislation is unreasonable, on various grounds. More specifically, the violation of Article 1(2) of the Constitution is claimed to result from the unreasonable and unjustified limitation of the "democratic control mechanism consisting in the attribution of full value to each vote"; Article 3 of the Constitution is claimed to have been violated in view of the "unreasonable" provision enacted to regulate the various "interest and values" at issue; finally, Article 48 of the Constitution is alleged to have been violated by the unjustified exclusion from "political representation of broad sections of the electorate".

The challenge thus concerns the balance struck between the countervailing "interests and values", which serves as a basis for the provision for a threshold clause for eligibility for the allocation of seats, and this Court is required in particular to assess whether the contested provisions give rise to an excessive and intolerable impairment of the principle of representative voting and equality in voting.

6.2.– Such an examination must be carried out after having previously identified the nature and function of threshold clauses or qualifying thresholds. These expressions refer to the stipulation of a minimum percentage of votes that a list or coalition of lists must obtain in order to be eligible for the allocation of seats; accordingly, any list or coalition of lists that does not reach the threshold will not be entitled to any seats (unless provision is made for a form of top-up seats, which operates in favour of such lists or coalitions). Provision is usually made for these thresholds within proportional electoral systems or in mixed systems, which allocate a certain number of seats on a proportional basis, thereby establishing a rule that supplements the proportional system.

This generic definition of the mechanism embraces a broad range of possible variations and combinations, which makes it a complex matter to ascertain the scope and effects of the different types of threshold. Moreover, any assessment of a threshold clause and of its effects on the specific operation of the electoral system must take account of the need to contextualise the analysis with reference to the relevant political party, historical and social circumstances and, in particular, to the territory within which that electoral system is applied.

Along with the political party context, the historical and cultural environment within which a given electoral system operates also conditions the assessment of that system and of its threshold mechanisms. From this viewpoint, it is clear that the evolution of electoral systems is closely related to the historical development in the nature of parliamentary assemblies, thereby raising the problem of moving beyond the perspective of a mere "proportional registration of the socio-political plurality" in order to put in place mechanisms that are capable of ensuring effective and efficient decision-making processes. These developments have given rise to the need mentioned above – which has acted as an inspiration to introduce mechanisms to rationalise the composition of assemblies, including the provision for minimum thresholds for eligibility for the allocation of seats – to reconsider mechanisms for political representation, which is not merely a simple "mirror" of the relevant society.

These considerations must be taken into account when assessing threshold clauses which, it is important to remember, may come in various forms, and in particular may be either explicit or implicit. In essence, in fact, the exclusionary effect which is specifically embodied by the mechanism under review by this Court (namely, the exclusion from the allocation of seats, of any list that does not reach the threshold) may arise also where there is no explicit threshold clause or qualifying threshold, and may by contrast result from the particular manner of operation of the electoral system, or more

simply from the number of seats to be allocated or the size of constituencies. For example, it is clear that a very low number of seats will result in a exclusionary effect that is potentially much more significant than a qualifying threshold, including even a relatively high threshold. Similarly, the size of constituencies may have exclusionary effects because, if the size is very small – and hence the number of candidates elected for each constituency is lower – this will result in a strong threshold effect for the evident reason that even a significant percentage of votes may not be sufficient in order to be eligible for the allocation of seats where the constituency is very small.

6.3.– Subject to these riders, it is now possible to examine the mode of operation of explicit qualifying thresholds, such as that under examination, where the need to represent the "totality" of voters is sacrificed in the name of other "interests and values" (according to the formula used by the referring court), which are also deemed to merit protection. These "interests and values" must be considered to consist, essentially, in the need to ensure governability and to avoid the fragmentation of political parties, which could impair or paralyse decision-making processes within the parliamentary assembly. The two needs are not overlapping, relating, rather, to different aspects of the functioning of a parliament: one concerns the relationship between the parliament and the government, and is aimed at ensuring fruitful interaction between these two bodies; the other seeks to ensure that the decision-making mechanisms of the parliamentary assembly are efficient, regardless of the relations with the executive, or at least affording reduced priority to them.

The requirements described above have been considered by this Court on various occasions, where it has asserted that "[t]he provision for qualifying thresholds along with the manner of their application […] are typical manifestations of the discretion of a legislator that wishes to avoid fragmented political representation, and to promote governability" (Judgment no. 193 of 2015). Recently, within proceedings concerning the constitutionality of the provision of the electoral law for the Chamber of Deputies setting a minimum threshold for the operation of the majority bonus, that threshold was considered in itself not to be manifestly unreasonable as it "is intended to balance the constitutional principles mandating the representative nature of the Chamber of Deputies and the equality of votes, on the one hand, with the objectives (themselves of Constitutional import) of the stability of the government of the Nation and the efficiency of the decision-making process, on the other." (Judgment no. 35 of 2017).

Within the same context, the consideration of these requirements has also led this Court to reject the view that "the juxtaposition of bonus and threshold, in the specific entity and forms concretely fixed by the electoral law" could in itself justify "a pronouncement that the bonus is unconstitutional"; in fact, whilst "any minimum threshold entails an artificial alteration of the representativeness of an elected body, which could, in the abstract aggravate the distortion brought about by the bonus", "it is not manifestly unreasonable that the legislator, in consideration of the political/party-based system that it intends to regulate with electoral rules, should resort contemporaneously, in its discretion, to both these mechanisms". It also led it to acknowledge that "if the bonus has the goal of assuring the existence of a majority, a reasonable minimum threshold may, in turn, contribute to the goal of not preventing its formation", as it is moreover important not to overlook the fact "that the threshold may favor the development of an opposition of parties that is not overly fragmented, thus allaying, rather than aggravating, the imbalances brought about by the stipulation of the majority bonus" (Judgment no. 35 of 2017).

6.4.– Turning from threshold clauses considered in general terms to the specific threshold stipulated for elections of Italian members of the European Parliament, it must be pointed out in the first place that the referring court argues that the questions submitted to this Court for review are not manifestly unfounded, by pointing out that the requirement of governability does not arise for the European Parliament, as there is no relationship of confidence between it and the Commission.

It may be noted that the German Constitutional Court ruled unconstitutional first (by a judgment of 9 November 2011) the provision for a 5 percent threshold clause for European elections, and subsequently (by a judgment of 26 February 2014) the provision for a 3 percent threshold clause, with reference to this same argument. However, it must also be recalled that, based on a consideration of the role and functions of the European Parliament that was similar to that adopted by the German Constitutional Court, the Constitutional Court of the Czech Republic arrived at the opposite conclusion and held that the provision for a 5 percent threshold clause was not unconstitutional (judgment of 19 May 2015, Pl. ÚS 14/14).

This is an argument that appears first and foremost not to be decisive: taking account of the two distinct requirements which, as mentioned above, provide the inspiration for the introduction of threshold mechanisms, namely stability of government and the proper functioning of the parliamentary assembly, the referring court limited itself to considering one only, specifically the former, finding it not to be relevant, whilst it did not in any way examine the latter.

In fact, it is difficult to refute the significance of the latter: there is a need for efficient decision-making processes also within the European Parliament, which the provision for a qualifying threshold undeniably furthers, in reducing political-party fragmentation within the Parliament.

This is a need that is no less worthy of protection than the former, as the proper functioning of the parliamentary assembly is a value of primary significance in itself, in consideration of the decision-making functions of the assembly itself, along with the risks associated with any paralysis of its activity resulting from the fact that it is impossible or excessively difficult to form the necessary majorities.

Thus, from this first point of view alone, it is not possible to consider the provision for a qualifying threshold to be unreasonable, as it by contrast appears to further the objective of rationalising the organisation of the assembly, and such an objective arises for the European Parliament no differently than it arises for national parliaments. The consequences of the failure to provide for a qualifying threshold do not in fact consist merely in a generic difficulty within decision making, but also result in the real impairment of the proper operation of the representative body.

6.5.– Alongside the above considerations on the need for the efficient internal operation of the assembly, with a view to improving its decision-making processes, it is nonetheless also necessary to mention the undoubted transformation of the form of government of the European Union towards parliamentary government, which has started to occur in recent years also due to the changes introduced by the Treaty of Lisbon, signed on 13 December 2007 and entered into force on 1 January 2009. Significant indications of this tendency without doubt include the enhancement of the legislative, budgetary, political control and consultative function of the European Parliament (Article 14(1) TEU and Articles 289 and 294 TFEU), including in particular its power to elect the President of the Commission and the ability to approve a motion of censure against the Commission (Article 17(8) TEU).

Within this enhanced dialectical relationship between the European Parliament and the Commission, which gives rise to the need to promote the formation of a political majority within the assembly, the threshold clause pursues the specific and self-standing function of avoiding a scenario under which the excessive fragmentation of the parties represented within it rendered the formation of a majority particularly complex, thereby jeopardising the interest in the stability of the political organ of government.

In conclusion, the provision for a mechanism for selecting the lists eligible for the allocation of seats with reference to the percentage of votes obtained meets with real requirements, which merit protection, relating to the proper operation of the European Parliament, both in terms of its relations with the Commission as well as in the conduct of its business more generally. It must therefore be concluded that the choice made by the Italian legislator cannot be deemed to have exceeded the limits of the discretion vested in it in the area of electoral law (*ex plurimis*, Judgments no. 35 of 2017, no. 193 of 2015, no. 275 and no. 1 of 2014), all the more taking account of the highly political nature of choices in this area.

6.6.– The Council of State argues that the provision for a qualifying threshold is also unreasonable in consideration of the existence of different regulations and non-homogeneous thresholds in the various Member States. In other words, the referring court observes that, even if the sacrifice of full representativeness were considered to be tolerable in view of the objective of reducing political fragmentation, it would not be justified in this case, in which the lack of homogeneity between national legal systems in this area is claimed to thwart the "effort" made by the Italian legislator.

The argument cannot be endorsed. Whilst it may be the case that the result of rationalising the presence of political forces within the European Parliament could only be fully achieved through the enactment of uniform legislation to govern electoral mechanisms – and this is the objective which the Union has set itself the target of meeting in accordance with Article 223 TFEU, as implemented most recently by the abovementioned Council Decision 2018/994/EU, Euratom of 13 July 2018 – it is equally the case that this result is to be achieved progressively, in stages which necessarily involve the adoption by the individual Member States of legislation aimed at achieving it, and that within this perspective the Italian legislation introducing the qualifying threshold – along with that of each other country that provides for a threshold – constitutes a necessary (although not sufficient) condition for pursuing the objective.

Within this perspective, the choice made by the national legislator is not, considered in itself, unreasonable. It is also not unreasonable if it is considered that a similar choice has already been made by other Member States of the Union, numbering specifically 14, which also include larger countries such as France and Poland. It is evident that this fact contributes to reducing significantly the risk, raised by the referring court, that isolated legislation could be thwarted in terms of its effects by different choices made by other States. Finally, the consideration that the objective of arriving at increasingly uniform legislation in this area continues to be pursued by the European institutions, which, as noted above, have recently confirmed the provision for a threshold, and have in fact imposed such an obligation on Member States in which list-based voting is used, although in relation only to electoral constituencies made up of more than 35 seats (Decision 2018/994/EU, Euratom), is decisive in excluding the irrationality alleged.

Against the backdrop set out, it would thus be contradictory, and from this viewpoint indeed unreasonable, to hold that the provision for a qualifying threshold was

unconstitutional solely on the grounds that it might not, on its own, be sufficient in order to give full effect to the objective pursued, absent provisions of the same type within the legal systems of all Member States.

Ultimately, it must be concluded that the fact of having introduced a qualifying threshold without uniform legislation throughout all Member States does not in itself render unconstitutional a provision which, in providing for such a threshold, partially sacrifices the principle of representation in order to pursue two objectives that are worthy of protection.

6.7.– Finally, it is necessary to take account of the further reason why the contested legislation is supposedly unreasonable, which is inferred by the referring court from a comparison between the electoral outcomes brought about by provisions that require the allocation of a minimum number of seats to Member States with smaller populations and the outcomes of provisions that exclude the allocation of seats to lists that have not reached the threshold in Italy.

This is, in actual fact, a comparison that lacks any significance, due to the evident lack of comparability between the situations taken into consideration, along with the different rationales underlying the legislative choices – which in fact in both cases depart from the ordinary rules of proportional representation – relating to them. The reservation of a minimum number of seats for Member States with smaller populations is intended to ensure that all Member States – and thus including the smallest – can have a minimum level of representation and avoid such an outcome from being precluded as a consequence of the application of the ordinary rules of the proportional electoral system. In fact, the amendment introduced by the Treaty of Lisbon, which provides that "[t]he European Parliament shall be composed of representatives of the Union's citizens" (Article 14(2) TEU), and no longer of "representatives of the peoples of the States brought together in the Community", has not negated the national dimension to representation, and it is according to this logic that the recognition of a minimum number of seats (six) also to the Member States with smaller populations (Malta, Luxembourg, Cyprus and Estonia) can be explained.

By contrast, as noted above, the provision for qualifying thresholds are focused on entirely different purposes, namely of guaranteeing efficient relations with the Commission as well as the proper functioning of the assembly. These provisions share, with those that reserve seats to the smaller States, the common feature consisting exclusively in the fact that they both impinge upon the principle of proportional representation: however, in this latter case, the sacrifice involves an enhancement of representation, for the populations of those countries, whilst in the other case it involves the opposite dynamic of "reduced" representation, which is excluded for political groupings that fail to reach particular thresholds. Due to the different rationale inspiring the two systems, the reasonableness of each of them must assessed independently, and it makes no sense to attempt to infer that one of them is supposedly unreasonable by comparing outcomes produced under it with those produced under the other.

The questions raised are thus unfounded also in relation to this aspect.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

rules unfounded the questions concerning the constitutionality of Article 21(1) no. 1-*bis* and no. 2, and of Article 22 of Law no. 18 of 24 January 1979 (Election of the members of the European Parliament allocated to Italy), as in force following the amendments introduced by Article 1 of Law no. 10 of 20 February 2009 (Amendments

to Law no. 18 of 24 January 1979 concerning the election of the members of the European Parliament allocated to Italy), raised by the Fifth Division of the Council of State with reference to Articles 1(2), 3 and 48(2) of the Constitution by the referral order mentioned in the headnote.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 25 October 2018.