ISSN 2384-9169
Fascicolo n. 2 - 2020
rivista.eurojus.it

The remote voting between *force majeure* and procedural guarantees: EP's leading initiative and other national examples. What changes and what remains

DI ANDREA CIRCOLO*

Table of contents: I. Introduction: European Parliament's first time on distance voting. – II. The analysis of the legitimacy of the decision. – II.1. Formal and substantive limits. – II.2. Technical arrangements. – III. The role of the Court of Justice. – IV. Comparative approaches. – V. Active electorate and *internet-voting*. – VI. Conclusion.

I. Introduction: European Parliament's first time on distance voting

The explosion of the COVID-19 pandemic has put the European Union before the greatest health emergency, and perhaps the greatest challenge, since its creation[1]. . The large spread of the virus in all EU Member States has required extraordinary preventive and containment measures to be taken by both national and European institutions. As part of the EU's joint response, the European Parliament has decided to launch the first historic *virtual* plenary

* PhD Student in European Union Law – University of Naples 'Parthenope'. The author would like to thank Alessandro Di Martino, Nicola Maria Maiello and Luigi Montefusco for their valuable suggestions.

[1] «The coronavirus crisis, or COVID-19 outbreak, has affected the Member States in a sudden and dramatic manner, with a major potential impact on their societies and their economies. […] This has created an exceptional situation which needs to be addressed with specific measures to support and protect Member States' economies, companies and workers. […] This is a matter for the whole EU that necessitates that all available resources, at EU and Member States level, are mobilised to overcome the unprecedented challenges related to the COVID-19 outbreak»: Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1303/2013, Regulation (EU) No 1301/2013 and Regulation (EU) No 508/2014 as regards specific measures to mobilise investments in the health care systems of the Member States and in other sectors of their economies in response to the COVID-19 outbreak [Coronavirus Response Investment Initiative], 2020/0043 (COD), in *ec.europa.eu*, 13.03.2020.

session[2]. On March 26th, 2020, MEPs took part in the parliamentary proceedings through remote discussion and voting[3], thus avoiding a dangerous gathering of people in the Brussels Hemicycle[4].

As expected, the decision raised some doubts both with regard to its compatibility, with the existing norms - formally and on the merits - and with regard to the technical modalities of the expression of the consent.

It is true, in fact, that the decision falls within the expression of the parliamentary *autodichia*, since it intervenes on a previous act of self-regulation, namely the Rules of Procedure of the European Parliament (henceforth also "Rules of Procedure")[5].

It is also true, however, that the relevance of the act, also confirmed by the particular and reinforced majority necessary to approve it and to amend it[6], leads to the view that the Rules of Procedure cannot be regarded as a simple act of soft law. More precisely, the Rules of Procedure fall into the category of atypical acts *lato sensu*, which means that the normative effect - and the possibility to initiate proceedings against them - must be assessed in practice, *i.e*. with regard to the application of the individual provisions. Normally, the rules of procedure have effects limited to the internal functioning of the institutions. Nevertheless, it is possible that an act may be annulled for infringement of the rules of procedure of the institution which have adopted them[7]. As is well known, in fact, the Court considers that all acts implemented by EU institutions which have binding effects on the addressees may be challenged, regardless of the *nomen iuris* attributed to the act (so-called "substantive approach").

---

[2] See the Statement by President David Maria Sassoli on European Parliament's response to COVID-19 crisis, in *europarl.europa.eu*, 19.03.2020. On the difference between supervised and not supervised remote voting, F. CLEMENTI, *Proteggere la democrazia rappresentativa tramite il voto elettronico: problemi, esperienze e prospettive (anche nel tempo del coronavirus). Una prima introduzione*, in *federalismi.it*, No. 6, 2020, p. 216.

[3] 687 of the 705 MEPs have attended the plenary session remotely. Instead, there were physically present in the Chamber: President Sassoli, the President and the Vicepresident of the European Commission, Ursula von der Leyen e Maroš Šefčovič, and the parliamentary representations (Esteban Gonzáles Pons for EPP; Javier Moreno Sánchez for S&D; Dominique Riquet for Renew; Nicolas Bay for ID; Ska Keller for Verdi/ALE; Derk Jan Eppink for ECR; Manon Aubry for GUE/NGL).

[4] The first case of coronavirus-positive between MEP's was confirmed on March 20th, 2020: it is the Polish Adam Jarubas, a member of the European People's Party (EPP).

[5] The legal basis for the EP's Rules of Procedure is Article 232 TFEU. For the full text, see the version of the 9th parliamentary term (2019-2024), in *europarl.europa.eu*, 02.07.2019. For an in-depth commentary, G. CARELLA, I. INGRAVALLO, *Art. 232 TFUE*, in A. TIZZANO (a cura di), *Trattati dell'Unione europea*, II ed., Milan, 2014 p. 1883 et seq.

[6] The majority of the component Members of the Parliament. Cf. art. 232 TFEU and Rule 237(2) PRP.

[7] In this sense, G. TESAURO, *Manuale di diritto dell'Unione europea*, P. DE PASQUALE, F. FERRARO (a cura di), II ed., Naples, 2020, p. 192. Cf. also C. CURTI GIALDINO, *I vizi dell'atto nel giudizio davanti alla Corte di giustizia dell'Unione Europea*, Milan 2008, p. 147. In the Court's case-law, ECJ, 23 March 1993, Case C-314/91, *Weber v Parliament*, ECLI:EU:C:1993:109, ECR 1993, paras 9 and 10: «[…] measures which relate only to the internal organization of the work of the Parliament cannot be challenged in an action for annulment. That class of measures includes measures of the Parliament which either do not have legal effects or have legal effects only within the Parliament as regards the organization of its work and are subject to review procedures laid down in its Rules of Procedure». Cf. also ECJ, 4 June 1986, Case 78/85, *Group of the European Right v Parliament*, ECLI:EU:C:1986:227, ECR 1986, para 11; 22 May 1990, Case C-68/90, *Blot and Front National v Parliament*, ECLI:EU:C:1990:222, ECR 1990, para 12; 7 May 1991, Case C-69/89, *Nakajima v Council*, ECLI:EU:C:1991:186, ECR 1991, paras 49 and 50; 15 June 1994, Case C-137/92 P, *Commission v BASF and Others*, ECLI:EU:C:1994:247, ECR 1994, paras 75 and 76; 30 April 1996, Case C-58/94, *Netherlands v Council*, ECLI:EU:C:1996:171, ECR 1996, para 38; EGC, 2 October 2001, Joined cases T-222/99, T-327/99 and T-329/99, ECLI:EU:T:2001:242, *Martinez and Others v Parliament*, paras 56 and 57.

A decision amending the participation and the voting arrangements of one of the two co-decision-making bodies is likely to have a significant impact on the decision-making process[8] and therefore, more broadly, on the principle of democracy.

In fact, it should not be forgotten that the European Parliament sums up the drive towards the reduction of the EU democratic *deficit* and that, as President Sassoli recalled in his opening speech at the last session, «democracy cannot be suspended, especially in the midst of such a dramatic crisis».

II. The analysis of the legitimacy of the decision

For this reason, it is appropriate to dwell on the legitimacy of the decision, particularly verifying its compatibility with the Rules of Procedure, that are the main source of reference.

1. Formal and substantive limits

In the light of what has just been said, it is immediately clear that the necessary timeliness of the decision does not seem to justify complete freedom from formality. Indeed, it is in the full spirit of the European sincere cooperation (Art. 4, para 3, TEU) that such a choice should be preceded by an informal discussion with all the political groups[9]. But this is not enough. This phase must also be followed by an act endowed with minimum standards of formalities.

The subsequent decision formally adopted by the Bureau of Parliament[10] on March 20th is therefore to be welcomed[11]. Especially since, pursuant to Rule 25(2) and (4) of the Rules of Procedure, it is the competent body which is called upon to take «[…] organisational and administrative decisions on matters concerning the internal organisation of Parliament […]» and to take decisions «on matters relating to the conduct of sittings».

The Decision, which has not been published, consists of three articles and shall be valid for all votes until 31 July 2020, without prejudice to any subsequent amendment which interrupts or extends the period (Art. 3 of the Decision). In addition to Rule 25, the decision merely identifies, as legal bases, Rule 22 ("Duties of the President"; Art. 1 of the Decision) and Rule 192 ("Use of electronic voting system"; Art. 2 of the Decision)[12].

---

[8] Emotionally speaking, according to S. TRUMM, *Voting Procedures and Parliamentary Representation in the European Parliament*, in *JCMS*, Vol. 53, No. 5, 2017, p. 127, «MEPs are more inclined to defect from their EP party group when voting by show of hands or electronically, as opposed to roll call».

[9] In the press release following the President's statements, available on the website *europarl.europa.eu*, it is stated «[…] Parliament´s President and Group leaders (Conference of Presidents) held an informal exchange of views on Thursday morning. They approved in written procedure the proposal of EP President Sassoli to convene an extraordinary plenary session next Thursday, 26 March in Brussels to debate and vote on the first three legislative proposals of the European Commission to tackle the effects of the COVID19 pandemic in EU Member States».

[10] It is consisted of the President and of the 14 Vice-Presidents of Parliament (Rule 24 of the Rules of Procedure).

[11] Decision of the Bureau of the European Parliament of 20 March 2020 amending its Decision of 3 May 2004 on rules governing voting (not published).

[12] The identification of the 'legal basis' is necessary both to make individuals, institutions and Member States aware of how the decision has been taken and to enable the Court to exercise judicial review in an appropriate manner. Cf. K. S. C. BRADLEY, *The European Court and the legal basis of Community legislation*, in *ELR*, Vol. 13, No. 6, 1988, p. 379 et seq.; A. ENGEL, *The Choice of Legal Basis for Acts of the European Union. Competence Overlaps, Institutional Preferences, and Legal Basis Litigation*, 2018, pp. 1-9. «[The] choice of the appropriate

Surprisingly, no other provision is taken into account in such an important decision. Yet there are other relevant ones that should have been considered, and, additionally, some of them create quite a few problems. Just to anticipate some of them, think of the compulsory Strasbourg sessions, the MEPs physical presence in the Chamber, the secrecy of the vote, *et cetera*.

Indeed, the first difficulties come with the reading of the Chapter I of Title VII of the Rules of Procedure, entitled "Sessions of Parliament" (Rules 153-156)[13]. In particular, Rule 155 ("Venue of sittings and meetings") establishes that «Parliament shall hold its sittings and its committee meetings in accordance with the provisions of the Treaties. Any committee may decide to request that one or more meetings be held elsewhere […]».

Alongside the provision, moreover, the Rules of Procedure, in a way that is quite unusual for a legal text, sometimes also contains the (extensive) interpretation of the provision itself (Rule 236, para 6). This is also the case of Rule 155, from whose reading follows, according to the hermeneutic operation contained next to the disposition, that «Proposals for additional part-sessions in Brussels and any amendments thereto will require only a majority of the votes cast».

From an overall reading of the article, it seems clear that the meetings of the various parliamentary committees can be held in other ways, including through telematic devices[14]; in this regard, the use of the adverb "elsewhere" appears to be crucial.

It cannot be said the same for the plenary sessions.

The reference to the provisions of the Treaties is implicitly directed to the sole article of Protocol (No 6) on the location of the seats of the institutions and of certain bodies, offices, agencies and departments of the European Union, which simply states, under letter *a*), that «The European Parliament shall have its seat in Strasbourg, where the 12 periods of monthly plenary sessions, including the budget session, shall be held» and that «The periods of additional plenary sessions shall be held in Brussels»[15].

It has to be pointed out that, unlike the Rules of Procedure, which is based on a Treaty provision (Art. 232 TFEU) but is a secondary act, the Protocols form an integral part of the Treaties, in accordance with Article 51 TEU.

---

legal basis has constitutional significance»: ECJ Opinion, 6 December 2001, 2/00, ECLI:EU:C:2001:664, ECR 2001, *Biosafety Protocol*, para 5.

[13] The general formulation of Rule 153 ("Parliamentary term, sessions, part-sessions, sittings") does not seem to put obstacles in the way of distance voting, whereas Rule 154 ("Convening of Parliament") could be of interest only for paragraph 4 on emergency convocations. Actually, the situation appears to be a state of *ordinary emergency* rather than an emergency situation as regulated by the provision. Rule 153: «The parliamentary term shall run concurrently with the term of office of Members provided for in the Act of 20 September 1976. The session shall be the annual period prescribed by the Act and the Treaties. The part-session shall be the meeting of Parliament convened as a rule each month and subdivided into daily sittings»; Rule 154, para 4: «At the request of a majority of its component Members or at the request of the Commission or the Council, the President shall, after consulting the Conference of Presidents, convene Parliament on an exceptional basis».

[14] These modalities certainly also involve the organisation of the trilogues within the institutional triangle. About them, R. SCHÜTZE, *European Union Law*, II ed., Cambridge, 2018, p. 252 et seq; G. RUGGE, *Trilogues and access to documents:* De Capitani v. Parliament, in *CMLR*, Vol. 56, No. 1, 2019, p. 237 et seq.; EGC, 15 September 2016, Case T-755/14, ECLI:EU:T:2016:482, *Herbert Smith Freehills LLP v. Council*, paras 55 and 56; EGC, 22 March 2018, Case T-540/15, ECLI:EU:T:2018:167, *De Capitani v Parliament*, paras 68-73.

[15] With regards to the committees, they regularly shall meet in Brussels.

Assuming that a revision of the Treaties by the European Council would perhaps have been necessary[16], the minimum number of 12 sessions in Strasbourg could be made up when the emergency is over, although it should be remembered that the article expressly refers to the monthly recurrence of the plenaries[17].

The term "additional", in agreement with the authentic interpretation provided by Parliament, is able to enhance - also for the foreseeable future - the role of the plenary sittings in Brussels as *special* parliamentary sessions as opposed to the ordinary Strasbourg ones, which is currently impossible to host MEPs and less easily accessible[18].

Indeed, the contiguity between the adjective "additional" and the adjective "special" has already been shown in the case-law of the Court of Justice prior to the adoption of Protocol (No 6) on seats: «[…] the Parliament, in exercising its power to determine its own internal organization, [can decide] to hold a part-session away from Strasbourg, when such a decision remains exceptional in nature, thus respecting the position of that city as the normal meeting place, and is justified by objective reasons connected with the proper functioning of the Parliament. […] The expression 'special or additional plenary session' [referred to Brussels one] emphasizes the exceptional nature of the intended use […]»[19].

In this moment, EP's work can thus legitimately be guaranteed by the additional sessions in Brussels by a majority of the votes cast[20]; however, the arrangement of an additional session still needs to be materially combined with the remote voting.

2. Technical arrangements

In this respect, the physical presence in the Chamber, albeit at a due distance, of the President of Parliament and of representatives of the Commission, of the Council and of the political groups is essential, as it plays an important role in ensuring, not only symbolically, the regular and proper functioning of the proceedings[21].

---

[16] It is possible to conceive the use of an ordinary but accelerated revision procedure, without convening the Convention, in accordance with Article 48(3)(2) TEU, which, however, would raise the problem of voting in relation to national parliaments, called to ratify the amendment internally.

[17] Cf. ECJ, 13 December 2012, Joined Cases C-237/11 and C-238/11, ECLI:EU:C:2012:796, *France v. Parliament*.

[18] Cf. Opinion of Advocate General Wathelet, 5 June 2018, ECLI:EU:C:2018:386, ECJ Case C-73/17, *France v Parliament* (*Exercice du pouvoir budgétaire*), para 37: «[…] an additional plenary part-session of the Parliament in Brussels provides the same democratic guarantees that the debates are serious and open to the public as an ordinary plenary part-session in Strasbourg».

[19] Emphasis added. ECJ, 22 September 1988, Joined Cases 358/85 and 51/86, ECLI:EU:C:1988:431, ECR 1988, *France v Parliament*, para 36 and 40; for a different interpretation, see the relative Opinion delivered by Advocate General Mancini, 21 June 1988, ECLI:EU:C:1988:319, ECR 1988, para 10. *Sensitivity to sovereignty* has made case law on seats recurrent: above all, see ECJ, 10 February 1983, Case 230/81 ECLI:EU:C:1983:32, ECR 1983, *Luxembourg v Parliament*, paras 37 and 38; ECJ, 10 April 1984, Case 108/83, ECLI:EU:C:1984:156, ECR 1984, *Luxembourg v Parliament*; ECJ, 28 November 1991, Joined Cases C-213/88 and C-39/89, ECLI:EU:C:1991:449 ECR 1991, *Luxembourg v Parliament.*

[20] It is the same deliberative *quorum* as Rule 237(2) of the Rules of Procedure, which regulates amendments to the Rules.

[21] It should be recalled that, pursuant to Rule 22 of the Rules of Procedure ("Duties of the President"), «The President shall direct all the activities of Parliament and its bodies in accordance with these Rules and shall enjoy all powers that are necessary to preside over the proceedings of Parliament and to ensure that they are properly conducted» (para 1).

With reference, instead, to the technical aspects of the vote, the legal basis is represented by the combined provision of Rule 187, para 1, comma 2 and Rule 192, para 1, that set the possibility for the President of the Parliament to decide any time that «the voting operations will be carried out by means of the electronic voting system», whose technical arrangements shall be governed by instructions from the Bureau.

From this point of view, the choice of voting via the internet seems legitimate, since i-voting is just one of the subcategories of electronic voting (e-voting), which includes all the voting methods based on electronic or computerised mechanisms (telephone, online, optical scanning, punch cards, direct recording electronic system, *et cetera*)[22].

It should be observed that remote bilateral access to the Chamber, through a system of digital signing, would have guaranteed both a mediated physical participation and the assurance that every member of the Parliament was alone, especially at the moment of the voting, in accordance with the requirements of Rules 156 and 166 of the Rules of Procedure[23].

It is clear, however, the difficulty, in the short time available, to develope a bidirectional webstreaming system that could simulate the works in the hemicycle, creating a sort of virtual hall. That's why the solution adopted can be justified, *i.e*. setting up a voting card template to download, to fill in it with the preference, to scan it and to send it by certified e-mail (personal MEPs email address @europarl.europa.eu) to the mailbox plenary@europarl.europa.eu within a set time.

However, at the earliest opportunity, the Rules of Procedure should be amended and emergency provisions should be included to avoid any possible dispute on the point[24]. It is no wonder that the Constitutional Affairs Committee is currently considering an amendment to the Rules of Procedure which would allow for the inclusion of a title entirely devoted to emergencies resolution (Title XIIIa – 'Extraordinary circumstances'; Rules 237a, 237b and 237c)[25].

Moreover, such a provision would align EP's Rules of Procedure with those of the other co-legislator, the Council. It too, as is well known, has adopted exceptional measures in this direction to prevent the pandemic from stalling legislative works[26]. However, unlike the European Parliament, the Rules of Procedure of the Council already contained a specific provision to this effect. In fact, by derogation from the first subparagraph of Article 12(1) of its

---

[22] On the topic, L. SERGIO, *Il voto elettronico nel processo di cambiamento organizzativo degli enti locali*, in *astrid-online.it*, No. 15, 2017, p. 11 et seq.

[23] Rule 156 ("Attendance of Members at sittings"): «An attendance register shall be open for signature by Members at each sitting»; Rule 166 ("Access to the Chamber"): «No person may enter the Chamber except Members of Parliament, Members of the Commission or Council, the Secretary-General of Parliament, members of staff whose duties require them to be there, and any person invited by the President». The presence would be guaranteed by the audio-video signal transmitted live via webcam. The technical timing does not allow to think about the possibility of installing even more stringent control devices (*e.g*. a fixed camera on a chosen area that avoids blind spots).

[24] Above all, see the concerns raised by the Vice-President of the European Parliament Marcel Kolaja *Remote voting in the European Parliament. Why iVote is a strategic mistake*, in *kolaja.eu*, 17 June 2020.

[25] The AFCO working group on the Rules of Procedure (AFCO/9/03093) has presented a progress report on 8 June 2020 (Extraordinary meeting - AFCO(2020)0608_1). See also the proposal "Amendments to the Rules of Procedure in order to ensure the functioning of Parliament in extraordinary circumstances", Rapporteur: Gabriele Bischoff, 2020/2098 REG, in *europarl.europa.eu*.

[26] Council Decision (EU) 2020/430 of 23 March 2020 on a temporary derogation from the Council's Rules of Procedure in view of the travel difficulties caused by the COVID-19 pandemic in the Union, ST 6891 2020 INIT, in *consilium.europa.eu*.

Rules of Procedure, the Council will use an ordinary written procedure as an alternative to the adoption of acts at physical meetings until the emergency is resolved[27].

The existence of a provision to this effect, albeit with the use of a different form of voting (neither online nor by e-mail) has ensured the absence of any possible contestation, so proving the need for Parliament to take action in this direction too.

III. The role of the Court of Justice

To sum up, it is true that the decision seems to force the rules on the functioning of the EP. The most serious risk is that distance voting could affect the validity of all acts adopted *medio tempore* by the European legislator.

However, the judge of EU law validity remains the Court of Justice, which should, if necessary, balance the parameters of health protection[28], loyal cooperation[29], continuation of work[30] and *force majeure*[31], on the one hand, and procedural guarantees in defence of representative democracy, on the other. Instead, it should not be included among them the principle of precautionary, since in these circumstances the emergency is already ascertained[32].

---

[27] See Comments on the Council's Rules of Procedure. European Council's and Council's Rules of Procedure, in *consilium.europa.eu*, March 2016, p. 59: «Recourse to the written procedure is prompted by grounds of urgency. Such grounds arise, for instance, where failure to adopt a Council act by a specific date would create a legal vacuum, or in general terms, where an act must be adopted by a certain deadline but a Council meeting has not been scheduled and cannot be arranged in good time».

[28] «[…] the protection of consumers or the protection of the health and life of humans and animals [involve] requirements which the Community institutions must take into account in exercising their powers» (ECJ, 5 May 1998, Case 180/96, ECLI:EU:C:1998:192, ECR 1998, *United Kingdom v Commission* (*mad cow*), para 120; Advocate General Tesauro's Opinion, 30 September 1997, ECLI:EU:C:1997:447, para 29). See also ECJ, 4 April 2000, Case 269/97, ECLI:EU:C:2000:183, ECR 2000, *Commission v Council*, para 48 and the less recent ECJ, 23 February 1988, Case 68/86, ECLI:EU:C:1988:85, ECR 1988, *United Kingdom v Council*, para 12. See also R. ROSSOLINI, *Morbo della "mucca pazza" e tutela comunitaria della salute*, in *DCSI*, No. 3, 1997, p. 353 et seq.

[29] Cf. the Opinion of Advocate General Wathelet (note 18), para 33: «However, the protocols concerning the seats of the institutions are predicated on mutual respect on the part of the Member States and the Parliament for each other's areas of competence. That means that paragraph (a) of the sole provision of those protocols cannot be applied without regard to the duties of loyal cooperation to which the Member States and the EU institutions are subject. Specifically, while the Parliament is required to respect the protocols concerning the seats of the institutions when it determines its internal organisation, that cannot lead to the proper functioning of that institution, or a fortiori that of the EU, being impeded».

[30] ECJ, 19 December 2019, Case C-502/19, ECLI:EU:C:2019:1115, *Junqueras Vies*, para 63 (judgment not translated in English): «En ce qui concerne le contexte, il y a lieu de rappeler, premièrement, que, aux termes de l'article 10, paragraphe 1, TUE, le fonctionnement de l'Union est fondé sur le principe de démocratie représentative, qui concrétise la valeur de démocratie mentionnée à l'article 2 TUE». See also ECJ, 19 December 2019, Case C-418/18 P, ECLI:EU:C:2019:1113, *Puppinck and Others v. Commission*, para 64.

[31] On the scope of application of the notion of *force majeure* in EU law, see ECJ, 13 October 1993, Case C-124/92, *An Bord Bainne Co-operative and Compagnie Inter-Agra*, ECLI:EU:C:1993:841, ECR 1993, para 10; ECJ, 29 September 1998, Case C-263/97, *First City Trading and Others*, ECLI:EU:C:1998:444, ECR 1998, para 41; ECJ, 18 December 2007, Case C-314/06, *Société Pipeline Méditerranée et Rhône (SPMR)*, ECLI:EU:C:2007:817, para 25: «[…] since *force majeure* does not have the same scope in the various spheres of application of Community law, its meaning must be determined by reference to the legal context in which it is to operate».

[32] The invocation of the precautionary principle is subject to the fact that the potentially dangerous effects of a phenomenon have been identified through scientific and objective evaluation and that the latter does not make it possible to determine the risk with sufficient certainty (Communication from the Commission on the precautionary principle, COM/2000/0001 final, 02.02.2000). See K.H. LADEUR, *The Introduction of the Precautionary Principle into EU Law: A Pyrrhic Victory for Environmental and Public Health Law – Decision-Making under Conditions of Complexity in Multi-Level Political Systems*, in *CMLR*, Vol. 40, No. 1, 2003, p. 1455 et seq.; J.L. DA CRUZ VILAÇA, *The Precautionary Principle in EC Law*, in *EPL*, Vol. 10, No. 2, 2004, p. 369 et seq.; J. DUTHEIL DE LA

Assuming that such an appeal is introduced, '*Realpolitik*' issues and the renowned sensitivity of the EU judicature would surely tip the scales in favour of the former, as it has already demonstrated, *mutatis mutandis*, in the recent case *France v Parliament*, where «essential requirements relating to the proper conduct of the budgetary procedure» have prevailed over the respect of the formalities prescribed by the Protocol (No 6) on the seats[33]. The same essential requirements connected to public health, public security and public order which the Court could propose in its logical-legal reconstruction if it were seised of a dispute about the legitimacy of the acts adopted during the COVID-19 outbreak.

This hypothesis is viable especially if the EU legislator will keep on limiting itself to ensuring a regime of ordinary *administration*, just carrying on the legislative proposals strictly related to the health emergency and postponing all the other issues at the end of the crisis. In this case, the decision establishing remote voting would pass the proportionality test, as it is appropriate and necessary[34]. At the moment, the legislative proposals examined and approved are only those relating to the COVID-19 emergency: to name a few, the release of €37 billion in EU funding to support citizens, regions and countries fighting the coronavirus pandemic ("Corona Response Investment Initiative measures"); the extension of the EU Solidarity Fund (EUSF) to cover public health emergencies, making up to €800 million available EU Member

---

ROCHÈRE, *Le principe de précaution*, in J.-B. AUBY, J. DUTHEIL DE LA ROCHÈRE (sous la direction de), *Droit administratif européen*, Brussels, 2007, p. 459 et seq.; F. MUNARI, *Il ruolo della scienza nella giurisprudenza della Corte di giustizia in materia di tutela della salute e dell'ambiente*, in *Il diritto dell'Unione europea*, No. 1, 2017, p. 131 et seq. In the case law, EGC, 11 September 2002, Case T-13/99, *Pfizer v Council*, ECLI:EU:T:2002:209, ECR 2002; ECJ, 9 giugno 2016, Joined Cases C-78/16 and C-79/16, *Giovanni Pesce and Others v Presidenza del Consiglio dei Ministri* (Xylella), ECLI:EU:C:2016:428.

[33] ECJ, 2 October 2018, Case C-73/17, *France v Parliament* (*Exercice du pouvoir budgétaire*), ECLI:EU:C:2018:787, para 44: «Thus, the Parliament is obliged to exercise its budgetary powers in an ordinary plenary part-session in Strasbourg, although that obligation, arising under point (a) of the sole article of the Protocol concerning the seats of the institutions, does not preclude the annual budget from being debated and voted on during an additional plenary part-session in Brussels, if that is called for by essential requirements relating to the proper conduct of the budgetary procedure that is laid down in Article 314 TFEU. If that procedure were conducted in such a way as to give absolute precedence to observance of point (a) of the sole article of the protocol to the detriment of Parliament's full participation in the budgetary procedure, that would be incompatible with the need to reconcile the obligations arising under those provisions, to which reference has been made in paragraph 42 of this judgment». In the present case, France complained that the procedure for the adoption of the annual budget of the European Union for the financial year 2017 was unlawful on the ground that the budget had been discussed and voted on not at the ordinary plenary part-session in Strasbourg on 21-24 November 2016, as provided for in the Sole Article of the Protocol (6), but at the additional part-session of 30 November-1 December 2016 held in Brussels. Finally, the Court dismissed France's action. See also the Opinion of Advocate General Wathelet (note 18), para 36: «[…] the possibility of holding the second parliamentary session concerning the budget during an additional plenary session in Brussels does not seem to me to infringe the protocols concerning the seats of the institutions provided that that method of proceeding is exceptional and justified by the desire to ensure that the budget is adopted in accordance with the procedure and time limits laid down in Article 314 TFEU». *Occurrences and recurrences of history*, as *Giambattista Vico* would say: see *France v Parliament*, 22 September 1988 (note 19); ECJ, 1 October 1997, Case C-345/95, *France* v *Parliament*, ECLI:EU:C:1997:450, ECR 1997, paras 31 and 32; *France v Parliament*, 13 December 2012, paras 41 and 42 (note 17).

[34] *Ex plurimis*, ECJ, 8 June 2010, Case C-58/08, *Vodafone and Others*, ECLI:EU:C:2010:321, ECR 2010, para 51; ECJ, 17 October 2013, Case C-203/12, *Billerud Karlsborg and Billerud Skärblacka*, ECLI:EU:C:2013:664, para 34; ECJ Case C-5/16, *Poland v Parliament and Council*, ECLI:EU:C:2018:483, para 169: «[…] it must be borne in mind that that principle is one of the general principles of EU law and requires that measures implemented through EU law provisions be of such a kind as to allow the legitimate objectives pursued by the legislation at issue to be achieved and must not go beyond what is necessary to achieve them».

States in 2020; the temporary suspension of EU rules concerning airport slots, in order to stop empty flights (so called "use it or lose it" rule)[35].

On the other hand, it should also be added that democracy itself, of which the Parliament is the highest expression, would be in danger if work continued to take place in the Chamber and at the same time some MEPs or entire political groups were unable to take part in debates and votes because they were forced into quarantine[36]. From this perspective, distance voting seems to be a far more convincing remedy than, for example, proxy voting, and the only way to avoid the inexorable closure of Parliament, which would put democracy at serious risk.

IV. Comparative approaches

The experience of the European Parliament may be instructive for national parliaments. Indeed, the doubts about the legitimacy of the distance voting system and the relative operational solutions are certainly adaptable[37].

Nonetheless, beyond a few limited exceptions, Member States have shown a strong internal resistance to this mechanism[38]. In addition, none of them seems to be characterised by a 'praetorial' case law comparable to that of the Court of Justice, capable of favouring evolutionary interpretations of the rules in the event of *conflicting* provisions or in the inaction of the lawmaker[39]. Where they exist, the constitutional limits thus appear insurmountable.

---

[35] The same happened for the plenaries of 16-17 April 2020 and of 13-15 May 2020, once again in Brussels. The debate focused on the EU coordinated response to combat the COVID-19 outbreak and involved the Council and the Commission. For a comment on the measures taken within the EU, see the Special Issue *L'emergenza sanitaria Covid-19 e il diritto dell'Unione europea. La crisi, la cura, le prospettive*, in this *Review*, June 2020, pp. 1-197; the papers published in the section "Coronavirus e diritto dell'Unione" of the AISDUE website (Associazione italiana studiosi di diritto dell'Unione europea - *aisdue.eu*); the forum "COVID-19" in *sidiblog.org*; the section "European Union" in the website *comparativecovidlaw.it*.

[36] Actually, the problem involves a much larger number of people, including all the people working in the Parliament.

[37] Honestly, this is not a completely virgin debate. As said before, internet voting is only one branch of electronic voting, the peculiarities of which, positive and negative, have already been the topic of many discussions. On this point, see G. FIORIGLIO, *Problemi e prospettive della democrazia elettronica*, in T. SERRA (a cura di), *Giuseppe Prestipino. Un maestro*, Roma, 2014, p. 65 et seq., especially pp. 66-69; *amplius*, A. AGOSTA, F. LANCHESTER, A. SPREAFICO (a cura di), *Elezioni e automazione: tutela della regolarità del voto e prospettive di innovazione tecnologica*, Milano, 1989; L. TRUCCO, *Il voto elettronico nella prospettiva italiana e comparata*, in *Il diritto dell'informazione e dell'informatica*, No. 1, 2001, p. 47 et seq.

[38] Cf. M. DEL MONTE, *Remote voting in the European Parliament and national parliaments*, in *europarl.europa.eu*, 25 March 2020.

[39] The operating of the Court is inspired by the Rule of Law tradition rather than the *Rechtstaat* one: without any pretense of completeness, see v. A. GIARDINA, *The Rule of Law and implied powers in the European Communities*, in *The Italian Yearbook of International Law*, Vol. 1, No. 1, 1975, p. 99 et seq; S. CROSBY, *The Single Market and the Rule of Law*, in *ELR*, Vol. 16, No. 6, 1991, p. 451 et seq.; P. MENGOZZI, *La rule of law e il diritto comunitario di formazione giurisprudenziale*, in *JUS – Rivista di scienze giuridiche*, vol. 41, n. 3, 1994, p. 280 et seq.; V. CONSTANTINESCO, *The ECJ as a law-maker:* praeter aut contra legem*?*, in D. O'KEEFFE, A. BAVASSO (eds.), *Judicial Review in European Union Law*. Liber Amicorum *in Honour of Lord Slynn of Hadley*, Vol. I, The Hague, 2000, p. 73 et seq.

Taking Italian legal system as an example, Article 64(3) of the Constitution states that «The decisions of each House and of Parliament are not valid if the majority of the members is not *present*»[40].

An orientated interpretation of the constitutional text could certainly include in the concept of "presence" not only the physical one, but also the virtual one. Furthermore, the parliamentary vote is not conditioned by the principle of secrecy, which the Constitution has reserved only to the active electorate (Art. 48)[41].

On the contrary, among the *virtuous* examples, the Spanish legislation already provided for the possibility of voting remotely in strictly exceptional cases (pregnancy, maternity, paternity and serious infirmity: Art. 82 reglamento del Congreso de los diputados and Art. 92 reglamento del Senado)[42] and the Romanian Parliament has just adopted a decision amending its Rules of Procedure and allowing remote voting in emergency situations (see new Article 51 of the Rules of Procedure of the Parliament, as amended on March 14th, 2020)[43].

Certainly, the difficulties which have arisen in the emergency context will push us to face the subject in times of *peace* and to find, calmly and with due reflection, the most adequate and respectful solution to the rules and principles of law. Not to normalize such procedures, since Parliament remains the highest moment of democratic aggregation, but to regulate its emergency use, thus allowing the representation to function even in times of crisis.

V. Active electorate and *internet-voting*

Finally, it is interesting to verify the practicability of remote voting on a large scale in the near future. Indeed, the idea of applying i-voting to European Parliament elections is not new[44].

---

[40] Italics added. The Italian text is: «Le deliberazioni di ciascuna Camera e del Parlamento non sono valide se non è presente la maggioranza dei loro componenti, e se non sono adottate a maggioranza dei presenti […]». On the topic, N. LUPO, *Perché non è l'art. 64 Cost. a impedire il voto "a distanza" dei parlamentari. E perché ammettere tale voto richiede una "re-ingegnerizzazione" dei procedimenti parlamentari*, in *osservatorioaic.it*, n. 3, 2020; B. CARAVITA, *L'Italia ai tempi del coronavirus: rileggendo la Costituzione italiana*, in *federalismi.it*, n. 6, 2020. Between the relevant provisions, there are also Articles 55(2), 61, 62 and 63 (2) of the Constitution.

[41] «Any citizen, male or female, who has attained majority, is entitled to vote. The vote is personal and equal, free and secret. The exercise thereof is a civic duty». Italian version is more *iconic*: «Sono *elettori* tutti i cittadini, uomini e donne, che hanno raggiunto la maggiore età. Il voto è personale ed eguale, libero e *segreto*. Il suo esercizio è dovere civico» (italics added). On the distinction between elective and deliberative voting, see R. DICKMANN, *Alcune questioni di costituzionalità in tema di voto parlamentare a distanza*, in *federalismi.it*, No. 8, 2020, p. 3.

[42] Cf. S. CURRERI, C. MARCHESE, *Il 'voto telematico no presencial' nell'esperienza delle assemblee rappresentative spagnole: le Cortes Generales e i Parlamenti delle Comunità Autonome*, in *federalismi.it*, No. 12, 2020.

[43] *Outside* the EU, see also the UK experience: on the 12nd of May 2020, the first ever remote voting in the House of Commons took place. In this historic first, MPs voted remotely on a motion on a General Debate on Covid-19 (MPs cast first ever remote votes in Commons Chamber, in *parliament.uk*). For other examples, see Adjustment of Parliamentary Activity to COVID-19 Outbreak and the prospect of remote sessions and voting, Spotlight on Parliaments in Europe drafted by the Directorate for Relations with National Parliaments Institutional Cooperation Unit - European Centre for Parliamentary Research and Documentation, No. 27, 2020, in *epgencms.europarl.europa.eu*.; J. MURPHY, *Parliaments and Crisis: Challenges and Innovations: Parliamentary Primer No. 1*, Stockholm, 2020, especially p. 39 et seq.

[44] See the study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional: A. H. TRECHSEL, V. KUCHERENKO, F. SILVA, *Potential and challenges of e-voting in the European Union*, in *cadmus.eui.eu*, 2016. In the literature, P. NORRIS, *E-Voting as the Magic Ballot? The impact of Internet voting on turnout in European Parliamentary elections*, in *innovations.harvard.edu*, 2002.

As is well known, the procedures for electing Parliament are governed both by EU law, which defines common rules for all Member States, and by internal legislations, which are far from being harmonised on this point[45].

The polymorphism of the European electoral system does not favour an autonomous identification of the European Parliament elections, which are still perceived by most as *intermediate* national elections (like a test for the majority national party) or even as an unnecessary duplication of them. This is illustrated by the fact that election campaigns in the Member States are still dominated by the various national political parties, which sometimes make no reference whatsoever to the European political party to which they belong.

In order to reduce the democratic *deficit* of the Union and in an attempt to tie the European Parliament more and more to the democratic legitimacy circuit, voting remotely would enable the EU citizens to elect their representatives in the same way and on the same day[46], albeit thousands of kilometres away from each other.

The Union has a virtuous example at home from which it could draw inspiration. Among the Member States, Estonia is undoubtedly the most advanced country in terms of e-voting. The Estonian remote voting system is a proven one, given that it has been used for general elections since 2007[47].

VI. Conclusion

The implementation of a remote voting system that also involves the active electorate presents the same problems on the table of balancing interests.

What is certain is that the COVID-19 contagion has revealed, if there was still a need for it, how the globalised world is closely integrated and how digitalisation has been the primary driving force behind this process.

Far from expressing value-based choices on the point - this paper does not represent its natural context - the opening of a constructive and broadened debate cannot be postponed any longer. The time to repair the roof is when the sun is shining.

---

[45] M. SCHMID-DRÜNER, *The European Parliament: Electoral Procedures*, in *europarl.europa.eu*, 2020. At EU level, the relevant provisions are Article 14 TEU; Articles 20, 22 and 223 TFEU; Article 39 of the Charter; Act of 20 September 1976 concerning the election of the representatives of the Assembly by direct universal suffrage, last amended by Council Decision (EU, Euratom) 2018/994 of 13 July 2018. Member States shall instead regulate electoral system and thresholds, constituency boundaries, entitlement to vote, right to stand for election, voters' options to alter the order of candidates on lists, filling seats vacated during the electoral term, *et cetera*.

[46] Pursuant to Articles 10 and 11 of the Electoral Act, elections to the European Parliament are held within the same period starting on a Thursday morning and ending on the following Sunday; the exact date is set by each Member State.

[47] On this point, see the recent writing of M. SCHIRRIPA, *Il voto elettronico nell'esperienza europea tra pregi e criticità*, in *federalismi.it*, No. 6, 2020, pp. 239-241; Venice Commission (European Commission for Democracy through Law), Report on the Compatibility of Remote Voting and Electronic Voting with the Standards of the Council of Europe, 260/2003, 18 March 2004; Council of Europe, E-voting handbook. Key steps in the implementation of e-enabled elections, in *coe.int*, 2010.