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Prof. Dr. Christian Calliess, LL.M. Eur
Freie Universität Berlin

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Anna Kocharov:

**This Time It's Different? Constitutional Complexities of the
Spitzenkandidaten Arrangement**

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This Time It’s Different? Constitutional Complexities of the Spitzenkandidaten Arrangement

Se non ci siamo anche noi, quelli ti combinano la repubblica. Se vogliamo che tutto rimanga come è, bisogna che tutto cambi. Mi sono spiegato?

Giuseppe Tomasi di Lampedusa, *Il Gattopardo*

And when he hath made an end of atoning for the holy place, and the tent of meeting, and the altar, he shall present the live goat:
and Aaron shall lay both his hands upon the head of the live goat, and confess over him all the iniquities of the children of Israel, and all their transgressions, even all their sins; and he shall put them upon the head of the goat, and shall send him away by the hand of a man that is in readiness into the wilderness:
and the goat shall bear upon him all their iniquities unto a solitary land: and he shall let go the goat in the wilderness.

Leviticus 16:20-22

Abstract

The paper analyzes the shift from a politically neutral European Commission to a Commission whose President is nominated by the political party that wins most seats in the elections to the European Parliament. In the course of 2014 EP elections, the main European political parties nominated their candidates for president of the European Commission (the so-called Spitzenkandidaten) with the promise and the expectation that this linking of Presidency of the Commission with the outcome of EP elections would increase democratic legitimacy of the European Union. Consequently, the first part of the paper outlines the problem of legitimacy in the EU: the many meanings associated with the phrase and the institutional and constitutional setting that gives rise to the problem. It is argued that the actual problem of legitimacy is situated at the national rather than EU level, making the Spitzenkandidaten arrangement not only useless for enhancing legitimacy but directly harmful in this regard. The second part of the paper focuses on the factors that could undermine EU legitimacy as a direct result of politicization of the Commission. First, constitutionality of this innovation is scrutinized. Second, the institutional balance of Union institutions is considered. Third, the effects of the new arrangement on representation of Union citizens in the European political process are analyzed. Finally, an alternative solution for enhancing democratic legitimacy in the Union is presented. This solution lies with the European Parliament. Only real policy-setting powers of the European Parliament could shift the policy-setting power from national level to the EU. Accountability without power only obscures democratic legitimacy further.

* Anna Kocharov is a doctoral candidate at the Law Department, European University Institute (Florence, Italy); she holds a Masters and Licenciate degrees from Åbo Akademi University (Finland) and LL.M. from the European University Institute; she interned and worked at the European Parliament, European Food Safety Authority and the Court of Justice of the European Union. Law Department, European University Institute. She would like to thank Marise Cremona, Bruno de Witte, Paolo Ponzano, Enzo Moavero Milanesi and Christian Calliess for invaluable insights on the various aspects of this paper; any omissions remain with the author alone.

I. Introduction

On 4 July 2013, the European Parliament (EP) adopted a resolution¹ calling on European political parties to nominate their candidates for the presidency of the European Commission ahead of the 2014 elections to the EP. The resolution concluded by expressing an expectation that the candidate put forward by the party that wins the most seats in the EP “will be the first to be considered” for the post of President of the European Commission. Two claims are made in this connection. First, that such a procedure would increase democratic legitimacy of the Union; second, that this procedural innovation respects the Treaties. This chapter will analyze both claims. In particular, it will be scrutinized how the creation of direct link between the candidature for the President of the Commission to the outcome of EP elections reflects the letter and spirit of the Treaties.

The chapter begins by outlining the problem of legitimacy in the EU: the many meanings associated with the concept, the institutional and constitutional setting that raised the issue. Understanding legitimacy in the context of the Union is fundamental for evaluating the substance of the proposed arrangement.

Second, brief historical background of the accountability of the Commission to the EP is given. This analysis demonstrates that already prior to the 2014 elections, the Commission was accountable to the EP and the Parliament successfully exercised its powers in this regard.

Third, constitutionality of the proposed arrangement is tested against the letter and spirit of the Treaties. This section aims to go beyond the mere wording of Article 17 TEU, pointing out how interplays with other Treaty provisions and with the overall structural framework created for the Union in EU Treaties could pose problems of constitutional law. This analysis includes a look at the delicate institutional balance established for the EU and how it might be altered by the proposed arrangement. Respecting the letter and spirit of the Treaties is fundamental for raising the legitimacy of the Union and its institutions.

Finally, possible implications for legitimacy of the Union are considered. It will be argued that an alternative solution for enhancing democratic legitimacy in the Union is possible. This solution lies with the European Parliament, which currently lacks the power to determine policy agenda for the Union – a power which remains with the European Council. This makes the national governments, and not the European Commission, the real “government” of Europe, pointing to futility of the proposed reform.

¹ European Parliament resolution of 4 July 2013 on improving the practical arrangements for the holding of the European elections in 2014 ([2013/2102 INL](#))

II. Legitimacy and the Union

Ever since the Single European Act and the Maastricht Treaty, concerns over legitimacy of the Union flourished.² The reasons for them are two structural changes to Europe's Union that were reflected in these Treaties and elaborated in all the Treaties that succeeded them. The first concerns the reach of Union's policies and powers and can be termed as policy interdependence.³ Policy interdependence takes place independently from the decision-making procedure on Union level (unanimity, consensus or QMV) and refers to the factual capacity of each national polity to regulate within its jurisdiction (to implement a policy choice). This capacity can be undermined as a result of externalities and interdependence between the national polities created by European integration, whereby regulatory decisions by one polity may affect the regulatory capacity of the other. A good example of policy interdependence are the Schengen area and the Euro, where immigration and budgetary decisions respectively of one Member State may produce effects on the policies pursued by another Member State. The problem caused by policy interdependence can be resolved by shifting policy-making from national level to the Union. National polities and national political processes would then lend their legitimacy to the Union and its policies⁴ as long as these are adopted by unanimity or consensus.

The second structural evolution of the Union that gives rise to legitimacy concerns is the method of decision-making. The passage from unanimity or consensus to qualified majority vote (QMV) in the Council⁵ implies that Union policies no longer derive legitimacy from the national political process because individual Member States may find themselves bound against their will as represented by their governments in the Council. This creates interdependence between the national and European levels of decision-making: on the one hand, legitimacy of the national political process is undermined because the national polity can be bound against its will; on the other hand, an alternative source of legitimacy is needed on the Union level to compensate for this loss. Several options are available for this alternative legitimacy source:

1. *Messianic or promise legitimacy* corresponds to the original promise of Europe to deliver peace and prosperity to its peoples.⁶ To the extent that this promise is fulfilled, this type of legitimacy is transformed into output or result legitimacy. The original promise of European integration has been economic revival after WWII and to ensure a lasting peace among Member States of the Community;⁷ these goals have obviously been fulfilled.
2. *Substantive or output legitimacy* links the acceptance of public power to the results that this

² Ex multis A. Moravcsik, *Reassessing Legitimacy in the European Union* (Nov 2002) Journal of Common Market Studies 40(4), pp. 603-24; G. Majone, *The Common Sense of European Integration* (Aug 2006) Journal of European Public Policy 13 (5), pp. 607-26; A. Foellesdal and S. Hix, *Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik* (Sept 2006) Journal of Common Market Studies 44(3), pp. 533-62; as regards European institutions and the EP specifically see P. Dann, *The Political Institutions* in A. von Bogdandy and J. Bast (eds.) *Principles of European Constitutional Law* (2010) Hart - CH Beck - Nomos. For the view that EU need not be democratic along the model of nation states see G. Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (2005) OUP, Chapter 2

³ Chronologically, this is the second element that gained prominence with the abolition of internal borders and the introduction of the single currency.

⁴ Article 10(2) TEU secures representative democracy in the Union on two levels: "Citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens."

⁵ Although QMV was foreseen already in the original 1957 EEC Treaty, it was not exercised until the 1986 Single European Act.

⁶ JHH Weiler, *The political and legal culture of European integration: An exploratory essay*, I•CON (2011), Vol. 9 No. 3–4, 678–694 at 683

⁷ Recital 8, Preamble to the 1957 EEC Treaty; the Schuman Declaration (Paris, 9 May 1950) Selection of texts concerning institutional matters of the Community from 1950 to 1982. Luxembourg: European Parliament - Committee on Institutional Affairs, 1982. 561 pp. 47-48.

power achieves. It is also the extent to which the polity is capable of autonomous self-governance.⁸ Output legitimacy will be high for popular measures that achieve their promised results and low for unpopular policies or failure to deliver (the latter will also undermine messianic legitimacy). The onset of financial crisis and the need for unpopular austerity measures have undermined this source of legitimacy for the EU.

3. *Formal legitimacy or consent* describes whether the powers were constituted and laws enacted following formal rules, procedures, and constitutional guarantees. It is the legalistic side of process legitimacy that does not necessarily translate into the acceptance of resulting rules.⁹ However, lack compliance with the constitutional letter and spirit of the Treaties would undermine this legitimacy source.
4. *Process or input legitimacy* seeks to achieve the acceptance of public power through ensuring interest representation and participation in the political process. The idea is to ensure voice to those who are bound by the exercise of public power and whose acceptance this power is seeking. Such reforms as citizens' initiative and subsidiarity review by national parliaments seek to further process legitimacy; low turnout of voters in the EP elections, on the contrary, undermines it. Process legitimacy, to be effective, needs to be backed up by accountability.
5. *Political legitimacy or accountability* is the capacity of citizens to remove the government from power when the latter no longer represents their voice.¹⁰ This mechanism aims to ensure that the government acts in the interest of the citizens and does not abuse its powers.
6. *Adjudicative legitimacy* corresponds to the capacity of polity members to enforce limited government in court, in particular through the protection of the individual from the state and minorities from majorities, which ensure the good functioning of the political process.¹¹ Directly effective rights of citizens secured in the Treaties serve to raise this type of legitimacy in the EU.
7. *Social legitimacy* is the result of all the previous methods of increasing the authority of public power as reflected in public opinion surveys¹² and in the actual acceptance of the resulting norms.¹³ Here, the 2013 surveys were worrying: only 39% of Europeans expressed trust in the European Parliament while 48% distrusted it; 12% said that they expect nothing from the EU.¹⁴

Giving a face to EP elections¹⁵ aimed to create a “difference to Europe and in Europe whether and how the people vote for the European Parliament”¹⁶. By establishing a more direct link between outcome of EP elections and the nomination of President of the Commission, it is hoped to link elections to Union policies, offer voters a visible choice between the different European parties, increase voter turnout, citizen representation and accountability of EU executive. It would therefore

⁸ N.Walker, *Constitutionalizing Enlargement, Enlarging Constitutionalism*, European Law Journal, Vol. 9, No. 3, July 2003, p. 368, who cites F. Scharpf, *Governing in Europe: Effective and Democratic?* (1999) OUP chapter 1.

⁹ JHH Weiler, *The Transformation of Europe* (1991) 100 Yale Law Journal p. 2469

¹⁰ JHH Weiler, U. Haltern, F. Mayer, *European Democracy and its Critique Five Uneasy Pieces* (1995) EUI Working Paper RSC No. 95/11, p.9: “In its present state, no one who votes in the European elections has a strong sense at all of affecting critical policy choices at the European level and certainly not of confirming or rejecting European governance.”

¹¹ M. Poiares Maduro, *Sovereignty in Europe: the European Court of Justice and the Creation of European Political Community* in Mary L. Volcansek & John F. Stack Jr (eds) *Courts Crossing Borders. Blurring the Lines of Sovereignty* (2005) Carolina Academic Press; G. de Búrca and O. Gerstenberg, *The Denationalization of Constitutional Law* (Winter 2006) Harvard International Law Journal 47:1

¹² JHH Weiler, *The Transformation of Europe* (1991) 100 Yale Law Journal, p. 2469

¹³ What Tuori calls “empirical legitimacy”, see K. Tuori, *Critical Legal Positivism* (2002) Ashgate, p. 244

¹⁴ Standard Eurobarometer 80 Autumn 2013 *European Citizenship*, p. 7

¹⁵ J.Borrell Fontelles, *The Future Role of the European Parliament* in Loukas Tsoukalis, Janis A. Emmanouilidis (eds.) *The Delphic Oracle on Europe: Is There a Future for the European Union?* (2011) OUP, p.54

¹⁶ For analysis of the “opportunities and possible risks related to prospect of turning the European elections into personalized contest for the presidency of the European Commission” see JHH Weiler, *Challenges to electoral participation in the European elections of 2014. Restoring Electoral Faith: Prospects and Risks* in AFCO Report *Strengthening European Democracy: Citizens' Participation. Which challenges do we face at the European Elections of 2014?* (2013) European Parliament doc. PE 493.036

tackle the disinterest of citizens with the Union and the rise of Eurosceptic parties across Member States.

II. Accountability of the Commission to the EP

Originally under the EC Treaty, the members of the Commission were appointed by common accord by the governments of Member States¹⁷ while President of the Commission was to be appointed from Commission members after consultation of the entire college.¹⁸ The Assembly (which preceded the European Parliament) could pass a motion of censure of the Commission obliging it to resign as college;¹⁹ the Court of Justice could compulsorily retire individual members of the Commission.²⁰

The Maastricht Treaty reversed the order of appointment procedure. Under Article 158(2) EC as amended: “The governments of the Member States shall nominate by common accord, after consulting the European Parliament, the person they intend to appoint as President of the Commission. [...] The President and the other members of the Commission [...] nominated [by governments in consultation with the nominee for President of the Commission] shall be subject as a body to a vote of approval by the European Parliament.” This procedure was followed for the appointment of the Santer Commission in January 1995. The Court of Justice remained in charge of compulsory retirement of individual members of the Commission, while the possibility of the Council to suspend Commissioners was removed.²¹ The power of the European Parliament to censure the Commission as college remained in place; while a motion of censure was never carried, the mere threat thereof caused the Santer Commission to resign in March 1999.

The Amsterdam Treaty increased parliamentary control over the Commission further. The new Article 214(2) EC required not only consultation of the EP when nominating the President of the Commission but also EP approval; the provision on approval by EP of the Commission as a whole remained unchanged. The Prodi Commission was appointed using this procedure in September 1999. The EP retained its power to dismiss Commission as college. Article 219 EC as amended by Amsterdam Treaty specified that the Commission President shall provide “the political guidance” for work of the Commission.

A further amendment to Article 214(2) EC followed with the Treaty of Nice. While leaving the powers of the EP unaltered, the procedure for appointment of all Commissioners was changed from common accord to QMV in the Council. At the same time, the EP exercised its power of approval of the Commission as college postponing the appointment of the first Barroso Commission from October to November 2004.²² The Parliament exercised this power again during the appointment of the second Barroso Commission in early 2009. Both in 2004 and 2009, the political stripe of the President of the Commission followed the European party with most seats in the EP as well as the governments of most Member States in the Council, although both times the support of other parties in the EP was necessary since no one party ever had an absolute majority in the Parliament. The Treaty of Nice also introduced the power of Commission President to request resignation of individual Commissioners “after obtaining the approval of the College”.²³

¹⁷ Article 158 EC Treaty 1957

¹⁸ Article 161 EC Treaty 1957

¹⁹ Article 144 EC Treaty 1957

²⁰ Article 160 EC Treaty 1957

²¹ Article 160 EC as amended in Maastricht

²² For a detailed account see AFCO working document by MEP Andrew Duff, *How the European Parliament approves the European Commission* (30.11.2004) DT\548974EN

²³ Article 217(4) EC

Therefore, already prior to the Lisbon Treaty, the Commission was accountable to the EP both as college and its individual members,²⁴ while nomination of the President of the Commission and the college required approval of majority in the Parliament. On several occasions already the EP successfully exercised its powers in this regard.

Despite these developments, the Laeken Declaration of the European Council restated the link between the democratic deficit of European institutions and the procedure of appointment of President of the Commission.²⁵ The draft Treaty establishing a Constitution for Europe introduced the new phrasing²⁶ that was carried over into the Constitutional Treaty²⁷ Article I-27:

The President of the European Commission

1. Taking into account the elections to the European Parliament and after having held the appropriate consultations, the European Council, acting by a qualified majority, shall propose to the European Parliament a candidate for President of the Commission. This candidate shall be elected by the European Parliament by a majority of its component members. If he or she does not obtain the required majority, the European Council, acting by a qualified majority, shall within one month propose a new candidate who shall be elected by the European Parliament following the same procedure.
2. The Council, by common accord with the President-elect, shall adopt the list of the other persons whom it proposes for appointment as members of the Commission. They shall be selected, on the basis of the suggestions made by Member States, in accordance with the criteria set out in Article I-26(4) and (6), second subparagraph.

The President, the Union Minister for Foreign Affairs and the other members of the Commission shall be subject as a body to a vote of consent by the European Parliament. On the basis of this consent the Commission shall be appointed by the European Council, acting by a qualified majority.

3. The President of the Commission shall:

- (a) lay down guidelines within which the Commission is to work;
- (b) decide on the internal organisation of the Commission, ensuring that it acts consistently, efficiently and as a collegiate body;
- (c) appoint Vice-Presidents, other than the Union Minister for Foreign Affairs, from among the members of the Commission.

A member of the Commission shall resign if the President so requests. The Union Minister for Foreign Affairs shall resign, in accordance with the procedure set out in article I-28(1), if the President so requests.

With the Lisbon Treaty amendment, the first paragraph of this article became Article 17(7) TEU:

“Taking into account the elections to the European Parliament and after having held the appropriate consultations, the European Council, acting by a qualified majority, shall propose to the European Parliament a candidate for President of the Commission. This candidate shall be elected by the European Parliament by a majority of its component members. If he does not obtain the required majority, the European Council, acting by a qualified majority, shall within one month propose a new candidate who shall be elected by the European Parliament following the same procedure.

[...]

²⁴ Framework Agreement on relations between the European Parliament and the European Commission (2010) OJ (20.11.2010) L 304/47, Point II(5)

²⁵ Annexes to the Presidency conclusions, European Council meeting in Laeken 14 and 15 December 2001, SN 300/1/01 REV 1 pp. 22-23

²⁶ Article 26, (18.07.2003) CONV 850/03

²⁷ OJ (16.12.2004) C 310/3

The President [...] and the other members of the Commission shall be subject as a body to a vote of consent by the European Parliament. On the basis of this consent the Commission shall be appointed by the European Council, acting by a qualified majority.”

The European Commission reinterpreted this provision. In order “to foster the emergence of a genuine European political sphere”, the Commission called on the political parties to nominate their candidates for the President of the Commission in the context of 2014 elections.²⁸ The following year the Commission was even more explicit: “Each political party *should* make known its candidate for President of the Commission during the election process. In accordance with the Treaty, the outcome of the European elections *should* play a key role in determining which candidate becomes President of the Commission.”²⁹

The EP took up the idea and urged “the European political parties to nominate candidates for the Presidency of the Commission” with the expectation that “those candidates [...] play a leading role in the parliamentary electoral campaign, in particular by personally presenting their programme in all Member States of the Union”.³⁰ In the same Resolution, the Parliament called “for as many members of the next Commission as possible to be drawn from Members of the European Parliament, to reflect the balance between the two chambers of the legislature.”

Neither Commission Communications nor Resolutions of the European Parliament produce legal effects and as such cannot be challenged before the Court of Justice of the EU.³¹ Further, the Council did not issue any document in response to this initiative to express its formal opinion or consent. Thus, while a political agreement between the Commission and the Parliament is in place, there is no formal interinstitutional agreement between them and nothing documents any legal, formal nor political agreement on the proposed arrangement between these two institutions and the Council. Therefore, unlike previous cases where the Council indicated its readiness to challenge interinstitutional arrangements between the Commission and EP,³² no such formal challenge is possible for the Spitzenkandidaten arrangement. Nevertheless, the Court of Justice would be able to fulfill its constitutional role of “ensur[ing] that in the interpretation and application of the Treaties the law is observed”³³ by reviewing the act of appointment of the President of the Commission by the European Council pursuant to the last paragraph of Article 17(7) TEU.

²⁸ Communication from the Commission “A blueprint for a deep and genuine economic and monetary union” COM(2012) 777 final/2 (30.11.2012) p. 37

²⁹ Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee and the Committee of the Regions “Preparing for the 2014 European elections: further enhancing their democratic and efficient conduct” COM(2013) 126 final (12.3.2013) p.6, italics by author

³⁰ European Parliament resolution of 22 November 2012 on the elections to the European Parliament in 2014 (2012/2829(RSP))

³¹ Article 263 TFEU

³² For instance, as regards the Framework Agreement on relations between the European Parliament and the European Commission (2010) OJ (20.11.2010) L 304/47, the Council indicated readiness to commence infringement proceedings against the Commission and the EP for “modify[ing] the balance established in the Treaties between the institutions” to the prejudice of the Council, for “accord[ing] powers to the Parliament not conferred in the Treaties” and for “limit[ing] the autonomy of the Commission and its President”, see Council of the European Union, Opinion of the Legal Service on the Draft Framework Agreement between the European Parliament and the Commission (18.10.2010) doc. 15018/10

³³ Article 19(1) TEU

III. Constitutionality of the Proposed Change

The proposed arrangement is founded on an erroneous interpretation of Article 17(7) TEU taken out of context of the Treaties and the interinstitutional balance established therein. The Spitzenkandidaten arrangement is based on the excessive emphasis given to the phrase “[t]aking into account the elections to the European Parliament” contained in Article 17(7) TEU in disregard over other provisions contained in this and other Articles of the Treaties.

The Letter of Article 17(7) TEU: the Power to Propose Candidates and Interinstitutional Balance

The procedure for appointing President of the European Commission contained in Article 17(7) TEU is the following:

1. The European Council proposes the candidate by QMV.
2. The EP elects the candidate by absolute majority.
3. The Council, on the basis of suggestions made by Member States and by common accord with the President pre-elect, proposes the college.
4. The EP consents to the entire college (the President of the Commission included) by absolute majority.
5. The European Council appoints the college by QMV.

This procedure amounts to co-decision between the Member States in the European Council and Council on the one hand and the European Parliament on the other. This interpretation is corroborated by Declaration 11 on Article 17(6) and (7) TEU attached to the Treaty of Lisbon. While not legally binding, Declaration 11 obliges the two institutions to collaborate on the nomination, placing the responsibility for “the smooth running of the process leading to the election of the President of the European Commission” jointly on the EP and Council.

Article 17(7) TEU unequivocally reserves the power to propose candidates for President of the European Commission to the European Council: “the European Council [...] shall propose to the European Parliament a candidate for President of the Commission”. There is no priority given to any candidates advanced by the EP or any other institution or political party. Giving the Parliament an upper hand in nominating the candidate for President of the European Commission would reverse the procedure set out in the Treaties, a change requiring a formal Treaty amendment. Nominating the President of the Commission according to the Spitzenkandidaten arrangement without Treaty amendment would undermine formal legitimacy of EU institutions and of the national political processes in the course of which the peoples of Europe ratified the Treaties. Potentially, such an appointment would be reviewable by the Court of Justice as an act that produces legal effects and changes interinstitutional balance established in the Treaties.

The obligation to take account of EP elections should be read together with the rest of Article 17(7) TEU, which provides that the candidate gather majority support in the EP. The purpose of the requirement to take account of EP election is to ensure that the Council nominates a candidate who can realistically gather majority support in the Parliament, as opposed to nominating minority candidates who *a priori* cannot be expected to meet this requirement. The importance of this joint reading of the two provisions becomes especially apparent once the first candidate for President of the Commission does not gather a simple majority in the EP, since the European Council has a one-month time limit to propose each subsequent candidate.³⁴ The obligation to take account of the political composition of the EP therefore aims to expedite the appointment procedure.

³⁴ §1 Article 17(7) TEU

The requirement to take account of EP elections is not a special rule for the appointment procedure but a specific application of the general principle of mutual sincere cooperation between the EU institutions contained in Article 13(2) TEU:

“Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation.”

This reading is corroborated by the fact that the two obligations – to take account of EP elections in nominating the candidate for Presidency of the Commission on the one hand, and the duty of mutual sincere cooperation between EU institutions on the other – converge in their historic origins. Both were introduced into the Treaties with the draft Constitution and, in their legally binding form, in the Lisbon Treaty – yet, both obligations have pre-Constitution origins in the interinstitutional practice. As regards the political affiliation of the President of the Commission, it has been noted above that prior to 2014, in all the cases where election by the EP was required, the appointee belonged to the party with most seats in the European Parliament (although this coincided also with the governing parties in most Member States). As regards mutual sincere cooperation between European institutions, its importance was recognized by the Court of Justice on the basis of a joint declaration by the European Parliament, the Council and the Commission.³⁵ Both pertain to the functioning of the Union and its institutions as well as to the conferral and division of powers between them according to the provisions of the Treaties.³⁶ The Court of Justice might therefore be able to review the act of appointment of President of the Commission for compliance with Article 13(2) TEU in view of the institutional balance observed in the course of this appointment.³⁷

The Spirit of Article 17 TEU: Role of the European Commission and Its Independence

The purpose of conditioning the Presidency of the Commission on the outcome of elections to the EP is to create a more direct link between the outcome of EP elections and policies of the

³⁵ Joint Declaration by the European Parliament, the Council and the Commission on various measures to improve the budgetary procedure (30.06.1982) OJ (28.07.82) C 194/1 (which opens with the phrase “Whereas harmonious cooperation between the institutions is essential to the smooth operation of the Communities”) and Case 204/86 Greece v Council §16; see also Case C-65/93 EP v Council §23 on the “mutual duty of sincere cooperation” in the course of interinstitutional dialogue.

³⁶ It is significant in this regard that proposals to amend the wording “Taking into account the elections to the European Parliament” and the role of the EP in nominating Commission President contained in Article 26 of the draft Constitution in a way that would reverse the institutional balance giving the power to nominate candidates for President of the Commission to the European Parliament and leaving the European Council the role of confirming the President-elect were not carried into the final version of the Constitution. Proposals to reduce or even eliminate the role of the EP were equally rejected. See *ex multis* suggestions for amendment of Article 18 bis by Mr Valdo Spini; by Mr. Péter Balázs, Mr. Hannes Farnleitner, Ms. Sandra Kalniete, Mr. Jan Kohout, Mr. Ivan Korčok, Mr. Rytis Martikonis, Mr. Lennart Meri, Mr. Dimitrij Rupel, Ms. Teija Tiilikainen; by Mr. Kimmo Kiljunen, Mr Matti Vanhanen, Ms Riitta Korhonen and Mr Antti Peltomäki; by Mr Vytenis Povilas Andriukaitis and Mr Gintautas Šivickas; by Mr William Abitbol - for a full list of proposals see <http://european-convention.europa.eu/EN/amendments/amendmentsf9f8.html?content=41899&lang=EN> (06.06.2014) The relevance of *travaux préparatoires* for identifying the purpose of Treaty provisions has been confirmed in Case C-370/12 Pringle § 58.

³⁷ In a pending Case C-28/12 Commission v Council, the Commission *inter alia* alleges that “the Council infringed [...] the principle of sincere cooperation laid down in Article 13 (2) TEU. The Council should have exercised its powers so as not to circumvent the institutional framework of the Union and the Union procedures set out in Article 218 TFEU” in so far as “it transpires from Article 218 (2) and (5) TFEU that the Council is the institution designated to authorise the signing and provisional application of agreements. Therefore, the decision should have been solely taken by the Council and not also by the Member States, meeting within the Council.” For an opinion that “institutional balance does not entail a kind of one-way traffic in favour of the European Parliament” see S. Prechal, *Institutional Balance: A Fragile Principle with Uncertain Contents*, in T. Heukels, N. Blokker, and M. Brus (eds), *The European Union after Amsterdam: A Legal Analysis* (1998) Kluwer Law International, p. 278 and M. Klamert, *The Principle of Loyalty in EU Law* (2014) OUP p. 216: “always favouring the legal basis granting more rights of participation to the Parliament is not supported by arguments of institutional balance”

Commission.³⁸ Yet, were such a link created, it would mutate accountability of the Commission to the Parliament into “taking instructions”, failing to respect the balance between accountability and independence of the European Commission set out in the Treaties. According to Article 17(3) TEU,

The members of the Commission shall be chosen [...] from persons whose independence is beyond doubt.

In carrying out its responsibilities, the Commission shall be completely independent. [...] the members of the Commission shall neither seek nor take instructions from any Government or other institution, body, office or entity. They shall refrain from any action incompatible with their duties or the performance of their tasks.

Independence of the Commission is crucial for its ability to fulfill the institutional role assigned to it in the Treaties. The Commission has a number of tasks that require a high level of actual and perceived independence, in particular:

The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Treaties. With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union's external representation. It shall initiate the Union's annual and multiannual programming with a view to achieving interinstitutional agreements.³⁹

Because the EP votes on the candidate for President of the Commission twice – first individually and subsequently on the whole Commission as college – this amounts to instruction to the President-elect from the EP to form a certain type of Commission (where the coalition parties forming the absolute majority are represented). This instruction is further backed by the possibility to sanction the President-elect together with the entire college on the second vote. This also gives minority parties in the Parliament new bargaining power over the nomination of the college, shifting the power to propose all candidates for membership of the Commission from the Council to the EP - a shift not contained in the Treaties.⁴⁰

Both the President of the Commission and individual Commissioners “shall refrain from any action incompatible with their duties” and “may not, during their term of office, engage in any other occupation, whether gainful or not”.⁴¹ A failure to fulfill “the conditions required for the performance of his duties” by any member of the college enables the Court of Justice “on application by the Council acting by a simple majority or the Commission, compulsorily retire him”.⁴²

The obligation of the Council to take into account EP elections is only one of the criteria for nominating the candidate. Another major requirement is contained in Article 17(3) TEU: “the members of the Commission shall be chosen on the ground of their general competence”. This includes the President of the Commission. Declaration 11 lists the “backgrounds of the candidates” as a focus factor in choosing the nominee, alongside the EP elections. Additionally, the nomination should take account of “the need to respect the geographical and demographic diversity of the

³⁸ European Parliament, Resolution 2013/2102(INI) *Practical arrangements for the holding of the European elections in 2014 European Parliament* (4.7.2013) P7_TA-PROV(2013)0323. For a discussion of this objective in light of the Union structure contained in the Treaties see JHH Weiler, *European Parliament Elections 2014: Europe's Fateful Choices* (2013) European Journal of International Law Vol. 24 no. 3

³⁹ Article 17(1) TEU

⁴⁰ This would in particular contradict Article 24 TFEU: “the Members of the Commission shall be chosen on the basis of a system of rotation established unanimously by the European Council”.

⁴¹ Article 245 TFEU

⁴² Article 247 TFEU

Union and its Member States”, balancing with the nominations for President of the European Council and High Representative of the Union for Foreign Affairs and Security Policy.⁴³

Even if Treaty requirements regarding independence of the Commission were set aside, the arrangement could lead to a major interinstitutional crisis. This is so because the President of the Commission cannot nominate the Commissioners but only accord on nominations made by Member States,⁴⁴ what José Manuel Durão Barroso famously called “a blind date”.⁴⁵ Thus, even if the party that gains the most seats in the EP nominate a candidate who then gathers support of the majority in the Parliament and qualified majority in the Council, this President might not be able to wrestle 28 governments appointing Commissioners from other parties. Potentially, this could lead to two forms of an interinstitutional crisis. First, were a partisan President of the Commission belongs to a political stripe different from most governments in the Council, a disagreement on the college could delay appointment of the Commission. Second, once the college comprising Commissioners from different political parties is appointed, they might not necessarily follow the policies put forward by a partisan President. Partisan discord could undermine collegiality of the Commission, which its President has a duty to ensure.⁴⁶ It could also be more difficult for a partisan President of the Commission to request resignation of individual Commissioners⁴⁷ who belong to a different party, as this could be seen as a bet on new appointees closer to her political stripe. Also censuring the Commission by the EP⁴⁸ could become more difficult. Commission President belonging to the party that wins most seats in the EP is bound to pose questions of democratic legitimacy: can minority parties in Parliament collude to dismiss the President nominated by the party with most seats, i.e. elected by Union citizens? The proposal that the Parliament be able to dismiss the Commission only when the EP can propose a new candidate for President⁴⁹ would not solve this problem.

The Spirit of the Treaties: Democracy and the Union

A systemic issue lurks behind these provisions. The European Communities were founded with the finality – the source of EU’s messianic legitimacy – to ensure prosperity and peace between Member States. Throughout the process of European integration, one of the main concerns has been to prevent domination of some Member States over others. Democracy was not only absent from this original project of European integration but it was so on purpose: the Union would enable Member States to counteract the eventuality of another Hitler coming to power through democratic process. An intergovernmental Community would counterbalance the democratic nation state. The Commission plays a central role in this construct as a neutral guarantor of common European interest and of interests of small Member States.⁵⁰ For instance, the Commission has extensive supervisory powers in the areas of competition⁵¹ and budgetary oversight.⁵² Enlargement of the European Union to 28 Member States and extension of Union powers into more politically sensitive regulatory fields increase heterogeneity in circumstances and interests within the Union, raising

⁴³ Declaration 6 on Articles 15(5) and (6), 17(6) and (7) and 18 TEU

⁴⁴ Article 17(7) TEU

⁴⁵ European Voice (03.12.2009) p.6 cited in J. Peterson, *The College of Commissioners* in J. Peterson, M. Shackleton (eds.) *The Institutions of the European Union* (2012) OUP p.108

⁴⁶ Article 17(6)b TEU. In this regard, the Code of Conduct of Commissioners C (2011) 2904 p. 3 specifies that “Commissioners are expected to defend and support the decisions taken by the College. Their Commission duties must prevail over party commitment.”

⁴⁷ Art 17(6) TEU

⁴⁸ Art 17(8) TEU

⁴⁹ Speech of Commission President Barroso at Humboldt University Berlin (8.5.2014) SPEECH/14/355, p.16

⁵⁰ Article 4(2) TEU: “The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security.”

⁵¹ e.g. Article 96, 106, 108 TFEU

⁵² e.g. Article 126 TFEU

importance of the neutrality of the Commission further. Creating a direct link between the Head of the European executive – the actions of the Union – and the outcome of democracy would negate the very construct and purpose of the Union: similar to creating a European polity,⁵³ “it would be more than ironic if a polity set up as a means to counter the excesses of statism ended up coming round full circle and transforming itself into a (super) state.”⁵⁴

Linking policies pursued by the Commission to the outcome of EP elections would present major structural problems for the Union under the current Treaties. The nature and institutional setting of the Union established in the Treaties renders the Commission very dissimilar of the governments even in federal states, reflecting the fact that the EU is a “union among the peoples of Europe”. The role of the Commission is not equivalent nor comparable to a national government: the Lisbon Treaty reserves the power to set policy agenda to the European Council, so the functions exercised by governments in Member States are effectively split between the European Council and the Commission. The Council and EP are different from e.g. the Senate and Congress in the U.S. because the representation in both EU “chambers” reflects both Member States and their populations. This leaves small Member States more vulnerable than less populous states of the U.S.,⁵⁵ requiring a special role of the Commission.

In view of this special role, Article 17(3) TEU provides that “the members of the Commission shall be chosen on the ground of their [...] European commitment”. Giving priority to the candidate of the party that wins the most seats in the EP would open the door – at least hypothetically – to majority being the Eurosceptics. While Eurosceptics are not outlawed from the political process in the EU or any Member State (unlike the more extreme right-wing parties in some Member States), their candidates would be precluded from consideration not only for presidency of the Commission⁵⁶ but also for any member of the college. As a result, the credibility (and legitimacy!) of the arrangement will be hampered by its applicability to some political parties but not others.⁵⁷ This would clearly be incompatible both with democracy and rule of law, and would amount to giving the right to vote but the right to stand for office.

Nor would the linking of Commission’s policies to EP elections be desirable in democratic terms. Winning the most seats in the Parliament – the requirement for giving priority to one party candidate over others – is not the same as absolute majority. Even if the other parties back the candidate for President of the Commission so that the absolute majority required for appointment is

⁵³ Something that is attempted with the introduction of Union citizenship ever since the Treaty of Maastricht, compare specifically the definition of members of European Parliament as “representatives of the Union’s citizens” in Article 14(2) TEU Lisbon Treaty with their previous definition as “representatives of the peoples of the States brought together in the Community” in Article 189 EC before Lisbon.

Creation of a single European political process would pose problems as regards the language(s) of the debates among the candidates for Presidency of the Commission; failing to fully use for such debates the languages of smaller member States could undermine not only the democratic legitimacy of the European political process but also linguistic and cultural diversity among Member States protected by Articles 3(3) TEU and 24 TFEU.

⁵⁴ JHH Weiler, *The constitution of Europe: "Do the new clothes have an emperor?" and other essays on European integration* (1999) CUP, p. 341

⁵⁵ Under the new QMV rules, the relative importance of small Member States fell while the relative importance of medium and large Member States increased. The QMV rules in force from 2014, provide that three large Member States (representing 35% of Union population) may block the adoption of secondary EU law. This leaves small Member States little leverage while Member States with large populations retain much of their power despite the passage from unanimity to QMV.

⁵⁶ This is also because, according to EP resolution of 4 July 2013 on improving the practical arrangements for the holding of the European elections in 2014 ([2013/2102 INL](#)), the candidates for President of the Commission would be nominated by European parties, while not all the political forces competing in EP elections qualify as European parties under Article 3 Regulation 2004/2003/EC on the regulations governing political parties at European level and the rules regarding their funding as amended by Regulation 1524/2007/EC (27.12.2007) OJ L 343:5

⁵⁷ This is independently and additionally to the legitimacy issues that may arise if the candidate of the party that wins most seats in the EP fails to gather the absolute majority in the Parliament or qualified majority in the Council and therefore does not get appointed as President of the Commission.

gathered, this would be an arrangement very different from coalition governments formed in Member States. Since the President of the Commission can only accord with nomination of the college by Member States but has no power to propose own candidates, the composition of the college is not likely to reflect majority coalition in the European Parliament. Were a partisan President of the Commission to shape the policy agenda of the Union along her party lines – as opposed to merely “lay down guidelines within which the Commission is to work”⁵⁸ – such agenda-setting could disempower the other parties in the Parliament, especially the smaller parties who cannot hope to be the largest in the EP. This risks reducing the EU (and, by implication also the national political processes) to a two-party system, muting the votes of citizens who vote for medium and smaller parties, and concentrating excessive power in a single office. Failing to further the lines of her coalition party (for instance because none of the Commissioners share the latter) might risk a loss of support for the President of the Commission in the Parliament and a motion of censure for the entire college. This would not be undemocratic because however democracy is defined, a party that gathers less than 50% support from citizens should not be imposing its views on the majority.

Even if successful and constitutional, the proposed arrangement would not increase accountably and democratic legitimacy of Union policies. The actual power to shape policy agenda for the Union lies with Member State governments in the European Council.⁵⁹ Already the Maastricht Treaty it has been noted that in politically sensitive policy fields the national governments are tempted to avoid political accountability for contests policy choices by shifting decision-making to Brussels.⁶⁰ Appointing an EU “face” who could be sanctioned for failure of collective policies set by national governments on Union level would reduce their accountability further. Member State governments would continue evading democratic accountability in the national political process by shifting regulation from national level to the EU, while the person accountable for possible failures of these Union policies would be the President of the Commission. This would aggravate, not solve democratic deficit on both EU and national levels.

IV. An Unsurprising Conclusion

On its face, the proposed arrangement for nominating the candidate for President of the Commission will change little for representation and accountability. Already before the Treaty of Lisbon, the Commission was accountable to the EP, both its President and the entire college approved by the Parliament, while the President of the Commission belonged to the party with the most seats in EP.

However, it has been argued here that if successful, implementation of the arrangement whereby the candidate nominated by the party that wins the most seats in EP elections will be the first to be considered for the post of President of the European Commission would face a number of constitutional and democratic challenges. These challenges could undermine rather than further legitimacy of the Union and its policies.

The arrangement would be incompatible with the letter and spirit of the Treaties. It would change the institutional balance of the EU and alter the nature of the Union so deeply as to amount to Treaty amendment outside the procedure provided therefore in the Treaties. The procedure

⁵⁸ Article 17(6)a TEU

⁵⁹ Articles 15, 16(6), 22, 26 TEU, Articles 68, 121, 148 TFEU, as well as the capacity of national governments to enter between themselves into international treaties outside EU law, such as the Fiscal Compact.

⁶⁰ G. A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and in the United States* [1994] Columbia L. Rev. 94, p. 361; for the latest see JHH Weiler, *Challenges to electoral participation in the European elections of 2014* (2013) European Parliament doc. PE 493.036, p.6 and Speech of Commission President Barroso at Humboldt University Berlin (8.5.2014) SPEECH/14/355, p.11

established in Article 17(7) TEU would be twisted and impartiality of the Commission imperiled. It could result in a major institutional crisis and replicate on Union level the malfunctions of national democracies against which the Union is supposed to guard.

In terms of increasing accountability and input legitimacy, the proposed arrangement is fallacious in its design. Because the real power to set policy agenda for the Union lies with the national governments in the European Council, increasing accountability of EU officials would do little to promote European governance that respects the preferences of Union citizens. It is, indeed, questionable whether accountability can at all be shifted from the national level to the European level inasmuch as democratic accountability should follow the actual decision-makers. This is not the role of the European Commission.⁶¹ By placing accountability where responsibilities do not lie, the arrangement will create a European scapegoat for the failures of national governments and national democracies. Given the institutional and representation structure established in the Treaties, national governments could continue to use EU level for the adoption of laws that are controversial in their Member States; this would undermine further the debate on these policies in the national democratic processes and, as a result, limit the capacity of the peoples of Europe to elaborate shared European policies on Union level. Hardly any form of legitimacy would be served as a result.

Two venues are open for making the EU more accountable to its citizens. First, the agenda-setting power could be shifted from the European Council to the Parliament. This would ensure that accountability follows power, as opposed personifying accountability without corresponding power shift. Such a change would strike against the current letter and spirit of EU constitutional design and would require a Treaty amendment but, more importantly, it would require a shared perception on behalf of all the peoples of Europe as a single unified group for the purpose of majority rule – exactly the opposite of what is currently the case.⁶² Alternatively and second, national campaigns for EP elections could focus on the performance of national politicians in the EU, including both national governments in the Council and European Council and national MEPs. This would enhance the currently dominating national dimension of EP elections⁶³ positioning the prevailing domestic issues⁶⁴ in European context. Such enhancement would correspond to the actual Treaties but would require transparency in the work of the Council and the European Council so that a meaningful debate about it can take place on the national level. Linking EP elections to the performance of national governments and MEPs on EU issues is exactly the opposite from the decoupling between the national governments and the EU that is the substance of the proposed arrangement.

⁶¹ “The introduction of the co-decision procedure in the EU decision-making and the functioning in practice of the inter-institutional system have transformed the role of the Commission from that of an autonomous initiator to that of a reactive initiator.”, P. Ponzano, C. Hermanin and D. Corona, *The Power of Initiative of the European Commission: A Progressive Erosion?* (2012) Notre Europe, www.notre-europe.eu/media/commission_power_of_initiative_ne_feb_2012.pdf?pdf=ok (15.05.2014). See also T. Christiansen, *The European Union after the Lisbon Treaty: An Elusive Institutional Balance?* in A.Biondi, P. Eeckhout and S. Ripley (eds.) *EU Law After Lisbon* (2012) OUP p. 237

⁶² See Standard Eurobarometer 80 Autumn 2013 *European Citizenship*

⁶³ K Reif and H Schmitt, *Nine Second-order Elections* (1980) European Journal of Political Research 8(3); F. Jacobs, *European Parliament Elections in Times of Crisis* (2014) *Intereconomics* 1, p.7: “A related risk often referred to by political scientists is that voters may perceive these as “second-order elections” in which national governments are not directly at stake and that this will either lead to indifference and abstention or else provide an ideal opportunity to register a protest vote against incumbent governments and establishment parties.”

⁶⁴ S. Piedrafita and V. Renman, The ‘Personalisation’ of the European Elections: A half-hearted attempt to increase turnout and democratic legitimacy? (April 2014) EPIN Paper No. 37 p. 3: “elections to the EP to second-order elections largely focused on domestic rather than European issues”