



## Spitzenkandidaten: A debate about power and about the future development of the EU

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*In 2014, the European Parliament staged a small 'coup' when it imposed the EPP "Spitzenkandidat" Jean-Claude Juncker as the new Commission President, on the basis of a rather innovative reading of the Treaty. In 2019, the attempt at renewing this operation failed, because of some of the inherent flaws in the concept, and because the conditions were no longer the same. The European Council was quick to reclaim its prerogatives as set out in the Treaty. This may however not be the last word and a revised version of the Spitzenkandidaten could possibly emerge from the upcoming conference on the future of the EU. But any such move towards a more federal Europe requires an informed and transparent debate and cannot be introduced via the back-door.*

### INTRODUCTION

On 16 July 2019 Ursula von der Leyen, who had been proposed as candidate for the post of Commission President by the European Council at the beginning of the month, was elected by the European Parliament (EP) with 383 votes, just nine votes above the required threshold of 374.

This narrow result no doubt reflected a divided EP, but it also translated a sense of frustration on the part of many MEPs on the way the European Council had picked the candidate. They resented the fact that contrary to 2014 the name put forward this time was not one of the *Spitzenkandidaten* designated by the various party groupings to lead the lists for the EP elections<sup>2</sup>. There were accusations of back room deals, of ignoring democracy, and of spurning the directly elected parliament. The reality is a bit more complicated.

Since this is a debate that is far from over, it makes sense to have a closer look at the way of choosing the Commission President and setting up the Commission, with a special focus on the events of 2014 and 2019. This will allow us to better understand the arguments used by the various protagonists and above all to deepen our analysis of the way the Union functions and the changes that some want to bring to the system. It is important to understand that while this is very much a power game between institutions, it is also a debate on the way the EU should develop in the future.

## A UNION OF STATES AND PEOPLES

The best way to start from is to recall what the Treaty says about the choice of the Commission President in Article 17(5) 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.*" The Treaty thus clearly sees an important role for both institutions; the choice of the President of the Commission is a shared competence. This is very much in line with the very nature of the European Union, which is a Union of States and peoples. The candidate derives his or her legitimacy first from being chosen by the European Council, where the Member States are represented at the highest level, then by being approved by the directly elected European Parliament<sup>3</sup>. In the light of this double legitimacy, the argument frequently heard in euro-sceptic circles that "the Commission is a bunch of unelected officials" is completely off the mark. More generally, the division of powers between the Council (and the European Council) and the European Parliament also belies the frequently heard assertion that the EU has a "democratic deficit!" We will come back to that point.

The Treaty of Lisbon (hereinafter: the Treaty or Treaties) also gives very clear indications on what is requested of the members of the Commission and of the Commission as a whole. Commissioners are put forward by their respective national governments and they "*shall be chosen on the ground of their general competences and European commitment from persons whose independence is without doubt.*" (Article 17 (3) TEU) And the Treaty adds: "*In carrying out its responsibilities, the Commission shall be completely independent.*" This is a key point which should not be forgotten in the heat of the argument about the *Spitzenkandidaten*.

The choice of words in the Treaty points towards the Commission being an independent institution at an equal distance from the other players in the institutional triangle, not to an alignment on one of them. The sui generis nature of the Commission is further underlined by its threefold role, that of the holder of the sole right of legislative initiative, that of guardian of the Treaties, and that of some form of executive agency.

## THE IRRUPTION OF THE SPITZENKANDIDATEN CONCEPT AND THE "COUP" OF 2014

It is fair to say that the institutional set up has allowed the Union to develop and to thrive as well as to weather many storms! It has of course evolved over the years, with a sequence of significant Treaty reforms between 1985 and 2009. One of the key developments in that respect has been the growing involvement of the EP in the legislative process, especially since its first direct election in 1979. This has been very much in the logic of a Union of States and peoples, with the ordinary legislative procedure being, since the Lisbon Treaty, a sharing of the power between the Council and the EP. In the pursuit of this objective, the EP has frequently used, and to great effect, the slogan of a "democratic deficit" in the EU that had to be dealt with by awarding more powers to the EP. While this slogan certainly had a justification in terms of adopting Union legislation, there has been a tendency to use it in a somewhat indiscriminate way to call into question the very nature of the EU system as a whole. This has led to interpretations of the Treaty that do not always stand up to an objective analysis.

The debate about the *Spitzenkandidaten* is an interesting case in point. The concept is relatively simple. Citizens voting in the EP elections should have a say on who becomes the next Commission President. The way to do this, so the argument

goes, is for political groups and parties at the European level to pick as lead candidates (that is what the German term of *Spitzenkandidaten* means) personalities that would be seen as candidates for the post of President of the Commission.

This was precisely what the political parties did in 2014. Several factors facilitated what one may call a little political "coup": there was a majority within the EP of the two major groups, the EPP and the S&D, a quick agreement was reached between the two and endorsed by a majority of MEPs, and there was a candidate who happened to have spent many years as a member of the European Council, Jean-Claude Juncker. So when the EP signalled right after the elections that it would not vote for any other candidate, it got away with it. Many of the Heads of State or government were uneasy with this procedure, but the vast majority did not want to reject a candidate that they considered as one of them. Only the British PM and the Hungarian PM voted against.

The result of this was of course that the procedure foreseen in the Treaty was stood on its head: while the Treaty gives the European Council the right to put forward a candidate, who then needs the votes of a majority of the component members of the European Parliament, the approach imposed this time meant that the latter in fact put forward its candidate first who then needed a qualified majority in the European Council! The European Parliament used the fact that the Treaty asks the European Council to choose a candidate, "taking into account the elections to the EP", to great effect<sup>4</sup>. But there is quite a difference between taking into account the elections and accepting an automaticity between the choice of the EP and the decision of the European Council, which in fact deprives the latter of any margin of manoeuvre. Moreover, this is at odds with the fact that there are other criteria like the

geographical and gender balances that are actually more explicitly spelt out in other parts of the Treaty than the party political balance<sup>5</sup>. This is the reason why the European Council, while deciding on the name of Juncker in 2014, adopted a declaration saying that it would come back to the issue in view of the 2019 elections.

### THE 2019 INSTITUTIONAL CYCLE: A SETBACK FOR THE *SPITZENKANDIDATEN* MODEL

In February 2018, the Heads of State or government gathered to discuss the upcoming institutional cycle. In this context, as they had decided in 2014, they came back to the issue of the *Spitzenkandidaten*. They took note of the possibility for parties to organise elections as they saw fit, but made it very clear that there could be no automaticity between a possible majority choice of the EP and the decision of the EUCO on a candidate for the post of President of the Commission. This set the stage for the events that happened after the EP elections in May 2019. This time, at least four elements played against the *Spitzenkandidaten* idea:

- the February statement of the European Council: the unequivocal stance of the Heads meant that the EP could not count on its tactics working without a fight, with the risk of creating an interinstitutional conflict;
- the absence of a candidate with Juncker's credentials: the tradition since 1995 has been to nominate a former Prime Minister as President of the Commission. The fact that Juncker was available in 2014 made it possible to reconcile this tacit requirement with the acceptance of a *Spitzenkandidat*;
- the refusal of the ALDE group to play the game: while in 2014 this group had been one of the fiercest supporters of the new concept, this was no longer the case in 2019. The reason for this is interesting: it had to do with the possible arrival

of President Macron's party into the group and above all the recent vote of the European Parliament against the idea of setting up transnational lists for the EP elections. Macron and the group that was later on renamed "Renew Europe" considered that in the absence of such lists the *Spitzenkandidaten* idea was flawed<sup>6</sup>.

- the absence of a majority on any of the candidates within the EP: this time, any majority required at least the participation of the three major groups. Both liberals and socialists refused to accept the principle that the first choice would automatically be the lead candidate of the biggest group, i.e. Manfred Weber from the EPP. The Parliament in fact did not manage to agree on any candidate of its own, in spite of having renewed its pledge for the *Spitzenkandidaten* process in late May<sup>7</sup>.

This of course left the field open for the European Council to play its role as foreseen in the Treaty. After some quite animated discussions, the leaders agreed on 2 July 2019 by consensus, with the notable abstention of the German Chancellor, on Ursula Von der Leyen as the candidate for the post of President of the Commission. This was part of a wider package also including Charles Michel as President of the European Council, Christine Lagarde as President of the European Central Bank, and Josep Borrell as High Representative. This led to some fierce recriminations and a nail-biting election in the European Parliament.

### WHITHER NOW? ARGUMENTS AGAINST THE *SPITZENKANDIDATEN* MODEL IN ITS PRESENT FORM

It is impossible to say whether the concept of *Spitzenkandidaten* is dead or not, especially since there seems to be wide-spread agreement to launch a reflection process in the shape of a Conference on the future of Europe. It is unlikely to survive in its current form, both because the conditions of 2014 will not be replicated, and also

because the concept as it has been applied so far has a number of flaws, at least in the eyes of some key players:

1. Any automaticity between the result of the EP elections and the choice of the candidate by the European Council would deprive the latter of its right and even obligation to make its choice with the necessary margin of manoeuvre. That is the reason why the leaders excluded such an automaticity in the future.

2. The argument used by many in the European Parliament that there is a "democratic deficit" in the EU system and that the only way to overcome this is to hand over power to the EP is flawed. It is predicated on the idea that the situation within the EU is or should be analogue to the one existing at the national level in most of our Member States, where the elections yield a majority in parliament, and this majority forms a government. The problem with this is two-fold: the Commission is not the European government; the EU system is a system of checks and balances and it is based on a double legitimacy, that of the States and that of the peoples. The former translates via the Council (and European Council), the latter via the directly elected European Parliament. The "democratic deficit" does not exist in reality; there can be and there are different ways of ensuring democratic legitimacy. The EU system is admirable in combining the two legitimacies. In other words: the logic of the *Spitzenkandidaten* idea is at odds with the philosophy behind the EU institutional set-up.

3. The model does not integrate the fact that the President of the Commission, while having a say about the future members of the Commission, cannot choose them freely among some political majority: according to Article 17 (7) TEU ("*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 the Member States...*". Those suggestions will of course reflect the respective political majorities in each Member State, and this can easily result in a majority that is different from the majority reflecting the EP elections at a given time. What kind of political party programme is the Commission as a college supposed to pursue in that case?

4. The Treaty is very clear that the Commission, in carrying out its responsibilities, shall be completely independent. Independent not only from the Member States, but also from the other institutions including the European Parliament: "*Without prejudice to Article 18 (2), the members of the Commission shall neither seek nor take instructions from any Government or other institution, body, office or entity.*" (Article 17(3) TEU) The Commission has always been political in the sense of being an independent institution with its own agenda and role. The way the Commission is being set up shows that it is a political institution and that it enjoys legitimacy. But as a college, it has never been political in the sense of party politics. Like in the Swiss system, all the main political forces are traditionally represented in it because the members are put forward by their national governments. The political sensitivities, like the national ones, are thus represented, but that is not the same as saying that the Commission should be bound by a party political majority in the EP, nor by national considerations as expressed, for instance, at the Council level.

5. One of the arguments put forward in favour of the *Spitzenkandidaten* is that it allows the European citizens to vote for the person they want to see at the head of the Commission. That, we are told, is what the European citizens want. It is always a bit dangerous to talk about "the citizens" as if they were a compact group having the same wishes. Some maybe do want the EU to mirror the way things are done nationally and are in favour of moving towards the United States of

Europe. Others may like the idea without realising that this could lead to a very different EU from the one they are familiar with. But many others do not participate in the EP elections (where the participation rate is relatively low incidentally, even though 2019 saw a very welcome increase) to elect the President of the Commission; they rather vote to send to Strasbourg and Brussels the people who in their eyes best represent their national sensitivities in the EP.

6. The only citizens who could directly vote for one of the *Spitzenkandidaten* were the citizens whose nationality was represented among the *Spitzenkandidaten*. But even that is of little help to someone who traditionally votes for the EPP or the S&D and the *Spitzenkandidat* of his nationality (if there is one) happens to run for the Greens. Moreover, people voting for a party affiliated to the S&D or EPP did not necessarily want to cast a vote for Timmermans or Weber whom most voters outside of Germany and the Netherlands hardly knew. Assuming simply that any vote cast for such a party was a vote for those persons is bordering on usurping their votes, since there is no indication in the Treaties that the purpose of the EP elections is to directly elect a President of the Commission.

### **A JOINT REFLECTION ON A MAJOR INSTITUTIONAL REFORM: CAN THE *SPITZENKANDIDATEN* MODEL BE REVIVED?**

While the *Spitzenkandidaten* model seems doomed in its present shape, the debate is not over. It will certainly flare up again if the suggestion of a conference on the future of Europe that has been put forward by some in the context of the nominations process is implemented. In that case the idea of linking the *Spitzenkandidaten* model to a major reform of the electoral system by setting up one or several transnational lists will come up again. This is certainly worth exploring since it

would allow to remove at least some of the artificiality of the *Spitzenkandidaten* system as it has been applied hitherto. It would notably open up the possibility for all European voters to cast a vote for the various candidates for the post of President of the Commission. This is not the appropriate place to go into a detailed analysis of such a concept. We will simply point out that the idea requires much further thinking and studying; some of the questions raised in this short article will still be valid and others will come up, such as the risk of creating two classes of MEP.

This would be the occasion for a serious debate about what kind of Europe we want. One of the problems with the *Spitzenkandidaten* saga has been that it took the EU into uncharted waters without there having been a serious discussion about what this meant for the system. The latter is too important and too precious for it to be fundamentally altered via the backdoor and by seemingly innocuous changes in the practice of nominating the President of the Commission. In many ways, the *Spitzenkandidaten* approach partook of an "AS IF" world: people behaved as if the Union was more like a State, as if there was one European people, as if the Commission was the European government, as if the EP was the sole source of legitimacy and as if the Council was just a second legislative chamber, subordinated to it. That is not the best way of improving the way we communicate about the European Union: talking about the EU as if it were all of that and then measuring it against that yardstick rather than against the yardstick of what it is and is meant to be is not a recipe to make the citizens better understand the Union.

Introducing a half-way politicisation is a risky business. It will most likely not lead to the result some dream of, i.e. a European government, but it may well end up destroying what was the traditional legitimacy of the Commission: a political body composed of people representing all the various political sensitivities in the Member

states, a body that is independent and defends the common good, a body that is outside the daily electoral fray and hence has the possibility to think the long term and to put forward bold ideas, a body that because it is not politicised in the traditional sense of the term can be trusted to enforce the respect of the law and have extensive powers in competition for instance. Already now, even though the Juncker Commission has been in most ways a classical Commission, there have been some visible side-effects of the new rhetoric, with at times negative consequences. In the migrants' crisis of 2015, the Commission chose to ignore the warning signs coming from a very divisive discussion on the idea of quotas of migrants that took place among the Heads of State or government in April 2015 and pushed for such quotas, in a close political alignment with the political majority in the European Parliament. The effect has been to split the EU in two or more parts and to open wounds that will take a long time healing.

Europe needs an honest debate, with a confrontation of ideas, where all sides can make their views known and where a consensus will hopefully emerge on the future nature of the EU. It will be a good way to know whether there is a large buy-in for a more politicised Commission and for a move towards a more federal Europe. If there is, then this should be clearly set out and explained. If not, it would be preferable to stop using rhetoric, like the one about the *Spitzenkandidaten*, which is at odds with the system as it is presently defined in the Treaties.

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**ENDNOTES**

<sup>1</sup> All views are personal and do not commit the CGS nor the Council.

<sup>2</sup> GROS, D. RUSSACK, S.:(2019) *'The nomination of Von Der Leyen- Towards institutional balance in a reformed lead candidate process'*, CEPS 12 July 2019, at [https://www.ceps.eu/the-nomination-of-von-der-leyen/?mc\\_cid=c2ab47](https://www.ceps.eu/the-nomination-of-von-der-leyen/?mc_cid=c2ab47).

<sup>3</sup> The 'double legitimacy' concept is clearly based on Article 10(1)-(2) TEU, which provides that "*The functioning of the Union shall be founded on representative democracy. Citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council by their Heads of State and Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.*"

<sup>4</sup> Note that the Treaty does not talk about "the outcome" or "results" of the EP election!

<sup>5</sup> RUSSACK, Sophie, *Institutional Rebalancing: the Political Commission*, CEPS 5 March 2019 at [www.ceps.eu](http://www.ceps.eu).

<sup>6</sup> PERALDI LENEUF, F., *Spitzenkandidaten 2019: la grande illusion?*, J.D.E., 2019/4, no 258-15 avril 2019, at [https://www.stradalex.com/fr/sl\\_rev\\_utu/toc/jtde\\_2019\\_4-fr/doc/jtde20](https://www.stradalex.com/fr/sl_rev_utu/toc/jtde_2019_4-fr/doc/jtde20)

<sup>7</sup> See the EP Conference of Presidents' statement, issued on 28 May 2019, just ahead of the informal dinner of the Heads of State or government, last indent: "*The EP commits to the strengthening of the European democracy. Therefore we recall the EP resolutions Bresso-Brok, Gonzales Pons, Vehofstadt, Jaurequi, reconfirming our resolve for the lead candidate process so that the next Commission President has made /her/his program and personality known prior to the elections and engaged in a European-wide campaign.*" See: <https://www.europarl.europa.eu/news/de/press-room/20190528IPR53302>.

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