

# THE SPITZENKANDIDATEN PROCEDURE

## GENESIS AND NEMESIS OF A CONSTITUTIONAL CONVENTION?



---

Leiden University  
LL.M. Thesis, European Law  
Leiden, 10 July 2015  
Supervisor: dr. Armin Cuyvers  
Student: Paul W. Post (s0919780)  
Words: ±18 500 (main text only)

*'The fundamental principle of the EU is [that] the democratically elected leaders of the member states have the right to decide these issues. In making Mr Juncker president, you are going back on all of that. The Commission is becoming the creature of the parliament.'*<sup>1</sup>

*'Cijfert hij (...) den "custom" weg, (...) dan sluit hij zich op in een prachtig gebouw met eene sterrewacht, maar zonder vensteropening naar de straat van het werkelijk leven.'*<sup>2</sup>

*'What is a constitutional instrument without a political life to inspire it?'*<sup>3</sup>

---

<sup>1</sup> Prime Minister of the United Kingdom Cameron during the European Council meeting in Brussels of 27 June 2014, as quoted in Payne, S., *Leaked: what David Cameron really told Van Rompuy and the EU leaders last week*, The Spectator 29 June 2014, <http://blogs.spectator.co.uk/coffeehouse/2014/06/leaked-david-camerons-most-important-eu-speech-of-the-year/>, accessed 9 July 2015.

<sup>2</sup> Oppenheim, J. (1893), *De theorie van den organischen staat en hare waarde voor onze tijd* (Inaugural address, Rijksuniversiteit Leiden). Groningen: Wolters, at p. 10. 'If he obliterates custom, he locks himself into a magnificent building with an observatory, but without a window to the street of real life.' [Transl. PWP]

<sup>3</sup> Eijsbouts, T. (2005), 'The Barroso Drama: Campidoglio, Rome 29 October 2004: How the Form Was Brought to Matter', *European Constitutional Law Review*, vol. 1(2), p. 155-174, at p. 157.

## Abstract

In the run-up to the 2014 elections to the European Parliament, all main political groups in the European Parliament nominated *Spitzenkandidaten* (lead candidates) for the position of President of the European Commission. Previously, it had been the European Council that picked a candidate for the presidency of the Commission. With the *Spitzenkandidaten* innovation, each ballot cast for the European Parliament would also be an indirect vote for the new President of the Commission. The “coup” succeeded, and eventually the winning *Spitzenkandidat* was proposed by the European Council and elected by the European Parliament.

This thesis describes the genesis of the *Spitzenkandidaten* procedure. Looking at the procedure through the prism of constitutional conventions, it maintains that the *Spitzenkandidaten* development is (as yet) a frail convention. The argument is proposed that for the *Spitzenkandidaten* procedure to contribute to European Union parliamentary democracy, further changes are necessary. Without such changes, parliamentarisation might be weakened rather than strengthened: the nemesis of the *Spitzenkandidaten* procedure. This is crucial, because the strength and subsequent consolidation of a convention rely on the validity of the reason behind the convention.

## Table of contents

List of abbreviations .....	5
<b>1. Introduction .....</b>	<b>6</b>
1.1. Research questions and structure .....	6
1.2. Relevance of the research questions .....	7
1.3. Definitions .....	8
1.4. Caveats .....	10
<b>2. ‘This time, it’s different’: the genesis of the Spitzenkandidaten procedure.....</b>	<b>14</b>
2.1. Treaty revisions enabling change .....	14
2.2. The run-up to the 2014 elections: a flywheel effect at work .....	18
2.3. The clash between the European Parliament and the European Council .....	20
<b>3. The Spitzenkandidaten procedure as a constitutional convention?.....</b>	<b>24</b>
3.1. The “invisible rules” of constitutional law: the concept of constitutional convention.....	24
3.1.1. What are conventions? .....	25
3.1.2. Conventions and law(s).....	27
3.1.3. The establishment of conventions (Jennings’ test).....	30
3.2. Constitutional conventions in the European Union .....	34
3.2.1. Conventions and the legal order of the European Union .....	34
3.2.2. Two examples: parliamentary hearings and censure of candidate Commissioners ....	40
3.3. The Spitzenkandidaten rule through the prism of constitutional conventions .....	43
3.3.1. The content of the rule.....	43
3.3.2. Applying Jennings’ test to the Spitzenkandidaten procedure .....	44
3.3.3. Preliminary conclusion .....	47
<b>4. Parliamentarisation: the nemesis of the Spitzenkandidaten procedure .....</b>	<b>49</b>
4.1. Parliamentarisation as the reason behind the Spitzenkandidaten procedure .....	49
4.2. The Spitzenkandidaten procedure as a contribution to parliamentarisation? .....	53
4.3. Linking parliamentarisation and the strength of the convention .....	60
<b>5. Conclusion.....</b>	<b>62</b>
Bibliography .....	63
Annex – Treaty rules on the appointment of the (President of the) European Commission.....	74

## List of abbreviations

ALDE	Alliance of Liberals and Democrats for Europe
CJEU	Court of Justice of the European Union
COREPER	Committee of Permanent Representatives
COSAC	Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union
EEC Treaty	Treaty establishing the European Economic Community (Treaty of Rome)
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECR	European Conservatives and Reformists
ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights
EFD	Europe of Freedom and Democracy
EFDD	Europe of Freedom and Direct Democracy
EP	European Parliament
EPP	European People's Party
EU	European Union
MEP	Member of the European Parliament
QMV	Qualified Majority Voting
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
S&D	Progressive Alliance of Socialists & Democrats

# 1. Introduction

## 1.1. Research questions and structure

In the run-up to the 2014 elections to the European Parliament, all main political groups in the European Parliament nominated a lead candidate, generally referred to as *Spitzenkandidat*, for the position of President of the European Commission. Previously, it had been the European Council that picked a candidate for the presidency of the Commission. With the *Spitzenkandidaten* innovation, each ballot cast for the European Parliament would also be an indirect vote for the new President of the Commission.

The *Spitzenkandidaten* “coup” succeeded. Despite opposition from various Member States, the lead candidate nominated by the political group that obtained a plurality was proposed by the European Council and elected by the European Parliament. Article 17(7) Treaty on European Union (TEU), which governs the appointment procedure of the Commission President, had remained unchanged. Nonetheless, the role played by the European Council in the nomination process was reduced, to the benefit of the European Parliament. Ostensibly, this made the elections more akin to parliamentary elections in national democracies where a vote for a candidate (or party) also implies a vote for a prime ministerial candidate and government.

This thesis endeavours to offer an understanding of the *Spitzenkandidaten* development. More specifically, the aim of this thesis is threefold: to describe the genesis of the *Spitzenkandidaten* procedure; to analyse whether it is (already) a constitutional convention; and to review whether the *Spitzenkandidaten* procedure fulfils the stated intention of contributing to parliamentarisation of the European Union. This last goal is crucial, because the strength and subsequent consolidation of a convention rely on the validity of the reason behind the convention. In order to achieve the objectives of this thesis, the following two research questions are central:

- Is the *Spitzenkandidaten* procedure a constitutional convention?
- Does the *Spitzenkandidaten* procedure contribute to the parliamentarisation of the European Union?

The structure of this thesis is as follows. The remainder of Section 1 discusses the relevance of the research questions, defines the key concepts and reviews caveats. Section 2 describes the genesis of the *Spitzenkandidaten* procedure, focusing on the revision of (currently) Article 17(7) TEU, the activist stance of the European Parliament in the run-up to the 2014 elections, and the ultimate clash between the European Parliament and the European Council. Subsequently, Section 3 sets out the concept of constitutional convention and discusses the role of conventions in the context of the European Union. It introduces two conventions that are closely linked to the subject of the present thesis, namely parliamentary hearings for candidate Commissioners and the censure of individual candidate Commissioners, before maintaining that the *Spitzenkandidaten*

procedure is (as yet) a frail convention. Section 4 then outlines the notion of parliamentarisation of the European Union, argues that additional changes are necessary for the *Spitzenkandidaten* rule to contribute to parliamentarisation, and submits that this adversely affects the convention's strength. Finally, the main findings and suggestions are brought together in the Conclusion.

## ***1.2. Relevance of the research questions***

An examination of the *Spitzenkandidaten* procedure is relevant for three reasons. Firstly, it describes the origins and development of a procedure which aims, by parliamentarisation of the European Union, to address the so-called democratic deficit. For the first time, in 2014, the President of the European Commission was appointed after rival candidates were nominated by the various political groups. Especially in times of increasing Euroscepticism (which is partly based on the perceived lack of democracy in the European Union), the importance of the *Spitzenkandidaten* procedure is very clear.

Secondly, the research design offers the advantage of looking at this development through the prism of constitutional conventions. While a formalistic legal approach would lead to a distorted understanding of the novel reality of the *Spitzenkandidaten* procedure, constitutional conventions can function to bridge the divide between constitutional law and political reality, thus rendering it possible to look *au-delà du texte*.<sup>4</sup> This is because conventions can be seen as a product of politics, affecting the formal constitution in numerous ways. In fact, the advantage of looking at this development through the prism of constitutional conventions is twofold. It renders it possible to understand a quintessentially constitutional change that unfolded while no formal revision of the primary (constitutional) law had taken place. In addition, it also deepens our understanding of the role of conventions in the legal order of the European Union.

Thirdly, the stated intention of (and normative justification for) the *Spitzenkandidaten* procedure was the parliamentarisation of the European Union.<sup>5</sup> The research design renders it possible to assess whether parliamentarisation is the actual result of the process. This is crucial, because the strength and subsequent consolidation of a convention rely on the validity of the reason behind the convention. Thus, by assessing the possible implications of the *Spitzenkandidaten* procedure for parliamentarisation, it is possible to answer whether the rule constitutes a (strong) convention.

---

<sup>4</sup> Avril, P. (1997), *Les conventions de la Constitution*. Paris: Presses Universitaires de France, title of Chapter 3. This is in line with Black's call to look beyond 'the method of purported explication or exegesis of the particular textual passage considered in a directive of action' and instead employ 'the method of inference from the structures and relationships created by the constitution in all its parts or in some principal part.' See Black, C. (1969), *Structure and relationship in constitutional law*. Baton Rouge: Louisiana State University Press, at p. 7.

<sup>5</sup> For example by President of the European Commission Jean-Claude Juncker in his Political Guidelines for the new European Commission, [http://ec.europa.eu/priorities/docs/pg\\_en.pdf](http://ec.europa.eu/priorities/docs/pg_en.pdf), accessed 9 July 2015. Juncker held that the *Spitzenkandidaten* procedure has 'the potential to insert a very necessary additional dose of democratic legitimacy into the European decision-making process, in line with the rules and practices of parliamentary democracy'. See also Hix, S. (2011), 'Where is the EU going? Collapse, fiscal union, a supersized Switzerland or a new democratic politics', *Public Policy Research*, vol. 18(2), p. 81-87, at p. 85-87. See more elaborately Sections 2.2 and 4.1.

### 1.3. Definitions

This thesis revolves around the notions of *Spitzenkandidaten* procedure, constitution, constitutional convention and parliamentarisation. It is therefore useful to indicate working definitions of these concepts.

Spitzenkandidaten procedure indicates the rule that the appointment of the President of the European Commission will be determined by the elections to the European Parliament between opposing lead candidates of the political groups.<sup>6</sup> Section 2 describes this procedure more elaborately.

The notion of constitution is commonly used in (at least) two senses. A *formal* constitution consists of a solemn, written document with a strong normative connotation, which has the highest rank within a legal system and is more difficult to amend than other rules.<sup>7</sup> In its broader *material* sense, constitution encompasses the entire system of rules that regulate the government.<sup>8</sup> In this thesis, constitution is used in the last sense, following Dicey's characterisation of a constitution as 'all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state.'<sup>9</sup> Curtin defines this as 'the totality of fundamental legal norms that make up the legal order of the polity'.<sup>10</sup> To use the word 'constitution' in the material sense is not so much a normative choice, rather it was chosen because the existence of a *material* constitution of the European Union is least controversial.<sup>11</sup>

One set of the rules included under the umbrella of the constitution are positive laws, i.e. mostly written rules adopted by the legislature and enforced by the courts. The other set consists of constitutional conventions, aptly defined by Wheare as 'a binding rule, a rule of behaviour accepted as obligatory by those concerned in the working of the Constitution'.<sup>12</sup> These conventions may be as important as laws.<sup>13</sup> A test for the establishment of conventions was

---

<sup>6</sup> Compare Eijsbouts, T., et al. (2014), 'Editorial. Between the Constitutional Document and the Constitutional Settlement', *European Constitutional Law Review*, vol. 10(3), p. 375-378, at p. 376.

<sup>7</sup> Compare Kumm, M. (2006), 'Beyond Golf Clubs and the judicialization of politics: Why Europe has a constitution properly so called', *The American Journal of Comparative Law*, vol. 54, p. 505-530, at p. 508. For a classic statement see Kelsen, H. (1960), *Reine Rechtslehre* (2<sup>nd</sup> ed.). Vienna: Franz Deuticke, at p. 228-229.

<sup>8</sup> See also Wheare, K. (1966), *Modern constitutions*. Oxford: Oxford University Press, at p. 1-2; Jennings, I. (1967), *The law and the constitution* (5<sup>th</sup> ed.), London: London University Press, at p. 33-41.

<sup>9</sup> Dicey, A. (1915), *Introduction to the study of the law of the Constitution* (8<sup>th</sup> ed.). London: MacMillan, at p. 23.

<sup>10</sup> Curtin, D., 'Making a Political Constitution for the European Union', *European Journal of Law Reform*, vol. 8(1), p. 65-76, at p. 66.

<sup>11</sup> Much scholarly ink has been spilt on whether the European Union has a constitution in a *formal* or *normative* sense (see e.g. Craig, P. (2001), 'Constitutions, Constitutionalism, and the European Union', *European Law Journal*, vol. 7(3), p. 125-150; Kumm, M. (2006), 'Beyond Golf Clubs and the judicialization of politics: Why Europe has a constitution properly so called', *The American Journal of Comparative Law*, vol. 54, p. 505-530; Wilkinson, M. (2013), 'Political Constitutionalism and the European Union', *Modern Law Review*, vol. 76(2), p. 191-222) and whether it needs one (e.g. Grimm, D. (1995), 'Does Europe need a Constitution?', *European Law Journal*, vol. 1(3), p. 282-302; Habermas, J. (2001), 'Why Europe needs a constitution', *New Left Review*, (11), p. 5-26).

<sup>12</sup> Wheare, K. (1966), *Modern constitutions* (2<sup>nd</sup> ed.). Oxford: Oxford University Press, at p. 122.

<sup>13</sup> This also holds true for the European Union. See Driessen, B. (2006), *Interinstitutional convention as checks and balances in EU law*. (PhD thesis, Katholieke Universiteit Leuven); Beukers, T. (2011), *Law, Practice and Convention*



developed by Jennings. According to this tripartite test, the establishment of conventions turns on (i) the existence of precedents, (ii) the beliefs of the actors working with the constitution, and (iii) the presence of a reason behind the convention.<sup>14</sup> It must be observed that the answer to the question whether a rule constitutes a convention is not binary, but gradual: multiple precedents, firm beliefs and a convincing reason give rise to a strong convention, whereas a convention based on one precedent, divergent beliefs, or a less persuasive reason will be less strong. The concept of constitutional convention will be discussed in-depth in Section 3.

The concept of parliamentarisation of the European Union is well-established in academic literature.<sup>15</sup> A clear definition is however lacking. The only definition available is proposed by Lehman and Schunz, who defined parliamentarisation as ‘the gradual evolution towards a system of government at the European level with a strong priority-setting and policy-planning input from the [European Parliament], a system that in a way would resemble *mutatis mutandis* parliamentary democracy in a nation-state.’<sup>16</sup> In my opinion, this is a problematic definition for two reasons. First, it only considers priority-setting and policy-planning input, thereby ignoring the legislative, budgetary and oversight role of the European Parliament. Second, the condition that the European parliamentary democracy should resemble parliamentary democracy in a nation-state is problematic, for reasons addressed below in Section 1.4.

This thesis proposes a different definition of parliamentarisation which comprises definition of parliamentary democracy as a system of government ‘in which executive authority emerges from, and is responsible to, legislative authority.’<sup>17</sup> This widely accepted definition is for example employed by Lijphart in his seminal work *Democracies*.<sup>18</sup> Parliamentarisation in this thesis thus depicts *a gradual evolution towards a system of government at the level of the European Union in which executive authority emerges from, and is responsible to, legislative authority*.

The definition of parliamentarisation is further analysed in the next part devoted to caveats. The concept of parliamentarisation of the European Union will be discussed more elaborately in Section 4.

---

*in the Constitution of the European Union* (PhD thesis, Universiteit van Amsterdam). See more elaborately Sections 3.2 and 3.3.

<sup>14</sup> Jennings, I. (1967), *The law and the constitution* (6<sup>th</sup> ed.). London: London University Press, at p. 136. See more elaborately Section 3.1.3.

<sup>15</sup> See for example Rittberger, B. (2005), *Building Europe's Parliament: Democratic Representation beyond the Nation State*. Oxford: Oxford University Press; Hix, S., Noury, A. & Roland, G. (2007), *Democratic Politics in the European Parliament*. Cambridge: Cambridge University Press; Fabbrini, S. (2015), ‘The European Union and the Puzzle of Parliamentary Government’, *Journal of European Integration*, vol. 37(5), p. 571-586. See more elaborately Section 4.1.

<sup>16</sup> Lehman, W. & Schunz, S. (2005), ‘Anticipating the European Constitution: parliamentarization or renationalization?’, *Online Archives of European Integration*, <http://aei.pitt.edu/3026/>, accessed 9 July 2015, at p. 6; Fabbrini also adopts this definition, see Fabbrini, S. (2015), ‘The European Union and the Puzzle of Parliamentary Government’, *Journal of European Integration*, vol. 37(5), p. 571-586, at p. 572.

<sup>17</sup> Epstein, L. (1968), ‘Parliamentary Government’, in: D. Sills (ed.), *International Encyclopedia of the Social Sciences*. New York: Macmillan, 11:419.

<sup>18</sup> Lijphart, A. (1984), *Democracies: Patterns of majoritarian and consensus governments in 21 countries*. New Haven: Yale University Press, p. 68.

#### 1.4. Caveats

Several caveats exist. First, it must be observed that the theoretical concept of constitutional convention has been developed in the context of British constitutional law, which differs from the constitutional law of the European Union in many respects. Not only is the British constitution largely unwritten; conventions are also used for a different purpose. In Westminster, conventions are particularly important in governing power relationships within Parliament; in Brussels on the other hand they mainly serve to regulate inter-institutional links.<sup>19</sup> These differences do however not prevent the use of the doctrine of constitutional conventions in the context of the European Union. Constitutional conventions are no strangers in the constitutional traditions of many other Member States of the European Union.<sup>20</sup> These constitutional conventions are also relevant to European Union law on the basis of Article 6(3) TEU. Furthermore, in the European Union too, rules exist which only bind the institutions *politically* and which are not actionable in court, but which do prescriptively influence the behaviour of the institutions.<sup>21</sup> Thus, while the circumstances may differ, conventions in Britain and in the European Union share the same fundamental characteristics.

A second caveat concerns the fact that the *Spitzenkandidaten* procedure has only been employed once. Is it necessary that a rule has been employed at several occasions in order to exclude explanations for a certain course of events other than the establishment of a constitutional convention? Clearly, a consistent string of precedents makes it easier to find a constitutional convention, but this does not mean that multiple precedents are necessary. Jennings held that conventions turn on precedents, the beliefs of the actors concerned and the reason for the rule.<sup>22</sup> However, according to Jennings, a single precedent may already be enough to establish a convention, if the beliefs of the actors and the reason behind the convention are strong enough.<sup>23</sup> This implies that the *Spitzenkandidaten* procedure can be analysed through the prism of constitutional conventions.

A third caveat is linked to the definition of parliamentarisation adopted above. This definition only covers the European Parliament, leaving the role of national parliaments in the decision-

---

<sup>19</sup> See Driessen, B. (2006), *Interinstitutional convention as checks and balances in EU law*. (PhD thesis, Katholieke Universiteit Leuven), at p. 93.

<sup>20</sup> Examples are, amongst many others, the Netherlands, as illustrated by the rule of confidence (*vertrouwensregel*) described in Section 3.1.1, and France, where conventions are especially relevant in times of *cohabitation* (when the President and the parliamentary majority do not share the same political allegiance). See on the latter Avril, P. (1997), *Les conventions de la Constitution*. Paris: Presses Universitaires de France. A German example is the choice of the President of the *Bundestag* and the election of the President of the *Bundesrat*. See Taylor, G. (2014), 'Convention by consensus: Constitutional conventions in Germany', *International Journal of Constitutional Law*, vol. 12(2), p. 303-329, at p. 307-314.

<sup>21</sup> See Driessen, B. (2006), *Interinstitutional convention as checks and balances in EU law*. (PhD thesis, Katholieke Universiteit Leuven) and Beukers, T. (2011), *Law, Practice and Convention in the Constitution of the European Union* (PhD thesis, Universiteit van Amsterdam). See more elaborately Sections 3.2 and 3.3.

<sup>22</sup> These are the three factors of the so-called Jennings' test, which is more elaborately discussed in Section 3.1.3.

<sup>23</sup> Jennings, I. (1967), *The law and the constitution* (6<sup>th</sup> ed.). London: London University Press, p. 136. Wheare also states that a single precedent may be sufficient. See Wheare, K. (1966), *Modern constitutions* (2<sup>nd</sup> ed.). Oxford: Oxford University Press, at p. 122.

making of the European Union out of consideration.<sup>24</sup> In my opinion, the strengthening of the role of the national parliaments in the European Union should be distinguished from the evolution of the power of the European Parliament. These concern two interlinked but separate processes, which are neither mutually exclusive nor mutually dependent. The *Spitzenkandidaten* development, moreover, only concerns the role of the European Parliament, which implies that leaving the national parliaments out of consideration does not raise problems.

The definition of parliamentarisation, moreover, refers to executive and legislative authority. In the European Union, executive authority and legislative authority are dispersed amongst several institutions. The European Commission shares its executive power with the European Council.<sup>25</sup> The Commission is the main actor in the everyday decision-making process, for example wielding the sole right of legislative initiative, fulfilling the role of “Guardian of the Treaties”, and exercising important rule-making powers in the regulation of the Single Market and competition policy.<sup>26</sup> The European Council on the other hand possesses long-term executive power, determining the overall political direction.<sup>27</sup> The European Parliament, in addition, is not the sole legislator, but exercises its legislative and budgetary functions jointly with the Council of the European Union (informally referred to as Council of Ministers).<sup>28</sup> In brief, the European Union has a “dual executive”, and two co-legislators.

This relatively complex structure does not necessarily prevent the construction of a parliamentary relationship in the European Union. In fact, in many parliamentary systems, the executive shares its executive powers with other actors.<sup>29</sup> This implies that a unitary executive is not required for a system to be parliamentary, and that the concept of parliamentarisation can therefore also be applied to the European Union. This thesis focuses on the parliamentary relationship between the European Parliament and the European Commission, the institutions that represent not the Member States but the general interest of the European Union.<sup>30</sup> This focus follows logically from the fact that the *Spitzenkandidaten* procedure tries to strengthen this specific relationship, the parliamentary link at the European Union level.

---

<sup>24</sup> See on the role of national parliaments, and the interaction between national parliaments and the European Parliament, Hefflter, C., Neuhold, C., Rozenberg, O. & Smith, J. (eds.) (2015), *The Palgrave Handbook of National Parliaments and the European Union*. Basingstoke: Palgrave Macmillan.

<sup>25</sup> See on the European Union’s “dual executive” Curtin, D. (2009), *Executive Power of the European Union. Law, Practices, and the Living Constitution*. Oxford: Oxford University Press, especially Chapter 3 and Chapter 4.

<sup>26</sup> See Article 17(1) TEU.

<sup>27</sup> Article 15(1) TEU provides that ‘The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof (...)’.

<sup>28</sup> Article 14(1) TEU.

<sup>29</sup> In France, for example, a parliamentary relationship governs the relationship between *l’Assemblée nationale* and the *gouvernement*, while the *président de la République* is also part of the (dual) executive. Many executives, moreover, share their power with local or regional governments, as is especially the case in federal parliamentary systems like Germany. See Langenbacher, E., ‘The political and constitutional order’, in Colvin, S. (2015) (eds.), *The Routledge Handbook of German Politics and Culture*. London: Routledge, p. 87-104.

<sup>30</sup> The European Parliament is, on the basis of Article 10(2) TEU, the direct representation of the citizens at Union level. Article 17(1) TEU determines that ‘(t)he Commission shall promote the general interest of the Union and take appropriate initiatives to that end.’

A fourth caveat is linked to the notion that parliamentary democracy requires a nation-state, which is for example implied by the definition of parliamentarisation proposed by Lehman and Schunz. Is it possible to apply the concept of parliamentarisation to the European Union? Three reasons indicate that no insurmountable problems arise in this respect.

Firstly, the definition of parliamentary democracy adopted above requires that executive authority emerges from, and is responsible to, legislative authority.<sup>31</sup> Clearly, this does not presuppose a nation-state, or a unitary state. That a concept was previously applied primarily to nation-states does not imply that it can *only* be applied to nation-states.

Secondly, the European Parliament becomes (increasingly) similar to national parliaments.<sup>32</sup> Obviously, differences will continue to exist, for example regarding the multinational and multilingual character of the European Parliament. More importantly however, it may be observed that the internal organisation of the European Parliament, for example featuring party fractions and parliamentary committees, is not fundamentally different from those of domestic parliamentary bodies. Neither are its politics radically different: from 1958 onwards, MEPs have been seated according to political allegiance rather than to nationality, and studies show that the European Parliament increasingly offers a forum for left-right politics.<sup>33</sup>

Thirdly, the co-existence of other parliaments with which power is shared is common in many democracies that are widely considered parliamentary. In Germany, for example, the *Bundesländer* also have their *Landtage*, in addition to the federal *Bundestag* and *Bundesrat*. Germany may thus be considered a layered parliamentary democracy, with a parliamentary system at the level of the *Bundesländer* as well as at the federal level.<sup>34</sup> It is interesting in this regard that in Germany, appointments to several important posts are controlled by constitutional conventions.<sup>35</sup> Clearly, this indicates that a layered parliamentary democracy and the existence of constitutional conventions can go hand in hand. The European Union could also constitute such a layered parliamentary system, for parliamentary democracy at one level of government does not exclude parliamentary democracy at a higher or lower level of government. In sum, it is possible to apply the concept of parliamentarisation to the European Union.

---

<sup>31</sup> See more elaborately on these requirements Section 4.1.

<sup>32</sup> See Hix, S., Noury, A. & Roland, G. (2007), *Democratic Politics in the European Parliament*. Cambridge: Cambridge University Press, in particular Chapter 9. They hold, at p. 181, that 'Politics in the European Parliament is very much like politics in other democratic parliaments'. See also Rittberger, B. (2005), *Building Europe's Parliament: Democratic Representation beyond the Nation State*. Oxford: Oxford University Press.

<sup>33</sup> See Hix, S., Noury, A. & Roland, G. (2007), *Democratic Politics in the European Parliament*. Cambridge: Cambridge University Press. These authors state, at p. 180, that 'The main dimension of voting behaviour both within and between the European political parties is the classic left-right dimension of democratic politics'. See also Hix, S. (2006), 'Why the EU Needs (Left-Right) Politics: Policy Reform and Accountability are Impossible Without It', *Notre Europe Policy Paper*, No. 19, Paris: Notre Europe.

<sup>34</sup> For an overview of Germany's political order, see Langenbacher, E., 'The political and constitutional order', in Colvin, S. (2015) (eds.), *The Routledge Handbook of German Politics and Culture*. London: Routledge, p. 87-104.

<sup>35</sup> See Taylor, G. (2014), 'Convention by consensus: Constitutional conventions in Germany', *International Journal of Constitutional Law*, vol. 12(2), p. 303-329. Taylor amongst others mentions the choice of the President of the *Bundestag* (p. 307-312) and the election of the President of the *Bundesrat* (p. 312-314).

A fifth and final caveat relates to the access to data concerning the *Spitzenkandidaten* procedure. Ideally, essential players in the establishment of the *Spitzenkandidaten* procedure could have been interviewed.<sup>36</sup> Crucial actors would have been MEP Elmar Brok and former MEP Andrew Duff, who played a key role in the Treaty revision process;<sup>37</sup> Secretary General of the European Parliament Klaus Welle and current President of the European Parliament (and *Spitzenkandidat*) Martin Schulz;<sup>38</sup> winning *Spitzenkandidat* Jean-Claude Juncker; and the members of the European Council, most importantly British Prime Minister David Cameron (as the foremost opponent of the procedure), and German Chancellor Angela Merkel (whose decision to support Juncker is commonly considered to have been crucial for his appointment).<sup>39</sup> Such interviews would have presented an extraordinary chance to get insights into the background and development of the procedure. This caveat however is not insurmountable. Other reliable sources are available, such as press articles from various European newspapers,<sup>40</sup> accounts from those directly involved,<sup>41</sup> and scholarly sources such as Peñalver García's and Priestley's *The Making of a European President*.<sup>42</sup> Together, these sources suffice to offer a well-founded description of the genesis of the *Spitzenkandidaten* procedure.

Now that the research design and main concepts are introduced, it is possible to offer a description of the genesis of the *Spitzenkandidaten* development. The next section will discuss the revision of (currently) Article 17(7) TEU, the activist stance of the European Commission and the European Parliament in the run-up to the 2014 elections, and the ultimate clash between the European Parliament and the European Council.

---

<sup>36</sup> This is for example part of the research design chosen by Beukers in his PhD-research into constitutional conventions in the European Union. See Beukers, T. (2011), *Law, Practice and Convention in the Constitution of the European Union* (PhD thesis, Universiteit van Amsterdam).

<sup>37</sup> MEP Verhofstadt, during the debate in European Parliament on Juncker's candidacy, mentions Duff Brok as 'the two dedicated Europeans' who during the Convention 'invented this proposal in the Convention to elect the Commission by the European Parliament.' See European Parliament, debate of 15 July 2014, CRE 15/07/2014-5, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+CRE+20140715+SIT+DOC+PDF+V0//EN&language=EN>, accessed 9 July 2015.

<sup>38</sup> Welle is described as '[p]ushing behind the scenes'. See Mahony, H., *The Spitzenkandidaten Coup*, EUobserver 4 January 2015, <https://euobserver.com/review-2014/126456>, accessed 9 July 2015.

<sup>39</sup> Peñalver García & Priestley even go so far as naming a chapter on the clash between the European Parliament and the European Council 'The Lady is for Turning, or How the Battle was Won'. See Peñalver García, N. & Priestley, J. (2015), *The Making of a European President*. New York: Palgrave Macmillan, Chapter 8.

<sup>40</sup> Most importantly the Financial Times and specialised sources such as EUobserver, but also the excellent account in the Dutch NRC Handelsblad, Gruyter, C. de, Alonso, S., *Hoe een Duits een-tweetje Juncker aan de macht hielp*, NRC Handelsblad 28 June 2014, <http://www.nrc.nl/handelsblad/van/2014/juni/28/ho-een-duits-een-tweetje-juncker-aan-de-macht-hi-1394136>, accessed 9 July 2015.

<sup>41</sup> For example Duff's account *The European Union's Leadership Crisis: who's to blame, and why it matters*, Blogactiv 23 June 2014, <http://andrewduff.blogactiv.eu/2014/06/23/the-european-unions-leadership-crisis-whos-to-blame-and-why-it-matters/>, accessed 9 July 2015.

<sup>42</sup> Peñalver García, N. & Priestley, J. (2015), *The Making of a European President*. New York: Palgrave Macmillan. This book is, according to the Acknowledgements (p. xiii-xiv) primarily based on 'extensive, off-the record interviews with 50 or so key participants in the process.'

## 2. ‘This time, it’s different’: the genesis of the *Spitzenkandidaten* procedure

Ahead of the 2014 elections, the European Parliament’s slogan boldly proclaimed that ‘this time, it’s different’, for ‘the rules of the game have changed’. It would now be the prerogative of the European Parliament to elect the head of the European Commission, on the basis of the electorate’s wishes.<sup>43</sup> Many commentators will confirm that the elections were indeed different and that, where 2013 was baptised the European Year of Citizens, 2014 may enter the history books as the European Year of *Spitzenkandidaten*.<sup>44</sup> This section describes the genesis of the *Spitzenkandidaten* procedure, focusing first on the revision of (currently) Article 17(7) TEU, secondly on the activist stance of the European Commission and the European Parliament in the run-up to the elections, and thirdly on the ultimate clash between the European Parliament and the European Council.<sup>45</sup> This provides an indispensable basis for the analysis of the *Spitzenkandidaten* procedure through the prism of constitutional conventions, which follows in Section 3.

### 2.1. Treaty revisions enabling change<sup>46</sup>

The Treaty of Rome included the possibility to censure the Commission (as a body), but did not grant any right to the European Parliament (then the Assembly) to be involved in the appointment of the Commission.<sup>47</sup> The members of the Commission were to be appointed by the Governments of Member States in common agreement.<sup>48</sup> This was a thorn in the flesh of the European Parliament, which during the 1980s and 1990s consistently asked for a more significant role in the selection process.<sup>49</sup> The argument advanced by the European Parliament was that the turn-out at the elections to the European Parliament suffered, because the vote had no impact on the composition of the Commission. Hence, it was proposed that by giving the European Parliament a say in the appointment of the (President of the) Commission, democracy in the European Union

---

<sup>43</sup> European Parliament, press release of 10 September 2013, *The power to decide what happens in Europe*, <http://www.europarl.europa.eu/news/en/news-room/content/20130905STO18723/html/The-power-to-decide-what-happens-in-Europe>, accessed 9 July 2015.

<sup>44</sup> Or, as Mahony puts it, the year that ‘marked the sliding of ‘spitzenkandidat’ into the general lexicon.’ See Mahony, H., *The Spitzenkandidaten Coup*, EUobserver 4 January 2015, <https://euobserver.com/review-2014/126456>, accessed 9 July 2015.

<sup>45</sup> A first full account of the genesis of the *Spitzenkandidaten* procedure is given in Peñalver García, N. & Priestley, J. (2015), *The Making of a European President*. New York: Palgrave Macmillan. Chapter 3 (on how the idea emerged) and Chapter 4 (how the idea entered the political arena in the run-up to the 2014 elections) are particularly relevant.

<sup>46</sup> An overview of the revisions of the Treaty provisions on the appointment of the (President of the) Commission may be found in the Annex, at p. 74.

<sup>47</sup> Article 144 Treaty establishing the European Economic Community (EEC Treaty, or Treaty of Rome), 25.03.1957, 298 U.N.T.S. 11 provides: ‘(...) If the motion of censure is carried by a two-thirds majority of the votes cast, representing a majority of the members of the Assembly [European Parliament], the members of the Commission shall resign as a body. (...)’ Currently, Article 234 TEU provides for the right of censure.

<sup>48</sup> Articles 158 and 161 EEC Treaty (Treaty of Rome). This procedure was not changed by the Merger Treaty (Treaty establishing a Single Council and a Single Commission of the European Communities, OJ 152 of 13.7.1967).

<sup>49</sup> Moury, C. (2007), ‘Explaining the European Parliament’s right to appoint and invest the commission’, *West European Politics*, vol. 30(2), p. 367-391, p. 370-375.

would be strengthened.<sup>50</sup> Enhancing parliamentary democracy would remain at the core of the debate on the subsequent changes of the role of the European Parliament in the appointment of the European Commission, up to the debate on the *Spitzenkandidaten* innovation in 2014.

The role of the European Parliament in the appointment of the European Commission was significantly strengthened by the Treaty of Maastricht (which entered into force in 1993). From then onwards, the European Council had to consult the European Parliament in its appointment of the President of the Commission. The President and the other members of the Commission, nominated by the governments of the Member States, were subsequently subject (as a body) to a vote of approval by the European Parliament.<sup>51</sup> The Treaty did not specify how the European Parliament should be ‘consulted’, and using this room for manoeuvre the European Parliament adopted rules stating that a negative opinion on the candidate President of the Commission would render the approval of the Commission as a body impossible (thus turning the consultative vote in a *de facto* vote of approval).<sup>52</sup>

The European Parliament’s stance regarding its role in the appointment of the President of the Commission was codified in the Treaty of Amsterdam (1999). Since then, the European Parliament has held a separate Treaty right of approval over the President’s appointment, in addition to the vote of approval over the Commission as a body.<sup>53</sup> The Treaty of Nice (2003) left this appointment procedure intact, although the European Council decision on the appointment of the President of the Commission from then onwards no longer required common accord, instead being taken by a qualified majority<sup>54</sup> – a revision that would prove to be of crucial importance in 2014, especially to the United Kingdom’s Prime Minister David Cameron.

All this was a prelude to the Convention on the Future of Europe (2002-03), where the foundations for the *Spitzenkandidaten* innovation were laid. In the Laeken Declaration (which tasked the Convention with producing a draft Constitution for the European Union), the European Council cast doubts on the democratic nature of the appointment procedure of the Commission

---

<sup>50</sup> See for example Hix, S. (1997), ‘Executive Selection in the European Union: Does the Commission President Investiture Procedure Reduce the Democratic Deficit?’, *European Integration On-line Papers*, vol. 1(21), <http://eiop.or.at/eiop/texte/1997-021.htm>, accessed 9 July 2015. See more elaborately on this argument Section 4.1.

<sup>51</sup> Article 158(2) Treaty on European Union (Treaty of Maastricht), O.J C 191 of 29.07.1992.

<sup>52</sup> European Parliament resolution of 21 April 1994 on the investiture of the European Commission, A3-0240/94, O.J C 128 of 09.05.1994, p. 358, point 13: ‘[The European Parliament] (p)oints out that, if it delivers a negative vote on the name of the person whom the governments of the Member States plan to appoint as President of the Commission, it will refuse the investiture of the Commission if the governments of the Member States present the same candidate again’. See also Hix, S. (1997), ‘Executive Selection in the European Union: Does the Commission President Investiture Procedure Reduce the Democratic Deficit?’, *European Integration On-line Papers*, vol. 1(21), <http://eiop.or.at/eiop/texte/1997-021.htm>, accessed 9 July 2015, at p. 3; Moury, C. (2007), ‘Explaining the European Parliament’s right to appoint and invest the commission’, *West European Politics*, vol. 30(2), p. 367-391, p. 376-377.

<sup>53</sup> Article 214(2) Treaty on European Union, following the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and Certain Related Acts (Treaty of Amsterdam), O.J C 340 of 10.11.1997.

<sup>54</sup> Article 214(2) Treaty on European Union, following the Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and Certain Related Acts (Treaty of Nice), O.J C 80 of 10.03.2001.



President.<sup>55</sup> At the Convention, as a response to the more ground-breaking proposal to provide the European Council with a permanent chair, the idea was raised that the outcome of the elections to the European Parliament should play a role in the appointment of the President of the European Commission.<sup>56</sup> This was by no means a novel idea, as there had already been calls to reform the Commission President's appointment process in such a way before the Convention.<sup>57</sup>

The Constitutional Treaty (signed in 2004) provided for a further revision of the appointment process, namely that the European Council in its choice for a Commission President had to take the elections to the European Parliament into account.<sup>58</sup> This is phrased more precisely in German and Spanish, where the Treaty refers to the outcome (*das Ergebnis, el resultado*) of the elections. In a way, this was not a significant alteration, as the European Council from the Treaty of Maastricht onwards already had to take account of the elections, because since then the appointment of the President of the European Commission had required the support of the European Parliament.<sup>59</sup> Two additional, formal, changes were included in the Constitutional Treaty. First, the European Parliament was to vote by a majority of its component members, and not by a simple majority of the parliamentarians taking part in the vote. Second, a Declaration was annexed to the Treaty, providing that representatives of the European Parliament and of the European Council would conduct consultations, which had to 'focus on the backgrounds of the candidates for President of the Commission, taking account of the elections to the European Parliament'. This document, which has political rather than legal value, is currently the 11<sup>th</sup> Declaration.<sup>60</sup> Ultimately, the Constitutional Treaty failed to become law, *inter alia* after being rejected in referenda in the Netherlands and France. The changes to the appointment process that

---

<sup>55</sup> Laeken European Council 14 and 15 December 2001, Conclusions of the Presidency, Annex I, Laeken Declaration on the future of the European Union, SN 300/1/01 REV 1, at p. 23.

<sup>56</sup> Former ALDE MEP Duff, a prominent participant of the Convention on the Future of Europe, describes it as 'a counter' to Giscard d'Estaing's proposal for a permanent chair. See Duff, A., *The European Union's Leadership Crisis: who's to blame, and why it matters*, Blogactiv 23 June 2014, <http://andrewduff.blogactiv.eu/2014/06/23/the-european-unions-leadership-crisis-whos-to-blame-and-why-it-matters/>, accessed 9 July 2015. ALDE MEP Verhofstadt, during the debate in European Parliament on Juncker's candidacy, mentions Duff and EPP MEP Brok as 'the two dedicated Europeans' who during the Convention 'invented this proposal in the Convention to elect the Commission by the European Parliament.' See European Parliament, debate of 15 July 2014, CRE 15/07/2014-5, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+CRE+20140715+SIT+DOC+PDF+V0//EN&language=EN>, accessed 9 July 2015.

<sup>57</sup> For example in 1998 by think-tank Notre Europe, in its petition *From the single currency to the single ballot-box*, which stated that 'each of the European political groups should chose a candidate for the position of President of the European Commission', <http://www.institutdelors.eu/media/tps-ceo1998-en.pdf?pdf=ok>, accessed 9 July 2015; and by the European People's Party's Congress held in Estoril, Portugal, on 18 October 2002. This congress adopted a *Constitution for a Strong Europe*, which in paragraph 47 holds that 'European political parties [should be given] the opportunity to present their own candidates [for the President of the European Commission] in the framework of the campaign for European elections.' Available at [http://arc.eppgroup.eu/Press/peve02/eve30/congressdoc\\_en.asp](http://arc.eppgroup.eu/Press/peve02/eve30/congressdoc_en.asp), accessed 9 July 2015.

<sup>58</sup> Article I-27(1) Draft Treaty establishing a Constitution for Europe (Constitutional Treaty), O.J. C 310 of 16.12.2004 (never ratified).

<sup>59</sup> Crombez, C. & Hix, S. (2011), 'Treaty reform and the Commission's appointment and policy-making role in the European Union', *European Union Politics*, vol. 12(3), p. 291-314, at p. 296.

<sup>60</sup> 11<sup>th</sup> Declaration on Article 17(6) and (7), Treaty on European Union (Consolidated version), O.J. C 326 of 26.10.2012.



were proposed in the Constitutional Treaty were, however, reproduced almost verbatim in the Treaty of Lisbon (2009).<sup>61</sup>

It is instructive to note that, at the time, it was thought, for example by Dann, that the role of the European Parliament in the appointment of the Commission would not be ‘significantly’ different as a result of the changes brought by the Treaty of Lisbon, as the right of the European Council to choose the candidate to be voted on would not be abridged.<sup>62</sup> Curtin too, in 2009, while foreseeing ‘enhanced politicization’, held that ‘a direct election in some form’ was still far away,<sup>63</sup> while Fabbrini (in 2011) argued that the European Parliament merely had the power of ‘advice and consent’.<sup>64</sup> This indicates that the *Spitzenkandidaten* innovation was a surprising development even to specialised scholars, and that the new provision in the Lisbon Treaty was not considered to be a substantive alternation of the procedure. This would, in the summer of 2014, turn out to be far from the truth.

The reforms of the appointment of the European Commission are displayed in the following table.

**Table I. Reforms of the appointment of the European Commission**

	<i>Pre-Maastricht (1993)</i>	<i>Maastricht - Amsterdam (1999)</i>	<i>Amsterdam - Nice (2003)</i>	<i>Nice - Lisbon (2009)</i>	<i>Lisbon - now</i>
<i>Appointment of the President of the European Commission</i>	Unanimous decision by the governments of the MS.	Unanimous decision by the governments of the MS, ‘consultation’ EP. <sup>65</sup>	Unanimous decision by the governments of the MS, right of approval EP.	Council decision by QMV, right of approval EP.	European Council decision by QMV, ‘Taking into account the elections to the European Parliament’, right of approval EP.
<i>Appointment of the European Commission</i>	Unanimous decision by the governments of the MS.	Unanimous decision by the governments of the MS, right of approval EP.	Unanimous decision by the governments of the MS, right of approval EP.	Council decision by QMV, right of approval EP.	European Council decision by QMV, right of approval EP.

*EP: European Parliament*

*MS: Member States*

*QMV: Qualified Majority Voting*

<sup>61</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (Treaty of Lisbon), O.J. C 306 of 17.12.2007. Interestingly, the Treaty of Lisbon omits the word ‘she’, instead only referring to the candidate as ‘he’.

<sup>62</sup> Dann, P. (2006), ‘The Political Institutions’, in: von Bogdandy, A. & Bast, J. (eds.), *Principles of European constitutional law* (2nd ed.). Oxford: Hart Publishing, p. 229-280, at p. 248.

<sup>63</sup> Curtin, D. (2009), *Executive Power of the European Union. Law, Practices, and the Living Constitution*. Oxford: Oxford University Press, p. 93.

<sup>64</sup> Fabbrini, S. (2011), ‘The Institutional Future of the European Union’, *CIES e-Working Paper No. 109*, [http://www.cies.iscte.pt/destaques/documents/CIES-WP109\\_Fabbrini.pdf](http://www.cies.iscte.pt/destaques/documents/CIES-WP109_Fabbrini.pdf), accessed 9 July 2015, at p. 12.

<sup>65</sup> Interpreted by the European Parliament as a *de facto* vote of approval, see above.

## 2.2. The run-up to the 2014 elections: a flywheel effect at work

In his State of the Union Address of 12 September 2012, then President of the Commission Barroso stressed that the presentation by European political groups of their candidate for the President of the Commission would constitute ‘an important means to deepen the pan-European political debate’ as well as ‘a decisive step to make the possibility of a European choice offered by these elections even clearer.’<sup>66</sup> It was the first step in the creation of a flywheel effect. Similar to a spinning flywheel propelled by its own weight, after Barroso’s speech the *Spitzenkandidaten* procedure started generating a momentum all on its own.

The European Parliament was quick in reiterating Barroso’s stance. On 22 November 2012, a Resolution urging the European political groups ‘to nominate candidates for the Presidency of the Commission’ was adopted.<sup>67</sup> The Resolution, referring to Article 17 TEU, stressed ‘the importance of reinforcing the political legitimacy of both Parliament and the Commission by connecting their respective elections more directly to the choice of the voters’. The desire to strengthen the powers of the European Parliament in order to enhance the democratic character of the European Union is clear from this Resolution.

During the debate on the Resolution, Commissioner Šemeta promised the European Parliament to come up with proposals to enhance the democratic legitimacy of the European Union (and, more particularly, the European Commission).<sup>68</sup> As early as on 28 November 2012, the Commission presented the Communication on ‘A blueprint for a deep and genuine economic and monetary union. Launching a European Debate’, again calling upon the European political groups to nominate a candidate for the President of the Commission in order ‘to foster the emergence of a genuine European political sphere’.<sup>69</sup> It is interesting to observe in this respect that the Blueprint contained a proposal to provide the European Commission with far-reaching powers, which could probably be more authoritatively applied with a democratic mandate.<sup>70</sup>

The following year, the European Commission simultaneously presented a Recommendation and a Communication.<sup>71</sup> The latter stressed even more explicitly the Commission’s invitation to

---

<sup>66</sup> European Commission, 12 September 2012, ‘State of the Union 2012 Address’, [http://europa.eu/rapid/press-release\\_SPEECH-12-596\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-12-596_en.htm), accessed 9 July 2015.

<sup>67</sup> European Parliament resolution of 22 November 2012 on the elections to the European Parliament in 2014, 2012/2829(RSP).

<sup>68</sup> European Parliament, debate of 22 November 2012, CRE 22/11/2012–6, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20121122+ITEM-006+DOC+XML+V0//EN>, accessed 9 July 2015.

<sup>69</sup> European Commission, Communication, ‘A blueprint for a deep and genuine economic and monetary union. Launching a European Debate’ COM(2012) 777 final/2, p. 37.

<sup>70</sup> On the problems such a democratic mandate and corresponding politicisation of the European Commission might cause, see Section 4.2.

<sup>71</sup> Commission Recommendation of 12 March 2013 on enhancing the democratic and efficient conduct of the elections to the European Parliament, 2013/142/EU; 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.

European political groups to nominate candidates for its Presidency, declaring that, on the basis of Article 17(7) TEU, ‘the outcome of the European elections should play a key role in determining which candidate becomes President of the Commission.’<sup>72</sup> The matter was, according to various sources, also discussed by the Committee of Permanent Representatives (COREPER) in 2013, but no decision was taken on whether to support or disapprove of such interpretation of Article 17(7) TEU.<sup>73</sup>

In June 2013, the new approach was ‘hotly debated’<sup>74</sup> in the Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC), which brings together MEPs and members of national parliaments. Eventually, a neutral text was included in the body’s Contribution, which neither supports nor disapproves of the approach taken, merely emphasising the need for ‘genuine public debate prior to the elections in order to stimulate high participation’.<sup>75</sup>

Thus, by autumn of 2013, both representatives of national governments (in COREPER) and members of national parliaments (in COSAC) had discussed the new approach. Neither body explicitly rejected this interpretation of the Treaty provisions, probably underestimating the force and possible effects of the innovation. The European Parliament’s Press Service was less reluctant, exclaiming in September 2013 that, after the elections, ‘it is your parliament who will elect the head of Europe’s executive, based on your wishes, as expressed in these elections.’<sup>76</sup> Such claims, that went unchallenged, after the elections resulted in reproaches towards the opponents of the *Spitzenkandidaten* innovation of going back on the promises made to the electorate.

On 6 November 2013, Martin Schulz (the President of the European Parliament) was the first to enter the ring, being nominated as the “candidate designate” by the Progressive Alliance of Socialists & Democrats (S&D).<sup>77</sup> The Alliance of Liberals and Democrats for Europe (ALDE), the Greens/European Free Alliance and the European United Left all followed suit with their

---

<sup>72</sup> Idem, at p. 6.

<sup>73</sup> Duff, A., *The European Union’s Leadership Crisis: who’s to blame, and why it matters*, Blogactiv 23 June 2014, <http://andrewduff.blogactiv.eu/2014/06/23/the-european-unions-leadership-crisis-whos-to-blame-and-why-it-matters/>, accessed 9 July 2015; Gruyter, C. de, Alonso, S., *Hoe een Duits een-tweetje Juncker aan de macht hielp*, NRC Handelsblad 28 June 2014, <http://www.nrc.nl/handelsblad/van/2014/juni/28/hoe-een-duits-een-tweetje-juncker-aan-de-macht-hi-1394136>, accessed 9 July 2015.

<sup>74</sup> Duff, A., *The European Union’s Leadership Crisis: who’s to blame, and why it matters*, Blogactiv 23 June 2014, <http://andrewduff.blogactiv.eu/2014/06/23/the-european-unions-leadership-crisis-whos-to-blame-and-why-it-matters/>, accessed 9 July 2015.

<sup>75</sup> Contribution of the XLIX COSAC, Dublin 23-25 June 2013, 2013/C 305/01.

<sup>76</sup> European Parliament, press release of 10 September 2013, *The power to decide what happens in Europe*, <http://www.europarl.europa.eu/news/en/news-room/content/20130905STO18723/html/The-power-to-decide-what-happens-in-Europe>, accessed 9 July 2015.

<sup>77</sup> Schulz ran unopposed, and was eventually voted S&D-candidate on 1 March 2014. See Party of European Socialists, *European Socialists elect Martin Schulz as Candidate for Commission President*, 1 March 2014, <http://www.pes.eu/european-socialists-elect-martin-schulz-as-candidate-for-commission-president>, accessed 9 July 2015.

nominations.<sup>78</sup> Finally, in March 2014, former Prime Minister of Luxembourg and ex-President of the Eurogroup Jean-Claude Juncker received the candidacy of the European People's Party (EPP) after defeating his opponents in an open contest.<sup>79</sup> The major exceptions were the Eurosceptic political groups European Conservatives and Reformists (ECR), notably including David Cameron's Conservative Party, and Europe of Freedom and Democracy (EFD).<sup>80</sup> Both groups opposed the introduction of *Spitzenkandidaten* from the start and refused to participate.

The various *Spitzenkandidaten* started campaigning throughout the European Union, which culminated in a series of televised debates between the presidential candidates.<sup>81</sup> This notwithstanding, public attention was lagging behind, with for example only eight per cent of the voters being able to name Juncker.<sup>82</sup> However, of voters questioned in fifteen Member States, 41 per cent said that they were aware of 'the claim that when you made a choice to vote for a party in the European elections you also voted, indirectly, to support a specific candidate as the President of the European Commission'.<sup>83</sup>

### 2.3. *The clash between the European Parliament and the European Council*

The elections to the European Parliament, held between 22 and 25 May 2014, resulted in the EPP retaining its status as the largest political group, with the S&D following closely behind. Despite the campaigning of the *Spitzenkandidaten*, turn-out slightly decreased.<sup>84</sup> Following the elections, all major political groups, most importantly Schulz' S&D, expressed their support for Juncker. Dutch journal NRC Handelsblad reports that Schulz had already pledged his support for Juncker in the night of 25 May 2014, to which Juncker reportedly replied 'Du bist ein echter Europäer'.<sup>85</sup> Interestingly, Schulz could, thanks to the support of Juncker's EPP, remain as President of the

<sup>78</sup> Respectively Guy Verhofstadt (ALDE), Ska Keller and José Bové (Greens/European Free Alliance), and Alexis Tsipras (European United Left).

<sup>79</sup> Boland, V., *Jean-Claude Juncker to run for European Commission presidency*, Financial Times 7 March 2014, <http://www.ft.com/cms/s/0/bd9e4260-a607-11e3-b9ed-00144feab7de.html#axzz3VZt5YNSg>, accessed 9 July 2015.

<sup>80</sup> Renamed Europe of Freedom and Direct Democracy (EFDD) after the 2014 elections to the European Parliament.

<sup>81</sup> Between 9 April and 20 May 2014, nine debates took place, four of these including four out of five candidates. See Hobolt, S. (2014), 'A vote for the President? The role of Spitzenkandidaten in the 2014 European Parliament elections', *Journal of European Public Policy*, vol. 21(10), p. 1528-1540, at p. 1534. See in general on the campaign by the various *Spitzenkandidaten* Peñalver García, N. & Priestley, J. (2015), *The Making of a European President*. New York: Palgrave Macmillan, Chapter 6.

<sup>82</sup> When prompted, 26 % could name Juncker. See *Does Jean-Claude Juncker have a "popular mandate" to become the next President of the European Commission?*, Open Europe 12 June 2014, <http://www.openeurope.org.uk/Article/Page/en/LIVE?id=20223&page=PressReleases>, accessed 9 July 2015.

<sup>83</sup> AECR (2014), 'Post EU Election polling project', Fieldwork conducted by AMR GmbH Dusseldorf, 25-26 May, as quoted in Hobolt, S. (2014), 'A vote for the President? The role of Spitzenkandidaten in the 2014 European Parliament elections', *Journal of European Public Policy*, vol. 21(10), p. 1535-1536.

<sup>84</sup> From 42,97% to 42,61%. Countries such as Germany and France however, where the media coverage of the Spitzenkandidaten was the strongest, saw an increase in participation. See European Parliament (date unknown), <http://www.europarl.europa.eu/elections2014-results/en/turnout.html>, accessed 9 July 2015.

<sup>85</sup> See Gruyter, C. de, Alonso, S., *Hoe een Duits een-tweetje Juncker aan de macht hielp*, NRC Handelsblad 28 June 2014, <http://www.nrc.nl/handelsblad/van/2014/juni/28/hoe-een-duits-een-tweetje-juncker-aan-de-macht-hi-1394136>, accessed 9 July 2015.

European Parliament for an unprecedented second term, following a race that was severely criticised by other MEPs.<sup>86</sup>

A few hours before an informal dinner of the European Council on 27 May, the Conference of Presidents of the (outgoing) European Parliament published a press release stating that Juncker, as the candidate of the largest political group, would be ‘the first to attempt to form the required majority’, inviting the European Council ‘to start inter-institutional consultations in conformity with Declaration 11.’<sup>87</sup> The reaction of the European Council President Van Rompuy, that note was taken of the letter,<sup>88</sup> was ‘reminiscent of exchanges between governments on the brink of hostilities’.<sup>89</sup>

During the next weeks, support for Juncker slowly increased. Crucial in this respect was the backing of Merkel, who was accused of not supporting her own party’s candidate and of voter betrayal.<sup>90</sup> The argument was made that Article 10(1) TEU, which enshrines the European Union’s foundation on representative democracy, legally required the European Council to propose a particular candidate favoured by a clear majority of the European Parliament.<sup>91</sup> Juncker’s appointment was demanded in the influential tabloid Bild, as well as by Habermas in an interview with the Frankfurter Allgemeine Zeitung.<sup>92</sup> Eventually, Merkel publicly declared to back the EPP-*Spitzenkandidat* on 30 May.<sup>93</sup> After remaining silent on the issue for more than a week, on 4 June Juncker himself declared on Twitter to be ‘more confident than ever’ to become the next President of the European Commission.<sup>94</sup>

---

<sup>86</sup> Mahony, H., *Schulz elected EP president again, promises to fight for more powers*, EUobserver 1 July 2014, <https://euobserver.com/news/124824>, accessed 9 July 2015. Schulz’ second term as President of the European Parliament was dubbed by MEP Farage to be a ‘stitch-up’ and a ‘consolation prize.’ European Parliament, debate of 15 July 2014, CRE 15/07/2014-5, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+CRE+20140715+SIT+DOC+PDF+V0//EN&language=EN>, accessed 9 July 2015.

<sup>87</sup> European Parliament, *Conference of Presidents statement on Commission President Election*, press release of 27 May 2014, [www.europarl.europa.eu/news/de/newsroom/content/20140527IPR48501/html/Conference-of-Presidents-statement-on-Commission-President-election](http://www.europarl.europa.eu/news/de/newsroom/content/20140527IPR48501/html/Conference-of-Presidents-statement-on-Commission-President-election), accessed 9 July 2015.

<sup>88</sup> European Council, press release of 27 May 2014, EUCO 118/14/1 REV1, [www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/142862.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/142862.pdf), accessed 9 July 2015.

<sup>89</sup> Author unknown (2014), ‘Editorial comments. After the European elections: Parliamentary games and gambles’, *Common Market Law Review*, vol. 51(4), p. 1047-1056, at p. 1049.

<sup>90</sup> Peñalver García & Priestley even go so far as baptising a chapter on the clash between the European Parliament and the European Council ‘The Lady is for Turning, or How the Battle was Won’. See Peñalver García, N. & Priestley, J. (2015), *The Making of a European President*. New York: Palgrave Macmillan, Chapter 8.

<sup>91</sup> Author unknown (2014), ‘Editorial comments. After the European elections: Parliamentary games and gambles’, *Common Market Law Review*, vol. 51(4), p. 1047-1056, at p. 1051. However, the *Common Market Law Review* indicates that ‘there is little reason to believe that such a subordination of the European Council is dictated by the Union’s commitment to democracy. Rather, as Article 10(2) TEU indicates, the European Parliament and the European Council are put on an equal footing.’

<sup>92</sup> Döpfner, M., *Juncker muss Präsident werden*, Bild Zeitung 30 May 2014, <http://www.bild.de/news/standards/mathias-doepfner/juncker-muss-praesident-werden-36187236.bild.html>, accessed 9 July 2015. Minkmar, N., *Europa wird direkt ins Herz getroffen*, Frankfurter Allgemeine Zeitung 30 May 2014, <http://www.faz.net/aktuell/feuilleton/juergen-habermas-im-gespraech-europa-wird-direkt-ins-herz-gegriffen-12963798.html>, accessed 9 July 2015.

<sup>93</sup> Wagstyl, S., *Merkel swaps back to supporting Juncker*, Financial Times 30 May 2014, <http://www.ft.com/intl/cms/s/0/539b1c68e7d311e39af800144feabdc0.html#axzz3W9rEQuuY>, accessed 9 July 2015.

<sup>94</sup> Tweeted on 4 June 2014, see <https://twitter.com/junckereu/status/474114809462816768>, accessed 9 July 2015.



At the same time, the United Kingdom's Prime Minister Cameron remained a vocal opponent to Juncker. In a mini-summit in Sweden on 9 June 2014, Cameron tried to persuade Merkel as well as his Dutch and Swedish counterparts not to support Juncker. On 13 June, an opinion piece of his hand was published in several European newspapers, stating that 'certain MEPs have invented a new process whereby they are trying to both choose and elect the candidate.'<sup>95</sup> Cameron's efforts were to no avail. In the following weeks Cameron's 2011 veto of proposed Treaty changes aimed to increase fiscal discipline was recalled (eventually circumvented by the adoption of the intergovernmental Fiscal Compact),<sup>96</sup> and Cameron was compared to Don Quixote for his increasingly isolated resistance.<sup>97</sup>

Efforts to find a compromise, such as a plan to incorporate many of Britain's reform wishes into the European Commission's policy for the next five years in exchange for acceptance of Juncker, were unsuccessful.<sup>98</sup> Eventually, in the run-up to the meeting of the European Council in which the issue was tabled, it was already clear that Juncker would receive the support of all of the Council's members except for Cameron and the Hungarian Prime Minister. On 27 June 2014, the European Council, in a divided vote (a *première*), adopted the decision proposing Juncker as candidate for Presidency of the European Commission.<sup>99</sup>

During the European Council meeting, Cameron reportedly stated that by proposing Juncker his fellow leaders were 'going back' on the 'fundamental principle' that the European Council decides on the appointment of the Commission President, exclaiming that '[t]he Commission is

---

<sup>95</sup> See for example Cameron, D., 'Invented' process to appoint President of European Commission is damaging to democracy, Irish Times 13 June 2014, <http://www.irishtimes.com/news/world/uk/invented-process-to-appoint-president-of-european-commission-is-damaging-to-democracy-1.1830355>; Cameron, D., *Juncker président de la Commission ? Ce serait « un non-sens », juge Cameron*, Le Monde 13 June 2014, [www.lemonde.fr/europe/article/2014/06/13/juncker-president-de-la-commission-ce-serait-un-non-sens-juge-cameron\\_4437441\\_3214.html](http://www.lemonde.fr/europe/article/2014/06/13/juncker-president-de-la-commission-ce-serait-un-non-sens-juge-cameron_4437441_3214.html); Cameron, D., "Juncker wurde von niemandem gewählt", Süddeutsche Zeitung, 13 June 2014, <http://www.sueddeutsche.de/politik/britischer-premier-cameron-juncker-wurde-von-niemandem-gewahlt-1.1997345>, all accessed 9 July 2015.

<sup>96</sup> Formally the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, concluded by all Member States of the European Union except for the United Kingdom and the Czech Republic.

<sup>97</sup> For example by Denis MacShane, the United Kingdom's Minister for Europe from 2002 to 2005. See MacShane, D., *Preventing Juncker: Cameron's Self-Defeatist Move*, The Globalist 20 June 2014, <http://www.theglobalist.com/preventing-juncker-camersons-self-defeatist-move/> accessed 9 July 2015. This comparison was picked up by journals in other countries, see e.g. Albert, E. *Le combat perdu de David Cameron contre Jean-Claude Juncker*, Le Monde 26 June 2014, [http://www.lemonde.fr/europe/article/2014/06/26/le-combat-perdu-de-m-cameron-contre-m-juncker\\_4445641\\_3214.html](http://www.lemonde.fr/europe/article/2014/06/26/le-combat-perdu-de-m-cameron-contre-m-juncker_4445641_3214.html), accessed 9 July 2015; Buchsteiner, J., *Don Cameron*, Frankfurter Allgemeine Zeitung 27 June 2014, <http://www.faz.net/aktuell/politik/europaeische-union/cameron-hat-die-meisten-briten-hinter-sich-13012665.html>, accessed 9 July 2015.

<sup>98</sup> 'In Berlin hat man den Eindruck, dass Cameron an einem Kompromiss nicht mehr gelegen ist. Der könnte so aussehen, dass man beim Arbeitsprogramm der Kommission für die nächsten fünf Jahre den Briten entgegenkommt, sie dafür aber Juncker akzeptieren.' See Amann, M., Knaup, H., Pauly, C. & Schult, C., *Jetzt erst recht*, Der Spiegel 16 June 2014, <http://www.spiegel.de/spiegel/print/d-127626338.html>, accessed 9 July 2015.

<sup>99</sup> Eijsbouts remarks on the appointment of the 2004 Commission President that 'In vital questions among governments, the name of the game is consensus.' See Eijsbouts, T. (2005), 'The Barroso Drama: Campidoglio, Rome 29 October 2004: How the Form Was Brought to Matter', *European Constitutional Law Review*, vol. 1(2), p. 155-174, at p. 158. In 2014, for the first time the Commission President-designate did not receive unanimous support.

becoming the creature of the parliament.’<sup>100</sup> The European Council however, together with appointing Juncker, decided to reconsider the process for the appointment of the President of the European Commission for the future, as an indication that the battle over the *Spitzenkandidaten* procedure had not yet been definitively decided.<sup>101</sup>

In brief, after various proposals to that effect, and building on a series of Treaty revisions, in 2014 the European Parliament succeeded in ensuring that the appointment of the President of the European Commission was determined by the elections to the European Parliament. Does this mean that the *Spitzenkandidaten* procedure is now part of European Union law, in the sense that an (conventional) obligation would exist to follow the procedure and appoint the winning *Spitzenkandidat* as President of the Commission? This question will be addressed in the next section, which analyses the *Spitzenkandidaten* procedure through the prism of constitutional conventions.

---

<sup>100</sup> Prime Minister of the United Kingdom David Cameron, during the European Council meeting in Brussels of 27 June 2014, as quoted by in: *Leaked: what David Cameron really told Van Rompuy and the EU leaders last week*, Payne, S., The Spectator 29 June 2014, <http://blogs.spectator.co.uk/coffeehouse/2014/06/leaked-david-camerons-most-important-eu-speech-of-the-year/>, accessed 9 July 2015.

<sup>101</sup> Brussels European Council 26 and 27 June 2014, Conclusions of the Presidency, EUCO 79/14, [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/143478.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/143478.pdf), accessed 9 July 2015, point 27.

### 3. The *Spitzenkandidaten* procedure as a constitutional convention?

It may seem a paradox that, to understand and grasp the written law, it is crucial to consider the wider legal and political reality.<sup>102</sup> This holds especially true of constitutional law, which encompasses an entire system of rules regulating the distribution or the exercise of public power.<sup>103</sup> Plato, in his dialogue *Laws*, already stressed the existence and importance of such unwritten rules, ‘ancestral customs of great antiquity, which, if they are rightly ordered and made habitual, shield and preserve the previously existing written law’.<sup>104</sup> Such rules also exist in the European Union, where they play a crucial yet frequently overlooked role.<sup>105</sup>

The first part of this section serves to examine the key elements of the concept of constitutional convention. The second subsection concerns the role of conventions in the context of the European Union, sketching their place in the European Union legal order and discussing two examples that are closely linked to the subject of the present thesis, namely parliamentary hearings for candidate Commissioners and the censure of individual candidate Commissioners. The third and last part of this section analyses the *Spitzenkandidaten* innovation through the prism of constitutional conventions.

#### 3.1. The “invisible rules” of constitutional law: the concept of constitutional convention

The first part of this section reviews the essential components of constitutional conventions, “the invisible rules” of constitutional law. It looks at what constitutes a convention, the relation between conventions and law(s), and Jennings’ test for the establishment of conventions. This provides a necessary basis for the discussion (in the second part of this section) of the role of constitutional conventions in the context of the European Union, and for the analysis (in the third

---

<sup>102</sup> According to Dicey, ‘a lawyer cannot master even the legal side of the English constitution without paying some attention to the nature of those constitutional understandings which necessarily engross the attention of historians or of statesmen’. Dicey, A. [1885] (1915), *Introduction to the study of the law of the Constitution* (8<sup>th</sup> ed.). London: MacMillan, at p. 413-414. See similarly Freeman, E. (1872), *Growth of the English Constitution from the Earliest Times* (1<sup>st</sup> ed.). London: MacMillan, p. 109-110, who held that ‘it would be in vain to seek for any trace of such doctrines in any page of our written Law’; Munro, C. (1987), *Studies in Constitutional Law*. London: Butterworths, at p. 35, who contended that ‘[m]any matters which are of interest to students of the British constitution are not matters of law at all. Nobody need be surprised by this, other than a few lawyers who naively imagine that law is what makes the world round’; and Jennings, I. (1967), *The law and the constitution* (5<sup>th</sup> ed.). London: London University Press, p. 81-83. Black advocates to look beyond ‘the method of purported explication or exegesis of the particular textual passage considered in a directive of action’ and instead employ ‘the method of inference from the structures and relationships created by the constitution in all its parts or in some principal part.’ See Black, C. (1969), *Structure and relationship in constitutional law*. Baton Rouge: Louisiana State University Press, at p. 7.

<sup>103</sup> Dicey, A. (1915), *Introduction to the study of the law of the Constitution* (8<sup>th</sup> ed.). London: MacMillan, at p. 23. See also Wheare, K. (1966), *Modern constitutions* (2<sup>nd</sup> ed.). Oxford: Oxford University Press, p. 1-2; Jennings, I. (1967), *The law and the constitution* (5<sup>th</sup> ed.). London: London University Press, p. 33-41. See also Section 1.3.

<sup>104</sup> Plato [c. 360 B.C.], *Nómoi* [Laws], Book 7, section 793b. Translation by Jowett, B. (1873), *The dialogues of Plato*. New York: Scribner, Armstrong.

<sup>105</sup> See Driessen, B. (2006), *Interinstitutional convention as checks and balances in EU law*. (PhD thesis, Katholieke Universiteit Leuven) and Beukers, T. (2011), *Law, Practice and Convention in the Constitution of the European Union* (PhD thesis, Universiteit van Amsterdam).



part of this section) of the *Spitzenkandidaten* procedure through the prism of constitutional conventions.

### 3.1.1. What are conventions?

In modern times, nineteenth-century British constitutional lawyers were first to recognise the importance of conventional rules.<sup>106</sup> Much ink has flowed since to assess their character and significance.<sup>107</sup> A wide variety of names has been given to such rules: John Stuart Mill referred to ‘the unwritten maxims of the Constitution’,<sup>108</sup> while others called them customs, usages or precepts.<sup>109</sup> Most commonly, however, they are – following Dicey’s classic *Law of the Constitution* – referred to as conventions.<sup>110</sup> This meaning of the word convention differs from its meaning in international law, where it is synonymous to a treaty or agreement between states.<sup>111</sup> In constitutional literature, by contrast, a convention is commonly defined following Wheare’s definition of ‘a binding rule, a rule of behaviour accepted as obligatory by those concerned in the working of the Constitution.’<sup>112</sup>

Constitutional conventions may, as is clear from Wheare’s definition, be characterised by their obligatory nature. This obligatory nature is what distinguishes conventions from practice. Practice comes into being for reasons of efficiency and a tendency to rely on a precedent. It

---

<sup>106</sup> Which might be explained by the fact that the United Kingdom had (and still, for the biggest part, has) an unwritten constitution. Another factor that might explain the amount of British literature on constitutional conventions is perhaps that at the time the United Kingdom had one of the most developed constitutional and legal systems. Wheare is, in any regard, right in emphasising that ‘in all countries usage and convention are important’, and that in many countries with a written constitution ‘usage and convention play as important a part as they do in England.’ See Wheare, K. (1966), *Modern constitutions* (2<sup>nd</sup> ed.). Oxford: Oxford University Press, at p. 122.

<sup>107</sup> Dicey, A. [1885] (1915), *Introduction to the study of the law of the Constitution* (8<sup>th</sup> ed.). London: MacMillan, p. 1-34 and 413-468; Jennings, I. (1967), *The law and the constitution* (5<sup>th</sup> ed.). London: London University Press, p. 80-136; Wheare, K. (1966), *Modern constitutions* (2<sup>nd</sup> ed.). Oxford: Oxford University Press, p. 121-136; Marshall, G. (1986), *Constitutional conventions: The rules and forms of political accountability*. Oxford: Clarendon Press; Munro, C. (1987), *Studies in Constitutional Law*. London: Butterworths, p. 35-60; Allan, T. (1993), *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism*. Oxford: Oxford University Press, p. 237-263; Bradley, A. & Ewing, K. (2007), *Constitutional and Administrative Law*. Essex: Pearson, p. 20-31; Hood Phillips, O. (1964), ‘Constitutional Conventions: A Conventional Reply’, *Society of Public Teachers of Law*, vol. 8, p. 60-70; Munro, C. (1975), ‘Laws and Conventions Distinguished’, *Law Quarterly Review*, vol. 91(2), p. 218-235; Maley, W. (1985), ‘Laws and Conventions Revisited’, *The Modern Law Review*, vol. 48(2), p. 121-138; Brazier, R. (1992), ‘The Non-Legal Constitution: Thoughts on Convention, Practice and Principle’ *Northern Ireland Legal Quarterly*, vol. 43(3), p. 262-287; Barber, N. (2009), ‘Laws and constitutional conventions’, *Law Quarterly Review*, vol. 125(2), p. 294-309. See on the development of the analysis of constitutional conventions by authors before Dicey, such as by Freeman, Hood Philips, O. (1966), ‘Constitutional conventions: Dicey’s predecessors’, *Modern Law Review*, vol. 29(2), p. 137-148.

<sup>108</sup> Mill, J.S. (1865), *Considerations on Representative Government*. London: Longmans, Green, and Co, at p. 35.

<sup>109</sup> Marshall, G. (1986), *Constitutional conventions: The rules and forms of political accountability*. Oxford: Clarendon Press, at p. 1.

<sup>110</sup> Dicey, A. (1915), *Introduction to the study of the law of the Constitution* (8<sup>th</sup> ed.). London: MacMillan.

<sup>111</sup> Still, it might be noted that constitutional conventions and conventions drawn up in international relations are similar in that the latter too are considered morally or politically binding, while they remain outside the formal law (and correspondingly are not actionable before the courts) of most states until they are enacted or transposed. See Wheare, K. (1966), *Modern constitutions* (2<sup>nd</sup> ed.). Oxford: Oxford University Press, at p. 122.

<sup>112</sup> Wheare, K. (1966), *Modern constitutions* (2<sup>nd</sup> ed.). Oxford: Oxford University Press, at p. 122. This definition is commonly accepted and employed in constitutional literature; see for example Marshall, G. (1986), *Constitutional conventions: The rules and forms of political accountability*. Oxford: Clarendon Press, at p. 7; Bradley, A. & Ewing, K. (2007), *Constitutional and Administrative Law*, Essex: Pearson, at p. 20.

signals regularity in behaviour and introduces an element of predictability, but does not give rise to an obligation of any sort.<sup>113</sup> Conventions, too, signal regularity and introduce predictability, but they go a step further than that. What distinguishes conventions is that they entail a strong normative character, or sense of obligation. This obligation is not a formally enacted one, but actors nonetheless perceive conventions to be ‘morally binding and politically binding’.<sup>114</sup> In a nutshell, practices describe, conventions prescribe.<sup>115</sup>

Constitutional conventions differ considerably in importance and content. They do, however, possess a common quality; conventions are mainly rules governing the exercise of prerogatives.<sup>116</sup> In France, for example, conventions limit the powers of the President in times of *cohabitation* (when the President and the parliamentary majority do not share the same political allegiance);<sup>117</sup> in Germany, the competence of the members of the *Bundestag*, and the competence of the members of the *Bundesrat*, to elect the Presidents of these bodies are governed by constitutional conventions;<sup>118</sup> in the United Kingdom, conventions *inter alia* limit the powers of the Queen and govern the dissolution of Parliament by the Prime Minister.<sup>119</sup> Thus, conventions provide a framework for the exercise of prerogatives.

So far we have ascertained that constitutional conventions are rules that may be characterised by their obligatory nature, which in essence, serve to govern the exercise of prerogatives. It is possible to take this analysis of the character of constitutional conventions one step further, and observe that they also share one ultimate purpose. Dicey remarked that conventions, such as the dissolution of the British Parliament, shall give effect to the will of the ‘nation’ and ‘secure the ultimate supremacy of the electorate as the true political sovereign of the state.’<sup>120</sup> Both Marshall

<sup>113</sup> Brazier, R. (1992), ‘The Non-Legal Constitution: Thoughts on Convention, Practice and Principle’ *Northern Ireland Legal Quarterly*, vol. 43(3), p. 262-287, at p. 270. See also Beukers, T. (2011), *Law, Practice and Convention in the Constitution of the European Union* (PhD thesis, Universiteit van Amsterdam), p. 103-107. Clearly, practice might develop into convention, if a particular course of conduct becomes (to be regarded as) obligatory.

<sup>114</sup> Wheare, K. (1966), *Modern constitutions* (2<sup>nd</sup> ed.). Oxford: Oxford University Press, at p. 122. This is similar to the famous distinction between mere regularity and rule-guided behaviour in Hart, H. (1994), *The Concept of Law* (2<sup>nd</sup> ed.). Oxford: Clarendon Press, p. 55-60.

<sup>115</sup> This notion of prescription is intrinsically linked to the perception of conventions as “morality”. Mill, for example, held that conventions are the ‘positive political morality (...) we must look to, if we would know in whom the really supreme power in the Constitution resides’, while the English historian Freeman refers to conventions as ‘a whole system of public morality, a whole code of precepts for the guidance of public men’. See Mill, J.S. (1865), *Considerations on Representative Government*. London: Longmans, Green, and Co, at p. 35; Freeman, E. (1872), *Growth of the English Constitution from the Earliest Times* (1<sup>st</sup> ed.). London: MacMillan, at p. 109.

<sup>116</sup> See Dicey, A. (1915), *Introduction to the study of the law of the Constitution* (8<sup>th</sup> ed.). London: MacMillan, at p. 414-424.

<sup>117</sup> See Avril, P. (1997), *Les conventions de la Constitution*. Paris: Presses Universitaires de France.

<sup>118</sup> See Taylor, G. (2014), ‘Convention by consensus: Constitutional conventions in Germany’, *International Journal of Constitutional Law*, vol. 12(2), p. 303-329. He contends (at p. 307) that ‘(t)he choice of the president of the *Bundestag* is, however, covered by a fixed rule, usually described as follows: the president must always be a member of and nominated by the party with the greatest number of seats.’ At p. 312, he observes that ‘the [*Bundesrat*] presidency will be exercised in yearly turns by each state premier, starting with the premier of the most populous state and finishing with that of the least populous.’

<sup>119</sup> See Marshall, G. (1986), *Constitutional conventions: The rules and forms of political accountability*. Oxford: Clarendon Press, p. 19-44 (powers of the queen) and p. 45-53 (dissolution).

<sup>120</sup> Dicey, A. (1915), *Introduction to the study of the law of the Constitution* (8<sup>th</sup> ed.), London: MacMillan, p. 432. See also p. 424.

and Wheare refer approvingly to Dicey's remark and suggest that conventions indeed aim to remove obstacles from the giving effect to the will of the people, thus helping the laws to achieve their aims.<sup>121</sup> In the Dutch context, a prime example is the unwritten rule of confidence (*vertrouwensregel*) that governs the relationship between parliament and government since 1868. This rule entails that no minister can remain in office without the support of the majority of parliament. From 1848 until 1983, however, the Dutch Constitution has provided that ministers were appointed and dismissed by the King 'at his pleasure' (*naar welgevallen*).<sup>122</sup> Thus, between 1868 and 1983, an explicit provision of the Dutch Constitution was invalidated by a constitutional convention intended to secure the ultimate supremacy of the electorate.

The nature of conventions, as a set of "invisible" rules, leaves it difficult to identify their precise meaning. Conventions can hardly be penned exactly, and can normally only be described in general terms.<sup>123</sup> Munro remarks that '[o]nly a few conventions are widely agreed as existing, and argument surrounds the meaning and extent of even these.'<sup>124</sup> Clearly, this makes the applicability of conventions in given circumstances hard to predict.<sup>125</sup> Ultimately, the actors concerned decide on the content of the convention, and only multiple examples of the application of a convention can serve to reduce its inherent vagueness.

So far in this discussion it has been found that conventions are rules with an obligatory character, governing the exercise of prerogatives, which are often aimed at securing the supremacy of the electorate, and whose meaning is difficult to identify. The binding, obligatory, nature of conventions distinguishes them from mere practice. The question remains, however, what the relation is between conventions and law(s). This question will be addressed next.

### 3.1.2. Conventions and law(s)

Orthodox theory teaches that conventions and laws, i.e. mostly written rules adopted by the legislature and enforced by the courts, are related but separate. Dicey, for example, made a sharp

---

<sup>121</sup> Wheare writes that this is indeed the 'one characteristic which is found in many examples of the working of conventions', while Marshall remarks that 'the major purpose of the domestic conventions is to give effect to the principle of governmental accountability'. See Marshall, G. (1986), *Constitutional conventions: The rules and forms of political accountability*. Oxford: Clarendon Press, at p. 18; Wheare, K. (1966), *Modern constitutions* (2<sup>nd</sup> ed.). Oxford: Oxford University Press, at p. 135.

<sup>122</sup> From 1848 until 1917 in Article 73 of the Constitution; from 1917 to 1972 in Article 77; from 1972 to 1983 in Article 86. See Pot, C., Elzinga, D., de Lange, R. & Hoogers, H. (2014), *Handboek van het Nederlandse staatsrecht* (16<sup>th</sup> ed.). Deventer: Kluwer, p. 186-187 (the *vertrouwensregel* as an example of an unwritten rule), p. 644-645 (the *vertrouwensregel* in the Second Chamber), p. 656-657 (the *vertrouwensregel* in the First Chamber).

<sup>123</sup> It must however be noted in this respect that difficulties to establish the precise content of a rule are not unique to conventions, as evidently the meaning of written laws too is debatable and open for interpretation. The main difference is, of course, that the meaning of conventions can often not be clarified in court. See Marshall, G. (1986), *Constitutional conventions: The rules and forms of political accountability*. Oxford: Clarendon Press, p. 211-212.

<sup>124</sup> Munro, C. (1975), 'Laws and Conventions Distinguished', *Law Quarterly Review*, vol. 91(2), at p. 234.

<sup>125</sup> Brazier, R. (1992), 'The Non-Legal Constitution: Thoughts on Convention, Practice and Principle', *Northern Ireland Legal Quarterly*, vol. 43(3), p. 262-287, at p. 268.

distinction between the two, focusing on their enforcement.<sup>126</sup> Laws, he contended, are enforced by the courts, with legal sanctions following their breach.<sup>127</sup> Conventions, by contrast, are neither ‘enforced or recognised by the Courts’ and are effectuated by political pressure.<sup>128</sup> Clearly, Dicey’s distinction cannot be universally valid if it is found either that some conventions are enforced by the courts, or that not every law is court-enforced.<sup>129</sup>

If tested, it becomes clear that Dicey’s distinction cannot be sustained. Various authors, such as Allan, have suggested that constitutional conventions, like laws, are or could become enforceable in the courts. Such enforcement could be directly or indirectly through a connection with a distinct legal right, if courts interpret that right in conformity with a convention.<sup>130</sup> Some conventions, moreover, may be enforced directly, albeit by bodies that are not courts, such as parliaments. Laws, on the other hand, are not always enforceable by courts either. An example is the Dutch constitution, which provides that courts are forbidden to judge the constitutionality of statutory laws as well as treaties, which means that the Dutch Constitution cannot be enforced by the national courts.<sup>131</sup>

In addition to these practical objections to Dicey’s binary distinction, an argument has also been advanced at a conceptual level, purporting that no distinction of substance or nature would exist between laws and conventions. According to Jennings, because some conventions are firmly fixed and can be stated as accurately as laws, and because both rest on the acquiescence of the people they regulate, the distinction holds no water.<sup>132</sup> All in all, while Dicey has identified an

<sup>126</sup> Dicey divided the constitution into just two sources, laws and conventions. This position was however challenged by later writers. Wheare, Brazier and several other authors propose constitutional practice as a third category, separate from conventions and hierarchically inferior to it. Wheare, K. (1966), *Modern constitutions* (2<sup>nd</sup> ed.). Oxford: Oxford University Press, p. 122; Brazier, R. (1992), ‘The Non-Legal Constitution: Thoughts on Convention, Practice and Principle’ *Northern Ireland Legal Quarterly*, vol. 43(3), p. 266-270. Brazier, at p. 266, refers to Hood Phillips, Wade & Bradley, and Mitchell.

<sup>127</sup> Dicey, A. (1915), *Introduction to the study of the law of the Constitution* (8<sup>th</sup> ed.). London: MacMillan, p. 22-30.

<sup>128</sup> Idem, at p. 413. Similarly, Bradley and Ewing hold that the enforcement of conventional rules ‘may depend essentially on the force of public and political opinion.’ See Bradley, A. & Ewing, K. (2007), *Constitutional and Administrative Law*. Essex: Pearson, at p. 24.

<sup>129</sup> Munro, C. (1975), ‘Laws and Conventions Distinguished’, *Law Quarterly Review*, vol. 91(2), at p. 225, also proposes this test for Dicey’s criterion, as does Barber, N. (2009), ‘Laws and constitutional conventions’, *Law Quarterly Review*, vol. 125(2), p. 294-309, at p. 294.

<sup>130</sup> See Allan, T. (1993), *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism*. Oxford: Oxford University Press, at p. 244, who holds that ‘to recognize a convention is necessarily to endorse the principle which justifies it; and, in a context where legal doctrine is developed to reflect that principle, recognition means enforcement’; he continues to conclude (at p. 253) that conventions express ‘conclusions of political principle, and so cannot (...) be distinguished from the law’; and Barber, N. (2009), ‘Laws and constitutional conventions’, *Law Quarterly Review*, vol. 125(2), p. 294-309, at p. 295-300. Barber, at p. 300, approvingly refers to Elliot, who mentions the *Factortame* litigation as an example of courts giving legal force to a convention, *in casu* the convention that governed the relationship between English and European law. See Elliot, H. (2002), ‘Parliamentary Sovereignty and the New Constitutional Order’, *Legal Studies*, vol. 22(3), p. 340-375, at p. 371.

<sup>131</sup> Dutch Constitution, Article 120. However, the courts may test rules enacted by bodies other than the statutory legislator, e.g. municipal regulations, against the Constitution. It should be noted that a Bill introducing constitutional review in the Constitution (*Kamerstukken II*, 2001-02, 28 331, nos. 1-2 of 11 April 2001) is currently considered in second reading in the Dutch Second Chamber. See Pot, C., Elzinga, D., de Lange, R. & Hoogers, H. (2014), *Handboek van het Nederlandse staatsrecht* (16<sup>th</sup> ed.). Deventer: Kluwer, at p. 201-204.

<sup>132</sup> Jennings, I. (1967), *The law and the constitution* (6<sup>th</sup> ed.). London: London University Press, p. 72-73, p. 117-118; supported by Mitchell, J. (1968), *Constitutional Law* (2<sup>nd</sup> ed.). Edinburgh: W. Green & Sons Ltd., p. 34.

important characteristic of laws and constitutional conventions, the strict, dichotomous division he proposes is inadequate.<sup>133</sup>

A second possible distinction between conventions and laws relates to the systematic character of the latter. Munro, in defence of Dicey's dichotomous division, asserts that this is the sharp line dividing laws and conventions.<sup>134</sup> Building on Hart's account of law,<sup>135</sup> Munro contends that in a legal system rules interact, and that their production and adjudication are regulated, whereas conventions 'do no form a system'<sup>136</sup> but a 'discrete unconnected set',<sup>137</sup> with no rules governing their existence, force or adjudication.

Is this second distinction persuasive? As Hart recognised, it is not always possible to identify a single moment from which onwards rules constitute laws. Rules may increasingly resemble laws, until they reach a point at which an unequivocal legal system has been created.<sup>138</sup> Following Hart, Barber argued that constitutional conventions can become more crystallised as actors create mechanisms which can create, modify, and adjudicate upon these conventions.<sup>139</sup> This process of crystallisation, i.e. something (a liquid, or a convention) gradually assuming a different form (a crystal, or a law), implies that ultimately conventions and laws differ in the extent of their formalisation, and should be differentiated as such. The difference between the two is one of degree, and conventions may ultimately develop into laws.<sup>140</sup> Accordingly, laws and conventions must be placed on a continuum.<sup>141</sup>

In the present thesis, the approach is taken that, despite the doubts raised by writers such as Allan, Jennings and Barber, a clear conceptual divide between laws and conventions does exist. The fact that the distinction is blurred in certain cases does not mean that there is no difference. While conventions may permeate, supplement, alter, shape, and ultimately become laws, it must

---

<sup>133</sup> Maley, W. (1985), 'Laws and Conventions Revisited', *The Modern Law Review*, vol. 48(2), at p. 128, and Barber, N. (2009), 'Laws and constitutional conventions', *Law Quarterly Review*, vol. 125(2), p. 295-301, also arrive at this conclusion. *Contra* Munro, C. (1975), 'Laws and Conventions Distinguished', *Law Quarterly Review*, vol. 91(2), at p. 231; Munro, C. (1987), *Studies in Constitutional Law*. London: Butterworths, p. 44-46.

<sup>134</sup> Munro, C. (1975), 'Laws and Conventions Distinguished', *Law Quarterly Review*, vol. 91(2), at p. 231-234; Munro, C. (1987), *Studies in Constitutional Law*. London: Butterworths, p. 44-48.

<sup>135</sup> Hart, H. (1994), *The Concept of Law* (2<sup>nd</sup> ed.). Oxford: Clarendon Press, especially Chapters 5 and 6.

<sup>136</sup> Munro, C. (1987), *Studies in Constitutional Law*. London: Butterworths, p. 47.

<sup>137</sup> Munro, C. (1975), 'Laws and Conventions Distinguished', *Law Quarterly Review*, vol. 91(2), at p. 233.

<sup>138</sup> Hart, H. (1994), *The Concept of Law* (2<sup>nd</sup> ed.). Oxford: Clarendon Press, p. 94.

<sup>139</sup> Barber, N. (2009), 'Laws and constitutional conventions', *Law Quarterly Review*, vol. 125(2), p. 294-309, at p. 302-309. Other authors (such as Brazier R. & Robilliard, St. J. (1982), 'Constitutional Conventions: the Canadian Supreme Court's Views Reviewed', *Public Law*, vol. 28, at p. 32-33; and Allan, T. (1993), *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism*. Oxford: Oxford University Press, at p. 259-261) previously speculated that conventions may develop into laws, using the metaphor of crystallisation.

<sup>140</sup> A familiar example, from the American context, is the constitutional convention that limited a President to two terms of office. After President Franklin D. Roosevelt was re-elected thrice, this convention was enacted in legal form in 1951, in the Twenty-Second Amendment to the US Constitution. See Wheare, K. (1966), *Modern constitutions*. Oxford: Oxford University Press, at p. 134-135. In the context of the European Union, an example is the parliamentary right of inquiry, which started as an initiative by the European Parliament and was ultimately codified in (currently) Article 226 TFEU. See Driessen, B. (2006), *Interinstitutional convention as checks and balances in EU law*. (PhD thesis, Katholieke Universiteit Leuven), at p. 5.

<sup>141</sup> Barber, N. (2009), 'Laws and constitutional conventions', *Law Quarterly Review*, vol. 125(2), p. 294-309, at p. 309.

be observed that they continue to exist as a separate category of binding constitutional rules. Clear differences exist as to the creation, certainty, enforcement, and evolution of conventions and laws. To distinguish between laws and conventions follows logically from these differences.

The notion that conventions are not laws (*lois*, or *Gesetze*) raises the question whether they are part of the law (*droit*, or *Recht*). This is of relevance since it influences the normative force of conventions, especially vis-à-vis the laws they alter or supplement. Three positions can be distinguished. Firstly, some authors, such as Kelsen, insist on a strict dichotomy of legal rule and political practice, adopting a view of law shaped by exclusive legal positivism.<sup>142</sup> Arguing that only norms formally laid down by legislature or established by courts are part of the law, they contend that constitutional conventions (accepted by politicians as binding, but not formally laid down) are outside of the law.<sup>143</sup> Secondly, authors such as Dworkin by contrast propose not to draw such sharp boundary lines between law and convention, based on a view shaped by the theories of natural law and legal interpretivism.<sup>144</sup> Arguing that law does not consist entirely of (formally established) rules, but also embeds certain moral principles, they hold that ‘no clear distinction between law and convention can be sustained’.<sup>145</sup> A middle position in this debate is adopted by inclusive legal positivists such as Hart, who propose that (moral) principles can be part of the law, but that for something to be law it need not be based on morality.<sup>146</sup> In this thesis, Hart’s view of law is employed. This is not so much a normative choice, but a position adopted with an eye to the nature of the European Union legal order, which is very open and liberally uses “general principles” (see more elaborately Section 3.2.1).

Thus, conventions can be considered part of the law (*droit*, or *Recht*), but they are not laws (*lois*, or *Gesetze*). So far, it has been found that conventions are obligatory rules different from both practice and laws. Now that this has been examined, it is time to turn to the establishment of conventions.

### 3.1.3. The establishment of conventions (Jennings’ test)

Jennings developed a test for the establishment of conventions, which has been followed in two

---

<sup>142</sup> I.e. the philosophy, developed by thinkers such as Bentham, Austin and Kelsen, that law must be separated from morality, because whether a norm forms part of the law depends on its sources. See Kelsen, H. (1960), *Reine Rechtslehre* (2<sup>nd</sup> ed.). Vienna: Franz Deuticke.

<sup>143</sup> For example Dicey, A. (1915), *Introduction to the study of the law of the Constitution* (8<sup>th</sup> ed.). London: MacMillan, at p. 22-30, and at p. 413 et seq.; Jaconelli, J. (2005), ‘Do constitutional conventions bind?’, *The Cambridge Law Journal*, vol. 64(1), p. 149-176, who (at p. 151) proclaims the existence of a ‘clear conceptual divide between laws and conventions’.

<sup>144</sup> A modern, secular version of natural law was developed by Fuller. See Fuller, L. (1964), *The Morality of Law*. London: Yale University Press. Fuller was an important influence on Dworkin, who built upon his work to develop legal interpretivism. See Dworkin, R. (1977), *Taking rights seriously*. London: Duckworth; Dworkin, R. (1986), *Law’s empire*. London: Fontana.

<sup>145</sup> See for this position Allan, T. (2013), *The Sovereignty of Law: Freedom, Constitution and Common Law*. Oxford: Oxford University Press, p. 56; see also Elliot, H. (2002), ‘Parliamentary Sovereignty and the New Constitutional Order’, *Legal Studies*, vol. 22(3), p. 340-375.

<sup>146</sup> See generally Hart, H. (1994), *The Concept of Law* (2<sup>nd</sup> ed.). Oxford: Clarendon Press.

cases by the Supreme Court of Canada.<sup>147</sup> According to this tripartite test, the establishment of conventions turns on (i) the existence of precedents, (ii) the beliefs of the actors working with the constitution, and (iii) the presence of a reason behind the convention.<sup>148</sup> It is important to note here that these criteria are non-cumulative, which is why in this thesis they are denoted as factors rather than requirements. This also means that the answer to the question whether a rule constitutes a convention is not binary, but gradual: multiple precedents, firm beliefs and a convincing reason give rise to a strong convention, whereas a convention based on one precedent, divergent beliefs, or a less persuasive reason will be less strong. Dicey, in this respect, remarks that some conventions ‘are never violated and are universally admitted to be inviolable. Others on the other hand have nothing but a slight amount of custom in their favour and are of disputable validity.’<sup>149</sup> Dicey’s contemporary Maitland regarded the strength of conventions in the same way, remarking that they can be found ‘of every degree of stringency and of definiteness.’<sup>150</sup>

Jennings’ first factor relates to the existence of precedents. A long and consistent string of precedents might seem to warrant the conclusion that a convention has been established, but such a rule will, without actors believing to be required to take a certain course of action and without a reason, be mere practice (because it lacks the obligatory character that distinguishes conventions). The first factor should therefore be considered in close conjunction with the other two factors. Precedents may be difficult to find in practice, for in constitutional reality some situations only rarely occur. According to Jennings however, a single precedent may already be enough to establish a convention, if there is a (very) persuasive reason for the convention to exist.<sup>151</sup> A parallel may be drawn here with “instant customs” in international law. Deviating from the traditional notion that consistent usage and *opinio juris* are necessary for a rule to constitute a custom, the International Court of Justice (in the *North Sea Continental Shelf Cases*)<sup>152</sup> and scholars such as Cheng have identified the possibility of instant customs. Such customs do not need to be *usage* in the sense of repeated practice, provided that *opinio juris* can be

---

<sup>147</sup> *Reference re Amendment of the Constitution of Canada* [1981] 1 S.C.R. 753; *Reference re Objection to a Resolution to Amend the Constitution of Canada* [1982] 2 S.C.R. 793.

<sup>148</sup> Jennings, I. (1967), *The law and the constitution* (6<sup>th</sup> ed.). London: London University Press, p. 136.

<sup>149</sup> Dicey, A. (1915), *Introduction to the study of the law of the Constitution* (8<sup>th</sup> ed.). London: MacMillan, at p. 26.

<sup>150</sup> See Maitland, F. (1908), *The Constitutional History of England*. Cambridge: Cambridge University Press, at p. 398. Munro too holds that the rules of the constitution may be ‘viewed on a continuum. (...) Some are more or less variably obeyed, while there are others to which, by degrees, a lesser sense of obligation adheres.’ Munro, C. (1987), *Studies in Constitutional Law*. London: Butterworths, at p. 59-60.

<sup>151</sup> Jennings, I. (1967), *The law and the constitution* (6<sup>th</sup> ed.). London: London University Press, p. 136. Wheare also states that a single precedent may be sufficient. See Wheare, K. (1966), *Modern constitutions* (2<sup>nd</sup> ed.). Oxford: Oxford University Press, at p. 122.

<sup>152</sup> The International Court of Justice held that ‘Although the passage of only a short period of time is not necessarily a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked;—and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.’ See *North Sea Continental Shelf (F.R.G. v. Den. & Neth.)*, 1969 I.C.J. 3, § 74.

established.<sup>153</sup> “Instant constitutional conventions” are also possible, but similarly require almost universal recognition by the actors and a convincing reason.

The second factor, the beliefs of the actors working with the constitution, may be approached empirically and normatively. An empirical outlook asks which beliefs the actors hold about what is required of them, while a normative outlook asks which rules the actors *ought* to feel obliged by.<sup>154</sup> While Marshall took the normative view, other writers (such as Wheare and Jennings) suggested that for a convention to exist, the actors themselves must consider that they are bound by it.<sup>155</sup> This difference is, in my opinion, ultimately of no real importance if Jennings’ test is applied. The main benefit of Marshall’s approach is that, apart from the beliefs of the actors, it also takes the rationale for a convention into account. This however, in Jennings’ test, is encompassed under the third factor.

If an empirical approach is taken towards the second factor (the beliefs of the actors), a methodological problem arises: how to assess these beliefs? In the literature, no answer to this question is available. Obviously, qualitative research consisting of interviews with various actors could provide a solution here.<sup>156</sup> Given however that this might be complicated in practice, it is useful to consider a more feasible approach. An option would be to examine whether resistance exists to a particular convention, which for example is manifest from strong positions taken by the actors (in the media, or in debates), or in votes against a particular rule. Clearly, this resistance must be substantial – if not, every opposition or breach of the rule would lead to the conclusion that no convention exists. In brief, no resistance indicates converging beliefs, while *substantial* resistance suggests divergence.

The third factor, the presence of a reason for the rule, may be considered ‘the weakest link’ of the test,<sup>157</sup> for who is to decide on what constitutes a good reason? However, in my opinion it is necessary to take this factor into account, for it allows commentators to say that a rule (be it widely or even universally observed) rests on unstable foundations, for the conclusions drawn from earlier precedents or the reasons proposed in justification are faulty.<sup>158</sup> If the existence of a convention was only determined empirically on the basis of the beliefs of the actors, it would be impossible to say that they were mistaken in believing a constitutional convention to exist.

---

<sup>153</sup> Cheng, B. (1983), ‘Custom: The Future of General State Practice in a Divided World’, in: Macdonald, R. & Johnston, D. (eds.), *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory*. The Hague: Martinus Nijhoff, p. 513-554, at p. 532.

<sup>154</sup> Marshall, G. (1986), *Constitutional conventions: The rules and forms of political accountability*. Oxford: Clarendon Press, at p. 11-12, in this context refers to ‘positive morality’ and ‘critical morality’.

<sup>155</sup> Marshall, G. (1986), *Constitutional conventions: The rules and forms of political accountability*. Oxford: Clarendon Press, at p. 11-12; Wheare, K. (1966), *Modern constitutions* (2<sup>nd</sup> ed.). Oxford: Oxford University Press, at p. 122.

<sup>156</sup> See on the desirability of such research Section 1.4.

<sup>157</sup> Verhey, L. (2014), *De Constitutionele Conventie: Een Blinde Vlek in Ons Staatsrecht*. Deventer: Kluwer, at p. 14.

<sup>158</sup> This is similar to Marshall’s justification for taking into account a normative view towards the beliefs of the actors. See Marshall, G. (1986), *Constitutional conventions: The rules and forms of political accountability*. Oxford: Clarendon Press, at p. 12.



The strength and subsequent consolidation of a convention rely on the validity of the reason behind the convention. Take, for example, a convention justified with a reference to enhancing democracy. It may be expected that, if this hypothetical convention does in reality not enhance democracy, soon enough opponents will point to this flaw. The perception of an obligation, which is at the core of the concept of constitutional convention, will then be attenuated. Clearly, if we link this to the notion of the strength of a convention, this means that the hypothetical convention in question will be less strong, to the point that it loses its obligatory force. Thus, it may be observed that the validity of the reason behind a convention is essential.

A fundamental criticism of Jennings' test has been brought by Jaconelli. This author, in his search for the basis of constitutional conventions, contends that to ask about the precedents, and the beliefs of the actors in those precedents, is too limited a basis.<sup>159</sup> Rejecting the proposition that constitutional conventions rest solely on the beliefs of the various actors, Jaconelli argues to derive the obligatory basis of conventions from their mode of emergence, which exists of reciprocal acts and 'a stream of concordant actions and expectations deriving from such actions.'<sup>160</sup> This idea, however, implies mutual forbearance and a shared interest in the convention, and might therefore be more useful in the context of understanding (British) inter-party conventions than (European Union) inter-institutional conventions.<sup>161</sup>

Jennings' test is not only instructive in relation to the establishment of conventions, but also in addressing the question of how conventions may change. Conventions can develop or extend in novel directions by being applied to fresh political circumstances.<sup>162</sup> In that process, precedents may function as stepping stones, whereas the beliefs of the actors and the reason for the rule will constitute the arguments for change. Conventions may also disappear, for example by way of constitutional amendment or judicial review, or simply because the need for a certain convention disappears. Jennings' test for the establishment of conventions may also be useful when analysing their end: if there is precedent of a rupture with the convention, if the beliefs of the actors involved have changed, or if the underlying reason for the convention disappears, it is probable that the convention will vanish.

The key elements of the concept of constitutional convention have now been introduced and examined. The differences between conventions and practice and conventions and laws reveal the utility of the concept as a tool to understand the constitutional reality. In the next subsection, the focus will shift from the concept of constitutional convention to its place in the legal order of the European Union.

---

<sup>159</sup> Jaconelli, J. (2005), 'Do constitutional conventions bind?', *The Cambridge Law Journal*, vol. 64(1), p. 149-176, at p. 172.

<sup>160</sup> Idem, at p. 173.

<sup>161</sup> Beukers, T. (2011), *Law, Practice and Convention in the Constitution of the European Union* (PhD thesis, Universiteit van Amsterdam), p. 101. See also Driessen, B. (2006), *Interinstitutional convention as checks and balances in EU law*. (PhD thesis, Katholieke Universiteit Leuven), at p. 93.

<sup>162</sup> Marshall, G. (1986), *Constitutional conventions: The rules and forms of political accountability*. Oxford: Clarendon Press, at p. 217.

### 3.2. Constitutional conventions in the European Union

Every constitution, to a greater or lesser extent, needs conventions, for they enable actors to work with the old law in new circumstances. Given that the European Union constitutional framework is rather general (Tridimas speaks of the TFEU as a '*traité cadre*'<sup>163</sup>), the need for conventions in Brussels is all the bigger. Conventions, furthermore, offer the benefits of informal adaptation and thus 'make the legal constitution work'.<sup>164</sup> This is even more useful in settings with written constitutions and a greater degree of constitutional rigidity, such as the European Union.<sup>165</sup> Thus, while the constitutional setting renders convention in Brussels different from its counterpart in Westminster, conventions do play a crucial role in the European Union.<sup>166</sup> According to Curtin, they even provide 'the glue to hold it together in overall constitutional terms'.<sup>167</sup>

This second subsection examines the role of conventions in the context of the European Union. First, the place of conventions in the legal order of the European Union is sketched, taking into account the general principles of law, the principles of institutional balance and democracy, and the 'special significance' of the case-law of the European Court of Human Rights (ECtHR) in the European Union legal framework. Second, two examples that are closely linked to the subject of the present thesis are discussed, namely parliamentary hearings for candidate Commissioners and the censure of individual candidate Commissioners.

#### 3.2.1. Conventions and the legal order of the European Union

##### *General principles of law*

The general principles of law form part of the hierarchy of norms in European Union law. On top of the pyramid, we find the Treaties (TEU and TFEU) and the Charter.<sup>168</sup> The second tier of

---

<sup>163</sup> Tridimas, T. (2006), *The General Principles of EU Law* (2nd ed.). Oxford: Oxford University Press, at p. 18.

<sup>164</sup> Jennings, I. (1967), *The law and the constitution* (6<sup>th</sup> ed.). London: London University Press, at p. 81-82.

<sup>165</sup> Munro, C. (1975), 'Laws and Conventions Distinguished', *Law Quarterly Review*, vol. 91(2), at p. 218-219. In the European Union, the legislative powers of the institutions are strictly circumscribed and limited by the principle of conferral (Article 5 TEU). It is therefore difficult to regulate interinstitutional relationships in Regulations. Governing and adopting such relationships must therefore either be done by Treaty revision, which is politically complicated (and results in the petrification of the rule), or by using unilateral instruments. Constitutional conventions can fill the gap between these two possibilities. See Driessen, B. (2006), *Interinstitutional convention as checks and balances in EU law*. (PhD thesis, Katholieke Universiteit Leuven), at p. 93.

<sup>166</sup> Driessen considers conventions in the Union context to be 'much more formalised' and 'more based on explicit agreement than on accepted custom' (Driessen, B. (2008), 'Interinstitutional Conventions and institutional balance', *European Law Review*, vol. 33(4), at p. 556), but also contends that they play 'a crucial, but often overlooked, role' (Driessen, B. (2006), *Interinstitutional convention as checks and balances in EU law*. (PhD thesis, Katholieke Universiteit Leuven, at p. 5).

<sup>167</sup> Together with traditions and implementing law. See Curtin, D. (2009), *Executive Power of the European Union. Law, Practices, and the Living Constitution*. Oxford: Oxford University Press, at p. 11.

<sup>168</sup> Charter of Fundamental Rights of the European Union, O.J. C 83 of 30.03.2010. The Charter has the same status as the Treaties, since Article 6(1) provides that it has the same legal value.

norms consists of the general principles of law.<sup>169</sup> These sit below the primary law, but above the other sources of law, which include legislative acts, delegated acts, and implementing acts.<sup>170</sup> General principles can be used as an aid to the interpretation of primary law, and to interpret legislative, delegated, or implementing acts. They can also work to invalidate such acts, if a particular act breaches a general principle of law. Thus, they work to permeate, supplement, alter, and shape formal laws, just like conventions do with the constitution.<sup>171</sup>

The general principles play an important role in the judicial review under Article 263(2) TFEU, which provides that the Court of Justice of the European Union (CJEU) has jurisdiction in actions brought ‘on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.’ The broad wording of this provision, especially the third ground of review ((...) any rule of law’), provided the Court with a possibility to introduce various principles of law as grounds of review.<sup>172</sup> The Court developed a rich body of jurisprudence on general principles of law, covering topics such as proportionality, legal certainty and legitimate expectations, and process rights.<sup>173</sup> (Fundamental rights, which are also general principles of law on the basis of Article 6 TEU, are discussed more elaborately below.)

Why are the general principles relevant in a discussing the (possible) role of conventions in the legal order of the European Union? First, their significance indicates that that the European Union legal order encompasses sources of law not formally adopted by the legislature (such as constitutional conventions).<sup>174</sup> Second, general principles, like conventions, serve to fill normative gaps left by the “Masters of the Treaties”. According to Lenaerts and Gutiérrez-Fons, ‘general principles seek to create a “common constitutional space” where EU and national law engage in a dynamic dialogue’. Hence, they facilitate the renewal of the legal order of the European Union, ‘epitomizing the “EU’s living constitution”’.<sup>175</sup> The analogy between general principles and conventions is very clear, and the significance of the former indicates that the latter, too, has a place in the legal order of the European Union.

---

<sup>169</sup> Ziller, J. (2014), ‘Hierarchy of Norms: Hierarchy of Sources and General Principles in European Union Law’, in: Becker, E., Hatje, A., Potacs, M. & Wunderlich, N. (eds.), *Verfassung und Verwaltung in Europa. Festschrift für Jürgen Schwarze zum 70. Geburtstag*, Baden-Baden: Nomos Verlagsgesellschaft, p. 334-352.

<sup>170</sup> See respectively Article 289 (legislative acts), Article 290 (delegated acts) and Article 291 (implementing acts) TFEU.

<sup>171</sup> See generally Tridimas, T. (2006), *The General Principles of EU Law* (2nd ed.). Oxford: Oxford University Press;

<sup>172</sup> In addition, Article 19 TEU tasks the CJEU with the duty of ensuring that ‘the law’ is observed in the interpretation and application of the Treaties. The word law here is open to a broader interpretation which encompasses general principles.

<sup>173</sup> See for an overview Lenaerts, K. & Corthaut, T. (2003), ‘Judicial Review as a Contribution to the Development of European Constitutionalism’, *Yearbook of European Law*, vol. 22(1), p. 1-43; Lenaerts, K. & Gutiérrez-Fons, J. (2010), ‘The Constitutional Allocation of Powers and General Principles of EU law’, *Common Market Law Review*, vol. 47(6), p. 1629-1669.

<sup>174</sup> Some general principles are Treaty-enshrined, such as the principles of subsidiarity and proportionality (Article 5 TEU) and the principle of equal treatment for men and women (Article 157(1) TFEU, see also Case 149/77 *Defrenne v Sabena* [1978] ECR 1365.

<sup>175</sup> Lenaerts, K. & Gutiérrez-Fons, J. (2010), ‘The Constitutional Allocation of Powers and General Principles of EU law’, *Common Market Law Review*, vol. 47(6), p. 1629-1669, at p. 1669.

## *The principles of institutional balance and democracy*

The principles of institutional balance and democracy also suggest that constitutional conventions have a place in the legal order of the European Union.

The principle of institutional balance is reflected in Article 13(2) TEU, under which each institution is to 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.’ In 1958 already, the Court held in *Meroni* that the balance of powers is ‘characteristic of the institutional structure of the Community’.<sup>176</sup> Recently, in April 2015, the Court described the notion of institutional balance as ‘a principle’ requiring each of the institutions to exercise its powers with due regard for the powers of the other institutions.<sup>177</sup>

The principle of institutional balance has been used by the Court of Justice in various cases concerning the powers of the European Parliament. The Court for example referred to institutional balance in relation to the delegation of implementing powers,<sup>178</sup> and in relation to the right of consultation.<sup>179</sup> Institutional balance, furthermore, played a pivotal role in cases concerning the *locus standi* of the European Parliament before the Court. In *Les Verts*, the Court included the European Parliament as a respondent in annulment proceedings, even though only the Council and the Commission were mentioned under the relevant Treaty provision at that time.<sup>180</sup> Subsequently, in *Chernobyl*, the Court found that the European Parliament could be a plaintiff in annulment proceeding (although only where its prerogatives had been infringed). This finding was based the notion of institutional balance, which according to the Court required ‘that it should be possible to penalize any breach of that rule which may occur.’<sup>181</sup>

What is clear from *Les Verts* and *Chernobyl* is that the Court does not hesitate to broaden an

---

<sup>176</sup> Case 9/56 *Meroni* [1957-1958] ECR 133.

<sup>177</sup> Case C-409/13 *Council of the European Union v European Commission* ECLI:EU:C:2015:217, 14 April 2015, § 64. This definition dates back to Case 70/88 *European Parliament v Council (Chernobyl)* [1990] ECR I-2041, § 21. See also Case C-187/93 *Parliament v Council (Transfer of Waste)* [1994] ECR I-2857. Academics have written about the notion of institutional balance as a principle. Lenaerts & Van Nuffel, for example, argue that ‘Article 13(2) TEU ‘must be read in the light of the principle of institutional balance.’ Lenaerts, K. & Van Nuffel, P. (2005), *Constitutional Law of the European Union* (2<sup>nd</sup> ed.). London: Thomson Sweet & Maxwell, at p. 260. Prechal named a book chapter on the notion ‘Institutional Balance. A Fragile Principle with uncertain contents.’ See Prechal, S., in: Heukels, T., Blokker, N. & Brus, M. (1996) (eds.), *The European Union after Amsterdam. A Legal Analysis*. The Hague: Kluwer Law International, p. 273-294. See also Driessen, B. (2006), *Interinstitutional convention as checks and balances in EU law*. (PhD thesis, Katholieke Universiteit Leuven), p. 45-48.

<sup>178</sup> ‘Consequently, without distorting the Community structure and the institutional balance, the management committee machinery enables the Council to delegate to the Commission an implementing power of appreciable scope (...). Case 25/70 *Köster* [1970] ECR 1161, § 9. See also Case 9/56 *Meroni* [1957-1958] ECR 133.

<sup>179</sup> ‘The effective participation of the Parliament in the legislative process of the Community, in accordance with the procedures laid down in the Treaty, represents an essential factor in the institutional balance intended by the Treaty.’ Case C-65/93 *European Parliament v Council* [1995] ECR I-643, § 21.

<sup>180</sup> Case 294/83 *Parti Ecologiste ‘Les Verts’ v Parliament* [1986] ECR 1339, § 23. The relevant provision was Article 173 EEC Treaty.

<sup>181</sup> Case 70/88 *European Parliament v Council (Chernobyl)* [1990] ECR I-2041, § 21-22. See also Case C-187/93 *Parliament v Council (Transfer of Waste)* [1994] ECR I-2857.

exhaustive catalogue of litigants (provided by the Treaty) in favour of the European Parliament, under the cloak of the principle of institutional balance.<sup>182</sup> The Court's willingness to protect the prerogatives of the European Parliament may also be illustrated by its judgment in *Titanium Dioxide*.<sup>183</sup> In that case, a directive designed to harmonise rules on titanium dioxide waste had both environmental and economic benefits and could therefore have been validly adopted on two legal bases.<sup>184</sup> The first legal basis only required the consultation of the European Parliament, whereas the second basis required the European Parliament to approve of the measure (in case of a rejection, the Council could only adopt the measure by unanimous vote).<sup>185</sup> The directive was enacted on the first legal basis which granted a weaker role to the European Parliament. The Court, in this case, confirmed its earlier finding that the choice of legal basis must be based on objective factors such as the aim and content of the measure.<sup>186</sup> Crucially, however, it found that where two bases are equally applicable, the legal basis that gives most power to the European Parliament should be chosen.<sup>187</sup>

The judicial protection of the prerogatives of the European Parliament is of paramount importance not only in order to secure compliance with the principle of institutional balance, but also with the principle of democracy.<sup>188</sup> Cases such as *Les Verts*, *Chernobyl*, and *Titanium Dioxide*, but also *Roquette Frères v Council* (in which the Court annulled a regulation because the Council failed to consult the European Parliament)<sup>189</sup>, demonstrate that the Court endeavours to protect and even strengthen the powers that the Treaties have conferred on the European Parliament. In doing so, it has not only used the principle of institutional balance. In *Roquette Frères v Council*, the Court referred to 'the fundamental democratic principle that the people should take part in the exercise of power through the intermediary of a representative assembly'.<sup>190</sup> This principle of democracy, which is enshrined in Article 10(1) TEU, is according to Lenaerts 'a dynamic concept', which is imbued with elements of 'continuity and change'.<sup>191</sup> A strong analogy between this concept and the concept of constitutional convention appears to

<sup>182</sup> Eventually, both judgments were incorporated into the Treaty. Currently, Article 263 TFEU grants the European Parliament full *locus standi*.

<sup>183</sup> Case C-300/89 *Commission v Council (Titanium Dioxide)* [1991] ECR I-2867.

<sup>184</sup> The European Union may, on the basis of the principle of conferral of powers as set out in Article 5(2) TEU, act only when there is a legal basis in the Treaties. The correct legal basis for legislation has in the past been the subject of many disputes, for the European Parliament wished to ensure that its rights would not be circumvented by a choice for a legal basis which gave it less extensive rights in the legislative process. For example, in addition to *Titanium Dioxide*, Case 45/86 *Commission v Council* [1987] ECR 1493 and Case C-187/93 *Parliament v Council Transfer of Waste* [1994] ECR I-2857. Such disputes are less likely today, because the ordinary legislative procedure of Article 289 TFEU is applicable to most Treaty provisions.

<sup>185</sup> Case C-300/89 *Commission v Council (Titanium Dioxide)* [1991] ECR I-2867, § 14-19. The relevant provisions were Article 100a and Article 130s EEC Treaty.

<sup>186</sup> Case C-300/89 *Commission v Council (Titanium Dioxide)* [1991] ECR I-2867, § 17. The Court refers to Case 165/87 *Commission v Council* [1988] ECR 5545, § 11.

<sup>187</sup> Case C-300/89 *Commission v Council (Titanium Dioxide)* [1991] ECR I-2867, § 20.

<sup>188</sup> Lenaerts, K. (2013), 'The principle of democracy in the case law of the European Court of Justice', *International and Comparative Law Quarterly*, vol. 62(2), p. 271-315, at p. 282.

<sup>189</sup> Case C-138/79 *Roquette Frères v Council* [1980] ECR 3333.

<sup>190</sup> Case C-138/79 *Roquette Frères v Council* [1980] ECR 3333, § 33.

<sup>191</sup> Lenaerts, K. (2013), 'The principle of democracy in the case law of the European Court of Justice', *International and Comparative Law Quarterly*, vol. 62(2), p. 271-315, at p. 282.

exist, for conventions likewise (generally) aim at securing the supremacy of the electorate, and also enable constitutional change.

The relevance of the case-law of the Court of Justice on the principles of institutional balance and democracy to the current thesis is twofold. First, it forms another indication, in addition to the significant role of general principles in the Court's case-law, that the legal order of the European Union is open to sources of law not formally adopted by the legislature (such as constitutional conventions). The principles of institutional balance and democracy govern the exercise of prerogatives, which was identified above as one of the characteristics of conventions. Second, it shows that the Court has an inclination to protect and even strengthen the prerogatives of the European Parliament, as the only directly elected institution of the European Union. Clearly, this is of relevance to the *Spitzenkandidaten* procedure, which also aims at strengthening the position of the European Parliament.

### *The 'special significance' of the ECHR and the case-law of the ECtHR*

The 'special significance' of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the case-law of the ECtHR in the legal order of the European Union also suggests that constitutional conventions can play a role in the legal order of the European Union.

The ECHR and the case-law of the ECtHR occupy a special place in the case-law of the Court of Justice. In *Nold*, the Court held that international human right treaties are a source of inspiration for the general principles of European Union law.<sup>192</sup> Subsequently, in *Rutili*, the Court specifically referred to the ECHR as one of those treaties.<sup>193</sup> The Court of Justice from then onwards routinely pointed to the 'special significance' of the ECHR and the case-law of the ECtHR.<sup>194</sup> Finally, while the provisions of the ECHR were never formally incorporated in European Union law, Article 6 TEU has since the Treaty of Maastricht referred expressly to the ECHR and provided that the fundamental rights guaranteed by it constitute general principles of the Union's law.

The reference in Article 6 TEU to the ECHR and the significance accorded by the Court of Justice to the ECHR and the case-law of the ECtHR are important to take into account when discussing the role of conventions in the legal order of the European Union, because it forms (yet another) indication that this order is not rigid but very open to change. The ECtHR has interpreted the ECHR to be 'a living instrument' that must be interpreted 'in the light of present-

---

<sup>192</sup> Case 4/73 *Nold v Commission* [1974] ECR 491.

<sup>193</sup> Case 36/75 *Rutili v Ministre de l'Intérieur* [1975] ECR 1219.

<sup>194</sup> For example in Case C-260/89 *Elliniki Radiophonia Tileorassi AE* [1991] ECR I-2925, § 41; Case C-299/95 *Kremzow v Austria* [1997] ECR I-2629, § 14.

day conditions'.<sup>195</sup> Such a “dynamic” or “evolutive” reading of the ECHR is intended to ensure that the rights of the convention are ‘practical and effective’, not ‘theoretical and illusory’.<sup>196</sup> The role accorded by the Court of Justice to the ECHR, a living instrument subject to dynamic interpretation, is indicative of the openness of the legal order of the European Union. The openness to the fundamental rights guaranteed by the ECHR facilitates, like the other general principles of European Union law, renewal of the legal order of the European Union.

### *Conventions and the legal order of the European Union: final observations*

So far various factors have been discussed that indicate that the European legal order is open to constitutional conventions. One further factor that hitherto has been left out of consideration is that the constitutional traditions of the Member States are, on the basis of Article 6 TEU, also of importance to European Union law. The Court of Justice has in the past referred to the constitutional traditions of the Member States.<sup>197</sup> Constitutional conventions are part of the constitutional traditions of many Member States of the European Union, such as the United Kingdom, but also France, Germany and the Netherlands.<sup>198</sup> The scope of this thesis does not allow for a discussion of the interaction between European Union constitutional law and the constitutional law of the Member States, but it is possible to argue that the significant role of constitutional conventions in various Member States also forms an indication that constitutional conventions have a place in the European Union legal order.

Various arguments have now been advanced that indicate that the European Union legal order could encompass conventions. Does this also mean that such conventions could be actionable before the Court in Luxembourg? The case-law of the Court of Justice provides little guidance in this regard, although it is clear from two cases that mere practice does not bind in any way (as long as no legitimate expectations are created) and that it certainly cannot override the provisions of the Treaty.<sup>199</sup> Conventions could perhaps serve as an aid to the interpretation of primary and secondary legislation. However, unlike the general principles they do not form grounds for judicial review. The role of conventions is political rather than legal, also because the exact

---

<sup>195</sup> European Court of Human Rights, *Tyrer v. the United Kingdom*, 25 April 1978, Series A no. 26, § 31. This has been a central feature of the case-law of the ECtHR. See on the interpretation of the ECHR Letsas, G. (2007), *A theory of interpretation of the European Convention on Human Rights*. Oxford: Oxford University Press, especially p. 59-80; Dzehtsiarou, K. & O'Mahony, C. (2013), ‘Evolutive Interpretation of Rights Provisions: a Comparison of the European court of Human rights and the U.S. Supreme Court’, *Columbia Human Rights Law Review*, vol. 44(1), p. 309-927.

<sup>196</sup> European Court of Human Rights, *Airey v. Ireland*, 9 October 1979, Series A no. 32, § 24.

<sup>197</sup> The first case in which the ECJ referred to ‘traditions common to the Member States’ was Case 11/70 *Internationale Handelsgesellschaft v Einfuhr und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125, § 4. This was repeated in Case 4/73 *Nold v Commission* [1974] ECR 491, § 13 and many subsequent cases.

<sup>198</sup> See on conventions in France Avril, P. (1997), *Les conventions de la Constitution*. Paris: Presses Universitaires de France; on their role in Germany, see Taylor, G. (2014), ‘Convention by consensus: Constitutional conventions in Germany’, *International Journal of Constitutional Law*, vol. 12(2), p. 307-314; see specifically on the Dutch *vertrouwensregel* Section 3.1.1.

<sup>199</sup> Case C-84/94 *United Kingdom v Council* [1996] ECR I-5755, § 19. See also case C-327/91 *France v Commission*, [1994] ECR I-3641, § 36. See Driessen, B. (2006), *Interinstitutional convention as checks and balances in EU law*. (PhD thesis, Katholieke Universiteit Leuven), at p. 82.

content of a convention is difficult to determine, which renders conventions difficult to adjudicate. All in all, it therefore seems likely that constitutional conventions are not actionable before the Court in Luxembourg, but they could be used as an aid to the interpretation of primary and secondary law.

This discussion of the role of general principles, the principles of institutional balance and democracy, and the ‘special significance’ of the ECHR and the case-law of the ECtHR underpin Curtin’s remark that ‘under the superficial outer crust of core understandings’ we may find ‘more complex sediments of ‘living’ institutions and empirical practices.’<sup>200</sup> The European Union legal order is open to dynamic sources of law that serve to fill normative gaps and can permeate, supplement, alter, and shape formal laws. Constitutional conventions are an example *par excellence* of such a source of law that can be found under the superficial outer crust.<sup>201</sup> In sum, it seems clear that the legal order of the European Union, by some referred to as a ‘living constitution’,<sup>202</sup> leaves place for conventions.

In the next part, the attention shifts from the theoretical possibility of conventions in the European Union legal order to two concrete examples. The introduction of parliamentary hearings for candidate Commissioners and the censure of individual candidate Commissioners during the appointment procedure of the Commission are discussed. These two examples, both closely linked to the topic of the present thesis, may serve to prove the practical significance of constitutional conventions in the legal order of the European Union.

### ***3.2.2. Two examples: parliamentary hearings and censure of candidate Commissioners***

Parliamentary hearings for candidate Commissioners were introduced in 1995, after the Maastricht Treaty provided the European Parliament with a vote of approval concerning the proposed Commission as a body.<sup>203</sup> On the initiative of the European Parliament, individual nominees were to be scrutinised by parliamentary committees in public sessions. An approval vote of the Commission would be held only after the parliamentary hearings. The outgoing Commission disapproved of the procedure, and the proposed President of the European Commission Santer and his Commissioners were very reluctant.<sup>204</sup> However, non-appearance

---

<sup>200</sup> Curtin, D. (2009), *Executive Power of the European Union. Law, Practices, and the Living Constitution*. Oxford: Oxford University Press, at p. 11.

<sup>201</sup> The role of constitutional conventions in the legal order of the European Union has been explored and substantiated by Beukers. See Beukers, T. (2011), *Law, Practice and Convention in the Constitution of the European Union* (PhD thesis, Universiteit van Amsterdam).

<sup>202</sup> The metaphor of a living entity, commonplace in American constitutional law, is for example used in the context of the European Union legal order in Curtin, D. (2009), *Executive Power of the European Union. Law, Practices, and the Living Constitution*. Oxford: Oxford University Press (see specifically p. 10-11); and in Lenaerts, K. & Gutiérrez-Fons, J. (2010), ‘The Constitutional Allocation of Powers and General Principles of EU law’, *Common Market Law Review*, vol. 47(6), 1629-1669, at p. 1669.

<sup>203</sup> Article 158(2) Treaty on European Union (Treaty of Maastricht), O.J C 191 of 29.07.1992; currently Article 17(7) TEU.

<sup>204</sup> Moury, C. (2007), ‘Explaining the European Parliament’s right to appoint and invest the commission’, *West European Politics*, vol. 30(2), p. 367-391, at p. 379.



seemed unthinkable as this would in all probability result in the rejection of the Commission as a body. Thus, despite hearings not being mentioned in the Treaties, a rule for individual candidate Commissioners to appear before a parliamentary committee had been established.

The censure of individual candidate Commissioners during the appointment procedure of the Commission was initiated in 2004, when several candidates for the European Commission faced strong opposition during the parliamentary hearings. A vote of a parliamentary committee against the Italian candidate commissioner made it seem probable that a majority of the European Parliament would reject the investiture of the Commission (as a body). Ultimately, the new Commission President Barroso asked the Italian and the Latvian government to replace their candidates and switched the Hungarian candidate to another position.<sup>205</sup> In 2010, the European Parliament went even further and successfully demanded individual, specific change in relation to the composition of the Commission (while in 2004 the rejection was part of a package of multiple, balanced changes).<sup>206</sup> A second rule, in addition to the obligation to appear in parliamentary hearings, had thus been established, namely that the European Parliament can reject *individual* candidates for the European Commission – while the Treaty only provides for a vote of approval concerning the proposed Commission *as a body*.

The application of Jennings' test to the introduction of parliamentary hearings for candidate Commissioners and the censure of individual candidate Commissioners results in the conclusion that both are constitutional conventions. First, it is clear that consistent precedence exists regarding both examples. After the introduction of public hearings in 1995, hearings before Parliamentary committees have been held during every Commission investiture procedure, and such hearings were also organised when new Commissioners were appointed during the course of a Commission's term. No candidate Commissioner has ever refused to appear before the responsible Parliamentary committee, and some candidates were even heard twice, after their first performance was considered unsatisfactory.<sup>207</sup>

Several precedents also exist concerning the censure of individual candidate Commissioners. In 2004, the Italian candidate Commissioner Buttiglione and his Latvian counterpart Udre were replaced (in response to a vote on the Italian candidate in a committee of the European

---

<sup>205</sup> See on this development (elaborately) Beukers, T. (2011), *Law, Practice and Convention in the Constitution of the European Union* (PhD thesis, Universiteit van Amsterdam), p. 325-345; see also Driessen, B. (2006), *Interinstitutional convention as checks and balances in EU law*. (PhD thesis, Katholieke Universiteit Leuven), p. 113-114; Eijssbouts, T. (2005), 'The Barroso Drama: Campidoglio, Rome 29 October 2004: How the Form Was Brought to Matter', *European Constitutional Law Review*, vol. 1(2), p. 163-165.

<sup>206</sup> Beukers proposes a sharp distinction between these competences, whereas I consider the possibility of demanding individual changes as a mere logical result and further elaboration of the rule established in 2004. See Beukers, T. (2011), *Law, Practice and Convention in the Constitution of the European Union* (PhD thesis, Universiteit van Amsterdam), at p. 349.

<sup>207</sup> Such as Dutch candidate Commissioner Kroes, in 2010. See Willis, A., *Kroes' future hangs in the balance*, EUobserver 15 January 2010, <https://euobserver.com/economic/29277>; Kris, J. van der, *Bungelen van Kroes toont nieuwe verhoudingen EU*, NRC Handelsblad 21 January 2010, <http://www.nrc.nl/handelsblad/van/2010/januari/21/bungelen-van-kroes-toont-nieuwe-verhoudingen-eu-11840241>, both accessed 9 July 2015.

Parliament). This was repeated during the next two investiture procedures, when the European Parliament again got supposedly unsuitable nominees replaced (Bulgarian candidate Jeleva, in 2010, and Slovenian candidate Bratušek, in 2014).<sup>208</sup> These examples are strong indications that the shift from strict collegiality to individual political responsibility of candidate Commissioners is now deeply rooted.

Secondly, in relation to the beliefs of the actors, both examples also pass the test. The simple fact that all candidate Commissioners obey the rules and appear before the hearings, rather than disobey or reject them, shows that they are believed to formulate obligatory rules.<sup>209</sup> Thus, it appears that not only the European Parliament, but also the European Commission, as represented by the candidate Commissioners, has exchanged the old interpretation of the Treaty rule of collegiality for an understanding that individual candidates can be rejected. Although no votes have been held on individual candidates in the European Parliament's plenary, the belief that the European Parliament now possesses the power to force the withdrawal of an individual candidate is virtually uncontested.<sup>210</sup>

It is important to note in this respect that both of these powers are backed up by a Treaty competence, namely the European Parliament's right under Article 17(7) TEU to reject the European Commission as a body. This does, however, not mean that the Commission was forced into accepting the conventions. The Commission, if it had been strongly opposed to the conventions, could have picked a battle with the European Parliament. Clearly, while the European Parliament could then have rejected the entire Commission, the Commission in return could have continued its resistance and created a deadlock situation. The fact that the Commission has never entered into such a conflict with the European Parliament over this issue forms an indication that it believed the conventions to be acceptable, because otherwise it would have preferred such a conflict. In brief, the threat of the European Parliament to make use of its Treaty competence could have been answered by the European Commission, and the lack of such an answer implies acceptance.

As to the third factor, the underlying reason for the rule, it is most commonly argued that the empowerment of the European Parliament is justified by the strengthening of the democratic legitimacy of the European Commission. The European Parliament, as a democratically elected representation, legitimises the Commission by hearing the candidate Commissioners, and by exercising the possibility to reject individual candidates.<sup>211</sup> This process of legitimisation is also

---

<sup>208</sup> On the development of the Commission investiture, see Beukers, T. (2011), *Law, Practice and Convention in the Constitution of the European Union* (PhD thesis, Universiteit van Amsterdam), p. 322-351, who extensively discusses the European Parliament's rejection of Udre, Buttiglione, and Jeleva.

<sup>209</sup> Cf. Marshall, G. (1986), *Constitutional conventions: The rules and forms of political accountability*. Oxford: Clarendon Press, p. 210.

<sup>210</sup> According to Beukers, a 'conventional power' has been established. See Beukers, T. (2011), *Law, Practice and Convention in the Constitution of the European Union* (PhD thesis, Universiteit van Amsterdam), at p. 351.

<sup>211</sup> For a more elaborate discussion of this argument, see Section 4.1.

broadly recognised in the constitutional traditions of the Member States, which following Article 6(3) TEU are also of importance to European Union law.

In summary, in addition to primary (Treaty) and secondary (Treaty-based) European Union law, there exists a separate category of rules that may be *politically* binding.<sup>212</sup> The parliamentary hearings for candidate Commissioners and the censure of individual candidate Commissioners during the appointment procedure of the Commission serve as examples of such rules. The concept of constitutional convention is apt to describe the nature of these rules and their relationship with the primary and secondary law of the European Union. In the next subsection, the *Spitzenkandidaten* innovation will therefore be analysed through this prism.

### **3.3. The Spitzenkandidaten rule through the prism of constitutional conventions**

The third and last part of this section serves to analyse the *Spitzenkandidaten* innovation through the prism of constitutional conventions set out above. Interestingly, the *Spitzenkandidaten* rule fits remarkably well in the general pattern sketched in the first part of this section, that conventions are often intended to secure the ultimate supremacy of the electorate. Various proponents of the rule have argued for the new procedure with an eye to enhance parliamentary democracy at the level of the European Union and address the democratic deficit.<sup>213</sup>

In the following, first the content of the rule will be discussed. Second, Jennings' test for the establishment of constitutional conventions will be applied to the *Spitzenkandidaten* procedure. The application of the test renders it possible to give a balanced answer to the question whether the *Spitzenkandidaten* procedure is a constitutional convention. The test's three factors, namely (i) the existence of precedents, (ii) the beliefs of the actors concerned, and (iii) the presence of a reason for the convention, are successively discussed.<sup>214</sup>

#### **3.3.1. The content of the rule**

The content of the *Spitzenkandidaten* rule is yet undecided. The rule remains subject to possible modifications in the future, as is most clear from the European Council's decision to reconsider the process for the appointment of the President of the European Commission for the future.<sup>215</sup> Undoubtedly, the rule requires that the appointment of the President of the European Commission

---

<sup>212</sup> Driessen, B. (2006), *Interinstitutional convention as checks and balances in EU law*. (PhD thesis, Katholieke Universiteit Leuven), at p. 84. According to Beukers, '(c)onventions play an important role in the constitution of the European Union', but are neglected by scholarship 'due to their falling between categories'. Beukers, T. (2011), *Law, Practice and Convention in the Constitution of the European Union* (PhD thesis, Universiteit van Amsterdam), at p. 394.

<sup>213</sup> The most important representative of this line of thought is Hix. See for example Hix, S. (2008), *What's Wrong with the European Union and How to Fix It*. Cambridge: Polity; Hix, S. (2011), 'Where is the EU going? Collapse, fiscal union, a supersized Switzerland or a new democratic politics', *Public Policy Research*, vol. 18(2), p. 81-87, at p. 86. See more elaborately Section 4.1.

<sup>214</sup> Jennings, I. (1967), *The law and the constitution* (6<sup>th</sup> ed.). London: London University Press, p. 136.

<sup>215</sup> Brussels European Council 26 and 27 June 2014, Conclusions of the Presidency, EUCO 79/14, [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/143478.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/143478.pdf), accessed 9 July 2015, point 27.

is determined by the elections to the European Parliament between opposing lead candidates of the political groups. The exact interpretation of this rule will however depend on the events after the next elections. It may be that the European Council again nominates the winning *Spitzenkandidat* (a strict interpretation of the rule), but it could also be that the choice of Commission President merely *reflects* the outcome of the vote (for example because the eventual proposed President of the Commission shares his or her political affiliation with the political group that reached a plurality). Eijsbouts mentions the further possibility that the victorious *Spitzenkandidat* leads the consultations on the choice of a new Commission President, which would ‘introduce an element of procedural automaticity, but no automaticity as to result.’<sup>216</sup>

Predicting the future of the *Spitzenkandidaten* innovation is reading the tea leaves, but whatever its exact content, it seems clear to most observers that the *Spitzenkandidaten* procedure, in one way or the other, is here to stay.<sup>217</sup> If the European Council again chooses the victorious *Spitzenkandidat* in 2019, then ‘only hard-nosed believers in a “petrified” constitution would not attach any normative significance to it.’<sup>218</sup> If this scenario indeed prevails, the European Parliament and the European Council would by their own actions have defined their relationship under Article 17(7) TEU. The European Parliament’s claim that ‘the rules of the game have changed’,<sup>219</sup> which could be interpreted as wrong (for the formal rules remained unaltered), would then describe the situation quite accurately.

This prompts the question whether the *Spitzenkandidaten* procedure is a constitutional convention. In the next part of this subsection, Jennings’ test for the establishment of constitutional conventions will be applied to the *Spitzenkandidaten* procedure.

### 3.3.2. Applying Jennings’ test to the *Spitzenkandidaten* procedure

#### *First factor: the existence of precedents*

The application of Jennings’ test, which first factor revolves around the existence of precedents, immediately raises the difficulty that the *Spitzenkandidaten* procedure has only been employed once. As has been mentioned already, Jennings held that a single precedent might already be

<sup>216</sup> Compare Eijsbouts, T., et al. (2014), ‘Editorial. Between the Constitutional Document and the Constitutional Settlement’, *European Constitutional Law Review*, vol. 10(3), p. 375-378, at p. 377.

<sup>217</sup> Decker holds that ‘eine Verfassungspraxis etabliert [ist], hinter der die Union auch bei künftigen Wahlen kaum mehr zurückfallen dürfte – selbst wenn einige Mitglieder des Europäischen Rates (wie Kanzlerin Angela Merkel) das heute noch nicht wahrhaben wollen.’ See Decker, F. (2014), ‘Die Europäische Union auf dem Weg zur parlamentarischen Demokratie?’, *Aus Politik und Zeitgeschichte*, vol. 64 at p. 3.

<sup>218</sup> Author unknown (2014), ‘Editorial comments. After the European elections: Parliamentary games and gambles’, *Common Market Law Review*, vol. 51(4), 1047-1056, at p. 1052.

<sup>219</sup> European Parliament, press release of 10 September 2013, *The power to decide what happens in Europe*, <http://www.europarl.europa.eu/news/en/news-room/content/20130905STO18723/html/The-power-to-decide-what-happens-in-Europe>, accessed 9 July 2015.

enough to establish a convention, if a (strong) reason for the convention exists.<sup>220</sup> In my view, too, the fact that there is no string of precedents does not prevent the application of the test, but only requires to shift the focus towards the second and third factor.

In considering the existence of precedents in this particular case, it must be taken into account that the *Spitzenkandidaten* rule is part of a wider development. Although being distinct from the conventions regarding the hearing of candidate Commissioners and the censure of individual candidate Commissioners, the *Spitzenkandidaten* procedure is yet another example of the European Parliament using its Treaty right of approval to expand its power over the composition of the European Commission. From a wider perspective, while this specific rule indeed rests (for the time being, at least) on one single precedent, it is underpinned by various precedents concerning highly similar rules which constitute constitutional conventions.<sup>221</sup> This indicates that the *Spitzenkandidaten* procedure could be seen as yet another instance of a general tendency to strengthen the powers of the European Parliament in the appointment of the European Commission. Thus, the *Spitzenkandidaten* rule is not an isolated precedent, but part of a broader development. Considering all this, in my opinion the fact that the *Spitzenkandidaten* rule has only been employed once does not prevent a categorisation as a constitutional convention.

#### *Second factor: the beliefs of the actors concerned*

To analyse the beliefs of the actors concerned, which is the second factor of Jennings' test, it must be established which actors are concerned in the *Spitzenkandidaten* rule. On the basis of Article 17(7) TEU, two institutions are involved in the appointment of the President of the European Commission: the European Parliament and the European Council. Under the *Spitzenkandidaten* rule, it is the European Council that must propose the *Spitzenkandidat* of the political group that has reached a plurality in the elections to the European Parliament, while it is subsequently up to the European Parliament to approve of this particular candidate. For the *Spitzenkandidaten* procedure to succeed, both institutions must comply with its role; if either does not, the rule perishes.

In my view, however, it would be incorrect to consider the European Parliament and the European Council as two coherent blocs. Both institutions are not monoliths but mosaics, composed of various actors that do not share the same beliefs regarding the *Spitzenkandidaten* innovation. In the European Council, there is the obvious example of Prime Minister Cameron and his Hungarian counterpart Orbán, whose criticism of the *Spitzenkandidaten* procedure ultimately culminated in a vote against Juncker. In the European Parliament, too, dissident voices

---

<sup>220</sup> Jennings, I. (1967), *The law and the constitution* (6<sup>th</sup> ed.). London: London University Press, p. 136. Wheare too states that a single precedent may be sufficient. See Wheare, K. (1966), *Modern constitutions* (2<sup>nd</sup> ed.). Oxford: Oxford University Press, at p. 122.

<sup>221</sup> See Section 3.2.2 on the parliamentary hearings for candidate Commissioners and the censure of individual candidate Commissioners.

are represented, such as MEP Kamall (the new leader of the Eurosceptic ECR), who during the parliamentary debate on Juncker's election contended that his political group was not only opposed to Juncker, but also to the *Spitzenkandidaten* procedure, which he referred to as 'the mother of all backroom deals'.<sup>222</sup> It was writing on the wall in that respect that the ECR and the even more Eurosceptic EFD had refused to nominate a *Spitzenkandidat* in the first place.

Does the strong opposition in the European Council and the European Parliament suffice to conclude that no convention has been established, for apparently a substantial part of the relevant actors does not believe to be required to comply with the new rule? In my opinion, it does not. One voice crying in the wilderness cannot warrant such conclusion, nor can a cacophony of such voices. Despite the criticism, nearly all heads of state or government in the European Council, and almost all political groups in the European Parliament did participate in, contribute to and support the *Spitzenkandidaten* procedure. Thus, the beliefs of most of the actors concerned converged. Still, this resistance (which is likely to be repeated during the next election cycle for the President of the Commission) may influence the strength of the convention, as it signifies that a minority of the actors concerned holds different beliefs regarding the *Spitzenkandidaten* rule.

### *Third factor: the reason for the convention*

In relation to the third factor of Jennings' test, which takes the reason for the rule into account, it must be observed that various rationales have been advanced. All these, in their core, concern the claim that the *Spitzenkandidaten* innovation brought the European Union substantially closer to parliamentary democracy.<sup>223</sup> During the parliamentary debate on Juncker's election, proponents of the *Spitzenkandidaten* procedure from the EPP, the S&D and ALDE respectively held that 'Europe was made more democratic',<sup>224</sup> that 'a small revolution had taken place' which signified 'an irreversible step towards parliamentary democracy',<sup>225</sup> and that 'real European democracy' had been established.<sup>226</sup> This is a strong normative justification, which is in line with the general purpose of constitutional conventions identified above (that conventions are often aimed at securing the supremacy of the electorate).

<sup>222</sup> European Parliament, debate of 15 July 2014, CRE 15/07/2014-5, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+CRE+20140715+SIT+DOC+PDF+V0//EN&language=EN>, accessed 9 July 2015.

<sup>223</sup> See for example Decker, F. (2014), 'The pitfalls of parliamentarisation: why the procedure of appointing the European Commission should be changed', *European View* (the EPP's Centre for European Studies), vol. 13(2), at p. 326; Werts, J. (2014), 'De parlementariseren van Europa', *Europa Nu*, [http://www.europa-nu.nl/id/vjl6b2uu47xs/nieuws/de\\_parlementariseren\\_van\\_europa](http://www.europa-nu.nl/id/vjl6b2uu47xs/nieuws/de_parlementariseren_van_europa), accessed 9 July 2015.

<sup>224</sup> MEP Weber (PPE): 'Wir haben Europa mit dieser Wahl auch ein großes Stück demokratischer gemacht.' European Parliament, debate of 15 July 2014, CRE 15/07/2014-5, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+CRE+20140715+SIT+DOC+PDF+V0//EN&language=EN>, accessed 9 July 2015.

<sup>225</sup> MEP Pitella (S&D): 'Se Lei quest'oggi è qui di fronte a noi è anche perché una piccola rivoluzione si è realizzata in Europa nelle ultime settimane. Per la prima volta dalla nascita dell'Unione il Presidente della Commissione viene eletto tenendo conto del voto delle cittadine e dei cittadini. Questo marca, segna l'avvento della democrazia parlamentare ed è un passo irreversibile.'

<sup>226</sup> MEP Verhofstadt (ALDE): 'we establish once and for all real European democracy in which the voters are deciding what is happening.'

The *Common Market Law Review*, in the editorial comments on the *Spitzenkandidaten* procedure, argues that support for Juncker was not driven by respect for the European Parliament but mainly by domestic considerations or the anticipation of a *quid pro quo*. Thus, while it is recognised that it is not precluded that the *Spitzenkandidaten* procedure might ‘eventually solve the constitutional *non liquet*’, it is thought that this time has not yet come.<sup>227</sup> Several MEPs also questioned the rationale of enhancing democracy. MEP Le Pen (non-attached), for example, contended that Juncker ‘was not elected by the people’, reproaching him to represent ‘the archetype of the denial of democracy’,<sup>228</sup> whereas MEP Farage (EFDD) held that ‘increasing democracy’ was all just ‘a pretence’.<sup>229</sup>

Whether support for Juncker was driven by a sincere desire to enhance parliamentary democracy or other objectives is difficult to determine. While it is quite possible that other motives did play a role, it still must be observed that the *Spitzenkandidaten* procedure was publicly defended in the name of democracy. This rationale, in fact, played an important role in the eventual success of the procedure, as Merkel only supported Juncker after heavy accusations of voter betrayal were made against her might she prefer a different candidate.<sup>230</sup> The language of this reason is therefore relevant in itself and requires a closer look.

### 3.3.3. Preliminary conclusion

In weighing the factors of Jennings’ test, on the one hand it may be observed that the rule forms part of a larger development towards stronger parliamentary oversight, that the beliefs of a substantial part of the actors converge, and that the reason of enhancing democracy has the potential of offering a strong normative and political justification. This seems sufficient to conclude that the *Spitzenkandidaten* rule meets the criteria of Jennings’ test. The rule has, however, only been applied once, is opposed by various actors, and its reason is contested. All in all, therefore, it must be concluded that the *Spitzenkandidaten* procedure is a convention, but (as yet) a frail one.

The frailness of the convention highlights the need to take a closer look at the underlying

<sup>227</sup> Author unknown (2014), ‘Editorial comments. After the European elections: Parliamentary games and gambles’, *Common Market Law Review*, vol. 51(4), p. 1047-1056, at p. 1051.

<sup>228</sup> MEP Le Pen (NA): ‘Monsieur Juncker, vous êtes arrivé à la tête d’une institution à laquelle les patriotes en France, mais aussi dans beaucoup d’autres pays de l’Union européenne, récusent toute légitimité. Vous n’êtes pas l’élu du peuple. Vous n’avez en aucune manière été choisi par le peuple français, ni par aucun autre d’ailleurs. (...) Vous représentez donc dès cet instant l’archétype du déni de démocratie.’ Currently, Le Pen is member of Europe of Freedom of Liberties, which political group was created in June 2015.

<sup>229</sup> MEP Farage (EFDD): ‘The truth of it is that no voters in any of the countries actually realised what this process was. Mr Juncker’s name did not appear on any single ballot paper. The whole thing has been the most extraordinary stitch-up. The loser, Mr Schulz, gets the consolation prize of being an unprecedented second-term President in Parliament. It is all just a pretence that we are increasing democracy.’

<sup>230</sup> See for example Döpfner, M., *Juncker muss Präsident werden*, Bild Zeitung 30 May 2014, <http://www.bild.de/news/standards/mathias-doeppfner/juncker-muss-praesident-werden-36187236.bild.html>, accessed 9 July 2015. Minkmar, N., *Europa wird direkt ins Herz getroffen*, Frankfurter Allgemeine Zeitung 30 May 2014, <http://www.faz.net/aktuell/feuilleton/juergen-habermas-im-gespraech-europa-wird-direkt-ins-herz-getroffen-12963798.html>, accessed 9 July 2015. See more elaborately Section 2.3.

justification for the convention. The reason behind a convention is crucial, because the strength and subsequent consolidation of a convention rely on the validity of this reason. The next section therefore focuses at parliamentarisation, which has been advanced as the main rationale for the *Spitzenkandidaten* procedure. By assessing the contribution of the *Spitzenkandidaten* procedure to the parliamentarisation of the European Union, it is possible to consider whether the procedure might develop into a strong convention.



## 4. Parliamentarisation: the nemesis of the *Spitzenkandidaten* procedure

In the Political Guidelines for the European Commission, Juncker described the *Spitzenkandidaten* procedure as ‘a direct link (...) between the outcome of the European Parliament elections and the proposal of the President of the European Commission’, with the ‘potential to insert a very necessary additional dose of democratic legitimacy into the European decision-making process, in line with the rules and practices of parliamentary democracy.’<sup>231</sup> The new President of the Commission was not the first to argue that the procedure would enhance the parliamentary democracy of the European Union, joining the ranks of numerous academics and politicians.<sup>232</sup>

So far, it was found that the *Spitzenkandidaten* procedure is a convention, but (as yet) a frail one. This section serves to take a closer look at parliamentarisation, the underlying justification for the convention. The first subsection considers what parliamentarisation is, what it forms a solution to, and how the *Spitzenkandidaten* procedure was proposed as a major contribution to parliamentarisation. The second subsection assesses the validity of this reason. It reviews arguments against the *Spitzenkandidaten* procedure, before assessing whether it actually contributes to the parliamentarisation of the European Union. Crucially, it is suggested here that additional changes are necessary for the procedure to fulfil its *raison d’être* of parliamentarisation. The third subsection connects this finding with the status of the *Spitzenkandidaten* procedure as a (frail) constitutional convention, and argues that the convention’s strength suffers from the fact that additional changes are necessary for it to contribute to parliamentarisation.

### 4.1. Parliamentarisation as the reason behind the *Spitzenkandidaten* procedure

*What is parliamentarisation?*

Parliamentarisation was defined in the first section as ‘a gradual evolution towards a system of government at the level of the European Union in which executive authority *emerges from*, and is *responsible to*, legislative authority.’<sup>233</sup> In the European Union executive and legislative authority

---

<sup>231</sup> European Commission, 15 July 2014, ‘Political Guidelines’, [http://ec.europa.eu/priorities/docs/pg\\_en.pdf](http://ec.europa.eu/priorities/docs/pg_en.pdf), accessed 9 July 2015.

<sup>232</sup> Such as Decker, who maintained that, thanks to ‘the uncompromising stance exhibited by Members of the European Parliament during this year’s deliberations surrounding the appointment of the Commission president, Europe has moved significantly closer to becoming a parliamentary democracy.’ Decker, F. (2014), ‘The pitfalls of parliamentarisation: why the procedure of appointing the European Commission should be changed’, *European View* (the EPP’s Centre for European Studies), vol. 13(2), at p. 326; similarly MEP Pitella (S&D), who during the debate on the appointment of the new Commission President held that ‘Per la prima volta dalla nascita dell’Unione il Presidente della Commissione viene eletto tenendo conto del voto delle cittadine e dei cittadini. Questo marca, segna l’avvento della democrazia parlamentare ed è un passo irreversibile.’ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=/EP//NONSGML+CRE+20140715+SIT+DOC+PDF+V0//EN&language=EN>, accessed 9 July 2015

<sup>233</sup> See Section 1.3.

are dispersed amongst several institutions.<sup>234</sup> This thesis, as discussed in Section 1.3, is concerned with the parliamentary relationship between the European Commission and the European Parliament, for it is this relationship that the *Spitzenkandidaten* procedure aims to strengthen.

The adopted definition encompasses the generally accepted definition of parliamentary democracy.<sup>235</sup> The two crucial features are italicised. First, in a parliamentary system, the head of government is not popularly elected (unlike his counterpart in a presidential system), but selected by the legislature. This process can take different forms, but usually the leader of the party that became biggest is appointed.<sup>236</sup> Second, ‘the head of the government (...) and his or her cabinet are dependent on the confidence of the legislature and can be dismissed from office by a legislative vote of no confidence or censure’.<sup>237</sup> Thus, the head of the government and the cabinet are responsible to the legislature.

The *Spitzenkandidaten* procedure is an attempt to also fulfil the first feature of a parliamentary system, which is that the head of government emerges from the legislature. The second feature is fulfilled by the European Union – as pointed out above, the Treaty of Rome already provided for a vote of censure.<sup>238</sup> In the second subsection, we will return to the question whether the *Spitzenkandidaten* procedure contributes to fulfilling the first feature of a parliamentary system. Now, first parliamentarisation is discussed in relation to the (alleged) democratic deficit of the European Union.

### *Why parliamentarisation? A solution to the democratic deficit*

In the history of European cooperation, initially democracy at a supranational level played a modest role.<sup>239</sup> The Treaty of Rome included a consultative assembly consisting of national

<sup>234</sup> The European Union has a so-called “dual executive” (European Commission and European Council) and two co-legislators (the European Parliament and the Council of the European Union (informally referred to as Council of Ministers)).

<sup>235</sup> Epstein, L. (1968), ‘Parliamentary Government’, in: Sills, D. (ed.), *International Encyclopedia of the Social Sciences*. New York: Macmillan, 11:419 (italics added). This definition is also employed by Lijphart, A. (1984), *Democracies: Patterns of majoritarian and consensus governments in 21 countries*. New Haven: Yale University Press, at p. 68.

<sup>236</sup> In countries with multiparty systems, such as the Netherlands, usually the head of government emerging from inter-party bargaining is the leader of the party that became biggest in the elections. In the United Kingdom, the king or queen normally appoints the leader of the majority party. Freeman mentions this as an example of a convention: ‘The party who for the time being command a majority in the House of Commons, have (in general) a right to have their leaders placed in office. (...) The most influential of these leaders ought (generally speaking) to be the Premier, or head of the Cabinet.’ See Freeman, E. (1872), *Growth of the English Constitution from the Earliest Times* (1<sup>st</sup> ed.). London: MacMillan. Dicey also refers to this convention. See Dicey, A. (1915), *Introduction to the study of the law of the Constitution* (8<sup>th</sup> ed.). London: MacMillan, at p. 417.

<sup>237</sup> Lijphart, A. ‘Introduction’, in Lijphart, A. (ed.) (1992), *Parliamentary versus Presidential Government*. Oxford: Oxford University Press, at p. 2. Similarly Lijphart, A. (1984), *Democracies: Patterns of majoritarian and consensus governments in 21 countries*. New Haven: Yale University Press, at p. 68.

<sup>238</sup> Article 144 EEC Treaty (Treaty of Rome) provides: ‘(...) If the motion of censure is carried by a two-thirds majority of the votes cast, representing a majority of the members of the Assembly [European Parliament], the members of the Commission shall resign as a body. (...)’

<sup>239</sup> According to Rittberger, the Common Assembly of the ECSC was frequently referred to as a mere ‘talking-shop’. See elaborately Rittberger, B. (2005), *Building Europe’s Parliament: Democratic Representation beyond the Nation State*. Oxford: Oxford University Press, at p. 1-3.

members of parliament, without significant legislative or budgetary powers.<sup>240</sup> The assembly already held the competence to censure the European Commission (as a body), but was not involved in any way in appointing the European Commission or its President.<sup>241</sup> As the (then) European Economic Community gained importance, it was increasingly suggested that the transfer of power to the European level caused a democratic problem. In 1979, British political scientist David Marquand coined the phrase ‘democratic deficit’,<sup>242</sup> claiming that ‘(s)o long as each Member Government can veto a Council decision, if it wants to, there is a sense in which each Member Government [can] be held to account for them by its Parliament. If national vetoes disappear this will no longer be true (...). The resulting ‘democratic deficit’ would not be acceptable in a Community committed to democratic principles.’ Marquand considered the deficit ‘inevitable’, ‘unless the gap were somehow to be filled by the European Parliament.’<sup>243</sup>

In the decades following Marquand’s book, the gauntlet was taken up by “the Masters of the Treaty”. Successive Treaty reforms increased the powers of the European Parliament, exactly as many of scholars had advocated. In what has been described as ‘an almost revolutionary development’,<sup>244</sup> the European Parliament transformed from a mere consultative assembly into a directly elected body, with budgetary powers, an increasing ability to control the European Commission, and legislative competences to decide on most secondary legislation on an equal footing with the Council (of Ministers).<sup>245</sup> The increasing powers allocated to the European Parliament in the appointment of the European Commission (described in Section 2.1) eventually culminated in the post-Lisbon situation that the European Parliament held a right of approval over both the Commission President and the Commission as a body, while the European Council was obliged by the Treaty to take the elections to the European Parliament into account. Thus, paradoxically, parliamentarisation of the European Union is not only the intended result of the *Spitzenkandidaten* procedure, but also the process that enabled its genesis.

The European Parliament, after the Treaty of Lisbon, was clearly established as a powerful, popularly elected chamber of the Union’s bicameral legislature.<sup>246</sup> Indeed, Hix considered that

---

<sup>240</sup> See elaborately Rittberger, B. (2005), *Building Europe’s Parliament: Democratic Representation beyond the Nation State*. Oxford: Oxford University Press, p. 73-113

<sup>241</sup> Article 144 EEC Treaty (Treaty of Rome) provides: ‘(...) If the motion of censure is carried by a two-thirds majority of the votes cast, representing a majority of the members of the Assembly [European Parliament], the members of the Commission shall resign as a body. (...)’

<sup>242</sup> According to Meny, Marquand was the first to use this phrase. Meny, Y. (2003), ‘De la démocratie en Europe: Old Concepts and New Challenges’, *Journal of Common Market Studies*, vol. 41(1), p. 1-13, at p. 8.

<sup>243</sup> Marquand, D. (1979), *Parliament for Europe*. London: Jonathan Cape Ltd, at p. 65.

<sup>244</sup> Dann, P. (2006), ‘The Political Institutions’, in: von Bogdandy, A. & Bast, J. (eds.), *Principles of European constitutional law* (2<sup>nd</sup> ed.). Oxford: Hart Publishing, p. 229-280, at p. 245.

<sup>245</sup> See, in general, Rittberger, B. (2005), *Building Europe’s Parliament: Democratic Representation beyond the Nation State*. Oxford: Oxford University Press; Hix, S., Noury, A. & Roland, G. (2007), *Democratic Politics in the European Parliament*. Cambridge: Cambridge University Press.

<sup>246</sup> It is telling in this respect that the Treaty of Lisbon renamed the legislative procedure involving the European Parliament and the Council of Ministers as the *ordinary* legislative procedure (Article 289 TFEU). According to Rittberger, ‘the attribute “ordinary” ... suggests that the EP more closely resembles a domestic parliament or chamber in a federal system’. See Rittberger, B. (2012), ‘Institutionalizing Representative Democracy in the European Union: The Case of the European Parliament’, *Journal of Common Market Studies*, vol. 50(1), p. 18-37, at p. 18.

the European Union already constituted ‘a quasi-parliamentary system of government’ after the Treaty of Nice had been signed.<sup>247</sup> This finding notwithstanding, the critique was raised that the European Parliament was not yet a *true parliament*. According to Hix and various other scholars, as long as the European Parliament would not play a decisive role in the appointment of the European Commission, it would not become a genuine parliament.<sup>248</sup> In brief, according to these scholars, the democratic deficit of the EU would only disappear if the elections to the European Parliament would determine the Presidency and composition of the European Commission. Only if the European Parliament could also decide who governs, the evolution of the quasi-parliamentary European Union into a full-fledged parliamentary system could be completed.

### *Parliamentarisation and the Spitzenkandidaten procedure*

To achieve the aim of parliamentarisation, the proponents set out, not even a Treaty change was required. Various suggestions were made to the European Parliament to use its existing veto power in the appointment of the European Commission to further strengthen its role (similar to the way the European Parliament previously used this power to institute hearings and the individual censure of candidate Commissioners).<sup>249</sup> Early on, it was suggested to the main European parties to indicate a *Spitzenkandidat* for the presidency of the Commission. In 1998 already, pro-Europe think-tank Notre Europe called for a reform similar to the *Spitzenkandidaten* system, proposing to the political groups of the European Parliament ‘to choose a candidate for President and declare that if they win the election, i.e. form the largest group in the new Parliament, they will give their vote of confidence to a Commission whose President is their candidate.’<sup>250</sup> Such proposals were reiterated by other think tanks in the next years.<sup>251</sup> It was thought that such a procedure would give meaning to the elections to the European Parliament and transform them from second-order elections revolving around *national* issues to first-order elections concerning *European* issues. In addition, it was argued that a stronger link to the democratically elected European Parliament would legitimise the European Commission.

One of most vocal scholars in this field has been Hix, who has consistently advocated a stronger role of the European Parliament in the appointment of the European Commission. He proposed, in 2006, that rival candidates would set out their ideas in a ‘manifesto’, trying to receive support

<sup>247</sup> Hix, S. (2008), *What's Wrong with the European Union and How to Fix It*. Cambridge: Polity, at p. 38.

<sup>248</sup> Follesdal, A. & Hix, S. (2006), ‘Why there is a democratic deficit in the EU: A response to Majone and Moravcsik’. *Journal of Common Market Studies*, vol. 44(3), p. 533-562; Dann, P. (2003), ‘European Parliament and executive federalism: approaching a parliament in a semi-parliamentary democracy’, *European Law Journal*, vol. 9(5), p. 549-574; Kohler-Koch, B. & Rittberger, B. (eds.) (2007), *Debating the democratic legitimacy of the European Union*. Lanham: Rowman & Littlefield; Hix, S. (2008), *What's Wrong with the European Union and How to Fix It*. Cambridge: Polity; Majone, G. (2009), *Europe as the would-be world power*. Cambridge: Cambridge University Press.

<sup>249</sup> See Section 3.2.2.

<sup>250</sup> Notre Europe (1998), *From the single currency to the single ballot-box*, <http://www.institutdelors.eu/media/tps-ceo1998-en.pdf?pdf=ok>, accessed 9 July 2015.

<sup>251</sup> Bonvicini, G., Tosato, G. & Matarazzo, R. (2009), ‘Should European Parties Propose a Candidate for European Commission President?’, in G. Bonvicini (ed.), *Democracy in the EU and the Role of the European Parliament*, Rome: Istituto affari internazionali, p. 59-72, [http://www.institutdelors.eu/media/quaderni\\_e\\_14\\_external1\\_2\\_.pdf?pdf=ok](http://www.institutdelors.eu/media/quaderni_e_14_external1_2_.pdf?pdf=ok), accessed 9 July 2015;

from the political groups in the European Parliament as well as the members of the European Council.<sup>252</sup> In 2011, Hix provided four scenarios for the European Union in crisis. One scenario is based on what Hix refers to ‘emerging democratic politics’. In this strikingly accurate scenario of what eventually happened, Hix fantasises that ‘something new happens in the June 2014 European Parliament elections: rival candidates for the Commission presidency are declared before the elections. (...) With several names on the table in 2014, there will be a truly European focus to the European Parliament election campaign for the first time.’ (...) Hix concluded that the fourth scenario would bring the European Union ‘the injection of democratic politics it vitally needs’.<sup>253</sup>

In a nutshell, parliamentarisation can be considered as an answer to the democratic deficit (as identified by Marquand in 1979).<sup>254</sup> In the decades following his famous remark, the European Parliament transformed from a mere consultative assembly into a powerful co-legislator. Despite this transformation, various scholars and politicians argued that a democratic deficit still existed.<sup>255</sup> The rationale behind the *Spitzenkandidaten* procedure was to take a step forward and turn the quasi-parliamentary European Union into a full-fledged parliamentary system. Essentially, the procedure is thought to transform the European Union, sealing the European Parliament and the European Commission together in a European parliamentary democracy. As in the domestic parliamentary systems, executive power would become dependent on the will of the legislature, the directly elected representation of the electorate. Thus, for proponents, the *Spitzenkandidaten* procedure represents a major contribution to the process of parliamentarisation. The next subsection discusses whether the *Spitzenkandidaten* development indeed contributes to the parliamentarisation of the European Union, as operationalized by the two standards set out above (that executive authority *emerges from*, and is *responsible to*, legislative authority).

#### 4.2. The *Spitzenkandidaten* procedure as a contribution to parliamentarisation?

The reason behind the *Spitzenkandidaten* procedure has now been discussed. This subsection assesses the validity of this argument. It first reviews a number of arguments against the procedure, before assessing whether it actually contributes to the parliamentarisation of the European Union.

<sup>252</sup> See for example Hix, S. (2006), ‘Why the EU Needs (Left-Right) Politics: Policy Reform and Accountability are Impossible Without It’, *Notre Europe Policy Paper*, No. 19, Paris: Notre Europe. See also Hix, S. (2008), *What’s Wrong with the European Union and How to Fix It*. Cambridge: Polity, Chapter 9 (‘A scenario: the 2009 European Commission President contest’).

<sup>253</sup> Hix, S. (2011), ‘Where is the EU going? Collapse, fiscal union, a supersized Switzerland or a new democratic politics’, *Public Policy Research*, vol. 18(2), p. 81-87, at p. 85-87.

<sup>254</sup> Marquand, D. (1979), *Parliament for Europe*. London: Jonathan Cape Ltd, at p. 65.

<sup>255</sup> Follesdal, A. & Hix, S. (2006), ‘Why there is a democratic deficit in the EU: A response to Majone and Moravcsik’. *Journal of Common Market Studies*, vol. 44(3), p. 533-562; Kohler-Koch, B. & Rittberger, B. (eds.) (2007), *Debating the democratic legitimacy of the European Union*. Lanham: Rowman & Littlefield; Hix, S. (2008), *What’s Wrong with the European Union and How to Fix It*. Cambridge: Polity; Majone, G. (2009), *Europe as the would-be world power*. Cambridge: Cambridge University Press.

## *Arguments against the Spitzenkandidaten procedure*

It is useful to review the arguments that have been advanced against the *Spitzenkandidaten* procedure, in order to assess whether they are able to call the validity of the reason behind the convention in question. It is instructive in this respect to take a look at the arguments of the procedure's foremost opponent, the British Prime Minister Cameron.<sup>256</sup> Some of Cameron's points may be easily refuted. He argued, for example, that the system restricts the pool of talent, preventing a serving head of government or head of state from ever leading the European Commission. Cameron does not argue why this would be different under the old situation, but it may be presumed that he expects members of the European Council to refrain from participating in a *Spitzenkandidaten* race because of the reputational risk.

It is clear however from the American and German situation that this is not true: in the United States, incumbent state governors can participate in the presidential contest; in Germany, a governing *Ministerpräsident* of a *Bundesland* can also be candidate to become *Bundeskanzler*.<sup>257</sup> Nothing prevents an incumbent member of the European Council from following the same path. In fact, such a candidate could benefit from his or her strong position in the media as well as contacts with other members of the European Council to strengthen the candidature.<sup>258</sup>

What is true, is that (currently, at least) only *Spitzenkandidaten* from the EPP and the S&D stand a real chance of reaching a plurality in the European Parliament. This does indeed restrict the pool of talent to politicians associated with these two political groups (at least under a strict interpretation of the *Spitzenkandidaten* rule). However, this is not markedly different from the pre-*Spitzenkandidaten* situation, in which the presidency of the European Commission was also usually held by a social-democrat or Christian-democrat (the last exception being Luxembourg liberal Gaston Thorn, from 1981 till 1985). The chance that an exceptionally talented member of the Greens or even ALDE becomes Commission President is close to zero, with or without *Spitzenkandidaten* rule.

Cameron furthermore remarked that the *Spitzenkandidaten* procedure gives 'a green light' to those who want to breach the European Union's rules, claiming that the procedure breaches the

---

<sup>256</sup> See for example Cameron, D., 'Invented' process to appoint President of European Commission is damaging to democracy, Irish Times 13 June 2014, <http://www.irishtimes.com/news/world/uk/invented-process-to-appoint-president-of-european-commission-is-damaging-to-democracy-1.1830355>; Cameron, D., Juncker président de la Commission ? Ce serait « un non-sens », juge Cameron, Le Monde 13 June 2014, [www.lemonde.fr/europe/article/2014/06/13/juncker-president-de-la-commission-ce-serait-un-non-sens-juge-cameron\\_4437441\\_3214.html](http://www.lemonde.fr/europe/article/2014/06/13/juncker-president-de-la-commission-ce-serait-un-non-sens-juge-cameron_4437441_3214.html); Cameron, D., "Juncker wurde von niemandem gewählt", Süddeutsche Zeitung, 13 June 2014, <http://www.sueddeutsche.de/politik/britischer-premier-cameron-juncker-wurde-von-niemandem-gewahlt-1.1997345>, all accessed 9 July 2015.

<sup>257</sup> In the United States, Florida governor Jeb Bush is a clear example; in the German context, Bavaria's then incumbent *Ministerpräsident* Edmund Stoiber was the *Kanzlerkandidat* for the CDU/CSU in 2002. After losing these elections to Gerhard Schröder, Stoiber remained *Ministerpräsident* of Bavaria until 2007.

<sup>258</sup> It is interesting to note that Alexis Tsipras (current Prime Minister of Greece, *Spitzenkandidat* for European United Left in 2014), has followed this scenario the other way around.

Treaty. This argument, however, fails to take into account that the wording of Article 17(7) TEU allows both the European Council and the European Parliament significant leeway in the appointment procedure of the President of the European Commission. The 11<sup>th</sup> Declaration does not contribute much to clarity in this respect, tautologically providing that the ‘appropriate consultations’ referred to in Article 17(7) TEU should take place in ‘the framework most appropriate’. It appears quite unlikely that the Court of Justice, if it would give a judgment in this matter, would find that either the *Spitzenkandidaten* rule, or reversely a refusal by the European Council to nominate the victorious *Spitzenkandidat*, goes contrary to Article 17(7) TEU. This holds especially true if the open nature of the “living” European constitution and the importance accorded by the Court of Justice to the principle of democracy are taken into account.<sup>259</sup> The only *legal* conclusion possible is that “the Masters of the Treaty” left considerable room for manoeuvre for both institutions.

The most pertinent warning issued by Cameron was that the *Spitzenkandidaten* procedure would politicise the European Commission.<sup>260</sup> The *Common Market Law Review*, in the editorial comments on the *Spitzenkandidaten* procedure, similarly remarked that a European Commission headed by a President with a democratic mandate will encounter difficulties in its role of guardian of the Treaties, for example in the enforcement of European Union competition law.<sup>261</sup> It may be questioned however whether the perception of a neutral, technocratic European Commission is realistic. Before the *Spitzenkandidaten* innovation, the President of the Commission was also approved by the European Parliament, which naturally would seek political promises. The Commission, moreover, consists of politicians selected for their political affiliation.<sup>262</sup> Most importantly, warnings against politicisation disregard the rationale of parliamentarisation that is behind the *Spitzenkandidaten* innovation. In this line of thought, politicisation of the European Commission is welcomed as a crucial step towards a strong Parliamentary democracy at the European level, and is therefore considered by proponents as an argument in favour rather than against the *Spitzenkandidaten* rule.<sup>263</sup>

In brief, it must be concluded that the arguments proposed by Cameron are not very convincing. They do, moreover, not focus on the core claim and rationale behind the *Spitzenkandidaten* procedure, which is that it enhances parliamentarisation of the European Union. From the perspective of Cameron, this lack of focus has not been a very strategic choice, given that the

<sup>259</sup> See on the “living” constitution of the European Union Section 3.2.1, where references are made to (amongst others) Curtin, D. (2009), *Executive Power of the European Union. Law, Practices, and the Living Constitution*. Oxford: Oxford University Press; Lenaerts, K. & Gutiérrez-Fons, J. (2010), ‘The Constitutional Allocation of Powers and General Principles of EU law’, *Common Market Law Review*, vol. 47(6), p. 1629-1669.

<sup>260</sup> See for example Dashwood, A., Edward, E., Lever, J. & Temple Lang, J., *Independence of EU commission at risk over Spitzenkandidat process*, EUobserver 26 June 2014, <https://euobserver.com/opinion/124768>, accessed 9 July 2015.

<sup>261</sup> Author unknown (2014), ‘Editorial comments. After the European elections: Parliamentary games and gambles’, *Common Market Law Review*, vol. 51(4), p. 1047-1056, at p. 1051. Similarly Fabbrini, S. (2015), ‘The European Union and the Puzzle of Parliamentary Government’, *Journal of European Integration*, vol. 37(5), p. 571-586, at p. 580.

<sup>262</sup> In ‘t Veld, S., *Spitzenkandidaten boost legitimacy of the European Commission*, EUobserver 3 July 2014, <https://euobserver.com/opinion/124854>, accessed 9 July 2015.

<sup>263</sup> For example by Hix, S. (2008), *What’s Wrong with the European Union and How to Fix It*. Cambridge: Polity, at p. 187.



perception of an obligation (which is at the core of the concept of constitutional convention) stands or falls by the validity of the reason behind the convention.<sup>264</sup> The next part, therefore, considers the contribution of the *Spitzenkandidaten* rule to the parliamentarisation of the European Union.

### *The contribution of the Spitzenkandidaten rule to parliamentarisation*

In the above, two crucial features of parliamentary democracy were distinguished: first, that in a parliamentary system, the head of government is selected by the legislature; and second, that the head of the government and his or her cabinet are dependent on the confidence of the legislature and can be dismissed from office by a legislative vote of no confidence or censure. Clearly, the second feature is fulfilled by the European Union – as pointed out above, the Treaty of Rome already provided for a vote of censure.<sup>265</sup> The *Spitzenkandidaten* procedure is an attempt to also fulfil the first feature of a parliamentary system, which is that the head of government emerges from the legislature. The relevant question therefore is whether it is clear to the voters casting their votes for the elections to the European Parliament that the *Spitzenkandidaten* rule guarantees that the head of government emerges from the legislature.

It is instructive in this respect to compare the *Spitzenkandidaten* rule to an example from the United States. Formally, in the United States, the President is not elected by the voters. Instead, people vote for electors, who form the Electoral College. This College then elects the President and the Vice President. The American Constitution does not entail any obligation on these electors to vote according to the voters' mandate, and they could therefore (theoretically) ignore the electorate's preference and vote for the candidate they prefer themselves. In reality, however, a pledge is taken and honoured. Breaking this pledge and voting for the presidential candidate that did not receive a majority in the elector's state is not prohibited by the Constitution, but would nonetheless be considered as a breach of a binding obligation (and is therefore a clear example of a constitutional convention).<sup>266</sup> In a nutshell, although the Constitution does not provide for a direct election, in reality the President of the United States is directly elected.

The analogy between the American example and the *Spitzenkandidaten* rule is that they both aim to remove an obstacle to the effectuation of the will of the people.<sup>267</sup> The differences between the example of the Electoral College and the *Spitzenkandidaten* rule are however more illuminating. Most importantly, the United States are a presidential system, whereas the *Spitzenkandidaten* rule aims to create a parliamentary system. In the American context, the removal of the intermediary

---

<sup>264</sup> See Section 3.1.1.

<sup>265</sup> Article 144 EEC Treaty (Treaty of Rome) provides: '(...) If the motion of censure is carried by a two-thirds majority of the votes cast, representing a majority of the members of the Assembly [European Parliament], the members of the Commission shall resign as a body. (...)'

<sup>266</sup> Wheare, K. (1966), *Modern constitutions*. Oxford: Oxford University Press, p. 129.

<sup>267</sup> See more elaborately Section 3.1.1, where this purpose was discussed as a characteristic feature of many conventions. See also Marshall, G. (1986), *Constitutional conventions: The rules and forms of political accountability*. Oxford: Clarendon Press, at p. 18; Wheare, K. (1966), *Modern constitutions* (2<sup>nd</sup> ed.), Oxford: Oxford University Press, at p. 135.



results in direct influence of the American citizens, who can vote for their candidate of choice. In the European context, the reduced role of the European Council does not result in such a direct link, for other obstacles remain. In my opinion, this relates to the principal weakness of the *Spitzenkandidaten* rule, which is that the link between the choice of the electorate and the eventual pick of the European Parliament remains too indirect.

For the relationship between the European Commission and the European Parliament to be parliamentary, it is pivotal that voters understand that the President of the European Commission will be determined by their vote for the elections to the European Parliament. Thus, a clear link is indispensable, meaning that voters understand that if they vote for national party X, they (indirectly) vote for candidate Y to become the President of the European Commission, who will subsequently be able to carry out policy Z. Currently, (at least) three factors blur this necessary link.

Firstly, it is not possible for a large majority of the citizens of the European Union to actually vote for the *Spitzenkandidat* of their pick. In domestic parliamentary democracies, usually the proposed leader of the new government is the frontrunner of a political party, and appears as such on the ballot papers. In the European Union however, no Union-wide electoral lists exist, and most voters can therefore not vote for their preferred *Spitzenkandidat*. It may be observed in this respect that the elections to the European Parliament do not take place on one single day, but usually span four days.<sup>268</sup> There is, moreover, no uniform voting system for the elections; instead, each Member State is (subject to certain conditions) free to choose its own system.<sup>269</sup>

The absence of the names of the *Spitzenkandidaten* on the ballot papers has a fundamental repercussion. The assumption that people determine their vote because of a candidate for the government's presidency may be questioned in any case. Voters may determine their choice on various considerations, for example on the basis of the ideology of a party. This implies that a vote for a particular party or national candidate cannot one-to-one be explained as a vote for a candidate. This is, however, *particularly true* if the candidate in question does not even appear on the ballot papers, as was the case during the 2014 elections to the European Parliament. How valid is it to interpret a German voter casting a vote for the CDU as a vote to support Juncker's bid for the presidency of the European Commission? The claim for democratic legitimacy that forms the foundation of the *Spitzenkandidaten* procedure is thus corroded by the absence of the candidates' names on the ballot papers.

---

<sup>268</sup>

<sup>269</sup>

The 2014 elections to the European Parliament, for example, were held between 22 and 25 May 2014.

Some countries, for example, are split up in multiple constituencies (such as Belgium, France and the United Kingdom). Member States that do function as single constituencies still differ considerably, as a great variety of electoral procedures is used for the allocation of the seats (e.g. largest remainder method, highest averages method). In addition, the minimum electoral thresholds also vary from Member State to Member State. See for more information a factsheet on the website of the European Parliament, 'The European Parliament: electoral procedures', available at [http://www.europarl.europa.eu/ftu/pdf/en/FTU\\_1.3.4.pdf](http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.3.4.pdf), accessed 9 July 2015.

Secondly, the European Union lacks true Union-wide political parties.<sup>270</sup> The political groups, or ‘Eurogroups’, that nominate the *Spitzenkandidaten* do not exist on the national level – in fact, they are merely the sum of their parts, assembling national parties.<sup>271</sup> The fragmented nature of the elections to the European Parliament, which usually span four days and lack a uniform electoral system, has the result that the key players in the elections to the European Parliament, as Bressanelli rightly remarks, ‘were and remain the national parties’.<sup>272</sup> These national parties present manifestos, select candidates, and compete in elections which rules are nationally defined. Paradoxically, it is the markedly national character of the European elections – which the *Spitzenkandidaten* procedure tries to alter – that poses a real threat to the success of the *Spitzenkandidaten* procedure.<sup>273</sup>

Thirdly, it must be observed that the European Commission relies on the European Council for its political input. This dependency was particularly clear during the Eurocrisis.<sup>274</sup> Curtin, in this respect, remarks that ‘the European Council calls the shots in general terms and largely tells the Commission (and the Council) what to do if formal legislation needs to be adopted’.<sup>275</sup> De Vries is therefore right in concluding that, because of the dual executive structure of the European Union, ‘the election of a Commission president on the basis of the power balance of the EP would only *partially* strengthen electoral accountability in the EU multilevel system’.<sup>276</sup>

The fact that the European Commission does not independently determine the policy of the

- 
- <sup>270</sup> There is extensive literature on the role of political parties in the European Union. See for example Hix, S. & Lord, C. (1997), *Political parties in the European Union*. Basingstoke: Macmillan Press; Lightfoot, S. (2006), ‘The consolidation of Europarties? The ‘party regulation’ and the development of political parties in the European Union’, *Representation*, vol. 42(4), p. 303-314; Hix, S., Noury, A. & Roland, G. (2007), *Democratic Politics in the European Parliament*. Cambridge: Cambridge University Press; Johansson, K. (2009), ‘The emergence of political parties at European level: Integration unaccomplished’, in: S. Gustavsson, L. Oxelheim and L. Pehrson (eds.), *How Unified is the European Union? European Integration between Visions and Popular Legitimacy*. Heidelberg: Springer, p. 157-178; Bartolini, S. (2012), ‘The strange case of Europarties’, in: E. Külahci (ed.), *The Domestic Party Politics of Europeanisation: Actors, Patterns and Systems*. Colchester: ECPR Press, p. 157-170; Bressanelli, E. (2014), *Europarties after enlargement: Organization, ideology and competition*. Basingstoke: Palgrave Macmillan.
- <sup>271</sup> Bressanelli remarks that ‘The role of the Europarties and, in particular, of the extra-parliamentary parties in the electoral arena is limited to the loose coordination of the national member parties.’ Bressanelli, E. (2014), *Europarties after enlargement: Organization, ideology and competition*. Basingstoke: Palgrave Macmillan, at p. 58.
- <sup>272</sup> Bressanelli, E. (2014), *Europarties after enlargement: Organization, ideology and competition*. Basingstoke: Palgrave Macmillan, at p. 58.
- <sup>273</sup> This national character of European elections has led scholars to refer to them as second-order elections. This was first put forward in Reif, K. & Schmitt, H. (1980), ‘Nine second-order national elections: a conceptual framework for the analysis of European election results’, *European Journal of Political Research* vol. 8(4), p. 3-45. See Hix, S. (2008), *What’s Wrong with the European Union and How to Fix It*. Cambridge: Polity, p. 80-84; Corbett, R. (2014), “‘European elections are second-order elections’: Is received wisdom changing?”, *Journal of Common Market Studies*, vol. 52(6), p. 1194-1198. The latter argues that the *Spitzenkandidaten* procedure might be one of the reasons to ‘re-evaluate’ the categorisation as second-order elections.
- <sup>274</sup> See for example Fabbrini, S. (2013), ‘Intergovernmentalism and its limits: assessing the European Union’s answer to the euro crisis’, *Comparative Political Studies* vol. 46(9), p. 1003-1029; Gocaj, L. & S. Meunier (2013), ‘Time will tell: the EFSF, the ESM, and the Euro Crisis’, *Journal of European Integration*, vol. 35(3), p. 239-253.
- <sup>275</sup> Curtin, D. (2014), ‘Challenging executive dominance in European democracy’, *The Modern Law Review*, vol. 77(1), p. 1-32, at p. 9. See on the role of the European Council and its effect on the parliamentarisation of the European Union Fabbrini, S. (2015), ‘The European Union and the Puzzle of Parliamentary Government’, *Journal of European Integration*, vol. 37(5), p. 571-586, at p. 579.
- <sup>276</sup> Vries, C. de (2014), ‘Rethinking Electoral Democracy in Europe’, in: Cramme, O. & Hobolt, S. (eds.), *Democratic Politics in a European Union Under Stress*. Oxford: Oxford University Press, p. 217-235, at p. 231 (italics added).

European Union is inherent to the Union's institutional structure. In the introduction to this thesis, the dual executive structure of the European Union was already discussed, and it was determined that this structure does not necessarily prevent the construction of a parliamentary relationship between the European Parliament and the European Commission.<sup>277</sup> Clearly, De Vries' remark also considers a *partial* strengthening of the democratic accountability of the executive possible. It may be observed here that in many parliamentary systems, the executive is considerably constrained by various other actors, which implies that a parliamentary system does not require a unitary executive.<sup>278</sup> Still, the dual executive structure adds to the considerable difficulties a *Spitzenkandidat* will encounter in delivering on his or her words.

If we look closer at this ability to turn promises into progress, it may be observed that the ability of a Commission President to carry out a certain policy depends on a great number of circumstances. In most national democracies, the formation of the government is carried out by the leader of the government. In the European Union, the Commission President influences the formation of the Commission, but is not the decisive factor. Instead, he is heavily dependent on the nominations of the national governments for the composition of his College of Commissioners.<sup>279</sup> To use a football analogy: the European citizens can, thanks to the *Spitzenkandidaten* procedure, determine who coaches the team – but they still cannot influence which players represent the team on the pitch. This is of importance, because it may be assumed that the composition of the College of Commissioners affects the policy of the Commission.<sup>280</sup> This implies that it will be very difficult for a particular *Spitzenkandidat* to deliver on his or her words. It even affects his or her ability to present the electorate with a clear choice as to the policies proposed.

In sum, while the arguments of the opponents of the *Spitzenkandidaten* procedure must be rejected, doubts may be cast as well about whether the *Spitzenkandidaten* rule, without additional changes, furthers the parliamentarisation of the European Union. Particularly, the lack of Union-wide electoral lists and the absence of Union-wide parties, together with the difficulty any President of the European Commission will experience in delivering on a certain policy promise, may obfuscate the (proposed) link between votes for the elections to the European Parliament and the choice for a certain candidate. The next subsection connects this finding with the status of the *Spitzenkandidaten* procedure as a constitutional convention.

---

<sup>277</sup> See section 1.4.

<sup>278</sup> In France, for example, a parliamentary relationship governs the relationship between *l'Assemblée nationale* and the *gouvernement*, while the *président de la République* is also part of the (dual) executive. Many executives, moreover, share their power with local or regional governments, as is especially the case in federal parliamentary systems like Germany. See Langenbacher, E., 'The political and constitutional order', in Colvin, S. (2015) (eds.), *The Routledge Handbook of German Politics and Culture*. London: Routledge, p. 87-104.

<sup>279</sup> See on the formation of the European Commission Wille, A. (2013), *The normalization of the European Commission politics and bureaucracy in the EU executive*. Oxford: Oxford University Press, p. 57-96.

<sup>280</sup> In addition, it might be remarked that the composition of the European Commission is very visible to voters, as many Commissioners are well-known national politicians, who regularly appear in national media. A stronger role of the President of the Commission in the composition would thus contribute to a clearer link between the vote for a *Spitzenkandidat* and the eventual (policy of the) Commission.

### 4.3. Linking parliamentarisation and the strength of the convention

So far, it has been argued that further changes are necessary for the *Spitzenkandidaten* rule to contribute to the parliamentarisation of the European Union. In this subsection, the finding that additional changes are necessary will be connected with the status of the *Spitzenkandidaten* procedure as a constitutional convention, and the argument will be proposed the convention's strength suffers from the fact that additional changes are necessary for the *Spitzenkandidaten* procedure to contribute to parliamentarisation.

In Section 3.3, it was found that the *Spitzenkandidaten* procedure is (as yet) a frail constitutional convention. The rule being part of a larger development towards stronger parliamentary oversight, the converging beliefs of a substantial part of the actors concerned, and the strong normative justification offered by the reason of enhancing democracy are all factors indicating the existence of a new constitutional convention. The rule has, however, only been applied once, is opposed by various actors, and its reason is contested. All these factors are reflected in referring to the rule as a frail constitutional convention.

For the *Spitzenkandidaten* innovation to strengthen, the observance of the rule (either in a stricter or looser variant) is important. An explicit acknowledgement by the members of the European Council of the automaticity of the process, which is still lacking so far, would therefore contribute to its development. More important, however, is that the aim of parliamentarisation must be achieved. The categorisation of the *Spitzenkandidaten* rule as a frail convention highlighted the need to take a closer look at the underlying justification for the convention. The reason behind a convention is crucial, because the strength and subsequent consolidation of a convention rely on the validity of this reason. Thus, by assessing the contribution of the *Spitzenkandidaten* procedure to the parliamentarisation of the European Union, it is possible to consider whether the procedure might develop into a strong convention.

Repeated instances of the *Spitzenkandidaten* procedure will remove various problems currently surrounding the rule, such as the lack of attention in various Member States. Teething troubles such as a low number of citizens being able to name the *Spitzenkandidaten* will probably diminish if the electoral process that preludes the *Spitzenkandidaten* campaign receives more attention from media and politicians.<sup>281</sup> In that respect, it is commonly expected that the *Spitzenkandidaten* receive a stronger presence in the electoral campaigns preceding the next elections to the European Parliament, which in turn might render it far more difficult for the European Council to reject the winning *Spitzenkandidat* without putting democratic credibility at

---

<sup>281</sup> See for statistics on the number of citizens that could name the *Spitzenkandidaten* in 2014 AECR (2014), 'Post EU Election polling project', Fieldwork conducted by AMR GmbH Dusseldorf, 25-26 May, as quoted in Hobolt, S. (2014), 'A vote for the President? The role of Spitzenkandidaten in the 2014 European Parliament elections', *Journal of European Public Policy*, vol. 21(10), p. 1528-1540, at p. 1535-1536.

risk.<sup>282</sup> It consequently appears unlikely that the European Council will be able to resist the pressure of the European Parliament in 2019, and most observers therefore contend that the *Spitzenkandidaten* procedure, in one way or the other, is here to stay.<sup>283</sup>

Other problems, however, are more fundamental. These are linked to the current set-up of the European Union's democracy and will not disappear as quickly. It has been argued in the previous subsection that without Union-wide electoral lists and Union-wide political parties, the link between the vote for the elections to the European Parliament and a particular candidate for the presidency of the European Commission is too indirect. Clearly, the goal of parliamentarisation of the European Union is not achieved if voters are not aware that their vote also represents an indirect choice for the President of the European Commission.

It is, moreover, indispensable for a credible *Spitzenkandidaten* procedure that the President of the European Commission can deliver on the promises made during the election campaign. If voters are not presented with a clear choice as to the policies proposed, the *Spitzenkandidaten* procedure will be toothless and parliamentarisation far away. Voters might even think that the procedure is a sham which does not offer any *real* choice at all, if they have voted for a particular candidate who cannot turn words into deeds.

Essentially, constitutional conventions are obligatory rules that exist by the grace of the beliefs of the actors involved in the working of the constitution and the reason for the rule. Naturally, if the reason for the rule fails to materialise, the force of the convention will also be affected. This means that for the *Spitzenkandidaten* rule to develop from a frail convention into a strong convention, the aim of parliamentarisation must be achieved. If voters fail to understand the link between their vote and the President of the European Commission, or if they are disappointed by a President who cannot deliver on the promises made, then very soon the *raison d'être* of the *Spitzenkandidaten* rule will be questioned.

Additional changes ensuring that the rule achieves its aim of parliamentarisation are therefore necessary for the *Spitzenkandidaten* procedure to consolidate and develop into a strong convention. Without such changes, democracy at the level of the European Union will be doubted even further, which is the very opposite of what the *Spitzenkandidaten* procedure sought to accomplish – the nemesis of the *Spitzenkandidaten* procedure.

---

<sup>282</sup> 'There will be more campaigning, earlier, and with a lot more money. And, much more care will be taken about who is nominated.' Mahony, H., *The Spitzenkandidaten Coup*, EUobserver 4 January 2015, <https://euobserver.com/review-2014/126456>, accessed 9 July 2015.

<sup>283</sup> See Section 3.3.1, where various possible interpretations of the rule are discussed.

## 5. Conclusion

The story of *Spitzenkandidaten* is a story of dedication and surprise. This thesis has endeavoured to describe the origins of this new development. Fuelled by a strong urge to turn the European Union into a full-fledged parliamentary democracy, the European Parliament was determined to interpret the loose wording of Article 17(7) TEU as a basis to take the lead in the appointment of the President of the Commission. Members of the European Council, who anticipated a continuation of the procedure of yesteryear, suddenly found themselves the followers in a transformed dance of power. As David Cameron remarked, ‘this process developed a momentum of its own. We need to ask ourselves how this happened.’ Reluctantly or instead actively contributing, the members of the European Council witnessed the genesis of the *Spitzenkandidaten* procedure.

The story of *Spitzenkandidaten* is a story of constitutional development. It can only be understood if we read *au-delà du texte*, for not the Treaty rules, but the dancers’ roles changed. This thesis has argued that the new procedure is (as yet) a frail constitutional convention. This categorisation reflects that the novel procedure has only been applied once, that it encountered opposition by various actors, and that its reason is contested; yet it also reflects that the procedure forms part of a larger development towards stronger parliamentary oversight, that the beliefs of a substantial part of the actors converge, and that the reason of enhancing democracy has the potential of offering a strong normative justification. Some toes got stepped on while the dancers changed roles, but it seems unlikely that the European Council will be able to resist the pressure of the European Parliament in 2019.

The story of *Spitzenkandidaten* is a story of democracy. This thesis has rejected the arguments of opponents such as Cameron, but also cast doubts about the rationale of parliamentarisation advanced by proponents such as Hix. Crucially, a weak rationale implies a weak constitutional convention, since a convention depends on a perception of obligation that stands or falls by the validity of the reason behind the convention. For the *Spitzenkandidaten* procedure to contribute to European Union parliamentary democracy, further changes are necessary, such as Union-wide electoral lists and political parties. Without such changes, democracy at the level of the European Union will be doubted even further – the nemesis of the *Spitzenkandidaten* procedure.

## Bibliography

### *Treaties*

- Treaty establishing the European Economic Community (EEC Treaty, or Treaty of Rome), 25.03.1957, 298 U.N.T.S. 11.
- Treaty establishing a Single Council and a Single Commission of the European Communities (Merger Treaty), OJ 152 of 13.7.1967.
- Treaty on European Union (Treaty of Maastricht), O.J C 191 of 29.07.1992.
- Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and Certain Related Acts (Treaty of Amsterdam), O.J C 340 of 10.11.1997.
- Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and Certain Related Acts (Treaty of Nice), O.J C 80 of 10.03.2001.
- Draft Treaty establishing a Constitution for Europe (Constitutional Treaty), O.J. C 310 of 16.12.2004 (never ratified).
- Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (Treaty of Lisbon), O.J. C 306 of 17.12.2007.
- Charter of Fundamental Rights of the European Union, O.J. C 83 of 30.03.2010.
- Consolidated version of the Treaty on European Union (TEU), O.J C 326 of 26.10.2012.
- Consolidated version of the Treaty on the Functioning of the European Union (TFEU), O.J C 326 of 26.10.2012.

### *Secondary law / policy documents*

- European Commission, 12 September 2012, ‘State of the Union 2012 Address’, [http://europa.eu/rapid/press-release\\_SPEECH-12-596\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-12-596_en.htm), accessed 9 July 2015.
- European Commission, Communication, ‘A blueprint for a deep and genuine economic and monetary union’ COM(2012) 777 final/2.
- Commission Recommendation of 12 March 2013 on enhancing the democratic and efficient conduct of the elections to the European Parliament, 2013/142/EU, [eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2013.079.01.0029.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2013.079.01.0029.01.ENG), accessed 9 July 2015.
- European Commission, 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, [http://ec.europa.eu/justice/citizen/document/files/com\\_2013\\_126\\_en.pdf](http://ec.europa.eu/justice/citizen/document/files/com_2013_126_en.pdf), accessed 9 July 2015.

- European Commission, 15 July 2014, ‘Political Guidelines’, [http://ec.europa.eu/priorities/docs/pg\\_en.pdf](http://ec.europa.eu/priorities/docs/pg_en.pdf), accessed 9 July 2015.
- Laeken European Council 14 and 15 December 2001, Conclusions of the Presidency, Annex I, Laeken Declaration on the future of the European Union, SN 300/1/01 REV 1, [https://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/68827.pdf](https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/68827.pdf), accessed 9 July 2015.
- European Council, press release of 27 May 2014, EUCO 118/14/1 REV1, [www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/142862.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/142862.pdf), accessed 9 July 2015.
- Brussels European Council 26 and 27 June 2014, Conclusions of the Presidency, EUCO 79/14, [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/143478.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/143478.pdf), accessed 9 July 2015.
- European Parliament resolution of 21 April 1994 on the investiture of the European Commission, A3-0240/94, O.J C 128 of 09.05.1994, p. 358.
- European Parliament, debate of 22 November 2012, CRE 22/11/2012–6, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20121122+ITEM-006+DOC+XML+V0//EN>, accessed 9 July 2015.
- European Parliament resolution of 22 November 2012 on the elections to the European Parliament in 2014, 2012/2829(RSP), <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2012-462>, accessed 9 July 2015.
- European Parliament resolution of 4 July 2013 on improving the practical arrangements for the holding of the European elections in 2014 (2013/2102 INL), <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-323>, accessed 9 July 2015.
- European Parliament, press release of 10 September 2013, *The power to decide what happens in Europe*, <http://www.europarl.europa.eu/news/en/news-room/content/20130905STO18723/html/The-power-to-decide-what-happens-in-Europe>, accessed 9 July 2015.
- European Parliament, *Conference of Presidents statement on Commission President Election*, press release of 27 May 2014, [www.europarl.europa.eu/news/de/newsroom/content/20140527IPR48501/html/Conference-of-Presidents-statement-on-Commission-President-election](http://www.europarl.europa.eu/news/de/newsroom/content/20140527IPR48501/html/Conference-of-Presidents-statement-on-Commission-President-election), accessed 9 July 2015.
- European Parliament, debate of 15 July 2014, CRE 15/07/2014–5, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONGML+CRE+20140715+SIT+DOC+PDF+V0//EN&language=EN>, accessed 9 July 2015.
- Contribution of the XLIX COSAC, Dublin 23-25 June 2013, O.J C 305 of 19.10.2013.



## *Case-law*

### *Court of Justice of the European Union*

- Case 9/56 *Meroni* [1957-1958] ECR 133.
- Case 11/70 *Internationale Handelsgesellschaft v Einfuhr und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125.
- Case 25/70 *Köster* [1970] ECR 1161.
- Case 4/73 *Nold v Commission* [1974] ECR 491.
- Case 36/75 *Rutili v Ministre de l'Intérieur* [1975] ECR 1219.
- Case 149/77 *Defrenne v Sabena* [1978] ECR 1365.
- Case C-138/79 *Roquette Frères v Council* [1980] ECR 3333.
- Case 294/83 *Parti Ecologiste 'Les Verts' v Parliament* [1986] ECR 1339.
- Case 45/86 *Commission v Council* [1987] ECR 1493.
- Case 165/87 *Commission v Council* [1988] ECR 5545.
- Case 70/88 *European Parliament v Council (Chernobyl)* [1990] ECR I-2041.
- Case C-260/89 *Elliniki Radiophonia Tileorassi AE* [1991] ECR I-2925.
- Case C-300/89 *Commission v Council (Titanium Dioxide)* [1991] ECR I-2867.
- Case C-327/91 *France v Commission* [1994] ECR I-3641.
- Case C-65/93 *European Parliament v Council* [1995] ECR I-643.
- Case C-187/93 *Parliament v Council (Transfer of Waste)* [1994] ECR I-2857.
- Case C-84/94 *United Kingdom v Council* [1996] ECR I-5755.
- Case C-299/95 *Kremzow v Austria* [1997] ECR I-2629.
- Case C-409/13 *Council of the European Union v European Commission* ECLI:EU:C:2015:217, 14 April 2015 (n.y.r.).

### *International Court of Justice*

- *North Sea Continental Shelf (F.R.G. v. Den. & Neth.)*, 1969 I.C.J. 3.

### *European Court of Human Rights*

- *Tyrer v. the United Kingdom*, 25 April 1978, Series A no. 26.
- *Airey v. Ireland*, 9 October 1979, Series A no. 32, § 24.

### *Supreme Court of Canada (Cour suprême du Canada)*

- *Reference re Amendment of the Constitution of Canada* [1981] 1 S.C.R. 753.

- *Reference re Objection to a Resolution to Amend the Constitution of Canada* [1982] 2 S.C.R. 793.

### **Scholarly literature**

- Allan, T. (1993), *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism*. Oxford: Oxford University Press.
- Allan, T. (2013), *The Sovereignty of Law: Freedom, Constitution and Common Law*. Oxford: Oxford University Press.
- Author unknown (2014), 'Editorial comments. After the European elections: Parliamentary games and gambles', *Common Market Law Review*, vol. 51(4), p. 1047-1056.
- Avril, P. (1997), *Les conventions de la Constitution*. Paris: Presses Universitaires de France.
- Barber, N. (2009), 'Laws and constitutional conventions', *Law Quarterly Review*, vol. 125(2), p. 294-309.
- Bartolini, S. (2012), 'The strange case of Europarties', in: E. Külahci (ed.), *The Domestic Party Politics of Europeanisation: Actors, Patterns and Systems*. Colchester: ECPR Press, p. 157-170.
- Beukers, T. (2011), *Law, Practice and Convention in the Constitution of the European Union* (PhD thesis, Universiteit van Amsterdam). Unpublished.
- Black, C. (1969), *Structure and relationship in constitutional law*. Baton Rouge: Louisiana State University Press.
- Bonvicini, G., Tosato, G. & Matarazzo, R. (2009), 'Should European Parties Propose a Candidate for European Commission President?', in G. Bonvicini (ed.), *Democracy in the EU and the Role of the European Parliament*, Rome: Istituto affari internazionali, p. 59-72, [http://www.institutdelors.eu/media/quaderni\\_e\\_14\\_external1\\_2\\_.pdf?pdf=ok](http://www.institutdelors.eu/media/quaderni_e_14_external1_2_.pdf?pdf=ok), accessed 9 July 2015.
- Bradley, A. & Ewing, K. (2007), *Constitutional and Administrative Law*. Essex: Pearson.
- Brazier R. & Robilliard, St. J. (1982), 'Constitutional Conventions: the Canadian Supreme Court's Views Reviewed', *Public Law*, vol. 28, p. 28-34.
- Brazier, R. (1992), 'The Non-Legal Constitution: Thoughts on Convention, Practice and Principle', *Northern Ireland Legal Quarterly*, vol. 43(3), p. 262-287.
- Bressanelli, E. (2014), *Europarties after enlargement: Organization, ideology and competition*. Basingstoke: Palgrave Macmillan.
- Cheng, B. (1983), 'Custom: The Future of General State Practice in a Divided World', in: Macdonald, R. & Johnston, D. (eds.), *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory*. The Hague: Martinus Nijhoff, p. 513-554.

- Corbett, R. (2014), “European elections are second-order elections”: Is received wisdom changing?, *Journal of Common Market Studies*, vol. 52(6), p. 1194-1198.
- Craig, P. (2001), ‘Constitutions, Constitutionalism, and the European Union’, *European Law Journal*, vol. 7(3), p. 125-150.
- Curtin, D., ‘Making a Political Constitution for the European Union’, *European Journal of Law Reform*, vol. 8(1), p. 65-76.
- Curtin, D. (2009), *Executive Power of the European Union. Law, Practices, and the Living Constitution*. Oxford: Oxford University Press.
- Curtin, D. (2014), ‘Challenging executive dominance in European democracy’, *The Modern Law Review*, vol. 77(1), p. 1-32.
- Crombez, C. & Hix, S. (2011), ‘Treaty reform and the Commission’s appointment and policy-making role in the European Union’, *European Union Politics*, vol. 12(3), p. 291-314.
- Dann, P. (2003), ‘European Parliament and executive federalism: approaching a parliament in a semi-parliamentary democracy’, *European Law Journal*, vol. 9(5), p. 549-574.
- Dann, P. (2006), ‘The Political Institutions’, in: von Bogdandy, A. & Bast, J. (eds.), *Principles of European constitutional law* (2<sup>nd</sup> ed.). Oxford: Hart Publishing, p. 229-280.
- Decker, F. (2012), ‘Electing the Commission president and commissioners directly: a proposal’, *European View* (the EPP’s Centre for European Studies), vol. 11(1), p. 71-78.
- Decker, F. (2014), ‘The pitfalls of parliamentarisation: why the procedure of appointing the European Commission should be changed’, *European View* (the EPP’s Centre for European Studies), vol. 13(2), p. 319-326.
- Decker, F. (2014), ‘Die Europäische Union auf dem Weg zur parlamentarischen Demokratie?’, *Aus Politik und Zeitgeschichte*, vol. 64, p. 3-8.
- Dicey, A. (1915), *Introduction to the study of the law of the Constitution* (8<sup>th</sup> ed.). London: MacMillan.
- Driessen, B. (2006), *Interinstitutional convention as checks and balances in EU law*. (PhD thesis, Katholieke Universiteit Leuven). Unpublished.
- Driessen, B. (2008), ‘Interinstitutional Conventions and institutional balance’, *European Law Review*, vol. 33(4), p. 550-562.
- Dworkin, R. (1977), *Taking rights seriously*. London: Duckworth.
- Dworkin, R. (1986), *Law's empire*. London: Fontana.
- Dzehtsiarou, K. & O'Mahony, C. (2013), ‘Evolutive Interpretation of Rights Provisions: a Comparison of the European Court of Human Rights and the U.S. Supreme Court’, *Columbia Human Rights Law Review*, vol. 44(1), p. 309-927.
- Eijsbouts, T. (2005), ‘The Barroso Drama: Campidoglio, Rome 29 October 2004: How the Form Was Brought to Matter’, *European Constitutional Law Review*, vol. 1(2), p. 155-174.

- Eijssbouts, T., et al. (2014), 'Editorial. Between the Constitutional Document and the Constitutional Settlement', *European Constitutional Law Review*, vol. 10(3), p. 375-378.
- Elliot, H. (2002), 'Parliamentary Sovereignty and the New Constitutional Order', *Legal Studies*, vol. 22(3), p. 340-375.
- Epstein, L. (1968), 'Parliamentary Government', in: Sills, D. (ed.), *International Encyclopedia of the Social Sciences*. New York: Macmillan, 11:419.
- Fabbrini, S. (2011), 'The Institutional Future of the European Union', *CIES e-Working Paper No. 109*, [http://www.cies.iscte.pt/destaques/documents/CIES-WP109\\_Fabbrini.pdf](http://www.cies.iscte.pt/destaques/documents/CIES-WP109_Fabbrini.pdf), accessed 9 July 2015.
- Fabbrini, S. (2013), 'Intergovernmentalism and its limits: assessing the European Union's answer to the euro crisis', *Comparative Political Studies*, vol. 46(9), p. 1003-1029.
- Fabbrini, S. (2015), 'The European Union and the Puzzle of Parliamentary Government', *Journal of European Integration*, vol. 37(5), p. 571-586.
- Follesdal, A. & Hix, S. (2006), 'Why there is a democratic deficit in the EU: A response to Majone and Moravcsik', *Journal of Common Market Studies*, vol. 44(3), p. 533-562.
- Freeman, E. (1872), *Growth of the English Constitution from the Earliest Times* (1<sup>st</sup> ed.). London: MacMillan.
- Gocaj, L. & S. Meunier (2013), 'Time will tell: the EFSF, the ESM, and the Euro Crisis', *Journal of European Integration*, vol. 35(3), p. 239-253.
- Grimm, D. (1995), 'Does Europe need a Constitution?', *European Law Journal*, vol. 1(3), p. 282-302.
- Habermas, J. (2001), 'Why Europe needs a constitution'. *New Left Review*, (11), p. 5-26.
- Hart, H. (1994), *The Concept of Law* (2<sup>nd</sup> ed.). Oxford: Clarendon Press.
- Hefftlar, C., Neuhold, C., Rozenberg, O. & Smith, J. (eds.) (2015), *The Palgrave Handbook of National Parliaments and the European Union*. Basingstoke: Palgrave Macmillan.
- Hix, S. (1997), 'Executive Selection in the European Union: Does the Commission President Investiture Procedure Reduce the Democratic Deficit?', *European Integration On-line Papers*, vol. 1(21), <http://eiop.or.at/eiop/texte/1997-021.htm>, accessed 9 July 2015.
- Hix, S. & Lord, C. (1997), *Political parties in the European Union*. Basingstoke: Macmillan Press.
- Hix, S. (2006), 'Why the EU Needs (Left-Right) Politics: Policy Reform and Accountability are Impossible Without It', *Notre Europe Policy Paper*, No. 19, Paris: Notre Europe.
- Hix, S., Noury, A. & Roland, G. (2007), *Democratic Politics in the European Parliament*. Cambridge: Cambridge University Press.
- Hix, S. (2008), *What's Wrong with the European Union and How to Fix It*. Cambridge: Polity.

- Hix, S. (2011), 'Where is the EU going? Collapse, fiscal union, a supersized Switzerland or a new democratic politics', *Public Policy Research*, vol. 18(2), p. 81-87.
- Hobolt, S. (2014), 'A vote for the President? The role of Spitzenkandidaten in the 2014 European Parliament elections', *Journal of European Public Policy*, vol. 21(10), p. 1528-1540.
- Hood Philips, O. (1966), 'Constitutional conventions: Dicey's predecessors', *Modern Law Review* 1966, vol. 29(2), p. 137-148.
- Jaconelli, J. (2005), 'Do constitutional conventions bind?', *The Cambridge Law Journal*, vol. 64(1), p. 149-176.
- Jennings, W. (1967), *The law and the constitution* (5<sup>th</sup> ed.). London: University of London Press.
- Johansson, K. (2009), 'The emergence of political parties at European level: Integration unaccomplished', in: S. Gustavsson, L. Oxelheim and L. Pehrson (eds.), *How Unified is the European Union? European Integration between Visions and Popular Legitimacy*. Heidelberg: Springer, p. 157-178.
- Judge, D. & D. Earnshaw (2003), 'The future is parliamentary? Parliamentarisation and legitimation in the EU' (conference paper for the EUSA 8<sup>th</sup> International Biennial Conference), <http://aei.pitt.edu/6511/>, accessed 9 July 2015.
- Kelsen, H. (1960), *Reine Rechtslehre* (2<sup>nd</sup> ed.). Vienna: Franz Deuticke.
- Kohler-Koch, B. & Rittberger, B. (eds.) (2007), *Debating the democratic legitimacy of the European Union*. Lanham: Rowman & Littlefield.
- Kumm, M. (2006), 'Beyond Golf Clubs and the judicialization of politics: Why Europe has a constitution properly so called', *The American Journal of Comparative Law*, vol. 54, p. 505-530.
- Langenbacher, E. (2015), 'The political and constitutional order', in: Colvin, S. (ed.), *The Routledge Handbook of German Politics and Culture*. London: Routledge, p. 87-104.
- Lehman, W. & Schunz, S. (2005), 'Anticipating the European Constitution: parliamentarization or renationalization?', *Online Archives of European Integration*, <http://aei.pitt.edu/3026/>, accessed 9 July 2015.
- Lenaerts, K. & Van Nuffel, P. (2005), *Constitutional Law of the European Union* (2<sup>nd</sup> ed.). London: Thomson Sweet & Maxwell.
- Lenaerts, K. & Corthaut, T. (2003), 'Judicial Review as a Contribution to the Development of European Constitutionalism', *Yearbook of European Law*, vol. 22(1), p. 1-43.
- Lenaerts, K. & Gutiérrez-Fons, J. (2010), 'The Constitutional Allocation of Powers and General Principles of EU law', *Common Market Law Review*, vol. 47(6), p. 1629-1669.
- Lenaerts, K. (2013), 'The principle of democracy in the case law of the European Court of Justice', *International and Comparative Law Quarterly*, vol. 62(2), p. 271-315.
- Letsas, G. (2007), *A theory of interpretation of the European Convention on Human Rights*. Oxford: Oxford University Press.

- Lightfoot, S. (2006), 'The consolidation of Europarties? The 'party regulation' and the development of political parties in the European Union', *Representation*, vol. 42, no. 4, p. 303-314.
- Lijphart, A. (1984), *Democracies: Patterns of majoritarian and consensus governments in 21 countries*. New Haven: Yale University Press.
- Lijphart, A. (ed.) (1992), *Parliamentary versus Presidential Government*. Oxford: Oxford University Press.
- Maitland, F. (1908), *The Constitutional History of England*. Cambridge: Cambridge University Press.
- Majone, G. (2002), 'The European Commission: The Limits of Centralization and the Perils of Parliamentarization', *Governance*, vol. 15(3), p. 375-392.
- Majone, G. (2009), *Europe as the would-be world power*. Cambridge: Cambridge University Press.
- Maley, W. (1985), 'Laws and Conventions Revisited', *The Modern Law Review*, vol. 48(2), p. 121-138.
- Marquand, D. (1979), *Parliament for Europe*. London: Jonathan Cape Ltd.
- Marshall, G. (1986), *Constitutional conventions: The rules and forms of political accountability*. Oxford: Clarendon Press.
- Meny, Y. (2003), 'De la démocratie en Europe: Old Concepts and New Challenges', *Journal of Common Market Studies*, vol. 41(1), p. 1-13.
- Mill, J.S. (1865), *Considerations on Representative Government*. London: Longmans, Green, and Co.
- Mitchell, J. (1968), *Constitutional Law* (2<sup>nd</sup> ed.). Edinburgh: W. Green & Sons Ltd.
- Moury, C. (2007), 'Explaining the European Parliament's right to appoint and invest the commission', *West European Politics*, vol. 30(2), p. 367-391.
- Munro, C. (1975), 'Laws and Conventions Distinguished', *Law Quarterly Review*, vol. 91(2), p. 218-235.
- Munro, C. (1987), *Studies in Constitutional Law*. London: Butterworths.
- Oppenheim, J. (1893), *De theorie van den organischen staat en hare waarde voor onze tijd* (Inaugural address, Rijksuniversiteit Leiden). Groningen: Wolters.
- Peñalver García, N. & Priestley, J. (2015), *The Making of a European President*. New York: Palgrave Macmillan.
- Plato [c. 360 B.C.], *Nómoi* [Laws]. Translation by Jowett, B. (1873), *The dialogues of Plato*. New York: Scribner, Armstrong.
- Pot, C., Elzinga, D., de Lange, R. & Hoogers, H. (2014), *Handboek van het Nederlandse staatsrecht* (16<sup>th</sup> ed.). Deventer: Kluwer.
- Prechal, S. (1996), 'Institutional Balance. A Fragile Principle with uncertain contents', in: Heukels, T., Blokker, N. & Brus, M. (eds.), *The European Union after Amsterdam. A Legal Analysis*. The Hague: Kluwer Law International, p. 273-294.

- Reif, K. & Schmitt, H. (1980), 'Nine second-order national elections: a conceptual framework for the analysis of European election results', *European Journal of Political Research*, vol. 8(4), p. 3-45.
- Rittberger, B. (2005), *Building Europe's Parliament: Democratic Representation beyond the Nation State*. Oxford: Oxford University Press.
- Rittberger, B. (2012), 'Institutionalizing Representative Democracy in the European Union: The Case of the European Parliament', *Journal of Common Market Studies*, vol. 50(1), p. 18-37.
- Taylor, G. (2014), 'Convention by consensus: Constitutional conventions in Germany', *International Journal of Constitutional Law*, vol. 12(2), p. 303-329.
- Tridimas, T. (2006), *The General Principles of EU Law* (2nd ed.). Oxford: Oxford University Press.
- Verhey, L. (2014), *De Constitutionele Conventie: Een Blinde Vlek in Ons Staatsrecht* (Inaugural address, Universiteit Leiden). Deventer: Kluwer.
- Vries, C. de (2014), 'Rethinking Electoral Democracy in Europe', in: Cramme, O. & Hobolt, S. (eds.), *Democratic Politics in a European Union Under Stress*. Oxford: Oxford University Press, p. 217-235.
- Wheare, K. (1966), *Modern constitutions*. Oxford: Oxford University Press.
- Wilkinson, M. (2013), 'Political Constitutionalism and the European Union', *Modern Law Review*, vol. 76(2), p. 191-222.
- Wille, A. (2013), *The normalization of the European Commission politics and bureaucracy in the EU executive*. Oxford: Oxford University Press.
- Ziller, J. (2014), 'Hierarchy of Norms: Hierarchy of Sources and General Principles in European Union Law', in: Becker, E., Hatje, A., Potacs, M. & Wunderlich, N. (eds.), *Verfassung und Verwaltung in Europa. Festschrift für Jürgen Schwarze zum 70. Geburtstag*. Baden-Baden: Nomos Verlagsgesellschaft, p. 334-352.

### ***Press articles***

- Albert, E., *Le combat perdu de David Cameron contre Jean-Claude Juncker*, Le Monde 26 June 2014, [http://www.lemonde.fr/europe/article/2014/06/26/le-combat-perdu-de-m-cameron-contre-m-juncker\\_4445641\\_3214.html](http://www.lemonde.fr/europe/article/2014/06/26/le-combat-perdu-de-m-cameron-contre-m-juncker_4445641_3214.html), accessed 9 July 2015.
- Amann, M., Knaup, H., Pauly, C. & Schult, C., *Jetzt erst recht*, Der Spiegel 16 June 2014, <http://www.spiegel.de/spiegel/print/d-127626338.html>, accessed 9 July 2015.
- Boland, V., *Jean-Claude Juncker to run for European Commission presidency*, Financial Times 7 March 2014, <http://www.ft.com/cms/s/0/bd9e4260-a607-11e3-b9ed-00144feab7de.html#axzz3VZt5YNSg>, accessed 9 July 2015.
- Buchsteiner, J., *Don Cameron*, Frankfurter Allgemeine Zeitung 27 June 2014, <http://www.faz.net/aktuell/politik/europaeische-union/cameron-hat-die-meisten-briten-hinter-sich-13012665.html>, accessed 9 July 2015.



- Cameron, D., *'Invented' process to appoint President of European Commission is damaging to democracy*, Irish Times 13 June 2014, <http://www.irishtimes.com/news/world/uk/invented-process-to-appoint-president-of-european-commission-is-damaging-to-democracy-1.1830355>, accessed 9 July 2015.
- Cameron, D., *Juncker président de la Commission ? Ce serait « un non-sens »*, juge Cameron, Le Monde 13 June 2014, [www.lemonde.fr/europe/article/2014/06/13/juncker-president-de-la-commission-ce-serait-un-non-sens-juge-cameroun\\_4437441\\_3214.html](http://www.lemonde.fr/europe/article/2014/06/13/juncker-president-de-la-commission-ce-serait-un-non-sens-juge-cameroun_4437441_3214.html), accessed 9 July 2015.  
Cameron, D., *"Juncker wurde von niemandem gewählt"*, Süddeutsche Zeitung, 13 June 2014, <http://www.sueddeutsche.de/politik/britischer-premier-cameron-juncker-wurde-von-niemandem-gewaehlt-1.1997345>, accessed 9 July 2015.
- Dashwood, A., Edward, E., Lever, J. & Temple Lang, J., *Independence of EU commission at risk over Spitzenkandidat process*, EUobserver 26 June 2014, <https://euobserver.com/opinion/124768>, accessed 9 July 2015.
- Döpfner, M., *Juncker muss Präsident werden*, Bild Zeitung 30 May 2014, <http://www.bild.de/news/standards/mathias-doepfner/juncker-muss-praesident-werden-36187236.bild.html>, accessed 9 July 2015.
- Duff, A., *The European Union's Leadership Crisis: who's to blame, and why it matters*, Blogactiv 23 June 2014, <http://andrewduff.blogactiv.eu/2014/06/23/the-european-unions-leadership-crisis-whos-to-blame-and-why-it-matters/>, accessed 9 July 2015.
- Gruyter, C. de, Alonso, S., *Hoe een Duits een-tweetje Juncker aan de macht hielp*, NRC Handelsblad 28 June 2014, <http://www.nrc.nl/handelsblad/van/2014/juni/28/ho-een-duits-een-tweetje-juncker-aan-de-macht-hi-1394136>, accessed 9 July 2015.
- Kris, J. van der, *Bungelen van Kroes toont nieuwe verhoudingen EU*, NRC Handelsblad 21 January 2010, <http://www.nrc.nl/handelsblad/van/2010/januari/21/bungelen-van-kroes-toont-nieuwe-verhoudingen-eu-11840241>, accessed 9 July 2015.
- In 't Veld, S., *Spitzenkandidaten boost legitimacy of the European Commission*, EUobserver 3 July 2014, <https://euobserver.com/opinion/124854>, accessed 9 July 2015.
- MacShane, D., *Preventing Juncker: Cameron's Self-Defeatist Move*, The Globalist 20 June 2014, <http://www.theglobalist.com/preventing-juncker-camerons-self-defeatist-move/>, accessed 9 July 2015.
- Mahony, H., *Schulz elected EP president again, promises to fight for more powers*, EUobserver 1 July 2014, <https://euobserver.com/news/124824>, accessed 9 July 2015.
- Mahony, H., *The Spitzenkandidaten Coup*, EUobserver 4 January 2015, <https://euobserver.com/review-2014/126456>, accessed 9 July 2015.
- Minkmar, N., *Europa wird direkt ins Herz getroffen*, Frankfurter Allgemeine Zeitung 30 May 2014, <http://www.faz.net/aktuell/feuilleton/juergen-habermas-im-gespraech-europa-wird-direkt-ins-herz-getroffen-12963798.html>, accessed 9 July 2015.
- Payne, S., *Leaked: what David Cameron really told Van Rompuy and the EU leaders last week*, The Spectator 29 June 2014,



<http://blogs.spectator.co.uk/coffeehouse/2014/06/leaked-david-camerons-most-important-eu-speech-of-the-year/>, accessed 9 July 2015.

- Wagstyl, S., *Merkel swaps back to supporting Juncker*, Financial Times 30 May 2014, <http://www.ft.com/intl/cms/s/0/539b1c68e7d311e39af800144feabdc0.html#axzz3W9rEQuuY>, accessed 9 July 2015.
- Willis, A., *Kroes' future hangs in the balance*, EUobserver 15 January 2010, <https://euobserver.com/economic/29277>, accessed 9 July 2015;

### *Miscellaneous*

- European Parliament (date unknown), <http://www.europarl.europa.eu/elections2014-results/en/turnout.html>, accessed 9 July 2015.
- European People's Party (2002), *A Constitution for a Strong Europe, Congress Document adopted by the EPP of 18 October 2002 in Estoril, Portugal*, [http://arc.eppgroup.eu/Press/peve02/eve30/congressdoc\\_en.asp](http://arc.eppgroup.eu/Press/peve02/eve30/congressdoc_en.asp), accessed 9 July 2015.
- Notre Europe (1998), *From the single currency to the single ballot-box*, <http://www.institutdelors.eu/media/tps-ceo1998-en.pdf?pdf=ok>, accessed 9 July 2015.
- Open Europe (2014), *Does Jean-Claude Juncker have a "popular mandate" to become the next President of the European Commission?*, <http://archive.openeurope.org.uk/Article/Page/en/LIVE?id=20223&page=PressReleases>, accessed 9 July 2015.
- Party of European Socialists, *European Socialists elect Martin Schulz as Candidate for Commission President*, 1 March 2014, [http://www.pes.eu/european\\_socialists\\_elect\\_martin\\_schulz\\_as\\_candidate\\_for\\_commission\\_president](http://www.pes.eu/european_socialists_elect_martin_schulz_as_candidate_for_commission_president), accessed 9 July 2015.

## **Annex – Treaty rules on the appointment of the (President of the) European Commission**

Treaty of Rome (1957 / 1958)<sup>284</sup>

### *Article 158*

The members of the Commission shall be appointed by the Governments of Member States acting in common agreement.

(...)

### *Article 161*

The President and the two Vice-Presidents of the Commission shall be appointed from among its members for a term of two years in accordance with the same procedure as that laid down for the appointment of members of the Commission. Their term of office shall be renewable.

(...)

After the Treaty of Maastricht (1991 / 1993)<sup>285</sup>

### *Article 158(2)*

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 thus nominated shall be subject as a body to a vote of approval by the European Parliament. After approval by the European Parliament, the President and the other members of the Commission shall be appointed by common accord of the governments of the Member States.

---

<sup>284</sup> Treaty establishing the European Economic Community (EEC Treaty, or Treaty of Rome), 25.03.1957, 298 U.N.T.S. 11.

<sup>285</sup> Treaty on European Union (Treaty of Maastricht), O.J C 191 of 29.07.1992.

After the Treaty of Amsterdam (1997 / 1999)<sup>286</sup>

*Article 214(2)*

The governments of the Member States shall nominate by common accord the person they intend to appoint as President of the Commission; the nomination shall be approved by the European Parliament.

(...)

The President and the other members of the Commission thus nominated shall be subject as a body to a vote of approval by the European Parliament. After approval by the European Parliament, the President and the other members of the Commission shall be appointed by common accord of the governments of the Member States.

After the Treaty of Nice (2001 / 2003)<sup>287</sup>

*Article 214(2)*

The Council, meeting in the composition of Heads of State or Government and acting by a qualified majority, shall nominate the person it intends to appoint as President of the Commission; the nomination shall be approved by the European Parliament.

(...)

The President and the other Members of the Commission thus nominated shall be subject as a body to a vote of approval by the European Parliament. After approval by the European Parliament, the President and the other Members of the Commission shall be appointed by the Council, acting by a qualified majority.’

Constitutional Treaty (2004 / -)<sup>288</sup>

*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

---

<sup>286</sup> Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and Certain Related Acts (Treaty of Amsterdam), O.J C 340 of 10.11.1997.

<sup>287</sup> Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and Certain Related Acts (Treaty of Nice), O.J C 80 of 10.03.2001.

<sup>288</sup> Draft Treaty establishing a Constitution for Europe (Constitutional Treaty), O.J. C 310 of 16.12.2004 (never ratified).

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 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.

After the Treaty of Lisbon (2007 / 2009)<sup>289</sup>

*Article 17(7)*

7. 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.

(...)

The President, the High Representative of the Union for Foreign Affairs and Security Policy 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.

*11. Declaration on Article 17(6) and (7) of the Treaty on European Union*

The Conference considers that, in accordance with the provisions of the Treaties, the European Parliament and the European Council are jointly responsible for the smooth running of the process leading to the election of the President of the European Commission. Prior to the decision of the European Council, representatives of the European Parliament and of the European

---

<sup>289</sup>

Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (Treaty of Lisbon), O.J. C 306 of 17.12.2007.

Council will thus conduct the necessary consultations in the framework deemed the most appropriate. These consultations will focus on the backgrounds of the candidates for President of the Commission, taking account of the elections to the European Parliament, in accordance with the first subparagraph of Article 17(7). The arrangements for such consultations may be determined, in due course, by common accord between the European Parliament and the European Council.