

1 Comment

 verfassungsblog.de/european-council-legal-duty-appoint-jean-claude-juncker/

Speculation over the nominee for the next President of the European Commission has been rife in newspapers, media and the blogosphere. In the face of such uncertainty, it might be reassuring to believe that, as [Mattias Kumm asserts](#), there is an actual legal duty to appoint a particular candidate. No such luck. If there was to be legal certainty, then the authors of the treaty could quite easily have provided that clarity, including by institutionalising the *Spitzenkandidat* concept in the treaties. They did no such thing. Instead what they did was mandate institutional deliberation over the nominee under a penalty default of a European Parliament veto. Far from the legal architecture creating a duty to appoint a particular candidate, it creates the conditions for deliberation over (a) what the recent elections to the EP mean (itself a matter for political debate and contestation) and (b) how to translate complex and sometimes contradictory political messages into the programme of the next European Commission and its President. This interpretation requires some elaboration.

Kumm's argument appropriately seeks to marry together the text of the treaties with where the EU is now in political and democratic terms. Let's start with what the treaties do – and importantly – do not say. Article 17(7) TEU states:

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 the candidate so nominated does not command a majority then within one month the European Council shall propose another nominee.

What is obvious is that there is no mention of *Spitzenkandidat* or any other means by which the EP might first nominate a candidate for consideration by the European Council. You can take a view on whether this most indirect means of selecting the EP's 'candidate' is a good or a bad way of representing the voice and vision of a majority of Europeans – or indeed whether it might in the future become a mobilising force – but on one thing the treaties are crystal clear: the EP has no competence to propose a nominee for the European Commission presidency. Inside the EP bubble it might have felt as though it had such an institutional power and the rival 'candidates' might have indulged in the charade that the EP could exercise such a power, but wishful thinking does not a treaty make.

So the important point is that the power to nominate the President of the European Commission rests where it has always rested, namely with the Heads of State and Government of the Member States meeting in the European Council. Indeed, for the European Council to be under a duty to appoint a candidate nominated by another EU institution would itself amount to an unlawful delegation of its responsibilities contrary to the precise wording and intent of the treaties. The changes which have been made to the treaties to require that the European Council take into account the EP elections, to conduct consultations and to give the EP a veto cannot detract from the fundamental legal responsibility of the European Council to select a nominee.

As between the power of the European Council to nominate and the power of the EP to veto there is a need for institutional dialogue. Kumm is right that depending on the circumstances and outcome of the EP election, the candidacy of some candidates rather than others may be more compelling in political terms. Leaving aside the tendency for the *Spitzenkandidat* concept to create a sense of legal entitlement, it is one – albeit only one – plausible way of thinking about who would make a good nominee. But again, the choice of language of the treaty is what is interesting. The substantive requirement that is to guide the process is the open-ended 'taking into account the elections'. The last round of elections can be read in a range of ways. On the one hand fringe and extremist parties have had some electoral success. One view may be to respond to this Euroscepticism and

another may be to seek to reject it. On the other hand, the middle-ground has held up. One view may be that this consensus should be preserved while another may argue that it is this consensus which also fuels Euroscepticism. The point is simply that the conflicting messages of the European polity need to be decoded and deliberated. The idea that we ought to eschew a deliberative process designed to work out where the EU should be going, in favour of a legal duty to appoint a particular EP nominee is not just to be wrong on the law, it's to get the politics that underpins the law entirely wrong.

Of course, the EP does have the institutional power to veto. But in the long run that is to no one's advantage and ultimately could be argued to be a violation of the legal duty of sincere cooperation insofar as a repeated exercise of the veto sought to compel the European Council effectively to delegate its power of nomination to the EP. The better way to view the veto is as a penalty default. The role of penalty defaults is to encourage participants to reach an agreed outcome that is superior than either the certainty of an outcome that no participants in the deliberation would wish or the uncertainty of the failure to agree on an outcome and the paralysis it would create. In this way, penalty defaults can be deliberation-inducing.

Kumm's analysis of what the treaty says about the democratic principle in the EU is as irresponsibly over-optimistic about the capacity of the EP to generate a genuine representative European democracy as it is neglectful of the powerful capacity of the European Council – through its representation of individuals democratically accountable to their own national electorates – to seek also to promote a vision of a common European good. What Europe needs is deliberation within the European Council and between the European Council and the EP. It's also what the treaties mandate.

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SUGGESTED CITATION Armstrong, Kenneth: *Why the European Council is NOT under a legal duty to appoint Jean-Claude Juncker*, *VerfBlog*, 2014/6/11, <http://verfassungsblog.de/european-council-legal-duty-appoint-jean-claude-juncker/>.

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