

# Why Kumm is Wrong and there is not in LAW a duty to appoint Juncker

 [verfassungsblog.de/kumm-wrong-law-duty-appoint-juncker/](https://verfassungsblog.de/kumm-wrong-law-duty-appoint-juncker/)

In the debate that has followed [Mattias Kumm's bold and provocative assertion](#) that the European Council is under a legal duty to nominate Jean-Claude Juncker for the presidency of the European Commission, there is probably a good measure of philosophical disagreement being played out. Like all such disagreements there can be reasonable grounds for taking opposing positions on what might be the best way to approach the selection of a Commission President in a way that both reflects and promotes democratic values. That would, indeed, make for an interesting debate. But that is not quite the disagreement between us which is instead based on how, legally, to read the EU treaties and what they do and do not say. In the following three points I seek to clarify, amplify and extend the argument I presented in my original response to Kumm.

Firstly, as I made clear in my earlier post, an obligation to take into account the elections to the EP is not synonymous with an obligation to nominate the candidate which the EP would wish to see elected to the Commission Presidency. The obligation is to consider the political lessons and messages of the elections which are complex and sometimes contradictory. It is worth repeating that it is the 'elections' that are to be taken into account, and not how the result of the elections has been translated by the EP into a process by which it nominates a candidate that it considers to be politically acceptable to it. Whatever may be the merits of the *Spitzenkandidaten* concept – and there may be some – the obvious limitation of the device is its reduction of the complexity of a multi-state electoral process and electoral politics down to one pre-selected candidate's capacity to embody and personify the (fragmented) European polity. So not only is there a misunderstanding of what the treaty demands, it would be, in my view, to actually fail to take into account the elections as a whole.

Secondly, it is important also to return to the original claim made by Kumm that there is a legal duty on the European Council to nominate Juncker. There is a perfectly sensible argument that says that the European Council would be unwise to nominate a candidate to which the EP is opposed and will not elect. We can all agree on that. What one cannot do is to turn that political fact into a legal duty whose consequence would be to render the European Council's capacity to nominate its preferred candidate illusory and incapable of exercise in practice. It would be to give the EP a right of initiative in the nomination process which it does not possess. As I stated in my earlier contribution the EP is fully free to exercise a veto. The purpose of that veto is to act as a penalty default whose aim is to promote consultation and deliberation within the European Council and between it and the EP to agree a candidate acceptable to both institutions. Again, for the EP to use its power of veto in a repeated manner to arrogate to itself a de facto power of candidate selection in addition to its de jure power to approve the European Council's nomination would be ultra vires the treaties.

Thirdly, there is a missing dimension to this debate (and I am grateful to Alastair MacIver for pointing this out). It takes the form of Declaration 11 which elaborates somewhat on the procedures surrounding Article 17(6) TEU. It is worth quoting this in full:

*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 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.*

This Declaration makes clear the obligations on both institutions to work together to select the candidate for the Commission Presidency ‘in the framework deemed the most appropriate’. Of course, that framework could indeed be one that endorsed the *Spitzenkandidaten* concept. But unless and until that framework is agreed between the institutions then other options remain not only plausible but also legally possible. Indeed, the Declaration provides that the institutions may, by common accord, agree on the arrangements for such consultations. So there is a capacity for both institutions to seek to formalise and institutionalise aspects of the process leading to the nomination and election of the Commission President, subject of course to the compatibility of that agreement with the treaty and the institutional responsibilities set out therein. And perhaps in light of the experience of the current situation that would be no bad thing. But the point is that no framework and no arrangements have been agreed let alone adopted by common accord. As such, no one institution can adopt its own procedural framework and demand that the other accede to whatever candidate emerges from that process. That is precisely the result which Kumm not only endorses but also views as legally mandated. I disagree.

In sum, not only do I disagree with Kumm’s assessment that I am wrong, but I would go so far to say that were the European Council to make a nomination based on the sort of legal duty Kumm asserts, and were that nomination to be taken by the qualified majority vote which the treaty permits, an outvoted state would have good legal grounds for challenging the decision before the European Court of Justice. Maybe then we would see who is right and who is wrong.

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