



## HIGHLIGHT

# THE *SPITZENKANDIDATEN* METHOD AND THE EUROPEAN MATERIAL CONSTITUTION

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Legal studies on the method for the appointment of the President of the Commission, known as *Spitzenkandidaten*, are not frequent. Yet this method has been known and discussed at least for a decade. The neglect of the European scholarship could be explained by the widespread belief that this method is not relevant to the legal discourse. It has been developed and applied on the basis of political necessity and based on purely political dynamics.

However, one can hardly deny the profound impact that the application of this method has on the Union's institutional system. It tends to take power away from the Member States and hand it over to the Parliament, perhaps the weakest in the European institutional balance.

The instrument that could produce the miraculous result of revitalizing the Parliament's role in the institutional dynamics of the Union is at first sight rather trivial. It is based on an ingenious exploitation of position in the system of art. 17(7) TEU, a very complex rule which owes its complexity to the aim to give all the stakeholders a piece of power in the procedure to appoint the Commission. Indeed, art. 17(7) is a paradigmatic example of the institutional philosophy of the Union, which requires, at least in decisions of fundamental importance for the development of integration, cooperation among the institutions and between the institutions and the Member States.

This is the case concerning the appointment of the Commission; an institution of vital importance for the functioning of the integration process. Art. 17(7) gives the European Council the power to propose a candidate and the Parliament the power to elect it. The underlying principle is that without cooperation between these two institutions the procedure will easily end in a deadlock.

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Yet, at this juncture, the main parliamentary groups, invoking a passage of uncertain meaning enshrined in art. 17(7) which requires the European Council to “take into account” the result of the European elections, promoted a political agreement whereby the President should be the leader of the list of the group most voted in the European elections. Such an agreement, if actually implemented, renders the proposal of the European Council's meaningless.

The agreement, stipulated among private parties, outside the institutional venues, can hardly produce binding effect. It is, indeed, a political understanding which can be dismissed unilaterally at any rate. Therefore, it can hardly violate art. 17(7). But it tends to subvert its underlying principle; namely, that the Commission cannot be the child of a single parent. All in all, the *Spitzenkandidaten* method is intended to disrupt the institutional balance reflected in art. 17(7) TEU and to make the Commission the executive arm of the Parliament.

This effect may have deep constitutional consequences. The pursuance of a direct and organic link between the President of the Commission and the Parliament dates back remote times, in search of a “supranational” front opposed to the excessive power of the Member States, within the two Councils. But, in the past, that alliance was episodic, not structural, also in light of the reluctance of the Commission to abdicate from its role of independent guardian of the European legality.

From a constitutional perspective, the *Spitzenkandidaten* method could establish an organic relationship, which has never existed before, between the two supranational institutions. In turn, the establishment of a permanent link between Parliament and Commission could change the “material” Constitution of the European Union, which is composed not only by legal texts but also by constitutional conventions and practices.

The method of the *Spitzenkandidaten* itself is prone to change to adapt to the changing political and institutional setting of the EU. In 2014, the European Council was dramatically divided within itself and the division heralded the success of the Parliament. The second attempt, in 2019, turned out to a triumph of the Council, which reaffirmed its central role in the institutional dynamics of the Union, at the cost of provoking institutional turbulence that followed the election of the current President of the Commission.<sup>1</sup>

Perhaps even more so, the success or failure of the method can determine the constitutional moment of today, on the eve of the parliamentary elections of 2024. In its third trial, the *Spitzenkandidaten* method, after an uncertain start, has not only been proposed by the parliamentary groups; it has also been recognized by the governments of the Member States, some of which actively participating in the selection of the *Kandidaten* and *Kandidatinnen*.

This move may appear staggering at first sight, as it comes from the entities that cannot expect immediate or direct political benefits from it. A reasonable explanation could be

<sup>1</sup> See the Editorial ‘The European Parliament at the First Crusade’ (2019) European Papers [www.europeanpapers.eu](http://www.europeanpapers.eu) 423.

based on the political relevance of the upcoming European elections and the fear that they will produce an impetuous rise of sovereignist movements, radically hostile to the integration process. This growth should not, according to most reliable forecasts, lead to a sovereignist majority in the European Parliament. But the long wave of sovereignism could weaken the European loyalty of the governments of some Member States.

It is, admittedly, hard to assess the impact of these turmoil, which will probably remain as an enduring and disquieting presence in the political landscape, and not only in Europe. But there is many an element to suggest that, in the aftermath of the European elections, there may be a sovereignist minority in each of the European Institutions structurally dissenting from the principles and values of the Union.

In this scenario, the European “material” Constitution must change to adapt itself to the challenges ahead. And the *Spitzenkandidaten* method could anticipate the advent of a new European political dynamic, no longer based on a cohesion inside the institution and a competition among the institutions. At a time of unsettling change, when the integration process could be called into question at its deepest roots, and when two antithetical visions of the Union will be confronted within each institution, and probably within each Member State, this method could produce the interinstitutional legitimacy necessary to defend the genetic heritage of the integration process.

