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Dissertation Topic:

The *Spitzenkandidaten* Procedure in Light of the
Election of the European Commission Presidency

by Seyed Peyman Khaljani

University of Hamburg

Faculty of Law

Supervising Professor: Prof. Dr. Armin Hatje

Second Reader: Prof. Dr. Anne van Aaken

Assessor: Prof. Dr. Alexander Proelß

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*Dedicated to my endlessly loved
mother, father and brother*

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List of Abbreviations

AFCO	European Parliament's Committee on Constitutional Affairs
CAP	Common Agricultural Policy
CJEU	Court of Justice of the European Union
e.g.	Exempli gratia
EAEC	European Atomic Energy Community
ECI	European Citizens' Initiative
ECSC	European Coal and Steel Community
EDC	European Defense Community
EEC	European Economic Community
EPC	European Political Cooperation
EPP	European People's Party
EU	European Union
f.	Following
i.a.	Inter alia
IGC	Intergovernmental Conference
MEP	Member of the European Parliament
MEPs	Members of the European Parliament
No.	Number
PES	Party of European Socialists
pp	Pages
QMV	Qualified Majority Voting
SEA	Single European Act
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
US	United States
USA	United States of America
USSR	Union of Soviet Socialist Republics

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§ 1 Introduction and Research Issue

The *Spitzenkandidaten* arrangement was introduced as a reform of the election of the Commission Presidency with greater involvement of the European Parliament and hereby taking the electorate's preferences into account. This innovation was concluded by the initiating Parliament as the necessary consequence of its long-standing institutional development, as it places the European Parliament on an equal footing with the European Council. This strengthening of the European Parliament can be seen, on the one hand, in the treaty amendments and, on the other, in the de-facto practice of institutional behaviour in the EU framework.¹ The aim was to bring the European Commission, which increasingly acts in an executive capacity and represents the EU externally, closer to the electorate.²

For those who believe in the EU as a supranational organisation, the aim is to give the European Parliament greater importance and thus independent decision-making power vis-à-vis the heads of state or government of the EU Member States, who together form the European Council.³ The supranational European Commission, and its President play a key role in initiating and implementing European law so that its actions directly impact the lives of European citizens. Therefore, concerning the competencies of the European Commission, Article 234 TFEU stipulates its accountability to the European Parliament. However, according to Article 17 TEU, the European Parliament has only limited influence on the personnel composition of the European Commission, namely in the election of the European Commission. This state of affairs calls into question the comparability of competencies between the European Parliament and the national parliaments.

For this reason and regarding the continuously low voter turnouts in the European elections, the European Commission and the European Parliament, as well as the European party families, had set themselves the goal for the 2014 European elections of arousing greater interest among EU citizens and preventing non-transparent appointments to top positions, as was common in the past, and initiated the *Spitzenkandidaten* procedure.⁴ This innovation was ultimately intended to contribute to greater democratisation of the EU, analogous to the national

¹ Holzner, EuR 2015, 525, 526.

² Schild, integration 2005, 33, 44; McCormick, European Union Politics, 159.

³ Nemitz, Internationale Politik 1998, 45, 46.

⁴ Wuermling, Europäische Grundrechte Zeitschrift 2004, 559, 561.

models in national elections.⁵

After the 2014 European elections, the European Parliament imposed Jean-Claude Juncker as the *Spitzenkandidat* of the leading EPP as the only eligible candidate for the office of Commission President based on the *Spitzenkandidaten* procedure.⁶ The *Spitzenkandidaten* arrangement was enforced at the inherent risk of triggering an inter-institutional conflict, risking a constitutional crisis that would permanently damage the EU if the European Council did not implement this model.⁷ The European Parliament and the European Commission succeeded.

In 2019, the European Parliament called the election of the new Commission Presidency under the *Spitzenkandidaten* process.⁸ As a result, almost all European parties put forward lead candidates and focused their election campaigns on these personalities.⁹ However, the European Council turned against this procedure after the 2019 elections and sought a brought consensus candidate for Commission President in the European Council, although a qualified majority would have been sufficient for this under Article 17 (7) TEU.¹⁰ Following the same law, the European Council proposed Ursula von der Leyen as the nominated President of the European Commission to the European Parliament after days and weeks of internal discussions. Von der Leyen did not appear as a *Spitzenkandidatin* in the run-up to the elections,¹¹ nor was she active in the corresponding European party family EPP, which she now represents as head of the European Commission. Yet she was unanimously elected by the members of the European Council, with only one abstention from Germany.¹² The resulting institutional conflict raises doubts about the efficient and sustainable cooperation of the European institutions. Such a practice carries the risk of regression through this procedure to non-transparent personnel decisions of the European Council, which might lead to higher scepticism of EU citi-

⁵ Göler/Jopp, integration 2014, 152, 157.

⁶ Holzner, EuR 2015, 525, 529 f.

⁷ Holzner, EuR 2015, 525, 529 f.

⁸ <https://www.europarl.europa.eu/news/en/press-room/20180202IPR97026/spitzenkandidaten-process-cannot-be-overturned-say-meps>, last accessed: 15 June 2022.

⁹ Day, EU Studies in Japan 2015, 77.

¹⁰ Hopp/Wessels, Europa von A bis Z 2020, 241, 242.

¹¹ <https://www.spiegel.de/politik/deutschland/ursula-von-der-leyen-grosse-koalition-streitet-ueber-spd-nein-a-1277673.html> - last accessed: 15 June 2022.

¹² <https://www.spiegel.de/politik/ausland/ursula-von-der-leyen-spd-war-gegen-nominierung-als-eu-kommissionschefin-a-1275482.html> - last accessed: 15 June 2022.

zens regarding the guarantee and observance of democratic principles in the EU.¹³

This dissertation aims to examine the necessity and the legally binding nature of the *Spitzenkandidaten* arrangement in the EU. Such examination shall be done by looking at the intentions at the founding of the EU, its development and the resulting inter-institutional cooperation of the European Council and European Parliament, surrounding the European Commission. Such an assessment is carried out through methods of legal interpretation¹⁴, in particular through the analysis of European primary law and inter-institutional agreements. A look at other unions and national governments can highlight the unique character of the EU and its elections. Furthermore, the paper aims to show to what extent the intentions and goals pursued with the *Spitzenkandidaten* arrangement are finally incorporated by the Treaty of Lisbon in current European law and whether such a model could contribute to greater democratisation of the EU under the premise of a democratic deficit.

Concerning the consequences of the 2019 European elections, the question arises as to whether such models, under the specification of the *Spitzenkandidaten* arrangement, carry a legal obligation vis-à-vis the European electorate, particularly about the subsequent personnel decisions. It must become clear what exactly was or should have been the subject of the 2019 European elections and whether the deviation from the *Spitzenkandidaten* model calls the validity of the election itself into question. It is also debatable if EU institutions can represent such measures unilaterally but non-bindingly to their citizens.

Ultimately, it is necessary to discuss how such a *Spitzenkandidaten* model should be designed and what consequences it must have on the European elections to remain more effectively next time and not become a possible threat to the existence of the EU by dividing its institutions from each other.

§ 2 A Need for Change: Towards the *Spitzenkandidaten* Procedure

The 2014 European elections took place when the political environment in Europe was changing. The roots of this change lie in the global financial crisis and the subsequent sovereign debt crisis that rocked Europe since the 2009 elections.¹⁵ These crises have led to a remarka-

¹³ <https://www.faz.net/aktuell/feuilleton/juergen-habermas-im-gespraech-europa-wird-direkt-ins-herz-getroffen-12963798.html> - last accessed: 15 June 2022.

¹⁴ *Larenz/Canaris*, Methodenlehre der Rechtswissenschaft, 153.

¹⁵ *Oppermann*, EuR Beiheft 2 2015, 171, 172.

ble increase in media attention towards the Euro and EU policies. Some significant events during this period were the outbreak of the Greek crisis in early 2010 and the subsequent bailout of Greece, the bailout of Ireland in autumn 2011 and the agreement on the Fiscal Compact in 2012.¹⁶ The polling data show that citizens were increasingly preoccupied with the Euro crisis in this period, so European issues were more prominent in 2014 than in any previous European election.¹⁷ It has been suggested that the critical development of the EU may have led to a steady decline in voter turnout in the European elections,¹⁸ as the consequence to European voters being more likely to blame the EU and its institutions than their national governments for the economic situation in their country.¹⁹

Despite the increased powers of the European Parliament, in retrospect, the European elections have not brought about the connection between European citizens and EU policy-making that was initially hoped for. The turnout in European Parliament elections has declined over the years from 62 % in 1979 to 43 % in 2009 and 2014. This steady decrease raises questions about the democratic legitimacy of the EU and its institutions.²⁰ Previously, European elections focused on domestic issues and were dominated by national political actors rather than European alternatives, resulting in European elections having a secondary character.²¹ This outcome shows that the European elections have not been able to provide a strong mandate for EU policy-making in line with democratic principles.

European parties, which should be fundamental to public policy-making in the EU, and their agendas have traditionally played a limited role in European Parliament election campaigns, tending to be a conglomeration of many related parties from across Europe.²² Due to the non-transparent decision-making within party groups, European citizens generally know little about the policies implemented or promised by these parties at the European level²³ and find

¹⁶ *Oppermann*, *EuR Beiheft 2* 2015, 171, 172.

¹⁷ *Hobolt/Tilley*, *Blaming Europe? Responsibility without Accountability in the European Union*, 6.

¹⁸ *Weidenfeld*, *Jahrbuch der Europäischen Integration* 2019, 15, 16.

¹⁹ *Hobolt/Tilley*, *Blaming Europe? Responsibility without Accountability in the European Union*, 55.

²⁰ *Franklin/Hobolt*, *Electoral Studies* 2011, 67, 75.

²¹ *Hobolt*, *Journal of European Public Policy* 2014, 1528, 1530; *Hix/Noury/Roland*, *Democratic Politics in the European Parliament*, 27 f.

²² *Hobolt*, *Journal of European Public Policy* 2014, 1528, 1530 f.

²³ *Hobolt*, *Journal of European Public Policy* 2014, 1528, 1530 f.

it hard to identify which parties are responsible for current political outcomes and which parties offer an alternative.²⁴ The disconnection of citizens from their mouthpiece at the European level could describe why European voters are unlikely to use European elections to reward or punish European politicians and their parties for their past performance, as studies show.²⁵

Then again, for those who emphasise input legitimacy, European Parliament elections are the primary mechanism through which European citizens can give a democratic mandate and hold EU institutions and actors accountable.²⁶ Despite the formal powers of the European Parliament in approving and dismissing the European Commission established in previous Treaty revisions, the link between the political majority in the European Parliament and the policies of the European Commission is weak.²⁷ The European Commission and its structure used to be criticised as being too undemocratic, as its election was not legally dependent on a parliamentary majority before the innovations of the Lisbon Treaty.²⁸ To make matters worse, even after almost fifty years of electing Commission Presidents, the European Council had still not developed an internal procedure for deciding on possible candidates.²⁹

Before the Lisbon Treaty, the President of the European Commission was appointed by the heads of state and government at European Council meetings and then had to be confirmed by the European Parliament. In the 1990s, there were numerous considerations to have the President of the European Commission elected directly by the European electorate.³⁰ However, there was never any serious prospect of such a proposal meeting the needs of the governments of the European Member States,³¹ and adjusting the investiture of the Commission President would have required both a treaty change and a change in national electoral laws. The EPP Congress in Estoril/Portugal in October 2002 put forward a wording proposal for the Eu-

²⁴ *Hix/Noury/Roland*, *Democratic Politics in the European Parliament*, 26 f.; *Hix*, *What's Wrong with the European Union and How to Fix it*, 5.

²⁵ *Hobolt/Tilley*, *Blaming Europe? Responsibility Without Accountability in the European Union*, 55.

²⁶ *Kocharov*, *ZEuS* 4/2014, 443, 444.

²⁷ *Hobolt*, *Journal of European Public Policy* 2014, 1528, 1530.

²⁸ *von Ondarza*, *SWP-Aktuell* 5/2014, 1.

²⁹ *Peñalver García/Priestley*, *The Making of a European President*, 19.

³⁰ *Peñalver García/Priestley*, *The Making of a European President*, 54.

³¹ *Peñalver García/Priestley*, *The Making of a European President*, 55.

European Constitution in electing the President of the European Commission by introducing the *Spitzenkandidaten* procedure.³² This proposed solution links the nomination to the results of the European elections, with the European Council making its proposal for the candidate by QMV.³³ Thus, advocates of greater democratic accountability in the EU pushed for such treaty changes to make the EU more similar to a “quasi-parliamentary system”.³⁴ The goal of bridging the “[...] yawning chasm between European citizens and European political system [...] in the wake of the Maastricht Treaty”³⁵ should be achieved by strengthening the role of the European Parliament in electing the EU’s supposed executive.³⁶

§ 2.1 The *Spitzenkandidaten* Arrangement - A suitable Procedure in electing “the EU’s Government”?

Apart from the possible democratic deficit of the EU resulting from the solidly low voter turnout, the *Spitzenkandidaten* idea is based on the underpinning of accountability to the executive acting European Commission possibly similar to a national government, which would make its election by the electorate necessary for the sake of the input democracy legitimising the output of the Commission’s actions. Thus, a founding matter for the establishing of the *leading candidate* principle is whether such a European government exists and whether the European Commission, based on its competencies, could be determined as such, making a legitimisation through personalised voting necessary.

The question arises as to whether the EU can be compared with nation-state organised political systems.³⁷ One might promptly say that the EU is already an amalgamation of sovereign national governments and that there is therefore no need or possibility for a European government. For this reason, a clean separation is needed here between a comparison of states and a comparison of political systems.³⁸ The EU is obviously not a state and therefore cannot

³² *Christiansen*, integration 1/2015, 26, 28.

³³ *Christiansen*, integration 1/2015, 26, 28.

³⁴ *Hobolt*, Journal of European Public Policy 2014, 1528, 1531 f.

³⁵ *Dehousse*, West European Politics 3/1995, 118, 123.

³⁶ *Hobolt*, Journal of European Public Policy 2014, 1528, 1533.

³⁷ *Wiesner*, Die Europäische Kommission zwischen Technokratie und Politisierung, 85.

³⁸ *Wiesner*, Die Europäische Kommission zwischen Technokratie und Politisierung 2016, 85.

be measured by such a yardstick.³⁹ However, it is a political system, which as such is comparable to other political systems, such as those of its Member States, particularly with regard to their institutions.⁴⁰ The question of a European government therefore goes back to the idea that typologies of political systems use these categories to name their respective manifestation in a certain system and its specific features.⁴¹

De facto, however, the development of European primary law shows a progressive transfer of sovereignty from the Member States to the EU, which is legally supported and guaranteed by the national constitutions.⁴² In addition, the EU has taken on a wealth of state functions that carry out the sovereign rights conferred on it.⁴³ As a result, policies are to a significant extent made at the European level leading to the CJEU having proclaimed the primacy and autonomy of the EU producing direct effect already in 1962 and 1963.⁴⁴ Particularly, the governmental character of the European Commission could be underlined by way of the legal development that the European Parliament elects the European Commission, similar to the representative democracies.⁴⁵

Moreover, this diversity of competences is visible in the different prerogatives of the executive: the political power to govern, the legislative power to adopt executive norms, and the administrative power to enforce legislation.⁴⁶ Under this order, the government is the part of the executive branch which is in charge of providing leadership and direction.⁴⁷ Whereas the system of the USA show a unitary executive, where all executive power is concentrated on the US President, in Britain and France the executive is divided between two institutions.⁴⁸

As is clear from Article 13 (2) TEU the EU, unlike the basic tripartite structure of nation-sta-

³⁹ *Wiesner*, Die Europäische Kommission zwischen Technokratie und Politisierung 2016, 85.

⁴⁰ *Wiesner*, Die Europäische Kommission zwischen Technokratie und Politisierung 2016, 85.

⁴¹ *Wiesner*, Die Europäische Kommission zwischen Technokratie und Politisierung 2016, 86.

⁴² *Fisahn/Viotto*, Zeitschrift für Rechtspolitik 2007, 198; *Wolf*, Herrschaftstheorien und Herrschaftsphänomene 2004, 177, 186 *et seq.*

⁴³ *Fisahn/Viotto*, Zeitschrift für Rechtspolitik 2007, 198.

⁴⁴ *Fisahn/Viotto*, Zeitschrift für Rechtspolitik 2007, 198; Case C-26/62, *Van Gend en Loos*; Case C-6/64, *Costa v. ENEL*.

⁴⁵ *Oppelland*, Die Europäische Kommission zwischen Technokratie und Politisierung 2016, 57.

⁴⁶ *Schütze*, European Constitutional Law, 315.

⁴⁷ *Schütze*, European Constitutional Law, 315.

⁴⁸ *Schütze*, European Constitutional Law, 315.

tes, consists of a multitude of institutions, from which the European Council and the European Commission stand out in particular.⁴⁹ Both are executive institutions. However, to understand the individual tasks of these two institutions, the structure of the distribution of powers in the EU must be taken into account. This is shown by a relationship of checks and balances between the institutions, in which they do not act within a fixed framework, but in a network of functions.⁵⁰ As a result of the institutional balance, each institution must act within its competences conferred by the Treaties and in doing so may not expand its power independently or transfer it to other institutions.⁵¹ Additionally they must respect the competences of the other institutions when carrying out their tasks,⁵² ultimately jointly contributing to the governance of the EU.⁵³

The legislative executive component enacted by the European Commission now accounts for about ninety percent of the EU's total legislative activity.⁵⁴ Legislation by the executive can be twofold, on the one hand, through the direct allocation of legislative competences by the Treaties and, on the other hand, on the basis of primary law, whereas it is constitutionally prohibited to delegate essential political choices to the executive.⁵⁵ Particularly with the new constitutional design distinguishing between the delegation of legislative power to the European Commission and the delegation of executive power containing the competence of the Commission to transfer this competence to a third instance, the scope of the European Commission has been broadened further.

Thus, addressing the importance of the European Commission and its presidency within the framework of the EU is fundamental to an ultimate understanding of the intentions behind the *Spitzenkandidaten* idea. First and foremost, it is to emphasise that the European Commission is a supranational institution that operates independently of the Member States, which is reflected in particular in its independence from instructions according to the second and third

⁴⁹ Schütze, *European Constitutional Law*, 74.

⁵⁰ Schütze, *European Constitutional Law*, 77 based on the idea of *Montesquieu*, *Spirit of Laws V*, chapter 14.

⁵¹ *Jacqué*, *Common Market Law Review* 2004, 383; Case C-149/85, *Wybot v Faure*, 23; Case C-70/88, *Parliament v Council (Chernobyl)*, 21; Case C-687/15, *Commission v Council*, 41.

⁵² Case C-70/88, *Parliament v Council (Chernobyl)*, 22; Case C-133/06, *Parliament v Council*, 57.

⁵³ Schütze, *European Constitutional Law*, 79.

⁵⁴ *Zoller*, *Droit constitutionnel*, 436; Schütze, *European Constitutional Law*, 320.

⁵⁵ Schütze, *European Constitutional Law*, 320 f.

subparagraphs of Article 17 (3) TEU.⁵⁶

The European Commission is primarily the pivotal body in implementing the EU agenda.⁵⁷ It has a monopolistic right of initiative and grants rights and prohibitions in the area of market regulation and the implementation of EU legal acts, which is why the European Commission is referred to as the “engine of the European integration”⁵⁸, following Article 17 (2) first sentence and (8) 2 TEU in conjunction with Article 234 TFEU.⁵⁹ This right of initiative and the provisions of Articles 17 (1) TEU and 352 TFEU give the Commission the possibility to act as “guardian of the Treaties”, promoting the general interest of the Union while launching initiatives to be taken into account by the political decision-makers.⁶⁰ While the European Council and the European Parliament have the right to ask the Commission to draw up an initiative, it can refuse if the proposed law conflicts with its agenda.⁶¹ Moreover, the European Commission has the right to unilaterally withdraw a legislative initiative during the legislative process if it considers the *raison d'être* of the legislative proposal to be at risk, making the adoption of secondary law against the will of the European Commission impossible.⁶² However, the Lisbon Treaty names exceptions in specific cases, entitling the Parliament and the European Council and a certain number of persons to compel the drafting of laws.⁶³ After the legislations have come into force, the Commission, with the support of the national governments, ensures that this new European law is implemented appropriately by the European

⁵⁶ *Härtel*, *Europäisches Organisations- und Verfassungsrecht* 2014, 623, 677 (115).

⁵⁷ *Hartlapp/Metz/Rauh*, *Which Policy for Europe?*, 1; *Napel/Widgrén*, *Public Choice* 2008, 21, 24; *Hatje/von Förster*, *Europäisches Organisations- und Verfassungsrecht* 2014, 543, 583 (132).

⁵⁸ *Haratsch/Koenig/Pechstein*, *Europarecht*, 142 (298); *Hatje/von Förster*, *Europäisches Organisations- und Verfassungsrecht* 2014, 543, 583 (145); *Härtel*, *Europäisches Organisations- und Verfassungsrecht* 2014, 623, 677 (114); *Kassim/Peterson/Bauer/Connolly/Dehousse/Hooghe/Thompson*, *The European Commission of the Twenty-First Century*, 1; *Hallstein*, *Der unvollendete Bundesstaat*, 56.

⁵⁹ *Ioannou-Naoum-Wokoun/Ruelling*, *The European Union: History, Institutions, Law, Politics*, 116; *Staeglich*, *Der Kommissionspräsident als Oberhaupt der Europäischen Union*, 114; *Oppelland*, *Die Europäische Union nach dem Vertrag von Lissabon*, 79, 88; *Peterson*, *The Institutions of the European Union* 2012, 96, 115; *Tsakatika*, *Journal of Common Market Studies* 2005, 193, 212; *Hatje/von Förster*, *Europäisches Organisations- und Verfassungsrecht* 2014, 543, 583 (132); *Curtin*, *Executive Power of the European Union*, 91; *Kassim/Peterson/Bauer/Connolly/Dehousse/Hooghe/Thompson*, *The European Commission of the Twenty-First Century*, 1; *Müller Gómez/Wessels*, *Europa von A bis Z* 2020, 495, 499.

⁶⁰ *Nugent/Rhinard*, *Journal of Common Market Studies* 2016, 1199, 1200; *Knauff*, *Die Europäische Kommission zwischen Technokratie und Politisierung* 2016, 9, 20.

⁶¹ *Decker/Sonnicksen*, *Zeitschrift für Politikwissenschaft* 2016, 71, 74.

⁶² *Knauff*, *Die Europäische Kommission zwischen Technokratie und Politisierung* 2016, 9, 20.

⁶³ *Decker/Sonnicksen*, *Zeitschrift für Politikwissenschaft* 2016, 71, 74.

Member States.⁶⁴ In implementing EU directives by Member States, the European Commission also acts as an “honest broker”⁶⁵ and takes on a neutral and mediating role when an agreement must be reached on the concrete course of action regarding the national legislation based on it.⁶⁶ Its normative role is complemented by its right to sue the Member State if the directives are not transposed into domestic legislation as intended.⁶⁷ In exercise of its administrative role, the European Commission directs European agricultural and competition policy and, as the “keeper of the Treaties”⁶⁸, oversees European finances together with the CJEU.⁶⁹ In addition, the European Commission represents the EU externally by brokering and negotiating treaties with external countries or international organisations.⁷⁰

Overall, this institution combines legislative, executive and regulatory power in the EU, which shows there is no clear separation of power in the EU apart from its judicial system.⁷¹ However, according to the fifth sentence of Article 17 (1) TEU, its competencies are primarily executive.⁷² This entanglement of powers could be due to the constant back and forth between “intergovernmentalism” and “supranationalism” in the founding and historical development of the EU.⁷³

Finally, the Commission and its members are accountable to the European Parliament as a

⁶⁴ *Ioannou-Naoum-Wokoun/Ruelling*, *The European Union: History, Institutions, Law, Politics*, 116; *Edwards*, *The European Commission*, 1, 6; *Napel/Widgrén*, *Public Choice* 2008, 21, 24; *Peterson*, *The Institutions of the European Union* 2012, 96, 97.

⁶⁵ *Peterson*, *The Institutions of the European Union* 2012, 96, 97.

⁶⁶ *Ioannou-Naoum-Wokoun/Ruelling*, *The European Union: History, Institutions, Law, Politics*, 116; *Edwards*, *The European Commission*, 1, 6; *Curtin*, *Executive Power of the European Union*, 91; *Cini*, *Pragmatism prevails: Barroso’s European Commission*, 6; *Endo*, *The presidency of the European Commission under Jacques Delors: The Politics of shared leadership.*, 37; *Peterson*, *Journal of European Public Policy* 1999, 48.

⁶⁷ *Ioannou-Naoum-Wokoun/Ruelling*, *The European Union: History, Institutions, Law, Politics*, 116; *Edwards*, *The European Commission*, 1, 6.

⁶⁸ *Hatje/von Förster*, *Europäisches Organisations- und Verfassungsrecht*, 543, 583 (132).

⁶⁹ *Hooghe/Nugent*, *The Institutions of the European Union* 2017, 147, 152 f.; *Napel/Widgrén*, *Public Choice* 2008, 21, 24; *Hatje/von Förster*, *Europäisches Organisations- und Verfassungsrecht* 2014, 543, 583 (132); *Case C- 70/88 Parliament v Council*, 23.

⁷⁰ *Ioannou-Naoum-Wokoun/Ruelling*, *The European Union: History, Institutions, Law, Politics*, 116; *Edwards*, *The European Commission*, 1, 6; *Peñalver García/Priestley*, *The Making of a European President*, 22.

⁷¹ *Müller*, *Political Leadership and the European Commission Presidency*, 36.

⁷² *Hatje/von Förster*, *Europäisches Organisations- und Verfassungsrecht* 2014, 543, 583 (132).

⁷³ *Müller*, *Political Leadership and the European Commission Presidency*, 36.

collegial body under Article 17 (8), first sentence TEU.⁷⁴ In fact, according to Article 17 (3) second and third sentence of the TEU, the Commissioners are obliged to guarantee their active and passive autonomy and independence from national interests by acting with certain institutional and legal limits which cannot be transferred back to the Member States.⁷⁵ In return, the Member States must also not seek to influence the Members of the Commission in the performance of their duties under the first sentence of Article 245 (2) TFEU. Full transparency must be ensured in all relations between the European Commission and the Member States.⁷⁶

The European Commission is a “multi-dependent” institution in three essential aspects. The Commission’s dependence is primarily reflected in the investiture procedure of the Commission President and the entire College.⁷⁷ Furthermore, the EU budget is set by the European Council and the European Parliament. Finally, the Commission cannot act unilaterally in carrying out its main tasks. It shares responsibility for setting EU objectives with the European Council and the Council of Ministers, legislative competence with the Council and the Parliament, and policy implementation with Member State administrations, which the Commission shares with the CJEU.⁷⁸ Whereas the Commission launched, on average, more than a hundred initiatives per year in the early 2000s, today, there is merely only a handful.⁷⁹ This subdued pace of drafting will also be due to the influence of these competence entanglements.⁸⁰

The European Commission consists of the Commission President and the College of Commissioners. The position of the Commission President is legally secured and characterised in Article 17 (6) TEU. According to its letters (a) and (b), the European Commission carries out its activities under political direction and guidelines of its President.⁸¹ The President also has

⁷⁴ *Hatje/von Förster*, *Europäisches Organisations- und Verfassungsrecht* 2014, 543, 583 (133).

⁷⁵ *Curtin*, *Executive Power of the European Union*, 91.

⁷⁶ *Haratsch/Koenig/Pechstein*, *Europarecht*, 137, Rn.285.

⁷⁷ *Christiansen*, *Journal of European Public Policy* 1997, 73, 85 f.

⁷⁸ Case C-70/88, *Parliament v Council*, 23.

⁷⁹ *Nugent/Rhinard*, *Journal of Common Market Studies* 2016, 1199, 1205.

⁸⁰ *Nugent/Rhinard*, *Journal of Common Market Studies* 2016, 1199, 1205.

⁸¹ *Staeglich*, *Der Kommissionspräsident als Oberhaupt der Europäischen Union*, 111, 155 f.; *Hatje/von Förster*, *Europäisches Organisations- und Verfassungsrecht* 2014, 543, 583 (140); *Hofmann*, *Europa von A bis Z* 2020, 197, 199 f.; *McCormick*, *European Union Politics*, 163.

the competence to organise this institution internally, e.g. by appointing the Vice-Presidents independently, advising the national governments on the appointment of Commissioners and dismissing or forcing the resignation of Commissioners, letter (c).⁸² The incumbent may direct or take over tasks from Commissioners that s/he deems to be performed ineffectively.⁸³ The President of the Commission convenes, chairs meetings of the College, draws up the agenda and approves its minutes.⁸⁴ In doing so, s/he can utilise procedural means, e.g. influencing where, when and how decisions are taken in the collective decision-making process.⁸⁵ On one side, the President is empowered to establish subcommittees in the College and decide on their composition; on the other side, s/he cannot delegate the College's decision-making power to these formations to circumvent opposition in the College.⁸⁶ These specific competencies arise less from EU primary law, as e.g. Article 17 (6) TEU, but rather from the practical necessities resulting from the organisation of the Commission's work, the institutionalisation of office since its first incumbent, Walter Hallstein,⁸⁷ and the Commission's Rules of Procedure.⁸⁸ The Commission President's direct and indirect presence in all chambers of the Union gives them comprehensive knowledge,⁸⁹ as s/he is the only incumbent to participate in all four areas of decision-making.⁹⁰ For example, the Commission President is de jure an influential member of the European Council.⁹¹ In the polycentric system of the EU, the Com-

⁸² *Staeglich*, Der Kommissionspräsident als Oberhaupt der Europäischen Union, 149 f.; *Hatje/von Förster*, Europäisches Organisations- und Verfassungsrecht 2014, 543, 583 (140); *Hofmann*, Europa von A bis Z 2020, 197, 199 f; *Nasshoven*, The Appointment of the President of the European Commission, 87.

⁸³ *Kassim/Connolly/Dehousse/Rozenberg/Bendjaballah*, Journal of European Public Policy 2017, 653, 659; E.g. since the Juncker administration, which began in 2014, only Vice Presidents were entitled to submit agenda items *Becker/Bauer/Connolly/Kassim*, West European Politics 2016, 1011, 1022; *Dinan*, Journal of Common Market Studies 2016, 101, 104.

⁸⁴ *Kassim*, The European Commission of the Twenty-First Century 2013, 151, 156.

⁸⁵ *Kassim*, The European Commission of the Twenty-First Century 2013, 151, 155.

⁸⁶ *Kassim*, The European Commission of the Twenty-First Century 2013, 151, 156.

⁸⁷ *von der Groeben*, Walter Hallstein - The Forgotten European?, 95, 96 f.

⁸⁸ *Kassim*, The European Commission of the Twenty-First Century 2013, 151, 155.

⁸⁹ *Hooghe/Nugent*, The Institutions of the European Union 2006, 147, 152.

⁹⁰ The Commission President is the lead representative of the College of Commissioners, a member of the European Council, and through regular participation in the Council of Ministers and in plenary sessions of the European Parliament; *Müller*, Political Leadership and the European Commission Presidency, 35.

⁹¹ *de Schoutheete*, The Institutions of the European Union 2017, 55, 72.

mission Presidency thus occupies the central mediating position.⁹² This positioning of the Commission President gives them more political capacity than initially intended for their role as head of a technocratic institution in the 1957 Treaties of Rome.⁹³ According to that s/he was to promote the general interest of the Union and take appropriate initiatives, provide leadership and formulate general objectives.⁹⁴ A Commission President who uses these freedoms and maximises their formal powers can significantly influence the direction of European policy.⁹⁵ Based on these competencies, the Commission, its placement in the European framework and the agenda it pursues are determined by the individual Commission President's design of the institution and their interpretation of legal powers.⁹⁶ Outside the EU institutions, the Commission President can also achieve pan-European goals and agendas in negotiations with Member States following the public will.⁹⁷

The outlined rights and functions of the European Commission and its President derive indirectly from the legal requirements of Article 17 (6) TEU but are only explicitly formalised in the Commission's Rules of Procedure.⁹⁸ In summary, the President of the Commission is the agenda-setter, the leading facilitator and the public leader of the EU.⁹⁹ As a 'mediator' and 'honest broker', the President of the Commission acts within the framework of the 'community method', always taking decisions at the European and international level with the community's interests in mind.¹⁰⁰ The Commission President as the face of the EU, being directly or

⁹² *Müller*, *Politics and Governance* 2016, 68, 70.

⁹³ *Müller*, *Political Leadership and the European Commission Presidency*, 35.

⁹⁴ *Curtin*, *Executive Power of the European Union: Law, Practices, and the Living Constitution*, 91; *Peterson*, *Journal of European Public Policy* 1999, 46, 47.

⁹⁵ *Tömmel*, *Journal of Common Market Studies* 2013, 789, 790; *Nugent/Rhinard*, *Journal of Common Market Studies* 2016, 1199, 1201; *Becker/Bauer/Connolly/Kassim*, *West European Politics* 2016, 1011, 1026; *Jabko*, *Playing the Market*, 43, 47.

⁹⁶ *Tömmel*, *Journal of Common Market Studies* 2013, 789, 790; *Müller*, *Politics and Governance* 2016, 68, 72.

⁹⁷ *Endo*, *The Presidency of the European Commission under Jacques Delors*, 26-28; *Tömmel*, *Journal of Common Market Studies* 2013, 789, 790.

⁹⁸ *Müller*, *Political Leadership and the European Commission Presidency*, 48 f.

⁹⁹ *Becker/Bauer/Connolly/Kassim*, *West European Politics* 2016, 1011, 1014; *Endo*, *The Presidency of the European Commission under Jacques Delors*, 26, 63 f.; *Tömmel*, *Journal of Common Market Studies* 2013, 789, 790; *Wille*, *The Normalization of the European Commission: Politics and Bureaucracy in the EU Executive*, 61, 64; *Kassim/Peterson/Bauer/Connolly/Dehousse/Hooghe/Thompson*, *The European Commission of the Twenty-First Century*, 164; *Cini*, *The European Commission Leadership, Organisation and Culture in the EU Administration*, 36 f.

¹⁰⁰ *Curtin*, *Executive Power of the European Union*, 92; *Müller*, *Politics and Governance* 2016, 68, 70.

indirectly involved in all of the EU's aspects, was called into question with the introduction of the permanent Presidency of the European Council by the Treaty of Lisbon. However, this did not lead to the exclusion of the Commission President from European Council summits or the loss of those other cross-institutional competencies that s/he had before. This description shows that the President of the European Commission occupies a - if not the - crucial and leading position in the EU framework, which has the most significant impact on the lives of European citizens when s/he exercises their powers in all areas of the ever-growing Union.

Compared to the prime ministers at the national level, the Commission President used to assume the relatively weak role of a "primus inter pares" - first among equals - within the College of Commissioners.¹⁰¹ Even though the Treaties have conferred significant functions on the European Commission, as already explained, there is only a rudimentary distinction between the Commission President and the other members of the College of Commissioners.¹⁰² In addition, the President of the Commission, like the other members, has only one vote; formal decisions are taken by a simple majority in the European Commission.¹⁰³ S/he must strike a balance between effectively chairing the College, achieving collegial consensus and exercising leadership on policy direction, and being unable to exercise managerial control or impose policy positions on their colleagues.¹⁰⁴ However since the Treaty of Nice, now according to Article 17 (6) TEU the entire Commission acts under the political guidance of the Commission President.¹⁰⁵ Like the entire College of Commissioners, the President is elected by the European Parliament. Due to the current lack of clarity in the European elections, the Commission does not have the legitimacy a popular mandate confers.¹⁰⁶ By not being a party leader or head of a coalition, s/he does not have the resources of a head of state or government to mobilise voters or influence the content of their ministerial colleagues.¹⁰⁷

Overall, the success of the Commission President is shaped by three key external factors in

¹⁰¹ *Kassim*, *The Oxford Handbook of the EU 2012*, 219, 220; *Spence*, *The European Commission*, 25, 29.

¹⁰² *Cini*, *Leaderless Europe 2008*, 113, 117.

¹⁰³ *Kassim*, *The European Commission of the Twenty-First Century 2013*, 151, 156.

¹⁰⁴ *Spence*, *The European Commission*, 25, 27-30.

¹⁰⁵ *Wagener/Eger*, *Europäische Integration*, 222.

¹⁰⁶ *Kassim*, *The European Commission of the Twenty-First Century 2013*, 151, 156.

¹⁰⁷ *Kassim*, *The European Commission of the Twenty-First Century 2013*, 151, 156.

particular. Firstly, the calibre of candidates that member governments are willing to select for the College is decisive.¹⁰⁸ Secondly, it depends on whether the Commission President can muster supportive majorities in the European Parliament.¹⁰⁹ Finally, the willingness of the member governments to act at the EU level is crucial and the ability of the Commission President to convince and mobilise support within and outside the European Commission.¹¹⁰ The far-reaching influence of the European Commission shows that its leadership stands out as unique in the EU's institutional structure.¹¹¹

These decision-making processes are what the democratic claim to participation refers to.¹¹² Although the independent European Commission is elected by the European Parliament, without a content-based and personal electoral procedure it nevertheless acts largely detached from the political will-forming process.¹¹³ However the Commission is a supranational oriented institution, its investiture is intergovernmental as becomes clear through the considerable influence of the Member State governments in that regard.¹¹⁴ In addition to the appointment of the personalities of the commissioners, the executive acts as the legislature in the Council through a breach of the separation of powers in the shape of an entanglement of powers in an amount surpassing the national political systems.¹¹⁵ Similar to a parliamentary government, the European Commission is responsible to the European Parliament.¹¹⁶ Democratic participation, in fact, requires the accountability of the executive to democratic representation and, for the Union, can only mean that the Commission is appointed by the electorate and is accounta-

¹⁰⁸ *Coombes*, Politics and Bureaucracy in the European Community, 251 f.; *Spence*, The European Commission 2006, 25, 28; *Peterson*, The Institutions of the European Union 2006, 81, 92 f.

¹⁰⁹ *Kassim*, The European Commission of the Twenty-First Century 2013, 151, 160 f.

¹¹⁰ *Kassim*, The European Commission of the Twenty-First Century 2013, 151, 160 f.

¹¹¹ *von Ondarza*, SWP-Aktuell 5/2014, 1; *Peterson*, The Institutions of the European Union 2012, 96, 97.

¹¹² *Fisahn*, Demokratie und Öffentlichkeitsbeteiligung, 292 *et seq.*

¹¹³ *Fisahn/Viotto*, Zeitschrift für Rechtspolitik 2007, 198, 201; *Ruffert*, Die Europäische Kommission zwischen Technokratie und Politisierung 2016, 39, 44.

¹¹⁴ *Ruffert*, Die Europäische Kommission zwischen Technokratie und Politisierung 2016, 39, 44; *Wiesner*, Die Europäische Kommission zwischen Technokratie und Politisierung 2016, 85, 88.

¹¹⁵ *Ruffert*, Die Europäische Kommission zwischen Technokratie und Politisierung 2016, 39, 44; *Neyer*, Wirtschaftsdienst 2008, 491, 492; *Hartlapp/Wiesner*, Zeitschrift für Politikwissenschaft 2016 - Sonderband; *Wiesner*, Die Europäische Kommission zwischen Technokratie und Politisierung 2016, 85, 92.

¹¹⁶ *Wiesner*, Die Europäische Kommission zwischen Technokratie und Politisierung 2016, 85, 93.

ble to it.¹¹⁷ This governmental accountability of the European Commission is ultimately safeguarded by the possible vote of no confidence by the European Parliament.¹¹⁸ However, the permanent central-executive position of the European Council and thus of the Member States cannot be overlooked and should not be underestimated.¹¹⁹ In consideration of the significant powers of the European Commission despite the duality of the EU's executive, the view of the Federal Constitutional Court¹²⁰ that the EU and thus its Commission, as a central supranational and executive-acting body, does not have to meet the requirements of that of a national government, such as the German Federal Government, due to its particularity,¹²¹ is at least debatable.

§ 2.2 The Lisbon Treaty triggering a new Electoral Process concerning the Commission President's Investiture

The Lisbon Treaty, signed on 13 December 2007, significantly changed the procedure for appointing the President of the European Commission. According to Article 17 (7) TEU, the European Council shall “take into account the elections” when nominating the candidate for Commission President, and the European Parliament shall subsequently “elect” this candidate instead of confirming them.¹²² This adjustment, reflected in the resulting *Spitzenkandidaten* rule, was intended to give European voters in the 2014 European elections the opportunity for the first time to determine the composition of the European legislature and the leadership of the supposedly EU executive as well.¹²³ It was expected that there would be a push for democratisation, especially in the European Commission,¹²⁴ which would show the growing confidence of the European Parliament and increase the importance of the EU elections. The idea

¹¹⁷ Gusy, *Globalisierung und Demokratie* 2000, 131 *et seq.*

¹¹⁸ Wiesner, *Die Europäische Kommission zwischen Technokratie und Politisierung* 2016, 85, 94 f.

¹¹⁹ Wiesner, *Die Europäische Kommission zwischen Technokratie und Politisierung* 2016, 85, 95; Duverger, *European Journal of Political Research* 1980, 165-187; Sartori, *Comparative constitutional engineering. An inquiry into structures, incentives and outcomes.*

¹²⁰ BVerfGE, 123, 267 (368), *Lissabon.*

¹²¹ Ruffert, *Die Europäische Kommission zwischen Technokratie und Politisierung* 2016, 39, 51.

¹²² Hobolt, *Journal of European Public Policy* 2014, 1528, 1533; Müller Gómez/Wessels, *Jahrbuch der Europäischen Integration* 2019, 71, 72.

¹²³ Weiler, *The European Journal of International Law* 2013, 747, 750; Kocharov, *ZEuS* 4/2014, 443, 444; Christiansen, *West European Politics* 2016, 992, 993.

¹²⁴ Göler/Jopp, *integration - 2/2014*, 152.

was that the parliamentary majority should be reflected in the leadership of the future European Commission.¹²⁵ After the Lisbon Treaty entered into force on 1 December 2009, the then Commission President José Manuel Barroso laid the foundation for a lead candidate process for the future appointment of Commission Presidents. To this end, he invited all European party families to nominate their top candidates to be elected by the European citizens in the European elections.¹²⁶ AFCEP subsequently adopted a resolution¹²⁷ calling on European political parties to nominate top candidates for the European elections. Section 15 states that the candidate of the party that wins the most seats in the European Parliament elections will “be the first to be considered” for the post of President of the European Commission.¹²⁸ According to the European Parliament’s interpretation of the Lisbon Treaty, a vote in the 2014 European elections would thus also be an indirect vote on the President of the European Commission.¹²⁹

§ 2.3 Further developments of the *Spitzenkandidaten* arrangement

Consequently, the larger European parties nominated individual lead candidates and therefore adopted the requirements of the *Spitzenkandidaten* arrangement.¹³⁰ The idea of *Spitzenkandidaten* at the European level, apart from the national lead candidates on the national lists, brought a new transnational dimension to the European election process.¹³¹ This vision goes hand in hand with the expectation that the European Parliament can expand its power and bring about the parliamentarisation of the EU,¹³² especially the European Commission. The *Spitzenkandidaten* arrangement intended to add personnel to the European election campaigns

¹²⁵ Puglierin/Rappold, DGAPstandpunkt 6/2019, 1.

¹²⁶ European Commission, SPEECH/12/596.

¹²⁷ European Parliament, Resolution on the practical arrangements for the holding of the 2014 European Parliament elections, P7TA-(2013), 0323; Thieme/Wessels, Jahrbuch der Europäischen Integration 2019, 93, 94.

¹²⁸ Kocharov, ZEuS 4/2014, 443, 444; Müller Gómez/Wessels, Jahrbuch der Europäischen Integration 2019, 71, 72.

¹²⁹ Hobolt, Journal of European Public Policy 2014, 1528, 1533.

¹³⁰ von Ondarza, SWP-Aktuell 36/2014, 1, 2.; Hobolt, Journal of European Public Policy 2014, 1528, 1533 f.; Weidenfeld, Jahrbuch der Europäischen Integration 2019, 15, 16; Müller Gómez/Wessels, Jahrbuch der Europäischen Integration 2019, 71, 72.

¹³¹ Christiansen, West European Politics 2016, 992, 993.

¹³² Grimm, Europa ja - aber welches?, 135; Kassim, The European Commission of the Twenty-First Century 2013, 130, 132.

hoping to stimulate the European debate by Europeanising the campaign issues and the turnout by personalising the election.¹³³ According to its initiators, this adaptation could provoke a Europe-wide discussion on specifically European problems and mobilise European voters.¹³⁴ Finally, the hope was to solve the fundamental problem assumed by empowering the European Parliament.¹³⁵ The aim was to raise the European elections to a higher priority than second-order elections and to put the European Parliament at the centre to increase the democratic legitimacy of the EU.

This development and intention correspond to the original idea of the European elections when introduced in 1979, as these elections would strengthen the democratic dimension of policy-making in the EU.¹³⁶ The Parliament was created as a legislative chamber that would be accountable to the interests of the electorate,¹³⁷ which would legitimise the exercise of power in the EU.¹³⁸ Before, democratic legitimacy rested solely with elected national governments in the Council. The movement which aimed to strengthen the democratic legitimacy of the EU, was realised through successive treaty changes that made the European Parliament a real co-legislator alongside the Council, also being able to impact the investiture of the Commission President.¹³⁹ Ultimately, this new impetus was also well-received by European citizens, with 57 % of EU citizens in favour of European political parties putting forward their candidate for President of the European Commission in the next European elections.¹⁴⁰

§ 2.4 The Impact of *Spitzenkandidaten* on the 2014 European Elections and its Outcome

Despite establishing the *Spitzenkandidaten* model, the voter turnout did not increase in 2014 but remained at a low of hardly 43 % across the EU.¹⁴¹ It rose in countries where the profile

¹³³ *Peñalver García/Priestley*, *The Making of a European President*, 183.

¹³⁴ *Müller Gómez/Wessels*, *Jahrbuch der Europäischen Integration* 2019, 71, 72.

¹³⁵ *Grimm*, *Europa ja - aber welches?*, 135.

¹³⁶ *Hobolt/Franklin*, *Electoral Studies* 2011, 1; *Franklin/Hobolt*, *Electoral Studies* 2011, 67, 68.

¹³⁷ *Hobolt/Franklin*, *Electoral Studies* 2011, 1.

¹³⁸ *Hobolt/Franklin*, *Electoral Studies* 2011, 1.

¹³⁹ *Hix/Noury/Roland*, *Democratic Politics in the European Parliament*, 14 f.

¹⁴⁰ *European Commission*, *Special Eurobarometer 415*, 80.

¹⁴¹ *European Parliament*, *Results of the 2014 European elections*, <https://www.europarl.europa.eu/elections2014-results/en/election-results-2014.html>, last accessed: 15 June 2022.

of this model was high and the home countries of some leading candidates, for example, Germany, France, and Greece.¹⁴² Nevertheless, it should not be overlooked that the majority of Europeans did not vote in these elections, which does not support the choice of the *Spitzenkandidaten* arrangement.

After the 2014 elections, the leaders of the winning parties, the EPP and the PES, agreed on a coalition.¹⁴³ So, the European parties and their top candidates were unanimously desiring to adhere to the *Spitzenkandidaten* model.¹⁴⁴ Consequently, from their point of view, the European Council had to propose the name of the leading candidate, Jean-Claude Juncker, to the European Parliament to respect the democratic will of the European electorate.¹⁴⁵ His opponent, the PES top candidate Martin Schulz, declared Juncker the winner, conceded defeat and finally offered him his full support,¹⁴⁶ which was a decisive step towards establishing the *Spitzenkandidaten* model. The European Parliament resorted to means other than simply claiming that the election result should decide the candidate and leveraging the European Council in the inter-institutional process.

The European Council, on the other hand, in particular its President Herman van Rompuy, initially refused to accept the *Spitzenkandidaten* procedure.¹⁴⁷ He argued that it would abuse the prerogatives of the European Council and create dissent between Member States that would allow for institutional deadlock.¹⁴⁸ The then Prime Minister of the United Kingdom, David Cameron, described this procedure as a “power grab by the back door” that the Member States had never agreed to and that would shift power from the European Council to the Parliament and politicise the European Commission.¹⁴⁹

Because of this disagreement, the plurality of heads of state or government expected the European Council to propose compromise candidates, as they did not see a clear majority in the

¹⁴² *European Parliament*, Results of the 2014 European elections, <https://www.europarl.europa.eu/elections2014-results/en/election-results-2014.html>, last accessed: 15 June 2022.

¹⁴³ *Peñalver García/Priestley*, *The Making of a European President*, 153.

¹⁴⁴ *Peñalver García/Priestley*, *The Making of a European President*, 153.

¹⁴⁵ *Peñalver García/Priestley*, *The Making of a European President*, 153.

¹⁴⁶ *Christiansen*, *West European Politics 2016*, 992, 1005.

¹⁴⁷ *Christiansen*, *West European Politics 2016*, 992, 1005.

¹⁴⁸ *Peñalver García/Priestley*, *The Making of a European President*, 183.

¹⁴⁹ *Cameron*, *European Voice 2014*, <http://www.politico.eu/article/no-one-voted-for-mr-juncker>, last accessed: 15 June 2022.

electorate.¹⁵⁰ However, many European government leaders got trapped by their individual earlier support for the *Spitzenkandidaten* rule being unable to officially turn away from this procedure, which argued for an increase in the importance of the European elections in the choice of the Commission presidency. Although the European Council hesitated and never formally accepted the *Spitzenkandidaten* procedure, it finally nominated Juncker as Commission President.¹⁵¹ Therefore, the 2014 election under the *Spitzenkandidaten* model marked “a sort of change in the European Union’s constitutional balance without treaty amendment”¹⁵², with significant implications for the inter-institutional balance of power. The European Parliament argued that it should and would not be possible for the European Council to overrule such a choice by the European electorate, even in future elections.¹⁵³ This procedure would end the previous backroom elections and non-transparent decisions of the European Council, respecting the legal duty of consideration in Article 17 (7) TEU and leading to a genuine and sufficient link between the European elections and the appointment of the Commission President.¹⁵⁴ Consequently, the European Parliament seemed to have secured a direct right to appoint the President of the European Commission.¹⁵⁵ However, this point of contention between proponents of increasing parliamentarisation of the EU and those of an intergovernmental interpretation of the Lisbon Treaty remains legally unresolved.¹⁵⁶

§ 2.5 The 2019 European Elections: Final Consolidation of the *Spitzenkandidaten* Rule?

The 2019 European elections represented an opportunity to establish the *Spitzenkandidaten* model ultimately.¹⁵⁷ Therefore, party political support was further emphasised and strengthened in the run-up to the 2019 elections, with most party families presenting lead candidates

¹⁵⁰ Göler/Jopp, *integration* - 2/2014, 152, 159-160

¹⁵¹ Hrbek, *integration* 2019, 167, 182-183; Müller Gómez/Wessels, *Jahrbuch der Europäischen Integration* 2019, 71, 72.

¹⁵² Goldoni, *European Law Journal* 2016, 279, 284.

¹⁵³ Weiler, *The European Journal of International Law* 2013, 747, 750.

¹⁵⁴ Weiler, *The European Journal of International Law* 2013, 747, 750.

¹⁵⁵ Hobolt, *Journal of European Public Policy* 2014, 1528, 1538.

¹⁵⁶ Göler/Jopp, *integration* - 2/2014, 152.

¹⁵⁷ *European Parliament*, <http://www.europarl.europa.eu/news/de/press-room/20180202IPR97026/europawahl-2019-parlament-wird-am-prinzip-desspitzenkandidaten-festhalten>, accessed: 15 June 2022; Weigl, *Jahrbuch der Europäischen Integration* 2019, 165, 166.

again.¹⁵⁸ These candidates became much more prominent¹⁵⁹ through their campaigning opposite to the 2014 elections.

The European Parliament, as the only directly elected body of the EU, was significantly strengthened by the higher turnout in 2019.¹⁶⁰ Both European Parliament and the European Commission saw this development as a sign of continuation and consolidation of the *Spitzenkandidaten* model.¹⁶¹ The European Parliament saw in its mind's eye the institutionalised framework within which the European Council must comply with the rules established after the 2014 elections.¹⁶² However, some European Member States were now represented by other actors and, as a result, were reluctant or opposed to the *Spitzenkandidaten* model.¹⁶³ Therefore, the European Council and its then President, Donald Tusk, had reservations about praising the *Spitzenkandidaten* arrangement.¹⁶⁴ Tusk, tasked with launching consultations with the European Parliament and the Member States, stressed that there could be “no automatism”¹⁶⁵ for the appointment of one of the *Spitzenkandidaten* as the future Commission President.¹⁶⁶

Under pressure from the media and the two other EU institutions, the first debates in the European Council focused on possible party-political majorities for a candidate who had been the frontrunner in the elections.¹⁶⁷ Although the EPP and its top candidate Manfred Weber won most of the seats in the European Parliament, the election results indicated that forming a grand coalition with the PES would no longer be possible, so a strong consensus from all poli-

¹⁵⁸ *Heidbreder/Schade*, Research and Politics 4/2020, 1, 3.

¹⁵⁹ Especially in media *Weidenfeld*, Jahrbuch der Europäischen Integration 2019, 15, 16; *Kohls/Müller*, integration 2019, 218, 221.

¹⁶⁰ *Kaeding/Müller/Schmälter*, Die Europawahl 2019: Ringen um die Zukunft Europas, 9, 15.

¹⁶¹ *Puglierin/Rappold*, DGAPstandpunkt 6/2019, 1.

¹⁶² *Heidbreder/Schade*, Research and Politics 4/2020, 1, 3.

¹⁶³ *Herszenhorn/de La Baume*, Politico 2018. <https://www.politico.eu/article/jean-claude-juncker-spitzenkandidat-eu-leaders-we-wont-be-bound-by-spitzenkandidat-process/>, last accessed: 15 June 2022

¹⁶⁴ *Herszenhorn/de la Baume*, Politico 2018, <https://www.politico.eu/article/jean-claude-juncker-spitzenkandidat-eu-leaders-we-wont-be-bound-by-spitzenkandidat-process/>, last accessed: 15 June 2022

¹⁶⁵ *Tusk*, Remarks by President Donal Tusk at the press conference of the informal dinner of EU heads of state or government, 28 May 2019.

¹⁶⁶ *Müller Gómez/Thieme*, Die Europawahl 2019, 181, 188.

¹⁶⁷ *Müller Gómez/Thieme*, Die Europawahl 2019, 181, 186.

tical spectrums in the European Council was needed.¹⁶⁸ When they met on 20 June 2019, the heads of state and government of the European Member States could not find a majority for Weber or any of the leading candidates of the other European party families.¹⁶⁹ Following Declaration No. 6 to the Lisbon Treaty, Tusk stressed that the European Council would seek a compromise within the interests of the European Parliament and agree on a personnel package for the EU's top posts that respected the diversity of the Union and its Member States.¹⁷⁰ At the G20 meeting in Osaka, German Chancellor Angela Merkel, French President Emmanuel Macron, Socialist European Council spokesman and Spanish Prime Minister Pedro Sánchez, and Dutch Prime Minister Mark Rutte agreed on Frans Timmermans, the PES *Spitzenkandidat*, as the Commission President to be nominated.¹⁷¹ However, the Visegrád countries and other conservative leaders vetoed this proposal as Timmermans, the former Vice-President of the Commission, was responsible for triggering the Article 7 procedure against Poland.¹⁷² After three days of intense negotiations, EU leaders agreed to nominate the then German Defence Minister Ursula von der Leyen as President of the European Commission at a special meeting in early July 2019.¹⁷³ As a member of the Christian Democrats in Germany and thus belonging to the EPP, von der Leyen personified a compromise of the European Member States in the spirit of the Treaty provisions.¹⁷⁴ With this decision, the members of the European Council completely ignored the *Spitzenkandidaten* process and thus concluded a classic “package deal”¹⁷⁵ that bridged the diverging interests of the EU heads of state and government after protracted negotiations.

Similarly, following the European elections, the European Parliament was divided on the final call for *Spitzenkandidaten* for the nomination of the Commission President in 2019. Before

¹⁶⁸ Müller Gómez/Thieme, *Die Europawahl 2019*, 181, 186.

¹⁶⁹ Tusk, Remarks by President Donal Tusk after the European Council meeting on 20 June 2019.

¹⁷⁰ Tusk, Remarks by President Donal Tusk after the European Council meeting on 20 June 2019.

¹⁷¹ Thieme/Wessels, *Jahrbuch Der Europäischen Integration 2019*, 93, 95.

¹⁷² Meta Beisel/Kolb/Mühlhauer, *Süddeutsche Zeitung* 1 July 2019, <https://www.sueddeutsche.de/politik/eu-kommissionspraesident-1.4506319>, last accessed: 15 June 2022; Thieme/Wessels, *Jahrbuch der Europäischen Integration 2019*, 93, 96.

¹⁷³ *European Council*, Special meeting of the European Council on 30 June, 1 and 2 July 2019.

¹⁷⁴ Müller Gómez/Thieme, *Die Europawahl 2019*, 181, 186; Ahrens, *Jahrbuch der Europäischen Integration*, 243, 246.

¹⁷⁵ Wessels, *The European Council*, 139-140.

the European elections in February 2019, MEPs still emphasised that “the candidate must have been designated as a *Spitzenkandidat* by one of the European political parties and must have campaigned for the post of President of the Commission in the run-up to the European elections”¹⁷⁶. However this stipulation disappeared after the European elections. The political party groups could not form a majority for any one of the lead candidates.¹⁷⁷ Therefore, the European Parliament could not oppose the European Council’s alternative proposal with a unified, strong voice. As a result, on 16 July 2019, von der Leyen was presented to the European Parliament for election as the nominated candidate for Commission President. The narrow majority of 383 votes, nine more than necessary, with which von der Leyen was elected, shows the internal division of the European Parliament over the new Commission President.¹⁷⁸

§ 2.6 Legal Protection of the winning *Spitzenkandidat* after being passed over

In the scenario of the winning *Spitzenkandidat* not being elected as President of the Commission, despite their legitimate claim according to the *Spitzenkandidaten* arrangement, as in 2019, it is uncertain whether a respective right to contest the election of another candidate exists. Apart from that, the European electorate could possibly claim their share of the European elections under the pledged connection to the election of the President of the Commission before the elections. Such a legal protection could possibly arise from the action for annulment under Article 263 TFEU, which allows judicial review of legislative acts and legally binding acts by the General Court of the EU at first instance. It is therefore questionable whether the election of the Commission President constitutes a legally binding act and if so, whether its review would be covered according to Article 263 TFEU.

As a direct action, Article 263 TFEU regulates the possibility to file an action for Member States, institutions of the EU and individuals against acts and legislative acts of the EU, including the supervision of the legality of acts executed by EU institutions, safeguarding the full

¹⁷⁶ *European Parliament*, European Parliament resolution of 13 February 2019 on the state of debate on the future of Europe (2018/2094(INI)).

¹⁷⁷ *Weigl*, *Jahrbuch der Europäischen Integration* 2019, 165, 167.

¹⁷⁸ *Müller Gómez/Thieme*, *Die Europawahl 2019*, 181, 188; *Hofmann*, *Jahrbuch der Europäischen Integration* 2019, 109, 111.

legal protection guaranteed in Article 19 TEU.¹⁷⁹ The legal consequence sought is the ex tunc-annulment of the contested act.¹⁸⁰

Both the former candidate and the European citizens could be actively legitimised as natural persons under Article 263 (4) TFEU. Moreover, according to this law, natural persons can only attack, if the acts affect them directly and individually, therefore they are named non-privileged plaintiffs.¹⁸¹ Consequently, proof on an individual interest in legal protection must be provided at the time the action for annulment is filed.¹⁸²

Article 263 (1) TFEU formulates the various causes of action in an action for annulment. Since the central act for the election of the President of the Commission lies in the election by the European Parliament, and the latter on the whole opposes the *Spitzenkandidaten* principle if it elects another nominated candidate, as it has happened in 2019, the action for annulment has to be directed against the election by the European Parliament. For this purpose, however, the election of the Commission President must also have a legal effect vis-à-vis third parties. In such a case, the plaintiff would be individually concerned, according to the established case law of the CJEU, if “*the decision affects him/her on account of certain personal characteristics or special circumstances which distinguish him/her from all other persons and therefore individualises him/her in a manner similar to an addressee*”¹⁸³. It is therefore questionable whether the election or non-election of a candidate as President of the European Commission triggers such a legal effect. Under Article 263 (1) TFEU this act must produce binding legal effects affecting the interests of the plaintiff by interfering with their legal position.¹⁸⁴ For the creation of binding legal effects, it is necessary that a measure definitively establishes the author’s position, as distinguished from a mere intention of an institution to behave in a certain way.¹⁸⁵ Mere factual effects and disadvantages, especially of an economic nature of an act or

¹⁷⁹ Mayer/Stöger-Lengauer, 176. Lfg., Artikel 263, Rn.3; Lenz/Borchardt, 6. Auflage, Artikel 263, Rn.1.

¹⁸⁰ Mayer/Stöger-Lengauer, 176. Lfg., Artikel 263, Rn.4; Lenz/Borchardt, 6. Auflage, Artikel 263, Rn.2.

¹⁸¹ Mayer/Stöger-Lengauer, 176. Lfg., Artikel 263, Rn.16.

¹⁸² Mayer/Stöger-Lengauer, 176. Lfg., Artikel 263, Rn.24.

¹⁸³ so called “Plaumann formula”, Case C-25/62, *Plaumann v Commission*, 213.

¹⁸⁴ Mayer/Stöger-Lengauer, 176. Lfg., Artikel 263, Rn.35.

¹⁸⁵ Mayer/Stöger-Lengauer, 176. Lfg., Artikel 263, Rn.36 f.

decision are not sufficient to prove a legal effect.¹⁸⁶ In contrast, the rejection of a request for action by an EU body may be considered insofar as there is a corresponding obligation to act.¹⁸⁷ A challengeable legal act may also consist of atypical acts that introduce new obligations and are therefore intended to produce legal effects towards their addressees.¹⁸⁸ On the subject of the *Spitzenkandidaten* arrangement, it is therefore questionable whether the election of the President of the Commission constitutes a legal effect according to Article 263 TFEU and whether the Parliament has had a legally binding obligation for compliance with the *Spitzenkandidaten* principle in 2019 towards the effected *Spitzenkandidat* and the EU electorate.

An election is not a legal action in the sense of European primary or secondary law. Instead, it is an act with legal effects. This is because every election has a direct legal consequence, which is decided by the majority. The same applies to the election of the President of the Commission. The direct consequence of the election of the candidate proposed by the European Council is their appointment as President of the Commission. This consequence also has an indirect effect on third parties. On the one hand, the candidate elected by a majority under the *Spitzenkandidaten* principle in the European election has not been appointed Commission President. On the other hand, the electorate has cast its democratic vote under a different guiding principle, assuming that they will influence the election of the Commission Presidency with their vote. In this respect, it is reasonable, to assume a legal responsibility of the European Parliament towards the nominated top candidates and the European electorate to adhere the *Spitzenkandidatenprinzip*.

This conclusion gets enhanced by an inter-institutional agreement between the European Parliament and the European Commission on 17 February 2018, which, among other things, provides for the possibility for Commissioners to be nominated as lead candidates for the election of the Commission President by the European party families, explicitly using the word *Spitzenkandidaten*.¹⁸⁹ With the Treaty of Lisbon, the inter-institutional cooperation of the EU institutions involved in legislation was codified in primary law in the form of inter-institutio-

¹⁸⁶ Case C-543/79, *Birke v Commission*, 2669; Lenz/Borchardt, 6. Auflage, Artikel 263, Rn.11.

¹⁸⁷ Case C-246/81, *Lord Bethel v Commission*, 2277; Lenz/Borchardt, 6. Auflage, Artikel 263, Rn.11.

¹⁸⁸ Case T-258/06, *Germany v Commission*, II-2027; Lenz/Borchardt, 6. Auflage, Artikel 263, Rn.12.

¹⁸⁹ [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018Q0217\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018Q0217(01)&from=EN) - last accessed 08 June 2022.

nal treaties in Article 295 sentence 2 TFEU.¹⁹⁰ Inter-institutional agreements can be characterised as implementing the principle of loyal cooperation between the EU institutions.¹⁹¹ They have the purpose of filling existing gaps in the Treaties.¹⁹² Artikel 295 sentence 2 clarifies that inter-institutional agreements can have a legally binding effect.¹⁹³ However, the question, whether an inter-institutional agreement also has legally binding force must be assessed on a case-by-case basis.¹⁹⁴ Indications for this can be the parties' intention to be legally bound and the scope and binding effect vis-à-vis third parties.¹⁹⁵

The assumption of the legal standing of an MEP who acts as the leading candidate of a European party family seems unlikely overall. This is mainly due to the fact that there is no law that recognises the legal figure of a *Spitzenkandidat* as such. Consequently no rights can be derived from it, since a *Spitzenkandidat*, assuming that s/he must be a MEP can only invoke such rights, which however, would not distinguish them from other MEPs, as the nomination as *Spitzenkandidat* does not confer any additional rights on him or her. The situation is different with regard to the European electorate, which can invoke its electoral rights. The election of the European Parliament in recognition of the *Spitzenkandidaten* principle cannot be compared with election promises made by individual parties, since the Parliament as an institution has decided to feel bound as a whole to adhere to this agreement. Thus, as a consequence of the disregard of the leading candidate principle by the European Parliament, an action for annulment by the European people appears to be admissible and justified.

§ 2.7 Conclusions

The amendment of the wording of Article 17 (7) TEU with the Lisbon Treaty left room for various interpretations, in particular to what extent the European Council should take into account the outcome of the European elections when nominating the Commission President. In parallel, the supranational institutions of the EU, the European Parliament and the European Commission developed the idea of a leading candidate principle for the election of the Com-

¹⁹⁰ Schoo/Görlitz, EU-Kommentar, Article 295, 1.

¹⁹¹ Schoo/Görlitz, EU-Kommentar, Article 295, 3.

¹⁹² Schoo/Görlitz, EU-Kommentar, Article 295, 3.

¹⁹³ Schoo/Görlitz, EU-Kommentar, Article 295, 10.

¹⁹⁴ Schoo/Görlitz, EU-Kommentar, Article 295, 20.

¹⁹⁵ Schoo/Görlitz, EU-Kommentar, Article 295, 22.

mission President. These institutions envisaged this rule as binding for the determination of the new Commission Presidency in 2014 and prepared themselves accordingly. They assumed that the *Spitzenkandidaten* procedure promises a suitable alternative to the previous practice in the election of the Commission Presidency, according to which the European voters have a supposedly more powerful influence in the determination of this central position, thus bringing about a modernisation of the processes and an increased sense of responsibility on the part of the candidates standing for election.

Following the 2014 European elections, the European Council initially argued for using a legalistic interpretation or a strict interpretation of the wording.¹⁹⁶ Under considerable pressure from the European Parliament, however, it nevertheless had to bow to the normative demands of the European Parliament and consequently nominated Juncker as Commission President.¹⁹⁷ The European Parliament elected him with a large majority of 422 votes out of 376 required. In 2019, on the other hand, the European Council did not act as if the new arrangement had already been institutionalised and, after lengthy discussions, finally resisted the Parliament's demand for submission to the *Spitzenkandidaten* principle. In contrast, the European Parliament did not have sufficient strength to oppose the European Council's nomination, entering into an open institutional dispute. The inter-institutional turmoil in the appointment process highlights an ongoing competition between the European Council and the European Parliament for powers and responsibilities, and the question regarding the structure of the European Commission, whether it should be further politicised or remained technocratic.¹⁹⁸ For this reason, the European Council acted out of activated resources and strategies that pushed the decision back to its initial state to exploit the timing and formulate a package deal between competing interests as strategic resources. Its impact is most notably reflected in von der Leyen's election result in 2019, which received only 383 of the required 374 votes.

Article 17 (7) TEU states that the European Council shall "take the European election result into account". The adoption of the Lisbon Treaty and its commitment to the European Council highlights the need to link the vote of European citizens in the European Parliament's elec-

¹⁹⁶ Goldoni, European Law Journal 2016, 280.

¹⁹⁷ Goldoni, European Law Journal 2016, 280, 286.

¹⁹⁸ Schimmelfennig, The Spitzenkandidaten Plot: The European Parliament as a Strategic Competence-Maximizer, www.europedebate.ie/spitzenkandidaten-plot-european-parliament-strategic-competence-maximizer/ - last accessed: 15 June 2022.

tions more closely to the appointment of the President of the Commission.¹⁹⁹ Thus, the wording leaves considerable scope for interpretation, which was exhausted by its application in 2014, just as in 2019.²⁰⁰

§ 3 The Appointment of the President of the European Commission in a historical and legal Context

The TEU regulates the appointment of the President of the European Commission in its Article 17 (7). The wording is as follows:

“Taking into account the elections to the European Parliament and after having held the appropriate consultations, the European Council, acting by a qualified majority, shall propose to the European Parliament a candidate for President of the Commission. This candidate shall be elected by the European Parliament by a majority of its component members. [...]”

The *Spitzenkandidaten* process used for appointing the President of the Commission in 2014 is not included in the literal wording of the relevant section. Within this excerpt, two passages stand out as rather vague requirements for the European Council in the appointment process of the President of the European Commission. On the one hand, the European Council shall *take* the elections to the European Parliament *into account* when nominating a candidate for the Commission Presidency. On the other hand, the European Council must *hold appropriate consultations* for this purpose before the nomination. Something to be taken into account, is defined as *“to consider or remember something when judging a situation”*²⁰¹. Something is appropriate if it is *“suitable or right for a particular situation or occasion”*²⁰². Finally, a consultation is *“a meeting to discuss something or to get advice”*²⁰³. If one fills in the quoted passage with the above definitions, the passage reads as follows:

“Considering or remembering the elections to the European Parliament when judging the appointment of the President of the European Commission, and after having held meetings, which are suitable or right to discuss the appointment of the President of the European Commission, the European Council [...], shall propose to the European Parliament a candi-

¹⁹⁹ Waldherr, EuR 2/2019, 31, 38.

²⁰⁰ von Oндarza, SWP-Aktuell 5/2014, 1, 2.

²⁰¹ Defined by the Cambridge Academic Content Dictionary.

²⁰² Defined by the Cambridge Academic Content Dictionary.

²⁰³ Defined by the Cambridge Academic Content Dictionary.

date for President of the Commission [...].

These abstract formulation of the legislators indicates that the issue of the concrete appointment procedure was left open by law. The concrete implementation is entrusted to the institutional bodies of the EU and their understanding of Article 17 (7) TEU. However, the European Council has still not provided an internal procedure for the nomination of the Commission Presidency. What is striking about this passage is that the European Council is assigned the active position, while the European Parliament, as the receiving body, is given the passive role.

Whether the TEU only assigns the European Council a formal right of a proposal aimed at the *Spitzenkandidaten* procedure at the EU level will be examined based on the historical development of the EU, its institutions, its structure and its cooperation in inter-institutional decision-making. The focus here will be on the appointment procedure of the Commission Presidency, whereby all factors have shaped the current legal situation. Another decisive factor is whether the EU has followed a more intergovernmental or supranational path. Ultimately, the issue is whether the European Parliament has a legal right to influence its nomination.

§ 3.1 General Development of the EU and its Treaties in Light of the Appointment of the President of the European Commission

The roots of the idea of uniting Europe in terms of a common currency and language go back to the Middle Ages and Charlemagne, king of the Franks, Lombards and Romans, also known as *Pater Europae* in the 8th century and his successors. During the Renaissance at the beginning of the 17th century, Duke Maximilien de Béthune had a vision of a union that would create a European balance between fifteen equally strong states as guardians of peace.²⁰⁴ In 1713 Abbé Castel de Saint-Pierre envisioned a federal union of sovereign European states, guided by rationalism and progress.²⁰⁵ This union was intended to counter the absolutist domination of Louis XIV with a permanent alliance through regular meetings in a parliament or congress.²⁰⁶ In his book “Perpetual Peace” of 1795, the German philosopher Immanuel Kant envisages a “federative organisation of Europe with republican states”.²⁰⁷ Subsequently, other

²⁰⁴ Pfetsch/Beichelt, Die Europäische Union: Geschichte, Institutionen, Prozesse, 16.

²⁰⁵ Pfetsch/Beichelt, Die Europäische Union: Geschichte, Institutionen, Prozesse, 16.

²⁰⁶ Pfetsch/Beichelt, Die Europäische Union: Geschichte, Institutionen, Prozesse, 16.

²⁰⁷ Müller-Graff, EuR - Beiheft 2 2015, 149, 153.

philosophers such as Henri de Saint-Simon (1814) and Victor Hugo (1849) also paint the picture of a reorganised European society as a unitary state. An early model of international government was designed at the Congress of Vienna in 1815 to give Europe order after the defeat of Napoleon.²⁰⁸ The League of Nations, founded in 1920, aimed to ratify a new territorial division of Europe.²⁰⁹ The internationalists believed in cooperation between nations to be promoted through scientific and economic progress.²¹⁰ In the years between the two world wars, the processes of European unification came to the fore, especially in the Pan-European movement conceived by Count Richard Coudenhove-Kalergi and Aristide Briand's Plan for Europe in 1929, which, however, could not be realised due to the world economic crisis in the same year.²¹¹

After the immense destruction and trauma of the Second World War, only thirty years after the equally devastating First World War, European leaders had to understand that the old system of state egoism had created this catastrophe. While two victorious powers, the USA and the USSR, were rising, Europe remained morally, economically and politically at the bottom. Two facts that favoured European unification were, therefore, the destruction of the European countries and the ambition to become a world power again, as a "third power" on a par with the USA and the USSR,²¹² to prevent a third world war with the possibility of destruction of all human life.²¹³ Europe wanted a new self-image of a democratically constituted Europe.²¹⁴ On 19 September 1946, former British Prime Minister Winston Churchill called for the formation of a United States of Europe in a speech at the University of Zurich.²¹⁵ He also chaired the Congress of Europe in The Hague from 7 to 10 May 1948, which brought European interest groups and trade unions together to map out a future united Europe.²¹⁶ Such caesuras

²⁰⁸ *Mazower*, *Die Welt regieren*, 10; *Müller-Graff*, *EuR - Beiheft 2 2015*, 149, 152.

²⁰⁹ *Mazower*, *Die Welt regieren*, 12.

²¹⁰ *Mazower*, *Die Welt regieren*, 128.

²¹¹ *Bajon*, *Europapolitik "am Abgrund"*, 24.

²¹² *Patel* classifying the establishment of the "third force" as unrealistic in *Projekt Europa*, 30.

²¹³ *Ioannou-Naoum-Wokoun/Ruelling*, *The European Union: History, Institutions, Law, Politics*, 100; *Loth*, *Der Weg nach Europa*, 28; *Patel*, *Projekt Europa*, 26 f..

²¹⁴ *Weidenfeld*, *Europa von A bis Z 2021*, 11.

²¹⁵ *Bajon*, *Europapolitik "am Abgrund"*, 24; *Weidenfeld*, *Europa von A bis Z 2020*, 11, 12.

²¹⁶ *Dehousse/Magnette*, *The Institutions of the European Union 2017*, 30, 32.

supported the idea that a European constitutional assembly should be convened to lay down the ground rules for relations between European countries. The demand for the transfer of sovereignty rights to European organisations was a widespread belief at the time.²¹⁷ Therefore, on 5 May 1949, the Council of Europe was founded.²¹⁸ It was a time when, in response to the economic and social dilemmas of the decades of world wars, genocides and expulsions, a variety of international organisations were founded, especially in Western Europe.²¹⁹ In fact, between 1945 and 1948, around one hundred international organisations were established,²²⁰ which grew continuously in the following years and drew on the unification efforts of the 1920s.²²¹ The implementation of these intentions was significantly inspired by the American model, especially their constitution adopted in 1787.²²² However, a split was emerging between the supporters of federal ideas and others, desiring the future of Europe to be realised through intergovernmental relations.²²³

§ 3.2 The Era of the Founding Treaties for a United Europe (1950-1959)

The decisive event for the foundation of a "European Union" was the speech by the former French Foreign Minister Robert Schuman on 9 May 1950, known as the Schuman Declaration, in which he proposed unification of the mining industries of the participating states, thus paving the way for a European federation.²²⁴ Compared to the previous attempts at unification, the Schuman Declaration contained a more modest approach and confined cooperation to a limited area.²²⁵ As a precaution against the perceived German threat, especially against France, political and economic framework conditions had to be created to maintain world

²¹⁷ *Mosler*, Probleme des Europäischen Rechts 1966, 355, 361.

²¹⁸ *Weidenfeld*, Europa von A bis Z 2020, 11, 12.

²¹⁹ *Patel*, Projekt Europa, 23 f.; *Iriye*, Global Community, 39 f.; *Mazower*, Governing the World, 3 f.

²²⁰ *Patel*, Projekt Europa, 24; *Everling*, Principles of European Union Law 2007, 677, 680; *Dehousse/Magnette*, The Institutions of the European Union 2017, 30, 32.

²²¹ *Everling*, Principles of European Union Law 2007, 677, 680.

²²² *Dehousse/Magnette*, The Institutions of the European Union 2017, 30, 32.

²²³ *Dehousse/Magnette*, The Institutions of the European Union 2017, 30, 32; *Weidenfeld*, Europa von A bis Z 2020, 11, 12.

²²⁴ *Everling*, Principles of European Union Law 2007, 677, 680; *Weidenfeld*, Europa von A bis Z 2020, 11, 13.

²²⁵ *Dehousse/Magnette*, The Institutions of the European Union 2017, 30, 32.

peace.²²⁶ The proposal he made in his speech at a time of European reconstruction was to bring together the functions and potentials of the European states in the economic field.²²⁷ This speech was based on the original idea of the influential French entrepreneur Jean Monnet to bring about harmonisation in the control and planning use of coal and steel production between France and Germany to stimulate their economies and bring the Franco-German reconciliation to the fore.²²⁸ A related effect was, above all, Germany's control over coal and steel production to prevent the possibility of another war instigated by Germany since coal and steel are war-relevant industries.²²⁹ Germany and Italy wanted to become equal players in Europe again and restore their prestige.²³⁰ The other countries were hoping for growth and feared being left behind.²³¹ Creating a community would also bring a combined political power between the USA and the USSR and put the historical rivalries aside, especially between France and Germany.²³² In summary, the founding countries pursued the twin goals of lasting peace and growing economic prosperity.²³³

The European countries that founded the ECSC were France, West Germany, Italy, Belgium, the Netherlands and Luxembourg. The Treaty establishing the ECSC was signed in Paris on 18 April 1951 and came into force on 23 July 1952 with the duration of fifty years, Article 97 ECSC Treaty. The founding countries sought economic and political unity and a mutual organisation of European countries and were committed to securing lasting world peace and raising the general standard of living, Recital 5 ECSC Treaty.²³⁴ The founding states agreed on free trade in various core resources such as coal, steel and iron ore, chosen for their industrial and military importance, always bearing in mind the danger of another destructive war.²³⁵

²²⁶ *Weidenfeld*, Europa von A bis Z 2020, 11, 13.

²²⁷ *Weidenfeld*, Europa von A bis Z 2020, 11, 13.

²²⁸ *Ioannou-Naoum-Wokoun/Ruelling*, The European Union: History, Institutions, Law, Politics, 101; *Patel*, Projekt Europa, 30; *Weidenfeld*, Europa von A bis Z 2020, 11, 13.

²²⁹ *Ioannou-Naoum-Wokoun/Ruelling*, The European Union: History, Institutions, Law, Politics, 101; *Weidenfeld*, Europa von A bis Z 2020, 11, 13.

²³⁰ *Nicolaysen*, Europarecht I, 25 f; *Weidenfeld*, Europa von A bis Z 2020, 11, 13.

²³¹ *Nicolaysen*, Europarecht I, 25 f.

²³² *Ioannou-Naoum-Wokoun/Ruelling*, The European Union: History, Institutions, Law, Politics, 101.

²³³ *Piattoni*, The European Union 2015, 3, 7; *Weidenfeld*, Europa von A bis Z 2021, 11.

²³⁴ *Nicolaysen*, Europarecht I, 25 f.

²³⁵ *Nicolaysen*, Europarecht I, 25 f.

Against the backdrop of the ongoing Cold War between Eastern and Western Europe, which had begun in the 1950s, the EDC was created between the Member States of the ECSC, providing for a joint army to be led by a new supranational defence minister.²³⁶ The European Political Community, launched by the six foreign ministers of the ECSC Member states, was to expand the existing ECSC and eventually evolve into a federal government for Europe, dealing, among other things, with issues of common defence and common foreign policy, but also with a common standard of living.²³⁷ The draft of the Treaty on the European Political Community was unanimously adopted by the ECSC Assembly in March 1953.²³⁸ The treaties establishing the EDC and the European Political Community were later rejected due to disagreements over the extent of the cessions of national sovereignty.²³⁹

The heads of state and government of the six Member States sought “full integration” to eventually create a single Community-wide environment for economic prosperity and stability.²⁴⁰ At the Conference of ECSC Foreign Ministers in Messina on 1-2 June 1955, it was decided to continue negotiations on a broader integration of the Member States.²⁴¹ Sometime later, on 25 March 1957, the same Member States concluded the EEC Treaty and the EAEC Treaty in Rome, following the ECSC’s draft, which entered into force on 1 January 1958 and is also known as the Treaties of Rome.²⁴² These two new Communities formed an arrangement together with the ECSC. They each had their own Council and Commission (called the “High Authority” in the case of the ECSC), although they had a joint Assembly and a joint Court of Justice. The objectives of the EEC Treaty were set out in its preambles, such as bringing the peoples of Europe closer together, focusing on economic and social progress and improving living and employment conditions. The EEC was designed to ensure the balance and harmonious development of national economies and protect and strengthen peace through the union

²³⁶ *Weidenfeld*, Europa von A bis Z 2020, 11, 13.

²³⁷ *Gillingham*, Coal, steel, and the rebirth of Europe, 314; *Dehousse/Magnette*, The Institutions of the European Union 2017, 30, 33; *Weidenfeld*, Europa von A bis Z, 11, 13.

²³⁸ *Weidenfeld*, Europa von A bis Z 2020, 11, 14.

²³⁹ *Dehousse/Magnette*, The Institutions of the European Union 2017, 30, 33.

²⁴⁰ *Gillingham*, Coal, steel, and the rebirth of Europe, 299; *Weidenfeld*, Europa von A bis Z 2020, 11, 14.

²⁴¹ *Weidenfeld*, Europa von A bis Z 2020, 11, 14.

²⁴² *Weidenfeld*, Europa von A bis Z 2020, 11, 14.

of economic powers.²⁴³ Thus, the EEC sought to create a common market based on the free movement of goods, persons, capital and services.²⁴⁴ According to Article 8 No.1 of the EEC Treaty, this common market was to be established during a transitional period of twelve years, during which the economic policies of the Member States were to be gradually approximated. In this way, tariffs or barriers to the flow of labour and goods should be removed to achieve continued economic growth and avoid the protectionist policies of the pre-war period.²⁴⁵ The EAEC was to coordinate the supply of fissile material and the research programmes initiated or progressed by the Member States for the peaceful use of nuclear energy.²⁴⁶ Its objectives also included the rapid establishment and development of nuclear industries.²⁴⁷

The first session of the European Parliament was held in Strasbourg on 19 March 1958, with Robert Schuman elected President of the Assembly. With the creation of the EEC, the Assembly decided to call itself the European Parliament, which was reluctantly accepted by the EEC Member States and was only officially confirmed in the EEA in 1985.²⁴⁸ The supranational character of the Joint Assembly was underlined by the fact that the deputies decided to take their seats along party lines instead of organising parliamentary seating according to the national representations.²⁴⁹

§ 3.2.1 Legal Regulation of the Election of the High Authority's President in the Founding Treaties

The ECSC set up the High Authority under Article 8 of the ECSC Treaty to pursue its founding objectives. The High Authority was to act supranational as the executive and principal legislative body, Article 9 (5) and (6) ECSC Treaty. It was also empowered to take decisions

²⁴³ *Moravcsik*, *The Choice for Europe*, 86; *Patel*, *Projekt Europa*, 36; *Weidenfeld*, *Europa von A bis Z* 2020, 11, 14.

²⁴⁴ *Moravcsik*, *The Choice for Europe*, 86; *Patel*, *Projekt Europa*, 36; *Weidenfeld*, *Europa von A bis Z* 2020, 11, 14; *Müller-Graff/Kainer*, *Europa von A bis Z* 2020, 645, 646.

²⁴⁵ *Moravcsik*, *The Choice for Europe*, 86.

²⁴⁶ *Weidenfeld*, *Europa von A bis Z* 2020, 11, 15.

²⁴⁷ *Weidenfeld*, *Europa von A bis Z* 2020, 11, 15.

²⁴⁸ *Hix/Noury/Roland*, *Democratic Politics in the European Parliament*, 12; *Maurer*, *Europa von A bis Z* 2020, 255, 256.

²⁴⁹ [https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637959EPRS_BRI\(2019\)637959_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637959EPRS_BRI(2019)637959_EN.pdf) - last accessed: 13 June 2022.

creating a common market for coal and steel.²⁵⁰ The new approach of the ECSC was made clear as the supranational CJEU was endowed with the power to enforce European law.²⁵¹ Nevertheless, the Member States' need to participate was taken into account so that an inter-governmental Council of Ministers, consisting of members of the Member State governments, was set up to balance the supranational and intergovernmental interests of the Community.²⁵² The Council of Ministers had to "*exercise its powers in the cases provided for and in the manner set out in this treaty*" (Article 26 (1) ECSC Treaty), e.g. the legislative power. To ensure the organisation of the market, the Member States were to transfer state competencies in the coal and steel sectors to this High Authority, Article 67 No.1 ECSC Treaty. The Assembly functioned only as an advisory and supervisory body compared to national parliaments.²⁵³ It was composed of representatives sent by the national parliaments of the Member States and representing "the people of the Member States of the Community" according to Articles 20, 21 No.1 ECSC Treaty.²⁵⁴ It met for its first meeting on 10 September 1952.²⁵⁵

According to Article 10 ECSC Treaty, the High Authority should have been composed of nine members appointed for six years. Eight of these members were supposed to be elected by the Member States, who should then jointly name the ninth member (Article 10 ECSC Treaty). Under Article 11 ECSC Treaty, the President and Vice-President of the High Authority had to be appointed from its nine members for two years.

In general, the Treaties of Rome knew the same institutions as the ECSC Treaty. Under the respective Treaties, the EEC (Article 137 EEC Treaty) and EAEC (Article 107 EAEC Treaty) Assemblies should have exercised advisory and supervisory powers and were merged into one Assembly for the three Communities. The procedure for appointing representatives was left to the Member States, Article 138 No.1 EEC Treaty and Article 108 No.1 EAEC Treaty. The As-

²⁵⁰ *Hodson/Peterson*, The Institutions of the European Union 2017, 1, 7.

²⁵¹ *Hodson/Peterson*, The Institutions of the European Union 2017, 1, 7.

²⁵² *Nicolaysen*, *Europarecht I*, 25 f; *Hodson/Peterson*, The Institutions of the European Union 2017, 1, 7.

²⁵³ *Ioannou-Naoum-Wokoun/Ruelling*, The European Union: History, Institutions, Law, Politics, 101; *Hodson/Peterson*, The Institutions of the European Union 2017, 1, 7; *Maurer*, *Europa von A bis Z* 2020, 597.

²⁵⁴ *Ioannou-Naoum-Wokoun/Ruelling*, The European Union: History, Institutions, Law, Politics, 101; *Hodson/Peterson*, The Institutions of the European Union 2017, 1, 7; *Maurer*, *Europa von A bis Z* 2020, 597.

²⁵⁵ *Hix/Noury/Roland*, *Democratic Politics in the European Parliament*, 12.

sembly had the power to dismiss the entire High Authority by a vote of no confidence under Article 144 EEC Treaty and Article 114 EAEC Treaty.²⁵⁶ The Council, on the other hand, was responsible for coordinating the general economic policies of the Member States and had the power to take respective decisions under the Treaty of Rome.

In opposition to the ECSC Treaty, the Treaties of Rome introduced the Commission instead of a High Authority in Article 4 No.1 of the EEC Treaty and Article 3 No.1 of the EAEC Treaty. The Commission is established in section 3 of the Rome Treaties as an institution with independent powers and mutual responsibility, Article 155 EEC Treaty and Article 124 EAEC Treaty. According to these provisions, the Commission had to “promote the general interest of the Union and take appropriate initiatives to that end”.²⁵⁷ This wording left many grey areas to be interpreted by the Commission President and the College of the Commission.²⁵⁸ The Commission was also envisaged as the guardian of the Treaties, as set out in Article 169 EEC Treaty and Article 141 EAEC Treaty, as it had to control the Member States in fulfilling their obligations and, if not, referring them to the CJEU. According to Article 157 EEC Treaty, the EEC Commission should have consisted of 17 members, and according to Article 126 No.1 EAEC Treaty, the EAEC Commission should have consisted of five members, the number of which, however, could be changed by unanimous decision of the Council. The members of the Commission were to be appointed by the governments of the Member States by common accord for four years, Article 158 EEC Treaty and Article 127 EAEC Treaty.²⁵⁹ As in the ECSC Treaty, the President and Vice-President of the Commission were appointed from among the Commissioners for two years, Article 161 EEC Treaty and Article 130 EAEC Treaty. However, in the case of the Vice-Presidents of the EEC Commission, the Council could amend the provisions, Article 161 EEC Treaty. Overall, while the ECSC Treaty contained detailed provisions (*traité loi*), the EEC Treaty left broad powers to act (*traité cadre*), thus requiring interpretations.²⁶⁰

²⁵⁶ Hix/Noury/Roland, *Democratic Politics in the European Parliament*, 13; Héritier, *Explaining Institutional Change in Europe*, 139.

²⁵⁷ Endo, *The Presidency of the European Commission under Jacques Delors*, 38.

²⁵⁸ Endo, *The Presidency of the European Commission under Jacques Delors*, 38.

²⁵⁹ Hix/Noury/Roland, *Democratic Politics in the European Parliament*, 15.

²⁶⁰ Patel, *Projekt Europa*, 37.

§ 3.2.2 Conclusions

The catastrophes of the twentieth century were the catalyst for creating the European Communities and thus for establishing a supranational Europe.²⁶¹ “Supranational” was a term used in the ECSC Treaty to describe the newly established institutions, such as the High Authority and the CJEU, which were not bound by the state.²⁶² Under the guise of the post-war economy, the founding states of the European Communities sought lasting peace. The comprehensive aspiration is visible in the introductory remarks of the treaties and, on the other hand, in the envisaged duration of the treaties.

This aspiration is also evident in the unique establishment of institutions and their interconnection, namely the Assembly, the High Authority and the Council of Ministers. The Schuman Plan aimed, above all, to install the “High Authority” as a new and unique institution on European territory, independent of governments and private interests.²⁶³ Jean Monnet, President of the High Authority until 1954, described the “High Authority” as “the symbol of the founding community”, which was to embody independent responsibility and not consist of government representatives.²⁶⁴ Its competence would theoretically result from a fusion of sovereign rights transferred to the High Authority.²⁶⁵ The question of democratic control of the High Authority’s actions should be resolved by a joint Assembly composed of parliamentary representatives of the Member States, to which the High Authority should be accountable and submit an annual report.²⁶⁶ The Council of Ministers was to coordinate the policies of the High Authority and the Member States and bring them together under the legal framework of the ECSC.²⁶⁷ The ECSC thus moved away from the traditional model of international organisations in which the institutions created by the government representatives of the Member States acted as the sole legislative bodies.²⁶⁸

It is visible that the appointment of the High Authority was explicitly reserved for the agree-

²⁶¹ *Everling*, Principles of European Constitutional Law 2007, 677, 679.

²⁶² *Dehousse/Magnette*, The Institutions of the European Union 2017, 30, 32.

²⁶³ *Mosler*, Probleme des Europäischen Rechts 1966, 355, 356.

²⁶⁴ *Mosler*, Probleme des Europäischen Rechts 1966, 355, 364.

²⁶⁵ *Mosler*, Probleme des Europäischen Rechts 1966, 355, 356.

²⁶⁶ *Mosler*, Probleme des Europäischen Rechts 1966, 355, 364.

²⁶⁷ *Schrans*, Dreißig Jahre Gemeinschaftsrecht 1983, 19, 21.

²⁶⁸ *Nicolaysen*, Europarecht I, 25 f.

ment of the heads of state and government, while the Assembly had no right to appoint the Commission.²⁶⁹ However, the High Authority was primarily accountable to and controlled by the Joint Assembly, in that this institution could criticise the High Authority as a whole. The independence of the ECSC was affirmed in particular by its founding father, Jean Monnet, in that it was a sovereign power, answerable not to the states that created it but only to the European Assembly elected by national parliaments and to the CJEU.²⁷⁰

On the one hand, the governments of the Member States were very concerned about the competencies of the new European institutions, but on the other hand, they had to create a political system strong enough to enforce the common political goals. For this reason, they extended the scope of European cooperation and created the European Communities. The ECSC had thus proved its worth in previous years.

The supranational institutions of the European Communities received a mixture of agency and trusteeship functions, depending on the role they had to fulfil.²⁷¹ In this light, it should be noted that the High Authority was the central institution of the newly established European Communities, and the competencies and tasks of the Joint Assembly and the Council of Ministers were aligned with the functionality of the High Authority. Therefore, the Joint Assembly of the 1950s cannot be understood as a parliament in the general sense, since its legal function was not to initiate measures but to control the High Authority. Nevertheless, the treaties codify from the outset a considerable dependence on and a need for substantive cooperation between the High Authority and the Joint Assembly. These cautious regulations underline the desire for supranational actions for the functioning of the European Communities, as the Assembly's supervision and control rights could have been withheld by the Member States in the first place to guarantee an intergovernmental design of the newly founded communities.

§ 3.3 Consolidation Phase despite immense Challenges (1960-1968)

The creation of the ECSC, the EEC and the EAEC ushered in a period of economic growth as European countries no longer levied customs duties in trade between each other.²⁷² On the

²⁶⁹ *Héritier*, Explaining Institutional Change in Europe, 139; *Héritier/Meissner/Moury/Schoeler*, European Parliament Ascendant, 62.

²⁷⁰ *Gillingham*, Coal, steel, and the rebirth of Europe, 313.

²⁷¹ *Rasmussen*, The History of the European Union 2009, 34, 45.

²⁷² *Weidenfeld*, Europa von A bis Z 2020, 11, 15.

other hand, the consolidation of the European Communities over time prompted the European institutions, especially the Joint Assembly, to seek further development.

On 17 May 1960, the members of the European Parliamentary Assembly had adopted an agreement on the election of the Assembly by universal suffrage. In addition, the Faure Report of November 1960 on the forthcoming Merger Treaty called for the establishment of the Commission by the Parliament.²⁷³ Two years later, on 30 March 1962, the European Parliamentary Assembly adopted a resolution officially renaming itself as European Parliament to strengthen its powers. It also exerted pressure towards an extension of the consultation procedure and called for that in “all important problems”, which was realised in 1964.²⁷⁴ Nevertheless, the Council did not follow their opinion on their legislative proposal.²⁷⁵ In 1965 the Member States agreed to merge the three existing European Communities, the ECSC, the EEC and the EAEC, without changing their competencies.²⁷⁶ Subsequently, the Merger Treaty was signed on 8 April 1965 and entered into force on 1 July 1967, with the express intention of creating a joint permanent civil service, as stated in the preamble. This merger of the European Communities was momentous for the distribution of the European institutions particularly, as there was now only one Commission President.

The Treaty of Rome and the Agricultural Regulations of January 1962 established the link between agricultural financing and the creation of independent revenues for the European Communities.²⁷⁷ Creating this own revenue of the European Communities led politically and legally to a strengthening of the European Parliament since the rights of control would extend to its management.²⁷⁸ This proposal, drafted in 1965 by Walter Hallstein, then President of the EEC Commission, aimed at developing the Communities’ financial resources independent of the Member States.²⁷⁹ It gave additional budgetary powers to the European Parliament and

²⁷³ *Héritier*, Explaining Institutional Change in Europe, 139.

²⁷⁴ *Héritier*, Explaining Institutional Change in Europe, 71.

²⁷⁵ *Héritier*, Explaining Institutional Change in Europe, 71.

²⁷⁶ *Dehousse/Magnette*, The Institutions of the European Union 2017, 30, 33.

²⁷⁷ *Bajon*, Europapolitik “am Abgrund”, 53.

²⁷⁸ *Bajon*, Europapolitik “am Abgrund”, 53.

²⁷⁹ *Mittag/Wessels*, Aufbruch zum Europa der zweiten Generation 2004, 3, 7; *Dehousse/Magnette*, The Institutions of the European Union 2017, 30, 34.

assigned a more prominent role to the EEC Commission.²⁸⁰ This package of proposals was adopted by the Commission on 15 March 1965 without the approval of the two French Commissioners.²⁸¹ On 24 March 1965, the Commission presented it to Parliament for the first time.²⁸² On 1 January 1966, the transition to the third stage of the transitional period for establishing the Common Market was to take place through the introduction of QMV in the Council.²⁸³ According to Article 148 No.2 of the EEC Treaty, the Council could decide by a qualified majority on crucial issues such as agricultural prices, trade policy, transport and capital movements.²⁸⁴ The package also aimed to create a broader system of independent financing, known as ‘own resources’, for the European Communities.²⁸⁵ Consequent to these developments, France announced on 1 July 1965 that it would not attend the Council meetings as it did not agree with the negotiations on the financing of the CAP and the extension of the powers of the EEC Commission and the European Parliament.²⁸⁶ This proposal would have put the Commission as mediator between the Council and the Parliament in the budgetary procedure.²⁸⁷ The Parliament would then have had the right to amend the budget decided by the Council if the Commission confirmed this and five out of six Council members did not vote against it.²⁸⁸ France disagreed with this development, which was considered an unacceptable renunciation of sovereignty.²⁸⁹ De Gaulle pursued a policy of European state union or confederation while reversing supranational aspirations.²⁹⁰ For him, the Commission was a

²⁸⁰ *Moravcsik*, *The Choice for Europe*, 159.

²⁸¹ *Palayret*, *Visions, Votes and Vetoes 2006*, 45, 52.

²⁸² *Palayret*, *Visions, Votes and Vetoes 2006*, 45, 52; *Ludlow*, *Visions, Votes and Vetoes 2006*, 79, 80.

²⁸³ *Mittag/Wessels*, *Aufbruch zum Europa der zweiten Generation 2004*, 3, 7; *Weidenfeld*, *Europa von A bis Z 2020*, 11, 16.

²⁸⁴ *Moravcsik*, *The Choice for Europe*, 160; *Wallace/Winand*, *Visions, Votes and Vetoes 2006*, 21, 29.

²⁸⁵ *Palayret*, *Visions, Votes and Vetoes 2006*, 45, 52 f.; *Baquero Cruz*, *Visions, Votes and Vetoes 2006*, 251, 254.

²⁸⁶ *Wallace/Winand*, *Visions, Votes and Vetoes 2006*, 21; *Baquero Cruz*, *Visions, Votes and Vetoes 2006*, 251, 254; *Palayret*, *Visions, Votes and Vetoes 2006*, 45, 53; *Ludlow*, *Visions, Votes and Vetoes 2006*, 79, 85..

²⁸⁷ *Palayret*, *Visions, Votes and Vetoes 2006*, 45, 55.

²⁸⁸ *Palayret*, *Visions, Votes and Vetoes 2006*, 45, 55.

²⁸⁹ *Moravcsik*, *The Choice for Europe*, 177.

²⁹⁰ *Moravcsik*, *The Choice for Europe*, 177; *Palayret*, *Visions, Votes and Vetoes 2006*, 45, 47; *Mittag/Wessels*, *Aufbruch zum Europa der zweiten Generation 2004*, 3, 7 f.; *Dehousse/Magnette*, *The Institutions of the European Union 2017*, 30, 34.

purely technocratic institution of bureaucrats and experts without democratic legitimacy, which should consequently be at the service of the governments of the Member States.²⁹¹ In this sense, de Gaulle criticised Hallstein for having drawn up the budget proposal without prior consultation with the governments of the Member States and accused him of behaving like a head of state.²⁹² As he was against European federalism, de Gaulle opposed the accession of Britain to the Communities.²⁹³ The resulting so-called ‘empty chair crisis’ meant that the EEC was effectively stymied for seven months by the actions of a single Member State.²⁹⁴ As France finally agreed to resume negotiations, meetings were held in Luxembourg on 17 and 18 January and 28 and 29 January 1966, with France present and the Commission absent.²⁹⁵ The resulting proposal was a compromise, the so-called ‘Luxembourg Compromise’, which provided that in cases “*where [...] very important interests of one or more partners are at stake, the Members of the Council will endeavour [...] to reach solutions which can be adopted by all the Members of the Council while respecting their mutual interests and those of the Community [...].*”²⁹⁶ If such a compromise could not be reached, France demanded compliance with the unanimity rule, which gave the Member State in the minority the right to veto.²⁹⁷ The other Member States adhered to the provisions of the EEC Treaty on majority decisions in the Council, fearing that France could block the Council’s work at any time.²⁹⁸ Given this continuing disagreement, the Member States of the EEC decided that the work of the Council should be resumed to avoid another enduring blockade by France. The document, which fun-

²⁹¹ *Moravcsik*, *The Choice for Europe*, 177; *Palayret*, *Visions, Votes and Vetoes 2006*, 45, 47; *Mittag/Wessels*, *Aufbruch zum Europa der zweiten Generation 2004*, 3, 7 f.; *Dehousse/Magnette*, *The Institutions of the European Union 2017*, 30, 34.

²⁹² *Wallace/Winand*, *Visions, Votes and Vetoes 2006*, 21, 27 f.; *Palayret*, *Visions, Votes and Vetoes 2006*, 45, 53.

²⁹³ *Moravcsik*, *The Choice for Europe*, 177.

²⁹⁴ *Moravcsik*, *The Choice for Europe*, 177; *Wallace/Winand*, *Visions, Votes and Vetoes 2006*, 21; *Dehousse/Magnette*, *The Institutions of the European Union 2017*, 30, 34; *Weidenfeld*, *Europa von A bis Z 2020*, 11, 16.

²⁹⁵ *Baquero Cruz*, *Visions, Votes and Vetoes 2006*, 251, 257.

²⁹⁶ B) 1) of the Luxembourg Compromise; *Moravcsik*, *The Choice for Europe*, 159; *Baquero Cruz*, *Visions, Votes and Vetoes 2006*, 251, 258; *Lahr*, *Europa-Archiv 1983*, 223, 228 f.; *Weidenfeld*, *Europa von A bis Z 2020*, 11, 16.

²⁹⁷ *Schrans*, *Dreißig Jahre Gemeinschaftsrecht 1983*, 19, 24 f.; *Baquero Cruz*, *Visions, Votes and Vetoes 2006*, 251, 258; *Dehousse/Magnette*, *The Institutions of the European Union 2017*, 30, 33; *Weidenfeld*, *Europa von A bis Z 2020*, 11, 16.

²⁹⁸ *Weidenfeld*, *Europa von A bis Z 2020*, 11, 16.

damentally changed the spirit of the EEC Treaty by creating a new mechanism for Member States to put pressure on the Council, does not define the term ‘vital national interest’, nor does it provide for arbitration at cases of disputes.

§ 3.3.1 Legal Adjustments to the Design of the Commission as a Consequence to the Merger Treaty

Under Article 1 Merger Treaty, the Council of the European Communities was to replace the Council of Ministers of the ECSC, the Council of the EEC and the Council of the EAEC, continuing their original functions. Furthermore, according to Article 9 (1) Merger Treaty, a Commission of the European Communities replaced the High Authority of the ECSC and the Commissions of the EEC and the EAEC and exercised the powers and responsibilities conferred to these bodies by the Treaties establishing them, Article 9 (2) Merger Treaty.

However, the merger agreement stipulated that the new unified executive bodies would continue to act under those treaties from which they had previously derived their competencies.²⁹⁹ The number of members of the joint Commission was fixed at nine Commissioners. The provisions of the Merger Treaties concerning the appointment of Commissioners, as well as the general structure and functioning of the Commission, were aligned with those of the EEC Treaty. As in the founding Treaties, the members of the Commission of the European Communities should be elected by common accord of the governments of the Member States, Article 11 (1) Merger Treaty. However, in contrast to them, Article 14 (1) Merger Treaty calls for three Vice-Presidents of the Commission to be appointed for two years. The leading positions of the Commission should then be determined from the ranks of the Commissioners. The political accountability of the Commission to the Parliamentary Assembly, was modelled under the EEC and the EAEC Treaties. According to Article 15 of the Merger Treaty, the European Council and the European Commission should consult each other and regulate the manner of their cooperation.³⁰⁰

§ 3.3.2 Conclusions

In the early 1960s, the Joint Assembly initiated steps towards establishing a parliament and parliamentary structures in the European Communities by independently changing its name to

²⁹⁹ *Busse*, Die völkerrechtliche Einordnung der EU, 17.

³⁰⁰ *Schrank*, Dreißig Jahre Europäisches Gemeinschaftsrecht 1983, 19, 20.

the European Parliament and calling for parliamentary elections. Moreover, when the Commission, under the leadership of Walter Hallstein, intended to confer budgetary rights on the Joint Assembly, France's expectations of a European economic confederation were exceeded, so that President de Gaulle reacted with the 'empty chair crisis', and de facto blocked the work of the Council of Ministers. As a result, the ongoing process of supranationalisation within the EEC was slowed down. Thus, France initiated a questioning and reviewing of the entire supranational system, resulting in further cooperation between confederated and sovereign nation-states.³⁰¹ Walter Hallstein was an ambitious president of the then High Authority who wanted to establish it as the equivalent of national administrations and described himself as a 'European prime minister'.³⁰² However, the 'empty chair crisis' has shown that any measure that disturbs the balance between supranational and intergovernmental elements will be opposed by at least one Member State.³⁰³ The Luxembourg Compromise has, perhaps unintentionally, reinforced this approach for the future, thus shifting power from the Commission to the Council of Ministers, i.e. to the Member States. In summary, this agreement established something like a "de facto commitment" to the will of the individual Member States being created in favour of an intergovernmental approach, as the principle of unanimity was maintained. Although the other five Member States did not accept that the French use of a veto violated the legal and institutional structure of the EEC by unilaterally blocking the work of the Community, France did not suffer any consequences for its actions as a result.³⁰⁴

The stalemate in the Council also weakened the Joint Assembly, which had to monitor the Commission's legislation.³⁰⁵ The Member States devalued the Assembly by denying it the right to deliberately decide on its institutional name by not including the name 'European Parliament' in the codification of the Merger Treaty coming into force. However, the outlook into future parliamentarisation could be seen in the fact that the Assembly's two Furler Reports of 1963 and 1972, like the Faure Report, relentlessly called for the parliamentary nomination of Commissioners, albeit from a list submitted by the Member States' governments.³⁰⁶

³⁰¹ *Bajon*, *Europapolitik* "am Abgrund", 356.

³⁰² *Peterson*, *The European Commission 2006*, 502, 504.

³⁰³ *Dehousse/Magnette*, *The Institutions of the European Union 2017*, 30, 34.

³⁰⁴ *Rasmussen*, *The History of the European Union 2009*, 34, 48.

³⁰⁵ *Craig/Búrca*, *EU Law*, 14; *Dankert*, *Journal of Common Market Studies* 1982, 3.

³⁰⁶ *Héritier*, *Explaining Institutional Change in Europe*, 139.

§ 3.4 First Enlargement of the European Communities (1969-1978)

The decisions the heads of state and government took in The Hague on 1 and 2 December 1969 were central to the further development of the European Communities. The occasion was the end of the twelve years laid down in Article 8 No.1 EEC Treaty on December 31, 1969, when the parties decided to create a financial constitution of the European Communities and thus an economic and monetary union, political cooperation and new accession negotiations, but also to strengthen the budgetary powers of the European Parliament.³⁰⁷ These intentions were developed as part of the conceptual preparations of the Werner Plan and the Davignon Report.³⁰⁸ The foreign policies of the Member States were aimed on being harmonised. Thus, political cooperation by linking the economic integration process with foreign policy was supposed to be reached.³⁰⁹

The Davignon Report of October 27, 1970, served as a response to the question posed in the Communiqué of The Hague about how best to move forward concerning political consensus in light of the upcoming renewal.³¹⁰ In the Davignon Report, the Member States' foreign ministers suggested that governments should decide to cooperate in foreign policy. In addition, they recommended the Commission's involvement to the extent that ministerial action affects Community action. This report can be seen as the first conception of the EPC, acting as a precursor to the second pillar of the Union.³¹¹ In contrast to the Fouchet-Plans, which envisaged loose coordination concerning a joint foreign policy,³¹² the EPC sought to intensify coordination through increasingly frequent meetings of foreign ministers and heads of state and government. According to the Davignon Report, this EPC was to present joint positions of the Member States on significant issues in regular consultations. The Werner Plan called for institutional reforms to transform previous national authorities and institutions into Community institutions and expand the powers of the European Parliament.³¹³

³⁰⁷ *Mittag/Wessels*, *Aufbruch zum Europa der zweiten Generation* 2004, 3, 13.

³⁰⁸ *Mittag/Wessels*, *Aufbruch zum Europa der zweiten Generation* 2004, 3, 15.

³⁰⁹ *Jansen*, *Mainzer Beiträge zur Europäischen Einigung* 1986, 24.

³¹⁰ *Weidenfeld*, *Europa von A bis Z* 2020, 11, 16.

³¹¹ *Busse*, *Die völkerrechtliche Einordnung der Europäischen Union*, 19; *Pechstein/Koenig*, *Die Europäische Union*, 140 f.

³¹² *Bajon*, *Europapolitik "am Abgrund"*, 41; *Weidenfeld*, *Europa von A bis Z* 2020, 11, 15.

³¹³ *Brunn*, *Aufbruch zum Europa der zweiten Generation* 2004, 47, 58.

In a regulation adopted on April 21, 1970, the Council decided to replace the financial contributions of the Member States with the Communities' resources.³¹⁴ The Treaty of Luxembourg, signed on 22 April 1970, stipulates that while the Council continues to have the final say on expenditure necessarily deriving from the Treaties - Chapter II, Article 4 No.8 - the Parliament would have the final say on those spendings not arising from the Treaties, thus transferring to Parliament the corresponding budgetary powers for the Communities' resources. These amendments have raised the question of strengthening the legislative and budgetary powers of the European Parliament.

At its July 22, 1971 meeting, the Commission decides to set up an ad hoc working group of independent experts to study the impact of the extension of Parliament's powers.³¹⁵ In the Vedel Report of March 25, 1972, this working group identified a democratic deficit in the Communities.³¹⁶ It therefore concludes that further development of treaty provisions must be accompanied by strengthening the Parliament.³¹⁷ The report advocated parliamentary elections, although it considers the main reason for Parliament's weakness in its lack of legislative powers and thus its lack of effectivity.³¹⁸ Finally, it calls for the Commission President to be appointed by the Parliament.³¹⁹

On 1 January 1973 Denmark, Ireland and the United Kingdom joined the European Communities. The trigger for this was the economic stagnation of the United Kingdom compared to the European Communities and Denmark and the strong dependence of Denmark and Ireland on Great Britain. At the Paris Summit on 10 December 1974, the heads of state and government considered regular meetings indispensable and therefore decided to meet every six months, thus establishing the institution of the "European Council",³²⁰ legally, however, only

³¹⁴ OJ L 94, 28.4.1970, p. 19-22.

³¹⁵ Chapter IV, Section I (3) Vedel-Report.

³¹⁶ Chapter IV, Section I (2) Vedel-Report.

³¹⁷ Chapter IV, Section I (3), Vedel-Report.

³¹⁸ *Brunn*, *Aufbruch zum Europa der zweiten Generation*, 47, 60.

³¹⁹ *Héritier*, *Explaining Institutional Change in Europe*, 139 f.; *Héritier/Meissner/Moury/Schoeler*, *European Parliament Ascendant*, 62.

³²⁰ *Mourlon-Droul*, *Cold War History* 2010, 315, 317; *Young*, *The Hague Journal of Diplomacy* 2009, 319 f.; *Bulmer*, *Journal of Common Market Studies* 1985, 89, 90 f.; *Dehousse/Magnette*, *The Institutions of the European Union* 2017, 30, 36; *Weidenfeld*, *Europa von A bis Z* 2020, 11, 16.

based on an uncodified and non-binding decision in its communiqué.³²¹ This new formation was commented by former French President Valéry Giscard d'Estaing with, "Le sommet est mort - vive le Conseil européen", thus satisfying the need for a force to pursue higher-level political problems and issues of European integration. Since the heads of states and government were unwilling to give the Community institutions too independent political functions, they formed the European Council.³²² They also decided on strengthening their relations with Parliament, for instance, by increasing its powers of control.³²³ One development was the consultation of the Parliament on Commission proposals by the Council and the Commission before the Council itself examined the draft legislation.³²⁴ In this way, the Parliament was actively involved in the legislative process.³²⁵ The heads of state and government also decided to hold direct elections to the European Parliament, establish the European Regional Development Fund, and create an economic and monetary union. In the meantime, Community institutions became aware that consensus politics were hampering decision-making in the Community.³²⁶

The Treaty amending certain financial provisions of 22 July 1975, significantly strengthened the European Parliament with additional budgetary powers, which led to various conflicts between the European Council and the Parliament.³²⁷ The European Parliament gained political strength through universal and direct suffrage under the Council's decision relating to the act concerning the election of the representatives of the Assembly on September 20, 1976.³²⁸ Furthermore, by the mid-1970s, the Council consulted the Parliament in every legislative pro-

³²¹ *Mourlon-Droul*, Contemporary European History 2016, 409, 410; The European Council was not named as a European institution until the Lisbon Treaty in 2007 *Hodson/Peterson*, The Institutions of the European Union, 1, 4.

³²² *Sasse*, Regierungen, Parlamente, Ministerrat: Entscheidungsprozesse in der Europäischen Gemeinschaft, 212; *Ipsen*, Europarecht 1981, 309, 312 f.

³²³ *Héritier*, Explaining Institutional Change in Europe, 71.

³²⁴ *Héritier*, Explaining Institutional Change in Europe, 71.

³²⁵ *Héritier*, Explaining Institutional Change in Europe, 71.

³²⁶ *Baquero Cruz*, Visions, Votes and Vetoes 2006, 251, 259

³²⁷ *Kommission der Europäischen Gemeinschaften*, 30 Jahre Gemeinschaftsrecht, 21; *Héritier*, Explaining Institutional Change in Europe, 74; *Dehousse/Magnette*, The Institutions of the European Union 2017, 30, 36.

³²⁸ *Kommission der Europäischen Gemeinschaften*, 30 Jahre Gemeinschaftsrecht, 21; *Brunn*, Aufbruch zum Europa der zweiten Generation 2004, 47; *Dehousse/Magnette*, The Institutions of the European Union 2017, 30, 36.

positional.³²⁹ Like the Vedel Report, though more far-reaching, the 1976 Tindemans Report called for the choice for the President of the Commission to be confirmed by voting in Parliament, after being appointed by the European Council.³³⁰ The Tindemans Report further stated that the “[r]ecourse to majority voting in the Council should become normal practice in the Community field”.³³¹ QMV was intended to overcome the uncertainties that had arisen from the results of the ‘empty chair crisis’.³³²

The 1977 London Declaration met the need for detailed written clarification of the internal workings of the European Council.³³³ In doing so, the heads of state and government of the Member States underlined their support and motivation for the newly created institution, the European Council.³³⁴ Looking ahead to the next decade, in December 1978, the European Council established the Committee of “Three Wise Men” to examine and draft the institutions of the EEC, making recommendations for their future development.

§ 3.4.1 Legal Implications of the first Expansion Phase for Institutional Relations

The 1970s were a period of institutional and integrative stagnation due to a severe economic crisis.³³⁵ To strengthen the Parliament, the Commission, based on the instructions of the Vedel Report, proposed far-reaching measures, such as a right of co-decision in the examination of treaties, the admission of new members and the ratification of international agreements, a right of veto in Community matters, the assent of the President of the Commission and, finally, a genuine budgetary right.³³⁶ Threatening an action for failure to act against the European Council, the Parliament also called for holding European elections before the Council summit in Paris in October 1972.³³⁷

³²⁹ *Héritier*, Explaining Institutional Change in Europe, 71.

³³⁰ *Héritier/Meissner/Moury/Schoeler*, European Parliament Ascendant, 62.

³³¹ *Bulletin EC*, 1/76, 31.

³³² *Weidenfeld*, Europa von A bis Z 2021, 11, 19 f.

³³³ *Mourlon-Droul*, Contemporary European History 2016, 409, 421.

³³⁴ *Mourlon-Droul*, Contemporary European History 2016, 409, 421.

³³⁵ *Dehousse/Magnette*, The Institutions of the European Union 2017, 30, 35.

³³⁶ *Brunn*, Aufbruch zum Europa der zweiten Generation 2004, 47, 60.

³³⁷ *Grabitz/Läufer*, Das Europäische Parlament, 217; *Dehousse/Magnette*, The Institutions of the European Union 2017, 30, 36.

On page 8 of the Council's bulletin 12-1974, the Member States stated that it was "necessary to renounce the practice which consists of agreeing on all questions conditional upon the unanimous consent of the Member States [...]".³³⁸ In deciding to meet three times a year, the unofficial European Council composed by the heads of state and government were "recognising the need for an overall approach to the internal problems involved with achieving European unity and the external problems facing Europe" and "consider[ed] it essential to assure the progress and overall consistency in the activities of the Communities in the work on political co-operation".³³⁹ The creation of the European Council was also a reaction to the lack of leadership of the European Commission, which feared conflicts with the Council.³⁴⁰ The 1977 London Declaration distinguished between "informal discussions" and "formal decisions" in terms of European Council decision-making, thus legally underpinning the role of the European Council as a decision-making body with the institutional framework of the EEC.³⁴¹

§ 3.4.2 Conclusions

After the Luxembourg Compromise, European integration in the eyes of the intergovernmentalists meant only multilateral and intrastate cooperation in clear defined areas, especially in the coordination of a European monetary policy.³⁴² As a result, the European Parliament was tolerated only with consultation and limited control rights.³⁴³ The EEC Member States were notably divided on this issue, although France accepted an institution called European Parliament but granted it only with minimal powers, while the other Member States called for general elections to the European Parliament.³⁴⁴ The Gaullist approach was to block both European elections and the extension of powers, supporting the European Parliament.³⁴⁵ Accord-

³³⁸ *Baquero Cruz*, Visions, Votes and Vetoes 2006, 251, 259 f.

³³⁹ Final communiqué of the meeting of heads of government of the Community, Paris, 9-10 Dec. 1974, Bulletin of the European Communities, 1974.

³⁴⁰ *Weidenfeld*, Europa von A bis Z 2020, 11, 16

³⁴¹ *Mourlon-Droul*, Contemporary European History 2016, 409, 421.

³⁴² *Brunn*, Aufbruch zum Europa der zweiten Generation 2004, 47, 50.

³⁴³ *Brunn*, Aufbruch zum Europa der zweiten Generation 2004, 47, 50.

³⁴⁴ *Siegler*, Europäische Politische Einigung 1949-1968. Dokumentation von Vorschlägen und Stellungnahmen, 114 f.

³⁴⁵ *Brunn*, Aufbruch zum Europa der zweiten Generation 2004, 47, 55; *Grabitz/Läuffer*, Das Europäische Parlament, 189.

ding to their argumentation, direct elections to the European Parliament would not make sense because of the lack of essential competencies.³⁴⁶ Moreover, it would be irresponsible to give more powers to an institution that was not directly elected.³⁴⁷ This circular argument presented the European Communities with an insoluble task, which only changed with the election of Valéry Giscard d'Estaing in 1974.

As a consequence of the European Summit in The Hague, the European Parliament was supposed to be given the right to approve the budget draft submitted by the Commission and the Council of Ministers as the final authority and make its own adjustments.³⁴⁸ However, this was rejected by the French government because it would exceed the competencies of the French National Assembly.³⁴⁹ Therefore, it was not until 1970 that the European Parliament was given the power to decide its budget,³⁵⁰ whereas in 1975, the decision-making power on the entire budgetary right over administrative expenditure was added.³⁵¹ The strengthening of the European Parliament took place as a necessary consequence of the Vedel Report, which found a considerable democratic deficit in the European Communities and made a continuous strengthening of the Parliament existential.

In its efforts for more competencies and the introduction of elections to the European Parliamentary, the European Parliament was supported by the European Movement and the European Commission.³⁵² The then Commission President Walter Hallstein saw the European Commission and the European Parliament as allies in their respective exercise of power.³⁵³ This attitude was underlined by the fact that the European Commission submitted an annual action plan to the European Parliament, thus strengthening the Parliament's control over the work of the European Commission.³⁵⁴ On the other hand, the European Parliament assured

³⁴⁶ *Brunn*, Aufbruch zum Europa der zweiten Generation 2004, 47, 55; *Grabitz/Läufer*, Das Europäische Parlament, 189.

³⁴⁷ *Grabitz/Läufer*, Das Europäische Parlament, 189.

³⁴⁸ *Brunn*, Aufbruch zum Europa der zweiten Generation 2004, 47, 57.

³⁴⁹ *Brunn*, Aufbruch zum Europa der zweiten Generation 2004, 47, 57.

³⁵⁰ *Brunn*, Aufbruch zum Europa der zweiten Generation 2004, 47, 57.

³⁵¹ *Brunn*, Aufbruch zum Europa der zweiten Generation 2004, 47, 57.

³⁵² *Brunn*, Aufbruch zum Europa der zweiten Generation 2004, 47, 52.

³⁵³ *Brunn*, Aufbruch zum Europa der zweiten Generation 2004, 47, 52.

³⁵⁴ *Brunn*, Aufbruch zum Europa der zweiten Generation 2004, 47, 52.

the European Commission of increased support in matters concerning the European Communities.³⁵⁵ Accordingly, the demand for Parliament's participation in the appointment of the President of the Commission arose.

During the first enlargement of the European Communities, a common understanding regarding mutual political positions can be discerned in certain areas. Evidence can be seen in the development from the Fouchet Plans to the Davignon Report and the Werner Plan, which called for a joint foreign policy. The associated establishment of the European Council gave the European Communities a higher status. They became a management issue. Thus, the heads of state and government together formed an independent institution alongside the European Parliament and the European Commission. It should be noted that the establishment of the European Council was based on an uncodified agreement of the heads of state and government of the Member States. In preparation for British Prime Minister Margaret Thatcher's first attendance at a European Council meeting in Strasbourg in June 1979, the British Foreign Office summarised in this regard that "the European Council is not an institution set up by the Treaties and its formal status is nowhere very clearly defined - partly to preserve its informality of procedures".³⁵⁶ This informality also carried over to the President of the Commission, who, by actively participating in the Council meetings, de facto assumed the position of a head of government.³⁵⁷ Nevertheless, the unanimity rule and the need for consensus in the European Council would pose a problem for the efficiency of this institutions.

§ 3.5 The Decade of the First European Elections (1979-1989)

The European elections marked a period of strengthening the European Communities' identity and forging more links with Member States and stakeholders.³⁵⁸ Further development of the EC's institutional framework was intended to promote effectiveness and democratic legitimacy of European policies.³⁵⁹ However, the focus remained on economic issues and joint struc-

³⁵⁵ *Brunn*, *Aufbruch zum Europa der zweiten Generation* 2004, 47, 52.

³⁵⁶ FCO breit on European Council, Strasbourg, 21/22 June 1979, 7 June 1979, The National Archives, UK.

³⁵⁷ *Mourlon-Droul*, *Contemporary European History* 2016, 409, 423.

³⁵⁸ *Weidenfeld*, *Europa von A bis Z* 2021, 11, 19.

³⁵⁹ *Weidenfeld*, *Europa von A bis Z* 2021, 11, 19.

tural and foreign policies.³⁶⁰ The year 1979 was a significant turning point concerning the institutional structure of the European Communities and, in particular, increased the importance of the European Parliament.³⁶¹ Until then, the European Parliament was composed of members of the national parliaments of the Member States.³⁶² In June 1979, for the first time, members of the European Parliament were directly elected by the European electorate and thus became their direct representatives, which strengthened the democratic legitimacy of the European Communities.³⁶³

As a result to the Tindemans Report, the European Parliament established a subcommittee on “institutional problems” to study the Parliament’s relations with the Council and the Commission.³⁶⁴ This subcommittee demanded, among other things, that the Commission should first consult the European Parliament on draft legislation before submitting a formal proposal to the Council.³⁶⁵ This strengthening also led to the European Parliament’s rejection of the entire European Communities’ budget, thus creating an institutional conflict.³⁶⁶ The new coordination in the EEC’s financial structure led to an expansion of Parliament’s powers in this regard.³⁶⁷ The subcommittee also proposed a return to QMV instead of unanimity after this had been reversed by the Luxembourg Compromise.³⁶⁸ It called in its 1980 Rey Report for the European Parliament to be entitled to discuss the designated Commission President’s agenda. Furthermore, Parliament should be permitted to cast the final vote on the candidate proposed by the Member States.³⁶⁹ This demand was attributed to the right of censure regarding the Commission’s policy.³⁷⁰ These requirements were taken up in paragraphs 3 and 8 of the ‘European Parliament Resolution on the Relations between the European Parliament and the

³⁶⁰ *Weidenfeld*, *Europa von A bis Z* 2021, 11, 19.

³⁶¹ *Patel*, *Projekt Europa*, 55; *Weidenfeld*, *Europa von A bis Z* 2020, 11, 17.

³⁶² *Hix/Noury/Roland*, *Democratic Politics in the European Parliament*, 13.

³⁶³ *Patel*, *Projekt Europa*, 55; *Weidenfeld*, *Europa von A bis Z* 2020, 11, 17.

³⁶⁴ *Héritier*, *Explaining Institutional Change in Europe*, 72.

³⁶⁵ *Héritier*, *Explaining Institutional Change in Europe*, 72.

³⁶⁶ *Priestley*, *Six Battles that shaped Europe’s Parliament*, 6.

³⁶⁷ *Weidenfeld*, *Europa von A bis Z* 2020, 11, 17.

³⁶⁸ *Héritier*, *Explaining Institutional Change in Europe*, 72.

³⁶⁹ *Héritier*, *Explaining Institutional Change in Europe*, 140.

³⁷⁰ *Héritier*, *Explaining Institutional Change in Europe*, 140.

Commission with the View to the Forthcoming Appointment of a new Commission' in 1980.³⁷¹ It was put into practice when Gaston Thorn, the elected candidate for Commission President, took part in a debate in the European Parliament, which he called 'confirmation hearings'.³⁷²

However, the European elections did not immediately lead to greater de facto parliamentary control over the European Commission and its election.³⁷³ The European Parliament's competence in this matter was limited to the motion of censure, which carried with a set of stringent requirements.³⁷⁴ While the Parliament was empowered to suspend the Commission, it had no competence in appointing the President of the European Commission or the members of its College.³⁷⁵ For this reason, this issue became the subject of negotiations between the European Parliament and the European Council under the presidency of Piet Dankert between 1982 and 1984.³⁷⁶

On 19 June 1983, the Solemn Declaration of Stuttgart was signed by the then ten heads of state or government, providing the parliamentarisation and unification of the EU's institutional system.³⁷⁷ In his speech to the European Parliament on 30 June 1983, after the Stuttgart meeting, Helmut Kohl stressed the need for a dialogue between the European Parliament and the President of the European Commission.³⁷⁸ In doing so, he represented the view of some Member States that the European Commission would gain a certain legitimacy through the participation of the European Parliament in the appointment of the Commission President to strengthen its position in the institutional structure of the EU.³⁷⁹ In addition, the Commission promised to consult the European Parliament more frequently on draft legislation, but without

³⁷¹ *European Parliament*, OJ C 117, 12-05-1980.

³⁷² *Westlake*, *Journal of Common Market Studies* 1998, 431, 438.

³⁷³ *Priestley*, *Six Battles that shaped Europe's Parliament*, 46.

³⁷⁴ *Priestley*, *Six Battles that shaped Europe's Parliament*, 46.

³⁷⁵ *Priestley*, *Six Battles that shaped Europe's Parliament*, 46.

³⁷⁶ *Priestley*, *Six Battles that shaped Europe's Parliament*, 46 f.

³⁷⁷ *Ipsen*, *Europarecht* 1984, 1, 8; *Héritier*, *Explaining Institutional Change in Europe*, 73.

³⁷⁸ *Mourlon-Droul*, *Contemporary European History*, 2016, 409, 424; Official Journal of the European Communities. Debates of the European Parliament. 30.06.1983, no.1-301. "Report by Helmut Kohl to the European Parliament (30 June 1983)", 16-21.

³⁷⁹ *Priestley*, *Six Battles that shaped Europe's Parliament*, 47.

being obliged to accept amendments of the Parliament.³⁸⁰ In 1983, the European Parliament presented a draft treaty on the EU, which provided that the Commission's legislature should coincide with the mandate of the European elections.³⁸¹

Subsequently, the Spinelli-Draft, signed on 14 February 1984, drew up a treaty establishing the EU with a Union constitution.³⁸² In it, Parliament called for a vote of confidence in the Commission in its entirety.³⁸³ This paper brought solutions for inter-institutional conflicts over legislative powers.³⁸⁴ The Dooge-Report of 1984 was intended to examine the reform of European institutions.³⁸⁵ Its final draft, completed in 1985, formed a foundation for the SEA consolidations.³⁸⁶ Part of these consolidations was also the "Draft European Union Treaty", in which the European Parliament argued that it should have a say in the appointment of the Commission President to transform the EU into a parliamentary democracy.³⁸⁷ In this, the Parliament was supported by the Commission Presidency.³⁸⁸ The Milan Summit on 28-29 June 1985 was supposed to decide whether the institutional developments and reforms needed to become part of a new treaty or the existing treaty.³⁸⁹

The enlargement process continued after Greece joined the European Communities in 1981, and Spain and Portugal joined in 1986. The SEA, signed on 17 and 28 February 1986, was a treaty that revised the Treaty of Rome and formed the basis for a six-year programme aimed at solving problems with the free flow of trade across the European Communities' borders, thus creating a "single market".³⁹⁰ For the first time, the European Communities' integration

³⁸⁰ *Héritier*, *Explaining Institutional Change in Europe*, 73.

³⁸¹ *Héritier*, *Explaining Institutional Change in Europe*, 141.

³⁸² *Héritier*, *Explaining Institutional Change in Europe*, 78; *Weidenfeld*, *Europa von A bis Z 2020*, 11, 20; OJ EG, 1984 C 77/33.

³⁸³ *Corbett*, *The Maastricht Treaty*, 20.

³⁸⁴ *Corbett*, *The Maastricht Treaty*, 20.

³⁸⁵ *Gabel/Hix*, *Institutional Challenges of the European Union 2002*, 22, 26.

³⁸⁶ *Gabel/Hix*, *Institutional Challenges of the European Union 2002*, 22, 26.

³⁸⁷ *Gabel/Hix*, *Institutional Challenges of the European Union 2002*, 22, 26.

³⁸⁸ *Corbett*, *The European Parliament's Role in Closer EU Integration*, 241.

³⁸⁹ *Héritier*, *Explaining Institutional Change in Europe*, 81; *Dehousse/Magnette*, *The Institutions of the European Union 2017*, 30, 36; *Weidenfeld*, *Europa von A bis Z 2020*, 11, 21.

³⁹⁰ *Dehousse/Magnette*, *The Institutions of the European Union 2017*, 30, 37; *Weidenfeld*, *Europa von A bis Z 2020*, 11, 20.

objective was enshrined in legally binding primary law of the European Communities.³⁹¹ The SEA, which entered into force on 1 July 1987, marked the first formal but incidental appearance of the European Council in an EEC Treaty, which did not provide details of the functions of this new body (Article 2, Title I).³⁹² Nevertheless, it gave the European Parliament several rights of participation.³⁹³ Finally, in a 1989 resolution, the European Parliament called for the creation of an IGC to establish a political union of the “federal type”.³⁹⁴

§ 3.5.1 Legal Developments of the Institutional Balance in the European Communities

The 1979 report of the “Three Wise Men” formally recognised that the European Council had existed informally under its name for several years and had become indispensable to the general functioning of the Community during that time.³⁹⁵ This view of the centrality of the European Council was confirmed by the Genscher-Colombo initiative for the Draft European Act in November 1981 and the Solemn Declaration on the European Union in 1983, particularly concerning the direction of the European Communities, and its decision-making powers.³⁹⁶

The 1981 newly elected Commission President Gaston Thorn agreed with the European Parliament that the latter should have the right to examine the Commission’s programme and vote on the Commission’s presidency, while the Parliament compiled.³⁹⁷ This attitude marked the beginning of a de facto arrangement whereby the President of the Commission presents his program subject to consultation with Parliament.³⁹⁸

Following discussions on increasing the involvement of the European Parliament, the Council established in paragraph 2.3.5 of the Stuttgart Declaration that the Council Presidency would consult the European Parliament through its Extended Bureau on the nomination of the Presi-

³⁹¹ First recital of the SEA’s preamble.

³⁹² *Mourlon-Droul*, Contemporary European History 2016, 409, 411.

³⁹³ *Brunn*, Aufbruch zum Europa der zweiten Generation 2004, 47.

³⁹⁴ *Héritier*, Explaining Institutional Change in Europe, 90.

³⁹⁵ Report on European Institutions presented by the Committee of Three to the European Council, Oct. 1979, 15.

³⁹⁶ *Weidenfeld*, Europa von A bis Z 2020, 11, 19.

³⁹⁷ *Westlake*, Journal of Common Market Studies 1998, 431, 438; *Héritier*, Explaining Institutional Change in Europe, 140..

³⁹⁸ *Héritier*, Explaining Institutional Change in Europe, 140.

dent of the European Commission.³⁹⁹ In doing that, the Council and the Commission should, according to 2.3.5 Stuttgart Declaration, answer questions raised by Parliament and decisions taken. The Stuttgart Solemn Declaration gives the European Parliament the right to discuss and vote on the programme of the European Commission.⁴⁰⁰ The measure to inform the European Parliament of the meetings of the European Council introduced by Prime Minister Thatcher was formalised to the effect that the Head of State of the Presidency of the European Council should address the European Parliament at least once during the parliamentary term.⁴⁰¹

According to the Spinelli-Draft, the Commission President was supposed to be elected by the Council, whereas the other Commissioners were intended to be nominated by the Member States.⁴⁰² Finally, Parliament was granted a vote of confidence.⁴⁰³ The Spinelli-Draft also defined Parliament's powers as joint resolutions were to be adopted with the Council in terms of legislation, supervision of the European Communities' various policies and competence for decisions on Community revenue.⁴⁰⁴

The preamble of the SEA states that the signatory parties are “*convinced that the European idea, the results achieved in the fields of economic integration and political cooperation, and the need for new developments correspond to the wishes of the democratic peoples of Europe, for whom the European Parliament, elected by universal suffrage, is an indispensable means of expression*”. This extract is a commitment to the fundamental importance of the European Parliament in the institutional framework of the European Communities after the first European elections. Taking into account the broader wording of the SEA, the Member States were “*aware of the responsibility incumbent upon Europe to aim at speaking ever increasingly with one voice and to act with consistency and solidarity in order more effectively to protect its common interests and independence, in particular, to display the principles of demo-*

³⁹⁹ Priestley, *Six Battles that shaped Europe's Parliament*, 47; Héritier, *Explaining Institutional Change in Europe*, 141.

⁴⁰⁰ Héritier/Meissner/Moury/Schoeler, *European Parliament Ascendant*, 64.

⁴⁰¹ Mourlon-Droul, *Contemporary European History 2016*, 409, 424.

⁴⁰² Héritier, *Explaining Institutional Change in Europe*, 78; Weidenfeld, *Europa von A bis Z 2020*, 11, 20; OJ EG, 1984 C 77/33.

⁴⁰³ Héritier, *Explaining Institutional Change in Europe*, 78; Weidenfeld, *Europa von A bis Z 2020*, 11, 20; OJ EG, 1984 C 77/33.

⁴⁰⁴ Héritier, *Explaining Institutional Change in Europe*, 78; Weidenfeld, *Europa von A bis Z 2020*, 11, 20; OJ EG, 1984 C 77/33.

cracy and compliance with the law [...]. This extract shows that the ever-closer integration and unification of Member States would be an essential path for the European Communities. To underpin this, the text of the SEA, in the first section of its Article 1, systematically shows the importance of the unity of the European Communities, introducing principles “*the European Communities and European Political Co-operation shall have as their objective to contribute together to making concrete progress towards European unity*”. According to the SEA, the Council was completely free to determine its tasks regarding political governance.⁴⁰⁵ MEPs, on the other hand, became entitled to vote on laws and issues, with the number of votes depending on population size of each Member State.⁴⁰⁶ In the SEA, the European Parliament was officially designated as such for the first time.⁴⁰⁷ However, the informal procedure of appointing the European Commission was not transformed into a formal arrangement in the SEA.⁴⁰⁸

In 1983, the European Parliament presented a draft treaty on the EU with the proposal that the legislature of the Commission and the mandate of the European Parliament should coincide in time.⁴⁰⁹ In 1986, 1987 and 1990, the European Parliament adopted three successive resolutions calling for and insisting that Parliament be fully consulted on the appointment of the Commission President and Commissioners and that this consultation ended with a vote by Parliament.⁴¹⁰ In a 1990 resolution, the European Parliament called for the official right to elect the Commission President and the entire Commission.⁴¹¹

§ 3.5.2 Conclusions

The overall increase of importance of the European Communities’ institutions, especially with the introduction of the election of the European Parliament, resulted from the increase in integration and the risen number of Member States to ten countries. However, it remained undefi-

⁴⁰⁵ *Hilf/Pache-von der Groeben/Thiesing/Ehlermann*, Kommentar zum EWG-Vertrag Band 4, EEA - Art.2 (4, 7).

⁴⁰⁶ *Hilf/Pache-von der Groeben/Thiesing/Ehlermann*, Kommentar zum EWG-Vertrag Band 4, EEA - Art.2 (4, 7).

⁴⁰⁷ *Hix/Noury/Roland*, *Democratic Politics in the European Parliament*, 12.

⁴⁰⁸ *Héritier*, *Explaining Institutional Change in Europe*, 141.

⁴⁰⁹ *Héritier*, *Explaining Institutional Change in Europe*, 141.

⁴¹⁰ *Héritier*, *Explaining Institutional Change in Europe*, 143.

⁴¹¹ *Resolution Martin*, doc. PE 144/2177 def. 31.10.1990.

ned what the ultimate goal and the desired European unity was.

The 1980 Isoglucose Ruling of the CJEU⁴¹² was groundbreaking for the European Communities' inter-institutional relations and the democratic importance of the European Parliament in the European institutional structure.⁴¹³ As the Parliament had debated the draft Isoglucose decision, it did not take a final vote on the complete resolution and returned it to the committee responsible, which deferred its opinion and dragged out the decision-making process.⁴¹⁴ The European Parliament had a new internal rule whereby it could decide on postponing the final vote on the European Commission's proposal until it had given its opinion on the European Parliament's amendments.⁴¹⁵ Due to the delay, the European Council nevertheless adopted the Isoglucose Directive.⁴¹⁶ The European Parliament then accused the European Council of neither using the urgency procedure nor requesting an extraordinary session.⁴¹⁷ Finally, the CJEU declared the directive invalid because the Parliament had not delivered an opinion, thus undermining the exercise of power by the people.⁴¹⁸ The ruling also called into question the self-image of the European Council, which presented itself as the central body capable of coherently shaping affairs and political cooperation of the European Communities.⁴¹⁹ This attitude ignored the fact that the European Council lacked internal stability to lead the way forward on its own, as its members changed depending on national government elections. On the other side, the involvement of the European Parliament became increasingly important.⁴²⁰ It became clear that the European Commission and the European Parliament should look after

⁴¹² Judgment of the Court of 29 October 1980. - SA Roquette Frères v Council of the European Communities. - Isoglucose - Production quotas. - Case 138/79.

⁴¹³ *Schoo*, EuR - Beiheft 2 2015, 55, 57.

⁴¹⁴ *Schoo*, EuR - Beiheft 2 2015, 55, 57.

⁴¹⁵ *Schoo*, EuR - Beiheft 2 2015, 55, 57.

⁴¹⁶ *Schoo*, EuR - Beiheft 2 2015, 55, 57.

⁴¹⁷ *Schoo*, EuR - Beiheft 2 2015, 55, 57; *Héritier*, Explaining Institutional Change in Europe, 75; *Corbett/Jacobs/Shackleton*, The European Parliament, 179.

⁴¹⁸ *Héritier*, Explaining Institutional Change in Europe, 75; *Corbett/Jacobs/Shackleton*, The European Parliament, 179; Judgment of the Court of 29 October 1980. - SA Roquette Frères v Council of the European Communities. - Isoglucose - Production quotas. - Case 138/79, European Court Reports 1980 Page 03333.

⁴¹⁹ *Mourlon-Droul*, Contemporary European History 2016, 409, 425; Judgment of the Court of 29 October 1980. - SA Roquette Frères v Council of the European Communities. - Isoglucose - Production quotas. - Case 138/79, European Court Reports 1980 Page 03333..

⁴²⁰ *Schoo*, EuR - Beiheft 2 2015, 55, 57.

the interests of the Communities and be an institutional counterpart to the Council, which was the body that expressed the interests of the Member States.⁴²¹ The CJEU ruled that the participation of the European Parliament reflected a fundamental democratic principle for the Communities.⁴²² The strengthening of the European Parliament's position in the institutional structure was also supported by the fact that on 16 December 1981, with Margaret Thatcher, for the first time, a leader of government reported to the European Parliament on the last meeting of the European Council in London in November 1981.⁴²³

However, it is questionable why the Parliament did not enforce the codification or formalisation of the developments, legally extending its powers, e.g. in the Solemn Declaration of Stuttgart in 1983. Legalising the extension of the scope of the consultation rule would have been a necessary consequence of the developments of the 1960s and 1970s, which saw the ongoing institutional self-entitlement, automatism and demands of the Parliament tolerated by the Council and the Commission.⁴²⁴ Accordingly, the Commission demanded reform of necessary institutional rules, pushing in particular for all individually marked measures to be adopted by QMV and for powers of the Parliament to be strengthened.⁴²⁵ Added to this was the exogenous effect of enlargement with new members supporting the power of the Parliament and its objectives and reinforcing the general call for greater democratic legitimacy of European decision-making.⁴²⁶ On the other hand, most Member States were not ready to formalise these demands in the Stuttgart Solemn Declaration.⁴²⁷ From their point of view, increasing legally binding cooperation between Council and Parliament could have led to a risk of delay and growing inter-institutional conflicts.⁴²⁸

As early as in the run-up to the IGC on the SEA in 1985, Parliament saw the need to become

⁴²¹ *Schrans*, *Dreißig Jahre Gemeinschaftsrecht* 1983, 19, 20.

⁴²² *Schoo*, *EuR - Beiheft 2* 2015, 55, 57; Judgment of the Court of 29 October 1980. - SA Roquette Frères v Council of the European Communities. - Isoglucose - Production quotas. - Case 138/79, *European Court Reports* 1980 Page 03333..

⁴²³ *Mourlon-Droul*, *Contemporary European History* 2016, 409, 424.

⁴²⁴ *Héritier*, *Explaining Institutional Change in Europe*, 76.

⁴²⁵ *Héritier*, *Explaining Institutional Change in Europe*, 81; *Beach*, *The Dynamic of European Integration. Why and When European Institutions Matter*, 53; *Dehousse/Magnette*, *The Institutions of the European Union* 2017, 30, 37.

⁴²⁶ *Héritier*, *Explaining Institutional Change in Europe*, 76 f.

⁴²⁷ *Héritier*, *Explaining Institutional Change in Europe*, 77.

⁴²⁸ *Héritier*, *Explaining Institutional Change in Europe*, 77.

involved in the upcoming treaty reform.⁴²⁹ Thus, Parliament's Committee on Institutional Affairs demanded that Parliament, as the only "*legitimate representative of all the citizens of Europe*", should be an equal partner and given a seat in the IGC, jointly deciding on the new treaty.⁴³⁰ Finally, the Conference determined to take into account the draft treaty and further proposals of the Parliament and to "submit" the results of the IGC to the Parliament.⁴³¹ However, it remained unclear whether "submit" meant the possibility for the Parliament to make amendments or whether the representative was only to inform the plenary.⁴³²

Following the Stuttgart Solemn Declaration, the Council had to appoint the members of Commission for five years. Moreover, after having heard the designated President of the Commission, the entire Commission was to be confirmed by the Parliament.⁴³³ In this way, the European Parliament had the opportunity to acknowledge the Commission's program. At the end of 1990, there were three options for reforming the Commission's investiture. First, the Parliament approves the candidate for Commission Presidency proposed by the Member States; second, the President of the European Council consults the President of the Parliament on the Commission's proposed candidates; and third, the Commission President is elected by the Parliament. The European Commission supported the positive development of Parliament's participation in its election, as it increased the democratic legitimacy of the Commission and thus, from its point of view, ensured institutional balance, whereas, for the European Council, this represented a point of no return without loss of face and hence a restriction.⁴³⁴

§ 3.6 Time for a new Push (1991-1999)

In an opinion on the forthcoming IGC on Political Union and the revision of the SEA, the Commission argued in favour of the co-decision right of the European Parliament in legislati-

⁴²⁹ *Héritier*, Explaining Institutional Change in Europe, 82; *Gazzo*, Towards European Union. From the "Crocodile" to the European Council in Milan, 35.

⁴³⁰ *Héritier*, Explaining Institutional Change in Europe, 82; *Gazzo*, Towards European Union. From the "Crocodile" to the European Council in Milan, 35.

⁴³¹ *Héritier*, Explaining Institutional Change in Europe, 82, *Budden*, Journal of European Public Policy 2002, 76, 91.

⁴³² *Héritier*, Explaining Institutional Change in Europe, 82.

⁴³³ *Héritier*, Explaining Institutional Change in Europe, 144 f..

⁴³⁴ *Héritier/Meissner/Moury/Schoeler*, European Parliament Ascendant, 63.

ve procedures,⁴³⁵ as it needed the Parliament to exert pressure on the Council on other issues.⁴³⁶ In this context, the European Parliament adopted a resolution in October 1990, the so-called Martin Report, calling for the right to “elect” by absolute majority the candidate proposed by the European Council for the office of President of the Commission.⁴³⁷ According to this, the Commission would also have had to request an election of the entire Commission, which would have elevated the Commission’s inauguration to a two-stage procedure involving the European Parliament both times.⁴³⁸

The Maastricht Treaty was signed on 7 February 1992 and entered into force on 1 November 1993. According to Article 1.1 TEU, the Member States of the three European Communities (ECSC, EAEC, EEC) established the EU. It also contained a somewhat more detailed description of the newly established institution of the European Council compared to its first appearance in the SEA in the process of creating an “*ever closer union among peoples of Europe*”. This treaty also granted the European Parliament co-decision rights on some EU legislation and gave the European Parliament the right to approve the Commission.⁴³⁹

In 1995, Austria, Finland and Sweden became members of the EU. The Parliament wanted to formalise the institutional development of de facto voting on the Commission’s composition with a resolution in 1995, calling for a right to elect the Commission President based on a list proposed by the Council.⁴⁴⁰

The Treaty of Amsterdam was signed on 2 October 1997 and entered into force on 1 May 1999. It amended the TEU, the Treaties Establishing the European Communities and certain related acts, as provided in Article N of the Maastricht Treaty. The IGC on the Amsterdam Treaty paid particular attention to bringing Europe closer to its citizens and reforming the institutions and functioning of the Union to make it more democratic and efficient in preparation for the forthcoming large scale enlargement in 2004.

⁴³⁵ *Héritier*, Explaining Institutional Change in Europe, 91; *Ross*, Jaques Delors and European Integration, 98.

⁴³⁶ *Héritier*, Explaining Institutional Change in Europe, 91; *Ross*, Jaques Delors and European Integration, 98.

⁴³⁷ *European Parliament*, doc. 144/177/def.; *Héritier/Meissner/Moury/Schoeler*, European Parliament Ascendant, 65.

⁴³⁸ *European Parliament*, doc. 144/177/def.; *Héritier/Meissner/Moury/Schoeler*, European Parliament Ascendant, 65.

⁴³⁹ *Priestley*, Six Battles that shaped Europe’s Parliament, 1.

⁴⁴⁰ *Héritier*, Explaining Institutional Change in Europe, 148.

§ 3.6.1 Legal implications of the first EU Treaties

Title I, Article D of the Maastricht Treaty empowered the European Council to “*provide the Union with the necessary impetus for its development*” and define its “*general political guidelines*”. In addition, Article 103 Maastricht Treaty gave the European Council an economic focus. Finally, Article J8 of the Maastricht Treaty mandated the European Council to “*define the principles of and general guidelines for the common foreign and security policy*” and ensure the unity, consistency and effectiveness of the Union’s action. On the other hand, the co-decision rights provided by the Maastricht Treaty for many legal acts significantly strengthened the position of the European Parliament, so that the European Council needed the consent of the European Parliament to legislate and avoid conflicts such as the Isoglucose case.⁴⁴¹

According to Article 158 (2) Maastricht Treaty, the governments of the Member States should have nominated the person to be appointed President of the Commission after ‘*consulting*’ the European Parliament. In addition, Article 189b Maastricht Treaty gave the European Parliament a right of negative assent to the proposals of the European Council.⁴⁴² The European Parliament interpreted these developments as a ‘formal veto’ in the election of the Commission President.⁴⁴³ Together with the candidate for Commission President, the governments of the Member States then nominated the other members of the Commission. The nominated Commissioners are jointly subject to a final vote by the European Parliament, which introduces a right of veto of the Parliament against the entire Commission.⁴⁴⁴ Only then are the governments of the Member States supposed to have unanimously approved the composition of the Commission. The Maastricht Treaty also changed the Commission’s term of office to five years to bring it into line with the one of the European Parliament.⁴⁴⁵

The Parliament’s view that it had a formal veto right over the election of the Commission President was confirmed by presidential nominee Jaques Santer in July 1994. He conceded that he would withdraw his candidacy if the European Parliament rejected him, as a Commission

⁴⁴¹ *Gabel/Hix*, Institutional Challenges in the European Union 2002, 22.

⁴⁴² *Gabel/Hix*, Institutional Challenges in the European Union 2002, 22.

⁴⁴³ *Hix/Noury/Roland*, Democratic Politics in the European Parliament, 15; *Hix*, British Journal of Political Science 2002, 259, 277.

⁴⁴⁴ *Hix/Noury/Roland*, Democratic Politics in the European Parliament, 15; *Héritier*, Explaining Institutional Change in Europe, 147.

⁴⁴⁵ *Hix/Noury/Roland*, Democratic Politics in the European Parliament, 15.

President would not be able to govern effectively without Parliament's support.⁴⁴⁶

The Treaty of Amsterdam, which came into force in 1999, finally formalised the European Parliament's de facto right of veto.⁴⁴⁷ Article 158 (2) Amsterdam Treaty now stated that the appointment by the Council must be "approved" by the European Parliament. Accordingly, the European Parliament was no longer an advisory body but a consenting or voting body when electing the President of the Commission, whose primacy and political leadership were underlined in Article 219 TEC.

§ 3.6.2 Conclusions

The European Parliament gained a more significant influence on upcoming legislation in EU policy as it became the directly elected body of the EU.⁴⁴⁸ This development resulted from the aforementioned institutional disputes between the Parliament and the Council over the co-decision procedure.⁴⁴⁹ An example of this is the reaction to the CJEU's Isoglucose ruling, which established the need for the European Parliament to be involved in the EU's legislative decisions. A primary factor that contributed to the Parliament gaining the competence of a co-legislator was its multi-level strategy.⁴⁵⁰ On the other hand, the habit of two readings gave the general impression of a classic bicameral legislative procedure.⁴⁵¹ The provisions of the Maastricht Treaty elevated the European Council to the role of structural architect of the EU. Nevertheless, the Council had to accept that it needed to negotiate legislative items with the Parliament.⁴⁵² Given the inter-institutional dependencies, the Council, Parliament and Commission created a system of regular meetings.⁴⁵³

The Maastricht Treaty (Article 158 (2) TEC) gave the designated Commission President a say in the appointment of other members of the College and, on the other hand, granted the Par-

⁴⁴⁶ *Hix/Noury/Roland*, *Democratic Politics in the European Parliament*, 15.

⁴⁴⁷ *Héritier/Meissner/Moury/Schoeler*, *European Parliament Ascendant*, 68 f.

⁴⁴⁸ *Gabel/Hix*, *Institutional Challenges in the European Union*, 22.

⁴⁴⁹ *Farrell/Héritier*, *Governance 2003*, 577, 582.

⁴⁵⁰ *Héritier*, *Explaining Institutional Change in Europe*, 95.

⁴⁵¹ *Héritier*, *Explaining Institutional Change in Europe*, 97; *Corbett/Jacobs/Shackleton*, *The European Parliament*, 187.

⁴⁵² *Corbett/Jacobs/Shackleton*, *The European Parliament*, 173 f.

⁴⁵³ *Héritier*, *Explaining Institutional Change in Europe*, 98; *Shackleton*, *Journal of Common Market Studies* 2000, 98.

liament a right of assent in the nomination of the Commission President by the European Council.⁴⁵⁴ Another development brought about by the Maastricht Treaty for the inter-institutional structure was the change or adjustment of the legislative period of the European Commission to five years, aligned with the legislative period of the European Parliament.⁴⁵⁵ One reason for this adjustment may be the creation of a mandatory common agenda between the European Commission and the European Parliament. Another is to determine the derivation of the democratic legitimacy of the European Commission through the direct elections to the European Parliament. These assumptions go hand in hand with the events surrounding the 1994 European elections, as the manifestos of the Socialist, Liberal and Christian Democrat party groups uniformly sought to establish a link between the elections to the European Parliament and the election of the next Commission President.⁴⁵⁶ They were encouraged in this by the presidential candidate Jaques Santer, who had made his election conditional on confirmation by the European Parliament.⁴⁵⁷ This stronger involvement of the European Parliament was underlined by the new wording of the Treaty of Amsterdam concerning the investiture of the Commission President. Instead of the European Council's duty to consult the European Parliament, the latter now had a right of approval and the final vote concerning the election of the President of the Commission. This change can be interpreted as significant and binding strengthening of the European Parliament, as the wording changed from a negative right of veto and the passivity of only being consulted to an active and positive right of assent. The Amsterdam Treaty finally codified a shared power concerning the investiture, thus substantially compensating for the democratic deficits pointed out by earlier reports and leading forces of the European Commission and Parliament.⁴⁵⁸ Before the Maastricht Treaty came into force, the election of the Commission President seemed more like the election of the head of an international organisation than the head of a democratic system.⁴⁵⁹ While he was initially elec-

⁴⁵⁴ *Kassim*, *The European Commission of the Twenty-First Century* 2013, 151, 157; *Westlake*, *Journal of Common Market Studies* 1998, 439 f.

⁴⁵⁵ *Nugent*, *The European Commission*, 62.

⁴⁵⁶ *Gabel/Hix*, *Institutional Challenges of the European Union*, 22, 25.

⁴⁵⁷ *Gabel/Hix*, *Institutional Challenges of the European Union*, 22, 25.

⁴⁵⁸ *Gabel/Hix*, *Institutional Challenges in the European Union*, 22, 23; *former Secretary-General of the Commission foresaw the final appointment by the governments as being only of formal character in the future*; *Noël*, *Government and Opposition* 1992, 148, 155.

⁴⁵⁹ *Gabel/Hix*, *Institutional Challenges of the European Union* 2002, 22, 25.

ted from among the Commissioners for a renewable two-year term, his election later took place in the Council meetings. Nevertheless, the European Parliament did not manage to participate in the IGC of the Political Union and be present at the negotiating table from the beginning, as was the case with the IGC of the SEA.⁴⁶⁰ Instead, it was only consulted in regular meetings.

Overall, two crucial elements for the institutional development of the European Parliament and thus of the EU in its entirety can be highlighted, the “soft rights” and the “hard rights”. Although the Maastricht Treaty codified the European Parliament’s right to be consulted on the investiture of the Commission, this provision did not clarify how the right to be consulted had to be interpreted.⁴⁶¹ Thus, the European Parliament deliberately transformed the mixture of the “soft rule” of consultation and “hard rule” of the vote of confidence for the entire Commission into a de facto approval vote concerning the Commission. These automatisms led to the codification of precisely this vote of approval by the European Parliament in the Treaty of Amsterdam, formalising the existing informal rule of establishing the Commission. According to Article D of the Maastricht Treaty, the Commission President was also a member of the European Council alongside the heads of state and governments. This, and the extraordinary procedure for their election, underlined the central position of the Commission President, which made them the central figure of the EU, probably the head of the executive in a democratic system.

§ 3.7 Introduction and Stabilisation of the Euro (2000-2009)

The adoption of the Treaty of Nice in 2001 prepared the EU for the entry of the economically weakened but newly democratic states of Eastern Europe in 2004. Following the amendment of the Amsterdam Treaty, which concerned the European Parliament’s consent to the election of the Commission President, the European Parliament took unilateral action to change the investiture procedure and the wording of the Treaty to “election of the Commission President”.⁴⁶²

The Laeken Declaration on the future of the EU fleshed out the issues raised by the Nice Con-

⁴⁶⁰ *Héritier*, Explaining Institutional Change in Europe, 91 f.; *Beach*, The Dynamics of European Integration, 83.

⁴⁶¹ *Héritier*, Explaining Institutional Change in Europe, 147.

⁴⁶² *Héritier/Meissner/Moury/Schoeler*, European Parliament Ascendant, 71.

ference in December 2001 and, in particular, launched a debate on a European Constitution and the democratic legitimacy of the Union.⁴⁶³ A crucial concern was to bring the EU closer to its citizens.⁴⁶⁴ For this reason, it was decided that the European Convention, which had to prepare the next IGC, should adequately represent Europe's citizens and therefore consist of representatives of national governments, both national and EU parliamentarians and an EU Commissioner.⁴⁶⁵

The draft Constitutional Treaty recognised the existence of the three leading institutions of the EU: the European Parliament, the European Council and the European Commission.⁴⁶⁶ The Constitution of the EU was called for by the European Parliament, at the instigation of Altiero Spinelli, after the first European parliamentary elections in 1979.⁴⁶⁷ The constitution, advocated mainly by federalists, had been intended to integrate the European economy into a joint political and democratic framework.⁴⁶⁸ It foresaw the establishment of a permanent EU President, a Foreign Minister and a Charter of Fundamental Rights and brought a significant strengthening of the EU's independent decision-making.⁴⁶⁹ Although the EU constitution was signed by the European Convention in Rome on 29 October 2004, it was rejected in 2005 when France and the Netherlands refused to ratify it.

The original political divide between Eastern and Western Europe was formally overcome when the ten newborn Eastern European countries joined the EU in 2004, followed by Bulgaria and Romania in 2007. Despite everything, the EU was hit by severe crises such as the rejection of the European Constitution and the global financial crisis in September 2008.

After two years of deadlock on the issue of the Constitution of Europe, the European Council decided to convene a new IGC to draft a "Reform Treaty" to amend the current treaties, setting aside the constitutional concept. Nevertheless, it relied on the content of the final Consti-

⁴⁶³ *Church/Phinnemore*, *European Union Politics 2019*, 31, 49; The debate on an EU constitution actually began with a speech held by foreign minister Fisher on 9 May 2000 in Berlin: *Dehousse/Magnette*, *The Institutions of the European Union 2017*, 30, 39.

⁴⁶⁴ *Allen*, *The Future of Europe 2005*, 18, 21.

⁴⁶⁵ *Héritier/Meissner/Moury/Schoeler*, *European Parliament Ascendant*, 71.

⁴⁶⁶ *Allen*, *The Future of Europe 2005*, 18, 29.

⁴⁶⁷ *Weidenfeld*, *Europa von A bis Z 2020*, 11, 20.

⁴⁶⁸ *Allen*, *The Future of Europe 2005*, 18, 28.

⁴⁶⁹ *Allen*, *The Future of Europe 2005*, 18, 28.

tutional Treaty.⁴⁷⁰ To this end, the reformation was supposed to improve the transparency and efficiency of European institutions while increasing the democratic legitimacy of EU decision-making.⁴⁷¹ On 13 December 2007, the Lisbon Treaty was signed by the heads of state or government and entered into force on 1 December 2009.

§ 3.7.1 Legal Implications

The Nice Treaty introduced QMV in the European Council on many issues, which was a significant step forward, largely abolishing the right of veto of a single Member State and forcing more cooperative decision-making.⁴⁷² Article 217 (2)-(4) TEC strengthened the power of the Commission President to allocate portfolio responsibilities and appoint Vice Presidents from among the College or to request the resignation of a Commissioner.

The Lisbon Treaty brought together the three pillars of the Community and the two areas of intergovernmental cooperation, namely foreign and security policy.⁴⁷³ The EU thus acquired legal personality and replaced the European Communities, Article 47 TEU. The Treaty of Lisbon also made the Charter of Fundamental Rights legally binding. It brought about a strengthening of the legislative and budgetary powers of the European Parliament and placed great emphasis on redefining and extending QMV.

At the end of the first paragraph of Article 1 TEU, the Lisbon Treaty adds that the Member States confer competences upon each other to achieve their common objectives. The institutional framework of the EU is amended by the new Article 13 (1) TEU, which lists the institutions. Article 14 (1) TEU now states that the European Parliament should exercise legislative rights and budgetary functions together with the European Council. The Lisbon Treaty turned the existing co-decision into a general legislative procedure, which applies in new areas such as judicial cooperation.⁴⁷⁴ In addition, the new budgetary arrangement ensures a proper balance between the Parliament and the Council following Article 319 TFEU.⁴⁷⁵ Another important innovation of the Lisbon Treaty is the right of the European Parliament to elect the President

⁴⁷⁰ *Gerards/Wessels*, Europa von A bis Z 2020, 295, 296.

⁴⁷¹ *Hatje/Kindt*, NJW 2008, 1761.

⁴⁷² *Curtin*, Executive Power of the European Union, 92.

⁴⁷³ *Schwarze*, EuR - Beiheft 1 2009, 9, 11.

⁴⁷⁴ *Schwarze*, EuR - Beiheft 1 2009, 9, 12.

⁴⁷⁵ *Schwarze*, EuR - Beiheft 1 2009, 9, 12.

of the Commission under Article 17 (7) TEU after the Council nominated a candidate. It clarifies that the office of the President of the Commission is distinct from the other positions, as the power of electing the President of the Commission is different from the right of assent regarding the entire Commission as an institution. Therefore, the European Council must consider the results of the previous European Parliament elections when selecting its candidate for the Presidency to align the election of heads of state or government with the expressed will of European citizens. However, it is striking that Article 17 (8) sentence 1 TEU explicitly states that the Commission is responsible to the European Parliament as a collegial body.⁴⁷⁶

While, according to Article 15 (1) TEU, the European Council provided the political framework, the European Parliament had to exercise political control. The QMV principle was further developed and combined with the requirement of the ‘double majority principle’.⁴⁷⁷ Such majority exists when 55 % of Member States representing 65 % of EU citizens agree.⁴⁷⁸ Another significant institutional development was the introduction of the permanent President of the European Council, elected every two and a half years, Article 15 (5) and (6) TEU, which made the European Council a fully independent body.

In Article 12, the TEU involves the national parliaments in the Union framework for the first time. Among other things they shall monitor compliance with the competencies and the principle of subsidiarity within the framework of the EU.⁴⁷⁹ In particular, the national parliaments have an early warning system vis-à-vis the European Commission.⁴⁸⁰ Citizens themselves will be involved in the functioning of the EU framework with the introduction of the ECI through Article 11 (4) TEU, as an instrument to initiate legislative procedures with the support of one million European citizens to strengthen the direct democratic elements within the Union.⁴⁸¹

⁴⁷⁶ *Hatje/von Förster*, *Europäisches Organisations- und Verfassungsrecht*, 543, 583 (133).

⁴⁷⁷ *Schwarze*, *EuR - Beiheft 1 2009*, 9, 14; *Weidenfeld*, *Europa von A bis Z 2020*, 11, 31.

⁴⁷⁸ *Schwarze*, *EuR - Beiheft 1 2009*, 9, 14.

⁴⁷⁹ *Mellein*, *Subsidiaritätskontrolle durch nationale Parlamente*, 122; *Barrett*, *European Law Review* 2008, 66, 67 f.

⁴⁸⁰ *Schwarze*, *EuR - Beiheft 1 2009*, 9, 19.

⁴⁸¹ *Meyer*, *Der Verfassungsentwurf des Europäischen Konvents 2004*, 431, 438.

§ 3.7.2 Conclusions

Before the Treaty of Nice entered into force, the governments of the Member States appointed the President of the Commission by consensus.⁴⁸² With the diversity of representatives that made up the IGC, the European Parliament, in particular had the opportunity to influence further institutional developments for future Treaty changes, e.g. by convincing the IGC members to strengthen the role of the European Parliament in the appointment of the President of the European Commission.⁴⁸³ The first draft of the Convention Praesidium considered an adjustment in the election process of the candidate for President of the Commission in line with the European Parliament.⁴⁸⁴ After the failure of the Constitutional Treaty, the Lisbon Treaty retained this provision and was adopted under the mentioned agreement of the Convention Praesidium, in particular, to strengthen the democratic elements by incorporating the will of the people in European politics.⁴⁸⁵ The Treaties of Amsterdam and Nice (Article 219/217 TEU) officially introduced the political leadership of the President of the Commission, who sets the agenda, into the legal framework of the EU.⁴⁸⁶ Following the amendments of the Lisbon Treaty, Article 17 (6) TEU now states that the President sets the guidelines for the Commission's work, removing their 'political' focus. However, it has been reinstated in the Commission's Rules of Procedure and allows the President to "*lay down the political guidelines within which the Commission shall exercise its functions*".⁴⁸⁷ It remains questionable what the reason were for removing the political guidelines from the TEU and what consequences have to be drawn by that.

By 2005, the European Parliament succeeded in establishing several informal rules governing the appointment of the Commission and its President: the power to hold hearings of individual Commissioners and the right to ask the Commission President to reshuffle their team, crea-

⁴⁸² Curtin, Executive Power of the European Union, 92.

⁴⁸³ Beach, Journal of European Public Policy 2007, 1271, 1272; Héritier/Meissner/Moury/Schoeler, European Parliament Ascendant, 71 f.

⁴⁸⁴ Beach, Journal of European Public Policy 2007, 1271, 1272; Héritier/Meissner/Moury/Schoeler, European Parliament Ascendant, 71 f.

⁴⁸⁵ Beach, Journal of European Public Policy 2007, 1271, 1272; Héritier/Meissner/Moury/Schoeler, European Parliament Ascendant, 71 f.

⁴⁸⁶ Müller, Politics and Governance 2016, 68, 69.

⁴⁸⁷ European Commission, Commission Decision of 24 February 2010 amending its Rules of Procedure.

ting a quasi-investiture of the respective Commissioners.⁴⁸⁸ The right of the European Parliament to elect the Commission as a whole was traced back to the previous practical approval, which was formalised in the Maastricht Treaty. It is striking how the European Parliament managed to elect the Commission President against the will of the European Member States and why the individual Commissioners presented themselves to the European Parliament while the Council was initially opposed to this practice.⁴⁸⁹ Essential to this was also the attitude of the Commission, which former Commission President Barroso called for concerning the 2004 and 2007 enlargements.⁴⁹⁰ He stressed the need for strong presidential leadership in an enlarged College of Commissioners consisting of one Commissioner per Member State, thus 27 in total.⁴⁹¹ He also said that the European Commission needs “*a President that is seen by members of the Commission as a last resort and authority*”, after which the Commission can only function or be run efficiently and effectively as a powerful and personalised authority.⁴⁹² The Lisbon Treaty finally gave the European Parliament the legal competence to elect the President of the European Commission. The legal provisions leave open questions about the ultimate significance of the President of the European Commission and the special inter-institutional relationship between the European Parliament and the European Commission. Since the Lisbon Treaty created the position of the permanent President of the Council, it is unclear what the function of the President of the Commission will be when attending European Council meetings. This all-encompassing involvement could support the idea for the European Constitution that a European President should be involved in all matters and underline the accountability of the President of the European Commission to the European Parliament. Apart from the legal provisions, Declaration 11 on former Article 9 D Nr.7 TEU states that the European Council and the European Parliament are jointly responsible for the smooth running of the election process, allowing for necessary consultations on further provisions and concrete

⁴⁸⁸ *Héritier*, Explaining Institutional Change in Europe, 156.

⁴⁸⁹ *Héritier/Meissner/Moury/Schoeller*, European Parliament Ascendant, 61.

⁴⁹⁰ *Spinant*, European Voice 2006, published in: <https://www.europeansources.info/record/barroso-commission-needs-presidential-style-leadership/> - last accessed: 13 June 2022; *Peterson*, European Political Science 2008, 64, 68; *Peterson*, Journal of European Public Policy 2008, 761, 763.

⁴⁹¹ *Spinant*, European Voice 2006, published in: <https://www.europeansources.info/record/barroso-commission-needs-presidential-style-leadership/> - last accessed: 13 June 2022; *Peterson*, European Political Science 2008, 64, 68; *Peterson*, Journal of European Public Policy 2008, 761, 763.

⁴⁹² Quoted in *Spinant*, European Voice 2006, published in: <https://www.europeansources.info/record/barroso-commission-needs-presidential-style-leadership/> - last accessed: 13 June 2022.

candidates.

The process of 'de-constitutionalisation' and the establishment of a 'reform treaty', namely the Treaty of Lisbon, shows that, for another time, the intergovernmental approach has prevailed and prevented the superstate feared by Eurosceptics.⁴⁹³ Although the Lisbon Treaty legally strengthens the democratic rights of European voters by indirectly influencing the election of the Commission President, it fails to bring the EU closer to its citizens. In contrast, there is a clear hierarchy between the European institutions, as the Member States represented in the European Council only transfer competencies to the European Parliament to a limited extent, and the latter is in a relationship of dependency.

The European Parliament has been quite active in exercising its power of assent by holding hearings and debates on the College of the European Commission before the vote. This practice led to further politicisation of what was once seen as a technocratic institution, the European Commission.⁴⁹⁴

With the adoption of the Lisbon Treaty, the governance of the EU was ultimately divided among three institutions.⁴⁹⁵ The European Council gives the Union the necessary impetus for its development and defines the general political objectives and priorities, according to Article 15 (1) TEU. Secondly, the Council of the EU performs political decision-making and coordination tasks following the Treaties, Article 16 (1), second sentence TEU. Finally, the European Commission has the exercise of promoting the general interest of the EU and taking appropriate initiatives to this end, Article 17 (1) first sentence TEU. This task entails difficulties in attributing state action directly to the assignable actors. However, imputability is central to democratic accountability and responsibility to ensure that citizens can sanction accountable individuals in upcoming election.⁴⁹⁶

§ 3.8 Outcomes

This extensive chapter aimed to gain a better understanding of the central Article 17 (7) TEU and its excerpts in need of interpretation and, in particular, to work out, based on the deve-

⁴⁹³ *Dinan*, *Journal of Common Market Studies* 2007, 67, 84; *Hatje*, *EuR - Beiheft 2* 2015, 39, 42 f.

⁴⁹⁴ *Curtin*, *Executive Power of the European Union*, 92.

⁴⁹⁵ *Hatje*, *EuR - Beiheft 2* 2015, 39, 42.

⁴⁹⁶ *Lübbe-Wolff*, *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 2001, 246, 256; *Hatje*, *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 2010, 137, 140.

lopment of the EU to its present state, whether the legal text provides a basis for the *Spitzenkandidaten* process, which the exact wording does not as explained.

The outcome of the European Parliament elections would already be taken into account when the European Council would consider the majority of seats in the Parliament after the election. The required appropriate consultations also do not specify a particular procedure. Given the intergovernmental character of the EU, the procedure for nominating the Commission President could be entrusted exclusively to the European Council, similar to its actions after the 2019 elections.

However, such an interpretation could contradict the institutional framework and its evolution since the founding of the ECSC. While the original intentions of the ECSC, as stated in the preamble of the ECSC Treaty, still exist, there is nothing left of the old. In the last almost sixty-five years, the ECSC has become the EU, the Joint Assembly has become the European Parliament, the High Authority has become the European Commission, and a new body has been created, the European Council, which is made up of the heads of state or government of the European Member States. Apart from the names being changed, their functions, competencies, and meanings have evolved considerably over the years. Moreover, it should be emphasised that the ECSC consisted of five institutions when it was founded in 1952, whereas today, the EU has over seventy institutions and agencies, which derive their legal status to a considerable extent from European secondary law.⁴⁹⁷ The EU is no longer merely an economic association for mutual prosperity. It has become a mutual commitment to social, political and economic ideals, as expressed in the preamble to the TEU and its contribution to the Charter of Fundamental Rights of the EU. The European Parliament has evolved from a mere consultative assembly into a counterpart to the European Council and the European Commission and is the EU's most directly legitimised institution.⁴⁹⁸ Whether in the reports of the 1960s and 1970s, such as the Davignon Report and the Vedel Report or in the Laeken Declaration of 2001, there have been repeated demands for greater democratisation of the institutional framework, in the course of the EU's steadily growing influence on citizens' everyday lives. While the introduction of European elections in 1979 represented a decisive step towards democratisation and integration of European citizens, participation of the European

⁴⁹⁷ *Hodson/Peterson*, *The Institutions of the European Union 2017*, 1, 4.

⁴⁹⁸ *Judge/Earnshaw*, *The European Parliament*, 64; *Kreppel*, *The European Parliament and Supranational Party System*, 89; *Rittberger*, *Journal of Common Market Studies*, 203; *Dann*, *Principles of European Constitutional Law*, 229, 245.

electorate in further democratisation efforts happened only indirectly. During the EU's development process, the implementation of these aspirations was realised mainly in the Parliament's co-decision rights on legislation, and the election of the President of the European Commission and the College. It needs to be emphasised that the European Parliament is still the only directly elected transnational parliament and must be seen in its uniqueness of its rights, such as the active election of the Commission President and the entire College of Commission.⁴⁹⁹

The *Spitzenkandidaten* procedure aimed to give the European electorate the power of directly electing the Commission President through their vote in the European Parliament. In this way, this central figure of the EU framework would have been accountable first and foremost to the European citizens. Even though the legal text of the Treaties does not provide for the *Spitzenkandidaten* procedure as a rule for the election of the Commission President, the nomination of former Commission President Juncker in 2014 was based on this concept. In the run-up to the 2019 European elections, the European Council and the party families were aware of the development up to the previous election, supported by the Parliament's self-commitment to the *Spitzenkandidaten* arrangement and the presentation of leading candidates. The European Council merely observed the election campaign of the leading candidates without seeking a binding regulation in line with the demands of the European Parliament and the Commission. The European Council's inaction could have replaced the appropriate consultations required by Article 17 (7) TEU and would have become an unspoken rule. The lethargy of the European Council has led to individual heads of state or government boycotting this principle after the elections, reminiscent of the empty chair policy pursued by the French government in the second half of the 1960s. The appointment of the Commission President by the European Council solely based on the nomination of a member of the winning European party group, without even having to have a connection to European politics, appears very superficial and inconsistent. On the other hand, the European Parliament could theoretically have voted out the presented candidate for the Commission Presidency in 2019, Ursula von der Leyen, and thus prevented a Commission under her leadership and maintained the *Spitzenkandidaten* procedure.⁵⁰⁰

A significant change in nominating the candidate for Commission President is the election in

⁴⁹⁹ Hodson/Peterson, *The Institutions of the European Union* 2017, 1, 10.

⁵⁰⁰ Dann, *Principles of European Constitutional Law* 2007, 229, 249.

the Council by a qualified majority instead of unanimity. It offers more dynamism in choosing a candidate, regardless of single Member States having the power to block candidates with a de-facto veto right, thus avoiding ‘lowest-common denominator’ nominations.⁵⁰¹ The pre-eminent position of the President of the European Commission as *primus inter pares* is underlined by the fact that s/he is elected before the College.⁵⁰² In contrast to pre-2009, when the Commission President developed the agenda of the European Council together with the rotating Council Presidency, the resulting direct access to the Member States and influence on Council work has been reduced by the establishment of the permanent President of the European Commission.⁵⁰³ Moreover, the introduction of the High Representative of the CFSP has weakened the international visibility of the Commission President. Overall, both the wording of Article 17 (7) TEU and the development of the entire EU allow for an interpretation in favour of the *Spitzenkandidaten* procedure, especially since the European Parliament has had to assert itself time and time again by exercising new de facto rights.

§ 4 Is the *Spitzenkandidaten* Idea suitable for Preserving and Promoting the Democratic Principle at the EU level?

It becomes clear from chapter § 2 that the *Spitzenkandidaten* idea was introduced to correspond to the development of the EU’s democratic elements in the shape of accountability and the Europeanisation of European elections. Having established in § 3 that the historical path to today’s EU and the existing treaty provisions do not make the *Spitzenkandidaten* system binding, though possible, it is questionable whether there is a democratic deficit at the EU level at all, and if so, whether the *Spitzenkandidaten* idea would be an adequate instrument to compensate for this democratic deficit.

Democracy, in general, is conceived as a form of government in which the people (Greek: “*demos*”) are the sovereign (Greek: “*kratia*”) of a given territory and are supposed to independently give themselves a constitution.⁵⁰⁴ The purpose of democracy, then, is to capture the

⁵⁰¹ *Nasshoven*, The Appointment of the President of the European Commission, 89 f.

⁵⁰² *Wille*, The Normalization of the European Commission: Politics and Bureaucracy in the EU Executive, 63.

⁵⁰³ *Endo*, The Presidency of the European Commission under Jacques Delors. The Politics of Shared Leadership, 60; *Curtin*, Executive Power of the European Union. Law, Practices, and Living Constitution, 77; *Dinan*, West European Politics 2013, 1258, 1262 f.; *Tömmel*, Paper presented at the conference “Political Leadership in the EU” 2015, 13, 18 f., 21 f.

⁵⁰⁴ *Borowsky*, Philosophische Überlegungen zur Europäischen Union, 55.

right of all people to free self-determination and uphold core values such as political equality, public control and freedom.⁵⁰⁵ US-President Abraham Lincoln, defined democracy as “government of the people, by the people, and for the people” in 1863.⁵⁰⁶ The people’s sovereignty makes democratic representation necessary to ensure the legitimacy of institutions, thus creating incentives for governments and responsiveness for citizens.⁵⁰⁷ Democratic legitimacy is also enshrined in Article 2 of the French Constitution, which states that government action shall be based on the administration and power of the community.⁵⁰⁸ It is defined as a system in which a majority of a group of people are willing to participate in democratic discourse and binding decisions and is referred to as “input legitimacy”.⁵⁰⁹ According to the idea of chain legitimacy, citizens in parliamentary democracies elect their representatives in parliament, who in turn elect the head of government, who selects the cabinet, which appoints the officials of the authority.⁵¹⁰ This procedure is referred to as “output legitimacy”.⁵¹¹

The democratic principle of the EU appears for the first time in the SEA as a mutual obligation of Member States in the third, fourth and fifth sections of the preamble. These provisions include the uniform promotion of democracy at the European level and the representation of the democratic peoples of Europe through the European Parliament elected by universal suffrage. By incorporating these goals into the preamble of the Maastricht Treaty, the European institutions were also bound to democratic functioning.⁵¹² Democracy as a guiding value is now enshrined in the preamble and Articles 1 (2) and 2 TEU and is a condition for future Member States to join the EU and a sanction option for current Member States under Article 7

⁵⁰⁵ *Piattoni*, *The European Union* 2015, 3, 8; *Borowsky*, *Philosophische Überlegungen zur Europäischen Union*, 14.

⁵⁰⁶ *Hatje*, *EuR - Beiheft 2* 2015, 39, 40.

⁵⁰⁷ *Kröger*, *The European Union: Democratic Principles and Institutional Architectures in Times of Crises* 2015, 112, 116.

⁵⁰⁸ *Hatje*, *EuR Beiheft 2* 2015, 39, 40.

⁵⁰⁹ *Cederman*, *European Journal of International Relations* 2001, 144; *Hatje*, *EuR - Beiheft 2* 2015, 39, 40.

⁵¹⁰ *Psygkas*, *From the Democratic Deficit to a Democratic Surplus: Constructing Administrative Democracy in Europe*, 4; *Hatje*, *EuR - Beiheft 2* 2015, 39, 40.

⁵¹¹ *Psygkas*, *From the Democratic Deficit to a Democratic Surplus: Constructing Administrative Democracy in Europe*, 4; *Hatje*, *EuR - Beiheft 2* 2015, 39, 40.

⁵¹² *Schorkopf*, *Europarecht* 2016, 147, 148.

TEU.⁵¹³ The principles of democracy are protected in the Articles 9 and 10 TEU. The particular democratic system, called representative democracy, is established for the EU in Article 10 (1) TEU. Apart from the people's representation in the European Parliament, European citizens are represented by the respective elected heads of state and government at the European Council and by members of their governments in the Council of the EU, Article 10 (2) TEU. According to Article 10 (2) TEU, the members of the European Council and the Council must be accountable for their activities to their particular national parliaments or directly to the citizens of their country. Furthermore, Article 10 (3) and (4) TEU ensures and provides for the continuous participation of European citizens in maintaining the democratic system of the EU. The core of democracy consists of "input and output legitimacy" embodied in elections to establish a procedural chain of legitimacy from the electorate to the government, which forms the branch and thus determines the quality of government action.⁵¹⁴

Since the Lisbon Treaty, the EU has introduced measures such as the ECI to establish participation of citizens at the European level to force legislative action by the European Commission.⁵¹⁵ However, it must be noted that since the establishment of the ECI with the Lisbon Treaty in 2007, only five initiatives met the requirements, and there has not been a single implementation by the Commission in a proposed action, so the measure to increase direct democratic tools for European citizens has not yet had an impact.⁵¹⁶

The possible European democratic deficits can be divided into a legitimacy deficit, a representation deficit and a participatory deficit.⁵¹⁷ One example for a possible representation and recognition deficit of citizens concerning measures could result, on the one hand, from QMV in the European Council.⁵¹⁸ On the other hand, it is questionable whether, and if so, to which extent the European Council is institutionally accountable to the European Commission, and

⁵¹³ *Skouris*, Demokratie und Rechtsstaat: Europäische Union in der Krise, 17; *Plottka/Rebmann*, Europa von A bis Z 2020, 127.

⁵¹⁴ *Hatje*, EuR - Beiheft 2 2015, 40, 41.

⁵¹⁵ *Dreischer*, Supranationalität und Demokratie: die Europäische Union in Zeiten der Krise 2015, 111, 121.

⁵¹⁶ *Dreischer*, Supranationalität und Demokratie: die Europäische Union in Zeiten der Krise 2015, 111, 121; *Müller Gómez/Wessels*, Europa von A bis Z 2020, 495, 503. The only ECI that received a positive reaction of the Commission was the Right2Water Initiative, with the result rather in the form of acknowledging rather than in proposing a new legislation as was requested.

⁵¹⁷ *Bollmohr*, Das Demokratiedefizit der EU nach dem Vertrag von Lissabon, 73 f.

⁵¹⁸ *Weiler*, Yale Law Journal 1991, 2403, 2473; *Sonnicksen*, Ein Präsident für Europa. Zur Demokratisierung der Europäischen Union, 168.

how exactly the legal competencies of the European Council differ from those of the European Parliament.⁵¹⁹ The reader must be aware that the European Council, as the agenda-setting body of the EU, is the representing executive organ of the EU Member States,⁵²⁰ consisting of their heads of state and government.⁵²¹ Therefore the European Council is elected by the citizens of the respective Member States on grounds of a national agenda and not by one united European *demos* based on a European agenda.⁵²²

According to the existing ‘no demos’- thesis, there is no such European figure outside the national context since the peoples of Europe are not connected in the same way as national communities are.⁵²³ This thesis points to the cultural heterogeneity between EU Member States and their citizens and a lack of will to be a European community, thus a lack of sense of belonging.⁵²⁴ This feeling is reinforced by a missing equality in electoral principles.⁵²⁵ The latest form of the TEU, after the reform by the Lisbon Treaty, does not provide any clear answer on the issue of sovereignty in the EU. Dieter Grimm, former judge at the German Constitutional Court, summarises five possible scenarios concerning the question of sovereignty of the EU, which decisively influences the required measures for democracy: Sovereignty has been transferred to the EU; the sovereignty remains with the Member States; sovereignty is divided between the EU and the Member States; Member States and the EU share sovereignty and exercise it through EU institutions; sovereignty has dissolved in the EU.⁵²⁶ Strikingly, none of these constellations challenges the original sovereignty of people or citizens. This realisation calls for a discussion of the signals of these narratives on European citizens toward the EU. Concerning the functions and powers of the European Parliament, it is also important to distinguish between parliamentarisation and democratisation and to examine whether the

⁵¹⁹ *Bollmohr*, Das Demokratiedefizit der EU nach dem Vertrag von Lissabon, 94; *Borowsky*, Philosophische Überlegungen zur Europäischen Union, 15; *Bieling*, Supranationalität und Demokratie: die Europäische Union in Zeiten der Krise 2015, 63, 69.

⁵²⁰ Just as the Council being the intergovernmental legislative organ of the EU.

⁵²¹ *Borowsky*, Philosophische Überlegungen zur Europäischen Union, 55; *Grimm*, Europa ja - aber welches?, 74.

⁵²² *Borowsky*, Philosophische Überlegungen zur Europäischen Union, 55; *Grimm*, Europa ja - aber welches?, 74.

⁵²³ *Cederman*, European Journal of International Relations 2001, 139, 153, 154.

⁵²⁴ BVerfGE 126, 276, 322 - *Lissabon*.

⁵²⁵ BVerfGE 126, 276, 322 - *Lissabon*.

⁵²⁶ *Grimm*, Europa ja - aber welches?, 55 f.

measures taken, and the recent empowerments of the European Parliaments meet the requirements of democratisation for the EU.⁵²⁷

§ 4.1 What Expectations of Democratic Standards should the EU Meet?

An essential point in the analysis of the EU's democratic standards is to understand what expectations the EU should meet and whether it should apply the democratic principles of its Member States. Moreover it is essential to understand how much uniformity European constitutional law requires and how much flexibility it allows.⁵²⁸ It is undisputed that the EU has a twofold democratic structure: supranational elements through the European Parliament and the independent institutions, e.g. the European Commission and the CJEU, and intergovernmental ones through particularly the European Council, the Council and national parliaments, which are involved in the EU's policy-making process when they exercise their influence through their national executives, which are the main actors in the European Council and Council.⁵²⁹ The democratic requirements find special attention when it is imagined that the transparency of the negotiations and discussions in the European Council is not guaranteed.⁵³⁰ It must be taken into account that the European Council has strengthened its competencies at the expense of the European Parliament during the years of European crises.⁵³¹ With some regarding the European Council as probably the only legislature in liberal democracy that continues to make primary laws behind closed doors, thus approaching EU decision-making in a conscious and consensual matter,⁵³² the subject of transfer and the current execution of the sovereignty becomes the crucial point when examining a democratic deficit of the EU. Sovereignty includes "notion of power, authority, independence, and the exercise of will".⁵³³ It goes hand in hand with the "legal capacity of national decision makers to take decisions wi-

⁵²⁷ *Decker/Sonnicksen*, *Zeitschrift für Politikwissenschaft* 2016, 71, 77.

⁵²⁸ *Hatje*, *EuR* 2005, 148, 149.

⁵²⁹ *Crum/Curtin*, *The European Union: Democratic Principles and Institutional Architectures in Times of Crisis* 2015, 63, 66.

⁵³⁰ *Abels*, *Handbuch Europäische Union* 2018, 1, 8.

⁵³¹ *Abels*, *Handbuch Europäische Union* 2018, 1, 8.

⁵³² *Lord/Harris*, *Democracy in the New Europe*, 74; *Bickerton*, *The New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era* 2015, 1.

⁵³³ *Nugent*, *The Government and Politics of the European Union*, 502.

thout being subject to external restraints".⁵³⁴ It eventually includes the right to hold and exercise authority.⁵³⁵ With regards to that, intergovernmentalists and supranationalists dispute the extend of sovereignty transferred to the EU.

§ 4.1.1 Intergovernmental Approach

The intergovernmentalist theory focuses on the privileges of the Member States' roles in the European framework, understanding the EU as an institution ruled on a government-to-government basis by sovereign states, whereas supranational actors only have limited competences.⁵³⁶ According to that, these supranational institutions take only joint action within the individual national interest to reach collective goals.⁵³⁷

The influential participation of the European Council can be seen as symptomatic of a new form of intergovernmentalism. While national governments remain committed to cooperation at the EU level, they are reluctant to delegate new powers to supranational institutions, partly because public support for European integration is modest. It is striking that, after Maastricht, the EU has focused more on political coordination than on the traditional Community method of legislative decision-making, with functionalism being the main force behind this development.⁵³⁸ Moreover, the European Council is seen as the "single institution holding overall political leadership in all EU affairs".⁵³⁹ Some see a misunderstanding regarding the legitimacy and legal nature of the EU and its institutions as being little more than a traditional international organisation of sovereign states.⁵⁴⁰ In their view, the EU is a conglomeration of democratic Member States, hence deriving much of its legitimacy from national governments, which are responsible to the electorate and have chosen to delegate limited powers to the EU institu-

⁵³⁴ *Nugent*, *The Government and Politics of the European Union*, 502.

⁵³⁵ *McCormick*, *Understanding the European Union*, 10.

⁵³⁶ *Cini/Pérez-Solórzano Borragán*, *European Union Politics 2010*, 446.

⁵³⁷ *Dashwood/Dougan/Rodger/Spaventa/Wyatt*, *European Union Law*, 66.

⁵³⁸ *Puetter*, *The European Council and the Council: New Intergovernmentalism and Institutional Change*, 56; *Dehousse/Magnette*, *The Institutions of the European Union 2017*, 30, 49.

⁵³⁹ *Wessels*, *The European Council*, 18; *van Middelaar*, *The Passage to Europe: How a Continent Became a Union*, 30.

⁵⁴⁰ *Moravcsik*, *The Choice for Europe*, 472, 501; *Moravcsik*, *Journal of Common Market Studies* 1993, 480, 481.

tions.⁵⁴¹ The Member States are the democratic pillars and guarantors of the EU, so this particular role must be adequately taken into account when assessing the EU's democratic requirements.⁵⁴² European integration must be seen as a sequence of arrangements among the larger Member States based on national interests and domestic politics.⁵⁴³

*Moravcsik*⁵⁴⁴ argues that “the creation of the European Council was explicitly designed to narrow rather than to broaden the scope for autonomous action by supranational actors” and that those supranational actors have limited influence or access to negotiations.⁵⁴⁵ As long as the leaders of the EU Member States are democratically elected, the EU would have a well-founded and sufficient claim to democratic legitimacy, regardless of how it created policies and institutions on a day-to-day basis to maintain its ability to function.⁵⁴⁶ A democratic deficit in the EU would thus be “democratically justified” or non-existent, assuming that the Union performs political functions appropriate to non-majoritarian institutions.⁵⁴⁷ The German Constitutional Court rulings on the Maastricht Treaty in 1993⁵⁴⁸ and the Lisbon Treaty in 2009⁵⁴⁹ shall in this regard be taken into account. According to them, it should be noted that the powers of the EU are delegated by the national democracies of the Member States.⁵⁵⁰ Under the “principle of conferral” affirmed in these rulings, certain powers are delegated by the Member States to the EU though not alienated, which means that the original legitimacy and competence for these matters remain with the delegating Member States.⁵⁵¹ In contrast to this

⁵⁴¹ *Innerarity*, *Beyond the Crisis: The Governance of Europe's Economic, Political and Legal Transformation*, 181; *Moravcsik*, *Journal of Common Market Studies* 1993, 480, 481.

⁵⁴² *Fossum*, *Journal of European Public Policy* 2015, 799, 810.

⁵⁴³ *de Schoutheete*, *The Institutions of the European Union* 2017, 55, 73.

⁵⁴⁴ *Moravcsik*, *The Choice for Europe*, 485, 488.

⁵⁴⁵ *Moravcsik*, *The Choice for Europe*, 485, 488; *Plottka/Rebmann*, *Europa von A bis Z* 2020, 127..

⁵⁴⁶ *Agné*, *The European Union: Democratic Principles and Institutional Architectures in Times of Crisis* 2015, 46.

⁵⁴⁷ *Majone*, *European Law Journal* 1998, 5, 7; *Plottka/Rebmann*, *Europa von A bis Z* 2020, 127.

⁵⁴⁸ *BVerfGE*, 12 October 1993 - 2 BvR 2134/92.

⁵⁴⁹ *BVerfGE*, 30 June 2009 - 2 BvR 2/08.

⁵⁵⁰ *Agné*, *The European Union: Democratic Principles and Institutional Architectures in Times of Crisis* 2015, 46.

⁵⁵¹ *Agné*, *The European Union: Democratic Principles and Institutional Architectures in Times of Crisis* 2015, 46, 49 f; *Grimm*, *Europa ja - aber welches?*, 15; *BVerfGE*, 30 June 2009 - 2 BvR 2/08 point 275.

principle, the EU lacks the *Kompetenz-Kompetenz*, which means it is always dependent on the competencies delegated to it by the Member States.⁵⁵² These opinions suggest that what matters are not the democratic standards of the EU itself but the states delegating powers to the EU and from which the EU derives its legitimacy.⁵⁵³ Proponents of this view argue that the heads of state or government concluded international treaties being ratified by the Member States in the procedure prescribed by each constitution without direct popular participation.⁵⁵⁴ The original legitimation procedure thus does not involve popular but rather state sovereignty and therefore must remain at the intergovernmental level.⁵⁵⁵

Finally, the European treaties guarantee the Member States an autonomous national and cultural identity and limit the EU's competencies to conclusive, objective and instrumentally restricted possibilities of action.⁵⁵⁶ In addition to the principle of conferral, the European institutions are formally bound to subsidiarity and proportionality.⁵⁵⁷ Moreover, the Member States are the final authority when it comes to fundamental revision of the treaties, and this is provided for in revision procedures, despite the European Parliament having its right of initiative to amend the treaties, which is not limited to political proposals in the form of resolutions.⁵⁵⁸ It is also striking that Article I-6, which was included in the draft EU Constitutional Treaty and provided for the supremacy of European law over the law of the Member States, was, unlike many other provisions, not included in the Lisbon Treaty, and instead included in the attached Declaration No. 17.

§ 4.1.2 Supranationalist Approach

In contrast to the intergovernmentalist theory, the supranational approach understands the existence of the EU as a diminution of national sovereignty, by having created an institution,

⁵⁵² *Callies*, Die neue Europäische Union nach dem Vertrag von Lissabon. Ein Überblick über die Reformen unter Berücksichtigung ihrer Implikationen für das deutsche Recht, 186.

⁵⁵³ *Agné*, The European Union: Democratic Principles and Institutional Architectures in Times of Crisis 2015, 46, 51.

⁵⁵⁴ *Grimm*, Supranationalität und Demokratie 2015, 17, 19.

⁵⁵⁵ *Grimm*, Supranationalität und Demokratie 2015, 17, 19.

⁵⁵⁶ Articles 3 (3), 4 (1) and 6 (3) TEU.

⁵⁵⁷ Article 5 (1), (3) and (4) TEU.

⁵⁵⁸ Article 48 (1) and (2) TEU.

which is above the national level.⁵⁵⁹ For this purpose the supranationality is related to the nature of the institutions, the European Parliament, the European Commission and the CJEU in particular, emphasising their autonomy and their significance in the overall framework.⁵⁶⁰ It recognises the European idea as a joint identification at the pursuit of a collective interest, overreaching the individual interests of the Member States, aiming for an eventual federal system.⁵⁶¹

An important column of this theory is the initial design of the predecessor of the European Commission, the High Authority.⁵⁶² As an independent institution it was supposed to act independently within its own area of competence and the purpose of pursuing the joint interests.⁵⁶³ In the 1960s, financial arrangements for the CAP were approved leading to the Commission proposal of enhancing supranational authority and shifting more powers from the Member States to the High Authority and the European Parliament.⁵⁶⁴ In addition to that, national sovereignty was reduced by the extension of QMV.⁵⁶⁵ This direction was underlined by the creation of the Single Market and the establishing of the EU with the Maastricht Treaty in the 1990s, and the following supranational reforms of the Nice Treaty.⁵⁶⁶

Two landmark judgements of the CJEU in 1963⁵⁶⁷ and 1964⁵⁶⁸ declared the EU legal order autonomous vis-à-vis the laws of the Member States. EU Community law is by that supposedly directly applicable (*effet utile*), and national courts may not apply conflicting domestic law or ask the national constitutional courts to apply it.⁵⁶⁹ As a result, the internationally signed treaties, the Treaties of Rome, form the legal basis for a constitutional effect, which has ever since been further developed and gives the EU its unique position. The general law is thus

⁵⁵⁹ *Urwin*, *European Union Politics* 2010, 15, 19.

⁵⁶⁰ *Cini/Pérez-Solórzano Borragán*, *European Union Politics*, 452.

⁵⁶¹ *Dashwood/Dougan/Rodger/Spaventa/Wyatt*, *European Union Law*, 66.

⁵⁶² *Urwin*, *European Union Politics* 2010, 15, 20.

⁵⁶³ *Urwin*, *European Union Politics* 2010, 15, 22.

⁵⁶⁴ *Urwin*, *European Union Politics* 2010, 15, 26.

⁵⁶⁵ *Urwin*, *European Union Politics* 2010, 15, 26.

⁵⁶⁶ *Jensen*, *European Union Politics* 2010, 71, 84; *Dover*, *European Union Politics* 2010, 239, 250.

⁵⁶⁷ Case C-26/62, *Van Gend en Loos*, 1.

⁵⁶⁸ Case C-6/64, *Costa v. ENEL*, 587.

⁵⁶⁹ *Grimm*, *Europa ja - aber welches?*, 13, 35.

permeated by constitutional law, and the treaties are elevated to the status of a constitution and thus used to interpret secondary law.⁵⁷⁰ This process makes a stringent legal system hard to calculate but also very malleable, as the CJEU interprets EU law depending on a case-by-case basis.⁵⁷¹ The idea of ‘constitutionalisation’ returns responsibility to the Member States, as national law becomes inapplicable with a mere notification by the European Commission, and European law initially being established by a unanimous decision of the European Council, despite the contradiction with the fundamental “principle of conferral”.⁵⁷² This approach also underlines that the CJEU has become a tremendously powerful supranational EU institution that can sustainably shape the EU framework because, unlike the European Council, it exclusively looks after the common interest of the Union, so it has no counterpart and is not accountable for its decisions.⁵⁷³ Thus, the CJEU promotes integration making aware, that after the creation of the supranational institutions, they exist and develop independently, hereby demonstrating the lock-in effect and determination of supranationality.⁵⁷⁴

§ 4.1.3 Conclusions

Concerning the question, whether the EU is a rather intergovernmental or supranational organisation, no forward-looking indications are discernible from the entanglements of interests among the Member States. The Member States actions show, that while in some areas the Member States prefer regulation at national level, in other matters regulation at national level is not feasible, so that community solutions are sought.⁵⁷⁵

In a CJEU ruling on June 24, 2014,⁵⁷⁶ a Decision of the European Council⁵⁷⁷ concerning an agreement between the EU and Mauritius on transferring suspected pirates, was declared null and void. Although this occurred within the framework of the CFSP and there was no right of confirmation by the European Parliament, it had to be informed immediately and comprehen-

⁵⁷⁰ *Grimm*, Europa ja - aber welches?, 36.

⁵⁷¹ *Grimm*, Europa ja - aber welches?, 15 f.

⁵⁷² *Grimm*, Europa ja - aber welches?, 14, 15, 17.

⁵⁷³ *Grimm*, Europa ja - aber welches?, 17, 88; *Wagener/Eger*, Europäische Integration, 226.

⁵⁷⁴ *Wagener/Eger*, Europäische Integration, 226.

⁵⁷⁵ *Wagener/Eger*, Europäische Integration, 138.

⁵⁷⁶ Case C-658/11, *Parliament v Council*.

⁵⁷⁷ Council Decision 2011/640/CFSP of 12 July 2011.

sively.⁵⁷⁸ After the Isoglucose decision, the CJEU has once again demonstrated the illegality of the European Council's unilateral action.

On the other hand, the intergovernmental approach downplays the crucial supranational features of the EU.⁵⁷⁹ This imbalance becomes clear when one considers that the significant powers delegated to the EU are not accessible to the initial and legitimate delegators of power, the people.⁵⁸⁰ Even if the EU does not have the *Kompetenz-Kompetenz*, its actions have an immense impact on the European people's lives, requiring their democratic representation nevertheless. By delegating powers to the EU, it governs and thus influences areas previously also constitutionally reserved for nation-states.⁵⁸¹ This finding suggests that the preservation of democracy in the European Member States is called into question, especially if the supranational institutions contradict the interests of the Member States. Such an intergovernmental approach could lead to a setback if considering for the European Council to be the powerful and decisive institution of the EU, as by now there exists directly elected European institution, the European Parliament. For this reason, a distinction must be made between the allocation of powers, and subjects between national institutions and EU institutions.⁵⁸² It should be noted that the measures taken for the EU set standards that are irrevocable for the European *demos*.⁵⁸³ On the one hand the EU has state elements; on the other hand the EU is not a state, which leads to a Janus-faced nature underlining its *sui generis* character.⁵⁸⁴ However, it is inadequate to classify the founding of the European Council as a step towards intergovernmentalism, as the intention was to bring the leaders of governments together and preventing institutional blockings as in the "empty chair crisis" in 1965.

This particular construction of the EU becomes even more evident when it comes to the activation of national parliaments within the framework of the EU. Article 12 TEU, concerning

⁵⁷⁸ *Schoo*, EuR Beiheft 2 2015, 55, 57.

⁵⁷⁹ *Psygkas*, From the Democratic Deficit to a Democratic Surplus: Constructing Administrative Democracy in Europe, 3.

⁵⁸⁰ *Agné*, The European Union: Democratic Principles and Institutional Architectures in Times of Crisis 2015, 46.

⁵⁸¹ *Wimmel*, Integration 2008, 48, 52; *Abels*, Handbuch Europäische Union 2018, 1, 2.

⁵⁸² *Agné*, The European Union: Democratic Principles and Institutional Architectures in Times of Crisis 2015, 46, 52, 55.

⁵⁸³ *Agné*, The European Union: Democratic Principles and Institutional Architectures in Times of Crisis 2015, 46, 57; *Gillingham*, European Integration, 1950-2003, 491.

⁵⁸⁴ *Abels*, Handbuch Europäische Union 2018, 1, 12 f.

No.1 of the Protocols on the role of national parliaments in the EU and No.2 on applying the principles of subsidiarity and proportionality, endows national parliaments with participation and information rights and regulates their relations with the European Parliament. These powers were further extended by the Lisbon Treaty, which created an ‘early warning system’ giving national parliaments the competence to monitor whether initiatives for EU decisions comply with the principles of solidarity.⁵⁸⁵ The national parliaments do not have a veto right in this regard but rather a control competence following the requirements of Protocol No.2.

On the question of the transferability of national democratic standards to the EU, it should be noted that the Member States have different constitutional traditions and forms of democracy that cannot be transferred 1:1 to the European level.⁵⁸⁶ The Lisbon ruling⁵⁸⁷ of the German Constitutional Court outlines that Germany is constitutionally able to transfer sovereign rights but not sovereignty to the EU, which is not the same thing according to the *Kompetenz-Kompetenz* theory by the German Constitutional Court and the state power of Georg Jellinek.⁵⁸⁸

The EU’s unique character is clearly visible in the Union not having a constitutional system based upon any traditional system of a clear separation of powers, or a conservative model of checks and balances.⁵⁸⁹ According to that, there is no single institution responsible for exercising either legislative or executive power within the EU.⁵⁹⁰ Instead it is a constitutional system designed to meet the particular demands of its own historical circumstances⁵⁹¹

Nevertheless, some see the EU’s executive-heavy policies as threatening the democracy.⁵⁹² The reasons for these concerns are that, on the one hand, the European Council is the agenda-setter of the EU. On the other hand, the European Commission performs many European executive functions. Neither of these institutions are directly elected by EU citizens, so the only directly elected European institution, the European Parliament, has comparatively limited powers, confined in legislation, control rights and the election of the Commission and its Pre-

⁵⁸⁵ *BVerfGE*, 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14, point 125 - *Banking Union*.

⁵⁸⁶ *BVerfGE*, 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14, point 125 - *Banking Union*.

⁵⁸⁷ *BVerfGE*, 30 June 2009 - 2 BvE 2/08; E 123/267 - *Lissabon*.

⁵⁸⁸ *Grimm*, Europa ja - aber welches?, 57.

⁵⁸⁹ *Dashwood/Dougan/Rodger/Spaventa/Wyatt*, European Union Law, 66.

⁵⁹⁰ *Dashwood/Dougan/Rodger/Spaventa/Wyatt*, European Union Law, 66.

⁵⁹¹ *Dashwood/Dougan/Rodger/Spaventa/Wyatt*, European Union Law, 66.

⁵⁹² *Callies*, Berliner Online-Beiträge zum Europarecht 2004, 2, 6.

sident. Also it is not capable of giving itself ultimate competencies, as visible with the enforcement approach of the *Spitzenkandidaten* principle. Overall, the horizontal and vertical elements of the separation of powers are more complexly interwoven than in a “normal” federal state, e.g. regarding the EU executive horizontally between the institutions and vertically concerning the Member States, similar to a bicameral system.⁵⁹³ Some, therefore, believe that the European Commission should shed its regulatory functions and instead become a genuine political executive dedicated to “initiating social, economic and environmental laws”, divorced from any mandatory discussion between the European Council and the European Parliament about who should lead the European Commission and what its political agenda should be.⁵⁹⁴ This would reinforce the Commission’s dependency towards the European people, which it currently enacts to the European Parliament.

The ‘constitutionalisation’ idea exposes the imbalance between politics and administration in the EU.⁵⁹⁵ On the one hand, the CJEU’s interpretation of the European law is extended, and the Commission’s competencies are expanded.⁵⁹⁶ On the other hand, a correction of the actions of the CJEU and the European Commission is generally not possible without a treaty amendment or an action for annulment before the CJEU, with very little chance of success.⁵⁹⁷ The arising problem is not that the democratic aspects of the EU are not comparable to national patterns of democracy, but that the European actions of the CJEU and the European Commission take on a life of their own beyond democratic legitimacy.⁵⁹⁸ Moreover, these CJEU decisions ruled that European law can be directly invoked by private plaintiffs, even if not explicitly provided for in the treaties, and that it should prevail in case of conflict with national law, thereby increasing the pressure on the governments.⁵⁹⁹ The theory of ‘constitutionalisation’ goes too far in using the CJEU’s 1963 and 1964 rulings as a connecting factor. The previous research in § 3.3 shows that the European Communities at that time were prima-

⁵⁹³ *König/Lindberg/Lechner/Pohlmeier*, *British Journal of Political Science* 2007, 281; *Kaeding/Selck*, *International Political Science Review* 2005, 271, 272.

⁵⁹⁴ *Føllesdal/Hix*, *Journal of Common Market Studies* 2006, 533, 554.

⁵⁹⁵ *Grimm*, *Europa ja - aber welches?*, 87.

⁵⁹⁶ *Grimm*, *Europa ja - aber welches?*, 87 f.; *Case C-70/88 Parliament v. Council*, 23.

⁵⁹⁷ *Grimm*, *Europa ja - aber welches?*, 87 f.

⁵⁹⁸ *Grimm*, *Europa ja - aber welches?*, 91.

⁵⁹⁹ *Dehousse/Magnette*, *The Institutions of the European Union* 2017, 30, 35.

rily an economic union consisting only of the six founding countries. The agenda-setting institution, the European Council, which established the future Treaties of Maastricht, Amsterdam, Nice and Lisbon, did not exist then. At that time, the European Commission and the CJEU were only empowered to enforce the law set by the Member States and were thus bound by their will; the Joint Assembly, on the other hand, was not elected and had only an advisory function.⁶⁰⁰ A continuation of the former prioritisation can further be seen in the fact that after the failure of the Constitutional Treaty in June 2005, there no longer is an intention of establishing a European constitution, but institutional reforms instead.⁶⁰¹ The CJEU is to rule within the framework of EU law but not take the place of the legislative bodies.⁶⁰²

§ 4.2 Does Dual Legitimacy already meet the EU's Democratic Requirements?

As described in § 3.4, the election of the European Parliament was decided by the European Council's resolution of September 20, 1976, and took place for the first time in 1979. The intention behind the creation of European elections was to compensate for the loss of democratic legitimacy by the introduction of majority voting in the European Council and the strengthening of supranational European institutions in light of the CJEU rulings of 1963 and 1964.⁶⁰³ The studies in § 3.4 also mention the democratic deficit identified in the 1972 Vedel Report and the 1976 Tindemans Report, which addressed the necessity of European elections and the election of the Commission President by the European Parliament. As more and more sovereign rights were transferred to the EU, an increased focus on democratisation was necessary.⁶⁰⁴

This dual legitimacy under the maintenance of the majority principle in the European Council could contradict the democratic legitimacy principles and exacerbate a divide, as some Member States can be outvoted by the majority in the European Council.⁶⁰⁵ In a case, where the citizens of such countries do not support these impactful changes at the European level, the chain of democratic legitimacy may not be preserved, as their national representative is not

⁶⁰⁰ *Grimm*, Europa ja - aber welches?, 80.

⁶⁰¹ *Grimm*, Europa ja - aber welches?, 32.

⁶⁰² *Magiera*, Europa von A bis Z 2020, 341, 345.

⁶⁰³ *Grimm*, Europa ja - aber welches?, 80; *Grimm*, Supranationalität und Demokratie 2015, 17, 24.

⁶⁰⁴ *Bollmohr*, Das Demokratiedefizit der EU nach dem Vertrag von Lissabon, 9.

⁶⁰⁵ *Weiler*, Yale Law Journal 1991, 2403, 2473; *Plotka/Rebmann*, Europa von A bis Z 2020, 127.

responsible for the decision of the European Council. These effects are severe, as they allow the application of EU law on the territory of a Member State, which may not have been approved by the majority of the Member State's population.⁶⁰⁶ Following this line of thought, majority voting in the European Council underlines the supranational character of the EU since developments and adjustments are precisely not always in line with the interests of each Member State. The gap in legitimacy through majority voting was also to be filled by transferring legislative powers to the European Parliament with the Maastricht Treaty in 1992.⁶⁰⁷ Until then, unitary decisions in the European Council guaranteed an unbroken chain of legitimation for the Member States when they decided on primary and secondary legislation and were the only legislative institution, even if they did not have the right of initiative.⁶⁰⁸ In contrast, a de facto veto right of a Member State would also undermine the democratic claim since a single Member State could thwart collective decisions and thus block the functioning of the rest of the Union,⁶⁰⁹ as happened in the France's 1965 "empty chair crisis", as explained in § 3.3. However, the crucial difference lies in the intergovernmental perspective, in that a Member State would not be forced to change its status quo against its actual will.⁶¹⁰ The majority vote and its implications are thus themselves signs of the supranational character of the EU.⁶¹¹ The principle of dual legitimacy would bypass the lack of legislative initiative and the European election as a second-tier vote by the European Parliament, and the ECI could become a third democratic source.⁶¹²

However, it is questionable whether the European Council, as the EU's day-to-day body, fulfils democratic obligations, given the scope and depth of the EU's regulatory powers and the resulting impact on the lives of European citizens.⁶¹³ It should be noted that the European Council receives only indirect legitimacy for the European integration from the European citi-

⁶⁰⁶ *Grimm*, Europa ja - aber welches?, 19.

⁶⁰⁷ *Grimm*, ZSE 2017, 3, 6.

⁶⁰⁸ *Grimm*, Europa ja - aber welches?, 80.

⁶⁰⁹ *Weiler*, Yale Law Journal 1991, 2403, 2473.

⁶¹⁰ *Plottka/Rebmann*, Europa von A bis Z 2020, 127.

⁶¹¹ *Plottka/Rebmann*, Europa von A bis Z 2020, 127.

⁶¹² *Plottka/Rebmann*, Europa von A bis Z 2020, 127.

⁶¹³ *Marquand*, Parliament for Europe, 64-66.

zens, as it derives its legitimacy from the legitimation of Member States' governments.⁶¹⁴ Moreover, the members of the European Council wear two hats: one national and one European.⁶¹⁵ The European Commission's assessment that the EU is "remote and at the same time too intrusive"⁶¹⁶ in the public perception is alarming in light of the democratic legitimacy of the EU. Therefore, the Commission has made a systematic attempt to promote and develop social representation at the EU level arguing that the EU's "legitimacy today depends on involvement and participation"⁶¹⁷. Moreover, this leads to a lack of social legitimacy, as citizens generally do not have a strong opinion about the EU.⁶¹⁸ This attitude, reflected in the turnout of the European elections, triggered the new provision in the Lisbon Treaty that European Council must consider the outcome of the European elections when proposing the candidate for the Commission Presidency.⁶¹⁹ However, the Lisbon Treaty does not specify how this should be implemented in practice. The position of the European Council within the EU framework leaves little room for the European Parliament to intervene, as bureaucracies and governments dominate the processes, and the imbalance of power is not compatible with the supranational nature of the EU. Overall, a lack of connection between parliament and the executive at the EU level is conspicuous, leading to a lack of parliamentary democracy.⁶²⁰ This deficit is exacerbated by the lack of a European public sphere, authentic Europarties and thus a genuine pan-European political competition.⁶²¹ The suspicion is growing that the Union is not governed by its citizens but is a government of governments, possibly without the required legitimation.⁶²²

The European Council continues to be the agenda-setting institution of the significant deve-

⁶¹⁴ *Majone*, *European Law Journal* 1998, 5, 6.

⁶¹⁵ *Piris*, *The Lisbon Treaty: A Legal and Political Analysis*, 76.

⁶¹⁶ *Commission of the European Communities*, Communication from the Commission: Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission, COM (2002) 704 final Brussels, 11.12.2002, p.4.

⁶¹⁷ *European Commission*, Communication on European Governance - A White Paper, C 397, 12 October 2001, COM (2001) 428 final, 11.

⁶¹⁸ *Schweiger*, *The European Union in Crisis* 2017, 188, 192.

⁶¹⁹ *Schweiger*, *The European Union in Crisis* 2017, 188, 193.

⁶²⁰ *Piattoni*, *The European Union* 2015, 3, 9. - referring to *Moravcsik*, *Journal of Common Market Studies* 2002, 603-624, *Føllesdal/Hix*, *Journal of Common Market Studies* 2006, 533-562.

⁶²¹ *Piattoni*, *The European Union* 2015, 3, 9.

⁶²² *Scharpf*, *Leviathan* 2009, 244, 252.

lopments, despite the European Parliament's legislative competencies.⁶²³ It is therefore striking that the heads of state and government of the European Member States in the European Council make the most important decisions and set the political course at the European level without being chosen to do so in most cases, as they are elected in a purely national electoral process and campaign. As explained in § 2.1, the European Commission is an institution completely independent from any influence of the European Member States and thus a purely supranational institution, according to European law.⁶²⁴ For this reason, it is questionable whether the participation of the Member States, representing their national interests through the European Council, should be an issue in the nomination of the candidate for the Commission Presidency and the respective national governments in the nomination of candidates for the other Commission leadership positions,⁶²⁵ or whether it should rather be open to the European party families to each nominate someone from among themselves for this position. These considerations are reinforced by the fact that the European Commission as a college is responsible to the European Parliament as the representative of the European people, Article 17 (1) TEU. In conclusion this raises doubts concerning the Council's legitimacy being sufficient for taking decisions without confirmation of the European Parliament, particularly if not taken unanimously.

§ 4.3 Does the European Electoral System satisfy the EU's Democratic Requirements?

In representative democracies, citizens usually have only one instrument to control politics and its actions: their vote.⁶²⁶ In the EU context, however, citizens can only vote on the composition of the European Parliament. For this reason, there is currently no legal provision for citizens to influence the behaviour of those who make decisions on their behalf, in particular, the European Council as an institution and the European Commission as a whole, as well as its individual members, especially the Commission President.⁶²⁷ In national elections, European citizens elect heads of state and government and thus influence the composition of the

⁶²³ *Bocquillon/Dobbels*, *Journal of European Public Policy* 2014, 20.

⁶²⁴ Different view concerning its structure and working manner: *Decker/Sonnicksen*, *Zeitschrift für Politikwissenschaften* 2016, 71, 74.

⁶²⁵ *Decker*, *European View* 2012, 71, 76.

⁶²⁶ *Psygkas*, *From the "Democratic Deficit" to a "Democratic Surplus": Constructing Administrative Democracy in Europe*, 4.

⁶²⁷ *Joerges*, *Debating the Democratic Legitimacy of the European Union* 2007, 311, 317.

the European Council, an intergovernmental institution that decides the general line of the EU.⁶²⁸ On the other hand, national elections in Europe have an impact on the concrete policy-making of the EU in areas where the transfer of competencies to the EU has already been decided.⁶²⁹ However, the results of national elections do not reflect the actual subject matter because national elections mostly make national issues the subject of discussion and thus the subject of the election.⁶³⁰ Therefore, the citizens' votes are essential for the EU to assert legitimate claims to influence the exercise of European powers.⁶³¹

However, it should be emphasised that, despite their considerable democratic significance, there is no uniform European electoral law.⁶³² According to Article 223 TFEU, the European Parliament is to draw up a uniform electoral system for European elections, which was already enshrined in the EC Treaty in 1997 but has not been implemented to date.⁶³³ As a result, national election law applies until an EU-wide solution is agreed upon. This continuing intermediate solution leads to a proper democratic deficit since the electoral systems, laws, and conditions differ in the individual European Member States.⁶³⁴ It is also striking that the electoral principles listed in Article 14 TEU do not include the principle of equality since the equality of votes is brought about by the degressive proportionality of the European Parliament. In addition, the European elections are very impersonal since, for example, for Germany, one MEP stands for 830.000 citizens in the European Parliament, while one MP stands for 136.000 citizens in the German Parliament. It is a serious matter that in the European elections, citizens can vote for national parties that are not fully represented in the European Parliament but are absorbed into European party groups, which in turn are not rooted in European society.⁶³⁵

⁶²⁸ *Schäfer*, *Leviathan* 2006, 350, 353.

⁶²⁹ *Schäfer*, *Leviathan* 2006, 350, 353.

⁶³⁰ *Schäfer*, *Leviathan* 2006, 350, 353.

⁶³¹ *Agné*, *The European Union: Democratic Principles and Institutional Architectures in Times of Crisis* 2015, 46, 60.

⁶³² *Abels*, *Handbuch Europäische Union* 2018, 1, 6.

⁶³³ *Grimm*, *Europa ja - aber welches?*, 133 f.; *Føllesdal/Hix*, *Journal of Common Market Studies* 2006, 533, 535 f.

⁶³⁴ *Føllesdal/Hix*, *Journal of Common Market Studies* 2006, 533, 535 f.

⁶³⁵ *Grimm*, *Europa ja - aber welches?*, 32 f.

In summary, the European elections are not sufficiently Europeanised.⁶³⁶ In addition to the aforementioned lack of a uniform European electoral law, despite provisions in the European treaties, it is problematic that the European Council is not elected as a European body, even though it has an agenda-setting position in the EU framework.⁶³⁷ Overall, the link between the citizen vote and the European policy is weak, and the representation of the European population in the European Parliament is therefore tenuous. The intention of the European elections was democratisation through parliamentarisation.⁶³⁸ In reality, they have become second-order national elections, represented by national politicians and thus focusing more on national than European issues.⁶³⁹ Lastly, they are national parties, not European party families, that nominate candidates for the European elections, and thus they are a competition between national parties, not European party families.⁶⁴⁰ The failure to establish a uniform European electoral law therefore constitutes a serious democratic gap in the composition of the European Parliament, which even the introduction of the leading candidate principle is not able to change.

§ 4.4 Does the Structure of the European Parliament comply with the Principles of Parliamentary Democracy?

Parliaments are indispensable in democracies. As representatives of the people, MEPs mediate between them and those who exercise public power.⁶⁴¹ Parliaments are the central arena where challenges and representative democratic politics are played out.⁶⁴² The parliament creates a forum of accountability, as the executive is obliged to justify its behaviour and deci-

⁶³⁶ *Grimm*, ZSE 2017, 3, 6; *Raunio*, The Institutions of the European Union 2017, 357, 370.

⁶³⁷ *Grimm*, Europa ja - aber welches?, 32 f.

⁶³⁸ *Rittberger*, Journal of Common Market Studies 2014, 1174, 1175.

⁶³⁹ *Träger*, Die Europawahl 2014 2015, 33 f.; *Müller Gómez/Wessels*, Europa von A bis Z 2020, 495, 502; Population's tendency to vote in extremes at European elections: *Mattila/Raunio*, West European Politics 2012, 589, 590; *Hooghe/Marks/Wilson*, Comparative Political Studies 2002, 965, 984; *Steenbergen/Scott*, European Integration and Political Conflict 2004, 165; *Terhechte*, Wirtschaftsdienst 2008, 495, 498.

⁶⁴⁰ *Piattoni*, The European Union 2015, 3, 9 - referring to *Moravcsik*, Journal of Common Market Studies 2002, 603-624, *Føllesdal/Hix*, Journal of Common Market Studies 2006, 533-562.

⁶⁴¹ *Crum/Curtin*, The European Union: Democratic Principles and Institutional Architectures in Times of Crisis 2015, 63, 65.

⁶⁴² *Crum/Curtin*, The European Union: Democratic Principles and Institutional Architectures in Times of Crisis 2015, 63, 65.

sions, while the parliamentarians can ask questions and make judgements that may have consequences for the executive.⁶⁴³ As far as the demand for accountability is concerned, the European Parliament is not comparable with national parliaments, in particular, because of the lack of competence for consistent control of the “government”.⁶⁴⁴ Moreover, there is no dualism between government and opposition, common in parliamentary democracies.⁶⁴⁵ The European Parliament can constrain the executive actors by vetoing laws that fall under the EU’s ordinary legislative procedure.⁶⁴⁶ It also plays a pivotal role in appointing and dismissing the executive, albeit concerning the Commission rather than the work of its specialised committees.⁶⁴⁷ Through their work, the European Parliament exercises parliamentary control, and the European Parliament is involved in the ratification of international agreements and treaties to which the EU is a signatory party.⁶⁴⁸ This clarifies the requested link between the European Parliament in nominating a leading candidate for becoming the Commission President.

Especially after the first European elections in 1979, the European Parliament tried to improve its reputation by drafting its European treaties and, on the other hand, regulating its institutional framework through the courts,⁶⁴⁹ in which, as early as 1980, the European Parliament claimed to have a say in the appointment of the President of the European Commission⁶⁵⁰ and the Commission to adopt its legislative initiatives as their own⁶⁵¹.

According to the above description, a parliament is determined to hold the executive accountable in matters imposed on it by democratic political agreements.⁶⁵² However, in the EU, there is no single executive body but a fragmented executive with the European Commission, the

⁶⁴³ *Bovens*, *European Law Journal* 2007, 447, 450.

⁶⁴⁴ *Hatje*, *EuR - Beiheft 2* 2015, 39, 51.

⁶⁴⁵ *Borowsky*, *Philosophische Überlegungen zur Europäischen Union*, 14.

⁶⁴⁶ *Hodson/Peterson*, *The Institutions of the European Union* 2017, 1, 22.

⁶⁴⁷ *Hodson/Peterson*, *The Institutions of the European Union* 2017, 1, 22.

⁶⁴⁸ *Hodson/Peterson*, *The Institutions of the European Union* 2017, 1, 22.

⁶⁴⁹ *Schoo*, *EuR - Beiheft 2* 2015, 55, 56.

⁶⁵⁰ OJ EG 1980 C 117/52

⁶⁵¹ OJ EG 1984 C 77/33.

⁶⁵² *Crum/Curtin*, *The European Union: Democratic Principles and Institutional Architectures in Times of Crisis* 2015, 63, 66.

European Council, and specific European subsidiary bodies with executive powers.⁶⁵³ It is striking that although the European Parliament is the highest democratically legitimised institution in the EU, it is the comparatively weakest resulting from its limited powers.⁶⁵⁴ The politics of the EU as a whole are to a great extent independent of the outcome of the European elections and thus, independent of the composition of the European Parliament since the European agenda is set by the European Council and the more concrete decisions are taken by the Council of Ministers and the European Commission.⁶⁵⁵ The European Parliament has minimal control rights over European Council resolutions, which it can only oppose but whose content it cannot determine.⁶⁵⁶ On the other hand, MEPs cannot exert significant pressure on Member States over European Council decisions through their national parliaments, as they could only influence a single member of the European Council.⁶⁵⁷ However, an influence of the people on the decisions of the European Council would be necessary since it does not represent the European citizens but the interests of the Member states, as explained above.⁶⁵⁸ Therefore, the European Council lacks democratic legitimacy, which cannot be sufficiently compensated for by participation or control rights of the European Parliament since it is not directly elected and it is not subject to any directly elected body.⁶⁵⁹

The distribution of seats in the European Parliament is based on a degressive proportionality principle.⁶⁶⁰ Degressive proportionality means, that the weight of the individual votes of European citizens decreases proportionally as the population of the Member States increases. Malta, the smallest Member State in terms of population with approximately 520.000 inhabitants in 2020, has six representatives in the European Parliament, each representing around 86.600 citizens, while Germany, the most populous Member State with approximately

⁶⁵³ *Crum/Curtin*, *The European Union: Democratic Principles and Institutional Architectures in Times of Crisis* 2015, 63, 69.

⁶⁵⁴ *Grimm*, *Europa ja - aber welches?*, 82; The European Parliament having less competencies than national parliaments: *Hodson/Peterson*, *The Institutions of the European Union* 2017, 1, 22.

⁶⁵⁵ *Grimm*, *Europa ja - aber welches?*, 82.

⁶⁵⁶ *Grimm*, *Europa ja - aber welches?*, 76.

⁶⁵⁷ *Hatje*, *EuR - Beiheft 2* 2015, 39, 44 f.

⁶⁵⁸ *Franzius*, *Supranationalität und Demokratie* 2015, 153.

⁶⁵⁹ *Pelinka*, *Europäische Leitbilder* 2001, 75, 76.

⁶⁶⁰ The Parliament is no adequate representation of the EU citizens as long as there is a degressive proportionality: *Hatje*, *EuR - Beiheft 2* 2015, 39, 47.

83.000.000 people in 2021 has ninety-six representatives each representing over 860.000 citizens. The result is a significant imbalance in votes in the European Parliament. Another problem associated with degressive proportionality is that it focuses on an equitable distribution of national representation in the European Parliament, even though this institution is supposed to be a fully supranational one. Therefore, it is not the national representation that is supposed to be decisive but distribution according to multinational party families, guaranteed by regulations on building party families and party groups.⁶⁶¹

Given these limitations in the European Parliament, an institutional deficit becomes apparent.⁶⁶² For the EU to move closer to the ideal of parliamentary systems, the EU political system must undergo significant reform. To develop into a full-fledged democracy, the EU needs the expanded expertise of the European Parliament and thus a growing influence of the European citizens on EU policy.⁶⁶³ For this, however, it is crucial to define the substance and foundation of the EU.⁶⁶⁴ Democracy is based on a united *demos*, its united identity and mutual culture. This democratic identity results from the self-definition of a *demos*, consisting of the creation of a mutual consciousness and identification with the level to which the rights and democratic consciousness refer, leading to universal recognition.⁶⁶⁵ It is thus questionable whether the EU would meet these requirements and whether, in this case, a truly democratic system would be possible at the EU level or whether this would amount to a transfer of the powers back to the national level.⁶⁶⁶

§ 4.4.1 The Importance of European Parties and European Party Groups in the Framework of the EU

European party groups exist only in the European Parliament, intending to bring together groups of MEPs to pursue, among other things, a common position on EU legislation.⁶⁶⁷ They are an organised group of members of a representative body elected either under the same

⁶⁶¹ Maurer, Europa von A bis Z 2020, 255, 256.

⁶⁶² Plottka/Rebmann, Europa von A bis Z 2020, 127.

⁶⁶³ Plottka/Rebmann, Europa von A bis Z 2020, 127.

⁶⁶⁴ Plottka/Rebmann, Europa von A bis Z 2020, 127.

⁶⁶⁵ Wiesner, Europa von A bis Z 2020, 189, 190.

⁶⁶⁶ Plottka/Rebmann, Europa von A bis Z 2020, 127.

⁶⁶⁷ Raunio, The Institutions of the European Union 2017, 357, 358.

party label or under those of different parties that do not compete in elections and that do not form a group expressly for technical reasons only.⁶⁶⁸ Europarties, on the other hand, are extra-parliamentary organisations in which politicians from the European Parliament and beyond have joined forces to pursue common political goals and find candidates for the Commission presidency in the 2014 European elections.⁶⁶⁹ They exist as cooperations of programmatically close national parties.⁶⁷⁰ These Europarties, which are legally regulated in Article 10 (4) TEU, are an essential instrument for the representation of European citizens. They are intended to help build political awareness and express the will of the citizens of the Union.

The formation of supranational party groups dates back to the early 1950s.⁶⁷¹ At that time, more supranational institutions emerged with the establishment of the High Authority and the Assembly, in contrast to the intergovernmental Council of Europe.⁶⁷² In addition, national interests in the development of the ECSC were already represented in the Council of Ministers, so the Assembly sought to counterbalance them through its partisan structure, as the exemplary account in § 3.2 shows, underscoring the importance of unified programmatic work in representing the Community.⁶⁷³ For the constituent session of the ECSC Joint Assembly in September 1952, which preceded the first significant election of the Assembly's president, the MEPs decided to form ideological groups. Since then, the party families have consolidated and expanded their positions in the European Parliament, primarily through procedural reforms that enable them to effectively utilise the competencies of the European Parliament.⁶⁷⁴ The Maastricht Treaty officially integrated the European parties into European primary law. Following the footsteps of national parties, European parties see themselves as independent, with membership not entailing specific or additional rights.⁶⁷⁵ Even though the form of the

⁶⁶⁸ *Heidar*, Parliamentary Party Groups in European Democracies: Political Parties behind Closed Doors 2000, 249.

⁶⁶⁹ *Raunio*, The Institutions of the European Union 2017, 357, 358.

⁶⁷⁰ *Maurer/Mittag*, Europa von A bis Z 2020, 219, 220.

⁶⁷¹ *Raunio*, The Institutions of the European Union 2017, 357, 359; *Maurer/Mittag*, Europa von A bis Z 2020, 219, 220.

⁶⁷² *Raunio*, The Institutions of the European Union 2017, 357, 359.

⁶⁷³ *Mittag/Maurer*, Europa von A bis Z 2020, 219, 220; *Raunio*, The Institutions of the European Union 2017, 357, 359..

⁶⁷⁴ *Raunio*, The Institutions of the European Union 2017, 357.

⁶⁷⁵ *Mittag/Maurer*, Europa von A bis Z 2020, 219, 220.

European party system has become more stable, the national parties still influence the political groups, notably through their control over the selection of candidates.⁶⁷⁶ An MEP who belongs to a party family is bound by its guidelines. It should be noted that there are no coherent and hierarchically organised parties at the European level. MEPs are elected from the lists of national parties and based on national electoral campaigns so that MEPs come from about 200 different national parliaments. Due to their competencies and influence, they are more similar to mergers of national parties or party networks compared to parties at the national level.⁶⁷⁷ The members of party families are not the European citizens in the first place but the national parties.⁶⁷⁸ This becomes particularly clear bearing in mind that before the elections it is sometimes unclear to which national parties will belong to which European party families after the elections.⁶⁷⁹ The introduction of Article 17 (7) TEU has potentially upgraded European parties by requiring that the outcome of European elections should be taken into account in the nomination of the Commission President, which has been proactively interpreted by European parties as aiming at greater visibility and interaction with citizens and thus lead to the *Spitzenkandidaten* idea.⁶⁸⁰ The European Statute on Political Parties, adopted on November 4, 2003, gives legal personality to European parties to free the European elections from their heavy national roots and create a European public debate and greater parliamentarisation.

While relations between national parties and their MEPs have traditionally been rather loose, there is now greater political coordination between MEPs and their parties, as evidenced by case studies confirming this trend.⁶⁸¹ Nevertheless MEPs have various obligations to the electorate by which they were elected, their national parties by which they were nominated, and

⁶⁷⁶ *Mittag/Maurer*, Europa von A bis Z 2020, 219, 220.

⁶⁷⁷ *Ladrech*, Social Democracy and the Challenge of European Union, 84 f. ; *Bardi*, Political Parties in the New Europe 2002, 293, 296.

⁶⁷⁸ *Grimm*, Europa ja - aber welches?, 133.

⁶⁷⁹ Freezing relationships of the PES with the Romanian ruling Social-democratic party PSD: <https://www.politico.eu/article/romanian-ruling-party-hits-back-at-pes-over-freezing-of-relations-romania-eu-elections-brexitepp-rule-of-law/> - last accessed: 07 June 2022; The Hungarian Conservative party Fidesz finally dropping out of the EPP in 2021: <https://www.swp-berlin.org/publikation/europaeisches-parlamentdie-zukunft-von-fidesz-jenseits-der-evp> - last accessed: 07 June 2022.

⁶⁸⁰ *Mittag/Maurer*, Europa von A bis Z 2020, 219, 220.

⁶⁸¹ *Raunio*, Party Politics 2000, 211; *Blomgren*, Cross-Pressure and Political Representation in Europe: A Comparative Study of MEPs and the Intra-Party Arena, 224 f.; *Bailer*, Intra-Party Politics and Coalition Governments 2009, 189, 192.

the European Parliament groups they serve.⁶⁸² In addition, it should be remembered that MEPs seeking re-election are particularly reluctant to ignore national party guidelines, thus having a decisive influence on their work,⁶⁸³ and hoping that this adherence to national party guidelines will be tolerated and appreciated by the electorate.⁶⁸⁴

§ 4.4.2 Differential Impact on European Voters

The considerable influence of the national parties compensates for the fact that European citizens do not know the candidates when they vote in the European elections. However, the dependency this creates among candidates must be taken into account.⁶⁸⁵ If the European Parliament were to draw up transnational lists based on a uniform European election law and independent European parties, the campaign for the European election would be conducted based on party programs rather than national parties. The conclusions drawn from the example of European party families show that the European Parliament does not yet represent one European *demos*.⁶⁸⁶ As some authors have noted, the European Parliament is run more by tactical lobbying in contrast to the European Commission and especially the European Council in day-to-day business than by implementing the will of the voters.⁶⁸⁷ As a result, it can be observed that voter turnout decreased as the power of the European Parliament increased, which shows that the reputation and development of the European Parliament did not depend on the level of its legitimacy and differed significantly in terms of content.⁶⁸⁸ Given these developments, it is questionable whether the representation of citizens in the European Parliament and the European environment and the democratisation process overall would increase if the European Parliament were given the competencies that parliaments usually have.⁶⁸⁹ As a “federal” parliament, the European people must be able to elect and control a real parliament.

⁶⁸² *Raunio*, Party Politics 2000, 211, 220; *Raunio*, The Institutions of the European Union 2017, 357, 365.

⁶⁸³ *Raunio*, The Institutions of the European Union 2017, 357, 365.

⁶⁸⁴ *Lindstädt/Slapin/Vander Wielen*, Legislative Studies Quarterly 2011, 37.

⁶⁸⁵ *Manin*, Kritik der repräsentativen Demokratie, 281 f.

⁶⁸⁶ *Grimm*, Europa ja - aber welches?, 72.

⁶⁸⁷ *Haratsch/Koenig/Pechstein*, Europarecht, 73, Rn. 139.

⁶⁸⁸ *Majone*, Europe as the Would-Be World Power: The EU at Fifty, 70, 173, 175; *Føllesdal*, Democratic Politics in a European Union under Stress 2015, 199, 202.

⁶⁸⁹ *Grimm*, Europa ja - aber welches?, 32.

This idea is supported by the fact that the EU has considerable powers in a wide range of policy areas, and the decision on who should exercise these powers should be based on a competition of political forces.⁶⁹⁰ On the other hand, it must be taken into account that there is no “common European identity” and decisions that matter most to European citizens are mostly taken at the national level.⁶⁹¹ Moreover, it would be a significant challenge for European parties to become independent and self-organised from national parties at a time when parties in national parliamentary democracies are generally at a critical juncture, while the European Parliament and the European Commission expect to refute the European Council’s right to nominate the Commission President.⁶⁹²

§ 4.4.3 Conclusions

One reason for introducing the *Spitzenkandidaten* principle was an increase in democratic standards in the EU and a democratic feedback to the mainly executively acting European Commission. However, it must be borne in mind that in a parliamentary democracy, the parliament is the foundation and benchmark for representing the people’s sovereignty. Accordingly, the European Parliament’s institutional design can be considered a framework for the requirements of democratic principles within the EU and against the background of national parliaments.

First, it should be emphasised that the EU has a parliament that represents the people. It is elected by the European people for a fixed term and is organised according to interest groups called European party families. However, concerning the MEPs, the European party families lack the bond with the European citizens compared to the parliamentary groups in the national parliaments. Since the national parties are responsible for sending candidates as MEPs, they act in a relationship of dependence on the national parties. In addition, voters in European elections continue to elect the MEPs in a nationally oriented voting procedure. This dependency, in turn, leads to the fact that even in the European Parliament, national issues and interests continue to dominate, which entails a steady disengagement of voters from the European Parliament in terms of specifically EU-wide content.

⁶⁹⁰ *Føllesdal/Hix*, *Journal of Common Market Studies* 2006, 533, 549; *Hix*, *What’s Wrong with the European Union and How to Fix It*, 89 f.

⁶⁹¹ *Moravcsik*, *Journal of Common Market Studies* 2002, 603, 616.

⁶⁹² *Hatje*, *EuR - Beiheft 2* 2015, 39, 48; *Mair/Thomassen*, *Journal of European Public Policy* 2010, 20.

Similar as in national parliaments, the European Parliament is also supposed to exercise legislative and control rights. Furthermore, the distribution of seats in parliament by interest groups is consistent with those in a national parliament. However, the control powers of the national parliaments go beyond this because they hold the executive accountable as a government, mainly through oppositions, which, however, do not exist at the European level.

A historical peculiarity of the European Parliament is its fundamentally counterbalanced position vis-à-vis the European Council. With regard to the former Council of Ministers as the representation of the governments of the Member States, the European Parliament was supposed to be the direct representation of the people to create a balance of different interests. However, the existing principle of degressive proportionality, according to which de facto voters from different Member States have different voting weights, ensures an inequality in this institution itself that cannot be downplayed.

These findings conclude that the European Parliament currently does not conform to parliamentary democratic standards. The representation of the people in the European Parliament functions more like a lobby of the national parties in the European party families on the European stage, whose size is determined by the European elections. If the greater democratisation of the EU via the European Parliament were to be desired, the further development of European parties would be necessary, whose membership would be independent of national parties. This shift would lead not only to transnational but completely independent European lists and limit topics and impulses for European elections to European issues only. Only then can the *Spitzenkandidaten* principle also be used by the European Parliament as an effective instrument to democratise the European Commission, whereas in the meantime, the *Spitzenkandidaten* principle merely attempts to resolve a discussion about personnel discussion regarding the Commission President.

§ 4.5 Conformity of the *Spitzenkandidaten* Rule with the Provisions and Increase of the Democratic System of the EU

The way the European Commission is established depends on whether the administration of the EU is and should be based on an act of delegation by European principles, by the Member States,⁶⁹³ or on a direct election of the Commission by the people.⁶⁹⁴ The *Spitzenkandidaten*

⁶⁹³ *Thatcher/Sweet*, West European Politics 2002, 1, 4.

⁶⁹⁴ *Dann*, European Law Journal 2003, 549, 560.

procedure could represent a mixed solution that considers both the intergovernmental and the supranational path.⁶⁹⁵ It intends to achieve greater democratisation through personalisation.⁶⁹⁶ At the latest, with the legally highlighted leadership role of the President of the European Commission in the Amsterdam Treaty, in Article 248 sentence 3 TFEU, a democratic chain of legitimacy between the European citizens and this unique position had become inevitable. In addition, the EU has long been thought to have a leadership problem, as it has never had a single and undisputed source of leadership.⁶⁹⁷ Leadership in the EU has been dispersed among the European institutions and the Member States, resulting in weak, fragmented and inadequate institutional arrangements.⁶⁹⁸ The idea of more active participation of European citizens in the election of the Commission President based on European manifestos, whether directly or indirectly, envisages a fundamental change in the Commission's rule by making a party political institution rather than a technocratic one.⁶⁹⁹

Nevertheless, the implementation of the nomination of the President of the Commission under the *Spitzenkandidaten* scheme in 2014 was flawed, as national parties had too much influence on the candidates and sometimes anticipated agreements that one candidate would become President of the European Commission and the other President of the European Parliament. The appointment procedure under the guise of the *Spitzenkandidatenprinzip*, thus, did not promote the EU's democratic legitimacy, as the appointments to the top positions seemed to be fixed before the election. On the other hand, the *Spitzenkandidaten* system had a positive short-term impact regarding public perceptions of the EU, as positive associations increased in mid-2014 while negative opinions about the EU's democratic deficit decreased.⁷⁰⁰ It could contribute to the European Parliament becoming independent from the European Council.⁷⁰¹ It was indeed an act of self-empowerment of the European Parliament towards a parliamenta-

⁶⁹⁵ *Nasshoven*, The Appointment of the President of the European Commission, 223 ; *Wonka*, Journal of European Public Policy 2007, 169, 173.

⁶⁹⁶ *Hobolt*, Journal of European Public Policy 2014, 1528.

⁶⁹⁷ *Nugent*, The European Union in Crisis 2017, 167, 180, 183.

⁶⁹⁸ *Nugent*, The European Union in Crisis 2017, 167, 183.

⁶⁹⁹ *Raunio*, The Institutions of the European Union 2017, 338, 355.

⁷⁰⁰ *Schweiger*, The European Union in Crisis 2017, 188, 192.

⁷⁰¹ *Grimm*, Europa ja - aber welches, 85 f.

risation of the EU “governmental system”.⁷⁰² And it is to be asked how this self-empowerment is to be treated against the background of democratic requirements.⁷⁰³ In any case, this development took place in line with the legal reforms of the TEU, most recently under the Lisbon Treaty.⁷⁰⁴

However, it should be noted that if the democratisation of the EU is sought through parliamentarisation, the *Spitzenkandidaten* process will not have significant impact on this, as the European Parliament first needs an alignment of the competencies with those of national parliaments, which would consequently require degradation of intergovernmental institutions.⁷⁰⁵ While the *Spitzenkandidaten* scheme allows for an expansion of the political legitimacy of the Commission President and increases their political influence and public visibility during the election process, it could subsequently lead to a dependency of the President on party-political dictates, jeopardising the statutory independence and the function of the Commission to represent the common interest of the Union.⁷⁰⁶

§ 4.6 What Instruments or further Steps could be taken to strengthen the Democratic Principle at the EU level?

As the European philosopher Daniel Innerarity calls towards a future legal framework in line with the democratic principle in the EU, it is necessary to invent new paradigms, rules and institutions instead of trying to duplicate existing national regulations.⁷⁰⁷ Others propose a closer adaptation of the EU along the lines of nation-states, the crucial difference being that it has no direct constitutional power.⁷⁰⁸ The introduction of EU-wide referendums would certainly increase EU citizens’ participation and legitimacy and consequently force transnational debates.⁷⁰⁹

⁷⁰² *Kassim*, *The European Commission of the Twenty-First Century* 2013, 130, 132.

⁷⁰³ *Decker/Sonnicksen*, *Zeitschrift für Politikwissenschaft* 2016, 71, 76.

⁷⁰⁴ *Sonnicksen*, *Ein Präsident für Europa: zur Demokratisierung der Europäischen Union*, 226.

⁷⁰⁵ *Grimm*, *Europa ja - aber welches*, 135.

⁷⁰⁶ *Kassim*, *European Political Science* 2017, 1, 5.

⁷⁰⁷ *Innerarity*, *Beyond the Crisis: The Governance of Europe’s Economic, Political and Legal Transformation*, 182.

⁷⁰⁸ *Grimm*, *Europa ja - aber welches*, 91.

⁷⁰⁹ *Abels*, *Handbuch Europäische Union* 2019, 1, 9.

A direct election of the Commission Presidency could turn the European Commission into a politicised institution.⁷¹⁰ Such an election could entail higher participation or turnout of European citizens. In addition, the national parties would be forced to support the European party families more strongly and thus establish more European thinking and action so that the election campaign for the European elections would be filled with European instead of national issues. Another advantage would be that the direct election of the Commission President would create a unifying figure, bringing with it a more clear-cut distribution of powers, especially between the legislative and executive branches.⁷¹¹ This depicted politicisation of the Commission could contradict the original intention that it, the former High Authority, was initially meant to be a technocratic body within the EU framework. A politically motivated electoral process could undermine the technocratic orientation of the European Commission, as the executive has to remain independent of control rights.⁷¹² Favouring this idea is that the administrative and judicial bodies of the EU can hardly be held accountable for their decisions by the European people, whereas the European Commission can be held responsible through an action for annulment under Article 264 TFEU.⁷¹³ The CJEU, in particular, has immense power as the highest court of the EU, having the ability to overrule national courts.⁷¹⁴ Hence it follows that these bodies should not be political and thus should be elected or voted out by EU citizens. The independence of the College of Commissioners, the political arm of the EU, from its nation-states is particularly emphasised by the independence oath they have to take.⁷¹⁵ The independence of the College of Commissioners is enshrined in Article 17 (3) TEU and Article 245 (1) TFEU. Nevertheless, the Commissioners are appointed in a highly politicised procedure and are supposed to set the political direction of the Commission.⁷¹⁶ Their Janus-faced character comes together in their claim to be the “honest broker” of the EU

⁷¹⁰ *Raunio*, *The Institutions of the European Union 2017*, 357, 374; *Skouris*, *Demokratie und Rechtsstaat: Europäische Union in der Krise*, 83, 97, 99, 109.

⁷¹¹ *Sonnicksen*, *Ein Präsident für Europa. Zur Demokratisierung der Europäischen Union*, 166, 168.

⁷¹² *Skouris*, *Demokratie und Rechtsstaat: Europäische Union in der Krise*, 83, 97, 99, 109.

⁷¹³ *Grimm*, *Europa ja - aber welches*, 88.

⁷¹⁴ *Raunio*, *Government and Opposition 1999*, 180, 181.

⁷¹⁵ *Peterson*, *The Institutions of the European Union 2012*, 96, 97.

⁷¹⁶ *Peterson*, *The Institutions of the European Union 2012*, 96, 97.

framework.⁷¹⁷ Eventually it has to be remembered that politicisation creates controversy, which could enhance the election process. Accordingly, for the European Commission to shape the long-term agenda together with the European Council, a politicisation of the Commission Presidency is necessary, which presupposes a competitive choice of this position by the European electorate in direct or indirect elections.⁷¹⁸ Such an election would give the President of the European Commission the necessary ideological power at the negotiating table with the European Council.⁷¹⁹ Finally, the direct election of the President of the European Commission would respond to the lack of sufficient democratic control and the insufficient participation of citizens.⁷²⁰

§ 4.7 Conclusions

To determine whether the *Spitzenkandidaten* idea is suitable for the preservation and, particularly, the promotion of the principle of democracy, it is necessary to understand the democratic standards which the EU wants to and can meet due to its unique position. The intention of the European Parliament in introducing the *Spitzenkandidaten* principle was to give more legitimacy to the administering and law-initiating European Commission by indirectly electing its leadership in the European elections, and the vote of the electorate taking place in the knowledge of the *Spitzenkandidaten* running. Therefore, the view that for a political system to be democratic, it is not mandatory that the people should be directly involved in every decision, and thus it is sufficient that the people can hold the institutions accountable for all decisions made,⁷²¹ is not convincing within the frame of the EU. In the more than seventy years since the founding of the EU's predecessor, the ECSC, the EU and its institutions have steadily evolved. Its sphere of influence has been considerably and continuously increased. However, after the introduction of the European elections in 1979, the possibility for European citizens to exert influence has not changed significantly. This standstill has supposedly been compensated for by the greater involvement of the European Parliament. It is to be feared that, for many European citizens, this institutional development process has created a self-

⁷¹⁷ Peterson, *The Institutions of the European Union* 2012, 96, 97.

⁷¹⁸ Franzius, *Supranationalität und Demokratie* 2015, 153, 155.

⁷¹⁹ Dann, *Grenzen der europäischen Integration* 2014, 251.

⁷²⁰ de Jongh/Theuns, *Journal of Contemporary European Research* 2017, 1283, 1285.

⁷²¹ Richardson, *Democratic Autonomy: Public Reasoning about the Ends of Policy*, 225.

perpetuating unity that seems unattainable for them. The growing alienation can be seen in the continuously decreasing voter turnout in European elections until 2014 when the *Spitzenkandidaten* principle was to be used for the first time for the election of the Commission presidency. This comparative peak and trend of voter turnout stagnated at around fifty percent in the following European election under the announcement of the *Spitzenkandidaten* principle in 2019. Perhaps with this new impulse, it was possible to stop the downward trend in electoral participation and to compensate, at least in part, for the propagated democratic deficit.

The unique path the EU is taking cannot be compared to nation-states in terms of democratic standards. Currently, the European Parliament and the Council operate as two chambers in a bicameral legislative system.⁷²² An approximation with the legislature in the US, consisting of the Senate and the House of Representatives, elected by the citizens, could be envisaged. In a democracy, which means complete rule by the people, nation-states must in all respects establish and maintain a chain of legitimacy from state institutions to the people. The EU, on the other hand, is a community of democratic nation-states. This peculiarity leads to many different views being held regarding the legal nature of the EU, which can be summarised in particular in intergovernmentalism and supranationalism.⁷²³

Some say Europe is too big and too diverse for the EU institutions to govern democratically in a national sense.⁷²⁴ For the intergovernmentalists, the union of democratic Member States is already sufficient to preserve democratic standards for the EU. Accordingly, sovereignty must be preserved in every way for the Member States. The decisions of the EU must be subject to constant control by the Member States.

In contrast, the supranationalists consider that the Member States or the national parliaments, have transferred extensive sovereign powers and competencies to the EU with their accession. The supranationalists place the principle of popular sovereignty at the centre of the European

⁷²² *Hodson/Peterson*, *The Institutions of the European Union 2017*, 1, 10.

⁷²³ *von Komorowski*, *Demokratieprinzip und Europäische Union*, 59; *Niess*, *Die europäische Idee - aus dem Geist des Widerstands*; *Wiesner*, *Die Europäische Kommission zwischen Technokratie und Politisierung 2016*, 85, 87.

⁷²⁴ *Dahl*, *Democracy's Edges 1999*, 19, 30.

concept of legitimacy⁷²⁵ and demand its transfer to the EU.⁷²⁶ European law now has primary validity in the hierarchy of norms of the Member States. By creating nation-state elements, such as a citizenship of the Union, a Union flag and anthem, and a definable Union territory, the EU fulfills the requirements for the existence of a state.⁷²⁷ Thus, the EU has special sovereignty, which must be secured by a comprehensive legitimation by the citizens of the Union. However, the constitutionalisation theory of some supranationalists referencing to decisions of the CJEU from the 1960s is not appropriate. Since then, the EU has developed significantly, created new institutions and gained many new members.

These democratic claims to legitimacy are not met by the control and decision-making power of the European Council, however, as this is merely an association of the Member States of the EU, which is problematic in two aspects. Firstly, the Member States are represented in the European Council by their heads of state and government. Yet, this is the executive branch of the Member States, which in parliamentary democracies is elected by the national parliaments based on a national agenda to execute existing laws. On the other hand, all Member States have only one vote in the decision-making process in the European Council, regardless of their size. As a result, when votes have to be taken unanimously, a Member State can block them by refusing to vote. Thus, the European Council is not sufficient to set the relevant decisions and the agenda for the EU. In addition, it should be noted that the national parliaments decided to join the EU, and therefore significant decisions concerning the EU must be taken by the national parliaments or at least by institutions legitimised by the European citizens for this purpose.

For this reason, the institution evolved from the original Joint Assembly into the European Parliament, which has been elected since 1979 to represent European citizens in legislation and other voters and elections is essential. However, more than forty years after the first European elections, crucial deficits concerning the European Parliament are discernible. For one thing, the procedure of the European election has not changed. Although the European treaties call for an independent European electoral law, the European election is still conducted

⁷²⁵ *Heller*, Gesammelte Schriften Bd.3, 280; *Böckenförde*, Handbuch des Staatsrechts der Bundesrepublik Deutschland Bd.2 § 24 Rn.1; *Raufer*, Die legitime Demokratie. Zur Begründung politischer Ordnung in der Bundesrepublik, 12 f.

⁷²⁶ *Epiney*, Schweizerische Demokratie und Europäische Union, 116 ff.; *Spieß*, Sozialer Dialog und Demokratieprinzip, 113 ff.

⁷²⁷ *Hatje/Kindt*, NJW 2008, 1761, 1768.

through the national electoral laws of the Member States. On the other hand, the principle of degressive proportionality persists in the European Parliament. The success value equality of the electoral votes in the number of their representatives in the European Parliament deviates from each other. The result is to the detriment of countries with large populations and the advantage of countries with small populations.

Transnational lists would remedy this since, in such a case, legitimacy would depend directly on the electoral votes and not on the number of parliamentarians concerning the respective population size of their national states. That would also solve the problem of the lobby of national parties in the European Parliament. For that reason, according to Shackleton, people's attitudes towards important decisions are developed from a national rather than a European perspective.⁷²⁸ MEPs would no longer find themselves in a dilemma: representing the interests of national parties, European party families and voters. Therefore, to form transnational lists, independent European parties would have to be established, or the existing ones would have to be expanded to have an autonomous European agenda and be able to accept members and from these members nominate MEPs whom voters could elect. Due to these inconsistencies, a significant democratic deficit of the EU is apparent, which is particularly evident in the European Parliament.

As already described, the European Commission occupies a key position in this institutional structure among the institutions that function in a representative manner, concentrating on the Commission President.⁷²⁹ However, the *Spitzenkandidaten* principle in the election of the Commission President cannot compensate for the presented democratic deficits of the EU. The *Spitzenkandidaten* principle was a rather media-effective advertising measure for the European election. Through this, the voters' interest in the election could have been won by supposedly involving them in the upcoming personnel decision. That can be seen in the fact that nothing has changed for the voters after establishing the *Spitzenkandidaten* principle. They continue to have only one vote, as this should now be used for two different decisions despite the deficit in the value of success. Ultimately, the democratic deficit becomes particularly clear in that, in the end, it was the Parliament that did not enforce the *Spitzenkandidaten* principle despite the legitimacy of their voters in this regard and gave in to the European Council.

⁷²⁸ *Shackleton*, *The Institutions of the European Union 2017*, 138, 155.

⁷²⁹ *de Schoutheete*, *The Institutions of the European Union 2017*, 55, 72.

§ 5.0 Closing

The introduction of the *Spitzenkandidaten* principle in the 2014 European elections and its renewed invocation in 2019 attracted much political and media attention. With its suspension after the 2019 European election this dissertation aimed to analyse and conclude the legal and political impacts of the application and absence of the *Spitzenkandidaten* arrangement.

The innovation is due to an increasing number of European political problems that peaked in the late 2000s. These developments resulted in a growing alienation of EU citizens based on dissatisfaction, which crystallised out of the historically low voter turnout in the 2009 European elections. One reason for this estrangement is also seen in the remoteness of European policy issues from the European population. As the mouthpiece of the people, parties must, by definition, be anchored in the centre of society and influence the formation of political will. As far as the European parties are concerned, however, they are passive and therefore have little presence in the everyday lives of citizens, so a concrete engagement with European content seems remote. Another problem is that the European Commission, which has both legislative and executive functions and plays a decisive role in shaping the direction of the EU's development, is not directly elected by the European people, and its election by the European Parliament was only legally established by the entry into force of the Lisbon Treaty in 2009. In addition, the European Council, which is responsible for the nomination of the future Commission President, has not yet determined a binding scheme for their internal appointment. By adapting the European Treaties through the Lisbon Treaty (Art. 17 (7) TEU), the European Council should consider the results of the European elections in the nomination process already. The aim of the innovation was for the European Commission to reflect parliamentary majorities to be more democratic.

The competencies of the European Commission and its Presidency were outlined to understand the idea of a more concrete political legitimisation of the Commission Presidency based on the *Spitzenkandidaten* arrangement. The European Commission is a supranational institution that is unparalleled in its tasks and influence in the EU and nation-states. As a legislative and executive institution, it is involved equally in shaping and implementing the EU agenda, which is primarily set by the Member States in the European Council. However, through its monopoly on initiatives, the European Commission can exert considerable influence on it. Thus, the European Commission has an overall administrative and leading role in an EU without a clear separation of powers. Its supranational character is underlined by the fact that it

acts as an institution entirely independent of Member States and, being exclusively responsible to the supranational European Parliament according to Art. 17 (8) TEU. However, there are complementary entanglements among the EU institutions, which make the independence of the European Commission necessary. These entanglements include the election of the Commission, the size of the budget available to the Commission and, finally, the EU agenda. Within this institution, the President of the Commission has the power to issue directives and shape the internal actions of the Commission, the EU and the external representation of the EU. The Commission Presidency has a uniquely central position through direct and indirect influence and participation in all four areas of decision-making in the EU, the Commission, the European Council, the Council and the European Parliament. In contrast, the presidencies of the other three institutions are limited only to the institutions' own areas of responsibility. Thus one of the questions to be analysed was, whether the Commission Presidency requires stronger legitimisation by the European people similar to the election of a government and whether the principle of the *Spitzenkandidat* would meet such a requirement and already is legally safeguarded according to existing EU law.

Recognising the mentioned problems but circumventing bureaucratic obstacles such as legislative changes at both the European and national level, the *Spitzenkandidaten* principle was developed. In the period leading up to the 2014 European elections, the then Commission President Barroso and subsequently the European Parliament included it as a substantive impact of the European elections. Through the *Spitzenkandidaten* principle, the voter should get to know the potential Commission President and consider their party in their election decision. For this purpose, the European party families were to present candidates who would represent them in the election campaign and who would be their presidential candidate after the election. Through this, the *Spitzenkandidat* as the face of a European party family for the European election should bring with it a focus on European issues.

The European election was initiated in 1979 to give the European Parliament and its representatives a democratic mandate that would justify an expansion of competencies. Consequently, the *Spitzenkandidaten* principle was expected to strengthen the influence of the European Parliament on the European Commission, as this would bypass the European Council in its legally regulated nomination competence. It has been expected that the *Spitzenkandidaten* arrangement could have a refreshing effect on the European people, focusing the attention of the European population on European transnational relations.

And yet, after the 2014 European elections, there was no significant increase in voter turnout. It was particularly worrying that over half of the EU's electorate did not vote for the fourth consecutive year. Nevertheless, the winning party families stuck to the *Spitzenkandidaten* scheme, citing that the voter turnout had increased in countries where the leading candidates were well known. However, the European Council was opposed to implementing the *Spitzenkandidaten* idea after the European elections, referring to the legal basis and the sub-institutional cooperation with the European Parliament. In addition, the European Council argued that the Commission, as successor to the High Authority, should not become political and does not stand in comparison to national governments. However, they then recalled their announcements and joined the European Parliament in nominating Juncker as Commission President. Although this principle was supposed to be carried over for future elections by the European Parliament and the European Commission, no impetus was subsequently given to a legal amendment of Art. 17 (7) TEU.

The nomination of a Commission President after the 2019 European elections was a different matter. In the meantime, the leading candidates had become better known among the European people, which led, among other things, to the first increase in voter turnout after fifty years since the establishment of the European elections. The European Council, which, in the meantime, had been reconstituted and feared that the renewed application of the *Spitzenkandidaten* principle would be de facto binding for future elections, broke away from the commitment to the original candidate from the leading party family, Weber, early on in the nomination process. However, this is highly questionable, given the promises made to the electorate, particularly to battle the criticised lack of transparency in EU institutions and the significant responsibilities of the Commission Presidency, which were supposed to be combated with the introduction of the *Spitzenkandidaten* principle.

The wording of the existing legal regulation for the election of the Commission President, Article 17 (7) TEU, does not mention the *Spitzenkandidaten* principle. Instead, it contains elements in need of interpretation. In order to understand these concepts and the norm as a whole, an analysis of the historical development of the EU and its institutions was undertaken with a particular focus on the European Commission and its presidency.

The predecessor of the EU, the ECSC, was founded in 1951 by six states as a consequence of peace alliances for Europe that had been under consideration for centuries after two destructive world wars and a world economic crisis. It was already clear from the preamble that the

association was future-oriented by creating the prospect of bringing the peoples of Europe closer together. For founding this international organisation, a supranational, central institution called the High Authority was established accordingly, being entrusted with implementing the ECSC Treaty.⁷³⁰ This central character of the High Authority was maintained when the Treaties of Rome were concluded. Back then, the President of the High Authority was elected exclusively by the members of the High Authority. The history of the origins of the European Commission's predecessor shows that it was precisely not intended to be staffed with acting state politicians and thus intended to be independent of a national perspective and answerable only to the Joint Assembly.

The period of the 1960s can be described as a consolidation phase in which the laws and institutions brought into being were able to prove their functionality. To this end, the Merger Treaty of 1965 brought together all the existing treaties. With its conclusion, the European Communities were established. However, this period was also accompanied by ambitions for a stronger parliamentarisation of the European Communities. From the point of view of the Joint Assembly, it should have been renamed the European Parliament. Furthermore, the European Parliament was supposed to have its independent budget. To establish a sufficient chain of legitimacy between the European people and the Joint Assembly, the latter decided in 1960 to present a draft for European elections. This call for the stronger legitimisation of the European Communities through greater parliamentarisation also affected the European Commission, in that, according to the Furler and Faure Report, the European Parliament was now to elect the Commission. However, these development ambitions met with resistance, especially from France. These disagreements escalated based on the CAP. The concerns were about the amount of sovereignty conferred on the European Communities. Moreover, it was questionable to whom the Commission should be answerable. After a seven-month blockade by France, it was decided, to restore the Council of Ministers' ability to function, that each Member State would have a right of veto when individual interests were problematically affected. In the more than fifty years that have passed since then, and 21 Member States having been incorporated into the European Communities, or the present EU, this *de facto* right of veto has not been further specified and continues to exist in a wide range of topics, severely limiting the functioning of the EU Council.

The 1970s brought decisive innovations to the European Communities. Budgetary rights were

⁷³⁰ *Hofmann*, Europa von A bis Z 2020, 391.

now transferred to the European Parliament, and an independent European budget was created. Furthermore, the way was paved for a joint European policy with a particular focus on foreign policy. The now nine Member States founded the European Council without a legal foundation and based only on the agreement of its founding states. As a result, the European Council now saw itself as the central and guiding decision-maker for the EU. At the same time, it was the opportunity for the Member States to continue to have control over the developments of the European Communities. On the other hand, the European Parliament, in particular, continued to complain about a democratic deficit leading to the European elections and the Council involving it more in its legislative work to avoid a blockade by the European Parliament.

The period after the first European elections illustrates the immense developments of the European Parliament without an official adaption of the treaty documents. On the one hand, this confirms that agreements reached are de facto enforced by the institutions. On the other hand, it must be taken into account that the increased rights of the Parliament were not written down to avoid a resulting legally binding effect. Although the European Council was named for the first time in the SEA, its functions and rights were not specified. An attempt by the European Council to circumvent the influence of the European Parliament was rejected by the CJEU *Isoglucose* ruling. It enforced the balance of power among the institutions of the European Communities. Through the election of independent members of the European Parliament by the European people, it developed into another supranational institution of the European Communities. This transformation enabled the European Parliament to assert its interests de facto more effectively since any infringement by other institutions would have resulted in an impairment of democratic principles. In particular, the influence of the Parliament on the Commission was also welcomed by the latter. It enabled it to free itself from unilateral requirements of the European Council and thus to act in a forward-looking manner in the sense of the European Treaties.

The 1990s, which saw the establishment of the EU and the creation of new treaties, had a fundamental impact on the inter-institutional dependencies of EU institutions. In particular, this also sealed the previous future orientation of the predecessor organisations. It particularly emerges from the fact that the newly listed European Council was authorised to take necessary measures for the development, unity, consistency and effectiveness, and therefore conversely not for regression or stagnation, of the EU. In this sense, the Treaty of Amsterdam was

intended to be a correction to the Treaty of Maastricht to bring the EU closer to its citizens by making it more democratic and efficient. The greater democratisation was particularly realised through the more regulated influence of the European Parliament on the election of the European Commission and its President. The adjustment was made by giving the European Parliament the right to veto the candidate presented by the European Council and, secondly, by aligning the legislative period of the European Commission with that of the European Parliament. This empowerment allowed the European Parliament to incorporate the results of the European elections into the Commission President's election and link this to the formation of a joint, inter-institutional agenda.

The introduction of the qualified majority principle by the Treaty of Nice restored the functionality of the European Council in many areas. Nevertheless, according to the Laeken Declaration, an active representation of the European peoples should happen when creating the European Constitution, in particular through the participation of the European Parliament in the IGC. Despite the failure of the European Constitution, it was now possible for the European Parliament to assert more influence on the other institutions in the direction of active electoral rights concerning the Commission and its President. This right of the European Parliament to vote, found its way into Article 17 (7) TEU through the Treaty reform of Lisbon. Despite introducing a permanent Council President, the Commission President remains the central figure in the EU's institutional network due to his entanglements. Therefore, in the sense of a future-oriented EU, it would not have been out of the question to use the *Spitzenkandidaten* principle for a closer link between the European elections and the election of the Commission President without an official treaty reform.

Another question, though, is whether the *Spitzenkandidaten* principle is a useful instrument in compensating for a possibly existing democratic deficit of the EU. Under the meaning of democracy as sovereignty of the people, it was necessary to conclude the requirements towards democratic elements of the EU as the sui generis organisation, which it is. It has to be noted that the intergovernmental approach, concluding that a democratic deficit is non-existent or democratically unjustified, is not convincing. Concerning the sufficient democratic existence of the Member States, the intergovernmental theory fails to realise that the Member States have only concluded the European Treaties. A possible democratic legitimacy of the treaties does not automatically guarantee the democratic legitimacy of their implementation by the European institutions. If this was not taken into account, democratic legitimisation through

the European elections would also be superfluous. The heads of state and government of the Member States are elected in national elections based on a national agenda, and thus European issues are at least not primarily up for debate, particularly not on a professional-level. Therefore, it seems unfounded to transfer the democratic legitimacy of a nationally elected executive to the European level. In addition, the majorities in the European Council are constantly changing due to the staggering national elections, which makes it difficult for the European Council to develop a long-term vision for the EU, as it acts more as a crisis manager. In the European context, an independent legal system has developed, and its court is in a position to put European interests and ideals before those of the Member States and enforce compliance with them. Moreover, the Commission has developed as a powerful European institution, being represented in all areas of the EU. Due to its competencies, it is able to elaborate a substantive vision for the future of the EU through majorities in the Parliament. These arguments suggest that the EU has developed autonomy over time, which has allowed it to grow into a supranational organisation. The feedback on the legitimacy of its institutions to democratic elements of the Member States is therefore insufficient. Therefore, the possibility of democratic deficits exists if the legitimacy chain to the European population is insufficiently legitimised.

In particular, the principle of double legitimacy, consisting of the majority principle for a large part of the Council's decisions and the European elections, is also unsatisfactory. Initially, European elections were installed in response to pressure from the European Parliament and the democratic deficit identified in the Vedel Report of 1972 and the Tindemans Report of 1976 to compensate for the democratic gap created by the majority principle in the European Council. For in this way, measures can be enforced by the European Council even if a Member State and its citizens are not prepared to do so. However, it should be borne in mind that the opposite de facto power of a Member State in the European Council would also lead to severe losses of democracy since, in this case a member of the Council would have the possibility of thwarting the progress of the Union as a whole, as happened in the 'empty chair crisis'. Flawless democratic legitimacy of the European Council could, thus, only be guaranteed with unanimous decisions. For this reason, the elections to the European Parliament are the central instrument for guaranteeing democratic legitimacy, which makes the connection established by Article 17 (7) TEU between the European elections and the election of the Commission Presidency comprehensible. Furthermore, this shows that even greater participation of the Eu-

European Parliament in central and future-shaping decisions are necessary.

In 1997, the necessity of a uniform European electoral law was legally standardised. Since this has not yet been implemented, the European elections are de facto national elections influencing the composition of the European Parliament according to the shares of the individual Member States. MEPs are, therefore, primarily national representatives so that European issues are commonly linked to their respective national context. The European elections are the only opportunity for the European population to hold the European Parliament accountable for representing the entire EU.

However, this is also problematic as the European Parliament in its current form does not meet democratic principles even in several areas of the Parliament's structure. Although seats are allocated on the basis of the European party families, it is not absolutely definite before the European elections which national parties will come together in the European party families afterwards.⁷³¹ Furthermore, the representation of the European population in the European Parliament takes place based on the principle of degressive proportionality, according to which the citizens of Member States with fewer inhabitants are more strongly represented than countries with larger populations. Ultimately, MEPs are in a relevant relationship of dependency on their national parties, as these national parties are the members of European party families and it is them who nominate the candidates for election. As a result, there is a danger that European representatives are caught between national and European interests. Taking into account that the *Spitzenkandidaten* principle was developed to solve the democratic deficit of the EU in the election of the Commission Presidency, it can be seen that this procedure would circumvent the existing democratic gap of the European Parliament. Instead, the approach required is developing a uniform European electoral law with the simultaneous development of independent European parties whose members stand for election on exclusively European issues, detached from their nationality.⁷³² In this way, the European party families would become independent from national parties. Furthermore, the problem of degressive proportionality would not exist, as MEPs would now represent all EU citizens equally.

An important question for determining the choice of the Commission Presidency is to whom

⁷³¹ Freezing relationships of the PES with the Romanian ruling Social-democratic party PSD: <https://www.politico.eu/article/romanian-ruling-party-hits-back-at-pes-over-freezing-of-relations-romania-eu-elections-brexitepp-rule-of-law/> - last accessed on 07 June 2022; The Hungarian Conservative party Fidesz finally dropping out of the EPP in 2021: <https://www.swp-berlin.org/publikation/europaeisches-parlamentdie-zukunft-von-fidesz-jenseits-der-evp> - last accessed on 07 June 2022.

⁷³² Possibly balanced based on inner-party quorums.

the Commission as a whole is beholden. Its independence is secured by Article 17 (3) TEU with the addition that it is only obligated to the European Parliament. The *Spitzenkandidaten* principle meant that the personalisation of the election had a positive effect, even if only slightly, on the European elections. However, it has been shown that this principle does not have the legal or ideological strength to bring about a stronger democratic legitimacy of the European Commission, which has an impact on the EU as a whole. The *Spitzenkandidaten* idea was not adhered to after the 2019 elections and despite the agenda of the current Commission President von der Leyen to further elaborate the principle and revive it for the 2024 European elections, no substantial added value of this principle can be seen. Despite its adopted implementation, the listed problems that lead to the democratic deficits of the EU are not solved. What is needed instead, is the short-term elaboration of transnational lists, the introduction of an Europe-wide electoral law and the abolition of the representation of MEPs according to the size of their Member States. For doing justice to the prominent position of the Commission President, there is a need for the direct election of the Commission Presidency by the European people on the basis of an exclusively European agenda. Although this would lead to a political statement by the candidates, while the independence of the Commission from party-political guidelines would still have to be guaranteed.

Nevertheless, the disregard of the *Spitzenkandidaten* arrangement after the 2019 European elections leaves a bitter taste in terms of transparency and trust towards the EU and its institutions. In a democratic system, there is a need for a legal possibility of control in such cases with regard to decisions of the organs, insofar as a power of plaintiff exists. In the absence of violated rights, it is not evident that the respective leading candidate who has been passed over has a right of action, since their nomination as leading candidate does not confer on them any binding and additional rights vis-à-vis other MEPs. In contrast, an action for annulment by the European electorate against the European Parliament appears to be appropriate, which follows from the fact that the latter declared itself committed to the principle of the leading candidate before the election and, by disregarding this very principle after the election, violated, among other things, the electoral law principle under the immediacy of the election.

Overall, this work shows that the EU is still in a state of a conglomerate of fundamentally different interests, which becomes obvious through the escalation in attempts to solve problems, as concerning the *Spitzenkandidaten* arrangement. It is true that the treaties have formally established the institutions of the Community and their competences. However, it is important

to note the complexity of the governance network, whereby numerous institutions at all levels work together to find solutions.⁷³³ This results in unstable compromises and balances that can easily be shaken. This results in a proliferation of institutional problems due to this opposing dynamic. This has a particularly, democratically, highly questionable effect, to the detriment of the European population. The existing democratic deficits, which are not being solved due to these opposing dynamics, lead to increased intransparency and lack of understanding and consequently to an increased alienation of the European population from the EU, which can already be seen in the worrying voter turnout. More than ten years after the Lisbon Treaty came into force, the role of the European Council as crisis manager and the adoption of non-transparent decisions is no longer appropriate, as reality does not hold out the prospect of an end to crises. Moreover it must be regarded, that the EU is currently neither a state nor an international organisation but something in between and therefore requires an individual concept, whose duality is represented by the current legal structure and institutional framework in general.⁷³⁴ This necessitates a binding perspective for the EU that makes the EU as a whole permanently functional and fully exploits its potential within the framework of the transferred competencies without being in a state of mutual blockades time after time, which the *Spitzenkandidaten* procedure in its current design does not provide for. Only through the recognition of the EU as a supranational community with limited competencies can the European Commission Presidency fully assume its unique and independent role, which is then rounded off with its direct election.

⁷³³ *Wagener/Eger*, Europäische Integration, 194.

⁷³⁴ *Hatje*, EuR - Beiheft 2 2015, 39, 46.