

EDITORIAL COMMENTS

Power to the people of the European Union – Right on?

The rules seemed to be clear; the way the game was going to be played was not. The rules are laid down in Article 214(2) third paragraph, EC:

“The President and the other Members of the Commission thus nominated shall be subject *as a body* to a vote of approval by the European Parliament.”¹

The drafters of the Amsterdam Treaty who inserted this particular provision presumably had a clear vision of the role of Parliament. This view certainly excluded the vetting of individual Members of the Commission. In this view the European Parliament would act as a responsible Community institution and not rock the boat by going for the “nuclear option.”

In July 2004 Mr Barroso’s nomination was approved by the European Parliament.² Thereafter the Council by common accord with the President-designate had adopted the list of other persons it intended to appoint as Members of the Commission. Subsequently, Parliament organized hearings in the Parliamentary committees responsible for the specific subject matter for which the proposed Member of the Commission was to be responsible. In itself this was not a novelty. A similar procedure was followed by the Parliament five years ago. Some candidates were subjected to hearings by more than one committee. However, unlike the last time, serious objections were raised against individual candidates. These were expressed after a meeting of the President of the Parliament and chairpersons of the individual committees. A brief, if somewhat positively slanted, summary of these objections is given in Mr Barroso’s speech to the Plenary Session of the Parliament on 26 October 2004.³ Although other proposed commissioners were also the subject of serious reservations and criticism, the principle target of Parliament’s

1. Italics supplied.

2. The motion received 413 votes in favour and 251 votes against, with 44 abstentions; see minutes of the sitting of 22 July 2004, consulted via the Parliament website.

3. europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/04/474&format=HTML&aged=0&language=EN&guiLanguage=en

criticism was Mr Buttiglione. The candid expression of his views on homosexuality and the role of women predictably provoked fierce reactions. His subsequent assertion that he would be able to distinguish his personal conviction from his professional views failed to make an impression. Nor did Mr Barroso's extensive reply stressing the importance he attached to decisive political action against all forms of discrimination. It was simply too little too late. The EP had found its political high ground and it was not going to let the momentum go.

On the eve of the vote it became clear that a majority of the Parliament would vote against the approval of the Commission. The next day President Barroso announced that he had come to the conclusion that if a vote were to be taken, the outcome would not be positive for the European Institutions or for the European project. He therefore decided not to submit the new Commission to a vote. There was no new Commission to assume its duties on 1 November 2004. Applying the principle of the continuity of public service, which is also expressed in Article 201 EC for cases of motion of censure on the activities of the Commission, the Prodi Commission would continue to deal with "*current business until they are replaced*."⁴

A comment on the Parliament's rejection of the Barroso Commission necessarily implies a view or concept of the EU. However, it is for the purposes of this editorial not necessary to indulge in a debate about the nature and intensity of the integration process in Europe or the European project. It is sufficient to point out that at every level of integration the rule of law in a democratic society has to be guaranteed. This principle has been developed by the ECJ in many landmark judgments and found particular expression in its seminal case law on the role of the Parliament as a litigant. Thus, it held in the *Isoglucose* judgment:

"It reflects at Community level the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly. Due consultation of the Parliament in the cases provided for by the Treaty therefore constitutes an essential formality disregard of which means that the measure concerned is void."⁵

The principle of the rule of law in a democratic society is expressed in the Copenhagen criteria for accession. It is also now enshrined in the preamble to the Draft Constitution as well as in Article I-2.

The Laeken declaration provides an even more specific starting point for an evaluation of the *de facto* rejection of the new Commission:

4. Our emphasis.

5. Case 139/79, *Maizena v. Council*, [1980] ECR 3393 para 34.

“The first question is thus how we can increase the democratic legitimacy and transparency of the present institutions, a question which is valid for the three institutions.
How can the authority and efficiency of the European Commission be enhanced?”

It may be argued that the authority of the Commission will be enhanced if in addition to its President its individual Members have the unequivocal confidence of the EP – at the very least, it is clear that the authority of the Commission will not be strengthened if certain members are the subject of severe criticism by committees of the Parliament, regardless of whether or not the Parliament ultimately votes in favour of the proposed Commission. At the same time the power of approving individual Members of the Commission may strengthen the position of the Parliament in the institutional triangle. Thus a right to vote on individual commissioners would seem to increase the democratic legitimacy of both the Commission and the Parliament. It strengthens the power of the Parliament and thereby increases the democratic legitimacy of the EU as such.

As is well known the Constitution has not advanced matters for the EP very much. Nevertheless, there are some changes.⁶ Article I-27 provides that the European Council: “shall propose a candidate for President of the Commission” whereas Article 214(2) EC states that: “The Council meeting in the composition of Heads of State or Government shall nominate the person it intends to appoint as the President of the Commission.” The second change lies in the words “the European Parliament shall elect the President” instead of the words “approve the nomination” presently contained in Article 214(2) third paragraph EC. In addition Article I-27 provides a procedure to be followed if the EP rejects the Council’s choice.⁷ The failure to achieve a greater say in the appointment of President of the Commission during the negotiations in the Convention may have put the EP in an extra assertive mood in the present procedure.

In the constitutional practice of most – though not all – Member States, individual cabinet ministers can be subject to a vote of censure by the na-

6. Kokott and Rüth, “The European Convention and its Draft Treaty establishing a Constitution for Europe: Appropriate answers to the Laeken questions?” 40 CML Rev. 2003, 1315 et seq. (esp. 1332-33) qualify these changes as cosmetic. They do not address the issue of the Parliament’s right to vote on individual Commissioners. Giscard d’Estaing, *La Constitution pour L’Europe* (Éditions Albin Michel, 2003), at pp. 53–54 is also silent on this question. Both publications only address the question of the selection of the President of the Commission.

7. Giscard d’Estaing writes: “La Constitution modifie profondément l’esprit de ce dispositif, en fixant des règles nouvelles.” *ibid.* p. 54. The addition of the next sentence outlining the procedure to be followed when the Parliament rejects the Council’s choice does not add much, as this was going to be the likely procedure under the present rules anyway.

tional parliaments. Such a practice increases their political status and their effectiveness. Whilst it may be argued that the position of the Commission and that of a national government, and derived from that the positions of individual Commissioners and cabinet ministers, are not comparable, it cannot be denied that the functioning of the Commission in the institutional framework of the Community is enhanced by authoritative Commissioners, that is Commissioners with firm standing in the Parliament.

Furthermore, the right to vet individual Members of the Commission may well be more vital at a Community level than at a national level because it may protect the Community from egregious efforts of national governments to pack the Commission with persons serving national interests. In the present case, the Italian Government certainly played into the hands of Parliament by proposing Mr Buttiglione.

It is also interesting to observe that the Parliament procedure of calling the hearings created their own momentum, even though five years ago the investiture of the Prodi Commission went unopposed. The very fact that hearings are conducted will inevitably create the opportunity for expressing political views thus feeding into the ever-present tendency of parliamentarians to claim more powers.

The episode does raise concerns about the collegiality of the Commission. Individual investiture and responsibility of members of the Commission will affect the collective responsibility of the Commission. It would be unfortunate if the non-presentation to a vote of the Commission, resulting in a *de facto* right of the Parliament to veto individual Commissioners, were to lead to a weakening of the Commission as a body and its President-designate in particular. This may be more effectively remedied by a procedure whereby a new Commission has to be formed. Another solution may consist of allowing the President to choose from more than one candidate proposed by the Member States. It may be recalled that there was a proposal to this effect in the Convention. The text of Article I-27 does not rule out such a procedure. The October events mark the development of a new constitutional practice in the formation of a Commission as well as the introduction of a proper parliamentary regime. They may well trigger further developments in such practices.

They also show an implicit acceptance of the discretion of the President-designate of the Commission to decide whether or not to submit for Parliamentary approval a particular formation of the Commission as it results from a first round of proposals made by each Member State (under Art. 214 EC), although no such provision is made in the Treaty. Thus new law is actually being made.

At the time of drafting this Editorial, it is not clear what turn the rejection of the proposed Commission will take. Mr Barroso has indicated that he

needs more time, at least a few weeks.⁸ Much will depend on his political deftness. In his declaration of 27 October 2004, he suggested that a negative vote was not positive for the institutions or for the European project. This does not seem to be a very forward-looking view. From another perspective this episode may well create opportunities for strengthening the hand the President-designate and selecting Members of the Commission with better credentials for the European project. As Mr Barroso also put it in the same declaration: “we [addressing himself to the President of the Parliament] can agree on our common commitment to reinforce the democratic nature of European Integration.”

The enhancement of the powers of the Parliament will bring it closer to the citizens if only because it has focused the attention of the media on its business in a much more positive way than usual.

The events of the last week of October 2004 demonstrate that even if the rules for the appointment of the Commission seemed to exclude an intervention by the Parliament with the appointment of individual Commissioners, its bold way of playing the game has created a *de facto* right of refusal. This extra power created will be there to stay. This development may also provoke reactions from the Council and individual governments in an effort to retain their powers and/or safeguard the collegiality principle. History has shown that such imaginative behaviour by national parliaments has often served the advancement of democracy.

8. On 18 November, the Parliament approved the new Commission presented by Mr Barroso – in which three changes had been made compared with the first Commission-designate, including the replacement of Mr Buttiglione – by 449 votes in favour to 149 votes against with 82 abstentions. Taken from the Parliament’s website www.europarl.eu.int/