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EDITORIAL COMMENT

A new Commission takes office: On the relevance of Union law and the emergence of constitutional conventions.

Observers of the Union in late 2014 might be forgiven for fearing that dark clouds continue to gather with precious few silver linings around them. Will all these difficult and divisive years of struggling to resolve the euro crisis now give way, not to stability and recovery, but to prolonged economic stagnation? With even the German economy showing worrying signs, let alone the more serious troubles around growth and budgets facing countries like France and Italy, it is clear that yet more political wrangling lies ahead before the Union can manage to define clearly and pursue effectively the policies needed to revive its economic outlook. Meanwhile, the situation in the UK becomes ever more critical: the electoral threat posed by UKIP, exemplified by their first elected MP in October 2014, seems to be driving the Conservatives in particular towards ever more Eurosceptic positions. Indeed, rather than awaiting the outcome of his own comprehensive and evidence-based "Balance of Competences Review" before conducting an informed debate about UK membership of the Union,[1] Prime Minister Cameron seems intent on pushing for almost impossible demands (particularly as regards the free movement of persons) which can only increase the prospect of a total British exit within the lifetime of the next Parliament.

Not that populist rhetoric or rising nationalism constitute a British monopoly.[2] One need only recall that the Orban regime in Hungary continues to pose its own challenges – pitting the Prime Minister's undoubted domestic popularity against difficult allegations that he is leading the country in an increasingly illiberal, if not altogether authoritarian, direction and raising equally tricky questions about when (if ever) those allegations will be assessed against respect for the Union's core values.

Externally, the picture is hardly much brighter. As the civil war in Ukraine rumbles on, and his anti-Western rhetoric intensifies, President Putin shows no sign of reining in Russia's assertiveness on the international stage. Islamic State and its equally extreme affiliates now pose an existential threat to

1. On which, see www.gov.uk/review-of-the-balance-of-competences.

2. Even if they can seem a British speciality: consider Cameron's performance, at and around the European Council meeting on 23–24 Oct. 2014, over the (admittedly badly timed and perhaps poorly communicated) demand for an increased UK contribution to the Union budget.

civilization in swathes of the Middle East, and even beyond to countries like Libya, pushing both extreme violence and its awful consequences right into the immediate vicinity of the Union and its allies. The growing threat of an Ebola pandemic, even if it does not realistically pose the same health risks to Europe as it does to developing countries, nevertheless creates not only a moral but also a strategic responsibility in safeguarding the stability of West Africa. Even the project of a major trade deal with the US, which had seemed to be making solid progress, has attracted increasing hostility – not least through allegations that potential provisions concerning investment dispute settlement are to be considered a threat to the prerogatives of democratically elected governments as well as to the preservation of high social and environmental standards in Europe. With so little cheery news about, it could even be forgiven if many Union officials breathed a sigh of relief when the Scots voted against independence in their September 2014 referendum, followed soon after by the cancellation of Catalonia's unofficial poll, so that at least one major headache – having to face up to the unknown challenges of what to do in the event of the disintegration of an existing Member State – has been deferred for another day.

All of that hardly provides a very auspicious backdrop for the installation of the new Commission under the direction of President Jean-Claude Juncker. The College secured the consent of the European Parliament on 22 October 2014 and, with the final approval of the European Council, took up office as planned on 1 November 2014.

Of course, it is difficult to gauge expectations about how far this Commission can, will or should play a leading strategic role in tackling the Union's myriad challenges. After all, the Commission's institutional position seems to point in two apparently contradictory directions. On the one hand, it is undeniable that the Commission has emerged from the last few years in certain respects a much more influential institution than before – particularly in the field of economic governance and budgetary discipline, especially for those Member States participating in the single currency. And, for his part, Juncker has already lapped up widespread praise for his pragmatic and balanced allocation of roles and responsibilities among a highly experienced team of Commissioners. On the other hand, the reality of the Union's institutional framework post-Lisbon Treaty and since the advent of the euro crisis is one in which the Member States unquestionably dominate the political agenda. The Commission is of course far from some mere henchman of the European Council, but it is as dependent as ever upon the cooperation of the Member States for its vision to stand any realistic chance of being translated into a legal or political reality. Similar tensions exist when it comes to the Commission's public standing. In many Member States, the Union in general

and the Commission in particular remain held in relatively high regard and – particularly when it comes to tackling Union-own problems such as reforming the euro zone – the new Commission might rightly feel some considerable weight of expectation resting upon its shoulders. Yet in other Member States, there surely exists real scepticism about whether the Union in general and the Commission in particular can claim any real legitimacy in advocating let alone pushing a political agenda which carries significant implications for cherished national social policies. The UK situation is only an extreme manifestation of the Union's long-standing difficulties in winning even a minimum level of political allegiance from large numbers of its own citizens.

To the new Commission, we can only offer our best wishes for success in tackling its unenviable tasks. To our readers, we provide a few brief comments for reflection, inspired by the process of appointing and constituting the new Commission. Let's begin with the relationship between the Commission and the European Parliament. In another recent editorial comment, we discussed in detail the process by which Juncker was selected by the European Council as President-elect of the new Commission, having already been effectively cast in that role by the winning centre-right bloc of the European Parliament.[3] There is no doubt that the European Parliament succeeded here in significantly expanding its influence over the selection of the Commission President – well above and beyond the role envisaged for it in this regard by the written text of the Treaties, which merely oblige the European Council to take into account the European elections when selecting its own candidate for Commission President.[4] A similar phenomenon has since been at work in the process of Parliamentary scrutiny over the rest of the new Commission. Strictly speaking, the Treaties provide only for Parliamentary consent to be granted or withheld over the entire Commission.[5] On that basis, for example, the European Parliament had made it clear that it expected the new Commission to respect at least some minimum degree of gender balance (which it only just about managed to achieve – one notes that only 9 of the 28 Commissioners are female). But in keeping with a trend already set from the last two Commission appointment processes, the European Parliament was determined to exercise real muscle in the approval or otherwise also of individual national nominations – again, going above and beyond the role envisaged for it in this regard by the written text of the Treaties. Several candidates were subjected to second helpings of MEP scrutiny over their competence and outlook. This was the case, for example, with Lord Hill,

3. "After the European elections: Parliamentary games and gambles" (2014) 51 CML Rev. 1047.
4. Art. 17(7) TEU.
5. Art. 17(7) TEU, third para.

earmarked for the sensitive portfolio dealing with financial services – widely seen as a conciliatory gesture by Juncker towards the UK, which remains concerned about EU interference with one of its major domestic industries at a time of speculation over how far the interests of the euro zone might determine the direction of the Single Market as a whole. And the original Slovenian candidate, who had been assigned to the Vice-Presidency with responsibility for "energy union" (on which see further below), was forced to withdraw her own candidacy after being heavily rebuffed by MEPs in the wake of a particularly poor performance before the relevant committees – thus sparing Juncker the dilemma of whether to risk defying the European Parliament's position and seeing his whole team shot down in flames.[6]

For some, the European Council's formal endorsement of the European Parliament's preferred "Spitzenkandidat", together with the process of *de facto* Parliamentary consent to or veto over each individual nominee, was justified if not even compelled by the Union's express commitment to representative democracy as expressed in the Lisbon Treaty reforms.[7] For others, however, the European Parliament has quite wrongly usurped prerogatives that rightly lie with the Member States, the latter having foolishly connived in distorting an important dimension of the inter-institutional balance laid down in primary law. The truth is that, despite attempts by both sides to invoke the law's power to bestow saving grace or impose damning sanction, Union law actually has little role to play in these admittedly important constitutional disputes. The Treaties provide but an incomplete text – laying down certain basic rules for the political game but otherwise leaving considerable room for the Union institutions to recast their relations and relative power in myriad possible ways. One's sympathy here will thus be coloured more by political than legal analysis: how far one believes (for example) that the Union's democratic future lies in a fuller politicization so as to replace traditional consensus-building with more lively forms of contestation; or that the public preferences reflected in the outcome of the European elections (particularly taking into account the scourge of low voter turnout) should still carry less weight than the democratic voices of the Heads of State and Government. Either way, it is perhaps ironic that the centre-left President of the European Parliament itself was re-elected in what many criticized as a continuing stitch-up of this particular post between the two main political groupings with little regard being paid by the MEPs to the outcome of their own election… And of course, recent events raise interesting questions,

6. The new Slovenian candidate received Parliamentary approval in respect of the transport portfolio; the existing Slovakian candidate was instead elevated to the Vice-Presidency dealing with energy union.

7. Art. 10(1) TEU.

not only about the relationship between the European Council and the European Parliament, but also between the latter and the Commission itself. For example: having been appointed as "Spitzenkandidat", will Juncker now find himself in practice (at least expected to be) more beholden to expressions of Parliamentary preference than did his predecessors? Or will he actually prove even more keen to assert his independence, so as to avoid any impression that the Commission's freedom from all external instruction has been compromised?

The interaction between the letter of Union law and the spirit of Union politics is also evident in the internal configuration of the new Commission. Juncker has restructured the Commission, in particular, by offering a greater role for the (now seven) Vice-Presidents. Federica Mogherini, as High Representative of the Union for Foreign Affairs and Security Policy, is automatically designated a Vice-President of the Commission with extensive powers as defined under the Treaties.[8] In addition, Frans Timmermans will assume the title of "First Vice-President" with overall responsibility for better regulation, inter-institutional relations, the rule of law and the Charter of Fundamental Rights. That includes a specific role in ensuring that all Commission proposals comply with the principles of subsidiarity and proportionality – a role which sounds rather like exercising a power of veto, albeit on defined grounds, over which initiatives ever see the light of day. The remaining five Vice-Presidents have each been assigned a broad field of responsibility: Budget and Human Resources; Digital Single Market; Energy Union; the Euro and Social Dialogue; and Jobs, Growth, Investment and Competitiveness. In pursuing those responsibilities, the Vice-Presidents will lead flexible and cross-cutting "project teams" of individual Commissioners – a system intended to provide greater coordination between Directorates General in the pursuit of their common policy objectives. Crucially, an individual Commissioner will need the active support of a Vice-President in order to see any new initiative or proposal placed onto the Commission's formal work programme.

This approach has raised some eyebrows, largely because of its markedly more hierarchical character: the Vice-Presidents are undoubtedly more influential than before, to the point of being widely dubbed "Super Commissioners"; even among the Vice-Presidents themselves, some voices (especially that of Timmermans) are consciously intended to carry more weight than others. The prospect of such a "two-tier" Commission has already attracted mutterings that Juncker's reorganization somehow runs counter to fundamental principles of Union constitutional law, in particular, that of equality between each and every Commissioner. But again, we need to be

8. Art. 18 TEU.

careful about the proper role and limits of Union law in this situation. Under Article 17(6) TEU, the Commission President enjoys the power to decide on the internal organization of the Commission, for which purpose he is specifically charged with ensuring that it acts consistently, efficiently and as a collegiate body. Given that the Treaties also provide for the creation of Vice-Presidents, one is entitled to assume that the latter can exercise certain functions over and indeed above those of ordinary Commissioners.[9] So long as every Commissioner retains the right to vote on final action by the College, it is difficult to see how Juncker's reforms conflict with any identifiable provision of Union law. On the contrary: one might well argue that – given the size of the Commission – Juncker's reforms are more in keeping with the letter and spirit of Article 17(6) TEU than ever before.

In that regard, one should recall that, under the Lisbon Treaty, it was intended substantially to reduce the absolute number of Commissioners, coupled with a complex rotation system to ensure that Member States were "represented" in a balanced manner.[10] Those provisions were the result of a widespread consensus that, after the recent enlargements, the Commission's sheer size threatened to undermine its efficiency and effectiveness. However, the political deal which led to Ireland's repeat referendum on and eventual ratification of the Lisbon Treaty included a promise by the European Council to exercise its reserved power under the Treaties, so as to abolish the new system even before it had become applicable, and instead retain the principle of "one Commissioner per Member State" into the future.[11] Juncker was therefore faced with the prospect of having to work with a Commission of 28 ambitious political animals when there are simply not 28 distinct policy jobs that actually need to be done. The new system of Vice-Presidents, managing and filtering proposed initiatives in accordance with a coordinated work programme, could encourage the College as a whole to operate on a more consistent and efficient basis.

That is not to say that Juncker's structural innovations will be free from practical challenges. For example, the role of the First Vice-President as subsidiarity gatekeeper for all future Commission initiatives means that his own understanding and application of this notoriously ambiguous and contested principle will acquire an unusually potent significance – which may well have to be squared with the rather different views and approaches expressed by his colleagues, by the Member States and (perhaps most

9. Art. 17(6) TEU.

10. Art. 17(5) TEU and Art. 244 TFEU.

11. See, in particular, Conclusions of the European Council held on 11–12 Dec. 2008; European Council Decision 2013/272 concerning the number of members of the European Commission, O.J. 2013 L 165/98.

crucially) by the national parliaments when exercising their "early warning" powers.[12] And of course, merely creating greater hierarchy does not in itself guarantee any greater degree of consistency or efficiency.[13] Much will depend upon the outcome of any given encounter between (on the one side) a Commissioner standing in front of a large team of departmental staff and (on the other side) a Vice-President standing behind a much smaller cabinet of advisers: such a contest, pitting the momentum of mass resources against the bottleneck of focused power, could play out in very different ways. Moreover, the idea of cross-cutting and flexible teams, wherein individual Commissioners might be able to court the support of several different Vice-Presidents, leaving the President to manage and reconcile competing assessments as to the value of any given proposal, is bound to induce the odd bout of political shenanigans. But so too would any other system. The real test of its success will be whether Juncker's new style Commission proves to be a one-off experiment, or instead sets a precedent for the longer term good functioning of the College – either outcome surely having a significant input into the European Council's future review of the "Irish deal".[14]

Perhaps there is a broader lesson in all this for Union lawyers. There has been a marked tendency in recent years to invoke notions about the supreme importance of upholding the rule of law, and to level allegations of grave constitutional infringements, as the basis for criticizing more or less controversial political initiatives – most notably in assessing various institutional and regulatory responses to the euro crisis, though the phenomenon is certainly not limited to that sphere (as critical legal comments about the Juncker nomination and the restructuring of the Commission indeed illustrate). In many such cases, the truth is that any objective appraisal of the state of Union law could make little definitive contribution to what was essentially a choice between contested policy responses to complex problems. Particularly in novel situations, where the Treaties or general principles of Union law provide no or only very patchy guidance, to invoke notions about legality and illegality without acknowledging their essentially subjective character is not always a helpful contribution: it can distract attention from critically assessing the substantive merits, and unfairly call into question the very legitimacy, of certain courses of action; it also risks tolerating a situation in which lawyers and judges feel entitled to substitute themselves and their policy preferences for those of the democratically accountable political actors

12. Art. 5(3) TEU and Protocols No. 1 and No. 2.

13. One thinks here of the post-Nice reforms to the internal organization of the Court of Justice, particularly the creation of the Grand Chamber. Cf. Rasmussen, "Present and future European judicial problems after enlargement and the Post-2005 ideological revolt" 44 CML Rev. (2007), 1661.

14. In accordance with Art. 2 of Decision 2013/272.

actually tasked with addressing the problem at hand. That is not to suggest for a moment that the law must give way to political necessity, the constitutional rules most of all, even for the sake of overcoming periods of severe crisis – when on the contrary, basic legal principles can serve as an invaluable guide through difficult terrain. The point is rather than we should be careful to separate situations where the legal framework is indeed clear and binding, from those where it remains open to interpretation and evaluation, and indeed those where the law deliberately creates the space for political creativity and political battle.

That still leaves Union lawyers with plenty to contribute – not least in watching carefully how far short-term political manoeuvres conducted legitimately within the open framework set by the Treaties, might translate over time into more settled constitutional conventions that genuinely fill the gaps left within and between Treaty provisions; and especially in situations such as the "Spitzenkandidaten", how far such emergent constitutional conventions might come in time to be considered not only self-binding by the Union's political institutions,[15] but ultimately perhaps to acquire that all-important binding force, whether through the endorsement of the Union Courts,[16] or by means of formal Treaty change.

15. One thinks of the development of the Copenhagen criteria for the accession of new Member States; or the treatment of the Charter of Fundamental Rights before its incorporation into primary law.

16. Using legal tools such as the duty of loyal cooperation or the doctrine of legitimate expectations.