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Proposing versus electing the Commission President –
openness versus transparency

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Preface

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A. Introduction

In the next few days, elections for the European Parliament will take place again. And once again, parliamentarians are already preparing for the months after the election, pushing for more influence when it comes to the subsequent election of a new Commission President. After the failure of the lead candidate system in 2019,¹ Parliament has nevertheless reiterated its support for such a system with a resolution from December 2023, that was adopted with a broad majority.² The month before, Parliament had already adopted proposals for fundamental Treaty changes that also included changes to the system of electing a new Commission President.³ Not much attention has been given to these resolutions so far,⁴ even though both are far-reaching in their goals and may contain legal pitfalls. It is therefore useful to revisit the discussion on the legal permissibility of the lead candidates and the power struggle between Parliament and the European Council. After the debacle in 2019, Parliament is keen to create legal certainty and firmly establish the lead candidate system. Traditionally this discussion has been on the fundamental divide between an inter-governmental system versus a (supranational) parliamentary democracy.⁵ We argue that it can – additionally – be seen as a conflict between the need for openness (in the sense of a process where different options remain available to parliamentarians until the very end) and the need for transparency in the selection process (in the sense of excluding backroom deals). A well-designed inter-institutional agreement between the European Parliament and the European Council could be a possible solution and should also seek to balance these principles.

¹Andrew Gray, Jacopo Barigazzi and Maia de la Baume, ‘Who Killed the Spitzenkandidat?’ *Politico* (5 August 2019) <<https://www.politico.eu/article/who-killed-the-spitzenkandidat-european-parliament-election-2019-transition/>>.

² EP Resolution of 12 December 2023, 2023/2016(INI).

³ EP Resolution of 22 November 2023, 2022/2051(INL).

⁴ For some discussion, see for example Robert Böttner, ‘Die Vorschläge des Europäischen Parlaments zur Änderung der Verträge’ (*JuWissBlog*, 27 February 2024) <<https://www.juwiss.de/11-2024/>>. Similarly, the process of electing the highest offices often remains insufficiently researched even in national legal systems.

⁵ Kenneth Armstrong, ‘Has the Spitzenkandidaten System Failed and Should We Care?’ (*Verfassungsblog*, 4 July 2019) <<https://verfassungsblog.de/has-the-spitzenkandidaten-system-failed-and-should-we-care/>>.

B. The lead candidate principle

Since its introduction in the election campaign of 2014, the concept of lead candidates has created considerable debate in the European sphere.⁶ Parliament's attempt to establish lead candidates has led to a political tug-of-war with the European Council.⁷ Interestingly, the impetus did not come solely from the Parliament, but also from the Commission. In 2012 the then Commission President *José Barroso* called for European Parties to present their candidates to "deepen the pan-European political debate"⁸. In the following, we will first explain the system of lead candidates and then discuss some of its legal issues.

I. Definition of the term "lead candidate"

On the European level, the term "lead candidate" or "Spitzenkandidat" is used by European political parties and the media in election campaigns to refer to prominent politicians who are considered as future candidates for the position of European Commission President.⁹ The lead candidates are typically chosen at the meetings of European political parties. By nominating these individuals before the 2014 European elections, Parliament attempted to link the selection of the candidate for the office of President of the Commission at least to a certain extent to the election of the European Parliament. They were reported on in the press, adorned election posters and appeared in televised debates. Some voices in Parliament saw this as a turning point in the history of the European Union and the introduction of the lead candidate model was described as an "important victory for democracy"¹⁰. Accordingly, before the elections in 2019, Parliament confidently stated that it would be willing to reject a candidate for the position of Commission President who had not previously been a lead candidate.¹¹ In the end, with the election of *Ursula von der Leyen*, it did not manage to follow this announcement. Since then,

⁶ For a recent overview see Citino Ylenia Maria, 'The Spitzenkandidaten Practice in the Spotlight' (*Verfassungsblog*, 3 April 2024) <<https://verfassungsblog.de/the-spitzenkandidaten-practice/>>. For the history of lead candidates see Hilde Reiding and Fons Meijer, "'This Time It's Different' – the European Lead Candidate Procedure of 2014 and Its Historical Background" (2019) 39 *Parliaments, Estates and Representation* 64.

⁷ See for the announced consequences by the Parliament in case of refusal of the lead candidate process: EP decision of 7 February 2018, OJ 2018, C 463/89.

⁸ José Manuel Durão Barroso, 'State of the Union 2012 Address' (Plenary Session of the European Parliament, Strasbourg, 12 September 2012) <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_12_596>.

⁹ See for example Eddy Wax, 'Von Der Leyen: "Fake" Spitzenkandidat' *Politico* (23 February 2024) <<https://www.politico.eu/newsletter/eu-election-playbook/von-der-leyen-fake-spitzenkandidat/>>.

¹⁰ See this very enthusiastic video produced by Parliament in 2015 Spitzenkandidaten: The Underlying Story <<https://www.youtube.com/watch?v=GXpuSZj8e1s>>.

¹¹ EP decision of 7 February 2018, OJ 2018, C 463/89.

the broad discussion on this topic has been put on hold. With the upcoming European Elections in 2024, the debate has gained significance once again.

II. Legal foundations for the election of the Commission President

According to Article 17(7) TEU, the European Council proposes a candidate for the position of EU Commission President. The results of the European Parliament elections have to be taken into account. Subsequently, the European Council communicates this proposal to the European Parliament.¹² Even before the decision of the European Council, representatives of the European Council and the European Parliament should hold consultations. The obligation to consider the results of the European elections was first introduced by the Treaty of Lisbon. It aims to highlight the significance of the European elections for the citizens and to increase the legitimacy of the Commission President as well as the Commission as a whole.¹³

The European Parliament then decides on the European Council's proposal by a majority of its members. If Parliament rejects the candidate, the European Council puts forward a new candidate. This must be done within one month.¹⁴ The procedure can, in theory, be repeated indefinitely.¹⁵

III. Is the lead candidate principle legally permissible?

The appointment of the Commission President is of great interest and the possibility of conflict developing is high. In 2014, the British government even threatened the possibility of the UK leaving the EU if *Jean-Claude Juncker*, who was favoured by Parliament, was actually proposed by the European Council.¹⁶ The UK Prime Minister at the time, *David Cameron*,

¹² Florian Schmidt and Helmut Schmitt von Sydow, 'Art. 17 EUV' in Hans von der Groeben, Jürgen Schwarze and Armin Hatje (eds), *Europäisches Unionsrecht* (Nomos 2015) para 160.

¹³ Volker Epping, 'Art. 17 EUV' in Christoph Vedder and Wolff Heintschel von Heinegg (eds), *Europäisches Unionsrecht* (Nomos 2018) para 26; ; Thomas Oppermann, 'Eine Verfassung für die Europäische Union' [2003] *Deutsche Verwaltungsblätter* 1234, 1235; ; Matthias Kumm, 'Why the Council Is under a Legal Duty to Propose Juncker as a Commission President' (Verfassungsblog, 6 June 2014) <<https://verfassungsblog.de/der-europaeische-rat-ist-verpflichtet-juncker-vorzuschlagen/>>. Whether these goals are actually met is questionable, with polls showing that EU citizens favour the lead candidate process but don't see it as a motivation for voting, see Wax (n 10).

¹⁴ Article 17(7) sentence 3 TEU.

¹⁵ Bernd Martenczuk, 'Art. 17 EUV' in Martin Nettesheim (ed), *Das Recht der Europäischen Union* (CH Beck 2024), at 107.

¹⁶ Rudolf Hrbek, 'Europawahl 2014: Kontinuität und neue Facetten' (2014) 37 *Integration* 205, at 206 f.

spoke of an undermining of the EU Treaty.¹⁷ *Viktor Órban* and the Hungarian government were also strictly opposed to this procedure.¹⁸ On the one hand, the argument has been raised that it might influence the European Council's freedom of choice and prejudice its decision.¹⁹ On the other hand, one could argue that Parliament thereby makes a preliminary decision that only affects its own actions, i.e. it does merely limit itself. If the European Parliament announces in advance that it will only elect the lead candidate whose political party group obtained the relative majority in the EP elections,²⁰ the European Council is still free in its decision and has the sole right of nomination.²¹ Consequently, the procedure demanded by Parliament does not *legally* alter the institutional structure. But the early public positioning of Parliament could create political pressure.²² The European Council has to explain why it is not proposing a person with whom the European Parliament agrees, who has been a lead candidate, and who has been presented to the voters as a promising candidate. This is especially challenging in a Union where there are calls for stronger democracy. Some authors were therefore arguing that the change brought about by the lead candidate model would become an "explosive political force"²³ that should not be underestimated.²⁴ If both institutions were to strictly adhere to their positions, numerous electoral processes could end without results.²⁵ In practice, Parliament in 2019 elected the first candidate, that was put forward even though *Ursula von der Leyen* was not a lead candidate. The Parliament's announced refusal did not occur, and the anticipated tensions did not materialize. The criticism of the European Council was relatively minor in 2019.

¹⁷ Nicholas Watt and Ian Traynor, 'Juncker Is Wrong Person for European Commission Job, Says David Cameron' *The Guardian* (27 June 2014) <<https://www.theguardian.com/world/2014/jun/27/juncker-wrong-person-european-commission-leadership-david-cameron>>.

¹⁸ Hrbek (n 17) 206 f.

¹⁹ Thomas Christiansen and Karin Göldner, 'EU-Spitzenkandidaten – neue Impulse und ihre Folgen für das politische System der EU' (2015) 38 *Integration* 26, at 39 ff., who describe the pressure on the Council after the election in 2015.

²⁰ Which has been the practice in all elections since 2014.

²¹ For details, refer to the next section.

²² Thomas Holzner, 'Das Europäische Parlament im Institutionengefüge der EU' [2015] *Europarecht* 525, at 529.

²³ Holzner (n 22) 530 (translation by the authors).

²⁴ In addition to the risk of tensions, there are further points of criticism. The European parties do not have uniform lists across Europe, there are only national lists. This could make the procedure misleading for voters and the nomination of lead candidates not very meaningful. In addition, the parties proceed differently with the nomination of lead candidates, some parties do not even put forward a candidate for the office of Commission President. This is problematic, as there is no uniform EU-wide approach. See further: Paula Wiśniewska, 'The Spitzenkandidaten Process – an Attempt to Europeanise Elections or a Tool to Influence the Political System of the European Union?' [2021] *Online Journal Modelling the New Europe* 4 25ff; Daniela Braun and Tobias Schwarzbözl, 'Put in the Spotlight or Largely Ignored? Emphasis on the *Spitzenkandidaten* by Political Parties in Their Online Campaigns for European Elections' (2019) 26 *Journal of European Public Policy* 428.

²⁵ Criticism of the attempt by the European Parliament: Ben Crum, 'Why the European Parliament Lost the *Spitzenkandidaten* -Process' (2023) 30 *Journal of European Public Policy* 193, 202.

But if the European Parliament manages to assert itself through the lead candidate model and commits to a single individual early on, it will acquire increased leverage and the European Council will inevitably have to forfeit this power. In this respect, it is a question of the relationship between "European democracy"²⁶ and the "sphere of influence of the Member States that reaches into Europe"²⁷. Thus, the focus in the debate is to be led by broader questions surrounding the fundamental division between intergovernmental and supranational competences.

As various competences clash here and may be curtailed by the practical implementation of the lead candidate model, we will examine whether and to what extent that would be permissible under the Lisbon Treaty.

1. Requirement for appropriate consultations

According to the wording of Article 17(7) TEU, the European Council is generally free to select a candidate of its liking and is subject to only few restrictions, one being appropriate consultations. In the event that the European Council complies with the European Parliament's request and only proposes lead candidates, the choice of candidates is restricted from the outset. Critical voices were already being heard – even from Parliament – in 2014, which considered the procedure to be incompatible with the Treaty provision²⁸ and with the requirement for consultations. Firstly, the question must be answered as to how the requirement of "consultation" can be interpreted more precisely and whether it is still fulfilled if lead candidates are installed. The consultations are intended to avoid a possible conflict between the institutions through communication in the run-up to the nomination of candidates. Declaration No. 11 on Article 17(6) and (7) TEU attached to the Treaty of Lisbon states in this regard that the European Parliament and the European Council are jointly responsible "in accordance with the provisions of the Treaties (...) for the smooth running of the process leading to the election of the President of the European Commission"²⁹. It continues: "Prior to the decision of the European Council, representatives of the European Parliament and of the European Council will thus conduct the necessary consultations in the framework deemed the most appropriate"³⁰. Details will be

²⁶ Roman Lehner, 'Die Berücksichtigung der Europawahlen bei der Nominierung des Kommissionspräsidenten nach Art. 17 EUV Absatz VII UAbs. 1 S. 1 Hs. 2 EUV' [2015] *Neue Zeitschrift für Verwaltungsrecht* 20, 21.

²⁷ Hrbek (n 17) 206 f.

²⁸ Hrbek (n 17) 206 f.

²⁹ Declaration on Article 17(6) and (7) of the Treaty on European Union, OJ 2012 C 326/344.

³⁰ *Ibid.*

finalised "in due course, by common accord between the European Parliament and the European Council"³¹. This has not happened to date.

When examining various language versions of the treaties, all these phrases carry the same meaning as the English version.³² It can be deduced from the term "consultation" that there should be discourse in the process. Parliament is not merely informed of something, nor is it merely listened to.³³ Instead, there is a mutual exchange. This distinguishes a consultation from an announcement or acknowledgement. Thus, Parliament cannot commit itself to a single person either. The consultations are intended to ensure that the institutions agree on a candidate at an early stage, so that this candidate can receive the required majority and the election process does not have to be repeated several times. The lead candidate principle does not necessarily mean that consultations no longer take place, as several people will stand for election and consultation on the selection of personnel would still be possible. The principle's establishment restricts options, which could be problematic if Parliament insists on choosing the most successful lead candidate, as this would not fulfil the consultation requirement and would ultimately grant proposal rights solely to European parties. It is important that the consultations still take place, as they can prevent an "institutional crisis"³⁴ and also protect the legitimacy of the participating institutions. For consultations to be appropriate there needs to be a certain degree of exchange between institutions.

2. Consideration of the election result

Additionally, the European Council must also take the election results into account. The exact meaning of how the European Council is obligated to incorporate the results of the European Parliament elections into its decision and how the role of the lead candidates fits into this process is contested. People who are in favour of the system generally understand it in that way that the lead candidate of the party with the most seats should be nominated.³⁵ In support,

³¹ *Ibid.* The Declarations are not part of the Treaty but can be used for interpretation within the meaning of Art. 31 para. 2 of the Vienna Convention on the law of treaties.

³² For example: In the French, Dutch, German, Spanish and Slovenian versions Article 17(7) TEU refers to 'consultations', 'raadplegingenand', Konsultationen' 'consultas' and 'posvetovanjih'.

³³ In contrast, Article 36 TEU, for example, refers in the German version to 'Anhörung', (hearing in English) of the Parliament.

³⁴ Lehner (n 25) 23.

³⁵ Editorial Board, 'Spitzenkandidaten and the European Union's System of Government' (2019) 15 European Constitutional Law Review 609, 614.

political parties, Parliament as well as the Commission refer to the principle of democracy³⁶ as well as the strengthening of legitimacy.³⁷ Members of the European Council on the other hand do not feel the obligation to propose one of the lead candidates, as they mentioned frequently during the run-up to the election in 2019.³⁸ Instead, what matters for the European Council is whether the individual has experience in key political offices.³⁹ The purpose of considering the election results is to secure majorities in Parliament when electing the Commission President. Although the wording of Article 17(7) TEU doesn't strictly imply an obligation to nominate only a person from the party family performing best in the election, the European Council usually takes that into account considering the majority requirements. When a person belonging to the most successful party family is proposed who was not a lead candidate before, election results are still taken into account and the requirement is fulfilled. The obligation to consider the election results doesn't necessitate the proposal of one of the lead candidates, nor does the installation of lead candidates hinder the consideration of the election outcome, as very successful party families have nominated lead candidates in the past.

3. Decision-making only by the political parties?

In Resolution 2023/2016(INI) No. 7 Parliament states:

*"...believes that the lead candidates and the presidents of the European political parties and of their respective parliamentary groups should engage in negotiations immediately after the 2024 European elections to agree on behalf of the European Parliament on a common candidate to preside over the Commission before the European Council makes its proposal"*⁴⁰

At first glance, this endeavour sounds problematic as it would result in the decision in favour of a candidate ultimately being made by Parliament. This would restrict the legal position of

³⁶ For an overview of the political system in the EU and the principle of democracy, see *ibid* 609, 609ff; Lukáš Hamřík and Petr Kaniok, 'Is It All about European Democracy? The Motives behind the Institutionalisation of the Spitzenkandidaten Procedure' (2019) 15 *Journal of Contemporary European Research* 354.

³⁷ EPP Press release, 'Poll: Citizens want the Council to respect the Spitzenkandidat process' (24 June 2019) <www.epp.eu/press-releases/poll-citizens-want-the-council-to-respect-the-spitzenkandidatprocess/>; EP Resolution González Pons (7 February 2019) Revision of the Framework Agreement on relations between the European Parliament and the European Commission, P8_TA(2018)0030, A8-0006/2018.

³⁸ Editorial Board (n 35) 614. Already in 2014, the European Council was not enthusiastic about the initiative, Reiding and Meijer (n 7).

³⁹ For this reason, the European Council proposed Jean-Claude Juncker in 2014 and rejected the lead candidate Manfred Weber in 2018, Wiśniewska (n 24) 19.

⁴⁰ EP Resolution of 12 December 2023, 2023/2016(INI), No. 7.

the European Council much more than the lead candidate principle does. The impression arises that the European Council should ultimately be excluded by this procedure. If the Parliament announces a joint candidate first, the European Council's right of proposal would be undermined. A consensus solution would no longer be possible. If the parties in the European Parliament were to strictly implement this plan, it would be problematic as Article 17(7) TEU in its current version requires the European Council to make the proposal, subject to the restrictions outlined above. Even if Parliament agrees on a candidate according to the resolution before the European Council nominates a person, the requirements of the Treaties would not change: Consultations must remain possible and the decision of the Parliament must not have an exclusive character. The resolution can also be understood to mean that an agreement should be reached on a person in advance, and negotiations should proceed with this favoured candidate. This understanding is in line with the Treaty. A superior position of the Parliament or the political parties vis-à-vis the European Council would not be compatible with Article 17(7) TEU.

4. The principle of sincere cooperation

Ensuring that a competent individual is elected to office is in the interest of all institutions. The path to achieving this should proceed as smoothly as possible and not be blocked by general power struggles between institutions. Therefore, when discussing the introduction of the Spitzenkandidaten system, it is also important to consider the principle of mutual sincere cooperation under Article 13(2)(1) TEU. A "consensus solution" should be the new approach. While this does not mean that the European Council and Parliament must agree on a person beforehand, as repeat elections are provided for, insistence by the European Council on nominating lead candidates, as well as insistence by the Parliament on nominating its own person and only electing lead candidates, could be detrimental to this interest.

C. The lead candidates between openness and transparency

Much has been written about how the lead candidate principle is a push by the European parliament for increased supranationalism within the EU and how the reaction against it by the European Council wants to defend intergovernmentalism.⁴¹ While this is definitely correct – as we have also once again shown above – this focus on the political side tends to ignore how the

⁴¹ See for another recent contribution Enrico Letta, 'In Defence of the Spitzenkandidaten System' (Birkbeck Jean Monnet Paper Series, May 2023) <<https://eprints.bbk.ac.uk/id/eprint/51284/1/51284.pdf>> at 5.

lead candidate system is to be evaluated against general democratic principles. While the lead candidate system might further transparency in the political selection process, it restricts what we in this contribution describe as openness: the ability for political decision makers to negotiate and react to recent developments.

First, we turn to transparency, which is a core principle of the EU, see for example Article 15 TFEU. The system of lead candidates as proposed by the European Parliament greatly enhances the transparency of the political process: There is a limited number of potential candidates chosen months before election day, which gives voters a clear understanding of who they are going to elect.⁴²

This is to be welcomed since giving voters more information ensures the democratic accountability of candidates.⁴³ To a certain extent this also mirrors national parliamentary elections where the lead candidates are almost certain to become elected into the highest offices, if their party wins. On the other hand, there are also two crucial differences: In non-presidential national systems, electors do not pre-commit to candidates via – albeit non-binding – resolutions as is the case with the European Parliament. Additionally, national parliaments do generally not have to negotiate with another institution on who they are even able to elect in the first place.⁴⁴

These two differences point us in the direction of why such a very early and very strong pre-commitment to the candidates as envisioned in the resolutions by Parliament is also not without downsides. The political process gets very restricted and even new parliamentarians for the new election period are bound to the choices made by representatives elected in a different European Parliament. Also, the election campaign itself, which happens after candidates are selected, might reveal reasons why parliamentarians would rather choose a different candidate after all. The openness of the political process and the freedom for members of Parliament to cast their vote in any direction is an important part of an open and pluralistic democracy. A very strong

⁴² European Parliament decision of 7 February 2018 on the revision of the Framework Agreement on relations between the European Parliament and the European Commission (2017/2233(ACI)), L.5.

⁴³ At least in a traditional understanding of democratic processes, although some recent studies in social sciences find no such effects, see for example Thad Dunning and others, ‘Voter Information Campaigns and Political Accountability: Cumulative Findings from a Preregistered Meta-Analysis of Coordinated Trials’ (2019) 5 Science Advances 1.

⁴⁴ Although there are exceptions, where Parliaments face some restrictions. See for example Art. 63 (1) of the German Basic Law, which gives the Federal President a right to propose a candidate; afterwards however, the German Parliament is free to select another candidate, see Art. 63 (3) of the German Basic Law.

pre-commitment can also be harmful for potential negotiations with the European Council, which again weakens the European Parliament and democracy.

In the end, a possible agreement between the European Parliament and the European Council would not only need to satisfy the political ambitions of both institutions, but would also need to balance these different dimensions of democracy.

D. An inter-institutional agreement on the lead candidate principle – a solution in conformity with the (future) Treaties?

In its December resolution, Parliament called "for the establishment of an interinstitutional agreement between Parliament and the European Council on the lead candidate system within the framework of Article 17(7) TEU"⁴⁵. In the following, we will explain if such an agreement would be legally permissible under the Treaties *de constitutione lata*. Afterwards, we will show how such an agreement might be able to balance the conflict between openness and transparency. In a final step, we will give an outlook on the Treaty changes envisioned by the European Parliament.

I. Inter-institutional agreement

The first part of article 7 of the resolution also "calls for the establishment of an inter-institutional agreement between Parliament and the European Council on the lead candidate system within the framework of Article 17(7) TEU". This raises two questions: What could such an inter-institutional agreement look like and what would – again – be permissible under Article 17(7) TEU?

First, the call for an inter-institutional agreement with the European Council as a party is already breaking new ground. Article 295 TFEU states that inter-institutional agreements are a type of agreement under Union law between the European Parliament, the Council and the Commission and that they can be binding. There are multiple examples of inter-institutional agreements between the Parliament, the Council and the Commission, for example on better law-making,⁴⁶ or on a mandatory transparency register.⁴⁷ However, the European Council is not mentioned in Article 295 TFEU. Including the European Council by analogous application is not possible

⁴⁵ EP Resolution of 12 December 2023, 2023/2016(INI), No. 7.

⁴⁶ OJ, L 123/1, 12.5.2016.

⁴⁷ OJ, L 207/1, 11.6.2021.

since its omission does not appear to be an accident but rather on purpose.⁴⁸ Accordingly, there exists no published inter-institutional agreement with the European Council as a party.⁴⁹ The wording of Article 295 TFEU would however not preclude the establishment of an agreement since it does not explicitly forbid inter-institutional agreements outside of Article 295 TFEU. An example of such an agreement outside the scope of Article 295 TFEU is one between Parliament and the European Central Bank.⁵⁰ While some authors argue that such an outside agreement could then not be legally binding,⁵¹ that seems dubious, considering that such agreements were already permissible before the creation of Article 295 TFEU⁵² and the relevant EU institutions such as the European Council are free in their decision whether they want to enter into such a legally binding agreement. An *argumentum e contrario* that only relates to the binding nature of concluded agreements under Article 295 TFEU but not to the general possibility of concluding agreements is inconsistent. Additionally, non-binding agreements could be detrimental to the rule of law by introducing uncertainty into the EU legal order, which would be especially problematic for processes such as the election of the Commission President. It must be concluded that it is possible for the European Council to enter legally binding inter-institutional agreements, even though it is not named in Article 295 TFEU. We therefore turn to the question of what the specific limits of such an agreement on the election procedure in Article 17(7) TEU would be. First, we need to recall once again that Declaration 11 to the Lisbon Treaties calls for the European Parliament and the European Council to work together to ensure a smooth running of the process. The last sentence of Declaration 11 reads, "The arrangements for such consultations may be determined, in due course, by common accord between the European Parliament and the European Council." This does not only further indicate that the contracting parties intended for the European Council to be able to enter into (binding) inter-institutional agreements; it also implies that it is possible for Parliament and the European

⁴⁸ The same text was already used in the proposed European Constitution, Art. III-397. Markus Kotzur, 'Art. 295 AEUV' in Rudolf Geiger and others (eds), *EUV, AEUV* (CH Beck 2023) para 2, argues that an analogous application would be dubious.

⁴⁹ Which makes sense, considering that the European Council does take almost no formal decisions under the Treaties anyway – with Article 17 (7) TEU being a rare exception (see also Article 48 (3), (6) and (7), Article 50 TEU).

⁵⁰ Interinstitutional Agreement between the European Parliament and the European Central Bank on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the Single Supervisory Mechanism, OJ L 320/1, 30.11.2013.

⁵¹ Kotzur (n 47) para 2.

⁵² European Court of Justice (ECJ), *FAO*, Case C-25/94, Judgment, 19 March 1996, ECLI:EU:C:1996:114, para. 49.

Council to give up some of their prerogatives under Article 17(7) TEU. The question, however, remains to what extent that would be possible.

Leaving aside a system where Parliament unilaterally proposes a candidate (which we already showed to be both legally problematic and politically unlikely), the strongest conceivable form of an inter-institutional agreement would be for both institutions to be bound to the outcome of negotiations between them. This would however mean that both the right of the European Council to freely propose and the right of the European Parliament to elect a candidate is severely restricted. While a legally binding agreement will always need to limit the rights of the contracting parties to a certain extent, such a solution would be especially problematic for Parliament where parliamentarians are of course free to cast their vote in any direction they see fit (see Article 10 TEU). Additionally, such an agreement would also overly extend into the authority of the European Council, especially considering that even if the current composition of the European Council unanimously entered into such an agreement, it would also bind the European Council into the future, with different members. It can therefore be concluded that an agreement where the parties are bound to the result of the negotiations between them goes against the Treaties.

A less strict agreement would only oblige parties to negotiate and set the general framework for such negotiations. It could for example prohibit the European Council and Parliament from proposing or confirming a candidate before having carried out the prescribed negotiations. This seems to be more in line with existing inter-institutional agreements such as the agreement on better law-making.⁵³ It could be argued that such a weak "duty to negotiate" does not really help Parliament in its push for increased influence on the Commission President. However, it would at least force the European Council to engage with Parliament, which it did not do last time. This would also add to the current duties under Art. 17 (7) subpara. 1 TEU, where the European Council only has a very general obligation to hold consultations. An inter-institutional agreement could bring more structure into those consultations, providing a time-frame, composition of the negotiators and other concrete requirements. This proposed change is also part of a general trend, where the European Parliament carefully tries to extend its powers by soft and increasingly more robust legal instruments to push for constitutional change.⁵⁴

⁵³ OJ, L 123/1, 12.5.2016.

⁵⁴ Daniela Kietz and Andreas Maurer, 'The European Parliament in Treaty Reform: Predefining IGCs through Interinstitutional Agreements' (2007) 13 *European Law Journal* 20.

II. Balancing the needs of the democratic process

Setting up a framework for negotiations would also balance the need for openness and transparency. The European political parties would nominate their lead candidates before the election campaign and voters know that Parliament is going to take these into the negotiations with the European Council, which would lead to a transparent process. Negotiations would then need to happen at least partially behind closed doors to facilitate an open process, where other options could be considered.⁵⁵ Importantly, it should be possible for the negotiators of the European Parliament to bring other people forward as well, if that would be advantageous for their negotiation position. This openness is needed, if two sides are to come to an agreement.

III. Lead candidates and the proposed Treaty amendments

In line with the observation that the European Parliament constantly pushes for soft changes that it wants to turn into increasingly robust law, Parliament has also proposed Treaty change to enhance its position. In addition to the December resolution (concerning the current elections) the European Parliament has brought forward a more extensive overhaul of the procedure for selecting a Commission President. In November 2023, the European Parliament adopted a resolution that called for specific changes to the Treaties.⁵⁶ One of those changes concerns Article 17(7) TEU, with the revised first subsection as follows:

*"Following European elections, the European Parliament, acting by a majority of its component members, shall nominate to the European Council a candidate for President of the European Union. The European Council, acting by a qualified majority, shall give its consent. If the nominated candidate does not obtain the required majority, the European Parliament, acting by a majority of its component members, shall within one month nominate a candidate. The European Council, acting by a simple majority, shall give its consent."*⁵⁷

⁵⁵ David Stasavage, 'Open-Door or Closed-Door? Transparency in Domestic and International Bargaining' (2004) 58 *International Organization* 667.

⁵⁶ EP Resolution of 22 November 2023, P9_TA(2023)0427; this follows previous resolutions calling for Treaty change, starting with EP Resolution of 9 June 2022, OJ 2022 C 493/130.

⁵⁷ Amendment 41 in the EP Resolution of 22 November 2023, P9_TA(2023)0427. The amendment of Article 17 TEU is possible through the ordinary amendment procedure outlined in Article 48 TEU.

The proposed change would reverse the roles between Parliament and the European Council: The European Parliament would propose a candidate, the European Council would "give its consent". This change is clearly motivated by the 2019 election process, in which Parliament was stronghanded by the European Council into accepting *Ursula von der Leyen* as Commission President – after her name had been brought forward it was politically difficult to reject her. While this proposed role reversal would strengthen the European Parliament to some extent (considering for example increasing pressure to confirm a candidate due to time restraints) the European Council would still retain the ability to reject a candidate. At the end of the day, political power might be much more important than the order of the proceedings.

Another aspect of the proposed change to Article 17(7) TEU are the majority requirements. First of all, the revised article calls for a qualified majority in the European Council (which is currently necessary for a proposal under Article 17(7) TEU). However, if the candidate is rejected, the European Parliament gets a second chance, where a simple majority in the European Council would be sufficient. Interestingly, the revised article does not explicitly state that the second proposal by the European Parliament would need to be a different candidate. This also shows the weakness of such a two-stage approach: If a candidate would not reach a qualified majority but a simple majority in the first stage, it would always make sense for Parliament to nominate them for a second time. Therefore, since there is no difference in outcome, the first vote would often be unnecessary.⁵⁸ Accordingly, a two-stage approach with different voting majorities is also nowhere else to be found in the Treaties.⁵⁹

In conclusion, while the proposals by Parliament would strengthen it to a certain extent, real power dynamics cannot be avoided. The first stage in the proposed two-stage approach for approval by the European Council is not necessary and should not be included in a potential treaty change. As we showed above, a more important suggestion would have been a more concrete framework for negotiations between Parliament and the European Council.

E. Conclusion

The election of the Commission President remains an important power struggle, where Parliament does not intend to give up easily. Enshrining the lead candidate system in an inter-

⁵⁸ The German Constitution – for example – follows a similar pattern in Art. 63 GG, with different majorities in different stages of the process but the end result is different: A candidate *has to be* nominated if they gain a majority in the first stage, otherwise they *may be* nominated.

⁵⁹ Article 7 follows a similar pattern but again with different outcomes.

institutional agreement has some legal pitfalls which can be avoided. Agreeing on a duty to negotiate would be an important milestone already envisaged by the Declarations to the Lisbon Treaty. The proposals by Parliament to change the Treaties themselves on the other hand are rather weak and would not necessarily solve the fundamental question of who actually proposes and who elects the Commission President.

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