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The Juncker Commission and new institutional and legitimacy set up what main issues and challenges?

In-Depth Analysis for the AFCO Committee

EN

2015

EUROPEAN PARLIAMENT

DIRECTORATE GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT C: CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

CONSTITUTIONAL AFFAIRS

The Juncker Commission and new institutional and legitimacy set up What main issues and challenges?

IN-DEPTH ANALYSIS

Abstract

The Juncker Commission's legitimacy and effectiveness in is being assessed connection with on the one side its composition, its organisation and functioning, and on the other side with its capacity to enhance legitimacy in the exercise of the EU's competences and enhance and its input efficiency.

PE 510.013 EN

DOCUMENT REQUESTED BY THE COMMITTEE ON CONSTITUTIONAL AFFAIRS

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LINGUISTIC VERSIONS

Original: EN

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Policy Departments provide in-house and external expertise to support EP committees and other parliamentary bodies in shaping legislation and exercising democratic scrutiny.

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European Parliament, manuscript completed in XXX 20xx.

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[1] For a more detailed discussion of these figures, see Yves Bertoncini, "The EU and its legislation: prison of peoples or chicken coops?", *op. cit.*

EXECUTIVE SUMMARY

The Juncker Commission has been formed within a new legal, institutional and political context, which has a direct impact on the way its legitimacy will be perceived in the next few months and years. It is essential to analyse the underlying political factors structuring this legitimacy and to analyse the impact of the changes already visible as regards the Barroso Commission as well as of some other evolutions which could take place in the course of the legislature 2014-2019.

In this perspective, it is worth underlining that the Commission's legitimacy and effectiveness can be assessed in connection with four main sets of issues (see Summary for more details)[2]:

1. The composition of the Juncker Commission: a twofold legitimacy test quite successful
2. The organisation and functioning of the Juncker Commission: a welcome change to be confirmed
3. The Juncker Commission's and the subsidiarity challenge: imparting greater legitimacy to the exercise of the EU's competences
4. The Juncker Commission's input: the efficiency test[3]

[2] I thank to thank the members of the European Parliament AFCO Committee for the comments and statements they have made during my hearing on the 6th of November 2014.

3 For wider analyses and recommendations on the institutional and political EU set up, see Yves Bertoncini and Antonio Vitorino, "Reforming Europe's governance – For a more legitimate and effective Federation of Nation States", Studies&Reports n°105, Notre Europe – Jacques Delors Institute, September 2014.

1. THE COMPOSITION OF THE JUNCKER COMMISSION: A TWOFOLD LEGITIMACY TEST QUITE SUCCESSFUL

As the Commission members are not directly elected, the legitimacy of the Commission comes from the Member states as well as from the European parliament; this twofold legitimacy corresponds to the dual nature of the EU (a Union of citizens and a Union of states).

The "representativeness" of the Juncker Commission then lies on the fact that its members come from all the Member states (one commissioner each). It also derives from its link with the European Parliament elections, as its members have been collectively endorsed by the European Parliament (which can also censure the College).

In this framework, the Juncker Commission appointment appears to have matched quite successfully the main political criteria to be met as regards the legitimacy of the composition of this institution, be they national, political or personal.

1.1. The distribution of tasks between the members of the Juncker Commission

It is worth nothing that a desire for balance has emerged during the designation of the Juncker Commission and the distribution of tasks among its 28 members, which appears to cater for considerations at once demographic (size of their countries of origin), geopolitical (location of their countries of origin) and historical (length of membership of their countries of origin).

The Juncker Commission also complies with a non-written rule applied since the launch of the EMU and the creation of the so called "Schengen area": the president of the Commission and the Commissioner in charge of these issues all come from member states which belong to these two major achievements of the European construction. This was also key for their legitimacy given the intensity of the political debates generated around these two Areas, especially during the so called "euro area crisis".
Having said this, it has to be recalled that some member states could still express concerns about the way the Juncker Commission is composed:

- the bigger member states could feel that being on an equal footing (1 commissioner designate by each country) does not reflect the respective power of the countries (the bigger member states had two commissioners instead of one until the Treaty of Nice);
- the euro area member states could still feel uneasy with decisions taken by a Commission in which 9 members out of 28 (around 1/3) come from non-euro area countries.

Nevertheless, these two concerns should not prompt the bigger and euro area member states to promote tools and procedures departing from the "Community method" if the Juncker Commission confirms its ability to act in accordance with the respective power and interests of the 28 member states.

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1.2. The party affiliation of the members of the Juncker Commission he distribution of tasks between the members of the Juncker Commission

The adoption of the "Spitzenkandidat" procedure has strengthened the party aspect in terms of the choice of the president of the Commission: JC Juncker was indeed nominated in his capacity as lead candidate in the party (the EPP) that garnered the highest number of votes in the May 2014 European elections.

Table 1: Composition of the European Commission: what political balance?

POLITICAL AFFILIATION	2009-2014	2014-2019
EPP	13	14
ALDE	8	5
S&D	7	8
Other political groups	-	-
ECR	0	1

Source: Data European Commission, calculations by Yves Bertoncini

The party affiliations of the Juncker Commission's members, on the other hand, have played a less clear role in their appointment, both on the European Council and in the European Parliament. Almost every single member state nominated its candidates to the Commission from parties belonging to whatever national coalition is in office in their

country, but Bulgaria and Luxembourg, which are governed respectively by a member of the PES and of the ALDE, opted for commissioners affiliated to the EPP; while four member states nominated candidates who were not members of the government leader's party:

- two commissioners affiliated to the ALDE were nominated by governments led by Social Democrats, in Denmark and in the Czech Republic;
- a commissioner affiliated to the EPP was nominated by the Austrian Government, also headed up by a Social Democrat;
- and a commissioner affiliated to the S&D was nominated by the Netherlands Government, which is led by a member of the ALDE.

As a result, the Juncker Commission's makeup reflects a quite stable balance of forces among the parties (see Table 1), despite the electoral rebalancing that has taken place since 2009. The Commission chaired by José Manuel Barroso comprised 21 members from right-wing and centre-right parties, as opposed to 7 from left-wing and centre-left parties; the Juncker Commission comprises 20 members from right-wing and centre-right parties, as opposed to 8 from left-wing and centre-left parties.
The only noteworthy changes concern the smaller number of commissioners affiliated to the ALDE (5 instead of 8 in the Barroso Commission) and the arrival of a commissioner affiliated to the CRE group (Britain's Jonathan Hill), while the commissioners affiliated to the EPP and to PES number 14 and 8 (instead of 13 and 7) respectively.

Table 2: Dominant parties and majority coalitions within the European Parliament from 1979 to 2014

GROUP/ YEAR	EPP		CENTRE		S&D		TOTAL NUMBER OF MEPS
	SEATS	%	SEATS	%	SEATS	%	
2014	214	28.50	66	8.79	189	25.17	751
2009	285	38.72	84	11.41	184	25.00	736
2004	268	36.61	88	12.02	200	27.32	732
1999	233	37.22	50	7.99	180	28.75	626
1994	156	27.51	44	7.76	198	34.92	567
1989	155	29.92	49	9.46	180	34.75	518
1984	160	36.87	31	7.14	130	29.95	434
1979	108	47.71	40	9.76	112	27.32	410

Source: Yves Bertoncini, Thierry Chopin, Claire Taglione-Darmé, "Who will the Commission next President be?" Notre Europe – Jacques Delors Institute / Robert Schuman Foundation, Policy-paper n°113, June 2014

Centre = ELDR/ALDE; 1989: Centre = LDR; 1984 and 1979: centre = L.

This virtually unchanged status quo in party terms is at odds with the party rebalancing that has taken place since 2009:

- on the one hand, in the European Parliament (see Table 2), where the EPP's relative superiority over the S&D group has diminished considerably (29% of seats rather

than the previous figure of 36%, as against 25% for the PES both before and after May 2014);

- on the other hand, in the European Council (see Table 3), which had sixteen government leaders from the right or the centre-right in fall 2014, as against twelve from the left or centre-left.

A purely party-based interpretation is, of course, insufficient to explain the political rationales at work within the Commission – rationales which also owe a great deal to its members' national origins and personal profiles. But if the Juncker Commission adopts a more collegial and political style in its work, as its president has promised, it will be in a position to vote on the basis of a balance of forces assigning twice as much clout to commissioners affiliated to right-wing and centre-right parties, who will have, on their own, the simple majority required to adopt its decisions.
So it is on a more quality-related register that we could perceive a kind of party-based rebalancing, symbolised in particular :

- by Social Democrat Frans Timmermans' appointment to the post of first vice-president of the Commission,
- by the presence of an equal number of EPP and S&D vice-presidents (three each),
- and by Pierre Moscovici's appointment to the post of commissioner for economic and monetary affairs.

The real impact of these more qualitative balances on the decisions of the Commission should be monitored carefully, as it will also have an impact on the Commission's legitimacy.

In any case, it will be up to the Juncker Commission to use its powers non only on the basis of its internal party balances, but also to be able to reach variable geometry majorities in the European Parliament and at the European Council, while taking the at once party-based and diplomatic rationales into account when it uses its right of initiative and implements the political guidelines laid down by its President.

Table 3: Party balances within the European Council from 1979 to 2014*

	1977	1981	1984	1989	1994	1999	2004	2009	2014
EPP	5	6	7	8	7	3	7	13	11
PES	3	3	3	3	4**	10**	4	6	11
Liberals	1	0	0	1	1	2	4	4	4
Others***	0	0	0	0	0	0	0	4	2
Total	9	9	10	12	12	15	15	27	28

Source: data European Council, calculations by Yves Bertoncini

* The political affiliations given are those of the heads of government in July 2014, i.e. right after the European elections and and at the time of the designation of the president of the Commission. In December 2014, the party balances were as such: EPP = 12; PES = 9; Liberals = 5; Others = 2. The Party affiliation of the President of the European Council and President of the Commission is not mentioned.

** In 1994, France had a Socialist president of the republic but a right-wing prime minister, while in 1999 the opposite was true: here we take the president's party affiliation into account.

*** Others include: ECR: European Conservatives and Reformists / EL: Party of the European Left/ NA: Non-attached / IND : Independent.

1.3. The personal profile of the members of the Juncker Commission

It could seem a sign of naivety to recall that the legitimacy and effectiveness of the Juncker Commission will also rely on the profiles of its members, whose selection was in member states hands, under the control of the EP - the objective being to select the right commissioners at the right place.
In terms of national experience, it's worth underlining that the Juncker Commission comprises 4 former Prime Ministers, 4 Deputy Prime Ministers and 19 former Ministers (see Table 4) ; it is also worth noting that it includes 8 former MEPs and that 9 of the Commissioners were candidates in the European elections, which is a good sign in terms of European experience as well as in terms of democratic legitimacy. This evolution should be fostered in prevision of the next Commission, so as to strengthen the link between the appointment of its members and the European elections, beyond the case of its President.

The European Parliament's hearings interviewing the commissioners nominated gave rise, as in the past, to occasionally lively exchanges, and at times even to outright questioning of the candidates' expertise or profile. As in 2004 and in 2009, they led to the replacement of at least one commissioner-designate (liberal Slovenian candidate Alenka Bratusek) as well as to a little minor tinkering with the portfolios entrusted to other commissioners – the Slovak commissioner, in particular, being assigned the post of vice-president with responsibility for the "energy union" and the new Slovenian commissioner being given the transport portfolio.

These hearings were marked by the occasionally implied invocation of a "pact of non-aggression" between the S&D, EPP and even ALDE groups, which appeared to assign priority to the defence of candidates from the same party over an assessment of their real merits, as provided for in Article 17.3 in the Treaty on the European Union (in connection with their expertise, commitment and independence). These hearing have sometimes led to the confirmation of Commissioners whose profile and national origins have been seen as contradictory with the portfolio they had been designated for. It is by no means a given that such conduct adds lustre to the legitimacy of commissioners thus appointed: it will be up to them to confirm that they can act properly and strengthen their credibility on the basis of concretes actions.

Table 4

Profiles of the Members of the Commission chaired by Jean-Claude Juncker				
Jean-Claude JUNCKER	President	Luxembourg	Prime Minister	EPP
Frans TIMMERMANS	First Vice-President Improving regulations, Inter-institutional relations, Rule of law and the Charter of Fundamental Rights, Sustainable Development	Pays-Bas	Foreign Minister	PES
Federica MOGHERINI	Vice-President High Representative for the Common Foreign and Security Policy	Italy	Foreign Minister	PES
Kristalina GEORGIEVA	Vice-President Budget and Human Ressources	Bulgaria	European Commissioner	EPP
Andrus ANSIP	Vice-President Single Digital Market	Estonia	Prime Minister	ALDE
Maros ŠEFCOVIC	Vice-President Energy Union	Slovakia	European Commissioner	PES
Valdis DOMBROVSKIS	Vice-President Euro and Social Dialogue	Latvia	Prime Minister	EPP
Jyrki KATAINEN	Vice-President Employment, Growth, Investment and Competitiveness	Finland	Prime Minister	EPP
Violeta BULC	Transport	Slovenia	Minister	ALDE
Gunther OETTINGER	Digital Economy and Digital Society	Germany	European Commissioner	EPP
Johannes HAHN	Neighbourhood Policy and Enlargement Negotiations	Austria	European Commissioner	EPP
Cecilia MALMSTROM	Trade	Sweden	European Commissioner	ALDE
Neven MIMICA	International Cooperation and Development	Croatia	European Commissioner	PES
Miguel ARIAS CANETE	Action for the Climate and Energy	Spain	Minister	EPP
Karmenu VELLA	Environment, Maritime Affairs and Fisheries	Malta	Minister	PES
Vytenis ANDRIUKAITIS	Healthcare and Food Safety	Lithuania	Minister	PES
Dimitris AVRAMOPOULOS	Migration, Internal Affairs and Citizenship	Greece	Foreign Minister	EPP
Marianne THYSSEN	Employment, Social Affairs, Workers' Skills and Mobility	Belgium	European MP	EPP
Pierre MOSCOVICI	Economic and Financial Affairs, Taxation and Customs Union	France	Economy and Finance Minister	PES
Christos STYLIANIDES	Humanitarian Aid and Crisis Management	Cyprus	Government spokes-person	EPP
Phil HOGAN	Agriculture and Rural Development	Ireland	Minister	EPP
Jonathan HILL	Financial Stability, Financial Services and Capital Markets Union	UK	Under Secretary of State, leader of the House of Lords	ECR

Profiles of the Members of the Commission chaired by Jean-Claude Juncker				
Elzbieta BIENKOWSKA	Internal Market, Industry, Entrepreneurship, SME, Space	Poland	Minister	EPP
Vera JOUROVA	Justice, Consumers, Gender Equality	Czech Repu-blic	Minister	ALDE
Tibor NAVRACSICS	Education, Culture, Youth and Sport	Hungary	Foreign Minister	EPP
Corina CRETU	Regional Policy	Romania	European MP	PES
Margrethe VESTAGER	Competition	Denmark	Economy Minister	ALDE
Carlos MOEDAS	Research, Science and Innovation	Portugal	Secretary of State to the Prime Minister	EPP

Source : C. de Marcilly, "The Juncker Commission, the return of politics ?", Issue Paper n°330, Robert Schuman Foundation, October 2014

2. THE ORGANISATION AND FUNCTIONING OF THE JUNCKER COMMISSION: A WELCOME CHANGE TO BE CONFIRMED

2.1. Organisation aspects: a more vertical Commission based on clusters

A Commission of 28 members needs to work on a more vertical internal basis, giving a key role to the vice-presidents, as announced by JC Juncker: it was indeed not desirable to go on having 27 technical portfolios devoted to commissioners having the same status for the implementation of their tasks[4].
The internal hierarchy put in place within the Juncker Commission is then not rely only on the president power to structure and allocate responsibilities among its members, but also on a new use of the status of the "Vice-presidents" (see Chart below):

- on the basis of the article 248 TFEU, the President chose these vice-presidents according to their political weight and origin, and not to compensate the narrowness of their portfolio;
- he has even created overarching portfolios (on Energy Union, Euro and social dialogue, etc.);
- the President and vice presidents of the Commission are seconded by the other commissioners, whose portfolio are connected to their respective spheres of competence, on the basis of a "cluster system" and "project teams".

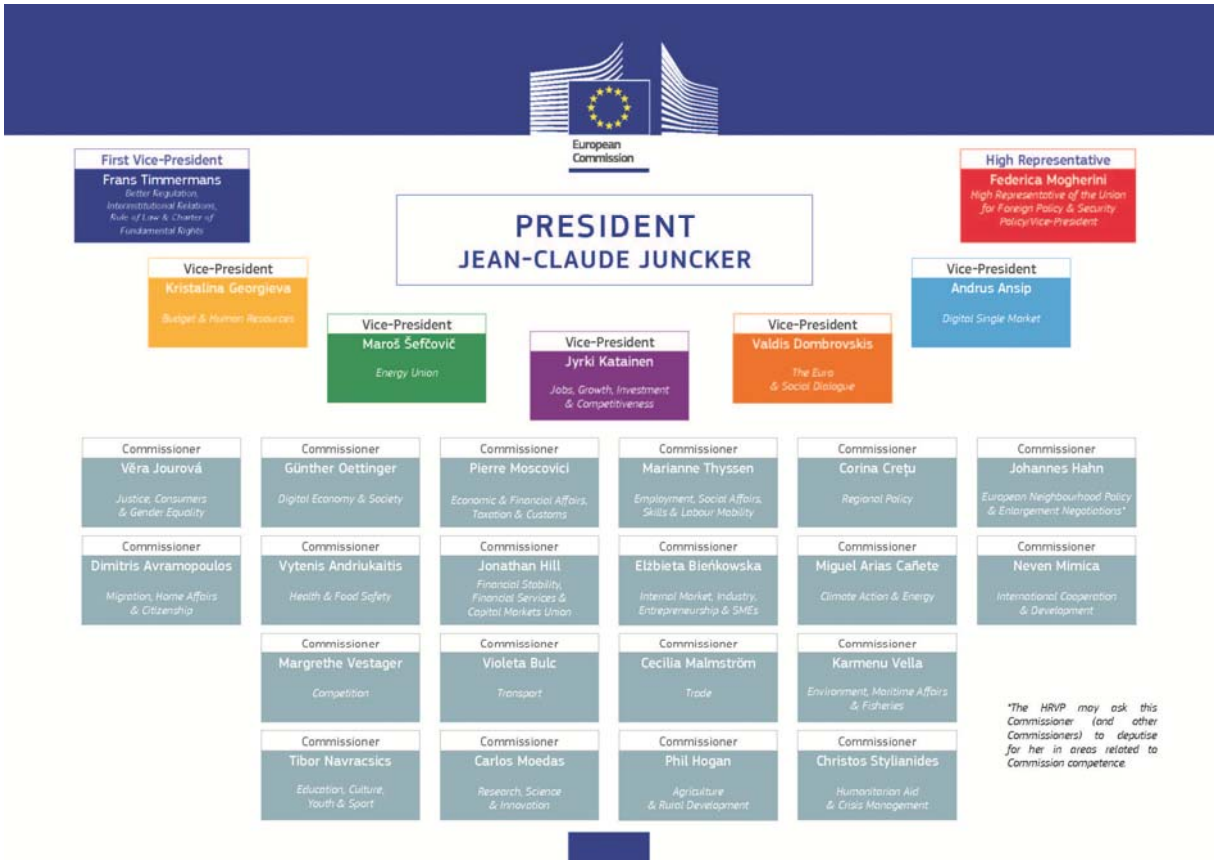
This more collective functioning to reach the overall political objectives of the Commission and the EU should be guaranteed on a daily basis by the college itself and, last but not least, its President.

In this perspective, the "internal rules of procedure" of the Commission should be properly revised to ease the implementation of the clusters system, for example by giving some specific rights to the vice presidents such as setting the agenda of the Clusters meeting and of the commissioners acting in their respective field of competence. A new use of "empowerment procedures" and "delegation procedures" should in particular be promoted. These rewriting of the rules of procedure should be made on the basis of the provisions of the article 18 of the TEU dealing with the vice-president/high representative for foreign affairs and security policy, drawing lessons (political, human, functional, etc.) on the way they were implemented (or not).

At this stage, it is still unclear that such formal rewriting of the "internal rules of procedures" has been made. The welcome change introduced by JC Juncker then still needs to be confirmed at this level as well.

[4] On these points, see Yves Bertoncini and Antonio Vitorino, "The Commission's reform: between efficiency and legitimacy", Policy paper n°115, Notre Europe – Jacques Delors Institute, July 2014.

Chart 1: Chart of the Juncker Commission



Source: European Commission

2.2. Functioning aspects: a more collegial Commission

There is a vital need to apply fully and properly the collegiality principle within the Juncker Commission, so as to take advantage of the added value of all the Commissioners, whose experience and contribution on all the issues at stake are key: it will guarantee that the Commission's decisions and initiatives have been approved after an open political discussion, and the Commission's meeting aim is not to produce a formal endorsement of the technical proposals prepared by the DG's. A genuine collegiality will also be crucial to strengthen the feeling of ownership of all Commissioners and to ease their mobilisation in the public debate of their countries of origin and beyond.

The President or vice-presidents of the Commission should then meet on a regular basis with the commissioners acting within their respective sphere of competence (sector based collegiality within Clusters meetings); the President of the Commission and his/her vice-presidents should meet on a periodic basis so to promote a better political coordination of the institution; all these meeting should take place with the support and presence of the Secretariat general of the Commission.

The overall collegiality of the Commission will be reinforced by weekly meetings based on the inputs from the Clusters meetings and Coordination meetings mentioned above; it will also be reinforced by open discussions of the college concluded by more systematic votes, based on the principle that its President is a "primus inter pares", not a prime minister. The fact that all the commissioners are able to participate in the vote of the college on an equal footing is not a real problem: the simple majority rule is indeed a functional advantage for the Commission, whose decision can be made much more easily than at the Council

(qualified majority or unanimity) and even more easily than at the EP (where a majority of its component members or a 2/3 majority are sometimes required).

Jean-Claude Juncker has said that the new organisation of the Commission has led to a reduction of his powers, given the prerogatives he has delegated to the Vice-president: he must now accept to go beyond this organisational step by accepting to organise more systematic discussion and votes in the College, including if he runs the risk too loose some of them. He will then also foster a welcome evolution when compared with the President Barroso, who claimed publicly his satisfaction not to have organised a single vote in ten years time.

2.3. A legal consolidation of the functional developments: a President the Commission appointing the members of his team

In the short run, the Commission's dual legitimacy will still have a key diplomatic and civic dimension. Its efficiency will certainly be reinforced if the recent political changes are completed on the medium term by some legal changes, including a slight but decisive amendment of the Treaty providing a shift from the Council to the president of the Commission with regard to the appointment of the commissioners.
In the short term, there will still be one commissioner per member state, so as to preserve the diplomatic legitimacy of the Commission (no change) – this is a non-starter for many member states5. It should in no way block the Commission's decision-making process, given the simple majority rule applied in the event of a vote. The appointment of the president of the Commission is still made by the European Council, on the basis of the results of the European elections (no change in Article 17.7 of the TEU.): its twofold diplomatic and civic legitimacy is thus confirmed. There should be no change either as regards the dual status of the high representative for foreign affairs and security policy, who is at the same time one of the vice-presidents of the Commission. He/she will keep on ensuring "the consistency of the Union's external action" and being "responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union's external action".

Nevertheless, after having been given the power to fire the members of the college (see Article 17.6 TEU), the president of the Commission should be able to appoint the commissioners in a personal capacity, instead of the Council acting on the basis of a common agreement with him/her (Article 17.7 TEU to be amended).

This slight modification would reinforce the likelihood to have good commissioners in the right place, but would also give real vertical powers to the president of the Commission. The president of the Commission would naturally appoint the commissioners in close conjunction with the national governments (see for example what happens for the composition of the commissioners' cabinets).

Within this new legal framework, the president of the Commission could more easily appoint vice-presidents and commissioners, as in any national government[6]; the president should choose the vice-presidents while respecting the political balances of the EU (big-smaller member states and North-South-East-West especially); the member states could accept this kind of *de facto* political internal hierarchy, whereas they are reluctant to accept a *de ju*re hierarchy.

5. Articles 17.5 TEU and 244 TFEU could then be redrafted.
6. If the Ecofin commissioner were to hold the post of permanent president of the Eurogroup (see high representative status), its designation would be made jointly by the European Council and the president of theCommission (see Article 18 TEU).

3. THE JUNCKER COMMISSION'S AND THE SUBSIDIARITY CHALLENGE: IMPARTING GREATER LEGITIMACY TO THE EXERCISE OF THE EU'S COMPETENCES

The EU has appeared to be rather intrusive these past few years, particularly in the "countries under programmes" but also because it adopts norms that are very detailed, badly explained and often met with a hostile reception by citizens. While the Troika has already left Ireland and Portugal, there is no doubt that it is necessary to send the same political signals concerning the level of detail of EU rules and interventions between now and 2019, by retaining a limited number of priority actions, even if this does not mean that the EU should do less in all fields.

This is mainly because EU action would be better embodied if it were clearer in the future. Embodied by great projects such as the promotion of balanced economic, social and environmental development or the assertion of the interests and values of Europeans within globalisation; embodied by symbolic projects to be promoted in all their dimensions, such as "banking union" or the "Energy Union". But it is also necessary to proceed with adjustments relating to the conditions governing the exercise of the EU's competences, which are often the target of complaints focusing on the way the Community produces laws. It is with this in mind that the Juncker Commission should act in the four following complementary directions.

3.1. Clarifying the impact of EMU governance reforms on national sovereignties

It is first urgent to establish the extent to which the reforms of the EMU's governance have or have not reinforced the power of the Juncker Commission and narrowed the field of national sovereignty and democracy. The euro area crisis is indeed also a "sovereignty crisis", which has led it to change how competences are distributed between the EU and its member states. This crisis has therefore led some of these States to provide assistance to those whose private and public debts had become excessive, in exchange for increased EU monitoring of national fiscal and economic policies. In this context, the series of "memoranda of understanding", "packs" and "pacts" seem however to have produced a political system based on poorly defined responsibilities, while EU treaties are based more traditionally on the principle of subsidiarity. The creation of the « Troika » is then the most striking element of a general evolution of the EMU governance which desserves an in-depth analysis: this means in particular putting up for debate the idea that "Brussels" or the Commission governs member states without the legitimacy to do so, while this is generally not the case7.

With this in mind, it is important to analyse in more detail the nature of the competences exercised by the EU and the Commission under the new EMU governance with regard to those that international organisations exercise. This prior clarification is crucial both in order to get recent developments into proper perspective and to make it possible to implement on a healthy basis all those adjustments that the euro area's governance still requires.

If we leave aside the competences exercised in the framework of the banking union, it's possible to classify the relations between the EU and its member states under four different political regimes, in which national or popular sovereignties are being jeopardised to extremely variable degrees. An analysis of the nature of the various competences exercised by the EU in the context of the EMU's new governance by comparison with the

7 For a more detailed discussion of these issues, see Sofia Fernandes, "Who calls the shots in the euro area? "Brussels' or the member states?", *Policy Paper n°111*, Notre Europe – Jacques Delors Institute, May 2014.

competences exercised in international organisations indeed allows us to note that relations between the EU and its member states reflect four different political regimes which have an extremely variable political impact on national or popular sovereignty (see Table 5):

Table 5: The way competences are exercised in the EMU

Purpose	Tools	Keyword	European actors	Comparable actors
Bailout	Memorandum of Understanding MOU	Condition	Commission / ECB European Council	IMF
Preventing/correcting fiscal excesses and macro-economic imbalances	Stability Pact TSCG	Sanction	Commission Council	UN
Monitoring economic and social policies	Europe 2020 Euro + Pact TSCG	Incitation (political)	Commission Council	OECD
Promoting structural reforms	Reform financial aid	Incitation (financial)	Commission Council	World Bank

Source: Yves Bertoncini, António Vitorino, Reforming Europe's governance, op.cit.

- The "**IMF regime**": the sovereignty of the 4 countries benefiting from European aid programmes is conditioned by the fact that representatives of the Troika and of the European Council can combine an obligation to achieve results with an obligation concerning the means for achieving those results, demanding specific, major pledges in return for the loans they grant. Other than when a new bail-out is required, it could appear possible to extend this European control over the budgetary, economic and social choices made at the national level only in the event all or some of the member states commit to the mutualisation of national debts (Eurobills or Eurobonds).
- The "**UN regime**": this regime applies to the monitoring of national budgetary surpluses (rather than to national budgets per se) and it also rests on member states' pledges not to exceed certain budgetary ceilings (in particular, a deficit standing at over 3% of GDP). If they comply with those ceilings, they are free to act as they please, but if they consistently exceed them, then in theory they can be subjected to a coercive approach based on potential financial penalties. In any event, member states have an obligation to achieve a result (i.e. to return below the ceiling) but no obligation as to the means used to achieve that result: it is up to them to define the ways chosen for achieving it and it is their choice whether or not to comply with the EU's detailed recommendations.

Table 6: The scope and impact of competences exercised within the EMU

Tools	Political scope	Geographic scope	Temporal scope
Memorandum of understanding MoU	Definition of national economic and social policies	Greece, Ireland, Portugal, Cyprus	2009-214 (GR, (IE, PT) 2013-2016 (CY)
Stability&Growth Pact TSCG	Control of national fiscal excesses and macro-economic imbalances	EU28 EU25 (except Croatia, UK &Czech Republic).	Since 1997 (SGP) Since 2013 (TSCG)
Europe 2020 Euro + Pact TSCG	Coordination of national economic and social policies	EU28	Since 2000 (Lisbon Strategy)
Reform aid fund	National structural reforms	Euro area	Post-2014?

Source: Yves Bertoncini, António Vitorino, Reforming Europe's governance, op.cit.

- The **"hyper-OECD regime":** this regime concerns the relationship between the EU and its member states regarding monitoring national economic and social policies, thus "structural reforms". These relations are based on a combination of political initiatives (recommendations, supervision and mutual pressure) among member states. This political pressure is considerably greater than that brought to bear by the OECD, yet it has no compulsory impact on the member states' domestic political choices. Where structural reforms are concerned, the EU can recommend but it cannot command.
- The **"World Bank regime":** this regime rests on the principle whereby if the EU grants financial aid to its member states, that aid must serve to promote structural reforms at the national level. The proposal to set up a new "financial tool for convergence and structural reforms" illustrates this approach, as indeed do the reiterated attempts to enforce a macro-economic conditionality in return for access to European structural funds.

Such classification shows that these four political regimes are very different, including from a geographic and temporal point of view (see Table 6); it recalls in particular that the « IMF regime » and the Troika are to come to an end in a near future, and that the Juncker Commission can then be perceived as a "post Troika Commission". It also highlights that, in the absence of clarification regarding the real scope of their competences and powers, the « EMU institutions » and the Commission will continue to adopt doubly counterproductive positions and recommendations: on the one hand those positions and recommendations will be perceived as being excessively intrusive and thus illegitimate in view of their level of detail, while on the other they will ultimately have no direct, concrete impact on the decisions taken by the member states concerned.

3.2. Dispelling the myth that 80% of laws are of Community origin

Improving the legitimacy of the way the EU exercises its competence requires first and foremost an initial clarification of a pedagogical nature regarding the scope and impact of laws originating with the Community. This, because this crucial political issue is the target of ceaseless exaggeration both from those opposed to the European construction and from the least important supporters of that process, to the point where they end up bolstering the myth that 80% of laws in force in EU member states originate in "Brussels"[8].

In this regard, an adjustment of the phrasing of the treaties would be useful to clarify the exact scope and impact of the Community's competences, because it is both incorrect and misleading to argue that "education", "industry" or "social policy" are part of the EU's areas of jurisdiction, even in a support or coordination role. And it would be preferable by far to confine the text to more accurate descriptions. For example, the EU has no general competence in the field of education, only in the sphere of exchange and cooperation in the education and university fields. So that being the case, why do the treaties not talk about "the European education and training area" in the same way as they talk about "the area of freedom, security and justice" without going as far as to claim that "security" and "justice" are EU competences?

By the same token, it would be better to make a clear distinction at the Community level between that which falls strictly within the "legislative" sphere and that which falls within the "regulatory" sphere, a distinction which might help to highlight the fact that the EU intervenes to a far greater extent on technical issues for purposes of standardisation than it does in defining the laws that govern its citizens' lives (in connection with this necessary distinction, *see § 3.3.*).

In the immediate term, however, the urgent issue is more political than legal in nature: it requires that the Juncker Commission and all players in, and observers of, European affairs adopt clear and substantiated arguments regarding the real scope and impact of the EU's competences and the proportion of laws originating with the Community, on the basis of the converging figures now available, which show that that proportion is closer overall to 20% than to 80%, with major differences from one sector to the next *(see Box 1)*.

[8] In this connection, seer Yves Bertoncini, "The EU and its legislation: prison of peoples or chicken coops?", *Policy Paper n°112*, Notre Europe –Jacques Delors Institute, May 2014.

Box 1

The Scope and Impact of Community Law at the National Level[9]

1. European legislation with a highly variable sectoral impact

- The Europeanisation of national laws is high in some sectors (agriculture, financial services, the environment, etc.) and very limited in others (education, social protection, housing, security, etc.).
- This contrasting state of affairs stems directly from the major sectoral concentration of legislative intervention by the EU, dealing mainly with agriculture, the internal market, followed by foreign relations.

2. A cross-cutting legislative impact: the supervisory power of the EU

- Member states must notify the EU of a large number of state aid measures that they grant. Despite EU supervision of this aid, tens of billions of euros are granted each year (banking and railway sectors, etc.).
- The distribution of powers within EMU allows the EU to supervise national policies, but it has not drastically limited the capacity of the member states to take action, particularly in terms of budget deficit.

3. European legislation having regulatory rather than legislative implications

- Only one quarter of directives transposed in France have legislative implications, as opposed to three quarters with purely regulatory implications (including on the size of chicken coops).
- Almost two-thirds of draft directives and regulations submitted to the Council of ministers have legislative implications, but this is the case for only 12% approximately of all directives and regulations adopted by the Council, the European Parliament and the Commission.

4. The subsidiary legislative impact of the EU: 20% rather than 80%

- All studies available converge towards a proportion of Europeanised national laws varying from between 10% and 33% according to countries.
- This proportion varies according to the calculation methods used, but remains within this law hypothesis as shown by studies concerning Germany and France.

Getting Community law back into its rightful perspective by comparison with national laws is both beneficial from a civic standpoint and useful from a political standpoint. This, because a pedagogical clarification of this nature is by no means at variance with the desire to promote further EU intervention in certain spheres. In fact, it is far more consistent to argue that case by noting that the EU produces only 20% of laws in force than by claiming that it already produces 80% of our laws (because if it already did that, how much further could it go?). In any event, this is a pedagogical task of the utmost importance for all of the players in the European public debate, but above all for the national and Community authorities.

9 For a more detailed discussion of these figures, see Yves Bertoncini, "The EU and its legislation: prison of peoples or chicken coops?", *op. cit.*

3.3. Improving the separation of the legislative and regulatory spheres

At the EU member state level there is a clear separation between the legislative and executive powers: legislative power is exercised by parliament, the only body entitled to adopt laws, and the fact that parliament may exceptionally delegate its powers to the government (for instance with the "order" system in France) merely confirms this rule. This "separation of powers", of course, varies from country to country, because not all of them have the same concept of legal hierarchy; it does not apply at the Community level, despite the clarification effort undertaken by the CJEU and pursued by the Treaties' drafters:

- At the Community level, first of all, there is no "instrumental" distinction between legislative instruments of general scope: the EU adopts directives or regulations without one or other of those instruments being reserved for the law-makers (the European Parliament and Council) along the lines of "laws" at the national level;

- At the Community level, the distinction between legislative and executive cannot be based on "material" elements: secondary legislative instruments naturally concern "essential elements" rather than major "political choices" when they are adopted by the Community "law-maker"; but they can equally well be "legislative" or "non-legislative" with regard to national law, whether they are adopted by the "law-maker" or even by the "executive", as shown by the nature of the acts transposing Community directives adopted in France *(see Table 7)*[10].

Table 7: Number and material nature of the acts transposing Community directives in France from 2000 to 2010

	LEGISLATIVE ACTS			REGULATORY ACTS			
Type of act	DDADC*	Laws	Ordinances	Decrees	Orders	Diverse**	TOTAL
Number of acts	62	224	67	788	1,356	34	
Total legis./reg.	353			2,178			2,531
Proportion of acts Leg/Reg (%)	14%			86%			
Number of directives concerned	236			757			993
Number of directives concerned/year	21.4			68.8			90.2
Proportion of directives/year (%)	23.8%			76.2%			100%

Source: SGAE data, computations by Yves Bertoncini

* "DDADCs" ("Diverses Dispositions d'Adaption au Droit Communautaire") are laws on diverse provisions for the adaptation to Community Law.

[10] The EU's member states do not necessarily transpose Community directives in the same way, even from a material standpoint: thus measures transposed by regulation in France can be transposed by law in other EU member states in accordance with each country's stance on legal hierarchy.

** "Diverse" acts with regulatory implications include, for example, decisions made by an independent public service authority.

The identification of a "legislative" act cannot rest either on an "organic" differentiation: the Community "law-maker" (the European Parliament and Council) and executive (the Commission and Council) are both empowered to adopt directives and regulations; we may of course consider the legislative instruments adopted by the law-maker to be instruments of "secondary" law and the legislative instruments adopted by the executive to be instruments of "tertiary" law (the Treaties themselves being the "primary" law in this instance), but that does not fully predetermine the material content of such instruments *(see Table 8)*.

The fact that the percentage of instruments of a truly legislative nature is considerably more substantial for the European Parliament and Council than it is for the Commission should urge the Juncker Commission first and foremost to modify the terms used to designate them. Of course, the Treaty of Lisbon already states (in Article 289-3 in the TFEU) that "legal acts adopted by legislative procedure shall constitute legislative acts". But we need to use different terms to designate presumably non-legislative implementing acts adopted by the Commission (in the context of comitology procedures): to achieve this, it is sufficient for us to call them implementing directives and implementing regulations in order to provide an initial, clear indication of what is essential and what is accessory; it does not require a revision of the Treaties, simply a change in the terms used at the Community level.

Table 8: The method governing the transposition of directives in France from 2000 to 2008

Percentage of directives	Legislative Transposition*	Regulatory Transposition**
Council	58.2%	41.8%
EP and Council	48.1%%	51.9%
Commission	3.5%	96.5%
Total	26.6%	73.4%

Source: Yves Bertoncini, "What is the impact of the EU interventions at the national level?", *Studies & Reports No.73*, Notre Europe –Jacques Delors Institute, June 2009

* Transposition by law or by "order"
** Transposition by decree, by resolution or by other legislative act

The fact that the percentage of "non-legislative" directives adopted by one or other of the Community "law-makers" is far from negligible (accounting for approximately half of all directives adopted under the co-decision procedure) should urge the Juncker Commission to engineer another, more ambitious clarification as an extension of the clarification introduced by the Treaty of Lisbon with the creation of the "delegated act" (Article 290 in the TFEU).

This is in effect a new Community act considered "non-legislative" but which allows the Commission to complete or to modify "certain non-essential elements of the legislative act" under given circumstances. The creation of this new legal instrument has basically been devised to allow the Commission itself to define the ground rules with regard to highly technical issues after being "delegated" to do so by the Community "law-maker"; its effect has been to introduce a kind of hierarchy of instruments between "legislative acts", "delegated acts" and traditional "implementing acts" (Article 291 in the TFEU) adopted by the Commission.

For this new hierarchical order to be clear in political and civic terms, it is necessary at this juncture for the Juncker Commission and the EU authorities (and their legal offices) to ensure that the texts submitted to the law-makers are restricted to containing only measures of a genuinely legislative nature, while the implementing acts and delegated acts must be confined to non-legislative measures. This is one of the ways in which the production of Community law can at once associate upstream those decision-makers that have the greatest legitimacy to adopt it, and be better perceived downstream for what it is, namely a partly legislative but mostly non-legislative production of law. A clarification in this sense seems to be crucial in order to shed light on the nature of the areas of authority and of the powers exercised by the EU and those exercised by its member states.

3.4. Less intrusive Community laws: the cost of "too much Europe" challenge mproving the separation of the legislative and regulatory spheres

The pedagogical clarifications recommended above may not necessarily be sufficient to seal the debate on the impact of Community laws at the national level, thus it demands more specific political action from the Juncker Commission.

It is by no means a foregone conclusion that the EU needs to have new powers allocated to it in the short and medium terms, given that the current Treaties already list five areas of exclusive authority, thirteen areas of shared authority and seven areas in which the EU plays a support and coordination role. And a new, formal adjustment of the division of powers seems to be even less necessary when we consider that use of the flexibility clause contained in the Treaties (Article 352 in the TFEU) authorises additional innovative intervention on the EU's part. Conversely, any repatriation of competences to the national level should be justified on a case-by-case basis by the national authorities making the request, as "the burden of proof" lies with them. And quite apart from the technical difficulties involved in formulating such a justification, a unanimous consensus would have to be forged among the member states in order to make the necessary changes to the treaties.

In this light, the Commission priority must be to make adjustments relating to the way in which the its powers and EU's powers are exercised, because they are frequently the object of disputes focusing on the way the Community's norms are produced[11]. It is necessary, therefore, for the European Commission on the one hand to focus their initiatives on a limited number of properly-targeted political priorities; and on the other, to monitor the strict application of the principles of subsidiarity and of proportionality under the watchful eye of national parliaments and of the Court of Justice.

On this basis, it is incumbent upon the European institutions at large, and especially upon the Juncker Commission, to strictly limit the "bureaucratic" output of Community laws in certain sectors, or to allay the impact of some of the Community laws currently in force, in order to send out a clear signal to the citizens and to the member states.

This "legal signal" will be a balanced signal if it simultaneously identifies the sectors in which European laws could be less numerous or less intrusive, and those in which more European legislation could be considered useful, for instance in the fiscal or energy spheres. This, because it is crucial to properly decipher the highly contradictory demands that have emerged from the European elections in May 2014 and in the various national political arenas throughout the year. The new European authorities must rapidly draft this dual inventory in order to set the debate in motion over the coming months. But in any

[11] In connection with this issue, see Yves Bertoncini, "What is the impact of the EU interventions at the national level?", *Studies & Reports n°73*, Notre Europe –Jacques Delors Institute, June 2009.

event, it is not a matter of withdrawing or of rewriting laws which a majority of public opinion are eager to see remaining in force.

For example, when the "Barroso I" Commission decided to pursue "better lawmaking" (often tantamount to "less lawmaking"), including in the financial services sphere, it is by no means certain that its choices proved beneficial for the EU's economies and societies or would have attracted majority support. On the other hand, it made a better choice when it decided to dispense with Community measures regulating the curve of the cucumber, dating back to 1973, which had triggered a huge amount of misunderstanding and of sarcasm.

The "legal signal" that the European authorities address to the EU's member states and citizens will also be balanced if it clearly sets out the terms of the debate in terms of effectiveness, but also of legitimacy. Thus it is crucial to admit that the political cost of some of these laws is higher than their economic or social benefit on account of the way in which they are perceived. The key issue here is not to restrict action to simply adopting a technocratic approach, rightly pointing to the "cost of non-Europe"[12] in numerous spheres, but to associate action with a political analysis including the "cost of too much Europe" in those spheres where it might seem that the presence of European laws leads *de facto* to incomprehension or even to outright rejection.

It must be clear, therefore, that it is possible to forego the adoption of new Community laws, for political and even symbolic reasons, even if doing so would damage the European citizens' purchasing power or protect their health to a lesser degree. The crucial thing is that this choice be made explicitly and publicly (rather than implicitly, as is so often the case) in such a way that its benefits and disadvantages can clearly be perceived by the citizens and by all of the players involved.

The European institutions have special responsibility with regard to this choice between cost and benefits, and the Commission is in the front rank in this connection because it holds a monopoly on legislative initiative. In particular, it is crucial for the college of commissioners to play their role to the full in this area in order to steer the activities of the Commission's services in the right direction. The European institutions' responsibility is all the greater if we consider that they cannot really rely on the national authorities to provide Community laws with a decent "after-sales service". This can be because ministers and heads of state and government do not feel directly involved in the production of certain laws, primarily when those laws are adopted by "committee-style" procedure, it can be because they have no wish to spend any of their political capital on defending the EU and its achievements, or, even worse, it can be because they can then adopt a demagogical posture targeting one or the other Community law that may be especially symbolic in their own country[13]. So it really is up to the Commission to gauge the extent to which the production of new Community laws or a revision of the content of some of those currently in force can serve the "broader European interest" and, more specifically, echo the political messages coming from the member states, while simultaneously improving the transparency of the EU's operations in its citizens' eyes.

And lastly, the "legal signal" that the Community authorities send out will be more clearly received if it concerns laws which have cornered the public debate at either the European or the national level and which are therefore of symbolic significance. It should be relatively easy for the Commission to identify such laws, through its offices in the member states or on the basis of public opinion surveys (whether already available or specially commissioned). By way of an example, based purely on a "gut feeling", we shall confine ourselves here to identifying at least two categories of law that should be made less

[12] According to the expression popularised by the "Cecchini Report": *Research on the Cost of non-Europe - Basic Findings*, volumes 1 to 16, EC Commission, Documents Series, 1988.
[13] For instance the law designed to facilitate the circulation of "cheese made from unpasteurised milk" in the past (François Mitterrand) or the law regulating the domestic production of alcoholic beverages today (Viktor Orbán).

intrusive in order to trigger a beneficial "legislative shock": on the one hand, health, phytosanitary and environmental safeguard laws which, while basically useful, regularly grab the headlines to the point where they undermine the EU's image (laws regulating the presentation of bottles of olive oil, the consumption of toilet waters, the size of chicken coops, hunting migratory birds and so forth); and on the other hand, laws connected with European competition rules, particularly those relating to state aid, which unquestionably provide for (excessively low?) thresholds below which the EU has no calling to intervene (so-called "*de minimis*" rules) but which *de facto* result in the nit-picking monitoring of national and local public-sector players who frequently fail to understand either their cumbersomeness or their legitimacy.

4. THE JUNCKER COMMISSION'S INPUT: THE EFFICIENCY TEST

The Commission's legitimacy and effectiveness are partly linked to the inter-institutional and political context. In times of "crisis management" (recent period), the European council is more legitimate as "firefighter" that the Commission (the same applies to the ECB); the European council is also very legitimate as an "architect" to build solutions based on EU or non EU treaties; the Commission nevertheless plays a key role as a "co-architect" and as a "mason" (drafting of the new legislation in particular). In more "normal" times, the Juncker Commission should become more influent if it's well managed, with a new college benefiting from a new legitimacy.

Nevertheless, the Juncker Commission will play its role efficiently if it can get the correct inputs from the institutional and civic framework within which it is supposed to act, so that the content of its initiatives can be perceived and accepted more easily. The establishment of a clearer link between the European elections and JC Juncker appointment at the presidency of the Commission doesn't mean that the latter should act on his own during the next five years.

This means that it should go on consulting stakeholders, social and economic actors and NGO in an even more transparent way. But this also implies that the setting of the Juncker Commission agenda should be defined more formally in connection with the European Parliament and the European Council, and that it can promote the development of the Citizen's initiatives, so as to examine more of them properly.

4.1. The strategic agenda setting challenge: from "Spitzenkandidaten" to "Koalitionsverhandlungen"

The circumstances surrounding the Juncker Commission's inauguration would have benefited from being governed by more institutional procedures as regards the definition of the EU agenda. The "Spitzenkandidaten" is a useful innovation, but its natural complement, the "Koalitionsverhandlungen" should also be adopted and adapted to the EU inter-institutional specificity.

While it is the very nature of Juncker's election to spawn a new agenda for the legislative term of 2014 to 2019, nevertheless a certain vagueness still surrounds it in this sphere. The European Council has identified "five overarching priorities" which it would like the Commission to adopt; in an extension of their election campaigns, the political groups in the European Parliament have all put forward their proposals during the hearing for the new Commission president and the hearing of the members of its team; and JC Juncker, for his part, has identified "ten areas", specifying that he plans to submit a detailed programme only after putting his team together. The Juncker Commission has identified "ten key priorities" for the year 2015, but the articulation of these priorities with the ones defined by the European council remains unclear.

A reading of these documents indeed reveals areas of fairly strong convergence, particularly in connection with a better balance between stringency and growth and a stronger profile for the EU on the international stage. Yet no visible inter-institutional negotiations have been made to formally produce a fully-fledged "contract for the legislative term", as happens for instance in the budgetary sphere: why should there be an agreement on the EU's means yet not on its objectives? In light of this, the prospect of

tensions arising cannot be ruled out, which may well blur the exact scope and importance of the link forged between the European elections and the EU's action plan.

The political directions of the EU should then be subject to deeper and constant discussion between the Juncker Commission, the majority political groups of the European Parliament and the members of the European Council. Such a "trialogue" would be all the more useful if it could lead to the adoption of an inter-institutional agreement formalising a "contract for the parliamentary term" that would provide the EU and its citizens with the internal and international direction they need more than ever between now and 2019, both at the EU28 and at the euro area levels.

In broader terms, it would be preferable to conclude a basic tripartite framework agreement to replace the current model of agreements that appears to be fragmented and unbalanced. The distinction between political programming and procedural engagements and the very different scope of them can be acknowledged. Nevertheless the need for enhanced dialogue and shared planning would be preferable to the set of partial agreements that might be contradictory and do not contribute to the clarity of the political purposes of the EU as a whole and the Juncker Commission in particular.

4.2. The right of legislative initiative challenge: a dynamic and open monopoly

The exercise of the monopoly over legislative initiative assigned to the Commission is strictly regulated: in this sphere, the Commission takes its inspiration from the conclusions of the European Council on the one hand and from the guidelines of the European Parliament on the other, in the context of its annual working agenda. But this monopoly also allows it to play an irreplaceable role when the time comes to draft the content of proposals for directives and regulations, after consulting with all of the interested parties and making every effort to serve the general European interest. Calling into question this monopoly over legislative initiative, by assigning it to the European Parliament for instance, could well undermine the Juncker Commission's position within the institutional triangle, within which its role as an intermediary has already been impacted to a major degree by the substantial increase in the number of first-reading agreements between the European Parliament and Council.

Introduced by the Treaty of Lisbon, the "right of citizens' initiative", in other words the opportunity offered to a representative group of EU citizens to call on the Commission to propose a legislative initiative, offers more promising potential for development because it breathes substance into the notion of participatory democracy at the European level. This new right has already been exercised by over twenty groups of citizens from at least seven EU member states, but only some of the initiatives launched have succeeded in attracting over one million signatures; many of them have thus triggered a fully-fledged Europe-wide debate on which the Commission has had to react. Such reactions should mobilise all due political and communication resources in the future, especially when they are negative, given the negative feelings to be expressed by their initiators among all the people they had mobilised in their campaign.

Numerous citizens' mobilisations have encountered difficulties of a technical, legal or political nature which have hampered their development and revealed the need to simplify the circumstances governing the exercise of this right of initiative, particularly in relation to conditions governing the collection of signatures (a system should be set up for on-line signature gathering) and the 12-month time limit set for their collection, which appears to

be too short for players in associations devoid of sufficient means to enable them to act at the pan-European level (a 24-month delay would be better). It is up to the Juncker Commission to propose that simplification on the basis of the initial reviews drafted after the right of citizens' initiative has been exercised for a few years.
On this basis, it will also be up to the Juncker Commission to grant all the attention and resources needed to communicate with the promoters of citizens' initiative and to explain them and public opinion why their proposals can be taken on board or not and if yes, how it will be transformed into a formal proposal. The preservation of its monopoly of initiative by the College will then be all the more obvious if it appears that it is exercised in an open mind, not only vis-à-vis the other institutions but also vis-à-vis the EU citizens.

All these substantial human, organizational and legal changes could be completed by others, especially as regards the nature and number of the inter-institutional agreements concluded by the Commission and the other institutions. The balance of powers between the institutions, and then the legitimacy and efficiency of the Commission, will also go on depending on the evolution of the political context (crisis period or not). But even if they are not revolutionary as regards the nature of the EU treaties and political game, these changes are likely to give the Commission all the strength it needs to contribute to address the challenges Europe is facing.

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NOTES

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PHOTO CREDIT: iStock International Inc.

ISBN: 978-92-823-6559-5
doi: 10.2861/05315

Publications Office