

The size and structure of the European Commission: legal issues surrounding project teams and a (future) reduced College

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European Commission – Size of the Commission – Presidentialisation – President’s power of organisation – Principle of collegiality – Responsibility of the College at large – Reorganisation of the Commission – Balance between efficiency and member state representation – Legality of project teams – Rotation of voting rights in EU law – System of rotation for the European Commission

INTRODUCTION

The size of the European Commission has been a topic of debate for quite a while. Although it has been discussed for a number of years already, it is highly unlikely that the number of Commissioners will decrease anytime soon. For this reason, the incumbent President, Jean-Claude Juncker, has made considerable changes to the internal organisation of the Commission. One of the major reforms is the introduction of so called ‘project teams’. While the forming of groups of Commissioners is certainly not new, the current President put these groups under the leadership of a Vice-President and invested these Vice-Presidents with the right to veto initiatives of so-called ‘line’ Commissioners. This article aims to review this new internal setting for its compliance with the requirements of primary law. More precisely, it will discuss which principles guide the organisation of the Commission and whether the current design of the project teams is in conformity with these principles. To this end, I will first outline the historical development of the size of the Commission, leading to the necessity of either a smaller number of Commissioners or a setting for an efficient organisation of a

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Commission of ‘one Commissioner per Member State’. In this context, I will discuss the arguments for and against a Commission of 28 (or 27, respectively) which, for the foreseeable future, will be its size. In the following section, I will explore whether the introduction of project teams in the Juncker Commission, aiming at a more streamlined organisation of the College, complies with primary law requirements. In addition, I will attempt to explore a future institutional design for the Commission with a reduced size. Finally, some conclusions will be drawn about institutional reform of the Commission in general.

THE SIZE OF THE COMMISSION – AN OVERVIEW

Since the establishment of the European Commission (formerly the High Authority) as the executive of European integration *stricto sensu*,¹ its size has grown considerably, as each Member State claimed representation in this – genuinely European – institution. The following section will outline the growth of the Commission over the last decades, and will also include references to the first attempts to reduce the size of the Commission and detach it from a strict ‘one Commissioner per Member State’ rule in order to ensure its effective functioning.

From the very beginning of European integration within the Communities, as a matter of principle the European Commission was composed of (at least) one Commissioner per Member State. The EEC Commission and the High Authority of the ECSC were each composed of nine members, as the large member states (Germany, France, and Italy) were each granted the right to nominate two Commissioners. With the accession of additional (large) member states, the EU-15’s Commission was temporarily composed of 20 members (the United Kingdom and Spain each also had two Commissioners). The Treaty of Amsterdam and the Treaty of Nice provided for a reduction of the number of Commissioners by reverting to the principle of ‘one Member State – one Commissioner’; the Commission was henceforth composed of 15 members. At the same time, the Council was invested with the power to alter the number of members of the Commission by unanimous decision² (which, however, it did not do). In view of the upcoming Eastern enlargement, the Conference drafting the Treaty of Nice included another provision that would automatically take effect on the date the first Commission following the accession to the Union of the twenty-seventh member state took up its duties.³ According to that provision, the number of

¹ I.e., the Treaty establishing the European Coal and Steel Community, the Treaty establishing the European Economic Community and the Treaty establishing the European Atomic Energy Community and their successors.

² See Art. 4(1) of Protocol No. 10 on the enlargement of the European Union, O.J. 2001 C 80/49. In fact, the ECSC Treaty as well as the Merger Treaty already provided for this option.

³ Art. 4(2) of Protocol No. 10.

members of the Commission – to be determined by unanimous Council decision – should be less than the number of member states. The Commissioners would be chosen on the basis of a system of rotation. That moment had come with the accession of Romania and Bulgaria, but the anticipated Council decision was superseded by the negotiations for the next Treaty amendment.

The European Convention drafting the Constitutional Treaty provided in Article 25 that the number of Commissioners would be fixed at 15 (President, Foreign Minister and 13 Commissioners), subject to a rotation system.⁴ The member states whose nationals were not included in the Commission should designate Commissioners without voting rights.⁵ The Commission itself criticised this idea as a ‘complicated, muddled and inoperable’ system that ‘might affect the legitimacy and effectiveness of the Commission’ and ‘may threaten the basis of collegiality’.⁶ Condemned for creating a two-tier system of Commissioners,⁷ it does not come as a surprise that the system met strong resistance in the following Intergovernmental Conference. It was for that reason that the Conference agreed to maintain for the time being the system of one Commissioner per member state. A reduction of the number of Commissioners (equal to two thirds of the number of member states, unless the European Council decides otherwise) and a rotation system would have taken effect later.

Despite the failure of the Constitutional Treaty, the idea of a reduced Commission was taken over by the Treaty of Lisbon. Article 17(5) TEU in combination with Article 244 TFEU provides that the number of Commissioners (including the President and the High Representative) shall correspond to two thirds of the number of member states and that the seats in the College shall rotate among the member states in the consecutive terms of office. However, in order to obtain Irish consent to the Lisbon Treaty the European Council decided to trade in one of the reform treaty’s achievements by agreeing that, provided the Treaty of Lisbon entered into force, a decision would be taken, in accordance with what is now Article 17(5)(1) TEU, to the effect that the Commission would continue to

⁴Fifteen was long considered the ideal number of Commissioners. See F. Schmidt and H. Schmitt von Sydow, ‘Artikel 17 EUV’, in H. von der Groeben et al. (eds.), *Europäisches Unionsrecht*, 7th edn. (Nomos 2015) para. 107, with further references.

⁵From a critical viewpoint P. Craig, ‘The Treaty of Lisbon, process, architecture and substance’, 33(2) *European Law Review* (2008) p. 137 at p. 155; cf also P. Ponzano, ‘La Commissione europea; composizione e ruolo nel sistema istituzionale dell’Unione’, *Il Diritto dell’Unione Europea* (2004) p. 501 at p. 502.

⁶Commission Communication, A Constitution for the Union – Opinion of the Commission, pursuant to Article 48 of the Treaty on European Union, on the Conference of representatives of the Member States’ governments convened to revise the Treaties, COM(2003) 548 final, p. 5.

⁷See B. Martenczuk, ‘Artikel 17 EUV’, in E. Grabitz et al. (eds.), *Das Recht der EU* (CH Beck 2016) para. 80 with further reference.

include one national of each member state.⁸ In May 2013 the European Council adopted the announced decision.⁹ It should be noted in this context that the President of the European Commission is a member of the European Council, but he does not take part in the votes (Article 15(2) TEU in combination with the second sentence of Article 235(1)(2) TFEU), thus having no possibility to avoid any such decision. For the time being, the plan to reduce the number of Commissioners has been politically abandoned, keeping a College of 28 (27) and maybe more.

‘ONE MEMBER STATE, ONE COMMISSIONER’ – WHY (NOT)?

There are a number of arguments commonly used to justify the rule that the European Commission be composed of one Commissioner per Member State. First of all, it is held that the principle of the equality of member states (Article 4(1) TEU) necessitates that each country have one Commissioner. The member states as ‘masters of the Treaties’ in fact have a vital interest in being ‘represented’ by one of their nationals in the Commission, a powerful institution with the right (and most times even a monopoly) of legislative initiative. Also, both larger and smaller member states have raised the concern that their interests would not be adequately taken into account by a smaller Commission. In particular, small member states are reluctant to ‘break a direct bilateral umbilical cord’ with the Union’s executive.¹⁰ The same holds true for euro area member states, fearing that in a reduced Commission the number of Commissioners from Eurozone countries would not reflect the impact of the euro area.¹¹

In fact, it has been argued that the presence of one Commissioner of each nationality creates a strong bond to the individual member states. This makes it possible to ‘take the temperature’ in the member states before an initiative is proposed or a decision is taken.¹² The credibility of, trust in, and loyalty towards the institution are enhanced if it includes among its membership a liaison of one’s nationality and cultural background.¹³ By that, the legitimacy of the

⁸European Council, 11-12 December 2008 (Doc. 17271/1/08) and 18-19 June 2009 (Doc. 11225/2/09).

⁹European Council Decision 2013/272/EU of 22 May 2013 concerning the number of members of the European Commission, OJ 2013 L 165/98. Interestingly, compared to the system foreseen by the Treaty of Nice, the European Council could (theoretically) even decide on a number of Commissioners that exceeds the number of Member States.

¹⁰M. Szapiro, *The European Commission – A Practical Guide* (John Harper Publishing 2013) p. 36.

¹¹Cf Y. Bertoncini and A. Vitorino, ‘The Commission Reform: Between Efficiency and Legitimacy’, *Notre Europe Policy Paper* 115 (2014) p. 4.

¹²Szapiro, *supra* n. 10, at p. 38.

¹³Schmidt and Schmitt von Sydow, *supra* n. 4, at para. 109; see also M. Dougan, ‘The Treaty of Lisbon 2007: Winning minds, not hearts’, 45 *Common Market Law Review* (2008) p. 617 at p. 695;

Commission's actions is strengthened.¹⁴ In return, also in public opinion, Commissioners are perceived as defenders of the national interest,¹⁵ which enhances public support for the European executive and also for the Union in general.

On the other hand, there are strong arguments against the 'one Member State – one Commissioner' rule. First and foremost, the growing number of Commissioners has led to concerns regarding the working capacity of the Commission. These were voiced already within the EU-15, and the Eastern enlargement has refuelled the debate. The functioning of the Commission with a large number of Commissioners may suffer, as the need for coordination, the overlap of competences and potential inefficiencies grow.¹⁶ A growing number of Commissioners makes it harder to act as a College with collegiate responsibility; a larger group needs stronger leadership.

Secondly, while it is true that equality of the member states before the Treaties is an underlying principle of the Union's architecture, it does not require that all Union institutions be organised in an intergovernmental manner.¹⁷ The member states are fully represented in the Council and the European Council and all Union citizens are represented in the European Parliament.¹⁸ Commissioners are supposed to represent the collective interests of the Union, so there is no intrinsic need for all member states to be represented in the College of Commissioners at any given time.¹⁹ The equality of member states can be taken into account *within* a reduced Commission (as an element of collegiality) if, over time, a system of rotation ensures an equal number per member state of the Commissioners' terms of office (see below).

Thirdly, the European Commission as the prime supranational institution is committed only to the Union's interests (Article 17(1) TEU). As stipulated by the

P.-C. Müller-Graff, 'Der Vertrag von Lissabon auf der Systemspur des Europäischen Primärrechts', 2 *integration* (2008) p. 123 at p. 129; P. Braukmann, *Die EU-Kommissare* (Peter Lang 2015) p. 32.

¹⁴J. Temple Lang, 'How much do the smaller Member States need the European Commission?', The role of the Commission in a changing Europe', 39 *Common Market Law Review* (2002) p. 315 at p. 319; P. Stancanelli, 'La Commission et le traité de Lisbonne', 1 *Revue des affaires européennes* (2009-2010) p. 11 at p. 19; Y. Bertoincini and A. Vitorino, 'Reforming Europe's Governance for a more legitimate and effective Federation of Nation States', 105 *Notre Europe Studies & Reports* (2014) p. 48; Ponzano, *supra* n. 5, at p. 514.

¹⁵P. de Schoutheete, 'Institutional Reform in the EU', 19 *European Policy Brief* (2014) p. 6.

¹⁶Schmidt and Schmitt von Sydow, *supra* n. 4, at para. 107; *see also* V. Di Bucci and B. Martenczuk, 'Articolo 17 TUE', in C. Curti Gialdino (ed.), *Codice dell'Unione europea operativo. TUE e TFUE commentati articolo per articolo* (Simone 2012) p. 214; W. Frenz, *Handbuch Europarecht, Vol. 6* (Springer 2011) para. 1103; N. Nugent and M. Rhinhard, *The European Commission* (Palgrave 2015) p. 38.

¹⁷Schmidt and Schmitt von Sydow, *supra* n. 4, at para. 108.

¹⁸*See* Frenz, *supra* n. 16, at para. 1104, with further reference.

¹⁹Nugent and Rhinhard, *supra* n. 16, at p. 97.

Treaties, the members of the Commission shall be chosen, on grounds of their general competence and European commitment, from among persons whose independence is beyond doubt. This implies that, in carrying out its responsibilities, the Commission shall be completely independent, i.e. the members of the Commission shall neither seek nor take instructions from any Government or other institution, body, office or entity (Article 17(3) TEU).²⁰ This means that the Commissioners shall ensure that the general interests of the Union take precedence at all times, not only over national, but also over personal interests.²¹ The Commission is not an institution whose members are representatives²² of their member states,²³ but instead representatives of the political and socio-economic reality in *all* the member states.²⁴ The Commission, in fact, is no 'Coreper III'.²⁵

A great number of members in a government is not *per se* detrimental to the working capacity and the efficiency of the cabinet, as examples from France or the United Kingdom show.²⁶ In fact, as the number of Commissioners has grown over time, so have the Union's competences. However, not every accession has led to a parallel and proportional growth in competences. Looking at the portfolios, it is hard to establish that there are in fact 28 different, clear-cut areas to be exercised by the Commission. A Commission of 28 or more Commissioners inevitably leads to a fragmentation of portfolios, and it will get ever more difficult to balance a reasonable size with each Commissioner's responsibilities. This can have the effect of some Commissioners, their cabinets, and their director generals being underemployed.²⁷

PROJECT TEAMS: LEGITIMATE, BUT LEGAL?

In order to streamline the work of a College of (still) 28 members, the current President of the Commission decided to modify the internal structure by grouping

²⁰ Cf. also Di Bucci and Martenczuk, *supra* n. 16, at p. 214.

²¹ ECJ 11 July 2006, Case C-432/04, *Cresson*, ECLI:EU:C:2006:455, para. 71.

²² In this context, it may be misleading that some language versions of the Treaties in Art. 244 TFEU speak of the Commissioners 'mandates' (DE: *Mandate*; FR: *mandats*; ES: *mandatos*; IT: *mandati*); the English version more precisely refers to 'terms of office'.

²³ See, among others, C. Calliess, *Die neue Europäische Union nach dem Vertrag von Lissabon* (Mohr Siebeck 2010) p. 144; A. Hatje and S. von Förster, '§ 10 Organordnung der Europäischen Union', in A. Hatje and P.-C. Müller-Graff (eds.), *Enzyklopädie Europarecht, Band I: Europäisches Organisations- und Verfassungsrecht* (Nomos 2014) para. 132; V. Epping, 'Artikel 244 AEUV', in R. Streinz (ed.), *EUV/AEUV*, 2nd edn. (CH Beck 2011) para. 2; see also Nugent and Rhinhard, *supra* n. 16, at p. 96.

²⁴ Ponzano, *supra* n. 5, at p. 503.

²⁵ Bertoncini and Vitorino, *supra* n. 11, at p. 6; Szapiro, *supra* n. 10, at p. 38.

²⁶ Cf. P.F. Nemitz, 'Artikel 17 EUV', in J. Schwarze et al. (eds.), *EU-Kommentar*, 3rd edn. (Nomos 2012) para. 59; Ponzano, *supra* n. 5, at p. 512; however, Frenz, *supra* n. 16, at para. 1101, points out that a comparison with national governments is only of limited value as they are structurally different.

²⁷ de Schoutheete, *supra* n. 15, at p. 5.

Commissioners into so-called project teams (clusters), responsible for one of the great priority topics and headed by one of the Vice-Presidents. The following section will explore not only the legal bases of, but also the legal limits for the creation of these clusters.

Structure of the clusters

In response to the Convention's proposal to have a Commission with a reduced size, the European Commission stated its preference to maintain the system of one Commissioner per member state with the same rights and obligations instead of creating a two-tiered system of Commissioners.²⁸ Aware of the difficulties in managing and taking decisions in an enlarged Commission, it suggested instead enabling decision-making within groups of Commissioners, while the College would address only the most important issues and would therefore have only a limited number of decisions to take.²⁹

Prior to the current Commission, both Commission Presidents Prodi and Barroso used their powers to create a number of so called 'Commissioners' Groups'. These groups brought together a number of Commissioners with related portfolios for a certain topic. They were chaired by a lead Commissioner (*chef de file*) in order to oversee developments in a particular area³⁰ and to contribute to the coordination and preparation of the work of the Commission in accordance with the political guidelines laid down by the President. The Commissioners' Groups were not authorised to take decisions but instead were to prepare certain items for deliberation by the College. The Barroso II Commission started with ten such groups (external relations, innovation, internal market, industrial policy, digital agenda, climate change, pensions, financial instruments and two for the preparation of the budget).³¹

Entrusted with a College of 28 and the challenge of assigning a portfolio to each Commissioner, the new President-elect of the European Commission, Jean-Claude Juncker, announced the implementation of a 'radical reform of the traditional structure of Colleges'³². Apart from the High Representative for Foreign Affairs and Security Policy, who is member of the Commission and one of its Vice-Presidents *ex officio* (Article 17(4) and (5) and Article 18(4) TEU), he

²⁸ Commission Communication, *supra* n. 6, at p. 5 ff.

²⁹ Commission Communication, *supra* n. 6, at p. 6.

³⁰ T. Christiansen, 'The European Commission: the European executive between continuity and change', in J. Richardson (ed.), *European Union – Power and Policy Making*, 3rd edn. (Routledge 2006) p. 99 at p. 114.

³¹ Nugent and Rhinhard, *supra* n. 16, at p. 121.

³² Nugent and Rhinhard, *supra* n. 16, at p. 98. On the idea, *see also* Bertoncini and Vitorino, *supra* n. 14, at p. 43 ff.

named six other Vice-Presidents, each leading a so-called project team or cluster: (1) Foreign Affairs and Security Policy, headed by the High Representative; (2) Better Regulation, Inter-Institutional Relations, the Rule of Law and the Charter of Fundamental Rights, headed by the new post of First Vice-President; (3) Budget and Human Resources; (4) Digital Single Market; (5) Energy Union; (6) Euro and Social Dialogue; (7) Jobs, Growth, Investment and Competitiveness.³³ The remaining Commissioners are assigned to one or more project teams, depending on their portfolios and the profile of the clusters. The project teams are not static, but may change over time as new priorities arise.

The Vice-Presidents shall ‘steer and coordinate work across the Commission’ for certain ‘well-defined priority projects’ in accordance with the Political Guidelines of the Commission’s President. To this end, the President entrusted the Vice-Presidents with certain prerogatives to act on his behalf. The Commissioners that are assigned to a certain project team are expected to work in close cooperation with the respective Vice-President and report to him. The clusters shall thus have a sort of sector-based collegiality.³⁴ The building of these project teams led to the creation of a *de facto* hierarchy within the Commission.³⁵

In addition, ‘the Vice-Presidents will be able to draw on any service in the Commission whose work is relevant for their area of responsibility, in consultation with the relevant Commissioner’.³⁶ In order to coordinate the work within a cluster, project team meetings take place about once a month. These meetings serve the purpose of taking into account the comments of all Commissioners whose portfolio is impacted by a proposal.³⁷

Furthermore, as a general rule, the President will not include new initiatives in the Commission Work Programme or place them on the College’s agenda ‘unless this is recommended [...] by one of the Vice-Presidents on the basis of sound arguments and a clear narrative that is coherent with the priority projects of the Political Guidelines’.³⁸ In addition, the President will ‘pay particular attention to

³³ See Press Release IP/14/984 of 10 September 2014, Annex 2, and MEMO/14/523 of 10 September 2014, p. 3 ff.

³⁴ Cf Bertoncini and Vitorino, *supra* n. 14, at p. 46; M. Borchardt, ‘A political European Commission through a new organisation – ‘This time it’s different’. Really?’, 180 *Notre Europe Policy Paper* (2016) p. 6.

³⁵ Cf Borchardt, *supra* n. 34, at p. 3.

³⁶ Letter from President-elect of the European Commission J.-C. Juncker to EP President M. Schulz of 25 September 2014, p. 1.

³⁷ Cf Borchardt, *supra* n. 34, at p. 11.

³⁸ Letter from President-elect of the European Commission J.-C. Juncker to EP President M. Schulz of 25 September 2014; on the new structure *see also* J. Brauneck, ‘EU-Kommission: Ist die neue Macht der Vizepräsidenten unionsrechtswidrig?’, 21 *Die öffentliche Verwaltung* (2015) p. 904 at p. 904, with examples of how this new design would affect the Commission’s functioning.

the opinion of the First Vice-President [...] before including any new initiative in the Commission Work Programme or putting it on the agenda of the College'.³⁹ This means that all new initiatives must go through a filtering system whereby a Commissioner needs approval from the responsible Vice-President, and then by the First Vice-President carrying out a 'Better Regulation' test.⁴⁰

Recent research suggests that this reform has in fact increased the President's leadership role and led to a centralisation of the co-ordination process. First of all, with the function of the First Vice-President acting as a filter, the establishment of the working programme is controlled from the top rather than by means of a bottom-up process. Furthermore, the introduction of project teams with responsible Vice-Presidents has enabled coordination at an earlier stage, thus improving strategic political decision-making by the Commissioners. Lastly, interviews suggest that the reduced number of Commissioners with a specific portfolio ensures more centralised coordination.⁴¹ One may thus conclude that the introduction of the project teams indeed fulfils the expectations of more streamlined and efficient policy-making by the Commission.⁴²

The President's organisational powers as legal basis

Since the Treaty of Maastricht and the changes it made to the European Commission, the Commission President is no longer *primus inter pares*, but instead the rather powerful leader of the College. He is elected in a separate act and has a decisive say in the selection of the Commissioners. Moreover, he is also a member of the European Council. As an expression of his leadership role, he has considerable organisational power.⁴³ The President of the Commission has at his disposal the power to determine the internal organisation of the Commission, as Article 17(6)(b) TEU points out. As part of the organisational powers, the President shall structure the responsibilities incumbent upon the Commission and allocate these among its members (Article 248 TFEU). This includes the size and

³⁹ Communication from the President to the Commission of 11 November 2014, The Working Methods of the European Commission 2014-2019, C(2014) 9004, p. 5; see also A. Hofmann, 'Europäische Kommission', in *Jahrbuch der Europäischen Integration* (Nomos 2015) p. 95 at p. 96. It should be noted that the Work Programme is established by the Commission at large, but only in accordance with the President's political guidelines (Art. 2 of the Rules of Procedure). The agenda is adopted by the President alone (Art. 6(1) of the Rules of Procedure).

⁴⁰ Cf Borchardt, *supra* n. 34, at p. 5.

⁴¹ A. Bürgin, 'Intra- and Inter-Institutional Leadership of the European Commission President: An Assessment of Juncker's Organizational Reform', *Journal of Common Market Studies* (2017) p. 1 at p. 7-9.

⁴² See also Borchardt, *supra* n. 34, at p. 16.

⁴³ Schmidt and Schmitt von Sydow, *supra* n. 4, at para. 117; cf also M.W. Bauer and S. Becker, 'Die Europäische Kommission unter Jean-Claude Juncker – Eine Zwischenbilanz', 38(4) *integration* (2015) p. 292 at p. 299).

format of the portfolios and the direction to be followed by the respective Directorates-General.

Furthermore, in accordance with Article 17(6)(a) TEU, the President of the Commission shall lay down guidelines within which the Commission is to operate. The President's authority to set the general guidelines comprises the power to determine the general direction and priorities of the Commission as well as determine the specific topics to be covered.⁴⁴ In reverse, the last sentence of Article 248 TFEU provides that the Commissioners shall carry out the duties devolved upon them by the President under his authority. More specifically, Article 3(2)(2) of the Commission's Rules of Procedure provides that the President shall assign to Members of the Commission special fields of activity with regard to which they are specifically responsible for the preparation of Commission work and the implementation of its decisions. However, each Commissioner remains answerable to the President, who now has the power to dismiss individual Commissioners without approval by the College (Article 17(6) TEU).⁴⁵ These powers provide the primary law framework within which the President is competent to determine the internal organisation of the College.

In addition, the establishment of project teams or clusters is governed by provisions of the Commission's Rules of Procedure⁴⁶ which are, as an expression of the right to self-organisation of the Commission as a whole, adopted by the College at large (Article 249(1) TFEU). Article 3(4) of the Rules provides that the President may set up groups of Members of the Commission, designating their chairpersons, setting their mandate and operating procedures, and deciding on their membership and term. According to Article 18 of the Rules, groups of Members of the Commission shall contribute to the coordination and preparation of the work of the Commission in accordance with the political guidelines and mandate laid down by the President. In addition, according to Article 3(2)(3) of the Rules, the President may ask Members of the Commission to carry out specific tasks with a view to ensuring that the political guidelines that he has laid down and the priorities set by the Commission are implemented. These rules serve as the general foundation for the establishment of clusters within the Commission.

Despite this general legal basis, however, it should be noted that the specific design and functioning of the project teams is not governed by primary law or the Commission's Rules of Procedure. This is especially true for the veto given to the Vice-Presidents as leaders of the clusters and the veto of the First Vice-President.

⁴⁴ Martenczuk, *supra* n. 7, at para. 93.

⁴⁵ More precisely, the second subparagraph of Art. 17(6) TEU provides: 'A member of the Commission shall resign if the President so requests'.

⁴⁶ Rules of Procedure of the Commission, C(2000) 3614, OJ 2000 L 308/26, as amended by Commission Decision 2011/737 of 9 November 2011, OJ 2011 L 296/58.

Instead, they are based on the President's Working Methods for the Commission,⁴⁷ which he adopted autonomously as an expression of his organisational power and authority to set guidelines for the Commission,⁴⁸ and on the mission letters given to the Commissioners.

Collegiality as the outermost limit for internal reform

The President's discretionary power of internal organisation is subject to certain requirements and conditions. As Article 17(6)(b) TEU provides, the President, when deciding on the internal organisation, has to ensure that the Commission acts consistently, efficiently and as a collegiate body. These three principles – consistency, efficiency, and collegiality – constitute both the objectives of and the limits to the organisational power of the President. Formally, they are of equal value and the President must strike a fair balance between them, as they cannot all be achieved to the fullest extent concurrently. A conflict of objectives may, for example, arise between efficiency and collegiality in a growing Commission: the number and complexity of decisions taken in and by the Commission entail that no Commissioner can review each file in depth, especially not those too far-removed from his own dossier. However, collegial deliberation requires that all Commissioners formally take notice of initiatives, leading to cumbersome coordination procedures that compromise efficiency.⁴⁹

Special attention is given by the Treaties to the principle of collegiality. While the President has a certain margin of appreciation for the sake of consistency and efficiency, the principle of collegiality imposes objective limitations on the President.⁵⁰ Collegiality as a principle contains specific elements that must be respected by any organisational decision. The principle of collegiate responsibility is explicitly mentioned only in Article 17(6)(b) TEU, but characteristics of collegiality are found throughout the Treaties and in fact, it penetrates all stages of the College's life cycle.⁵¹

First of all, according to Article 17(7)(3) TEU, the President of the Commission, the High Representative and the other members of the Commission shall be subject as a body to a vote of consent by the European Parliament, on the basis of which the Commission shall be appointed by the European Council. While in practice the individual Commissioners are heard separately by the European Parliament before the election of the College,⁵² the

⁴⁷ C(2014) 9004 of 11 November 2014.

⁴⁸ Martenczuk, *supra* n. 7, at para. 99a.

⁴⁹ Nemitz, *supra* n. 26, at para. 65.

⁵⁰ R. Adam, 'Articolo 17 TUE', in A. Tizzano (ed.), *Trattati dell'Unione europea* (Cedam 2014) point IX.4; *cf also* E. Gianfrancesco, in H.-J. Blanke and S. Mangiameli (eds.), *The Treaty on European Union (TEU) – A Commentary* (Springer 2013) para. 125 ff.

⁵¹ Szapiro, *supra* n. 10, at p. 28.

⁵² *See* Rule 118 and Annex XVI of the European Parliament's Rules of Procedure.

Commission *as a whole*, rather than the Commissioners individually, is subject to a vote of approval by Parliament.⁵³ In line with this procedure, according to Article 17(8) TEU, the Commission, as a body, shall be responsible to the European Parliament. The European Parliament cannot impeach individual Commissioners; it can only initiate a motion of censure of the Commission as a whole. If such a motion is carried, the members of the Commission shall resign as a body (Article 234 TFEU).

Furthermore, equality of votes and voting by simple majority are generally perceived as characteristic of collegiate bodies.⁵⁴ As Article 250(1) TFEU provides, the Commission shall act by a majority of its Members. Every Commissioner has one vote and each vote has the same weight. This holds true also for the vote of the Commission's President. His vote does not carry any special weight – he does not have a veto – nor does he have a casting vote in the event of a tied vote. This means that, despite his leadership position, the President of the Commission can be outvoted.⁵⁵ While the Commission as a whole shall act within the guidelines set by its President (Article 17(6)(a) TEU), the College is not barred from taking a decision that is not supported by the President himself.⁵⁶

As the European Court of Justice has pointed out, the principle of collegiality or collegiate responsibility 'is founded on the equal participation of the members of the Commission in the adoption of decisions and it follows from that principle [...] that decisions should be the subject of a collective deliberation and that all the members of the College of Commissioners bear collective responsibility on the political level for all decisions adopted.'⁵⁷ While it is true that there are stronger and weaker Commissioners with greater or lesser skills, political expertise and capacity,⁵⁸ they are, from a legal point of view,⁵⁹ equal peers as regards their

⁵³ Cf Nugent and Rhinhard, *supra* n. 16, at p. 117; M. Mistò, 'La collégialité de la Commission européenne', 1 *Revue du Droit de l'Union Européenne* (2003) p. 189 at p. 212 ff.

⁵⁴ C. Thiele, *Regeln und Verfahren der Entscheidungsfindung innerhalb von Staaten und Staatenverbindungen* (Springer 2008) p. 139.

⁵⁵ Martenczuk, *supra* n. 7, at para. 94.

⁵⁶ With a different point of view P.F. Nemitz, 'Europäische Kommission: Vom Kollegialprinzip zum Präsidialregime?', 5 *Europarecht* (1999) p. 678 at p. 681.

⁵⁷ ECJ 23 September 1986, Case 5/85, *AKZO Chemie v Commission*, ECLI:EU:C:1986:328, para. 30; ECJ 15 June 1994, Case C-137/92 P, *Commission v BASF and Others*, ECLI:EU:C:1994:247, paras. 62-63; ECJ 29 September 1998, Case C-191/95, *Commission v Germany*, ECLI:EU:C:1998:441, para. 39; ECJ 13 December 2001, Case C-1/00, *Commission v France*, ECLI:EU:C:2001:687, para. 79; CFI 2 October 2009, Case T-324/05, *Estonia v Commission*, ECLI:EU:T:2009:381, para. 65 ff.; see also A. Haratsch, 'Artikel 17 EUV', in M. Pechstein et al. (eds.), *Frankfurter Kommentar zu EUV, GRC und AEUV* (Mohr Siebeck 2017) para. 36; Braukmann, *supra* n. 13, at p. 43.

⁵⁸ See Nugent and Rhinhard, *supra* n. 16, at p. 127.

⁵⁹ For that reason, Borchardt, *supra* n. 34, at p. 5, claims that 'collegiality is dead but it died a long time ago and has not been killed by the new structure', while admitting that 'in a formalistic sense [it] is still alive and used to refer to the *modus operandi* of the College's functioning'.

participation in the College.⁶⁰ Collegiality ensures that, regardless of the importance of his or her portfolio, the political importance of his or her party affiliation, and the importance of the member state whose nationality the Commissioner has, every member of the Commission has an equal opportunity to influence the decisions of the College.⁶¹ This includes the right (of every Commissioner) to propose an initiative for adoption by the College (Article 8 of the Rules of Procedure) and to propose it for inclusion on the Commission's agenda (Article 6(3) of the Rules of Procedure).⁶² Collegiality therefore is also one – and in fact, the primary – tool to ensure the independence of the Commission as stipulated by Article 17(3)(3) TEU⁶³ in that it allows any initiative by the College at large to be discussed, leaving less room for obstructive outside influence on individual Commissioners.

Equality of members as a constituent element of collegiality implies that there is common deliberation and decision-making by all members of that body.⁶⁴ Of course, nothing has changed in this regard for initiatives that have passed the filter of the respective Vice-President and the First Vice-President. However, the current design leads to selection at an earlier phase of Commission decision-making and thus leads to differentiation among the members with regard to the input they can deliver to the College. Collegiality in the form of the equality of Commissioners, save the prerogatives of the President, demands that there are no first-class and second-class Commissioners, i.e. no senior and junior,⁶⁵ associated or adjunct⁶⁶ Commissioners. Under current primary law, therefore, any restructuring of the Commission by its President alone cannot lead to a hierarchical structure within the College.⁶⁷

The requirement that all members of the College of Commissioners bear collective responsibility for decisions adopted does not mean that all decisions have to be adopted *by the Commission at large*. Article 13 of the Rules of Procedure

⁶⁰ See also Thiele, *supra* n. 54, at p. 139.

⁶¹ G. Verheugen, 'Erfahrungen, Entwicklungen und Perspektiven', in M. Knauff and T. Oppelland (eds.), *Die Europäische Kommission zwischen Technokratie und Politisierung* (BWV-Verlag 2016) p. 23 at p. 26; Szapiro, *supra* n. 10, at p. 29; cf also Nugent and Rhinhard, *supra* n. 16, at p. 116.

⁶² See also Brauneck, *supra* n. 38, at p. 912.

⁶³ Borchardt, *supra* n. 34, at p. 6; Szapiro, *supra* n. 10, at p. 30; Mistò, *supra* n. 53, at p. 219; Braukmann, *supra* n. 13, at p. 45.

⁶⁴ Cf Thiele, *supra* n. 54, at p. 63-65.

⁶⁵ J. Lipsius, 'The 1996 Intergovernmental Conference', 20(3) *European Law Review* (1995) p. 235 at p. 251.

⁶⁶ J. Schwarze, 'Ein pragmatischer Verfassungsentwurf', 38(4) *Europarecht* (2003) p. 535 at p. 550.

⁶⁷ D. Kugelmann, 'Artikel 244 AEUV', in R. Streinz (ed.), *EUV/AEUV*, 2nd edn. (CH Beck 2011) paras. 11, 13.

provides that decisions can be taken by the so-called ‘empowerment procedure’. The Commission (i.e., the College) may, provided the principle of collective responsibility is fully respected, empower one or more of its Members to take management or administrative measures on its behalf and subject to such restrictions and conditions as it shall impose (Article 13(1)), thus excluding decisions of principle. Furthermore, the Commission may also instruct one or more of its Members to adopt, with the agreement of the President, the definitive text of any instrument or of any proposal to be presented to the other institutions, the substance of which has already been determined in discussion (Article 13(2)).⁶⁸ The delegation of powers is in conformity with the principle of collective responsibility if the decision-delegating authority is adopted at meetings of the College, if all the departments are in agreement, if the Commissioner is satisfied that the decision does not need to be considered by the full Commission (i.e., the Commissioner finds that the decision is too important to be taken by him individually) and if the decisions adopted under a delegation of authority are transmitted to all the members of the Commission.⁶⁹

Due to the President’s organisational power and his authority to determine the guidelines, and the requirement that delegation of decision-making competences be made by the College at large, there is, at the level of the European Commission and in contrast to most national governments, no principle dictating that each Commissioner shall conduct all affairs of his or her department independently (*‘Ressortprinzip’*).⁷⁰ However, there is a certain degree of independent responsibility for his or her department. This enhances the efficiency of the Commission’s work and thus takes due account of one of the organisational principles laid down in Article 17(6) TEU. Conversely, the Treaties provide that, on the one hand, the Commissioners are answerable only to the President of the Commission, not to other, individual members of the College.⁷¹ On the other hand, their initiatives are subject only to approval by the College as a whole.

⁶⁸ See ECJ 23 September 1986, Case 5/85, *AKZO Chemie v Commission*, ECLI:EU:C:1986:328, para. 37; CFI 27 April 1995, Case T-442/93, *AAC and others v Commission*, ECLI:EU:T:1995:80, para. 84; CFI 2 October 2009, Case T-324/05, *Estonia v Commission*, ECLI:EU:T:2009:381, para. 65 ff.; cf also Mistò, *supra* n. 53, at p. 234 ff.

⁶⁹ See ECJ 23 September 1986, Case 5/85, *AKZO Chemie v Commission*, ECLI:EU:C:1986:328, para. 33.

⁷⁰ With the same view B. Martenczuk, ‘Artikel 248 AEUV’, in E. Grabitz et al. (eds.), *Das Recht der EU* (CH Beck 2016) para. 9; Braukmann, *supra* n. 13, at p. 145 ff; with a slightly different view M. Ruffert, ‘Artikel 17 EUV’, in C. Calliess and M. Ruffert (eds.), *EU/VAEUV*, 6th edn. (CH Beck 2016) para. 30; A. Haratsch, ‘Artikel 248 AEUV’, in M. Pechstein et al. (eds.), *Frankfurter Kommentar zu EUV, GRC und AEUV* (Mohr Siebeck 2017) para. 6.

⁷¹ See the last sentence of Art. 248 TFEU, which provides that ‘[t]he Members of the Commission shall carry out the duties devolved upon them by the President under his authority’. See also Brauneck, *supra* n. 38, at p. 913.

The Commission shall take decisions on the basis of proposals from one or more of its Members and a vote shall be taken if any Member so requests (Articles 8(1) and 8(2) of the Rules of Procedure). Thus, individual responsibility finds its limits in collegiate agreement.

As a result, despite the strong presidential elements in the Commission's architecture and tendencies towards a certain level of independence in the conduct of day-to-day business by the individual Commissioner, the European Commission as an institution is and remains a collegial body with equal rights for all Commissioners.⁷²

Project teams in the light of EU primary law

It is true that Treaty reforms have, over time, enhanced the role of the President of the European Commission, leading to a sort of presidentialisation of the Commission's overall architecture.⁷³ This is necessary to manage the growing number of Commissioners and to ensure the institution's functioning. Nonetheless, it is but one of the principles determining the Commission's institutional design, with collegiality and limited individual responsibility acting as its strong counterweights. While their content and meaning have certainly changed over time, they are still equally valid and must be respected.⁷⁴

The establishment of project teams that are more structured and well-organised as compared to the groups of Commissioners in the Barroso Commission constitutes a fair compromise between the concession of having one national per member state and the requirement of maintaining a well-functioning executive institution. It is a good solution to a situation which will persist for the foreseeable future. Clustering the Commissioners with related portfolios is therefore a suitable option for streamlining decision-making and enhancing the efficiency of a College of 28. The idea of concentrating on politically important issues, which President Juncker aimed to achieve with the introduction of project teams and the delegation of responsibilities to the Vice-Presidents, is a move in the right direction.⁷⁵ It signals the beginnings of reform that will be necessary for the future development of an effective European Commission.⁷⁶

⁷² Cf. M. Kotzur, 'Rechtliche Ausgestaltung der Organstellung: Aktionsmöglichkeiten und Grenzen', in M. Knauff and T. Oppeland (eds.), *Die Europäische Kommission zwischen Technokratie und Politisierung* (BWV-Verlag 2016) p. 103 at p. 112; Martenczuk, *supra* n. 7, at para. 91; Haratsch, *supra* n. 57, at para. 34; with a different view Nemitz, *supra* n. 26, at para. 60.

⁷³ M.W. Bauer and J. Ege, 'Politicization within the European Commission's Bureaucracy', 78 *International Review of Administrative Sciences* (2012) p. 403 at p. 405.

⁷⁴ Cf. also L. Coutron, 'Le principe de collégialité au sein de la Commission européenne après le Traité de Nice', *Revue trimestrielle de droit européen* (2003) p. 247 at p. 258.

⁷⁵ With the same view Verheugen, *supra* n. 61, at p. 36 ff.

⁷⁶ See, with regard to past needs for reform, D. O'Sullivan, 'La réforme de la Commission européenne', *Revue du Droit de l'Union Européenne* (2000) p. 723.

Nonetheless, the current design and legal framework of the project teams is in conflict with primary law. The prerogatives of the Vice-Presidents responsible for each cluster and the right of the First Vice-President to veto initiatives by 'line' Commissioners, thus preventing their inclusion in the College's agenda and the Commission's Work Programme, violate the individual Commissioner's right, as it derives from the principle of collegiality, to make proposals and introduce initiatives in the College.⁷⁷ The hierarchy created by the President's new internal organisation of the Commission exceeds his formal competence to structure the College and impairs the principle of collegiality.⁷⁸

To be clear, clustering the Commission is a legitimate approach and not *per se* illegal under the existing Treaties, but it needs to be constructed upon a sound legal basis. First of all, the design of the project teams and the competences of the Vice-Presidents should be governed by the Rules of Procedure, and not the President's Working Methods.⁷⁹ The right to adopt the Rules of Procedure lies with the Commission as a whole (Article 249 TFEU); hence it is the College of Commissioners that has the right to govern its internal organisation (principle of self-organisation). In this context, the College may decide to transfer certain organisational powers to its President or endow individual Commissioners with certain decision-making powers. A veto power for lead Commissioners in project teams must be authorised by the Commission as a whole.

Through this formal procedure, one could even consider granting the clusters certain decision-making competences. The European Commission, in response to the Convention's first draft Constitution, provided some suggestions in this regard:⁸⁰

The Commission could be organised in accordance with the following principles:

- o The Commission will create Groups of Commissioners. [...]
- o The composition of each Group will be decided by the President, who must take account of the responsibilities of each Commissioner and the need for the Group to represent the entire College.

⁷⁷ See also Haratsch, *supra* n. 57, at para. 37; Brauneck, *supra* n. 38, at p. 908; Hofmann, *supra* n. 39, at p. 97; T. Lübbig, 'Die Europäische Kommission: Auch in Zukunft ein Kollegialorgan', 20 *fireu Newsletter* (2014) p. 2 ff.

⁷⁸ See also Brauneck, *supra* n. 38, at p. 912; with a different view Borchardt, *supra* n. 34, at p. 5 ff, claiming that the fact that proposals need to pass through several filters 'pertains more to the procedural than the hierarchical in the sense that it is a tool to streamline the internal process on the 10 priorities'; differently also Report of the CEPS High Level Group, *Shifting EU Institutional Reform into High Gear*, 2014, p. 8.

⁷⁹ This was already suggested by the Commission itself when it delivered its opinion on the Constitutional Convention's draft, see Commission Communication, *supra* n. 6, at p. 6.

⁸⁰ Commission Communication, *supra* n. 6, Annex 3.

- o The [High Representative] shall chair the Group of Commissioners for the Union's external activities. The Chairpersons of the other Groups shall be appointed by the Commission, on a proposal from the President, from among the members of each Group.
- o The College will regularly conduct policy guideline debates and adopt the following decisions:
 - the most important decisions set out in the rules of procedure (e.g. annual programme, draft budget for the Union, financial perspective and referral of judicial proceedings),
 - decisions put on the agenda of the College by the President or by the Group responsible for the matter in hand where, in view of the importance or the specific nature of the decision to be taken, it ought to be discussed by all the Members of the Commission, [...]
- o Other Commission decisions are to be taken on its behalf by the Group of Commissioners responsible for the matter in hand. [...]
- o Draft decisions taken on behalf of the Commission by the Groups of Commissioners are to be communicated in good time to all the Commissioners who have the right to submit written comments for the attention of the Group of Commissioners concerned.

Furthermore, the new rules would have to ensure that the equality of the Commissioners within the College is maintained and that every Commissioner's right to propose initiatives is ensured. The Commission, even though it governs its internal structure, could not install a system that violates primary law.⁸¹ While introducing filters in order to streamline the Commission's proposals with regard to the political guidelines is not in itself a violation of primary law, as long as the Vice-Presidents' vetoes are merely suspensive and not final, i.e., if a 'line' Commissioner still has the right to bring an initiative to the College. This could be done by a sort of 'escalation mechanism' that would be activated if a Vice-President rejected an initiative by one of his line Commissioners. It could be a resolution mechanism that would include the President and, in case no agreement was reached, a collective vote by the College of Commissioners.⁸² The Commission's own proposal at the time of the Constitutional Convention provided that: 'The College will regularly conduct policy guideline debates and adopt [...] any decision which a Member of the Commission considers, after taking note of the draft decision of the competent Group, should be discussed by the entire Commission.'⁸³

⁸¹ *Cf also* Brauneck, *supra* n. 38, at p. 913.

⁸² Lübbig, *supra* n. 77, at p. 4.

⁸³ Commission Communication, *supra* n. 6, Annex 3.

A (REDUCED) COMMISSION *DE LEGE FERENDA*

The internal restructuring of an oversized College can only be a temporary solution. The rationale behind the size and structure of the Commission should not be numerical (equal to the size of member states), but should rather be efficiency (reasonable number of well-sized portfolios). As mentioned above, the original intention of the Treaty-makers of Lisbon was to permanently reduce the size of the Commission. According to Article 17(5) TEU the Commission shall consist of a number of members (including its President and the High Representative) corresponding to two-thirds of the number of member states, or any other number, if the European Council so decides. The members of the Commission shall be chosen from among the nationals of the member states on the basis of a system of strictly equal rotation between the member states, which is spelled out in Article 244 TFEU.

In fact, although the reduction in the number of Commissioners has currently been suspended, it will be reviewed in the near future. Sooner or later, the construction envisaged by Article 17(5) TEU should (and hopefully will) be implemented. The following section will therefore take a look at how the 'system of strictly equal rotation' could be designed.

Rotation in EU institutional law

The idea of a system of rotation is not new to European institutional law. What is meant here is not the rotation of a post among the members of an institution or body (for example a rotating presidency, as is the case in the Council). Instead, this section will look at settings in which the exercise of membership rights rotates among the totality of members of the Union.

An example is found in the institutional setup of the Governing Council of the European Central Bank. The Governing Council is the main decision-making body of the European System of Central Banks. According to Article 283(1) TFEU and Article 10.1 of the ESCB Statute (Protocol No. 4) the Governing Council shall comprise the members of the Executive Board of the European Central Bank (President, Vice-President and four other members) and the governors of the national central banks of the member states whose currency is the euro. Hence, the number of members of the Governing Council is dynamic and, without further rules, would grow as the euro area grows.

In order to strike a balance between an effective working and decision-making capacity on the one hand and appropriate representation of the members of the euro area on the other, the Council of the European Union, on recommendation from the European Central Bank, decided to introduce a multistage system of rotation for the Bank's Governing Council, now found in Article 10.2 of the

ESCB Statute.⁸⁴ Originally, the new system was to take effect with the accession of the sixteenth member state to the euro area, but the Governing Council (Article 10.2(1), sixth indent, ESCB Statute) decided to postpone the entry into force until the accession of the nineteenth Eurozone member.⁸⁵ This was the case with the introduction of the euro in Lithuania as of 1 January 2015.⁸⁶ From that date on, the first stage of rotation of voting rights in the Governing Council in two groups took effect. A second stage (three groups) will take effect with the accession of the twenty-second member state.

The number of voting rights for the Executive Board remains at six. For the governors of the national central banks, the number of votes is fixed at 15 and distributed among the two (four and eleven votes) or three (four, eight and three votes) groups. The presidents of the national central banks are then assigned to one of the groups⁸⁷ in accordance with the economic position⁸⁸ of the member state's central bank.⁸⁹ Within the various groups, the members rotate on a regular basis (currently monthly).⁹⁰

Making the economic performance of a member state the point of reference and most significant criterion for establishing the representative nature is generally welcomed, as this is the decisive factor for the work of the European Central Bank.⁹¹ The division into separate groups is meant to ensure that the governors of the national central banks who are eligible to vote come from member states that, in sum, are representative of the euro as a whole. This implies that the governors of

⁸⁴ Decision 2003/223/EC of the Council, meeting in the composition of the Heads of State or Government of 21 March 2003 on an amendment to Article 10.2, OJ 2003 L 83/66.

⁸⁵ Decision of the European Central Bank of 18 December 2008 to postpone the start of the rotation system in the Governing Council of the European Central Bank (ECB/2008/29), OJ 2009 L 3/4.

⁸⁶ Council Decision 2014/509/EU of 23 July 2014 on the adoption by Lithuania of the euro on 1 January 2015, OJ 2014 L 228/29.

⁸⁷ In first stage, the first group shall be composed of five governors (four votes) and the second group of the remaining governors (eleven votes). In the second stage, the first group shall be composed of five governors (four votes), the second group shall be composed of half of the total number of governors, with any fraction rounded up to the nearest integer (eight votes), and the third group shall be composed of the remaining governors (three votes). Currently, the first group includes Germany, France, Italy, Spain and the Netherlands. The second group includes Belgium, Estonia, Ireland, Greece, Cyprus, Latvia, Lithuania, Luxembourg, Malta, Austria, Portugal, Slovenia, Slovakia, and Finland.

⁸⁸ Size of the share of their national central bank's Member State in the aggregate gross domestic product at market prices (weighed by 5/6) and in the total aggregated balance sheet of the monetary financial institutions of the Member States whose currency is the euro (weighed by 1/6).

⁸⁹ See also H.J. Hahn and U. Häde, *Währungsrecht*, 2nd edn. (CH Beck 2010) § 16 para. 56.

⁹⁰ C. Steven, 'Artikel 10 ESZB', in H. Siekmann (ed.), *Kommentar zur Europäischen Währungsunion* (Mohr Siebeck 2013) para. 29.

⁹¹ Cf Steven, *supra* n. 90, para. 19.

the national central banks from the larger member states are more often in a position to vote than governors of the central banks from smaller member states.⁹²

Another system of rotation is found within the Court of Justice of the European Union, namely with regard to the Advocates General at the European Court of Justice. According to Article 252(1) TFEU, the European Court of Justice shall be supported by eight Advocates-General. The Council, acting unanimously, may increase this number. In the light of Declaration No. 38 attached to the Treaties, the number was increased to 11 by October 2015.⁹³ The number is composed of a group of six posts that, on the basis of a political compromise, are permanently occupied by certain member states⁹⁴ and five posts that rotate among the remaining member states. The rotation system takes effect when a vacancy within the group of five needs to be filled.

The number of judges of the (recently abolished) Civil Service Tribunal was also subject to a system of rotation.⁹⁵ It was similar to the system envisaged for the European Commission. The number of judges was not relative (e.g. two-thirds), but instead fixed at seven.⁹⁶ According to Article 3(1) of the Annex to the Court of Justice of the European Union Statute (Protocol No. 3) the Council, acting unanimously, should 'ensure a balanced composition of the Civil Service Tribunal on as broad a geographical basis as possible from among nationals of the member states and with respect to the national legal systems represented' when appointing the judges.

The selection of the Advocates General, and also formerly of the judges of the Civil Service Tribunal, serves the purpose of having a broad and balanced geographical representation. At the same time, it shall also include the different legal systems and traditions found in Europe. While it is true that six fixed posts for Advocates General is the result of a political compromise, it nonetheless results in the largest legal orders within the EU being permanently represented within the Court of Justice for the preparation of cases before the Courts. This is balanced by the fact that both within the Court of Justice as well as in Court there is one

⁹² C. Zilioli and G. Gruber, 'Artikel 10 ESZB', in H. von der Groeben et al. (eds.), *Europäisches Unionsrecht*, 7th edn. (Nomos 2015) para. 19; ECB, Monthly Report, May 2003, p. 82.

⁹³ Council Decision 2013/336/EU of 25 June 2013 increasing the number of Advocates-General of the Court of Justice of the European Union, OJ 2013 L 179/92.

⁹⁴ Germany, France, Italy, Spain, the United Kingdom and Poland.

⁹⁵ In fact, the reform that abolished the Tribunal also entailed an increase in the number of judges at the Court, which follows the 'one judge per Member State' rule. The transfer of Civil Service Tribunal jurisdiction back to the Court plus a general increase in workload over the last couple of years justified a doubling of judges at the Court. However, this does not mean that rotation is to be abandoned as a principle for good. Future specialised courts may again be set up with a small number of judges and rotation among the Member States.

⁹⁶ The number of judges can be amended through the ordinary legislative procedure, see Art. 257 (2) TFEU.

(or two) judge(s) per member state, thus including all national legal orders in the European judiciary. The emphasis on the national legal systems within the Civil Service Tribunal was only logical, as the European judiciary and jurisprudence are based on the various (groups of) national legal cultures and traditions. The inclusion of experts from different jurisdictional families aims to take them into account in developing a corpus of genuine *European law*.

A system of rotation for the European Commission

It is evident that European law already has some experience with systems in which the exercise of membership or voting rights rotates among the totality of EU member states. While political factors cannot be ignored, all these systems try to strike a fair balance between broad representation based on objective factors on the one hand, and a reasonable size and working capacity for the body or institution in question on the other. The experience gained from the existing designs may help find a system of rotation for the Commission once political consensus is reached on a reduction in the size of the College.

Article 17(5)(2) TEU provides that the system of rotation for a reduced Commission shall be based on the strictly equal rotation of the member states, reflecting the demographic and geographical range of all the member states. The details of these criteria are spelled out in Article 244 TFEU.

Article 244(a) TFEU requires that member states be treated on a strictly equal footing. As mentioned above, the Commission is a supranational institution and, as opposed to intergovernmental institutions, the principle of the equality of member states does not require that all member states are 'represented' at all times. The system of strictly equal rotation establishes the equality of member states *within* the Commission. Strictly equal rotation means, as Article 244(a) TFEU goes on to state, that the difference between the total number of terms of office held by nationals of any given pair of member states may never be more than one.⁹⁷ In other words, as regards determination of the sequence of the terms of office, every member state must have one of its nationals appointed a member of the Commission in two out of three successive Commissions.⁹⁸ Since the President of the Commission and the High Representative are also members of the Commission, their nationality also counts when drawing up the list of sequences of terms of office. As their election is strongly influenced by political factors, especially as regards the Commission's President (see Article 17(7)(1) TEU), the

⁹⁷ See on this also Nemitz, *supra* n. 26, at para. 56.

⁹⁸ B. Martenczuk, 'Artikel 244 AEUV', in E. Grabitz et al. (eds.), *Das Recht der EU* (CH Beck 2016) para. 4; F. Schmidt and H. Schmitt von Sydow, 'Artikel 244 AEUV', in H. von der Groeben et al. (eds.), *Europäisches Unionsrecht*, 7th edn. (Nomos 2015) para. 4.

list can be established only after the European Parliament election, taking into account the outcome of that election.⁹⁹

Strictly equal rotation not only refers to the number of terms of office held by various nationals over time, but also to the time span during which the various nationals serve as members of the Commission. This means that in the event of the premature termination of a Commissioner's term of office (due to resignation, dismissal, or death) the vacancy has to be filled by a new member of the same nationality.¹⁰⁰ Over time, this results in the duration spent by any two nationalities as members of the Commission being the same.

The primary function¹⁰¹ of the system of rotation is to ensure equality among the member states. Article 244(b) TFEU lays down the subordinate criteria to be realised when designing the system of rotation, i.e. the demographic and geographical range of all the member states. Furthermore, on a political level, one has to take note of Declaration No. 6 according to which due account is to be taken of the need to respect the geographical and demographic diversity of the Union and its member states in choosing the persons called upon to hold the offices of President of the European Council, President of the Commission and High Representative.

The demographic element refers to the population of the member states. It does not mean, however, that the greatest possible share of the Union citizens shall be represented by the members of the Commission,¹⁰² as this would inevitably lead to dominance by the larger member states. The institution that represents Union citizens is the European Parliament (see Article 14(2) TEU). Instead, Article 244(b) TFEU refers to the demographic 'range'¹⁰³ of the member states. Therefore, each Commission should include nationals from large, small, and medium-sized member states. Thus, the share of Union citizens reflected by the nationalities of the successive Commissions should be about the same. This ensures to a certain extent the constant democratic legitimacy of Commission actions, much as in the determination of the qualified majority in the Council, which shall, among others, comprise at least 65% (or 72%) of the population of the Union represented by the consenting Council members (Article 16(4) TEU and Article 238(2) TFEU).¹⁰⁴

⁹⁹ Cf. also Frenz, *supra* n. 16, at para. 1107.

¹⁰⁰ A. Haratsch, 'Artikel 244 AEUV', in M. Pechstein et al. (eds.), *Frankfurter Kommentar zu EUV, GRC und AEUV* (Mohr Siebeck 2017) para. 5; Martenczuk, *supra* n. 98, at para. 4.

¹⁰¹ 'Subject to point (a)', as Article 244(b) TFEU stipulates (DE: *vorbehaltlich des Buchstabens a*; FR: *sous réserve du point a*).

¹⁰² Martenczuk, *supra* n. 98, at para. 6; Haratsch, *supra* n. 100, at para. 7; with a different view S. Breier, 'Artikel 244 AEUV', in C.-O. Lenz and K. D. Borchardt (eds.), *EU-Verträge Kommentar*, 6th edn. (Bundesanzeiger 2012) para. 4.

¹⁰³ DE: *Spektrum*; FR: *éventail*; IT: *molteplicità*; ES: *diversidad*.

¹⁰⁴ Cf. N. Scafarto, 'Articolo 244 TFUE', in C. Curti Gialdino (ed.), *Codice dell'Unione europea operativo. TUE e TFUE commentati articolo per articolo* (Simone 2012) point 2 (p. 1718).

In addition, Article 244(b) TFEU calls for the representation of the geographical range of the member states. The idea of adequate geographical representation is not unknown to EU recruitment. According to Articles 7 and 27 of Regulation No. 31 (EEC), 11 (EAEC),¹⁰⁵ recruitment shall be directed to securing for the institution the services of officials of the highest standard of ability, efficiency and integrity, recruited on the broadest possible geographical basis and that no posts shall be reserved for nationals of any specific member state.¹⁰⁶ Representation of the geographical spectrum requires that nationals from different regions of the European Union (e.g. Northern Europe, the Mediterranean, Central and Eastern Europe) are included as members of the Commission.¹⁰⁷ One could refer to the practice of nominating Vice-Presidents in the 1970s and 1980s, which included a national from the Benelux, the Northern enlargement and the Southern enlargement.¹⁰⁸

The system of rotation shall be adopted by the European Council, which corresponds to its role as a forum for decision on fundamental political questions.¹⁰⁹ It needs to be remembered that the President of the Commission, albeit member of the European Council, is not eligible to vote (Article 235(1) TFEU). A marginalisation or outvoting of a particular group of member states (e.g. North over South, large over small member states) is excluded by the fact that the Heads of State or Government shall decide unanimously, thus granting each member of the European Council a veto. When determining the system of rotation, the European Council has a margin of appreciation at its disposal,¹¹⁰ as long as equality is ensured and the criteria laid down in paragraph (b) are 'satisfactorily' reflected.¹¹¹ Due to the heterogeneity of the member states and the priority given to equal rotation it is almost impossible to realise all criteria to the fullest extent.¹¹²

If and as long as the primary law requirements are fulfilled, the European Council is free to rely on other criteria it deems relevant for the determination of

¹⁰⁵ Regulation No. 31 (EEC), 11 (EAEC) laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, OJ 1962 P 45/1385.

¹⁰⁶ See ECJ 30 June 1983, Case 85/82, *Schloh v Council*, ECLI:EU:C:1983:179, para. 26; CFI 18 December 1997, Case T-142/95, *Delvaux v Commission*, ECLI:EU:T:1997:212, para. 102; CFI 19 September 2000, Joined Cases T-101/98 and T-200/98, *Stodtmeister v Council*, ECLI:EU:T:2000:211, para. 77; see also Scafarto, *supra* n. 104, at point 2 (p. 1718 ff.).

¹⁰⁷ Schmidt and Schmitt von Sydow, *supra* n. 98, at para. 5.

¹⁰⁸ Schmidt and Schmitt von Sydow, *supra* n. 98, at para. 6.

¹⁰⁹ See V. Edjaharian, 'Article 15', in H.-J. Blanke and S. Mangiameli (eds.), *The Treaty on European Union (TEU) – A Commentary* (Springer 2013) para. 11.

¹¹⁰ Martenczuk, *supra* n. 98, at para. 8.

¹¹¹ DE: *auf zufrieden stellende Weise zum Ausdruck kommt*; FR: *refléter d'une manière satisfaisante*.

¹¹² Haratsch, *supra* n. 100, at para. 8.

the system of rotation. If it does not impair the representative nature of the Commission intended by Article 244 TFEU and its effectiveness, it may also take into account geopolitical factors or aspects of the history of EU integration¹¹³ (for example ‘old’ and ‘new’ member states¹¹⁴). Linguistic or cultural connections may also play a role, e.g. for the determination of small groups of member states that ‘share’ a seat over time; frankly, these considerations may overlap with geographical aspects. Moreover, social or economic factors can also be guiding lights for the system, for example the welfare models or membership in the Eurozone.

Finally, as a political commitment, the European Council and the (reduced) Commission must also take into consideration the interests of those member states not represented during one term of office it serves. Declaration No. 10 points out that the Commission should ensure full transparency in relations with and should liaise closely with *all* member states, whether or not they have a national serving as member of the Commission, and in this context, pay special attention to the need to share information and consult with *all* member states. The Commission should take all necessary measures to ensure that political, social and economic realities in *all* member states are fully taken into account.¹¹⁵ To this end, the Commission shall ensure that the position of member states that have no national serving as member of the Commission is addressed by appropriate organisational arrangements.

These ‘organisational arrangements’ could include inviting representatives of those member states not currently represented to sit in as guests of the Commission. This option is already foreseen in Article 10 of the Commission’s Rules of Procedure. Furthermore, the interests of those member states could be taken into account by conducting special consultations when preparing an initiative.¹¹⁶ Following the original idea of the Constitutional Convention, one could also consider the option of appointing (by the member states concerned) members as ‘permanent representatives’ without portfolio or voting rights, but who are allowed to attend the meetings of the College, thus gaining information on current initiatives and able to state their interests and concerns. A similar constellation is found in the Council for decision-making within an enhanced cooperation (Article 330 TFEU) or on matters concerning the euro area (Article 136(2) and 139(4) TFEU). Frankly speaking, however, this option might water down the achievement of having a reduced number of Commissioners and might

¹¹³ Kugelmann, *supra* n. 67, at para. 13 ff.

¹¹⁴ See on this J. Schoo, ‘Das neue institutionelle Gefüge der EU’, *Europarecht* 2009, Supplement No. 1, p. 51 at p. 65; with a different view Frenz, *supra* n. 16, at para. 1106.

¹¹⁵ Emphasis added.

¹¹⁶ Cf Nemitz, *supra* n. 26, at para. 59.

once again be subject to criticism for creating two types of Commissioner. In this context, therefore, one should bear in mind that – at least in the legislative field – the European Parliament is called upon to take due account of citizens' interests, and the Council is the forum for presenting national interests (and the member states not represented in the Commission would always have a blocking minority). The Commission is the institution that represents, and is committed to, the general interest of the Union.

CONCLUSIONS

The Treaty makers of Lisbon were ambitious in their plan to finally reduce the size of the Commission. While not fixed at a certain number, the reduced size was to reflect the requirement of having a well-functioning 'government' with portfolios of reasonable extent and responsibilities. By the same token, the new system was to decouple the College's size from the idea of one-to-one representation of member states, instead taking due account of its function as supranational body committed to the Union's general interests. Political realities, however, compromised these ambitions.

For the time being, the internal restructuring of the Commission in the form of clusters of project teams seems to be a viable approach to reconciling a College of 28 with the need for ensuring an efficient working capacity. Initial evaluations show that this is indeed the case. Nonetheless, changes in the legal framework are necessary to ensure compliance with primary law requirements. It is not the Commission's President acting alone, but rather the Commission at large (through their Rules of Procedure) that can authorise the establishment of clusters with veto powers for lead Commissioners.

In the long run, it is desirable that the Heads of State and government fulfil the Treaty of Lisbon's constitutional obligation and reduce the size of the College. While fixing a number may not be hard to agree on, debates will likely arise on the factors determining the rotation of seats among the member states. The Treaty of Lisbon establishes certain requirements, and some lessons may be learnt from existing systems of rotation.

On a wider scale, the reduction of the size of the College could be the starting point for an ambitious reform and reconstruction of the Commission. Further attention should be given to the responsibility and decision-making powers of the individual Commissioners (as now in the empowerment procedure) and the Directorates-General (as currently under the delegation procedure) and the role of the College at large for the most important decisions.

