

Commission as 'caretaker administration'

The hearings of the Commissioners-designate before the European Parliament's committees took place between 30 September and 8 October 2019. The plenary vote on the entire Commission was originally planned for 23 October in Strasbourg, after a presentation by the Commission President-elect Ursula von der Leyen of the full College and its programme. However, three Commissioners-designate did not successfully complete the hearings process, making it necessary for three Member States to nominate new candidates and for committees to carry out new hearings. The new Commission will not, therefore, now be able to enter into office on 1 November, as scheduled. The outgoing Commission will thus remain in office until the formal appointment of its replacement, although questions arise as to its powers in that period.

Background

Following the [election](#) by Parliament of Ursula von der Leyen as President-elect of the Commission, her next [step](#) was to announce, after a decision taken in common accord with the [Council](#) according to Article 17(7) TEU, the [names and portfolios](#) of the Commissioners-designate. They then had to undergo public hearings before the committees responsible for their portfolios, prior to the vote of consent of Parliament (a majority of the votes cast) on the President-elect and the Commissioners-designate (including the Vice-President appointed by the Council as High Representative of the Union for Foreign Affairs and Security Policy) as a body.

Ultimately, following that consent, the appointment of the Commission is done by the European Council, acting by qualified majority (Article 17(7) TEU). The [hearings](#) to which Commissioners-designate are subject are not required by the Treaties, but have long existed in a practice which has been codified in the Rules of Procedure of Parliament ([Rule 125](#) and [Annex VII](#)). For the ninth term, the Conference of Presidents [decided](#) that the hearings would be [held](#) between 30 September and 8 October, with the plan being to vote subsequently on the Commission as a body at the Parliament's plenary session of [23 October](#).

This process of scrutiny of the candidates and the ensuing hearings, which represent a fundamental democratic exercise, implies a possible need to adjust the steps and timetable. Indeed, after the scrutiny of the declaration of financial interests of Commissioners-designate [László Trócsányi](#) (Neighbourhood and Enlargement) and [Rovana Plumb](#) (Transport), the Committee on Legal Affairs concluded that both were unable to take up their duties in the Commission. Being a precondition for the holding of a hearing according to the Rules of Procedure (Article 2 of Annex VII), neither could proceed to that step.

In addition, after a first unsatisfactory [hearing](#) on 2 October, the Committees on Internal Market and Consumer Protection, and on Industry, Research and Energy requested the hearing of Commissioner-designate [Sylvie Goulard](#) (Internal Market) be resumed on [10 October](#), with, in the end, a [negative](#) outcome. With three Commissioners-designate not having successfully passed Parliament's scrutiny, new appointments are required. As the date originally scheduled for a vote in Parliament on the Commission as a body has now passed, the new Commission cannot therefore take office on 1 November 2019 as [required](#).

The notion of a 'caretaker' Commission

The question that arises is what are the consequences if the Commission is delayed in taking office, since the Juncker Commission's term of office comes to an end on [31 October 2019](#). What limits are there, if any, on the exercise of the Commission President's functions, and those of the College, and under what rules?

The Treaties do not explicitly take into account a possible delay in Commission taking office. Neither Article 17 TEU, setting out the term of office and the details of the procedure leading to the Commission's election, nor any other provisions of the Treaties provide for this situation, although similar events have occurred more than once in the past (see below).

Article 246(6) TFEU, however, deals with a comparable situation, according to which, when all members of the Commission submit their resignation collectively, they are to remain in office and continue to deal with

current business until they are replaced, for the remainder of their term of office. This provision embodies the principle, quite widespread in the life of both EU and national institutions, of institutional continuity. The Treaties do not define the powers of the 'prolonged' Commission, however [some](#) argue that the Commission must act as a '[caretaker administration](#)' not only when it resigns collectively as a College but also when, as in this case, the new Commission does not take office immediately after the expiry of the term of office of the previous College.

In this context, 'current business' would include all daily, routine business as well as all acts that cannot be postponed to the next College. Against this background, the adoption of new legislative proposals would seem excluded except for emergency reasons. Some limited case law has helped in framing the scope of the Commission's room for manoeuvre when the notion of 'current business' comes into play.

In 2003, the question arose in the case [Westdeutsche Landesbank Girozentrale v Commission](#) of whether a State aid decision issued by a resigning Commission was lawful. On that occasion, the Court affirmed that the adoption of a State aid decision by the Commission after its collective resignation did fall within the scope of a caretaker administration, insofar as it did not constitute a new political initiative and the supervisory function of the Commission constituted part of the fulfilment of an 'essential task of the Community'. In this sense, the Court considered that the Commission had not exceeded the powers entrusted to a 'caretaker administrator' but 'confined itself to applying to that case a legal scheme of long-established rules and principles'.

In another case in 2012, [European Parliament v Council](#), the Court argued that the same reasoning could be applicable '*a fortiori* in circumstances in which a pre-existing proposal remained pending'. In fact, in that specific case, the Barroso I Commission formally amended one of its own proposals – which was then adopted as Regulation 1286/2009 – in respect of its legal basis, to take account of the entry into force of the Lisbon Treaty. This decision was taken at a time when the Barroso I Commission's term of office had ended, but the new Commission had not yet formally entered into office. The Court also ruled in this case that such a 'step was essential if the Union legislature was to continue with the pending procedure after the Treaty of Lisbon entered into force'. However, the Court did not provide additional clarifications on what should be considered as 'essential'.

The current circumstances, the precedents in jurisprudence and the principle of continuity of institutional work allow a reasonable belief that the current Commission will work in a 'current business' mode until the new Commission does take office. Although some commentators expect that the new Commission will come into office in [December 2019](#), how long the 'caretaker' administration continues will depend on new Commissioners-designate being nominated by France, Hungary and Romania, the agreement thereon of the President-elect, and those candidates then completing the hearings process successfully. After that, the entire College would need to obtain the consent of Parliament in a plenary vote.

A look back

The current situation is not an [extraordinary one](#). The Prodi Commission was appointed to a term running until [22 January 2005](#), although its end was brought forward to [31 October 2004](#) under Article 45 of the Act concerning the 2004 enlargement. The Barroso I Commission should, therefore, have started on 1 November 2004. Due to [uncertainties](#) as to whether Parliament would support three of the Commissioners-designate initially put forward by Barroso (Rocco Buttiglione, László Kovács and Ingrida Udre) the vote of Parliament was [postponed](#) from 27 October to 18 November 2004. After [election](#) by Parliament, the Barroso I Commission (with two of those three candidates replaced, and the third taking a different portfolio than originally proposed) took office on 22 November 2004, i.e. three weeks after the statutory date.

Likewise, the Barroso II Commission took office with a few months of delay, starting work on [10 February 2010](#), instead of 1 November 2009, due to the delayed process of ratification of the Lisbon Treaty, which was finalised only in November 2009 and which consequently delayed the process of election of the Barroso II Commission which fell under the Lisbon rules. On that occasion, the Commission spokesperson, Johannes Laitenberger, [declared](#) that the Commission's mandate was extended 'based on the principle of institutional continuity' so that the Commission could work in a 'caretaker capacity'.

