

AFCO Public Hearing on Transnational lists and the Spitzenkandidaten principle

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1. The first question to be addressed regarding both the Spitzenkandidaten principle and the transnational lists is, whether and how they can be implemented in the presently applicable legal structure as established by the Treaties.
2. As for the transnational lists the correct interpretation of the existing rules gives a simple and immediate answer to the question of the transnational lists as there is general consensus that the introduction of TNL would require the amendment of the Treaties. The Treaty change would not and could not be limited to this single issue, but should be made in the general context of not only a large number of other institutional issues, but also in view of the general legal and political questions related to and having an impact upon the European integration process as a whole. Institutional issues are never isolated, any change has an impact upon the whole system and is to be embedded in the underlying policies and objectives.
3. The introduction of TNL should therefore be preceded by a thorough analysis and discussion covering all aspects of the functioning of the EU. The main question that should be answered is the following:

would TNL reduce the distance between the voters and the MEPs, that is would it bring the electorate closer to the elected representatives in terms of nomination, identification, communication, contacts and answerability?

My answer to this question is essentially in the negative. Nominations would be made by political parties (that is by their leaders), persons nominated could be locally and nationally little known, communication would be more limited, answerability would be purely theoretical. The remoteness between the voter and the elected does not promote and reinforce democracy, quite to the contrary, it reduces democratic legitimacy. The closer the voters and the elected persons are, the stronger are the democratic credentials of not only of the elected persons, but also of the institution itself. This must be the reason that no federal country in the world uses federation lists for its legislative elections.

There are, of course arguments for and against. However, on the balance of all considerations, I believe that TNL would create more problems in the overall institutional structure, than it would resolve.
4. The Spitzenkandidaten principle is different, to the effect that the present provisions of the Treaties do not exclude the possibility for the European Council to propose for President of the Commission to the European Parliament the lead candidate of the political party achieving the best result in the elections.

The question is rather, whether the European Council has, in any way, a legal obligation to do so, based upon the true construction of the relevant provisions of the Treaties.

5. The question is how the words „taking into account the elections to the European Parliament” are to be interpreted. Do the words „taking into account” refer to the political party having the best result or to the lead candidate on the list of that political party? (They certainly do not refer to the lead candidate of the political party having the second or third result that is the party, which, in a sense, „lost the elections”.) As voters vote for parties and the competition is essentially among political parties, the result of the election reflects the outcome of this competition. If the elections are to be taken into account, it is the result of the competition among the political parties that must be taken into account and, indeed, cannot be disregarded. To draw the conclusion that the lead candidate of the best performing party must automatically become the President of the Commission goes against the interpretation of the ordinary meaning of the words „taking into account the elections”.
6. Further, if there was to be any kind of automaticity in the lead candidate’s becoming President of the Commission, why should „appropriate consultations” be held and why should the European Council act by qualified majority, if the decision has already been taken by the elections? The automaticity would not only make the consultations and the vote purely formal, but also it would deprive the European Council of its right to propose.
7. The present language of Art. 17.3. does not make doubt that there is no automaticity, and there is, indeed, no legal obligation on the European Council to propose the lead candidate of the best performing political party (let alone the lead candidate of any other political party). The European Council is neither obliged to, nor precluded from proposing a candidate, who was the lead candidate of the best performing party at the elections of the European Parliament.
8. It follows from the above that to establish such a legal obligation upon the European Council would need a Treaty change with all the procedural and political prerequisites and consequences. In case such a proposal is put on the table, the following questions should be given serious consideration:
 - how this amendment would impact the existing institutional structure, in particular, the overall balance of the system, and how the power sharing between the institutions, notably between the European Parliament and the European Council would be affected. How the complete independence of the European Commission could be fully respected, an independence not only from the other European institutions and the Member States, but also, first and foremost, from the respective political parties. What further amendments would be necessary to draw the conclusions from significant institutional changes, the effects of which upon the overall system can hardly be foreseen

- would it be fair and democratic to grant the political party representing between 20 and 30 percent of the electorate the favour of automatically receiving one of the highest posts in the Union, without taking into account not only the positions of the Member States (the peoples), but also the views of the 70 to 80 percent of the overall European electorate, who did not vote for that particular party, nor for its lead candidate
- what would be the political consequences of institutional changes in the present situation of grave challenges to the European integration process, challenges which should be given – after a series of institutional reforms – absolute priority. Any institutional change should and could only be considered after an in-depth analysis and thorough discussion are carried out and consensus is achieved, if not on all, at least on most of the fundamental issues and dilemmas facing us now and in the future.

Summing up, while there are differences between the transnational lists and the Spitzenkandidaten principle, the essential common element between the two interrelated institutional issues is that their inclusion in the legal system of the European Union (their „judicialisation“) in both cases would require the amendments of the Treaties. These amendments could not be made in an isolated way, that is disregarding their direct and indirect repercussions, but only in view of the general context of, and the impact upon the overall institutional and legal system, as well as their - largely unforeseeable - political consequences.