Law, practice and convention in the constitution of the European Union
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5. The Commission Investiture and other elements of the European Constitution

1 Introduction

Much attention has so far been given to the identification of constitutional conventions. This was considered necessary for two main reasons. Firstly, there is the remarkable absence of the subject in literature on European integration in general and in literature on the constitution of the European Union in particular.\textsuperscript{1090} Conventions are not a common element in studies on the constitution of the European Union. Considering this absence, their existence had to be shown. Secondly, no further study of the role of conventions in the constitution of the European Union is possible without their prior identification.

Now we might draw up a list of conventions. Instead the significance of convention for constitutional structure and development will be analysed in the light of a number of relevant distinctions (for example political vs. legal constitution; revolutionary vs. evolutionary constitutional change). Also, several general trends will be discerned through inductive reasoning, that is by coming to a number of tentative broader generalisations on the basis of the conventions discussed here and earlier in this book.

In fact, with regard to the second important pillar of our research question, that about the significance of convention for the constitution of the European Union, it is now possible to give the analysis a more systematic character. Throughout the above chapters the role played by conventions has been illustrated in the discussion of individual conventions – in the sense of their concrete effect on the powers of the European institutions and of the interpretation they provide of legal rules by those institutions. However, the general question of significance has so far only been present on the background. It is now time for a theoretical analysis of the meaning of the existence of conventions in terms of their effect on the constitutional structure and development of the European Union.

The question how constitutional conventions affect our understanding of constitutional structure and development will be central.

In the discussion of the significance of convention for constitutional structure the distinction between a political constitution and a legal constitution is used as the main analytical tool. As will be seen below, this distinction focuses on what the constitution is, and

what is the role of representative and judicial institutions in interpreting, enforcing and changing it.\footnote{1091} Without going into details, it can be said that in a political constitution the constitution is politics and the political institutions limit the exercise of public power through political rules. In a legal constitution the constitution is a legal framework and judicial institutions limit the exercise of power by enforcing legal rules. It is good to realise that no constitution is only legal or political in character, but constitutions normally contain elements and characteristics of both. For example, it could be said that the United Kingdom has more of a political constitution and Germany more of a legal constitution. This does not mean of course that the constitution of the United Kingdom does not include legal rules, but they are indistinct – not different from other Acts of Parliament – and unentrenched – meaning that there are no special formal requirements for enacting or amending constitutional norms.\footnote{1092} In this chapter, it will become clear what elements underlie this distinction, and how it can foster our understanding of the constitution of the European Union and the role played in it by convention (paragraph 3).

The analysis of the role of convention in light of the distinction between a political and legal constitution allows a new analysis of a number of aspects of the relation between law and politics in the constitution of the European Union. It should however first be noted that the distinction between a political and a legal constitution is also central to an academic discussion about what the constitution should be and what the role of representative and judicial institutions in creating limits on the exercise of public power should be. In short, this is a discussion between advocates of (republican) political constitutionalism and (liberal) legal constitutionalism. In this chapter no principled position is taken, as a descriptive analysis is intended of the structure of the constitution of the European Union.

The role of convention in constitutional development of the European Union will be analysed in light of a number of relevant distinctions traditionally used in the analysis of constitutional change (paragraph 5). This includes the distinction between revolutionary and evolutionary change, which contrasts a constitutional moment with a gradual and incremental process of constitutional change; closely related is the distinction between grand design and accidental change, which contrasts design with chance in constitutional development. Then there is an analysis in the light of the parties involved, which applies the dichotomy between original ‘pouvoir constituant’ and autonomous ‘pouvoir constitué’ to the context of the European Union. Finally it includes the distinction between rigid and flexible constitutional change, which focuses mostly on the procedural requirements for constitutional amendment.

\footnote{1091 See for references, paragraph 3.1 below.\footnote{1092 S.E. Finer, Vernon Bogdanor and Bernard Rudden, \textit{Comparing Constitutions} (Oxford, Oxford University Press 1995) p. 42-43.}}
It is clear that the constitutionalisation of the European Union is not the result of a single constitutional moment, but is, as has been argued by others,\textsuperscript{1093} of an evolutionary nature. In this chapter an explicit claim is made for convention as a source of constitutionalisation. Using the above distinctions it will moreover be shown that because of some of its characteristics convention reinforces the evolutionary nature of constitutional change of the European Union: it is open to various parties, relatively flexible and often accidental. Conventions constitute an element of autonomous development of the political constitution in relation to the legal constitution. At the end of this chapter general trends in the development of the constitution of the European Union through convention will appear, notably one of increasing the control by and powers of the two representative pillars of the European Union.

The spectacular conventions that shape the investiture of the European Commission are most fit for the purpose; in particular the second phase of the investiture procedure, in which the team of Commissioners is formed and approved. This phase follows the nomination and approval of the President designate of the Commission.

The elements concerned are the conventional rule prescribing the appearance of candidate Commissioners before a parliamentary committee hearing (paragraph 2) and the development away from strict collegiality, which this convention sparked in the appointment procedure of the Commission in the beginning of the nineties. A further development of individual political responsibility taking place during the appointments of the Barroso Commissions in 2004 and 2010 will be illustrated in paragraph 4.

2 Introducing the questions on constitutional structure through the facts of the Commission investiture

What does the existence of conventions mean for our understanding of the constitution and the relation between law and politics in the European Union? In this paragraph the question is interpreted as that of the part of convention in constitutional structure. In answering this question, it is instructive to use the distinction between a political and a legal constitution as an analytical tool.

The relation between law and politics in the constitution can be and is studied in different ways. One usual approach is to study politics in relation to the role of

(constitutional) courts. This approach is related to one of the available meanings of constitutional politics identified by Castiglione and Schönlau, that in which constitutional politics is an aspect of judicial power:1094

this understanding of constitutional politics therefore focuses on the way in which political issues and policy making are influenced by the judicial process and by judicial actors (...).1095

A recent example is the work of political scientist Alter, who, building on the work of Stein1096 and Weiler,1097 seeks to explain how the European Court of Justice ‘became a political actor that was capable of transforming European and international politics’.1098

Another common approach is to study legal rules in relation to their application in political practice. This approach is related to a second meaning of constitutional politics identified by Castiglione and Schönlau, which

takes a reverse view of the relationship between constitutional reality and politics by looking at ways in which political action contributes to the creation of a stable structure of rules, norms and expectations within which ordinary politics operate. The focus here is on the capacity that political decisions and circumstances have to determine a higher order of rules and to produce a constitutional structure, even when this is not formalized as such.1099

Broadly falling within this second approach, the relation between the political constitution (in the empirical sense) and the legal constitution of the European Union is central to the work of a number of Union law scholars as well as political scientists. Among the many political scientists the writings of Farrell and Héritier stand out, discussed in chapter 2. 1100

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1094 ‘The role that constitutional courts and the process of constitutional interpretation and adjudication play in limiting and re-directing legislation and policy-making can be considered intrinsically political, and studied as a form of politics’, Dario Castiglione and Justus Schönlau, ‘Constitutional Politics’, in: Knud Erik Jorgensen, Mark A. Pollack & Ben Rosamond (eds.), Handbook of European Union politics (London, Sage Publications 2007) p. 283-300 at p. 284.
1099 Castiglione and Schönlau (2007) p. 284. Closa in his definition (‘the processes of creation and modification of the fundamental norms, rules and institutions of the polity’) seems to include both aspects or approaches to constitutional politics as he includes the constitutive role of the European Court of Justice, Intergovernmental Conferences and the Convention method, see Carlos Closa, ‘The Convention method and the transformation of EU constitutional politics’, in: Erik Oddvar Eriksen, John Erik Fossum and Augustín José Ménendez (eds.), Developing a Constitution for Europe (London, Routledge 2004) p. 183-206 at 184. A third and final definition given by Castiglione and Schönlau is: ‘processes of constitution making and constitutional transformation, looking at particular qualities and normative purchase that political action has, or need to have, in order to produce a higher set of rules and law’, Castiglione and Schönlau (2007) p. 284.
exponent, also discussed there, is Hix.\textsuperscript{1101} For legal doctrine the relation between the empirical constitution and the legal constitution of the European Union is developed in the work of among others Curtin, who speaks of the combination of the two as the ‘living constitution’ and the ‘sedimentary constitution’.\textsuperscript{1102} Craig’s writings about the relation between Europe’s political order and its legal constitution, focusing on informal constitutional practices,\textsuperscript{1103} and institutional developments outside the letter of the Treaty, deserve mentioning as well.\textsuperscript{1104}

In this second approach to constitutional politics the structural or rule element has remained somewhat underdeveloped in relation to the focus on practice and empirical development.\textsuperscript{1105} In this chapter this lacuna will be addressed through a focus on the role of convention and its relation to both the political and legal constitution. Conventions can be seen as a most interesting meeting point constitutional politics and law, or the political and the legal constitution.\textsuperscript{1106} What is the relation of convention to the political constitution? How does the political constitution create structure by way of convention? And how does the political constitution affect the legal constitution by way of convention?

These questions are best introduced in the context of the European Union by way of a straightforward concrete case. It is the appearance of candidate Commissioners before a parliamentary committee hearing as part of the investiture procedure of a new Commission. The vote of confidence expressed by Parliament during the investiture procedure can be seen as an expression of a relationship of responsibility complementary to the censure motion available to Parliament during the Commission’s term. The appearance of candidate Commissioners is arguably not based on the legal constitution, but on a political obligation. It is best seen as an instrument of political accountability, which is supplementary to Parliament’s Treaty based legal power of approval of the entire college of Commissioners.

### 2.1 Parliamentary hearings for candidate commissioners: no open invitation


\textsuperscript{1104} See for more detail about convention and constitutional structure, paragraph 3.3.

\textsuperscript{1105} Note for example the catchy title of Canadian constitutionalist Heard on constitutional conventions: Andrew Heard, Canadian constitutional conventions: the marriage of law and politics (Toronto, Oxford University Press 1991).
2.1.1 How a new convention was established

The appearance of a candidate Commissioner before a parliamentary committee as part of the approval procedure of the Commission has taken place ever since the investiture of the Santer Commission in 1995. This element was created on the initiative of the European Parliament in order to give substance to the new formal powers to approve the Commission, gained under the Maastricht Treaty (1993). No legal right or obligation exists for this form of parliamentary scrutiny; the Treaties make no mention of the hearings. But the European Parliament has exploited its legal power of approval of the whole Commission to impose the hearings on candidate Commissioners. It has created what is best understood as a conventional rule prescribing the appearance of candidate Commissioners before a parliamentary committee as part of the investiture procedure. It has added a new element to the structure of the European constitution.

The result of a cautious strategy of the European Parliament in 1994/1995

The acceptance of the committee hearings was not at all clear during 1994. At the end of his last term Jacques Delors, who was openly sceptical about the introduction of the hearings, told Parliament he could not guarantee that the next Commission President was going to accept them. What followed was a cautious strategy of President Klaus Hänsch of the European Parliament to create a precedent that could become a tradition. Two elements of his strategy were the agreement not to vote on individual Commissioners and the mild use of the parliamentary committee hearings. Hänsch remembers:

It was not a condition of Santer. But at my first meeting with him, I made the proposal on behalf of Parliament not to vote on individual Commissioners. That was an offer made deliberately by the Parliament in order to make the hearings acceptable to Santer and the Member States. The most important thing for me at that time was to organise the hearings in a way that they became accepted and turned into a tradition. I therefore did not want to use them too bluntly at the first time.

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1109 Interview with Klaus Hänsch, Brussels, 18 October 2006. Slightly different is the interpretation of Klaassen that it took a promise from Klaus Hansch, President of the European Parliament, that no vote would be held in Parliament on individual Commissioners-designate for Santer finally to accept, see Jos Klaassen, ‘Hier waakt het Europees Parlement’, De Volkskrant, 7 January 1995.

Klaus Hänsch and I took the same approach to the hearings. I believe we had the same view on the purpose of the hearings, which was to examine the suitability of the candidate for office. Other people thought it should just be a show. We believed that if the candidates were any good, they will be able to cope with serious questions. Santer, I think, did not agree with this view on the purpose of the hearings. (…) Bangemann for example came to the economic committee to be admired and the chairman allowed him to. The budget committee and environment committee were taking it seriously, but they were the exceptions. Hänsch confided to me that if all would have taken it as seriously, the Commission would have probably been rejected and I think that is true. The budget committee basically rejected the Commissioner, but could not do so explicitly. Also, the environmental committee was not happy with Ms. Bjerregaard’s performance, but she did thereafter try very hard to have good relations with the Parliament.1111

The Commissioner that proved most problematic to Parliament was Irish Commissioner Padraig Flynn, because of derogatory remarks about women. In the end, only a small change in his portfolio was decided on by Santer to appease Parliament.

A further element of the strategy was the agreement not to make public the evaluations of the candidate Commissioners by the committee.

We could not publish the individual comments on the candidate Commissioners. It was part of the deal with the Commission not to evaluate individual Commissioners explicitly. So the letters of evaluation of the committees remained confidential.1112

The cautious approach by Hänsch did not serve only to win Santer’s support, but also that of the member states. The latter were not all happy to accept this new element in the procedure, but Hänsch managed to convince them.

Parliament had already before expressed the view that the Commissioners should undergo public hearings before Parliament gives its assent to the whole Commission. I was determined to put this idea into practice for I thought it unreasonable to vote for them without testing before their qualification. But I knew that this was an innovation for which there was no legal basis in the treaties and which could be seen as running encounter with the concept of the Commission as a college. So, not surprisingly, Delors was against the parliamentary committee hearings. But Santer, at my first meeting with him, accepted them. His willingness helped me in convincing the Ministers of Foreign Affairs, step by step and slowly, to accept the hearings, too.

1111 Interview with Ken Collins, Glasgow, 4 April 2008.
1112 Interview with Ken Collins, Glasgow, 4 April 2008.
Initially, a majority of Ministers of Foreign Affairs was against the hearings, but in the end all were convinced of the usefulness of this procedure.\textsuperscript{1113}

In the end, neither Santer – weakened by a narrow vote of approval by the European parliament – nor the member states had a real choice in accepting the committee hearings.

There may have been countries that disliked it, but I don’t think they tried to stop them. And I don’t think they could have.\textsuperscript{1114}

They even had to accept that the hearings were public,\textsuperscript{1115} which was not obvious from the beginning.\textsuperscript{1116}

\textbf{2.1.2 Why there is a conventional rule}

No legal obligation exists for candidate Commissioners to appear before a Parliamentary Committee hearing and no legal enforcement of their appearance is possible. In this light it is relevant to note that the European Parliament’s Rules of Procedure do not create a legal obligation for candidate Commissioners to appear in a hearing. The Rules of Procedure are surely binding on the European Parliament itself and thus create for example the power for its President to ‘request the nominees proposed by the President-elect of the Commission and the Council for the various posts of Commissioners to appear before the appropriate committees according to their prospective fields of responsibility’.\textsuperscript{1117} But they do not legally bind other institutions.\textsuperscript{1118}

Does this mean that the European Parliament sends out an open invitation to the candidate Commissioners, with the decision whether to attend or not left to their discretion?

\textsuperscript{1113} Interview with Klaus Hänsch, Brussels, 18 October 2006.
\textsuperscript{1114} Interview with Gunnar Riberholdt, Copenhagen, 17 November 2008.
\textsuperscript{1116} Julian Priestley, former head of the Private Office of Klaus Hänsch and Secretary-General of the European Parliament (1997-2007) remembers: ‘The next stop was Jacques Delors. Although Santer, under the stress of a difficult confirmation procedure for himself, had agreed to cooperate in organising ‘meetings’ between his proposed colleagues and parliamentary committees – not quite the same thing as public hearings – Hänsch wanted to square the outgoing Commission President.’, Julian Priestley, \textit{Six battles that shaped Europe’s parliament} (London, John Harper Publishing 2008) p. 52-53. Italics by T. Beukers. David Gardner writes that ‘With this moderately fair wind behind it, the parliament has, under Mr. Hansch, already seized an additional right to individual, public vetting of appointees to the Commission – by threatening not to put the endorsement of the entire Commission on the agenda.’, ‘General of the assembly – Klaus Hansch’, \textit{Financial Times}, 14 November 1994.
\textsuperscript{1117} Article 106(1) of the Rules of Procedure of the European Parliament.
\textsuperscript{1118} Differently Kietz and Maurer: ‘Strengthened by these formal rights of appointment and thus armed with a major bargaining chip, the European Parliament again at the informal level complemented its new powers by introducing a provision into its Rules of Procedure that obliges the individual nominees for the College of the Commission to appear before parliamentary committees for hearings prior to the European Parliament’s vote on the Commission.’, Daniela Kietz and Andreas Maurer, ‘The European Parliament in Treaty Reform: Predefining IGCs through Interinstitutional Agreements’, \textit{European Law Journal} (2007) p. 20-46 at p. 27. Italics by T. Beukers.
The answer is no. The consequences of a refusal to appear before a parliamentary hearing seem to be clear. The person will not be acceptable to the European Parliament as a Commissioner. And since the President-designate in such a case had obviously proved unwilling to or incapable of convincing the candidate Commissioner in question to show respect of Parliament, rejection would fall on the entire college of Commissioners.\footnote{An interesting consequence of the hearings is further that the President-designate has to divide the portfolios between the candidate Commissioners before their appointment, see Richard Corbett, Francis Jacobs and Michael Shackleton, \textit{The European Parliament}, 7\textsuperscript{th} edition (London, John Harper Publishing 2007) p. 269.} The sanction thus is of a political nature. Paolo Ponzano, former Commission Director responsible for relations with the Council, believes that non-appearance is unthinkable.\footnote{‘È impensabile. Metterebbe il Collegio sotto il rischio di una mozione di censura. Sarebbe una dimostrazione di non essere all’altezza dell’incarico. È politicamente impensabile.’, interview with Paolo Ponzano, Brussels, 5 September 2008.}

It is unthinkable. It would put the entire College at risk of a motion of censure. It would be a demonstration of not matching up to the charge. It is politically unthinkable.\footnote{Interview with Klaus Hänsch, Brussels, 18 October 2006.}

The assumption of normative character has been strengthened by the credible threat of a majority in the European Parliament to reject an entire Commission for some of its members’ unsatisfactory performance during the hearings in October 2004.\footnote{See in more detail about these events, paragraph 4.2.} If Parliament is ready to reject a Commission because some of its members did not come out well from their hearing, it is difficult to imagine that it would not be ready to do so if one or more candidate Commissioners refused to appear and be scrutinised. Hänsch comments:

Now, in 2006, we can say that the hearings have become a fixed tradition. It is unthinkable that a candidate Commissioner would refuse to undergo a hearing. In such a case, I hope and I am firmly convinced that the European Parliament will reject the entire Commission.\footnote{Interview with Klaus Hänsch, Brussels, 18 October 2006.}

The same assumption is strengthened by the credible threat of a parliamentary committee to reject Bulgarian candidate Rumiana Jeleva (whose candidacy was withdrawn in reaction) because of her unsatisfactory performance in January 2010.\footnote{See in more detail about these events, paragraph 4.3.} Finally, the successful demand by a parliamentary committee that a candidate undergoes a second ‘hearing’ behind closed doors adds to this conviction; that was the fate of Dutch candidate Neelie Kroes in January 2010, who was called back by all groups, including her own Liberal group.\footnote{Martin Visser, ‘Twee grootste Europese fracties keuren Kroes nog niet goed’, \textit{Het Financieele Dagblad}, 15 January 2010; Andrew Willis, ‘ Kroes does enough as new date set for EP vote’, \textit{EUobserver}, 19 January 2010; Simon Taylor, ‘The candidates that failed to fail’, \textit{European Voice}, 21 January 2010.} The
idea was also raised for other candidates, including Lithuanian candidate Algirdas Šemeta and Finnish candidate Olli Rehn.

It is even hard to imagine that a candidate Commissioner would refuse to appear in a Parliamentary committee hearing. If it is accepted that there is a political or constitutional obligation for them to appear, then the appearance of candidate Commissioners before a parliamentary committee hearing is not merely a practice, but is prescribed by a conventional rule.

2.2 Conclusions and new questions

The parliamentary committee hearings for candidate Commissioners show what the existence of conventions means for our view of the constitution. A legal view of the constitution with regard to the investiture procedure is limited to the relevant provisions of the Treaty (notably article 17(7) TEU) and the Rules of Procedure of the institutions (especially those of the European Parliament are relevant here). Such a view leaves out the hearings, an important part of the investiture procedure.

A view of the constitution as ‘what happens’ (or the empirical constitution) will take into account also the parliamentary committee hearings for candidate Commissioners. This does not suffice however to see the important conventional constitutional obligation for candidate Commissioners to appear and allow Parliament to scrutinise them. It creates a new, additional constraint on candidate Commissioners – and as will be seen below also on member states since their discretion in proposing and withdrawing candidates is limited. It is as an instrument for holding candidate Commissioners accountable to the European Parliament, not only by testing their views and competence before entry into office, but also by seeking commitments for future action.

1128 Former article 214 EC Treaty (Treaty of Amsterdam), 158 EEC Treaty (Rome Treaty).
1129 See paragraph 4.2.4 below.
The conventional rule prescribing the appearance of candidate Commissioners in a parliamentary committee hearing is thus not part of the legal constitution in the strict sense, but is a political rule. What then is its relation to the political constitution? Is it a product of or also part of the political constitution? And what is the relation in general between conventions and the political constitution? These and other questions about the relation between conventions and the political and legal constitution are addressed in the following.

It is easily seen that the conventional obligation for candidate Commissioners exists in addition to the Treaty rules. In other words, this conventional rule supplements the Treaty rules. But below it will appear that next to supplementing legal rules, conventions can also nullify the effects of legal rules and transfer the exercise of legal powers to other institutions (paragraph 3.4).

Conventions further create constitutional structure. This happens in the first place by establishing rules, but further differentiation is possible. It can be said that the conventional rule in question not only creates a conventional obligation for candidate Commissioners to appear before Parliament, but also a conventional power of the European Parliament to scrutinize candidate Commissioners. This element of power needs further discussion. If the political constitution – like the legal constitution – not only limits the exercise of public powers, but also empowers institutions, then what is the relation between the two categories of power conferring and duty imposing conventions? And how is the character of conventional powers to be understood? These questions are addressed in paragraph 3.5.

Finally, and in anticipation of paragraph 4 and 5 on constitutional development, it is interesting to note here that the creation of the conventional obligation of candidate Commissioners to appear before a parliamentary committee hearing, illustrates one of the characteristics of conventions as a source of constitutional development. The European Parliament, an institution with a very limited formal role in the Treaty amendment procedure, uses conventional rules here to increase its powers over the Commission. It uses convention as an autonomous source of development of the constitution; a source independent from the amendment procedure, giving other institutions an important role in constitutional development. What other characteristics of this source of constitutional development can be discerned? And, considering that the hearings introduce an additional element of accountability to the EU constitution, are there general trends in the role of convention in the development of the EU constitution? These questions are central to paragraph 5 below.

3 The significance of conventions for creating constitutional structure in light of the distinction between political and legal constitutions

3.1 On political and legal constitutions
3.1.1 Political constitutions

What is a political constitution? In the academic literature on political constitutions different points of emphasis can be found. One is that of the political constitution seen as the empirical constitution. In British constitutional doctrine Griffith for example defends the political constitution as a concept simply for ‘what happens’,\(^{1130}\) the constitution being a ‘political construct’ rather than a legal construct.\(^{1131}\) Similarly, Bellamy argues that

(…) we should see the political system itself, not its legal description in a written constitution but its actual functioning, as the true and effective constitution (…)\(^{1132}\)

With regard to the constitution of the European Union this emphasis is found with several authors. Snyder for example uses the concept ‘empirical constitution’ for the way a polity is organised in fact.\(^{1133}\) The concept empirical constitution is used in a similar fashion by Curtin for the manner in which the European polity ‘is ordered as a matter of fact’.\(^{1134}\) This empirical constitution of the European Union, or the institutional and constitutional practices, does receive attention from legal scholars,\(^{1135}\) but is more the terrain of political scientists studying the functioning of the institutions and the application of the Treaty rules.\(^{1136}\) There are also those who argue against this use of the concept constitution, such as German Union law scholar Von Bogdandy who believes that there is a ‘general understanding of the constitution as something other than the socio-political reality’.\(^{1137}\)

\(^{1132}\) Richard Bellamy, ‘Political Constitutionalism’, UCL School of Public Policy Working Paper Series, Working Paper 26 (2007) p. 9. Behind this perception of the constitution as the political constitution also lies a normative discussion about what the role of law and judicial review should be in limiting the exercise of public power as opposed to limits posed by the democratic process. In short it is a debate between legal and political constitutionalism. No position is taken in this debate here, even though some thoughts and suggestions for future research on this topic are presented in the conclusions to this book. See chapter 6, paragraph 3.
\(^{1134}\) Curtin (2009) p. 78. Note that the empirical constitution for Curtin is not the same as the political constitution. With the latter she means a documentary constitution that is the product of popular endorsement, that has been deliberated on by the people, directly or through their representatives. See e.g. Deirdre Curtin, ‘Making a Political Constitution for the European Union’, European Journal of Law Reform (2007) p. 65-76 at p. 67 and Curtin (2009) p. 77-78.
\(^{1135}\) See e.g. Jacqué (1987) about institutional practices, which include Interinstitutional Agreements; Curtin (2009); Craig (2001) p. 126, 146 about informal constitutional practices.
\(^{1136}\) Farrell and Héritier e.g. have done much valuable research on informal institutions, in particular on the role of informal institutions in constitution-building: Farrell and Héritier (2003); and on ‘rules governing the distribution of competences and authority among formal European decision-making bodies’: Henry Farrell and Adrienne Héritier, ‘A rationalist-institutionalist explanation of endogenous regional integration’, 12 Journal of European Public Policy (2005) p 273-290 at p. 277. For other examples, see chapter 2.
A second emphasis found in academic literature is that of the political constitution as political rules limiting the exercise of public power or holding political institutions accountable. In this view the constitution is not only an empirical construct, but includes also conventional rules that limit the exercise of public power. In the view of British political scientist Bogdanor the political constitution is a power map tracing the normative relationships between government and citizen. It consists of limitations of power in conventions, political habits and opinion, rather than in statutes. British constitutional lawyer Tomkins sees a political constitution as one in which those who exercise political power are held to constitutional account through political means and through political institutions (as opposed to accountability through the law and the court-room). The English constitution, Tomkins argues, is a constitution of multiple sources, some of which are legal (statutes, secondary legislation, cases), but not all: ‘the English constitution also relies on a number of political (that is, non-legal) sources. These we call ‘constitutional conventions’.

A further definition of the political constitution is that of a documentary constitution that is the product of popular endorsement, that has been deliberated on by the people, directly or through their representatives. This is the use of the concept by Curtin, who also calls this the normative or democratic constitution. In the introduction of this book this was called the constitution in the existential sense, which is not central to this study.

3.1.2 Legal constitutions

In a legal constitution the rules that organise, limit and define public powers are of a legal character, in other words the constitution is a legal construct. Possible characteristics of a legal constitution are that it is a single document, which is entrenched (i.e. more difficult to amend than ordinary legislation) and has a higher status than legislation. The main instrument

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1142 Tomkins (2003) p. 9-10. Note that Tomkins distinguishes between practice and convention (p.13): ‘a convention is a practice which enjoys a long history of unbroken observation, in respect of which there is a strong sense of obligation, and which forms an integral part of the constitutional order.’ Italics added by T. Beukers. Compare chapter 3, paragraph 2.1.3.
of accountability is the law and a legal constitution counts on judicial review as a check upon political institutions.1145

This view of the constitution is understandably dominant in academic legal writings on the constitution of the European Union. Lawyers generally perceive the constitution of the European Union as a *formal legal structure*, consisting of Treaty rules and their judicial interpretation through case law. Gerkrath for example refers to the material constitutional rules of the Community as the various Treaties, decisions and acts as well as the case law of the European Court of Justice that has crystallised the Community constitution.1146 The more recent and popular ‘multilevel constitution’ concept proposed by Pernice to describe the constitution of the European Union equally has this formal legal character and, apart from the Treaties and European Court of Justice’s case law, also includes the *national* constitutions and case law.1147

What does the existence of convention mean for the relation between political and legal constitution as described above? This question will now be answered in several steps. Firstly, it will be considered that conventions can be seen as product or part of the political constitution. Secondly, it is seen how the political constitution creates constitutional structure; thirdly, how the political constitution limits and empowers; fourthly, how the political constitution affects the legal constitution. And finally, conclusions are drawn about the relation between the political and legal constitution and convention as an expression of the autonomy and at times supremacy of the first over the latter.

### 3.2 Convention as product or part of the political constitution

Conventions can be seen as either a product or a part of the political constitution, depending on which of the above described definitions is given to the latter.1148 If the political constitution is seen as an empirical construct of what happens, then conventions are best understood as a *product* of the political constitution. Conventions find their origin in the application of the Treaty rules and in political bargaining over these rules between the institutions (short: in political practice), sometimes resulting in implicit or explicit (and possibly written) agreement on the application of the Treaty rules, sometimes resulting in conventional rules as the outcome of an institutional conflict. They represent the way the

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1145 It was in this context, of judicial review and of the rule of law, that the European Court of Justice has spoken of the Treaties as the ‘basic constitutional charter’ of the European Economic Community; see European Court of Justice, Case 294/83, *Parti écologiste “Les Verts” v European Parliament*, [1986] ECR 1339, 23 April 1986, paragraph 23.


1148 See above paragraph 3.1.1.
polity is organised as a matter of fact (of course to the extent that they are observed) and reflect the constitutional relations between the various institutions and the institutional balance of powers (notably used here not as a strictly legal notion).

If the political constitution is seen not only as an empirical construct, but also including the politically binding rules that limit the exercise of public power, then conventions are best understood as product and part of the political constitution. Conventional rules are politically and morally binding. They lack a legal origin, but follow instead from the application of legal rules in political practice. They limit the discretion in the exercise of these legal powers.

It is thus clear that the political constitution can give rise to conventional rules (possibly also a part of this political constitution), and that these rules are more than mere empirics or practice. They are a normative element of prescription and create constitutional structure.

### 3.3 Conventions and how the political constitution creates constitutional structure

Constitutional conventions can be seen as an element that creates constitutional structure. How do conventions create structure? In the first place, they create a structure of rules. Conventional rules are an element of structure in the sense that they exist independently from the facts that give rise to them. When this factual situation has ceased, the rule continues to exist. Conventional rules are thus an example of structural consequences of singular facts,\(^{1149}\) where the structural effect is found in the perception of actors that they are bound, which continues to exist.

Unlike a practice, which is more volatile and in flux, a conventional rule fixates something. A constitutional convention fixates power relationships between institutions. Not legally, but politically.\(^{1150}\)

A further differentiation is possible though. Conventional rules create a structure of powers and obligations. In chapter 2 it was already said that the combination of legal powers and the effect on them of conventional rules can be seen to reflect the actual powers of institutions.\(^{1151}\) Sometimes these actual powers have the character of conventional powers. Interestingly though, the character of conventional powers has received only little attention in academic literature, including that on the British constitution. Below the nature of conventional powers is discussed by contrasting them with empirics, legal powers and conventional obligations.

\(^{1149}\) See also chapter 2, paragraph 5.2.4.

\(^{1150}\) See also chapter 2, paragraph 4.3.3.

\(^{1151}\) See also chapter 2, paragraph 4.3.3.
First however the different question will be addressed how the political constitution affects the legal constitution by way of convention, as the various ways offer useful insights into the nature of power conferring conventions. Conventional rules and legal rules coexist and the combination of the two results in a structure or construct of constitutional rules. How does the political part of this structure affect the legal part?

3.4 Conventions and how the political constitution affects the legal constitution

According to British constitutional lawyers Marshall and Moodie the purpose of conventions is to define the use of constitutional discretion. To put this in slightly different words, it may be said that conventions are non-legal rules regulating the way in which legal rules shall be applied.1152

In fact, conventions often limit the discretion left by legal rules and determine how formal powers are to be exercised. Wheare, in his 1966 study of various modern constitutions, usefully distinguishes three ways: conventions (and usage) nullify the effects of the law, transfer powers and supplement legal rules. This distinction is equally instructive for understanding how conventions affect the rules of the Treaty in the European Union, or the legal constitution of the European Union.1153

3.4.1 Nullifying the effects of the law

The first way in which law is affected by convention is through the nullification of the effects of legal rules.1154 Nullification of the effects of legal powers means that, even though they formally exist, their use is made impossible. An example commonly found in national constitutions is the power of the King/Queen to veto a bill, which is nullified by convention (or practice).1155

At the level of the European Union examples have been analysed earlier in this book of both nullification and partial nullification of the effects of legal rules. The Council’s third reading powers in case of failure of conciliation in the early co-decision procedure are a good

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1153 It is admitted that these effects and functions are equally produced and performed by practice or usage, albeit differently. See extensively on the difference between practice and convention, chapter 3, paragraph 2.

1154 ‘The first way in which usage and convention show their effects is in nullifying a provision of a Constitution. This might be expressed by saying that convention paralyses the arm of the law. It is essential to stress that it does not amend or abolish the law. It does not amputate the limb; it merely makes its use impossible.’, Kenneth Wheare, *Modern Constitutions* (Oxford, Oxford University Press 1966) p. 123.

1155 Wheare (1966) p. 124.
example of a limitation of an institution’s discretion in the exercise of its legal powers in the sense that it should not exercise its legal power at all (see chapter 2). The various limits posed by conventional rules to the use of qualified majority voting in the Council discussed in chapter 3 can serve as an example of partial nullification in the sense that powers should be exercised only under specific circumstances or in a specific way. The effect of the power to vote by qualified majority is only partially nullified, since votes are taken and the possibility of a vote creates different dynamics. It was seen that the effect of the power to ask for a vote on a vote by the Commission or Council members not in the Presidency was nullified, and that a conventional obligation was perceived by a number of members to support a veto, giving each member individually a conventional power to block a decision.

3.4.2 The transfer of the exercise of legal powers to another institution

A second way in which law can be affected by convention is through the transfer of the exercise of legal powers to another institution. An institution’s discretion in the exercise of its legal powers can be limited in the sense that it has to exercise its legal powers whenever another institution acts (without that other institution having the formal legal power to do so). An example commonly found in national constitutions is the power of the King/Queen to dissolve Parliament (transferred to the Prime Minister). In the constitution of the United States the election of the President and Vice-President is governed by a convention transferring the power from the Electoral College to the people.

At the level of the European Union an example may be found in the investiture procedure. In paragraph 4 it will be seen how the European Parliament, through the 2004 and 2010 investiture of the Commission has limited the discretion in the exercise of the power of candidacy.

A further example could be found in the right of initiative. It can be said that the Commission’s discretion to use its right to initiate legislation is at least in part limited by not infrequent instructions of the European Council to exercise it – and how to exercise it. The

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1156 In these cases the constitutional discretion is limited by a conventional obligation, also called a duty-imposing convention. Not necessarily new and related conventional powers are created. See about the distinction between power conferring and duty imposing conventions, paragraph 3.5.
1157 ‘What often happens is that powers granted in a Constitution are indeed exercised but that, while they are in law exercised by those to whom they are granted, they are in practice exercised by some other person or body of persons. Conventions, in short, transfer powers granted in a Constitution from one person to another.’, Wheare (1966) p. 127; compare Jennings: ‘One of the earliest results, naturally, was that the powers which are legally exercised by the King – the royal prerogative – were in practice exercised by the Cabinet or by the individual ministers who formed the Cabinet (…) Hence there was by constitutional convention a transference of the royal prerogative to the Cabinet.’, Sir Ivor Jennings, The law and the constitution, 5th edition (London, University of London Press 1967) p. 87.
1158 Wheare (1966) p. 127-129.
1159 The parallel exercise of the Commission of its power of initiative in other cases is not disputed, so we could speak of a shared power. Also, the exercise of the formal power by the Commission is still necessary to initiate the legislative procedure. One could even argue that the power of initiative is also shared with the European
question whether the follow-up given by the Commission to these instructions is based on a mere practice or on a convention falls outside the scope of this book. Whether it is based on practice or convention, in any event the discretion of the Commission is limited (see in more detail, paragraph 3.5.2.1).

Even though the exercise of a legal power is transferred to another institution, in order to create the intended legal effects formally the legal powers still need to be exercised by the original institution. Thus, the Commission undoubtedly still has to exercise its right of initiative to start the ordinary legislative procedure. And, to take a clear example from the British constitution, even if the Queen on the basis of constitutional convention may not refuse a request for dissolution of Parliament by the Prime Minister, that power still formally needs to be exercised by the Queen in order to have Parliament dissolved.

This proves the existence of power conferring convention, in parallel with duty-imposing conventions. Parallel to the formal legal power, a conventional power is created, the exercise of which limits the discretion in the use of the legal power. As the given example of the right of initiative illustrates, the transfer can also be only partial.

3.4.3 Supplementing the law

A third way in which convention can affect law is by supplementing it. Again we are dealing with the creation of new conventional powers in the exercise of different, but related formal legal powers, through the creation of new conventional obligations (also often created with the leverage of other legal powers, for example a threat by Parliament to reject the whole team of candidate Commissioners).

An example of a conventional power supplementing the law is the power of the European Council to decide on the Financial Perspective determining the ceilings to multiannual expenditure of the European Union (in more detail paragraph 3.5.2.1). This power, exercised once every 5 to 7 years since 1988, has not been conferred to any institution, and it is difficult to read it into article 15(1) TEU (former article 4 EU Treaty). It can be explained from the fact that the member states have total control over the decision on Union revenue (Decision on Own Resources). The decisions on the Financial Perspective are in reality linked to the decisions on Union revenue, and they supplement the annual expenditure of the Union.
budgetary procedure. The Financial Perspectives are decided on by the European Council and then included in an Interinstitutional Agreement between the Council, Commission and European Parliament.\textsuperscript{1164}

The Financial Perspectives have had another interesting effect, namely of neutralising the rules on the Maximum Rate of Increase for non-compulsory expenditure of (former) article 272(9) EC Treaty.\textsuperscript{1165} The legal power of the Commission to establish the Maximum Rate of Increase was exercised, but its result had no impact on the budgetary procedure. So the effect of these legal rules was not nullified in the sense that the power of Commission was not to be exercised, but was nonetheless neutralised.

A second important example is the appearance of candidate-Commissioners before parliamentary committee hearings as a part of the investiture procedure. This is a clear example of a power conferring convention supplementing the law, as it creates both a new conventional power of Parliament (to scrutinize individual Commissioners in public) and an obligation for candidate Commissioners (to appear before a parliamentary committee hearing).\textsuperscript{1166}

3.4.4 Conclusions

All types of effects found in national constitutions can also be found in the constitution of the European Union. The above distinction between various effects of convention on law illustrates that conventions can be complementary to law as well as competing with it. In fact, conventions can be at clear tension with the law. Below this tension will be analysed in terms of the autonomy and primacy of the political over the legal constitution (paragraph 3.6).

The given examples moreover show that conventional powers can relate to existing legal powers the exercise of which is being transferred (right of initiative), but can equally deal with powers that do not exist legally (to decide on a financial perspective/to organise hearings). It also follows from these examples that conventions do not only deal with obligations but also with the transfer and creation of new (conventional) powers. How are these conventional powers to be understood? This question is now discussed.

\textsuperscript{1164} See Annex IV with dates of the European Council political agreement on multi-annual Revenue and Expenditure, the Interinstitutional Agreements on budgetary discipline and the Council Decisions Own Resources since 1988.


\textsuperscript{1166} See above paragraph 2 and below paragraph 4.
3.5 How the political constitution limits and empowers: on duty imposing and power conferring conventions

One way to look at the role of conventions within or in relation to the political constitution is through the ways in which they perform the functions of the constitution, understood here as the limiting and empowering of European institutions. This will allow a discussion of the nature of the empowering aspect of conventions in greater detail, an element that has not received sufficient attention so far in this and other studies.

3.5.1 The debate in British academia

The distinction between power conferring conventions and duty imposing conventions in the constitution in which conventions are generally attributed an important role, the United Kingdom’s, has been used by a number of constitutional lawyers. Remarkably, however, it seems that the character of power conferring conventions has not received much attention in British academia.¹¹⁶⁷ This is in stark contrast with the literature on the character of the obligation of duty imposing conventions.¹¹⁶⁸ Marshall argues that:

> The emphasis on obligatory behaviour in Sir Kenneth Wheare’s definition may obscure the point that the conventions, as a body of constitutional morality, deal not just with obligations or duties but confer rights, powers, and duties.¹¹⁶⁹

One example from the British constitution will show that the distinction is relevant and that it is useful to reflect on the character of power conferring conventions. It is the power to dissolve Parliament. Formally it is a legal prerogative of the Queen to decide on the dissolution of Parliament. A number of authors however argue that there is a convention that the Queen must act on Prime Ministerial advice here.¹¹⁷⁰ Marshall uses this example to argue for the use of distinguishing duty imposing conventions from entitlement conferring conventions. Next to the well-established usage of

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¹¹⁶⁷ Exemplary is Brazier who argues that ‘Those conventions which impose duties (as distinct from those which confer rights or powers) are regarded as obligatory; they do not cease to exist if they are broken’, Rodney Brazier, ‘The Non-Legal Constitution: Thoughts on Convention, Practice and Principle’, 43 Northern Ireland Legal Quarterly (1992) p. 262-287 at p. 267. Brazier distinguishes duty-imposing and power/rights-conferring conventions but does not discuss the character of the latter. Many authors however pay no attention at all to the distinction.
¹¹⁶⁸ See extensively on this, chapter 3, paragraph 2.1.
compliance by the Queen with requests for dissolution,\footnote{Note that Marshall speaks of a usage (practice) and apparently does not consider this compliance to be based on a conventional obligation. Similarly, Jennings: '(…) the fact that no monarch has refused a dissolution for over a century when advised by his Cabinet does not in itself create a convention that the monarch must always accept the advice tendered. (…) The position is, therefore, that the Queen has a right to refuse a dissolution, though no doubt she would exercise the right only in exceptional circumstances.', Jennings (1967) p. 135. The positions of these authors clearly show that the \textit{existence} of conventions can be contested.} he identifies a separate power conferring convention:

That the Queen is (in some circumstances) entitled to refuse a Prime Ministerial request to dissolve Parliament is a further example of the second type of conventional rule.\footnote{Marshall (1984) p. 8.}

Jaconelli doubts whether the use of entitlement conferring conventions by Marshall is useful. With regard to the Queen’s entitlement to refuse a Prime Ministerial request he comments

\begin{quote}
The idea of an entitlement-conferring convention is therefore superfluous, as simply referring to a situation which falls within an exception to some other duty-imposing convention.\footnote{Jaconelli (2005) p. 152. Brazier identifies a number of cases, which could arise in a hung parliament, in which a Royal refusal would be possible, see Rodney Brazier, \textit{Constitutional Practice. The Foundations of British Government} (Oxford, Oxford University Press 1999) p. 46-50.}
\end{quote}

In fact, it seems that the Queen’s right to refuse a request is not based on convention, but is simply a legal power falling under the exception of the general conventional rule.\footnote{A parallel can be drawn with the French and Irish positions on the veto power associated with the Luxembourg Compromise, see chapter 3, paragraph 4.3.}

Nonetheless, the power to dissolve the British Parliament is still a good example to illustrate the relevance of the analytical distinction between power conferring and duty imposing conventions. Note Brazier’s analysis of the dissolution of Parliament:

\begin{quote}
Thus the convention that advice to the Sovereign to dissolve was tendered by the Cabinet as a whole may now be seen to have given way in 1918 to a convention that the Prime Minister alone took the decision on what advice to give; that convention subsequently attracted the constitutional practice of the Prime Minister informally consulting some Ministers and some party officials in helping to make up his mind.\footnote{Brazier (1992) p. 271.}
\end{quote}

If it is accepted that we are dealing with a convention, then this is an example of a transfer of the exercise of legal powers from one institution to another. It illustrates that sometimes conventions have two aspects, one duty imposing and the other power conferring. In these cases, the rule is most precisely formulated when both aspects are included and distinguished.
Importantly, it also illustrates that conventions – as do many legal rules of the constitution – deal with the relations between various institutions.

A first important aspect of the convention is that it imposes a duty: the Queen should not decide on dissolution of Parliament on her own (but should instead automatically follow the Prime Ministerial request for dissolution). This aspect of the convention is normally emphasised. A second important aspect of the convention is however that it confers a (conventional) power: it identifies the power to decide on the dissolution of Parliament as one of the Prime Minister’s alone, as opposed to the whole Cabinet’s (and as opposed to, of course, the Queen’s).1176 An important aspect of this power is the obligation of the Queen to follow the advice of the Prime Minister and not make her action conditional upon consultation of the Cabinet. This power conferring side of the relation should not be ignored. It is relevant to know who or what institution has the actual or conventional power to decide on dissolution. It is also relevant to know what the character of that power is and what its foundations are, if it is not a legal power.1177

3.5.2 The relevance of the distinction for our understanding of the European constitution

The relevance of the distinction between duty-imposing and power-conferring convention was already touched upon in the analysis above of the parliamentary committee hearings that supplement the law of the investiture procedure. However, the relevance is not limited to that. In paragraph 3.4 the non-legal power of the European Council to decide on the financial perspective and its instructions to the Commission about the initiation of legislation were analysed in light of their effect on the law.1178

These powers of the European Council – not formally attributed – provide an interesting parallel with the legal powers of the British Queen and the conventional powers of the Cabinet. In fact, like the British Cabinet, the European Council itself, which first convened in 1974, can be seen as a pure creation of convention until it gained Treaty status in the Single European Act (1987).

3.5.2.1 Conventional powers of the European Council

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1176 Even though, as was seen in paragraph 2.3.3, a characteristic of power transferring conventions is that they leave the necessity of the exercise of the legal power by the original institution untouched.

1177 A recent development further highlighting the importance of the question about who has the actual power to decide on dissolution is the creation of a coalition government in the United Kingdom, the first one since the Second World War. Will this affect the rule?

1178 ‘By far the greatest part of the involvement of the European Council, or the HSG Council, in decision-making and other activities takes place without being prescribed or authorised by, or even alluded to, in the treaties (…).’, Jan Werts, The European Council (London, John Harper Publishing 2008) p. 45.
The position and importance of the European Council in the institutional balance (used here not as a legal notion) of the European Union follows to a great extent from the conventional powers that it exercises.\textsuperscript{1179} An important example is the decision taken by the European Council on the Financial Perspectives, already amply discussed in chapter 4.\textsuperscript{1180} This multiannual financial framework, which sets the expenditure ceilings of the Union specified for specific categories of expenditure, was an important part of the Interinstitutional Agreements on budgetary discipline concluded between Council, Parliament and Commission in 1988, 1993, 1999 and 2006. These agreements, with the exception of 2006, have always been very clear about the main authority in establishing the Financial Perspective. The 1999 Interinstitutional Agreement for example explicitly stated that

The 2000 to 2006 financial perspective, set out in Annex I, forms an integral part of this Agreement. (...) Its contents are consistent with the conclusions of the Berlin European Council of 24 and 25 March 1999.\textsuperscript{1181}

It is therefore no secret that the Financial Perspectives have been based on a decision by the European Council, a decision not provided for by the Treaties.\textsuperscript{1182} This decision has been considered as binding politically by the other institutions, notwithstanding attempts by Parliament to change it, with only very limited success.\textsuperscript{1183}

Why are the Financial Perspectives based on a decision taken by the European Council? The dominance of the member states (in the European Council) over multi-annual expenditure policy can be explained through the link with the most important decision on Community revenue. This Decision on Own Resources, the result of a political European Council decision taken by consensus, takes the legal form of a unanimous decision of the Council followed by ratification by all member states (article 311 TFEU, former article 269

\textsuperscript{1179} Piris in this context refers to ‘political reality’, see Jean-Claude Piris, \textit{The Lisbon Treaty. A Legal and Political Analysis} (Cambridge, Cambridge University Press 2010) p. 236.

\textsuperscript{1180} See chapter 4, paragraph 3.2.


\textsuperscript{1182} Only in a very benevolent reading of Article 4 EU Treaty (now article 15(1) TEU), one could see this article, which states that the European Council shall provide the Union with the necessary impetus for its development, as a legal basis for this power of the European Council. However, it is argued here that the argument is not convincing, and in any event this article only entered into force on 1 November 1993.

\textsuperscript{1183} For example, in the 1999 Interinstitutional Agreement, Parliament managed to make minor changes to heading 3 Internal Policies, leaving the two most important categories of expenditure, Agriculture and Structural Operations, untouched. On 4 April 2006 the negotiators of the Council, Commission and Parliament agreed to an increase of total expenditure of €2 billion – to €864,4 billion. A reshuffle of another €2 billion resulted in a total increase for MEP-favoured policies of ‘only’ €4 billion, representing some 0.5 % of the total expenditure. It is also instructive to compare the final budget agreed to by the December 2005 European Council with a total of €862 billion or 1,045 % of GNI to the original proposals of the Commission – €1.025 billion – and the European Parliament – €975 billion. See European Commission ‘Proposal for renewal of the Interinstitutional Agreement on budgetary discipline and improvement of the budgetary procedure’, 14 July 2004, COM(2004)0498; European Parliament ‘Resolution on Policy Challenges and Budgetary Means of the enlarged Union 2007-2013’, 8 June 2005, 2004/2209(INI).
EC Treaty). Also, the direct contributions by member states are the most important resource of the Community.\footnote{1184} Finally, according to the budgetary principle of equilibrium laid down in article 310 TFEU (former article 268 EC Treaty) the total expenditure of the Community has to be in balance with its total revenue. This explains why the decision on the Financial Perspective is closely related to the Decision on Own Resources and why both decisions are part of the same package deal concluded at a single European Council meeting. The member states, responsible for the major part of revenue, also want to control expenditure.

If it is accepted that we are dealing with a conventional power of the European Council to decide on the multi-annual expenditure ceilings, then it is an example of a convention supplementing the law (see paragraph 3.4.3). It is one that is at tension with the European Parliament’s Treaty based budgetary powers. Jan Werts argues that ‘The European Council curtailed the Parliament as the budget authority. The European Council fixes the financing of the Union in detail, every seven years. This working method interferes with the authority of the Parliament, which, according to Article 272 (ex. 203) TEC, makes up the budget authority, together with the Council of Ministers.’\footnote{1185}

A further example is the role of the European Council in the initiation of legislation. Formally the Commission has an exclusive right of initiative with regard to many policy areas.\footnote{1186} However, Werts argues that

> The numerous demands and instructions coming from the Heads of Government put the seal on a practice whereby the right to make the proposals in important matters of policy moved to the European Council.\footnote{1187}

Werts speaks of a practice. Are we also dealing with a convention? As explained above giving a final answer to the question whether we are dealing with a practice or a convention falls outside the scope of this book. Nonetheless, in this context the following remark of Paolo Ponzano, former Commission Director responsible for relations with the Council, is interesting. He recognises that the right of initiative is in reality compromised:

\footnote{1184} These contributions, a percentage of their Gross National Income, are by far the largest part of total revenue – next to VAT, agricultural levies and custom duties.
\footnote{1185} Werts (2008) p. 56.
\footnote{1186} In the European Community this right was nearly exclusive. In the Lisbon Treaty, which abolished the pillar structure, this right was extended (not for the Common Foreign and Security Policy), but with regard to judicial cooperation in criminal matters and police cooperation the Commission still shares the initiative, now with a quarter of the member states; see article 76 TFEU.
\footnote{1187} Werts (2008) p. 47. He also notes that this is not only detrimental to the Commission’s position: ‘One may conclude that although the European Council has eroded the initiative-taking powers of the Commission, it has simultaneously upgraded the latter’s political position.’, Werts (2008) p. 52.
Yes, in practice yes. I can not imagine a Commissioner saying: “However, I have to make an assessment because maybe it goes against the principle of subsidiarity.” It is unthinkable.\footnote{[Sì, in prassi si. Non vedo un Commissario dire: ‘Però, devo fare un assessment perché magari è contrario alla sussidiarietà.’ È impensabile.], interview with Paolo Ponzano, Brussels, 5 September 2009.}

Werts notes with regard to the instructions that the European Council has been given since its first meeting in Dublin in 1975:

Of course, being independent Institutions, the Commission and Parliament are not obliged to accept such instructions. None of the Institutions has ever refused to follow up a demand of the European Council.\footnote{Werts (2008) p. 27.}

The question whether the Commission, even though legally not bound, in reality does feel politically bound to follow the requests of the European Council is therefore an interesting one that deserves further investigation.

Such research will also have to address the question whether a power of the European Council to give instructions to the Commission is a \textit{legal} power following from its power to provide the Union with the necessary impetus for its development and to define its general political guidelines (article 15(1) TEU).\footnote{Former article 4 EU Treaty.} Two remarks can be made here. Firstly, this power of the European Council was introduced only by the Treaty of Maastricht, so it does not cover the period before the entry into force of that Treaty on 1 November 1993.\footnote{For example the European Council of 8/9 December 1989 asked the Commission to take appropriate measures on the development of trans-European networks, see the Presidency Conclusions under point 2A.} Secondly, the power to define \textit{general} political guidelines arguably does not cover giving \textit{detailed} instructions. Even though the European Council generally refrains from detailed instructions, Werts keenly notes that the European Council of March 2006 asked the Commission to base its new proposal on the Services Directive ‘largely on the outcome of the European Parliament’s first reading.’\footnote{Werts (2008) p. 80.}

\subsection*{3.5.3 The nature of power conferring conventions}

How are conventional powers, such as the power of the European Parliament to hear candidate Commissioners or the conventional powers of the European Council best understood? Considering the lack of attention in academic literature for this aspect of conventions, it is now necessary to reflect on the nature of power conferring conventions. How are they different from legal powers and, importantly, from mere practice? What is their relation to conventional obligations? And how do they create constitutional structure?
The character of conventional powers can be illustrated by confronting them with legal powers. Take the legal power of the European Parliament to request the Commission to submit a legislative proposal on a matter on which it considers that action is required, conferred to it by article 225 TFEU (former article 192 EC Treaty). This is an interesting case because there is no legal obligation for the Commission to follow such requests, even though since the Lisbon Treaty the Commission has the legal obligation to inform Parliament of the reasons if it does not.\textsuperscript{1193} Two situations can now be distinguished.

Either the legal power of the European Parliament is combined with an \textit{institutional or constitutional practice} of the Commission (sometimes or generally) following these proposals at its own discretion, or the legal power can be combined with a (nearly) uniform practice of the Commission following them on the basis of a \textit{conventional rule}.

What is important to note is that the \textit{existence} of the formal legal power of the European Parliament is not affected by nor in any way dependent on its combination with either a practice of the Commission to take over these proposals or a conventional rule prescribing it (even though it can be said that it does affect the \textit{substance} of the power).

The situation is different for a power that is not formally attributed by a legal provision, such as the ‘power’ of the European Council to put proposals for legislation to the European Commission. It can very well be defended that it does not make sense to speak of a legal power of the European Council in this case,\textsuperscript{1195} nor is there a legal obligation of the Commission to follow these instructions. Again two situations can be distinguished.

Either the ‘power’ of the European Council to put proposals to the European Commission is combined with an \textit{institutional or constitutional practice} of the Commission (sometimes or generally) following these proposals at its own discretion, or the legal power can be combined with a (nearly) uniform practice of the Commission following them on the basis of a \textit{conventional rule}.

It is submitted here that it does not make sense to speak of a \textit{conventional} power if there is no \textit{conventional} obligation for the Commission to follow the instructions. In the absence of such a conventional obligation, the European Council can be said to have the power to put legislative proposals to the European Commission in the sense of ‘possibility’

\textsuperscript{1193} Article 225 TFEU: ‘The European Parliament may, acting by a majority of its component Members, request the Commission to submit any appropriate proposal on matters on which it considers that a Union act is required for the purpose of implementing the Treaties. If the Commission does not submit a proposal, it shall inform the European Parliament of the reasons.’

\textsuperscript{1194} Is there in reality a political or conventional obligation? See on the Commission’s record in following these proposals: Corbett, Jacobs and Shackleton (2007) p. 238-240.

\textsuperscript{1195} At least until the Maastricht Treaty; it may be debatable whether the later article 4 EU (now article 15(1) TEU) can be seen as a legal basis. See above paragraph 3.5.2.

\textsuperscript{1196} The question whether there is in reality a political or conventional obligation falls outside the scope of this book. See also above paragraph 3.5.2.
(who is going to stop them?), but there would, it is argued, be no conventional power. It could ask, but not instruct. A conventional power is thus not the same as practice.

It can thus be said that the existence of a conventional power of the European Council is determined by and dependent on the normative character of the Commission’s behaviour. The existence of a conventional power is dependent on the existence of a correlating conventional obligation. In this sense a conventional power is different from a legal power. Equally, its substance is also here determined by that obligation. It can be safely argued that this power would not amount to much if the Commission could decide with wide discretion whether to follow it or not. It would be a power in the sense of possibility, not a conventional power based on a rule. In that case the discretion in the exercise of the Commission’s power could be limited, but by nothing more than a practice (not by a rule).

The same reasoning can be applied to the above discussed parliamentary committee hearings. The essence of the parliamentary hearings history is that it has led to a conventional obligation for candidate Commissioners to appear before a parliamentary committee hearing as part of the investiture procedure. From the point of view of the Parliament it can be said that it has a conventional power (right) to hear candidate Commissioners as part of the investiture procedure.

As there is no formal legal obligation for candidate Commissioners to appear, this can be seen as an example of a duty imposing convention. If, however, there would be wide discretion for a candidate Commissioner in deciding whether to appear or not, there would not be a conventional obligation, but only a practice of Commissioners appearing. In that case it could still be argued that the European Parliament has a right/power to hold the hearings (in the sense of possibility; who is going to stop them from organising the hearings?), but it would not amount to much and would arguably not be a conventional power based on a conventional rule. The existence of a conventional power is thus also here dependent on the existence of a conventional obligation; and again the substance of the power is determined by the (possible) obligation on the part of the candidate Commissioner.

In conclusion, a conventional power only seems to exist in combination with a conventional obligation. Its existence depends on the corresponding binding effects on other institutions. Such a power does not find its normative foundation in attribution by a legal rule, but in the perception of another actor of being bound by convention to respond to the exercise of the conventional power.1197 This is different from a legal power, which can exist without a

1197 A further explanation may be found in the authority of both representative institutions. The European Council – with a conventional power to decide on the financial perspective – is indirectly, but powerfully, representative; the European Parliament – with a conventional power to hear candidate Commissioners individually – is directly, but relatively weakly, representative. The relation between authority and conventional powers on the one hand and
corresponding conventional or legal obligation. The existence of a legal power depends on formal elements, such as its origin. As to the corresponding conventional obligation, this is what differentiates a conventional power from mere empirics, or a conventional power from a possibility.

This does not mean that conventional obligations are always accompanied by a new conventional power. To use Wheare’s distinction, it seems that only a conventional obligation transferring a power or supplementing the law is always accompanied by a new conventional power (see the above examples). The same is not necessarily true for a convention that nullifies the effect of legal rules, such as the conventional rule nullifying the effect of the legal third reading powers of the Council in the early co-decision procedure, analysed in chapter 2. The conventional obligation of the Council not to use these legal powers did not create a new conventional power of the European Parliament to act. At the same time, examples can also be given of conventional rules nullifying the effect of legal rules that seem to be accompanied by new conventional powers. An example is the conventional commitment between a number of members of the Council to support an invocation of a vital national interest, giving these individual members a conventional power of veto.

It thus seems that, if we use Wheare’s distinction between various effects of convention on law, power-conferring conventions are always the counterpart of duty imposing conventions that transfer or supplement the law, and often the counterpart of conventions that nullify the effects of law. This could explain why so much attention is given (especially in British academia) to the normative character of conventions imposing obligations as opposed to the normative character of power-conferring conventions. The normative character of power conferring conventions is found in the corresponding obligation-conferring convention.

What then is the relation between conventional powers and actual powers? The concept ‘actual powers’ has been introduced in chapter 2 for the result of legal powers and the effect on them of conventional rules. This can lead to the actual powers being a combination of legal powers and additional conventional powers. It can also be the case that the actual powers of an institution correspond to restricted legal powers, in the sense that the effect of certain legal powers is nullified by a conventional obligation. This was arguably the case for the third reading of the early co-decision procedure discussed in chapter 2. No new conventional powers were added to the legal powers of the third reading, but the Council’s third reading powers were limited.

the representative character of an institution on the other hand forms an interesting further research question. See also paragraph 5.5.
1198 See chapter 3, paragraph 2.1.
1199 See chapter 2, paragraph 4.3.3.
3.6 Conventions and the autonomy and primacy of the political in relation to the legal constitution

Conventions are an interesting meeting point of the political and the legal constitution. They represent the point where law and politics compete in controlling constitutional reality; where the legal constitution is coloured, ignored or put aside by the political constitution, reflecting the dominant constitutional ideas or division of power between institutions.

As it appeared above in a concrete sense conventions can be seen as a product and possibly part of the political constitution.\textsuperscript{1200} The effects of convention on law furthermore illustrated the tension between politics and law in the constitution. In a more abstract way, conventions can be understood as a reflection of the autonomy and at times even primacy of the political constitution over the legal constitution. In fact, it can be said that the greater the role of conventions in the constitution, the greater the autonomy and potential primacy of the political constitution in relation to the formal legal constitution.

How are conventions an expression of the autonomy or primacy of the political constitution? For this purpose it is useful to come back to the various ways in which conventions affect the legal constitution: they can nullify the effects of legal rules, transfer the exercise of legal powers to another institution and supplement the law.\textsuperscript{1201} It is equally instructive to remember how, through conventional rules, the political constitution exercises the constitutional functions of both limiting the exercise of public powers and empowering.\textsuperscript{1202} When conventions go as far as to nullify the effects of the law or transfer the exercise of legal powers to another institution, the political constitution has primacy over the legal constitution. When conventions have these effects, but also when they supplement the law, they can be said to reflect autonomous development of the political constitution, convention assuming a role in constitutional development that is independent from other sources. This autonomous development of the constitution through convention is subject of the next paragraphs.

Autonomy can also be seen in a different way, not in relation to constitutional change, but in relation to enforcement. Italian constitutionalist Rescigno interestingly notes that some conventions are to remain within the autonomy of political subjects since it would not be politically opportune to have other ‘judges’ than the parties subject to these rules.\textsuperscript{1203}

\textsuperscript{1200} See paragraph 3.2.
\textsuperscript{1201} See paragraph 3.4 above.
\textsuperscript{1202} See paragraph 3.5 above.
\textsuperscript{1203} Giuseppe Ugo Rescigno, Le convenzioni costituzionali (Milan, CEDAM 1972) p. 18: ‘(...) in parte debbono rimanere affidate alla autonomia dei soggetti politici per ragioni di opportunità politica (cosicché non potrebbero divenire giuridiche perché non sarebbe opportuno politicamente che esistessero altri giudici di queste regole oltre i soggetti ai quali esse si riferiscono).’
Conventions are not legally enforceable, but their non-observance will often be sanctioned through political means.\textsuperscript{1204} Seen in this light, conventions also mark the autonomy of the political institutions from judicial bodies.

4 Constitutional development through practice and convention: the Commission investiture between collegiality and individual responsibility

The Commission investiture procedure is most fit to show the evolutionary nature of the constitutionalisation of the European Union. The procedure has undergone tremendous constitutional development over the last decades, especially since the Treaty of Maastricht (1993) introduced the European Parliament’s power of approval. This development is best understood as one between two extremes. At one extreme, in complete respect of the principle of collegiality, is a single Parliamentary vote on the team of candidate Commissioners. This is what the Treaty rules provide for – with the exception of the President on whom a separate vote in Parliament is prescribed since the Treaty of Amsterdam (1999).\textsuperscript{1205}

At the other extreme is a situation of plenary votes on each individual candidate Commissioner and thus an approval of each individual Commissioner reflecting the principle of individual political responsibility. Such plenary votes of confidence on individual candidates have not yet occurred, but developments in the direction of individual political responsibility have clearly taken place. This constitutional change has taken the form not of Treaty amendment, but of practice and convention.

The most important steps in this development are discussed below with two main objectives. Firstly, to illustrate how practice and convention bring about constitutional change in an evolutionary process. Secondly, to introduce a number of relevant distinctions to understand the role of convention in constitutional development of the European Union, namely that between flexible and rigid constitutional change; ‘original’ and autonomous change; and grand design and accidental change. The role of convention in constitutional development of the European Union will then further be analysed in the light of these distinctions in paragraph 5.

4.1 Step 1: The organisation of parliamentary committee hearings since 1995

The parliamentary committee hearings for individual candidate Commissioners represent a first and important step in the development of individual political responsibility and thus

\textsuperscript{1204} See in more detail chapter 4, paragraph 2.2.1.
\textsuperscript{1205} Article 17(7) TEU, former article 214 EC Treaty (Treaty of Amsterdam).
development away from a strict application of the principle of collegiality in the appointment
procedure.

A tension between a collective vote by Parliament on the Commission and individual
hearings for the candidates has been clear from the beginning. According to Karel van Miert,
Commissioner under Santer, the Santer Commission was willing to undergo the hearings
assuming that they would not undermine the principle of collegiality, meaning that only the
entire college could be refused, not an individual Commissioner. Former President of the
European Parliament Klaus Hänsch, who was responsible for the cautious introduction of the
hearings back in 1994, has come to believe that individual votes will take place in the future.

I think that the hearings will develop into individual votes on every individual
Commissioner. That is, if the investiture procedure is not changed in the meantime. If, for example, in the future there are 3 candidates from each country from which the
candidate Commission-President can choose, then the whole structure of the
procedure would have to be changed.

How the European Parliament managed to introduce the parliamentary committee hearings
and create the conventional obligation for candidate Commissioners to undergo this form of
scrutiny, was extensively discussed in paragraph 2.

4.1.1 Rigid versus flexible constitutional change

It is here relevant to use the hearings to introduce two analytical distinctions helpful for
understanding constitutional change: firstly, the distinction between *rigid* and *flexible*
constitutional change. Legal constitutional change in the European Union through Treaty
amendment can be considered procedurally very rigid, as unanimous agreement among the
representatives of the member states in an Intergovernmental Conference must be followed
by ratification by all member states. Conventional constitutional change in the European
Union by contrast is flexible, as no procedural requirements exist. The European Parliament
was able to create a new and important conventional power bypassing the requirements of
legal constitutional change.

4.1.2 ‘Original’ versus autonomous constitutional change

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1207 Interview with Klaus Hänsch, Brussels, 18 October 2006.
1208 Article 48 TEU.
The difference explained between legal and conventional constitutional change is related to a second useful distinction between two extremes: *original* revolutionary change at one extreme and *autonomous* evolution at the other. 1209 Original constitutional change is seen here as change brought about by those actors that *have* created the legal system (one could also say the ‘pouvoir constituant’): in the European Union these are the member states.

Autonomous constitutional development is seen as change brought about by the institutions that *were* created as part of the new legal system (one could also say the ‘pouvoir constitué’). In the European Union these are the institutions of the European Union, including the European Parliament, the Commission, the Council of Ministers, the European Court of Justice, etc. Such autonomous evolution can take the form of legal change, as exemplified by the constitutionalising case law of the European Court of Justice. The absence of a decisive role of the political ‘pouvoir constitué’ in formal change can furthermore stimulate constitutional evolution by these institutions through practice and convention, as exemplified by the various conventions discussed in this book.

An important characteristic of the European Union is that the original creators (the member states) have intentionally limited to a minimum the role of the newly created political institutions (European Parliament, Commission, etc.) in formal constitutional change. 1210 Legal constitutional change in the European Union is still firmly in the hands of the member states. 1211 The creation by European Parliament of its conventional power to scrutinise candidate Commissioners in parliamentary committee hearings illustrates that the life of the constitution of the European Union can take its own course, also politically.

4.1.3 Grand design versus accidental constitutional change

More about the role of convention in constitutional change of the European Union in light of these distinctions will follow in paragraph 5. First, two further steps in the development away from a strict application of the principle of collegiality in the investiture of the Commission need to be detailed. This will not only serve to further illustrate evolutionary constitutional change through convention. It will also introduce, next to the distinctions just mentioned, a third relevant distinction: that between *grand design* and *accidental* constitutional change. 1212 Historian Van Caenegem has recently applied this distinction to national constitutions. In the

1209 See also Peters (2006) p. 46 and following.

1210 This does not exclude that several supranational institutions do have a role, procedurally and in terms of their influence on the decisions taken at an Intergovernmental Conference. See e.g. on the role of the European Parliament, Commission and Council Secretariat in treaty reform Thomas Christiansen, ‘The role of supranational actors in EU treaty reform’, *Journal of European Public Policy* (2002) p. 33-53.

1211 Even though important legal constitutional change is undoubtedly also to a great extent a result of the case law of the European Court of Justice.

1212 See for a recent application of this distinction on national constitutions: R.C. van Caenegem, ‘Constitutional History: Chance or Grand Design?’, *EuConst* (2009) p. 447-463.
context of European integration political scientists Stacey and Rittberger make a related
distinction between (informal) interregnum integration and (formal) history-making integration.1213

The Intergovernmental Conferences held as part of the Treaty amendment procedure in the
European Union could be considered as examples of constitutional development
through grand design. The amendments are the result of 'purposeful and thoughtful
discussions of a small group of lawmakers', at times also in a ‘revolutionary context’ if one
accepts the post-Second World War context or the German reunification as such.1214
Constitutional development through practice and convention, as will be seen, are by contrast
often closer to accidental constitutional change, resulting ‘from piecemeal and often
disconnected initiatives, customs or reactions to fortuitous external circumstances’.1215

4.2        Step 2: A balanced package of changes in the 2004 investiture of ‘Barroso I’

4.2.1 What the European Parliament did and did not do

After the 1999 procedure, the 2004 investiture procedure of the first Barroso Commission
would bring an interesting second step in the development away from strict collegiality. For
the first time parliamentary committees explicitly or implicitly rejected candidates, namely
the Italian Rocco Buttiglione and the Hungarian László Kovács. Also, the European
Parliament was ready to adopt a resolution expressing its dissatisfaction with Barroso’s
proposed team, but without mentioning names. Finally, for the first time, and under pressure
from the European Parliament and the Heads of State and Government, candidates were
withdrawn (Buttiglione and Latvian candidate Udre) and portfolios were reshuffled
(including that of Kovács).

These developments have led some to argue that the right of Parliament to reject
individual Commissioners-designate had been established.1216 However, two things will
follow from the analysis below. Firstly, the European Parliament left the solution to be found
open. Secondly, a balanced package of various changes was agreed in the negotiations
between Commission President Barroso and the Heads of State and Government and the
withdrawal of a single candidate was cautiously avoided. It is therefore more accurate to
speak of a power of Parliament to impose changes (note the plural!) to the team.

1213 See Jeffrey Stacey and Bertold Rittberger, ‘Dynamics of formal and informal institutional change in the EU’,
1214 For these characteristics of constitutional change by grand design see Van Caenegem (2009) p. 449.
1216 J.M. Wiersma & M. Verhelst, ‘Confrontatie met Barroso tekent volwassenheid Europees Parlement’, 59
In the 2004 (as in the 2010) investiture procedure of the Barroso Commission no individual votes on candidates have been held by Parliament’s plenary, but the power of Parliament to impose changes represents a further development in the direction of individual political responsibility. This has been the consequence of several cases of unprecedented dynamics, some of which illustrate that constitutional change is often the result of accidental events in the application of Treaty rules. Some of the decisive events of the 2004 Barroso Commission investiture in fact represent constitutional change by chance.\footnote{For an overview of the key dates of the 2004 investiture of ‘Barroso I’, see Annex III.}

The rejection of Buttiglione (by vote) and Kovács by a parliamentary committee\footnote{The following part further develops research published earlier in: Thomas Beukers, ‘The Barroso Drama. Enhancing Parliamentary Control over the European Commission and the Member States. Constitutional Development through Practice’, 2 EuConst (2006) p. 21-53.}

The 2004 round of hearings drew unprecedented attention from the media, not least because of the weak performances of various Commissioners-designate. In the first week three candidates became controversial. On 28 September the Dutch candidate for Competition, Neelie Kroes, raised concerns on her independence and integrity, caused by her involvement in business.\footnote{M. van Keulen, ‘The Barroso Drama: Kroes At All Cost’, 1 EuConst (2005) p. 211-216 at p. 214.} One day later, MEPs questioned if the Greek candidate for Environment, Stavros Dimas, would attribute the necessary importance to the environment in relation to economic issues. But the performance of the Hungarian candidate for Energy, László Kovács, on Thursday 30 September was the most unsatisfactory of the opening week because of his lack of knowledge and preparation.\footnote{Enikő Horváth, ‘The Barroso Drama: Brussels for Beginners’, 1 EuConst (2005) p. 182-188 at p. 184.}

During the second week a commotion was caused by the Italian candidate for the Liberty, Justice and Freedom portfolio, Rocco Buttiglione.\footnote{Only one hearing was to be organised for each Commissioner. An exception to this rule was created by a conflict between the chairmen of the Committee on Civil Liberties, Justice and Home affairs (LIBE) and the Committee on Legal Affairs (JURI), respectively Jean-Louis Bourlanges and Giuseppe Gargani, about the competent committee for the hearing of Commissioner-designate for Justice, Freedom and Security, Rocco Buttiglione. The outcome of the conflict over competence was that Buttiglione had to undergo two separate hearings, one by LIBE for three hours, and one by JURI for one and a half hours.} During the hearing on Tuesday 5 October MEP, Kathalijne Buitenweg (Verts/ALE), provoked him to make statements on homosexuality. Buttiglione among other things said that ‘I may think that homosexuality is a sin but this has no effect on politics unless I say that homosexuality is a crime’.\footnote{An unofficial transcript of the hearing, from which this passage is taken, can be found on: <http://www.acton.org/press/special/transcript1.pdf>.} The original commotion was aggravated in the days after the hearing by another statement by Buttiglione that marriage existed to allow women to have children and for the protection of the woman by the man.\footnote{G. Sarcina, ‘Buttiglione, attacchi sui gay e risposte in 5 lingue’, Corriere della Sera, 11 October 2004.} Other candidates having a troublesome hearing that week were Danish Mariann Fischer Boel (Agriculture and Rural Development) for possible conflict of
interests and Latvian Ingrida Udre (Taxation and Customs Union) for allegations regarding her party’s finances.

After each hearing, the chairman of the committee responsible for the hearing (or chairmen in case of a joint meeting) is responsible for drawing up and signing an evaluation letter, to be sent to the President of the European Parliament.\textsuperscript{1224} Usually on the same day or the day after each hearing, the committee convenes a meeting of the co-ordinators – the spokesman of each political group within the committee – in order to evaluate the candidate behind closed doors. This is the first moment that partisan views compete and agreement between different political groups can be sought. During these meetings the committee chairman tries to capture the opinion of the majority of the members of the committee, when necessary accepting the explicit mention of minority opinions. The only meeting in which this procedure failed outright was the meeting of the co-ordinators of the Committee on Civil Liberties, Justice and Home affairs (LIBE) after the hearing of Buttiglione on 5 October. During the evaluation meeting on 6 October ‘the coordinators for the political groups represented (…) were unable to agree on a joint text assessing Mr Buttiglione’.\textsuperscript{1225} They decided to refer the matter back to the committee. Within the committee, attempts to agree on a joint text continued. In the negotiations between the different political groups there was strong pressure from the EPP/ED group co-ordinator to weaken the severe criticism in the draft evaluation letter. At a certain point a majority of the committee members considered the risk of losing a vote on Buttiglione in the committee preferable to the soft evaluation text the EPP/ED demanded.\textsuperscript{1226}

It was therefore decided to have a vote, which was held on 11 October. The procedure for the vote had already been decided upon at the coordinators’ meeting of 6 October. Two proposals were put to the vote:

1. Endorsement of Mr Buttiglione’s nomination as Vice-President of the Commission in charge of the freedom, security and justice portfolio.
2. Endorsement of Mr Buttiglione’s nomination as Vice-President of the Commission on condition that he be given a different remit.\textsuperscript{1227}

The second proposal would be voted on only if the first one was rejected, which is what happened. By the thinnest margin, 27 votes against and 26 in favour, the proposal to endorse Buttiglione as Vice-President of the Commission in charge of the freedom, security and justice portfolio was rejected.

\textsuperscript{1224} Occasionally two evaluation letters were produced for one commissioner, in the case of Buttiglione even leading to opposite outcomes.
\textsuperscript{1226} Interview with Edith Mastenbroek (former MEP), Brussels, 20 June 2005.
In a second vote the alternative proposal was also rejected, mainly because the EPP/ED members, who had voted in favour the first time, could not accept their loss. At that point, accepting even a transfer of Buttiglione would mean political defeat. The result was that as far as the LIBE committee was concerned, there was no place for Buttiglione in the Barroso Commission.

With hindsight, it seems that neither the order of the votes nor the formulation of the second proposal favoured Buttiglione’s case. Judging from his successful amendment to the original Duff report on guidelines for the approval of the Commission,\textsuperscript{1228} Jean-Louis Bourlanges – committee chairman of the LIBE committee during the hearing of Buttiglione – would have formulated the proposals differently had he been given a new chance. In the future a vote will be held first on a Candidate’s membership in the Commission and then on his or her suitability for the assigned portfolio.

Although some have found the decision to vote in the committee to be a logical solution when there is no consensus, others have criticised it for being a way for one committee to commit the whole Parliament. They argue that where the European Parliament can only approve or reject the Commission as a whole, it is not appropriate to vote on Commissioners-designate within a single committee. Clearly, the decision to vote on a single Candidate in a committee highlights the tension between the Council and the Commission on one side – stressing the collegial nature of the Commission – and the European Parliament on the other – trying to increase its influence in the investiture procedure, though without demanding a formal right to vote on individual Candidates in plenary.\textsuperscript{1229}

Judging the final text of the guidelines for the approval of the European Commission included in the European Parliament Resolution of 1 December 2005, voting is agreed on as a last resort. That is, in case parliamentary committees are unable to reach a consensus in stating ‘whether the Commissioners-designate are qualified both to be a member of the college and to carry out the particular duties for which they have been nominated’.\textsuperscript{1230} This can be interpreted as a small victory for those who advocate a right to vote on individual candidates.

The suspicion of a political answer to Buttiglione’s rejection was raised only one day later, on 12 October, by the Committee on Industry, Research and Energy (ITRE). It rejected Commissioner-designate Kovács for the Energy portfolio, not through a vote but by assessing

\textsuperscript{1228} PE 357,790v01-00.
\textsuperscript{1229} The only group that argued for such a plenary vote on individual Candidates was the Verts/ALE group, in its motion for a resolution B6-0088/2004, by Daniel Marc Cohn-Bendit and Monica Frassoni, 20.10.2004.
him in the following words signed to by the committee chairman Mr Chichester (EPP/ED) in the evaluation letter to the President of the European Parliament:

In general terms, most members of the Committee were not convinced by his professional competence in the energy field nor his aptitude to assume the high office he has been proposed for. However, one large group expressed their belief he would learn enough to cope once able to devote himself full-time to the job.1231

Partisan politics seemed to operate not only inside each committee, but also between the various committees. After the rejection of an EPP/ED supported Commissioner-designate by LIBE, a majority of the ITRE Committee decided that a Socialist candidate had also failed the test.

The (absence of a) plenary reaction: Parliament leaves the solution open

Parliament’s rules of procedure do not contain provisions on the coordination of horizontal scrutiny of the results of the hearings. In January 1995 the reports from the various committees had simply been commented upon by the President of the European Parliament in a press conference the day after the hearings had ended.1232 In 1999 a horizontal scrutiny of the letters had taken place in the Conference of Committee Chairs, before they were transmitted to the President of the Parliament.1233 This time a different action was taken. The co-ordinated horizontal scrutiny of the results was skipped and the letters were sent directly by the committee chairmen to President of the Parliament, Josep Borrell. An extraordinary meeting of the Conference of Presidents was then convened to discuss the matter.

On 13 October this extraordinary meeting of the Conference of Presidents took place, with Josep Borrell and the leaders of the political groups present. Faced with the rejection of Buttiglione and Kovács, the political leaders in the European Parliament had to decide their approach to the situation. Borrell offered to set up a resolution in which the problem cases were explicitly mentioned, using the evaluation letters as a basis. This idea was not accepted by the group leaders.1234 Watson’s (ALDE) explanation that ‘I don’t think we should force

1232 “We had convened in advance that they would be sent to me as President and not be published. But at the end of the hearings, I immediately organised a press conference. Although this has been criticised, I still think that was the right thing to do. The public had to understand what the hearings had been about and what had been the critical issues.”, interview with Klaus Hänsch, Brussels, 18 October 2006.
1234 A second idea proposed by Borrell, to hold another extraordinary meeting of the group leaders before their planned meeting with Barroso on 21 October, was also rejected by a majority of the leaders of the groups; Agence Europe, No. 8806, Thursday 14 October 2004, p. 3.
any one solution on Mr Barroso when there could be a number of possibilities,1235 represented the majority position in Parliament. Anyway, as none of the political groups had yet found a common internal position,1236 there was no way a deal could be reached. Also, the problems with the two Commissioners-designate, Buttiglione and Kovács, who came out worst from the committee hearings, were so fundamentally different in character that a solution to the effect that both could stay or that both had to go would be unacceptable to the Socialists.1237 It was decided to send the evaluation letters directly to Barroso without any recommendations, leaving it to the President-designate to decide on the necessary concessions.

At that point, the leaders of the three largest groups – Pöttering, Watson and Schulz – probably hoped that some minor changes would suffice to prevent a no vote. But as time passed the determination of Liberal and Socialist backbenchers grew to see at least one of the Commissioners-designate go.

_Barroso’s initial resistance to any serious consequences_

The moment for Barroso to address the concerns in the European Parliament was to come on 21 October during a Conference of Presidents meeting. In the days before, Barroso had extensively consulted with the different political groups on their positions. A lot of exchanges and phone calls, mostly with Pöttering but also with Watson and Schulz, had taken place. On Monday evening 18 October, Barroso and Watson met in the Berlaymont building. ‘Can I count on your votes?’ Barroso wanted to know. Watson told him that by agreeing to six wishes of ALDE, his chances would seriously grow.1238

During lengthy talks with his group on 20 October, Schulz had come to understand that it was unacceptable to the Socialist MEPs to have Buttiglione as a Commissioner for Justice, Freedom and Security. The Verts/ALE Group in the meantime adopted a resolution proposing that the Commission could be approved by a separate individual vote for each commissioner. At that time, from the main groups, only Pöttering could give Barroso his full and unconditional support.

Momentum had thus been building up in the days before the meeting of the Conference of Presidents. When Barroso met with the Conference of Presidents on Thursday, he only gave in on two of Watson’s demands. Among these was his decision personally to chair a group of Commissioners concerned with fundamental rights and non-discrimination. Another concession was a letter from Buttiglione to Parliament in which he regretted the

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1236 Interview with Edith Mastenbroek (former MEP), Brussels, 20 June 2005.
1237 Interview with Jan Marinus Wiersma (MEP), Brussels, 20 June 2005.
1238 Interview with Graham Watson (MEP), Brussels, 21 June 2005.
problems having arisen from his parliamentary committee hearing. For the Liberals this was not enough. Watson saw their support for the Commission fall from two thirds to only one third, even putting himself in a minority position within his own group.\textsuperscript{1239}

Considering that the recommendations from the parliamentary committees were not yet formal decisions from the European Parliament and still left without a common position from the parliamentary groups, Barroso decided to go for a centre right majority in Parliament, including EPP/ED, a large part of ALDE and maybe a few PSE votes. He showed little sensitivity to the concerns expressed and did not accept the rejection of either Buttiglione or Kovács. Instead, he thought making some minor changes would suffice, such as taking away from Buttiglione the responsibility for individual freedoms and non-discrimination.\textsuperscript{1240}

But after the meeting it was not at all certain that he could muster a majority in Parliament. The EPP/ED confirmed its unanimous support through its leader Hans-Gert Pöttering, securing 268 votes.\textsuperscript{1241} But combined with the 27 votes confirmed from the nationalist UEN members, this did not suffice to reach the 366 votes needed for a majority. For the PSE, as had become clear already on the day before the meeting, these cosmetic changes were not enough. Martin Schulz said he was going to recommend to his group to vote against the Commission, expecting an overwhelming majority to do so.\textsuperscript{1242} More significant was the position of the ALDE group, which according to Andrew Duff now showed a three quarters majority against the Commission.\textsuperscript{1243} If this was to reflect the ALDE vote on the following Wednesday, or even if it were two thirds as Watson thought, Barroso would be in serious trouble.

Parliament’s majority threat with rejection, but again leaving the solution open

On Monday 25 October, the day before the Plenary session started, all groups had agreed on their internal position. The Verts/ALE Group took the toughest position, asking for a replacement of Buttiglione and a change of portfolio for Kovács, Fischer Boel, Dimas, Kroes and Udre.\textsuperscript{1244} More or less the same position was taken by GUE/NGL.\textsuperscript{1245} On the other side of the spectrum, the EPP/ED Group and UEN supported the whole team and focused on the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{1239} Interview with Graham Watson, Brussels, 21 June 2005.
\item \textsuperscript{1240} According to Schulz, by doing so Barroso had gone back on an offer to strip Mr. Buttiglione of all responsibility for fundamental rights; J. O’Doherty and G. Parker, ‘Barroso struggling for votes after bid to sway MEPs over Buttiglione fails’, \textit{Financial Times}, 22 Oct. 2004.
\item \textsuperscript{1241} J. O’Doherty and G. Parker, ‘Barroso struggling for votes after bid to sway MEPs over Buttiglione fails’, \textit{Financial Times}, 22 October 2004.
\item \textsuperscript{1242} \textit{Agence Europe} No. 8812, Friday 22 October 2004, p. 5.
\item \textsuperscript{1243} Apparently the Italian, French and British ALDE MEPs were against the Commission, while the Dutch and Danes were still in favor, \textit{Agence Europe} No. 8812, Friday 22 October 2004, p. 6.
\item \textsuperscript{1244} Motion for a resolution B6-0088/2004, by Daniel Marc Cohn-Bendit and Monica Frassoni on behalf of the Verts/ALE group, 20.10.2004.
\item \textsuperscript{1245} Motion for a resolution B6-0099/2004, by Francis Wurtz on behalf of the GUE/NGL Group, 25.10.2004.
\end{itemize}
\end{footnotesize}
specific elements they wanted to have included in a renewed Framework Agreement between the Commission and Parliament. In between these positions two variants were proposed. The PSE Group would have been satisfied with a change of portfolio for Buttiglione only and already expressed some wishes regarding the Framework Agreement. A pragmatic ALDE motion simply noted the rejection of Buttiglione by the LIBE committee as well as the negative opinion on Kovács in the ITRE committee and insisted 'that all the institutions draw the political consequences from it, which might include resignation, reshuffle or withdrawal'.

All the groups having established their internal position, the negotiations on a joint motion could be concluded. In a joint motion dated 26 October the PSE, ALDE, GUE/NGL and Verts/ALE Groups reached a compromise position representing a majority in Parliament. The two substantive parts of the motion stated that the European Parliament:

Identifies various concerns as to the endorsement of certain candidates: political convictions contradicting basic values of the Union; lack of political skill and knowledge and commitment with regard to the portfolio proposed; unresolved problems or unanswered questions concerning conflicts of interests or possible involvement in political and legal malpractice;
Underlines the democratic and legal validity of the approval process of which the hearings are a crucial part, and insists that all the institutions draw the political consequences of it, which might include resignation, reshuffle or withdrawal.

Interestingly these sentences were almost literally copied from the earlier Verts/ALE motion (first sentence) and ALDE motion (second sentence). It was part of the compromise that the joint motion still did not mention the specific problem cases to be resolved. While the EPP/ED and UEN Groups were already wishfully thinking ahead on the renewed Framework Agreement to be adopted between Commission and Parliament, the other groups were demanding changes in a joint motion.

The motion was never put to the vote.

*Barroso is forced to turn to the member states*

During the plenary session of Tuesday 26 October, Barroso made some new cosmetic concessions, but refused to reorganise his team. Somewhat provocatively he said: 'As you can see, I have listened carefully to Parliament’s opinion. I have taken into consideration your

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major concerns and objections and have provided substantive replies’. It still took him a few hours to understand that a majority in parliament strongly disagreed and was ready to act on it. Only at the end of the day, on the eve of the planned vote, did Barroso understand that he was not going to get the majority needed for his team.

That Tuesday the deadlock that had prevented the Conference of Presidents from reaching a common position on 13 October was confirmed. In the evening, after Barroso knew from Graham Watson that the ALDE group would vote overwhelmingly against the Commission and knowing that the PSE was going to vote against unanimously, Barroso finally reached for the ultimate remedy and called Berlusconi about a possible withdrawal of Buttiglione. But when Pöttering heard from his friend Buttiglione that he had been asked to withdraw, the leader of the largest group in Parliament threatened Barroso that he would order his group to vote against the college, if Buttiglione was not in it.\textsuperscript{1250} It was thus importantly the European Parliament that prevented a solution involving only the withdrawal of a single Commissioner. Barroso was forced to postpone the proposal of his team planned for the following day.\textsuperscript{1251} This way he could at least secure his own position.

Barroso thus for the first time seriously turned to one of the member states (Italy) on Tuesday October 26 when he finally realised that he risked defeat of his team of Commissioners in the European Parliament. For practical reasons, mainly lack of time, it was impossible to create a forum in which to consult the member states collectively. The member states so far had remained on the sideline even though it may be assumed that when Barroso on Tuesday called Berlusconi to ask for Buttiglione’s withdrawal,\textsuperscript{1252} he had the explicit or implicit support of at least some European leaders.\textsuperscript{1253} Barroso’s decision however was not coordinated with the member states collectively.

Facing defeat in Parliament on Wednesday October 27, Barroso asked for more time in order to consult the Council. This was an unprecedented move.\textsuperscript{1254} For any change to this team Barroso now needed the help of the Heads of State and Government of the member states. It had proven impossible to find a solution inside the European Parliament as the Conference of Presidents could not reach a common position that balanced the various

\textsuperscript{1250} Buttiglione later admitted he had been willing to resign, but had not done so because Pöttering had implored him not to, Agence Europe, No. 8819, Wednesday 3 November 2004, p. 8; Roberto Zuccolini, ‘Ma Buttiglione non cede: ho la coscienza a posto’, Corriere della Sera, October 27, 2004.

\textsuperscript{1251} There is a strong resemblance with the events of March 1999 when Jacques Santer decided to act only once it had become clear from Pauline Green that her Socialist Group would support the censure vote to be held the next day. Without letting it come to a vote, Santer and his team resigned collectively.


\textsuperscript{1253} Chirac was the one most explicitly in support of this decision on October 26, immediately after he had visited Schröder that evening; Hervé Gattegno and Arnaud Leparmentier, ‘Comment José Manuel Barroso a failli tomber dans le piège tendu par l’extrême droite’, Le Monde, October 30, 2004.

\textsuperscript{1254} Le Monde noted: ‘Certains diplomates estiment que, en droit, M. Barroso ne peut exiger aucun renvoi. Toutefois analyse un responsable du Quai d’Orsay, “le Conseil aurait tort de faire du juridisme. Le président de la Commission peut décider qu’il n’attribue pas de portefeuille à certains commissaires. Il faut laisser M. Barroso régler les problèmes.”'}
interests. Instead the European Parliament had tabled a motion that left various possibilities open. The largest group inside the European Parliament, the EPP/ED, had blocked a solution sought by Barroso at the latest hour and requiring the involvement of only one member state, Italy. Pöttering blocked that solution because it did not balance the interests of the various political groups.

Once a candidate’s replacement is necessary to have Parliament’s approval of a new Commission, the nominee for President automatically becomes dependent on the member states. Replacing a Commissioner was impossible as long as the European Council was blocking it, as Barroso himself commented in a press conference on October 27. Barroso lamented that the Capitals had not given him space for manoeuvre. In fact, as long as the European Parliament did not force a single solution on the other players, that solution, either balanced or not, was to be found by the nominee for President with the help of the Heads of State and Government individually and possibly collectively. It is not easy to find out exactly the role of the Heads of State and Government. In the following attempt is made to construe their part in the 2004 investiture procedure.

4.2.2 How the member states and Barroso were forced to come up with a balanced solution

Some European Ministers of Foreign Affairs immediately stressed that the crisis was a matter between the Commission and the European Parliament. Most European leaders didn’t go any further than expressing their hope that a solution would soon be found. But they could not avoid being drawn into the matter. A proposal from the Dutch Presidency to hold a European Summit on October 28 over the matter was rejected by the Permanent Representatives of the other member states. This left the already planned ceremony for the signing of the Treaty establishing a Constitution for Europe on Friday 29 October as the forum to discuss the matter. On this date the Heads of State and Government met in their formal capacity of delegates of their respective member states. Bilateral phone calls and

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1255 Could Barroso have found a majority without the EPP? It is unthinkable that he would have sought one, as that is the group to which he is himself affiliated.
1256 Agence Europe, No. 8816, Thursday 28, October 2004, p. 5. Barroso was right in saying that not only the European Council but also the European Parliament were in fact blocking a solution.
1259 A spokesman of the British Foreign Office said that the crisis was to be resolved by the EP together with Barroso, Walter Oppenheimer, ‘Confianza en Barroso’, El País, October 28, 2004; A spokesman of the Dutch Minister of Foreign Affairs, Bot, stated that according to the rules agreed upon in Europe it was a matter between the European Parliament and the European Commission; Floris van Straaten, ‘Nederland opereerde lijdzaam’, NRC Handelsblad, October 28, 2004.
meetings had by then already taken place, but this meeting in Rome provided the necessary forum from a practical point of view to consult, pressurize and reach a consensus. One of these bilateral meetings was held between Dutch Prime Minister Balkenende (in the Council’s Presidency) and Barroso on Thursday evening at the Dutch ambassador’s home in Rome where they met for dinner. 1262 Despite an attempt of Barroso to obtain replacement of Kroes, Balkenende refused to withdraw the Dutch candidate. 1263 After that dinner the Heads of State and Government met informally and bilaterally in the shadow of a concert given in Rome in their honour. 1264

The Heads of State and Government collectively break the deadlock

The decision on the changes to the team of candidate Commissioners was a decision with multiple moments during a period of bargaining between Barroso and the member states. On the background Barroso consulted with leading figures in the European Parliament in order to avoid a second drama. 1265 First, a decision was taken on Buttiglione on 29 October, when Italy decided to withdraw its candidate under pressure of the other Heads of State and Government. Secondly, on 30 October Latvia withdrew its candidate in reaction a request by letter of Barroso. Thirdly, Barroso decided to reshuffle portfolios, giving Kovács a different portfolio; a decision Barroso could finally take when the new Italian candidate was made known on 4 November.

It seems that the deadlock was broken on 29 October 2004, the day that the Heads of State and Government had gathered in Rome to sign the Treaty establishing a Constitution for Europe. After this meeting Italy withdrew the candidacy of Buttiglione, thereby opening the first and most important door to a solution of the conflict. Barroso met Berlusconi for breakfast at the Quirinale. 1266 At 11.35h. the Constitutional Treaty was signed at the Campidoglio. 1267 After that the Heads of State and Government talked about the Commission’s composition during lunch. 1268 In the afternoon, after the various leaders had left Rome, Barroso and Berlusconi again talked. 1269 At the closing press conference

1264 Agence Europe, No. 8817, Friday 29 October, p. 4.
1265 For example on Dutch candidate Neelie Kroes: ‘After the vote on Thursday, he was even more explicit: “Mr Watson said on several occasions that Ms Kroes was good for this portfolio”’, Agence Europe, No. 8830, Friday 19 November 2004, p. 6.
1267 Agence Europe, No. 8817, Friday 29 October 2004, p. 4.
Berlusconi, and after dining with his coalition partners, announced that Buttiglione would stay as a minister in his government. Not everyone was present during the lunch (notably Blair was absent), and in fact no formal decision was taken, but it is clear that the meeting of the Heads of State and Government triggered the first change to the team: the withdrawal by Italy of its candidate. This created a precedent in the history of the Commission investiture.

No vote was held about a solution, but a consensus was found. A few scenarios were decided to be acceptable, the one with the largest support among the European leaders being the withdrawal of Buttiglione, Kovács and Udre. How was the necessary consensus reached? Concerning the most delicate and important issue, that of Buttiglione’s withdrawal, some European leaders have tabled this as unavoidable, while the others have acquiesced. Among the first were Zapatero, Verhofstadt, Ahern, Chirac and Persson, who had not considered it problematic to express themselves negatively on Buttiglione and implicitly calling for his withdrawal. Among the latter were undoubtedly those member states whose own candidate was at risk. It could thus be said that the decision of Italy to withdraw its candidate was preceded by a political decision by the Heads of State and Government.

Several commentators have noted that Berlusconi had to concede his ‘sacrifice’ without securing a balance.\(^{1274}\) In the first days after Barroso obtained the postponement of the vote on his team Italy had reconfirmed, the candidacy of Buttiglione,\(^{1275}\) and had stressed that it would not accept having to make a sole sacrifice.\(^{1276}\) Berlusconi had made it clear that if on the other hand Italy was not the only member state making a sacrificio, it would not pose any problems.\(^{1277}\)

It is true that, as MacDonald comments ‘Berlusconi was finally compelled to withdraw his candidate without securing a similar, reciprocal sacrifice from someone on the European left to offset it’.\(^{1278}\) However, it may be assumed that Berlusconi was reassured and confident that other changes would follow. In fact, on the evening of October 29, Barroso for the first time said he planned to replace some members (note the plural!) of his team.\(^{1279}\) And only a day later a second sacrifice was announced.

The other sacrifice turned out to be Latvian candidate Udre. Her replacement was a reaction to her ‘possible involvement in political and legal malpractice’.\(^{1280}\) Apparently, Barroso had sent a letter to the Latvian government asking for Udre’s withdrawal.\(^{1281}\) Her withdrawal was a relatively easy accomplishment, since Udre lacked national support after the Latvian government had been defeated.\(^{1282}\) Prime Minister Emsis, whose minority government fell on 28 October, was a member of the Greens’ Union. Udre was a member of the Farmers’ Union, which together with the Greens formed the Union of Greens and Farmers. The Latvian government withdrew Udre on 30 October and replaced her with Andris Piebalgs on 2 November 2004.\(^{1283}\)

Considering that a withdrawal of Buttiglione, Udre and Hungarian candidate Kovács was the solution with the largest support among the Heads of State and Government, Kovács’ survival as a member of the team is surprising (although he was later assigned a different

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\(^{1278}\) MacDonald (2005) p. 194.

\(^{1279}\) Agence Europe, No. 8818, Saturday 30 October 2004, p. 6.


\(^{1281}\) Agence Europe, No. 8819, Wednesday 3 November 2004, p. 8; Agence Europe, No. 8820, Thursday 4 November 2004, p. 5 speaks of a request of Barroso.

\(^{1282}\) ‘The Latvian Government also fell yesterday, making it more likely that Ms Udre will lose her job,’. Anthony Browne and Rory Watson, ‘Europe woes sceptics on rocky route to ratify the constitution’, The Times, October 29, 2004; George Parker, ‘Latvian commissioner sacked in EU cull’, Financial Times, November 2, 2004.

The reason is that he could rely on continuing support of his government. The Hungarian government was willing to accept a different portfolio for her Commissioner-designate; Agence Europe, No. 8820, Thursday 4 November 2004, p. 5.

Not only did Hungarian Prime Minister Gyurcsány resist the pressure from his colleagues, Hungary also refused a request for withdrawal made by Barroso in a presumed letter. The Dutch and Danish government equally resisted the pressure for change of respectively Kroes and Fischer Boel, the Dutch government being forced by pressures from the Liberal group in Parliament to keep Ms Kroes on the competition portfolio. Between 29 October and 4 November there had been protesting voices against these countries’ candidates from groups in the European Parliament, but there had been no sign of a plenary rejection if none of them was withdrawn.

Barroso completes the changes and brings the political balance

If the Heads of State and Government managed to break the deadlock, they did not fully define the final solution, since it was Barroso who brought the necessary political balance. Barroso was faced with the withdrawal of only two candidates, since the Hungarian, Dutch and Danish government successfully continued to resist pressure to withdraw their candidate. Barroso therefore used his power to assign and shift portfolios to balance the solution between the main groups in the European Parliament. After the withdrawal of the conservative Buttiglione (affiliated to the EPP/ED group) and the liberal Udre (affiliated to the ALDE group), Barroso changed the portfolio of the socialist Kovács (affiliated to the PSE group). In fact, Pöttering after the withdrawal of Buttiglione had asked for ‘other changes’. Barroso had to satisfy the various groups in Parliament. This included the conservative EPP/ED group, which had to be persuaded that a reshuffle of Kovács would be sufficient. This took place in the office of the President of the EPP/ED group and former Prime Minister Wilfried Martens, where special efforts were needed to convince the opposition of the Hungarian members of Parliament’s conservative Group.

The need for this balance is illustrated by Barroso’s failed attempt to solve the situation on 26 October by asking Berlusconi to withdraw Italian candidate Buttiglione. This solution was blocked by Pöttering as he could not at that point accept a sacrifice solely by his group. At that point Barroso could not impose a balanced solution (since a balanced reshuffle...
was clearly not enough for Parliament) and the European Parliament, another candidate for finding an equilibrated solution for all main groups, had not been capable – nor willing – to find one.

It was only when Italy made known its new candidate Frattini on 4 November that Barroso could finalise the puzzle. On the same day the Council adopted the new list of Commissioners. If Monti had become the new Italian candidate Commissioner, this would have allowed Barroso to shift also Kroes away from competition. Even though the Dutch government had opposed a change in portfolio for its candidate Kroes, it would not necessarily have been able to prevent it. Barroso now chose to assign the Hungarian Kovács to the tax portfolio and give the energy portfolio to the new Latvian candidate Piebalgs, a decision he made public on November 5. Neither Hungary nor Latvia opposed this decision.

On 5 November Barroso met with the Conference of Presidents to present the changes. Although some MEPs were still not satisfied with the changes made, the main problems had been addressed. On 12 November the spokesperson for the three main political groups in the European Parliament (EPP/ED, PSE and ALDE) said that they would support the new team of Commissioners, while the Greens still intended to vote against. On 15-16 November 2004, a second round of hearings took place, after which the Committee chairmen sent their evaluation letters to President Borrell. No negative opinions were given this time. The changes were sufficient for a majority in the European Parliament, which approved the Commission on November 18.

4.2.3 Lessons about limits in the discretion to exercise legal powers in the investiture procedure

The powers of the President-designate of the Commission

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1292 Agence Europe No. 8820, Thursday 4 November 2004, p. 5.
1294 Agence Europe No. 8820, Thursday 4 November 2004, p. 5.
1295 Dissatisfaction was mostly expressed on maintaining of Kroes at Competition. A letter from Bourlanges to Watson proved that within ALDE resistance to the team had not ceased, some MEPs being especially disappointed by the survival of Kroes (a Liberal herself); Agence Europe No. 8827, Tuesday 16 November 2004, p. 4.
1296 Agence Europe No. 8826, Saturday 13 Nov. 2004, p. 6. The Greens were particularly unhappy with the survival of Kroes at Competition.
1297 A majority of the LIBE committee did reach agreement on the contents of the evaluation letter on Frattini, although the Greens and GUE could not agree to it. <http://www.europarl.eu.int/hearings/commission/2004_comm/pdf/lt_frattini1_en.pdf>.
1298 Agence Europe, No. 8830, Friday 19 November 2004, p. 4.
Article 17 TEU gives the formal power to adopt the list of Commissioners to the Council in common accord with the President-elect of the Commission.\textsuperscript{1299} Barroso thus needed the individual member states, which had the formal power to propose and withdraw their candidate (the Lisbon Treaty now speaks of ‘suggestions made by member states’\textsuperscript{1300}), and the Council to adopt a new list of Commissioners. On the other hand, his accord was finally necessary for that list to be adopted.

It can be argued that Barroso gave new substance to the involvement of the President-designate in the adoption of the list, by explicitly asking member states for a withdrawal of the proposed candidates. Sometimes the request was successful, as in the case of Italy and Latvia; sometimes it was without success, as in the case of Hungary and Netherlands. The explanations of the withdrawals given above indicate that a mere request by Barroso for withdrawal was not enough; in order for it to be successful he needed the pressures from the European Parliament and the Heads of State and Government and, in one instance, the fall of a national government.

A different power accorded to the President-elect is the power to allocate responsibilities to the individual Commissioners and to reshuffle the allocation of responsibilities during the term of office.\textsuperscript{1301} Also here a new substance was given by Barroso to this power by using it to change portfolios between Kovács and Piebalgs. In the past a candidate Commissioner has been denied certain parts of his portfolio in reaction to criticism from the European Parliament (for example the Irish Flynn in 1995), but this was the first time a true shift in portfolios took place during the investiture.

Even though it is Barroso who can formally assign portfolios and reshuffle them, the exercise of this power is not without constraints. In the first place, he will not always get the candidate of his preference. Barroso admitted during plenary in Parliament that he had preferred Monti over Frattini\textsuperscript{1302} but did not get him. Also, he is thought to have preferred female Patricia Hewitt over Peter Mandelson.\textsuperscript{1303}

Secondly, he has to resist pressure from member states, which evidently each want an influential portfolio. It could be said that Barroso resisted this pressure relatively well, considering that some of the most important positions (competition, internal market) went to

\textsuperscript{1299} Former article 214 EC Treaty.

\textsuperscript{1300} While confirming the power of the Member States to propose their candidate, the Treaty of Nice has formally shifted the nominating act from the governments of the Member States to the Council, acting by a qualified majority. The Lisbon Treaty has turned the proposals into what seems to be a lower qualification, namely ‘suggestions’. On the other hand, it has retained the Council as the nominating authority for the other Commissioners, whereas the power of nominating the President of the Commission and the final appointment of the whole body is attributed to the European Council (article 17(7) TEU).

\textsuperscript{1301} Article 217(2) EC Treaty during the ‘Barroso I’ investiture; now article 248 TFEU.

\textsuperscript{1302} ‘In the case of the Italian Commissioner, I accepted Franco Frattini. I wanted Mario Monti but the Italian government was not keen.’, Agence Europe No. 8830, Friday 19 November 2004, p. 6.

\textsuperscript{1303} MacDonald (2005) p. 192.
small member states like the Netherlands and Ireland and not to France or Germany. The Netherlands bargained intelligently, by only proposing a – much needed – female candidate in return for an influential portfolio.

Thirdly, the candidate himself needs to accept the portfolio that the President-designate has in mind for him, something the French candidate Barrot refused to do with regard to the justice and home affairs portfolio.1304

4.2.4 Autonomous, flexible and accidental constitutional development through convention

The conventional powers the European Parliament did and did not (yet) establish

Above the tension was noted between the European Parliament’s right to approve the Commission as a body and the vote in Parliament’s LIBE committee on 6 October 2004 on Buttiglione as an individual Commissioner. In fact, the 2004 investiture can be seen as a new step in the development from strict collegiality to individual political responsibility in the Commission investiture. Some, including Members of the European Parliament, have argued that a right for the European Parliament to reject individual Commissioners-designate has been established.1305 How exactly is the 2004 investiture a new step in the development of the investiture procedure?

One thing clearly did not happen. No power of the European Parliament was established to approve individual Commissioners through individual votes in plenary. This power has clearly not been established. A formal rejection of an individual Commissioner-designate has only taken place inside a parliamentary committee (Buttiglione, Kovács). A vote on an individual Commissioner-designate in plenary has not taken place and, it is here argued, would not have taken place. True, there has been a credible threat of a vote rejecting the Commission as a body, leading Barroso to withdraw his proposed team. But voting on individual Commissioners in plenary has never been an option. In the joint motion for a resolution by the PSE, ALDE, Verts/ALE and GUE/NGL groups tabled for the plenary session of 27 October 2004, the problem cases were intentionally not mentioned. And, apart from the Verts/ALE Group,1306 no group in Parliament has favoured voting on individual Commissioners-designate. A vast majority in Parliament still agrees that it is not appropriate to approve the Commission by voting on individual commissioners.

Yet, two Commissioners-designate have been forced to withdraw (Buttiglione, Udre), and one has had his portfolio changed (Kovács). These precedents show that the Commission

1304 ‘I fought hard for Mr. Barrot to take on the justice and home affairs portfolio, but he refused.’, Agence Europe No. 8830, Friday 19 November 2004, p. 6.
as a college is not immune to pressure from the European Parliament when it comes to its composition. Individual changes (note the plural!) have been triggered on the basis of individual performances and as a consequence of Parliament’s threat not to approve the Commission as a college. In fact, plenary votes on individual candidates are not the only way in which the European Parliament can impose changes on the Commission.

What then about a possible power of Parliament to reject individual Commissioners? It is argued here that the detailed description of the 2004 investiture above calls for a distinction between a power to impose unidentified changes and a power to impose a single, specified and individual change. In 2004 the latter power, to impose a specified, single change to the team, was not established. The explanation for this is that the European Parliament did not seize this power, or better, was not capable to do so. The European Parliament did in various ways express its dissatisfaction, including a committee vote, a credible threat with non-approval of the Commission, a resolution proposed (but never adopted) by a majority of parties stating that there were problems. However the problem cases were not named in the resolution, nor did the European Parliament agree on what the solution should look like.

The facts of the 2004 investiture show that it is difficult to define the demands of the majority of Parliament. Yes, the problem cases were more or less clear to the public, but from the beginning it was decided to leave Barroso discretion in finding a solution. Neither the problematic candidates nor the solutions were explicitly mentioned in the motion proposed by a majority of Parliament. It is interesting to note that the rejection of Buttiglione and Kovács in the parliamentary committees was not given more weight in the joint motion than, for example, the concerns about a possible conflict of interest for Kroes. Parliament was incapable of imposing a single solution and left this to Barroso and the member states.

The case for arguing the establishment of a right to reject an individual Commissioner would have been stronger had there been clear evidence that the acceptability of the Commission depended only on the acceptability of one Commissioner. On Tuesday 26 October, when it became clear that there would not be a majority for the Commission in a vote the day after, Barroso tested this hypothesis by opting for a withdrawal of Buttiglione. This attempt is an interesting precedent in itself, for it was only five years earlier that the then Commission President Santer opposed the resignation of an individual Commissioner, preferring the resignation of the whole Commission. Significantly, it was not Italy’s Berlusconi who blocked Barroso’s attempt, but EPP/ED leader Pöttering.

The dynamics of the events after Barroso withdrew his entire team suggest that an early withdrawal of Buttiglione would not have solved the problem for the whole Commission. They show that both to the Parliament and to the member states, the rejection of one single Commissioner would not have been acceptable. The fact that together with
Buttiglione also Udre and Kovács had to be sacrificed shows that any change in the composition of the Commission will face the test of European parliamentary politics, in which, for lack of a majority system, every interest has to be delicately balanced.\footnote{On the question whether the final solution should be seen as a political trade-off, Hänsch comments: ‘As a politician I would say no, but as a scientist analysing it, I would say yes. A political balance on important issues is inevitable in the EU.’, interview with Klaus Hänsch, Brussels, 18 October 2006.} Berlusconi set the stage for the negotiations between the member states by stating that a sacrificio by Italy would be possible only if it were not the only member state having to make one.\footnote{Marco Conti, ‘Il premier cerca alternative a Buttiglione’, Il Messaggero, 28 October 2004. See Beukers (2005) p. 223.}

While the 2004 investiture created an important precedent of several candidate Commissioners being changed after scrutiny by the European Parliament, at the same time it showed the limits to the power of Parliament to reject an individual Commissioner. Limits determined by the internal party structure of Parliament, which first prevented the imposition of a single, specified, solution and then forced Barroso to come up with a balanced solution. Below it will be shown how the 2010 investiture led to a new situation.

**A conventional power to impose changes and the limited discretion in the exercise of a member state’s power of candidacy**

A conventional power that Parliament can be said to have established in the 2004 investiture is the power to impose changes (note the plural) to the team of Commissioners, since it left the choice of the precise solution to the member states and to Barroso. It can be ascertained that Parliament has established the power to demand multiple, not specified (in terms of names) changes to the team of Commissioners.

This power to impose changes can also be understood as a limitation of the discretion in the exercise of a member state’s power of candidacy (including proposal and withdrawal of a candidate). In the past there was no serious limit to this discretion as member states could propose whomever they wanted without any serious scrutiny by other institutions or other member states. The parliamentary hearings organised by European Parliament and the following pressure on member states to withdraw their candidate, also by the President-designate of the Commission and by other Heads of State and government have created certain limits.

This is most evident in the case of Italy, which has been forced by events to withdraw its candidate Buttiglione. There was obvious resistance to Buttiglione in Parliament (though not formally expressed by a majority in plenary) and pressure by Barroso and Heads of State and Government, illustrating how the discretion in the exercise of the power of withdrawal...
was limited.\textsuperscript{1309} This is in stark contrast with a free decision of a government to withdraw its candidate in order for him/her to participate in a national election campaign or to become a member of that government, as happened in the case of Italy’s withdrawal of Commissioner Frattini in 2008 when he became the Italian Minister of Foreign Affairs.

### 4.2.5 Conclusions

The 2004 investiture illustrates how constitutional change through convention can be accidental. Some events that in particular seem to have led to the withdrawal and reshuffle of candidates can be ascribed to chance. The most telling is maybe the procedure chosen by the LIBE committee in its evaluation of Italian candidate Buttiglione, in particular the order of the votes first on his suitability as Commissioner for the freedom, security and justice portfolio and only then on his general suitability as a Commissioner. This order of vote sparked the political reaction of the EPP/ED in the second vote to the negative result of the first vote and therefore made Buttiglione’s position in the future Commission untenable. Another fortuitous element leading to the final balanced solution was the fall of the Latvian government, which opened the door for a withdrawal of Latvian candidate Udre.\textsuperscript{1310}

The investiture of the ‘Barroso I’ Commission equally illustrates what is meant with autonomous constitutional change through convention. The European Parliament, by threatening to use one of its formal powers – a credible threat to reject the Commission as a whole – has established a conventional power to impose changes of the team of Commissioners. The European Parliament has increased its powers, however, outside the legal framework of the Treaty amendment procedure, a procedure dominated by the member states.\textsuperscript{1311}

This contrast between the rigid amendment procedure of the Treaty and the way the European Parliament has circumvented this procedure by establishing conventional powers of scrutiny of a new Commission moreover illustrates the relatively flexible character of this source of constitutional development.\textsuperscript{1312}

The events of the 2004 round of hearings both confirm and develop the constitutional relevance of the scrutiny by European Parliament of individual Commissioners. Through the hearings and their follow-up, the possible constitutional consequences of a negative vote of a

\textsuperscript{1309} That the amount of discretion depends on the circumstances is evidenced by the case of the Netherlands and Hungary, since both member states successfully resisted the pressures to withdraw their candidate Kroes and Kovács.

\textsuperscript{1310} Below the distinction between constitutional change through grand design and chance is further discussed in relation the constitution of the European Union (paragraph 5.4).

\textsuperscript{1311} For more on constitutional development of the European Union in the light of the distinction between original change and autonomous evolution see paragraph 5.2.

\textsuperscript{1312} The distinction between rigid and flexible constitutional change is subject of paragraph 5.3.
parliamentary committee have been shown, as well as the consequences the European Parliament is willing to give in plenary to negative assessments of individual Commissioner-designates. The European Parliament has demonstrated its willingness to use the ‘nuclear option’ of rejecting the entire Commission over individuals.

The changes made to the composition of the Commission indicate a further development of its approval procedure. At the same time, these changes show the limits to Parliament’s power to reject an individual Commissioner. Interestingly, these limits to development of a power to reject individual Commissioners seem to have been imposed by political conditions, not by the legal rules. The European Parliament was not willing to vote on individual Commissioners and not willing nor capable to propose a precise solution to Barroso and the member states.

On this occasion the European Parliament has not seized the authority/taken the responsibility of proposing a single solution, i.e. by rejecting a single or more individual Commissioners in plenary (the different groups could not agree on this) and has left this decision to Barroso and the Heads of State and Government. However through the imposition by Parliament of multiple changes to the team of Commissioners, the formal legal power of individual member states to candidate is affected; the discretion in the exercise of this power is limited.

So far no individual votes have been held by Plenary on Candidate Commissioners and the motion tabled by Parliament during the 2004 investiture shows that it explicitly did not choose this option. Only the Verts group asked for this to happen, but the plenary chose to leave all options open to Barroso (and the member states).

4.3 Step 3: An individual withdrawal in the investiture of ‘Barroso II’ in 2010

The 2010 investiture of the ‘Barroso II’ Commission represents an interesting, further step in the development from strict collegiality to individual political responsibility of candidate Commissioners during the investiture procedure.1313

4.3.1 How Barroso’s hopes for a smooth investiture evaporated

The 2010 parliamentary committee hearings of the 26 candidates of the ‘Barroso II’ Commission were held from 11 until 19 January 2010.1314 This time Barroso wanted to prevent another threat of Parliament to reject his team like it threatened to do in 2004.

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1313 For an overview of the key dates of the 2010 investiture of ‘Barroso II’, see Annex III.
1314 The hearing for the new Bulgarian candidate was held on 3 February 2010; a preliminary parliamentary hearing for High Representative Catherine Ashton was held before Christmas, see Tony Barber, ‘Brussels leadership team faces grilling’, Financial Times, 11 January 2010.
Candidates were thoroughly prepared for the hearings, with Commission officials calling MEPs to know what they will ask during the hearings. Barroso, undoubtedly with the outspoken remarks of Buttiglione in 2004 in mind, had instructed his candidates by letter to cause ‘no waves’ during the hearings.

However, Bulgarian candidate Rumiana Jeleva caused serious problems as a result of her hearing on 12 January 2010 by the European Parliament’s development committee. Since there had been allegations against her in especially German media for some time, before the beginning of the hearing Barroso had sent a letter to the group leaders that accusations had to be backed up with evidence.

After the hearing Jeleva was strongly criticised for lack of competence and about her financial interests. Apparently she was ready to throw in the towel after her hearing, but she received strong backing from her political family, the EPP, of which she was a vice-President. Apparently also, Bulgarian Prime Minister Borissov could have replaced her at that point, but the strategy of the centre-right group in Brussels was to keep Jeleva.

However, by Thursday 14 January it was clear that the S&D (the Socialist group formerly called PSE), the Liberals, the Greens, the United Left and the European Conservatives and Reformists, which were withholding approval for Jeleva to become commissioner for humanitarian aid, would block Jeleva from becoming a Commissioner.

On that day European Parliament’s President Jerzy Buzek sent a letter to Barroso in which he asked whether Barroso was still confident that Jeleva could take up the portfolio of international relations and humanitarian aid and whether her declaration of interest was in conformity with the Commission’s code of conduct. Barroso replied in a letter that Jeleva’s declaration of interest was ‘fully accurate and complete’ and that she has the ‘necessary general competence’, interpreted as a subdued endorsement of his candidate.

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1318 ‘Parliamentary sources told EurActiv that Jeleva had already expressed the wish to withdraw in the hours after her hearing on 12 January. However, she was strongly advised by EPP leaders to stay in the race, the sources added. Sources in Sofia told EurActiv that Prime Minister Boyko Borissov had become conscious of the fact that the accusations against Jeleva were harming his party, GERB. According to these sources, Borissov could have replaced her days ago, but again, the strategy of the centre-right Brussels politicians had been to keep Jeleva, who was recently elected EPP vice-president.’ ‘Jeleva pull-out upsets Barroso II plans’, Euractiv, 20 January 2010.
1321 Honor Mahony, ‘Barroso backs Bulgarian commissioner designate’, EUobserver, 15 January 2010.
1322 Honor Mahony, ‘Barroso backs Bulgarian commissioner designate’, EUobserver, 15 January 2010; According to Simon Tayer Barroso supported Jeleva, but not wholeheartedly, see Simon Taylor, ‘How Jeleva was forced out’, European Voice, 21 January 2010.
4.3.2 How the Socialists and Liberals prevented their candidates from becoming part of a balanced solution

As during the 2004 investiture, the serious attack on one candidate and delay of a final decision provoked a political reaction from the candidate’s group. In an attempt to prevent the candidacy of Jeleva from being blocked, the EPP immediately raised doubts about a socialist candidate, Slovakian Šefčovič, who was only to be heard on January 18. Apparently, as EPP sources claimed, he had made certain comments in 2005 putting Roma population in a bad light. This move was similar to the one made during the 2004 investiture, when socialist Kovács was attacked by the right in reaction to the criticism of conservative Buttiiglione from the left. It seems that stalling the committee’s decision on a candidate has become the way to put pressure on the other groups.\footnote{Simon Taylor, ‘Parliament’s attack on Jeleva intensifies’, European Voice, 15 January 2010.}

Also, on 15 January it was decided that Liberal candidate Kroes from the Netherlands had to attend a second meeting with the political group co-ordinators on the industry committee, in a move interpreted as taking Kroes hostage to prevent the Liberal group from voting against either Christian-Democrat Jeleva or Socialist Šefčovič.\footnote{The tactics of stalling the procedure and delays of the evaluation letter were tried by the liberals and socialists with regard to conservative candidates Jeleva and Semeta, and by conservatives and socialists with regard to liberal candidates Kroes, Rehn and Malmström.}

Dutch Liberal MEP Van Baalen commented: ‘They have just taken her hostage to protect their own weak candidate Commissioners.’\footnote{Andrew Willis, ‘Kroes’ future hangs in the balance’, EUobserver, 15 January 2010; Caroline de Gruyter, ‘Parlement pest Kroes omdat ze liberaal is’, NRC Handelsblad, 15 January 2010.} Apparently, Socialists and Christian-Democrats were already talking about a re-sit before Kroes’s hearing had started.\footnote{Martin Visser, ‘Twee grootste Europese fracties keuren Kroes nog niet goed’, Het Financieele Dagblad, 15 January 2010.} A Commission official close to Kroes accused Parliament of ‘making it up as they go along’.\footnote{Caroline de Gruyter, ‘Parlement pest Kroes omdat ze liberaal is’, NRC Handelsblad, 15 January 2010.} Kroes was criticised for being too vague, which was no different from many other candidates heard before her, but when it was her turn frustration about this had grown among many MEPs.\footnote{Andrew Willis, ‘Kroes’ future hangs in the balance’, EUobserver, 15 January 2010.}

4.3.3 ‘Jeleva resigns before being pushed’\footnote{Jeroen van der Kris, ‘Parlement vecht om macht in dramatisch spel’, NRC Handelsblad, 21 January 2010, p. 6.}

Late on Monday evening of 18 January the political group co-ordinators of the Parliament’s development committee met to discuss Jeleva, but could not reach a consensus. The committee would take a formal decision, by individual votes, on her on Tuesday 19 January

\footnote{'Jeleva resigns before being pushed', European Voice, 19 January 2010}
if her name would not be withdrawn before.\textsuperscript{1331} It became clear that with her in the team, most political groups would vote against the Commission.

That night there was contact between Barroso and Bulgarian Prime Minister Borissov. ‘Following contacts on Monday between Barroso and Borissov, the Bulgarian prime minister was persuaded to drop Jeleva.’\textsuperscript{1332} Barroso may have used the 2004 precedent of Buttiglione to convince Borissov that Jeleva’s position was untenable if a majority in Parliament expressed its willingness to reject the Commission with a specific member in it. In that sense the position of Barroso may have come out stronger from the events of 2004.

4.3.4 EPP leader Daul does not repeat his predecessor’s 2004 stalemate

On Tuesday morning Jeleva withdrew her candidacy, in what Barroso described as a ‘personal decision’.\textsuperscript{1333} In her page long letter to Commission President Barroso and Joseph Daul, French leader of the EPP, Jeleva was extremely critical of the way she was treated by Socialists and Liberals. It is not likely that Barroso has tried to convince her to reconsider.\textsuperscript{1334} Bulgaria immediately informed Barroso about its new candidate, Kristaline Georgieva, at that time vice-president of the World Bank. However, with the outcome of a number of hearings still uncertain and the memories of the balanced solution of 2004, Barroso could not yet confirm that the new Bulgarian candidate would get the same portfolio.\textsuperscript{1335}

What seems to have allowed things to take a different course from 2004, when Buttiglione was convinced not to step down on the eve of the planned Parliament’s plenary vote on the Commission, is EPP leader Joseph Daul’s way of handling the situation. Remember how the EPP group and its then leader Pöttering in 2004 had created a stalemate on the evening before the planned vote in plenary on Barroso’s first Commission.\textsuperscript{1336} Daul apparently has not been able to continue to convince Jeleva from staying, as Pöttering managed to do with Buttiglione in 2004. Daul also has not threatened that his EPP group would vote against Barroso’s team if Jeleva were not in it, as Pöttering had successfully done on 26 October 2004. Pöttering had used the knowledge that Barroso would never accept his team to be approved by a majority that did not include the group to which he himself is affiliated, the EPP.

\textsuperscript{1333} ‘Jeleva resigns before being pushed’, \textit{European Voice}, 19 January 2010.
\textsuperscript{1334} ‘Le retrait de Mme Jeleva, que M. Barroso n’a rien fait pour retenir (…)’, Philippe Ricard, ‘Une nouvelle candidate bulgare à la Commission’, \textit{Le Monde}, 21 January 2010; ‘But Mr Barroso’s willingness to let Ms Jeleva’s head be offered to the parliament was also a shrewd calaculation that it would smooth the way for the confirmation of his new team’, Tony Barber and Joshua Chaffin, ‘Bulgaria drops candidate for Brussels post, \textit{Financial Times}, 20 January 2010.
\textsuperscript{1336} See paragraph 4.2.1 above under ‘Barroso is forced to turn to the member states’.
Daul and his EPP thus have not played the game as tough as Pöttering did in 2004, and after Jeleva withdrew her candidacy, their position was weakened.\textsuperscript{1337} No doubt the EPP has looked for a victim from another group to ease the political blow, even though Daul commented: ‘don’t expect any blood on the carpet. We are a responsible group.’\textsuperscript{1338} Interestingly, liberal MEP Duff commented that the EPP should in fact resist any urge to engage in a partisan bloodbath, as it would violate Parliament’s formal agreement with the Commission on the conduct of the hearings.\textsuperscript{1339} It seems however that no Socialist candidate’s performance was poor enough to provide the EPP with the leverage to successfully claim a political balance in the change(s) to Barroso’s team.

On Tuesday 19 January a second, closed, hearing was held for Kroes in Strasbourg, during which only the spokesman for each political group in the industry committee put questions.\textsuperscript{1340} It is illustrative of the consequences of the internal political turmoil in the European Parliament for the candidates that on Monday evening Kroes had not yet had a formal request for a follow-up meeting (but had already travelled to Strasbourg just in case).\textsuperscript{1341} Only on Wednesday evening 20 January she got the green light from the committee. Political tit-for-tat continued however, as the EPP group in the civil liberties committee delayed work on the evaluation letter of Swedish Liberal candidate Malmström and, in reaction to that, the liberal group in the budgetary control group prevented the adoption of Šemeta’s evaluation letter.\textsuperscript{1342} In the end, however, these two last candidates received a green light from their committees, as did the new Bulgarian candidate Georgieva. On 9 February the European Parliament approved the new Commission by an overwhelming majority.

4.3.5 \textit{A new step in the development of individual political responsibility} 

Above it was argued that the 2004 investiture of ‘Barroso I’ called for a distinction between a power of the European Parliament to impose multiple, balanced changes on the team of Commissioners and the power to impose an individual, specific change. It is in the light of this distinction that the novelty of the investiture of ‘Barroso II’ can be understood as well as

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\textsuperscript{1337} ‘A decision by centre-right Romanian [Bulgarian; T. Beukers] candidate Rumania Jeleva to withdraw her strongly contested candidacy on Tuesday also helped clear the air, with some observers saying objections to Ms Kroes were largely politically motivated as parliament’s groups engaged in a round of tit-for-tat attacks on opposition candidates.’, Andrew Willis, ‘Kroes does enough as new date set for EP vote’, \textit{EUobserver}, 19 January 2010.
\textsuperscript{1338} Honor Mahony, ‘European commission vote may be delayed as Jeleva steps down’, \textit{EUobserver}, 19 January 2010.
\textsuperscript{1339} Jim Brunsden, ‘Jeleva was ‘right to step down’’, \textit{European Voice}, 19 January 2010. Duff probably referred to point 7 of the 2005 Framework Agreement which states: ‘The procedures shall be designed in such a way as to ensure that the whole Commission-designate is assessed in an open, fair and consistent manner.’
\end{flushleft}
a further development towards individual political responsibility of candidates during the investiture.  

Again no votes of approval have been held on individual candidates in plenary (nor in a committee this time). Nor was a plenary position taken in Parliament that imposed a single solution. But through a successful threat of a majority in Parliament to vote against the Commission if Jeleva was in it, and through the incapability of the EPP to obtain a political balance, the power of the European Parliament to force the withdrawal of a singular candidate has been established.

Is there now a customary law prescribing that Parliament can reject the candidacy of a single Commissioner, as NRC Handelsblad Brussels correspondent Van der Kris argues? In a comparison with the 2004 investiture he argues that

Parliament then had to threaten with rejection of the whole Commission. Formally MEPs may not send home individual candidates. This time the group spokesmen only had to threaten with a negative report on Rumania Jeleva, the Bulgarian candidate. A customary law has been established: Parliament can reject a single candidate.

It is argued here that also this time a credible threat of rejection of the whole Commission was necessary for the dynamics of withdrawal to be created. More interesting is the use by Van der Kris of the term ‘customary law’. In chapter 3 this concept was contrasted with ‘convention’. The concept ‘customary law’, apart from the question whether an ‘opinio iuris’ exists and with who, is problematic here considering that there is a single precedent, but no custom yet. By contrast, it could well be defended that the European Parliament has now established a conventional power to reject an individual candidate, based on a single precedent and the conviction that a candidate against whom a majority of Parliament expresses that he/she should not be in the Commission – for example through the group...
leaders’ declaration that their group intends to vote against the team – has to leave (either withdraw or be withdrawn).  

The withdrawal of one single candidate, without a political balance between the main political groups being imposed, is different in comparison to what happened in the 2004 investiture. Why was there no balanced solution this time? This can be explained by the combination of circumstances, including EPP leader Daul’s strategy not to play tough, Jeleva’s decision to resign, and the performances of the other groups’ candidates.

4.4 Conclusions

The organisation of parliamentary committee hearings since 1995 meant a first important crack in the strict application of the principle of collegiality of the Commission during the investiture. Even though no individual votes have been held by Parliament’s plenary on candidate Commissioners since, this conventional obligation has led to some important further developments in the direction of individual political responsibility during the 2004 and 2010 investitures of respectively the Barroso Commissions I and II. Several unprecedented political dynamics have led to the establishment first of a conventional power of Parliament to impose multiple, balanced changes to the team of Commissioners in 2004 and then also to a power to impose an individual, specific withdrawal in 2010. This evolutionary process highlighted a number of characteristics of convention as a source of constitutional development, namely its flexible, autonomous and accidental nature.

5 Convention as a source of constitutional evolution of the European Union

5.1 An independent source of constitutionalisation

It is now time to turn to my explicit claim for an independent place of convention as a source of constitutional development, next to Treaty amendments, case law and practice. What was above illustrated through the facts of the history of the Commission investiture, namely that the constitutionalisation of the European Union is of an evolutionary nature and that convention has a crucial role in this process, will now be given a more solid theoretical basis.

1347 Compare the analysis of the Financial Times prior to Jeleva’s resignation: ‘The parliament does not have the legal power to reject individual candidates, only the new European Commission as a whole. But if legislators were to raise particularly strong objections to a candidate, José Manuel Barroso, Commission president, would probably be obliged to withdraw his or her name.’, Joshua Chaffin, Nikki Tait and Tony Barber, ‘De Gucht warns on carbon border tax’, Financial Times, 13 January 2010 [Italics by T. Beukers].
A particular connotation of the concept of constitutionalisation in the context of the European Union relates to the transformation of the Community from an international to a constitutional legal order.\footnote{Craig (2001) p. 128; Christoph Möllers, ‘Pouvoir Constituant – Constitution – Constitutionalisation’, in: Armin von Bogdandy and Jürgen Bast (eds.), Principles of European Constitutional Law, second edition (Oxford, Hart Publishing 2009) p. 169-204 at p. 195.} This specific use of the notion is central to the traditional tale of constitutionalisation of the European Union, its judicial constitutionalisation by the European Court of Justice. It is also related to a formal concept of constitution. However, in this book a broader concept of constitution is used, related to the functions of establishing, organising and limiting public powers (see chapter 1); similarly, constitutionalisation is understood here not only as a legal concept.

Recently, various broader definitions of constitutionalisation of the European Union have been given. Curtin refers to ‘the movement towards attaining defined constitutional features and one or other form of a ‘constitution’.\footnote{Curtin (2009) p. 81. Similarly Craig (2001) p. 127.} She includes the expansion of the rule of law by the courts, but interestingly also ‘practices that emerge on the ground that reinforce accountable institutions’.\footnote{Curtin (2009) p. 81.} For Christiansen and Reh the concept denotes the process that has conferred and is conferring a constitutional status on the basic legal framework of the European Union, including the transformation to a legal order ‘in which the controls and exercise of public power are similar in nature to those found in the member states’.\footnote{Christiansen and Reh (2009) p. 5.} Peters notes that the ‘initial academic focus on the ECJ as a constitution-maker has given way to a broader concept of constitutionalisation’,\footnote{Peters (2006) p. 36.} namely the transformation of the European Union in to a political system on a constitutional basis. I would argue that this transformation to a political system on a constitutional basis includes the creation of accountability mechanisms and the strengthening of authority of the representative institutions in the European Union.

Various authors have noted the evolutionary nature of the constitutionalisation of the European Union.\footnote{See for example Christiansen and Reh ( 2009) p. 4; Peters (2006) p. 47; Besselink (2003) p. 13-26.} However, the role of convention in this evolution has to a large extent been neglected. Besselink for example considers the constitution of the European Union as a 
\textit{young constitution of old style},\footnote{Besselink (2003) p. 13-26.} meaning that it originates through \textit{evolution} (a process over time, a primary example is the Constitution of the United Kingdom) as opposed to a \textit{revolution} (a constitutional big bang, such as the Constitution of the United States). Focusing
on the legal sources of development, he does not include practice or convention as a source of constitutional evolution of the European Union.1355

Whereas Curtin includes practices as a source of constitutionalisation, Peters importantly also considers convention.1356 She identifies a relatively broad array of constitutionalising acts,1357 including what she calls soft law or conventions: the Luxembourg Accords, the Joint Declaration against Racism and Xenophobia, the Interinstitutional Declaration on Democracy, Transparency and Subsidiarity and the Charter of Fundamental Rights.1358 Not mentioned and arguably just as important, or even more, are the Interinstitutional Agreements on budgetary discipline and the Framework Agreement on relations between Commission and Parliament. Moreover, not only written convention, such as important Interinstitutional Agreements, but also conventions based on practice or precedent should also be taken into account.

The importance of Intergovernmental Conferences (IGCs) and the following Treaty amendments for the development of the constitution of the European Union can hardly be exaggerated. Revision Treaties concluded since the mid eighties have brought important institutional changes, such as the extension of qualified majority voting in Council decision making, the introduction of the cooperation, co-decision and ordinary legislative procedure, the increased role of the European Parliament in the Commission investiture.1359

Equally, the role of the European Court of Justice’s case law in the constitutional evolution of the European Union can hardly be exaggerated. In fact, the traditional tale of the constitutionalisation of the European Union is that of the judicial constitutionalisation of the European Union by the European Court of Justice.1360 In landmark cases the Court has determined especially the vertical relations between the Community/Union and its member states (Van Gend & Loos, Costa ENEL, Francovich). The Court has arguably been less decisive in determining the horizontal relations at the Union level.1361 However, it is not

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1356 This even though she adopts a legal definition of constitutionalisation, as ‘the emergence of European constitutional law within the European legal order’, see Peters (2006) p. 36.
1357 Interestingly, but rather incidentally, as constitutionalising acts she also mentions ‘constitutionally significant autonomous modifications to the Treaty law by European institutions’, even though it remains unclear what modifications she refers to. Peters (2006) p. 50.
1359 The constitutionally important decision on direct elections for the European Parliament took the form of a Council decision.
1361 On the role of the European Court of Justice in determining horizontal relations between the European institutions see also chapter 4, paragraph 3.4.
uncommon for constitutional courts to be relatively absent from the latter field in national constitutions.\textsuperscript{1362}

Many important constitutional developments originated furthermore in political practice. The institution of the European Council is only the most telling case. Various constitutional conventions based on practice or precedent have been discussed throughout this book.

Such practices have often been seen as an empirical stage preparing the ground for Treaty change. In the following it will be argued that conventions based on practice as well as on written agreement should be seen not only as an empirical stage anticipating Treaty amendment, but exist as an independent source of constitutional development and of constitutionalisation of the European Union. Moreover, it will appear that their existence is an element of autonomous development of the political constitution in relation to the legal constitution.

\textit{5.1.1 Convention as an anticipation of Treaty amendment}

Various authors have noted the possible anticipatory function of empirical practices and informal institutions to later Treaty amendments. In chapter 2 a number of political scientists were found to consider the application of Treaty provisions as an explanation of institutional change and, more specifically, of subsequent Treaty changes. Hix illustrates how ‘Constitutional reform’ (amendment) in the European Union is affected by ‘Constitutional operation’ (re-interpretation given to rules) that deviates from the original ‘Constitutional design’.\textsuperscript{1363} Farrell and Héritier show how the process of informal institution-building may, in turn, affect future formal Treaty changes.\textsuperscript{1364} Their case in point was the abolishment of the Council’s third reading powers of the co-decision procedure.

In chapter 2 it was argued that political scientists have not, or not fully, recognized the rule character of the disuse of the third reading powers.\textsuperscript{1365} In the following it will be emphasised that conventional rules can be a structural element of the (political) constitution before and independently from their (possible) inclusion in the formal Treaties. First, however, it is good to illustrate that conventional rules do indeed have an anticipatory function to Treaty change and that this holds for both conventions based on practice and conventions based on written agreement.

\textsuperscript{1362} A. Dölle, \textit{Over ongeschreven staatsrecht} (Groningen, Wolters-Noordhoff 1988) p. 36: ‘De rechter ontbreekt op vitale onderdelen van het staatsrecht waardoor vaak die organen met de handhaving van gewoonterechtelijke normen zijn belast die tevens onder het beslag van die normen vallen.’

\textsuperscript{1363} Hix (2002) p. 272.

\textsuperscript{1364} Farrell and Héritier (2003) p. 578.

\textsuperscript{1365} In chapter 3 it was moreover argued that the concept of institution is too broad to be used for distinguishing between practice and convention, as it includes both.
There are numerous examples of conventions, based on practice or on written agreement, which have later been incorporated or reflected in the Treaty. The abolishment of the Council’s third reading powers in the early co-decision procedure (now the ordinary legislative procedure) by the Treaty of Amsterdam (1999) after their disuse is only one example of a convention based on practice, reflected in a Treaty amendment.\footnote{See chapter 2 on the third reading of the co-decision procedure.}

A number of Treaty elements of the investiture procedure have found their origin in practice and conventions based on practice. The vote by Parliament on the European Commission as a team first took place in February 1981 (Thorn Commission), and was only given Treaty status in the Maastricht Treaty of 1993. A vote on the nominee for President was held for the first time in July 1992 and prepared the way for Jacques Delors’s third term as Commission President. In 1994 nominee for President Jacques Santer indicated that he would go quietly in case of a parliamentary rejection.\footnote{Simon Hix and Christopher Lord, ‘The Making of a President: The EP and the Confirmation of Jacques Santer as President of the Commission’, Government and Opposition (1996) p. 62-76 at p. 69.} In other words, he considered its result binding. The power of European Parliament to approve the Commission President by vote was only incorporated in the Treaty of Amsterdam (1999).\footnote{Article 214(2) EC Treaty.}

Another interesting example is the precedent set for taking into account the elections to the European Parliament in the (European) Council’s proposal for candidate for the Presidency of the Commission. A precedent was established during the 2004 investiture when, at the insistence of conservative EPP/ED Group leader Pöttering, conservative Barroso was chosen as candidate, notwithstanding the pressure of French President Chirac and German Chancellor Schröder for (their) Liberal candidate Verhofstadt.\footnote{On the role of the EPP/ED in the choice of Barroso, see extensively Martens (2006) p. 731-733.} Interestingly, this precedent was set during the negotiations for the failed Constitutional Treaty, which, as does the Lisbon Treaty, required that the proposal for candidate for Commission President take into account the elections to the European Parliament.\footnote{Article I-27(1) Treaty establishing a Constitution for Europe. See also Martens (2006) p. 723.} One only has to remember the candidacy of Santer in 1994, even though the Socialist group was the largest in the European Parliament, to realise that this was not always so obvious.\footnote{See Martens (2006) p. 662.}

The same anticipatory function has been noted with regard to Interinstitutional Agreements. Marti for example speaks of the ‘function d’anticipation’ of Interinstitutional Agreements.\footnote{Gaëlle Marti, ‘Les accords interinstitutionnels: source du droit constitutionnel de l’Union européenne?’, paper for VIème Congrès français de droit constitutionnel – AFDC, Montpellier, juin 2005, p. 3.} Kietz and Maurer apply a similar reasoning to the origin of Interinstitutional Agreements and
their possible influence on Treaty amendments. They argue that through path dependence Interinstitutional Agreements ‘shape the realm for further developments by narrowing the scope for possible change and by indirectly obliging Member States to think only of the incremental revision of existing arrangements’. In particular, the European Parliament uses formal bargaining powers in a context of conflict to wrest concessions from the Council and the Commission in Interinstitutional Agreements, agreements which can then be instrumental in Treaty reform.

From the Financial Perspective (IIA) to the Multiannual Financial Framework (Regulation)

A good example of a written convention which has led to a Treaty amendment is the Interinstitutional Agreement on budgetary discipline. Formerly part of this agreement, the Financial Perspective/Multiannual Financial Framework as of the Lisbon Treaty takes the form of a regulation (article 312 TFEU). Already before this Treaty amendment it had significant structural consequences, by way of its rule character and through the anticipation of institutions to it.

The Interinstitutional Agreements on budgetary discipline and the Financial Perspectives have led to a new multi-annual budgetary cycle and have become a central element of reference for the annual budgetary procedure. The impact of both agreements on the exercise of powers in the annual budgetary procedure has already been discussed in chapter 4. They have been able to function as a new ceiling for non-compulsory expenditure, independently from the ceiling established by the Commission on the basis of the Treaty. They have also limited the possibility to shift expenditure from one heading to another.

The Interinstitutional Agreements on budgetary discipline (including the Financial Perspectives) have thus significantly changed the constitutional structure of decision making on Union finance. They have led to the development of a multiannual budgetary cycle for the most important financial policy decisions concerning revenue and – notably, agricultural and structural – expenditure. In this new structure, the decisions on medium-term revenue and expenditure of the European Union, which originally were separate, have become linked up in a single package deal.

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1375 See also chapter 4, paragraph 3.3 for a discussion of the Interinstitutional Agreement on budgetary discipline and the Financial Perspective included in it. It was there argued that the Interinstitutional Agreement on budgetary discipline is best understood as a conventional agreement.
1376 See chapter 4, paragraph 3.3.2.
1377 Note that the financial perspectives are not a budget in the strict sense of entailing an authorisation to spend, see Piris (2010) p. 294. However, it can rightfully be seen as part of the budgetary procedure.
The multiannual budgetary cycle consists of a Decision on Own Resource, a decision that is taken by the member states on the basis of article 311 TFEU (former article 269 EC Treaty). It also includes the Interinstitutional Agreement on budgetary discipline, which fixates the ceilings for various expenditure categories. The Treaty does not provide a legal framework for this medium-term decision making on expenditure. In fact, the time elements in the Treaty paragraph on the finances of the Union are related to the annual budgetary cycle.\footnote{Articles 271/272 EC Treaty.}

Since 1988 the multiannual budgetary cycle has functioned in a regular and stable way.\footnote{See Annex IV with dates of the European Council political agreement on multi-annual Revenue and Expenditure, the Interinstitutional Agreements on budgetary discipline and the Council Decisions Own Resources since 1988. On a regular basis new Decisions on Own Resource have been taken (OJ 2000 253/42, 7/10/2000), accompanied by a Financial Perspective setting the annual ceilings of expenditure for the various Union policies and followed by an Interinstitutional Agreement on budgetary discipline (1988, 1999, 2006).} Member states are aware of this cycle and try to anticipate it. One example of such anticipation is the October 2002 Brussels European Council decision to freeze agricultural expenditure for the whole period of the next financial perspective 2007-2013.\footnote{Namely at the 2006 level as established at the March 1999 Berlin European Council in the financial perspective for 2000-2006. See Brussels European Council Presidency Conclusions, 24/25 October 2002, doc 14702/02, provision 12.} While the European Union was in need of a financial basis for the 2004 enlargement with 10 new member states, France successfully linked this to securing its agricultural subsidies after that enlargement. It placed a ‘coup’ in October 2002, in the form of a Franco-German deal on freezing agricultural expenditure for 2007-2013.\footnote{See for details: Peter Ludlow, ‘The Brussels European Council. October 24 and 25, 2002’, EuroComment Briefing Note, No. 8 (October 31, 2002).} Blair was so keen on enlargement that he, reluctantly, accepted.

This political agreement of October 2002 dominated the negotiations on the financial perspective for 2007-2013 in 2005, as it had already set the parameters for the negotiations over the most important expenditure category: agriculture. In June 2005 Blair tried hard to link a possible reduction of the British rebate to a change in the 2002 European Council agreement, causing a failure of the June European Council. But he had to give in at the December 2005 European Council under his Presidency and bow to the compelling character of the agreement.\footnote{As can be read in the Presidency Conclusions: “The amounts for market-related expenditure and direct payments correspond to those agreed at the October 2002 European Council, expressed in 2004 constant prices. These constitute a ceiling and (…)”, Council of the European Union, 15915/05 Cadrefin 268, Brussels, 19 December 2005, provision 61.}

Another example of anticipation of a new European Council agreement on Union finance is the famous letter sent on 15 December 2003 by the six net contributors to the Union – France, Germany, the Netherlands, Sweden, the United Kingdom and Austria – to Commission President Prodi. In this letter they argue that expenditure in the next financial perspective period should not exceed 1% of GNI. They put pressure on first the Commission
(which then proposed 1.24% – 1025 billion euros – so the success is debatable) and then on other member states to accept budgetary discipline. The attempt ultimately proved successful, considering the final agreement at the December 2005 European Council (1.045% of GNI).

To understand why the Interinstitutional Agreements on budgetary discipline have had such a profound impact on budgetary decision making, it should be remembered that they are an answer to the structural conflicts the Community was dealing with in the 1980’s. These related to the need to find new resources for a Community that was on the brink of bankruptcy and needed to finance the completion of the internal market, the costs of enlargement and of (new) Community policies. They also related to the continuing institutional conflict between the Council and the European Parliament in the annual budgetary procedure. The agreement has been able to reduce conflict on the definition of the two categories of expenditure that are typical for the Community and on the maximum level to which the European Parliament can raise non-compulsory expenditure. It also restored budgetary discipline, providing a structural solution for structural problems.

5.1.2 Stable conventions which have not been followed by Treaty amendment, and are not likely to be

Conventions may often function as an anticipation of Treaty amendment, but this is not always the case. It is important to recognise the effect they have in changing the structure of the constitution before and independently from a following Treaty amendment. This structural impact is not always recognised by legal scholars and political scientists, as was illustrated in chapter 2 on the third reading of the co-decision procedure.

A good example is the political obligation of candidate Commissioners to appear before a parliamentary committee hearing in the investiture procedure, which has not been incorporated in the Treaty, but which already now, on the basis of its rule character, has a significant effect on the constitution of the European Union. Héritier argues that the European Parliament has not requested incorporation of the hearings in the Treaty, because there was no need to: the de facto rule could be directly derived from the right to vote on the Commission as a whole.

More conventions exist that are stable and enduring and arguably a part of the structure of rules that constitutes the constitution of the European Union, without it being

1384 As it successfully did with regard to the abolition of the Council’s third reading powers – that were discussed in chapter 2 – by threatening to reject any common position if these powers were not formally abolished, see Adrienne Héritier, Explaining Institutional Change in Europe (Oxford, Oxford University Press 2007) p. 109.
likely that they will be incorporated in the Treaty. Italian constitutionalist Rescigno in this light identifies constitutional conventions that should be left to the autonomy of the political actors for reasons of political opportunity. 1386

One further example of a stable element of the constitution of the European Union that is not likely to be incorporated in the Treaty is the Framework Agreement on Relations between the European Parliament and the Commission. Kietz and Maurer argue that there is no need for further codification of the Framework Agreement, since the rules established in order to hold the European Commission accountable are adhered to by the Commission.1387

Two other explanations could be given. The first is that the member states are not a party to these agreements and the Council has even openly expressed its opposition to their conclusion in 2000 and in 2005. The second is that these agreements are concluded in the context of the relation of political accountability of the Commission to Parliament and positions about their negotiation are taken already during the investiture procedure of the Commission.1388

Another stable, structural, element of the constitution of the European Union not likely to be incorporated is the veto power based on a conventional commitment of a number of member states to support each other’s invocation of a fundamental interest to block a qualified majority vote. Even though invocation is not frequent, as the discussion in chapter 3 illustrates, the commitment has not disappeared with the Single European Act, as is often thought.1389 Again, it is not likely that this element will find its way into the Treaty. The reason is that it is simply too much contested by the other member states not part of the so-called ‘Luxembourg Compromise Club’. On the other hand it is interesting to note the resemblance with the veto power of the emergency brake procedure introduced by the Treaty of Amsterdam (1999) the scope of which was extended by the Lisbon Treaty (2009), giving members of the Council the possibility to block a qualified majority decision by invoking fundamental aspects of the criminal justice system (article 82(3) TFEU), important aspects of the social security system (article 48 TFEU) or vital and stated reasons of national policy with regard to the Common Foreign and Security Policy (article 31(2) TEU).1390 These emergency brake procedures were necessary to have qualified majority voting accepted also in these fields.

1386 Rescigno (1972) p. 18: ‘(...)' in parte debbono rimanere affidate alla autonomia dei soggetti politici per ragioni di opportunità politica (cosicché non potrebbero divenire giuridiche perché non sarebbe opportuno politicamente che esistessero altri giudici di queste regole oltre i soggetti ai quali esse si riferiscono).’
1388 See in more detail about the Framework Agreement on Relations between the European Parliament and the Commission chapter 4, paragraph 3.1.
1389 See chapter 3, paragraph 4.3.
Conventions can thus be a stable element of the constitution of the European Union independently from a following Treaty amendment. In fact, as will be seen, even though conventions are flexible procedurally, they are not necessary so with regard to frequency and ease of change.1391

5.1.3 Conventions that disappear and re-emerge: the Ioannina Compromise

Conventional elements of the constitution of the European Union may lose relevance, disappear and later emerge. An interesting example is the Ioannina Compromise. This 1994 Compromise, which arguably constituted a conventional agreement,1392 soon lost practical relevance, died with the Treaty of Nice (2003), but has recently re-emerged through the Treaty of Lisbon (2009).1393

The 1994 Ioannina Compromise was an Intra-institutional Agreement concluded between the members of the Council and therefore somewhat different from the Interinstitutional Agreements discussed in chapter 4. The agreement stipulated that if a large minority of member states opposed a decision by qualified majority voting, member states could ask for negotiations to continue for a reasonable period.1394

The agreement was necessary to break a deadlock situation in the Council and to get British and Spanish support for the new definition of qualified majority following the accession of new member states in 1995. However, it is generally argued that the Ioannina Compromise has hardly been invoked in Council decision making. Former German Coreper member Jochen Grünhage remembers:

The Ioannina Compromise was invoked twice. I remember a UK invocation of the Ioannina Compromise. The UK mentioned that there were a certain number of votes against and the Presidency then replied: “Ah, so you are invoking the Ioannina Compromise!” After a break agreement was found.1395

1391 See paragraph 5.3.
1392 An indication is the publication of this decision in the C-series of the Official Journal. For more on the differences between conventional and legally binding agreements, see chapter 4.
1394 ‘If Members of the Council representing a total of 23 to 25 [26] votes indicate their intention to oppose the adoption by the Council of a Decision by qualified majority, the Council will do all in its power to reach, within a reasonable time and without prejudicing obligatory time limits laid down by the Treaties and by secondary law, such as in Article 189B and 189C of the Treaty establishing the European Community, a satisfactory solution that could be adopted by at least 65 [68] votes. During this period, and always respecting the Rules of Procedure of the Council, the Presidency undertakes, with the assistance of the Commission, any initiative necessary to facilitate a wider basis of agreement in the Council. The Members of the Council lend him their assistance.’
1395 Interview with Jochen Grünhage, Brussels, 12 February 2008. Compare Sliben: ‘In one case about telecommunications there was a very long discussion. The British invoked Ioannina to continue the negotiations and in the same meeting agreement was found.’, interview with Niels Henrik Sliben, Copenhagen, 14 November 2008; ‘The Ioannina Compromise is what we in Austria would call a ‘Beruhigungstropfen (tranquilizer)’, it sounds good, but in practice it is not important. The Ioannina Compromise may sometimes have been brought up,
Also, in those rare instances that it has been invoked it has not led to substantive changes of significance.\textsuperscript{1396} The substance of the compromise lost its meaning when the Treaty of Nice changed the definition of a qualified majority.\textsuperscript{1397}

Interestingly, The Lisbon Treaty has now introduced a new version of the Ioannina Compromise, due to the insistence of Poland.\textsuperscript{1398} However, contrary to what Poland had preferred, the text has not been included in the Treaty, but in a declaration stating the text of a Council decision that entered into force together with the Lisbon Treaty.\textsuperscript{1399} There is a new Protocol, which states that this Council decision can only be changed or withdrawn after a preliminary deliberation by the European Council, which is to act by consensus.\textsuperscript{1400}

Is any future role of this new Ioannina version to be expected? Former Belgian Ambassador (and deputy Ambassador) to the European Union Jan de Bock does not exclude this.

The old Ioannina has never been used, but I think that the new Ioannina will play a role. The thresholds have really been lowered. We should not be the first to use it, as founding members. But it depends on the interests. If large member states start making deals and pushing them through, I do not know what we will do.\textsuperscript{1401}

Why did the Ioannina Compromise hardly have an impact on qualified majority decision making? Piris finds an explanation in the provision in the Council’s Rules of Procedure that a simple majority of the Council may ask for a vote to take place.\textsuperscript{1402} That provision itself has however hardly had a significant impact on Council decision making, as was illustrated in

\textsuperscript{1396} 'It was not a basis for negotiating substantive changes of significance. The only example I can recall of its being used was to secure a slightly longer timetable for reviewing progress in applying a directive: a fairly minor negotiating achievement’, interview with David Bostock, Luxembourg, 16 April 2008.
\textsuperscript{1399} Declaration (No 7) on Article 16(4) of the Treaty on European Union and Article 238(2) of the Treaty on the Functioning of the European Union.
\textsuperscript{1400} Protocol (No 9) on the decision of the Council relating to the implementation of Article 16(4) of the Treaty on European Union and Article 238(2) of the Treaty on the Functioning of the European Union between 1 November 2014 and 31 March 2017 on the one hand, and as from 1 April 2017 on the other.
\textsuperscript{1401} [‘De oude Ioannina is nooit gebruikt, maar ik denk dat de nieuwe Ioannina nog wel een rol gaat hebben. De drempels zijn echt verlaagd. Wij moeten niet de eerste zijn als stichtende leden om het te gebruiken. Maar het hangt net af van de belangen. Als grote lidstaten afspraken gaan maken en deze door de strot duwen, weet ik niet wat wij zouden doen.’], interview with Jan de Bock, Rome, 23 April 2008.
chapter 3. A more convincing explanation is probably that trying to look for a broad consensus is deeply rooted in Council decision making.

Not only is convention an independent source of constitutionalisation of the European Union. Because of some of its characteristics, it reinforces the strong evolutionary nature of the process. These, including it being a source open to various parties, relatively flexible and often accidental, follow from the analysis below.

5.2 **Autonomous constitutional evolution established by parties other than the ‘pouvoir constituant’**

The contrast between original constitutional change by a ‘pouvoir constituant’ and autonomous constitutional evolution by a ‘pouvoir constitué’ is helpful to analyse the role of convention in the constitution of the European Union.

This distinction relates to the parties involved in constitutionalisation and constitutional change and thus equally to the question of the nature of the European Union. Peters argues that the revision procedure can be seen as the decisive element in the dichotomy Treaty-constitution, in which the latter is characterised by autonomy from the creators. The amendment power is not in the hands of the *pouvoir constituant* but of the *pouvoir constitué*. In other words, the *pouvoir constituant* remains outside the order in terms of its change, passing the power of change to the *pouvoir constitué*.

Firstly, the member states are not only *pouvoir constituant* but also *pouvoir constitué* (article 48 TEU). This however is not strange, as the experience of federations teaches us. Secondly, in the European Union there is a ‘*pouvoir constituant mixte*’ and ‘*multiple pouvoirs constituants*’, including not only the member states governments, but also their parliaments, European bodies and institutions (for example through their role in the amendment procedure of article 48 TEU) and the European Union.

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1403 See chapter 3, paragraph 3.1.
1404 See extensively chapter 3, paragraph 2.3. See also Westlake: ‘The Ioannina Compromise has never yet been enacted but, in a sense, it is always in force, as it was before the agreement was signed. This is because (...) the Council is in a perpetual search for consensus. The Ioannina Compromise, like the 1991 German proposal for a reinforced qualified majority, is itself a demonstration of just how far Member States are prepared to go in seeking compromise.’, Martin Westlake, *The Council of the European Union* (London, Cartermill Publishing 1995) p. 94.
1408 Peters (2006) p. 59. ‘Because the *pouvoir constituant* and the *pouvoir constitué* can be regarded as two faces of a bundle of constitutionalising powers, it is no anomaly that the Member States of the Union are both the most important co-creators of the European constitutional order and the dominating actors within the formal revision procedure.’, Peters (2006) p. 58.
Moreover, all these actors are ‘in a way both pouvoir constituant and pouvoirs constitués’. 1410

How does constitutional evolution through convention fit this picture? Conventions illustrate that constitutional change is not limited to the parties involved in the amendment procedure of 48 TEU (and case law), nor are these parties limited to their respective powers in that procedure. Conventions allow parties and actors, which are not dominant in the formal amendment procedure, in particular the European Parliament, to be decisive in bringing about constitutional change. This does not necessarily lead to an identification of new institutions being involved in constitutional change, but it does lead to new insights about how they are involved: autonomously through convention.

The Framework Agreement between the Commission and Parliament clearly illustrates this autonomous character, since the member states, nor their representatives in the Council, are a party to it; they even oppose it. The European Parliament and the European Commission, whose consent is not required for Treaty amendment,1411 shape the rules autonomously and compete with the member states in this process.

Another illustration is given by the investiture procedure. Through practice and convention the division of powers evolves step by step in an evolutionary way, increasing the power of the European Parliament in relation to the Commission and the member states: first by the success demand for candidate Commissioners to appear before parliamentary committee hearings; then by the withdrawal of candidate Commissioners forced upon the member states. Again, the European Parliament shapes the rules autonomously.

Autonomous development does, however, not only take place through supranational institutions. The member states are themselves, through their representatives, equally involved in the constitutional development outside the framework of the treaty amendment procedure. An example of this is the creation of the European Council. Also, member states’ representatives in the Council contribute to this process through the conclusion of Interinstitutional Agreements and through conventional rules on voting in the Council. The involvement of member states is different here from that in Treaty amendment, because the role of representatives of the executive is not followed by ratification by a national parliament or by a referendum, as is the case with Treaty amendments.

In terms of the parties determining constitutional change, conventions thus offer support to political science theories of European integration that emphasise the successes of

1411 Since the Treaty of Lisbon European Parliament’s consent is required in two simplified revision procedures (‘passarelle’ to qualified majority voting and ordinary legislative procedure), see article 48(7) TEU.
supranational institutions (notably neo-functionalism\textsuperscript{1412} and supranational governance\textsuperscript{1413}) as well as to theories which claim that European integration can best be explained as a series of choices made by national leaders and as a result of intergovernmental negotiations (notably liberal intergovernmentalism\textsuperscript{1414}).\textsuperscript{1415} In as much as the member states are given a more central role through the political constitution, this shows resemblance to the formal process of constitutional change in which the national executive is prominent in relation to national parliaments; but the central role of Parliament and informality of the role of the member states in constitutional development through convention is different. Furthermore, it strengthens the claim of historical institutionalism that processes over time lead to unexpected outcomes and unintended consequences from the perspective of the member states.\textsuperscript{1416}

In sum, the role played by convention in constitutional change can be used to reflect on a specific way in which both ‘pouvoir constituant’ and ‘pouvoir constitu\' from its creators. This element of autonomy in constitutional development is related to a further aspect of constitutionalisation, central to a distinction made between contract and Treaty on the one hand and a ‘true’ constitution on the other hand. Whereas a contract or Treaty creates no independent legal order, a constitution ‘literally constitutes an objective order, builds an institution, and unfolds its own life independent of the will of its creators.’\textsuperscript{1418} Conventions, reflecting the autonomous development of the political constitution in relation to the legal constitution (see paragraph 3.6), in a way represent the ‘life of its own’ of the European Union, independent of the will of

\begin{footnotes}
\item[1412] See e.g. Ernst Haas, \textit{The Uniting of Europe: Political, Social and Economic Forces 1950-1957} (London, Stevens and Son 1958).
\end{footnotes}
its formal creators. Through convention the institutions influence the direction of constitutional development of the European Union. A most convincing example is the Interinstitutional Agreement on budgetary discipline, which was fundamental to the creation of a multi-annual budgetary procedure in which medium term decisions are taken in the European Council not only on revenue, but also on expenditure.

5.3 *A flexible source*

One of the old and still useful distinctions in an analysis of constitutional development is that between rigid and flexible change. The distinction is mostly used in relation to the procedure for (legal) change of the constitution, but can also relate to the frequency and ease of constitutional change. A rigid constitution is generally seen as one in which there is a special, aggravated procedure for changing the constitution; a flexible constitution does not require such special procedures.1420

A relevant concept in this context is entrenchment, which is often considered a fundamental characteristic of formal legal constitutions.1421 It refers to the fact that legal change of the constitution is difficult in comparison to the change of ordinary laws. Entrenchment thus makes a constitution procedurally rigid. It does not necessarily mean that constitutional amendment is not frequent, or that constitutional change through practice and convention is excluded.

The Treaties of the European Union can be used to show that a procedurally rigid constitution does not exclude frequent change. It could be said that the amendment procedure of the European Union is extremely rigid, requiring unanimous agreement among representatives of the member states followed by ratification by the individual member states.1422 This rigid procedure has not prevented formal constitutional change of the Treaties. On the contrary, especially since the Single European Act was concluded in 1986, the European Union has seen a substantially significant Treaty amendment every few years.

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1419 International lawyers speak of the ‘own will’ of an International Organisation, see e.g. Klabbers, J., *An Introduction to International Institutional Law* (Cambridge, Cambridge 2009); political scientists in terms of ‘unintended consequences’.

1420 Where no special process is required to amend a Constitution, it is called ‘flexible’; where a special process is required, a Constitution is called ‘rigid’.; Wheare (1966) p. 16. See also C.F. Strong, *Modern Political Constitutions*, 8th edition (London, Sidgwick and Jackson 1972) p. 58.


1422 A little less rigid, but still not flexible is that of the recent simplified amendment procedure, see article 48(7) TEU.
The rigidity of the procedural requirements of constitutional change thus does not tell us everything about the ease with which a constitution is changed. Wheare has argued that ‘…it may be wiser, perhaps, to use the terms ‘flexible’ and ‘rigid’ to distinguish Constitutions not according to whether or not they require for their amendment a special procedure which is not required for ordinary laws, but according to whether they are in practice, through the force of a variety of circumstances, easily and often altered or not.’\(^{1423}\) In fact, it can be said that whereas the legal constitution of the European Union is procedurally rigid, in terms of frequency of amendment it is relatively flexible.

Of particular relevance here is that a procedurally rigid constitution does not exclude constitutional development through practice and convention. Munro argues to the contrary:

> Indeed, it is at least arguable that conventions should play a larger role in countries with written constitutions; the greater the degree of constitutional rigidity, the greater is the need for the benefits of informal adaptation which conventions bring.\(^ {1424}\)

In fact, it could be said that entrenchment demands a more prominent role of convention to adapt the constitution to changing circumstances. The need for flexibility is solved through the flexible nature of constitutions. How are they flexible?\(^{1425}\) To be established no procedural requirements are to be met. There only needs to be a practice, precedent or agreement and a conviction to be bound. Moreover, conventions can affect legal rules in the absence of formal amendment and legal change.\(^{1426}\) They defy the legal rules of change of the legal system.\(^{1427}\)

With regard to the European Union, the procedure for legal change of the basic constitutional texts, the Treaty, is relatively rigid. The political constitution and in particular conventions provide the flexibility to constitutional development which is lacking in the (procedurally) rigid amendment procedure of European Union’s Treaties.

The distinction between rigid and flexible sources thus offers insights in the character of convention as a source of constitutional development, not only in terms of its character, but also of its function. Those functions can be described as bringing flexibility to development.

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\(^{1423}\) Wheare (1966) p. 17.


\(^{1425}\) On the relation between the written character and entrenchment see also Tomkins and Strong: ‘There is no necessary connection between the constitution being written and it being unentrenched.’, Tomkins (2003) p. 18; ‘although a constitution may be much written – that is to say, although it may consist of a large bundle of isolated statutes – it may still be flexible.’, Strong (1972) p. 58-59.

\(^{1426}\) ‘Clearly, it is conventions which provide the more flexible norms of conduct.’, Jaconelli (2005) p. 154.


\(^{1427}\) See also chapter 4, paragraph 3.3.
of the constitution; bringing flexibility in the development of the division of powers; accommodating events; allowing a response to events; having the structure reflect the actual division of powers, adapting structure to the needs of time; and ultimately adapting the structure to the prevailing constitutional values.

5.4 An accidental source

In the light of the contrast between grand design and accidental constitutional change (see paragraph 4.1.3), conventions as a source of constitutional development seem to be closer to the latter. A number of accidental, but apparently decisive factors in the 2004 and 2010 investiture can be used to illustrate this: the order of votes in the 2004 investiture on the suitability of Italian candidate Buttiglione, the fall of the Latvian government during the 2004 investiture opening the door for a withdrawal of Latvian candidate Udre, the performance of various (notably Socialist) candidates in 2010 (which was not bad enough for the PPE to have leverage to demand a political balance) and the strategy of PPE leader Daul in 2010 described above. Incremental development is thus to a large extent determined by chance.

This does not mean however that change through convention is only determined by chance. Sometimes constitutional change is the consequence of a cautious and intentional strategy, as the establishment of the parliamentary committee hearings in 1994/1995 illustrate. Remember that the judgment of leading figures in the European Parliament such as Collins and Hänsch about the 1995 hearings was that if the European Parliament had immediately used this power of scrutiny seriously, that is if all committees had taken the hearings as seriously as the budget and environmental committee had done, that would have led to rejection of the Commission. But the intention was to first create a tradition of hearings in order to make full use of them only at a later moment (as evidenced by the 2004 and 2010 investiture).

5.5 General trends? On conventions, authority and representation

The aim of this study was not to provide an exhaustive list of conventions in the constitution of the European Union. It is nonetheless interesting to reflect on possible general trends in development through convention. In his 1966 study of modern constitutions Wheare notes that:

1428 ‘Their general purpose is to adapt structure to function.’, Hood Phillips, Jackson and Leopold (2001) p. 25.
1429 ‘(…) conventions are adaptable to changing ideas and circumstances, and have been a useful means of evolving the constitution (…)’, Colin Munro, Studies in Constitutional Law (London, Butterworths 1987) p. 52.
1430 See paragraph 2.
There is, however, one characteristic which is found in many examples of the working of convention, a characteristic which Dicey described in his *Law of the Constitution* when he said of the conventions in the British system of government that they were ‘intended to secure the ultimate supremacy of the electorate as the true political sovereign of the state’. This description of the effects of conventions applies to many countries besides Britain.\(^{1431}\)

What can be said at this point about the relation between convention and representation in the European Union? If we look at the impact of convention on the division of powers, or the institutional balance seen not only as a legal concept, it seems that in the European Union conventions tends to reinforce the position of representative institutions. This adds force to Dicey’s claim that conventions are intended to secure the ultimate supremacy of the electorate.

Both pillars of representation in the European Union, European Parliament and the member states (article 10(2) TEU), are strengthened by convention. Many of the conventions discussed in this book have improved the position of the *directly* elected European Parliament in the institutional balance. This holds for the conventional rules established in the investiture procedure, such as the convention prescribing the appearance of candidate Commissioners before a parliamentary committee hearing or the conventional power to force the withdrawal of individual candidates as was seen above (paragraph 4). The disuse of the Council’s third reading powers in the early co-decision procedure provides a further example.

Also the second pillar of representation in the European Union is strengthened by conventions. The Heads of State and Government of the member states have seen their position improved, notably through the creation and conventional powers of the European Council. This institution dominates decision-making on medium term expenditure of the European Union (expressed in the Financial Perspective/Multiannual Financial Framework) and to a certain extent has taken over the right of initiative for legislation of the Commission. The European Council is an *indirectly* representative institution of the European Union, but nonetheless for the moment at least has a stronger representative capacity than the European Parliament. And while the institution of the European Council has weakened the position of the member state representatives in the various Council configurations, these representatives have seen their position strengthened individually through the various practices and conventional rules on qualified majority voting in the Council.

By contrast, it can be said that conventions have generally limited the (discretion in the exercise of) powers of the Commission, the more technocratic and non-representative

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\(^{1431}\) Wheare (1966) p. 135. Compare also: ‘The ultimate object of most conventions is that public affairs should be conducted in accordance with the wishes of the majority of the electors.’, Hood Phillips, Jackson and Leopold (2001) p. 142.
institution of the European Union. Its position has therefore been weakened, even though the control of the representative institutions over the Commission is not necessarily only detrimental. Werts argues that the fact that most important initiatives now come from the European Council is not only detrimental to the Commission’s position: ‘One may conclude that although the European Council has eroded the initiative-taking powers of the Commission, it has simultaneously upgraded the latter’s political position.’\(^{1432}\) One could also argue that the Commission’s democratic legitimacy is strengthened by an increased control of Parliament in the investiture procedure. Piris however is less optimistic about the effects on the authority of the Commission.\(^{1433}\)

The fact that the political constitution through convention tends to reinforce both pillars of representation in the European Union is of course not irrelevant in a discussion on the question whether the existence of convention is a good thing. This can be understood especially in the light of the debate between legal and political constitutionalism, where the latter current of thought advocates a strong role of representative institutions in constitutional development and enforcement in comparison to judicial bodies.\(^{1434}\)

Interestingly, the same conventional rules also show up the competition between the two representative pillars in the European Union, the member states and the European Parliament, for control over the budget, over legislative process and over the Commission. It has appeared that the control of the European Council over the Financial Perspectives is to the detriment of Parliament’s role in the annual budgetary procedure, while the practices and conventions that strengthen consensus decision making in the Council also weaken the position of Parliament in the legislative process. On the other hand, the disuse of the Council’s third reading powers in the early co-decision procedure was no doubt a victory for the European Parliament and the increased control of Parliament over the Commission in the investiture procedure is to the detriment of the control of individual member states.

The relationship between conventions and the authority of political institutions is another fundamental question that can be subject to future research on the basis of this book. Representative institutions have at least some political authority on the basis of their formal representative character. This is different from courts or executive bodies, which derive their authority from elements such as their independence and/or their expertise. However, the formal representative character of an institution does not necessarily entail a strong and actual

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\(^{1433}\) ‘However, one has also to recognise that, at least since 1999, the trend has not been in favour of strengthening the political authority of the Commission. The pressures exercised on it, sometimes by the most powerful Member States, often by the European Parliament (e.g. through the conclusion of ‘framework agreements’ imposed on the Commission) are not foreign to this regrettable trend.’, Piris (2010) p. 235-236.

\(^{1434}\) See also, chapter 6, paragraph 3.1.1.
substantive representation, as the case of the European Parliament clearly shows. The increase of power of political institutions through convention can be seen as based on their political authority and at the same time as an attempt to increase that authority.

6 Conclusions

6.1 Convention and the investiture of the Commission

The investiture of the European Commission has developed over the last decades through a number of conventions that have increased the individual political responsibility of candidate Commissioners and limited the discretion of candidates and their member states in the exercise of their powers. These changes mean a clear departure from strict collegiality during the investiture; they are however still short of the other extreme, that is individual votes of approval of candidates in plenary.

A first important step in this development has been the organisation by European Parliament of parliamentary committee hearings for candidate Commissioners since 1995. Candidates do not receive an open invitation to attend, but have a conventional, political obligation to do so; failure will lead to rejection of the Commission by Parliament.

A second important step was the withdrawal of two candidates and reshuffle of portfolio for a third during the 2004 investiture of the ‘Barroso I’ Commission. Importantly, these changes were not defined by the European Parliament directly, but by Barroso and the various Heads of State and Government. Also, the package struck a delicate political balance between the biggest political Groups in Parliament. It can be said that Parliament established a conventional power to impose a number of balanced changes to the team of Commissioner.

A third significant step in the development of individual political responsibility was taken during the 2010 investiture of ‘Barroso II’. A majority of Parliament forced the withdrawal of a single candidate without balancing the interests of the main political Groups. It can be said that the European Parliament established a conventional power to impose the withdrawal of an individual candidate, notwithstanding its legal power to vote on the Commission as a team only.

6.2 Convention and constitutional structure and development

Conventions can be seen as a product of or a part of the political constitution of the European Union. Through convention constitutional structure is created, which in various ways affects the structure of the legal constitution. These effects, supplementing the law, transferring the exercise of a legal power from one institution to another and nullifying the effects of the law,
can be understood as an expression of the autonomy and primacy of the political over the legal constitution. In all these cases, the political constitution claims autonomy from the legal constitution in determining the behaviour of constitutional actors. Moreover, autonomy can also be understood in the sense that the political institutions subject to the conventional rules are the only ‘judges’ about them. Especially when conventions transfer the exercise of powers from one institution to another or nullify the effect of law, the political constitution takes primacy over the legal constitution.

Convention as a source of constitutional convention has a number of characteristics, which come to the fore if seen in light of traditional distinctions made in the analysis of constitutional change. Compared to the procedurally rigid amendment procedure, development through convention is relatively flexible. In contrast with original, revolutionary change, development through convention is an autonomous and evolutionary source of constitutional change. Finally, it is relatively accidental in contrast with the more ‘grand design’ like constitutional change of Treaty amendments. Convention thus highlights certain aspects of the constitutional development of the European Union, such as its evolutionary nature. Convention is an evolutionary source of constitutionalisation of the European Union, next to but independent from Treaty amendment and case law of the European Court of Justice.

A general trend that can be discerned in constitutional development through convention in the European Union is that it strengthens the position and powers of its two representative pillars, the European Parliament and the (representatives of the) member states. This confirms Dicey’s early analysis that conventions are intended to secure the ultimate supremacy of the electorate in any form over non-elected bodies. The more precise relationship between convention and representation constitutes a further research question. It also relates to a further relevant research question, namely whether the existence of constitutional convention is a good thing or not (see chapter 6, Conclusions).