

# The Barroso Drama

## The Invisible Elephant

### Member States' Collective Involvement in the Appointment of the Barroso Commission

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Collective involvement of member states' governments. Law and practice of nominating the European Commission president and his team. The responsibility to resolve the political conflict and the failure of the Dutch Council presidency. The European Council providing the political authority necessary for a solution.

#### INTRODUCTION

The dominant involvement of the governments of the member states of the European Union in the appointment procedure of a new Commission can be divided into two phases.<sup>1</sup> In the first phase the member states look for a person to nominate as President of the Commission, who is then to be approved by the European Parliament. In the second phase they draw up a list of the other persons to become members of the new Commission, by common accord with the nominee for President.<sup>2</sup>

This article is about the collective role of the member states. It will start by discussing the first stage of nominating Barroso as President of the Commission. However, the emphasis will be on the second phase in the appointment procedure, since it made the appointment of the Barroso Commission into a constitutional event. By postponing the presentation of his team to the European

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<sup>1</sup> Art. 214(2) EC Treaty as amended by the Treaty of Nice of 2001.

<sup>2</sup> Finally, after both the President and the other members of the Commission thus nominated have received a vote of approval from the European Parliament, the member states appoint the Commission. This act, although another involvement of the member states, is not a substantive phase in the appointment procedure, but merely a formal confirmatory act.

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Parliament, Barroso extended the second phase and forced the member states to change its character and act collectively.

#### PHASE 1: NOMINATION OF THE PRESIDENT OF THE COMMISSION

If the choice of a new president for the European Commission is one of the most important decisions taken by the member states together every five years,<sup>3</sup> then what does the latest nomination tell us about the current state of affairs? Until the entry into force of the Nice Treaty, the nomination of the President was formally made by the governments of the member states acting by common accord.<sup>4</sup> The Nice Treaty changed both forum and voting procedure. Hence, the nomination of the 2004 President of the Commission was the first nomination that could be made by the Council, meeting in the composition of Heads of State or Government and acting by a qualified majority.<sup>5</sup> It is not within the scope of this article to address the motives of these formal changes. What it will do instead is analyse if practice has followed on the formal amendments.

The European Council of 17/18 June 2004 in Brussels will be remembered both for its success, i.e., the agreement reached on the Constitution for Europe, and for its failure to find agreement on the nominee for Commission President. The debate centred on two main candidates, namely Verhofstadt and Patten. The first candidate was a champion for Germany and France, but opposed by the UK, Italy and Poland.<sup>6</sup> The second was an alternative supported by the EPP and seen to reflect the European Parliament's election results of 10-13 June 2004. On Thursday 17 June, France and Germany are said to have asked for a vote on Verhofstadt.<sup>7</sup> We can be sure now that a vote never took place – to the regret of Luxembourg's Prime Minister Juncker.<sup>8</sup> We also know that things got out of hand, mainly because of a clash between Chirac and Blair,<sup>9</sup> but also due to the great pressure that Chirac and Schröder put on small member states.<sup>10</sup> Verhofstadt's disappointment after not having received the necessary support at the European Council meeting was intensified by a feeling of betrayal. While Verhofstadt was touring the capitals

<sup>3</sup> This choice of a new European Commission President used to be made once every four years prior to the Maastricht Treaty of 1992.

<sup>4</sup> Art. 214(2) EC Treaty as amended by the Amsterdam Treaty of 1997.

<sup>5</sup> Art. 214(2) EC Treaty as amended by the Nice Treaty of 2001.

<sup>6</sup> For positions and motives see: Bertrand Benoit et al., 'Presidency fight sours EU summit', *Financial Times*, 17 June 2004.

<sup>7</sup> George Parker, 'Leaders play out a battle for supremacy', *Financial Times*, 19 June 2004.

<sup>8</sup> *Agence Europe*, No. 8730, Sunday 20 June 2004, p. 6.

<sup>9</sup> James Blitz, 'Summit spats reveal Blair's irritation with Chirac', *Financial Times*, 19 June 2004.

<sup>10</sup> George Parker, 'One summit conquered but it is still a hard climb to the peak of ratification', *Financial Times*, 21 June 2004. There is a similarity with the crisis over the Iraq war, when Chirac told east European Candidates they had missed a great opportunity to shut up.

before the summit in order to get support for his candidacy, Blair allegedly told him: 'I will not do to you what John Major did to Jean-Luc Dehaene'.<sup>11</sup>

It seems that the qualified majority voting mechanism itself was considered an acceptable option by at least a number of large member states. This not only by the member states requesting a vote, like France and Germany, but also by the United Kingdom, that on 17 June suddenly decided to support Juncker, a candidate it had opposed earlier for being too federalist and too close to Berlin and Paris. This was probably done in order to avoid the embarrassment of being outvoted, since it left Juncker with unanimous support (Juncker declined). The decision not to resort to a vote was finally taken by the Irish Presidency, itself not in favour of voting, driven by the simple fact that neither candidate was able to get the necessary qualified majority.<sup>12</sup> Yet, had Patten been able to get a qualified majority, accepting him immediately would have been impossible for he had killed Verhofstadt's candidacy.<sup>13</sup> Without the precedent of a vote, many questions are left to be answered by future events. Surely though the QMV rule is not a codification of practice, as the decision about who to nominate as Commission President has always been made by consensus. Future nominations will show whether this important decision is suitable for a decision other than by consensus.<sup>14</sup>

Barroso's nomination was formally made at an extraordinary European Council meeting on 29 June 2004,<sup>15</sup> with unanimous support from the member states. Here we are confronted with the first conceptual difficulty concerning the various member states' configurations.<sup>16</sup> Where the Treaty provisions now indicate the Council instead of the governments of the member states as the formal nominating actor of the Commission President, in practice it seems to be in yet another configuration – the European Council – that the member states adopt the decision.<sup>17</sup> Both the decision of the Irish Presidency of the EU to convene an extraor-

<sup>11</sup> Martine Dubuisson, 'Chronique d'une défaite annoncé', *Le Soir*, 21 June 2004. This is a reference to an episode that occurred ten years earlier on the Island of Corfu, when the UK blocked the candidacy of Jean-Luc Dehaene, who was supported by the other eleven member states.

<sup>12</sup> See *supra* n. 7.

<sup>13</sup> Peter Ludlow, 'The Barroso Commission. A tale of lost innocence', Briefing Note No. 3.4/5, Dec. 2004, p. 4.

<sup>14</sup> An 'Ioannina Compromise' type of practice may well remain, making it possible for a small coalition of large member states to block any nomination. This mechanism was introduced in 1994 in the Council's qualified majority decision-making, thereby answering to the fear of large member states of losing influence in an enlarged Union.

<sup>15</sup> *Agence Europe*, No. 8736, Tuesday 29 June 2004, p. 4.

<sup>16</sup> These formal configurations being the European Council; the Council meeting in the composition of Heads of State or Government; the governments of the member states; the governments of the member states at the level of Heads of State or Government; the Council; the member states collectively.

<sup>17</sup> Hereby anticipating on Art. 1-17 of the Constitution for Europe of 29 October 2004, which formally gives this power to the European Council.

dinary meeting of the European Council (formal element) as well as Mr. Ahern's statement afterwards that: 'I am happy to announce that the European Council has agreed to the nomination of a successor to Romano Prodi (...)', (substantial element) support this view.

## PHASE 2: NOMINATION OF THE OTHER MEMBERS OF THE COMMISSION

Again, the Treaty of Nice formally shifts the nominating action from the governments of the member states to the Council, acting by a qualified majority, reinforcing the community character of the decision. At the same time it explicitly confirms the power of the member states to propose candidates.<sup>18</sup> This conceptual distinction between proposing and nominating, introduced by the Treaty of Nice, has immediately been highlighted by the facts of the Barroso crisis. These facts have forced the member states, united in the Council, to take upon themselves the collective responsibility to resolve the Parliament's discontent, hereby giving constitutional substance to the formal power of nominating the other members of the Commission.<sup>19</sup> That they had not anticipated this responsibility can be easily induced from the events.<sup>20</sup>

Barroso for the first time seriously turned to some of the member states on Tuesday 26 October 2004 when he finally realised that he was risking defeat 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. Also, the member states had hoped that this could be avoided and that they could remain passive throughout the solution of the conflict. They had deliberately abstained from coming to the help of Barroso, a position criticised by the leader of the liberal group Graham Watson. Watson denounced the Council during the plenary meeting of the European Parliament on 26 October, calling it the *Invisible Elephant* in the room. It had until then refused to contribute to a solution of the political conflict and instead tried to use its weight to retain the status quo as much as possible.

Barroso ultimately decided to request Berlusconi to ask Buttiglione for his withdrawal.<sup>21</sup> We may assume that at that time Barroso had the explicit or im-

<sup>18</sup> The Constitution for Europe of 29 Oct. 2004 turns the proposals into what seems to be a lower qualification, namely 'suggestions'. On the other hand, it leaves 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.

<sup>19</sup> The facts are well described in the other contributions to this issue.

<sup>20</sup> Clear proof not only of a lack of anticipation but also of the Council's arrogance was its absence at the plenary debate in the European Parliament on 26 Oct. 2004.

<sup>21</sup> Marco Galluzzo, 'Barroso chiede cambio. Berlusconi: Rocco, lascia', *Corriere della Sera*, 27 Oct. 2004.

licit support of at least some European leaders,<sup>22</sup> but Barroso's decision surely was not made in co-ordination with the member states collectively. Berlusconi transferred Barroso's message to Buttiglione, but the latter refused to step back, mainly because of the deadlock created by his biggest supporter, EPP leader Pöttering.<sup>23</sup> As a consequence Barroso decided not to present his team to the European Parliament for approval.

### *Phase 2 extended*

By postponing the presentation of his team, Barroso created an extension of the second phase in which the Council is responsible for nominating Commissioners. As we will see the member states entered new constitutional territory in which they were forced to act collectively, bearing a collective responsibility for a possible failure.

After Barroso had asked the European Parliament for more time in order to consult the Council,<sup>24</sup> some European Ministers of Foreign Affairs rushed to stress that the crisis was a matter between the Commission and the European Parliament.<sup>25</sup> Most European leaders did not go any further than expressing their hope that a solution would soon be found.<sup>26</sup> All this looks more like an attempt not to burn their fingers on this delicate matter than like a successful waiver of their responsibility as member of the Council. As much as the member states would have wanted to, the *elephant* could not remain *invisible*. If anything can in fact be learnt from this crisis, it is that the final responsibility for solving the political conflict lies with the member states acting together in the Council.<sup>27</sup> In

<sup>22</sup> Chirac being the one most explicitly in support of this decision on 26 Oct., 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*, 30 Oct. 2004.

<sup>23</sup> Pöttering had threatened Buttiglione that his group would vote against the whole Commission if the latter would withdraw his candidacy; *Agence Europe*, No. 8819, Wednesday 3 Nov., p. 8; Roberto Zuccolini, 'Ma Buttiglione non cede: ho la coscienza a posto', *Corriere della Sera*, 27 Oct. 2004.

<sup>24</sup> *Agence Europe* made a significant lapse here while transliterating Barroso's words. It changed the word Council into European Council, *Agence Europe*, No. 8816, Thursday 28 Oct. 2004, p. 3.

<sup>25</sup> 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*, 28 Oct. 2004; A spokesman of the Dutch Minister of Foreign Affairs 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*, 28 Oct. 2004.

<sup>26</sup> Ralf Beste e.a., 'Rasierte Stachelbeeren', *Der Spiegel*, 30 Oct. 2004; 'Réactions: victoire pour le Parlement européen et espoirs d'une solution rapide', *Le Monde*, 27 Oct. 2004.

<sup>27</sup> Dutch Minister for European Affairs Nicolaï, while representing the Council at the EP meeting on 27 Oct. 2004, went as far as acknowledging that the Council bore 'a share of responsibility' in the situation.

the following we will see that in practice the European Heads of State and Government were politically acting in a European Council setting on 29 October 2004 when taking upon themselves this responsibility.

The October 2004 events made it clear once again that the powers of a President-Designate of the Commission are limited. Berlusconi had successfully opposed Barroso's request made on Tuesday 26 October for an exchange of portfolios between Buttiglione and Dimas.<sup>28</sup> Although Barroso is assigned the legal power to distribute portfolios,<sup>29</sup> and in fact in general can do so as he pleases, in practice member states are able to prevent a change of portfolio.<sup>30</sup> Replacing a Commissioner was impossible as long as the European Council was blocking it, as Barroso himself admitted in a press conference on 27 October.<sup>31</sup> It is no surprise that the President-Designate of the Commission depends widely on the support of the member states in shaping his team.<sup>32</sup>

#### THE MEMBER STATES' COLLECTIVE RESPONSIBILITY

It makes little sense to lay the responsibility for solving the crisis with the President-Designate of the Commission if he has little power. This power is really in the hands of the member states collectively. It seems even more accurate to place responsibility with the highest political authority in the Union, namely the European Council, instead of the Council. Here, again we are confronted with the conceptual difficulties concerning the various configurations in which the member states act collectively in the European Union.

Formal legal reasoning is not helpful to understand how the member states acted collectively in this case. No extra Council meeting was planned to discuss the matter, nor was an extraordinary European Council meeting.<sup>33</sup> A proposal from the Dutch Presidency to hold a European Summit on 28 October 2004 over the matter was rejected by the Permanent Representatives of the other member

<sup>28</sup> Romano Dapas, 'Barroso rischia la sfiducia per Buttiglione', *Il Messaggero*, 27 Oct. 2004.

<sup>29</sup> Art. 217(2) EC Treaty as amended by the Treaty of Nice.

<sup>30</sup> Gabriela Canas, 'Barroso pierde el pulso con el Parlamento', *El País*, 28 Oct. 2004.

<sup>31</sup> *Agence Europe*, No. 8816, Thursday 28 Oct. 2004, p. 5. Barroso was right in saying that not only the European Council but also the European Parliament was in fact blocking a solution. See above n. 24.

<sup>32</sup> It was to the surprise of many that Barroso chose to neglect the wishes of some influential member states in the distribution of portfolios in Aug. 2004. It is not hard to imagine how this must have influenced the willingness of these same member states to come to his help when he needed it.

<sup>33</sup> The new list of Commissioners designate was finally presented by Barroso to the Heads of State and Government during the European Council meeting on 4 Nov. 2004 and formally approved by the Council, but the most important decisions were made on 29 Oct., not through a vote but by consensus; *Agence Europe*, No. 8821, Friday 5 Nov. 2004, p. 4; *Agence Europe*, No. 8823, Tuesday 9 Nov. 2004, p. 9.

states.<sup>34</sup> In fact, immediately after Barroso's request for more time, it was clear to all the actors that Friday 29 October would provide the collective forum in which to discuss the matter. On this date the Heads of State and Government met in the formal capacity of delegates of their respective member states to sign the Treaty establishing a Constitution for Europe. Bilateral phone calls and 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 decide collectively.

Once the responsibility of the (European) Council to resolve the political conflict is acknowledged, the role to fulfil by the Presidency becomes clear. The member state holding the Presidency during the Barroso crisis was the Netherlands. Its role in the crisis is instructive since it shows the two-faced character of member states when acting together in the European Union. Dutch CDA Prime Minister Balkenende found himself paralysed by his national coalition partner VVD, which threatened with a crisis if the support for Dutch candidate Kroes were withdrawn. Therefore, between taking up the task of the Presidency actively to search for a European solution on the one side and looking after the Dutch national interest on the other, Balkenende chose to do the last. He defended the highly controversial position of Kroes in front of Barroso during a dinner at the Dutch embassy in Rome on 28 October. This action was in contrast with the formal statement of Dutch Minister of European Affairs Nicolai that the Presidency had the Dutch priority.<sup>35</sup> The Netherlands thus failed the role of president, leaving it to other member states actively to push towards a European solution. A future President of the European Council under the Treaty establishing a Constitution for Europe should not be hampered in performing this role as Balkenende was, since he 'shall not hold a national office'.<sup>36</sup>

At the time Barroso was dining with Balkenende, Berlusconi had made it clear that if Italy was not the only member state making a *sacrificio*, it would not pose any problems.<sup>37</sup> Officially still holding on to Buttiglione as its candidate, Italy seemed more willing than the Netherlands to give in.<sup>38</sup> Barroso thus knew the national positions concerning the two most controversial candidates when he started the informal consultation on Friday 29 October.

<sup>34</sup> 'M. Barroso a annoncé le report de l'investiture de sa Commission', *Le Monde*, 27 Oct. 2004.

<sup>35</sup> He received fierce criticism from Dutch opposition Parliamentarian Timmermans for saying that if tension would arise between the Presidency and national interest, the Dutch priority would be with the role of Presidency; Floris van Straaten, 'Nederland opereerde lijdzaam', *NRC Handelsblad*, 28 Oct. 2004.

<sup>36</sup> Art. 1-22(3) EU Constitution of 2004.

<sup>37</sup> Marco Conti, 'Il premier cerca alternative a Buttiglione', *Il Messaggero*, 28 Oct. 2004.

<sup>38</sup> Barroso later complained about this lack of collaboration from some member states, meaning the Netherlands; *Agence Europe*, No. 8830, Friday 19 Nov. 2004, p. 6.



29 OCTOBER 2004

The problem was solved on this day by the European Council formally meeting as signatories of the Treaty establishing a Constitution for Europe. No vote was taken, but consensus was found on a solution to the political conflict. A few scenarios were decided to be acceptable as a solution, the one with the largest support among the European leaders being the withdrawal of Buttiglione, Kovács and Udre.<sup>39</sup> Knowing that the Netherlands did not take up the presidency role during the meeting, the question remains how the necessary consensus came about. Concerning the most delicate and important issue, that of Buttiglione's withdrawal, some European leaders have tabled this as unavoidable, while all 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.<sup>40</sup>

In fact, that evening of 29 October, Barroso for the first time said he planned to replace some members of his team,<sup>41</sup> and at the closing press conference Berlusconi, after dining with his coalition partners,<sup>42</sup> announced that Buttiglione would stay as a minister in his government. Udre's withdrawal then was an easy accomplishment for Barroso, since Udre lacked national support after the Latvian government had been defeated.<sup>43</sup> Kovács, who could rely on continuing support of his government,<sup>44</sup> surprisingly survived, although he was assigned a different portfolio.<sup>45</sup>

These changes turned out to be enough to satisfy a majority in the European Parliament on 18 November 2004.<sup>46</sup> The survival of both Kroes and Fischer-Boel, together with the above-mentioned amendments, shows the importance of national support and the limits in both power and willingness of the European Council to impose changes upon individual member states. Italy had to make the biggest *sacrificio*, due to pressure by events, institutions – both European Parliament and European Council – and member states separately. In fact, various Eu-

<sup>39</sup> Jean-Jacques Bozonnet et Thomas Ferenczi, 'Les Vingt-Cinq signent à Rome la Constitution et refont la Commission', *Le Monde*, 30 Oct. 2004.

<sup>40</sup> 'Des dirigeants de l'UE poussent Buttiglione vers la sortie', *Agence France Presse*, 29 Oct. 2004.

<sup>41</sup> *Agence Europe*, No. 8818, Saturday 30 Oct. 2004, p. 6.

<sup>42</sup> Paola Di Caro, 'Buttiglione via da Bruxelles. E Spunta Frattini', *Corriere della Sera*, 30 Oct. 2004.

<sup>43</sup> The new Latvian government withdrew Udre and replaced her with Andris Piebalgs on 2 Nov. 2004; George Parker, 'Latvian commissioner sacked in EU cull', *Financial Times*, 2 Nov. 2004.

<sup>44</sup> The reasons for this continuing support are described in this issue by Enikö Horvath.

<sup>45</sup> The Hungarian government was willing to accept a different portfolio for her Commissioner-designate; *Agence Europe*, No. 8820, Thursday 4 Nov. 2004, p. 5.

<sup>46</sup> *Agence Europe*, No. 8830, Friday 19 Nov. 2004, p. 4.



ropean leaders had expressed themselves negatively about Buttiglione at some point before his withdrawal.<sup>47</sup> This somewhat changed the character of the member states' action already before they started acting collectively, since normally they do not express themselves openly on the suitability of another member state's candidate.

Several actors involved in the crisis explicitly stated that the European Council was to be consulted on the matter. Why does this seem so obvious to many when formally it is still the Council that draws up the list of Commissioners? Moreover, in the Constitution for Europe this remains so, whereas the European Council becomes responsible for nominating the President and appointing the final team. The explanation is that the European Council is seen as the highest political authority representing the member states in the Union. It has once again proven to be the forum politically best suitable for taking decisions as delicate as those that had to be taken in this crisis. Through its authority it provides decisions with the necessary collective legitimacy that member states need, to have painful consequences accepted at home.

## CONCLUSION

The consensus built during the informal collective talks on 29 October 2004 brought an unprecedented element into the nomination procedure of the Commission, namely that of an active involvement of the member states collectively in solving the political conflict with the European Parliament on the composition of the European Commission. The responsibility of the governments of the member states collectively has now become more clear than ever. Whether positive collective action will be required again in the future will entirely depend on the circumstances. For now it seems that, until another unique combination of events occurs, the *elephant* can keep its preferred *invisibility*.



<sup>47</sup>Among whom Chirac, Persson, Zapatero and Verhofstadt. See, e.g., Raphael Minder, 'Barroso regains edge in fight over Buttiglione', *Financial Times*, 14 Oct. 2004. Dutch Minister for Development Co-operation Van Ardenne surprised many on 21 Oct. 2004 by calling Buttiglione unfit for the post several times.