

The infringement action against the UK for failing to nominate a new Commissioner

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The [further extension](#) of the UK's membership to 31 January sees the UK remain a Member State beyond the re-scheduled date of 1 December for the new Commission to assume office. This has prompted the incoming Commission President Ursula von der Leyen to request the United Kingdom Prime Minister to nominate a Commissioner.

On 13 November the United Kingdom [informed](#) the European Commission that it would not appoint a new Commissioner before the national General Election on 12 December. The failure to do so has prompted the Commission to initiate [infringement proceedings](#) against the UK.

The UK was given until 22 November to respond to the proceedings, which it has [failed](#) to do. Thus on 25 November the Council [adopted](#) the list of Commission candidates to be approved by the European Parliament without a nomination by the United Kingdom. The European Parliament [voted to elect](#) the von der Leyen Commission on 27 November, which commenced its term without a UK representative on 1 December.

This post will first analyse the legal sources informing the infringement proceedings. It will then consider the proceedings as a reactive mechanism to ensure the UK's compliance with EU law during extension, contrasting this to pro-active measures used for previous extensions. Finally, the post will conclude with consideration as to how the UK's empty chair crisis could impact upon the legitimacy of measures adopted under the new Commission for the EU and the UK.

The legal argument

Primary Law and implementing decision

The Commission has stated that the UK is in breach of its EU Treaty obligations. Article 17(5) TEU states that 'the Commission shall consist of a number of members...corresponding to two thirds of the number of Member States, unless the European Council, acting unanimously, decides to alter this number'.

The European Council exercised this discretion on 22 May 2013. Its [decision](#) provided that the Commission will continue to consist of a number of members equal to the number of Member States. Article 288 TFEU holds that such a decision 'shall be binding in its entirety'.

The status of this May 2013 decision as a means to implement a treaty article means that a Member State is in breach of a treaty obligation if it fails to ensure that the Commission's membership is equal to the number of Member States.

The situation in reality, however, does seem to deviate from this legal requirement. The current Commission President Jean-Claude Juncker has [not nominated](#) replacements for the Estonian and Romanian Commissioners after the incumbents were elected as Members of the European Parliament.

However, as Mathias Lydholm, EU advisor to the Danish Parliament, indicates in a [comment](#) on the original publication of this blog, Article 246 TFEU mandates that no new Commissioners need to be named by Estonia and Romania. It states that 'the Council may, acting unanimously on a proposal from the President of the Commission, decide that such a vacancy need not be filled, in particular when the remainder of the Member's term of office is short'.

The United Kingdom situation is distinguished from this factual situation as there has been no 'vacancy caused by resignation, compulsory retirement or death', but instead a vacancy on the basis of impending withdrawal under Article 50 TEU.

The European Council extension decision

The obligations of the United Kingdom are also regulated specifically in the 28 October decision extending the period under Article 50(3) TEU.

The preamble reiterates that the UK will remain bound by 'the obligation to suggest a candidate for appointment as member of the Commission'. This is declaratory of the 'full rights and obligations in accordance with Article 50 TEU' rather than being a condition for the extension to take place.

Therefore this obligation should not be understood as contained within 'a decision which specifies those to whom it is addressed [and] shall be binding only on them' in accordance with Article 288 TFEU. Instead, it reiterates obligations attendant upon all Member States, and confirms that the extension of UK membership beyond the starting point of the new Commission triggers its obligation to nominate a candidate.

The case law

The Commission cites C-317/14 [Commission v Belgium](#) as the case for the precept that 'a Member State may not invoke provisions prevailing in its domestic legal system to justify failure to observe obligations arising under Union law'.

The Belgian laws on the use of languages in administrative measures required candidates for local posts to provide evidence of linguistic knowledge through a certificate issued only by one body in Belgium. The judgment held that this violated the treaty obligations to facilitate the free movement of workers.

By contrast, it is [reported](#) that the UK has justified its decision not to nominate a candidate on the basis of 'official general election [guidance](#) from the UK's Cabinet Office [that] says the government should not put forward candidates for senior international appointments, including to European institutions, during an election period'.

This does not even reach the threshold of 'provisions prevailing in the domestic legal system'. At most this guidance may be regarded as provisions prevailing in the domestic political system.

However the context of the General Election could prove relevant. Article 4(2) TEU professes that the Union shall respect the national identities of the Member States 'inherent in their fundamental structures, political and constitutional'. A General Election may be argued to constitute such a fundamental political structure.

However, it may be argued that any such 'respect' must be counter-balanced against the fact that the nomination of a Commissioner concerns in itself a fundamental constitutional structure of the European Union.

On these bases it may be concluded that the United Kingdom has breached the treaties by failing to nominate a candidate for

Commissioner.

Ensuring UK compliance with EU law: proactive to reactive

The decision to initiate infringement proceedings may be regarded as a step-change in the EU's strategy to ensure that the UK continues to comply with EU law during the extensions of its membership.

The method used in the [previous extension decision](#) of 11 April 2019 may be regarded as a pro-active preventative mechanism. It held that the extension to 31 October 'shall cease to apply on 31 May 2019 in the event that the United Kingdom has not held elections to the European Parliament...by 22 May 2019'.

Thus this decision pro-actively prevented the UK from violating its treaty obligations to hold European Parliament elections by providing de facto that it would no longer be a Member State in the event of such a breach.

By contrast the latest extension decision has not predicated extension upon the obligation to nominate a Commissioner. Instead the reactive mechanism of infringement proceedings has been utilised which would not impact upon the UK's status as a Member State.

The shift to a reactive mechanism may have been necessitated by practical considerations. By contrast to the previous Prime Minister Theresa May who actively sought an extension to prevent a no deal Brexit, the current Prime Minister Boris Johnson was reluctantly compelled to request extension by an [Act of Parliament](#) .

Terminating the extension on the basis of a failure to nominate a Commissioner could therefore have provided a preferential option for the UK Prime Minister in order to bypass this imposed obligation.

The reactive mechanism is less conducive to legal certainty as it is unclear when a judicial determination and remedy of the issue, if necessary, would be provided and whether this would be relevant as the UK may have already left the Union.

As will be discussed below, this temporal uncertainty could have detrimental consequences for the legitimacy of the new EU legislature and for EU law within the UK during transition.

Legitimacy implications

The von der Leyen Commission had a stormy political gestation. The European Parliament rejected the original nominations of [Hungary and Romania](#) , and [France](#) . This has delayed the start of the new term. The European Parliament's role in approval of the Commission indirectly democratically legitimates the EU's executive institution.

The infringement actions against the UK may raise further concerns that the new Commission is not constitutionally legitimate. If MEPs have not had the chance to approve a UK Commissioner, this may imply that legislative initiatives proposed by the Commission before this time are not legally valid acts of that institution.

The Council has taken a pragmatic approach to the UK failure. The decision endorsing the nominations states that 'This cannot undermine the regular functioning of the Union and its institutions and thus cannot constitute an obstacle to the appointment of the next Commission'. This short-term political solution which may secure the support of the European Parliament may not, however, provide an answer to longer-term legal validity.

The UK's empty seat may raise further concerns over the legitimacy of EU law within the UK during the transition period. From the

point that the treaties cease to apply until at least December 2020 all EU law will apply to and within the UK without any political representation.

The UK's decision to [reverse its policy](#) on abstention and vote on a [legislative proposal](#) on consumer protection in the Council may reflect a preference to ensure the maximum degree of input before this date. The failure to appoint a Commissioner further deepens the democratic deficit of any new laws that will apply during transition. This problem would be exacerbated in the event that the General Election eventually leads to the UK revoking Article 50, remaining a Member State, and belatedly nominating a Commissioner . In this situation, it would be permanently bound by EU law into which it did not have democratic input in the initial proposal in the time when it did not have a Commissioner.

This is an updated and adapted version of a [post](#) first published on the [European Law Blog](#) .

URL: <https://binghamcentre.biicl.org/comments/77/the-infringement-action-against-the-uk-for-failing-to-nominate-a-new-commissioner>