

EIPA Paper

European Institute of Public Administration

The background of the cover is a photograph of several European Union flags flying on tall silver poles. The flags are blue with a circle of yellow stars. In the background, a modern building with a curved glass facade is visible. A semi-transparent green rectangular box is overlaid on the center of the image, containing the title and author information.

The EU agenda and the right of initiative

Edward Best

June 2020

Dr Edward Best is Senior Expert and Head of Unit, EU Governance, at the European Institute of Public Administration (EIPA), Maastricht, and Senior Fellow of Maastricht University.

Contact: e.best@eipa.eu



European Institute of Public Administration
Institut européen d'administration publique



The European Commission supports EIPA
through the European Union budget



The views expressed in this publication are those of the author and not necessarily those of EIPA. This EIPA Paper may not be reproduced in any form without the prior permission of the author. © 2020 EIPA, Maastricht

European Institute of Public Administration
O.L. Vrouweplein 22
P.O. Box 1229
6201 BE Maastricht
The Netherlands

Tel. +31 43 32 96 222
E-mail: info@eipa.eu
Website: www.eipa.eu

The EU agenda and the right of initiative

Edward Best

Abstract

The Conference on the Future of Europe was to be launched on 9 May 2020 to debate the EU's priorities, institutional matters and democratic processes. Despite its delay due to the COVID-19 crisis, discussion of the EU's democratic functioning is ongoing. This EIPA Paper seeks to shed light on one element in EU law-making that is under scrutiny, namely the exercise of the European Commission's 'right of initiative'.

The Commission, subject to few exceptions, has the sole right of initiative for legislative acts. This power was given to the Commission as it allows an independent actor to ensure that the general interest is adequately taken into account in negotiations, and to serve as a counterweight to differences in size between member countries. The rationale has evolved under Better Regulation and Better Law-Making to emphasise also the Commission's role in guaranteeing the necessity and quality of initiatives in a context of broad consultation and interinstitutional cooperation.

Increased expectations regarding democratic participation, however, raise questions as to whether there should be a greater role for other players. The paper considers the European Parliament's push to have a full right to propose legislation, perspectives for the European Citizens' Initiative, and the possibility of a more proactive role for national parliaments.

By outlining the reasoning behind the Commission's right of initiative as well as how it has developed, this paper aims to explain the broader institutional issues at stake in these discussions of EU decision-making and democratic participation in EU governance.

Introduction

A Conference on the Future of Europe was proposed by the newly elected President of the European Commission, Ursula von der Leyen, in July 2019. It was meant to be launched on Europe Day, 9 May, 2020 and last until 2022. The European Commission has heralded this as a key part in the New Push for European Democracy, one of its six Political Priorities.¹ The European Parliament has welcomed it, affirming that '10 years after the entry into force of the Lisbon Treaty, it is an appropriate time to give EU citizens a renewed opportunity to have a robust debate on the future of Europe so as to shape the Union that we want to live in together'.² The European Council was positive but sounded more down-to-earth in its Conclusions of 12 December 2019, recalling that 'priority should be given to implementing the Strategic Agenda agreed in June, and to delivering concrete results for the benefit of our citizens'.

The Conference was rapidly overshadowed by the Coronavirus and arguments over the EU's response. By early April, some claimed that the very future of the European project was in question, as arguments about common fiscal responses seemed to show an alarmingly low level of both agreement between EU governments and solidarity between EU peoples.

The EU will almost certainly survive, and the Conference will go ahead in some form. The proposal places great emphasis on massive citizen involvement in the process. Whether or not citizens feel massively interested in them, institutional issues will figure prominently in the discussions. Indeed the Franco-German Non-Paper circulated in late November 2019 suggested that the first phase should ‘focus on issues related to EU democratic functioning’.³ The way in which these issues are approached will shape not only the outcome of the Conference but also the perceptions of citizens.

This series of EIPA Papers aims to contribute to both policy debate and public discussion over key issues in EU policy-making. The present paper concerns the **EU agenda and the right of initiative**.

The fact that the European Commission has a near-exclusive right to propose new EU legislation, the ‘right of initiative’ at the heart of the ‘Community method’ of policy-making, continues to be the focus of contention. The Paper addresses two specific questions that will be under consideration in this respect, while aiming also to help clarify the broader institutional issues at stake.

The first specific point is the European Parliament’s continuing demand to have its own right of initiative. In November 2019, Antonio Tajani, Chair of the EP Committee on Constitutional Affairs, confirmed that his committee would be pushing for this in the coming years, together with a strengthening of the Parliament’s right of enquiry: ‘The European Parliament is the only chamber directly-elected by citizens that does not hold the right of initiative.’⁴ Is this argument sufficient to change the Community method?

The second point concerns the interaction between the different actors who may formally request a Commission proposal, particularly the European Parliament and EU citizens, and between these processes and the other ways in which the Commission conducts consultations. How far have the new processes introduced by the Lisbon Treaty succeeded in ensuring that the Commission’s right of initiative goes hand in hand with democratic participation?

In order to discuss these points adequately, one needs first to clarify the specific context in which the right of initiative actually operates, and establish appropriate criteria for evaluation. The first section therefore summarizes the actual nature of the right of initiative and recalls the original reasons for which Member States gave this power to the Commission. The second assesses how the right of initiative has evolved in the context of Better Regulation and Better Law-Making. The third looks at the right of initiative from the perspective of democratic participation. It explains, and supports, the Commission’s rejection of the European Parliament’s demand for a stand-alone right of initiative, largely on grounds of Better Law-Making. It considers the state of play regarding the mechanisms by which the Council, the European Parliament and EU citizens may formally request the Commission to present a proposal, and the continuing discussion over the role of national parliaments.

1. The European Commission and the right of initiative in practice

The reasons for giving the Commission the right of initiative are often forgotten, and the actual nature of the right of initiative is widely misunderstood.

The ‘right of initiative’ in the EU does not refer only to the process of ‘agenda-setting’, the first stage in the classic policy cycle, in which many other EU actors play a role. And it is more than the right to place an issue on the agenda of a legislature, which in Europe is generally shared between the government and members of the legislature itself, and may extend to citizens in

what is often known as an ‘agenda initiative’. It is a specific power in the Treaty of Rome that the Member States chose to give to an independent body, the European Commission, to help in the subsequent stages of ‘policy formulation’ and even of ‘decision-making’.

Where EU law is concerned, the Commission has a near monopoly on the initiative for ‘legislative acts’. These contain the basic rules that the Council and the European Parliament adopt, usually on an equal footing, based on treaty provisions. The Commission adopts other legally binding acts to apply those rules in a uniform way (‘implementing acts’) or to adapt those rules (‘delegated acts’), by virtue of powers given to it in those ‘basic acts’.

The Commission has the right to shape how the ‘legislator’ (the European Parliament and the Council) takes decisions. The legislator can only adopt a legislative act on a proposal that is drafted by the Commission, with a few specific exceptions. The Commission may modify its proposal in the course of negotiations in order to facilitate a decision by qualified majority. It may request that the Council should act by unanimity where it strongly disagrees with amendments. In the very last resort, the Commission can withdraw the proposal to prevent an outcome that it considers worse than nothing.

This right was introduced to govern the relationship between the Commission and the Council (which was, until 1993 and the introduction of ‘codecision’, the sole legislator), and the relevant treaty article still refers explicitly only to the Council.⁵ It applies today not only to Commission-Council interaction under the ‘consultation procedure’ that is still used in some highly sensitive areas and results in Council acts, and when Council is agreeing its position in the first reading of the Ordinary Legislative Procedure (OLP - as codecision is now known). It also shapes the Commission’s role with regard to the negotiations between the Council and the Parliament that produce the final agreement.

Other actors share the right of initiative in a few specific cases. One quarter of the Member States may present ‘initiatives’ in the area of police and judicial cooperation in criminal matters.⁶ The European Parliament may adopt ‘regulations on its own initiative’ (see below). The European Central Bank may make ‘recommendations’ for certain issues related to finance and statistics, while the Court of Justice⁷ and the European Investment Bank may submit ‘requests’ with regard to their statutes.

Why did the Member States give the Commission the right of initiative?

The starting point is the concept of ‘promoting the general interest’.⁸ This is the primary reason given in the Treaty on European Union (Article 17) for the existence of an ‘independent’ Commission.

It would be unhelpful to present this as meaning that the Commission represents a putative higher-level entity (a sort of superstate that is to come) which has definable interests that are separate from, or even opposed to, national interests. It is more appropriate to see promotion of the ‘general interest’ as a function in a process, a power that sovereign states delegate in order to help achieve common goals over time. We should not forget that the TEU establishes in its first article a Union ‘on which the Member States confer competences to attain *objectives they have in common.*’ (emphasis added)

Achieving and managing ambitious goals such as a common market requires some degree of ‘pooling of sovereignty’ and delegation of powers, according to the seriousness of the problems

that can be expected. The European Community was created among countries of very different size, as well as different interests, and the integration process could be expected to generate strong pressures on governments from domestic actors who were negatively affected. In this context, the founding countries considered the right of initiative to be necessary not only to push ahead with the integration process, but also to help maintain stability through what has been known as the ‘institutional balance’.

First and foremost was the balance between the ‘general interest’ and national interests. The role of the Commission would be partly to help find a compromise between national interests in the Council. More than that, however, it would help ‘upgrade the common interest’ (to quote the classic phrase of Ernst Haas) and ensure that decisions would take into account the interest of the community as a whole and in a long-term perspective. Often forgotten is the fact that the right of initiative was also intended to be a counterweight to the difference in voting power among the Member States. In the negotiations for the Treaty of Rome in 1956, the Dutch delegation opposed the weighting of votes in view of the ‘guarantee of objectivity’ that would be provided by the Commission’s right of initiative. The compromise reached was to stipulate that four countries out of the Six would be required to vote in favour, in addition to 12 out of 17 votes, if the Council were to act other than on a Commission proposal.⁹ The present system of qualified majority voting still features this principle. Where the Council does not act on a Commission proposal, 72% of the Member States are required instead of the usual 55% (i.e. 20 out of 27 in 2020, as opposed to 15).¹⁰

Moreover, the right of initiative, through the possibility to request unanimity, was understood to give ‘an extra guarantee to Member States in the minority (usually, but not always, the “small” countries) in that the Council cannot push through a majority decision without the Commission’s consent.’¹¹

These two ‘political’ functions should be seen, together with the Commission’s role in ensuring that all Member States fulfil their obligations (the ‘Guardian of the Treaties’), as mechanisms to generate confidence in the fairness of the policy process. These reasons continue to be relevant but have been somewhat overshadowed by other considerations.

In the early 1990s, the political context in the EU became more restrictive with regard to legislation, giving rise to the demand for *Better Law-Making*, while expectations grew with regard to broader participation in policy processes. Against this background, the 1999 crisis of the Commission accelerated the move towards systematic application of evidence-based policy-making.

Better Regulation was born in the early 2000s, as the Commission strove to rebuild its credentials, and to reposition itself (and the Community method) in a more complex Union facing multiple challenges in terms of good *European Governance*. As the context has evolved, so too has the way in which the right of initiative is exercised and justified.

2. The right of initiative, Better Regulation and Better Law-Making

One key question has been how to ensure that the EU only works on the basis of proposals that are well prepared, and justified under the principles of subsidiarity (only do at European level what you can’t do as effectively at national level) and proportionality (only do as much as you need to get the job done).

For many years the dominant approach was the perceived need to control the Commission. On the one hand, the Commission, like the other supranational institutions, had a political commitment to

ever closer union and ‘more Europe’. On the other hand, it has been feared that this independent body, part of whose *raison d’être* is to propose rules and regulations, may come up with some that are not really necessary, or not thought through, out of institutional/bureaucratic interest.

This argument has, in a sense, been turned on its head since Maastricht. The emphasis in explaining the need for independent promotion of the general interest has shifted somewhat away from defence of the Commission’s own vision and ‘political’ role, towards its functional role in ensuring policy coherence and ‘managing legislative pressure’.

A supranational entity should be better placed to assess individual issues in a *long-term* perspective – hence the new emphasis on foresight - and to ensure *coherence* with the overarching objectives of EU policies. It should also be better equipped in terms of *technical capacity*, as well as having the necessary *independence*, to manage the tasks that are required to support evidence-based policy-making, such as consultation, impact assessment and evaluation.

If the Commission has the exclusive right of initiative, on this view, it will be able to provide a better safeguard against initiatives that are unnecessary, in the sense of not reflecting priorities, or inappropriate, in that they represent special interests rather than ‘the general interest’. This of course, creates tension with those actors who feel that they should, on grounds of good democratic governance, be able to insist that an issue is taken up in the legislative process.

The Juncker Commission introduced a new Better Regulation Agenda in 2015, emphasising the importance of openness and stakeholder consultation, and of only proposing what is really necessary: ‘Sensible, realistic rules, properly implemented and enforced across the EU. Rules that do their job to meet our common objectives - no more, no less.’ The 2020 Commission Work Programme promised a new Communication on Better Regulation for the second quarter of 2020.

The justification for the Commission’s role has thus increasingly focused on the ability to ensure the necessity and quality of initiatives in a context of broad consultation and interinstitutional cooperation.

The Interinstitutional Agreement on Better Law-Making (IABL) of 2016¹² formalizes this slightly refocused version of the ‘institutional balance’. The three institutions explicitly reaffirm the importance of ‘the Community method’, as well as recognizing the Commission’s treaty-based duty to initiate interinstitutional programming. However, the Agreement also provides that the Commission will systematically discuss initiatives in advance with the EP and the Council. The three institutions now adopt an annual Joint Declaration on Legislative Priorities for the following year.

This repositioning at the level of legislative activity should be seen in the broader perspective of institutional adjustment since Lisbon. At the strategic level too, the Commission seems to be establishing a new balance with the other institutions. When presenting her Political Guidelines in July 2019, Ursula von der Leyen seemed to define the Commission both as an independent body, and one that is sensitive to input from both institutions equally: ‘I have consulted far and wide and have inspired myself from my discussions with the political groups in the European Parliament, as well as from the European Council’s Strategic Agenda for 2019-2024.’

One can observe a similar trend regarding the preparation of ‘delegated acts’, by which the Commission may be empowered ‘to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act.’¹³ The Commission consults, adopts the act, and submits it for scrutiny and possible ‘objection’ by either co-legislator. There is no *ex ante* control by the Member States in a ‘comitology committee’ as is the case for ‘implementing acts’. Delegated acts are explicitly ‘non-legislative’ and do not come under the Commission’s right of legislative initiative. However, within the limits set by the legislator

in the basic act, the treaty seems to provide a certain margin of discretion for the Commission in deciding how to ‘flesh out’ the basic act. Immediately after the entry into force of the Lisbon Treaty, the Commission published a Communication emphasizing that ‘the Commission enjoys a large measure of autonomy in this matter’. It would carry out broad consultations, including with national experts, but in a purely consultative capacity.¹⁴ After several years of argument with the Council, including two court cases, the Commission shifted the emphasis in its position away from autonomy in technical assessment and towards preliminary consensus building with the co-legislators. The revised Common Understanding annexed to the 2016 IIABL requires the Commission systematically to consult experts from all Member States, and both the EP and the Council may send experts to Commission expert groups dealing with delegated acts. More important in practice is that the Commission has, as also foreseen in the IIABL, become much more pro-active in discussing and explaining what it is doing in advance of adoption, notably in EP Committees.

Finally, however, there continues to be discussion over the balance between the Commission’s more ‘political’ role in promoting its own convictions, and its functional role in finding general solutions, at the stage of interinstitutional negotiations.

The other institutions have recognized that the Commission continues to enjoy the right of initiative at first reading in the OLP, but expect it also to help bridge their positions. The 2007 Joint Declaration on practical arrangements for codecision (which is still generally relevant) thus states that:

‘Appropriate contacts shall be established to facilitate the conduct of proceedings at first reading. [...] The Commission shall facilitate such contacts and shall exercise its right of initiative in a constructive manner with a view to reconciling the positions of the European Parliament and the Council, with due regard for the balance between the institutions and the role conferred on it by the Treaty.’¹⁵

The Court of Justice has given a rather nuanced ruling on the status of the Commission vis-à-vis the co-legislators. In 2013, the Commission withdrew a proposal to prevent the co-legislators from adopting a text (for the first time in nearly 20 years), arguing that it represented a serious distortion of its proposal. The Council challenged this before the Court, and lost. The Court ruled in 2015 that: ‘[t]he power of withdrawal [...] cannot [...] confer upon that institution a right of veto in the conduct of the legislative process, a right which would be contrary to the principles of conferral of powers and institutional balance.’ However, ‘the Commission’s power under the ordinary legislative procedure does not come down to submitting a proposal and, subsequently, promoting contact and seeking to reconcile the positions of the Parliament and the Council’.¹⁶

Nevertheless, the Commission is still held sometimes to go too far when assisting in the informal interinstitutional negotiations known as ‘trilogues’. Looking back at the 2014-2019 term, the EP has complained that the Commission has been ‘adapting its role at stages of the legislative procedure which are the preserve of the co-legislators. [...] it is also sometimes apparent during trilogue negotiations: the Commission’s commitment to proposing compromises and resolving disputes between the Parliament and the Council has always been a key feature of legislative negotiations, and it should continue to play the role of honest broker and facilitator during such three-way discussions.’¹⁷

3. The right of initiative and democratic participation

This brings one to the broader concerns related to good governance and, in particular, norms of democratic participation. Some argue that this virtual monopoly on the initiative is a ‘technocratic’ function that is no longer appropriate. The Commission is independent, which for some people is the reason for its existence but for others a cause to denounce it as being ‘unelected’. Those who are less enthusiastic about the EU sometimes suggest that its proposals should largely be dictated by the Member States, whose governments are elected, and subject to control by national parliaments.

Others argue that the directly elected European Parliament should, at the very least, share the right of initiative. In an era in which new forms of direct democracy and citizens’ participation have come to be expected, should not citizens be able to oblige the Commission to deliver proposals on issues that they think have to be addressed?

The European Parliament

The EP already has a treaty-based right of initiative in a few special cases, all of which are of an institutional, rather than normative, nature. It has both the exclusive right of initiative and the right of consent regarding provisions for elections of its members, but the Council adopts the act. The EP may adopt ‘regulations on its own initiative’ in three cases. These concern the duties of its Members, the duties of the Ombudsman, and the exercise of the EP’s right of inquiry. Although the EP is to adopt the act, however, it always requires the consent of the Council and, over the *right of inquiry*, the consent of the Commission as well.

This last case has proved problematic. The EP presented an initiative in 2014 that the other institutions held to pose fundamental concerns of a legal and institutional nature. Both Council and Commission refused to negotiate on that basis, leaving the EP stuck with its initiative. The EP rapporteur could only lament in late 2018 that: ‘it is practically impossible to negotiate with the Council and the Commission and to study whether there is a margin for reaching agreements, since they are only obliged to give their consent or not to Parliament’s proposal, but not to negotiate it. Unfortunately, in contrast to what happens when it is the Council or the Commission that submits their proposals, Parliament has not been able to sit at the negotiating table.’¹⁸ This frustration may contribute to the present demand to give the EP a more clear-cut power.

The EP does have the formal right (Article 225 of the Treaty on the Functioning of the European Union (TFEU)) to request a proposal, and has often presented quite detailed indications as to what it would like to see. The EP is not satisfied with how the Commission has responded. According to a 2019 study, out of 26 cases between 2010 and 2019, the Commission followed up the Parliament’s request to some extent with a proposal in only eight cases.¹⁹

The EP therefore continues to press for the full right of initiative, but it is not entirely clear what this would mean in practice. Here, it is important to emphasise the difference between the agenda-setting phase of initiative, and the subsequent phase of policy formulation.

The EP has considerably strengthened its internal ‘technical’ capacity, with the establishment in 2012 of a Directorate for Impact Assessment and European Added Value ‘to equip the EP with an administrative capacity to support its agenda-setting function’.²⁰ This results in Cost of Non-Europe Reports that present overall arguments for new policy developments, and European Added Value assessments that set out in detail the justification for requests under Article 225

TFEU.²¹ The EP has also increased its ability (more so than the Council) to provide supporting analyses for substantial amendments made after the proposal has been submitted by the Commission.

Would it be either feasible or desirable for the EP to develop a parallel capacity to elaborate legislative proposals with the same rigour and quality that is now expected of the Commission?

In a majority of European countries, whatever the origin of the initiative, 'most drafts are elaborated within the ministries. The prevalence of the executive in the exercise of the legislative initiative implies that most laws are, in practice, initiated by the Government [...] the Ministries have the manpower and the expertise to prepare bills.'²² In the EU, this will equally be one of the core tasks of the Commission.

In reality, the idea of a stand-alone EP right of initiative comes down to whether the Commission's 'independence' should in some cases be interpreted as requiring it to give neutral technical support for drafting proposals to pursue the objectives proposed in the political agenda of the legislature.

However, the new Commission President, Ursula von der Leyen reiterated when presenting her Political Guidelines in July 2019 that the Commission, while being more responsive to EP concerns in shaping EU priorities, would maintain its formal rights precisely on the grounds of Better Law-Making:

'I support a right of initiative for the European Parliament. When Parliament, acting by a majority of its members, adopts resolutions requesting that the Commission submit legislative proposals¹, I commit to responding with a legislative act, in full respect of the proportionality, subsidiarity and better law making principles. To make this process as effective as possible, I will ask my Commissioners to work hand-in-hand with the European Parliament at every stage of designing and debating resolutions.

¹Article 225'

Citizens

Much the same applies to requests from citizens. Pressure to provide a formal possibility for citizens to be involved in agenda setting led to inclusion of the European Citizens' Initiative (ECI) in the Treaty at Lisbon. A citizens' committee of at least seven EU citizens from at least one quarter of the Member States may submit an initiative to the Commission. The Commission 'registers' it so long as procedural requirements are fulfilled; it does not manifestly 'fall outside the framework of the Commission's powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties'; and it is neither 'manifestly abusive, frivolous or vexatious' nor 'manifestly contrary to the values of the Union'. If an initiative collects over one million valid statements of support from at least seven Member States, the Commission is obliged to respond within (now) six months. Initial enthusiasm and activism quickly gave way to disappointment. The 2011 Regulation installed a process that proved complicated and burdensome, while the first successful initiatives seemed to bring no result in terms of legislative initiative from the Commission.

The Regulation was finally revised, the new version coming into force in 2019,²³ leading to simplification of the process, and the ECI seemed reinvigorated. As of May 2020, 97 initiatives had been submitted to the Commission, of which 74 had been 'registered', and five had been 'successful'. Of these, two so far have contributed to shaping legislative initiatives: Right2Water

contributed to revision of the Drinking Water Directive, and Stop Glyphosate to revision of the General Food Law.²⁴ The Commission only started to examine the fifth, Minority Safepack, on 10 January 2020.

Campaigners still generally feel that the ECI lacks teeth, and that the Commission should be obliged to draft a legislative proposal for each (and any) successful initiative. The Commission is not going to accept this, for the reasons outlined above, and there are other ways to address the concern expressed, for example, in the recommendations adopted at the 2020 ECI Day that, '[c]itizens' participation at the European level must always have a clear link to the formal decision-making process in order to make it meaningful.' Indeed, these recommendations include not only working with the European Parliament but also that national parliaments should hold a debate and a vote on each successful ECI prior to the Commission decision on follow-up.²⁵

A sort of compromise seems to be emerging by which the ECI may be formally linked with other agenda-setting processes with the aim of ensuring broad political discussion and consideration of possible legislative initiatives with the co-legislators themselves. Under the revised Regulation, the Commission transmits successful initiatives to the European Parliament, the Council, the advisory bodies and national parliaments, all of which may attend the public hearing in the European Parliament. 'Following the public hearing, the European Parliament shall assess the political support for the initiative.'²⁶ The EP Rules of Procedure now foresee that the EP may use its formal right to request a proposal on a successful initiative if the Commission fails to submit one.²⁷

National parliaments

Whereas the European Parliament has been most concerned with its ability to prompt new proposals, discussion of the role of national parliaments at EU level has mainly focused on how to control the Commission in exercising its right of initiative. The Lisbon Treaty introduced a mechanism for subsidiarity control (or 'check') by national parliaments. All legislative proposals²⁸ must be sent to national chambers, each of which has eight weeks to send a 'reasoned opinion' to the Commission. Each country has two votes. If one third of the total votes (one quarter in the field of police and judicial cooperation in criminal matters – the same policy area in which the Commission shares the initiative with one quarter of the Member States) are negative, the Commission must review the proposal and give reasons if it decides not to amend or withdraw the proposal. There have been three cases as of May 2020. The Commission withdrew the proposal in the first case, but for other reasons. This mechanism was dubbed the Yellow Card from the sporting image of warning a player, and this process (often referred to as the Early Warning System by academics but less so among practitioners) did sound purely negative.²⁹ Interest grew in finding means for national parliaments to act in a more positive light.

A parallel process had already been initiated in 2006, now known as the 'political dialogue', by which the Commission consults national parliaments. The national chambers can send back 'opinions', which may be positive, on any aspect of the proposal. The idea of a 'Green Card'³⁰ emerged in 2013. The Dublin Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC) 'call[ed] on the Commission to consider within the existing context of political dialogue any individual or collective requests from national Parliaments for new legislative proposals'. Two 'green card' initiatives were then presented, one in July 2015 led by the House of Lords on a strategic approach to the reduction of food waste co-signed by 16 chambers and another in July 2016 by the French *Assemblée Nationale* co-signed

by eight chambers. Both received a formal response from the Commission.³¹

In 2015 COSAC formally proposed the Green Card as a sort of ‘enhanced political dialogue’. This would allow ‘willing national parliaments to play a proactive role in the EU agenda-setting process with a view to contribute further to the good functioning of the EU [through] constructive non-binding suggestions regarding policy or legislative proposals to the European Commission, without undermining the Commission’s right of legislative initiative [...]’.³²

The Commission has welcomed this attitude, but consistently rejected the idea of formalizing this as a new procedure. The key point for the Commission and for many others is that, while national parliaments can and should help bring the EU and citizens closer together in terms of feeling, the EU and national levels of governance should be kept separate in terms of function.

‘The Commission recognises that national Parliaments, as the representatives of Europe’s citizens at national level, play an important role in bridging the gap between European institutions and the public. The Commission continues to respect the *balance between the institutions active on a European level*, and is mindful of its right of initiative.’³³ (emphasis added)

The idea is often discussed of promoting common efforts between national parliaments and the European Parliament. However, although there have been statements of EP support in the past,³⁴ the EP has generally indicated a preference for keeping things at EU level – and not doing anything that could weaken its own position in this respect. Expressions of openness to further dialogue with national parliaments have generally been set in the framework of the EP’s own formal right to request legislative proposals under Article 225.³⁵ Even as new structures for multi-level ‘interparliamentary cooperation’ have evolved between the EP and national parliaments in key policy areas (police cooperation, economic governance, CFSP/CSDP), the EP has maintained its insistence on keeping EU- and national-level roles separate when it comes to legislation. Moreover, following the principle that the primary role of national parliaments relates to national governments, the EP in 2017 in fact made the novel suggestion that green cards could be sent not to the Commission but to the **Council**, which could then – like the EP – exercise a right of legislative initiative.³⁶

The EP’s position was reasserted in 2018, this time with regard to suggestions made by national parliaments to the Commission.

‘...the Commission could enjoy the discretion either to take on board such proposals or to issue a formal response underlining its reasons for not doing so; [...] such a procedure cannot consist of a right of initiative, or the right to withdraw or amend legislation, as it would otherwise subvert ‘the Union method’ and the distribution of competences between national and European level, thus violating the Treaties; recommends, meanwhile, that in the event of a future revision of the Treaties, the right of legislative initiative should be accorded to the European Parliament, as the direct representative of EU citizens;’³⁷

On the other hand, efforts to develop joint initiatives using Article 225 could also run into concerns on the part of national parliaments, for example that the EP would be claiming credit for their work.³⁸ Indeed, when asked in the past, only six out of 30 responding chambers thought the EP should be involved at all.³⁹

While the von der Leyen Commission will be expected to at least maintain the current openness to national parliaments, it is unlikely that any green card procedure will be formalized, nor that there will be any major shift in interaction between national parliaments and the EP in this respect. Among those who believe that a system of multi-level governance is desirable, few would argue that this separation of levels is incompatible with basic principles of good, democratic governance.

Conclusions

The Commission's right of initiative has adapted remarkably successfully to the changes in the European community since the 1950s. This is a process of institutional evolution that will continue.

At this stage, the Commission's position seems appropriate in response to the demand to give a full, stand-alone, right of initiative to the European Parliament. Stronger interaction in defining priorities with the EP, as with the Council, together with closer technical cooperation, can boost the political legitimacy of Commission initiatives without losing the benefits of the Community method.

When it comes to democratic governance, it is important to recall that participatory democracy and representative democracy need to be mutually reinforcing. Otherwise, there is a danger that promotion of direct participation may undermine the legitimacy of parliaments. One should also perhaps more confidently reassert the traditional idea that Commission consultations are one source of legitimacy for the 'Community method', just as the Constitutional Treaty recognised 'broad consultations' by the Commission in themselves as one component of participatory democracy.

An optimistic view is that the different strands of participation – citizens' initiatives, national parliaments and the European Parliament – will come to interact between themselves as well as with Commission consultation to improve not only legislation but also legitimacy.

This new setting is more complex and multidimensional than in the past, and perhaps harder to understand. On the other hand, more openings now exist for Member States and stakeholders to be involved, and to contribute to EU policy-making from the beginning, if one knows how to go about it.

Notes

¹ Communication from the Commission to the European Parliament and the Council, *Shaping the Conference on the Future of Europe*. COM(2020) 27 final, 22 January 2020.

² European Parliament resolution of 15 January 2020 on the European Parliament's position on the Conference on the Future of Europe (2019/2990(RSP))

³ Conference on the Future of Europe, Franco-German non-paper on key questions and guidelines, 27 November 2019.

⁴ *EUobserver*, 20 November 2019.

⁵ Article 293 TFEU.

⁶ One condition for including the highly sensitive domains of judicial cooperation in criminal matters and police cooperation (the former 'third pillar') in the 'Community' treaty at Lisbon was that the Commission would share the right of initiative with one quarter of the Member States (previously the Commission shared the initiative with 'any Member State' for the adoption of binding decisions that were not part of Community law). An institutional showdown took place straight away. Immediately after the Lisbon Treaty entered into force, three Member State initiatives were tabled: the European Protection Order (EPO), the European Investigation Order (EIO); and the Directive on the right to interpretation and translation in criminal proceedings. Discussion of the EPO, which covered both criminal and civil law, saw open disagreement in 2010 between the Commission and the Spanish Presidency over the legal basis and the difference between shared right (criminal law) or exclusive right (civil law) of initiative for the Commission. In the case of the Proceedings Directive, the Commission produced its own proposal, with the result that there were briefly rival texts on the table on the same topic. The procedure has only been used once since then, for the more practical purpose of moving the European Police College from the UK to Hungary in 2014. Further Member States initiatives seem unlikely.

⁷ In the case of the Court of Justice, the Commission has the formal possibility to exert influence since it must be consulted on a 'request' of the Court (Art. 281 TFEU) and its 'opinions' have weight. This was manifested most recently in 2018 after the Court submitted a request. The Commission did not issue a favourable opinion on the proposed transfer from the Court of Justice to the General Court of jurisdiction to adjudicate at first instance in actions concerning control of state aid and in actions for failure to fulfil obligations. The Court withdrew these parts of the request. This case is also noteworthy (at least for institutional nerds) in that it seems to have involved the first use in the EU context of the term 'quadrilogue', to refer to the meeting among the four institutions in Strasbourg on 13 December 2018. See *Presidency Note* of 11 January 2019 Council doc. 5190/19.

⁸ The original text of the Treaty of Rome states: 'The members of the Commission shall perform their duties in the general interest of the Community with complete independence.'

⁹ See Best, E., 'The Debate over the Weighting of Votes' in Best, E., Gray, M. and Stubb, A., *Rethinking the European Union. IGC 2000 and Beyond*. (Maastricht: EIPA, 2000) pp.105-130.

¹⁰ Article 238(2) TFEU. This also applies to a proposal from the High Representative.

¹¹ European Convention, *Contribution from Mr Barnier and Mr Vitorino, members of the Convention: "The Commission's right of initiative"* CONV 230/02, 3 September 2002.

¹² *Interinstitutional Agreement of 13 April 2016 on Better Law-Making*, OJ L 123 of 12 May 2016.

¹³ Article 290(1) TFEU.

¹⁴ Communication from the Commission to the European Parliament and the Council, *Implementation of Article 290 of the Treaty on the Functioning of the European Union*, COM(2009) 673 final of 9 December 2009

¹⁵ *Joint Declaration on Practical Arrangements for the Codecision Procedure*, OJ C 145 of 30 June 2007, paras 12 and 13.

¹⁶ Judgment of the Court (Grand Chamber) of 14 April 2015, Case C-409/13 (macro-financial assistance) paras 75, 74.

¹⁷ European Parliament, *Activity Report, Developments and Trends of the Ordinary Legislative Procedure, 1 July 2014 - 1 July 2019* (8th parliamentary term), 2019, p. 21.

¹⁸ European Parliament, Committee on Constitutional Affairs, Third Working Document on a proposal for a regulation of the European Parliament on the detailed provisions governing the exercise of the European Parliament's right of inquiry and replacing Decision 95/167/EC, Euratom, ECSC of the European Parliament, the Council and the Commission of 19 April 1995. Rapporteur: Ramón Jáuregui Atondo. 17 December 2018.

¹⁹ Remáč. M. , *Parliamentary scrutiny of the European Commission: Implementation of Treaty provisions*, European Parliamentary Research Service, July 2019 p.71.

²⁰ European Parliament, The Secretary-General, *Strategic Planning for the Secretariat-General of the European Parliament*, January 2016. p.21

- ²¹ Kotanidis, S. *Briefing: Parliament's right of legislative initiative*, European Parliamentary Research Service, February 2020.
- ²² European Commission for Democracy through Law (Venice Commission), *Report on Legislative Initiative*, 2008. para 134.
- ²³ Regulation (EU) 2019/788 of the European Parliament and of the Council of 17 April 2019 on the European Citizens' initiative. OJ L 130/55 of 17.5.2019
- ²⁴ Other ECIs had different kinds of follow-up. For example, #Stop Vivisection# led to a significant increase in the work of the European Union Reference Laboratory for alternatives to animal testing (EURL ECVAM).
- ²⁵ ECI DAY 2020 recommendations on the future of the European Citizens' Initiative. 25 February 2020. <https://www.eesc.europa.eu/en/documents/report/eci-day-2020-recommendations>
- ²⁶ Regulation (EU) 2019/788 Article 14
- ²⁷ European Parliament, *Rules of Procedure*, February 2020. Rule 222(9).
- ²⁸ The same procedure also applies to legislative initiatives from the other bodies that have this right.
- ²⁹ A Red Card had also been proposed, by which two thirds of the votes could lead to the Commission being 'sent off'. The compromise between Yellow at one third and Red at two thirds resulted in the 'Orange Card' for cases (none so far) where one half of the votes would be negative, in which case either Council or EP could intervene.
- ³⁰ *Non-Binding Criteria for the application of Articles 290 and 291 of the Treaty on the Functioning of the European Union — 18 June 2019*. OJ C223 of 3 July 2019, para C.
- ³¹ A third 'green card' initiative was launched in November 2015 with regard to the revision of the Audiovisual Media Services Directive by the Latvian Saeima, but was not recognized as such. See Milan Remáč, Working with *national parliaments on EU affairs*, European Implementation Assessment, European Parliamentary Research Service, October 2017.
- ³² Contribution of the LIII COSAC (Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union), Riga, 31 May-2 June 2015, OJ C 342 of 16 October 2015. Points 2.9 and 2.10.
- ³³ European Commission, *Annual Report 2015 on Relations between the European Commission and National Parliaments* COM(2016) 471 final of 15 July 2016. p.13.
- ³⁴ In June 2013, for example, the EP proposed that the new Social Package should include ' a new legislative initiative on the right of national parliaments to require a legislative initiative from the Commission as a 'green card', on the basis of Article 352 TFEU; new rights for national parliaments to require a legislative initiative from the Commission as a 'green card' through a treaty change'. European Parliament resolution of 12 June 2013 on the Commission Communication 'Towards Social Investment' for Growth and Cohesion — including implementing the European Social Fund 2014-2020' (2013/2607(RSP)) OJ C65 of 19 February 2016 : para 76.
- ³⁵ Borońska-Hryniewiecka, K. 'From Legislative Controllers to Policy Proponents. The evolving role of national parliaments in European multi-level governance' in Pérez de las Heras, B. (ed.), *Democratic Legitimacy in the European Union and Global Governance: Building a European Demos*. (Springer, 2016): 65-86. p.76.
- ³⁶ European Parliament resolution of 16 February 2017 on possible evolutions of and adjustments to the current institutional set-up of the European Union (2014/2248(INI)) paras 60, 62.
- ³⁷ European Parliament resolution of 19 April 2018 on the implementation of the Treaty provisions concerning national parliaments (2016/2149(INI)) para 18.
- ³⁸ Gostyńska-Jakubowska, A. 'The role of national parliaments in the EU. Building or stumbling blocks?', Centre for European Reform, June 2016.
- ³⁹ Fasone, C. and Fromage, D., 'From Veto Players To Agenda-Setters? National Parliaments and their 'Green Card' to the European Commission'. *Maastricht Journal of European and Comparative Law* 23: 2 (2016): 295-316. p.76.