

The EU agenda and the right of initiative

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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. This has been heralded by the European Commission 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. Great emphasis is placed 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. And it considers the state of play regarding the mechanisms by which the Commission may be formally requested to present a proposal by the Council, the European Parliament and EU citizens, as well as discussion over whether national parliaments could have such a role.

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 are adopted by the Council and the European Parliament, usually on an equal footing, on the basis of treaty provisions. Other legally binding acts are adopted by the Commission to apply those rules in a uniform way (‘implementing acts’) or to adapt those rules (‘delegated acts’), on the basis of powers given to it in those ‘basic acts’.

The ‘legislator’ (the European Parliament and the Council) can only adopt a legislative act on the basis of a proposal that is drafted by the Commission, with a few specific exceptions. The Commission has the right to shape the decisions that are taken by the legislator. 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. And, 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.

There are a few special cases in which other actors share the right of initiative: one quarter of the Member States in the area of police and judicial cooperation in criminal matters,⁶ the European Central Bank for some specific issues related to finance and statistics, and the European Parliament (see below), the Court of Justice,⁷ and the European Investment Bank for institutional matters of their concern.

Why was the Commission given 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 is delegated by sovereign states 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 right of initiative was considered 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' as promoted by an independent Commission, and national interests which were the object of negotiation in the Council. The role of the Commission was to help find a compromise and, as far as possible, to help 'upgrade the common interest' (to quote the classic phrase of Ernst Haas). 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 the basis of a Commission proposal.⁹ This principle is still reflected in the present system of qualified majority voting. Where the Council does not act on the basis of 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.

Since 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, 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.' A new Communication on Better Regulation was promised in the 2020 Commission Work Programme 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, it also provides that new Commission initiatives will be systematically discussed 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 towards preliminary consensus-building with the co-legislators. The revised Common Understanding annexed to the 2016 IABL 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 IABL, 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

However, 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 is something to be denounced as being 'unelected'. Those who are less enthusiastic about the EU sometimes suggest that its proposals should therefore be dictated by the Member States, whose governments are elected – and perhaps also by national parliaments.

Alternatively, it is argued that, since we now have a directly elected European Parliament, the Parliament should, at the very least, also have the right of initiative. And, in an era in which new forms of direct democracy and citizens' participation have come to be expected, should not citizens also 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 it is the Council that adopts the act. There are three cases in which the EP may adopt 'Regulations on its own initiative'. 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 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 as 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 government or 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 was quickly followed by disappointment. A Regulation was rather rushed through in December 2010, installing 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 process was simplified after the Regulation was finally revised, the new version coming into force in 2019,²³ and the ECI seemed reinvigorated. As of March 2020, 96 initiatives had been submitted to the Commission, of which 72 had been 'registered', and five had been 'successful'. Of these, two so far could be seen to shape legislative initiatives: Right2Water contributed to revision of the Drinking Water Directive, and Stop Glyphosate to revision of the General Food Law.²⁴ The fifth, Minority Safepack, only started to be examined by the Commission 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 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 April 2020. The Commission withdrew the proposal in the first case, but for other reasons. This 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, and these can send back ‘opinions’ on any aspect of the proposal, and which may be positive. 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’ which 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, there are few voices who 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.

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 of the conditions 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. It is unlikely that further Member States initiatives will be submitted.

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. These parts of the request were withdrawn by the Court. 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 concept of the 'general interest' was in fact introduced in 1967 by the so-called Merger Treaty that unified the institutions of the Communities.

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.