The institutional alteration of the right of initiative of the European Commission

Spyros A. Pappas, Attorney at Law, Senior Adviser EGOA (European Governance Advisers), Former Director General at the European Commission.

1. De lege lata: The Commission's monopoly.

One of the basic rights/prerogatives of the European Commission is the right of initiative (CJEC 26.2.1976, SADAM, case 88, 90/75, Rec.323). This right means that the Commission not only participates in the creation of community legislation, but that it is also the body, which has the exclusive prerogative to initiate the legislative process. In this way, the Commission, by evaluating the Community interest can, at any given moment, propose new regulations and directives. It can even withdraw its respective proposals in the case that with reason it alters opinion or that the legislative process leads to a substantially different direction from its original proposals. Indeed, according to the provisions of articles 251, par.2 [1] and 252 par.2[2] of the Treaty establishing the European Communities (TEC) the Council on its own or jointly with the European Parliament, depending on the relevant provisions of the TEC, cannot proceed with legislative changes without a prior proposal of the Commission. Regulations and directives, if these are

[1] Article 251 TEC: «1. When reference is made in this Treaty to this Article for the adoption of an act, the following procedure shall apply. 2. The Commission shall submit a proposal to the European Parliament and the Council…"

[2] Article 252 TEC : « When reference is made in this Treaty to this Article for the adoption of an act, the following procedure shall apply: a) The Council, acting by a qualified majority on a proposal from the Commission and after obtaining the opinion of the European Parliament, shall adopt a common position…"

issued without the proposal of the Commission as is stipulated in the TEC, it is possible that the Court of Justice of the European Communities cancel them on the grounds of a breach of substantive procedural requirement [3], following an appeal. Moreover, if the Council wishes to diverge from the proposal of the Commission it can do so only by a unanimous decision of all its members[4], whereas, generally, in order for the Council to adopt acts by qualified majority the following is required:

- 62 votes, in the cases where according to the Treaty the Council decides on a proposal of the Commission.

- 62 votes which include the votes of at least ten members, in other cases [5].

Consequently, the proposal of the Commission is not simply the formal pre-condition for initiating the legislative process, but is rather the substantial basis, upon which the Council supports its decision. It is clear that, apart from the cases where the actual Treaty provides a binding deadline, the Commission disposes the right to decide, if and when it shall formulate a proposal. Furthermore, the Commission may either amend [6] its own proposal particularly by taking into account the opinion of the European Parliament or withdraw[7] it. This possibility bestowed to the Commission is a **broad discretionary power,** which is justified by the provisions of the Treaty that the Community interest be safeguarded by an independent and supranational body of the EC. However, in the framework of the institutional balance, the TEC foresees the possibility for the Council as well as for the European Parliament to urge or to inspire legislative proposals put subsequently

---

[3] Article 230 TEC, enumerating among others the grounds of review and, more specifically, Article 253 TEC : « Regulations, directives and decisions adopted jointly by the European Parliament and the Council, and such acts adopted by the Council or the Commission, shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty ". See, as well, Dr. Christian Runge, Einführung in das Recht der Europäischen Gemeinschaften, T.B/II/§4 - 3b.

[4] Article 250 paragraph 1 TEC : « Where, in pursuance of this Treaty, the Council acts on a proposal from the Commission, unanimity shall be required for an act constituting an amendment to that proposal, subject to Article 251 (4) and (5)".

[5] Article 205 paragraph 2 TEC

[6] Article 250 paragraph 2 TEC : « As long as the Council has not acted, the Commission may alter its proposal at any time during the procedures leading to the adoption of a Community act". For instance, the proposal on "Erasmus" was first withdrawn by the Commission (Dec.87/327 EC 1987 L 166/20) and then re-submitted (WQ 2421/86 (Herman) EC 1987 C 157/40).

[7] Example, the proposal on chocolate/gelatin, due to the opposition of the European Parliament : WQ 145/86 (Cortell) EC 1987 C 31/5.

forward by the Commission[8]. To be precise, the exercise of the right by the European Parliament or by the Council, according to a correct interpretation of the Treaty, cannot have as a result a modification of the right of initiative of the Commission into one of an obligation on its part to formulate a respective legislative proposal in accordance with the desires of the other two bodies in question. In other words, if the Commission does not act in conformity to the desires of the Council and European Parliament, there does not exist the possibility to appeal against it for failure to act[9]. If this were not the case, the Commission's right of initiative would be reduced into a mere formality and the Commission's role would be described as one of formal cooperation for institutionalising the decisions taken in advance by the other two Institutions. Such a situation, however, conflicts with the spirit and the letter of the Treaties, which express the wish for the Institutions to cooperate on an equal basis[10]. An exception to the basic rule would require an explicit provision in the provisions of article 192 b and 208 TEC[11]. In conclusion, the Commission's right of initiative constitutes an exclusive competence, indeed a monopoly, which ensures it has a significant and crucial part in the formulation of community policies and with a most political role. The significance of the Commission's role is ensured not only by the choice of timing for putting forward a proposal, not only by its formulation of the contents of a given proposal which actually sets the context in which the other two decision making bodies can act within, but also by its capacity to intervene in and influence the co-decision and cooperation procedures according to their respective and various national and institutional balances. The various actions which the Commission exercises in the political negotiations of the decision-making processes amount to it having a role which can be defined as one of Primus inter pares. Can such a role therefore continue to be justified? Does it correspond to the new reality?

---

[8] Article 192 b TEC: « The European Parliament may, acting by a majority of its Members, request the Commission to submit any appropriate proposal on matters on which it considers that a Community act is required for the purpose of implementing this Treaty" and Article 208 TEC "The Council may request the Commission to undertake any studies the Council considers desirable for the attainment of the common objectives, and to submit to it any appropriate proposals".

[9] Contra C.Runge, see above reference ; Similarly the practice :When in 1962 the Council asked the Commission, invoking the relevant article, to submit a proposal excluding transport from the competition rules, the Commission, although not in agreement about it, finally ceded, probably because it considered the Treaty provision as binding. See also WQ 865/82 (Radoux) EC 1982 C 298/5.

[10] See article 15 of the Merger Treaty.

[11] See P.J.G. Kapteyn and P.Verloren van Theemaat, Introduction to the Law of the European Communities, 1990, Kluver Law and Taxation Publishers, NL, p.253.

2. The waning of the Commission's right of initiative.

It is a fact that the significant role of the European Commission in the European enterprise has been decisive. It is with good reason that the Commission is known as the motor of the European Community, something, which is owed above all else to its right of initiative. Somebody had to pave the community road. For every type of new government organisation it is necessary to innovate. It was therefore most appropriate that the Commission was accorded such a role, during the period in which the dilemma "national versus supranational state" was felt acutely. For this reason there were periods characterised by intense action by the Commission and others characterised by a more low key approach, according to the prevalent political mood or to the vision of its respective Presidents over the years. The more mooted period of the 1970s was succeeded by the euro-euphoric Delors and Santer Commissions, which in turn have been followed by the regressive Prodi Commission. Is it a pattern of alternating phases of history being repeated in the course towards European completion or it is an evolution to a next phase, always with the same objective, but via a different direction? A deeper review of the fact cannot but lead to the conclusion that in reality the rhythm of the course has not just been a result of certain successive, coincidental or not, exchanges of attitudes, but rather, since 1970 there has been a corrosion of the Commission's right of initiative and of its negotiating power[12]. It is true that at the initial phase of the history of the European Communities, the Commission not only had the necessary legal basis in order to assume the primary role: Rather the Commission as the par excellence Community institution was able to flourish in the climate of Euro-optimism which characterised the period and which prevailed significantly in the key Member States following the tragic experience of the Second World War which had torn the continent apart. The Commission moreover had the appropriate technical infrastructure and know-how. On the other hand in the Member States, the concept of the nation state reigned, the dominant role of national policies continued to prevail over Community policies and notably national administrations had not yet developed the necessary familiarity with the complex procedures which characterised negotiations and decision making in the Community. **With the passing of time the necessary Community know-how was obtained and it became well understood that Community policies were not external to national**

[12] J.L.Devost, Les relations entre le Conseil et la Commission dans le processus de la décision communautaire, R.M.C. 1980.289. Against, Marie-Françoise Labouz, Le système communautaire européen, 2ème éd., Berger-Levrault, 1988, p.191, on grounds of the J.Delors period.

policies but rather constituted an integral part of policy at the national level. The result was that the lack of national interest and action was replaced by a vying on the part of the Member States to ensure the prevalence of their respective national interests prior to the formulation of the final Community interest by means of diplomatic but at the same time unrelenting negotiating rivalry[13].

From the free arena in which the Commission first operated in, it found itself increasingly in a new situation in which the European Parliament and the Council began to assert their institutional positions and the Member States for their part claimed the primary role in decision-making. Accordingly the Committee of Permanent Representatives obtained an ever increasing politically significant role becoming the factory for the processing of Community policies This resulted in the **bureaucracy becoming ever more politicised and politics becoming ever more bureaucratised** captive to technocracy and to the balances formulated for the big and small bargaining in the Community corridors[14].

Faced with this new situation the European Commission in its efforts to pass convincingly its proposals introduced and added a new informal but terribly important phase to the already over burdened Community procedures - that of the pre-negotiations. For this purpose the Commission uses in addition to the variously coloured papers -be they green or white -the so called Communications and the informal meetings which serve to allow the Commission to gauge the tendencies on a particular issue in the European Parliament and the Council. In addition, for this phase of the decision-making process the Commission issues working documents which are discussed by the Committee of Permanent Representatives and its sub-committees, as well as by the various responsible Committees of the European Parliament. The result is on the one hand a delay in the progress of work[15] and on the other the receding of the Community interest, which previously constituted the axis around which the negotiations took place. Negotiations are characterised by the pursuit to attain at whatever cost a compromise which in turn relates to another sought after balance in another field of Community policy making. The philosophy of *give and take*, instead

[13] See S.Pappas, Europe will find itself at the crossroads to integration in Nice, New Europe, Dec. 3-9 2000.
[14] See in greek S.Pappas, In front of the New European Governance, in the weekly Ependitis, 30-31 Dec. 2000.
[15] For example, by the end of 1982 there was still no proposal in relation to the 1978 green paper on the financial perspectives of the community budget.

of a rallying behind a principle which objectively represents the Community interest, in effect, weakens the capacity of the Commission to lead the negotiations[16] where as once it had been in the driving seat, undermines the potency of its interventions and renders it hostage to various ever changing alliances.

The recent past is filled with examples to illustrate this situation. The Council decision of September 1977 regarding the future action of the Community in the field of cultural policy constitutes an example [17]. With this decision the Council on the basis of Article 208 (ex 152) of the EC Treaty *"Calls on the Commission to undertake a study regarding the possibility to establish a guiding, consistent and transparent approach for the Community` s action in the cultural field in order to implement Article* 128 *of the EC Treaty. The Commission is furthermore called upon to, until the* 1*st May*1998 *at the latest to submit proposals regarding the future of European cultural action including the establishment of a single means for programming and financing with the objective to implement Article* 128 *given that the audio visual sector already has at its disposal its own means and taking into account the above* ***thoughts*** *of the under signed."* In any case, the thoughts mentioned make explicit reference to the conclusions of the Council and of the Council of Ministers of Culture meeting of the 12th November 1992 on the question of the guiding principles of the Community ` s cultural action "according to which...". Moreover, amongst other recommendations included in the preamble, it is considered advisable for the Commission to ask, in whatever way it deems appropriate, the Member States for their views regarding cooperation in the EU in the field of culture.

It should be noted that the Commission proceeded to ask the Member States –as it was its obligation in a field such as culture-, the Council and the European Parliament, both formally and informally, for their views, by means of organising the 1st European Forum on Culture, other European meetings with Ministers of Culture, as well as with a series of announcements in the committees of the European Parliament. The Commission also respected to the letter the binding deadline set by the Council. The most remarkable fact however is that initially the Commission had formulated the correct view, in conformity with the original views of the other two institutions, to focus the Community support only for large

[16] See Guy Isaak, Droit communautaire général, 3 ème éd., MASSON, 1990, p.55.
[17] EC C 305 07/10/1997 p.0001 -0001.

programmes with high visibility - in keeping with the principle of subsidiarity and with the administrative and management capabilities of the Commission. However, when the moment of truth arrived and it was realised that this would not allow the requests of micro-clientalism to be satisfied, it was belatedly discovered that there was in fact an imperative need for the maintenance and strengthening of the particular cultural characteristics which could only be attained by the small programmes. Thus the emphasis was given to allowing for Community subsidies to be splintered into many different Community actions. It was only thanks to the patriotism of certain Community technocrats and of the then Commissioner Marcelino Oreja that one part of the original proposal justifying Community intervention was saved. For the rest the Commission was dancing to the tune either of the Council or of the European Parliament. The worst instance, although, occurred with the issue of the European cultural capitals. The original proposal of the Commission for a Community programme, stemming from an intergovernmental initiative approved in 1985 following a proposal of the then Minister for Culture Melina Merkouri, was breached in such a way by the Council that the meritocratic system proposed on which the cultural capitals were to be chosen, was replaced by the Council approving itself a list of cultural cities by country up till 2019, thus removing the European dimension of the programme and fundamentally limiting the role of the European Commission in the process to the executive accountant[18]. A reaction to this state of affairs by the European Parliament was rather easily contained due to the pressure applied on individual members by the cities which featured on the list and in view of the major issue of the de-blocking by the Council of the budget for the cultural framework programme in question. The Commission however did not withdraw its proposal.

Likewise for other major subjects such as for the Agenda 2000. Instead of submitting its proposal exclusively on the basis of its evaluation of the Community interest, it worked out various scenarios in an attempt to pre-emt its eventual rejection by the Council. Indeed the document in question after various drafts was actually to the satisfaction of the Member States before its being formally submitted. This strategy could in part be regarded as a success for the Commission since amongst other things it opened the road for the enlargement process. On the other hand, however, it illustrates a reality sealed recently joyfully, although in disregard of the TEC, with the solemn condemnation of the principle of collegiality between

[18] EC L 166 01/07/1999 p. 0001-0005.

Commissioners, indeed by themselves, since they signed a declaration accepting a priori their resignation, following the recommendation of President Prodi who had succumbed to the pressures of the European Parliament.

Already the large number of Commissioners rendered difficult the handling of major issues. The resorting to a vote in the College of Commissioners had become more frequent and was replacing the traditional custom of seeking to find a consensus. The same situation was occurring in the departments. The increase in the number of Community policies, and therefore of service, renders their coordination if not impossible, at least very difficult[19]. The lack of collegiality which became more marked following the decision to separate the Commissioners, whereas previously up until the Santer Commission they had shared the same premises, and the lack of interdepartmental coordination have together, if not taken away, at least weakened the capacity of the Commission to identify and define the Community interest. Rather each Commissioner and each Director-General is confined to their particular dossier. For all these reasons it has already become apparent to many that the Commission was increasingly unable to fulfil its institutional role[20].

3. **Conclusions: On the eve of the new intergovernmental conference.**

From the above it has become apparent that the right of initiative is not being exercised by the Commission in the manner foreseen in the EC Treaty and that in practice this right has come to the Institutions which have the decision-making powers. The so-called institutional balance exists only in theory. In reality it never really did and does not exist. Formerly the balance weighed towards the Commission whereas from the Prodi Commission onwards it is leaning towards the Council and in part towards the European Parliament. This swing should not provoke neither surprise nor concern. Rather it is indicative of the **democratic normalisation** of a system of union of States, which if it had had a different beginning would have evolved differentely. The time has come for the reins to be handed over to those who are legitimized by the States. **The Council possesses all the necessary**

[19] Marie-Françoise Labouz, see above, p. 190.

[20] P.J.G. Kapteyn and P. Verlorenn van Themaat, see above, p. 254: "There is the inescapable impression that the Commission has gradually allowed itself to be maneuvered into a position in which it can no longer play to the full the role envisaged for in the Treaties". See also Conclusions of the "Three Wise Men" in Bull. EC 11-1979: " The role and authority of the Commission have declined in recent years".

prerequisites in order to prove to be the veritable workshop of community business and not, as often it is conceived, of intergovernmental confrontation[21]**.** This is an institutional development which was sanctioned by the European Parliament with its inexcusable adoption of the motion of censure against the Santer Commission and which has been consolidated by the de-politicisation of the current Commission. In other words, what we have today is an alteration of the founding treaties, something, which is not in itself a negative development. On the contrary, via the parliamentary control of governments, at the national level, exercised now also in regard of community initiatives, it will be possible to have a greater degree of democratic control. This has the potential to bring the citizen closer to Brussels thus bridging their sense of alienation. The Commission for its part can now regain its authority by focusing on its other significant role- that of guardian of the Treaties as well as the role of co-ordinating national administrations in the implementation of Community policies. **Politics for the politicians** with transparency and accountability, **the implementation of policies for technocrats**. Following the terrorist attack of the 11th September this distinction is resuming its significance. From now on, technocratic know-how will not be able to take precedence over politics. What merits questioning however is the fact that, although there is agreement regarding the need for better administration and management from the Commission and for a more homogeneous implementation of Community policies, no one has queried whether the Commission should continue to have the exclusive right of legislative initiative. It is noted that this right is not to be found in any other state organisation, at least not to the same degree. In the Communication addressed for the Commission on Administrative reform-Strategic questions[22], the competent vice-president of the Commission, Neil Kinnock notes that an improvement in the performance of the Commission in its administrative task constitutes an absolute priority and that over the years the Commission has had to increasingly develop its executive powers [23]. At the same time the Commissioner makes it clear, in a dogmatic manner, while

[21] See S. Pappas, After Nice : More intergovernmental or more community ?, Industrial Economic Review, February 2001, p. 32.

[22] N. Kinnock´s Communication, Administrative Reform -Strategic Questions, SEC (1999) 1917/2, 15.11.1999

[23] « However, the Commission itself has not given sufficient attention to its own priorities and its internal management and structure. Now it must. The European Union need a Commission with the strengths necessary to fulfil its modern tasks with maximum effectiveness…It is essential in order to serve the current Union and to deal with fresh obligations as Enlargement approaches".

reaffirming the turn for managerial tasks[24], that the Commission should continue to exercise its right of initiative[25]. This persistence is particularly interesting and is explained both by the prestige and power, which accompany the right of initiative, and to the future perspective of a European government. It knows only too well however the contradiction between the legislative and the administrative and executive powers as parallel and equal priorities. Moreover, account should be taken of the point that the exercise of the right of initiative exceeds the relative powers of the national governments who are limited to a proposal, without the negotiating intervention powers which the Commission possesses and which heightens the confusion of powers at the Community level, despite the principle of rule of law which is often recalled in Community texts[26]. It errs also regarding the view that exercising the right of initiative brings the Union closer to its citizens. The questioning of a reformed role of the European Commission in conformity with the new given commenced for the first time by President Santer in the framework of the dialogue for a "Europe for tomorrow". The principle of less action for better action constituted in part the basis for that discussion[27]. Indeed in 1990 the Commission had proposed 60 legislative proposals whereas the number was down to less than 10 in 1997. The discussion was a good start, which however was interrupted before final conclusions could be reached. The responsibility to continue the discussion lies now with the European Convention for the Future of Europe. Indeed it constitutes a unique opportunity for clarifying a lot of questions and for reviewing who does what both between the national and community levels (principle of subsidiarity)[28] as well as between the European institutions. The "good life" of the European institutions depends on the answers, which will be found. The question of the right of initiative will constitute a particularly significant issue. Maybe as a first step the arrangements of the third pillar and the procedures for reviewing the Treaties in accordance with article 48 of the Treaty on the European Union, both of which provide for a

---

[24] « With the passage of time, the Commission has had to concentrate more and more on a third obligation - managing significant budgets and operational programmes… ».

[25] « It is clear that the Commission should always continue to fulfil the European public service tasks…That means exercising the right of initiative to contribute to the creation of an ever closer Union among the peoples of Europe… ».

[26] COM(2001)428 Final, 25.07.2001, European Governance, A White Paper

[27] COM(1998)345/2, 26.05.1998, O.J. 1388 -point 9, « Agir moins pour agir mieux : les faits », Communication de M. le PRESIDENT : « agir moins :…le nombre de propositions de la Commission dans son ensemble diminue et en particulier celui de propositions de législation nouvelle…agir mieux :une meilleure consultation, une législation plus claire, plus simple, plus accessible… ».

[28] See inaugural speech of President V. Giscard d´Estaing to the Convention on the Future of Europe, 28.02.2002

sharing of the right of initiative between the Member States and the Commission could be considered. Certainly, there exists a significant qualitative difference between the review of the Treaties and their implementation. In the first instance it is the responsibility of the constitutional organs, which emerge, whereas in the second instance it is the responsibility mainly of the institutionalised organs. What will have to be clarified is the role, which will be assumed by the Commission in the formulation of policies by the Council and the European Parliament in order for it to ensure the proper functioning and development of the Common market[29]. For this to be attained, it is certain that considerable *enthusiasm* will be required and as the President of the European Convention noted in his introductory speech, "inspiration from God." [30]

[29] Article 211 c TEC

[30] « Permettez-moi, en conclusion, de faire appel à l´enthousiasme, un mot venu de la langue grecque, « enthousia », qui signifiait « inspiré par un dieu ». Dans notre cas, ce serait inspiré par une déesse, l´Europe ».