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COVER NOTE

from:	Secretariat
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Subject:	**Contribution from Mr Barnier and Mr Vitorino, members of the Convention:** **"The Commission's right of initiative"**

The Secretary-General of the Convention has received the attached contribution from Mr Barnier and Mr Vitorino, members of the Convention.

ANNEX

Contribution from Mr Barnier and Mr Vitorino, members of the Convention
on the Commission's right of initiative

THE COMMISSION'S RIGHT OF INITIATIVE

As we have been asked several times by members of the Convention to explain the Commission's right of initiative, we hereby submit to the Convention a short paper on this subject, for information purposes.

I. The origin of the Commission's right of initiative

The Commission's right of initiative originates in the experience of the Franco-British Joint Commission under Jean Monnet. In the light of this experience, Jean Monnet conceived the idea of giving the task of identifying the general interest of all the countries and proposing appropriate solutions to a body chosen by the governments, but independent from them. Transposed into the Community system, this meant giving the Commission virtually exclusive responsibility for identifying the Community's general interest and submitting first to the Council, and then to the co-legislator (since the Maastricht Treaty), proposals for legal instruments.

II. The scope of the Commission's right of initiative

The Treaty of Rome gave the Commission almost exclusive responsibility in the field of legislative initiative. Following successive revisions of the Treaties, the Commission's monopoly of legislative initiative covers practically the entire Community domain (the "first pillar"). The rare cases in which the Commission does not enjoy this monopoly come under Title IV of the EC Treaty, in which the Commission, on a transitional basis, shares the initiative with the Member States, and certain specific Treaty provisions, such as amendments to the statutes of the European System of Central Banks (ESCB) or measures pertaining to a Member State that infringes basic principles.

In the field of common foreign and security policy (second pillar) and police and judicial cooperation on criminal matters (third pillar), the Commission merely shares the right of initiative with the Member States.

III. The political implications of the right of initiative

The idea which led to the Commission being granted a near-monopoly of legislative initiative is that the Community interest is not necessarily the same as the sum of the national interests of the Member States[1]. Naturally, the Council can by unanimous vote adopt a different approach on the Community interest than that enshrined in the Commission's proposal, though even then it cannot change the essence of the Commission's proposal.

The right of initiative takes on a political hue once the Commission starts to make real policy choices when defining the contents of the proposals (for example: in the field of electronic commerce the Commission may choose to propose in the legislative instrument either the application of the law of the consumer's country of residence, or that of the supplier's country of origin (subject to the provisions of the Brussels Convention on *lex fori*); this choice has major political ramifications). The monopoly on the legislative initiative thus confers on the Commission a responsibility to reflect the Community interest in the proposals it draws up.

However, in cases in which Member States share the right of initiative with the Commission (cf. for example Title VI of the Treaty), the Member States tend to present projects reflecting concerns of a more national character. In this case, the filter of the Community interest which must be reflected in the Commission's proposal in principle no longer applies. Similarly, in the case of national initiatives, the minority Member States do not have the protection which results from the Commission's consent. Their protection lies solely in the need for a unanimous decision.

Moreover, the Commission's right of initiative gives 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.

[1] Examples: Each Member State might have an interest in raising its fishing quotas while the Community as a whole might have an interest in reducing the annual quotas in order to preserve fish stocks in the future; each Member State might have an individual interest in increasing its tax exemptions or breaks while the Community as a whole might have an interest in reducing or indeed eliminating them.

IV. Managing legislative pressure

The Commission's *de jure* monopoly on the right of initiative does not correspond to a *de facto* monopoly. In reality, the Commission exercises its right of initiative in an exclusive manner only in a very small percentage of its proposals (between 5% and 10%).

In other cases, the Commission in practice confines itself to transforming into law the commitments entered into by the Community at international level, to proposing "due instruments" under the Treaty or secondary law and to following up requests for legislation emanating from the Council, the European Parliament, the Member States and interested parties in general (economic operators, trade unions, NGOs, etc.) ([1]).

Under Articles 192 and 208 of the EC Treaty, the Council and the European Parliament have the option of asking the Commission to introduce specific legislative initiatives. Moreover, the Council and/or the European Parliament sometimes use the provisions of a legislative act to ask the Commission to present, whether or not within a particular deadline, a new legislative proposal. Naturally, this "legislative pressure" on the Commission to produce legal instruments in no way reduces the political responsibility of the Commission or the political impact of the Commission's proposals. Likewise, the legislative pressure on the Commission does not absolve it from ensuring, at the time of presentation of the proposal, compliance with the principle of subsidiarity as enshrined in Article 5 of the Treaty and in the Protocol of the Amsterdam Treaty.

V. Planning and the right of initiative

The Commission is currently making a major effort to improve the planning of its programme of initiatives (particularly through decisions on the Annual Policy Strategy and its annual programme). The Commission has also just presented a package of proposals for "better lawmaking", which are designed to improve both the quality of legislation and the way in which the Commission exercises its right of initiative.

The European Parliament is keen to express its views on the Commission's legislative programme and hence the way in which the right of initiative is exercised in practice. The Council has indicated a willingness also to play a role in defining legislative priorities. The Seville European Council has just agreed on a number of measures to strengthen the way in which Council activities are planned (in particular, by adopting a multiannual strategic programme). However, the participation of the European Parliament and, in future, of the Council, in defining legislative priorities, will not

[1] cf. the statistics on the "legislative pressure" on the Commission in 1998 (Annex).

impinge upon the two institutions' right to demand specific legislative initiatives from the Commission under Articles 192 and 208 of the Treaty.

VI. The principle of subsidiarity and its application

The Treaty sets an "effectiveness test" for Community measures in fields which do not come within its exclusive remit. Hence, when presenting a proposal, the Community, and consequently the Commission, must be able to show that the proposed action cannot be carried out appropriately at national level and can therefore be implemented more effectively at Community level. However, there is no mechanism of prior judicial control for ascertaining whether a legislative action does or does not respect the principle of subsidiarity: Member States give a view on the principle of subsidiarity when examining the substance of the Commission's proposal and not in advance. As a result, the principle of subsidiarity is often invoked by Member States which are opposed to the content of the Commission's proposal.

However, except in cases in which there is a specific conflict of interest between the Member States as regards the substance of the proposal and, consequently, as regards whether it is appropriate or not, as a general rule Member States allow the Commission to legislate in a domain which could, in their view, be challenged on subsidiarity grounds because they have requested legislation in other cases or other Member States have doubts about whether the subsidiarity principle will be respected. This situation leads indirectly to the maintenance of real legislative pressure on the Commission, because Member States can accept Commission proposals in non-priority areas, or even if they could be challenged under the subsidiarity principle, provided the Commission does likewise in other areas which are important to them. Moreover, the Commission is often led to propose new legislation judged "intrusive" after the event in order to ensure the free movement of goods within the internal market.

VII. Conclusions

(a) *De facto* the choice whether to legislate or not is shared between the Commission and the other institutions, and indeed with the Member States and interested parties. *De facto*, the Commission proposes legislation on an independent basis only in an extremely small percentage of cases.

(b) The Commission's virtually exclusive responsibility as regards the right of initiative has, above all, political implications; this political responsibility is reinforced by the supplementary guarantee which the Commission's proposal offers Member States in the minority (usually the "small" countries).

(c) The experience of a shared right of initiative between the Commission and the Member States gained in the context of the "third pillar" has not led to conclusive results. In particular, some legislative initiatives launched by the Member States have been criticised from the point of view of the Community interest.

(d) It follows that the problem is less that of "sharing the right of initiative" with other institutions than that of exercising the right of initiative more selectively and more in conformity with the principle of subsidiarity. Besides, sharing the right of initiative with the Member States or other institutions would eliminate the filter of the Community interest and would fail to protect "minority" States.

(e) The legislative pressure exerted on the Commission makes it difficult to ensure that the subsidiary principle can be efficiently controlled solely by the institutions exercising voluntary restraint, although this is desirable.

(f) It would therefore be useful to make provision for an additional *ex ante* control procedure for the subsidiarity principle (alongside the current *ex post* judicial control exercised by the Court of Justice).

Annex

EXERCISE OF THE COMMISSION'S RIGHT OF INITIATIVE IN 1998

	Number of proposals	%
- Adaptation of Community law to the development of scientific, economic or social data (including amendments to existing law and consolidation of laws)*	**129***	**35%**
- International obligations entered into by the Community	**118**	**31%**
- Response to an express request from other institutions, Member States or economic operators	**63**	**17%**
- Mandatory instruments under the Treaty or secondary law	**46**	**12%**
- New initiatives from the Commission	**18**	**5%**
	374	

* Approximately 15% of these proposals are also a response to requests from other institutions and Member States.