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Subject:	**Contribution from Mr Barnier and Mr Vitorino, members of the Convention:** **"The Community method"**

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

ANNEX

Contribution by Mr Barnier and Mr Vitorino to the European Convention

on the Community method

THE COMMUNITY METHOD

Convention debates very often refer to the "**Community method**". The Community method is indeed the most original element and the key to the success of the European project. It was initiated in the 1950s by the Robert Schuman Declaration and the Treaties establishing the three Communities: the ECSC, the EEC and EURATOM. Taking as their basis the need to create a new form of relations following a complete break with the past, these Treaties provided for the creation of an independent legal order led by independent institutions called to act - each in accordance with a specific mission - within the framework of a balanced system in order to achieve a common higher goal.

Fifty years on, the Community method is still **essential** for the effective operation of the European Union. It is vital, first of all, to reinforce and apply it correctly and, secondly, to extend it to certain areas where it does not yet apply, for the implementation of properly joint policies and actions. The Commission expounded its position in the *White Paper on European Governance* of 25 July 2001, and then in its *Communication on the future of the European Union* of 5 December 2001 and recently in its *Communication on a Project for the European Union* of 22 May 2002. Various Heads of State or Government, as well as many members of the Convention and other prominent figures, have expressed similar opinions.

Nevertheless, the ongoing debate on the future of the Union shows that some doubts and indeed misunderstandings remain regarding the scope and features of this method. This is due mainly to the absence of a precise definition of the Community method and the fact that the Treaties provide for several different ways for the EU to operate, depending on the area in question. It therefore follows

that simply referring to the "Community method" is not enough, because it can be understood in different ways.

For this reason, we have decided to **clarify** the subject using this contribution. We will firstly identify the main elements of the idea of the "Community method" and then present certain characteristics of it, in the light of concrete experiences.

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1. THE IDEA OF THE "COMMUNITY METHOD"

1.1. The "pure" Community method

The Community method is the **decision-making process** in areas coming under the EC Treaty and, in particular, the **interaction of the institutions** as part of this process.

Today, taking into account the various amendments to the Treaties regarding the roles of the institutions in decision-making, the "pure" Community method is a system whereby the **Commission** - the institution representing the **general European interest** - has a monopoly on initiating legislation, i.e. presents **proposals** for legislative acts, and the **Council** - an institution comprising representatives of the **Member State** governments - and the **European Parliament** - representing the **people of Europe** - adopt these acts **in codecision**. In particular, the Council votes by **qualified majority**, with unanimity being required if it wishes to amend the Commission's proposal.

Where the acts thus adopted are to be **implemented** at Community level, the relevant powers are generally granted to the Commission, which exercises them with the aid of committees comprising representatives from the Member States, supervised by the Council and, to a certain extent, the European Parliament.

The system is complemented by the **Court of Justice** - an independent jurisdiction - which, in an integrated way, enforces the **rule of law** using various procedures designed for this purpose.

1.2. Variations on the Community method and the intergovernmental method in the system of the Treaties

The "pure" Community method is not the only possible approach to the operation of the European Union, because the Treaties also provide for **other methods**, depending on the domain in question.

In particular, the **EC Treaty** provides for various decision-making processes, leading to a

corresponding number of **variations** on the Community method. For example, in the title which covers visas, asylum, immigration and other policies associated with the free movement of people, and until 1 May 2004, **the Commission does not have a monopoly on initiating legislation, but rather shares it with the Member States**. Moreover, many legal bases restrict the European Parliament's participation in the procedure for the adoption of acts to simple consultation. Incidentally, the European Parliament is excluded from the decision-making process in certain areas in respect of which legislative instruments are nonetheless required such as, to a certain extent, the common trade policy and the common agricultural policy. Furthermore, over 50 legal bases of the EC Treaty, for example in the fields of taxation, social policy, free movement of persons and the right to vote, require a unanimous Council vote. Finally, the role generally allotted to the European Council is a new element in relation to the institutional dynamic of the "pure" Community method.

In addition, certain decisions, such as establishing the seats of the institutions, appointing members of the Court of Justice or the Executive Board of the European Central Bank, are taken in a manifestly intergovernmental context by the Governments of the Member States.

The decision-making system and processes in the **second and third pillars** of the EU Treaty (common foreign and security policy and police and judicial cooperation in criminal matters) are also mainly **intergovernmental**. Even if the implementation of relevant actions in these areas comes under the overall authority of the Community institutions, the Commission and the European Parliament play fairly marginal roles compared to the Council, its bodies (the Presidency, the Secretariat-General/High Representation for the Common Foreign and Security Policy), and indeed the Member States. Moreover, the Court of Justice has fewer powers in the third pillar and has no powers in the second pillar.

2. CHARACTERISTICS

The Community method ensures **transparency** in decision making, thanks notably to the involvement of the European Parliament, and the **consistency** of each action with the principles of the system and the other actions, thanks to the Commission's role throughout the entire decision-making process. It allows for the aggregation of **sectoral interests**, via the preparation and consultation mechanisms which take place at different stages in this decision-making process. It guarantees the **effectiveness** of decision-making thanks to the application of the majority vote principle at the European Parliament and the qualified majority at the Council, while ensuring the **equal treatment** of all the Member States and the accommodation of the positions of states which could be minoritised, thanks to the

requirement that the Council vote unanimously if it wishes to deviate from the Commission's proposal. Finally, it safeguards respect for the **rule of law**, via the Court of Justice's powers of jurisdiction.

2.1. Comparison with the intergovernmental method

The **intergovernmental method**, which involves a decision-making method based essentially on diplomatic negotiations between sovereign states, has its advocates. They affirm that this method fully safeguards the **sovereignty of the Member States** and also makes it possible to implement more flexible forms of cooperation and hence to associate the protection of national interests with the development of coordinated initiatives in politically "sensitive" areas.

The intergovernmental method is certainly useful in areas of cooperation between the Member States for which the level of integration is still marginal. There is no question of competition or incompatibility between this method and the Community method, as each has its strong points.

Furthermore, it must be stressed that the Community method is indisputably legitimate and respects the principles of democracy, since decisions are taken by the representatives of the national governments meeting within the Council of Ministers and by the representatives of the European people. The qualified majority voting system, and hence the possibility that a decision be taken against the wishes of a Member State, far from impinging on the legitimacy of the decision, constitutes in contrast the highest expression of the democratic principle in a modern Community.

Finally, the Community method can coexist happily with other **flexible forms of action**. While it is used to adopt legally binding decisions, it does not in fact exclude the adoption of flexible measures when the situation so requires: the possibility of **reinforced cooperation**, the implementation of the **open coordination method**, the reliance on certain forms of **co-regulation** are just a number of illustrative examples.

2.2. Concrete examples

Recently, the European Union has been **criticised** because of failure to achieve concrete results in certain fields of action. The fact is that these criticisms focus on sectors in which the Union **cannot act in accordance with the "pure" Community method** or where

intergovernmentalism prevails, for example in foreign policy, or in the field of police and judicial cooperation in criminal matters. These criticisms argue in favour of more extensive use of the Community method in order to obtain effective results in an open and democratic context. And this applies with even greater force in the context of the enlarged Union.
Due account has to be taken of the experience of fifty years of European integration. The examples below show that the Community method produces **effective and lasting results**, while preserving the **imperatives of democracy and legitimacy**.

2.2.1. Community action and intergovernmental cooperation

An analysis of the various forms of international cooperation between countries clearly shows that that cooperation based on an independent regulatory system with independent bodies responsible for ensuring sound operation on a permanent basis generally has a much greater impact on the behaviour of the contracting parties than traditional international cooperation. It is enough to compare the difficulties associated with certain international treaties, even relatively recent ones, whose implementation has basically been left to the goodwill of the contracting parties (for example the Kyoto Protocol) with the undeniable success of the EC Treaty, based on strong institutions possessing effective powers. Individual cases are even more illustrative. Thus the organisation of **cross-border television broadcasting activities** was addressed, almost simultaneously, in a traditional convention under international law by the Council of Europe and in a Community Directive [1] : the Directive has applied in all Member States since 3 October 1991, whilst the Convention is only applicable in seven of them (in some cases only since 1998) because of delays or in the absence of the necessary ratification.
An even more important point is that joint action based on the Community method is **far more effective** than simple cooperation between the same Member States in the same areas via other methods provided for in the Treaties. **Judicial cooperation in civil matters** is an example of this. Such cooperation had already been possible in an intergovernmental

[1] European Convention on Cross-border Television, Strasbourg, 5 May 1989; Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities.

framework since the origin of the EC Treaty (Article 220 of the EC Treaty, now Article 293 EC). This possibility was extended by the Maastricht Treaty in the framework of the third pillar (Article K.3 of the EU Treaty, now Article 31 EC). Despite this, only two conventions have entered into force, because of difficulties in negotiating and subsequently ratifying instruments of this type and instruments amending them [1]. On the other hand, since the communitarisation of this area following the Amsterdam Treaty, namely since 1 May 1999, five specific regulations have already been adopted and have entered into force (or will shortly do so), as called for by the parties concerned, who were long awaiting joint regulation of these questions [2].

[1] The two instruments in question are the Brussels Convention of 1968 on jurisdiction and the enforcement of judgements in civil and commercial matters and the Rome Convention of 1980 on the law applicable to contractual obligations. Note that three other instruments of this type were adopted, sometimes after lengthy negotiations, but have not yet entered into force, since they have not yet obtained all the national ratifications required: the Convention on insolvency proceedings of 1995, the Convention on the service and notification in the Member States of judicial and extrajudicial documents in civil and commercial matters of 1997, and the Convention on jurisdiction, recognition and enforcement of judgements in matrimonial matters of 1998.
It should also be noted that, at each accession, conventions based on Article 200 EC had to be amended in a new convention, resulting in very lengthy delays (often several years) before the same text was applicable throughout the Community.

[2] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings. Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgements in matrimonial matters and in matters of parental responsibility for children of both spouses. Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters. Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters. Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

The regime applicable to bankruptcy and other insolvency proceedings

- Two draft conventions were negotiated between the Member States, in 1970 and 1980 respectively, but the Council suspended examination of them because of political disagreement in 1985.
- A convention was concluded by the Council of Europe in 1990, but never took effect because of failure to ratify it.
- A convention was negotiated and concluded on the basis of Article 220 of the EC Treaty between the Member States in 1995, but again it never took effect because one Member State refused to sign it.
- Following the communitarisation of judicial cooperation in civil matters, Regulation (EC) No 1346/200 was adopted by the Council on 29 May 2000; the adoption procedure lasted less than a year; the Regulation came into force on 31 May 2002.

Another striking example is that of the **protection of the Community's financial interests**. Under the EC Treaty, a relatively consistent and effective system for the exchange of information, cooperation and anti-fraud inquiries has been put in place [1], while, under the third pillar, cooperation in combating crime at intergovernmental level is still wanting because of the failure to ratify conventions concluded between the Member States [2].

Besides being more effective, the Community method has also proven **transparent and open**. **Anti-fraud activities**, which are performed both in the context of the EC Treaty and under the third pillar, provide a clear illustration of this. Notably, in the latter context the measure in question is characterised not only by the very minor role of the European Parliament in the decision-making process, but also by relatively incomplete control mechanisms. For example, while EUROPOL's activities are supervised only by its own board of administration consisting of representatives of the governments of the Member States,

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1 See, in particular, Council Regulation No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests; Council Regulation No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities; Council Regulation No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters; Regulation (EC) No 1073/99 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF).

2 Convention of 26 July 1995 on the protection of the European Communities' financial interests and its additional protocols of 27 September 1996, 29 November 1996 and 19 June 1997.

those of the European Anti-Fraud Office (OLAF), which operates in the framework of the EC Treaty, are subject to control by the European Parliament, the Court of Auditors, the Court of Justice and the OLAF Supervisory Committee.

2.2.2. The Commission's right of initiative

Another key component of the Community method is the Commission's monopoly of initiative. As already mentioned, this element is a guarantee of **consistency,** in that the Commission ensures that each proposal is in harmony with the political and legal context. Besides and above all, it guarantees the accommodation and **inclusion of all interests** notably in the case of countries which would find it harder to make their voice heard in an intergovernmental context or which would be minoritised if decisions were taken by qualified majority, having regard to the fact that the Council is obliged to vote unanimously if it wishes to deviate from the Commission's proposal.

Several examples serve to illustrate these points. As regards the risk of inconsistency, the **Space of Freedom, Security and Justice** comes to mind, where the Member States make extensive use of their shared power of legislative initiative. In particular, one might mention the proliferation of networks and other less well-structured forms of cooperation which are the fruit of these national initiatives and whose institutional structure, mode of operation and funding and sometimes even utility are questionable [1].

2.2.3. Qualified majority voting and unanimity

One of the keys to the success of the "pure" Community method is the qualified majority vote at the Council, which makes it possible to avoid the risks of deadlock associated with unanimous voting, to pursue integration and to obtain more specific results, whilst guaranteeing that the decisions adopted express the political will of the representatives of a large majority of European citizens.

Hence, the transition from unanimous voting to the qualified majority vote was, in major areas, a **real turning point** in the history of the Community. The most striking example is undoubtedly that of the approximation of national laws with a view to completing the

[1] European police college (OJ L 336, 30.12.2000); European crime prevention network (OJ L 153, 8.6.2001); European judicial training network (OJ C 18, 19.1.2001); proposal for a network for the protection of personalities (Council document 5361/02 ENFOPOL 9); proposal for a network of competent authorities for private security services (Council document 5135/02 ENFOPOL 5); proposal for a Police Studies Institute in the form of a network (Council document 5133/02 ENFOPOL 4); proposal for a restorative justice network.

internal market. In the first thirty years of the European Community's existence, the project to complete the internal market could not be realised because the legislation adopted on the basis of Article 100 of the EC Treaty, which provided for a unanimous vote [1], did not always manage effectively to eliminate regulatory and technical barriers to trade and approximate the relevant national laws. After the introduction, via the Single European Act, of the legal basis of Article 100a of the EC Treaty, now Article 95 EC, which provides for the qualified majority vote, and on the basis of the new impetus given by the *White Paper on the completion of the internal market* of 1985, legislative action was able to achieve the current level of integration, one of the greatest successes of European construction in the economic field [2]. Other examples could also be mentioned, such as the **environment**: the transition from unanimous to qualified majority voting on the legal basis of Article 130s(1) of the EC Treaty, now Article 175 EC, enshrined by the Maastricht Treaty, coincided with the revival and intensification of joint action in this sector, to the satisfaction of the citizens and civil society.

On the other hand, in domains in which the legal bases still provide for a **unanimous** Council vote, a certain **stagnation** in Community action, or even a **return** to forms of intergovernmentalism, which have failed to produce concrete results with lasting impact, transparency or consistency, has been seen. Here one might mention the field of **taxation**, whose legal basis is Article 99 of the EC Treaty, now Article 93 EC. In this field, except for VAT and excise tax, the European Community has failed to develop organic and consistent rules, despite the insistent demands of the interested economic parties. This situation has even led to the proliferation of forms of political cooperation between the Member States outside the Community framework, which add to the complexity and impenetrability of the system, but certainly not to its effectiveness. [3] However, the basic reason for this impasse is the unanimity requirement, as is demonstrated by the fact that certain legal proposals were blocked at the Council because of the opposition of one Member State only.

In its opinion of January 2000, in the light of the IGC which led to the Nice Treaty, the

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1 Some 560 directives were adopted on the basis of this article, but a substantial number concern only very technical aspects or are merely updates of preceding directives.

2 In particular, within the space of seven years (up to the 1992 deadline), a total of 280 instruments were adopted (regulations, directives and decisions) which made it possible to complete the bulk of the internal market. Naturally, legislative action has been continued with a view to supplementing and ensuring the smooth functioning of the system as a whole.

3 The code of conduct on corporate taxation; the Taxation Policy Group; the High Level Working Group in the framework of the tax package.

Commission recommended that the qualified majority vote at the Council should become the **general rule** in the treaties and that unanimity be reserved for certain categories of specific decisions, which it identified [1]. The reasoning underlying this demand for the "pure" Community method has lost none of its relevance, as shown by the concrete examples given above.

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[1] This concerns five categories of instruments: decisions to be "ratified" by the Member States in compliance with their constitutional rules; key institutional decisions and decisions affecting the institutional balance; decisions in the field of taxation and social security not linked to the smooth functioning of the internal market; parallelism between internal and external decisions; decisions which derogate from the common rules of the Treaty.