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ARTICLE

The basic principles of the European Union's ordinary legislative procedure

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Abstract

Every constitution needs to set out rules for the production of its laws. Legislation refers to the making of laws and is central for democracies to assure collective self-determination. Legislation is also fundamental to preserve liberty as Montesquieu observed for states more than 250 years ago: "In a free state, every man who is considered a free citizen ought to be governed by himself. Hence, the people as a body should have legislative power." (De l'Esprit des lois, 1748, XI.6, p. 331) In large societies this requires to have representatives who discuss matters of common concern and express the general will. For the European Union, the ordinary legislative procedure is the most important method for producing laws. This article shows that the Treaty of Lisbon introduced a formal conception of legislation. The ordinary legislative procedure is governed by a series of procedural principles which determine the relation between the European Parliament, the Council and the Commission as its main actors. While the Treaties define a formal sequence to adopt legislation, negotiations take place in informal Trilogues between these three institutions. In addition to the procedural principles, the legislative acts adopted must adhere to substantive principles related to their content.

Keywords Legislation · Ordinary legislative procedure · Democracy · Institutional balance · Trilogue

Disclaimer: The views expressed by the author are strictly personal and do not engage the institution for which he works.

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1 Introduction: material and formal conceptions of legislation

In the modern era, two competing conceptions of legislation have emerged.[1] The material conception of legislation focuses on *what* legislation is and defines it as legal rules of abstract and general application.[2] This first conception of legislation has traditionally informed continental constitutional thought where it is contrasted with the decision for a specific situation and addressed to an individual.[3] The second, formal conception of legislation focuses on *who* is in charge of exercising legislative functions. Legislation is then formally defined as every act adopted in accordance with a (parliamentary) legislative procedure. This formal conception has shaped Anglo-Saxon constitutional thought where in Britain only the parliament enacts legislation[4] and under the U.S. Constitution in accordance with Art. I, Sect. 1 "All legislative Powers herein granted shall be vested in a Congress of the United States".

When the European Communities were established, their competences to enact legal acts were not originally conceived as being of a legislative nature. Rather, the decision-making laid mostly in the hands of the Council of ministers which acted upon proposals by the Commission. The European Parliament was at most consulted in the Council's decision-making. An attempt to categorize this law-making started by analysing the final outcome of the procedure and the legal acts defined in Art. 189 EEC Treaty (now Art. 288 TFEU). In an emblematic ruling, the Court of Justice distinguished between a decision and a regulation in the following terms: "The essential characteristic of a decision arises from the limitation of persons to whom it is addressed, whereas a regulation, *being essentially of a legislative nature*, is applicable not to a limited number of persons, named or identifiable, but to categories of persons viewed in the abstract and in their entirety."[5] This material conception of legislation was also endorsed by scholars stating that "the legislative power relates to the function of enacting rules with a general and abstractly defined scope of application (this is what a Continental European lawyer would call the '*lois matérielles*')".[6]

While jurisprudence also referred to the importance of the European Parliament in the legislative procedure,[7] it was only the Treaty of Lisbon which introduced a formal conception of legislation. According to Art. 289(1) TFEU "[t]he ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission." After the rejection of the Constitutional Treaty,[8] this new provision dismisses

[1] See on this distinction Schütze [26], p. 91 et sq.

[2] Carré de Malberg [6], p. 1 et sq.

[3] Schneider [25], p. 22 et sq.

[4] Dicey [10], p. 39 et sq.

[5] Case 117/86 *Union de Federaciones Agrarias de Espana* (*UFADE*) *v Council*, EU:C:1986:419, para. 9. Similar in Joined Cases 16/62 and 17/62 *Conf. des prod. de fruits v Council*, EU:C:1962:47, p. 478 and Case 25/62 *Plaumann v Commission*, EU:C:1963:17, p. 107.

[6] Lenaerts [15], p. 13.

[7] Case 138/79 *Roquette Frères v Council*, EU:C:1980:249, para. 33.

[8] See the IGC mandate for the Lisbon Treaty in the Presidency Conclusions of the European Council of 21/22 June 2007, ST 11177/1/07 REV 1, Annex I, paras. 18 & 19 v).

the attempt to define legislation in terms of the type of legal acts. Rather, the defining criterion for the ordinary legislative procedure is that legislative acts are adopted jointly by the Parliament and the Council. A similar formalism was introduced for the special legislative procedures where the Parliament acts with the participation of the Council; or the Council after consulting the Parliament or with the consent of the Parliament. And it is only where the Treaties explicitly state that an act has been adopted in accordance with an ordinary or a special legislative procedure that this act also constitutes a legislative act.[9]

The introduction of this formal conception of legislation does not mean that material requirements for legislation have disappeared (5.). But it emphasizes the fundamental importance of procedural principles (2.). These principles determine the relations between the various actors (3.) and shape the conduct of negotiations in the ordinary legislative procedure (4.).

2 Principles governing the procedure

The ordinary legislative procedure is governed by a series of principles which are by now enshrined in the Treaties. They are the principles of conferral (2.1.), democracy (2.2.), institutional balance & sincere cooperation (2.3.) as well as legislative transparency (2.4.).

2.1 Conferral, Art. 5(1) & (2) TEU

Every action of a public authority requires a competence. Having a competence is therefore a prerequisite to legal and legitimate exercise of power. For the European Union the principle of conferral is enshrined in Art. 5(1) & (2) TEU and requires that the Union only acts within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. The fundamental importance of this principle has been acknowledged by the Court of Justice early on.[10] Pursuant to the principle of conferral the Union has independent powers, which it can legally and legitimately exercise in its own name.[11] This also means that the Union enjoys only conferred powers[12] and the choice of the appropriate legal basis has constitutional significance.[13] In accordance with established case law, the choice of a legal basis by the Union legislator must rest on objective factors amenable to judicial review, which include the aim and the content of that measure.[14]

[9] Art. 289(3) TFEU.

[10] Case 20/59 *Italy v High Authority*, EU:C:1960:33, p. 338; Case 25/59 *Netherlands v High Authority*, EU:C:1960:34, p. 373 et sq.

[11] See to this end Case 11/70 *Internationale Handelsgesellschaft*, EU:C:1970:114, para. 3.

[12] Opinion 1/03 *Lugano Convention*, EU:C:2006:81, para. 124.

[13] Opinion 2/00 *Cartagena Protocol*, EU:C:2001:664, para. 5.

[14] Opinion 1/15 *EU-Canada PNR Agreement*, EU:C:2017:592, para. 61; Case C-620/18 *Hungary v Parliament and Council*, EU:C:2020:1001, para. 38; Case C-626/18 *Poland v Parliament and Council*, EU:C:2020:1000, para. 43.

The legal basis in the Treaties determines whether the Union has a competence. It also enshrines how this competence is exercised. For example to achieve the objectives of the internal market Art. 114(1) TFEU empowers the European Parliament and the Council "acting in accordance with the ordinary legislative procedure" to adopt measures for the approximation of laws. Like other legal bases in the Treaties, this provision contains the conferral of powers and determines the applicable legislative procedure at the same time.

2.2 Democracy, Articles 9–12 TEU

Democracy as a founding value is enshrined in Art. 2 TEU and the Treaty of Lisbon sets out in Art. 9–12 TEU the democratic principles. These provisions are a culmination of a debate which has started in the early days of European integration,[15] intensified since the Treaty of Maastricht[16] and is by no means settled.[17] According to Art. 10 TEU the functioning of the Union is founded on representative democracy and the Treaties envisage two strands democratic legitimacy. On the one hand, citizens are directly represented at Union level in the European Parliament. On the other hand, the Treaties recognize the democratic organization of all Union citizens in their Member States. The Member States are therefore represented in the European Council by their respective Heads of State or Government and in the Council by their respective government, which in turn must be democratically accountable to the respective national parliaments and their citizens. The democratic legitimacy of the European Union, as envisaged in Art. 10(2) TEU, is thus provided by the citizens of the Union as a whole and by the peoples of the Member States.

The Treaties, however, do not address the key question of constitutional theory whether the two strands of legitimacy emanate from two structurally different subjects of legitimation or whether the source of legitimation is ultimately a single one. At first glance, the two strands of legitimacy seem to presuppose also two different subjects of legitimation: the individual citizens of the Union on the one hand and the aggregate subject of the people on the other. But ultimately, it is more convincing to comprehend individuals as the sole subjects of democratic legitimacy who are both citizens of Member States and the Union.[18] As illuminating as this theoretical insight may be, it remains controversial and can therefore only be used very cautiously in legal doctrine. This may also explain why the Court of Justice has so far developed the principle of democracy only cautiously and then mostly in conjunction with other general principles such as institutional balance and sincere cooperation.

The central motive for the Court is the effective participation of the European Parliament in the legislative process as a "reflection, at Union level, of the fundamental democratic principle that the people should participate in the exercise of power

[15] See only Pescatore [20], p. 505.

[16] See only Curtin [8] and Weiler [28], p. 278 et sqq.

[17] See for example the debate on European democracy in the Conference on the Future of Europe: https://futureu.europa.eu/processes/Democracy.

[18] See most insightful v. Achenbach [1], p. 416–423.

through the intermediary of a representative assembly".[19] For legislative action of the European Union, revisions of the Treaties have established that in normal cases democratic legitimacy is provided by the European Parliament and the Council together. Semantically this is expressed by calling one procedure the "ordinary" legislative procedure whereas other such procedures are "special". However, the principle of democracy does not determine what is a normal case and should be decided in an ordinary legislative procedure. This continues to be determined by the relevant competence.[20] In other words: not the claim on democratic legitimacy determines the applicable procedure but the Treaty provision conferring the competence.

2.3 Institutional balance & sincere cooperation, Art. 13(2) TEU

Institutional balance and sincere cooperation are two crucial principles governing the relations of the Union institutions in the ordinary legislative procedure.

The principle of institutional balance goes back to the beginnings of European integration. In the *Meroni* judgment, the Court of Justice held with regard to Art. 3 ECSC-Treaty: "From that provision there can be seen in the *balance of powers* which is characteristic of the institutional structure of the Community a fundamental guarantee granted by the Treaty"[21] The Court subsequently developed this case law under the term of institutional balance,[22] without, however, attempting to define the concept. It was not until the *Chernobyl* judgment in 1990 that the Court gave a more detailed definition: "The Treaties set up a system for distributing powers among the different Community institutions, assigning to each institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community. Observance of the institutional balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions."[23] Today, the principle of institutional balance is enshrined in Art. 13(2), 1st sentence TEU according to which each institution shall act in accordance with the powers conferred on it by the Treaties.

Like Montesquieu's famous separation of powers at national level,[24] the principle of institutional balance entails three different aspects:[25] First, powers must be separated allowing each institution to enjoy a sufficient independence in order to exercise

[19] Case C-130/10 *Parliament v Council*, EU:C:2012:472, para. 81 with reference to Case 138/79 *Roquette Frères v Council*, EU:C:1980:249, para. 33 and Case C-300/89 *Titanium dioxide*, EU:C:1991:244, para. 20.

[20] Case C-300/89 *Titanium dioxide*, EU:C:1991:244, paras. 20 et sq.

[21] Case 9/56 *Meroni v High Authority*, EU:C:1958:7, p. 152 (emphasis added).

[22] Case 25/70 *Einfuhr- und Vorratsstelle für Getreide und Futtermittel v Köster*, EU:C:1970:115, para. 9; Case 138/79 *Roquette Frères v Council*, EU:C:1980:249, para. 33; Case 149/85 *Wybot v Faure*, EU:C:1986:310, para. 23.

[23] Case C-70/88 *Parliament v Council*, EU:C:1990:217, paras. 21 et sq.

[24] Montesquieu [19], XI.6, p. 327 et sqq. See also Art. 16 of the Declaration of the Rights of Man and of the Citizens of 1789: "Toute société dans laquelle la garantie des droits n'est pas assurée, ni la séparation des pouvoirs déterminée, n'a pas de Constitution." Troper [27], p. 157 et sqq.

[25] Möllers [18], p. 43 et sqq. similar Lenaerts & Verhoeven [16], p. 44 et sq.

its powers.[26] Second, the ban on usurpation prohibits against the exercise of a particular power by an institution to which this power has not been allocated under the Treaties.[27] Third, the aspect of *balance* is already semantically underlined by the term of institutional balance. According to this, the powers of an institution are not to be considered in isolation, but must be understood within the institutional framework. In the *Meroni* judgment, the aspect of balance reinforces the allocation of powers under the Treaties and prevents arbitrary reallocation of these powers. The Court addresses the concerns precisely when it speaks of the "balance of powers" and uses this aspect to prevent the delegation of large discretionary powers to a body not governed by the Treaties.[28] In addition, institutional balance is used to sanction procedural errors: with reference to the powers in the Treaties, the Court interprets the procedural rights of the Parliament as essential procedural requirements and declares legislative acts violating them null and void.[29] But also the procedural rights of other institutions, such as the Commission's right of initiative in the ordinary legislative procedure, are interpreted in light of the institutional balance established by the Treaties.[30] For the Court of Justice, the principle of institutional balance forms the crucial background for understanding the powers and procedures in relation to the legal entity of the European Union as a whole.[31]

The functional counterpart to the principle of institutional balance is the principle of sincere cooperation. While the former focuses on the separation of powers and the balance between the institutions, the latter requires them to cooperate loyally. The principle of sincere cooperation is today enshrined in Article 13(2) 2nd sentence TEU and prevents the Union from disintegrating into a multitude of isolated and mutually blocking centres of power. Instead, the institutions are to cooperate with each other. This has mainly procedural consequences and the Court obliges institutions to enter into dialogue.[32] For the ordinary legislative procedure, this puts certain limits to the Commission's right to withdraw a legislative proposal.[33] At the same time, the necessity for dialogue does not augment a right of consultation to a right of co-decision

[26] Case 5/85 *AKZO Chemie*, EU:C:1986:328, paras. 37–40 (internal organization of the Commission); Case C-345/95 *France v Parliament*, EU:C:1997:450, para. 32 (internal organization of the Parliament). The aspect of separation is closely related to yet distinguishable from institutional autonomy, Bauerschmidt [3], p. 179 et sqq.

[27] Case 25/70 *Einfuhr- und Vorratsstelle für Getreide und Futtermittel v Köster*, EU:C:1970:115, paras. 8 et sq. (interference of the Council with the implementing powers of the Commission); Case 149/85 *Wybot v Faure*, EU:C:1986:310, para. 23 (power of the Council and the Commission to request an extraordinary session of the Parliament).

[28] Case 9/56 *Meroni v High Authority*, EU:C:1958:7, p. 152; Case 98/80 *Romano*, EU:C:1981:104, para. 20.

[29] See from the more recent jurisprudence Case C-133/06 *Parliament v Council*, paras. 56 et sq.; Case C-77/11 *Council v Parliament*, EU:C:2013:559 paras. 21, 28, 52 et sqq.

[30] Case C-409/13 *Council v Commission*, EU:C:2015:217, paras. 64–75.

[31] See in detail Bauerschmidt [3], p. 185 et sqq.

[32] Case 204/86 *Greece v Council*, EU:C:1988:450, para. 16; Case C-65/93 *Parliament v Council*, EU:C:1995:91, para. 23.

[33] Case C-409/13 *Council v Commission*, EU:C:2015:217, paras. 83, 97–105.

for the Parliament where the Treaty framers deliberately did not foresee the ordinary legislative procedure.[34]

2.4 Legislative transparency, Art. 15(2) & (3) TFEU

The principle of transparency is inherent to the Union's legislative process. The Treaties have rightfully been interpreted as establishing a close relationship between legislative procedures and the principle of transparency.[35] Since the Treaty of Lisbon, Art. 15(2) TFEU states on the publicity of deliberations that the European Parliament shall meet in public, as shall the Council when considering and voting on draft legislative acts. Art. 15(3) TFEU also extends legislative transparency to access to documents in accordance with the Transparency Regulation (EC) 1049/2001.[36] Although Art. 4(3) of the Transparency Regulation foresees an exception for such access if disclosure would seriously undermine the institution's decision-making process, the Court of Justice has interpreted this exception very narrowly when it comes to legislative procedures. Already Recital (2) of the Transparency Regulation makes clear that public access to documents is related to the democratic nature of the Union institutions, strengthens their legitimacy and renders them more accountable to the citizens in a democratic system.[37] To this end, the purpose of the Transparency Regulation is to give the public the widest access possible and exceptions must be interpreted strictly.[38] In the words of the General Court it is therefore precisely the openness of the legislative process which contributes to the greater legitimacy regardless of whether certain documents were produced at an early, late or final stage of the decision-making process or whether they were produced in a formal or informal context.[39] The principle of transparency and the strict interpretation of exceptions by the Union courts continues to influence legislative practice in the ordinary legislative procedure.

3 The actors in the ordinary legislative procedure

The procedural principles determine the relations of the actors in the ordinary legislative procedure. The main actors are the Parliament, the Council and the Commission which form a decision-making triangle (3.1.). In addition, national parliaments are formally involved (3.2.) and certain bodies are consulted (3.3.). Finally, the European Council gives political guidance but does not exercise legislative functions (3.4.).

[34]Case C-48/14 *Parliament v Council*, EU:C:2015:91, paras. 58–60.

[35]Opinion of AG Cruz Villalón in Case C-280/11 P *Council v Access Info Europe*, EU:C:2013:325, paras. 39 et sq.

[36]Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L 145/43.

[37]Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council*, EU:C:2008:374, para. 34; Case C-280/11 P *Council v Access Info Europe*, EU:C:2013:671, para. 27.

[38]Case C-266/05 P *Sison v Council*, EU:C:2007:75, para. 63; Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council*, EU:C:2008:374, para. 36; Case C-280/11 P *Council v Access Info Europe*, EU:C:2013:671, para. 30.

[39]Case T-540/15 *De Capitani v Parliament*, EU:T:2018:167, para. 101.

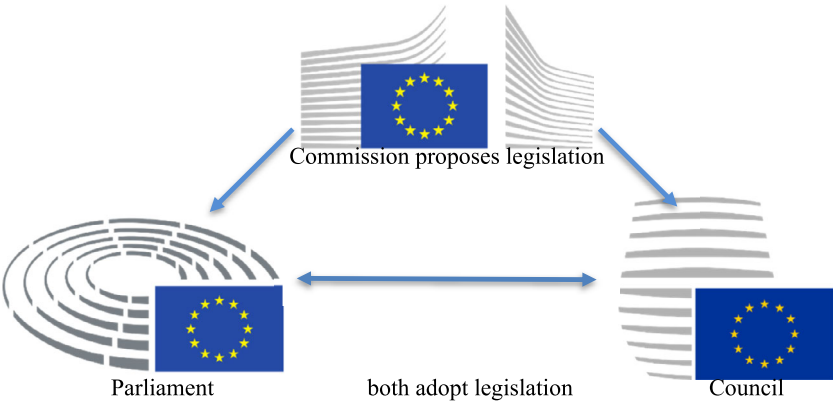

Fig. 1 Decision-making triangle

3.1 Decision-making triangle: Commission, Parliament and Council

The main actors in the ordinarly legislative procedure have a triangular relationship as can be seen in Fig. 1: the Commission proposes legislation and the Parliament and the Council both adopt legislation.

The Commission has the power of legislative initiative under Art. 17(2) TEU and Art. 294(2) TFEU. It is therefore for the Commission to decide whether or not to submit a proposal for a legislative act. By virtue of that power, it is for the Commission to promote the general interest of the Union and take appropriate initiatives to that end, to determine the subject-matter, objective and content of that proposal.[40] The involvement of the Commission in the legislative process does not end, once the proposal is submitted. Rather, the Commission promotes contacts and seeks to reconcile the positions of the Parliament and the Council. Moreover, the Commission may alter its proposal at any time during the legislative process as long as the Council has not acted and may even withdraw its proposal.[41]

The European Parliament and the Council exercise jointly legisliatve functions in accordance with Art. 14(1) & 16(1) TEU. In the ordinary legislative procedure they act as co-legislators with symmetric procedural rights which are set out in Art. 294 TFEU. They are thus on an equal footing and it is necessary that they both adopt the same legislative act. One cannot act without the other. This requirement has far reaching consequences for the conduct of negotiations which will be examined in the next section.

In relation to the Commission, the co-legislators may make amendments and may even introduce measures that were not foreseen in the initial proposal. They are also not bound by the Commission's impact assessment, which inform the co-legislators of the effect of their action, as these impact assessments are not binding on either the Parliament or the Council.[42] This is the result of the Union legislature's broad

[40] Case C-409/13 *Council v Commission*, EU:C:2015:217, para. 70.

[41] See Art. 293 TFEU and Case C-409/13 *Council v Commission*, EU:C:2015:217, para. 72 et sq.

[42] Case C-343/09 *Afton Chemical*, EU:C:2010:419, paras. 30 & 57.

discretion which applies not only to the nature and scope of the measures to be taken, but also, to a certain extent, the finding of the basis facts. However, the Union legislators must be able to show before the Court that in adopting the act they actually exercised their discretion, which presupposes the taking into consideration of all the relevant factors and circumstances of the situation the act was intended to regulate. The information the institutions may rely on when exercising their discretion includes, but is not limited to information in the public domain, workshops by the Parliament and scientific documents used by Member States in Council meetings, without them having to be official Council documents.[43]

3.2 National parliaments

The Treaty of Lisbon explicitly involves national parliaments in the Union's legislative process for the first time. These procedural rights strengthen the democratic legitimacy of the ordinary legislative procedure. Protocols No 1 on the role of national parliaments and No 2 on the application of subsidiarity and proportionality oblige the Commission to send its legislative proposals to national parliaments at the same time those are sent to the European Parliament and the Council. National parliaments then have 8 weeks to raise concerns about the legislative proposal. If at least one third[44] of the national parliaments express the view in reasoned opinions that the draft legislation does not comply with the subsidiarity principle, the draft must be reviewed. The Commission may then decide to maintain, amend or withdraw the proposal. In the ordinary legislative procedure, the Commission has to review its proposal if it receives a "yellow card", meaning the reasoned opinions of at least half of the national parliaments. If the Commission choses to maintain the proposal, then it must justify its position in a reasoned opinion and forward it to the European Parliament and the Council. The Union legislators must then consider whether the proposal is compatible with the principle of subsidiarity. If the Council, by a majority of 55% of its members, or the Parliament, by the majority of the votes cast, consider that the proposal is not in line with the principle of subsidiarity, the proposal will not be examined further.[45] Such a conclusion is, however, rather theoretical as the Commission will most likely either modify or withdraw its proposal in light of massive concerns.

3.3 The consultative bodies

The ordinary legislative procedure is also informed by consultative bodies. On the one hand, the legal basis may foresee mandatory consultation of the Economic and Social Committee (e.g. Art. 114(1) TFEU for the harmonisation of the internal market), the Committee of the Regions (e.g. Art. 175 TFEU for cohesion policy), the Court of Justice (e.g. Art. 257 TFEU for specialised courts) or the Court of Auditors (e.g. Art. 322 TFEU for the financial regulation). On the other hand, the European

[43] Case C-343/09 *Afton Chemical*, EU:C:2010:419, paras. 33–41.

[44] In the case of Art. 76 TFEU, in the area of freedom, security and justice, already a quarter of the national parliaments are sufficient.

[45] Art. 7(3) Protocol No 2.

Central Bank needs to be consulted on any proposed Union act falling within its field of competence in accordance with Art. 127(4) & 282(5) TFEU in order to give an opinion. These mandatory consultations are to be taken into account by the Union legislators and are reflected in the citations of the final legislative act, e.g. "having regard to the opinion of". Some consultation is carried out in accordance with secondary law. For example the European Data Protection Supervisory is consulted by the Commission in accordance with Art. 42 of Regulation (EU) 2018/1725 where a proposal for a legislative act may have an impact on the protection of individuals' rights and freedoms with regard to personal data. Such consultation not required for in the Treaties is reflected in the Recitals of the final legislative act.

3.4 The European Council

The European Council's main task is to give political guidance. Composed of the 27 Heads of State or Government of the Member States as well as the Presidents of the European Council and the Commission (who are both members without the right to vote), the European Council defines the general political directions and priorities of the Union. However, in accordance with Art. 15(1), 2nd sentence TEU the European Council shall not exercise legislative functions, which are left to the Parliament and the Council.

From a formal point of view, this distinction is ensured by the fact that the European Council is not involved in the adoption of legislation and Art. 294 TFEU does not foresee a role for this institution in the ordinary legislative procedure. From a substantive point of view, it is more difficult to draw a clear line between giving general politicial guidelines, which the European Council is allowed to do, and shaping ongoing legislation especially on controversial points. In fact, the Treaties even foresee that the European Council is seized in some particularly sensitive policy fields upon request of a member of the Council. In the so-called "emergency break procedures" the ordinary legislative procedure is suspenend and only resumes after the European Council could discuss the matter within a period of four months.[46] This is possible for "important aspects of social security systems" under Art. 48(2) TFEU and "fundamental aspects of the criminal justice system" in Art. 82(3) & 83(3) TFEU.[47] In addition, the European Council sometimes gives political guidelines on other sensitive files especially where multiple decision-making procedures are ongoing.[48]

4 Negotiations under Art. 294 TFEU

For the ordinary legislative procedure Art. 294 TFEU sets out a formal sequence of stages to adopt legislative acts (4.1.). An informal practice has developed where the

[46] See Dougan [11], p. 643 et sq.

[47] Similar involvement upon request of nine Member Sates exist in special legislative procedures regarding the European Public Prosecutor's Office, Art. 86 TFEU, and police cooperation, Art. 87 TFEU.

[48] See for example the Conclusions of the European Council of 10 and 11 December 2020 in document EUCO 22/20 regarding the Multiannual Financial Framework (MFF) as well as Regulation (EU, Euratom) 2020/2092 on a general regime of conditionality for the protection of the Union budget.

Parliament and the Council adopt their respective positions for a legislative text (4.2.) and then enter into informal Trilogue negotiations (4.3.). While the informal Trilogue negotiations take place against the background of the formal procedure under the Treaties, the political agreement still needs to be formally adopted in accordance with Art. 294 TFEU (4.4.).

4.1 The ordinary legislative procedure under Art. 294 TFEU

Art. 294 TFEU sets out a formal sequence under the ordinary legislative procedure.[49] After receiving the Commission's proposal, the Parliament and the Council are to vote on their respective positions in a series of three readings with a Conciliation Committee before the third reading. Only where both the Parliament and the Council approve the same text, is the legislative act finally adopted.

In first reading (Art. 294(3)–(6) TFEU), the Parliament adopts its position by the majority of the votes cast. It can reject the proposal, approve it or amend it. Then the bill moves to the Council which acts by the qualified majority of its members. If the Council approves the Parliament's position, the legislative act is adopted. If the Council disagrees, it adopts its position at first reading and transmits it to the Parliament, bringing the procedure to second reading.

In second reading (Art. 294(7)–(9) TFEU), the Parliament can vote on the text for a second time and has three choices. The Parliament may approved the Council's position by a majority of the votes cast; or it can reject this position by a majority of its component members. Thus, approval is easier than rejection. Parliament may also propose further amendments by a majority of its component members. This amended text is then transmitted to Council which, acting by qualified majority, may either approve all the Parliaments amendments or reject them. In the latter case, the negotiations enter the conciliation stage.

The conciliation stage is the last chance to save the draft legislative act (Art. 294(10)–(12) TFEU). In the Conciliation Committee representatives from the Council and an equal number of representatives from the Parliament have "the task of reaching an agreement on a joint text". While using the Parliament's and Council's position at second reading as a basis, the Conciliation Committee has a wide margin of discretion in choosing the method for resolving disagreements. Since the Treaty framers wanted this procedure to be effective, their very aim was that the points of view of the Parliament should be reconciled on the basis of examining all the aspects of disagreement.[50] This is also confirmed by Art. 294(11) TFEU where the Commission participates in the Conciliation Committee's proceedings and takes all the necessary initiatives to reconcile the different positions. The Conciliation Committee has six weeks to find a joint text, otherwise the proposed act is deemed not adopted.

In third reading (Art. 294(13)–(14) TFEU), the joint text of the Conciliation Committee still needs to be approved by the Parliament by a majority of the votes cast and by the Council by qualified majority. The institutions do not have a power to make any amendments. If only one of them disagrees with the joint text of the Conciliation Committee the proposal is finally rejected.

[49] See for overviews Lenaerts & Van Nuffel [17], p. 663 et sqq.

[50] Case C-344/04 *IATA and ELFAA*, EU:C:2006:10, para. 58.

Legislative acts which have been adopted still need to be signed by the President of the Parliament and by the President of the Council and are subsequently published in the Official Journal in accordance with Art. 297(1) TFEU.[51]

4.2 Parliament's legislative resolution and Council's general approach

While Art. 294 TFEU sets out a strict formal sequence, the institutions have developed an informal practice which operates within the framework set out under the Treaties. The power to enter into such arrangements for cooperation is expressly acknowledged by the Treaties in Art. 295 TFEU. Already before the Treaty of Lisbon, the Parliament, the Council and the Commission made a Joint Declaration on the Practical Arrangements for the Codecision Procedure where they acknowledged that informal contacts have proven to be useful for the effective decision-making.[52] This practice has been maintained under the Treaty of Lisbon. It foresees an *ex-ante* control where the Parliament and the Council adopt their respective positions which is the basis for Trilogue negotiations. The outcome of these negotiations is then subject to *ex-post* control because the co-legislators still need to formally adopt the text.

To begin with, the Parliament and the Council respectively define their positions on the Commission's proposal. In the Parliament the preparatory work is done in the relevant committee best suited to deal with the substance, which may also involve other committees. The Parliament's committee appoints a rapporteur who is responsible for preparing the committee's report and presenting it to the plenary. The rapporteur is assisted by the chair of the committee and a number of shadow rapporteurs who are appointed by the various political groups to follow the relevant report and to find compromises within the committee. This allows the various political groups to express themselves while ensuring that work on the text progresses.[53] In order to formalise the Parliament's position, either the plenary adopts a legislative resolution by a majority of the votes cast authorizing the committee to enter into negotiations. In the alternative, the committee can use its report as a negotiation mandate if this is announced at the beginning of a part-session and no political group or the medium threshold of MEPs (76 members) has requested a plenary vote.[54] This procedure ensures that the plenary either votes on the Parliament's position or (for less controversial proposals) at least has the possibility to vote.

On the Council's side, most of the detailed work is done in the relevant working party composed of national officials who examine and discuss the Commission's proposal. Although these discussions are not public, the documents exchanged are subject to legislative transparency. It is for the rotating Council presidency to find compromises which can be supported by a qualified majority of the Council members. Where there is an impasse in negotiations or the file needs more political guidance, the proposal is discussed at the level of ambassadors of Member States in Coreper or

[51] Legislation is published in the L-series of the OJ.

[52] Joint Declaration on Practical Arrangements for the Codecision Procedure, OJ C 145/5.

[53] See Ruiter [23].

[54] See Rule 71(2) of the Parliament's Rules of Procedure (2021).

	Commission proposal	Parliament position	Council position	Compromise text
1.	Article 1	Article 1	Article 1	
2.	This Regulation lays down X and Y.	This Regulation lays down X, Y *and Z*.	This Regulation lays down X ~~and Y~~.	

Fig. 2 A stylized four-column table

at the level of ministers in the Council.[55] About 40–50% of all pieces of legislation are discussed by ministers in the various Council configurations at some point.[56] In order to formalize the Council's position, either the Council at the level of ministers approves the so-called General Approach or Coreper at the level of ambassadors gives a negotiating mandate for proposals which are less controversial.

4.3 The trilogue negotiations

The Parliament and the Council then enter into negotiations on the basis of their respective positions. The Commission also takes part in these negotiations as a facilitator to find compromise. These tripartite meetings are called Trilogues. They bring together representatives from the three institutions in an informal format:[57] for the Parliament this usually involves the rapporteur and the chair of the committee, but may also include the shadow rapporteurs from the different political parties. For the Council, usually the ambassador of the Member State holding the rotating Council Presidency as well as the chair of the relevant working party participate. The Commission is typically represented by the relevant director-general and other officials knowledgeable in the field.

The aim of the Trilogue is to reach an agreement on a set of amendments acceptable to the Parliament and the Council, which must subsequently be approved by those institutions in accordance with their respective internal procedures. The legislative discussion conducted during the Trilogue may concern both political and technical legal issues. In order to have a full overview, the discussions are based on a table divided into four columns. These "four-column tables" contain the Commission's proposal, the Parliament's and the Council's respective positions and an empty fourth column to find a compromise text. Moreover, the Recitals and the Articles of the draft legislative act are broken down into lines. Negotiators then go through this table line-by-line with a view to finding a compromise for each line in the fourth column. A stylized four-column table looks like Fig. 2.

Since the Trilogue negotiations are not public, but rather held *in camera*, public access to the four-column tables contributes to strengthening democracy by allowing citizens to scrutinize all the information which forms the basis of a legislative act. The

[55] See on the internal organisation of the Council Bauerschmidt [4], sect. b.

[56] Rozenberg et al. [24], p. 11 et sq.

[57] Joint Declaration on Practical Arrangements for the Codecision Procedure, para. 8: "Each institution, in accordance with its own rules of procedure, will designate its participants for each meeting, define its mandate for the negotiations and inform the other institutions of arrangements for the meetings in good time."

General Court has, therefore, held that despite the informal nature of the Trilogues the four-column tables are part of the legislative procedure and subject to the strict rules of legislative transparency.[58] Moreover, it is clear that the informality of the Trilogues has proven to be very successful allowing the representatives from the Parliament and the Council to effectively and flexibly find common ground in many legislative procedures. In fact, around 90% of the agreements in the ordinary legislative procedure are reached at first reading and are preceded by Trilogue negotiations.[59]

4.4 Fitting the political agreement into Art. 294 TFEU

The Trilogues have been criticized for not ensuring sufficient democratic representation because a limited number of representatives from the three institutions negotiate a text which under Art. 294 TFEU needs to be adopted by the Parliament's plenary and the Council at ministerial level.[60] Therefore, the Trilogues seem to exhibit the same democratic deficit as the Conciliation Committee under Art. 294(10) TFEU.

This criticism underestimates, however, that the Parliament and the Council not only exercise an *ex-ante* control over their negotiators by giving them a mandate,[61] they also have considerable *ex-post* control over the outcome of the Trilogue negotiations. In contrast to the outcome from the Conciliation Committee which the Parliament and the Council in accordance with Art. 294(13) TFEU have to take as a *fait accompli* and can only accept or reject without amendments, the compromise text found in the Trilogues may be rejected by the co-legislators and send back for further negotiations. While the informal Trilogue negotiations take place against the background of the formal procedure set out in Art. 294 TFEU, the political agreement still needs to be formally adopted giving the Parliament and the Council considerable *ex-post* control.

The requirement to formalize the political agreement in accordance with the procedure set out in Art. 294 TFEU puts the representatives in the Trilogues into a constant "two-level game".[62] According to this theory, the representatives in the Trilogues must not only reach a political agreement among themselves. For this political agreement to be viable, representatives must also ensure that the result will be supported by the Parliament's plenary and the Council at the level of ministers. In order to hold representatives in the Trilogues accountable, they are required to report back to their respective constituencies. In the Parliament, the negotiation team is obliged to report back and update the responsible committee after every Trilogue meeting.[63] While the Council does not have a formal obligation in its Rules of Procedure, the rotating Presidency regularly reports back to the relevant working party and, if necessary, requests Coreper or the Council for an update of the mandate for Trilogue negotiations.

[58] Case T-540/15 *De Capitani v Parliament*, EU:T:2018:167, para. 74.

[59] European Parliament [13], p. 10.

[60] See v. Achenbach [2], p. 35 et sq., Farrell & Héritier [14], p. 1204 et sqq.

[61] See above 4.2.

[62] See in general Putnam [21] and applied to the Trilogue negotiations Delreux & Laloux [9], p. 302 et sqq.

[63] See Rule 74(3) of the Parliament's Rules of Procedure (2021).

When finally negotiations in the Trilogue lead to a provisional agreement, the responsible committee in the Parliament will hold a single vote whether to approve this agreement.[64] In addition, also the plenary can hold a vote on the provisional agreement tabled by a committee and where this provisional agreement fails to secure the majority of the votes cast, the Parliament's President can set a deadline for amendments.[65] On the Council's side, the outcome of Trilogue negotiations is first examined in the relevant working party and then Coreper verifies that there would be a qualified majority if the Council were to vote on the text. It is only after this verification that the chair of Coreper forwards a letter to the chair of the responsible committee in the Parliament indicating the Council's willingness to accept the Trilogue outcome.[66]

The mechanisms to exercise *ex-ante* and *ex-post* control have been strengthened in recent years.[67] This may not alleviate all the concerns voiced against Trilogues,[68] but it shows that the co-legislators seek to strengthen the democratic accountability of Trilogue negotiations.

5 Substantive principles for the content of legislative acts

In addition to the procedural principles which govern the relations between the actors and the negotiations in the ordinary legislative procedure, legislative acts must also adhere to a number of substantive principles. While each legal basis may already give legislative action a certain direction, the principles of subsidiarity and proportionality are of particular horizontal importance (5.1.). The protection of fundamental rights (5.2.) and the prohibition to delegate essential elements of a legislative act (5.3.) establish further requirements which combine material and formal aspects of the concept of legislation. Finally, the Union legislator is under a duty to state reasons (5.4.).

5.1 Subsidiarity and proportionality, Art. 5(3) & (4) TEU

The principles of subsidiarity and proportionality are enshrined in Art. 5(3) & (4) TEU and are applied in accordance with Protocol No 2. In the strategic discourse about the "correct" level of action, the principle of subsidiarity allows opponents of centralized action at Union level to express their political preferences also with legal arguments. Subsidiarity thus allows to bring together supporters and opponents of Union action in a discourse oriented towards the common good.[69] This also helps

[64] See Rule 74(4) of the Parliament's Rules of Procedure (2021).

[65] Rule 59(3) of the Parliament's Rules of Procedure (2021), which is, however, rarely used in practice.

[66] Joint Declaration on Practical Arrangements for the Codecision Procedure, paras. 14, 18 & 23 at the various stages in the first and second reading.

[67] Especially in the Parliament's Rules of Procedure: Rosén & Stie [22].

[68] V. Achenbach [2], p. 34 et sq. also mentions information asymmetries because Parliament committees are public whereas the Council working parties and Coreper are not.

[69] See only Estella [12], p. 177 et sqq.

explain why the Court of Justice has taken a cautious approach and grants the Union legislator a wide margin of appreciation when applying the principle of subsidiarity.[70]

The principle of proportionality limits the exercise of Union competences and requires that legislation is appropriate for attaining legitimate objectives and does not go beyond what is necessary to achieve them. As regards judicial review, the Court allows the Union legislator a considerable margin of discretion and only verifies whether a measure is manifestly inappropriate.[71]

5.2 Fundamental rights, Art. 52(1) of the Charter

Regulations, directives and decisions adopted in the ordinary legislative procedure can limit the fundamental rights enshrined in the Charter. In accordance with Art. 52(1) of the Charter, such limitations must be provided for by law, respect the essence of those fundamental rights, and must be necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. Where interferences with fundamental rights are at issue, the Court has recognized that the extent of the Union legislator's discretion may be limited, depending on factors such as the area concerned, the nature of the right at issue guaranteed by the Charter, the nature and seriousness of the interference and the object pursued by the interference.[72] Moreover, Art. 52(1) of the Charter has been interpreted by the Court as requiring that the legal basis which permits the interference with fundamental rights must itself define the scope of the limitation on the exercise of the right concerned.[73]

5.3 Non-delegation of essential elements, Art. 290(1) TFEU

The Union legislature cannot delegate the adoption of rules which are essential to the subject-matter. Rather, the provisions which require political choices and are essential for the matter in question fall within the responsibilities of the Union legislature. The prohibition of delegating essential elements precedes the Treaty of Lisbon.[74] It

[70] Case C-377/98 *Netherlands v Parliament and Council*, EU:C:2001:523, paras. 32 et sq.; Case C-491/01 *British American Tobacco* (*Investments*) *and Imperial Tobacco*, EU:C:2002:741, paras. 180–185; Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health a.O.*, EU:C:2005:449, paras. 104–108; Case C-58/08 *Vodafone a.O.*, EU:C:2010:321, paras. 76–79; Case C-176/09 *Luxembourg v Parliament and Council*, EU:C:2011:290, paras. 80–83; Case C-547/14 *Philip Morris Brands a.O.*, EU:C:2016:325, paras. 218–224; Case C-151/17 *Swedish Match*, EU:C:2018:938, paras. 70–75.

[71] Case 265/87 *Schräder*, EU:C:1989:303, para. 22; Case C-189/01 *Jippes*, EU:C:2001:420, paras. 82 et sq.; Case C-58/08 *Vodafone a.O.*, EU:C:2010:321, paras. 51–53; Case C-176/09 *Luxembourg v Parliament and Council*, EU:C:2011:290, para. 62; Case C-304/16 *American Express*, EU:C:2018:66, paras. 85 et sq.; Case C-151/17 *Swedish Match*, EU:C:2018:938, paras. 35 et sq. See on judicial review only Blumann [5], p. 450 et sqq.

[72] Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland*, EU:C:2014:238, para. 47.

[73] Opinion 1/15 *EU-Canada PNR Agreement*, EU:C:2017:592, para. 139; Case C-311/18 *Facebook Ireland and Schrems*, EU:C:2020:559, para. 175.

[74] See only Case 25/70 *Köster*, EU:C:1970:115, para. 6; Case C-133/06 *Parliament v Council*, EU:C:2008:257, para. 45.

is now expressly laid down for delegated acts under Art. 290(1) TFEU and also applies for implementing acts under Art. 291(2) TFEU.[75] The requirement to regulate all essential elements is an expression of the principle of democracy and prevents the democratically legitimate Union legislature from conferring excessive and undefined powers to the executive. This is what the French call *domaine de la loi* and the Germans *Gesetzesvorbehalt*. The "domain of the law" marks the subject matter which is reserved for rule-making by the legislator and combines material and formal aspects of the concept of legislation. For the Court, identifying the elements of a matter which must be categorised as essential must be based on objective factors amenable to judicial review, and requires to take into account the characteristics and particular features of the field concerned.[76]

5.4 Duty to state reasons, Article 296(2) TFEU

Finally, the Union legislator is under a duty to state reasons in accordance with Art. 296(2) TFEU. In accordance with the Court's settled case law, Union legislation must show clearly and unequivocally the reasoning of its authors. This is to enable the persons concerned to understand the motivation for those measures and to enable the Court to exercise its power of review. At the same time, Union legislation is not required to go into every relevant point of fact and law. Rather, for acts of general application it suffices to disclose the essential objective pursued by the Union legislature and it would be excessive to require a specific statement of reasons for all the various technical choices made.[77]

6 Conclusion

The ordinary legislative procedure is the most important method for producing laws in the European Union. It allows for collective self-determination of Union citizens who are represented directly in the European Parliament and indirectly in the Council. Legislation is at the same time a guarantee for liberty understood as "the right to do everything the law permits."[78] The Treaty of Lisbon introduced a formal conception of legislation which is governed by a series of procedural principles. They govern the triangular relationship between the Parliament, the Council and the Commission who are the key actors in the ordinary legislative procedure. Once the Parliament and the Council have defined their respective positions on a proposal by the Commission, negotiations between those three institutions take place in informal Trilogues. The participants in these Trilogues are subject to *ex-ante* and *ex-post* control in order to

[75] Case C-355/10 *Parliament v Council* (*Schengen Borders Code*), EU:C:2012:516, paras. 64–66; Case C-363/14, *Parliament v Council* (*Europol*), EU:C:2015:579, para. 46.

[76] Case C-355/10 *Parliament v Council* (*Schengen Borders Code*), EU:C:2012:516, paras. 67 et sq.; Case C-363/14, *Parliament v Council* (*Europol*), EU:C:2015:579, para. 47. See on this case law for example Chamon [7].

[77] Case C-221/09 *AJD Tuna*, EU:C:2011:153, paras. 58 et sq.; Case C-304/16 *American Express*, EU:C:2018:66, paras. 85 et sq.; Case C-151/17 *Swedish Match*, EU:C:2018:938, paras. 79–82.

[78] Montesquieu [19], XI.3, p. 325: "La liberté est le droit de faire tout ce que les lois permettent."

ensure the democratic accountability of Trilogue negotiations. Beyond setting procedural principles, the Treaties also create substantive requirements for legislative acts and thus combine material and formal aspects in the concept of legislation.

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