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Special Procedures for the Adoption of EU Legal Acts

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Abstract

The article is divided into three parts and Conclusions. The first part summarises institutions in EU legislative decision-making positions in the establishment of the European Communities, while part two addresses the procedures for adopting legal acts in their evolution. The third part presents the ordinary, special procedures and legal procedures for adopting non-legislative acts. Findings highlight how the Lisbon Treaty introduced new elements to the procedure.

Keywords: institution, ordinary procedure (co-decision), special procedures, decision making, legislative, advisory, cooperation, conciliation, consultation.

1. Institutions in EU decision-making positions

In the European Union, the process of adopting legal acts, and legislative or non-legislative decision-making – the so-called decision² process – mainly involves the European Parliament and the Council, Commission, European Council, while the Economic and Social Committee and the Committee of the Regions play an advisory role.

Since the establishment of the Community, the legislative powers of Parliament have evolved from their initial advisory role.

Since the introduction of the “budgetary treaties” in 1970 and 1975, involvement in the budgetary procedure has progressed, and budgeting competence in the European Community is now shared with the Council as specified in Art. 203 of the Treaty of the European Economic Community (TEC). By introducing the cooperation procedure in Article 6, the Single European Act (SEA) recognised the competence to adopt laws. The introduction of the co-decision procedure in the Maastricht Treaty (TMs) gave the European Parliament the same legislative powers as the Council. The Amsterdam Treaty then simplified the co-decision procedure; the Treaty of Nice promulgated the qualified majority for all Council actions, thus strengthening its position in the procedure for adopting Community legislation.

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2 See Dan Vataman, EU Law, Legal Universe Publishing, Bucharest, 2010, p 162.

The Lisbon Treaty made the co-decision procedure ordinary procedure in the European Union (Art. 289 Paragraph 1 of the Treaty on the Functioning of the European Union - TFEU), thus strengthening the status of the European Parliament - with the Council - as legislator. The Commission is the institution that initiates legislative acts in the European Union. Thus, Union legislative acts may only be adopted by Commission proposal, except where the Treaties provide otherwise. Other acts are adopted on proposal where the Treaties so provide (Art. 17 Para. 2 of the Treaty on the European Union - TEU). Also, the ordinary legislative procedure comprises joint adoption by the European Parliament (EP) and Council of a regulation, directive or decision on a proposal from the Commission (Article 289 TFEU).

In principle, draft laws are the result of Commission initiatives. As an exception, Parliament may request the Commission to submit an appropriate proposal for adoption of a new act or amendment of an existing act (Article 225 TFEU³), or the initiative can come from other institutions or from Member States, in special proceedings (Article 289 TFEU). The European Council does not exercise legislative functions but has decision-making powers, adopting non-legislative Common Foreign and Security Policy legal acts under the TEU (Art. 24, Art. 31). The Economic and Social Committee (ESC) and the Committee of the Regions (CoR) fulfil advisory functions. In this regard, consultation of the ESC and CoR by the European Parliament, the Council or the Commission is compulsory where provided for in the Treaties, and in all cases where deemed appropriate by these institutions (Articles 304 and 307 TFEU).

2. Procedures used in adopting legal acts in the evolution of the European Union

Since the establishment of the Community, procedures have seen the following forms⁴: conciliation, cooperation, notification, consultation⁵.

a) Conciliation procedure. Increasing the budgetary powers of Parliament meant that it needed to be associated more closely with development legislation that was likely to have an impact on the budgetary powers. For this reason, a "conciliation procedure" was introduced on 4 March 1975 by Joint Declaration

3 See Art. 42 Para. 1 of the Rules of Procedure.

4 In addition to budgetary powers. See Pierre Mathijsen, *Compendium of European Law*, ed. Seventh, Club Europe Publishing House, Bucharest, 2002, p 69 et seq.

5 "Consultation" is discussed in the section on the European Parliament, the advisory function of this institution, see in this respect, Ioana Nely Militaru, *EU Law*, ed. II, Legal Universe Publishing House, Bucharest, p 199 and seq.

of the Council and the European Commission⁶ in order to empower the views of Parliament. The conciliation procedure was applied to proposals with notable financial implications and whose adoption was not required by existing provisions. If opposition to these acts arose between Parliament and the Commission's position or the opinion of the Council, a conciliation procedure could be established in a joint committee. The Conciliation Committee was composed of members of the Joint Council (or their representatives) and a delegation led by the President of the Parliament, while Commission participants oversaw agreement between the two institutions. If three months of conciliation failed to produce a new opinion or Parliament and the Council failed to reach a final decision, the Council had the last word⁷. Far from being enlarged⁸ conciliation was restrained and finally replaced by cooperation and co-decision procedures.

b) The procedures for cooperation in making the right decisions. The procedure of "institutional cooperation"⁹ was introduced by the Single European Act in order to facilitate the adoption of Single Market legislation (Art. 6 SEA) according to a strict schedule that ended in 1992. The Maastricht Treaty (TMs) was extended to new areas that were subsequently "deprived of all the profit of co-decision procedure"¹⁰. Under the Lisbon Treaty, cooperation procedure was reconsidered in compliance with Art. 295 TFEU, according to which the European Parliament, the Council and the Commission shall consult each other and make arrangements to cooperate by common agreement. To this end, they may, in compliance with the Treaties, conclude inter-institutional agreements which may be binding.

c) The assent procedure was introduced by the Single European Act on association agreements¹¹ and applications for accession of new countries to the European Union [Art. 218 Para. 6 lit. a), i) TFEU, ex 300 TEC].

6 OJEC, n C 89 of 22 March 1975.

7 Conciliation did not produce the expected results, "because it was not completed (either Council was to agree with the view of Parliament or a late decision), and was open despite the request of Parliament". The conciliation procedure only applied to a small part of the legislative domain, see D. Strasser, *Travaux de concertation législative*, in *Les finances de L'Europe*, Éditions LABOR, Bruxelles, 1984, p. 572; Guy Isaac, Marc Blanquet, *Droit communautaire general*, 8 ed., Dalloz, Paris, 2001, p 77.

8 According to the second conciliation statement on 16 December 1981, Bull. EC 3/82.

9 See Cornelia Popescu, *Fundamentals of Community institutional law*, Economic Publishing House, Bucharest, 2003, pp. 132-133; Fabian Gyula, *Institutional Law Community*, Legal Sphere Publishing House, Bucharest, 2004, p 183 and 184 and Guy Isaac, Marc Blanquet, cited work, p 77.

10 See Guy Isaac and Marc Blanquet, cited work, p 77.

11 The Treaty of Nice has maintained this procedure.

By using the phrase "with the approval of the European Parliament", both the Treaty of Maastricht and now the Treaty of Lisbon assent procedure have been extended to other areas, such as:

- European citizenship (Art. 19 TEU ex 13 TEC);
- agreements establishing a specific institutional framework by organising co-operation procedures, agreements with important budgetary implications for the Union, agreements in areas where ordinary legislative procedure applies, or the special legislative procedure, agreement on EU accession to the European Convention on Human Rights and Fundamental Freedoms (Art. 218 Para. 6 lit. a), ii, iii, iv, v, TFEU, ex 300 TEC)¹²;
- rules for the election of members of Parliament if the Council determines necessary provisions on uniform voting for the election of the European Parliament by direct universal suffrage (Art. 223 TFEU, ex 190 TEC);
- or on detection of a serious risk of fundamental rights breaches in a member country (Art. 7 Para. 1 TEU was 7 TMs). The assent procedure obligates the Council, not only to ask the opinion of the European Parliament before making a decision, but also to take into account the Parliament's position, otherwise the act is not adopted¹³.

Nowadays, conciliation, cooperation, advising and consulting, are more associated with some EU institutions exercising functions which contribute to the adoption of legal acts. Since the new treaties came into force, these principles have been subjected to numerous adaptations and replacements, ultimately producing the following:

- conciliation has been replaced by the cooperation and co-decision procedure;
- cooperation is expressly provided in a single provision of the TFEU, encouraging, in this sense, the adoption of institutional arrangements that can be binding under Art. 295;
- consultation is expressly provided through the functions of the European Parliament, according to Art. 14 TEU, although, in principle, the advisory functions associated with the adoption of legal acts belong to the Economic and Social Committee and the Committee of the Regions (Article 300 TFEU). Although the European Parliament (EP) is consulted, the institution is not bound by its opinion,
- endorsement of the advisory function of the EP; this time, however, the institution requesting the opinion is obliged to take account of "EP opinion".

12 According to Art. 90 of the Rules of Procedure.

13 See Dan Vataman, *Union Law ...*, cited work, p 169.

3. The adoption of legal acts in the EU according to the Lisbon Treaty

Currently, EU legal acts are legislative and non-legislative.

The adoption of legislative acts of the European Union corresponds to the legislative function which is exercised, in principle, equally by the European Parliament and the Council. Pursuant to Art. 289 TFEU, these two institutions adopt the following two procedures:

- ordinary legislative procedure, so-called co-decision procedure, which consists of joint adoption by the European Parliament and the Council of a legislative act (regulation, directive or decision) as proposed by the Commission. This procedure is defined in Art. 294 TFEU;
- special legislative procedure, which consists of the adoption of a legislative act (regulation, directive or decision) by the European Parliament with the participation of the Council, or by the Council with the participation of the Parliament, at the initiative of a group of Member States (Art. 7 Paras. 1 and 3 TEU and Art. 11 Para. 3 TEU¹⁴) or the European Parliament (Article 225 TFEU), on the recommendation of the ECB (Article 129 paragraph. 4 TFEU) or at the request of the CJEU (Article 252 TFEU) or EIB (Article 308 TFEU).

A standard procedure for adopting non-legislative acts is not provided, nor for the adoption of legislation under special procedures. For the ordinary procedure, as we have seen, there are rules laid down in the TFEU, such as the budgetary procedure.

3.1. Ordinary legislative procedure, regulated by Art. 294 TFEU, was introduced by the Maastricht Treaty by modifying the Treaty establishing the European Community (TEC).

The procedure was extended by the Treaty of Amsterdam¹⁵, while the Treaty of Nice extended the co-decision procedure, substituting some cooperation and

14 Treaty refers to the corresponding third initiative “a significant number of Member States”.

15 The number of cases falling under the co-decision procedure increased from 15 to 37, of which 11 were previously subject to the cooperation procedure (e.g. Art. 12, 15 Para. 4, 175 Para. 1, 179 TEU), two to consultation procedure (Article 46 and 47 (2) TEU), 8 fell under new provisions introduced by the TA (e.g. Art. 135, 141 Para. 3, 255 Para. 2, 286 Para. 2 TEU). See Guy Isaac, Mark Blanquet, cited work, p. 77, and C. Reich, *Le traité*

consultation procedures. These substitutions "accounted for more than half of EU legislative activity". The co-decision procedure strengthens European Parliament legislative power – the procedures of acting by qualified majority and employing inter-institutional negotiations – introduced by the procedure of co-operation between Parliament, Council and Commission.

The Amsterdam Treaty accelerated the co-decision procedure to make it possible for a Community legislative act to be adopted at first reading, if everyone involved in the process agreed, thus strengthening Parliament's involvement in the pre-legislative phase of decision making¹⁶. In this respect, the three institutions – the European Parliament, Council and Commission – adopted a Joint Declaration on practical new approaches to co-decision procedure (1999)¹⁷ that replaced the Interinstitutional Agreement of 21 October 1993, which was considered to be quite cumbersome and complex. Although this procedure extended to seven provisions of the EC Treaty, namely Art. 13, 62, 63, 65, 157, 159 and 191, the Treaty of Nice did not establish and shift to qualified majority voting when adopting co-decision. Also, common agricultural policy legislative measures adopted by a qualified majority did not fall under the co-decision procedure.

Through the Lisbon Treaty, "co-decision" has become the ordinary legislative procedure for the adoption of EU legislation.

Ordinary legislative procedure is an original combination that includes:

- technocratic proposals from the Commission, which obtains technical advice from experts from all Member States;
- Parliament representing EU citizens of participating Member States;
- Council, which represents governments of the Member States, and acts by qualified majority (according to Art. 294 TFEU, ex 251 TEC).

3.2. *Special legislative procedure*

The Treaties provided for a special legislative procedure in some cases for the adoption of legislation by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament, or by a group of Member States, or by the European Parliament on recommendation of the European Central Bank, Court of Justice or European Investment Bank

d'Amsterdam et le champ d'application de la procédure de codécision, RMC, 1997, p. 665; L. Descot, L'affermissement du Parlement européen par la traité d'Amsterdam, l'exemple de la codécision, TPD, 1998, p. 38; O. Manolache, Treaty of Community law, ed. V, C. H. Beck Publishing House, Bucharest, 2006, p 201.

16 See O. Manolache, cited work, p 103.

17 OJEC, N. L. 148/1 from 28 May 1999.

(Article 289 TFEU). Special legislative procedure differs from ordinary legislative procedure in that:

- Parliament and Council work together, but each individually (e.g. Articles 19, 21, 25, 33, 64 Para. 3, 65 Para. 4, 81 Para. 3, Para. 82. 2, 83 Para. 1, 86 Para. 1, 87 Para. 3, 89, 108, Para. 2, 113, 115, 126 Para. 14, 127 Para. 6, 140 Para. 3, 311, 312 and other TFEU);
- the initiative driving a legislative act does not come from the Commission, but from another institution or a group of Member States (e.g. Articles 65 Para. 4, 108 Para. 2, 129, 252, 308, all TFEU).

If the provisions of the TFEU provide for legislative acts to be adopted by the Council in accordance with a special legislative procedure, the European Council may adopt a decision authorising the adoption of such acts in accordance with the ordinary legislative procedure (Art. 48 Para. 7 Para. 2 TEU).

Special legislative procedures are not covered by standard rules in the treaties, but are governed by different rules for each of the cases provided for in the Treaties. And in the special legislative procedure, the Council and the Parliament are still involved in passing legislation that is subject to different rules from those governing ordinary legislative procedure:

- in most cases, special legislative procedure requires unanimity in the Council and consultation of the Parliament (for example, Articles 21, 33, 64, 81 TFEU);
- in some cases, this implies unanimity in the Council and approval by the EP (e.g. Articles 19, 25, 82 Para. 2, 86 Para. 1 TFEU);
- there are also several cases where the Council votes by qualified majority and the European Parliament is only consulted (e.g. Articles 223 Para. 2, 226, 228, all TFEU);
- there is also a special legislative procedure for the adoption of the annual budget of the EU, which is based on the usual procedure but has been specially adapted to the particular characteristics of the budget process (qualified majority in the Council under Art. 314 TFEU).

3.3. Procedures for the adoption of non-legislative acts

Any action taken by the European Union through a – special or ordinary – legislative procedure is a "legislative act" (Art. 289 Para. 3 TFEU). Conversely, any measure that is not adopted by this procedure is a non-legislative act. In addition to the theoretical implications, the distinction between legislative and non-legislative acts also has practical implications, for example the European

Parliament and the Council shall meet in public when debating and voting on draft legislative acts, not being forced to do this when they discuss non-legislative acts (Art. 15 Para. 1 TFEU).

Non-legislative acts have their legal basis both in the Treaties (primary legislation) and in secondary legislation (derived).

Examples of non-legislative acts that are based on Treaties, (the TEU and TFEU) include:

- Article 74 TFEU on administrative¹⁸ cooperation in which the Council adopts measures on proposal from the Commission and after consulting the European Parliament. Given that the Treaty does not provide for measures to be adopted by legislative procedure, they are therefore non-legislative acts;
- Article 81.3 Para. 2 TFEU, according to which the Council may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by ordinary legislative procedure. The Council is therefore not obliged to adopt by legislative procedure in this area.
- A series of non-legislative acts have been adopted by the European Council, for example:
 - Art. 86 Para. 4 TFEU, according to which the institution may adopt a decision to extend the powers of the European Public Prosecutor.
 - Art. 24 Para. 1(2) and Art. 31 Para. 1, both TEU, on Common Foreign and Security Policy, stipulating that the “adoption of legislative acts shall be excluded” in the area of CFSP and therefore decisions in this area by the Council and the European Council are non-legislative acts.

The Council acted by qualified majority on a proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, in accordance with Art. 215 TFEU. In this regard, the Council adopted "restrictive measures" required on penalties related to CFSP against natural or legal persons, groups or state entities.

The examples mentioned above show that there are no rules for the procedure to adopt non-legislative acts because:

- the Commission – an institution with legislative initiative in principle under Art. 86 Para. 4 TFEU – only has an advisory role;
- in some cases the Commission is informed, but not consulted (Article 215 TFEU), in other cases it is consulted (Art. 74 TFEU);

18 Appropriate "Area of Freedom, Security and Justice" (formerly Pillar II of the EU JHA, later, by the Treaty of Amsterdam, CPJP).

- since TEU provisions exclude the use of CFSP legislation, all measures in this area are non-legislative,
- the European Council adopted a decision amending all or part of the provisions of Part III of the TFEU (Article 48 Para. 3 TEU). The Council shall act unanimously after consulting the EP and the Commission and the ECB, in the case of institutional changes in the monetary area. The Council shall act according to the rules above, and within the simplified treaty revision procedure (Article 48 Para. 6 TEU);
- when negotiating and approving agreements between the European Union and third countries or international organisations (Article 218 TFEU), the Council shall adopt the decision concluding the agreement, in some cases after approval by the EP and in others after consulting the EP.

Non-legislative acts adopted under secondary legislation or secondary legislation are: implementing acts and delegated acts. Their legal basis is as follows:

- 291 TFEU, according to which, if uniform conditions are necessary for implementing legally binding acts of the EU, those acts (the base) confer jurisdiction on the Commission, or – in specific cases duly justified and in cases provided for by Art. 24 and 26 TEU – the Council¹⁹. It is up to the legislature, while fully respecting the criteria laid down in the TFEU, to decide in each case whether to give powers to the Commission in accordance with Art. 291 Para. 2 of that Treaty. To date, the exercise of implementing powers by the Commission is governed by Council Decision 1999/468/EC.
- 290 TFEU, which introduces delegated acts pursuant to the Lisbon Treaty. According to this article, EU legislation may delegate to the Commission the power to adopt generally applicable non-legislative acts to supplement or amend certain non-essential elements of the act.

Does not are general rules governing the procedure for adopting delegated acts, unless a Commission Communication of 9 December 2009 establishing a model for legislation that could be adapted on a case by case basis²⁰. In this case, the Commission Communication considers that

"delegation may be considered a means of better regulation, which seeks to ensure that legislation can remain simple and be completed and updated without the need to

19 See Regulation (EU) 182/2011 of the EP and the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms Member States to control the exercise of implementing powers by the Commission (J Of L. 055, 28.02.2011, p 013-018).

20 COM (2010), C 81 E / 6, from 15.03.2011.

resort to repeated legislative procedures, legislature may also retain critical skills and responsibility" (Preamble, lit. H).

There is no general rule for the adoption of delegated acts in that Communication (the letter I), thus

"Article 290 TFEU does not contain a legal basis for the adoption of a horizontal instrument laying down the rules and general principles applicable to the delegation because those conditions must therefore be determined in each basic act (act of legislative nature, a.n.)".

4. Conclusions

Through the Lisbon Treaty, co-decision procedure has become ordinary procedure in the European Union (Art. 289 Para. 1 TFEU), with the legislative function being shared between the European Parliament and the Council.

Further, the legislative powers of the European Parliament are indicated by the special regulation adopting legal acts of the Union, namely the specific cases provided for in the Treaties in respect of the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the Council with the participation of the European Parliament (Article 289 Para. 2 TFEU). Note that the TEU, when enumerating the functions of the Parliament, begins by specifying that "The European Parliament shall, jointly with the Council, exercise legislative and budgetary functions" (Article 14 TEU).

Since the establishment of the European Community, the Council has retained its status as the main legislative body of the European Union. In this regard, the Council performs legislative functions, either individually, by special procedure acting unanimously in most cases (Art. 19, Art. 21, Art. 65, Art. 108, Art. 113 TFEU), or with a participating role only by the European Parliament, or jointly with the European Parliament, through the ordinary procedure (of co-decision).

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