



Analysis

The democratic accountability of the EU's legislative approach

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The EU legislative process lacks the basic rudiments of openness and transparency and gives civil society and national parliaments little time to react to agreements made by the Council and European Parliament. This article suggests a revised Inter-Institutional Agreement to address these concerns.

Following the entry into force of the Treaty of Lisbon, the EU has an 'ordinary legislative procedure' - consisting of qualified majority voting (QMV) of Member States' governments in the Council, and joint decision-making power of the European Parliament (EP). This procedure replaced the previous procedure known in practice as 'co-decision', without amending its substance; but the Treaty of Lisbon extended this procedure to apply to many more areas of EU decision-making.

The EU also has around 30 'special legislative procedures', comprising cases where the Council or the EP has the main role in adopting the legislation concerned, and the other institution has a secondary role. Most of these cases provide for unanimous voting in the Council and mere consultation of the EP, but some provide for the EP's consent or QMV in the Council. (On the two types of legislative procedure, see Article 288 of the Treaty on the Functioning of the European Union, or 'TFEU').

The ordinary legislative procedure can be compared to the legislative process in any State with a bicameral legislature; its closest comparators are perhaps the legislative procedures in Germany (within the EU) and the United States (outside it). However, the legislative process in any democratic State compares favourably to that of the EU as far as openness and transparency is concerned.

The EU's ordinary legislative procedure provides for either one, two or three readings before legislation is adopted (for the legal details, see Article 294 TFEU). In the large majority of cases, legislation is agreed after only one reading. In such cases, the relevant EP committee and the relevant Council

working group begin their analysis of the proposed legislation separately. Sometimes, the Council working group completes its examination of the proposal first, in which case the Council (at the level of ministers) often adopts a 'general approach' on the legislation. However, sometimes an agreement is reached only at the level of the Member States' representatives to the EU (known as 'Coreper'), without being endorsed by ministers. Negotiations then get underway at some point afterwards with delegates from the EP, on an essentially informal basis (these are known as 'trilogues').

On the Council side, the chief negotiators are officials from the Member State holding the rotating Council Presidency, and the overall control of the negotiations is managed by Coreper. Occasionally issues arising from the negotiations are discussed by ministers. On the EP side, the chief negotiator is the MEP in charge of the EP's report on the particular proposal (known as the 'rapporteur'), assisted by interested MEPs from other political parties (the 'shadow rapporteurs'). If an agreement is then reached between the two sides, it is submitted for approval by the full Council and the plenary EP. Either side can reject the deal, but this is very rare.

Sometimes agreement is not reached at first reading, often because the first-reading trilogues fail, or because there is no perceived point to holding one (because the institutions' positions are so far apart), or because one of the institutions has adopted its first reading position without waiting to hear the other institution's point of view. The large majority of such cases result in a deal at second reading. In about half of such cases, there is an 'early second reading deal': after the EP has adopted its first reading opinion, the EP and the Council hold a trilogue before the Council's first reading vote, with a view to agreeing a text. If a text is agreed, the Council adopts it at first reading, with the expectation that the EP will simply endorse that text. It should be noted that once the Council formally adopts its first reading position, there are binding deadlines which must be observed; an early second reading agreement means that the negotiations can take place without the pressure of such deadlines.

Second reading

In other cases, there is an ordinary second reading negotiation: the Council and EP essentially start negotiations after the adoption of the Council's first reading position, and are subject to the deadlines in the Treaty as they try to reach a deal. Usually this is facilitated because the Council often takes considerable account of the EP's first reading position when it adopts its own first-reading position. So the points of difference between the two institutions have been narrowed down already. In either case, the trilogue process plays a part in second reading negotiations as well.

It is possible that the EP can simply vote to reject the Council's first reading position, in which case the legislative process is terminated without the adoption of any measure. This is quite rare, however. In some cases, the

EP votes to reject a legislative proposal at first reading. Formally speaking, this does not end the legislative procedure, but it means there is little point in the Council continuing with its discussions, on the assumption that the EP would simply repeat its rejection of the proposal at second reading, thereby killing the proposed legislation officially. This is also rare. It is rather more common for the Council to fail to reach sufficient agreement on a proposal due to a 'blocking minority' of Member States opposed to it, in which case the Council does not adopt a first-reading position, and the legislative procedure is stalled. In practice, it then stays stalled until the Commission revises its proposal with a view to getting more support in Council, or enough Member States change their view to ensure its adoption, or a subsequent Council Presidency re-launches discussions based upon a revised text or until the Commission gives up and withdraws the legislative proposal - sometimes replacing it eventually with a fresh proposal on the same issue.

If the second reading negotiations fail, the EP and Council then enter into a formal 'conciliation' process, with a view to reaching a 'third-reading' deal. Only about 5% of legislative proposals are agreed at third reading. If the 'conciliation committee' fails to reach a deal (which sometimes happens), the process fails. If the conciliation committee reaches a deal, it must then be approved by the plenary EP and the Council at ministerial level. The Council has always approved deals made at this stage, while the plenary EP has approved most (but not all) of them.

The European Parliament and openness

There are some additional provisions relating to these processes in the institutions' rules of procedure, and in a joint agreement between them. On the EP side, Rule 70 of its Rules of Procedure states that negotiations on legislation must take account of a Code of Conduct attached to the Rules of Procedure. This Rule also states that before negotiations start:

"the committee responsible should, in principle, take a decision by a majority of its members and adopt a mandate, orientations or priorities."

The committee should also be reconsulted once a final deal has been reached. The Code of Conduct (Annex XXI of the Rules of Procedure) states that 'as a general rule', the EP negotiators should negotiate on the basis of the committee or plenary position. In the 'exceptional case' of negotiations before a committee vote, the committee 'shall provide guidance' to the negotiators. To 'enhance transparency', trilogues shall be announced. There are rules concerning the relations between the negotiators and the committee.

The EP's 'Conference of Presidents' decided in 2011 to amend the Rules of Procedure on this issue, and a draft set of amendments is under discussion. The draft states that a committee 'shall' adopt a mandate before negotiations get underway (although 'exploratory discussions' can start beforehand); the mandate 'may' include proposed amendments. The

decision to start talks will have to be announced at the EP's plenary session, and can be challenged there - but only at the behest of the EP's Conference of Presidents. The role of the committee during the negotiations and after their conclusion would be strengthened.

The EP rules on transparency state that debates shall be public, and that committees normally meet in public, but say nothing about legislative negotiations (Article 103 of the rules of procedure). Neither do the EP rules on access to documents (Article 104).

The Council and openness

As for the Council, its Rules of Procedure provide for public meetings as regards legislative discussion, and access to the documents related to those discussions (Article 7). However, this does not apply to Coreper, working groups or negotiations with the EP. In practice, some additional legislative documents are released either on the Council's own initiative or following a request for access to documents (see also Art. 11(5) of Annex II to the Rules of Procedure), but there is no uniform rule.

The joint declaration on the co-decision procedure (Annex XX of the EP's Rules of Procedure) regulates the relationship between the institutions, rather than public access to documents.

From the perspective of openness and transparency, the second and third reading process is more open in practice, because the Council's and EP first and second reading positions are published. In comparison, as pointed out in a previous Statewatch analysis on '*Proposals for greater openness, transparency and democracy in the EU*', first-reading negotiations:

"are totally lacking in the basic rudiments of openness and transparency. It is practically impossible for outsiders, including national parliaments, to work out whether first-reading negotiations are underway, what stage negotiations are at, and what drafts are under discussion. Once an agreement has been reached between the EP and Council, there is often little time for civil society or national parliaments to react before the adoption of the text."

For example, at time of writing (20 December 2011), an EP press release had announced on 1 December 2011 that the EP and the Council had reached an agreement on legislation concerning a unitary patent for the EU. But the agreed text of that legislation was not available on the EP website; nor was it released to the public via the Council register of documents. A document concerning the final state of the negotiations which was listed on the Council website had fortunately been leaked to the 'ipkitten' blog, but it was not absolutely clear whether or not this constituted the agreed text of the legislation. Some interested groups were anxious to suggest changes to the legislation, but this task was made more difficult because of the absence of official public access to the agreed text. The relevant EP

committee voted in favour of the agreed text on 20 December 2011, but there was no way for the public to find out in advance exactly what text the committee was voting on. This is clearly unacceptable in a democratic system - but it is common practice for the EU's legislators.

What should be done?

Since it seems unlikely that the institutions would change their practice of agreeing most legislation at first reading, the best way to ensure adequate transparency and openness is to adopt general rules which will improve the conduct of the EU's legislative procedures across the board. In the previously-mentioned Statewatch analysis, back in 2008, the text of a proposed 'Inter-institutional Agreement' to this effect was suggested. Since then, while practices have improved within the EP, which now often takes votes before negotiations begin and sometimes makes the text of its negotiating mandates as approved by committee available to the public. However, this still falls short of the minimum degree of transparency which a democratic system should ensure.

The Annex to this essay therefore suggests a revised text of this proposed Inter-Institutional Agreement, to address these fundamental concerns. It provides for the prior adoption of a negotiating position by the EP and the Council - which must be publicly available - before first-reading negotiations start (points 1 to 3). This would confirm the developments in the EP, to the extent that committee mandates are becoming the norm, and would add a requirement of making the relevant documents available.

Detailed information on all aspects of the negotiations must be available to the public (point 4). The final provisional text of any deal must in particular be public (point 5), and be widely publicised (in practice by means of press releases and updates on the dedicated website), in particular to national parliaments. There must then be at least eight weeks for national parliaments and civil society to scrutinise the final deal before any vote (based on the national parliaments' scrutiny period at the start of the legislative process) - although national parliaments could ask for an extension of this period (point 6).

For all this information to be accessible, there would be a single specialised website (point 7). At the moment, the separate 'co-decision' sites of the Commission, EP and Council are hard to find, contain much less information, and are infrequently updated. This site should be a broader forum for discussion of the proposals - including comments by civil society and interventions by national parliaments. There should be provision for interactivity, if, for instance, national ministers or MEPs want to respond to comments or to explain the latest developments.

Finally, since proposals to codify EU legislation do not make any substantive amendments to that legislation, there is no need to apply the rules to those proposals (point 9).

Proposed Annex: Inter-Institutional Agreement: On enhancing public access to documents and citizens' participation in decision-making as regards the co-decision procedure

- 1) The negotiating position of the European Parliament as regards a first-reading agreement shall be set out in a report adopted by the relevant committee of the European Parliament in accordance with the Parliament's Rules of Procedure; this committee report shall be publicly available;
- 2) The negotiating position of the Council as regards a first-reading agreement shall be set out in a document adopted by the Council, or agreed within Coreper or the relevant Council working group(s) or committee(s) on behalf of the Council; this document shall be publicly available;
- 3) The European Parliament and the Council shall not begin negotiations for a first reading agreement unless a negotiating position of the two institutions, in accordance with points 1 and 2, has been adopted;
- 4) When Members of the European Parliament and representatives of the Council hold any meetings to discuss a possible first-reading agreement, full information shall be publicly available as regards the meeting dates, the names and roles of participants at the meetings, the meeting agendas, all documents submitted to or considered at such meetings and the minutes of such meetings;
- 5) The text of any provisional first-reading agreement reached between the negotiators shall be made publicly available and shall be widely publicised by the Council and the European Parliament; in particular, the Council and the European Parliament will draw national parliaments' attention to these agreements;
- 6) Except for duly justified cases of urgency, a period of at least eight weeks shall elapse between the public availability of a first-reading agreement and any vote on that agreement by the Council or European Parliament; the relevant provisions of the Protocols on national parliaments and on subsidiarity and proportionality shall apply during this period; a national parliament may request an extension of this time period;
- 7) The documents referred to in this Agreement shall be made available to the public in a dedicated single website to be set up by the institutions, which shall be designed to ensure ease of use by the public; this website shall also include the original proposal and any related impact assessments or communications, any relevant documents forwarded by national parliaments (or regional parliaments), the Economic and Social Committee, the Committee of the Regions, and civil society, and full information about and documentation concerning any public hearing held by EU institutions or lobbying of EU institutions related to the proposal;

8) The EU institutions shall amend their rules of procedure and any prior agreements or declarations as necessary to ensure compatibility with this Agreement;

9) This Agreement shall not apply to measures to codify Union legislation.

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