

SPICe Briefing

The European Union – The Legislative Process

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This subject profile provides a brief introduction to the European Union's legislative process. It looks at the different forms of legislation available to the EU and the way in which that legislation is agreed at EU level.



The chamber at the European Parliament in Strasbourg. Image: European Parliament



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EU LEGISLATIVE PROCESS

WHY DOES EU LEGISLATION MATTER?

Legislation agreed at European Union level by the member states is significant because each member state is responsible for ensuring that the agreed legislation is transposed into domestic legislation and is then fully implemented and enforced. Failure to adequately comply with European legislation can lead to the European Commission taking action against an offending member state which might ultimately lead to prosecution in the European Court of Justice (ECJ). A finding of guilt at the ECJ would result in the member state being fined.

Although it is the United Kingdom which is the member state, under the devolution settlement the Scottish Government is responsible for implementing EU obligations in Scotland which relate to devolved matters. Thus, the Scottish Government and the Scottish Parliament can implement EU obligations in Scotland in a way which best suits Scottish needs. However, failure on Scotland's part to ensure its EU obligations are met would result in the United Kingdom Government (as the member state) being prosecuted by the European Commission at the ECJ. Any fine paid by the United Kingdom Government, as a result of Scotland's failure to implement EU obligations, would be reclaimed from the Scottish Assigned Budget¹.

FORMS OF EU LEGISLATION

There are five types or forms of EU legislation (Article 288 of the Treaty on the Functioning of the European Union):

- Regulations – these are binding and directly applicable in all Member States
- Directives – these are binding as to the result to be achieved but leave Member States to decide on the method of achieving that result. The method is decided by member states when they transpose the Directive into their own domestic legislation.
- Decisions – these are binding upon those to whom they are addressed
- Recommendations – these have no binding force
- Opinions – these have no binding force

EU DECISION-MAKING PROCEDURES

Following the introduction of the Treaty of Lisbon, the EU treaties provide for two main decision-making procedures for agreeing legislation:

- The ordinary legislative procedure (formerly known as co-decision)
- The special legislative procedure

This paper focuses on the ordinary legislative procedure as this is the most common process used for agreeing EU legislation. Where the special legislative procedure applies it generally allows the Council of the European Union to adopt legislation alone or (more rarely) the European Parliament alone rather than by the two institutions agreeing it jointly as happens under the ordinary legislative procedure.

¹ The Scottish Assigned Budget is a grant authorised by Westminster and funded by HM Treasury. It was formally known as the Scottish Block Grant.

This paper also examines the developing trend for seeking first reading agreements between the European Parliament and the Council.

THE ORDINARY LEGISLATIVE PROCEDURE

The ordinary legislative procedure is the main legislative procedure for the European Union. It is used to agree legislation in most areas of Union competence. Formerly known as co-decision, it was introduced by the Maastricht Treaty in 1992 and requires both the European Parliament and the European Council to agree on a Commission proposal, including agreement on any amendments, before it can become law.

The European Commission has produced a detailed list of the areas of EU competence where legislation is developed using the ordinary legislative procedure and the competencies where the special legislative procedure is used. This list is available at:

http://ec.europa.eu/codecision/docs/legal_bases_en.pdf. In total there are 83 areas of competence where the ordinary legislative procedure now applies.

HOW THE ORDINARY LEGISLATIVE PROCEDURE OPERATES

Commission Proposals

The European Commission is the only EU institution which has the right to initiate legislation. Consequently, it is responsible for drafting appropriate legislative proposals. Ahead of adopting formal proposals, the Commission will consult with relevant interest groups.

Following this initial consultation the Commission will usually publish a Green Paper or a White Paper. A Green Paper is essentially the Commission putting down some broad policy thinking in a particular area and asking for comments from interested parties. A White Paper will contain more detailed policy proposals from the Commission. The consultation periods that follow the publication of Green and White Papers (particularly a Green Paper consultation) are the most opportune moments for bodies or organisations such as the Scottish Parliament or the Scottish Government, to influence Commission thinking ahead of the drafting of the Commission's formal proposals. Once the Commission has undertaken consultation it will draft formal proposals which will begin making their way through the European legislative process.

The Commission's draft legislative proposal is submitted to both the European Parliament and to the Council and also to all 27 Member State Parliaments and where appropriate the Committee of the Regions and the Economic and Social Committee.

Under the Treaty of Lisbon, Member State Parliaments have the opportunity to object to a legislative proposal if in its view it breaches the principle of subsidiarity². Full details of this provision in the Treaty is provided in SPICe Briefing 08/21 [The Subsidiarity Protocol in the Treaty of Lisbon](#)

Opinions of the Committee of the Regions and the Economic and Social Committee

The Treaty on the Functioning of the European Union provides that both the Committee of the Regions (Article 307) and the Economic and Social Committee (Article 304) should be consulted

² "The Committee of the Regions suggests that subsidiarity is intended to ensure that decisions are taken as closely as possible to the citizen and that constant checks are made as to whether action at Community level is justified in the light of the possibilities available within Member States. Specifically, it is the principle whereby the Union does not take action (except in the areas which fall within its exclusive competence) unless it is more effective than action taken by Member States."

by the European Parliament, the Council or the Commission where the Treaties provide and where the institutions feel it is appropriate. This includes during the development and agreement of EU legislation. The Committee of the Regions and the Economic and Social Committee submit their views in the form of opinions.

Once the Commission's legislative proposal has been finalised it is then up to the European Parliament and the Council of the European Union to take the proposal forward. Article 294 of the Treaty on the Functioning of the European Union (TFEU) describes how the Ordinary Legislative Procedure (OLP) applies; a description of the procedure is provided below.

The European Parliament's First Reading

The European Parliament is asked to consider the European Commission's legislative proposal first. It does this by delivering a position on the Commission's proposals. This position is usually developed by a Rapporteur and is considered by the relevant parliamentary committee. At this stage the Committee will also discuss any amendments which have been proposed to the Commission's proposal. Amendments can be tabled by any MEP.

Following discussion at Committee level, the proposal will then be considered in plenary session by the whole parliament. The Parliament will be invited to agree any proposed amendments and then consequently a position on the Commission's proposal. Adoption of any amendments and of the Commission's proposal as amended requires only a simple majority. It is possible (and legitimate) for the Parliament to agree the Commission's proposal un-amended though this is unlikely for substantive pieces of legislation.

Once the Parliament has delivered its position on the Commission's proposal, the Commission may alter its legislative proposal allowing it to incorporate the European Parliament amendments which it feels would improve the legislation. This revised proposal is sent to the European Council along with the European Parliament's opinion.

There is no time limit on the first phase of the legislative process.

The Council of the European Union's First Reading

The Council of the European Union (the Council) will consider the European Commission's amended legislative proposal. This consideration usually takes place in working groups with decisions then taken at sectoral Council meetings. At this stage in the process there are three possible scenarios:

- The Council accepts without alteration the Commission's proposal, which the European Parliament has not amended, and the act can be adopted;
- The Council accepts all the European Parliament's amendments which the Commission has incorporated into its amended proposal, and the act can be adopted;

In all other cases, the Council adopts a common position

The Council's common position would set out its views on the Commission's proposal and views on proposed European Parliament amendments. If the Council decides to adopt a common position it can take on average 15 months to agree although for some more complex dossiers it can take longer. (European Commission 2010)

Once the Council has agreed its common position, the European Commission prepares a communication in which it sets out its views on the Council's common position and the Council's reaction to the European Parliament's amendments. The Commission document along with the Council's common position is forwarded to the European Parliament.

The European Parliament's Second Reading

When the European Parliament receives the Council's common position it has three months to take the legislation forward. Failure to meet the three month deadline allows the Council to adopt the legislation based on their common position. The process involved in the Parliament's second reading is largely similar to the first reading. One notable difference however, is that the Parliament's focus is on the Council's common position as opposed to the Commission's proposal which had been the focus during the first reading.

In terms of possible amendments to the Council's common position, they should include amendments proposed at the first reading but not accepted by the Council or should relate to a section of the common position which is substantially different from the Commission's original proposal.

Any amendments are considered by the Parliamentary Committee responsible and require a simple majority vote to be passed. The Parliament then meets in plenary session to agree its position on the amendments agreed at Committee and to vote on any further amendments which are tabled (further amendments must be tabled by political groups or by a minimum of 40 Members).

Following the Parliament's second consideration of the proposal it will either have been:

- Passed – if the Parliament approves the Council's common position by an absolute majority (369 votes) or fails to take a decision within the three month time limit.
- Rejected – if the Parliament rejects the common position by an absolute majority. This would result in the proposal not being adopted and the procedure ending.
- Amended – if the Parliament chooses to adopt the common position with amendments by an absolute majority. If this happens the text is forwarded to the European Council for further consideration and to the European Commission to provide an opinion.

If the European Parliament suggests amendments to the European Council's common position, the European Commission is required to provide an opinion for the European Council on those amendments. This opinion is considered by the European Council at their second reading.

The European Council's Second Reading

The European Council is allowed three months (which can be extended to four months) to consider the European Parliament's amendments to their common position. If they wish to approve the amendments they can do so by a qualified majority if the European Commission has provided a positive opinion on the amended common position or, if the European Commission has delivered a negative opinion, unanimously. Failure to reach a decision within the allocated timeframe means the legislation falls.

If the Council approves the amended common position the proposal will be deemed to have been adopted. If on the other hand the Council rejects some of the Parliament's proposed amendments to the common position, the Presidents of the European Council and the European Parliament will convene a conciliation committee.

The Conciliation Committee

A Conciliation Committee must be convened within six weeks of the Council's formal decision to reject the Parliament's amendments. The Conciliation Committee is made up of an equal number of representatives of the European Parliament and the European Council and is chaired by the European Commission. The aim of the Committee is to jointly agree finalised legislation.

The Conciliation Procedure - (Article 294 (10-12) TFEU)

Composition: the Conciliation Committee brings together members of the Council or their representatives and an equal number of representatives of the European Parliament, as well as the Commissioner responsible.

Modus operandi: in most cases, negotiations are conducted during informal trialogues involving small teams of negotiators for each institution, with the Commission playing a mediating role. The participants in these trialogues report to their respective delegations. The compromise ("joint text") resulting from the informal trialogues, which often takes the form of a "package", is submitted to the delegations for approval.

Decision-making: each delegation to the Conciliation Committee must approve the joint text in accordance with its own rules: qualified majority for the Council's delegation (unanimity in cases where the Treaty specifies an exception to the qualified majority rule) and simple majority for the European Parliament's delegation.

The Commission's role: Given that it is the originator of the legislative proposal and can attend meetings of the delegations of both the EP and the Council, the Commission plays a mediating role and frequently proposes compromises. Its main aim is to reconcile the positions of the two co-legislators while defending, as far as possible, the general interest and the requirements of the Treaty in line with its proposal. It is important to note that, at this stage of the procedure, the Commission can no longer prevent the Council from acting by a qualified majority without its agreement.

Elements for negotiation: negotiations focus on all the amendments adopted by the European Parliament at second reading on the basis of the Council's common position.

Time limits: the Treaty stipulates a time limit of six weeks (which may be extended by two weeks) for approving a joint text. The first meeting of the Conciliation Committee signals the start of that period.

If the conciliation procedure is successful then the European Parliament (by a majority of the votes cast with no amendments allowed) and the European Council (by a qualified majority) must adopt the jointly agreed text. This must be done within six weeks of the conciliation process starting.

If the Parliament and the Council cannot agree the text within the stipulated timeframe the legislation is not adopted and the proposal falls.

INCREASE IN FIRST READING AGREEMENTS

In recent years the Parliament and Council have sought to reach agreement on legislation at the first reading, so-called "first reading agreements". First reading agreements occur when following consideration of the Commission's Proposal, the conclusions and where appropriate amendments in the Parliament's first reading report are all agreed by the Council at its first reading.

This move towards first reading agreements was first outlined in a Joint Declaration of the European Parliament, the Council and the Commission of 13 June 2007 on practical arrangements for the co-decision procedure which was attached as an annex (number 19) to

the Rules of Procedure of the European Parliament for the eighth term which was published in September 2015. The Joint Declaration stated:

“The institutions shall cooperate in good faith with a view to reconciling their positions as far as possible so that, wherever possible, acts can be adopted at first reading.” (European Parliament 2015)

This move towards first reading agreements essentially means Council and Parliament representatives negotiating a legislative text in private which is then subject to Parliament and Council votes. This increased use of so called trilogues to achieve first reading agreements was the subject of an article by EU Observer in 2014:

“In terms of numbers, the volume of legislation does not appear to have changed much in the past two legislatures. MEPs and ministers adopted a total of 447 laws in the 2004-9 parliament. By November 2013, politicians had signed off on 395 files and, even with a wild flurry of activity as they seek to conclude as much legislation as possible before May's elections, the total number of files is likely to be around 500.

But what has changed is the way the laws are agreed.

The formal structure for breaking the impasse between the institutions mentioned in the treaties is the conciliation committee.

The conciliation committee, which also features MEPs together with European Commission and EU Council officials, but which is chaired by one of the parliament's vice-presidents, kicks in at the final stage of the law making process – the third reading.

But in the post-Lisbon treaty era, in which lawmakers are actively encouraged to go faster in agreeing legislation, the conciliation process has been almost eliminated in recent years. In the 1999-2004 parliament, 89 of the 403 pieces of EU law were completed after conciliation. In the first half of the current parliament term, the figure was down to a mere 4 percent.

Around 80 percent of EU laws are now agreed at first reading, with research by the parliament estimating that the average law agreed at first reading takes 14.4 months from start to finish.” (EU Observer 2014)

A key criticism of the increased use of first reading agreements is the danger it presents to democracy both from the point of view of European Parliament and National Parliament members. According to EU Observer:

“Others complain that democracy and transparency are the losers. The two points at which MEPs vote for laws, in committee before and at the end of the trilogue process, and the final vote among all 751 deputies, are both in public, but this only camouflages the fact that most of the negotiations are held behind closed doors with no public access.

For their part, national parliaments complain that the process makes it even tougher for them to influence the process. Back in 2009, a report by the UK parliament's EU committee noted that the use of informal trilogues "makes it harder for national parliaments to conduct effective scrutiny of EU legislation."

Anne Rasmussen (2012) from the University of Leiden in the Netherlands wrote a blog in February 2012 in which she suggested that first reading agreements had actually led to an increase in scrutiny during first reading and that the European Parliament's processes had been adapted as a result of the increased use of first reading agreements;

“Our findings show that even if fast-track legislation restricts access for certain actors to decision making, early agreements on salient legislation allow more time for substantive debate and negotiations during the first reading stage. Hence, when we compare the length of the first readings for salient files concluded here and later in the legislative process, we see that first readings on the first group of files last longer. This indicates that the co-legislators compensate for some of the lost time from not going to second reading by extending the length of the first reading negotiations when the deals are salient. Moreover, rather than finding evidence that deals are pushed through quickly irrespective of how controversial they are, we find that the co-legislators spend more time on the first reading negotiation period the greater the level of political disagreement between them...

... Negotiation of fast-track legislation looks different today from the early period of first reading deals discussed among commentators and academic scholars. In this way, it appears that the number of initiatives that the EP has undertaken to formalize, clarify and institutionalize the procedures according to which early agreements are concluded have had an effect. Hence, the increased amount of time spent on concluding first reading deals coincides with the implementation of the reforms.

Much work remains to systematically examine the consequences of early agreements. However, what seems clear based on the results of our analysis is that the EP has adapted to the changing nature of the co-decision procedure and that these adaptations seem to have contributed to a more thorough treatment of fast-track legislation.”

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