



4 Legislation and decision-making: putting the institutional puzzle together

■ Introduction

In December 2012, the European Commission presented a proposal for a revision of the Tobacco Products Directive (TPD), a piece of legislation that regulates the production, sale and packaging of tobacco products in the EU. The old directive from 2001 needed to be replaced because in 2005 the EU had become party to the WHO Framework Convention on Tobacco Control, requiring stronger rules to discourage people from smoking. A new directive was also necessary to deal with new developments such as the emergence of e-cigarettes as a new product that had so far escaped regulation.

After its release, the proposal went to the Council of Ministers and the European Parliament for decision-making. Within the Council, it was discussed in the 'Employment, Social Policy, Health, and Consumer Affairs Council', which includes the ministers of health of the member states. Within the European Parliament, the responsible committee was the Committee on Environment, Public Health and Food Safety. The proposal was also discussed in four other parliamentary committees. While the proposal was being discussed in the Council and the EP, formal opinions were issued by two advisory bodies: the Economic and Social Committee and the Committee of the Regions. The

Commission also received opinions from seventeen national parliaments, seven of which raised severe objections against the need to regulate this at the EU level.

In June 2013 the health ministers in the Council reached a ‘political agreement’ after making several changes to the proposal from the Commission – for example, by asking it to not ban menthol cigarettes. Soon thereafter the European Parliament debated the proposal and indicated which amendments it wanted to see adopted in order to make the proposal acceptable. It gave its rapporteur, Linda McAvan, a mandate to negotiate on its behalf with the Council and the Commission. After a series of informal meetings representatives from the EP, the Council and the Commission reached agreement in December 2013. The EP approved this agreement in its session in February 2014, whilst the Council approved it one month later, thereby formally adopting the proposal. The speed at which the EU managed to adopt this piece of legislation was remarkable. Despite the complexity of the issues on the table and the many changes that were suggested by member states and MEPs, it had taken only fifteen months to get the new TPD adopted.

The TPD proposal followed a procedure that is known as the ‘ordinary’ legislative procedure. As its name implies this is by now the most commonly used way to adopt legislation in the EU. In this chapter we will outline the formal rules of this decision-making procedure as well as those of the ‘special’ legislative procedures. We will also show how the EU institutions interact alongside these formal procedures through various negotiating arrangements in order to facilitate and accelerate finding agreement. In so doing, this chapter will address the following questions:

- What types of decisions are taken within the EU?
- What types of decision-making procedures exist in the EU and what role do the various institutions play in this?
- How does qualified majority voting in the Council of Ministers work and to what extent do member states actually vote on legislative proposals?
- What role do national parliaments play in the legislative process?
- How do alternative forms of decision-making such as the Open Method of Coordination and Enhanced Cooperation work?

This chapter builds on the institutional sketch given in Chapter 3. There, we discussed each of the EU’s institutions. In this chapter, we will explain how these institutions work together to make decisions. Together, the two chapters provide an overview of the formal backbone of the EU: its institutions and the procedures governing decision-making.

The central question underlying the entire chapter is: why are EU decision-making procedures the way they are? Like the EU’s institutional set-up, its decision-making procedures seek to find a balance between competing objectives: fostering EU-wide approaches to issues, protecting the sovereignty of its member states and installing an element of democracy in the way decisions are made in the EU. If you understand the logic behind this balancing act, the complex and diverse world of legal instruments and decision-making procedures in the EU becomes much easier to navigate.

■ Types of decisions in the EU

Decision-making results in decisions. Hence, it is important to understand the type of decisions that can be adopted in the EU. In this chapter we focus on those major decisions that as a rule require the involvement of the three major institutions: Council, European Parliament and European Commission.

The treaties define a range of different types of legal instruments, and stipulate which types can be used for which issues. Because the legal instruments differ in the degree to which they are binding upon the member states, they allow for variation in the balance between EU obligations and member state sovereignty. Therefore, the types of decisions available in the EU themselves reflect a highly political trade-off between competing objectives and interests.

Legal instruments in the EU

The Treaty on the Functioning of the European Union defines four basic legal instruments: Regulations, Directives, Decisions, and Recommendations and Opinions. Fact file 4.1 gives an overview of these instruments. They form the legal 'tool kit' that the European Union can make use of.

Each of these types of instrument serves a different purpose. The first two, Regulations and Directives, constitute the EU's legislative acts. They are used to lay down general and binding norms. Decisions concern individual cases. Recommendations and Opinions, finally, contain non-binding norms. The Treaty on the Functioning of the European Union determines which instrument(s) can be used for which issues.

In some areas all types of instruments are available – for instance, when it comes to the establishment of the internal market, a core task of the EU. In other areas, some instruments cannot be used. For instance, in the field of

Fact file 4.1

Legal instruments of the European Union

Article 288 of the Treaty on the Functioning of the European Union gives an overview of the 'legal acts' of the EU. It discerns four such acts. In the words of the Treaty itself:

- A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
- A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.
- A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.
- Recommendations and opinions shall have no binding force.

social policy the EU can adopt Directives, but not Regulations. For some specific issues in this policy area, including 'combating social exclusion' and 'the modernization of social protection systems', no EU legislation is allowed at all. This is no coincidence. Social policy is, politically speaking, a sensitive area, in which member state governments have been reluctant to cede power to the EU. This explains why the use of Regulations, which have a direct impact within the member states, is precluded. It also explains why in the most sensitive areas of social policy (i.e. those relating to poverty and social protection) the EU cannot adopt any (binding) legislation at all.

When no binding decisions are allowed, recourse can be had to non-binding instruments, such as Recommendations and Opinions. These instruments also appear under other names. For example, in the field of economic policies, the Council can adopt 'broad guidelines', which are formally adopted as a Recommendation. The term 'broad guidelines' is deliberately left vague: what exactly are 'guidelines'? To what extent do they 'guide' member state action? And what is the difference between 'guidelines' and 'broad guidelines'? The reason for these ambiguities is that the terminology is the result of compromises between member state governments during treaty negotiations. On the one hand, these terms suggest a degree of EU action in these fields while, on the other hand, they make it clear that the EU cannot force its member states to do (or abstain from doing) something. In this way, they find a middle ground between those member state governments that want the EU to play a larger role in economic policy-making and those member state governments that are opposed to EU 'interference' in their domestic economic policies.

Directives and Regulations

Above, we saw that the EU has two types of legislation: Regulations and Directives. The difference between the two relates to the way they become operational within the legal systems of the member states. The EU uses **Regulations** for two purposes: it adopts Regulations to organize its own work – for example, when it needs to set up a new agency or adopt rules on the way it hires and pays its staff. Regulations are also used to adopt those EU-wide policies that require legal provisions that are the same in every member state. As the official definition in Fact file 4.1 says, a Regulation is 'binding in its entirety and directly applicable in all Member States'. This means that a Regulation automatically has force of law within every member state, without the need for any further activity on the part of member state governments. This is different for **Directives**. When a Directive is adopted, each of the EU member states needs to adopt a (domestic) law that conforms to that Directive. This is what is meant by the phrase that a Directive is 'binding as to the result to be achieved' but that it 'leaves[...] to the national authorities the choice of form and

A **Regulation** is a type of EU legislation that is directly applicable in the EU and in all member states.

A **Directive** is a type of EU legislation that needs to be transposed into national law by the member state governments.

methods'. Hence, a Directive needs to be 'transposed' by the member states, whereas a Regulation does not. Each Directive itself specifies the date before which transposition needs to have taken place.

The reason for the distinction between Regulations and Directives is that they can be used for different purposes. Regulations lay down a single set of standards for the entire European Union that comes into force simultaneously in all member states. As a result, it is particularly suited for situations in which EU policy-makers want to create a fixed legal framework without differentiation between member states.

Because Directives need to be transposed, they allow for variation between member states. In fact, this is exactly what they are supposed to do. By laying down a set of more general common European norms and leaving the specification of those norms to the member states, it is possible to achieve a degree of convergence among the member states while allowing at the same time for adaptations to national circumstances. This is useful because there are vast differences between member states in terms of natural conditions, legal systems, cultures and social conditions. It is also a way to overcome political disagreements. In many cases, it is not possible to agree upon a 'one size fits all' approach for the entire EU. Directives provide for a degree of flexibility in this regard that may allow member states with diverging ideas and interests to at least agree upon a common set of standards. The TPD, for example, allows member states to exempt tobacco products that have a very small market share from the stringent labelling requirements.

Over time, the formal distinction between Regulations and Directives has become blurred as Directives are often so detailed and specific that they leave little room for variation between member states. Briefing 4.1 takes a look at an example of a Directive in order to show how this works.

Other types of instruments

Although Regulations, Directives, Decisions, Opinions and Recommendations are the main types of legal instruments in the EU, they cannot be used in all circumstances. As we saw above, specific types of instruments cannot be used in certain policy areas. In addition, some areas have their own legal instruments, which differ from the four main ones defined in Fact file 4.1. The best example is the EU's Common Foreign and Security Policy (CFSP), in which member states cooperate on issues of foreign policy. Article 25 of the Treaty on European Union defines a different set of instruments for use only in the CFSP. Apart from 'general guidelines', the EU can adopt 'decisions', which may define 'actions to be undertaken by the Union', 'positions to be taken by the Union', and 'arrangements for the implementation' of those actions and positions.

The choice to use a different set of instruments for the CFSP reflects the special position that this policy area has within the EU. Foreign policy and military issues are among the prerogatives most zealously guarded by member

Briefing 4.1

The level of detail in a Directive

In theory, Directives define 'the results to be achieved', while leaving 'the choice of forms and methods' to the member states. In practice, however, Directives are often quite specific and leave little room for different 'forms and methods'. The Tobacco Products Directive is no exception to this.

Article 9, paragraph 1 of the Directive requires each unit packet of tobacco products to carry one of the following warnings: 'Smoking kills – quit now' or 'Smoking kills', leaving member states just the choice between prescribing one of these two statements to be used in their country. Paragraph 3 of the article subsequently states that 'For cigarette packets and roll-your-own tobacco in cuboid packets the general warning shall appear on the bottom part of one of the lateral surfaces of the unit packets, and the information message shall appear on the bottom part of the other lateral surface. These health warnings shall have a width of not less than 20 mm.' Paragraph 2 of Article 14 of the Directive states that a packet of cigarettes 'shall not have an opening that can be re-closed or re-sealed after it is first opened, other than the flip-top lid and shoulder box with a hinged lid. For packets with a flip-top lid and hinged lid, the lid shall be hinged only at the back of the unit packet.'

Hence, although formally speaking the Tobacco Products Directive only contains the 'results to be achieved', leaving 'form and methods' to national authorities, the articles above show that these rules are very detailed. In practice, this often goes so far as to make the difference between Directives and Regulations all but imperceptible.

state governments. By defining a different set of instruments, it is made clear that the normal EU instruments (including its legislative instruments) do not apply to the CFSP. One difference is that the CFSP instruments only have legal effects between the member states and not within the member states. Furthermore, unlike Regulations, Directives and 'regular' decisions, the Court of Justice (CJ) does not have the competence to review CFSP decisions. This guarantees that the interpretation of CFSP decisions remains a matter for member state governments and cannot be imposed on them by the CJ. The only exception to this rule concerns restrictive measures against natural or legal persons, such as when the EU decides on sanctions against persons or organizations. The affected persons can in these cases ask the CJ to review the legality of the Council decision also in the light of the EU Charter of Fundamental Rights.

■ Decision-making procedures in the EU

Above we saw how the various types of decisions that are taken in the EU allow for variation in the balance between common EU policies and the powers of the

member states. The same balance can also be found in the different types of decision-making procedures. Some procedures give a greater role to the EU's supranational institutions, while others allow the member state governments to exert greater control over the outcome of the process. In addition, democratic legitimisation, through the European Parliament, plays a greater role in some EU decision-making procedures than in others. As a result, decision-making procedures differ in three regards:

- the role of the European Commission (exclusive right of initiative or not);
- the role of the European Parliament (consent required or not);
- the decision rule in the Council of Ministers (unanimity or a 'qualified majority').

At one end of the spectrum is the decision-making procedure that gives an exclusive right of initiative to the European Commission, gives the EP full powers of amendment and consent, and allows for Council decision-making with a qualified majority. This procedure used to be known as 'co-decision' but since the Treaty of Lisbon it has been called the 'ordinary legislative procedure'. It

The **Community method** is a way of making decisions in which the EU's supranational institutions (Commission, EP) play an important role.

is associated with what is called the '**Community method**' of decision-making.

At the other end of the spectrum are procedures in which the Commission has to share its right of initiative with member state governments, the EP has (at best) an advisory role, and the Council decides by unanimity. There is no one such procedure but a variety of

procedures that, to a greater or lesser extent, conform to this model. In the EU treaties, they are referred to as 'special legislative procedures'. These procedures conform to what is known as the **intergovernmental method**.

Since 2000, in a number of policy areas the so-called 'Open Method of Coordination' (OMC) has been used. Under the OMC, no binding legislation is adopted but coordination of policies between the member states is attempted through a process of benchmarking and policy learning. Because member state governments are firmly in the driving seat and cannot be bound by EU legislation, the OMC is also strongly intergovernmental in nature.

As its name implies, the ordinary legislative procedure is now the most common way of making decisions in the EU. This is especially the case since the coming into force of the Lisbon Treaty in 2009. Whilst in the parliamentary term 2004–9 49% of all legislative proposals were decided in that fashion, this had risen to 89% of all dossiers in the 2009–14 parliamentary term. Below, we will therefore devote most attention to the organization and actual functioning of this procedure.

■ The ordinary legislative procedure

The ordinary legislative procedure seeks to find a balance between the various institutions involved in EU decision-making (Commission, EP, Council) by

giving each institution a specific role in the procedure. The consent of each of these institutions is needed to arrive at a decision. In addition, decision-making within the Council of Ministers takes place with a qualified majority, which means that a proposal can be adopted even though individual member states are opposed to it. Below, we will explain how the ordinary legislative procedure works. First, we will discuss the roles of the various institutions in the ordinary legislative procedure. Then, we will outline the steps taken in the formal procedure. Finally, we will discuss the ways in which the various institutions interact during the decision-making process outside of these formal steps.

The logic behind the ordinary legislative procedure

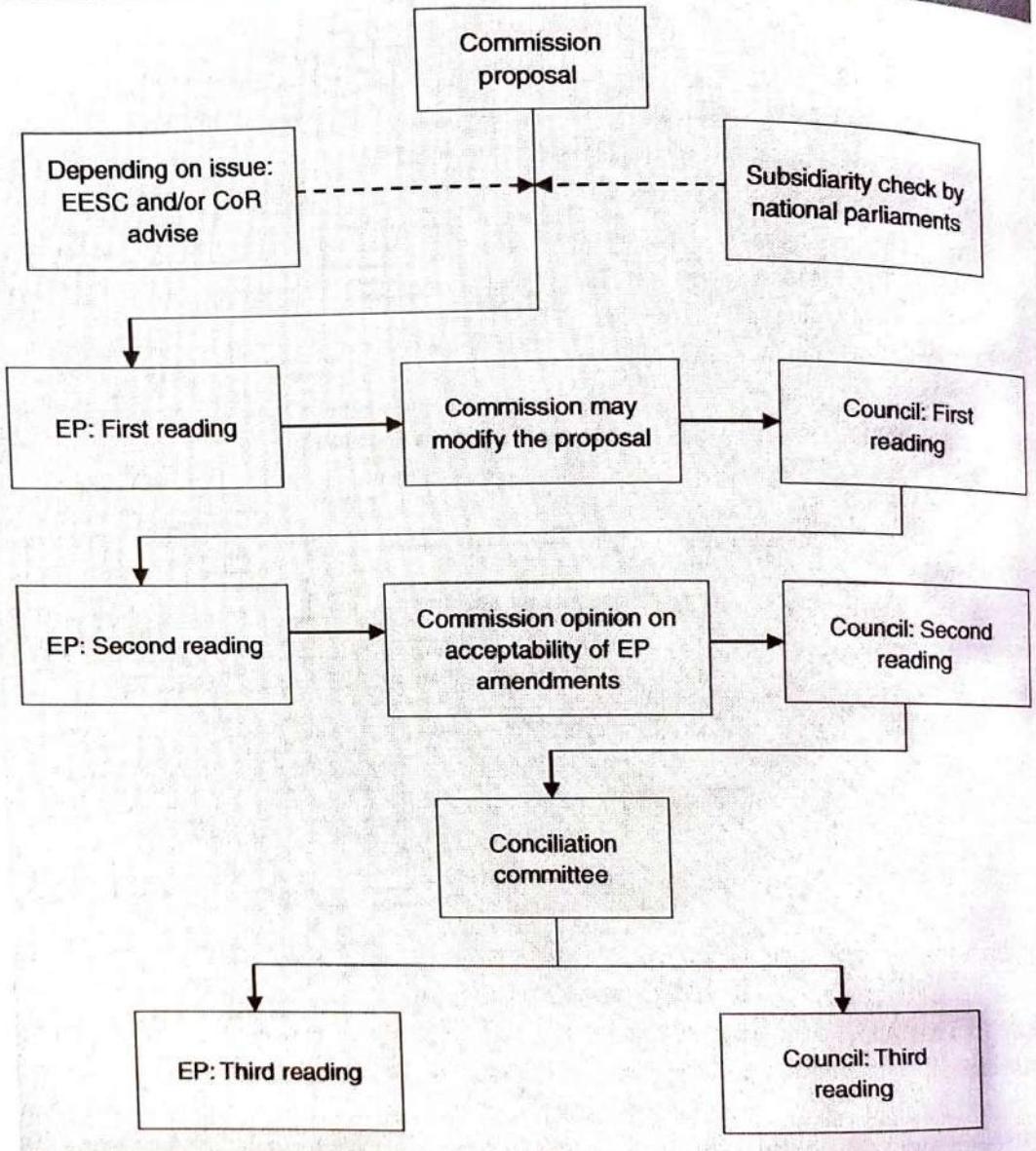
The formal roles of the institutions in the ordinary legislative procedure are strictly defined in the Treaty on the Functioning of the European Union:

- The European Commission has the exclusive (or, in EU terminology: 'sole') right of initiative. The Commission can also modify or withdraw its proposal during the decision-making process.
- The EP has to agree to the proposal before it can be adopted. Moreover, it can adopt amendments to the proposal.
- The Council of Ministers also has to agree to the proposal and it can adopt amendments as well.

From this brief outline, two points immediately become clear. First, the division of roles in the ordinary legislative procedure is such that the consent of all three institutions is necessary to reach a decision. Without the Commission, there can be no proposal, and without the Council or the EP that proposal cannot be adopted. Second, as a corollary to the first point, the ordinary legislative procedure has a great potential for deadlock, exactly because no institution can single-handedly force a decision. Not only do the EP and the Council both have to agree with a proposal, but both can also make amendments to the proposal. Since these amendments may not be the same (indeed, they most likely are not), it may happen that the two institutions end up drafting different versions of the same proposal. Yet, they need to agree to identical versions for a proposal to be adopted.

Therefore, the ordinary legislative procedure has been structured in such a way that, on the one hand, the balance between the different institutions involved in the process is maintained while, on the other, mechanisms are built in for reaching a conclusion (and thus breaking a potential deadlock). To that end, decision-making takes place in three rounds, which are called 'readings'. Let us go through the procedure step by step, illustrating each step with reference to the process leading up to the adoption of the TPD that we presented in the introduction to this chapter. An

Figure 4.1 Formal steps in the ordinary legislative procedure



overview of the formal steps in the ordinary legislative procedure is provided in Figure 4.1.

Commission proposal and advisory bodies

The ordinary legislative procedure starts with a proposal from the European Commission. In this procedure, the Commission is the only actor that can make a formal proposal. Member states or (members of) the European Parliament cannot put forward a proposal (although they can put pressure on the Commission to do so – see Chapter 9 on agenda-setting). The only exception to this rule applies to proposals relating to judicial cooperation in criminal

matters or police cooperation, which can be initiated either by the Commission or by at least a quarter of the member states, even when the ordinary legislative procedure is used to adopt the proposal.

Once the proposal is released, it goes to the European Parliament and the Council of Ministers. In some cases, the proposal also needs to go to the European Economic and Social Committee (EESC) and/or the Committee of the Regions (CoR). This is not a general feature of the ordinary legislative procedure, but depends on the issue at stake. If that issue relates to the remit of the EESC and/or CoR, the Commission is required to consult one or both of these bodies. For each issue area, this has been specified in the Treaty on the Functioning of the European Union.

After it is released, the Commission proposal is also sent to member state parliaments for a 'subsidiarity check'. Within eight weeks, national parliaments can raise objections if they believe the proposal violates the **subsidiarity principle**. We will explain how that procedure works below.

The **subsidiarity principle** states that the EU is only allowed to act if the objectives of that action can be better reached at EU level than at member state level.

The first reading

The first reading in the EP

In the first reading, the European Parliament adopts a so-called 'opinion'. In order to do so, the proposal is assigned to one of the EP's parliamentary committees. If a proposal touches upon the remit of several committees, it is debated in each but one committee is assigned as the main responsible committee. In the TPD proposal, the Environment, Public Health and Food Safety Committee was the lead committee because the major purpose of the proposal was to reduce the harmful effects of smoking for public health. In addition four other committees provided opinions: the Industry Committee (because the proposal had a major potential impact on tobacco industries), the Internal Market Committee (because it touched upon the internal market for tobacco products), the Agriculture Committee (because in some member states tobacco is grown) as well as the Legal Affairs Committee. In the end, the Environment Committee put together a draft opinion for the European Parliament to adopt.

As we already outlined in Chapter 3, within the responsible committee one MEP – the rapporteur – is assigned the task of drafting that opinion. It is the rapporteur's task to chart political sensitivities and come up with a compromise text that a majority of the EP will support. The rapporteur is also the person that in between the formal procedural steps conducts negotiations with the Council and the Commission in order to reach agreement. In complex dossiers the rapporteur may be accompanied by so-called shadow rapporteurs that monitor the negotiations on behalf of other political groups. For the TPD proposal, the rapporteur was Linda McAvan, a British MEP for the Socialist party group.

In terms of its opinion, there are three options for the EP:

- It may agree with the Commission proposal without amendments.
- It may disagree with the Commission proposal without amendments.
- It may agree with the Commission proposal but include amendments.

The first two options are rarely used. Only seldom will the EP agree fully and in every detail with a Commission proposal, whereas a proposal that meets with such fundamental opposition from the EP that not even extensive amendments can remedy it will not even be released by the Commission. Normally, then, the EP will adopt an opinion that includes amendments. In doing so, the EP does not simply vote on the rapporteur's full text but needs to approve each proposed amendment separately. The number of amendments in the EP opinion depends on the extensiveness and controversiality of the proposal. In the first reading, the EP decides on its opinion with a 'simple majority' – that is, a majority of the members that cast a vote. If some or many MEPs are absent from the vote, the simple majority may be less than a majority of all elected MEPs. After the EP has adopted its opinion, the European Commission may change its proposal to include some or all of the EP's amendments, but this need not happen.

The first reading in the Council

Next, the Council can do two things:

- It can approve the EP's opinion including all amendments, if the EP has included any in its opinion. In that case, the proposal as amended by the EP is adopted as the final legislative act, and the procedure ends here. In the case of TPD this is what in formal terms happened, making this a first reading agreement. The Council was able to agree with the EP's opinion, because this opinion itself was the result of negotiations with the Commission and the EP, allowing a compromise between these three institutions. We further explain these negotiations below.
- Alternatively, if the Council does not agree fully with the EP opinion, it can adopt a **common position**, which may or may not include some of the EP's amendments. In addition, the Council can include its own amendments. Because in this case the Council's common position and EP's opinion are not identical, the procedure then goes to the second reading. The European

In first reading the Council adopts a **common position** when its viewpoint on a proposal differs from the EP's opinion and/or the Commission's modified proposal.

Commission plays a crucial role in determining the voting rule that applies within the Council. The Council can adopt the Commission proposal with a qualified majority, which roughly conforms to a majority of at least 55% of all member states representing 65% of the EU population. Below we will explain in greater detail what this voting rule entails. If the Commission has changed its proposal after the EP opinion to include some or all of the EP's amendments, those amendments can also be adopted in

the Council by qualified majority. However, if the Council wants to adopt EP amendments that have not been included in the modified Commission proposal, it can only do so by unanimity (that is, with the consent of all its members). Likewise, the Council's common position is adopted with a qualified majority of votes in the Council but if it contains amendments that are not included in the Commission proposal, those amendments require unanimity. In this way, the Commission can increase the threshold for the adoption of amendments that it does not agree to.

The second reading

Differences between the first and the second reading

If the EP and the Council do not agree on an identical text in the first reading, the proposal goes to the second reading. In principle the second reading follows the same course as the first reading, with the proposal first going to the EP and then to the Council, and the Commission intervening to declare amendments either acceptable or not acceptable. At the same time, pressure is stepped up in order to force the institutions to come to a conclusion. This pressure results from several differences between the first and second readings:

- In the first reading, no time limits apply. The EP and the Council can take as long as they like to reach their decisions. In the second reading, time limits apply to both institutions. After receiving the Council's common position in first reading, the EP has three months to decide. If not, the Council's common position will become law. Similarly, the Council has three months to decide after receiving the EP's amendments in second reading. This time limit can be extended by one month, but no more.
- In the second reading, the European Parliament cannot adopt completely new amendments. Rather, it can only adopt amendments that (1) were already adopted by the EP in the first reading but not included in the Council's common position, (2) address elements in the Council's common position that did not appear in the Commission proposal (and therefore were not discussed in the EP in the first reading) or (3) are aimed at reconciling differences of opinion between the EP and the Council. In this way, the EP is forced to make 'constructive' use of its right of amendment in the second reading.
- The voting rule in the EP is different in the second than in the first reading. Whereas in the first reading a simple majority is sufficient to adopt the opinion including amendments, the EP needs an absolute majority (that is, a majority of all its elected members, not just those present at the vote) to adopt amendments in the second reading or to reject the proposal altogether. This raises the threshold for making changes to the proposal or rejecting it.

The EP in the second reading

This results in the following sequence of steps in the second reading. After the adoption of the Council's common position, it is up to the EP to make a move

again. The starting point for EP deliberations in the second reading is no longer the Commission proposal, but the Council's common position from the first reading. It can do three things with that common position:

- Adopt the Council's common position from the first reading as it is. For this, a simple majority suffices. Then the legislative act is adopted according to the common position. It is also the outcome if the EP fails to take a decision in the second reading within the specified time limit.
- Reject the Council's common position. For this, an absolute majority is needed. Then, the process ends without a legislative act being adopted.
- Adopt amendments to the Council's common position, whereby the restrictions outlined above apply.

The Commission in the second reading

If the EP has adopted amendments in the second reading, the Commission presents an opinion in which it declares for each amendment whether it finds that amendment acceptable or unacceptable. This opinion is important for decision-making in the Council. If an amendment is acceptable to the Commission, the Council can adopt it with a qualified majority, but if it is not acceptable to the Commission the Council needs unanimity to adopt it. The logic behind this is similar to the role of the Commission in the first reading, where it could raise the bar for EP amendments by not including them in its modified proposal.

The Council in the second reading

The Council in the second reading has two options:

- It approves all of the EP's amendments, either with a qualified majority or by unanimity, depending on the Commission's position. In that case, the legislative act is adopted with all of the EP's amendments in the second reading.
- It does not approve all of the EP's amendments. In that case, the procedure goes to the third reading.

Conciliation and the third reading

If the EP and the Council do not agree to the same amendments in the second reading, a special mechanism applies, called 'conciliation'. It is similar to the mechanism that is used in the US Congress when the Senate and the House of Representatives have adopted different versions of the same bill. The idea behind conciliation is that representatives of the EP and the Council, together with representatives of the European Commission, meet in a **conciliation committee**.

A **conciliation committee** consists of representatives of the Council and the EP, assisted by representatives of the Commission. Its task is to produce a compromise text if the Council and the EP have not reached an agreement after the second reading of the ordinary legislative procedure.

The task of the conciliation committee

is to formulate a compromise text that reconciles the differences of opinion between the institutions.

This compromise text then goes back to the EP and the Council for a simple ‘up and down vote’ in a third reading. This means that both institutions only have the options of either adopting or rejecting the compromise text. They cannot make any new amendments. In so doing, the EP decides by simple majority and the Council by qualified majority. If both institutions adopt the compromise text that has come out of reconciliation, that text becomes law. If one or both of the institutions rejects the compromise text, the procedure ends without a legislative act.

Strict deadlines apply to the conciliation procedure. The conciliation committee needs to be convened no later than six weeks after the Council has come to its decision in the second reading. Subsequently, the conciliation committee has six weeks to propose a compromise text. The Council and the EP have six weeks to adopt that text. Each of these deadlines can be extended by two weeks at most. If one of these deadlines is not met, the proposal is deemed to have been rejected.

All in all, what we see in the ordinary legislative procedure is a fine-grained specification of the balance that the procedure seeks to maintain between the three institutions. At the same time, the procedure presents a ‘funnel’, in which the three institutions are increasingly pushed towards a conclusion (be it adoption or rejection) by setting strict deadlines, raising voting thresholds and not allowing new amendments to be introduced beyond a certain stage.

Informal processes under the ordinary legislative procedure

Above, we outlined the formal steps taken in the ordinary legislative procedure. These steps prescribe a clear sequence of activities: first the Commission releases a proposal, then the EP moves, then the Council, then the Commission again, and so on. In reality, decision-making does not follow this neat separation of steps and roles. Within the limits set by the formal procedure, the three institutions also act and interact in ways that do not follow directly from the formal procedure (although they are sometimes laid down in **interinstitutional agreements** between them). These actions and interactions are important for understanding how the procedure works, and they complement the formal steps in that procedure. As a result, the actual activities of institutions overlap to a much greater extent than the formal description of the procedure would suggest.

Two practices facilitate this process. First, both the Council and EP have found ways to take a position on a proposal outside of the formal steps that the procedure prescribes. Second, the institutions have developed practices where they meet to discuss their positions in between the formal legislative steps. We discuss both practices in turn. First, institutions may decide to deliberate on a

An **interinstitutional agreement** is a binding agreement between the Commission, the Council and/or the EP, in which the institutions define arrangements for their cooperation.

proposal and make their viewpoint clear, without taking the accompanying formal decision that the ordinary legislative procedure prescribes. Above we showed that officially the Council has to wait before adopting its common position until the EP has adopted an opinion in first reading. In reality the Council will often start discussing a legislative proposal as soon as it has received it from the Commission. During these discussions, the contentious issues are determined and compromises are explored. In the end, this may result in the adoption of a

political agreement. As a result the Council's

Political agreement refers to the situation where the Council already communicates its views on a proposal before the EP has formally adopted its opinion.

viewpoint is already known before it has adopted its common position. In the case of the TPD the Council reached such a political agreement in June 2013, several months before the EP debated the dossier in its plenary session. This way it could make clear to the EP which provisions in the proposal it would like to see changed. A somewhat similar practice can be seen in the EP when it has to decide on adopting its formal opinion on a legislative proposal. In the first reading the EP needs to do this by taking a so-called final vote on the complete dossier. The EP may, however, decide to vote on all amendments but postpone this final vote. The matter is then referred back to the committee and the rapporteur is given the mandate to negotiate the proposal with the Commission and the Council. By doing this, the proposal remains in the first reading of the procedure. This is what happened with the TPD proposal. In October 2013 the EP adopted 114 of the 171 amendments proposed. It deliberately postponed the final vote and instead decided to give its rapporteur a mandate to start negotiations with the Commission and Council.

These negotiations between the institutions are the second leg of informal processes in decision-making. In the case of the TPD the Lithuanian presidency

of the Council had already approached the rapporteur and shadow rapporteurs in the EP to discuss the political agreement in the Council before the EP debated it in its plenary session. After the EP had voted on the amendments negotiations were continued in the form of **trilogues**. Trilogues link together the formally separate

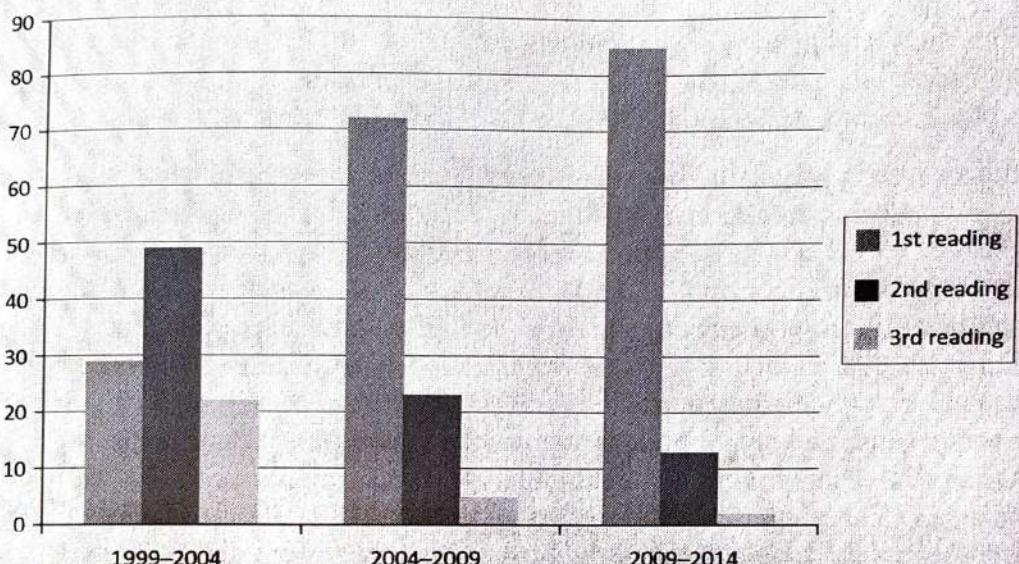
Trilogues are regular meetings of representatives of the three institutions (Commission, EP and Council) that are convened in order to identify points of agreement and differences, and find a compromise on a legislative text.

decision-making processes and make it easier to reach agreement in a faster way than when the formal steps would be followed.

In the TPD dossier the Commission, Council and EP reached agreement after several trilogue meetings on 18 December 2013. Once this compromise had been reached the EP adopted the compromise package as its opinion on 26 February 2014, and the Council adopted the same proposal on 14 March 2014.

Figure 4.2 shows that over the years more and more decisions have been concluded in first reading and that only very few dossiers make it all the way to the formal conciliation process in third reading. This is in fact achieved by engaging in a kind of conciliation at earlier stages of the procedure, through the system of trilogue meetings. Because so many first

Figure 4.2 Percentage of legislative dossiers concluded at first, second and third reading per legislative term



Source: European Parliament, *Activity Report on Codecision and Conciliation* (7th term), 2014, p. 8.

reading procedures are now accompanied by extensive informal conciliations, the average length to complete a dossier in first reading has gone up from eleven months in the 1999–2004 parliamentary term to seventeen months in 2009–14. Nevertheless, the average length to complete legislative dossiers has gone down from twenty-two months to nineteen months. This suggests that the increased use of informal procedures has speeded up decision-making considerably.

■ Other decision-making procedures

The ordinary legislative procedure is used for most issue areas in the EU. However, there is still a range of areas in which it does not apply. In those areas, there is not one single alternative procedure but a variety of procedures in which the balance between the institutions and the applicable voting rules in the Council is defined in different ways. In this section, we will show some of this variety and, crucially, explain the background to it.

The special legislative procedures

In the EU treaties, the ordinary legislative procedure is distinguished from the ‘special legislative procedures’. These procedures differ from the ordinary legislative procedure because they depart in one or more respects from the

balance between the three institutions that characterizes the ordinary legislative procedure:

- In some issue areas, the European Parliament cannot adopt amendments, has only an advisory role or no role at all.
- In some issue areas, the Council of Ministers decides by unanimity instead of a qualified majority.

Different combinations of a smaller role for the EP and the decision rule in the Council are used in different issue areas. For instance, association agreements between the EU and third countries are adopted by the Council by a qualified majority with the consent of the EP. Hence, the EP is only involved after the draft agreement has been concluded and only has the choice to adopt or reject that draft. The EP also has a consent role in the adoption of the EU's multi-annual financial framework, but then the Council decides by unanimity. However, most special legislative procedures combine an advisory role for the EP with unanimity in the Council. This is true, for instance, for proposals relating to spatial planning, family law, passports and residence cards, the EU's revenues, social security and social protection, and indirect taxes.

The European Council as an 'appeal body'

In some areas, the Council of Ministers can refer a decision to the European Council if vital national interests are at stake. In most legislative procedures, the European Council has no formal role, although political agreements are sometimes forged in the European Council in order to break a deadlock in the Council of Ministers. In some specific areas, however, the European Council has a formal role as a kind of 'appeal body' for the Council. This is the case, in particular, for sensitive issues relating to criminal matters (such as the definition of criminal offences and sanctions or the rights of suspects). In those cases, if a member of the Council finds that a proposal affects 'fundamental aspects of its criminal justice system', it may refer the issue to the European Council, which will decide by unanimity whether or not to proceed.

Decision-making under the CFSP

The role of the EP is the smallest in the EU's Common Foreign and Security Policy (CFSP). Here, the EP is only consulted on 'the main aspects and the basic choices' of the policy. It has no role in the adoption of decisions, except in decisions relating to the EU diplomatic service, where it is consulted. Likewise, the Commission has no exclusive right of initiative in this area; this right is exercised by any member state and by the High Representative for Foreign Affairs and Security Policy.

Strictly speaking, these are not 'special legislative procedures' because, as we saw above, no legislation can be adopted under the CFSP. The decisions that can be adopted are taken by the Council of Ministers and/or the European Council.

normally acting by unanimity. In some cases, the Council may decide by qualified majority. However, in a number of those cases, any member of the Council may demand the use of unanimity if vital national interests are at stake, introducing yet another safety valve for individual member states in this area.

Navigating the maze of EU decision-making

One could easily lose one's way in this maze of procedures, with exceptions and special procedures for specific issues and issue areas. Still, it becomes much easier to navigate the maze if one reflects on the logic behind this variation. As a general rule, the closer an issue is to elements of national sovereignty that member state governments hold dear, the smaller the role for the EP (and the Commission) and the more likely it is that unanimity is used in the Council. Both EP involvement and qualified majority voting represent a risk for individual member states: the risk that a decision will be adopted that they do not agree with. For issues that are not that politically salient and do not touch upon vital interests, this is less of a problem. Here, the benefits of easier agreement in the Council and democratic legitimisation through the EP outweigh the potential risk of being outvoted. However, for issues that are close to the vital interests of member state governments, those governments want to take fewer chances. As a result, for those issues, they have hung on to the power to veto a decision (hence requiring unanimity) and/or have diminished the role of the EP and even the Commission.

Although examples of such sensitive issues can be found in many policy areas, three broad areas stand out in this regard:

- Proposals relating to taxation and the budget often require unanimity, because taxation is a core element of national sovereignty and the member states that are net contributors to the EU budget are wary of being outvoted on budgetary matters.
- Issues of judicial and police cooperation are also sensitive because they touch upon member state governments' internal sovereignty. Hence, they can be referred to the European Council if a member of the Council so wishes. Moreover, as we already saw above, the European Commission does not have the exclusive right of initiative in these areas, as proposals can also be initiated by a quarter of the member states.
- Foreign policy is probably the most sensitive prerogative for member state governments. As a result, the main decisions under the CFSP are all taken by unanimity, the European Council plays an important role in decision-making, the EP has hardly any role to play in this area, while the Commission has to share its right of initiative with member states and acts through the High Representative for Foreign Affairs and Security Policy.

In these areas, the ordinary legislative procedure is replaced by another procedure or is complemented with additional safety valves that protect individual member states. In the end, EU decision-making procedures are the outcome of

Controversy 4.1

Simplifying legislative procedures in the EU?

Over the years, what is now called the 'ordinary legislative procedure' has been applied to an ever-increasing number of issue areas. Still, as we have seen in this chapter, important exceptions remain. In these areas, special legislative procedures are used. This stands in contrast to the practice in domestic political systems, where normally one basic procedure is used for all types of legislative decisions. Moreover, even the ordinary legislative procedure is quite complex, with differences between the various readings and different voting rules within the procedure.

Therefore, it has been argued that EU decision-making would benefit from a simplification of procedures. To begin with, the ordinary legislative procedure could be applied to all issue areas. This would give the European Parliament the same powers that national parliaments have in most of the EU member states. In addition, the procedure could be simplified, by saying no more than that the EP and the Council have the right to amend proposals and both need to approve a proposal before it becomes law. The relationship between the EP and the Council would then resemble that between the House of Representatives and the Senate in the US Congress.

Do you agree? Should the ordinary legislative procedure be used in all issue areas and should it be simplified? If so, what specific benefits do you expect from this change? If not, what disadvantages do you see?

treaty negotiations between member state governments. It is no surprise, then, that the protection of their interests should play such an important role in the types and diversity of procedures.

Nevertheless, there have been repeated calls for simplification of the EU's legislative procedures. Controversy 4.1 takes a further look at this issue.

■ Decision-making in the Council

The delicate balancing of member state interests that we explained above can also be observed in the way the Council of Ministers takes decisions. As we have seen, the Council plays an important role in all legislative decision-making procedures. Whereas the role of the Commission and the EP varies between issue areas, no legislation can be adopted without the consent of the Council. At the same time, decision-making within the Council does vary between issue areas. In the descriptions of the ordinary legislative procedure and the special legislative procedures, we already alluded to the two main decision rules used in the Council: unanimity and qualified majority voting. As we saw, the basic voting rule in the Council during the ordinary legislative procedure is qualified majority voting (known as QMV in EU parlance), with unanimity needed to adopt amendments that have not been endorsed by the Commission. In special

legislative procedures and under the CFSP, unanimity is often (though not always) the rule. Unanimity is a straightforward decision rule: all member states need to agree in order for a proposal to be adopted. This rule gives a veto to each single member state. QMV is a more complicated decision rule that requires more explanation, because it reflects yet another balance to be struck within the EU: that between larger and smaller member states.

How qualified majority voting works

Two decisions need to be made in devising a voting rule in the Council: how votes are distributed among the member states, and how many votes are necessary for a decision to be adopted.

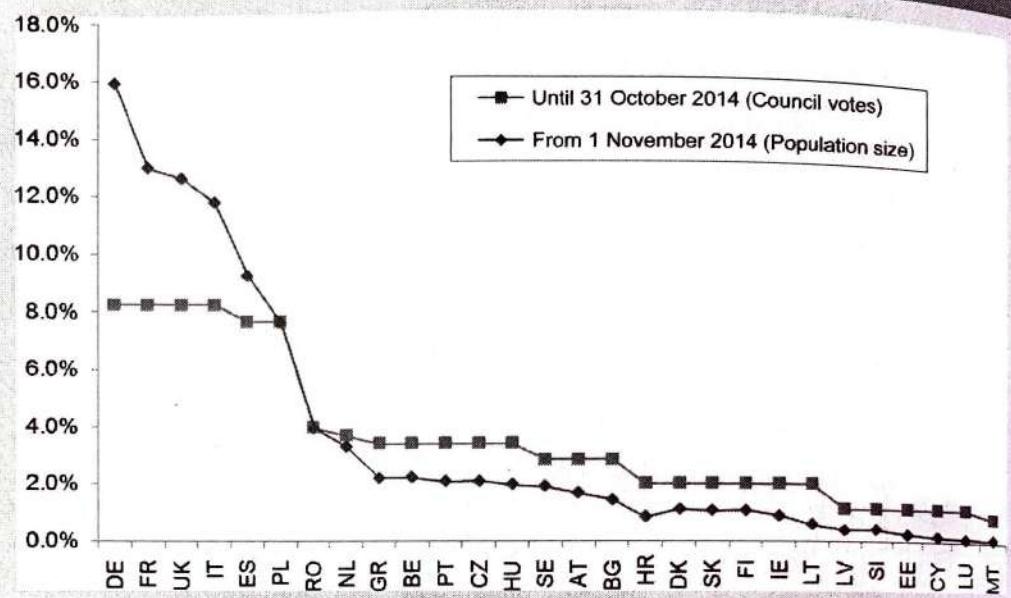
To illustrate the trade-off inherent in assigning votes to member states, consider two extreme possibilities. At one extreme, one could envisage a voting rule according to which each member state would have one vote. Such a voting rule would give equal voting power to, say, Germany and Malta. For that reason, it would not be acceptable to the larger member states, which could be outvoted by a coalition of small member states. The other extreme would be to give each member state a vote for each of its citizens. This solution would be unacceptable to the small member states since their votes would practically become irrelevant given the huge differences in population between the member states.

As to the number of votes needed to adopt a decision, various possibilities present themselves as well. On the one hand, one could simply define a majority as 50% of the votes plus one. This is the rule used for regular decision-making in national parliaments and in the EP. For member states, such a rule increases the risk of being outvoted. On the other hand, one could require a supermajority close to 100%. In that case, qualified majority voting would in practice almost amount to unanimity.

QMV is an attempt to find a middle ground between these extremes and reconcile the interests of large and small member states. As a result, QMV is quite a complex compromise. Moreover, the situation is complicated by the fact that the EU recently changed the rules for arriving at a qualified majority. Below we compare the two regimes in order to assess its effect on the relative voting power of every member state.

The old regime of qualified majority voting which was in place until 31 October 2014 allocated a total of 352 votes to the member states. The number of votes roughly reflected a member state's population, with the largest countries such as Germany and Italy each receiving the maximum number of twenty-nine votes and Malta, the smallest country, receiving three votes. Under these rules qualified majority is achieved when a so-called triple majority is reached, consisting of:

- a minimum of 260 out of the 352 votes (74%);
- a simple majority of member states (currently fifteen out of twenty-eight);
- at least 62% of the EU population being represented by those member states.

Figure 4.3 Voting weights under QMV before and after 2014

In the Treaty of Lisbon, a new regime was adopted with two considerations in mind: making it easier for the Council to adopt decisions under QMV as well as ensuring a stronger relation between a country's population size and its voting power. Under this regime, a qualified majority is reached if two conditions are met:

- A proposal is supported by at least 55% of the member states (sixteen of the twenty-eight).
- This majority represents at least 65% of the EU population.
- In order to block a decision at least four member states must vote against and represent at least 35% of the EU population.

As a result of the change, Germany saw its voting weight almost double to 16%, while, for example, Ireland's voting weight was halved from 2% to less than 1%. At the same time, while the relative voting power of member states changes on the basis of their populations, the need to obtain the support of at least 55% of the member states still protects smaller member states from being overruled by the larger countries, as does the rule that a 'blocking minority' needs to consist of at least four member states.

Because the population of the member states now directly affects the voting weight of every member state, the Council updates these every year on the basis of the population statistics of Eurostat, the statistical office of the EU. Figure 4.3 shows the implications of this change for the relative voting weights of each member state. The new regime for QMV came into effect as of 1 November 2014. This delay in application of the new rules was necessary to make the

change acceptable to member states that stood to lose from the change. As a further compromise, between 1 November 2014 and 31 March 2017, each member state may request that the old regime of QMV is applied instead of the new regime, so that the new voting rules for QMV will only fully come into effect as of 1 April 2017. These elaborate manoeuvres around QMV show the political nature of the compromises that make up the voting rules in the Council.

Voting and consensus in the Council

The above discussion of voting rules should not obscure the fact that in reality voting does not take place that often in the Council. The president summarizes the proposal and asks whether the decision can be considered adopted. If no member state objects, the adoption of the proposal is recorded and all member states are supposed to have voted in favour. As a result about two thirds of decisions requiring QMV are in fact taken unanimously. Still, the bargaining position of member states is largely determined by their capability to contribute to a blocking minority. In that sense, the distribution of votes always plays a role in the background of negotiations in the Council, even if in the end a proposal is adopted without a formal vote.

There are, however, instances where member states are unable to support a proposal. In these cases a member state has two options: to abstain from voting or to cast a vote against. Under QMV both abstentions and no votes count when calculating the required majority: as a result both operate as a vote against. Of all the member states the United Kingdom most often either abstains or votes against proposals (in about 10% of the votes), whilst Germany, Denmark and the Netherlands also from time to time do this. As an alternative to abstaining or voting against, member states may also show their discontent by making a formal statement following the adoption of the vote, thereby not obstructing the adoption of the act. In the TPD case Poland, the Czech Republic, Romania and Bulgaria had earlier on showed their opposition to the political agreement that the Council had reached. In the end, however, only Poland voted against, whilst Hungary and Sweden both made a statement expressing concern about certain provisions of the proposal. An important reason for the lack of open voting is the 'consensus culture' that permeates the Council. Even when a qualified majority is reached and a decision can be taken, the member states in the majority will try to accommodate reasonable demands by the member states in the opposing minority. If these demands are not met, a member state may decide to signal its discontent by casting a vote against. Still, because it is certain that it will be outvoted by the others, it is often wiser to vote along with the majority and thus build up some political credit with the other member states with a view to decisions in the future. Another reason for the high degree of consensual decision-making is that much legislation in the end will have to be implemented by the member states themselves. Doing

this might be more difficult for a government if it were to come out that in fact it had opposed the decision in the Council.

■ Member state parliaments and the subsidiarity check

With the conclusion of the Treaty of Lisbon, the role of national parliaments in EU decision-making has been strengthened. Before the Treaty of Lisbon, national parliaments were only involved indirectly in EU decision-making procedures, through their power to hold the minister representing their member state in the Council to account. Since national parliaments played no role at the EU level themselves, this was not a very effective power. Often, they would find themselves confronted with decisions taken within the EU for which they could hold their national minister accountable after the fact, but which they could not change.

The Treaty of Lisbon introduced several provisions that increased the involvement of national parliaments in legislative decision-making, by allowing them

The **principle of proportionality** states that the burden to implement legislation should be minimized and commensurate with the objective to be achieved.

to check the subsidiarity and **proportionality** of legislative proposals. As a result all legislative proposals are sent to the national parliaments where they can be debated and discussed in the relevant parliamentary committees. On the basis of these

deliberations national parliaments can ask the Commission for further clarification and information on the proposal and express their views through sending opinions as well as 'reasoned opinions'. This reasoned opinion constitutes an official statement in which the member state parliament declares the proposal to be in violation of the principle of subsidiarity. Every chamber of a national parliament has the ability to issue a 'reasoned opinion', allowing, for example, both the UK House of Commons and the House of Lords to voice objections. Every reasoned opinion that is cast can thus be considered a vote of one of the chambers of a parliament against the proposal. In order to give every parliament an equal voice, the reasoned opinion of a unicameral parliament is therefore counted as two votes. Depending on the number of reasoned opinions thus counted two things can happen:

- If the number of votes is at least a third, the actor that initiated the proposal (usually the Commission) must review it. If the proposal relates to issues of judicial cooperation in criminal matters or police cooperation, this should already happen if the number is a quarter or more. The outcome of the review is not predetermined: the initiator of the proposal may withdraw it, amend or maintain it, but is required to explain that decision. This is known as the 'yellow card' procedure, since the national parliaments give a warning to the EU legislators that they are about to violate the subsidiarity principle.
- If more than half the number of votes is reached, a more elaborate procedure is put in motion. Again, the initiator needs to review the

proposal and may decide to withdraw, modify or maintain it, explaining its decision in a reasoned opinion. Subsequently, the Council and the EP are required to consider the reasoned opinions of both the national parliaments and the Commission with a view to determining the compatibility of the proposal with the subsidiarity principle. This needs to be done before the end of the first reading. If 55% of the member states in the Council or a simple majority in the European Parliament find that the proposal violates the subsidiarity principle, it is withdrawn. This is known as the ‘orange card’ procedure, because it is more demanding than the yellow card procedure but still does not allow national parliaments to force the withdrawal of an EU proposal (which would be a ‘red card’).

In its first five years of existence a total of 312 reasoned opinions were issued, with the Swedish and Dutch parliaments most active and accounting for fifty and thirty-seven statements of subsidiarity concerns, respectively. In the TPD case nineteen legislative chambers made use of the opportunity to give their opinion on the legislative proposal, providing the Commission often with detailed suggestions on what parts of the directives would need to be changed. Seven of these constituted reasoned opinion, a number insufficient to generate a yellow card.

In two cases so far national parliaments have amassed a sufficient number of opinions to generate a yellow card. In 2012 the parliaments objected to a legislative proposal that would set certain EU-wide limits on the right to strike. The Commission decided to withdraw the proposal following these objections. The second yellow card was drawn in 2013 and resulted from the objection of fifteen chambers in eleven member states to the plans to establish a European Public Prosecutor’s Office. In this case the Commission decided not to drop its proposal and published a communication in which it set out in detail why the proposal did not violate the principle of subsidiarity. This could be a risky strategy, because it is very likely that the objecting parliaments will use the leverage they have over their member states’ ministers to force a blockade in the Council, once the proposal arrives there.

Although in its first five years only two yellow cards were actually drawn, the political relevance of involving national parliaments in the legislative process should not be underestimated. The yellow cards can be seen as the tip of an iceberg that consists of a by now intensive exchange of views between national parliaments and the Commission. In fact, only 14% of the opinions that the legislative chambers send are reasoned opinions. Most of the exchanges happen through the sending of ordinary opinions and through political dialogues where parliamentary chambers ask the Commission to clarify their legislative proposals. All in all for the Commission the system thus generates a wealth of useful information on the viability of its legislative proposals and the possible problems it may face when member states have to implement it.

■ The Open Method of Coordination

How the Open Method of Coordination works

The **Open Method of Coordination** (OMC) is a relative newcomer in EU policy-making. It was introduced in March 2000 as part of the Lisbon Strategy (not to be confused with the Treaty of Lisbon, which was adopted much later) and was meant to bring about a degree of policy coordination in social-economic policies. This fitted into the stated objective of the Lisbon Strategy to reinvigorate

The **Open Method of Coordination** is a mechanism which aims at convergence of member state policies through a process of benchmarking and policy learning.

the European economy and make the EU the most competitive economy by the year 2010. In this area, member states did not want to be bound by EU legislation. At the same time, they acknowledged that the economic ambitions of the Lisbon Strategy required some kind of coordination of economic policies. The OMC was invented to fill that gap by creating an institutionalized 'learning process' between member states. Since its inception, the concept and approach of the OMC have been applied to a range of other policy areas, such as pensions, health care and education.

OMC works in four steps:

- The Council determines the objectives to be achieved in an area.
- Indicators are established for measuring the attainment of those objectives.
- Each member state formulates an action plan for reaching the objectives.
- Based on those indicators, the performance of each member state is 'benchmarked' (that is, it is assessed and compared to the performance of other member states).

The OMC is largely driven by the member states themselves, assembled in the Council. It is the Council that determines the objectives and indicators, and it is in the Council that the results of the benchmarking exercise are discussed. Nevertheless, the Commission does play a role, since it monitors the performance of member states and draws up the reports that are discussed in the Council.

The outcome of the OMC is non-binding. It is entirely up to the member state governments to decide what to do with this benchmarking exercise, and there are no penalties for those member states that perform badly. The idea is that 'peer pressure' (being exposed as an underachiever in the presence of one's colleagues from other member states) will form an incentive to perform better.

Why the Open Method of Coordination is used

The creation and rise of OMC can be understood along the same lines that were sketched above when we explained differences between decision-making procedures. In areas where member states are reluctant to accept binding legislation, because of cultural concerns (education) and/or the high budgetary stakes

Table 4.1 Instruments and procedures in EU social policy

	Legislation allowed?	Procedure
Occupational safety and health	Yes	Ordinary
Working conditions	Yes	Ordinary
Information and consultation of workers	Yes	Ordinary
Equality between male and female workers	Yes	Ordinary
Integration of persons excluded from the labour market	Yes	Ordinary
Employment conditions for immigrants from outside the EU	Yes	Special
Collective representation of workers and employers	Yes	Special
Employment protection	Yes	Special
Social security and social protection	Yes	Special
Combating social exclusion	No	OMC
Modernization of social protection	No	OMC

involved (economic policy, health), the OMC offers a way to discuss policies without actually being forced to change anything.

The use of various types of policy instruments and decision-making procedures can be nicely illustrated by looking at EU social policy. Table 4.1 shows different issue areas within this policy field and lists whether binding legislation (in this field only Directives) can be adopted in them and what procedure applies.

Binding legislation is not allowed in two areas that carry significant financial implications (social exclusion and social protection). Legislation is allowed in four other issue areas that touch upon either politically sensitive (employment of immigrants from outside the EU and collective bargaining) or economically significant (employment protection and social security) areas, but it requires a special legislative procedure in which the Council decides by unanimity and the EP is only consulted. In five other issue areas, finally, legislation can be adopted using the ordinary legislative procedure. These include areas such as the information and consultation of workers, equal working conditions for men and women, and occupational health and safety that are regulatory in nature and have been subject to EU legislation for quite a long time now. Hence, the type of issue at stake determines the instruments and procedures that can be used.

■ Towards a Europe of multiple speeds?

Examples of 'multi-speed Europe'

So far, we have discussed decision-making in 'the EU', taken as a whole. Indeed, many policies are adopted for the entire EU and apply to all member states. Still, in some areas policies have been adopted that only apply to a subset of all member states. In EU parlance, this is known variously as

'multi-speed Europe', 'variable geometry', 'Europe à la carte' and, the terminology used in the EU treaties, 'enhanced cooperation'. Examples of policies that apply only to part of the member states can be found in several areas:

- When it was introduced, the Euro was adopted by twelve of the then fifteen EU member states. Denmark, Sweden and the UK chose to retain their own currencies. Since the enlargements with countries of Central and Eastern Europe, new member states have had to qualify for adoption of the Euro by fulfilling certain macroeconomic requirements. As a result, some EU member states use the Euro but others do not.
- In the field of defence policy, cooperation has typically relied on the willingness of groups of member states to move forward. A good example is the creation of EU battle groups, 1,500-person strong military groups that can be deployed in military operations across the globe. Although the concept and creation of battle groups was approved by all member states, actual participation in battle groups remains contingent upon the willingness of individual member states to contribute. Similarly, EU operations in the field of the Common Foreign and Security Policy have relied on variable coalitions of member states that are willing (and able) to participate.
- In the field of justice and home affairs, groups of member states have concluded treaties on closer cooperation outside the EU framework. These treaties have subsequently become part of the EU proper. Examples include the Schengen Treaty on the free movement of persons across borders, and the Treaty of Prüm on the exchange of information between law enforcement authorities in different countries.

Since the 1997 Treaty of Amsterdam, these types of **enhanced cooperation** between groups of member states have been officially made possible within the EU. At the same time, the EU treaties specify a number of conditions for and

procedures to be followed during the establishment of enhanced cooperation. Fact file 4.2 gives an overview of these conditions and procedures. The procedure was used for the first time in the summer of 2010, when the EP and the Council of Ministers allowed fourteen member states to

Enhanced cooperation is a procedure through which a group of EU member states can adopt legislation (or a decision under the CFSP) that only applies to them and not to the other member states.

move forward with a Regulation on divorce procedures that involve spouses from different member states. In 2012 enhanced cooperation was used in adopting EU patent legislation that allows patent holders to get EU-wide protection on the basis of a single application in one of the member states. Because Italy and Spain did not want to proceed, the other member states decided to use the enhanced cooperation procedure in order to adopt this legislation.

The arguments for and against enhanced cooperation

The conditions and procedures for establishing enhanced cooperation that we discussed above seek to ensure that agreements between a subset of member

Fact file 4.2

Conditions and procedures for establishing enhanced cooperation

Article 20 of the Treaty on European Union and Articles 326–34 of the Treaty on the Functioning of the European Union contain the conditions and procedures for establishing 'enhanced cooperation' between groups of member states.

Enhanced cooperation should respect the following conditions:

- It should include at least nine member states.
- Participation should be open to all member states, both at the time when a form of enhanced cooperation is created and after it has been established.
- It may not undermine the internal market or economic, social and territorial cohesion between the member states. It may also not introduce trade barriers or distort competition between member states.
- It should fall within one of the EU's competences. However, enhanced cooperation cannot be established in areas that fall under the exclusive competence of the European Union.

In addition, the Treaties include a procedure for establishing enhanced cooperation:

- For enhanced cooperation in policy areas outside the Common Foreign and Security Policy, the European Commission has the exclusive right to submit a proposal, upon request by a group of member states. The proposal has to be adopted by the Council of Ministers and consented to by the EP.
- For enhanced cooperation in the field of the Common Foreign and Security Policy, a group of member states can submit a proposal to the Council of Ministers. The Commission and the High Representative for Foreign Affairs and Security Policy may give their opinion. The EP is merely informed.
- In the Council of Ministers, all member states may participate in the deliberations, but only member states that will become part of the enhanced cooperation have the right to vote on the proposal.

states do not pose a threat to the EU as a whole, other (non-participating) member states or the EU's supranational institutions. Nevertheless, enhanced cooperation remains a controversial issue within the EU.

Its proponents argue that it is necessary in order to prevent European integration from slowing down and to allow a degree of flexibility in the type and extent of cooperation between member states. With the steady enlargement of the EU, the diversity of ideas, concerns and interests in the EU has also become greater. As a result, it is increasingly difficult to reach agreement on policies that cover the entire EU. Indeed, in many cases it makes little sense to adopt policies that are to be imposed from France to Bulgaria and from Spain to Sweden, since the kind of challenges EU member states have to cope with and the policies they can realistically aspire to implement vary widely. Why, then, should groups of member states not be allowed to proceed when they see scope for further cooperation, without burdening other member states with policies

they do not want or are not yet ready for? Moreover, enhanced cooperation may act as a laboratory for new policy initiatives that can subsequently be integrated into the EU framework at large, as has been done with the Schengen and Prüm Treaties. If policies can only be adopted by and for the EU as a whole, these types of policy initiatives may well never materialize.

Opponents, by contrast, warn against the negative consequences of a 'variable geometry' of European integration. Enhanced cooperation undermines the solidarity and uniformity characteristic of the EU. This may lead to a 'first class' and a 'second class' EU, differentiating member states that are in the 'elite' of front-runners and member states that lag behind. Moreover, enhanced cooperation may result in a patchwork of policies from which each member state chooses what it likes while opting out of policies that are inconvenient. Yet, many policies are only effective to the extent that they apply to all member states, including those for whom they are not convenient. Finally, enhanced cooperation may be a way for small groups of countries to create a *fait accompli* for the others. As happened with the Schengen and Prüm Treaties, under enhanced cooperation a limited number of member states defines the contents of a policy. Once that policy is established, other member states face the choice of going along or staying apart, but they can no longer change the outlines of the existing policy. This, so the critics say, is hardly democratic and could be used as a deliberate strategy by (groups of) member states to circumvent established policy-making procedures in the EU.

The conditions and procedures for enhanced cooperation that are now laid down in the EU treaties seek to find a balance between the arguments pro and contra. While facilitating cooperation between small groups of member states, they also ensure a role for the European Commission and the EP and they stress the right of each member state to participate in any initiative to arrive at enhanced cooperation. As was shown above, multi-speed Europe is already a reality in several areas. Depending on the use that is made of the provisions on enhanced cooperation in the EU treaties, it may become even more important in the future. Depending on one's perspective, this will be a motor for further integration or a threat to the integrity of the EU. Yet, whatever one's perspective, member states still have the option to cooperate outside of the EU, either directly with each other or in the framework of other international organizations. The Schengen and Prüm Treaties, for instance, were concluded outside the EU. Rejecting on principled grounds forms of enhanced cooperation within the EU may lead to a rise of such initiatives outside the EU.

■ Summary

This chapter has looked at decision-making in the European Union. It has argued that:

- There are four 'regular' types of legal instruments: Regulations, Directives, Decisions, and Recommendations and Opinions.

- Regulations and Directives are the two legislative instruments that have general application, and Decisions are used for individual cases. Regulations are directly applicable in the member states once they are adopted at EU level, whilst Directives first need to be transposed by the member states into domestic legislation.
- Recommendations and Opinions are non-binding instruments. Non-binding instruments also occur under other names, such as 'Guidelines'.
- The EU's Common Foreign and Security Policy uses a different set of legal instruments, which have no legal effects within the member states.
- Decision-making procedures in the EU differ along three main dimensions: the involvement of the Commission, the involvement of the European Parliament, and the voting rule used in the Council of Ministers. The more politically sensitive an issue is or the closer to member state governments' vital interests, the smaller the role of the Commission and the EP in the associated decision-making procedure will be and the more likely the Council will be to decide by unanimity.
- The ordinary legislative procedure seeks to define a balance between the Commission, the Council and the EP. In this procedure, the European Commission has the exclusive right of initiative, and both the Council and the EP have to approve a proposal and can amend it. Decision-making in the Council takes place by qualified majority.
- Special legislative procedures differ from the ordinary legislative procedure because the EP cannot amend proposals or is only consulted and/or voting in the Council takes place by unanimity. Under the Common Foreign and Security Policy, the Commission and the EP have even smaller roles than under the special legislative procedures, and the European Council takes important decisions alongside the Council of Ministers.
- Qualified majority voting (QMV) is a voting rule that seeks to balance the interests of small and large member states. As a result, it requires double (or even triple) majorities in the Council.
- Although QMV is important in the background of Council decision-making, formal votes are often avoided in the Council and the member states try to find consensus before resorting to a vote.
- Member state parliaments can raise objections to a legislative proposal if they feel the proposal violates the subsidiarity principle. If enough national parliaments do so, the initiator of the proposal needs to review the proposal and justify any revisions made (or not made).
- The Open Method of Coordination (OMC) is a policy-making procedure that does not yield any binding decisions but attempts to bring about policy coordination through a process of benchmarking and learning.
- 'Enhanced cooperation' has been presented as a way to overcome the wide variety of interests and local circumstances in the EU. At the same time, it has been criticized for leading to a fragmented Europe of 'first rate' and 'second rate' member states.

Further reading

A good introduction to different forms of policy-making in the EU is the chapter by Helen Wallace and Christine Reh on 'Institutional Anatomy and Five Policy Modes' in Helen Wallace, Mark Pollack and Alasdair Young (eds), *Policy-making in the European Union* (Oxford University Press, 6th edn, 2014). Legal specifics of instruments and decision-making procedures can be found in any good textbook on EU law, such as Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press, 5th edn, 2011). An in-depth analysis of the actual functioning of co-decision can be found in a special issue of the *Journal of European Public Policy* on 'Twenty Years of Legislative Co-decision in the European Union', 20, 7, 2013.

Websites

- The European Parliament's 'legislative observatory' is an excellent tool for tracking decision-making processes that involve the EP. It reproduces all steps in decision-making processes (including steps taken by other institutions), gives summaries of what happened at each step as well as links to underlying documents: www.europarl.europa.eu/oeil/
- The steps taken in decision-making procedures that involve the Commission can also be traced through Pre-Lex, with links to underlying documents: <http://ec.europa.eu/prelex/apcnet.cfm?CL=en>
- The results of votes taken in the Council of Ministers can be found on the Council's website: www.consilium.europa.eu
- All legislation that is adopted in the EU can be found on EUR-LEX, the EU's legal database: <http://eur-lex.europa.eu/en/index.htm>

Navigating the EU

On the website www.navigatingthe.eu you will find online exercises for this chapter.