

EU Lawmaking

EU Law 2230/ 3145

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1957 → European Economic Community Task of the EEC: Art 2 TEC

→ aim: create economic growth and development,
secure stability, raise the standard of living by
integrating the economic activities of MS

The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.

Activities of the EEC: Art 3 TEC

ECONOMIC:

Elimination of customs duties and QR on imported and exported goods

establishment of a common customs tariff and common commercial policy

achievement of (free movement) for persons, services and capital;

adoption of: common agricultural policy (CAP), common transport policy, common competition policy

coordination of economic policies and legal harmonisation

creation European Investment Bank

• SOCIAL:

creation of a European Social Fund

- promotion of economic and social development overseas

Goals of the EU in the 21st century: Art 3 TEU

- ECONOMIC: *remained the same*
- balanced economic growth and price stability
- highly competitive social market economy
- full employment and social progress
- ★ Promotion of science and technology
- Establish an economic and monetary union and the euro.

SOCIAL: *increased significantly*

peace, values, well-being

freedom, security and justice

Improvement and protection of the environment

社会
social exclusion, discrimination


social justice, rights of the child

团结
solidarity among Member States

cultural and linguistic diversity

safeguard Europe's 'cultural heritage' *文化遗产*

same objectives in relation to wider world



Is the EU trying
to do too
much?

Character of Union Powers

the EU has no innate power of its own, only that which is given or conferred by the MS

I. **Conferred**: the Union shall act within limits of powers conferred (Art 2-6 TFEU) and objectives assigned (Art 3 TFEU)

⇒ So the EU can only act using the powers that are given to it and only within the scope of objectives which are given to it.

II. **Controlled**: catalogue of competencies, subsidiarity & proportionality (Art 4-5 TEU)

to prevent the EU from encroaching excessively upon the autonomy of the MS

subsidiarity

2 important principles determine what the EU must act.

sets out the EU can only act where it adds value.

the EU can only take action to the extent necessary to achieve the goals agreed upon.

also for control

III. **Conditional**: respect for national identities (Art 4 TEU), legal basis

the identification of a legal basis for any measure that the EU wants to adopt as a binding law.

Catalogue of competencies



actually the commission
as the body of draft
proposals for legislation

Art 2 TFEU:
exclusive competence - 'only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts';
customs union;
competition,
monetary policy,
fisheries, common commercial policy,
some international treaties.

when making law
in any of the areas
the EU has the most
autonomy.

the MS may not act
in these areas unless
empowered by the union

Art 4 TFEU:
shared competence (~~sub~~ **subsidiarity**) – IM,
social policy,
economic, social
and territorial
cohesion, to be
agriculture and lawful
fisheries, and binding
environment,
consumer
protection,
transport, TENs,
energy, AFSJ,
public health,
R&D, overseas
development and
humanitarian aid

the commission must demonstrate that
it would add value for the EU to legislate
in the area, rather than the MS, the
commission must discharge the responsibility, must satisfy the test.

Sets out where the EU
has the least competence
to act.

Art 6 TFEU: 'The Union shall have competence to carry out actions to support, here the coordinate or MS has supplement the actions of the the most Member States' - autonomy protection and improvement of (human health, industry, culture, tourism, education, vocational training, youth and sport, civil protection, administrative cooperation.)

Subsidiarity
must satisfy the test.

to protect the sovereignty of MS

Art 5 TEU : Subsidiarity and proportionality

The MS must retain some autonomy
to act and determine the rules for
their own population.

- Fundamental principles of EU law
- Subsidiarity: boundary question - **WHO** should act?
 - Union = exclusive competence = the Union which should act.
 - Union and the Member States share the competence = presumption in favour of the Member States. Union acts if MS cannot achieve the objectives sufficiently and, by the reason of the scale or effects, the Union can achieve them better.
- Proportionality: behavioural question – **HOW** should EU act?
 - ‘The content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. Any decision must favour the least restrictive option.’
- **Impact Assessments Board (IAB)** : recommendations on subsidiarity and proportionality



Condition of legality: legal basis of action

*must be closely related
to a particular measure discussing.*

- Provision determines:
 - Legitimacy
 - Scope
 - Legislative procedure
 - Art 294 TFEU: 'ordinary legislative procedure' (co-decision)
 - Art 295 TFEU: consultation
 - Legal output (Regulation, Directive etc)
 - Eg. Art 19 TFEU; Art 75 TFEU

"what type of the legal act"

Requisites of Legal Base

Condition of legality

- Arts 296 & 297 TFEU

Reflects predominant aim and content of measure

Subject to (judicial review)

- Single base *Vodafone* C-58/08
- Multiple bases but procedures must not conflict *in order to demonstrate that the union has the power to adopt a measure*
 - *Kadi* C 402/05 P and C415/05 P;
 - C-176/03 *Environmental Crimes*;
 - C-440/05 *Ship Pollution*

Union legal acts

universally same among MS

Art 288 TFEU

legal acts:

1. Regulation

2. Directive

3. Decision

4. Recommendation

5. Opinion

*binding the outcome,
but give the MS more
autonomy in how...*

*(give 2 years)
framework & goals*

*they must be adhered to
by the MS and those to whom
they are addressed*

non-binding forms of law

legislative act
(Regulation, Directive or
Decision) –

OLP

Non-legislative
(implementing or
delegated) **act**
(Regulation, Directive or
Decision)

Evolution of EU Legislative Process

Rome (58)

Compromise)

Consultation Procedure
Unanimity in Council (Lux.

SEA (87)

Cooperation Procedure
QMV for completing SEM

quality majority voting

Maastricht (93)

Codecision (Art 251) replaces
Cooperation

Extend QMV

Amsterdam (99)

Amendments to Codecision

Nice (04)

Lisbon (07)

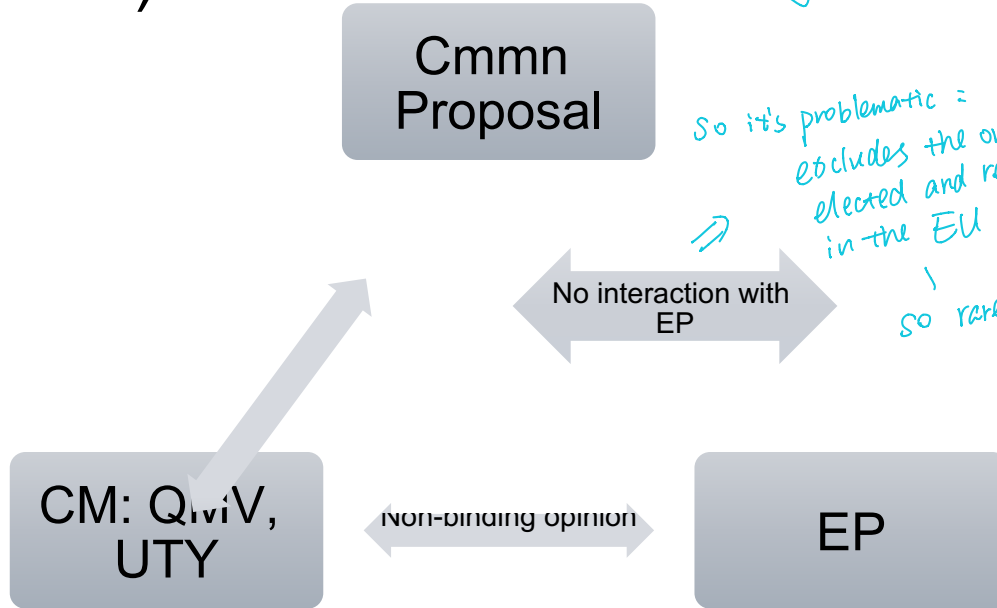
Lisbon (10)

Codecision => 'ordinary legislative
procedure' (OLP)

Extension of QMV in CM

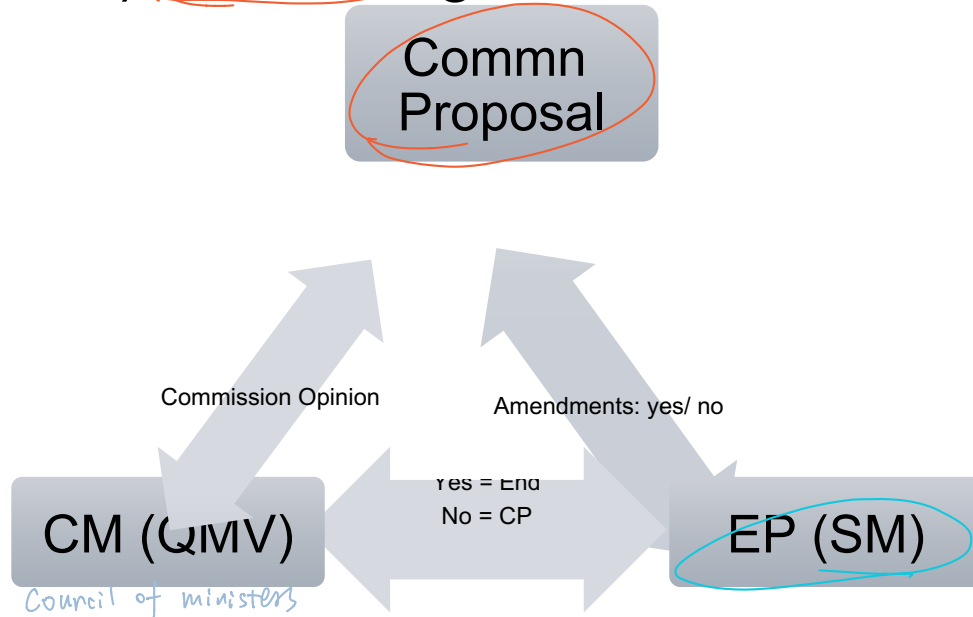
Art 289 (2) TFEU – consultation ('special procedure')

only used for special reasons

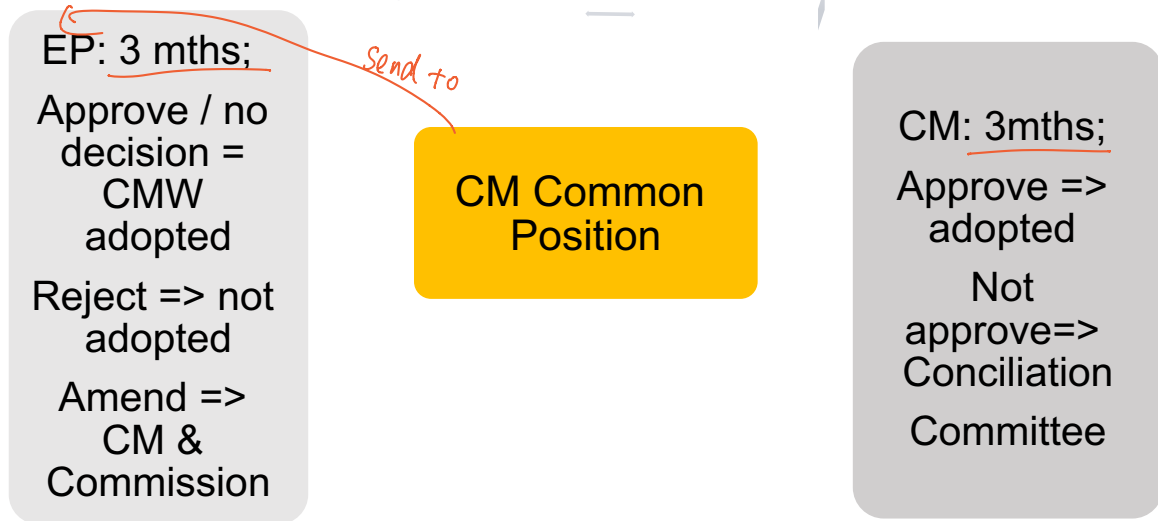


So it's problematic =
excludes the only democratically
elected and representative institution
in the EU law-making.
so rarely used.

Art 294 TFEU – OLP/ co-decision ('legislative procedure) 1st reading



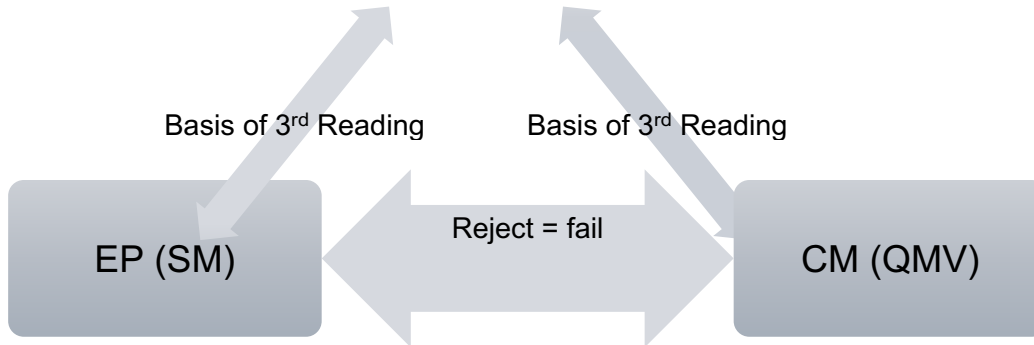
OLP/ Codecision – 2nd Reading



3rd reading

made up of representatives
from the EP and CM →

Conciliation
Committee: Joint
Text or FAIL



The EP, the OLP and democratic legitimacy

- Improved efficiency - measure can be adopted at 1st reading
 - Conciliation Committee Activity Report 14-19:
 - 414 OLP proposals tabled by the Commission
 - 410 OLP acts adopted *laws are being adopted in a more efficient way at the EU*
 - 1st reading: = 89%; 2nd reading: 10%; 3rd reading: 1%
 - No conciliation procedures
 - 1,185 trilogues (EO Inquiry OI/8/2015/FOR into maladministration) *informal meetings* *管理不善*
- BUT - limited use of EP veto: **is EP too consensual at 1st reading?**
 - Key EP 'product' = amendments!

Non-legislative acts - overview

Delegated Acts

Legislative act must set out scope of delegation

Commission given more autonomy to make 'technical' changes

More reliance upon commission expertise and resources

Implementing Acts

Exercise of these powers not set out in legislative act

Exercise set out in separate rules:

'Comitology' decision -

Regulation 182/2011

Network of national experts to oversee work of the Commission

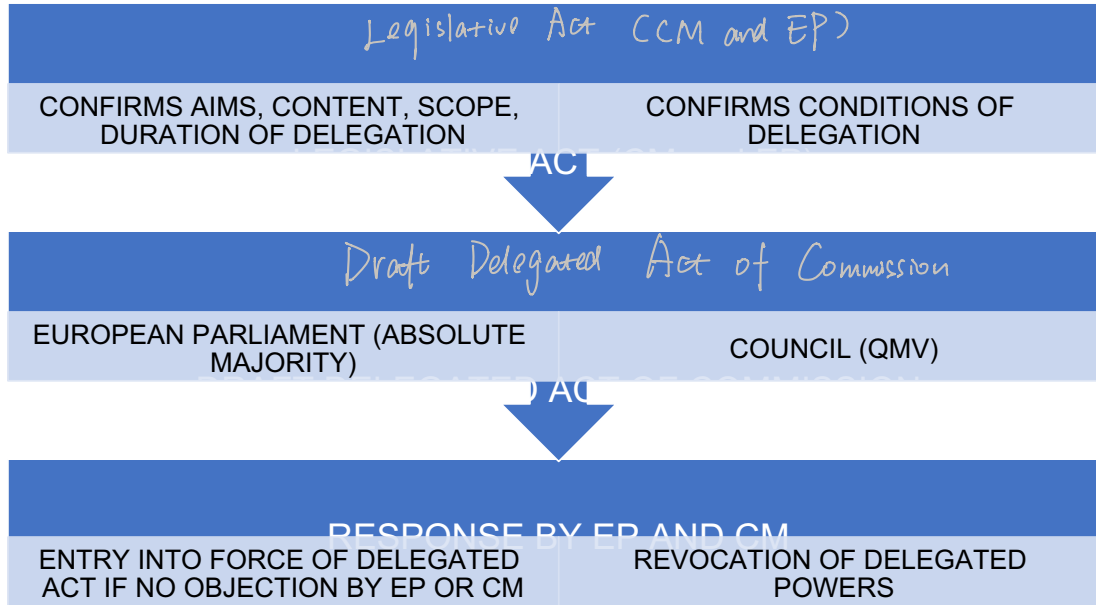
Art 290 TFEU ^{⇒ gives the MS the authority to decide within the scope of a legislative act}

- A legislative act [ie an act adopted using OLP] may delegate to the Commission the power to adopt non-legislative acts of general application to **supplement** or **amend** certain **non-essential elements** of the legislative act.
- The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The **essential elements** of an area shall be reserved for the legislative act and accordingly **shall not be the subject of a delegation** of power.

Delegated acts: amend/ supplement 'non-essential' elements of legislative act

eg. Commission **Delegated Regulation** (EU) No 1268/2012 on the rules of application of Regulation No 966/2012 on the financial rules applicable to the general budget of the Union

a) Adopting delegated acts (Art 290.2)



Art 291 TFEU

- 1. Member States shall adopt all measures of national law necessary to implement legally binding Union acts.
- 2. Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council.

b) Implementing acts: set uniform rules for implementing binding EU acts

Eg. Commission **Implementing** Decision of 18.4.2012 establishing a questionnaire for Member States reports on the implementation of Directive 2008/98/EC on waste

Implementing acts – Art 291.3 TFEU

when the commission is using implementing powers, it has to work through a procedure

- Comitology:
 - a method of decision making whereby committees 'consisting of representatives of the Member States (and chaired by a representative of the Commission) form a framework within which the Commission exercises the executive powers which are delegated to it.'
- Commission given power to give concrete shape to fundamental guidelines of Union policy
- 200 + committees 'oversee' work of the Commission

Code	Committee Title	Basic Legal Act	Committee Procedure	Meetings	Written procedures	Positive opinions	Negative opinions	No opinions	Measures referred to appeal committee	Positive opinion by appeal committee	Negative opinion by appeal committee	No opinion by appeal committee	Implementing acts adopted	RPS measures adopted
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C18106	Customs Code Committee - Tariff and Statistical Nomenclature	Council Regulation (EEC) No 2658/87 Council Regulation (EEC) No 2913/92	Examination	19	10	43	1	7	0	0	0	0	50	0
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C42900	Committee for the Common Organisation of the Agricultural Markets	Regulation (EU) No 1308/2013 Council Regulation (EU) No 1370/2013 COUNCIL REGULATION (EC) No 3/2008 Regulation (EU) No	Examination Advisory (+the usual procedure used)	77	1	42	0	2	0	0	0	0	40	0
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b) Advisory (basic) 'comitology' procedure

which gives the commission quite a lot of autonomy to adopt the implementing acts

1

- Draft implementing act
- Submitted to committee

2

- Committee adopts an opinion
- May vote

3

- Commission takes 'utmost account'
- May ignore opinion

• Dr
aft

• Commission takes account

requires commission to take more
amount of the committee

Examination 'comitology' procedure

reduces the autonomy of commission
to adopt implementing acts

- Commission shall not adopt
- 1 month to appeal
- 2 months to re-submit
- APPEAL
CTTE: 2-6 weeks

NEGATIVE
OPINION

POSITIVE
OPINION

- Commission shall adopt
- RIGHT OF
SCRUTINY
FOR EP
AND CM

NO OPINION

- Commission may adopt or revise
- Referral to
Comitology
committee

Does comitology contribute to democratic legitimacy?

contributes

- Democratic accountability: MS (via national experts) retain oversight and responsibility
- Control of Commission: more sensitive the measure, the more control required
- **NB:** EP role? Rights of information and scrutiny
- Efficiency: real-time legislation
 - **2009:** 266 committees; 894 meetings overseeing 1808 implementing measures. **2015** = 280 committees, 719 meetings, 1506 implementing measures adopted

Why focus on the EP to enhance EU democracy?

- Is enhancement of representative democracy route to legitimacy for a non-statist organisation?
 - Voter turn-out: 1979 = 62%; 2014 = 43%; 2019 = 51%
 - Most work in Committees; approved in plenary – ‘giant’ coalitions
 - Too impenetrable from the outside
 - Transparency on the inside: use of informal talks (‘trilogues’) to secure agreement at 1st reading - limits discussion and debate
- **Guinier** – the representative alone does not stand for democracy
- **Sen** - reasoned engagement and interactive discussion = heart of democracy
 - How to encourage wider participation?

The European Citizen's Initiative

- Art 11 (4) TEU: from citizens to the Commission
 - Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of *inviting* the European Commission, within the framework of its powers, to *submit* any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties
- Regulation on the European Citizens Initiative (EU) 2019/788
 - Personal element: Who?
 - Territorial element: Where?
 - Temporal element: When?
 - Topical element: What?
 - Quantitative element: How many?

Ultimate legitimating mechanism =
obligation to respect national specificities?

Article 4(2) TEU: The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.