

STUDY

Requested by the AFCO committee



Special legislative procedures in the Treaties

Institutional balance and sincere cooperation



Policy Department for Citizens' Rights and Constitutional Affairs
Directorate-General for Internal Policies
PE 738.331 - October 2022

EN

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Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCO Committee, examines the legislative procedures in the Treaties. It focuses on special legislative procedures where either Parliament or the Council adopts an act with the participation (consultation or consent) of the other institution. This should not mean, however, that the participating institution could not influence the substance of the act. Instead, the principles of institutional balance and mutual sincere cooperation require that the opinion of the participating institution be duly taken into account.

This document was requested by the European Parliament's Committee on Constitutional Affairs.

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Manuscript completed in October 2022

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LIST OF ABBREVIATIONS

AEUV	Vertrag über die Arbeitsweise der Europäischen Union (= <i>TFEU</i>)
AFCO	Constitutional Affairs Committee
BUDG	Budgets Committee
BAS	Brake-assist systems
CAP	Common Agricultural Policy
CFP	Common Fisheries Policy
CJEU	Court of Justice of the European Union
CMO	Common market organisation
CONT	Budgetary Control Committee
CoR	Committee of the Regions
COREPER	Committee of Permanent Representatives (= <i>Comité des représentants permanents</i>)
CULT	Culture and Education Committee
EAEC	European Atomic Energy Community
EAGV	Vertrag zur Gründung der Europäischen Atomgemeinschaft (= <i>Treaty establishing the EAEC, Euratom</i>)
ECON	Economic and Monetary Affairs Committee
ECOSOC	Economic and Social Committee
ECSC	European Coal and Steel Community
ENVI	Environment, Public Health and Food Safety Committee
EP	European Parliament
EU	European Union
EPPO	European Public Prosecutor's Office
Euratom	European Atomic Energy Community

EUV	Vertrag über die Europäische Union (= <i>TEU</i>)
IIA	Interinstitutional Agreement
JURI	Committee on Legal Affairs
LIBE	Committee on Civil Liberties, Justice and Home Affairs
MEP	Member of the European Parliament
MFF	Multiannual Financial Framework
TEU	Treaty on European Union (Lisbon)
TFEU	Treaty on the functioning of the European Union

EXECUTIVE SUMMARY

The European Union is a supranational organisation that can adopt legal acts through its institutions, notably the European Parliament and the Council, in formalised procedures. The Treaty of Lisbon has broadened the EU's competences and has consolidated the law-making procedures. However, there are still some fault lines that lead to incoherence in the law-making system. For instance, the Treaties differentiate between 'legal acts' and 'legislative acts' with different legal consequences, but this distinction is not based on a coherent system. Moreover, for legislative acts, in addition to the ordinary legislative procedure, there are several special legislative procedures that include different participatory rights for the institutions. In most cases, the Council takes the final decision and Parliament's participatory rights are limited. There are only very few cases in which Parliament is the institution that adopts the legal act.

The cooperation between the institutions is based on the principles of institutional balance and of mutual sincere cooperation as laid down in Article 13(2) TEU. They apply to every aspect of their cooperation, including their collaboration in the procedures for the adoption of legal acts. Institutional balance is based on the fact that the Treaties have established a system of horizontal repartition of competences among the institutions that the institutions themselves cannot derogate from. Mutual sincere cooperation requires the institutions to cooperate in good faith, to support one another and to refrain from any measure that would impede other institutions from exercising their competences. It is nonetheless possible – and in the light of mutual sincere cooperation even desirable – that the institutions agree on working methods that facilitate and promote their cooperation.

Against this background, Parliament's Committee on Constitutional Affairs has requested an inquiry into the special legislative procedures of the Treaties and especially into the cooperation between the two legislative institutions, Parliament and the Council. The aim of the study is to examine how the special legislative procedures, and in particular the consent procedure, have been implemented so far when adopting legislation or deciding on other matters of legislative nature. The study analyses whether, in order to guarantee a successful outcome of the procedures, the institutions have interacted within the limits of their powers and in conformity with the principle of mutual sincere cooperation. To this end, the study examines the adoption of the last two multiannual financial frameworks, of the rules for the European elections, of Parliament's right of inquiry, of the Statute of the European Ombudsman as well as of the rules for the composition of Parliament.

As regards mutual sincere cooperation, the examination of the dossiers paints a mixed picture. In some cases, there has been a high level of cooperation between Parliament and the Council and an open and constructive dialogue in search of a compromise for the final legal act. In other cases, especially the Council refused to engage in sincere negotiations because it had already disagreed with the initial *draft* presented by Parliament. In other words, it refused to engage in a search for a compromise because it felt that its position was not reflected in the draft from the start. This does not comply with the requirement to practice sincere cooperation. However, it must not be overlooked that in most cases where a special legislative procedure is used, the Council needs to act by unanimity. Consequently, an enormous amount of *internal* coordination before the Council as an institution can engage in negotiations with Parliament. Only if the Council has already defined its position can it make this position the point of departure for negotiations with Parliament.

In order to remedy the situation and improve the cooperation between the institutions, there are a few possibilities and instruments that can be deployed individually, but should be considered in an overall approach. A rather blunt option is to instigate proceedings before the European Court of Justice with

the claim that another institution has violated procedural rights or has failed to act and cooperate in a loyal manner. In a more cooperative manner, the institutions can discuss and specify their relations and concede to specific procedural rights in joint declarations and interinstitutional agreements. The institutions have concluded agreements of this kind in the past, and it appears that this has in fact improved their working relations. In specific acts, the institutions should consider using legislative techniques such as review and sunset clauses. While this might increase the legislative workload, it can also provide opportunities for improved cooperation that may not have been possible at an earlier stage. In addition, the institutions should consider exploiting the still unused potential of the current Treaties and work towards activating the so called *passerelle* clauses. With these clauses, the institutions can alter the voting procedure from a special to the ordinary legislative procedure or from unanimity to qualified majority voting in the Council without having to resort to an ordinary treaty revision. Introduced by the Lisbon Treaty, these clauses have not been used so far, but against the background of the outcome of the Conference on the Future of Europe, there seems to be political momentum to make use of these clauses after all. Finally, an unconventional method to overcome deadlock is the instrument of enhanced cooperation enshrined in Article 20 TEU. This enables a group of Member States to go ahead with a legislative file. Accordingly, only the participating States can vote in the Council. This may be a means for the Council to reach an *internal* agreement on the basis of which it can engage in negotiations with Parliament on the basis of mutual sincere cooperation.

1. LEGISLATIVE PROCEDURES IN EU PRIMARY LAW

Article 14(1) and Article 16(1) of the Treaty on the European Union (TEU)¹ provide that the European Parliament (Parliament, EP), as the representation of the Union citizens, and the Council of the European Union (Council), composed of the ministers of the Member States, shall jointly exercise legislative functions.² The exercise of public authority is thus based on a dual democratic legitimacy from the European Union (EU) citizens *directly* through the elections of the European Parliament (European elections) and *indirectly* through electing their national parliament, which then confers democratic legitimacy on the national government. However, not all EU acts are adopted jointly by these two institutions. Instead, the Treaties know a variety of procedures that involve Parliament and the Council in differing degrees. In particular, Article 289 of the Treaty on the Functioning of the European Union (TFEU),³ introduced by the Treaty of Lisbon,⁴ distinguishes between the two main legislative procedures for the adoption of EU legislative acts: the ordinary legislative procedure (paragraph 1) and the special legislative procedure (paragraph 2). It also provides that acts adopted in accordance with either of those procedures shall constitute legislative acts (paragraph 3).

Article 289 TFEU

1. The ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission. This procedure is defined in Article 294.
2. In the specific cases provided for by the Treaties, the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament, shall constitute a special legislative procedure.
3. Legal acts adopted by legislative procedure shall constitute legislative acts.
4. In the specific cases provided for by the Treaties, legislative acts may be adopted on the initiative of a group of Member States or of the European Parliament, on a recommendation from the European Central Bank or at the request of the Court of Justice or the European Investment Bank.

¹ [Treaty on European Union](#); entry into force on 1 November 1993, consolidated version (OJ C 202/13, 7.6.2016).

² Article 14(1) TEU provides that "(t)he European Parliament shall, jointly with the Council, exercise legislative and budgetary functions. It shall exercise functions of political control and consultation as laid down in the Treaties", whereas Article 16(1) TEU provides that "(t)he Council shall, jointly with the European Parliament, exercise legislative and budgetary functions. It shall carry out policy-making and coordinating functions as laid down in the Treaties."

³ [Treaty on the Functioning of the European Union](#), originally adopted as Treaty establishing the European Economic Community; entry into force on 1 January 1958, consolidated version (OJ C 202/47, 7.6.2016).

⁴ [Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community](#) (OJ C 306, 17.12.2007); entry into force on 1 December 2009.

1.1. Definition of Legislative Acts

The Treaties draw a distinction between legal acts *lato sensu* and legislative acts *stricto sensu*.⁵ The focal point of this distinction is Article 289(3) TFEU that provides that “[l]egal acts adopted by legislative procedure shall constitute legislative acts”. ‘Legal acts’, however, are not defined in this provision. From the wording and context of the provision, namely its position in the chapter on ‘Legal acts of the Union, adoption procedures and other provisions’, one can conclude that ‘legal acts’ are all acts that are the result of a formalised decision-making process⁶ by competent institutions in exercising public authority,⁷ i.e. when these acts exert a degree of bindingness on their addressees.

As Article 289(3) TFEU specifies, legal acts adopted by legislative procedure shall constitute ‘legislative acts’. In other words, a legislative act is a specific kind of legal act that is the result of a specific, i.e. a legislative procedure.

The distinction between ‘legal’ and ‘legislative’ acts has certain ramifications in primary law. First of all, Article 17(2) of the TEU provides that “Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise. Other acts shall be adopted on the basis of a Commission proposal where the Treaties so provide.” This means that the European Commission (Commission) has the exclusive right to propose legislative acts, except where the Treaties endow other actors with this right (cf. Article 289(4) TFEU).⁸ On the other hand, the Commission can initiate (non-legislative) legal acts only where the Treaties explicitly provide.

Secondly, the Council as one of the legislative institutions is required to meet in public only when it deliberates and votes on a draft legislative act.⁹ For all other legal acts it is under no such obligation, but can still be required to disclose information under Article 15(3) TFEU. In fact, it is the very openness and publicity that characterises a legislative process.¹⁰ As the Court of Justice of the European Union (CJEU, Court of Justice) has put it, “it is precisely openness in the legislative process that contributes to conferring greater legitimacy on the institutions in the eyes of EU citizens and increasing their confidence in them by allowing divergences between various points of view to be openly debated.”¹¹

⁵ On this distinction, stemming from the (failed) Constitutional Treaty, see Bast (2012), p. 887 f.

⁶ Bast (2010), p. 347.

⁷ [Von Bogdandy et al.](#) (2008), p. 1381 f.

⁸ Member States: Article 76 TFEU (Area of Freedom, Security and Justice); European Parliament: Article 223(1) TFEU (rules for the European elections by direct universal suffrage), Article 223(2) TFEU (regulations and general conditions governing the performance of the duties of MEPs), Article 226 TFEU (provisions governing the right of inquiry), Article 228(4) TFEU (Ombudsman); European Central Bank: Article 129(3) TFEU (amendment of the ESCB Statute); Court of Justice: Article 257(1) TFEU (setting up of specialised courts), Article 281(2) TFEU (amendment of the CJEU Statute); European Investment Bank: Article 308(3) TFEU (amendment of the EIB Statute).

⁹ See Article 16(8) TEU: “(t)he Council shall meet in public when it deliberates and votes on a draft legislative act.” See also Article 15(2) TFEU: “(t)he European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act.”

¹⁰ Bradley (2020), p. 126.

¹¹ GC, Case T-540/15, *De Capitani v Parliament*, [ECLI:EU:T:2018:167](#), para 78.

Thirdly, draft legislative acts are subject to scrutiny by national parliaments with regard to the principle of subsidiarity (Article 5(3) TEU¹²) in accordance with Article 12(c) TEU and Protocols No. 1 (on the role of national parliaments in the European Union) and No. 2 (on the application of the principles of subsidiarity and proportionality). In this context, Article 2(2) of Protocol No. 1 and Article 3 of Protocol No. 2 define 'draft legislative acts' as "proposals from the Commission, initiatives from a group of Member States, initiatives from the European Parliament, requests from the Court of Justice, recommendations from the European Central Bank and requests from the European Investment Bank, for the adoption of a legislative act". National parliaments can submit reasoned opinions on why they consider the draft legislative act in conflict with the principle of subsidiarity (Article 7(1) of Protocol No. 2). If the number of reasoned opinions exceeds one third of all votes allocated (or one quarter in specific cases), the author of the draft is required to review it (Article 7(2) of Protocol No. 2). If, in the ordinary legislative procedure, the number of reasoned opinions amounts to a simple majority of votes allocated, the Council and Parliament may each reject the draft in the first reading (Article 7(3) of Protocol No. 2).

Fourthly, the Treaty of Lisbon has codified the practice of comitology by introducing Articles 290 and 291 TFEU on delegated and implementing acts, respectively. By means of these provisions, legal acts can entrust the Commission with the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of an act (delegated power, Article 290 TFEU) or to adopt measures to provide necessary uniform conditions for implementing legally binding EU acts (implementing power, Article 291 TFEU). Whereas any legal act may contain implementing powers for the Commission, only legislative acts may delegate authority under Article 290 TFEU.

Finally, even though the Treaty of Lisbon has largely abandoned the former pillar structure of the EU, a special situation is retained for the Common Foreign and Security Policy (CFSP) under Title V of the TEU. It retains an intergovernmental character that is reflected in the dominant position of the (national) executive(s) as assembled in the Council and the European Council. While Article 15(1) TEU provides that the European Council "shall not exercise legislative functions",¹³ Article 24(1)(2) and Article 31(1)(1) TEU both provide that "the adoption of legislative acts shall be excluded" in the CFSP Chapter altogether. Consequently, neither the Council shall exercise any legislative function in the CFSP.

As important as the distinction between legislative and non-legislative acts may be, there is no clear systematic approach or inherent logic in the Treaties.¹⁴ This is mainly because the current system of decision-making procedures is the result of a dynamic development throughout the history of EU integration and not of a clear constitutional decision at a specific moment in time.¹⁵ The same holds true for the distinction between ordinary and special legislative procedures. The different areas in

¹² Article 5(3)(1) TEU: "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level".

¹³ Article 15(1) TEU: "The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof. It shall not exercise legislative functions."

¹⁴ Cf. Dougan (2008), p. 647; Frenz (2011), para. 1717; Bast (2012), p. 893; Otto (2022), p. 49.

¹⁵ Krajewski/Rösslein, in Grabitz et al., Artikel 289 AEUV para. 24 (62nd supplement, 2017).

which special legislative procedures apply cannot be systematised conclusively and without contradiction. Typical areas of regulation are tax measures, parliamentary organisation and budgetary law, as well as certain decisions that have been classified as politically 'sensitive'.¹⁶ Nonetheless, the terms 'ordinary' and 'special' imply a normative statement in the sense of a rule-exception relationship. The scope of application of norms providing for a special legislative procedure is to be interpreted rather narrowly in favour of a possibly existing complementary ordinary procedure.¹⁷

1.2. Ordinary Legislative Procedure

The ordinary legislative procedure of Article 289(1) and Article 294 TFEU is the default procedure for the adoption of legislative acts, for which the name itself is evidence ('ordinary' as opposed to a 'special procedure').¹⁸ It originates from the co-decision procedure that was introduced by the Maastricht Treaty. It accounts for around 80% of the EU law-making¹⁹ and is applicable whenever the Treaties refer to the adoption of an act 'in accordance with the ordinary legislative procedure'. Around 80 legal bases refer to the ordinary legislative procedure.²⁰

Article 289(1) TFEU outlines the procedure as "the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission", but paragraph 4 underlines that in specific cases also other actors may initiate legislation. Article 294 TFEU regulates the details of the procedure.²¹ This procedure applies whenever explicit reference is made to the 'ordinary legislative procedure'. The individual legal bases may include specifications, e.g. with regard to institutions or other bodies that need to be consulted (such as the Economic and Social Committee or the Committee of the Regions).

Article 294 TFEU

1. Where reference is made in the Treaties to the ordinary legislative procedure for the adoption of an act, the following procedure shall apply.
2. The Commission shall submit a proposal to the European Parliament and the Council.
3. The European Parliament shall adopt its position at first reading and communicate it to the Council.
4. If the Council approves the European Parliament's position, the act concerned shall be adopted in the wording which corresponds to the position of the European Parliament.

¹⁶ Krajewski/Rösslein, in Grabitz et al., Artikel 289 AEUV para. 54 (62nd supplement, 2017); Gómez-Leal Pérez (2012), p. 21.

¹⁷ Cf. Krajewski/Rösslein, in Grabitz et al., Artikel 289 AEUV para. 46 (62nd supplement, 2017).

¹⁸ With this view also Krajewski/Rösslein, in Grabitz et al., Artikel 289 AEUV para. 46 (62nd supplement, 2017); Frenz (2011), para. 1820. Bast (2012), p. 898: "constitutional standard case". On the evolution of the co-decision procedure, see also Gómez-Leal Pérez (2012), p. 17 ff.

¹⁹ Gómez-Leal Pérez (2012), p. 21; Nugent (2017), p. 330.

²⁰ See Annex section 1.

²¹ See on this [Council \(2016\)](#) and [European Parliament \(2020\)](#). Due to modifications of the right of initiative, consultations, participation of the European Council etc, Otto (2022), p. 103 ff. concludes that there are, in fact, 16 different variations of 'the' ordinary legislative procedure.

5. If the Council does not approve the European Parliament's position, it shall adopt its position at first reading and communicate it to the European Parliament.
6. The Council shall inform the European Parliament fully of the reasons which led it to adopt its position at first reading. The Commission shall inform the European Parliament fully of its position.
7. If, within three months of such communication, the European Parliament:
 - (a) approves the Council's position at first reading or has not taken a decision, the act concerned shall be deemed to have been adopted in the wording which corresponds to the position of the Council;
 - (b) rejects, by a majority of its component members, the Council's position at first reading, the proposed act shall be deemed not to have been adopted;
 - (c) proposes, by a majority of its component members, amendments to the Council's position at first reading, the text thus amended shall be forwarded to the Council and to the Commission, which shall deliver an opinion on those amendments.
8. If, within three months of receiving the European Parliament's amendments, the Council, acting by a qualified majority:
 - (a) approves all those amendments, the act in question shall be deemed to have been adopted;
 - (b) does not approve all the amendments, the President of the Council, in agreement with the President of the European Parliament, shall within six weeks convene a meeting of the Conciliation Committee.
9. The Council shall act unanimously on the amendments on which the Commission has delivered a negative opinion.
10. The Conciliation Committee, which shall be composed of the members of the Council or their representatives and an equal number of members representing the European Parliament, shall have the task of reaching agreement on a joint text, by a qualified majority of the members of the Council or their representatives and by a majority of the members representing the European Parliament within six weeks of its being convened, on the basis of the positions of the European Parliament and the Council at second reading.
11. The Commission shall take part in the Conciliation Committee's proceedings and shall take all necessary initiatives with a view to reconciling the positions of the European Parliament and the Council.
12. If, within six weeks of its being convened, the Conciliation Committee does not approve the joint text, the proposed act shall be deemed not to have been adopted.
13. If, within that period, the Conciliation Committee approves a joint text, the European Parliament, acting by a majority of the votes cast, and the Council, acting by a qualified majority, shall each have a period of six weeks from that approval in which to adopt the act in question in accordance with the joint text. If they fail to do so, the proposed act shall be deemed not to have been adopted.
14. The periods of three months and six weeks referred to in this Article shall be extended by a maximum of one month and two weeks respectively at the initiative of the European Parliament or the Council.

15. Where, in the cases provided for in the Treaties, a legislative act is submitted to the ordinary legislative procedure on the initiative of a group of Member States, on a recommendation by the European Central Bank, or at the request of the Court of Justice, paragraph 2, the second sentence of paragraph 6, and paragraph 9 shall not apply.

In such cases, the European Parliament and the Council shall communicate the proposed act to the Commission with their positions at first and second readings. The European Parliament or the Council may request the opinion of the Commission throughout the procedure, which the Commission may also deliver on its own initiative. It may also, if it deems it necessary, take part in the Conciliation Committee in accordance with paragraph 11.

The procedure starts with a proposal from the Commission (or an initiative or request from another competent actor). The draft is then submitted to Parliament and the Council as co-legislators as well as to the national parliaments for subsidiarity review in accordance with Protocol No. 2. If reasoned opinions from national parliaments represent at least one third of all the votes allocated to the national parliaments ('yellow card') or even a simple majority ('orange card'), the draft must be reviewed. In the latter case, the Council (by a majority of 55 % of its members) or Parliament (by a majority of the votes cast) may dismiss the proposal.

If the draft is maintained, Parliament will adopt its position at first reading and communicate it to the Council. The Council can approve Parliament's position, leading to the adoption of the legislative act. This requires unanimity in accordance with Article 293(1) TFEU, unless the Commission decides to endorse these amendments (which amounts to a formal amendment of the original draft in accordance with Article 293(2) TFEU²²) in order to facilitate adoption in the Council through qualified majority.²³ In practice, there are usually tripartite meetings between the Commission, the Council and Parliament (so-called 'trilogues') to discuss a proposal and find a compromise feasible for all institutions.²⁴ The draft is then amended accordingly to enable adoption by Parliament and the Council in first reading (so-called 'first-reading agreements'). In fact, most drafts in the ordinary legislative procedure are adopted as first-reading agreements.²⁵

In the course of the procedure, the Council can also reject Parliament's position in first reading by making amendments of its own and communicating these to Parliament. If Parliament approves Council's amendments or does not act at all, the act is adopted in the version of the Council's amendments. Parliament can also reject the proposal for good by an absolute majority (majority of its component members). As a third option, Parliament can propose new amendments and forward the amended draft to the Council and to the Commission, which shall deliver an opinion on those amendments. If within three months of receiving Parliament's amendments, the Council, approves all those amendments, the act in question shall be deemed to have been adopted. The Council can act by

²² Böttner, in Blanke/Böttner (forthcoming), Article 293 TFEU para. 9.

²³ Bradley (2020), p. 127.

²⁴ See inter alia Gómez-Leal Pérez (2012), p. 28 ff., [Del Monte](#) (2021) and Roederer-Rynning and Greenwood (2015).

²⁵ Nugent (2017), p. 204. See also [European Parliament Mid-term Activity Report: 1st July 2019-31 December 2021: Developments and Trends of the Ordinary Legislative Procedure, p. 12.](#)

qualified majority, unless the Commission has delivered a negative opinion on specific amendments, in which case Council must act by unanimity.

If Council does not approve all of Parliament's amendments, the Presidents of the Council and of Parliament can convene the Conciliation Committee, composed equally of members of Parliament and of the Council. The Conciliation Committee shall aim to produce a compromise text on the basis of Parliament's and the Council's second-reading positions. Parliament (by a majority of the votes cast) and the Council (by a qualified majority) must each approve the joint text within six weeks in order to adopt the legislative act. Otherwise, the proposed act shall be deemed not to have been adopted.

At whatever stage of the procedure the draft is adopted, it is signed by the President of Parliament and by the President of the Council and published in the Official Journal (Article 297(1) TFEU). This shows the shared ownership of and responsibility for the legislative act. As a consequence, both Parliament and the Council are defendants in a procedure for annulment (Article 263 TFEU) against an act adopted in the ordinary legislative procedure.

1.3. Special Legislative Procedures

As opposed to the ordinary legislative procedure, any adoption of a legislative act by Parliament and the Council that deviates from the procedure under Article 294 TFEU is a special legislative procedure. Paragraph 2 of Article 289 TFEU defines a special legislative procedure as "the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament". Thus, both institutions are involved, but not on equal footing: the legislative act is *adopted* by one of the two, while the other is contributing, e.g. by consent or consultation. Unlike with the ordinary legislative procedure in Article 294 TFEU, there is no general framework for *the* special legislative procedure. Instead, the applicable procedure is described on a case-by-case basis in the individual legal bases.

In this context, scholars have discussed the question whether the Treaties need to refer to the adoption of an act "in accordance with a special legislative procedure" or whether any procedure for the adoption of an act by Parliament or the Council with the participation of the other is automatically a 'special legislative procedure'. The question is relevant in the context of the Treaty establishing the European Atomic Energy Community (Euratom, EAEC),²⁶ since that treaty renders Article 289 TFEU applicable (Article 106a of the Euratom Treaty) without referring to the 'ordinary' or any 'special' legislative procedure in the text of the treaty.²⁷ While some scholars hold that any procedure in the sense of Article 289(2) TFEU is a special legislative procedure,²⁸ the majority opinion requires an explicit

²⁶ [Treaty establishing the European Atomic Energy Community](#); entry into force on 1 January 1958, consolidated version (OJ C 203/1, 7.6.2016).

²⁷ Cf. Tauschinsky/Böttner (2018), p. 675.

²⁸ Indlekofer/Schwichtenberg, in Vedder/Heintschel von Heinegg (2018), EAGV – Einführung para. 7.

textual reference.²⁹ On this basis, the Treaties contain almost 40 legal bases for special legislative procedures.³⁰

There are only a few instances where the legislative act is adopted by Parliament with the participation of the Council (Section 1.3.1). These are primarily cases that concern Parliament's own organisation. It comprises also the establishment of the annual budget, but this is a very specific procedure. In most cases of special legislative procedures, it is the Council that adopts the legislative act with the participation – consultation (Section 1.3.2) or consent (Section 1.3.3) – of Parliament. Due to the lack of full participatory rights by the directly elected Parliament, the special legislative procedures do not fully comply with the idea of bipolar democratic legitimacy through the Council and Parliament and are deficient from a democratic point of view.³¹

1.3.1. Acts adopted by Parliament requiring the Council's participation

A first category of special legislative procedures in the Treaties are procedures leading to the adoption of legislative acts by Parliament with the participation of the Council.³²

- The first legal basis is Article 223(2) TFEU, which empowers Parliament to adopt regulations on its own initiative laying down the regulations and general conditions governing **the performance of the duties of the Members of the European Parliament** (MEPs). Parliament shall seek an opinion from the Commission and the Council's consent. Council shall act by qualified majority (Article 16(3) TEU),³³ unless the act concerns rules or conditions relating to the taxation of the MEPs or former MEPs, in which case the Council needs to act unanimously. This is due to the general reservation of the Member States in tax matters, which is reflected in other provisions of primary law with financial implications. On the basis of the predecessor of Article 223(2) TFEU, Parliament has adopted the Statute in 2005.³⁴
- Secondly, Article 226(3) TFEU gives Parliament the power to adopt regulations on its own initiative laying down detailed provisions governing the exercise of **the right of inquiry**. Parliament may adopt these acts after obtaining the consent of the Council and the Commission. To this date, there has been no comprehensive act governing the right of inquiry. Instead, detailed provisions for committees of inquiry are laid down in an interinstitutional agreement between Parliament,

²⁹ See, inter alia, Schmidt, in von der Groeben et al. (2015), Artikel 289 AEUV para. 15; Waldherr, in Mayer/Stöger, Artikel 289 AEUV para. 11 (168th supplement, 2014); Gellermann, in Streinz (2018), Artikel 289 AEUV para. 4; Schoo, in Schwarze et al. (2019), Artikel 289 AEUV para. 10; Vedder, in Vedder/Heintschel von Heinegg (2018), Artikel 289 AEUV para. 4; Krajewski/Rösslein, in Grabitz et al., Artikel 289 AEUV para. 19, 60 (62nd supplement, 2017). See now also ECJ, Joined Cases C-643/15 and C-647/15, *Slovakia and Hungary v Council*, [ECLI:EU:C:2017:631](#), para. 57 ff.

³⁰ See Annex sections 2, 3 and 4.

³¹ Krajewski/Rösslein, in Grabitz et al., Artikel 289 AEUV para. 51 (62nd supplement, 2017).

³² Annex section 2.

³³ With a different view (simple majority in accordance with Article 238(1) TFEU): Szczekalla, in Pechstein et al. (2022), Artikel 223 AEUV para. 48; Hölscheidt, in Grabitz et al., Artikel 223 AEUV para. 58 (71st supplement, 2020).

³⁴ [Decision 2005/684/EC, Euratom of the European Parliament of 28 September 2005 adopting the Statute for Members of the European Parliament](#), OJ L 262, 7.10.2005, p. 1–10.

Council and the Commission,³⁵ but Parliament has proposed a new framework on the basis of Article 226 TFEU in May 2012.³⁶ Article 226(1) TFEU serves as one legal basis (among others) for setting up individual committees of inquiry.³⁷ In its resolution of 18 April 2019, Parliament regrets the current negotiation deadlock, refers to the principle of mutual sincere cooperation between institutions and invites the Commission and the Council to resume negotiations with Parliament. The matter will be discussed in more detail in Section 3.3.

- The third legal basis is Article 228(4) TFEU. Based on this provision, Parliament may adopt regulations on its own initiative laying down the regulations and general conditions governing **the performance of the Ombudsman's duties**. It shall seek an opinion from the Commission and the Council's consent. Council decides by qualified majority. The Statute of the European Ombudsman has been adopted only in 2021, by a regulation,³⁸ which replaced the pre-Lisbon decision of 1994.³⁹ The matter will be discussed in more detail in Section 3.4.
- A special case is the establishment of **the EU's annual budget** in accordance with Article 314 TFEU. According to Articles 14(1) and 16(1) TEU, Parliament and the Council shall jointly exercise budgetary functions. This could imply that Parliament and the Council act together in accordance with the ordinary legislative procedure. Indeed, the procedure appears to be an 'abbreviated' co-decision procedure with one reading and a conciliation procedure.⁴⁰ The annual budget procedure is initiated by the Commission, which submits the draft budget to Parliament and the Council in line with the multiannual financial framework (MFF) (Article 312(1)(3) TFEU). The Council then sends its position to Parliament, which can approve the Council's position (explicitly or by inaction) or amend the draft. The Council can then agree with these amendments or the two institutions convene the Conciliation Committee. In the end, according to Article 314(7)(d) TFEU, Parliament can adopt the annual budget even if the Council disagrees. The latter treaty provision ultimately corresponds to the idea of the European Convention's Working Group on Simplification that Parliament should have the last word over expenditure when the Council has the final say over

³⁵ [Decision 95/167/EC, Euratom, ECSC of the European Parliament, the Council and the Commission of 6 March 1995 on the detailed provisions governing the exercise of the European Parliament's right of inquiry](#), OJ L 113, 19.5.1995, p. 1.

³⁶ [Proposal adopted by the European Parliament on 23 May 2012 for a regulation of the European Parliament on the detailed provisions governing the exercise of the European Parliament's right of inquiry and repealing Decision 95/167/EC, Euratom, ECSC of the European Parliament, the Council and the Commission \(2009/2212\(INI\)\)](#), OJ C 264E, 13.9.2013, p. 41, [European Parliament legislative resolution of 16 April 2014 \(2009/2212\(INL\)\)](#), OJ C 443, 22.12.2017, p. 39, and [European Parliament resolution of 18 April 2019 on the negotiations with the Council and Commission on the legislative proposal for a regulation on the European Parliament's right of inquiry \(2019/2536\(RSP\)\)](#), OJ C 158, 30.4.2021, p. 15.

³⁷ See, most recently, [Decision \(EU\) 2022/480 of the European Parliament of 10 March 2022 on setting up a committee of inquiry to investigate the use of the Pegasus and equivalent surveillance spyware, and defining the subject of the inquiry, as well as the responsibilities, numerical strength and term of office of the committee](#), OJ L 98, 25.3.2022, p. 72.

³⁸ [Regulation \(EU, Euratom\) 2021/1163 of the European Parliament of 24 June 2021 laying down the regulations and general conditions governing the performance of the Ombudsman's duties \(Statute of the European Ombudsman\) and repealing Decision 94/262/ECSC, EC, Euratom](#), OJ L 253, 16.7.2021, p. 1.

³⁹ [Decision 94/262/ECSC, EC, Euratom of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties](#), OJ L 113, 4.5.1994, p. 15.

⁴⁰ Cf. Waldherr, in Mayer/Stöger, Artikel 289 AEUV para. 12 (168th supplement, 2014); Schoo (2009), p. 60.

resources and the financial perspective ceilings.⁴¹ Thus, while the annual budget procedure may be similar to the co-decision procedure, the wording is clear and the Court of Justice has confirmed that the budgetary procedure in Article 314 TFEU is a special legislative procedure,⁴² as it is Parliament through its President that declares that the budget has been definitively adopted. As a consequence, it is only the EP President who signs the budget in accordance with Article 297(1)(2) TFEU.⁴³ Still, the Court of Justice has underlined that, even though the act based on Article 314(9) TFEU is the outcome of a special legislative procedure, it does not, due to the nature of the budget, take the form of a legislative act in the strict sense of the term for the purpose of Articles 288 TFEU and 289(2) TFEU. Nevertheless, it is a measure open to challenge for the purpose of Article 263 TFEU, since it endows the EU's budget with binding force.⁴⁴

1.3.2. Acts adopted by the Council requiring Parliament's consultation

In a number of cases, a special legislative procedure consists of the adoption of a legislative act by the Council after having obtained Parliament's opinion. While obliged only to consult Parliament, the Council cannot take the final decision before Parliament has delivered its opinion so that it can actually take notice of the opinion.⁴⁵ However, the Council is not obliged to take Parliament's views into account.⁴⁶ On the other hand, not waiting for Parliament's opinion is an infringement of an essential procedural requirement.⁴⁷ If an essential part of the draft has been amended by Council or by the Commission, Parliament must be reconsulted.⁴⁸

A special legislative procedure requiring the consultation of Parliament applies in the following cases:⁴⁹

- Article 21 TFEU deals with **the free movement of the EU citizens and social protection measures**: Article 21(1) provides that "[e]very citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect." Article 21(3) provides that "[i]f action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance

⁴¹ [European Convention, Final report of Working Group IX on Simplification](#), CONV 424/02, p. 19; Niedobitek, in Streinz (2018), Artikel 314 AEUV para. 24.

⁴² ECJ, Case C-77/11, *Council v Parliament*, [ECLI:EU:C:2013:559](#), para. 46 ff.

⁴³ ECJ, Case C-77/11, *Council v Parliament*, [ECLI:EU:C:2013:559](#), para. 49 f., 56; see also Case 34/86, *Council v Parliament*, [ECLI:EU:C:1986:291](#), para. 8.

⁴⁴ ECJ, Case C-77/11, *Council v Parliament*, [ECLI:EU:C:2013:559](#), para. 60.

⁴⁵ Case C-417/93, *Parliament v Council*, [ECLI:EU:C:1995:127](#), para. 10.

⁴⁶ Loewenthal, in Kellerbauer et al. (2019), Article 289 TFEU para. 9.

⁴⁷ ECJ, Case 138/79, *Roquette Frères*, [ECLI:EU:C:1980:249](#), para. 32 ff.; Case 139/79, *Maizena v Council (Isoglucose)*, [ECLI:EU:C:1980:250](#), para. 33 ff.

⁴⁸ See, inter alia, ECJ, Joined Cases C-13/92 to C-16/92, *Driessen en Zonen and Others v Minister van Verkeer en Waterstaat*, [ECLI:EU:C:1993:828](#), para. 23; Case C-388/92, *Parliament v Council*, [ECLI:EU:C:1994:213](#), para. 10; Case C-280/93, *Germany v Council*, [ECLI:EU:C:1994:367](#), para. 38; Case C-21/94, *Parliament v Council*, [ECLI:EU:C:1995:220](#), para. 17; Case C-390/15, *RPO*, [ECLI:EU:C:2017:174](#), para. 26; Joined Cases C-643/15 and C-647/15, *Slovakia and Hungary v Council*, [ECLI:EU:C:2017:631](#), para. 161.

⁴⁹ Annex section 3.

with the **ordinary legislative procedure**, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1." However, "[f]or the same purposes as those referred to in paragraph 1 and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a **special legislative procedure**, may adopt measures concerning social security or social protection. The Council shall act **unanimously after consulting** the European Parliament." The legislative hurdles have been installed since social protection measures usually have financial implications for the Member State concerned. According to Article 22(1) TFEU, "[e]very citizen of the Union residing in a Member State of which he is not a national shall have **the right to vote and to stand as a candidate at municipal elections** in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State." The special legislative procedure has been chosen because the determination of the details of the electoral law may affect the administrative organisation of the Member States.⁵⁰ On the basis of the predecessor provision, the Council has adopted Directive 94/80/EC.⁵¹ In November 2021, the Commission has submitted a proposal for a recast of the directive⁵² that aims to facilitate the exercise of voting rights for mobile EU citizens.

- According to Article 22(2) TFEU, "[w]ithout prejudice to Article 223(1) and to the provisions adopted for its implementation, every citizen of the Union residing in a Member State of which he is not a national shall have **the right to vote and to stand as a candidate in elections to the European Parliament** in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State." Here as well, the special legislative procedure may have been chosen because the determination of the details of the electoral law may affect the administrative organisation of the Member States. In the light of the enhanced participatory rights for Parliament under Article 223 TFEU, the weaker status of Parliament in Article 22(2) TFEU seems inconsistent.⁵³ On the basis of a predecessor provision, Council has adopted Directive 93/109.⁵⁴ In November 2021, the Commission has submitted a proposal for a recast of the directive⁵⁵ that aims

⁵⁰ Haag, in von der Groeben et al. (2015), Artikel 22 AEUV para. 12.

⁵¹ [Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals](#), OJ L 368, 31.12.1994, p. 38.

⁵² [COM\(2021\) 733 final](#) of 25.11.2021. [2021/0373\(CNS\)](#), LIBE is responsible, AFCO will deliver an opinion.

⁵³ Cf. Haag, in von der Groeben et al. (2015), Artikel 22 AEUV para. 18.

⁵⁴ [Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals](#), OJ L 329, 30.12.1993, p. 34.

⁵⁵ [COM\(2021\) 732 final](#) of 25.11.2021. [2021/0372\(CNS\)](#), AFCO is responsible, LIBE and JURI will deliver opinions.

to facilitate the exercise of voting rights for mobile EU citizens. The matter will be discussed in more detail in Section 3.2.

- Under Article 23(2) TFEU, the Council may adopt directives establishing the coordination and cooperation measures necessary to facilitate **protection by the diplomatic or consular authorities** of any Member State **for EU citizens**, which are not nationals of that Member State. The Council decides by qualified majority. The provision clarifies that the implementation of protection is primarily the responsibility of Member States and their representations in third countries.⁵⁶ On the basis of this provision, the Council has adopted a new directive in 2015 that replaces a 1995 Decision of the Representatives of the Governments of the Member States meeting within the Council.⁵⁷
- Article 64 TFEU provides for a grandfather clause warranting specific restrictions to the **free movement of capital** that have existed at a specific date. The Council and Parliament may adopt liberalisation measures through the ordinary legislative procedure. On the basis of paragraph 3, the Council may adopt by unanimity measures which constitute a step backwards in the EU law as regards the liberalisation of the movement of capital to or from third countries. These strict procedural requirements can be explained by the deliberalising effect of legal acts based on paragraph 3.⁵⁸
- Article 77 TFEU provides the legal basis for **policy measures on border checks**. Under paragraph 3 of that provision, the Council may adopt by unanimity measures concerning passports, identity cards, residence permits or any other such document if these are necessary to facilitate the right for the EU citizens to move and reside freely within the territory of the Member States. The procedural requirements still exist because of the sensitivity of the matter for the Member States.⁵⁹
- Based on Article 81 TFEU, Parliament and the Council can adopt measures through the ordinary legislative procedure for **judicial cooperation in civil matters having cross-border implications**. According to Article 81(3)(1) TFEU, measures concerning **family law** with cross-border implications, however, shall be established by the Council, acting unanimously in accordance with a special legislative procedure. The Council's sole right of decision, including the principle of unanimity, is based on legal-cultural differences in family law with regard to divorce, recognition and registration of same-sex civil partnerships and matrimonial property law.⁶⁰ A few acts have been adopted on the basis of Article 81(3) TFEU. For two of the more recent measures, unanimity could not be achieved in the Council, and therefore these measures were adopted through the

⁵⁶ Haag, in von der Groeben et al. (2015), Artikel 23 AEUV para. 15.

⁵⁷ [Council Directive \(EU\) 2015/637 of 20 April 2015 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and repealing Decision 95/553/EC](#), OJ L 106, 24.4.2015, p. 1.

⁵⁸ Korte, in Calliess/Ruffert (2022), Artikel 64 AEUV para. 43.

⁵⁹ Cf. Weiß, in Streinz (2018), Artikel 77 AEUV para. 41; Progin-Theuerkauf, in von der Groeben et al. (2015), Artikel 77 AEUV para. 22.

⁶⁰ Leible, in Streinz (2018), Artikel 81 AEUV para. 46; Hess, in Grabitz et al., Artikel 81 AEUV para. 56 (42nd supplement, 2010).

enhanced cooperation mechanism.⁶¹ Specific aspects of family law with cross-border implications can be transferred to the ordinary legislative procedure through **the passerelle clause** contained in paragraph 3(2).⁶²

- A special legislative procedure with consultation of Parliament can apply on the basis of Article 83(2) TFEU. According to this provision, the Council can establish minimum rules with regard to **the definition of criminal offences and sanctions in harmonised areas** following **the same legislative procedure applicable to the adoption of the harmonising rules**. The parallelism of the procedures takes into account the annex character of the minimum provisions under Article 83(2) TFEU and allows for the adoption of both a non-criminal harmonisation and a directive harmonising criminal law in one and the same procedure, which is intended to avoid the practical inconveniences of parallel procedures under different procedural law, as had been apparent in the EU's former pillar construction.⁶³ Thus, depending on the procedure for the harmonising rules, Parliament is involved in the definition of criminal offences and sanctions either as co-legislator or only through consultation or consent.⁶⁴ In the latter cases, Parliament's role and thus democratic legitimacy of criminal law provisions is diminished, which has been subject to criticism.⁶⁵ Paragraph 3 of Article 83 TFEU contains an 'emergency brake' mechanism and the possibility to establish enhanced cooperation in an accelerated procedure.⁶⁶
- Based on Article 87(3) TFEU, the Council may unanimously establish measures concerning operational **cooperation between the national police, customs and other specialised law enforcement authorities** competent for the prevention, detection and investigation of **criminal offences**. Because of the increased sensitivity of operational measures to state sovereignty, law-

⁶¹ The first is [Council Decision 2010/405/EU of 12 June 2010 authorising enhanced cooperation in the area of the law applicable to divorce and legal separation](#), OJ L 189, 22.7.2010, p. 12, and [Council Regulation \(EU\) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation](#), OJ L 343, 29.12.2010, p. 10; see on this Böttner (2021), p. 47 ff. with further references. The second is [Council Decision \(EU\) 2016/954 of 9 June 2016 authorising enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships](#), OJ L 159, 16.6.2016, p. 16, and the two implementing acts [Council Regulation \(EU\) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes](#), OJ L 183, 8.7.2016, p. 1; [Council Regulation \(EU\) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships](#), OJ L 183, 8.7.2016, p. 30; see on this Böttner (2021), p. 57 ff. with further references.

⁶² See Böttner/Grinc (2018), p. 39 f.

⁶³ Vogel und Eisele, in Grabitz et al., Artikel 83 AEUV para. 97 (74th supplement, 2021).

⁶⁴ As regards the acts adopted by the Council requiring Parliament's consent, see below page 26.

⁶⁵ See, among others, Meyer, in von der Groeben et al. (2015), Artikel 83 AEUV para. 67 f., who argues that the effective participation of Parliament (i.e. co-decision) is an indispensable prerequisite for the democratic legitimation of supranational criminal law.

⁶⁶ See Böttner (2021), p. 286 ff.

making is subjected to this special legislative procedure.⁶⁷ If unanimity in the Council cannot be achieved, enhanced cooperation may be established through an accelerated procedure.⁶⁸

- Article 89 TFEU allows for the adoption of provisions by Council laying down the conditions and limitations under which the national authorities competent for **judicial and police affairs** may operate in the territory of another Member State in liaison and in agreement with the authorities of that State. The Council shall act by unanimity. The special legislative procedure is explained by the fact that Member States, on the basis of legal acts under Article 89 TFEU, should tolerate sovereign acts by authorities of another Member State on their national territory, which affects the sovereignty of the Member States concerned to a particular extent.⁶⁹
- On the basis of Article 113 TFEU, the Council, acting unanimously, can adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of **indirect taxation** to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition. In addition to Parliament, the Economic and Social Committee⁷⁰ shall be consulted. The special legislative procedure is appropriate, since tax harmonisation concerns a particularly sensitive area of harmonisation (tax sovereignty).⁷¹ The most important legislative act is the VAT Directive of 2006,⁷² which has been amended several times. The project for a financial transaction tax, which shall be adopted through enhanced cooperation, is still pending.⁷³
- Whereas according to Article 114 TFEU, the ordinary legislative procedure applies to the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market, Article 115 TFEU serves as the legal basis for **approximation of those laws**, regulations or administrative provisions of the Member States **that directly affect the establishment or functioning of the internal market**. The Council, acting unanimously, can adopt directives. In addition to Parliament, the Economic and Social Committee shall be consulted.⁷⁴ In relation to other provisions, its scope of application is primarily confined to the harmonisation of direct taxes,⁷⁵ thus justifying the special legislative procedure (tax sovereignty of the Member States). Article 115

⁶⁷ Spaeth, in von der Groeben et al. (2015), Artikel 87 AEUV para. 11; Dannecker, in Streinz (2018), Artikel 87 AEUV para. 23; Suhr, in Calliess/Ruffert (2022), Artikel 87 AEUV para. 23; Bogensberger, in Kellerbauer et al. (2019), Article 87 TFEU para. 36.

⁶⁸ See Böttner (2021), p. 288 ff.

⁶⁹ Cf. Dannecker, in Streinz (2018), Artikel 89 AEUV para. 2; Suhr, in Calliess/Ruffert (2022), Artikel 89 AEUV para. 6.

⁷⁰ The Committee of the Regions may deliver an opinion based on Article 307(3) TFEU.

⁷¹ Cf. Bahns et al., in von der Groeben et al. (2015), Artikel 113 AEUV para. 20; Waldhoff, in Calliess/Ruffert (2022), Artikel 113 AEUV para. 6; Kellerbauer, in Kellerbauer et al. (2019), Article 113 TFEU para. 7.

⁷² [Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax](#), OJ L 347, 11.12.2006, p. 1.

⁷³ See [Council Decision 2013/52/EU of 22 January 2013 authorising enhanced cooperation in the area of financial transaction tax](#), OJ L 22, 25.1.2013, p. 11. See on this Böttner (2021), p. 54 ff.

⁷⁴ The Committee of the Regions may deliver an opinion based on Article 307(3) TFEU.

⁷⁵ Kellerbauer, in Kellerbauer et al. (2019), Article 115 TFEU para. 2.

TFEU serves as legal basis for a Directive on tax dispute resolution mechanisms⁷⁶ and (together with Article 113 TFEU) for a Directive on administrative cooperation in tax matters.⁷⁷

- Article 118 TFEU allows for the establishment of measures for **the creation of European intellectual property rights** to provide uniform protection of intellectual property rights throughout the EU and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements. The accompanying regulation on language arrangements is adopted by Council, acting unanimously. The stricter procedural requirements are due to the fact that language questions are sensitive issues with national identity implications for Member States.⁷⁸ In 2011, this provision has been implemented by secondary law. As unanimity in the Council for a Union-wide measure could not be established, a group of Member States resorted to the instrument of enhanced cooperation.⁷⁹
- Article 126 TFEU contains rules on the prevention and sanctioning of **excessive government deficits**. The provision is complemented by Protocol No. 12 on the excessive deficit procedure. Paragraph 14(2) of Article 126 TFEU empowers the Council, acting unanimously, to adopt the appropriate secondary-law based provisions which shall then *replace* the said Protocol. In addition to consulting Parliament, the Council shall consult the European Central Bank. The unanimity requirement takes into account that Article 126(14)(2) TFEU is a simplified procedure for the revision of primary law (the Protocol) whose current content should not be undermined or watered down.⁸⁰ The procedure in subparagraph 2 has to be distinguished from the non-legislative procedure in subparagraph 3 that allows the Council to lay down detailed rules and definitions *for the application* of the provisions of the said Protocol on a proposal from the Commission and after consulting Parliament.
- On the basis of Article 127(6) TFEU, the Council, acting unanimously, may adopt a regulation conferring specific tasks upon the European Central Bank concerning policies relating to **the prudential supervision of credit institutions and other financial institutions** with the exception of insurance undertakings. In addition to consulting Parliament, Council shall consult the European Central Bank. This competence has been used to establish the Single Supervisory Mechanism as part of the so-called Banking Union.⁸¹

⁷⁶ [Council Directive \(EU\) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union](#), OJ L 265, 14.10.2017, p. 1.

⁷⁷ [Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC](#), OJ L 64, 11.3.2011, p. 1.

⁷⁸ Cf. Stieper, in Grabitz et al., Artikel 118 AEUV para. 27a and 30 f. (57th supplement, 2015).

⁷⁹ [Council Decision 2011/167/EU of 10 March 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection](#), OJ L 76, 22.3.2011, p. 53, and [Council Regulation \(EU\) No. 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements](#), OJ L 361, 31.12.2012, p. 89, together with the [Regulation \(EU\) No. 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection](#), OJ L 361, 31.12.2012, p. 1 (adopted through the ordinary legislative procedure in paragraph 1); see on his Böttner (2021), p. 50 ff.

⁸⁰ Cf. Harmer, in von der Groeben et al. (2015), Artikel 126 AEUV para. 158; Kempen, in Streinz (2018), Artikel 126 AEUV para. 57.

⁸¹ [Council Regulation \(EU\) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions](#), OJ L 287, 29.10.2013, p. 63.

- Based on Article 153 TFEU, the EU may take action to support and complement the activities of the Member States in the field of **social policy**. In most of the fields mentioned in paragraph 1, Parliament and the Council adopt measures on the basis of the ordinary legislative procedure. In specific cases, the Council, acting unanimously, adopts measures in a special legislative procedure: social security and social protection of workers (lit. c), protection of workers where their employment contract is terminated (lit. d), representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 5 (lit. f), conditions of employment for third-country nationals legally residing in Union territory (lit. g). In addition to consulting Parliament, the Council shall consult the Economic and Social Committee as well as the Committee of the Regions. When the Lisbon Treaty was negotiated, Member States were not yet willing to surrender their legislative veto in these areas. However, except for the area of the social security and social protection of workers, the Council, acting unanimously on a proposal from the Commission and after consulting Parliament, may decide to render the ordinary legislative procedure applicable.⁸²
- In the field of research and technological development, the EU may adopt a **multiannual research framework** through the ordinary legislative procedure on the basis of Article 182(1) TFEU. Paragraph 4 of that provision provides that the Council, acting in accordance with a special legislative procedure, shall adopt the specific programmes. The Council acts by qualified majority. In addition to Parliament, the Economic and Social Committee⁸³ shall be consulted. The weaker participatory rights for Parliament (mere consultation instead of full co-decision rights) are supposed to speed up the procedure. In practice, the difference in the procedures is negligible, since the framework programme and the specific programmes are deliberated and adopted at the same time.⁸⁴
- The EU's competence in **environmental matters** is enshrined in Articles 191 through 193 TFEU. Article 192 TFEU contains the legal bases for legislative acts, which are generally adopted in accordance with the ordinary legislative procedure (paragraph 1). Paragraph 2 provides that specific measures shall be adopted in accordance with a special legislative procedure, namely "provisions primarily of a fiscal nature", "measures affecting town and country planning, quantitative management of water resources or affecting, directly or indirectly, the availability of those resources, land use, with the exception of waste management", and "measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply". The Council acts by unanimity. In addition to Parliament, Council shall consult the Economic and Social Committee and the Committee of the Regions. The special procedural rules take account of national reservations regarding the use of Member States' territories⁸⁵ as well as financial and security issues (energy security).⁸⁶ Article 192(2)(2) TFEU contains a special *passerelle* clause by means of which the ordinary legislative procedure can be declared applicable.⁸⁷
- The following title in Part Three of the TFEU deals with **energy policy**. Here as well, legislative acts are generally adopted in accordance with the ordinary legislative procedure. Paragraph 3 of

⁸² Böttner/Grinc (2018), p. 37 f.

⁸³ The Committee of the Regions may deliver an opinion based on Article 307(3) TFEU.

⁸⁴ Eikenberg, in Grabitz et al., Artikel 182 AEUV para. 69 (55th supplement, 2015).

⁸⁵ Cf. Calliess, in Calliess/Ruffert (2022), Artikel 192 AEUV para. 28.

⁸⁶ See also Hesselhaus, in Pechstein et al. (2022), Artikel 192 AEUV para. 30.

⁸⁷ Böttner/Grinc (2018), p. 38 f.

Article 194 TFEU provides that a special legislative procedure applies for the establishment of measures mentioned in the second paragraph when they are primarily of a fiscal nature. The Council decides by unanimity. Again, these special procedural requirements are due to the Member States' reservation to surrender their veto position in fiscal matters.

- In accordance with Article 203 TFEU, the EU may lay down provisions as regards the detailed rules and the procedure for **the association of overseas countries and territories with the EU**. Similar to Article 352 TFEU, the provision allows for the adoption of legislative and non-legislative acts. Non-legislative acts are adopted by the Council, acting unanimously on the basis of a Commission proposal. Parliament does not participate. Legislative acts are adopted through a special legislative procedure requiring Parliament's opinion and unanimity in the Council. The current Overseas Association Decision has been adopted in accordance with a special legislative procedure.⁸⁸
- On the basis of Article 262 TFEU the EU may establish rules conferring **jurisdiction on the Court of Justice** in disputes relating to the application of acts adopted on the basis of the Treaties which create **European intellectual property rights**. The Council acts by unanimity. The legislative acts will enter into force after their approval by the Member States in accordance with their respective constitutional requirements. The special legislative procedure with unanimity in the Council is logical against the background of the requirement for national ratifications.
- Article 308(3) TFEU contains the legal basis for a simplified revision of **the Statute of the European Investment Bank** which is laid down in Protocol No. 5 annexed to the Treaties: As laid down in that provision, "[t]he Council acting unanimously in accordance with a special legislative procedure, at the request of the European Investment Bank and after consulting the European Parliament and the Commission, or on a proposal from the Commission and after consulting the European Parliament and the European Investment Bank, may amend the Statute of the Bank." Unanimity in the Council and the lack of Parliament's co-decision is due to the fact that Article 308(3) TFEU provides for a simplified treaty revision procedure, as the EIB Statute is part of primary law (Article 51 TEU). The Statute has been amended twice, in the context of the withdrawal of the United Kingdom from the EU.⁸⁹
- Article 311 TFEU provides the legal basis for **the EU's own resources system**. Paragraph 3 of the provision allows the Council to adopt by unanimity a decision on the EU's own resources, after having **consulted Parliament**. The decision cannot enter into force unless approved by all Member States in accordance with their respective constitutional requirements. Paragraph 4 allows for the adoption of implementing regulations that require **Parliament's consent**. For the latter, the Council can act by qualified majority.⁹⁰ The procedure under paragraph 3 underlines the Member States' final say and each State's veto position on the EU's resources.⁹¹ It is worth mentioning that

⁸⁸ [Council Decision \(EU\) 2021/1764 of 5 October 2021 on the association of the Overseas Countries and Territories with the European Union including relations between the European Union on the one hand, and Greenland and the Kingdom of Denmark on the other \(Decision on the Overseas Association, including Greenland\)](#), OJ L 355, 7.10.2021, p. 6.

⁸⁹ [Council Decision \(EU\) 2019/654 of 15 April 2019 amending Protocol No 5 on the Statute of the European Investment Bank](#), OJ L 110, 25.4.2019, p. 36, and [Council Decision \(EU\) 2019/1255 of 18 July 2019 amending Protocol No 5 on the Statute of the European Investment Bank](#), OJ L 196, 24.7.2019, p. 1.

⁹⁰ As regards the acts adopted by the Council requiring Parliament's consent, see below page 27.

⁹¹ Cf. also Waldhoff, in Calliess/Ruffert (2022), Artikel 311 AEUV para. 5.

the procedural requirements in Article 311(3) TFEU cannot be changed through the general *passerelle* clause of Article 48(7) TEU (see Article 353 TFEU).⁹² The current Own Resources Decision stems from 2020.⁹³ In order to provide the EU with the necessary revenue for the repayment of the financing costs of the recovery and resilience actions (Next Generation EU borrowing and the Social Climate Fund), the Commission proposed in December 2021 an amendment to the Own Resources Decision.⁹⁴ According to the proposal, “a share of the revenues from the sale of carbon border adjustment mechanism certificates will be transferred to the EU budget as own resources in the form of a national contribution.”

- On the basis of Article 349(1) TFEU, the EU may adopt specific measures aimed, in particular, at laying down the conditions of **application of the Treaties to the outermost regions**, including common policies. Similar to Article 352 TFEU, the provision allows for the adoption of legislative and non-legislative acts through identical procedures. The Council acts by qualified majority on a proposal from the Commission and after consulting Parliament. The Council has adopted a number of acts in accordance with a special legislative procedure.⁹⁵

1.3.3. Acts adopted by the Council requiring Parliament’s consent

As a second form of special legislative procedure with EP participation, a number of legal bases in the Treaties provide that the Council can adopt a legislative act only after Parliament has given its consent. The procedures vary as to the necessary quorums for votes in the Council and in Parliament. In any event, Parliament may only approve or reject the draft legislative act, but cannot amend it. On the other hand, the Council cannot overrule the lack or denial of consent.⁹⁶

A special legislative procedure requiring Parliament’s consent applies in the following cases:⁹⁷

- On the basis of Article 19(1) TFEU, the Council, acting unanimously, may take appropriate action to combat **discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation**. The enhanced procedural requirements mirror the political sensitivity of this matter, as measures under paragraph 1 may also touch upon relations between private

⁹² Böttner/Grinc (2018), p. 19 f.

⁹³ [Council Decision \(EU, Euratom\) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom](#), OJ L 424, 15.12.2020, p. 1.

⁹⁴ [Proposal for a Council Decision amending Decision \(EU, Euratom\) 2020/2053 on the system of own resources of the European Union](#), COM(2021) 570 final of 22.12.2021. 2021/0430(CNS), BUDG is responsible, AFCO, ENVI, CONT and ECON will deliver opinions.

⁹⁵ See more recently, for example, [Council Decision \(EU\) 2020/1791 of 16 November 2020 authorising France to apply a reduced rate of certain indirect taxes on ‘traditional’ rum produced in Guadeloupe, French Guiana, Martinique and Réunion](#), OJ L 402, 1.12.2020, p. 7, [Council Decision \(EU\) 2020/1792 of 16 November 2020 on the AIEM tax applicable in the Canary Islands](#), OJ L 402, 1.12.2020, p. 13, [Council Decision \(EU\) 2021/991 of 7 June 2021 concerning the dock dues scheme in the French outermost regions and amending Decision No 940/2014/EU](#), OJ L 221, 21.6.2021, p. 1, [Council Regulation \(EU\) 2021/2048 of 23 November 2021 temporarily suspending autonomous Common Customs Tariff duties on imports of certain industrial products into the Canary Islands](#), OJ L 420, 25.11.2021, p. 1.

⁹⁶ Loewenthal, in Kellerbauer et al. (2019), Article 289 TFEU para. 8.

⁹⁷ Annex section 4.

individuals.⁹⁸ The EU incentive measures, excluding any harmonisation, to support action taken by the Member States to combat discrimination may be adopted in accordance with the ordinary legislative procedure in paragraph 2. Three important directives have been based on Article 19(1) TFEU's predecessor.⁹⁹

- Article 20(2) TFEU contains a list of **rights that the EU citizens enjoy**. Based on Article 25(2) TFEU, the Council, acting unanimously, may adopt provisions to strengthen or to add to these rights. These provisions shall enter into force after their approval by the Member States in accordance with their respective constitutional requirements. The high threshold for acts adopted under this procedure is due to its nature as a simplified treaty amendment procedure and the influence that the Member States want to retain.
- A special legislative procedure with consent of Parliament can apply under Article 83(2) TFEU. According to this provision, the Council can establish minimum rules with regard to **the definition of criminal offences and sanctions in harmonised areas following the same legislative procedure applicable to the adoption of the harmonising rules**. According to this provision, the Council can establish minimum rules with regard to the definition of criminal offences and sanctions in harmonised areas following the same legislative procedure applicable to the adoption of the harmonising rules. The parallelism of the procedures takes into account the annex character of the minimum provisions under Article 83(2) TFEU and allows for the adoption of both regimes in one and the same procedure. This is to avoid the practical inconveniences of parallel procedures under different procedural law, as had been apparent in the EU's former pillar construction.¹⁰⁰ The potentially diminished role of Parliament and thus the limited democratic legitimacy of criminal law provisions has been subject to criticism.¹⁰¹ Paragraph 3 of Article 83 TFEU contains an 'emergency brake' mechanism and the possibility to establish enhanced cooperation in an accelerated procedure.¹⁰²
- Article 86 TFEU provides a legal basis for the establishment of a European Public Prosecutor's Office (EPPO) from Eurojust responsible for combatting crimes affecting the financial interests of the EU. The regulation is adopted by the Council acting unanimously. The special procedural requirements reflect the sensitivity of the Member States regarding this criminal law institution.¹⁰³ Article 86 TFEU provides for an accelerated establishment of enhanced cooperation in case the Council does not reach unanimity. Following the entry into force of the Lisbon Treaty, the project for establishing an

⁹⁸ Cf. Epiney, in Calliess/Ruffert (2022), Artikel 19 AEUV para. 10; Martin, in Kellerbauer et al. (2019), Article 19 TFEU para. 5; Streinz, in Streinz (2018), Artikel 19 AEUV para. 23; Grabenwarter and Struth, in Grabitz et al., Artikel 19 AEUV para. 81 f. (73rd supplement, 2021).

⁹⁹ [Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin](#), OJ L 180, 19.7.2000, p. 22, [Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation](#), OJ L 303, 2.12.2000, p. 16, [Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services](#), OJ L 373, 21.12.2004, p. 37.

¹⁰⁰ Vogel und Eisele, in Grabitz et al., Artikel 83 AEUV para. 97 (74th supplement, 2021).

¹⁰¹ See, among others, Meyer, in von der Groeben et al. (2015), Artikel 83 AEUV para. 67 f.

¹⁰² See Böttner (2021), p. 286 ff.

¹⁰³ Cf. Bogensberger, in Kellerbauer et al. (2019), Article 86 TFEU para. 3.

EPPO was initiated and eventually adopted through enhanced cooperation due to the lack of unanimity in the Council.¹⁰⁴

- On the basis of Article 223(1) TFEU, the Council shall lay down the provisions necessary for the for **the election of the Members of Parliament** by direct universal suffrage “in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States”. The proposal is drawn up by Parliament, the Council decides on it by unanimity and Parliament must give its consent by a majority of its component members. These provisions can enter into force only after being approved by the Member States in accordance with their respective constitutional requirements. A right of initiative of the Parliament is justified by the fact that this institution is closest to its own election.¹⁰⁵ The requirement of unanimity in the Council is due to the fundamental importance of the electoral procedure for the realisation of the democratic principle at EU level. Furthermore, in view of the requirement of ratification by the Member States, a decision taken by majority vote would always run the risk of not being ratified by the outvoted Member States.¹⁰⁶ Even though the proposal stems from Parliament itself, its subsequent consent is important since Council has the right to amend the proposal and only Parliament’s consent to the final act guarantees that Parliament agrees with the rules on its own election.¹⁰⁷ To this day, there has been no political agreement on a legislative act in accordance with Article 223(1) TFEU. The framework for the European elections is laid down in the Direct Universal Suffrage Act of 1976,¹⁰⁸ but subsequent amendments have been based on Article 223(1) TFEU and its predecessor.¹⁰⁹ Parliament has proposed another reform in 2015, which was adopted in 2018.¹¹⁰ In May 2022, Parliament adopted and forwarded to the Council a proposal for new, ambitious rules for European elections that would replace the Direct Elections Act of 1976.¹¹¹ The matter will be discussed in more detail in Section 3.2.
- Article 311 TFEU provides the legal basis for **the EU’s own resources system**. Paragraph 3 of that provision allows Council to adopt by unanimity a decision on the EU’s own resources. It acts by unanimity after consulting Parliament. The decision cannot enter into force unless approved by all Member States in accordance with their respective constitutional requirements. Paragraph 4 of that article allows for the adoption of implementing regulations that require Parliament’s consent. For the latter the Council can act by qualified majority. It is worth mentioning that the procedural

¹⁰⁴ See Böttner (2021), p. 60 ff.

¹⁰⁵ Huber, in Streinz (2018), Artikel 223 AEUV para. 10.

¹⁰⁶ Huber, in Streinz (2018), Artikel 223 AEUV para. 11.

¹⁰⁷ Cf. Bieber/Haag, in von der Groeben et al. (2015), Artikel 223 AEUV para. 4; Huber, in Streinz (2018), Artikel 223 AEUV para. 12.

¹⁰⁸ [Act concerning the election of the members of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom](#), OJ L 278, 8.10.1976, p. 5.

¹⁰⁹ [Council Decision 2002/772/EC, Euratom of 25 June 2002 and 23 September 2002](#), OJ L 283, 21.10.2002, p. 1.

¹¹⁰ [Council Decision \(EU, Euratom\) 2018/994 of 13 July 2018](#), OJ L 178, 16.7.2018, p. 1.

¹¹¹ [European Parliament legislative resolution of 3 May 2022 on the proposal for a Council Regulation on the election of the members of the European Parliament by direct universal suffrage, repealing Council Decision \(76/787/ECSC, EEC, Euratom\) and the Act concerning the election of the members of the European Parliament by direct universal suffrage annexed to that Decision \(2020/2220\(INL\) – 2022/0902\(APP\)\)](#).

requirements in Article 311(4) TFEU cannot be changed through the general *passerelle* clause of Article 48(7) TEU (see Article 353 TFEU).¹¹² In 2021, the Council has adopted a new regulation on implementing measures.¹¹³

- **The EU's multiannual financial framework (MFF)**, which is the basis for the annual budget under Article 314 TFEU, is adopted on the basis of Article 312 TFEU. The Council, acting unanimously adopts the MFF regulation after obtaining the consent of Parliament, which shall be given by a majority of its component members. It is worth mentioning that the procedural requirements in Article 312(2) TFEU cannot be changed through the general *passerelle* clause of Article 48(7) TEU (see Article 353 TFEU),¹¹⁴ but there is a special *passerelle* clause in paragraph 2(2) of Article 312 TFEU that allows at least a transition to qualified majority voting in the Council.¹¹⁵
- Article 352 TFEU is the EU's so-called '**flexibility clause**' or 'lacuna-filling competence'. Based on this provision, if the Treaties have not provided the necessary powers to attain one of the objectives set out therein, the Council, acting unanimously and after obtaining the consent of Parliament, may adopt the appropriate measures. Article 352(1) TFEU provides for a (special) legislative and a non-legislative procedure with identical procedural requirements. The decisive factor for the application of one or the other procedure is the distinction between legislative acts and non-legislative acts on the basis of the essentiality of the regulatory content.¹¹⁶ This view is supported by case law, which has regarded as essential those provisions intended to give concrete shape to the fundamental guidelines of Community policy.¹¹⁷ The high procedural requirements, i.e. granting every Member State a veto in the Council, can be explained by the fact that this provision is on the brink of giving the EU the competence to decide on its own competences. It is worth mentioning that the procedural requirements in Article 352 TFEU cannot be changed through the general *passerelle* clause of Article 48(7) TEU (see Article 353 TFEU).¹¹⁸ The flexibility clause has been used for several pieces of legislation,¹¹⁹ but as the number of specific legal bases has grown with the Treaty of Lisbon, this provision is used less often.¹²⁰ Recently the Commission has proposed to use Article 352 TFEU to transpose the European Stability Mechanism into a genuine EU body.¹²¹
- Finally, Article 2(1) of **Protocol No. 37 on the financial consequences of the expiry of the ECSC Treaty and on the research fund for coal and steel** contains a legal basis for the adoption of necessary provisions for the implementation of said Protocol, including essential principles. The

¹¹² Böttner/Grinc (2018), p. 19 f.

¹¹³ [Council Regulation \(EU, Euratom\) 2021/768 of 30 April 2021 laying down implementing measures for the system of own resources of the European Union and repealing Regulation \(EU, Euratom\) No 608/2014](#), OJL 165, 11.5.2021, p. 1.

¹¹⁴ Böttner/Grinc (2018), p. 25.

¹¹⁵ Böttner/Grinc (2018), p. 40 f.

¹¹⁶ Schröder, in von der Groeben et al. (2015), Artikel 352 AEUV para. 48.

¹¹⁷ ECJ, Case C-240/90, *Germany v Commission*, [ECLI:EU:C:1992:408](#), para. 37.

¹¹⁸ Böttner/Grinc (2018), p. 25 f.

¹¹⁹ See, inter alia, Winkler, in Grabitz et al., Artikel 352 AEUV para. 110 ff. (63rd supplement, 2017); Kellerbauer/Klamert, in Kellerbauer et al. (2019), Article 352 TFEU para. 25.

¹²⁰ Kellerbauer/Klamert, in Kellerbauer et al. (2019), Article 352 TFEU para. 22.

¹²¹ [Proposal for a Council Regulation on the establishment of the European Monetary Fund](#), COM(2017) 827 final of 6.12.2017. See on this [Manger-Nestler/Böttner](#) (2019).

Council decides by qualified majority. It has adopted a decision on the basis of the preceding provision.¹²²

1.4. Multitude of Legal Bases

Policy projects can cover narrow fields and tackle individual issues so that the legal act may be based solely on one legal basis. In accordance with Article 296(2) TFEU, “[l]egal acts shall state the reasons on which they are based”. As the Court of Justice has repeatedly stated, this includes the obligation to indicate the legal basis of a measure.¹²³ Failure to refer to a precise provision may constitute an infringement of an essential procedural requirement unless the legal basis for the measure may be determined from other parts of the measure.¹²⁴ An indication of the legal basis is essential in the light of the principle of conferral of powers enshrined in Article 5(2) TEU, according to which the EU must act “within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out in therein” with respect to both the internal action and the international action of the EU.¹²⁵ The choice of the legal basis for a measure is not at an institution's discretion. Instead, it must be based on objective factors, amenable to judicial review, as to the aim and content of the measure.¹²⁶ Therefore, the choice of an incorrect legal basis may invalidate the measure, especially if the appropriate legal basis lays down a procedure for adopting acts that is different from that which has in fact been followed and if this impinges upon the extent of the powers of the institutions laid down by the Treaties.¹²⁷

In complex matters, policy projects can be more comprehensive and touch upon different areas in the Treaties, which may lead to the need to have several legal bases for the same legal act. However, the Court of Justice has decided that the institutions cannot simply base the measure on a multitude of legal bases. Instead, if an examination of the measure reveals “that it pursues a twofold purpose or that it comprises two or more components and if one of these is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the act must be based on a single legal basis.” Only in exceptional cases, if it is established that the act simultaneously pursues a number of

¹²² [Council Decision 2003/76/EC of 1 February 2003](#), OJ L 29, 5.2.2003, p. 22.

¹²³ ECJ, Case C-325/91, *France v Commission*, [ECLI:EU:C:1993:245](#), para. 26; Case C-370/07, *Commission v Council*, [ECLI:EU:C:2009:590](#), para. 38; Case C-687/15, *Commission v Council (WRC-15)*, [ECLI:EU:C:2017:803](#), para. 52; Case C-600/14, *Germany v Council*, [ECLI:EU:C:2017:935](#), para. 82; cf. also Case 203/86, *Spain v Council*, [ECLI:EU:C:1988:420](#), para. 36-38.

¹²⁴ ECJ, Case 45/86, *Commission v Council*, [ECLI:EU:C:1987:163](#), para. 9; Case C-687/15, *Commission v Council (WRC-15)*, [ECLI:EU:C:2017:803](#), para. 55; Case C-600/14, *Germany v Council*, [ECLI:EU:C:2017:935](#), para. 84.

¹²⁵ See also ECJ, Case C-600/14, *Germany v Council*, [ECLI:EU:C:2017:935](#), para. 80.

¹²⁶ ECJ, Case 45/86, *Commission v Council*, [ECLI:EU:C:1987:163](#), para. 11; Case C-300/89, *Commission v Council*, [ECLI:EU:C:1991:244](#), para. 10; Case C-166/07, *Parliament v Council*, [ECLI:EU:C:2009:499](#), para. 42; Case C-130/10, *Parliament v Council*, [ECLI:EU:C:2012:472](#), para. 42; Case C-263/14, *Parliament v Council*, [ECLI:EU:C:2016:435](#), para. 43; Vedder, in Vedder/Heintschel von Heinegg (2018), Artikel 296 AEUV para. 10; Loewenthal, in Kellerbauer et al. (2019), Article 289 TFEU para. 12.

¹²⁷ ECJ, Case C-263/14, *Parliament v Council*, [ECLI:EU:C:2016:435](#), para. 42; Case C-687/15, *Commission v Council (WRC-15)*, [ECLI:EU:C:2017:803](#), para. 50; Case C-600/14, *Germany v Council*, [ECLI:EU:C:2017:935](#), para. 81; see also Loewenthal, in Kellerbauer et al. (2019), Article 13 TEU para. 13.

objectives, or has several components, which are inextricably linked without one being incidental to the other, such that various provisions of the Treaty are applicable, such a measure will have to be founded on the various legal bases corresponding to those components.¹²⁸ Problems may arise if the different legal bases provide for different law-making procedures, including different levels of participation of the institutions. In this context, the Court has stated that recourse to a dual legal basis is not possible where the procedures laid down for each legal basis are incompatible with each other¹²⁹ or where the involvement of an institution in the legislative process would be jeopardized.¹³⁰ An incompatibility of the legal bases may result from a difference in the voting rules within the Council (unanimity or qualified majority)¹³¹ or the involvement of Parliament (co-decision, consent or consultation).

However, in some cases, the Court of Justice has allowed for the combination of legal bases with different procedures, especially when this has led to an enhanced role of Parliament. In one case, for example, the Court of Justice ruled that the inclusion of Article 352 TFEU (ex-Article 308 TEC) in the legal bases – besides Articles 75 and 215 TFEU (ex-Articles 60 and 301 TEC, respectively) – was justified. This “enabled the European Parliament to take part in the decision-making process [– –] whereas, under Articles 60 EC and 301 EC, no role is provided for that institution”.¹³² In another case, the Court ruled that a Council regulation concerning Community financial contributions to the International Fund for Ireland¹³³ was wrongfully based on Article 352 TFEU (ex-Article 308 TEC) alone, but instead should have been based equally on Article 175 TFEU (ex-Article 152 TEC).¹³⁴ In that case, the two legislative procedures should have been combined, i.e. the co-decision procedure (ex-Article 152 TEC) combined with unanimity voting in the Council (ex-Article 352 TEC).¹³⁵

Other examples stem from the area of competition policy. Article 103 TFEU provides for the adoption of acts in a non-legislative procedure by the Council after consulting Parliament. Among others, the Damages Directive¹³⁶ and the ECN+ Directive¹³⁷ have been adopted on the joint legal basis of Articles

¹²⁸ ECJ, Case C-178/03, *Commission v Parliament and Council*, [ECLI:EU:C:2006:4](#), para. 42 f.; Case C-658/11, *Parliament v Council*, [ECLI:EU:C:2014:2025](#), para. 43; Case C-263/14, *Parliament v Council*, [ECLI:EU:C:2016:435](#), para. 44.

¹²⁹ ECJ, Case C-155/07, *Parliament v Council*, [ECLI:EU:C:2008:605](#), para. 37; Opinion 1/15, *EU-Canada PNR Agreement*, [ECLI:EU:C:2017:592](#), para. 78; Case C-178/03, *Commission v Parliament and Council*, [ECLI:EU:C:2006:4](#), para. 57.

¹³⁰ ECJ, Case C-300/89, *Commission v Council*, [ECLI:EU:C:1991:244](#), para. 20; Case C-178/03, *Commission v Parliament and Council*, [ECLI:EU:C:2006:4](#), para. 57.

¹³¹ ECJ, Case C-300/89, *Commission v Council*, [ECLI:EU:C:1991:244](#), para. 17–21; Case C-338/01, *Commission v Council*, [ECLI:EU:C:2004:253](#), para. 57 f.; Opinion 1/15, *EU-Canada PNR Agreement*, [ECLI:EU:C:2017:592](#), para. 109; see also Case C-178/03, *Commission v Parliament and Council*, [ECLI:EU:C:2006:4](#), para. 58.

¹³² ECJ, Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakat*, [ECLI:EU:C:2008:461](#), para. 235.

¹³³ [Council Regulation \(EC\) No 1968/2006 of 21 December 2006 concerning Community financial contributions to the International Fund for Ireland \(2007 to 2010\)](#), OJ L 409, 30.12.2006, p. 86.

¹³⁴ ECJ, Case C-166/07, *Parliament v Council*, [ECLI:EU:C:2009:499](#), para. 40 ff.; cf. also Case 242/87, *Commission v Council*, [ECLI:EU:C:1989:217](#), para. 37.

¹³⁵ ECJ, Case C-166/07, *Parliament v Council*, [ECLI:EU:C:2009:499](#), para. 69.

¹³⁶ [Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union](#), OJ L 349, 5.12.2014, p. 1.

¹³⁷ [Directive \(EU\) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market](#), OJ L 11, 14.1.2019, p. 3.

103 and 114 TFEU, the latter providing for the adoption of acts in accordance with the ordinary legislative procedure. In combination of these two legal bases, the acts have been adopted by Parliament and the Council as co-legislators, thus increasing the level of participation foreseen for Parliament in Article 103 TFEU.¹³⁸

¹³⁸ Hinds, in Blanke/Böttner (2022), Article 103 TFEU para. 3; see also Otto (2022), p. 194 ff.

2. COOPERATION BETWEEN THE INSTITUTIONS

Article 13 TEU

1. The Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions.

The Union's institutions shall be:

- the European Parliament,
- the European Council,
- the Council,
- the European Commission (hereinafter referred to as 'the Commission'),
- the Court of Justice of the European Union,
- the European Central Bank,
- the Court of Auditors.

2. Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation.

3. The provisions relating to the European Central Bank and the Court of Auditors and detailed provisions on the other institutions are set out in the Treaty on the Functioning of the European Union.

4. The European Parliament, the Council and the Commission shall be assisted by an Economic and Social Committee and a Committee of the Regions acting in an advisory capacity.

The central provision on the EU's institutional framework is Article 13 TEU. In fact, Article 13(1) provides that the Union shall have an institutional framework which shall aim to promote its values (Article 2 TEU), advance its objectives (Article 3 TEU), serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions (see also Article 7 TFEU). The EU's institutional framework consists of Parliament, the European Council, the Council, the Commission, the Court of Justice, the European Central Bank, and the Court of Auditors as 'Union institutions', as well as a number of bodies, offices and agencies. The institutions shall exercise the competences conferred on the Union in accordance with Article 5(2) TEU and Articles 2 ff. TFEU.

The relationships between the institutions are governed by **two principles, the principle of institutional balance and the principle of mutual sincere cooperation**, both enshrined in Article 13(2) TEU, according to which "[e]ach institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them" and "[t]he institutions shall practice mutual sincere cooperation". These principles guide the institutions' decision-making procedures and function in an interactive manner: mutual sincere cooperation contributes to maintaining institutional balance and both principles aim to an allocation

of responsibilities that can create a 'network of responsibility' (*Verantwortungsverbund*).¹³⁹ The institutions are together responsible for the legal act, the adoption of which is a result of loyal cooperation. This shared ownership is a form of separation of powers and at the same time a system of mutual checks and balances.

2.1. Institutional Balance

The principle of institutional balance enshrined in Article 13(2) TEU is a fundamental rule of EU constitutional law.¹⁴⁰ In providing that the institutions shall each act **within the limits of the powers conferred** on them in the Treaties, and **in conformity with the procedures, conditions and objectives** set out therein, this provision contains two separate but equally important rules.

First of all, the EU must be competent at all to adopt an act. This connects the EU's institutional framework to the principle of conferral enshrined in Article 5(2), which governs the relationship between the EU and the Member States. According to this principle, the EU shall act only within the limits of the competences conferred upon it by the Member States. In other words, if there is no competence for the EU, there is no need to discuss the distribution of competences among the institutions.

Secondly, therefore, Article 13(2) TEU provides, in a horizontal relationship, that the institutions at the EU level¹⁴¹ shall act only within the limits accorded to them by the Treaties. As the Court of Justice puts it, "the Treaties set up a system for distributing powers among the different Community institutions, assigning to each institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community".¹⁴² This means, on the one hand, that the institutions must respect the powers and competences of the other institutions as well as their participatory rights in the procedures provided for in the Treaties. Observance of the institutional balance means that each of the institutions must **exercise its powers with due regard for the powers of the other institutions**. It also requires that it should be possible to penalise any breach of that rule which may occur.¹⁴³ However, **the EU courts may not alter Union acts the adoption of which is entrusted to other institutions**.¹⁴⁴ On the other hand, it means for **each institution** that it **must not divest itself of its own competences unless the Treaties expressly provide for this option**, e.g. by means of delegation as foreseen by Articles 290 and 291 TFEU.¹⁴⁵ At the same time, the respective

¹³⁹ Krajewski/Rösslein, in Grabitz et al., Artikel 289 AEUV para. 24 (62nd supplement, 2017).

¹⁴⁰ Cf. Streinz, in Streinz (2018), Artikel 13 EUV para 23; Nettesheim, in Grabitz et al., Artikel 13 EUV para. 30 (55th supplement, 2015).

¹⁴¹ While formally addressed only to the "institutions" in the sense of paragraph 1 of Article 13 TEU, the institutional balance can be affected also by other bodies; cf. Case C-928/19 P, *EPSU v Commission*, [ECLI:EU:C:2021:656](#), para. 75 (with regard to the division of competences between the Commission on the one hand and management and labour on the other).

¹⁴² ECJ, Case C-316/91, *Parliament v Council*, [ECLI:EU:C:1994:76](#), para. 11.

¹⁴³ ECJ, Case C-70/88, *Parliament v Council*, [ECLI:EU:C:1990:217](#), para. 22.

¹⁴⁴ Cf. GC, Case T-718/16, *Mad Dogg Athletics v EUIPO*, [ECLI:EU:T:2018:758](#), para. 49; De Witte (2018), p. 145 ff.

¹⁴⁵ Cf. Nettesheim, in Grabitz et al., Artikel 13 EUV para. 62 (55th supplement, 2015).

powers of the institutions cannot be altered by political decision.¹⁴⁶ The institutional structure created by the treaty-makers is not at the free disposal of the EU institutions and can only be formally changed by means of a special procedure (Article 48 TEU).¹⁴⁷

The institutional framework and the competences attributed to each institution create a separation of powers and a system of checks and balances that is comparable to systems established in the States.¹⁴⁸ In the context of the EU as a multilevel governance system, the division of powers is also a division of functions that is likewise intended to achieve a balance between the interests of the Member States and the EU's interest.¹⁴⁹

It must be stressed, however, that **the principle of institutional balance enshrined in Article 13 TEU is not intended as an ideal of a just, right or effective institutional order** that must be realised by adjusting the institutional and procedural set-up of the EU.¹⁵⁰ Instead, it is a **characterisation of the status quo as designed by the treaty-makers**, which is not to say that the current system could not be altered in a treaty amendment procedure.¹⁵¹

The Court of Justice has ruled on this principle on several occasions. As early as in 1958, in the infamous *Meroni* case, the Court has decided that the delegation of discretionary powers from the High Authority (today the Commission) to bodies other than those which the Treaty had established would render the institutional balance ineffective.¹⁵²

In *Roquette Frères*, the Court has decided that the **consultation of Parliament provided for in the Treaties constitutes an essential formality** (i.e. an essential procedural requirement in the sense of Article 263(2) TFEU), disregard of which means that the measure concerned is void.¹⁵³ This is because participation by Parliament in whatever form foreseen by the Treaties **reflects a fundamental**

¹⁴⁶ See, in this regard, ECJ, Joined Cases C-106/19 and C-232/19, *Italy v Council and Parliament (relocation of EMA)*, [ECLI:EU:C:2022:568](#), para. 144 ff., where the Court of Justice held that Parliament (as well as the Council) is not bound in the ordinary legislative procedure by political decisions taken by the European Council as representation of the Heads of State or Government. See in this context also Fabbrini (2016), who argues that intergovernmental treaties in the sphere of EU competences, may upset the institutional balance with regard to the powers that Parliament has (or would have) under the EU Treaties.

¹⁴⁷ Nettesheim, in Grabitz et al., Artikel 13 EUV para. 30 (55th supplement, 2015).

¹⁴⁸ On the relationship between 'institutional balance', 'separation of powers' and 'checks and balances' see the discussion in Chamon (2015), p. 372 f.

¹⁴⁹ Calliess, in Calliess/Ruffert (2022), Artikel 13 EUV para. 9; Streinz, in Streinz (2018), Artikel 13 EUV para 22. Cf. also Chamon (2015), p. 373 f.

¹⁵⁰ See in this regard: [Resolution on the position of the European Parliament in the context of actions for annulment brought before the Court of Justice under Article 173 of the EEC Treaty](#), OJ C 283, 10.11.1986, p. 85, No. 3 (standing before the ECJ) and following this ECJ, Case C-70/88, *Parliament v Council*, [ECLI:EU:C:1990:217](#), para. 26 f.; [European Commission, The institutional system of the Community. Restoring the balance](#), COM(81) 581 final, Bull. EC Suppl. 3/82, para. 6 ff. (restoring institutional balance through a strengthening of Parliament).

¹⁵¹ Nettesheim, in Grabitz et al., Artikel 13 EUV para. 30 (55th supplement, 2015).

¹⁵² ECJ, Case 9/56, *Meroni I*, [ECLI:EU:C:1958:7](#), and Case 10/56, *Meroni II*, [ECLI:EU:C:1958:8](#). This issue has been subject to Court decisions also in recent time: see Case C-270/12, *United Kingdom v Parliament and Council (ESMA short selling)*, [ECLI:EU:C:2014:18](#).

¹⁵³ ECJ, Case 138/79, *Roquette Frères*, [ECLI:EU:C:1980:249](#), para. 33. See further Case C-417/93, *Parliament v Council*, [ECLI:EU:C:1995:127](#), para. 9; Case C-21/94, *Parliament v Council*, [ECLI:EU:C:1995:220](#), para. 17; Joined Cases C-643/15 and C-647/15, *Slovakia and Hungary v Council*, [ECLI:EU:C:2017:631](#), para. 160.

democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly.¹⁵⁴ **This includes the duty to reconsult Parliament** whenever the text finally adopted, viewed as a whole, departs substantially from the text on which Parliament has already been consulted, except where the amendments essentially correspond to the wish of Parliament itself.¹⁵⁵ The observance of Parliament's participatory rights in the EU's law-making procedure are not at the disposition of the other bodies involved in this procedure¹⁵⁶ and the Court of Justice is called upon to ensure compliance with this principle.¹⁵⁷ If, however, Parliament does not **act in due course** if it has been made aware of an urgent situation, the obligation to consult Parliament is complied with nonetheless.¹⁵⁸

The Court also had to rule on the issue of legislative initiative and, more precisely, on the right to withdraw a proposal from the legislative process. As pointed out above, the Commission has the quasi-monopoly to initiate a legislative procedure by submitting a proposal (Article 17(2) TEU). Article 293 TFEU supplements this right of initiative by stating, first, that where the Council acts on a proposal from the Commission, it may amend that proposal only by acting unanimously. Council is not limited to rubber-stamp Commission proposals.¹⁵⁹ Secondly, as long as the Council has not acted, the Commission may alter its proposal at any time during the procedure. Within the institutional framework, the Commission is not limited to determine the subject-matter, objective and content of a proposal and then submit it to the law-making process. Instead, it can alter or even withdraw the proposal if the legislative institutions distort it. However, the power of withdrawal cannot confer upon the Commission a right of veto in the conduct of the legislative process, a right which would be contrary to the principle of institutional balance. The Commission must at least justify the withdrawal.¹⁶⁰

Institutional balance does not only apply in the internal policies, but also externally. While the EU's external policy (not to mention the common foreign and security policy) is different from internal action, there is no reason to conclude that rules on external action and rule-making are exempt from the general distribution of power provided for in the Treaties. It is for this reason that the Court of Justice holds that the rules on identifying the correct legal basis for an act – since this determines the procedures to be followed in adopting that measure¹⁶¹ – apply not only to the procedures laid down for adopting an internal act but also to those applicable to the conclusion of international agreements. Article 218(6) TFEU establishes symmetry between the procedure for adopting EU measures internally

¹⁵⁴ ECJ, Case 138/79, *Roquette Frères*, [ECLI:EU:C:1980:249](#), para. 33; Case C-21/94, *Parliament v Council*, [ECLI:EU:C:1995:220](#), para. 17; Case C-390/15, *RPO*, [ECLI:EU:C:2017:174](#), para. 25; Joined Cases C-643/15 and C-647/15, *Slovakia and Hungary v Council*, [ECLI:EU:C:2017:631](#), para. 160.

¹⁵⁵ See, inter alia, ECJ, Joined Cases C-13/92 to C-16/92, *Driessen en Zonen and Others v Minister van Verkeer en Waterstaat*, [ECLI:EU:C:1993:828](#), para. 23; Case C-388/92, *Parliament v Council*, [ECLI:EU:C:1994:213](#), para. 10; Case C-280/93, *Germany v Council*, [ECLI:EU:C:1994:367](#), para. 38; Case C-21/94, *Parliament v Council*, [ECLI:EU:C:1995:220](#), para. 17; Case C-390/15, *RPO*, [ECLI:EU:C:2017:174](#), para. 26; Joined Cases C-643/15 and C-647/15, *Slovakia and Hungary v Council*, [ECLI:EU:C:2017:631](#), para. 161.

¹⁵⁶ Nettesheim, in Grabitz et al., Artikel 13 EUV para. 32 (55th supplement, 2015).

¹⁵⁷ ECJ, Case C-70/88, *Parliament v Council*, [ECLI:EU:C:1990:217](#), para. 26.

¹⁵⁸ See ECJ, Joined Cases C-643/15 and C-647/15, *Slovakia and Hungary v Council*, [ECLI:EU:C:2017:631](#), para. 165 ff.

¹⁵⁹ ECJ, Case C-40/10, *Commission v Council*, [ECLI:EU:C:2010:713](#), para. 51.

¹⁶⁰ See on this issue ECJ, Case C-409/13, *Council v Commission*, [ECLI:EU:C:2015:217](#), para. 63 ff.

¹⁶¹ See ECJ, Case C-130/10, *Parliament v Council*, [ECLI:EU:C:2012:472](#), para. 80.

and the procedure for adopting international agreements in order to guarantee that the Parliament and the Council enjoy the same powers in relation to a given field, in compliance with the institutional balance provided for in the Treaties.¹⁶² As regards the relationship between the Council, which authorises negotiations and concludes the agreement, and the Commission, which typically conducts the negotiations, the Court of Justice has ruled that the Council may issue negotiating directives in accordance with Article 218(2) and (4) TFEU. However, it would infringe the principle of institutional balance if the Council (or the special committee foreseen by Article 218(4) TFEU) imposed detailed and binding negotiating positions on the negotiator.¹⁶³

The principle of institutional balance seeks to maintain the balance of powers established by primary law. It does not, however, prohibit amendments and specifications through internal rules of the institutions, through agreements among them or even through procedures provided for in secondary legislation. All these specifications must not lead to a shift in the overall institutional architecture. More specifically, establishing procedural arrangements in secondary law – whether for the purpose of strengthening or easing the detailed rules for the adoption of an act – may amount to according the institution(s) concerned a legislative power exceeding the one provided for by the Treaty.¹⁶⁴ Furthermore, the institutions may enter into more or less formalised arrangements or even conclude binding interinstitutional agreements in the sense of Article 295 TFEU. However, the assumption that an agreement is legally binding must be treated with caution if it is not sufficiently clear that the institutions concerned intended to accept legal sanctions in the event of subsequent deviations from the agreement.¹⁶⁵ On the other hand, in no instance can institutional practice or custom alter the rules of the Treaties that the institutions are obliged to respect.¹⁶⁶

2.2. Mutual Sincere Cooperation

The institutional framework, governed by the principle of institutional balance, is not a mere conglomerate of institutions standing side by side in isolation. Instead, the institutions, bodies, offices and agencies of the EU are required to work together in various instances and procedures. This takes place under the duty to cooperate loyally, or, as enshrined in Article 13(2) TEU **the duty to “practice mutual sincere cooperation”**. The Court of Justice has underlined that this duty must not change the powers conferred by the Treaties on each institution.¹⁶⁷ The duty of sincere cooperation must be understood in the context of Article 13 TEU as a whole: it is not a stand-alone obligation but must be

¹⁶² ECJ, Case C-658/11, *Parliament v Council*, [ECLI:EU:C:2014:2025](#), para. 56 f.; C-244/17, *Commission v Council (Agreement with Kazakhstan)*, [ECLI:EU:C:2018:662](#), para. 22, 30; Case C-275/20, *Commission v Council (Agreement with the Republic of Korea)*, [ECLI:EU:C:2022:142](#), para. 47.

¹⁶³ ECJ, Case C-425/13, *Commission v Council*, [ECLI:EU:C:2015:483](#), para. 85 ff.

¹⁶⁴ ECJ, Case C-133/06, *Parliament v Council*, [ECLI:EU:C:2008:257](#), para. 56 f.

¹⁶⁵ Nettesheim, in Grabitz et al., Artikel 13 EUV para. 76 (55th supplement, 2015).

¹⁶⁶ ECJ, Case C-687/15, *Commission v Council (WRC-15)*, [ECLI:EU:C:2017:803](#), para. 42.

¹⁶⁷ ECJ, Case C-48/14, *Parliament v Council*, [ECLI:EU:C:2015:91](#), para. 57 f.; C-73/14, *Council v Commission*, [ECLI:EU:C:2015:663](#), para. 85.

seen in relation to the institutional framework and the purposes that the institutional framework – and thus the institutions – are to fulfil: promote the EU values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of the EU's policies and actions. While the duty to cooperate loyally is relevant especially for the 'institutional triangle' of Parliament, Council and Commission,¹⁶⁸ the principle enshrined in Article 13(2) TEU applies to all institutions, offices and agencies of the European Union alike.

As the Court of Justice has repeatedly held, the same mutual duties of sincere cooperation that govern the relations between Member States and the EU institutions as stipulated by Article 4(3) TEU apply to the institutions.¹⁶⁹ Seen in the light of the latter provision, the institutions "shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties" and "shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives". The principle of mutual sincere cooperation comprises, first of all, a positive duty (duty to act), whereby a distinction is made between a duty to fulfil obligations on the one hand and a duty to support on the other. Furthermore, the principle of mutual sincere cooperation also includes a negative component (duty to refrain from specific action).¹⁷⁰ However, loyalty does not in itself create any obligations to act or to refrain from action, but it strengthens existing duties and relationships. Thus, the duty of mutual sincere cooperation can have ramifications for the relationships between the institutions in the EU's law-making procedures.

The duty of mutual sincere cooperation affects already the initial phase of a law-making procedure, i.e. the initiative for a legal act. As mentioned above, the right of initiative for legislative acts rest with the Commission, save for some exceptions. Parliament and the Council as the institutions adopting the legislative act generally do not dispose of this right. They can only request the Commission to present a legislative draft (see Article 225 TFEU for Parliament and Article 241 TFEU for the Council). If the Commission does not submit a proposal, it must inform the requesting institution of the reasons. Since Lisbon, this is expressly provided for in the Treaties (sentence 2 of Article 225 and Article 241 TFEU, respectively). However, in the light of the duty of mutual sincere cooperation, the Commission is not free to decide whether to submit a proposal or not. Instead, the Commission must present a proposal unless there are good arguments against it.¹⁷¹ In conjunction with the general duty to give reasons in Article 296(2) TFEU, the justification must be comprehensive. In fact, the duty to state reasons is a special manifestation of the principle of loyal cooperation.¹⁷² On the other hand, however, the Commission cannot enter into an agreement with Parliament and/or the Council in which it would bind itself to presenting a proposal, as this would alter the EU's institutional balance.¹⁷³

¹⁶⁸ Delcourt (2006), p. 472 f.

¹⁶⁹ Cf. ECJ, Case 204/86, *Greece v Council*, [ECLI:EU:C:1988:450](#), para. 16; Case C-65/93, *Parliament v Council*, [ECLI:EU:C:1995:91](#), para. 23. Cf. also Obwexer, in von der Groeben et al. (2015), Artikel 4 EUV para. 146.

¹⁷⁰ Kahl, in Calliess/Ruffert (2022), Artikel 4 Abs. 3 EUV para. 102; Streinz, in Streinz (2018), Artikel 4 EUV para. 31 ff., 65 ff., 68 ff.; cf. also ECJ, Case C-246/07, *Commission v Sweden*, [ECLI:EU:C:2010:203](#), para. 74.

¹⁷¹ Cf. Kluth, in Calliess/Ruffert (2022), Artikel 225 AEUV para. 4;

¹⁷² Hölscheidt, in Grabitz et al., Artikel 225 AEUV para. 13 (71st supplement, 2020).

¹⁷³ Haag, in von der Groeben et al. (2015), Artikel 225 AEUV para. 3.

Once a proposal has been presented, the law-making institutions owe it to the actor presenting the draft to actually consider the draft for adoption.¹⁷⁴ The decision-making bodies have a wide margin of discretion regarding the treatment of the proposal.¹⁷⁵ However, it is hardly possible to derive from this a specific obligation regarding the period within which discussions must take place or within which the Council and/or Parliament must reach a decision on the proposal.¹⁷⁶ Nevertheless, it violates the basic principle of loyal cooperation if the Council and Parliament only start deliberations on a Commission proposal after several years.¹⁷⁷

Within the legislative procedure, the Commission, that almost always presents the draft legislative act, remains a vital player in the adoption of that act. On the basis of Article 293(2) TFEU, the Commission can alter or even withdraw its proposal if it runs the risk of being distorted by the legislator. However, in the light of mutual sincere cooperation, the Commission may withdraw a proposal only after having due regard to the concerns of Parliament and/or the Council underlying their intention to amend that proposal.¹⁷⁸

Another relevant aspect concerns the consent procedures both as legislative and non-legislative procedures, irrespective of the legal act's adoption by Parliament with the participation of the Council or vice versa. Consent, *prima facie*, requires only that the consenting institution receives the draft as negotiated by the adopting institution and can give (or deny) its consent on that final draft. However, for the sake of consistency, effectiveness and continuity of the EU's policies and actions that the institutional framework is to provide, the **duty of mutual sincere cooperation between the institutions demands that the institutions keep each other informed and consult each other** so that consent may be given in the end of the procedure.¹⁷⁹ **Consent is thus not only a 'yes or no' question** at the end of the procedure, but should be something the institutions aspire to achieve.

In special legislative procedures or other law-making procedures with asymmetrical participation, there is one institution adopting the legal act and other institutions or bodies participating through consultation or consent. Institutional balance requires that the participating bodies can exercise their powers as provided for in the Treaties, which means that their opinions or consent relate to the draft act in a very specific form. In combination with the duty of mutual sincere cooperation, the adopting institution is required to inform the participating institutions if major amendments have been made to the draft after they have given their opinion or consent. This means that the participating institutions or bodies must be reconsulted on each occasion when the text finally adopted substantially departs from the original draft, unless the amendments essentially correspond to the wishes formulated by

¹⁷⁴ Cf. in this respect, von Buttlar (2003), p. 62 ff.

¹⁷⁵ Krajewski/Rösslein, in Grabitz et al., Artikel 289 AEUV para. 31 (62nd supplement, 2017).

¹⁷⁶ Schorkopf (2000), p. 377.

¹⁷⁷ Krajewski/Rösslein, in Grabitz et al., Artikel 289 AEUV para. 31 (62nd supplement, 2017); with a similar view von Buttlar (2003), p. 67.

¹⁷⁸ ECJ, Case C-409/13, *Council v Commission*, [ECLI:EU:C:2015:217](#), para. 83.

¹⁷⁹ Cf. in this respect, Waldherr, in Mayer/Stöger, Artikel 289 AEUV para. 11 (168th supplement, 2014); with a dissenting view (only consent), see Germelmann, in Streinz (2018), Artikel 289 AEUV para. 9.

that institution or body.¹⁸⁰ Nonetheless, if another body is to be consulted, the institution eventually adopting the legal act is not barred from starting to examine the proposal before the other body has delivered its opinion.¹⁸¹ From the mere wording of the Treaties, **conducting the consultation is the only legal obligation**.¹⁸² It is **not obliged to take the opinion into account**. **In the light of mutual sincere cooperation**, however, the institution adoption the act must deal with the opinion and should **justify why it does not follow** the opinion. This requires that the final decision must not be taken before the institutions and bodies being consulted have delivered their opinion.

On the other hand, any institution that has participatory rights must exercise these rights with respect to the other institutions and the law-making procedures. If an institution or body is called upon to deliver an opinion on a draft, the adopting institution(s) may act only after the opinions have been delivered. On the other hand, the consulted bodies must ensure that they deliver their positions without undue delay.¹⁸³

2.3. Interinstitutional Agreements

The institutions may adopt provisions in their rules of procedure that shape and govern their conduct in law-making procedures in order to streamline cooperation with other institutions. They may also adopt joint declarations or enter into agreements in order to specify certain mutual obligations. These agreements may be of a more or less political nature and/or legal bindingness. As Article 295 TFEU now provides, the institutions “may [– –] conclude interinstitutional agreements which may be of a binding nature”, as long as they comply with the Treaties, notably the principle of institutional balance. A change in the powers and responsibilities of the institutions by way of an interinstitutional agreement is therefore inadmissible.¹⁸⁴ The binding nature of any agreement must be evaluated in line with substantial, not merely formal aspects.¹⁸⁵ As the Court of Justice has held, agreements between the institutions must be seen in the light of the principle of mutual sincere cooperation¹⁸⁶ as they can create a sort of ‘legitimate confidence’ worthy of protection.¹⁸⁷

¹⁸⁰ See, inter alia, ECJ, Case C-65/90, *Parliament v Council*, [ECLI:EU:C:1992:325](#), para. 16; Joined Cases C-13/92 to C-16/92, *Driessen en Zonen and Others v Minister van Verkeer en Waterstaat*, [ECLI:EU:C:1993:828](#), para. 23; Case C-388/92, *Parliament v Council*, [ECLI:EU:C:1994:213](#), para. 10; Case C-280/93, *Germany v Council*, [ECLI:EU:C:1994:367](#), para. 38; Case C-21/94, *Parliament v Council*, [ECLI:EU:C:1995:220](#), para. 17; Case C-390/15, *RPO*, [ECLI:EU:C:2017:174](#), para. 26; Joined Cases C-643/15 and C-647/15, *Slovakia and Hungary v Council*, [ECLI:EU:C:2017:631](#), para. 161.

¹⁸¹ ECJ, Case C-417/93, *Parliament v Council*, [ECLI:EU:C:1995:127](#), para. 10.

¹⁸² Cf. Loewenthal, in Kellerbauer et al. (2019), Article 289 TFEU para. 9.

¹⁸³ Cf. in this respect, ECJ, Case C-65/93, *Parliament v Council*, [ECLI:EU:C:1995:91](#), para. 27 f.

¹⁸⁴ Krajewski/Rösslein, in Grabitz et al., Artikel 295 AEUV para. 17 (62nd supplement, 2017).

¹⁸⁵ See, in this respect, ECJ, Case 60/81, *IBM v Commission*, [ECLI:EU:C:1981:264](#), para. 9; Calliess, in Calliess/Ruffert (2022), Artikel 13 EUV para. 27.

¹⁸⁶ ECJ, Case 204/86, *Greece v Council*, [ECLI:EU:C:1988:450](#), para. 16; cf. also Case C-25/94, *Commission v Council*, [ECLI:EU:C:1996:114](#), para. 49.

¹⁸⁷ ECJ, Case 81/72, *Commission v Council*, [ECLI:EU:C:1973:60](#), para. 13.

In practice, the institutions have entered into a number of agreements, some of which are relevant to the legislative process. The first is the **2010 Framework Agreement on relations between Parliament and the Commission**.¹⁸⁸ In this agreement, the Commission commits itself to guarantee “equal treatment for Parliament and the Council, especially as regards access to meetings and the provision of contributions or other information, in particular on legislative and budgetary matters” (point 9). Regarding **Parliament’s indirect ‘right of initiative’** (Article 225 TFEU), the Commission commits itself “to report on the concrete follow-up[---] within 3 months”. The Commission “shall come forward with a legislative proposal at the latest after 1 year or shall include the proposal in its next year’s Work Programme”. If the Commission does not submit a proposal, it shall give Parliament “detailed explanations of the reasons” (point 16, which appears to be more thorough than the duty to “inform the European Parliament of the reasons” enshrined in Article 225 TFEU). Concerning law-making, the Commission “undertakes to carefully examine amendments to its legislative proposals adopted by Parliament, with a view to taking them into account in any amended proposal” (point 37). The same commitment applies for Parliament’s second-reading amendments in the ordinary legislative procedure (point 38). Regarding special legislative procedures in which Parliament is consulted (point 40), the Commission shall act as a kind of trustee of Parliament’s views and interests vis-à-vis the Council. To this end, the Commission shall make sure that there is sufficient time for the Council to consider Parliament’s opinion and that Parliament is reconsulted in case of major amendments to the original draft. Finally, the Commission “undertakes, if appropriate, to withdraw a legislative proposal that Parliament has rejected” or otherwise explain the reasons in a statement before Parliament if the draft is maintained. All in all, the framework agreement strengthens Parliament’s leeway in the legislative process while not distorting the institutional balance.

Another important document is the tripartite **Interinstitutional Agreement on Better Law-Making of 2016**.¹⁸⁹ As a first aspect, the agreement deals with multiannual and annual legislative planning. The institutions will exchange views on a new Commission’s legislative programming for the term of office as well as the annual Commission Work Programme in order to facilitate long-term planning for the legislator. The Commission will duly take account of the views expressed by Parliament and the Council at each stage of the dialogue, including their requests for initiatives (point 6). This allows the institutions and their competent committees to plan and to prepare for upcoming initiatives, which facilitates formulating positions on the relevant dossiers. At the same time, the legislators can voice their opinion on upcoming proposals at an early stage, enabling the Commission to take account of their view already when drafting the acts. As regards the withdrawal of legislative proposals, the Commission is committed to provide the reasons for such withdrawal, and, if applicable, an indication of the intended subsequent steps. The Commission also intends to take due account of, and respond to, the co-legislators’ positions (point 9). The Commission reiterates its intention to respond to legislative requests made by Parliament under Article 225 TFEU and grants the same treatment to Council requests under Article 241 TFEU (point 10). As regards the legislative process, the institutions

¹⁸⁸ [Framework Agreement of 20 October 2010 on relations between the European Parliament and the European Commission](#), OJ L 304, 20.11.2010, p. 47, as amended by [agreement of 7 February 2018](#), OJ L 45, 17.2.2018, p. 46.

¹⁸⁹ [Interinstitutional Agreement between the European Parliament, the Council and the European Commission of 13 April 2016 on Better Law-Making](#), OJ L 123, 12.5.2016, p. 1.

reiterate the equality of Parliament and the Council in the ordinary legislative procedure (point 32).¹⁹⁰ An inconspicuous, but nevertheless very far-reaching obligation is contained in the agreement when it states that **the institutions will keep each other regularly informed throughout the legislative process about their work and seek to entertain mutual exchange of views and information**, including by inviting representatives of the other institutions to informal exchanges of views on a regular basis (points 33 f.). However, in a 2018 resolution Parliament criticised a **lack of improvement in the information flow** from the Council.¹⁹¹ The agreement also contains a section on ex-post evaluation of existing legislation. In this context, the three institutions agree to, where appropriate, establish reporting, monitoring and evaluation requirements in legislation (point 22), including review clauses or the limiting of the application of certain legislation to a fixed period of time (so called ‘sunset clauses’) (point 23). While this agreement does not contain many relevant specifications on the legislative process itself, it provides for some leverage that may be used in cases of special legislative procedures (see below).

As regards the **EU’s budgetary procedures**, the institutions agreed on a **new interinstitutional agreement in 2020**.¹⁹² The agreement’s Annex I on interinstitutional cooperation during the budgetary procedure is particularly relevant for the purpose of the current study. The annual budgetary procedure starts out with a trilogue discussing the possible priorities for next year’s budget and any questions arising from the implementation of the current budget, on the basis of the information provided by the Commission (point 3). Another trilogue shall be convened before the Council’s first reading (point 11). Throughout the procedure and “in the interest of loyal and sound institutional cooperation”, Parliament and the Council entertain regular and active contacts at all levels with a view to reaching an agreement, including timely and constant mutual exchange of relevant information and documents at both formal and informal levels (point 9). This includes trilogues at every level throughout the conciliation procedure (points 18, 22). All in all, the rules contained in this interinstitutional agreement streamline the annual budgetary procedure and facilitate reaching an agreement. The specifications on the duty to cooperate in good faith do not alter the institutional powers.

¹⁹⁰ See in this context also the tripartite [Joint declaration on practical arrangements for the co-decision procedure \(article 251 of the EC Treaty\)](#) of 13 June 2007, OJ C 145, 30.6.2007, p. 5.

¹⁹¹ [European Parliament resolution of 30 May 2018 on the interpretation and implementation of the Interinstitutional Agreement on Better Law-Making \(2016/2018\(INI\)\)](#), OJ C 76, 9.3.2020, p. 86, point 63 f.

¹⁹² [Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission of 16 December 2020 on budgetary discipline, on cooperation in budgetary matters and on sound financial management, as well as on new own resources, including a roadmap towards the introduction of new own resources](#), OJ L 433I, 22.12.2020, p. 28.

3. PRACTICAL EXPERIENCE WITH THE CONSENT PROCEDURE

In the light of the foregoing considerations, the following section will look into some dossiers in particular and will examine the interplay between the institutions. The most important legal acts adopted on the basis of consent procedures or any other special legislative procedure have been mentioned above. The following section will examine in more detail the adoption of the last two MFFs, of the rules for the European elections, of Parliament's right of inquiry, of the Statute of the European Ombudsman as well as of the rules for the composition of Parliament. To this end, the study will review available institutional documents such as EP resolutions, plenary and committee protocols as well as minutes of Council meetings.

3.1. Multiannual Financial Framework

The Treaty of Lisbon brought about a new primary law basis for the multiannual financial planning. Previously, the institutions agreed on the MFF and laid it down in an interinstitutional agreement.¹⁹³ Article 312(2)(1) TFEU now provides for a special legislative procedure through which the Council shall adopt a regulation laying down the MFF. The Council shall act unanimously after obtaining the consent of Parliament, which shall be given by a majority of its component members. In addition, paragraph 5 of that provision stipulates that throughout the procedure leading to the adoption of the financial framework, Parliament, the Council and the Commission shall take any measure necessary to facilitate its adoption, which is a specific expression of the duty to loyal cooperation. This means that Parliament should be involved in the negotiations on the MFF and not only be confronted with the final draft for consent. In fact, Parliament's Committee on Budgets (BUDG Committee) stated in the procedure for the 2007-2013 MFF that "the consent procedure regarding the MFF regulation is based on the assumption of prior negotiation". In the particular case, BUDG criticised that "[t]he Council adopted its proposal [-- --] and asked the European Parliament for consent [-- --] without entering into any negotiations with the European Parliament with a view to agreeing a common position".¹⁹⁴

Since the entry into force of the Lisbon Treaty, the above described multiannual financial planning has taken place twice. For the implementation of the new treaty rules, the Commission presented in 2010 the so called "**Lisbon Package**", containing proposals for a Council Regulation laying down the MFF¹⁹⁵ and for a new Interinstitutional Agreement on cooperation in budgetary matters¹⁹⁶ as well as a proposal to amend the Financial Regulation.¹⁹⁷ Parliament set out its views on the Commission proposal in oral

¹⁹³ See, inter alia, the agreement directly preceding the Lisbon Treaty's entry into force: [Interinstitutional Agreement of 17 May 2006 between the European Parliament, the Council and the Commission on budgetary discipline and sound financial management](#), OJ C 139, 14.6.2006, p. 1.

¹⁹⁴ [Recommendation on the draft Council regulation laying down the multiannual financial framework for the years 2007-2013](#), A7-0253/2011, explanatory statement.

¹⁹⁵ [COM\(2010\)72](#).

¹⁹⁶ [COM\(2010\)73](#).

¹⁹⁷ [COM\(2010\)71](#), to be adopted in accordance with Article 322 TFEU through the ordinary legislative procedure.

questions of 20 May 2010¹⁹⁸ and in its resolution of 22 September 2010,¹⁹⁹ which contained a number of recommendations to the Council, including the call for political negotiations in order to **implement the new competences of the Lisbon Treaty beyond a mere technical implementation**. The Council adopted its position on 21 December 2010, asking for Parliament's consent to its proposal on 18 January 2011 without entering into any negotiations with Parliament with a view to agreeing a common position. Consequently, the BUDG Committee recommended declining consent,²⁰⁰ which the plenary eventually did.²⁰¹

The Commission proposed a new MFF regulation²⁰² and a new interinstitutional agreement.²⁰³ In a resolution of June 2012, Parliament underlined that "it is not prepared to give its consent to the next MFF regulation without political agreement on reform of the own-resources system, putting an end to existing rebates and other correction mechanisms and leading to more transparency, fairness and sustainability". Furthermore, it demanded that "political positions agreed by the European Council be negotiated between Parliament and the Council [-- --] before the Council formally submits its proposals with a view to obtaining Parliament's consent on the MFF regulation", underlining its determination "to make full use [-- --] of its consent [-- --] powers, as enshrined in the Treaty".²⁰⁴ Apparently, collaboration and negotiation between Parliament, the Council and the Commission worked better this time.²⁰⁵ Nonetheless, in its resolution setting out the MFF/IIA negotiation guidelines, Parliament stressed that "any political agreement reached at European Council level constitutes no more than a negotiating mandate for the Council" and that "fully-fledged negotiations between Parliament and the Council need to take place before the Council formally submits for Parliament's consent its proposals on the MFF regulation".²⁰⁶ On 6 May 2013, the Presidents of Parliament, the Commission and the Council held a meeting, which opened the way for the start of negotiations. A first trilogue was held on

¹⁹⁸ Question for oral answer to the Council by R. Böge on behalf of the Committee on Budgets ([O-0074/2010](#)) and question for oral answer to the Commission by R. Böge on behalf of the Committee on Budgets ([O-0075/2010](#)). Cf. also the [plenary debate of 15 June 2010](#), CRE 15/06/2010 – 14, especially the statement by R. Böge: "I have to ask both the Commission and the Council very seriously if they think that all these agreements [i.e., the 2006 interinstitutional budget agreement] should now be regarded as dead letters. Or are you genuinely prepared to consult Parliament? It is in the interests of the Treaty of Lisbon that we take all necessary measures during the financial framework adoption procedure to facilitate adoption of this act. I have not seen any signs of this to date, which is why I need to ask you the following question: are you prepared and do you consider yourself able to revise the Multiannual Financial Framework while, at the same time, working with us, reconciling it with the provisions of the Treaty of Lisbon? Your replies, both those of the Commission and the Council, will decide our future cooperation on budgetary matters in the next few years."

¹⁹⁹ [European Parliament resolution of 22 September 2010 on the proposal for a Council regulation laying down the multiannual financial framework for the years 2007-2013 \(COM\(2010\)0072 – 2010/0048\(APP\)\)](#), OJ C 50E, 21.2.2012, p. 64.

²⁰⁰ [Recommendation on the draft Council regulation laying down the multiannual financial framework for the years 2007-2013, A7-0253/2011](#).

²⁰¹ [European Parliament legislative resolution of 6 July 2011 on the draft Council regulation laying down the multiannual financial framework for the years 2007-2013 \(16973/3/2010 – C7-0024/2011 – 2010/0048\(APP\)\)](#), OJ C 33E, 5.2.2013, p. 362.

²⁰² [COM\(2011\) 398 final](#) of 29.6.2011, amended by [COM\(2012\) 388 final](#) of 6.7.2012.

²⁰³ [COM\(2011\) 403 final](#) of 29.6.2011.

²⁰⁴ [European Parliament resolution of 13 June 2012 on the Multiannual Financial Framework and own resources \(2012/2678\(RSP\)\)](#), OJ C 332E, 15.11.2013, p. 42, points 3 and 5.

²⁰⁵ See the statements by rapporteurs R. Böge and I. Kalfin as well as A. Mavroyiannis, President-in-Office of the Council, and M. Šeřčovič, Vice-President of the Commission, at the [plenary session of 23 October 2012](#), CRE 23/10/2012 - 4.

²⁰⁶ [European Parliament resolution of 23 October 2012 in the interests of achieving a positive outcome of the Multiannual Financial Framework 2014-2020 approval procedure \(COM\(2011\)0398 – COM\(2012\)0388 – 2011/0177\(APP\)\)](#), OJ C 68E, 7.3.2014, p. 1, point 78.

13 May 2013. Following “strenuous negotiations”, Parliament, the Council Presidency and the Commission reached a political agreement on 27 June 2013.²⁰⁷ Still, Parliament made its consent to the MFF dependent on the covering of the outstanding payment claims for 2013, requiring an amended budget.²⁰⁸ Regarding the procedure leading to the MFF, Parliament strongly criticised that “in reality [it] has had the effect of depriving Parliament of its true budgetary powers”, considering that “the numerous meetings held over the past few years between its delegation and the successive Council presidencies [---] served no clear purpose, as they had no impact on the spirit, calendar or content of the negotiations or on the Council’s position”.²⁰⁹ In November 2013, Parliament gave its consent,²¹⁰ enabling the Council to adopt the final act.²¹¹ The accompanying interinstitutional agreement was adopted on the same day.²¹² The mid-term review appears to have been conducted constructively in a spirit of loyal cooperation.²¹³

Well in advance before the expiry of the current MFF, thoughts were issued concerning the future of the EU’s finances.²¹⁴ In this context, in October 2017 Parliament stressed its intention “that both the expenditure [EU’s own resources system] and the revenue side of the next MFF will be treated as a single package in the upcoming negotiations.”²¹⁵ In May 2018, the Commission presented its proposal for the new MFF regulation,²¹⁶ along with a comprehensive communication on the MFF,²¹⁷ a proposal for an own resources decision²¹⁸ and a proposal for a new interinstitutional agreement.²¹⁹ Parliament laid down its position on the MFF package in several resolutions,²²⁰ including a resolution with detailed

²⁰⁷ See [European Parliament resolution of 3 July 2013 on the political agreement on the Multiannual Financial Framework 2014-2020 \(2012/2799\(RSP\)\)](#), OJ C 75, 26.2.2016, p. 47, point 1.

²⁰⁸ [European Parliament resolution of 3 July 2013](#), point 4.

²⁰⁹ [European Parliament resolution of 3 July 2013](#), point 15.

²¹⁰ [European Parliament legislative resolution of 19 November 2013 on the draft Council regulation laying down the multiannual financial framework for the years 2014–2020 \(11791/2013 – C7-0238/2013 – 2011/0177\(APP\)\)](#), OJ C 436, 24.11.2016, p. 49.

²¹¹ [Council Regulation \(EU, Euratom\) No 1311/2013 of 2 December 2013 laying down the multiannual financial framework for the years 2014-2020](#), OJ L 347, 20.12.2013, p. 884.

²¹² [Interinstitutional Agreement of 2 December 2013 between the European Parliament, the Council and the Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management](#), OJ C 373, 20.12.2013, p. 1.

²¹³ See in this regard the [European Parliament resolution of 26 October 2016 on the mid-term revision of the MFF 2014-2020 \(2016/2931\(RSP\)\)](#), OJ C 215, 19.6.2018, p. 178; the [European Parliament non-legislative resolution of 5 April 2017 on the draft Council regulation amending Regulation \(EU, Euratom\) No 1311/2013 laying down the multiannual financial framework for the years 2014-2020 \(14942/2016 – C8-0103/2017 – 2016/0283\(APP\) – 2017/2051\(INI\)\)](#), OJ C 298, 23.8.2018, p. 30; and the statement by I. Borg, President-in-Office of the Council, at the [plenary session of 4 April 2017](#), CRE 04/04/2017 - 15.

²¹⁴ [European Commission, Reflection Paper on the Future of EU Finances](#), COM(2017) 358; [European Parliament resolution of 24 October 2017 on the Reflection Paper on the Future of EU Finances \(2017/2742\(RSP\)\)](#), OJ C 346, 27.9.2018, p. 139. See also [European Parliament resolution of 14 March 2018 on the next MFF: Preparing the Parliament’s position on the MFF post-2020 \(2017/2052\(INI\)\)](#), OJ C 162, 10.5.2019, p. 51.

²¹⁵ [European Parliament resolution of 24 October 2017](#), point 5.

²¹⁶ [COM\(2018\) 322 final](#) of 2.5.2018.

²¹⁷ [COM\(2018\) 321 final](#) of 2.5.2018.

²¹⁸ [COM\(2018\) 325 final](#) of 2.5.2018.

²¹⁹ [COM\(2018\) 323 final](#) of 2.5.2018.

²²⁰ Cf. [European Parliament resolution of 30 May 2018 on the 2021-2027 multiannual financial framework and own resources \(2018/2714\(RSP\)\)](#), OJ C 76, 9.3.2020, p. 103.

proposals for amendments of the draft MFF regulation and the draft interinstitutional agreement.²²¹ About a year later, following the 2019 European elections, Parliament reconfirmed its position and urged the Council to launch negotiations, lamenting that “the Council has so far not accepted to engage in any meaningful talks beyond short and formalistic briefings and debriefings in the margins of the General Affairs Council (GAC)” and “such minimalist contacts cannot be considered as satisfactory interinstitutional cooperation and do not comply with what the Treaty explicitly require”.²²² In this context, Parliament criticised that in the process leading to the adoption of the current MFF, the European Council has taken “irrevocable decisions on several aspects of the next MFF”, which would hinder true negotiations on the MFF. Parliament added that it would “not rubber-stamp a *fait accompli* from the European Council and is prepared to withhold its consent until a satisfactory agreement is reached”.²²³ As a reaction to the Covid-19 pandemic, in May 2020 the Commission amended its MFF draft²²⁴ and Parliament adapted its position for negotiations accordingly.²²⁵ On 27 August 2020, negotiations started in the form of ‘trilateral dialogue’ meetings between Parliament’s negotiating team, the Council Presidency and the Commissioner responsible for Budget. They are prepared and followed up by numerous trilateral meetings at technical level. On 10 November 2020, representatives of Parliament, the Council and the Commission reached an overall political compromise on the MFF for 2021–2027, on own resources and on the European Recovery Instrument.²²⁶ On the basis of this agreement, Parliament gave its consent,²²⁷ enabling Council to adopt the MFF.²²⁸ Against the background of the natural disasters and the war on Ukraine and the assistance the EU provided, the 2021–2027 MFF was “being pushed to its limits”. Parliament therefore called for a substantial revision of the MFF in an environment of “cooperation and dialogue” in order to address the funding gaps. In this context, it once again called for a deployment of the *passerelle* clause set out in Article 312(2) TFEU to overcome the impediments of unanimity in the Council and allow for adoption of the MFF regulation by qualified majority.²²⁹

²²¹ [European Parliament resolution of 14 November 2018 on the Multiannual Financial Framework 2021-2027 – Parliament’s position with a view to an agreement \(COM\(2018\)0322 – C8-0000/2018 – 2018/0166R\(APP\)\)](#), OJ C 363, 28.10.2020, p. 179.

²²² [European Parliament resolution of 10 October 2019 on the 2021-2027 multiannual financial framework and own resources: time to meet citizens’ expectations \(2019/2833\(RSP\)\)](#), OJ C 202, 28.5.2021, p. 31, point 12 f.

²²³ [European Parliament resolution of 10 October 2019](#), point 14, 16; reiterated in [European Parliament resolution of 23 July 2020 on the conclusions of the extraordinary European Council meeting of 17-21 July 2020 \(2020/2732\(RSP\)\)](#), OJ C 371, 15.9.2021, p. 110, point 7.

²²⁴ [COM\(2020\) 443 final](#) of 28.5.2020.

²²⁵ [European Parliament resolution of 23 July 2020 on the conclusions of the extraordinary European Council meeting of 17-21 July 2020 \(2020/2732\(RSP\)\)](#).

²²⁶ See the explanatory statement to the [draft European Parliament legislative resolution on the draft Council regulation laying down the multiannual financial framework for the years 2021 to 2027 \(09970/2020 – C9-0409/2020 – 2018/0166\(APP\)\)](#), A9-0260/2020.

²²⁷ [European Parliament legislative resolution of 16 December 2020 on the draft Council regulation laying down the multiannual financial framework for the years 2021 to 2027 \(09970/2020 – C9-0409/2020 – 2018/0166\(APP\)\)](#), OJ C 445, 29.10.2021, p. 240.

²²⁸ [Council Regulation \(EU, Euratom\) 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027](#), OJ L 4331, 22.12.2020, p. 11; see also the accompanying [Interinstitutional Agreement of 16 December 2020](#), OJ L 4331, 22.12.2020, p. 28.

²²⁹ [Upscaling the 2021-2027 Multiannual Financial Framework: a resilient EU budget fit for new challenges](#), 2022/2046(INI).

3.2. Rules Governing the Election of the European Parliament

As laid down above, Article 223(1) TFEU serves as the legal basis for the adoption of rules for European elections. The Council, acting by unanimity and on a proposal from Parliament, decides on the rules, and Parliament shall give its consent by a majority of its component members. The provisions can enter into force only after being approved by the Member States in accordance with their respective constitutional requirements.

On the basis of this provision, Parliament has submitted a proposal for an amendment of the Direct Elections Act in 2015.²³⁰ The proposal intended to strengthen the role of European political parties and improve the organisation of the European elections with regard to finalising electoral lists and the electoral roll (in order to avoid of double voting). At the same time, the electoral reform aimed at strengthening the lead candidate system ('*Spitzenkandidaten*') for the office of Commission President and, in the end, also the democratic and transnational character of the European elections as a whole. The competent Council working group and COREPER examined the draft and delegations were able to reach agreement on a common approach to a number of provisions, whereas other provisions appeared to be unacceptable to delegations as a matter of principle and/or on legal grounds, especially provisions on a joint constituency and on the lead candidate system. As the Council has recorded, it informed Parliament's Co-Rapporteurs and Shadow Rapporteurs on that file informally.²³¹ The Council Presidency "considered it timely and justified to meet the repeated requests from the European Parliament [...] to present a general overview" after almost two years of discussions in the Council.²³² In view of the time constraints for the 2019 European elections, Council intensified negotiations and "proposed to immediately inform the European Parliament of any political agreement, so that the Parliament can start undertaking the necessary steps."²³³ The final draft²³⁴ was submitted to Parliament in June 2018. The draft lacked some of the elements that the more ambitious EP draft contained, such as the above-mentioned transnational lists, the *Spitzenkandidaten* procedure and the proposed gender equality for the lists of candidates. All in all, however, Council did not fundamentally depart from the original draft. Moreover, even though the competent committee (AFCD) lamented that "more ambition from the Council would have been expected", it admitted that the negotiated outcome "was the maximum that could be achieved in the current political context and with the constraints of the procedure" (i.e. unanimity in the Council). It considered it a success for Parliament in modernising the rules for the European elections and "a door-opener for a gradual and comprehensive reform".²³⁵

²³⁰ [European Parliament resolution of 11 November 2015 on the reform of the electoral law of the European Union \(2015/2035\(INL\)\)](#), OJ C 366, 27.10.2017, p. 7.

²³¹ See [Council Doc. 7597/18](#) of 12 April 2018, p. 2.

²³² See [Council Doc. 15241/17](#) of 1 December 2017, point 3.

²³³ [Council Doc. 9226/18](#) of 28 May 2018, point 6.

²³⁴ [Council Doc. 9425/18](#) of 14 June 2018.

²³⁵ Explanatory statement on the [draft European Parliament resolution](#), A8-0248/2018.

Parliament gave its consent in early July 2018,²³⁶ and the Council adopted the final act shortly after.²³⁷ While Parliament agreed with the substance of the changes to the draft made by the Council, it appears that there should have been an improved flow of information from the Council to Parliament or its competent committee.

Still, Parliament adheres to its plan of a fundamental reform of the European elections. The AFCO committee published the draft legislative initiative report on 12 June 2021 and set the deadline for amendments to November 2021 so as to include recommendations from the Conference on the Future of Europe.²³⁸ On 3 May 2022 it presented a draft for a new Council regulation replacing the Direct Elections Act of 1976.²³⁹ The draft intends to harmonise rules on European elections that are currently a mixture of European and national rules, but it does not seek to establish uniform rules on relevant elements of the States' electoral systems (number of constituencies, system of proportional representation, electoral formula). The draft proposes to establish a minimum common voting age of 16 years of age and a minimum common age of 18 years of age to stand in elections. Furthermore, it contains an obligation to provide for postal voting. Once again, Parliament also proposes the establishment of a Union-wide constituency, comprising the territory of all Member States, in which 28 MEPs would be elected through transnational electoral lists. A main novelty is the creation of a European Electoral Authority, comprised of one expert on election systems per Member State, which would be in charge of conducting the elections in the Union-wide constituency and of coordinating the exchange of information among the national electoral authorities.²⁴⁰ Some Member States have already voiced reservations and it is unlikely that the rules would be adopted in time before the 2024 European elections.

3.3. Parliament's Right of Inquiry

We shall now look into the adoption of provisions concerning Parliament's right of inquiry in accordance with Article 226 TFEU. Pursuant to paragraph 3 of that article, the detailed provisions governing the exercise of the right of inquiry "shall be determined by Parliament, acting by means of regulations on its own initiative in accordance with a special legislative procedure, after obtaining the

²³⁶ [European Parliament legislative resolution of 4 July 2018 on the draft Council decision amending the Act concerning the election of the members of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976 \(09425/2018 - C8-0276/2018 - 2015/0907\(APP\)\)](#), OJ C 118, 8.4.2020, p. 246.

²³⁷ [Council Decision \(EU, Euratom\) 2018/994 of 13 July 2018 amending the Act concerning the election of the members of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976](#), OJ L 178, 16.7.2018, p. 1.

²³⁸ In fact, one proposal deals with most issues presented in Parliament's final draft. See European Parliamentary Research Service, [European democracy / Values and rights, rule of law, security - Citizens' recommendations and the EU context](#), PE 698.928 – February 2022, p. 21.

²³⁹ [European Parliament legislative resolution of 3 May 2022 on the proposal for a Council Regulation on the election of the members of the European Parliament by direct universal suffrage, repealing Council Decision \(76/787/ECSC, EEC, Euratom\) and the Act concerning the election of the members of the European Parliament by direct universal suffrage annexed to that Decision \(2020/2220\(INL\) – 2022/0902\(APP\)\)](#).

²⁴⁰ See in detail [Diaz Crego](#) (2022).

consent of the Council and the Commission". In April 2014, Parliament adopted a proposal for a new regulation²⁴¹ in order to take account of the (partly disappointing) experience from previous inquiries and to adapt the legal situation to the entry into force of the Lisbon Treaty.²⁴² Important aspects included the right for the committee to actually summon (not only invite) people to appear before it and to impose sanctions for failure to appear before or refusal to provide documents requested by the committee. When drawing up the proposal, Parliament's competent committee (AFCO) entered into discussions with the Council and the Commission in order to take their views and concerns into account at an early stage.²⁴³ As noted by the Council and the Commission, however, only a few of the 'problematic elements' in the initial draft had been reflected in the outcome of the final vote in the AFCO Committee.²⁴⁴ The Council especially contests that the far-reaching competences that Parliament wants to establish for its committees of inquiry, especially the right to impose sanctions, actually fall outside the scope of Article 226 TFEU.

Throughout the following years, there was therefore no considerable progress in the negotiations between the institutions. Consequently, questions were directed by the MEPs to the Council and the Commission to explain the deadlock.²⁴⁵ Meanwhile, the new Rapporteur tried to engage in negotiations with the Commission and the Council presidencies but was unable to lead formal discussions with the other two institutions.²⁴⁶ The Council, apparently, is of the opinion that due to the special legislative procedure that applies in this case, there are no formal meetings required.²⁴⁷ The experts of the *legal services* of the three institutions had nine technical level meetings between December 2016 and May 2017 and were able to delimit the differences. However, they were not able (nor mandated) to solve all outstanding political issues. In April/May 2018, based on the outcome of the latter meetings, the AFCO Committee issued an informal non-paper to the Council and the

²⁴¹ [Proposal adopted by the European Parliament on 23 May 2012 for a regulation of the European Parliament on the detailed provisions governing the exercise of the European Parliament's right of inquiry and repealing Decision 95/167/EC, Euratom, ECSC of the European Parliament, the Council and the Commission \(2009/2212\(INI\)\)](#), OJ C 264E, 13.9.2013, p. 41, and [European Parliament legislative resolution of 16 April 2014 \(2009/2212\(INL\)\)](#), OJ C 443, 22.12.2017, p. 39.

²⁴² See in this respect the speech delivered by rapporteur D. Martin at the [plenary meeting of 23 May 2012](#), CRE 23/05/2012 – 6: "The Equitable Life inquiry concluded that Parliament lacked the ability to get to the truth because we could not speak to the people involved, we could not ensure access to documents and there were no consequences for false testimony. It is perhaps not surprising that the last inquiry committee struggled to uncover the truth." See in this respect also the [European Parliament recommendation of 13 December 2017 to the Council and the Commission following the inquiry into money laundering, tax avoidance and tax evasion \(2016/3044\(RSP\)\)](#) (PANA resolution), OJ C 369, 11.10.2018, p. 132, para. 190-200, and the [European Parliament recommendation of 4 April 2017 to the Council and the Commission following the inquiry into emission measurements in the automotive sector \(2016/2908\(RSP\)\)](#) (EMIS resolution), OJ C 298, 23.8.2018, p. 140, para. 76-94, in which Parliament highlighted the shortcomings of the current system of inquires. See on this also [Fromage](#) (2020), p. 22 f. and [Rozenberg](#) (2020), p. 55 ff.

²⁴³ On the Council's concerns, see [Council Doc. 11174/15](#) of 24 July 2015, Annex.

²⁴⁴ See the statements delivered by N. Wammen, President-in-Office of the Council, and M. Šešćovič, Vice-President of the Commission, delivered at the [plenary meeting of 23 May 2012](#), CRE 23/05/2012 – 6.

²⁴⁵ Question for oral answer to the Council by AFCO Chair D.M. Hübner, on behalf of the Committee on Constitutional Affairs ([O-000089/2017](#)) and question for oral answer to the Commission by AFCO Chair D.M. Hübner, on behalf of the Committee on Constitutional Affairs ([O-000090/2017](#)).

²⁴⁶ Statement delivered by the new rapporteur R. Jáuregui Atondo at the [plenary meeting of 13 December 2017](#), CRE 13/12/2017 – 23.

²⁴⁷ See the letter from Z. Kalniņa-Lukaševica, President in Office of the Council to the AFCO Chair, [Council Doc. 8685/15](#) of 7 May 2015, stating that: "I must draw your attention to the fact that, pursuant to Article 226 TFEU, regulations ... are subject to a 'special legislative procedure, after obtaining the consent of the Council and the Commission'. Therefore, potential draft regulation(s) prepared by the European Parliament will not be subject to trilogues."

Commission addressing some of the pending issues, but apparently not to the satisfaction of the Council and the Commission. Accordingly, in April 2019 the Rapporteur lamented that a meeting with the Council and the Commission for a reasonable political dialogue was not possible.²⁴⁸

The AFCO Committee has always underlined that “there are alternative solutions and more flexible wordings, which would enable the deadlock on the regulation to be resolved”, indicating and proposing to the Council Presidency and to the Commission the way forward, with “political negotiations first followed by technical meetings.”²⁴⁹ The Council, however, “formalised a new list of concerns, also going beyond the opinion of its own legal service, putting in question the work accomplished so far and listing the main institutional problems for Parliament, which are difficult to overcome”, thus “not leaving any margin of manoeuvre for negotiations [-- --]”.²⁵⁰ This was also criticised in the questions for an oral answer by the AFCO Chair to the Council and the Commission.²⁵¹ As a reaction, Parliament adopted a resolution lamenting “the failure of the Council and Commission to comply with the principle of interinstitutional cooperation”.²⁵² In 2021, the new Rapporteur (meanwhile in the third parliamentary term dealing with this file) submitted new oral questions for debate in the Parliament,²⁵³ but there has been no satisfactory answers by the Council nor the Commission.²⁵⁴ In the light of this deadlock, it has been suggested that, among other approaches, Parliament should lower its level of ambition towards the Council and instead try to expand its inquiry

²⁴⁸ Statement delivered by the new rapporteur R. Jáuregui Atondo at the [plenary meeting of 17 April 2019](#), CRE 17/04/2019 – 25: “We have not been able to get the Council and the Commission to meet with Parliament in an institutional trilogue, in a reasonable political dialogue to establish a text that will allow us to have a regulation that regulates the powers of this House” (my translation).

²⁴⁹ [European Parliament resolution of 18 April 2019 on the negotiations with the Council and Commission on the legislative proposal for a regulation on the European Parliament’s right of inquiry \(2019/2536\(RSP\)\)](#), OJ C 158, 30.4.2021, p. 15, point A. Cf. also the Statement delivered by D. M. Hübner at the [plenary meeting of 17 April 2019](#), CRE 17/04/2019 – 25: “The Council demanded that the initial proposal of the European Parliament should already contain the text acceptable for the Council. This is not the way the consent procedure functions.”

²⁵⁰ [European Parliament resolution of 18 April 2019 \(2019/2536\(RSP\)\)](#), point F.

²⁵¹ Question for oral answer to the Council by AFCO Chair D.M. Hübner, on behalf of the Committee on Constitutional Affairs ([O-000003/2019](#)) and question for oral answer to the Commission by AFCO Chair D.M. Hübner, on behalf of the Committee on Constitutional Affairs ([O-000004/2019](#)): “This new wording [of the non-paper] ... was based on both the different agreements and options developed during the meetings carried out by the legal services of the three institutions in 2017 and on the David Martin Report adopted in 2014, including several modifications designed to resolve the concerns addressed by the Council and the Commission, had the sole ambition and intention of complying with the aforesaid commitment with the aim of launching negotiations with the Council and the Commission, which never took place during this term. In fact, the Council’s letter of reply to the non-paper of 25 October 2018 formalises a new list of concerns and leaves no margin of manoeuvre for negotiations, quite the reverse of the idea behind the non-paper – to open negotiations. ... AFCO committee wishes to express its most profound disagreement with the attitudes shown by the Council and the Commission, which are continuing to prevent, after more than four years of informal meetings and exchanges of letters and documents, a formal meeting to discuss at a political level possible solutions to resolve the problems identified. In fact, the Council’s attitude of continuing to refuse to approve a political mandate that opens the door for meetings of a political nature to resolve the most contentious issues and sound out whether an agreement could be reached represents a clear lack of loyal cooperation in the fulfilment of a mandate from the Treaties (Article 226 TFEU).”

²⁵² [European Parliament resolution of 18 April 2019 \(2019/2536\(RSP\)\)](#), point 2.

²⁵³ Question for oral answer to the Council by AFCO Chair A. Tajani and rapporteur D. Ruiz Devesa, on behalf of the Committee on Constitutional Affairs ([O-000029/2021](#)) and question for oral answer to the Commission by AFCO Chair A. Tajani and rapporteur D. Ruiz Devesa, on behalf of the Committee on Constitutional Affairs ([O-000030/2021](#)).

²⁵⁴ Statement delivered by A.P. Zacarias, President-in-Office of the Council, and by N. Schmit, Member of the Commission, at the [plenary meeting of 8 June 2021](#), CRE 08/06/2021 - 24.

powers step by step while at the same time establish more high-quality committees of inquiry to maximise pressure.²⁵⁵

3.4. The Statute of the European Ombudsman

Next, we shall take a closer look into the file on the Statute of the European Ombudsman. The Ombudsman is an entity empowered to receive complaints from the EU citizens or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the EU institutions, bodies, offices or agencies. In accordance with Article 228(4) TFEU, Parliament, acting on its own initiative, can adopt a regulation laying down the regulations and general conditions governing the performance of the Ombudsman's duties. It shall do so after seeking an opinion from the Commission and with the consent of the Council. In the light of changes brought by the Lisbon Treaty and developments in the legal framework of the EU, in February 2019, Parliament proposed a new regulation.²⁵⁶ The Commission issued its opinion in October 2019, indicating a number of issues that it regarded impractical or not in line with the law. An exchange of views between the AFCO Committee and the COREPER took place; however, the Council was reluctant to enter into formal negotiations. This was criticised by the AFCO Chair who also underlined that the Commission should be involved in Parliament's negotiations with the Council.²⁵⁷ Following a number of informal exchanges between Parliament and the Council and an intensive discussion within the Council's competent Working Group, in November 2020 the COREPER issued partial mandates for negotiations with Parliament²⁵⁸ and, eventually, a full mandate including amendments that were in line with what the Commission marked as problematic.²⁵⁹ Subsequently, several technical and two political meetings took place between Parliament and the Council, resulting in a compromise text²⁶⁰ that does not appear to be a 'one-sided compromise' to the detriment of Parliament. On 12 May 2021, the Working Party on General Affairs endorsed the wording on the basis of which the Council could be in a position to give its overall consent, and on the same day, both the Presidency and Parliament confirmed the text.²⁶¹ Consequently, the compromise between the Council and Parliament was presented as an amended draft in late May and adopted by Parliament in early June 2021.²⁶² Regardless

²⁵⁵ See [Rozenberg \(2020\)](#), p. 73 ff.

²⁵⁶ [European Parliament resolution of 12 February 2019 on a draft regulation of the European Parliament laying down the regulations and general conditions governing the performance of the Ombudsman's duties \(Statute of the European Ombudsman\) and repealing Decision 94/262/ECSC, EC, Euratom \(2018/2080\(INL\) — 2019/0900\(APP\)\)](#), OJ C 449, 23.12.2020, p. 182.

²⁵⁷ See the letter from A. Tajani, AFCO Chair, to H. E. M. Clauss, Chair of COREPER, of 15 September 2020, [Council Doc. 10792/20](#) of 16 September 2020.

²⁵⁸ [Council Doc. 13107/20](#) of 20 November 2020 and [Council Doc. 13339/20](#) of 25 November 2020.

²⁵⁹ [Council Doc. 13579/20](#) of 8 December 2020.

²⁶⁰ [Council Doc. 8698/21](#) of 12 May 2021, point 4

²⁶¹ [Council Doc. 8692/21](#) of 12 May 2021, point 4 f.

²⁶² [European Parliament decision of 10 June 2021 on a draft regulation of the European Parliament laying down the regulations and general conditions governing the performance of the Ombudsman's duties \(Statute of the European Ombudsman\) and repealing Decision 94/262/ECSC, EC, Euratom \(2021/2053\(INL\) — 2019/0900\(APP\)\)](#), OJ C 67, 8.2.2022, p. 195.

of the question if a reconsultation of the Commission had been necessary, the Commission issued a favourable opinion a few days later.²⁶³ The Council gave its consent by unanimity on the same day²⁶⁴ so that Parliament could eventually adopt the regulation.²⁶⁵

3.5. The Composition of the European Parliament

We will now examine a case where a legal act is adopted on the initiative of Parliament, but not through a (special) legislative procedure. According to Article 14(2) TEU, the European Council shall adopt by unanimity, on the initiative of Parliament and with its consent, a decision establishing the composition of Parliament, respecting the principles of degressively proportional representation and that each Member State shall be allocated at least six, but not more than ninety-six seats, creating a plenary of no more than 750 (plus one) members. This right of initiative was given to Parliament in the Treaty of Lisbon. In preparation of its entry into force, Parliament adopted a resolution containing a draft European Council decision that was supposed to be adopted before the 2009 European elections.²⁶⁶ Due to the delayed entry into force of the Treaty of Lisbon, the 2009 European elections took place under the old rules. Taking into account the accession of Croatia in 2013 and the transitional rules in its Act of Accession as well as the demographic changes that had occurred since the last European elections, Parliament issued a new draft European Council decision in advance of the 2014 European elections.²⁶⁷ The distribution of seats had to respect – in legal terms – the principle of degressive proportionality of representation (which was defined in the draft decision), but also – in political terms – reservations by Member States, notably the German Federal Constitutional Court, so as to ensure that the decision would actually be adopted.²⁶⁸ The proposed ‘pragmatic’ solution distributed the necessary cuts in seats so that no single State would lose more than one seat²⁶⁹ in order to allow for a solution acceptable to all Member States. This, however, was at the detriment of the degressivity. Since there were no points of disagreement, Parliament gave its consent to the draft²⁷⁰ so that the European Council could adopt the decision.²⁷¹

²⁶³ [COM\(2021\) 329 final](#) of 18 June 2021.

²⁶⁴ [Council Doc. 9947/21](#) of 18 June 2021.

²⁶⁵ [Regulation \(EU, Euratom\) 2021/1163 of the European Parliament of 24 June 2021 laying down the regulations and general conditions governing the performance of the Ombudsman's duties \(Statute of the European Ombudsman\) and repealing Decision 94/262/ECSC, EC, Euratom](#), OJ L 253, 16.7.2021, p. 1.

²⁶⁶ [European Parliament resolution of 11 October 2007 on the composition of the European Parliament \(2007/2169\(INI\)\)](#), OJ C 227E, 4.9.2008, p. 132.

²⁶⁷ [European Parliament resolution of 13 March 2013 on the composition of the European Parliament with a view to the 2014 elections \(2012/2309\(INL\)\)](#), OJ C 36, 29.1.2016, p. 56.

²⁶⁸ Cf. the [explanatory statement to the AFCO report](#), A7-0041/2013.

²⁶⁹ With the exception of Germany, which went from 99 to 96 as a result of new primary law rules.

²⁷⁰ [European Parliament legislative resolution of 12 June 2013 on the draft European Council decision establishing the composition of the European Parliament \(00110/2013 – C7-0166/2013 – 2013/0900\(NLE\)\)](#), OJ C 65, 19.2.2016, p. 256.

²⁷¹ [European Council Decision 2013/312/EU of 28 June 2013 establishing the composition of the European Parliament](#), OJ L 181, 29.6.2013, p. 57.

In accordance with Article 4 of the decision, the composition of Parliament had to be reviewed “sufficiently far in advance of the beginning of the 2019–2024 parliamentary term on the basis of an initiative of Parliament presented before the end of 2016”. However, it was only in February of 2018 that Parliament adopted the draft necessary to initiate the procedure;²⁷² the preparatory work had to take into account the United Kingdom’s notification to leave the EU, which could have taken place before the 2019 parliamentary election. The AFCO Committee had also originally proposed the establishment of a joint constituency comprising the entire territory of the EU, with the number of representatives elected being defined based on the number of Member States. However, as the Direct Elections Act was not amended accordingly, this provision was deleted from the proposal. Furthermore, the draft also intended to establish a permanent system for the fair, objective, and transparent distribution of seats.²⁷³ However, the AFCO acknowledged that, “while this and other formulas do respect the formal conditions necessary to achieve a composition of Parliament, which fully meets the requirements of Article 14 (2) TEU, they do not provide a solution which is also politically acceptable in the long run as well as in the current context. [– –] Furthermore, as Parliament has already underlined, the importance of the link between a permanent system for the distribution of its seats and a review of the voting system in the Council, which cannot be achieved without a revision of the Treaties, the Rapporteurs consider that the establishment of a system should be postponed to a time when the political context is ripe for a comprehensive discussion on the inter-institutional balance.”²⁷⁴ Since, again, the proposal presented by Parliament did not pose any serious problems, following Parliament’s consent,²⁷⁵ the European Council adopted the initial draft with its decision (EU) 2018/937 of 28 June 2018.²⁷⁶ Article 4 of the latter decision provides that “(s)ufficiently far in advance of the beginning of the 2024-2029 parliamentary term, the European Parliament shall submit to the European Council, in accordance with Article 14(2) TEU, a proposal for an updated allocation of seats in the European Parliament”. Consequently, the AFCO Committee is currently preparing a new report for a draft act establishing the composition of the European Parliament.²⁷⁷

²⁷² [European Parliament resolution of 7 February 2018 on the composition of the European Parliament \(2017/2054\(INL\) – 2017/0900\(NLE\)\)](#), OJ C 463, 21.12.2018, p. 83.

²⁷³ See on this Duff (2015) and Pukelsheim and Oelbermann (2015).

²⁷⁴ See the [explanatory statement to the AFCO report](#), A8-0007/2018.

²⁷⁵ [European Parliament legislative resolution of 13 June 2018 on the draft European Council decision establishing the composition of the European Parliament \(00007/2018 – C8-0216/2018 – 2017/0900\(NLE\)\)](#), OJ C 28, 27.1.2020, p. 154.

²⁷⁶ [European Council Decision \(EU\) 2018/937 of 28 June 2018 establishing the composition of the European Parliament](#), OJ L 1651, 2.7.2018, p. 1. Hungary delivered a statement criticising the alleged contradiction between the EP’s proposal, which is based on the population in the Member States, and the wording of Article 14(2) TEU, stating that the European Parliament shall be composed of representatives of the Union’s citizens; [Council Doc. 9926/1/18 REV 1 ADD 1](#) of 20 June 2018.

²⁷⁷ [Composition of the European Parliament, 2021/2229\(INL\)](#); Co-Rapporteurs Loránt Vincze (PPE) and Pascal Durand (Renew).

3.6. Conclusions

The Treaty provisions on the law-making procedures are straightforward when it gets to the involvement of the institutions and their level of participation. They spell out the rights and obligations towards one another. In the light of the constitutional principle of institutional balance and the obligation for the institutions to engage in mutual sincere cooperation, the procedures can be subject to certain specifications and modifications, e.g. in the form of negotiations before consent is requested. However, these specifications are not as clear-cut as the procedural obligations. It is therefore difficult to determine the outer limits of these loyalty obligations and of the institutions' rights and competences; instead, it is easier to determine once these limits have been *transgressed*. Against this background, the practical cases discussed above paint a differentiated picture regarding the interaction of the institutions within the limits of their powers and in conformity with the principle of mutual sincere cooperation with a view to guaranteeing a successful outcome of the procedures.

The adoption of the MFF is an interesting example. The first attempt to implement the new rules following their entry into force with the Treaty of Lisbon failed. While there may be several reasons, the documentation suggests that the main reason was the Council's neglect to engage in negotiations with Parliament. Clearly, Parliament's power in this special legislative procedure is to give or decline consent to a draft presented by the Council. As pointed out before, however, mutual sincere cooperation requires that the institutions cooperate in order to guarantee the adoption of the measure in question, especially when it is a measure whose adoption the Treaties demand, such as the MFF. The second attempt to adopt the 2014–2020 MFF was thus approached differently, and trilogue negotiations between Parliament, the Council and the Commission took place. It appears, however, that not all meetings between Parliament and the Council were as constructive and expedient as expected by Parliament. Nevertheless, political agreement was reached between the institutions, enabling Parliament to give its consent to the MFF regulation. It seems that the institutions have learnt from this first experience with the new rules on the adoption of the MFF, as the adoption of the MFF for 2021–2027 ran more smoothly, despite some initial difficulties.

What is peculiar about the adoption of the MFF is that it is not a stand-alone instrument. Instead, the MFF as a spending instrument is connected to the own resources of the EU at the revenue side and forms the basis for the annual budgets, which are adopted in a quasi-ordinary legislative procedure with different competences for the institutions. Moreover, the adoption of the MFF is a recurring procedure, requiring the institutions to cooperate on this issue on a regular basis. It is therefore both convenient and necessary that the institutions agree on a set of rules regarding a whole range of budgetary issues as they have done in the interinstitutional agreements accompanying the MFF. However, all actors should be careful so as not to upset the institutional balance due to a shift in competences. This is especially true, as Parliament has pointed out,²⁷⁸ for the European Council. In fact, as Article 15(1) TEU spells out, the European Council's mandate is to "provide the Union with the

²⁷⁸ See the [European Parliament resolution of 10 October 2019 \(2019/2833\(RSP\)\)](#), point 16: "Recalls that European Council conclusions are political in nature and that Article 15(1) of the TEU prohibits the European Council from exercising legislative functions; therefore calls on the European Council to refrain from adopting detailed and purportedly binding conclusions based on the MFF negotiating box, as this would amount to direct interference in the legislative sphere; counts on the Commission, as an honest broker and guardian of the Treaties, to support Parliament in exerting its legislative prerogatives under both the consent and ordinary legislative procedures".

necessary impetus for its development and [to] define the general political directions and priorities thereof", but it "shall not exercise legislative functions." Therefore, while the European Council may set priorities for budgetary negotiations, the budgetary authority (Parliament and the Council) is in charge of adopting the necessary legal acts. Both institutions need to have the room to manoeuvre in order to engage in serious and open negotiations.

Concerning the amendment of the Direct Elections Act, it appears that the procedure has worked well in the light of mutual sincere cooperation. It does not result from the documents that there would have been intensive negotiations between Parliament and the Council; however, the AFCO Committee has pointed out that it had been more important and more difficult to reach a unanimous agreement *within* the Council. The final result, the draft presented by Council, was still in line with Parliament's proposal and only cut out specific elements. While it may have been desirable to thoroughly discuss these matters with Parliament or its competent committee, it does not seem that the Council would have violated its obligation to cooperate in this case. However, as regards the new proposal by Parliament, one can only hope that Parliament and the Council engage in serious negotiations as to the content of the draft. They should discuss how much of the draft they could keep and still reach an agreement within the institutions (especially unanimity in the Council) and with a view to adopt the act.

The necessary unanimity among the Member States – this time in the European Council – was an issue also with regard to the rules on the composition of Parliament before the 2014 European elections. It affected already the drafting stage of Parliament's proposal, but even this may be an emanation of the principle of mutual sincere cooperation: presenting a proposal that contained elements that were *clearly* unacceptable to the institution adopting the measure could jeopardize its adoption from the beginning and thus be counterproductive to the implementation of the Treaties for which the institutional framework is responsible. The same holds true for the initiative in the run-up to the 2019 European elections, which the competent committee downsized due to the political environment in which it would have been impossible to pursue a more ambitious project. Moreover this file is intertwined with another dossier, i.e. the rules governing the European elections, which would require a package deal. This is another expression of mutual sincere cooperation: **files should be seen in their (political) context in order to evaluate the chances of success for initiatives.**

Regarding the adoption of the new statute for the European Ombudsman, it appears that Parliament and the Council have conducted the procedure in a spirit of good cooperation. Parliament engaged in negotiations with the Council and the Commission in order to find a compromise solution that would be acceptable to the Council, whose consent was required for the final adoption. While Parliament's competent committee, the AFCO Committee, criticised Council's initial reluctance to enter into negotiations, it appears that from then on, the institutions had constructive discussions so that Parliament amended its original proposal in order to take account of both the Council's and the Commission's concerns and remarks. In the end, the draft was an equitable, tripartite proposal. In doing so, Parliament honoured its commitment to mutual sincere cooperation in the consent procedure, directed towards producing a result that would in fact receive the consent of the competent institution.

In this context, it is worthwhile reproducing parts of the AFCO Committee's explanatory statement for the amended draft. The committee noted:²⁷⁹ "Your rapporteur [---] considered that **the views of the Council** about the legislative options of the Parliament on this regard **should be heard** in such a way as to prevent a legitimate refusal to give consent or a simple 'pocket veto'. More so, the **Commission should also participate**, to be in a better position to issue its opinion and to play a role of *honest broker*, indeed to help find compromises. As such, it was decided to have informal consultations, with the two institutions. These have proven fruitful, while not hindering the direct right of initiative and legislative competence of the European Parliament. It has allowed Council to anticipate the main legislative options of the Parliament and, necessarily, influence our decisions. The establishment of this procedure of informal consultations is not a matter of pragmatism. On the contrary, it results from our understanding of the nature and constitutional role of the power of consent of the Council. Indeed, Council's consent means more than a simple authorization or signature [---]. [T]he consent of the Council also means an adhesion to the content of the Regulation, an adherence to the content of the legislative decision of the European Parliament. In view of such understanding, **preliminary informal consultations are most opportune and even necessary**. If by giving its consent, Council is substantively adhering to the legislative options of this Parliament, then it is only natural that this house hears Council before taking definitive decisions. **This *modus operandi* constitutes a practical precedent to other areas where Parliament has direct right of initiative** and the Council's consent is required. But it also reflects, in our view, **the most appropriate reading of the intention of the treaties when setting up such special legislative procedure.**"

This opinion is completely in line with the obligations resulting from the principles of institutional balance and mutual sincere cooperation outlined above. What is startling, however, is Council's reaction to this constructive procedure. In a document from the General Secretariat of the Council to COREPER, endorsing the legislative compromise between the institutions, it is stated that "[i]t should be recalled that this way of proceeding is without prejudice to the approach which the Council might follow on other files which are subject to a special legislative procedure."²⁸⁰ In a statement delivered before Parliament about a month later, the incumbent Council Presidency stressed: "I would also like to commend and sincerely thank [the rapporteur] and the shadow rapporteurs for their engagement and spirit of compromise, which made it possible to bring the positions of the Council and of the Parliament together, with the valuable contribution of the European Commission. [---] Such a [special legislative] procedure requires good interinstitutional cooperation and indeed we found such a cooperation, which led to this result. [---] Thank you again for the cooperation of Parliament."²⁸¹

In contrast to the rather successful and constructive cases discussed above, the procedure regarding the adoption of measures on **Parliament's right of inquiry** can serve as a negative example. Parliament's original proposal was adopted in 2014 and transmitted to Council for approval. In the process leading to Parliament's draft, the competent committee had already engaged in discussions

²⁷⁹ [Explanatory Statement to the Report of 27 May 2021 on a draft regulation of the European Parliament laying down the regulations and general conditions governing the performance of the Ombudsman's duties \(Statute of the European Ombudsman\) and repealing Decision 94/262/ECSC, EC, Euratom \(2021/2053\(INL\) – 2019/0900\(APP\)\)](#), A9-0174/2021 (emphasis in the original).

²⁸⁰ [Council Doc. 8692/21](#) of 12 May 2021, point 6.

²⁸¹ Statement delivered by A.P. Zacarias, President-in-Office of the Council, at the [plenary meeting of 9 June 2021](#), CRE 09/06/2021 – 15.

with the Council and the Commission to have their views reflected in the proposal. However, following the submission of the draft, it appears that **there have been no serious negotiations between Parliament and the Council**, which Parliament blames on Council's unwillingness whereas the Council holds that it would only enter into negotiations on a draft that fully reflected Council's position. Meanwhile, the draft is in the third parliamentary term but still there have been no reasonable political discussions on the file. There have been meetings at technical level in order to clear out at least some of the formal legal issues that appear to stand in the way of a compromise between, but these technical meetings were not mandated to reach a compromise on *political* differences, which is a matter reserved to the institutions and their competent legislative/political committees, not their legal services. Throughout the years, the AFCO Chairs and competent Rapporteurs for the file have directed questions towards the Council and the Commission to receive explanations for the deadlock, but **the institutions' answers do not seem to reflect a willingness for a constructive and fruitful exchange in search for a compromise text**.

This attitude and what it entails – also in legal terms – has been expressed by AFCO Chair D.M. Hübner: “[The rapporteur] said that the Council and the Member States systematically refused to sit at the table and have a real discussion on the content of the European Parliament’s proposal. Their argument was that the proposal of the Parliament did not take into consideration their fundamental concerns. But this actually means **ignoring the nature of the special legislative procedure established by Article 226 TFEU. This procedure implies that the institutions exchange views and search for a compromise** acceptable for all of them. The Council demanded that the initial proposal of the European Parliament should already contain the text acceptable for the Council. This is not the way the consent procedure functions. How would the Council or the Commission react if the European Parliament refused even to discuss possible ways to reach an agreement on, let’s say, the MFF, using the pretext that it does not like the proposal of the Commission? Moreover, **this attitude is not compatible with the principle of mutual sincere cooperation** between the institutions that we all should respect and cherish.”²⁸² To be blunt: A proposal that comforts the concerns of *one* institution can be a possible *outcome of*, but should not be (mis)understood as a *precondition for* interinstitutional negotiations.

Clearly, the examples discussed in this section are only an excerpt of a whole range of cases in which a special legislative procedure applies for the adoption of measures, including consent procedures. Still, they are illustrative of the fact that there is no consistent procedure for cooperation in special legislative procedures. Instead, it appears that the way the institutions engage in negotiations depends on the subject matter of the dossier at issue. Upon closer inspection, there seems to be **more reluctance on the part of the Council and more willingness on the part of Parliament, irrespective of the fact which of the two institutions takes the final decision**. This may have to do with the fact that in most cases of a special legislative procedure, the Council needs to decide by **unanimity**, which enables each of the (currently) 27 members to veto a decision. Thus, the Council requires much more *internal* coordination to find its position before it can engage in discussions and negotiations with Parliament.

²⁸² Statement delivered by D.M. Hübner, AFCO Chair, at the [plenary meeting of 17 April 2019](#), CRE 17/04/2019 - 25.

4. POLICY RECOMMENDATIONS

In the light of the foregoing, there are several options that the institutions – first and foremost Parliament – have at their disposal in order to improve cooperation in law-making, taking due regard to the principles of institutional balance and mutual sincere cooperation. All these elements can be deployed individually, but should be considered in an overall approach.

4.1. Proceedings before the Court of Justice of the European Union

The institutions may refer to the Court of Justice if there is an alleged infringement of rights or a breach of obligations. For example, an institution may file a motion for failure to act under Article 265 TFEU if another institution has failed to take action to which it is required under primary law, despite being called upon to act. This obligation may result from a simple procedural rule in connection with the *bona fide* obligation of Article 13(2) TEU, e.g. when an institution refuses to engage in negotiations and thus impedes the adoption of a legal act without good reason. An institution may also instigate proceedings in the form of an action of annulment in accordance with Article 263 TFEU if, for example, another institution has infringed an essential procedural requirement such as a reconsultation or has in other ways infringed the Treaties and the rights and competences of the plaintiff in the procedure for the adoption of an act. However, legal action before the CJEU should be the last resort, as it is generally not a constructive tool that leads to better cooperation. It can undo wrongs and clarify obligations under the principle of mutual sincere cooperation, but undue recourse to court action can also be obstructive for *bona fide* cooperation.

4.2. Interinstitutional Cooperation and Own-Initiative Resolutions

A more constructive way is the conclusion between the institutions of agreements that govern their working relationships. As outlined above (Section 2.3), these can be more or less formalised and binding agreements that specify the rights and obligations of the institutions in the legislative and budgetary processes. In the tripartite Better Law-Making Agreement,²⁸³ the institutions have underlined the importance of coordination and of mutual exchange of views and information throughout the legislative process (points 33 ff.). As already indicated, this is a vital aspect of negotiation prior to requesting consent in a special legislative procedure. The institutions should honour this commitment at any stage of legislative procedures, but also in other law-making procedures. In the consent procedure, Parliament can use its veto power to convince Council to enter into negotiations at political level on a specific file. However, as has happened in the past, Parliament needs to be aware that mutual sincere cooperation is not a one-way street in consent procedures. This means that both institutions need to collaborate in order to reconcile their positions, which entails concessions on either side. In other words: the (veto) power of Parliament (or the Council in the relevant

²⁸³ [OJL 123, 12.5.2016, p. 1.](#)

cases) to decline consent cannot amount to the same co-decision powers as in the ordinary legislative procedure.

In a future review of the interinstitutional agreement, Parliament should try and implement more stringent consultation rights in special legislative procedures, especially in the consultation procedure. Until such an amendment, Parliament should rely on its strategic partnership with the Commission as laid down in the 2010 Framework Agreement.²⁸⁴ According to this agreement, the Commission is to undertake measures to better involve Parliament in such a way as to take Parliament's views into account as far as possible in consultation procedures. This can be done, inter alia, through the Commission's power to amend its own proposals as laid down in Article 293(2) TFEU. According to this provision, the Commission's competence exists "as long as the Council has not acted", i.e. until the Council has adopted the final act (in a legislative or non-legislative consultation procedure) or until the Council has adopted the draft act before it is submitted to Parliament for consent.²⁸⁵ If the Commission decides to amend its own proposal in accordance with Parliament's position, Council can depart from this amended draft only by unanimity, Article 293(1) TFEU.²⁸⁶

To this end, Parliament is well advised to continue to make use of its competence to adopt resolutions on its own initiative and also outside the framework of formal procedures leading to the adoption of a legal act. Thus, even before Parliament is requested to deliver its opinion or to give its consent on a specific proposal, the competent committee can draft parliamentary resolutions that would outline Parliament's position. In doing so, Parliament can communicate to the Council and the Commission its position on drafts at an early stage. At the same time, it can create public awareness of Parliament's position and a sort of public pressure for a specific topic.

In this context, Parliament can use its power under Article 225 TFEU, as it has done on numerous occasions in the past,²⁸⁷ to "request the Commission to submit any appropriate proposal on matters on which it considers that a Union act is required for the purpose of implementing the Treaties". The requests issued by Parliament can be more general in nature,²⁸⁸ but they can also be as specific as to include a draft of a legal act.²⁸⁹ Clearly, this indirect right of initiative does not guarantee that a proposal for a legal act is submitted to the adoption by the competent institution(s). Nevertheless, it gives Parliament a first-mover advantage, especially when it proposes full-fledged drafts. Moreover, as established above, the Commission is to follow these requests unless there are better reasons that argue against it. This could be spelled out more clearly in the framework agreement between the Commission and Parliament, as long as the Commission is not put under any *legal obligation* to submit proposals in any case, as this would upset the institutional balance of the Treaties.

²⁸⁴ [OJ L 304, 20.11.2010, p. 47](#), as amended by [OJ L 45, 17.2.2018, p. 46](#).

²⁸⁵ Cf. Böttner, in Blanke/Böttner (forthcoming), Article 293 TFEU para. 26.

²⁸⁶ Cf. Böttner, in Blanke/Böttner (forthcoming), Article 293 TFEU para. 11 f.

²⁸⁷ Since the entry into force of the Lisbon Treaty, the eur-lex website lists more than 50 cases in which Article 225 TFEU served as the legal basis (among others).

²⁸⁸ See, for example, [European Parliament resolution of 14 December 2021 with recommendations to the Commission on combating gender-based violence: cyberviolence \(2020/2035\(INL\)\)](#), OJ C 251, 30.6.2022, p. 2, with a list of "recommendations to the Commission as to the content of the requested proposal" in the annex.

²⁸⁹ See, for example, [European Parliament resolution of 16 September 2021 with recommendations to the Commission on identifying gender-based violence as a new area of crime listed in Article 83\(1\) TFEU \(2021/2035\(INL\)\)](#), OJ C 117, 11.3.2022, p. 88, with a proposal for a Council decision based on Article 83(1) TFEU in the annex.

4.3. Review and Sunset Clauses

In the procedure leading to the adoption of the legal act, Parliament can use its bargaining power to have review and/or sunset clauses included in the final act if appropriate.²⁹⁰ In fact, the Commission, Parliament and the Council have agreed in the Better Law-Making agreement “to systematically consider the use of review clauses in legislation and to [– –] consider whether to limit the application of certain legislation to a fixed period of time (‘sunset clause’)” (point 23).

Review clauses in the larger sense of the word are actual review, evaluation and reporting provisions contained in EU legislation.²⁹¹ In general, these clauses require an institution – usually the Commission – to evaluate a legal act or parts of it after a certain period of time and present proposals for its amendment if necessary. Regular reviews not only enable periodic updating of legal acts and consideration of their continued relevance, but can also open new opportunities for parliamentary involvement and amendments. Apart from specific amendments, it can also include the recast of an entire legal act, which opens more possibilities for the institutions to shape the act. However, a significant disadvantage of the widespread use of review clauses is that it can be very expensive in terms of legislative time.²⁹²

Sunset clause set a fixed duration to the validity of a legal act and determine when the act will cease to be in force unless extended by the competent legislator.²⁹³ As such, these clauses do not aim at continuity.²⁹⁴ These clauses can be connected to a review conducted by the Commission. If the main legislator – in most cases the Council – wishes to prolong the duration of the legal act, it needs to take a positive decision to that end. The decision is not necessarily subject to the same requirements that apply for the adoption of the legal act. The legislator is free to establish different procedural rules for the continuation of that piece of legislation. Nonetheless, if a sunset clause is included in a legal act, Parliament should aim to install a procedural safeguard that its consent is required. On the other hand, however, a disadvantage of sunset clauses is that, in some circumstances, they can increase uncertainty and thus have an adverse effect on the investment climate and on individuals’ confidence in the protection afforded them by regulation.²⁹⁵

4.4. *Passerelle* Clauses

A more ambitious approach is the use of the so-called “*passerelle* clauses” (or “bridging clauses”) contained in the Treaties. In general, these clauses are a sort of simplified treaty revision, as they allow to change from a special to the ordinary legislative procedure or to switch from unanimity voting in

²⁹⁰ On appropriate areas see Mandelkern Group on Better Regulation, Final report, 13 November 2001, p. 18.

²⁹¹ On a review of these clauses in the sixth and seventh parliamentary term, see Weber et al. (2017). On a comprehensive list of these review clauses in the eighth parliamentary term, see [Kiendl Krišto](#) (2022).

²⁹² Mandelkern Group on Better Regulation, Final report, 13 November 2001, p. 18.

²⁹³ See Mandelkern Group on Better Regulation, Final report, 13 November 2001, p. 18; Kouroutakis (2020), p. 17.

²⁹⁴ Cf. Molloy (2021), p. 150.

²⁹⁵ Mandelkern Group on Better Regulation, Final report, 13 November 2001, p. 18.

the Council to qualified majority voting. The rationale behind the *passerelle* clauses is to allow for a switch to more supranational decision-making procedures without the need for a full-fledged treaty revision. The general *passerelle* clause in Article 48(7) TEU applies to nearly all cases of special legislative procedures or unanimity voting in the Council, save for some written (Article 353 TFEU) and unwritten exceptions.²⁹⁶ Its activation requires a unanimous European Council decision after obtaining the consent of Parliament (by a majority of its component members) and no negative vote by a national parliament.²⁹⁷ Apart from the general *passerelle* clauses, there are a number of special *passerelle* clauses scattered around the Treaties for specific areas,²⁹⁸ whose activation is usually less restrictive due to their limited scope of application.

The activation of the *passerelle* clauses (switch from unanimity to qualified majority) would deprive the Member States of their veto position in the Council, opening the possibility to be outvoted by a qualified majority of Council representatives.²⁹⁹ Therefore, there is – understandably so – reluctance on the part of the Member States. Yet, this fear seems unjustified. As the Commission has pointed out, qualified majority voting has rarely been employed to outvote Member States. Instead, it is asserted that around 80 percent of decisions are ultimately taken in consensus even in cases where a qualified majority in the Council would suffice and that there have been only a handful of occurrences where three or more Member States have been forced to accept a majority vote.³⁰⁰ Furthermore, qualified majority voting tends to allow for more space for discussion and common solutions that reflect the interests of all.³⁰¹ As the Commission asserts, Member States “often hold back from seriously negotiating solutions in the Council, as they know that they can simply veto any result that they do not like. This ‘unanimity culture’ sometimes encourages Member States [---] to focus on the preservation of their national systems, instead of seeking to reach a necessary compromise to safeguard the EU’s general interests.”³⁰²

Any use of the *passerelle* clauses would strengthen the position of Parliament *vis-à-vis* the Member States; even the mere passing to qualified majority voting in the Council would make it easier for the Council to adopt its position and accommodate the position of Parliament. It seems natural therefore that Parliament has called for making an extensive use of the *passerelle* clauses as a means for

²⁹⁶ See Böttner/Grinc (2018), p. 19 ff.

²⁹⁷ On the procedure, see in detail Böttner/Grinc (2018), p. 55 ff.

²⁹⁸ 1) passing to qualified majority voting in the Council in the Common Foreign and Security Policy according to Article 31(3) TEU; 2) passing to ordinary legislative procedure in certain areas of social policy according to Article 153(2)(4) TFEU; 3) passing to ordinary legislative procedure in certain areas of environmental policy according to Article 192(2) TFEU; 4) passing to qualified majority voting in the Council when adopting the multiannual financial framework according to Article 312(2) TFEU; 5) passing to qualified majority voting in the Council and/or to ordinary legislative procedure within the framework of enhanced cooperation according to Article 333 TFEU. See in detail Böttner/Grinc (2018), p. 37 ff. and Kotanidis (2020), p. 24 ff. Some national constitutional orders contain further safeguards, e.g. tying the vote of the representative in the Council or the European Council to a positive decision by the national parliament.

²⁹⁹ Cf. Kotanidis (2020), p. 37.

³⁰⁰ Bendiek et al. (2018), p. 2; see also [Commission Communication, A stronger global actor: a more efficient decision-making for EU Common Foreign and Security Policy](#), COM(2018) 647 final of 12.9.2018, p. 3.

³⁰¹ COM(2018) 647 final of 12.9.2018, p. 2 f.

³⁰² [Commission Communication, Towards a more efficient and democratic decision making in EU tax policy](#), COM(2019) 8 final of 15.1.2019, p. 8. See also Böttner (2020), p. 496.

improving the functioning of the EU.³⁰³ Moreover, it has repeatedly called upon the European Council to use the *passerelle* clause of Article 312(2) TFEU, which allows qualified majority voting on the MFF in the Council.³⁰⁴ However, Parliament is aware of the low probability that such a giant leap in the decision-making procedures will be made.³⁰⁵ In its resolution it noted that “none of the ‘*passerelle* clauses’ provided for in the Lisbon Treaty with a view to streamlining the EU’s governance have been deployed, and are unlikely to be so in the present circumstances”.³⁰⁶

The decision-making procedures of the EU were one of the issues discussed at the recent Conference on the Future of Europe. Without explicitly mentioning the *passerelle* clauses, the 39th proposal of the final report on the EU decision-making process suggests that, with some exceptions, “[a]ll issues decided by way of unanimity should be decided by way of a qualified majority.”³⁰⁷ Following up on the results of the Conference, the European Parliament has adopted a resolution in which it calls for a Convention for a revision of the Treaties.³⁰⁸ Among the specific proposals is a change to qualified majority voting in the procedures for the activation of the *passerelle* clauses, i.e. a simplification of their deployment. Parliament’s AFCO Committee is currently working on two resolutions on Parliament’s proposals for the amendments of the Treaties³⁰⁹ and for the implementation of the *passerelle* clauses.³¹⁰

Despite or because of the Member States’ reluctance to use the *passerelle* clauses, the Commission has launched initiatives to this end. In his 2017 State of the Union Address, then Commission President *Jean-Claude Juncker* advocated the use of the *passerelle* clauses especially in the area of tax and foreign policy.³¹¹ Following up on the President’s remarks, the Commission presented communications on the activation and use of the *passerelle* clauses in four areas: common foreign and security policy (CFSP) (September 2018),³¹² taxation (January 2019),³¹³ energy and climate (April 2019),³¹⁴ and social policy (April 2019).³¹⁵ The incumbent Commission under President *Ursula von der Leyen* has endorsed this ambitious project. The mission letters for the Commissioner for Economy, for Energy, and for the High Representative for the CFSP, commit the Commissioners to “make full use of the clauses in the Treaties”

³⁰³ See [European Parliament resolution of 16 February 2017 on improving the functioning of the European Union building on the potential of the Lisbon Treaty \(2014/2249\(INI\)\)](#), OJ C 252, 18.7.2018, p. 215, point 27, 33, 79, 102, 135.

³⁰⁴ [European Parliament resolution of 16 February 2017 \(2014/2249\(INI\)\)](#), point 19 as well as [European Parliament resolution of 14 November 2018 \(COM\(2018\)0322 — C8-0000/2018 — 2018/0166R\(APP\)\)](#), point 13.

³⁰⁵ Böttner/Grinc (2018), p. 94.

³⁰⁶ [European Parliament resolution of 16 February 2017 \(2014/2249\(INI\)\)](#), point AA.

³⁰⁷ Conference on the Future of Europe, [Report on the Final Outcome](#), May 2022, p. 83 f. See also European Parliamentary Research Service, [European democracy / Values and rights, rule of law, security - Citizens' recommendations and the EU context](#), PE 698.928 – February 2022, p. 25.

³⁰⁸ [European Parliament resolution of 9 June 2022 on the call for a Convention for the revision of the Treaties \(2022/2705\(RSP\)\)](#).

³⁰⁹ [Proposals of the European Parliament for the amendment of the Treaties](#), 2022/2051 (INL).

³¹⁰ [Implementation of “passerelle” clauses in the EU Treaties](#), 2022/2142 (INI).

³¹¹ [2017 State of the Union Address](#), Brussels, 13 September 2017. These plans were reiterated in the [2018 State of the Union Address](#), Strasbourg, 12 September 2018.

³¹² [COM\(2018\) 647 final](#) of 12.9.2018.

³¹³ [COM\(2019\) 8 final](#) of 15.1.2019.

³¹⁴ [COM\(2019\) 177 final](#) of 9.4.2019.

³¹⁵ [COM\(2019\) 186 final](#) of 16.4.2019.

that allow proposals on taxation, energy, and the CFSP "to be adopted by qualified majority voting".³¹⁶ Parliament has endorsed these initiatives,³¹⁷ while the Member States are divided on this issue.³¹⁸ If Parliament builds a strategic alliance with the Commission, there is a good chance that at least part of the potential that rests in the *passerelle* clauses is finally deployed..

4.5. Enhanced Cooperation

Finally, a seemingly less straightforward approach to improving the cooperation between Parliament and the Council could be to consider using the instrument of 'enhanced cooperation'³¹⁹ more often, at least for specific legislative files. On the basis of Articles 20 TEU and 326 ff. TFEU, enhanced cooperation is a flexibility tool that allows a group of at least nine Member States to make use of the EU's institutions and procedures to exercise the EU competences without all Member States participating. In other words, the EU may adopt legal acts that apply only to a limited number of Member States and which are adopted only by those Council members representing Member States taking part in that cooperation. Enhanced cooperation is authorised on a proposal from the Commission (acting upon request from the group of Member States) by the Council acting by qualified majority after obtaining the consent from Parliament.³²⁰ The measures for the implementation of enhanced cooperation, i.e. the substantial legal acts, are adopted in accordance with the legal basis with the Council acting in reduced composition of the participating States.

In the past, there have been a few occasions in which this instrument has been used:³²¹ the law applicable to divorce and legal separation,³²² unitary patent protection,³²³ the financial transaction

³¹⁶ See, as an example, the [mission letter to Paolo Gentiloni](#), Commissioner for Economy, of 1.12.2019. See on these initiatives in details Böttner (2020) and [Kotanidis](#) (2020), p. 37 ff.

³¹⁷ See [Kotanidis](#) (2020), p. 50 ff.

³¹⁸ [Kotanidis](#) (2020), p. 53 with further references.

³¹⁹ See on this also [Wessels/Gerards](#) (2018).

³²⁰ This applies to enhanced cooperation outside the scope of the CFSP. In those cases, the Member States' request is directed to the Council, which decides by unanimity after consulting the High Representative and the Commission, Article 329(2) TFEU.

³²¹ On these cases, see Böttner (2021), p. 47 ff.

³²² [Council Decision 2010/405/EU of 12 June 2010 authorising enhanced cooperation in the area of the law applicable to divorce and legal separation](#), OJ L 189, 22.7.2010, p. 12, and [Council Regulation \(EU\) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation](#), OJ L 343, 29.12.2010, p. 10.

³²³ [Council Decision 2011/167/EU of 10 March 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection](#), OJ L 76, 22.3.2011, p. 53, and [Regulation \(EU\) No. 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection](#), OJ L 361, 31.12.2012, p. 1, as well as [Council Regulation \(EU\) No. 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements](#), OJ L 361, 31.12.2012, p. 89.

tax,³²⁴ property regimes of international couples,³²⁵ and the European Public Prosecutor's Office.³²⁶ Moreover, permanent structured cooperation (PESCO) as another flexibility tool has been established on the basis of Article 46 TEU.³²⁷ Besides these cases, there are a number of files for which enhanced cooperation was discussed but eventually not used as an alternative or where enhanced cooperation was considered but eventually Member States could agree on uniform integration.³²⁸

As has been shown above, a dysfunctional cooperation between Parliament and the Council sometimes has its cause in cumbersome negotiations between the Council representatives themselves, i.e. between the Member States of the EU. It is only when the Member States agree on a common position in the Council that the Council and its competent committees can enter into political negotiations with Parliament and its competent committees. The negotiations in the Council are especially difficult if the Council decides by unanimity. Unless the institutions decide to switch to qualified majority voting in the Council (see above), enhanced cooperation could improve the cooperation between Parliament and the Council because it would eliminate the need to have every Council member on board at any cost. The institutions involved in the authorisation of enhanced cooperation must strike a balance between ambition of a few and inclusion and compromise of all. In this context, one should consider also the odds and effects of a watered-down compromise between all EU Member States on the one hand and the risks that too much differentiation may bear.³²⁹ As its consent for the establishment of enhanced cooperation is required, Parliament could use this bargaining power and pressure the Council into using the *passerelle* clause of Article 333 TFEU *within* an established cooperation. Parliament is aware of this possibility, but has not been insistent.³³⁰

³²⁴ [Council Decision 2013/52/EU of 22 January 2013 authorising enhanced cooperation in the area of financial transaction tax](#), OJ L 22, 25.1.2013, p. 11. No implementing act has yet been adopted, but discussions are still on-going on the basis of the Commission's proposal [COM\(2013\) 71 final](#) of 14.2.2013 and a Franco-German proposal of 2019. As the Commission to intends to include a financial transaction tax as other own resource in the next MFF, discussions are intensifying; cf. [Council Doc. 5737/21](#) of 12 February 2021.

³²⁵ [Council Decision \(EU\) 2016/954 of 9 June 2016 authorising enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships](#), OJ L 159, 16.6.2016, p. 16, and [Council Regulation \(EU\) 2016/1103](#) and [Council Regulation \(EU\) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and in matters of the property consequences of registered partnerships](#), OJ L 183, 8.7.2016, p. 1 and p. 30.

³²⁶ [Council Regulation \(EU\) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office \('the EPPO'\)](#), OJ L 283, 31.10.2017, p. 1. There is no authorising decision as enhanced cooperation for the EPPO has been established by a fast-track procedure.

³²⁷ [Council Decision \(CFSP\) 2017/2315 of 11 December 2017 establishing permanent structured cooperation \(PESCO\) and determining the list of participating Member States](#), OJ L 331, 14.12.2017, p. 57. See also European Council of 14 December 2017, [Conclusions, EUCO 19/1/17 REV 1](#), p. 1.

³²⁸ See on this Böttner (forthcoming).

³²⁹ Böttner (2021), p. 338.

³³⁰ [European Parliament legislative resolution of 16 June 2010 on the draft Council decision authorising enhanced cooperation in the area of the law applicable to divorce and legal separation \(09898/2/2010 – C7-0145/2010–2010/0066\(NLE\)\)](#), OJ C 236E, 12.8.2011, p. 179, point 2: "Calls on the Council to adopt a decision pursuant to Article 333(2) of the Treaty on the Functioning of the European Union stipulating that, when it comes to the proposal for a Council Regulation implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, it will act under the ordinary legislative procedure"

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ANNEX

1. Legal bases for the ordinary legislative procedure

Article	Content
TEU	
Article 11(4) in conjunction with Article 24(1) TFEU	European citizens' initiative
TFEU	
Article 14	Principles and conditions for supply of services of general economic interest
Article 15(3)	General aspects of right of access to Union documents
Article 16(2)	Protection of personal data
Article 18(2)	Rules against discrimination based on nationality
Article 19(2)	Rules against discrimination based on other grounds
Article 21(2)	Free movement of citizens
Article 24(1) in conjunction with Article 11(4) TEU	Rules on the European citizens' initiative
Article 33	Customs cooperation
Article 42(1)	Competition rules in trade with agricultural products
Article 43(2)	Common organisation of agricultural markets
Article 46	Free movement of workers
Article 48	measures on social security in the context of free movement of workers
Article 50(1)	Freedom of establishment
Article 51(2)	Non-application of public policy exceptions to specific activities in freedom of establishment
Article 52(2)	Coordination of public policy exceptions
Article 53 (1)	Mutual recognition of qualifications
Article 56(2)	Extension of freedom to provide services to third-country nationals
Article 59(1)	Liberalisation of specific services

Article 62 in conjunction with Articles 51, 52, and 53, respectively	Applicability of rules on establishment to freedom to provide services
Article 64(2)	Measures for free movement of capital with third countries as regards direct investments
Article 75(1)	Framework for administrative measures with regard to capital movements to combat terrorism
Article 77(2)	Visas, border checks, free movement of third-country nationals
Article 78(2)	Common asylum system
Article 79(2)	Immigration and residency rights for third-country nationals; combatting human trafficking
Article 79(4)	Integration of third-country nationals
Article 81(2)	Judicial cooperation in civil matters
Article 82(1), (2)	Judicial cooperation in criminal matters; mutual recognition of judgments and decisions and police and judicial cooperation in criminal matters
Article 83(1)	Minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension
Article 83(2)	Minimum rules with regard to the definition of criminal offences and sanctions in harmonised areas (following the same ordinary or specialised legislative procedure of the harmonising measure)
Article 84	Crime prevention
Article 85(2)	Eurojust
Article 87(2)	Police cooperation
Article 88(2)	Europol
Article 91(1)	Common transport policy
Article 100	Common transport provisions for sea and air transport
Article 114	Internal market harmonisation
Article 116(2)	Eliminating internal market distortions
Article 118(1)	European intellectual property rights
Article 121(6)	Multilateral surveillance
Article 129(3)	Simplified amendment of the ESCB Statute (cf. Article 40.1 of Protocol No. 4)
Article 133	Use of the euro as the single currency
Article 149	Incentive measures for employment

Article 153(2)	Social policy measures
Article 157(3)	Equal treatment of men and women in employment matters
Article 164	Implementing regulations relating to the European Social Fund
Article 165(4)	Education, youth, and sport
Article 166(4)	Vocational training
Article 167(4)	Culture
Article 168(4)	Public health measures to meet common safety concerns
Article 168(5)	Incentive measures in public health designed to protect and improve human health
Article 169(3)	Consumer protection
Article 172	Trans-European networks
Article 173(3)	Industrial policy
Article 175(3)	Economic, social and territorial cohesion
Article 177(1)	Organisation of the Structural Funds,
Article 177(2)	Cohesion Fund
Article 178(1)	Implementing regulations relating to the European Regional Development Fund
Article 182(1)	Multiannual framework programme for research
Article 182(5)	European research area
Article 188(2), in conjunction with Articles 183, 184, and 185, respectively	Research programmes
Article 189(2)	Space policy
Article 192(1)	Environmental policy
Article 192(3)	General action programmes in environmental policy
Article 194(2)	Energy
Article 195(2)	Tourism
Article 196(2)	Civil Protection
Article 197(2)	Administrative cooperation
Article 207(2)	Implementing measures for the common commercial policy
Article 209(1)	Development cooperation
Article 212(2)	Economic, financial and technical cooperation with third countries
Article 214(3)	Framework for humanitarian aid cooperation

Article 214(5)	European Voluntary Humanitarian Aid Corps
Article 224	Political parties at European level
Article 257(1)	Establishment of specialised courts
Article 281(2)	Amendments to the CJEU Statute
Article 291(3)	Mechanisms for the control of the Commission's exercise of implementing powers
Article 298	European administration
Article 322(1)	Financial rules
Article 325(4)	Combatting fraud affecting the Union's financial interests
Article 336	Staff Regulations for EU officials and Conditions of Employment of other servants
Article 338(1)	Statistics
Protocols	
Article 13 of Protocol No. 3	Appointment of Assistant Rapporteurs
Article 40.1 of Protocol No. 4	Simplified amendment of the ESCB Statute (cf. Article 129(3) TFEU)
Article 12 of Protocol No. 7	Tax exemptions
Article 14 of Protocol No. 7	Social security benefits
Article 15 of Protocol No. 7	Categories of officials and other civil servants to whom certain exemptions apply

2. Legal bases for a special legislative procedure where acts are adopted by Parliament

Article	Content	Further procedural aspects
TFEU		
Article 223(2)	Regulations and general conditions governing the performance of the duties of MEPs	EP initiative Opinion from the Commission Consent of the Council (unanimity, if taxation is concerned)
Article 226(3)	EP's right of inquiry	EP initiative Consent of the Council

		Consent of the Commission
Article 228(4)	Regulations and general conditions governing the performance of the Ombudsman's duties	EP initiative Consent of the Council Opinion from the Commission
Article 314	Annual budget	Draft budget submitted by the Commission Adoption together with the Council Final act signed by Parliament

3. Legal bases for a special legislative procedure with consent by Parliament

Article	Content	Further procedural aspects
TFEU		
Article 19(1)	Measures combating discrimination	Council unanimity
Article 25(2)	Additional rights for EU citizens	Council unanimity Approval by the Member States in accordance with their respective constitutional requirements
Article 83(2)	Minimum rules with regard to the definition of criminal offences and sanctions in harmonised areas (following the ordinary or specialised legislative procedure of the harmonising measure)	Qualified majority of unanimity in the Council, according to the rules applicable for the harmonising measures
Article 86(1)	Establishment of a European Public Prosecutor's Office	Council unanimity
Article 223(1)	Rules for the European elections by direct universal suffrage	Proposal by the EP Council unanimity Parliament acting by majority of its component members Approval by the Member States in accordance with their respective constitutional requirements
Article 311(4)	Implementing measures for the Union's own resources system	Qualified majority voting in the Council

Article 312(2)	Multiannual financial framework	Council unanimity Parliament acting by majority of its component members
Article 352(1)	Flexibility clause	Council unanimity
Protocols		
Article 2(1) of Protocol No.37	Measures implementing the Protocol on financial consequences of the expiry of the ECSC Treaty	Qualified majority voting in the Council

4. Legal bases for a special legislative procedure with consultation of Parliament

Article	Content	Further procedural aspects
TFEU		
Article 21(3)	Measures concerning social security or social protection for the free movement of citizens	Council unanimity
Article 22(1)	Right to vote in municipal elections for EU citizens	Council unanimity
Article 22(2)	Right to vote in the European elections for EU citizens	Council unanimity
Article 23(2)	Diplomatic or consular protection for EU nationals	Qualified majority voting in the Council
Article 64(3)	Steps backward in the liberalisation of the movement of capital to or from third countries	Council unanimity
Article 77(3)	provisions concerning passports, identity cards, residence permits or any other such document	Council unanimity
Article 81(3)(1)	Judicial cooperation in civil matters concerning family law with cross-border implications	Council unanimity
Article 83(2)	Minimum rules with regard to the definition of criminal offences and sanctions in harmonised areas (following the same ordinary or specialised legislative procedure of the harmonising measure)	Qualified majority or unanimity in the Council, according to the rules applicable for the harmonising measures

Article 87(3)	Measures concerning operational police cooperation	Council unanimity
Article 89	Cross-border judicial and police operation	Council unanimity
Article 113	Harmonisation of indirect taxes	Council unanimity Consultation of the Economic and Social Committee
Article 115	Harmonisation directly affecting the internal market	Council unanimity Consultation of the Economic and Social Committee
Article 118(2)	Language arrangements for European intellectual property rights	Council unanimity
Article 126(14)(2)	Adoption of provisions replacing the excessive deficit Protocol	Council unanimity Consultation of the European Central Bank
Article 127(6)	Specific rules for prudential supervision by the ECB of financial institutions	Council unanimity Consultation of the European Central Bank
Article 153(2)	Specific social policy measures	Council unanimity Consultation of the Economic and Social Committee and the Committee of the Regions
Article 182(4)	Specific research programmes	Qualified majority voting in the Council Consultation of the Economic and Social Committee
Article 192(2)	Environmental measures of a fiscal nature or affecting specific domestic areas	Council unanimity Consultation of the Economic and Social Committee and the Committee of the Regions
Article 194(3)	Energy policy measures of a fiscal nature	Council unanimity
Article 203	Rules and procedures for the association of overseas countries and territories	Council unanimity
Article 262	Jurisdiction for European intellectual property rights	Council unanimity Approval by the Member States in accordance with their

		respective constitutional requirements
Article 308(3)	Amendments to the EIB Statute	Council unanimity Request of the European Investment Bank and consultation of Parliament and the Commission, or Proposal from the Commission and consultation of Parliament and the European Investment Bank
Article 311(3)	System of EU's own resources	Council unanimity Approval by the Member States in accordance with their respective constitutional requirements
Article 349(1)	Application of the Treaties to outermost regions	Qualified majority voting in the Council

5. Legal bases for other legal acts of the Council with participation of Parliament

Article	Content	Further procedural aspects
TEU		
Article 6(2) in conjunction with Article 218(6)(a)(ii) TFEU	Accession of the Union to the ECHR	Qualified majority in the Council (unanimity, if required by an internal policy) EP consent
Article 7(1)	Risk of a serious breach by a Member State of the Union's values	proposal by one third of the Member States, by Parliament or by the European Commission four fifths majority in the Council EP consent

Article 8(2) in conjunction with Article 218(6)(a) TFEU	Agreements with neighbouring countries	qualified majority voting or unanimity in the Council EP consent
Article 27(3)	European External Actions Service	unanimity in the Council EP consultation COM consent
Article 41(3)(1)	Specific procedures for guaranteeing rapid access to appropriations in the Union budget for urgent financing of initiatives	unanimity in the Council EP consultation
Article 49	Accession agreement	unanimity in the Council COM consultation EP consent (majority of its component members)
Article 50(2)	Withdrawal agreement	qualified majority voting in the Council EP consent
TFEU		
Article 74	Administrative cooperation in AFSJ	Qualified majority voting in the Council EP consultation
Article 78(3)	Provisional measures in case of a sudden inflow of third-country nationals	Qualified majority voting in the Council EP consultation
Article 81(3)(2)	Passerelle clause for aspects of family law with cross-border implications	Unanimity in the Council EP consultation
Article 82(2)(d)	Extension of EU competence in criminal procedure	Unanimity in the Council EP consent
Article 83(1)(3)	Identifying other areas of serious crime	Unanimity in the Council EP consent
Article 95(3)	Implementing rules in transport policy	Qualified majority voting in the Council EP consultation
Article 103(1)	Competition policy	Qualified majority voting in the Council

		EP consultation
Article 109	State aid policy	Qualified majority voting in the Council EP consultation
Article 125(2)	Specifications for rules on budgetary discipline	Qualified majority voting in the Council EP consultation
Article 126(14)(3)	Adoption of provisions specifying rules of the excessive deficit Protocol	Qualified majority voting in the Council EP consultation
Article 128(2)	Measures to harmonise the denominations and technical specifications of euro coins	Qualified majority voting in the Council EP and ECB consultation
Article 129(4) TFEU (= Article 41 of Protocol No. 4)	Adoption of provisions specified in the ESCB Statute	Qualified majority voting in the Council On a proposal from COM and EP and ECB consultation or On recommendation from ECB and EP and COM consultation
Article 134(3)	Composition of the Economic and Financial Committee	Qualified majority voting in the Council EP information
Article 140(2)	Abrogation of the derogation concerning the introduction of the euro	Qualified majority voting in the Council on recommendation from euro area members, acting by qualified majority EP consultation Discussion in the European Council
Article 148(2)	Economic policy guidelines	Qualified majority voting in the Council Based on European Council conclusions EP, ESC, COR and Employment Committee consultation

Article 150(1)	Establishment of an Employment Committee	Simple majority in the Council EP consultation
Article 153(2)(4)	Passerelle clause for aspects of social policy	Unanimity in the Council EP consultation
Article 155(2)	Implementation of agreements between management and labour	Qualified majority voting or unanimity in the Council (depending on subject matter) EP informed
Article 160(1)	Establishment of a Social Protection Committee	simple majority in the Council EP consultation
Article 188(1)	Establishment of structures necessary for the efficient execution of Union research	Qualified majority voting in the Council EP consultation
Article 192(2)(2)	Passerelle clause for aspects of environmental policy	Unanimity in the Council EP consultation
Article 218(6)(a)	Conclusion of agreements: association agreements; accession to the ECHR agreements establishing a specific institutional framework agreements with important budgetary implications for the Union; agreements covering fields of the ordinary legislative procedure or EP consent	Qualified majority voting in the Council (unanimity for association agreements and agreements covering areas requiring unanimity and agreement acceding to the ECHR) EP consent Approval by Member States (for accession to ECHR)
Article 218(6)(b)	Other international agreements	Qualified majority voting in the Council (unanimity for association agreements and agreements covering areas requiring unanimity) EP consent
Article 219(1)	Agreement on exchange-rate system for the euro	Unanimity in the Council Recommendation from ECB or from COM after ECB consultation EP consultation

Article 222(3)	Implementation of the solidarity clause	joint proposal by the Commission and the HR Qualified majority voting in the Council (unanimity, where the act has defence implications) EP informed
Article 286(2)	Appointment of the members of the Court of Auditors	Qualified majority voting in the Council EP consultation
Article 322(2)	Methods and procedure whereby the budget revenue shall be made available to the Commission	Qualified majority voting in the Council EP consultation
Article 329(1)	Authorisation for enhanced cooperation	Qualified majority voting in the Council EP consent
Article 329(2)	Authorisation for enhanced cooperation in CFSP	Unanimity in the Council HR and COM consultation EP information
Article 332	Change in financing rules for enhanced cooperation	Unanimity in the Council EP consultation
Article 333(2)	Switching to the ordinary legislative procedure in enhanced cooperation	Unanimity in the Council EP consent
Article 349(1)	Application of the Treaties to outermost regions	Proposal from the Commission Qualified majority voting in the Council EP consultation
Article 352(1)	Flexibility clause	Proposal from the Commission Unanimity in the Council EP consent
Protocols		
Article 64 of Protocol No. 3	Language arrangements for the CJEU	Unanimity in the Council At the request of the Court of Justice; EP and COM consultation or

		On a proposal from COM; EP and Court of Justice consultation
Article 41 of Protocol No. 4 (= Article 129(4) TFEU)	Adoption of provisions specified in the ESCB Statute	Qualified majority voting in the Council On a proposal from COM; EP and ECB consultation or On recommendation from ECB; EP and COM consultation
Article 6 of Protocol No. 12	Detail of the convergence criteria	Unanimity in the Council EP, ECB and Economic and Financial Committee consultation
Article 9 of Protocol No. 22	Participation of Denmark in financing of AFSJ measures	Unanimity in the Council EP consultation
Article 6(1) of Protocol No. 31	Revision of the Protocol	Unanimity in the Council EP and COM consultation
Article 2(2) of Protocol No. 37	Multiannual financial guidelines for managing the assets of the Research Fund for Coal and Steel	Qualified majority voting in the Council EP consultation

6. Legal acts of the European Council with participation of Parliament

Article	Content	Further procedural aspects
TEU		
Article 7(2)	determination of the existence of a serious and persistent breach of the EU values by a Member States	unanimity proposal of one-third of Member States or from Commission EP consent
Article 14(2)(2)	European Parliament's composition	unanimity EP initiative and consent
Article 17(7)(3)	appointment of the Commission	Qualified majority prior EP consent

Article 48(3)(1)	decision in favour of examining amendments to the Treaties	simple majority consultation of EP and Commission consultation of ECB if institutional changes in monetary area
Article 48(3)(2)	decision not to convene a Convention	simple majority EP consent
Article 48(6)(2)	simplified revision procedure	unanimity consultation of EP and Commission consultation of ECB if institutional changes in monetary area approval by Member States in accordance with their constitutional requirements
Article 48(7)	Bridging clauses	unanimity EP consent non-opposition from national parliaments
TFEU		
Article 86(4)	extension of powers of the European Public Prosecutor	unanimity EP consent consultation of Commission
Article 283(2)	appointment of the members of the ECB executive board	Qualified majority recommendation from the Council consultation with EP and ECB Governing Council

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCO Committee, examines the legislative procedures in the Treaties. It focuses on special legislative procedures where either Parliament or the Council adopts an act with the participation (consultation or consent) of the other institution. This should not mean, however, that the participating institution couldn't influence the substance of the act. Instead, the principles of institutional balance and mutual sincere cooperation require that the opinion of the participating institution be duly taken into account.

PE 738.331

IP/C/AFCO/IC/2022-039

Print ISBN 978-92-846-9868-4 | doi: 10.2861/29320 | QA-03-22-101-EN-C
PDF ISBN 978-92-846-9867-7 | doi: 10.2861/004330 | QA-03-22-101-EN-N