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Intergovernmental relations in the European Union

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1. Intergovernmental relations in EU.

The peculiar characteristic of the European order is that a domestic inter-governmental method is mainly applied within the system, even though it was born as an international organization and still maintains features that are not precisely federal in certain areas.

Besides, the adoption of the intergovernmental model in Community relations allowed for a background of intergovernmental relationships to develop especially with regard to the way in which it is carried out. Indeed, even though the Treaty declares the principle of sincere cooperation (Article 4.3 TEU), under which “the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties” (Klammert, 2014), it does not regulate the forms of intergovernmental cooperation, or it does so only roughly. Consequently, it is essential to examine the inner workings of the European Union to understand how intergovernmental relationships are implemented.

For this purpose, and looking at the scope and variety of the intergovernmental method in unified relationships, some cases will be analysed that can be considered to be emblematic of this part of the European order.

2. The power of legislative initiative of the Commission and European legislation

The European legislative procedure presents many differences with respect to that of unitary States and with regard to federal States, some typical elements are missing.

In any case, in simple terms, legislative acts should be approved according to the ordinary procedure by the European Parliament and by the Council (Villani, 2011, p. 199). The former is directly elected by the European citizens while the Council is made up of the governments of the Member States. In addition, it is significant to recall that, for the adoption of most legislative acts over which the EU has competence, the majority rule is



applied instead of unanimity, and that they are directly enforceable in the States. Hence, for this (sizeable) part of the European order, the European Union appears to have some elements that are typical of the *foedus* that led to the founding of federal states.

The Commission plays an active role towards the other Institutions that operate in the decision-making process (Chalmers, Davies and Monti, 2010, p. 58). Indeed, Article 17.2 TUE states that “Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise”, and it immediately adds that “Other acts shall be adopted on the basis of a Commission proposal where the Treaties so provide”.

This power of initiative, albeit not exclusive, is prevalent and finds its strongest expression in the draft budget submitted by the Commission to Parliament and the Council (Article 314.2 TEU).

Originally the Commission was configured as an independent authority (Nugent, Rhinard, 2015, p. 303) that, in the initial design, had the task of monitoring the application of the provisions of the Treaties and of those adopted by the Institutions under the Treaties in the general interest of the Community.

In this context, attributing the power of proposal to the Commission served the purpose of balancing the positions of the Member States, characterized by diversified conditions and by non uniform interests, and to achieve the objectives of the Treaties.

In the current context, instead, the Commission appears to be a highly politicized organ, since it has become an Institution to which many requests are addressed both by public and private parties (Villani, 2011, pp. 160-164). The informal dialogue that takes place with private parties - citizens, companies, associations, etc. - may go so far as to formulate legislative proposals that the Commission may decide to take on.

In some cases, after an informal phase, the Commission promotes this debate on specific issues through its “green papers” (The green paper is a communication in which the Commission illustrates the state of a given sector that needs regulations and clarifies its point of view on certain issues) and “white papers” (White Papers are documents containing proposals for European Union action in a specific area. In some cases, they follow on from a Green Paper published to launch a consultation process at the European level) that are consultation documents drawn up by the Commission; they are not envisaged in the Treaties (so-called atypical acts), even though now they are mentioned in Protocol no 1 on National Parliaments where it is stated that “consultation documents (green and white papers and communications) shall be forwarded directly by the Commission to national Parliaments upon publication” (Article 1).

At the end of the public debate, in general the Commission formulates its proposal. From the formal editorial standpoint, the Commissioner competent by subject matter is assigned the drafting of the text, which is done by senior officials who then present the draft legislative act to the Commissioner.



Before a given proposal is formulated, written and then forwarded to the European Parliament and to the Council for deliberation, it must deal with an issue that is included in the annual legislative programme.

The Commission's annual work programme is submitted every year after the Report on the State of the Union that the President of the Commission delivers at the end of September.

The Commission's work programme (CWP) is forwarded in the very simple form of a "Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee and to the Committee of Regions", which describes the priority actions the Commission will carry out during the year. These priorities are partially derived from the political orientations presented at the beginning of the mandate of the Commission, after discussions with the European Parliament, and in part they reflect the political input by the European Council on the occasion of the appointment of the Commission after the elections of the European Parliament.

These strategic inputs act as a framework and actually play a limited political role, while in practice, in order to know the orientations that will take on the form of a proposal, one needs to look at the outline adopted in the Communication from the Commission: first of all, this lays down the key initiatives that determine the legislative priorities of the year of reference (for 2017 there are 21 key initiatives, for each of which there should be a legislative proposal); secondly, all the proposals for updating and amending the European legislation already in force – maintenance work on the European order that comes under the REFIT programme – include tasks that are typically of the Commission; thirdly, the proposals on hold, formulated previously and not yet formalized in the presentation are grouped together under the title of 'priority proposals'; fourthly, the proposals that are withdrawn – because in the meantime the objectives have been reached through other pathways, or they have simply become obsolete; and fifthly, proposals to repeal previous acts.

In the past, the preparation of the Union's work programme occurred informally among the Institutions interested in the European legislative procedure, starting from the manifestations of interest that Parliament and the Council expressed at the beginning of each year and that the Commission would include in its programme.

From a certain time on, their legislative collaboration was coordinated by an interinstitutional agreement based on Article 295 of the TFEU ("The European Parliament, the Council and the Commission shall consult each other and by common agreement make arrangements for their cooperation. To that end, they may, in compliance with the Treaties, conclude interinstitutional agreements which may be of a binding nature"). Now, in May 2016, a new interinstitutional agreement was reached which bears the significant title of "*Better Law-making*".

The Agreement indicatively follows the phases of the legislative cycle and contains provisions concerning, among other things, the common objectives, the programming and the instruments for better law-making, like the impact assessment (Nugent, Rhinard, 2015, p.



303), consultation of stakeholders and the ex post evaluation; moreover, these instruments should involve the legislative acts, delegated acts and implementation acts in order to facilitate transparency, implementation and simplification of European acts.

Annual programming (section 6) envisages, right from the beginning of the year, timely bilateral exchanges of opinions on the initiatives for the following year on the basis of which the Commission transmits a written contribution in which it delineates, in considerable detail, the major points of political relevance for the following year and indications as to the proposals that the Commission intends to withdraw (“letter of intent”).

Following the debate on the state of the Union, and before the adoption of the Commission’s work programme, the European Parliament and the Council have an exchange of opinions with the Commission on the letter of intent.

The Commission takes into due account the opinions expressed by the European Parliament and by the Council in each phase of the dialogue, including their requests of initiative and to undertake studies (based respectively on Articles 225 and 241 of the TFEU) and responds to such requests within three months, giving reasons if it chooses not to submit further proposals. After the adoption of the Commission’s work programme, and based on it, the three Institutions exchange opinions on the initiatives for the following year and agree on a common statement on the annual interinstitutional programming: “Joint declaration”) signed by the three presidents of the three institutions (section 7). The joint statement sets the objectives and priorities in general lines for the following year and identifies the politically most important points that should be dealt with by way of priority in the legislative procedure. During the year the three institutions constantly follow up on the implementation of the joint statement. For this purpose they take part in the debates on the implementation of the joint statement at the European Parliament and/or at the Council in the Spring of the same year.

The provisions of the interinstitutional agreement that concern the horizontal collaboration among the three Institutions are completed by Protocol no 1 on National Parliaments. Indeed, Article 1 of Protocol no 1 envisages that “The Commission shall also forward the annual legislative programme as well as any other instrument of legislative planning or policy to national Parliaments, at the same time as to the European Parliament and the Council”.

However, on the legislative programme, national Parliaments (and with them also regional Parliaments) cannot exercise any form of direct influence, but they can give indications to their respective governments who act in the Council.

As to the instruments that allow for better law-making and that affect the individual legislative proposals before they are addressed to the European Parliament and to the Council, the Agreement explicitly confirms that the impact assessment is an instrument that enables the Institutions to make well-grounded decisions and does not replace political decisions within the democratic decision-making process.



Besides the legislative initiatives, the Impact Assessments made by the Commission concern also delegated acts and implementation measures that may have a significant economic, environmental or social impact.

In the internal impact assessment process the Commission conducts as wide-ranging consultations as possible.

The Agreement states that the consultation of the public and of stakeholders is an integral part of a well-informed decision-making process and of the quality improvement of the process (paragraph 19) and invites the Commission, before adopting a proposal, to conduct “open and transparent public consultations”, in such a way as to enable as a broad participation as possible. In particular the Commission should encourage direct participation in the consultations by the SMEs and other end users also through the Internet.

The results of the consultations with the public and stakeholders are reported without delay to the co-legislators in the accompanying reports (paragraph 25.2) and made public.

The consultations do not end with the adoption of the legislative act, but continue during the application and enforcement of the act and are important also for the adoption of delegated acts. Indeed, the provisions of the Agreement relative to delegated and enforcement acts contain some important novelties. With the intention of protecting the interests of the Council, the Commission is obliged to carry out consultations with the experts from Member States as well as public consultations before the adoption of the delegated acts. Parliament and the Council have equal access to the information gathered from such consultations of experts and, what is more important they have systematic access to the meetings with such groups of experts.

In the context of the legislative cycle, the *ex post* evaluations in terms of efficiency, efficacy, relevance, consistency and added value of the legislation and of the policies in force should serve as a basis for the re-examination of the legislation.

In the Agreement it is acknowledged that the ordinary legislative procedure has developed on the basis of regular contacts in all the phases of the procedure, and that the three Institutions are committed to further improving the activities carried out within the scope of the ordinary legislative procedure, in accordance with the principles of fair cooperation, transparency, responsibility and efficiency.

According to the Agreement, the three institutions agree that the European Parliament and the Council, as co-legislators (Niedobitek, 2014, p. 140 et seq.), exercise their powers on equal grounds and that the Commission should play the role of facilitator treating the two branches of the legislative authority equally, with full respect for the roles that the Treaties have attributed to the three institutions. To this end, the transparency of the legislative procedures is ensured by an adequate management of the three-party negotiations.

The interinstitutional Agreement raises the need for a rapid and correct application and implementation of the Union’s law at the national level and invites Member States to communicate clearly to their citizens the measures that they adopt to transpose or implement the legislation of the Union. In particular, in order to avoid over-regulation, the Agreement

states that, if the Member States choose to do so, on the occasion of the transposition of the directives, they can add elements “that are not at all linked to the legislation of the Union”, and such additions should be “identified” through the transposition acts or through related documents.

The interinstitutional Agreement also requires that interinstitutional cooperation be established in order to update and simplify the existing legislation of the Union and also to avoid administrative burdens without undermining the objectives of the legislation concerned.

3. Participation of National Parliaments in the European Union and subsidiarity in the European Order

As regards the issue of the democratic deficit of the European system, soon after the approval of the Maastricht Treaty (1992), a discussion was started on the participation of national Parliaments in the European decision-making process as a further element for legitimizing the European legal system. This issue appears to be closely related to the principle of subsidiarity (see Ippolito, 2007) that is involved in the division of powers between Member States and European Community and that has a strong impact on the principle of attributed powers, considered to be the hinge of the supranational model and of the protection of the legislative prerogatives of Member States, namely of national Parliaments; the temperance of Community intervention is further guided by the principle of proportionality (Article 5 TEC).

The participation of national Parliaments was first recognized in the Amsterdam Treaty (1997) in an ad hoc protocol. This system of participation was further consolidated with the Constitutional Treaty (2004) in the protocol on the application of the principles of subsidiarity and proportionality.

This system, that was forged progressively between 1992 and 2007, constitutes a model of intergovernmental relations of the vertical type and was entirely included in the Lisbon Treaty (2007) (Chalmers, Davies and Monti, 2010, p. 363). Article 5 TEU puts forth the rules governing the division of powers, and confirms the three principles that governs them (“The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality”). In particular it states that “Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein” and that “Competences not conferred upon the Union in the Treaties remain with the Member States”.

It further envisages that “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” (Mangiameli, 2017, pp. 139-163). With

reference to the principle of subsidiarity it also provides that “The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol no 2 on the application of the principles of subsidiarity and proportionality”; and, in this context, “National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol”.

Finally, with reference to the objectives of the Union, the principle of proportionality (Villani, 2011, p. 75) must be complied with (“Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties”), and also for this principle the rule applies according to which “the institutions of the Union shall apply the principle of proportionality as set out in the Protocol on the application of the principles of subsidiarity and proportionality”.

The interinstitutional Agreement on “Better Law-making” in its fourth recital states that “The three Institutions reiterate the role and responsibility of national Parliaments as laid down in the Treaties, in Protocol No 1 on the role of National Parliaments in the European Union (...) and in Protocol No 2 on the application of the principles of subsidiarity and proportionality”. Furthermore, in paragraph 25, with reference to legislative acts and with regard to the principle of the attribution of competences, it states that, “The Commission shall provide, in relation to each proposal, an explanation and justification to the European Parliament and to the Council regarding its choice of legal basis and type of legal act in the explanatory memorandum accompanying the proposal”, and, if reference is made to the principles of subsidiarity and proportionality, it shall justify their application through the measures proposed, and it shall motivate the provisions by demonstrating that they are compatible with the fundamental rights.

Protocol no 1 “On the Role of National Parliaments in the European Union” states that “Draft legislative acts sent to the European Parliament and to the Council shall be forwarded to national Parliaments at the same time as to the European Parliament and the Council” (Article 2 (1) and (3) Protocol no 1). For ordinary procedures it is up to the Commission to forward the draft legislative acts to national Parliaments (Article 2 (3) Protocol no 1).

At this point an eight-week period shall elapse before the proposal is “placed on a provisional agenda for the Council for its adoption” (Article 4 Protocol no 1).

During this time period, national Parliaments can send to the presidents of the European Parliament, of the Council and of the Commission a reasoned opinion on the conformity of a draft legislative act with the principle of subsidiarity according to a procedure envisaged by the protocol on the application of the principles of subsidiarity and proportionality (Article 3 Protocol no 1).

4. Compliance of European legislative acts with the principle of subsidiarity.

The compliance with the principle of subsidiarity (see Härtel, 2014, p. 510) is capable of determining consequences on the acts adopted in two ways that envisage that an *ex ante*

control (political) and an *ex post* control (judicial) may be carried out on the correct application of the principles.

From the former standpoint, the provisions of the Protocol produce the so-called proceduralization of the principle of subsidiarity since, within the legislative procedure, a “sub-procedure” is envisaged aimed at verifying, *ex ante*, compliance with the principle; this is the so-called early warning system. This control is exercised by the national Parliaments of Member States.

Regional parliaments with legislative powers may contribute to these opinions but it is up to the Member State to establish if this may occur, and above all, with what type of effects (binding or not) with respect to the expression of the will of the national Parliament or of either of its Chambers (see Mangiameli, Blanke, 2013, p. 1669).

Article 7 of the same Protocol sets out the consequences that may derive from this *ex ante* control on the legislative procedure. Indeed, the effects are different depending on whether the reasoned opinion on a draft legislative act’s non-compliance with the principle of subsidiarity represents (1) less than 1/3; (2) at least 1/3 (so-called “yellow card”); (3) the simple majority of votes attributed to national Parliaments (so-called “orange card”), that are two for each (both for the single Chamber if the Member State has a single-chamber system, one for each Chamber if it has two Chambers). Instead, the Protocol did not adopt the proposal of the so-called “red-card” mechanism, whose activation would require 2/3 of the votes and that would have entailed the obligation for the Commission to withdraw the draft legislative act.

If the reasoned opinions on a draft legislative act’s non-compliance with the principle of subsidiarity represent less than 1/3 of the votes allocated in total to national Parliaments, the Institutions or proponent Member States only have the duty of “taking it into account”.

Instead, under Article 7 (1) paragraph 2 of the Protocol, “where reasoned opinions on a draft legislative act’s non-compliance with the principle of subsidiarity represent *at least one third* of the votes allocated to national Parliaments (...) the proposal must be reviewed”. This is the mechanism of the so-called “yellow card”, that can be activated with a lower threshold of votes (at least 1/4) where the draft legislative act was submitted on the basis of Article 76 (TFEU (Article 7 (2)).

Finally, the mechanism of the so-called “orange card” is triggered where “the reasoned opinions on a draft legislative act’s non-compliance with the principle of subsidiarity represent at least a *simple majority* of the votes allocated to national Parliaments” (Article 7 (3) (1)). So far, not even this case scenario has ever occurred.

Also for the so-called orange card, the draft legislative act must be reviewed, but only by the Commission which – after such review – may decide, to maintain, amend or withdraw the proposal ((3) (1) last part).

In truth, what sets the two procedures apart is, therefore, what is envisaged for the subsequent steps following the initiative mentioned in letters a) and b) of paragraph 3 of Article 7. First of all the legislator of the Union (European Parliament and the Council), before concluding the first reading, “shall consider whether the draft legislative act is

compatible with the principle of subsidiarity, taking particular account of the reasons expressed and shared by the majority of national Parliaments as well as the reasoned opinion of the Commission” (letter a).

Moreover, letter b) introduces the possibility that one of the two European co-legislators may finally block the proposal because it does not comply with the principle of subsidiarity “if, by a majority of 55 % of the members of the Council or a majority of the votes cast in the European Parliament, the legislator is of the opinion that the proposal is not compatible with the principle of subsidiarity, the legislative proposal shall not be given further consideration”.

As already pointed out, the so-called orange card has never been used, whereas the so-called yellow card has been applied three times. The first case concerned the “Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services” (COM (2012) 130), and the joint action of national Parliaments led to the withdrawal of the proposal by the Commission.

In the second case the mechanism was triggered by the “proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office (COM (2013) 534) and the Commission has kept it in its 2017 Work Programme among the pending priority proposals.

The last case was a “proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services” (COM (2016) 128), and also for this proposal the Commission adopted the same resolution.

It would therefore appear to be realistic to think that failure to activate these mechanisms was due above all to the inadequacy of the interparliamentary coordination system (Stancanelli, 2012, p. 90) – whose main expression is COSAC (about it, see Storini, 2004, p. 257 ss) – and to the little time Parliaments have to take action (eight weeks: see Bußjäger, 2010, p. 51), besides the low level of confidence that national Parliaments very likely appear to have in the efficacy of this remedy.

5. Remarks on horizontal intergovernmental relations in the European legislative procedure.

As suggested in the foregoing, the Commission operates as a point of synthesis of the other European Institutions, of the social players and of Member States, not only with reference to the intentions of governments but also with regard to national Parliaments whose participation in the so-called “ascending phase” of the legislative procedure involves also the regional Parliaments especially those that have law-making powers, as for instance in the Italian, German and Spanish cases. In addition, contributions to the discussion are offered also by groups of experts identified by the institutions, Member States and the stakeholders



that preside over the European legislation from which they can draw benefits or suffer disadvantages with regard to their position in the marketplace.

Therefore we can distinguish different levels that have an impact on the formulation of the legislative proposal and on the procedure for attaining its approval.

The proposals drawn up by the Commission, acting on its power of initiative, are very few. The Commission gathers the legislative suggestions that are sent to it by the Member States, by production sectors and by non-governmental organizations; and, furthermore, it takes into account the proposals of the Council and of the European Parliament as well as the evaluations made by national Parliaments.

The Commission is the only institution that can formally submit a proposal, but the process for shaping the proposal is not only the outcome of an evaluation of the general interests of the Union but it is also the outcome of the influences that the various parties, public and private, seek to exercise on the Commission.

According to an estimate dating back to 1998, 35% of the proposals of the Commission concerned the adaptation of previous legislation; 31% was the consequence of international duties; 12% concerned the tasks envisaged by the Treaties which left no room for discretion; 17% of the proposals were a response to the requests made by the other Institutions, national governments and businessmen; and only 5% were proposals made by the Commission itself (See House of Lords, European Union Committee, 22nd Report of Session 2007-08, *Initiation of EU Legislation. Report with Evidence*, published 24 July 2008, page 12 et seq.).

In the following years, this rather low percentage of legislative initiatives taken autonomously by the Commission was confirmed by the various studies on this aspect authority (Nugent, Rhinard, 2015, p. 286) and, if we consider that, excluding the implementation acts of the Commission, in 2013 125 regulations, 260 decisions and 14 directives were adopted, it is clear that most European legislation originates elsewhere and derives from a complex set of pressures exercised on the Commission by the different stakeholders present in the single market – lobbies, national experts, organizations of civil society and also political inputs by the Members of the Commission. In particular, the influence of lobbies is particularly significant because they indeed have control over information and the expertise that the Commission needs; furthermore, they are endowed with the ability to provide the information, they have sufficient resources to exercise their pressure and have considerable economic and political weight; and finally, they almost always have direct access to the representatives of the Commission authority (Nugent, Rhinard, 2015, p. 252-253).

Consequently, in order to determine the development of the various positions and accommodate the various interests, the Commission has in fact undergone a process of politicization that has pushed it away from the image of the high Authority.

Moreover, most of the European legislation is a sort of development, adjustment and updating of existing rules that regulate the various European policies, and also in this case the Commission plays an important role in conceiving and constantly formulating these restyling

disciplines; even though, since these legislative measures have already been discussed within the European Parliament and the Council, the Commission has a fairly clear view of what the co-legislators wish to push through and of what they can accept.

We need to take into account the fact that this circumstance has an even greater weight in the European institutional design, because in determining the work programme, it has a veto power that could be considered to be even more important than its power to submit legislative proposals, and a power of withdrawing (Starita, 2015, Villani, 2011), at any time, the proposals that have already been submitted, albeit consistently with the principle of fair cooperation.

Moreover, in deciding to submit a proposal, the Commission may structure the terms of the debate and of the approval. Therefore, the Commission has a significant influence and the various parties cannot ignore its position even after the submission of a proposal.

Its position, however, must always be considered with reference to the institutional context, and its influence in the legislative process depends on the variables of the context. Undoubtedly, since the condition of unanimity of Member States has been set aside, the Commission can act as mediator among the various players with a decisive role compared to the others. Furthermore, it can take a variety of actions to induce the other Institutions to accept its proposal, for instance by making it appear to be the only acceptable discipline; it can exercise pressure on recalcitrant Member States by reminding them that they must comply with the duties envisaged in the treaties and can even bring non-compliant States before the Court of Justice.

The factor that most affects the result pursued by the Commission is time: if the Commission is interested in rapidly completing the procedure for approval of the proposal it has submitted, its influence is weaker; on the other hand, if the other Institutions are particularly interested in rapidly approving a proposal its political weight increases.

The important powers granted to the Commission by the Treaties in the legislative process and also in the implementation and enforcement of European law were traditionally motivated by the view that this Institution pursues the general interest of Europe, thanks to its independence and to the independence of its members, according to which, on the one hand “in carrying out its responsibilities, the Commission shall be completely independent” and on the other, its members “shall be chosen on the ground of their general competence and European commitment from persons whose independence is beyond doubt” (Article 17.3 TEU). The same provision, furthermore, envisages that “the members of the Commission shall neither seek nor take instructions from any Government or other institution, body, office or entity. They shall refrain from any action incompatible with their duties or the performance of their tasks” (art. 17.3 TEU) and also Art. 245 (1), TFEU, that adds: “Member States shall respect their independence and shall not seek to influence them in the performance of their tasks”).

The principle that the Commission represents the general interest of the Union is somewhat undermined by the fact that in proposing candidates for the appointment of



President of the Commission, account must be kept of the elections to the European Parliament and that the President and the Members of the Commission are subject to a vote of consent by the European Parliament, which is the organ having a political composition and that the confidence of Parliament must be maintained so that “the Commission shall be collectively responsible before the European Parliament (Article 17.7 TEU).

Moreover, the transfer of many competences from the national level to the European level has induced the governments of Member States gathered in the Council and the European Parliament itself to limit in various ways the discretion the Commission has in drawing up the agenda and in the procedure for approving the proposals. The “*Better Law-making*” interinstitutional agreement itself may be seen as a way through which the other Institutions are seeking to put limits to the political powers of the Commission.

There is a precise political reason that induces the other Institutions to size down the discretion that the Commission enjoys in the European institutional system deriving from the continuous increase in European legislative acts regulating matters that are increasingly more specific, so that we might say that “the decision to legislate at the European level is a shared responsibility between institutions, whilst the Commission has a discretionary power over the contents of its proposal” (Ponzano, Hermanin and Corona, p. 89.).

This statement on the role of the Commission must also take into account the fact that the matters covered by the European legislative proposals are highly technical and hence the provisions present a high level of technical detail.

Consequently these elements suggest that the Commission’s procedure for formulating the proposals has become overly bureaucratic since it must rely on the input of the experts and officials of its organization (each proposal is assigned to a senior official of the DG [Directorate-General] with competence in the subject matter and he is responsible for the dossier relevant to that proposal) and to various committees (consisting of officials appointed by the national governments and experts, or by stakeholders) whose level of importance and numbers differ depending on the sector involved; such committees are all the more important when the technological knowledge is held outside the bureaucratic structure of the Commission and their weight often depends on the contribution that the officials in charge of the proposal wish to have from the committees themselves authority (Nugent, Rhinard, 2015, p. 283 et seq.; p. 297).

In this way a sort of gap has been created between the political responsibility of the Commission – linked to the right of initiative – and the decisions on the contents of the proposals submitted that are in the hands of bureaucratic apparatuses that are not always easy to control.

In any case, the whole preparation process that leads up to the formulation of the legislation initiative puts the Commission in a position to exercise an important role also as leader in the approval procedure of the legislative acts. Indeed, the Commission is always present in all the steps of the procedure before the EP and before the Council, and it may withdraw its proposal at any time and amend it; furthermore, the Commission is in practice



in a position to settle, also informally, any disputes that may arise between the two Institutions.

This entails the fact that, under the leadership of the Commission, the proposals that it puts forward, also with the amendments resulting from the debate between the Institutions, are generally approved. In addition, the establishment of this relationship between the Commission and the EP, between the Commission and the Council, and between the EP and the Council for examining, evaluating and approving the draft legislative acts, has led to an expansion of the ordinary legislative procedure (codecision) to the detriment of the special legislative procedure, with a greater role of the EP and of the democratic legitimation of European law. Indeed, during the seventh legislative term, with the entry into force of the Lisbon Treaty, almost 90% of the legislative proposals adopted by the Commission were subject to the ordinary legislative procedure. With a significant increase compared to the fourth legislative term (21%), to the fifth (42%) and to the sixth (49%) legislative terms (European Parliament, *Codecision and Conciliation. A guide to how the European Parliament co-legislates under the ordinary legislative procedure*, Directorate-General for Internal Policies of the Union, Directorate for Legislative Coordination and Conciliations, Conciliations and Codecision Unit, December 2014). This has also made it possible to do a better job in preparing the draft proposals and, above all to reduce them by about 40% - down to 658 proposals - while in the three previous legislative terms they had been as many as a thousand (These statistics are based on the dates on which the legislative proposals were adopted by the Commission. See <http://eur-lex.europa.eu/>. The legislative terms for this and the following figures (1) and (2) are: 01/05/1994 - 30/04/1999, 01/05/1999 - 30/04/2004, 01/05/2004 - 13/07/2009 and 14/07/2009 - 30/06/2014).

Finally, the number and percentage of the agreements reached during the initial steps of the procedure (agreements reached at the beginning of the first reading or at the second reading) increased in the 2009-2014 period, whereas those concluded following a conciliation procedure (generally only for very difficult acts) have decidedly become an exception.

6. Remarks on the vertical intergovernmental relations in the European legislative procedure

Intergovernmental relationships of the vertical type, that are formed for examining a draft legislative act drawn up by the Commission, through the work of national Parliaments are even more puzzling. Their participation in the procedure has been seen as the solution to one of the most debated problems within the European constitutional architecture, that of the so-called democratic deficit of European Union Institutions and, in particular, of the Council. The national Parliaments provide the European Institutions with an indirect type of democratic legitimization alongside direct legitimization provided by the European Parliament.

The principle is currently expressed in Article 10 (2) sub-paragraph 2 of the TEU according to which “Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.”

This double level of legitimation, together with the direct representation of the citizens of the Union within the European Parliament, should ensure that the democratic principle is complied with, and hence that the law produced by the European Institutions is (democratically) legitimated.

It is, however, evident that this is a “weak” solution that assigns a merely negative role to national Parliaments in that they are attributed a task of “oversight” to be carried out, what is more, *a posteriori*. Indeed, national Parliaments do not participate in the consultation system of the Commission, nor in the agreements that the Commission makes with the Council and with the European Parliament.

This has furthermore entailed that, in general, domestic legislation of a procedural type was adopted to regulate how the European Union acts were to be treated and what behaviours national governments should have within the EU Council on the basis of indications provided by their respective Parliaments. This principle has a stronger political and institutional weight in the States where there is a parliamentary form of government (Germany, Italy and Spain), but also in Member States with a tending presidential type of government (France).

However, leaving aside the horizontal relations that the European legislative process produces within Member States, between Parliaments and national governments, the biggest doubts about this vertical procedure that sees national Parliaments engaged with the European Union, are prompted by a cost-benefit evaluation of the system, with regard to the efficiency of the European decision-making process on the one hand, and on the other with reference to the actual democratic legitimation that national Parliaments can give to the European legislative process through this approach.

Regarding the first aspect, the so-called “information flow” comes to mind that (both Articles 1 and 2 of Protocol no 1 and Article 4 of Protocol no 2) is generated by the transmission of draft legislative acts to national Parliaments by the European Commission which – being the holder of the power of legislative initiative – is the Institution that more than any other is responsible for providing information to national Parliaments.

The “information flow”, however, requires national Parliaments to master such a huge amount of acts, which is virtually an impossible feat, in spite of the fact that they have set up particularly complex structures staffed with experts specialized in the legal issues of European Union law.

As to the possibility for national Parliaments to make their position known to the European Institutions, which consists in expressing opinions both on the “political merit” and above all on compliance with the principle of subsidiarity of EU draft legislative acts, (virtually a role of oversight on the exercise of the competences of the European Institutions),

it must be pointed out that, given the huge amount of work that a Parliament must do in order to determine its position, the dialogue of national Parliaments is so fragmented as to be poorly efficient. Consequently, it is for this reason that their participation in the European legislative procedure has not produced any real procedural burdens, and has reached some level of significance only on a few occasions.

In substance, the instruments that the European Treaties attribute to national Parliaments, in order for them to intervene in the legislative procedure, may be said to be participatory only in a very broad sense as they are not participatory in the strict sense or, more concisely deliberative. And it is this very aspect that, in the name of a more pregnant implementation of the democratic principle, one might think of amendments to the Treaties to strengthen the role of national Parliaments (See House of Lords, European Union Committee, 9th Report of Session 2013-14, *The Role of National Parliaments in the European Union*, published 24 March 2014).

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Figures:

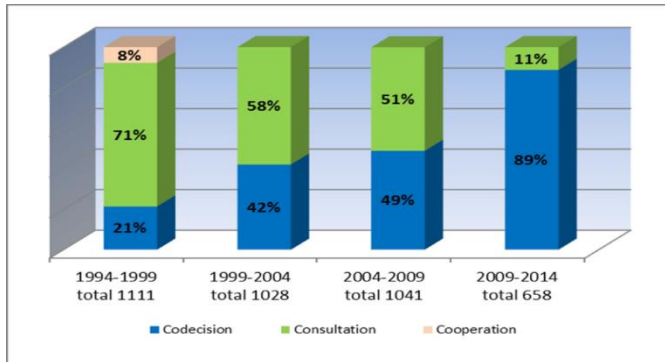


Figure 1: Distribution of legislative proposals under the cooperation, consultation and codecision procedures per legislative term.

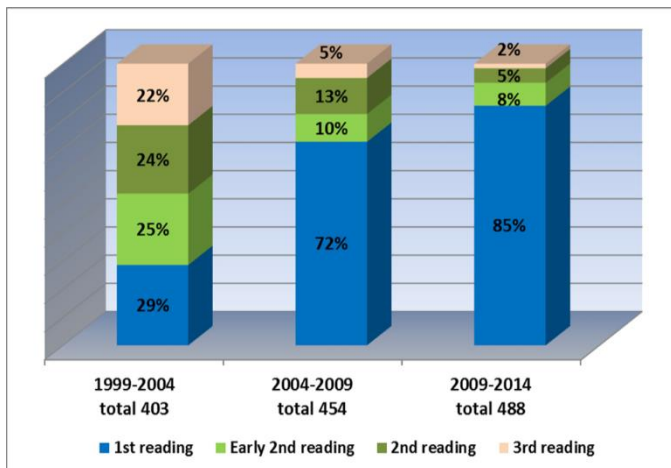


Figure 2: Percentage of codecision files adopted at 1st, early 2nd, 2nd or 3rd reading per legislature since 1999-2004