



A short guide to the legislative procedure in the European Union

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ABSTRACT: This paper aims to clarify how the legislative procedure works in the European Union (hereinafter, EU), both in the Treaties and in practice. We will study the rules governing the ordinary legislative procedure and the special consent and consultation procedures. Advantages and shortcomings of each of the procedures will also be addressed, including the main actors and the level of transparency and accountability. Within the ordinary legislative procedure, we will assess whether the informal trilogues should be reformed to be more accessible to the European citizen. Lastly, our paper will also address the use of passerelle clauses and citizen's and how they can affect the law-making procedure in the EU.

KEYWORDS: legislative procedure – trilogues – transparency – law-making.

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1. Legislative procedure in the European Union: introduction¹

The European Union (hereinafter, “EU”) is not made by aliens (but by us through our representatives),² but understanding the Union is not always as easy for the common citizen as it would be ideal. Nevertheless, the same could be said about Member States legal systems. However, with a significant percentage of our laws coming from the EU and the probable regulation in a harmonised manner of key matters for the future,³ understanding how law-making works in the European Union is essential. In other words, we need to understand the EU’s legislative procedure. The Treaty of Lisbon changed substantially the law-making procedure within the EU and what type of legislative acts the EU can enact. Nowadays, if we are talking strictly about “hard law” as in binding legal acts, the EU can enact either Regulations, Directives or Decisions. Decisions are generally directed at a specific actor, even though Article 288 TFEU allows for Decisions with a more general scope, and they have been used in matters as providing legal foundation for programmes. Regulations are meant to completely uniformize the Member States’ legal frameworks, they are directly applicable and do not need implementation by National Act(s). The degree of harmonisation pursued by a Directive can greatly vary depending on the subject and aims of the Directive. Maximum harmonisation Directives leave few if any opportunities for “creative” transposition by Member States. However, there are aspects that will never be perfectly harmonised/equal when using Directives, including time of implementation (within the legal limitations, Member States will implement the necessary legal acts at their own description and according to their own scheduling).⁴ Directives are not directly applicable – even if some of their dispositions can produce direct effect under the right circumstances if the criteria established by the Court of Justice of the European Union (hereinafter, “CJEU”) are met, namely being clear, unconditional and sufficiently precise⁵ – and depend on Member States to implement them.

There are numerous factors that influence the choice between enacting a Directive or a Regulation. Competence is the first, in areas where the EU has

¹ This paper is heavily inspired by our previous work “Democracia, legitimidade e competência legislativa na União Europeia”, albeit with some relevant developments including the addition of trilogues and a schematic view of the ordinary legislative procedure. See, Tiago Sérgio Cabral, “Democracia, legitimidade e competência legislativa na União Europeia”, in *E-book UNIO/CONPEDI Vol. 2: Interconstitucionalidade: Democracia e Cidadania de Direitos na Sociedade Mundial - Atualização e Perspectivas*, Alessandra Silveira coord. (Braga: CEDU, 2018), 265-292.

² Alessandra Silveira, “What future do we want for ourselves, for our children and for our Union? (as for the 60 years landmark of the Treaty of Rome: please open the fridge!)”, *UNIO EU Law Journal – The Official Blog Thinking and Debating Europe*, accessed May 5, 2020, <https://officialblogofunio.com/2017/04/03/editorial-of-april-2017/>; Alessandra Silveira, “Cidadania de Direitos e Comunidade Política Europeia (sobre a cidadania europeia que se move dos tribunais para a arena política)”, *Contencioso da Nacionalidade* (2nd ed., Lisboa: CEJ, 2017), 38-39.

³ For example, the General Data Protection Regulation and the Regulation on the free flow of non-personal data The Regulation, or the Sale of Goods and Supply of Digital Content and Digital Services. In the future regulation on AI or DLT will probably be European in nature.

⁴ Generally, if the objective is to fully harmonize Member State law, we find Regulations to be the superior solution. They avoid problems such as poor or plain incorrect transposition, different transposition schedules, partial transposition, transposition dispersed through various national laws and minimise translation issues. They also offer more security to economic operators and citizens who just need to consult a specific legal act to know the applicable law, instead of searching through national legislation.

⁵ See, Judgment of the ECJ of 5 April 1979, *Ratti*, Case C-148/78, ECLI:EU:C:1979:110.

exclusive or shared competence, Regulations and Directives are both options at the legislator's disposal, but if the EU only has the competence to support, coordinate or supplement Member-State actions, opting for a Regulation would be in breach of the EU's constitutional law⁶ (the flexibility clause contained in Article 352 could arguably be used). Political and social climate is the second, both regarding the EU and Member States. One can easily see how federalists or “*euroenthusiastics*” would be usually more open to supporting a Regulation than *eurosceptics*. A higher degree of satisfaction with the EU by its citizens can also allow for more intervention. A third factor is the nature of the Institutions responsible for producing laws in the EU. As *pure* European institutions, both the European Commission (hereinafter, “EC”) and the European Parliament (hereinafter, “EP”) are generally more ambitious than the Council whose approach is far more cautious.

Nevertheless, for both Directives and Regulations (and for Decisions that are legal acts), there are only three procedures than can be followed: *i*) the ordinary legislative procedure (co-decision); *ii*) consent procedure and; *iii*) consultation procedure. The rules are illustrated below.

2. Ordinary Legislative Procedure

With the changes introduced under the Treaty of Lisbon, the Co-Decision procedure was renamed, or one could argue rebranded to the Ordinary Legislative Procedure. The principles and rules underlying it remain the same, but it should be now seen as the default legislative procedure and not on equal ground with the consent and consultation procedures. Its intended use was also vastly expanded. It is in this type of procedure that the EU's constitutional design draws closer to true bicameralism where both the Council and the EP legislate as true equals. The Parliament is the lower chamber and represents the European citizens that directly elect Members of the European Parliament (hereinafter, “MEPs”) while the Council is the higher chamber representing Member States' interests.

The right of initiative rests, with minor exceptions,⁷ with the EC. This means that neither the Council nor the EP can directly propose new legislation, albeit both may request the EC to do so.⁸ In fact, the Framework Agreement on relations between the European Parliament and the EC (hereinafter, “Framework Agreement”) goes considerably further than the letter of the Treaties burdening the EC with the duty to “*to report on the concrete follow-up of any request to submit a proposal pursuant to Article 225 TFEU (legislative initiative report) within 3 months following adoption of the corresponding resolution in plenary. 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*”.⁹ Some developments may soon be happening

⁶ In fact, this would also be the case for a Directive that intended to establish a maximum harmonization regimen.

⁷ As an example, Article 76 TFEU permits exceptional initiative by a ¼ of the Member States, for Judicial Cooperation in Criminal Matters, Police Cooperation and for the creation of administrative measures to ensure cooperation within the Area of Freedom, Security and Justice.

⁸ For the European Parliament this right is contained in Article 225 TFEU and for the Council in Article 241 TFEU.

⁹ Regarding the Council, Paul Craig and Gráinne de Búrca argue that this power is used with such frequency that in practice, it works almost like a pseudo-right of initiative. *See*, Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (6.^a ed., Oxford: Oxford University Press, 2015), 125.

on this front. In her opening statement in the European Parliament Plenary Session, the new President of the EC, Ursula von der Leyen promised that, if elected,¹⁰ she would support a right of initiative for the European Parliament. It is still not clear how said support would materialise. It may be through trying to push an amendment to the Constitutional Treaties, even though that seems unlikely, or through a new Interinstitutional Agreement adopted under Article 295 TFEU. For now, the President-elect of the EC only specified that when Parliament adopts Resolutions requesting the Commission to submit a legislative proposal, her Commission pledges to respond with a “*legislative act in full respect of the proportionality, subsidiarity, and better law-making principles*”. It is also unclear whether the said legislative Resolution would contain a proposal for the content and text of the legislative act, that the EC would just “copy and paste” or if it just a request and content will still be defined by the EC. The first solution would be more akin to a true (albeit indirect) right to initiate legislation, the second would be similar to what is currently in the Framework Agreement. In this last scenario, the difference could be that the Commission would renounce the “right” to not submit a proposal.¹¹

The content of the EC’s proposal has binding power over other actors in the legislative procedure. Amendments cannot completely change the nature of the proposal because that would be akin to undermining the power given to this Institution.¹² The position of the EC is further strengthened by the fact that any amendment on which the EC has delivered a negative opinion has to be approved with unanimity in the Council. The EC can also alter its proposal at any time, as long as the Council has not yet acted.

The procedure’s first reading is kickstarted by the submission of the EC’s proposal to both the European Parliament and the Council. The Parliament is the first one to give its opinion and can choose three options: fully agree with it, amend it and send to the Council or reject it. If the European Parliament decides to reject the proposal at this stage the procedure ends, and the Act is not adopted.

If the Parliament agrees or amends the proposal it moves on to the Council.

The Council can vote by qualified majority to adopt the proposal in the wording which corresponds to the position of the European Parliament¹³ or can adopt its own position on the proposed Act and then send it back to the Parliament.

¹⁰ The speech was delivered before the confirmation vote which von der Leyen won with a (thin) majority of 383 MEPs. The support of several MEPs from groups like S&D and Renew Europe was made conditional on including in her programme a number of proposals, including the one abovementioned.

¹¹ See, “Opening Statement in the European Parliament Plenary Session by Ursula von der Leyen, Candidate for President of the European Commission”, European Commission, accessed July 17, 2019, http://europa.eu/rapid/press-release_SPEECH-19-4230_en.htm; Tiago Sérgio Cabral, “Legislative Initiative for the European Parliament: A Wish for 2020”, *UNIO EU Law Journal – The Official Blog Thinking and Debating Europe*, accessed 1 May, 2020, <https://officialblogofunio.com/2020/01/07/editorial-of-january-2020/>.

¹² Cfr. According to the Advocate General Tesauro “*the amendments adopted [cannot] fall outside the scope of the measure in question, as defined by the proposal*”. See, Judgment of the ECJ of 11 November 1997, *Eurotunnel SA v. SeaFrance*, Case C-408/95, ECLI:EU:C:1997:532, 35-39.; Opinion of the Advocate General delivered on 27 May 1997, *Eurotunnel SA v. SeaFrance*, Case C-408/95, ECLI:EU:C:2014:2470; Judgment of the ECJ of 14 April 2015, *Council v Commission*, Case C-409/13, ECLI:EU:C:2015:217.

¹³ If no amendments are made to the proposal by the European Parliament, it can directly reflect the wording proposed by the European Commission.

If the co-legislators are not able to agree on a position in the first reading, the procedure enters its second reading. The proposal goes back to the European Parliament where it can be approved by a majority of the votes cast or by tacit agreement (absence of a decision within a three-month time limit, extendable by one month). The proposal can also be rejected or amended by a majority “*of its component members*”. Rejection by Parliament means the end of the line for the proposal. However, Parliamentary amendments mean that the proposed Act must go back to the Council where, by qualified majority, the Institution must choose one of the following: either *i*) accept all amendments or *ii*) reject all amendments. There is no more room for back-and-forth modifications between co-legislators. If the Council fails to accept the Parliament’s demands, a Conciliation Committee is created.

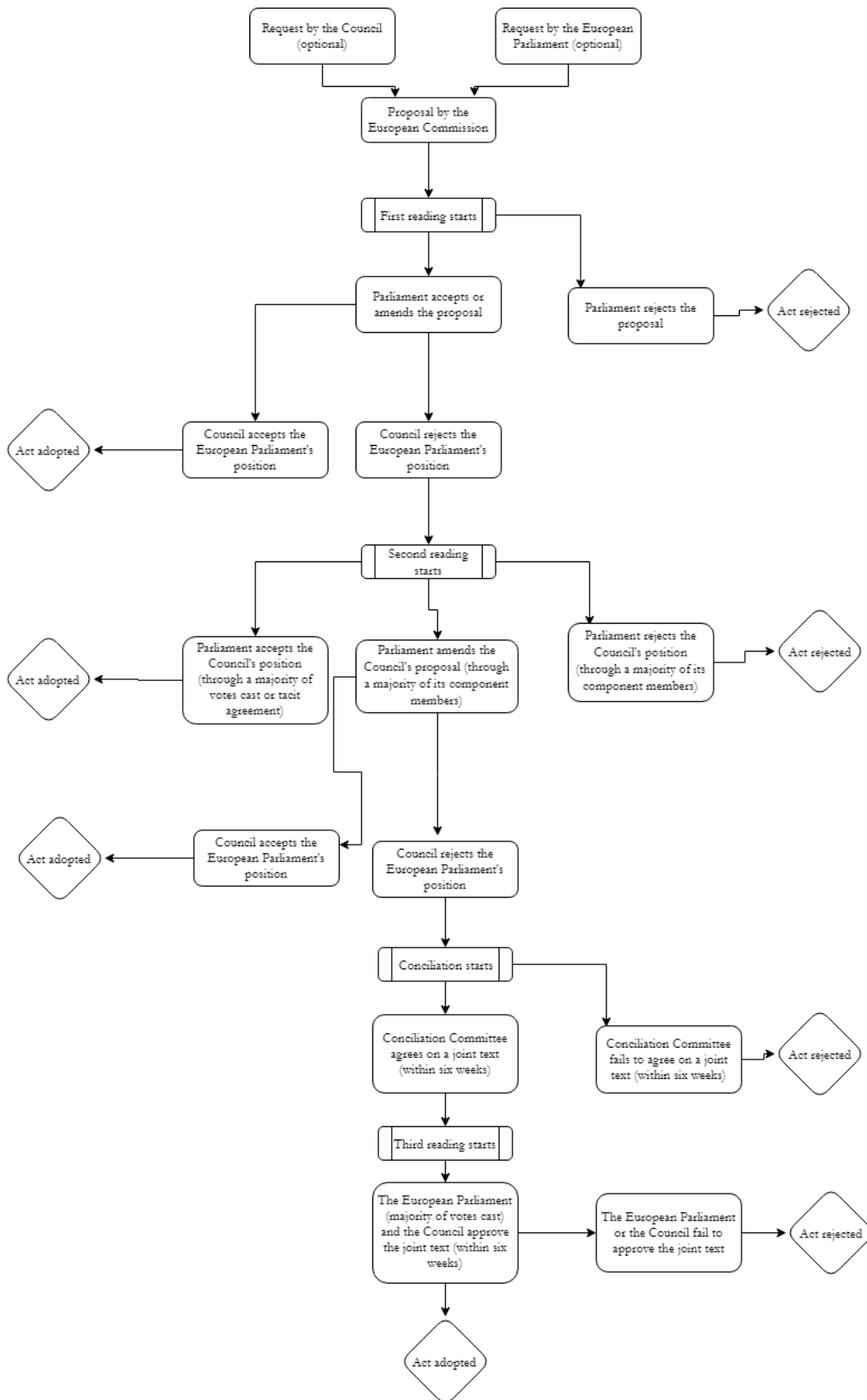
Conciliation aims at bringing the legislative procedure to a successful conclusion through closer cooperation between Parliament and Council, fostered by the Commission.¹⁴ The Committee is composed of an equal number of representatives from the Council¹⁵ and from the European Parliament, whose duty is to reach a joint proposal [Article 294(10) TFEU]. The Committee must reach this joint proposal within a 6-week timeframe, otherwise the proposal is not adopted.

If the Conciliation Committee reaches a joint proposal, the third, and last, reading begins. Both Council and Parliament have a 6-week deadline to approve the joint agreement. Parliament acts by majority of the votes cast and the Council acts by qualified majority. This is the final opportunity for the co-legislators to adopt the Act. If it is not approved, the legislative procedure ends here.¹⁶

¹⁴ One must not that trilogues can also take place before and during Conciliation to increase the likelihood of a fruitful conclusion.

¹⁵ Representatives from the Council can be either members of the Council or their representatives.

¹⁶ See, Miguel Gorjão-Henriques, “Anotação ao art. 289.º do TFUE”, in *Tratado de Lisboa anotado e comentado*, coord. Manuel Lopes Porto and Gonçalo Anastácio (Coimbra: Almedina, 2012), 1034-1038; Inês Morgado, “Anotação ao art. 293.º do TFUE”, in *Tratado de Lisboa*, 1048-1049; César Cortes e Paulo Rangel, “Anotação ao art. 294.º do TFUE”, in *Tratado de Lisboa*, 1050-1059; Robert Schütze, *European constitutional law*, (Cambridge: Cambridge University Press, 2012), 169ff.; João Mota de Campos, João Luís Mota de Campos and António Pinto Ferreira, *Manual de direito europeu: o sistema institucional. A ordem jurídica e o ordenamento económico da União Europeia* (7th ed., Coimbra: Coimbra Editora, 2014), 214; Alina Kaczorowska, *European Union Law*, (3^a ed., London: Routledge, 2013); 148; Directorate-General for Internal Policies of the Union and Directorate for Legislative Coordination and Conciliations Conciliations and Codecision Unit, *Handbook on the Ordinary Legislative Procedure* (European Parliament: Brussels, 2017), 11-25 and 37-39; Pierre Mathijsen and Peter Dyrberg, *Mathijsen’s Guide to European Union Law* (11th ed., London: Sweet & Maxwell Ltd, 2013), 88; Vincenzo Guizzi, *Manuale di diritto e politica dell’Unione Europea* (4th ed., Naples: Editoriale Scientifica: 2015), 366; Miguel Gorjão-Henriques, *Direito da União: História, Direito, Cidadania, Mercado Interno e Concorrência* (9th ed., Coimbra: Almedina, 2019), 249.



Ordinary Legislative Procedure: Diagram

2.1. Trilogues

Currently, 97% of all Ordinary Legislative Procedure files are adopted either at first or early second reading, with the percentage of full second readings standing at a mere 3% and third readings having practically disappeared. The reason for this phenomenon is the growing trend of trilogues. Trilogues are informal (but institutionalised) “negotiations between representatives of Parliament and Council, assisted by the Commission, aimed at reaching agreement on legislation, normally at an early stage of the legislative process”.^{17/18}

Typically, a variable number of trilogue meetings is held between representatives of the three law-making institutions, about 3.5 being the average.¹⁹ Generally, trilogues occur in the Parliament’s Brussels building. Technical trilogues like preparatory or operational meetings can be used to clear the path for the main political trilogues.

In the trilogue meetings, “Parliament is represented the Committee Chair leading the delegation, sometimes replaced by a Vice-President, the Rapporteur and Shadow Rapporteurs from the different parties, their assistants, political party functionaries and Committee secretariat staff. The Council is represented at earlier stages by the civil servant who chaired the Council Working Party supported by the Council Secretariat, and at later stages by the Chair of the Committee of Permanent Representatives. Finally, the Commission sends Heads of Unit or Directors, supported by the Legal Service and the Co-Decision Unit, although sometimes Director-Generals or their Deputies attend from the outset. A Commissioner often attends the concluding trilogues”.²⁰

Negotiations are based on a multi-column document where each of the first three columns contains the positions of the Commission, Parliament and Council. The fourth column is initially blank and is filled during negotiation with the jointly agreed position.

The three institutions hail trilogues as highly useful tools that contribute to expedient law-making. And while it is undeniable that they are effective, we cannot ignore the fact that authors have been, for a number of years, pointing to the fact that that when compared to the constitutionally enshrined readings procedure, trilogues lack in transparency.

Trilogues are closed-door affairs attended by a few representatives of the three Institutions.²¹ Documents related to trilogues are not freely available to citizens and, in fact, the Institutions usually fight tooth and nail against attempts to access them. They argue that making the discussions public causes disturbances in the legislative

¹⁷ See, “Decision of the European Ombudsman setting out proposals following her strategic inquiry OI/8/2015/JAS concerning the transparency of Trilogues”, European Ombudsman, access January, 20, 2019, <https://www.ombudsman.europa.eu/en/decision/en/69206>; Gijs Jan Brandsma, “Transparency of EU informal trilogues through public feedback in the European Parliament: promise unfulfilled”, *Journal of European Public Policy* (2018): 1-20.

¹⁸ Currently 70% to 80% of EU legislation is adopted following trilogues. See, Judgment of the EGC of 22 March 2018, *De Capitani v Parliament*, Case T-540/15, ECLI:EU:T:2018:167, 70.

¹⁹ More complex legislation might take significantly more trilogues to be agreed. The General Data Protection Regulation, for example, took 14 trilogues before the law-making institutions could reach an agreement.

²⁰ See, Justin Greenwood and Christilla Roederer-Rynning, “Taming Trilogues: The EU’s Law-Making Process in a Comparative Perspective”, in *The European Parliament in times of EU crisis: Dynamics and Transformations*, Olivier Costa ed. (Maastricht: Palgrave Macmillan, 2019), 121-141; Deirdre Curtin and Päivi Leino, “In Search of Transparency for EU Law-Making: Trialogues on the Cusp of Dawn”, *Common Market Law Review* vol. 54, No. 6 (2017): 1673–1712.

²¹ A frequent criticism to trilogues is that this type of procedure puts too much power in a few representatives/officials. However, empirical analysis seems to contradict these conclusions. See, Anne Rasmussen & Christine Ren, “The consequences of concluding codecision early: trilogues and intra-institutional bargaining success”, *Journal of European Public Policy* vol. 20, No. 7 (2013): 1006-1024.

procedure and does allow for the legislators to freely express their opinion.²² We deem such a position – particularly in an era where transparency is highly recognised in the European Union making-process – as appearing unacceptable for both co-legislators, but especially for the EP.

Council meetings are relatively informal, ministers even address each other on a first-name basis. This ensures that, away from the public eye, they can negotiate freely and compromise without fearing backlash in their Member States, but one would argue at the cost of some transparency. The Council prefers to see its reunions as diplomatic summits instead of what they really are: legislative meetings from a Senate-like Chamber of a law-making body. Council documents regarding legislative files are usually only made available to the public after the procedure is over. Moreover, some documents like Legal Service opinions are generally not disclosed, in this case as to not restrict the freedom of the legal counsel. Member States can also request that documents reflecting their position during negotiations are not made available to the public.

We should not forget that when legislating accountability is key, citizens should be able to analyse and, if they disapprove of the way that the minister is conducting business in the Council, express their disapproval internally (through voting). However, truth be told, the Council is not designed to be and has never tried to assert itself as the Institution that, more closely, represents the will of the European citizens. That is the role of the EP.²³

Indeed, MEPs are elected to the European Parliament by direct universal suffrage [Article 14(3) TEU] and have the most direct democratic legitimacy of any of the Institutions.²⁴ Parliament takes this to heart, and most legislative affairs there happen in a fairly transparent manner. Both plenary and committee meetings are broadcast live and made available with interpretation to allow citizens from different countries to understand them. Getting accreditation to access the European Parliament is a

²² See, Directorate-General for Internal Policies of the Union and Directorate for Legislative Coordination and Conciliations Conciliations and Codecision Unit, *Handbook*, 26-36.; Christilla Roederer-Rynning, “Passage to bicameralism: Lisbon’s ordinary legislative procedure at ten”, *Comparative European Politics* (2018): 1-17; Directorate-General for Internal Policies of the Union and Directorate for Legislative Coordination and Conciliations Conciliations and Codecision Unit, *Activity Report on the Ordinary Legislative Procedure: 4 July 2014 - 31 December 2016 (8th parliamentary term)* (European Parliament, Brussels: 2017), 19.; Christilla Roederer-Rynning and Justin Greenwood, “The culture of trilogues”, *Journal of European Public Policy* vol. 22, No. 8 (2015): 1148–1165; Christilla Roederer-Rynning and Justin Greenwood, “The European Parliament as a developing legislature: coming of age in trilogues?”, *Journal of European Public Policy* vol. 24, No. 5 (2017): 735-754; Aidan O’Sullivan, “How transparency can be improved in the way EU laws are negotiated and agreed”, *LSE Blog*, access January 30, 2019, <https://blogs.lse.ac.uk/euoppblog/2016/08/18/how-transparency-can-be-improved-in-the-way-eu-laws-are-negotiated-and-agreed/>.

²³ Nonetheless and even though the root of the Council’s legitimacy is different from the EP’s (*i.e.* Council possesses intergovernmental legitimacy while the EP possesses direct democratic legitimacy) that should not be considered a reason to not hold it to the same degree of scrutiny as the EP. As expressed above, citizens still hold the right to hold their representatives accountable (even if internally) and the Council’s decisions need to be transparent for that to be possible. Furthermore, one would argue (as we did above) that the legislative procedure in the EU is much closer to a standard bicameral law-making procedure than to a diplomatic summit. In this context, intergovernmental legitimacy may prove inadequate. See, Maria Luísa Duarte, *União Europeia: Estatística e Dinâmica da Ordem Jurídica Eurocomunitária* (Coimbra: Almedina, 2011), 122.

²⁴ See, Tiago Sérgio Cabral and Rita de Sousa Costa, “The European Union’s existential crisis: current challenges from populism to Donald Trump”, *UNIO - EU Law Journal*, vol. 4, No. 1 (2018): 3-15.

relatively straightforward procedure. Furthermore, lobbying is regulated and done with increasing transparency.²⁵ With all this in mind, are there any efforts by the European Parliament to boost transparency in trilogues? The short, answer is that yes there are, but they do not seem to be enough. In a 2014 Resolution on public access to documents, the European Parliament argued for broad changes to trilogues by calling; *“on the Commission, the Council and Parliament to ensure the greater transparency of informal trilogues, by holding the meetings in public, publishing documentation including calendars, agendas, minutes, documents examined, amendments, decisions taken, information on Member State delegations and their positions and minutes, in a standardised and easily accessible online environment”*.²⁶ More recent Resolutions have restated Parliament’s position on the issue, even though the demand for public meetings has apparently disappeared.²⁷

The other Institutions have shown little receptivity to these proposals and, in fact, even Parliament did little of substance to achieve its aims. Currently, Article 69(f) of the EP’s Rules of Procedure enshrines rules about the mandatory composition of negotiation teams to avoid any excessive concentration of power in a reduced number of actors [Article 69(f), first paragraph]. There are also rules on “reporting back” the progress achieved during trilogues [Article 69(f), third paragraph]. The underlying reasoning behind reporting back rules is that if the negotiators report to the responsible committees and since said committees are broadcast to the public, citizens can also get the relevant information. In practice, the rule does not apply if it is not “feasible” to do so, and studies show that it plainly does not work.²⁸

The problem is considered severe enough to merit the European Ombudsman’s attention. In her Decision setting out proposals following her strategic inquiry OI/8/2015/JAS concerning the transparency of trilogues, the Ombudsman states the current structure of trilogues might breach the principles of representative democracy (Article 10 TUE) and the right of European citizens to participate in the democratic life of the Union. The issue is, above all else, one of accountability. If citizens and National Parliaments do not know how their representatives cast their votes, how they are making their arguments for the causes they represent when they are making concessions, and when they are standing their ground, they cannot properly assess their performance and penalize or reward them accordingly. Furthermore, it is close to impossible for citizens and stakeholders to participate in the decision-making process if they do not know when the meetings are being held, who is there, what is being

²⁵ In January 2019, the European Parliament approved an amendment to Rules of Procedure that orders *“rapporteurs, shadow rapporteurs and committee chairs shall, for each report, [to] publish online all scheduled meetings with interest representatives falling under the scope of the Transparency register”*. Negotiations between the Institutions are underway to revamp and expand the Transparency Register.

²⁶ See, “European Parliament resolution of 11 March 2014 on public access to documents (Rule 104(7)) for the years 2011-2013”, European Parliament, access January 20, 2019, <https://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0203+0+DOC+XML+V0//EN&language=EN>.

²⁷ See, “European Parliament resolution of 14 September 2017 on transparency, accountability and integrity in the EU institutions”, European Parliament, access January 23, 2019, <https://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2017-0358>; “European Parliament resolution of 28 April 2016 on public access to documents (Rule 116(7)) for the years 2014-2015”, European Parliament, access January 23, 2019, https://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2016-0202&language=EN#def_1_10.

²⁸ Furthermore, the voting rules in Article 69 take negotiating power away from the Parliament by not allowing amendments to the provisional agreement. See, Justin Greenwood and Christilla Roederer-Rynning, “Taming Trilogues: The EU’s Law-Making Process”, 127-130.

discussed and what is the current stage of the discussions. Lobbying is an integral part of the European Union, one might even say a cornerstone, but lobbying should not be understood as practice that is only achievable by a select few insiders. Every citizen should be able to lobby their representatives in a transparent manner.

However, it is a fact that public pressure and continuous vigilance over the representatives' behaviour might be counterproductive, especially in the middle of the negotiation procedure. A representative might lose the ability to think strategically and to give ground on some issues expecting to gain concessions further down the line because public opinion reacts immediately, and public outrage spreads like wildfire.

After weighing all these considerations, the Ombudsman made the following proposals:

1. *That the institutions make publicly available a "trilogue calendar" identifying forthcoming trilogues. They should also refer to trilogues in databases on legislative files;*
2. *That both co-legislators make proactively available, before trilogue negotiations begin, their positions on the Commission proposal, regardless of the level at which the position has been adopted internally and regardless of the legislative proposal;*
3. *That the Institutions make available general summary agendas before or shortly after trilogue meetings;*
4. *That the institutions make proactively available four-column documents, including the final agreed text, as soon as possible after the negotiations have been concluded;*
5. *That the institutions include, in legislative databases and calendars dealing with trilogues, links to any minutes or videos of the institutions' public meetings where a trilogue has been discussed;*
6. *That the institutions make proactively available a list of the representatives who are politically responsible for decisions taken during a trilogue, such as the MEPs involved, the responsible Minister from the Council Presidency and the Commissioner in charge of the file. If the power to take decisions is delegated to civil servants, their identities should also be disclosed proactively;*
7. *For the purposes of facilitating requests for public access to documents, the institutions make available as far as possible lists of documents tabled during trilogue negotiations;*
8. *Furthermore, the Ombudsman encourages the institutions to work together to make as much trilogue information and documentation as possible publicly available through an easy-to-use and easy-to-understand joint database.²⁹*

The Ombudsman's proposals are, in our opinion, generally balanced and easy to apply. If anything, one could argue that they should go further on issues like access to the multi-column documents. In this matter, the Ombudsman seems to accept a type of presumption of secrecy for the document until its content can no longer have an impact on negotiations, going opposite to the CJEU and General Court's case-law on this matter.³⁰ The general rule should be for open access to documents related to the legislative procedure, with exceptions only tolerable when disclosure of the document would seriously undermine the Institution's decision-making process. Such an issue should be decided on a case-by-case basis. We can accept that general presumptions of confidentiality have been recognized by the CJEU for some types of documents,

²⁹ "Decision of the European Ombudsman setting out proposals following her strategic inquiry OI/8/2015/JAS concerning the transparency of 'Trilogues'", European Ombudsman, accessed January 20, 2019, <https://www.ombudsman.europa.eu/en/decision/en/69206>.

³⁰ Fact is that the European Court of Justice's interpretation of what can seriously undermine the decision-making is extremely strict as seen in *Access Info Europe*. See, Judgment of the ECJ of 17 October 2013, *Access Info Europe v. Council*, Case C-280/11 P, ECLI:EU:C:2013:671, upholding the Judgment of the EGC of 22 March 2011, Case T-233/09, ECLI:EU:T:2011:105.

namely: “the documents in an administrative file relating to a procedure for reviewing State aid; the submissions lodged in proceedings before the courts of the European Union, for as long as those proceedings remain pending; the documents exchanged between the Commission and notifying parties or third parties in the course of merger control proceedings; the documents relating to an infringement procedure during its pre-litigation stage, including the documents exchanged between the Commission and the Member State concerned during an EU Pilot procedure; and the documents relating to a proceeding under Article 101 TFEU”.³¹ However, there was no reason to think that these general presumptions of confidentiality also applied to every multi-column document. In fact, after *De Capitani*, it seems clear that multi-column documents are, indeed, not protected by this exception and should be disclosed as widely as possible, as a general principle. Full refusal should be a last resort, even when the requirements under Article 4 of Regulation 1049/2001/EC are met, solutions like confidentiality obligations to be imposed on the interested parties should be studied before opting for a negative answer.

In *De Capitani*,³² the General Court of the European Union analysed the refusal by the European Parliament to provide access to the fourth column of two multi-column documents part of trilogue negotiations on Police Cooperation, “including issues of data protection and the management board of” Europol. The European Parliament sustained its refusal on Article 4(3) of Regulation 1049/2001/EC of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and EC documents, arguing that making these documents available would impair the Institutions’ ability to decide, harm the confidence between the Institutions and Member States, hinder cooperation with the Council and open to door to external pressures on the ongoing negotiation.

We note that, with more than a touch of incoherence, Parliament appears in contradiction with its previous Resolutions. Even though the Resolutions accept the existence of exceptions to the principle of wide access by citizens to the legislative procedure, their spirit is that exceptions are precisely that: exceptions. Such a broad interpretation of the exceptions under Regulation 1049/2001/EC clearly goes against their spirit (and also of the 2016 Interinstitutional Agreement).

With all this in mind, the Court’s ruling can only be seen as a victory to transparency and a reason for the Institutions to rethink their position on the issue. First, the Court states that the exceptions in Article 4 of Regulation 1049/2001/EC must be interpreted and applied strictly.³³ Furthermore, the fact that a matter is covered by one of the exceptions is not enough to warrant refusal as a casuistic analysis of the particular case must be conducted. Only if the danger is likely to manifest itself and that likelihood of manifestation is reasonably foreseeable can the exception be called upon.

The Court also clarified in definitive that trilogues are part of the legislative procedure and thus, are subject to all general principles that govern it, including

³¹ See, Judgment of the ECJ of 4 September 2018, *ClientEarth v Commission*, Case C-57/16 P, ECLI:EU:C:2018:660 and also the decision that it repealed, Judgment of the EGC of 13 November 2015, *ClientEarth v Commission*, Case T-424/14, ECLI:EU:T:2015:848.

³² See, Judgment of the EGC of 22 March 2018, *De Capitani v Parliament*, Case T-540/15, ECLI:EU:T:2018:167.

³³ In its Judgment in *Turco* the European Court of Justice shows how strict its interpretation is. Even if a document is covered by one of the exceptions of Regulation n° 1049/2001/EC, in this case regarding legal opinions, a comprehensive assessment must be undertaken to decide which parts, in particular, cannot be disclosed. See, Judgment of the ECJ of 1 July 2008, *Turco v. Council*, Joined Cases C 39/05 P and C 52/05 P, ECLI:EU:C:2008:374.

openness and transparency. Furthermore, the Court found that there is no general presumption of non-disclosure regarding the fourth column of the multi-column document.

Regarding accountability and the right to participate in the democratic life of the Union, the Court argued that the European citizens are perfectly capable of understanding the nature of trilogues and the fact that the positions expressed in the fourth column can change during negotiation or even end with no deal at all. The paternalistic vision of the Institutions seems to have been rejected. Additionally, the General Court delivered a much-needed reminder that cooperation between the Institutions is not a choice at their discretion but a constitutional obligation.

Following this reasoning, the Court decided to annul the decision refusing access to the multi-column document. The Committee on Legal Affairs of the European Parliament decided to accept the decision instead of submitting an appeal to the CJEU. However, efforts to reinforce transparency in its wake have, thus far, been meek.^{34/35}

3. Special Legislative Procedures

3.1. Consent Procedure

Following the general rule, in the consent procedure, the right to propose legislation lies with the EC.³⁶ Still, unlike the Ordinary Legislative Procedure, within the limits of the CJEU's case-law (namely, amendments cannot completely change the nature of the proposal, as stated above) the Council possesses full decision power on the legal Act's content. In this type of procedure, the EP maintains vetoing power but no more. It can either "agree" with the act in its entirety or stop it completely. In practice, this "take it or leave it" approach is softened by the EP's power to issue an interim report during the procedure and by informal discussions between the Institutions. The EP may use these tools to suggest the necessary amendments to win parliamentary approval.³⁷ The consent procedure is used in situations such as:

- *Article 7(1) TEU*, according to which on a reasoned proposal by a third of the Member States, acting through the European Parliament or the European Commission, the Council, acting by a majority of four-fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2 TEU.

³⁴ See, Francesca Martines, "Transparency of Legislative Procedures and Access to Acts of Trilogues: Case T-540/15, De Capitani v. European Parliament", *European Papers*, vol. 3, No. 2 (2018): 947-959; Massimo Frigo, "EU Court Condemns the EU Legislative Process for Lack of Transparency: Time to Open Up?" *Opinio Juris Blog*, accessed December 10, 2018, <http://opiniojuris.org/2018/03/27/33507/>.

³⁵ "Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making", EC, EP and Council, accessed December 10, 2018, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016Q0512\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016Q0512(01)&from=EN).

³⁶ An exception can be identified in Article 86(1) TFEU (regarding the implementation of the European Public Prosecutor's Office) read along with Article 76 TFEU.

³⁷ Alina Kaczorowska, *European*, 158 e ss; Paul Craig and Gráinne de Búrca, *EU Law*, 130 e ss; Robert Schütze, *European Constitutional*, 176 e ss; Steve Peers, *Guide to EU decision-making and justice and home affairs after the Treaty of Lisbon* (London: Statewatch, 2010), <http://www.statewatch.org/analyses/no-115-lisbon-treaty-decision-making.pdf>; "The Special Legislative Procedures: Consent", University of Portsmouth European Studies Hub, accessed December 13, 2019, <http://hum.port.ac.uk/europeanstudieshub/learning/module-2-understanding-eu-policy-making/the-special-legislative-procedures/>.

- *Article 7(2) TEU*, which establishes that the European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2 TEU, after inviting the Member State in question to submit its observations.³⁸
- *Article 49 TUE*, regarding application and accession to the Union states that the Council shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members and respecting the conditions of eligibility agreed upon by the European Council.³⁹
- *Article 50 TEU*, regarding the agreement setting out the arrangements for the withdrawal of a Member State from the Union. The abovementioned agreement shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.⁴⁰
- *Article 25 TFEU*, regarding the reinforcement or addition of rights to the European citizen. In this situation, the Council acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament may adopt provisions with this aim. Said provisions will only enter into force after approval by Member States.⁴¹
- *Article 218(6) TFEU*, when the Council adopts a decision concluding the following agreements, it must obtain the consent of the EP: *i)* association agreements; *ii)* agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR); *iii)* agreements establishing a specific institutional framework by organising cooperation procedures; *iv)* agreements with important budgetary implications for the Union; *v)* agreements covering fields to which either the Ordinary Legislative Procedure applies, or the special legislative procedure where consent by the European Parliament is required.⁴²
- *Article 223(1) TFEU*, covering the election rules for the European Parliament.⁴³
- *Article 311 (4th paragraph) TFEU*, according to which the Council, acting by means of Regulations in accordance with a special legislative procedure, shall lay

³⁸ See, Stelio Mangiameli and Katharina Pabel, “Article 7 [The Principles of the Federal Coercion]”, in *The Treaty on European Union (TEU): a Commentary*, Hermann-Josef Blanke and Stelio Mangiameli eds., (Heidelberg: Springer, 2013), 349-373; Luís Miguel País Antunes, “Anotação ao artigo 7.º do TUE”, in *Tratado de Lisboa*, 43-46.

³⁹ See, Susanna Fortunato, “Article 49 [Accession to the Union]”, in *The Treaty on European Union (TEU)*, 1357-1383; Ricardo Bayão Horta, “Anotação ao artigo 49.º do TUE”, in *Tratado de Lisboa*, 183-185.

⁴⁰ See, note 146.

⁴¹ See, Rui Manuel Moura Ramos, “Anotação aos art.ºs 18.º a 23.º do TFUE”, in *Tratado de Lisboa*, 258-263; Rui Manuel Moura Ramos, “Anotação ao artigo 25.º do TFUE”, in *Tratado de Lisboa*, 268.

⁴² See, Margarida Afonso, “Anotação ao artigo 218.º do TFUE”, in *Tratado de Lisboa*, 832-837.

⁴³ See, Vital Moreira, “Anotação ao artigo 223.º do TFUE”, in *Tratado de Lisboa*, 847-850. While we concede that this procedure possesses very specific characteristics such as the fact that the EP must draw up an initial proposal, this is not enough to make one perish to thought that this provision is in need of serious revamp. At the very least, the ordinary legislative procedure should have been adopted in this situation. It is unacceptable and, in fact, borderline embarrassing for the entirety of European democracy that the European Parliament has less power to decide the rules of its own election than the Council.

down implementing measures for the Union's own resources system in so far as this is provided for in the decision adopted on the basis of the third paragraph. The Council shall act after obtaining the consent of the European Parliament.⁴⁴

▪ *Article 352 TFEU* (flexibility clause).⁴⁵

Infrequently, there are some residual cases where the European Parliament acts as the commanding institution. This coincides with the (very few) situations where the EP has legislative initiative and generally relate to matters of internal organisation. Some examples are Article 223(2) TFEU, Article 226 TFEU⁴⁶ and Article 228(4) TFEU.

3.2. Consultation Procedure

In the consultation procedure, the Council appears in an even stronger position (in comparison with the consent procedure). Again, the right of initiative rests with the Commission and this Institution refers the proposal to the Council (constitutional limitations to the degree of changes that can be made to the initial proposal still apply).⁴⁷ In this procedure, the Council is bound to request the opinion of the EP regarding the Act, but no more than that. The EP has no veto power in this procedure and the substantive content of its opinion holds no more than a persuasive nature over the Council. If the Council wishes to do so, it may ignore it its entirety and decide in an entirely different manner. Doing so does not affect the validity of the Act.

Nevertheless, Parliamentary opinion must be heard (even if not heeded) and the Council cannot suppress or ignore this step. It is an essential formality in accordance with the CJEU's judgment in *SA Roquette Frères v. Council*. In this judgment, the Court declared Regulation 1293/79/CEE to be void due to not having complied with this requirement. According to the CJEU: "*the consultation provided for in the third subparagraph of Article 43(2), as in other similar provisions of the Treaty, is the means which allows the Parliament to play an actual part in the legislative process of the Community. Such power represents an essential factor in the institutional balance intended by the Treaty. Although limited, it reflects at Community level the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly. Due consultation of the Parliament in the cases provided for by the Treaty therefore constitutes an essential formality disregard of which means that the measure concerned is void*".⁴⁸ This parliamentary power is not without limits though. According to the CJEU in *Parliament v. Council*, inter-institutional dialogue is subject "*to the same mutual duties of sincere cooperation as those which govern relations between Member States and the Community institutions*". Thus "*Parliament is not entitled to complain of the Council's failure to await its opinion before adopting*" an Act when failure to comply with the "*essential procedural requirement of Parliamentary consultation*" resulted from "*Parliament's failure to discharge its obligation to cooperate sincerely with the Council*".⁴⁹

⁴⁴ See, Manuel Lopes Porto, "Anotação ao artigo 311.º do TFEU", in *Tratado de Lisboa*, 1099-1102.

⁴⁵ See, Ana Maria Guerra Martins, "Anotação ao artigo 352.º do TFEU", in *Tratado de Lisboa*, 1232-1235.

⁴⁶ Regarding the rules enshrined in Article 226 TFEU, the appropriateness of the EP having to request consent from the EC and Council to define rules governing the right of enquiry in the EP is debatable.

⁴⁷ In line with what we explained regarding the consent procedures, there are also some exceptions in the consultation procedures such as Articles 87(3) and 89 TFEU, read in connexion with Article 76 TFEU.

⁴⁸ See, Judgment of the ECJ of 29 October 1980, *SA Roquette Frères v. Conselho*, Case 138/79, ECLI:EU:C:1980:249, 33-36.

⁴⁹ See, Judgment of the ECJ of 16 July 1992, *Parliament v. Council*, Case C-65/93 ECLI:EU:C:1992:325, 23-27.

Nonetheless, one may argue that the – admittedly very limited, especially if we take into account the limitations derived from the CJEU’s case-law – power to slow down an Act’s adoption may grant some influence to EP in a legislative procedure where it is wholly outranked and outgunned by the Council. By withholding its opinion, it is (at least theoretically) possible for Parliament to hold informal negotiations that may be particularly effective when the proposal is urgent in nature when the EP’s position finds wide support within the ranks of its MEPs, when the EP’s position is in line with the Commission’s and when the Act requires unanimity to be approved in the Council. If the proposed Act is part of a legislative package containing measures that follow other types of legislative procedure (consultation and especially the ordinary legislative procedure), Parliament may make its approval on other acts in the package depended on amendments to the Act(s) adopted under the consultation procedure.^{50/51}

⁵⁰ Raya Kardasheva, “The Power to Delay: The European Parliament’s Influence in the Consultation Procedure”, *Journal of Common Market Studies*, vol. 47, No. 2 (March 2009): 385-409.

⁵¹ The power to delay is frequently used in other Constitutional Systems as a negotiation tool. In the United States of America, under the right circumstances Filibusters may might allow a majority to delay, negotiate on even stop the adoption of undesirable measures. “Shutdowns” may also be considered as a means to use time as a factor of pressure in negotiations. The talking filibuster is the most well-known, but not the only type of filibuster, in the talking filibuster a member of the law-making body speaks continuously for long hours, delaying the debate regarding a certain proposal and hindering its adoption. Legal scholars and political science authors are divided regarding the use of these and similar tools, some consider that their excessive use halts progress and does not respect the will of the majority. Others counterargue that these tools are essential in protection the rights of the minority. These positions are sometimes inconsistent and tend to vary in accordance with the political party who is in power. Regarding filibusters see, Gregory Koger, *Filibustering: A Political History of Obstruction in the House and Senate* (Chicago: The University of Chicago Press, 2010); Catherine Fisk and Erwin Chemerinsk, “The Filibuster”, *Stanford Law Review* vol. 49, No. 2 (1997): 181-254; David R. Jones, “Explaining restraint from filibustering in the US senate”, *The Journal of Legislative Studies*, vol. 6, No. 4 (2000): 53-68; Patrick Fisher, “The filibuster and the nature of representation in the United States Senate”, *Parliaments, Estates and Representation*, vol. 26, No. 1 (2006): 187-195; Martin B. Gold and Dimple Gupta, “The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Overcome The Filibuster”, *Harvard Journal of Law and Public Policy*, vol. 28, No. 1 (2005): 205-272; Michael J. Gerhardt, “The Constitutionality of the Filibuster”, *Constitutional Commentary*, 21 (2005): 445-484; Ernest Bormann, “The southern senators’ filibuster on civil rights: Speechmaking as parliamentary stratagem”, *The Southern Speech Journal*, vol. 27, No. 3 (1962): 183-194; Steven S. Smith and Hong Min Park, “Americans’ Attitudes About the Senate Filibuster”, *American Politics Research*, vol. 41, No. 5 (2013): 735-760; Sarah A. Binder, Eric D. Lawrence and Steven S. Smith, “Tracking the Filibuster, 1917 to 1996”, *American Politics Research*, vol. 30, No. 4 (2002): 406-422; Josh Chafet, “The Unconstitutionality of the Filibuster”, *Connecticut Law Review*, vol. 43, No. 4 (2011): 1003-1040; Gerard N. Magliocca, “Reforming the Filibuster”, *Northwestern University Law Review*, vol. 105, No. 1 (2011): 303-328; Emmet J. Bondurant, “The Senate Filibuster: The Politics Of Obstruction”, *Harvard Journal on Legislation*, vol. 48, No. 2 (2011): 467-514; Laura T. Gorjanc, “The Solution to the Filibuster Problem: Putting the Advice Back in Advice and Consent”, *Case Western Reserve Law Review*, vol. 54, No. 4 (2004): 1435-1463; Brent Wible, “Filibuster vs. Supermajority Rule: From Polarization to a Consensus- and Moderation – Forcing Mechanism for Judicial Confirmations”, *William & Mary Bill of Rights Journal*, vol. 13, No. 3 (2005): 923-965. Regarding shutdowns, their motives and effects see, Clinton T. Brass, *Shutdown of the Federal Government: Causes, Processes, and Effects* (Washington, DC: Congressional Research Service, 2013), http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2182&context=key_workplace; Kevin R. Kosar, “Shutdown of the Federal Government: Causes, Effects, and Process” *CRS Report for Congress* (2004), <https://archives-democrats-rules.house.gov/archives/98-844.pdf>; Roy T. Meyers, “Late Appropriations and Government Shutdowns: Frequency, Causes, Consequences, and Remedies”, *Public Budgeting & Finance*, vol. 17, No. 3 (1997): 25-38; Scott R. Baker and Constantine Yannelis, “Income Changes and Consumption: Evidence from the 2013 Federal Government Shutdown”, *Review of Economic Dynamics*, vol. 23 (2017): 99-124; Corinne

Some notable examples of the use of the consultation procedure are:

- *Article 21(3) TFEU*, allowing Council – absent (specific) provision of the necessary powers by the Treaties – to adopt measures concerning social security or social protection to protect the right of Union citizens to move and reside freely within the territories of the Member States.
- *Article 74 TFEU*, regarding the adoption of measures to ensure administrative cooperation between Member States within the Union’s area of freedom, security and justice.⁵²
- *Articles 150 and 160 TFEU*, regarding the establishment of the Employment Committee and the Social Protection Committee.
- *Article 218(6) TFEU*, when the consent procedure is not necessary.
- *Article 311 (3rd paragraph) TFEU*, regarding the adoption of provisions relating to the system of owning resources of the Union. The Council’s decision will not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements.

4. Exceptions

There are cases when the Council can adopt legislation without involving the EP or the Commission at all. These situations are highly uncommon in nature and can be seen as a remnant of Council “supremacy” which was manifest in the EU’s past. It is relevant to highlight Article 108(2) TFEU according to which “*on application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the internal market, in derogation from the provisions of Article 107 or from the regulations provided for in Article 109, if such a decision is justified by exceptional circumstances*”. On occasion, the Commission may also exercise independent legislative power in accordance with Articles 45(3)(d), and 106(3) TFEU. However, the Commission’s use of this power has been rare⁵³.

The Commission may also be called upon to adopt Delegated or Implementing Acts (290 and 291 TFEU)⁵⁴ Implementing Acts do “*no more than ensure the uniform*

Bendersky, “Resolving ideological conflicts by affirming opponents’ status: The Tea Party, Obamacare and the 2013 government shutdown”, *Journal of Experimental Social Psychology*, vol. 53 (2014): 163-168; David R. Jones, “Party Brands, Elections, and Presidential-Congressional Relations”, accessed December 11, 2018, https://www.baruch.cuny.edu/wsas/academics/political_science/documents/PartyBrandsElectionsandPresidentialCongressionalRelations.pdf; Debbie Rabina and Anthony Cociolo, “US Government Websites During the 2013 Shutdown: Lessons from the Shutdown Library”, *Alexandria: The Journal of National and International Library and Information*, vol. 25, issue 1-2 (2014): 21-30; David Scott Louk and David Gamage, “Preventing Government Shutdowns: Designing Default Rules for Budgets”, *University of Colorado Law Review*, vol. 86 (2015): 181-258; Katharine G. Young, “American Exceptionalism and Government Shutdowns: A Comparative Constitutional Reflection on the 2013 Lapse in Appropriations”, *Boston University Law Review*, vol. 94, No. 3 (2014): 991-1027; Ricard Gil and Mario Macis, “Ain’t No Rest for the Wicked”: Population, Crime, and the 2013 Government Shutdown”, *Discussion Paper No. 8864* (Bonn: IZA, 2015), <http://repec.iza.org/dp8864.pdf>; Chris C. Martin and Kimmo Eriksson, “Who Accurately Predicted the End of the Government Shutdown?”, accessed December 11, 2018, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2609920.

⁵² Regarding this point and as abovementioned, in addition the Commission, Member States may also have the right to initiate legislation in accordance with Article 76 (TFEU).

⁵³ Alina Kaczorowska, *European*, 160; Lorna Woods and Philippa Watson, *EU Law* (11th ed., Oxford: Oxford University Press, 2012), 171.

⁵⁴ Ana Maria Guerra Martins, “Anotação ao artigo 48.º do TUE”, in *Tratado de Lisboa*, 176-182; Eileen Denza, “Article 48 [Treaty Revision Procedures]”, in *The Treaty on European Union*, 1331-1355; Luis Jimena Quesada, “The Revision Procedures of the Treaty”, in *The European Union after Lisbon*:

implementation of the legally binding acts from which they get their legal basis. Unlike delegated acts, implementing acts cannot amend or supplement even non-essential elements of the original act. Therefore, implementing acts are well suited to regulate highly technical matters where there is a need for very specific rules to ensure harmonized implementation and application through the EU". Both types of acts must be expressly provided for in the original Act. Delegated Acts may be revoked by Parliament or Council and may only enter into force absent objections from these Institutions. Meanwhile, Implementing Acts⁵⁵ are subject to Comitology, which gives Member States the power to examine the Act (and even block it when under the examination procedure) and the European Parliament and Council the power to scrutinize it, albeit absent the blocking and revoking powers that they enjoy in Delegated Acts.^{56/57/58/59}

5. *Passerelle* Clauses

A brief reference to the *passerelle* clauses contained within the Treaties. *Passerelle* clauses may be used to simplify or to replace the special legislative procedure originally enshrined in the Treaties with the ordinary legislative procedure. Article 48(7) of the TEU contains a general *passerelle* clause setting forth that:

a) *"Where the Treaty on the Functioning of the European Union or Title V of this Treaty provides for the Council to act by unanimity in a given area or case, the European Council may adopt a decision authorising the Council to act by a qualified majority in that area or in that case. This subparagraph shall not apply to decisions with military implications or those in the area of defence";* and

b) *"Where the Treaty on the Functioning of the European Union provides for legislative acts to be adopted by the Council in accordance with a special legislative procedure, the European Council may adopt a decision allowing for the adoption of such acts in accordance with the ordinary legislative procedure."*

In both cases, National Parliaments must be notified and can exercise veto power within six months of the notification date.⁶⁰

Constitutional Basis, Economic Order and External Action, eds. Hermann-Josef Blanke and Stelio Mangiameli (Heidelberg: Springer, 2012), 323-342; Miguel Gorjão-Henriques, *Direito da União: História*, 291.

⁵⁵ One should note that, strictly speaking, Implementing Acts should be categorized as administrative acts and not as legislative acts.

⁵⁶ See, Michael Kaeding and Kevin M. Stack, "Legislative Scrutiny? The Political Economy and Practice of Legislative Vetoes in the European Union", *Journal of Common Market Studies*, vol. 53, No. 6 (2015): 1268-1284; Michael Kaeding e Kevin M. Stack, "A dearth of legislative vetoes: Why the Council and Parliament have been reluctant to veto Commission legislation", *LSE Blog*, accessed December 20, 2019, <http://blogs.lse.ac.uk/europpblog/2016/10/25/a-dearth-of-legislative-vetoes/>.

⁵⁷ Exceptionally, in accordance with Articles 24 and 26 TFEU, the Council may adopt implementing acts (Article 291(2) TFEU),

⁵⁸ See, Marília Frias and Tiago Sérgio Cabral, "New Regulation on the rules and procedures for the operation of unmanned aircraft: Part A – Its relationship with national laws", Vda, accessed August 20, 2019, <https://www.vda.pt/pt/publicacoes/insights/new-regulation-on-the-rules-and-procedures-for-the-operation-of-unmanned-aircraft-part-a-its/21300/>.

⁵⁹ Under Regulation 182/2011/EU of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.

⁶⁰ See, António Gameiro, *O papel dos Parlamentos nacionais na União Europeia* (Coimbra: Coimbra Editora, 2011), 411; Alessandra Silveira, "Sull'esercizio delle competenze dell'Unione europea: il Parlamento portoghese e il giudizio di conformità al principio di sussidiarietà", in *The role of national parliaments in the EU integration process* (Wolters Kluwer Italia/CEDAM: Milan, 2016); Rudolf Hrbek, "The Role of National Parliaments in the EU", in *The European Union after Lisbon*, 129-157.

Additionally, there are special *passerelle* clauses applicable only to specific matters, but whose requirements are generally easier to meet than the ones for the general clause. These clauses may be found in Articles 31(3) TUE, 81(3) TFUE, 153(2) TFUE, 192(2) TFUE, 312(2) TFUE and 333(1 and 2) TFUE.

There are distinct advantages in using *passerelle* clauses to replace the use of special legislative procedures by the ordinary legislative procedure. Even though one can express some concerns regarding the transparency and democratic legitimacy of the ordinary legislative procedure when taking into account trilogues, any issue pales in comparison to the ones suffered by the special procedures. The expansion of the ordinary legislative procedure under the Treaty of Lisbon was a sensible and wise decision and a simplified manner to build upon it should be welcomed. However, this is not to say that *passerelle* clauses are flawless. This legislative tool grants too much power to the ECON in the legislative procedure, where there is no apparent reason for it to have any⁶¹. The power to trigger a *passerelle* clause should rest with the European Parliament itself, which is the interested party and the Institution with the highest connection with the European Citizens and the highest degree of democratic legitimacy. To keep State control over the procedure, the Council could be called upon to approve or reject the triggering of the clause. Veto power by National Parliaments offers a robust second layer of State control, making the systematically incoherent intervention of the ECON unneeded.

6. Citizens' Initiative

Citizens can directly propose legislation at the European level, in accordance with the principles enshrined within Article 11(4) TEU and 24 TFEU. Regulation No. 2019/788 of the European Parliament and of the Council of 7 April 2019 on the citizens' initiative operationalises and develops the Constitutional principles.

Using this tool entails fulfilling some strict requirements regarding representativity. The organisers must come from seven or more Member States and subscribers from, at least, $\frac{1}{4}$ of the Member States (Article 5(1)). The minimum number of signatures is 1 million with distribution rules. Besides the abovementioned rules, organisers have to ensure that signatures, also, correspond, at least "*to the number of the Members of the European Parliament elected in each Member State, multiplied by the total number of Members [of the EP]*" (Article 3(1)).

The Commission has the power to stop initiatives at an early stage by refusing their registration. However, this power should only be used when: *i*) the initiative manifestly falls outside the framework of the Commission's powers to submit a proposal for a legal Act of the Union for the purpose of implementing the Treaties;

⁶¹ The reason is probably due to the fact that using a *passerelle* clause effectively changes the basic rules of European Constitution law as enshrined in the Treaties and, in accordance to the underlying logic, this should be left to heads of State in the European Council. But that logic is incredibly flawed. First, opinions in the Council and European Council will be the mirror image of each other more frequently than not, so needing the European Council to trigger the clause and the Council to approve the (future) legislation is not logical. If we have to choose between the two institutions, the Council, which actually was law-making powers would be the most adequate. Second, those heads of State will frequently not have any law-making, let alone constitutionally amending powers on their States, it does not seem coherent for them to have it at a European level. Furthermore, they lack the mandate or democratic legitimacy for it. The fact the European Council is not needed is even clearer when national parliaments (which tend to have a higher degree of legitimacy) are involved and have veto power, therefore being perfectly able to raise any issues that a Member State might have with the amendment.

ii) the initiative is manifestly abusive, frivolous or vexatious; or *iii)* the proposed citizens' initiative is manifestly contrary to the values of the Union as set out in Article 2 TEU⁶².

Displaying a high degree of attention to the issue of democratic participation, the legislator opted to guarantee the existence of various possible tools to collect support for the initiatives (including paper and electronically). Collection should follow the rules of Articles 8 - 11 of the Regulation.

If success is achieved by the organisers and the initiative meets its goal, the Commission must publish it in the register with celerity and “receive the group of organisers at an appropriate level to allow them to explain in detail the objectives”. Furthermore, the Commission, within six months, has to “set out in a communication its legal and political conclusions on the initiative, the action it intends to take, if any, and its reasons for taking or not taking that action” (Article 15).

Additionally, a public audience must be organised in the European Parliament, within three months of the submission, where organisers have the opportunity to explain and argue for their proposal. In addition to the European Parliament and Commission, it is open to the participation of civil society and other institutions, bodies or national parliaments that show interest⁶³.

7. Concluding thoughts

Due to the necessary balance of interests within the EU, its legislative procedure is quite complex, though not necessarily more complex, or less transparent than the respective national procedures of its Member States. Still, this does not mean that there is no room for improvement.

Establishing a right of initiative for the European Parliament only appears more urgent as time goes on. By design, the European Parliament will have superior European legitimacy when compared to the other Institution. However, present times bring specific challenges and a range of doubts may be raised regarding the legitimacy of the EC (particularly its President) due to not having been elected under the *spitzenkandidaten* process. Parliament could be in prime position now to propose certain solutions that the present (and one could argue weakened from a legitimacy standpoint) Commission might struggle to.

Whenever it is feasible, the ordinary legislative procedure should be used instead of the special procedures. This may mean making use of passerelle clauses to the special legislative procedure originally enshrined in the Treaties with the ordinary legislative procedure. The objective is both to achieve more legitimacy and accountability. Still, this effort may be rendered moot if it is not accompanied by reinforcing transparency in the Ordinary Legislative Procedure itself. Specifically for trilogues which are a key (but seldom studied) part of the EU's legislative procedure,

⁶² The General Court was called upon to intervene in two occasions when the Commission refused citizen's initiatives in an unlawful manner. See, Pedro Infante Mota, “Acordos Mega-Regionais”, in *União Europeia – Reforma ou Declínio*, coord. Eduardo Paz Ferreira (Lisboa: Vega, 2016), 376-399; Judgment of EGC of 3 February 2017, *Minority SafePack - one million signatures for diversity in Europe*, Case T-646/13, ECLI:EU:T:2017:59; Judgment of the EGC of 10 May 2017, *Stop TTIP (Ejler v. Commission)*, Case T-754/14, ECLI:EU:T:2017:323; Judgment of the EGC of 24 September 2019, *Romania v. Commission*, Case T-391/17, ECLI:EU:T:2019:672.

⁶³ Patrícia Calvão Teles, “Anotação ao artigo 24.º do TFUE”, in *Tratado de Lisboa Anotado e Comentado*, coords. Manuel Lopes Porto and Gonçalo Anastácio (Coimbra: Almedina, 2012), 264-267; Dulce Lopes and Paula Veiga, “Anotação ao artigo 11.º do TUE”, in *Tratado de Lisboa Anotado e Comentado*, 54-57.

transparency should be reinforced and we would go as far as to state that the general rule should be for open access to documents related to them, with exceptions only tolerable when disclosure of the document would seriously undermine the institution's decision-making process. In fact, exceptions should be interpreted restrictively in what appears to be in line with the General Court's interpretation who rejected the "infantilization" of the European citizen as someone who could not understand the needed negotiations at the EU level. Allowing further access to citizens or, at least, interested stakeholders may also contribute to foster accountability. Lastly, it is not infrequent to see EU Law Manuals and EU Law syllabus at a University level which ignore trilogues completely. Taking into account the statistics we shared above, this does not seem reasonable, therefore more study into trilogues is needed to shine some light into the procedure.