

Special legislative procedures in the Treaties Institutional balance and sincere cooperation ¹

ABSTRACT

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

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

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

¹ Full study in English: [https://www.europarl.europa.eu/RegData/etudes/STUD/2022/738331/IPOL_STU\(2022\)738331_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/738331/IPOL_STU(2022)738331_EN.pdf)



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

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

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

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