

Legislation by way of trialogue

The end of transparent representative democracy?

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In order to shorten the EU legislative procedure, the European Parliament, Council and EU Commission try to reach agreement, prior to the conclusion of the 1st reading, by way of internal negotiations - or informal trialogues.

- ▶ No conciliation procedure can take place where the essential subject matter is not covered by the European treaties. This also applies to the informal trialogue.
- ▶ It should be possible, at any stage of the legislative procedure, to initiate the existing conciliation procedure (formal trialogue) and thus replace the informal trialogue.
- ▶ All the subject matter of any trialogue should be minuted and published prior to the final reading.
- ▶ All transfers of power to the EU Commission for the adoption of delegated and implementing acts should be prohibited in the trialogue procedure.

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1 Introduction

The EU's legislative procedure is often accused of lacking transparency resulting in a lack of public discussion on legislative proposals and the public becoming ever further removed from the EU. In addition, the legislative process is said to be too long which is why the public quickly loses interest in new legislative proposals. These accusations should be taken seriously because they are not without foundation.

The ordinary legislative procedure (Fig. 1) – the normal case – is codified under Art. 294 of the Treaty on the Functioning of the European Union (TFEU).¹ It allows the European Parliament and the Council to act together as legislative organs of equal standing. However, the TFEU only contains relatively general provisions on the course of the procedure. For this reason, the European Parliament and the Council have included, particularly in their Rules of Procedure, numerous provisions which they follow during the legislative process. In addition, they have agreed on how to speed up the ordinary legislative procedure by way of what is termed the informal trialogue - a procedure, not provided for under primary law, whereby the three institutions, European Parliament, Council and EU Commission, jointly seek a compromise on the Commission proposal. The informal trialogue effectively brings forward the conciliation procedure provided for under the TFEU (also called the formal trialogue procedure) which is actually intended for the Conciliation Committee between the 2nd and 3rd readings, so that it actually takes place prior to the 1st reading. The aim is to achieve an agreement in the informal trialogue - i.e. before the 1st reading - for all legislative acts which have to be adopted in the ordinary legislative procedure. If necessary, there may be an additional trialogue prior to the second reading.

Since the informal trialogue is not generally open to the public, the European legislator is caught between two objectives; the desire for a fast legislative process on the one hand, and a transparent one which is comprehensible to the public, on the other. This ceplInput looks into the impact which the informal trialogue has on the duration and quality of the legislative process, on transparency and on the right of EU citizens to take part in the process. In addition, the ceplInput will identify any improvements which could be made to the trialogue procedure.

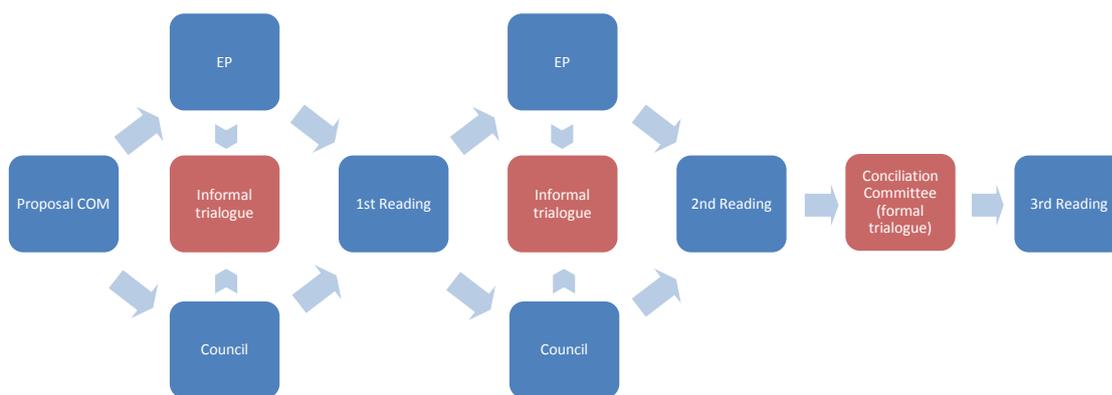


Fig. 1: The ordinary legislative procedure in practice

¹ Art. 294 TFEU regulates the ordinary legislative procedure in 15 paragraphs.

2 The ordinary legislative procedure

In the ordinary legislative procedure, both the European Parliament and the Council may, following submission of a legislative proposal by the EU Commission², make changes to the Commission's proposal. For this the proposal has a maximum of two passages, the 1st and 2nd readings, plus a Conciliation Procedure between the 2nd and 3rd reading. The 3rd reading serves simply to confirm or reject the result of the Conciliation Procedure (Fig. 2)

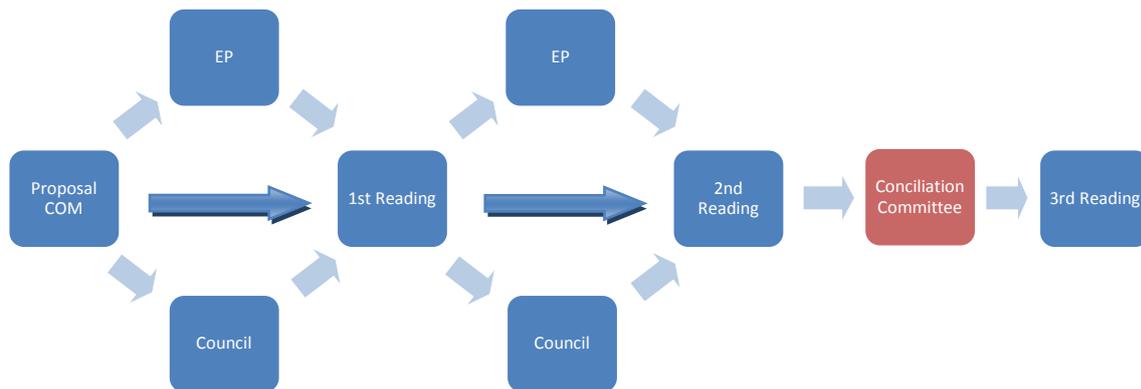


Fig. 2: The ordinary legislative procedure as laid down in the Treaty

2.1 The 1st Reading

In the 1st reading, the European Parliament defines its position on the EU Commission's proposal.³ In doing so, it may accept the proposal or modify it. Following this, the Council considers the proposal and the amendments of the European Parliament. It has two possibilities: (1) If it agrees with the position of the European Parliament in its 1st Reading the legislative act is deemed to have been adopted.⁴ (2) If it does not agree with the proposals of the European Parliament, it must determine its own position and notify the European Parliament of this together with detailed grounds for its divergences.⁵ This concludes the procedure in the 1st reading.

2.2 The 2nd Reading

The European Parliament must respond to the Council's position within three months of communication. It has two possibilities in this regard: (1) It says nothing or agrees with the Council's position in the 2nd reading. The legislative act is then deemed to have been adopted.⁶ (2) It rejects the Council's position with an absolute majority in the 2nd reading⁷. The legislative act is then deemed not to have been adopted.⁸ (3) It makes changes to the Council's position in the 2nd reading with an absolute majority. In this case, it sends the amended proposal to the Council and the EU Commission. The EU Commission gives its opinion on the amendments.⁹

² Art. 294 (2) TFEU.

³ Art. 294 (3) TFEU.

⁴ Art. 294 (4) TFEU.

⁵ (Art. 294 (5) and (6)) TFEU

⁶ (Art. 294 (7) (a) TFEU

⁷ An absolute majority requires the majority of the Members of the European Parliament.

⁸ (Art. 294 (7) (b) TFEU

⁹ (Art. 294 (7) (c) TFEU

The Council must then issue a statement on the changes made by the European Parliament within three months. As an exception to the rule, where the EU Commission has issued a rejection of the amendment by the European Parliament, the Council must decide unanimously. Otherwise it decides by way of a qualified majority.¹⁰ In the 2nd reading, the Council has two possibilities: (1) It approves all the changes made by the European Parliament. The legislative act is then deemed to have been adopted.¹¹ (2) It does not approve all changes. In this case, the President of the Council, in consultation with the President of the European Parliament, convenes a Conciliation Committee within six weeks.¹²

The time limit of three months or six weeks, as appropriate, may be extended by a maximum of one month or two weeks respectively on the initiative of the European Parliament or the Council.¹³

2.3 Conciliation procedure - the formal triologue

The Conciliation Procedure is the final opportunity to agree on the legislative act. It aims to prevent legislative proposals from failing at this late stage due to remaining discrepancies since this could be harmful to the interests of the EU.¹⁴ With the mediation of the EU Commission, delegations from the two institutions negotiate on the proposed legislative act in the Conciliation Committee.¹⁵

Detailed rules on the conciliation procedure are contained in particular in the Rules of Procedure of the European Parliament¹⁶ and of the Council¹⁷ as well as in the European Parliament's guidelines "Co-decision and Conciliation"¹⁸ and in the "Council Guide"¹⁹. The Conciliation Committee does not have its own Rules of Procedure however.

The Conciliation Committee contains equal representation from both sides. It is made up of representatives from the - currently 28 - members of the Council or their representatives and the same number of members of the European Parliament.²⁰ The delegation from the European Parliament must reflect the overall political balance between the political groups. The political groups decide which of their members - preferably those from the parliamentary committees dealing with the Commission proposal - will join the delegation for each individual conciliation procedure.²¹ In this regard, the Chairman and the Rapporteur of the leading parliamentary committee will certainly be members of the delegation.²² A further three members, representing at least two different political groups, are appointed by the political groups from among the Vice Presidents of the European Parliament, for all conciliation procedures taking place within a period of twelve months.²³ Political groups that are not represented on the delegation²⁴ and Members not attached to a group, may each send one representative to the internal preparatory meetings of the

¹⁰ For a qualified majority, at least 55% of the Member States, currently 15, must agree, which together makes up at least 65% of the EU population. For the specifics see *Sohn/Czuratis* in: "The new majority voting rules in the Council from 1 November 2014: less democratic and less efficient", ceplnput 02/2014 of October 2014.

¹¹ Art. 294 (8) (a) TFEU

¹² Art. 294 (8) (b) TFEU

¹³ Art. 294 (14) TFEU.

¹⁴ GA *Geelhoed*, Closing Submissions Case C-344/04, IATA, para. 81.

¹⁵ Art. 294 (11) TFEU).

¹⁶ Rules of Procedure of the European Parliament, 8th legislative term, April 2015 (hereinafter: GO-EP).

¹⁷ Art. 7 Rules of Procedure of the European Council of December 2009 (hereinafter GO-R).

¹⁸ "Co-decision and Conciliation - A guide to how the European Parliament co-legislates under the ordinary legislative procedure" December 2014 (hereinafter: EP Guidelines).

¹⁹ Council Guide, Part IV "Co-decision Guide" (hereinafter Guide-R).

²⁰ Art. 294 (10) TFEU

²¹ Art. 71 (2) and (3) GO-EP

²² Art. 71 (3), sentence 3 GO-EP

²³ Art. 71 (3), sentence 2 GO-EP

²⁴ Currently, all the political groups are large enough to be represented in the delegation. A political group with fewer than 27 MEPs would not be represented however (751 : 28 = 26.8).

delegations.²⁵ The deliberations of the delegations are not open to the public.²⁶ The results of the conciliation are reported to Parliament by the delegation members representing the European Parliament.²⁷ There is no provision requiring notification of MEPs, whether in the political groups or in the responsible committee, about the content of the individual conciliation meetings. Only the results are published and discussed in the European Parliament.²⁸

After being convened, the Conciliation Committee has six weeks to achieve an agreement. This time limit may be extended by a maximum of two weeks.²⁹ The adoption of the compromise by the Conciliation Committee requires a majority of the members representing the European Parliament and a qualified majority of the members of the Council.³⁰ If the Conciliation Committee is unable to reach a compromise, the legislative proposal fails.³¹

2.4 The 3rd Reading

Where an agreement is achieved in the Conciliation Committee, both the European Parliament and the Council must approve the agreement within 6 weeks in the 3rd reading. This requires a majority of votes in the European Parliament³² and a qualified majority in the Council. Following approval in the 3rd reading, the legislative proposal is deemed to have been adopted, otherwise the proposal will have failed.³³

The time limit of six weeks may be extended by a maximum of two weeks on the initiative of the European Parliament or the Council.³⁴

3 The informal trialogue

Finding a compromise in the formal trialogue has proven to be difficult.³⁵ In an endeavour to achieve acceptance of legislative proposals by consensus in the European Parliament and the Council, the so-called informal trialogue has therefore been introduced. As in the case of the formal trialogue, the informal trialogue involves negotiations between representatives of the European Parliament and those of the Council with mediation by the EU Commission. By contrast with the formal trialogue, which only takes place following a failure of the European Parliament and the Council to reach agreement after the 2nd reading, informal dialogues can take place, following submission of the legislative proposal by the EU Commission, at all stages of the legislative process up until commencement of the formal conciliation procedure, in particular prior to the 1st, and less frequently prior to the 2nd reading (Fig. 3). In the informal trialogue procedure, a compromise is often achieved even before the 1st reading in the European Parliament (known as early agreement or first reading agreement).

²⁵ Art. 71 (5) GO-EP

²⁶ Art. 71 (7) GO-EP

²⁷ Art. 71 (8) GO-EP

²⁸ Art. 72 GO-EP

²⁹ Art. 294 (14) TFEU.

³⁰ Art. 294 (10) TFEU.

³¹ Art. 294 (12) TFEU.

³² Art. 72 (4) GO-EP

³³ Art. 294 (13) TFEU.

³⁴ Art. 294 (14) TFEU.

³⁵ European Parliament Conciliations and Codecision Secretariat: "20 Years of Codecision: Conference Report", 2013, p. 4.

A few rules about the procedure for this informal conciliation were laid down in 2007 in a Joint Declaration by the European Parliament, Council and EU Commission³⁶ Although the informal trialogue is of great importance, it has not so far been subject to regulation under primary law.

The negotiating delegations are smaller than in the formal trialogue and vary from trialogue to trialogue. The delegation from the European Parliament is formally³⁷ made up of the Chairman of the leading Committee as well as the Rapporteur and the Shadow Rapporteur of the political groups. The Council's delegation is generally made up of a representative from the Member State holding Presidency of the Council, the Chairman of the Permanent Representatives Committee (I or II) and the Chairman of the working group. The EU Commission is generally represented by the competent Head of Unit or Director. Depending on the stage of the negotiations and the importance of the proposal, the representatives of the Council and the EU Commission are subject to change. Sometimes Ministers appear for the Council and a General Director or Commissioner may appear for the EU Commission.

Once a date has been fixed for a trialogue meeting, the European Parliament and Council establish the negotiating mandate.

On the side of the European Parliament, the members of the leading Committee prepare a report, including opinions from the other committees involved, with applications to amend the EU Commission's proposal. The plenary session of Parliament then deliberates on these amendment proposals. Once the amendment proposals have been accepted by the Parliament, the Chairman of the leading committee or the Rapporteur applies for a postponement of the vote on the formal legislative resolution and referral of the proposal to the leading Committee.³⁸ The amendment proposals are thus confirmed by Parliament without formal completion of the 1st and 2nd readings. Instead, the report is referred back to the leading Committee where it serves as negotiating mandate for the informal trialogue. The Council's negotiating mandate arises from its position on the amendment proposals from the European Parliament which are accepted by the Council in the 1st or 2nd reading without being passed as the formal result of the 1st or 2nd reading (known as the common position).

The representatives of the European Parliament and the Council then meet with the members of the EU Commission for the trialogue meetings. The job of the Commission representatives is to mediate between the position of the European Parliament and that of the Council.

All participating parties are obliged to submit draft compromise texts to the other institutions prior to trialogue meeting where possible. In order to "enhance transparency", the dates for dialogues are made public in advance.³⁹ The trialogue meetings themselves are not open to the public and no minutes are taken. The delegation members from the European Parliament report back to the responsible committee after every trialogue meeting.⁴⁰ There is no requirement for the Shadow Rapporteur to report back to the political groups but it is normal practice.

³⁶ Joint Declaration of the European Parliament, Council and the Commission of 13 June 2007 on practical arrangements for the new co-decision procedure (Art. 251 ECT), contained in Annex XIX GO-EP.

³⁷ In practice, the small political groups in particular waive the right to participate because they do not have enough MEPs.

³⁸ EP Rules of Procedure, p. 9.

³⁹ Annex XX No. 5 GO-EP

⁴⁰ Art. 73 (4) GO-EP

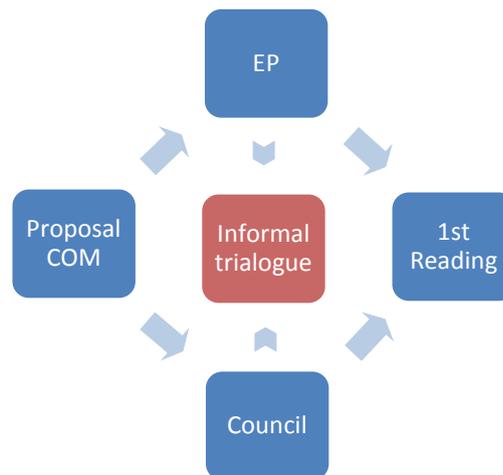


Fig. 3: The actual course of the ordinary legislative procedure

Where a compromise is achieved, the European Parliament and Council examine whether it is capable of gaining a majority in the respective institutions. Where approval is likely, the President of the European Parliament and the President of the Council indicate to each other their willingness to accept the compromise. The proposed compromise is then submitted to the plenary session of the European Parliament for approval. Where the proposed compromise is approved and the Council also agrees, the legislative act is adopted.⁴¹

4 Assessment

The existence of a conciliation procedure is not unique to the European legislative process. Other legislators, including some EU Member States, also make use of such procedures in order to save a legislative proposal in cases where agreement is proving elusive. There are however major differences between the conciliation procedures. Thus, in Germany, although agreement between the Bundestag and Bundesrat is sought on laws requiring approval, the interests of the Länder are often only superficially represented. More often, the fault line corresponds to the ideological differences between the parties and political coalitions. This means that laws requiring approval often cannot be passed because the majority of the Länder are governed by coalitions which form the opposition in the Federation and it is in their interest to obstruct the work of the executive, i.e. the Federal Government and the ruling parties from which it is formed.

At European level, the fault line is not generally between the ideological positions of the parties because the executive, i.e. the Commission, is not dependent on a parliamentary majority connected to the legislative term. The European Parliament is dominated by an effective coalition between the two largest parties, the EVP⁴² and S&D⁴³, whose representatives have a mutual interest in ensuring that their positions are represented in as many Commission proposals as possible. This ultimately results in the situation where the positions of the two large political groups are regularly brought to bear on the Commission proposal, in the amendments from the European Parliament, because the two political groups are more able to approve a legislative proposal if they both consider that they are being reasonably represented. On the other hand, the national

⁴¹ Annex XX No. 14 GO-EP

⁴² Group of the European Peoples Party (Christian Democrats)

⁴³ Group of the Progressive Alliance of Socialists and Democrats in the European Parliament

governments, irrespective of their political affiliations, want to see that their own country's interests are taken into account in European legislation. As a result of these two different standpoints, opposing interests at EU level generally arise between the European Parliament and the Council - rather than between the various ideological alignments.

With the formal and informal trialogue, there are, at EU level, two conciliation procedures which differ greatly in their design.

	Formal trialogue	Informal trialogue
Legal basis	Primary law (Art. 294 TFEU)	Joint Declaration of the EP, Council and Commission
When deployed	After 2nd Reading in Council and EP	Before 1st Reading in Council and before end of 1st Reading in EP
Initiation	Preparatory meetings	No official preparatory meetings
Duration	6-8 weeks	unlimited
Make-up of the EP Delegation	28 MEPs based on size of political groups	Committee Chairman Rapporteur, Shadow Rapporteur

Fig. 1 The main differences between the formal and informal trialogue

The following analysis will assess the formal and informal dialogues on the basis of three criteria which highlight the differences between the two dialogues.

- (1) Duration of the legislative process
- (2) Transparency and
- (3) Representation of citizens and institutional balance.

4.1 Conciliation procedure - the formal trialogue

The conciliation procedure is laid down in primary law as a fixed component of the ordinary legislative procedure. It is the final opportunity to save a legislative proposal following protracted negotiations where, even after two Readings, there is still no consensus between the institutions. Although the need for a conciliation procedure is essentially undisputed, the conciliation procedure gives rise to questions which must be addressed. These are, in particular, its impact on the duration of the legislative process (4.1.1), on transparency of the legislative process (4.1.2) and on the representation of citizens and institutional balance (4.1.3).

4.1.1 Impact on the duration of the legislative process

As a result of the formal trialogue, the legislative process is extended by up to a maximum of eight weeks. In the event of agreement, however, this additional time is justified because, where the conciliation procedure begins, following a failure to agree after the 2nd Reading in the European Parliament, all those involved have already invested a great deal of time in trying to reach a compromise. In addition to this, especially in urgent cases, the institutions involved will suffer a loss of reputation if they fail to achieve an agreement.

4.1.2 Impact on transparency

Public confidence in state institutions crucially depends on transparency in the decision-making process because only when citizens have the necessary information available to them can they fully understand the decisions. In addition, a sufficient level of transparency reduces the likelihood of negotiating parties concluding "package deals" and inappropriate compensation arrangements behind closed doors. Nevertheless, it is part of the reality of negotiations that the participants have

to be able to exchange views and compromise proposals without allowing them to get into the public domain where they will be talked to death. This simply hampers the ability to reach a compromise.

Requiring the European Parliament's delegation representatives to report on the results of the negotiations in the plenary session, ensures that all MEPs are informed and able to form their own opinion. Publishing the results of the conciliation procedure prior to the 3rd reading in the European Parliament also gives the public a chance to engage with the results. By comparing the debate in the 3rd reading with those which have already taken place in the 1st and 2nd readings, members of the public can also see whether or not the formal trialogue has resulted in changes which accord with their views. The possibility that the negotiating parties will conclude "package deals" and inappropriate compensation arrangements behind closed doors - a common problem of conciliation procedures - cannot be avoided. A certain amount of transparency, however, will be created in this regard because the earlier positions of the European Parliament and the Council during the 1st and 2nd readings are recorded.

Generally, therefore, the formal trialogue takes account of the requirement for transparency in the legislative process in a balanced way.

4.1.3 Impact on representation of citizens and institutional balance

In a representative democracy, all citizens should be represented in the decision-making process by way of their elected members of parliament. A limitation is necessary, however, in order to maintain the workability of the respective parliament which can be threatened by having too many members of parliament or too many parties. The number of members of the European Parliament is therefore limited to 751. The 751 parliamentary seats must also be distributed among the currently 28 Member States. As a result of this rule, the weight of the votes of EU citizens in the European Parliament is significantly lower than that in the national parliaments. The small Member States, who are entitled to fewer parliamentary seats overall than the large Member States, also have to contend with the fact that the political spectrum is less accurately reflected. In arithmetical terms, this means they are subject to minimum voting shares of up to 16.67%⁴⁴ which a member of parliament or a party must achieve in order to obtain a seat in the European Parliament at all.⁴⁵ This weakening of the vote is further exacerbated by the conciliation procedure because the European Parliament's delegation only has 28 members.

This weakening is ultimately acceptable, however, because the selection of the delegates at least reflects the balance of the political groups in Parliament⁴⁶ and opinion formation during the legislative process takes place in the Committees and political groups as well as in the plenary session during the 1st and 2nd readings. The overall political balance in the European Parliament as expressed in the composition of the political groups is thus preserved. Although only a minority of MEPs negotiates on a compromise in the formal trialogue, the plenary session has to decide, in the 3rd reading, on the compromise which has been reached. Even the inability of non-attached MEPs⁴⁷ to take part in the trialogue is justifiable. Their interests are taken into account by the fact that they can send a representative to the preparatory meetings of the delegations.⁴⁸ In addition, non-attached MEPs are entitled to vote in the 3rd reading. In any case, non-attached MEPs

⁴⁴ This quorum applies to Luxembourg and Malta which each send six MEPs.

⁴⁵ For more detail see *Sohn/Czuratis* in: "Eine Sperrklausel für Europawahlen", cepStudie, October 2012.

⁴⁶ Art. 71 (1) GO-EP

⁴⁷ Cf. <http://www.euoparl.europa.eu/meps/en/hemicycle.html> last accessed on 24 September 2015.

⁴⁸ Art. 71 (5) GO-EP

generally have fewer rights than those belonging to political groups in order to prevent the fragmentation of Parliament.

Consequently, although citizens' participation via their MEPs in the European Parliament is limited in the formal trialogue, this limitation is kept to a justifiable level because the political balance in the European Parliament is taken into account

The inclusion of the EU Commission as a mediator in the formal trialogue does not curtail the legislative powers of the European Parliament or the Council in such a way as to cause a problem. Firstly, at this stage, the Commission can no longer exercise what would amount to a de facto right of veto by withdrawing its original proposal.⁴⁹ It thus has no significant potential for making threats and therefore does not have greater bargaining power than the two other institutions. Secondly, there is also less risk that the European Parliament and the Council will agree to leave out controversial questions in order to achieve agreement, or that they will empower the EU Commission to bring about regulation subsequently by way of delegated⁵⁰ or implementing acts^{51,52}. This is because fundamental differences between the European Parliament and the Council, which have not been resolved in two formal Readings, will generally be excluded from delegation to the EU Commission right from the outset, precisely because of their fundamental nature. The involvement of the EU Commission as mediator in the negotiations is therefore unproblematic.

4.1.4 Interim conclusion

The intention of the formal trialogue - to save a legislative proposal that fails in the 2nd reading - leads to a conflict of objectives. On the one hand, the legislative process is supposed to be transparent. On the other, the negotiations necessary to find a compromise require a smaller number of negotiating partners and a certain amount of confidentiality. The formal trialogue procedure represents a reasonable balance between these two diverging objectives: it allows for the necessary level of publicity before the proposal is passed in the 3rd reading, but also facilitates confidential negotiations. The failure to include parts of the political spectrum in the trialogue negotiations is balanced out to a reasonable extent by their ability to take part in the preparatory meetings of the delegations and the inclusion of the plenary session in the 3rd reading. The maximum time limit of six or eight weeks means that the legislative process does not become unduly protracted as a result of the formal trialogue. One (probably insoluble) problem is the ability to conclude "package deals" and inappropriate compensation arrangements.

4.2 The informal trialogue

In practice, the informal trialogue procedure is of paramount importance. As early as the 5th legislative term (1999-2004), 54% of the legislative acts covered by the co-decision-making procedure used at that time - the predecessor of today's ordinary legislative procedure - were

⁴⁹ The ECJ has ruled that the EU Commission may only withdraw a legislative proposal provided there is no formal Decision of the Council (Case C-409/13). This formal Decision is the 1st readings.

⁵⁰ By way of delegated acts, the EU Commission can, provided it is authorised to do so in the basic legal act, supplement or amend non-essential elements of the respective legislative act (Art. 290 TFEU).

⁵¹ By way of implementing acts, the EU Commission can, provided it is authorised to do so in the basic legal act, adopt uniform conditions for implementing legally binding EU acts (Art. 291 TFEU).

⁵² Fox, in: „Secret EU lawmaking: the triumph of the trialogue“ <https://euobserver.com/investigations/123555> last accessed on 24 September 2015.

accepted in the 1st or 2nd reading following informal trialogues . In the 6th legislative term (2004-2009) this proportion rose to 82% and in the 7th legislative term (2009-2014) to as high as 93%.⁵³

The informal trialogue, like the formal trialogue, has an impact on the duration of the legislative process (4.2.1), on transparency (4.2.2) and on the representation of citizens and institutional balance (4.2.3).

4.2.1 Impact on the duration of the legislative process

The EU's much-lamented democratic deficit has been counteracted in recent decades by allowing the European Parliament to have a much greater say. As the Parliament has become established as an influential player alongside the Council, the potential for conflict and need for consultation on individual proposals has grown. At the same time, the EU's regulatory activity has increased significantly so that more and more legislative proposals are being debated in the European Parliament and the Council. Both situations have led to the legislative process becoming longer. The informal trialogue aims to counteract this.

Reducing the duration of the legislative process is the declared aim of the EU Commission.⁵⁴ A faster process has advantages: in a fast-moving age where challenges are constantly changing, government players must react quickly to provide legislative measures for the problems which arise. Since the codecision procedure, the predecessor to the ordinary legislative procedure, was introduced in 1992, the length of the legislative process in the EU has reduced on average from two years to 19 months.⁵⁵

Where a legislative act can be passed at the 1st reading - which generally requires a prior informal trialogue - the legislative process will take on average as little as 13 months to complete.⁵⁶ If we compare this considerable reduction with the length of a legislative process which goes to the 3rd reading, it is clear that the time limit of a maximum of eight weeks may be appropriate in the case of the formal trialogue but is not necessary for the informal trialogue. The informal trialogue thus achieves its aim.

4.2.2 Impact on transparency

By contrast with the formal trialogue, which only begins after the 2nd Reading, the political decision-making process of the informal trialogue usually takes place at a much earlier stage. At the same time, the delegations are significantly smaller than in the formal trialogue and there are no preparatory meetings in which the non-attached MEPs - they are excluded from the delegations in both the informal and in the formal trialogue - can state their positions. These circumstances require a particular level of transparency which is supposed to be achieved by the fact that MEPs who are not involved are kept informed about the negotiations: the Members of the leading Committee by the Rapporteur; other MEPs by the Shadow Rapporteurs in their political groups. The non-attached MEPs belonging to the leading Committee are also informed by way of the reports of the Rapporteur in the leading Committee. Only those non-attached MEPs who are not in the leading Committee will not be notified; only on publication of the negotiated compromise at the end of the trialogue procedure will they get the chance to reflect upon it. It should, however,

⁵³ European Parliament, Activity Report on Codecision and Conciliation for the period from 14 July 2009 to 30 June 2014 (7th legislative term), p. 10.

⁵⁴ Communication "Proposal for an Inter-Institutional Agreement on Better Regulation", COM(2015) 216 of 19 May 2015, No. 26. An assessment of the Communication is provided by *Sohn/Dauner*, in: "A new concept for better regulation" [ceplnput](http://ceplnput.org) 17/2015.

⁵⁵ Conciliations and Codecision Secretariat, in: "20 Years of Codecision: Conference Report", 2013, p. 26.

⁵⁶ Cf. <http://www.europarl.europa.eu/meps/en/hemicycle.html> last accessed on 24 September 2015.

be possible and reasonable for a non-attached MEP who is interested to ask his colleagues. Within the European Parliament, therefore, there is sufficient compliance with the requirement for transparency; there are no significant deficits by comparison with the formal trialogue.

This does not hold true, however, when it comes to the inclusion of the public because they are only informed of the result of negotiations. By contrast with the formal trialogue, in the case of the informal trialogue there is generally no prior 2nd reading in the European Parliament and neither a 1st nor a 2nd reading in the Council in the run-up to which, the public could be brought in or at least informed. In addition, the process of searching for and finding a compromise - is often not verifiable to the public due to the lack of prior readings.

Furthermore, the informal trialogue increases the incentive to reach "package deals" and inappropriate compensation arrangements which are not open to the public because, by contrast with the formal trialogue, during the run-up to the informal trialogue neither the European Parliament nor the Council take a formally established position by which its conduct when finding a compromise could be measured.

4.2.3 Impact on representation of citizens and institutional balance

Whilst the European Parliament has risen to become regular co-decision maker thereby reducing the EU's democratic deficit, the legislative process has become longer. The informal trialogue, which aims to make up for this, has now had the paradoxical effect of increasing the democratic deficit by the back-door.

By contrast with the formal trialogue, the negotiating delegations in the informal trialogue are much smaller. The European Parliament is only represented by the Committee Chairman, the Rapporteur and the Shadow Rapporteur. This effectively excludes the possibility of delegation members being represented proportionately to the strength of their party's vote in Parliament. In fact, Committee Chairman, Rapporteur and Shadow Rapporteur carry significantly more influence because they negotiate the compromise. The small political groups, like the large ones, are represented by one MEP and therefore have an advantage. Thus, unlike the formal trialogue, the composition of the delegations does not correspond to the overall political balance in the European Parliament resulting from the elections. The non-attached MEPs are also worse off in the informal trialogue than in the formal trialogue. Not only are they basically excluded from the trialogue negotiations, but also, by contrast with the formal trialogue, there are no official preparatory meetings in which they could put their positions forward.

It is also problematic that, in the informal trialogue, the EU Commission has a significantly larger influence on the ongoing legislative process than it does in the formal procedure. It is actually only there to act as a mediator between the European Parliament and the Council. However, by contrast with the formal trialogue, the informal trialogue is not preceded by the two formal readings in which less fundamental differences between the European Parliament and the Council - whether concerning central or peripheral issues of the legislative proposal - could have been dispelled. The negotiations in the informal trialogue therefore involve not only (as in the case of the formal trialogue) fundamental differences between the two institutions but also less important ones. Parliament and the Council thus have an incentive, in the interests of reaching a speedy agreement, not to negotiate such controversial points in full but to pass them on to the EU Commission to deal with by way of delegated or implementing acts, to which the Commission will certainly have no objection. As a result, however, all MEPs are then excluded from defining the detailed provisions. This approach threatens to blur the division between the legislative and executive. The EU Commission can only use delegated acts to regulate non-essential elements of

the basic legislative act.⁵⁷ There is however no definition of what is essential and what is non-essential. Consequently a grey area has arisen. The incentive to agree by transferring power is increased by the fact that the EU Commission is entitled, at this stage of the procedure, to withdraw its legislative proposals. The resulting pressure to reach an agreement should not be underestimated. On the whole, this amounts to an unjustifiable shift in the institutional balance.

4.2.4 Interim conclusion

Although the informal dialogue meets the requirement of shortening the legislative process, its disadvantages are disproportionate. As a result of the informal dialogue, the legislative process is no longer transparent to the public. It is more susceptible to "package deals" and inappropriate compensation arrangements and it shifts the institutional balance in favour of the EU Commission.

5 Conclusion and Requirements

In countries governed by the Rule of Law, the legislative process must follow defined rules. These rules must be laid down at the highest level, which in the case of the EU, is primary law, and cannot be enacted by the legislative organs in the form of rules of procedure or non-binding guidelines. The rules of procedure of the institutions only have room for internal provisions on implementation. The informal dialogue does not conform to this requirement.

Requirement 1: No conciliation procedure should be permitted to take place where the essential subject matter is not covered by primary law. This also applies to the informal dialogue.

The informal dialogue in its current form does not provide a proper balance between the legitimate need for efficient legislative procedures which are not too long, on the one hand, and the requirement for transparency, on the other. In addition, it shifts the institutional balance in favour of the EU Commission at the expense of the European Parliament and the Council. A reasonable balance requires fundamental changes to the current procedure. The existing formal dialogue pursuant to Art. 294 (10) and (11) TFEU creates such a balance. It is currently, however, only available after the 2nd reading.

Requirement 2: It should be possible, at any stage of the legislative procedure, to initiate the existing conciliation procedure (formal dialogue) and thus replace the informal dialogue.

This would take care of the problem that the informal dialogue has no preparatory meetings and does not reflect the overall balance in Parliament. Solely the time limit for the procedure, of six to a maximum of 8 weeks, should continue to apply only after the 2nd reading in order to prevent premature compromises at an early stage of the legislative process.

Even where - as required - only one dialogue procedure exists, it is necessary to improve transparency. EU citizens currently only hear the result of negotiations. They cannot therefore verify decisions taken in the dialogue because they are deprived of the relevant information. They should therefore be informed about the entire content of the negotiations. This is contradicted by the legitimate interest of the chief negotiator in keeping the proceedings confidential. Such a conflict of objectives must not be resolved, as in the case of the existing dialogues, at the expense of transparency. One solution would be to keep minutes of all dialogue meetings. These minutes would remain subject to confidentiality until the conclusion of negotiations and would then be

⁵⁷ Art. 290 (1), sub-para. 1 TFEU).

made available to the public within a reasonable time prior to the final reading in the European Parliament. Such a procedure would also make "package deals" and inappropriate compensation arrangements more difficult.

Requirement 3: All the subject matter of any trialogue proceedings should be minuted and published prior to the final reading.

The concentration of power in the hands of a few MEPs is a characteristic of the conciliation procedure. It is at least acceptable where a procedure is followed which is transparent and has been laid down in primary law. What is and remains a major problem, however, is the significant influence of the EU Commission in trialogue procedures which are deployed at an early stage of the legislative process. This is because the aforementioned incentive to transfer power to the EU Commission applies irrespective of whether an informal or a formal trialogue is implemented. This problem can be solved by a ban on the transfer of power to the EU Commission, for the adoption of delegated and implementing acts, during future formal trialogues.

Requirement 4: All transfers of power to the EU Commission for the adoption of delegated and implementing acts should be prohibited in the trialogue procedure.

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