pter 19
king and Applying EU Legislation

This chapter examines the making and applying of EU legislation. Regarding the making of legislation, attention is focused on legislation that is subject to a full legislative procedure, which means legislation that generally is thought to be especially significant and/or is concerned with establishing principles. The reason for this focus is that legislation that does not require a full legislative procedure – which means legislation that is usually narrow in focus and of an administrative and/or implementing character – was examined in Chapter 9.

By way of introducing 'the overall shape' of EU legislative and application procedures, Figure 19.1 shows their key organisational features and the positions of the main EU institutions within them. As can be seen, the 'route' taken by proposed administrative legislation is to the right of the figure and that taken by proposals involving a full legislative process is to the left.

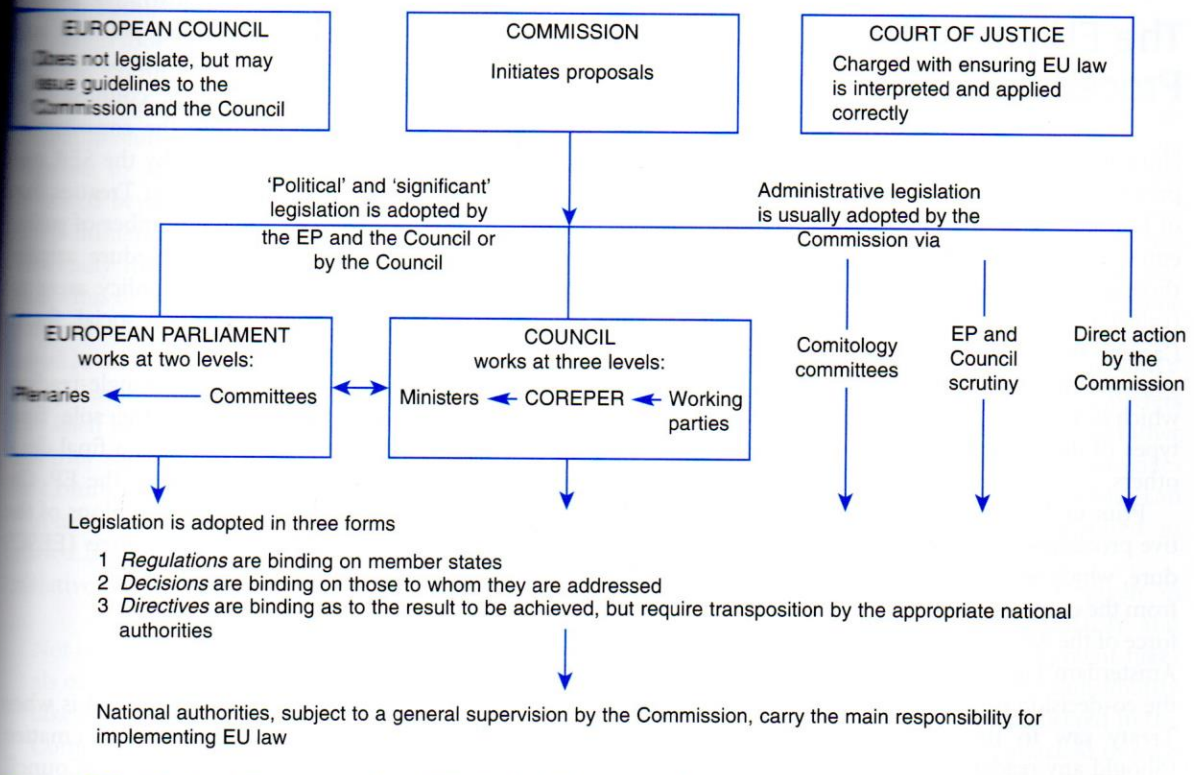

Figure 19.1 Principal features of the EU's legislative procedures

As has been shown earlier in this book (see especially pp. 230–1), the volume of EU legislation has fallen considerably in recent years. It has done so as decision-makers have sought to lighten the EU's legal load, have become more cautious of advancing legislative proposals in topic areas that are especially contested, and have increasingly used non-legally binding policy instruments. The fall includes both legislation requiring a full legislative procedure and administrative legislation. The former are commonly, though certainly not always, issued in the form of directives, whilst the latter are usually issued in the form of regulations and decisions (see Chapter 13).

However, notwithstanding the fall, legislation requiring a full legislative process continues to be very important. This was shown in the Commission's Work Programme for 2016, with projected new legislation including proposals designed to advance such key medium- and long-term programmes and objectives as the Digital Single Market Strategy, the Energy Union, the Single Market Strategy, and the European Banking Union (European Commission, 2015).

The EU's Legislative Procedures

Not counting the special cases of the annual budgetary process (see Chapter 23) and the little-used category of European Parliament acts, since the Lisbon Treaty entered into force in December 2009 the EU has had three legislative procedures: 'consultation', 'ordinary' (called 'co-decision' pre-Lisbon Treaty), and 'consent' ('assent' pre-Lisbon Treaty). Each of these procedures contains internal variations, the most important of which is that QMV is available to the Council for some types of decisions whereas unanimity is required for others.

Prior to the Lisbon Treaty there was a fourth legislative procedure: 'cooperation'. This two-reading procedure, which was created by the SEA, was widely used from the entry into force of the SEA until the entry into force of the Amsterdam Treaty, but the Maastricht and Amsterdam Treaties combined to virtually replace it by the co-decision procedure (see Chapter 6). The Lisbon Treaty saw to the procedure's complete abolition. (Should any reader wish to know about the nature of the cooperation procedure, it is described fully in the third edition of this book [1994]).

As its post-Lisbon name implies, the ordinary procedure is the most used of the EU's three legislative procedures. Since its creation by the Maastricht Treaty, its remit has been so extended by the Amsterdam, Nice and Lisbon Treaties that it is now used for around 90 per cent of legislation. Indeed, in addition to the telling name change to the procedure made by the Lisbon Treaty, the Treaty further emphasised the procedure's mainstreaming by referring to the other procedures as 'special legislative procedures'. So widely used is the ordinary procedure that rather than list its many applications, Box 19.1 confines itself to listing the legislative acts to which the consultation and consent procedures apply: that is the acts that are not subject to the ordinary procedure.

The nature of the EU's three post-Lisbon legislative procedures will now be described.

The consultation procedure

Prior to the SEA, the consultation procedure was the only procedure for non-administrative legislation. However, the creation of the cooperation and assent procedures by the SEA and of the co-decision procedure by the Maastricht Treaty, coupled with the 'elevation' of policy areas from the consultation procedure to these other procedures by the SEA and the Maastricht, Amsterdam and Lisbon Treaties, meant that, as Box 19.1 shows, the number of policy areas to which the consultation procedure applies is now limited. Amongst important policy areas to which it still does apply are aspects of social, fiscal, AFSJ, and citizenship policies.

The consultation procedure is a single-reading procedure in which the Council is the sole legislative decision-maker. However, it cannot take a final decision until it has received the opinion of the EP and for some proposals it must also await the opinions of the European Economic and Social Committee (EESC) and the Committee of the Regions (CoR).

Initiation

The starting point of any legislative proposal is when somebody suggests that the EU should act on an issue. Most likely this will be the Commission, the

the Commission because, apart from some ... it is the only body with the authority for- ... table a legislative proposal, and because of its ... expertise in, and responsibility for, EU affairs; ... Council because of its political weight, its position ... natural conduit for national claims and interests, ... power under Article 241 TFEU to request, by a ... majority vote, the Commission 'to undertake ... studies the Council considers desirable for the ... ment of the common objectives, and to submit ... appropriate proposals'; and the EP because ... desire of MEPs to be active and because under ... 225 TFEU 'The European Parliament may, act- ... a majority of its component members, request ... Commission to submit any appropriate proposal ... matters on which it considers that a Union act is ... for the purpose of implementing the Treaties.' ... the Commission, the Council, and the ... are many other possible sources of EU leg- ..., but little progress can be made unless the ... mission decides to take up an issue and draft a ... Many factors may result in it deciding to ..., the most frequent being that such legislation ... required as part of an ongoing policy commitment ... gramme. Sometimes, however, it is very diffi- ... when looking at specific proposals, to determine ... the Commission decided to act and to identify ... who originated the initiative. For example, ... mission proposal that seems to have been a ... nse to a Council request may, on inspection, ... traced beyond the Council to a national pressure ... influencing a minister, who then gradually and ... mally introduced the issue into the Council as ... tion to be considered. Similarly, a Commission ... sal may seem to have been a response to points ... in an EP committee or to representations from ... pe-wide interests, but in fact the Commission ... itself have dropped hints to MEPs or to interests ... they should look at the matter (thus reinforcing ... Commission's own position *vis-à-vis* the Council). ... new and further possible source of legislation was ... by the Lisbon Treaty: the European Citizen's ... tive (ECI). Under Article 11(4) TEU:

> Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on a matter where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.

However, as with Council and EP requests, the Commission is not under an obligation to respond positively, and in practice it has done so. Only 36 of the 56 initiatives that were deemed to have been properly submitted up to the autumn of 2016 were deemed to be admissible, with the main reason for inadmissible submissions being they were judged not to be within the Commission's powers: hence the rejections of intended petitions on subjects as varied as the abolition of bullfighting, an unconditional basic income, and stopping proposed trade agreements with the USA and Canada. Of the 36 that were deemed to have been properly submitted, only three had gathered the requisite number of signatures, and none of these had resulted in new legislation being proposed.

Preparation of a text

In preparing a text, a number of matters must be carefully considered by the Commission in addition to the direct policy considerations at issue.

- The proposal must have the correct legal base – that is, it must be based on the correct treaty article(s). Normally this is a straightforward matter and there is no room for argument, but sometimes disputes arise when a proposal cuts across policy areas and the Commission chooses a legal base that is deemed by a policy actor to be unsatisfactory. For example, a member state that is concerned about the possible implications of a policy proposal is likely to prefer a procedure where unanimity rather than QMV applies in the Council, whilst the EP always prefers the ordinary legislative procedure to be used rather than the consultation procedure because this gives it a potential veto. The question of legal base can therefore be controversial, and has resulted in references to the CJEU.
- Justification of the proposal must be given in terms of the application of the subsidiarity and proportionality principles. This requirement takes the form of a series of questions on subsidiarity and proportionality needing to be answered in the explanatory memorandum that is attached to each proposal.

Box 19.1

Special legislative procedures

I	**Ad hoc procedures**
1	Annual budget – joint decision of EP and Council.
II	**European Parliament acts**
2	Statute for Members of the European Parliament (MEPs). (Adoption by EP after obtaining consent of Council and after consulting Commission.)
3	Provisions governing the exercise of the right of inquiry. (Adoption by EP after obtaining consent of Council and Commission.)
4	Statute of European Ombudsman. (Adoption by EP after obtaining consent of Council and Commission.)
III	**Council acts**
A	*Unanimity and consent of European Parliament*
5	Measures to combat discrimination.
6	Extension of citizenship-related rights. (National ratifications also required.)
7	European Public Prosecutor's Office.
8	Uniform electoral procedure. (On initiative from and after consent of EP. National ratifications also required.)
9	Multiannual financial frameworks.
B	*Unanimity and consultation of European Parliament*
10	Accession to the European Convention on Human Rights. (Council decision on a proposal from the negotiator of the agreement [in principle the Commission], with consent of EP.)
11	Measures concerning social security or social protection.
12	Citizenship: right to vote and stand for election in member state of residence in municipal and European elections.
13	Adoption of measures that constitute a step backwards in Union law as regards the liberalisation of the movement of capital to or from third countries.
14	Measures concerning passports, identity cards and residence permits.
15	Judicial cooperation in civil matters concerning measures relating to family law with cross-border implications.*

- Where appropriate, justification must be given in terms of the environmental impact of the proposal. This usually applies, for example, to transport and agriculture proposals.
- The probable financial implications for the EU budget of the proposal must be assessed.

The standard way in which proposals are prepared is as follows. The process begins with a middle-ranking official in the 'lead' DG assuming the main responsibility for the dossier: that is for preparing and looking after the Commission's draft. This way of working emphasises individual responsibility, means that officials are or become highly expert in parti policy areas, and results in the distribution of in mation about policy proposals being very depen in the early stages at least, on the preferred appr of officials responsible for dossiers.

Formal communications within the Commis about a proposal tend initially to be of a vertical n than of a horizontal kind. That is to say, they tend marily to be up and down the lead DG – known as *chef de file* – rather than across and between DGs. rather hierarchical and compartmentalised appr can make for difficulties, though creative and in native officials make appropriate, and if nece

4.1 *continued*

Operational police cooperation.
Interventions by the authority of a member state on the territory of another member state.
Harmonisation of turnover taxes and indirect taxation.
Approximation of provisions with a direct impact on the internal market.
Language arrangements for European intellectual property rights.
Replacing the Protocol on the excessive deficit procedure.
Specific tasks of European Central Bank concerning prudential supervision.
Social policy: social security and social protection of workers, protection of workers where their employment contract is terminated, representation and collective defence, conditions of employment for third-country nationals.**
Environment: provisions of a fiscal nature, town and country planning, management of water resources, land use and the supply and diversification of energy resources.
Energy: fiscal measures.
Association of overseas countries and territories with the Union – rules and procedure.
Jurisdiction of the Court in the area of intellectual property.
Modification of the Protocol on the Statute of the European Investment Bank.
Union own resources – ceiling and creation of new resources. (National ratifications also required.)

Qualified majority and consent of EP
Implementing measures of the Union's own resources system.

Qualified majority and consultation of EP
Measures to facilitate diplomatic protection.
Research: specific programmes implementing a framework programme.
Outermost regions.

* Council may take a unanimous decision, after consulting the EP, to switch to the ordinary legislative procedure (second subparagraph of paragraph 3 of Article 65 [81] TFEU).
** Council may take a unanimous decision, after consulting the EP, to switch to the ordinary legislative procedure for points (d), (f), and (g) (second subparagraph of paragraph 2 of Article 137 [153] TFEU).

extensive, use of informal communications – through telephone calls, e-mails, and meetings – with potentially interested officials elsewhere in the services so as to ensure that there are not too many inter-service problems at a later stage of proceedings.

Whether or not they are kept fully informed of developments from an early drafting stage, other DGs with a possible interest in a proposal must be given the opportunity at some point to make their views known. This may involve the convening of one or more inter-service meetings. Other Commission services with which there must be exchanges and agreements include the Secretariat General (which has amongst its responsibilities the overall coordination of the Commission's work schedule) and the Legal Service (which amongst other things checks the legal base of proposals).

When all directly involved Commission interests have given their approval, the draft is sent to the *cabinets* of the Commissioner and his/her Vice-President responsible for the subject. The *cabinets*, which may or may not have been involved in informal discussions with Commission officials as the proposal was being drafted, may or may not attempt to persuade Commission officials to rework the draft before submitting it to the Commissioners for approval.

When the Commissioners are satisfied, the Secretariat General is asked to submit the draft to the College of Commissioners. The draft is then scrutinised, and possibly amended, in a meeting of *special chefs* and/or *chefs de cabinet*. If the draft is judged to be uncontroversial, the College may adopt it by written procedure; if it is controversial the Commissioners may, after debate, accept it, reject it, amend it, or refer it back to the relevant DG for further consideration.

* * *

When preparing a text, officials usually find themselves the focus of attention from many directions. Knowing that the Commission's thinking is normally at its most flexible at this preliminary stage, and knowing too that once a proposal is formalised it is more difficult for it to be changed, interested parties use whatever means they can to press their views. Four factors most affect the extent to which the Commission is prepared to listen to outside interests at this pre-proposal stage:

- What contacts and channels have already been regularised in the sector and which ways of proceeding have proved to be effective in the past?
- What political considerations arise and how important is it to incorporate different sectional and national views from the outset?
- How dependent is the Commission on outside knowledge and expertise?
- How do the relevant Commission officials prefer to work?

Assuming, as it is normally reasonable to do, Commission receptivity, there are several ways in which external views may be brought to the attention of those involved in the drafting of a proposal. The Commission itself may request a report, perhaps from a university or a research institute. Interest groups may submit briefing documents. Professional lobbyists, politicians, and officials from the Permanent Representations may press preferences in informal meetings. EP committees and EESC sections may be sounded out. And use may be made of the extensive advisory committee system that is clustered around the Commission (see Chapter 9).

There is thus no standard consultative pattern or procedure. An important consequence of this is that governmental involvement in the preparation of Commission texts varies considerably. Indeed, not only is there variation in involvement, there is also variation in knowledge of the Commission's intentions. Sometimes governments are fully aware of Commission thinking, because national officials have been formally consulted in committees of experts. Sometimes sectional interests represented on consultative committees will let their governments know what is going on. Sometimes governments will be abreast of developments as a result of having tapped sources within the Commission, most probably through officials in their Permanent Representations. But occasionally governments are not much aware of proposals until they are published.

The time that elapses between the decision to initiate a proposal and the publication by the Commission of its text naturally depends on a number of factors. Is there any urgency? How keen is the Commission to press ahead? How widespread are the consultations? Is there consensus amongst key external actors and does the Commission want their prior support? Is there consensus within the Commission itself? Not surprisingly, lapses of well over a year are common.

The opinions of the European Parliament, the European Economic and Social Committee, and the Committee of the Regions

On publication, the Commission's text is submitted to the Council for a decision and to the EP and, if appropriate, the EESC and the CoR, for their opinions.

The EP is by far the most influential of the consultative bodies. Though it does not have full legislative powers under the consultation procedure, it has enough weapons in its arsenal to ensure that its views are given serious consideration, particularly by the Commission. Its representational claims are one source of its influence. The quality of its arguments and its suggestions are another. And it has the power of delay, by virtue of the requirement that the EP's opinion must be known before the proposal can be formally adopted by the Council.

As was shown in Chapter 12, most of the detailed work undertaken by the EP on proposed legislation is handled by its standing committees and, to an extent, its political groups. Both the committees and the groups advise MEPs on how to vote in plenary.

The usual way in which plenaries act to bring influence to bear is to vote on amendments to the Commission's proposal, but not to vote on the draft legislative

Photo 19.1 MEPs

13.1 MEPs voting on a legislative proposal

resolution – which constitutes the EP's opinion – until the Commission states, as it is obliged to do, whether or not it will change its text to incorporate the amendments that have been approved by the EP. (Under the consultation, and ordinary procedures, the Commission can amend, or even withdraw, its text at any time, apart from at the third stage of the ordinary procedure.) If the amendments are accepted by the Commission a favourable opinion is issued, and the amended text becomes the text that the Council considers. If all or some of the amendments are not accepted by the Commission, the EP can exert pressure by not issuing an opinion and referring the proposal back to the committee responsible. A reference back can also be made if the whole proposal is judged to be unacceptable. Withholding an opinion does not, it should be emphasised, mean that the EP has a veto power, because it is legally obliged to issue opinions and the CJEU has referred to the duty of loyal cooperation between EU institutions. What the withholding of opinions does do, however, is to give the EP the often useful bargaining and pressurising tool of the power of delay.

For reasons that were outlined in Chapter 12 and which are considered further below, it is difficult to estimate the precise impact the EP has on EU legislation. In general terms, however, it can be said that the record in the context of the consultation procedure is mixed.

On the 'positive' side, the Commission is normally sympathetic to the EP's views and accepts about three-quarters of its amendments. The Council is less sympathetic and accepts well under half of the amendments, but that still means that many EP amendments, on many different policy matters, find their way into the final legislative texts.

On the 'negative' side, there are three main points to be made. First, there is not much the EP can do if the Council rejects its opinion. The best it can normally hope for is a conciliation meeting with the Council (not to be confused with a conciliation committee meeting under the ordinary procedure), but such meetings usually achieve little – mainly because the Council has no wish to re-open questions that may put at risk its own, often exhaustively negotiated, agreements. Second,

the Council occasionally – though much less than it used to – takes a decision 'in principle' or 'subject to Parliament's opinion', before the opinion has even been delivered. In such circumstances the EP's views, once known, are unlikely to result in the Council having second thoughts. Third, it is possible for the text of proposals to be changed after the EP has issued its opinion. There is some safeguard against the potential implications of this insofar as the CJEU has indicated that the Council should refer a legislative proposal back to the EP if the Council substantially amends the proposal after the EP has issued its opinion. Moreover, there is a Council–EP understanding that the former will not make substantial changes without referring back to the EP. In practice, however, the question of what constitutes a substantial amendment is open to interpretation and references back do not always occur.

* * *

The EESC and the CoR are not so well placed as the EP to influence the control of legislative proposals. As was explained in Chapter 14, a major reason for this is that their formal powers are not as great: whilst they must be consulted on draft legislation in many policy spheres, consultation is only optional in some. Furthermore, when they are consulted the Council or the Commission may lay down a very tight timetable, can go ahead if no opinion is issued by a specified date, and cannot normally be greatly pressurised if either the EESC or the CoR want changes to a text. Other sources of weakness include the part-time capacity of their members, the personal rather than representational nature of much of their memberships, and the perception by many interests and regional bodies that advisory committees and direct forms of lobbying are more effective channels of influence.

Decision-making in the Council

The Council does not wait for the views of the EP, the EESC, and the CoR before it begins to examine a proposal. Indeed, governments may begin preparing their positions for the Council, and informal discussions and deliberations may even take place within the Council itself, before the formal referral from the Commission.

The standard procedure in the Council is for the proposal to be referred initially to a working party of national representatives for detailed examination. The representatives have two principal tasks: to ensure that the interests of their country are safeguarded, and to try to reach an agreement on a text. Inevitably these two responsibilities do not always coincide, with the consequence that working party deliberations can be protracted. Progress depends on many factors: the controversiality of the proposal; the extent to which it benefits or damages states differentially; the number of countries, especially large countries, pressing for progress; the enthusiasm and competence of the Presidency; the tactical skills of the national representatives and their capacity to trade disputed points (both of which are dependent on personal ability and the sort of briefs laid down for representatives by governments); and the flexibility of the Commission in agreeing to change its text.

Once a working party has gone as far as it can on a proposal – which can mean reaching a general agreement, agreeing on most points but with reservations entered by some countries on particular points, very little agreement at all on the main issues – reference is made upwards to COREPER or, in some cases, to a specialised committee – such as the Special Committee on Agriculture (SCA). At this level Permanent Representatives (in COREPER II), deputies (in COREPER I), or senior officials (in the SCA) concern themselves not so much with the technical details of a proposal as with its policy and, to some extent, its political, implications. So far as possible, differences left over from the working party are sorted out and, if appropriate, the Presidency establishes in what circumstances, if any, a qualified majority exists. In the event of no resolution of differences being identified or seeming to be possible, the proposal is then either referred back to the working party for further detailed consideration or forwarded to the ministers for political resolution.

All proposals must be formally approved by the ministers. Those that have been agreed at a lower level of the Council machinery are placed on the ministerial agenda as 'A' points and are normally quickly approved. Where, however, outstanding problems and differences have to be considered a number of things can happen. One is that the political authority that ministers bring and the preparatory work undertaken by officials prior to ministerial meetings, may clear the way for an agreed settlement: perhaps reached quickly over lunch, perhaps hammered out in long and fraught adjourned Council sessions. A second possible

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a vote is taken when the treaty article(s) upon
the proposal is based so allows. However, as Box
llows, unanimity is normally required under the
ultation procedure. A third possibility is that no
ment is reached and a vote is either not possible
er the treaties or is not judged to be appropriate.
If no agreement can be reached in the Council, the
ative process does not necessarily end in failure.
proposal may well be referred back down the
ncil machinery for further deliberations, referred
k to the Commission with a request for changes
the existing text, or referred to a future meeting
the hope that shifts in position will take place and
basis of a solution will be found. If agreement is
ched, the decision-making process at EU level ends
the Council's adoption of a text.

The ordinary legislative procedure

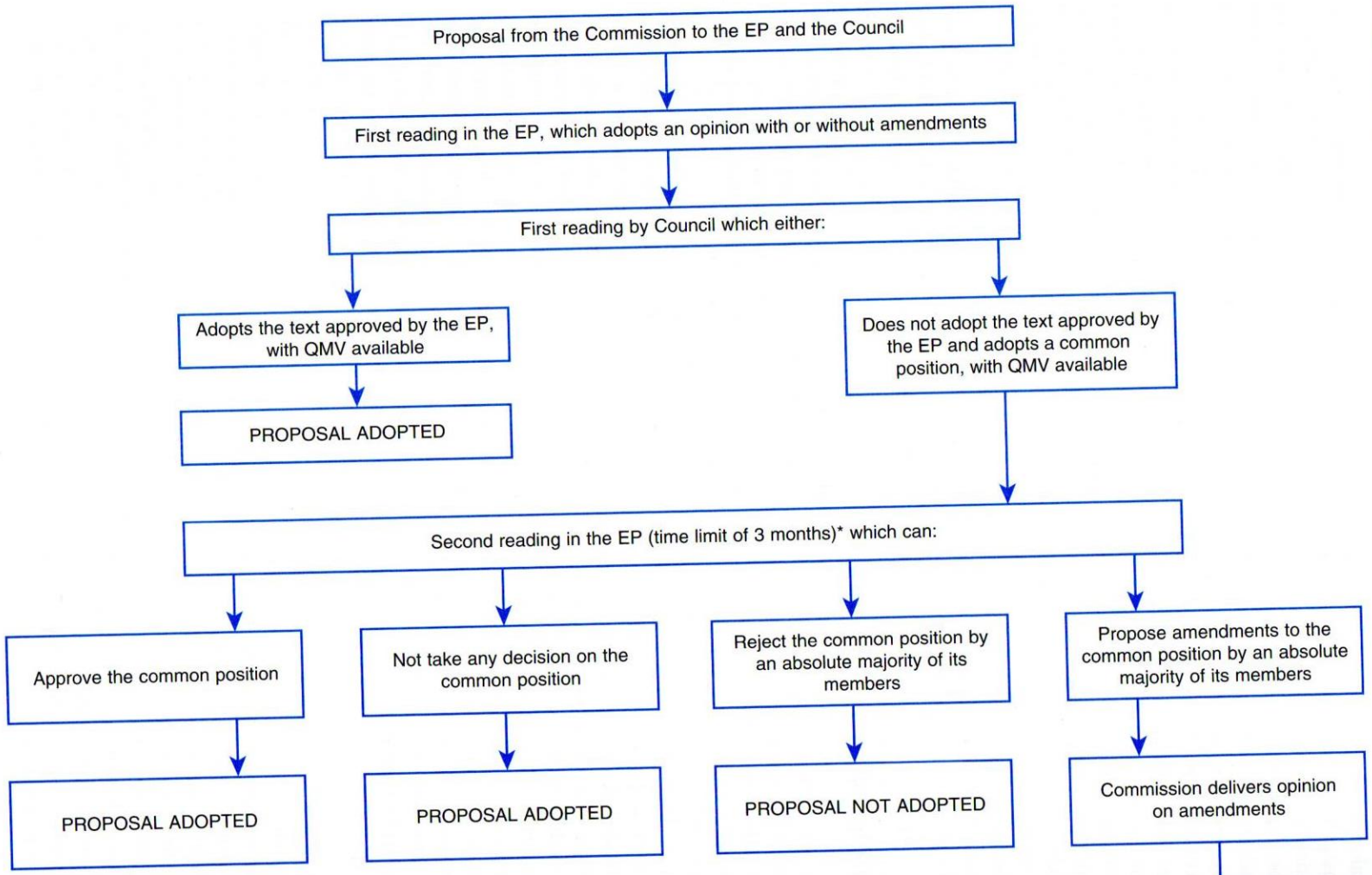
The co-decision procedure was created by the
aastricht Treaty. But, it was not named as such
the Treaty but rather was referred to, throughout
e Treaty, by reference to the article that set out its
ovisions – Article 189b. However, since the proce-
re provided for co-decision making by the EP and
uncil, it came to be referred to in everyday use as
e co-decision procedure. The Amsterdam Treaty,
ich amended aspects of the procedure, similarly
t not formally name it, with the consequence that
der the re-numbered TEC it officially became
e Article 251 procedure. The TFEU did finally
rmally name the procedure, but in recognition of
e fact that it would be the dominant procedure
en the Treaty came into effect, called it not the
-decision procedure but rather the ordinary legis-
ative procedure. The procedure is set out in Article
4 TFEU.

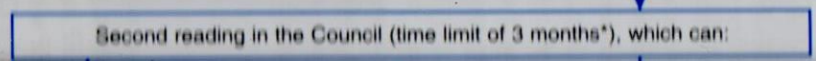
The co-decision procedure grew out of and extended
e cooperation procedure, which was created by the
EA. The cooperation procedure was established for
o main reasons. First, it was seen as being neces-
ry, especially with the internal market programme
mind, to increase the efficiency, and more especially
e speed, of decision-making processes. This was
hieved by enabling QMV to be used in the Council
en decisions were made under the procedure and by
ing down time limitations for the institutions to act
ring the later stages of the procedure. Second, it was
a response to concerns about 'the democratic deficit', and more particularly pressures for more powers to be given to the EP. This was achieved by introducing a two-reading stage for legislation, and increasing the EP's leverage – though not to the point of giving it a veto – over the Council at second reading.

Democratic deficit concerns and pressures from the EP were also very much behind the creation of the co-decision procedure in the Maastricht Treaty. Whilst the cooperation procedure had certainly increased the EP's influence, it did not give the EP the power of veto if the Council was resolved to press ahead with a legislative proposal. The co-decision procedure gave the EP this power of veto.

The application of the procedure was restricted to 15 treaty articles under the Maastricht Treaty, but was extended by the Amsterdam and Nice Treaties. However, two of the core policy areas remaining outside of the remit of the procedure – agriculture and trade – were included in the raft of extensions to the reach of the procedure that was part of the Lisbon Treaty, with the consequence that now about 90 per cent of legislative proposals are based on the procedure.

The nature of the ordinary legislative procedure will now be described. It will be seen that it is a one-, two-, or three-reading procedure, with four stages at which the legislators can reach agreement and conclude a legislative process. As such, it is a procedure that strongly encourages the EP, the Council, and the Commission to engage in intensive and extensive inter-institutional bargaining. Such bargaining was already developing before the co-decision procedure was established as a result of the creation of the cooperation procedure, but under co-decision it became an absolutely central part of the legislative process. The nature of the ordinary procedure is such that if the three institutions do not liaise and work closely with one another, protracted delays may occur in the early legislative stages and impasses may occur in the later stages. Since, though they may disagree on points of detail, each of the institutions normally wants legislative proposals to become legislative texts, the inevitable requirement is that they spend a lot of time communicating with one another – in forums ranging from a mushrooming number of formal inter-institutional meetings to casual off-the-record conversations between key institutional policy actors. Figure 19.2 provides a diagrammatic representation of the procedure.


Proposal from the Commission to the EP and the Council
First reading in the EP, which adopts an opinion with or without amendments
First reading by Council which either:
Adopts the text approved by the EP, with QMV available
PROPOSAL ADOPTED
Does not adopt the text approved by the EP and adopts a common position, with QMV available
Second reading in the EP (time limit of 3 months)* which can:
Approve the common position
PROPOSAL ADOPTED
Not take any decision on the common position
PROPOSAL ADOPTED
Reject the common position by an absolute majority of its members
PROPOSAL NOT ADOPTED
Propose amendments to the common position by an absolute majority of its members
Commission delivers opinion on amendments


Second reading in the Council (time limit of 3 months*), which can:

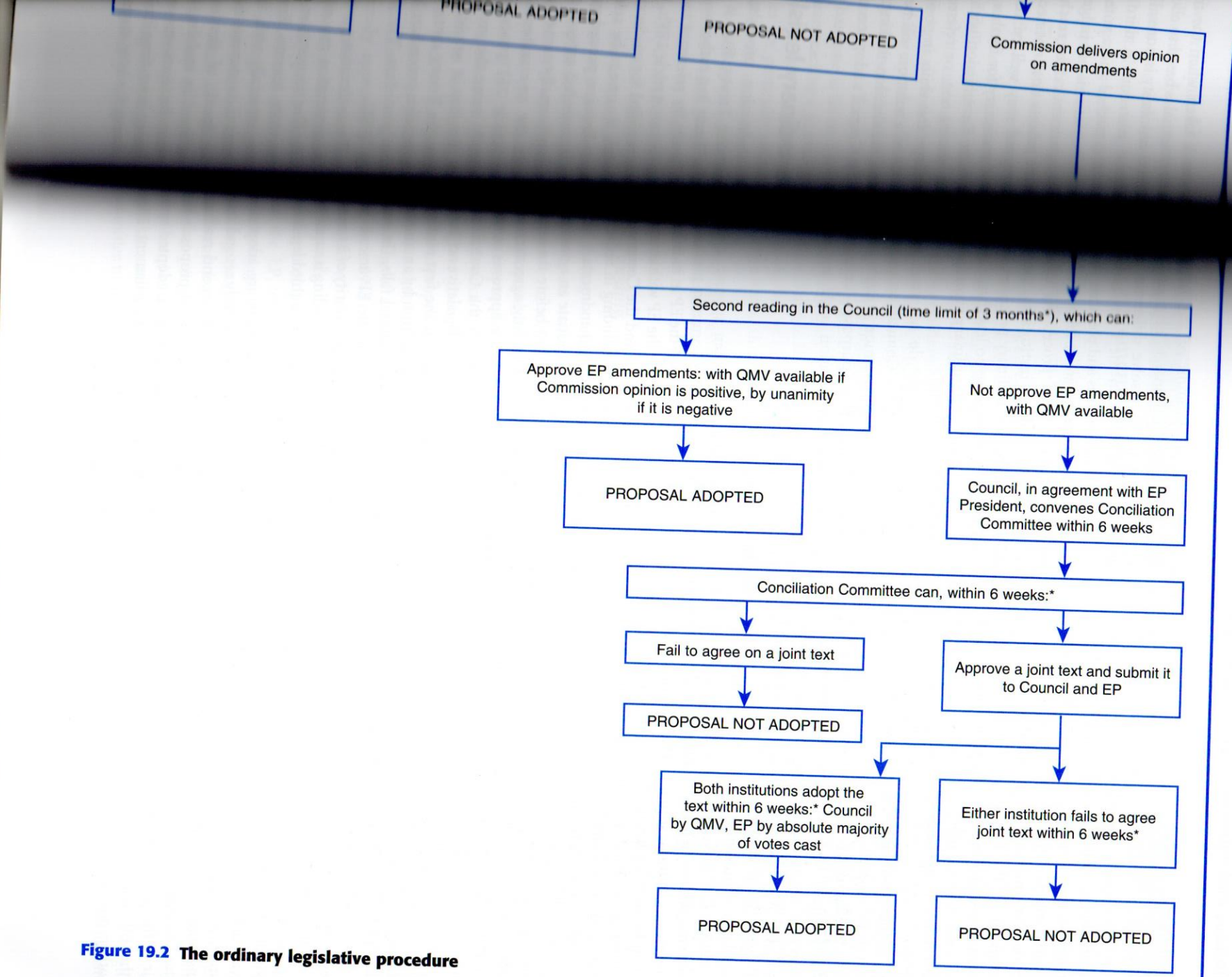


Figure 19.2 The ordinary legislative procedure

* The periods of three months and six weeks may be extended by a period of one month and two weeks respectively if both institutions agree

First reading

The pre-proposal processes are much as they are under the consultation procedure, though with the Commission being a little more sensitive to the EP's likely reactions given its greater powers under the ordinary procedure.

After the Commission has published its proposal, it is examined by the EP and the Council through their normal mechanisms: that is, with most of the detailed work being undertaken by the relevant EP committee(s) and by Council working parties and COREPER.

Prior to the Amsterdam Treaty it was not possible for a text to be adopted at the first legislative reading. However, as part of an attempt to streamline what was widely agreed to be a somewhat cumbersome procedure, the Treaty made provision for a text to be adopted at first reading providing the Council and the EP agree on its contents and that other 'standard' legislative requirements are met – notably the EESC and the CoR are consulted as appropriate, and amendments with which the Commission does not agree receive unanimous support in the Council. (This latter requirement applies to all stages of all legislative procedures, apart from the final – conciliation – stage of the ordinary procedure.)

Since the Amsterdam Treaty, the number of legislative proposals agreed at first reading has steadily increased, to the extent that around 85 per cent are now agreed at this stage (European Parliament, 2014a).

A number of factors explain why so many proposals are agreed at this early legislative stage, including: improved inter-institutional cooperation at the agenda-setting and policy formulation stages of the legislative cycle; increased cultural 'rapprochement' of the institutions; and increased familiarity with, and institutionalisation of, the ordinary procedure. A key part of the institutionalisation, at all legislative readings, is what are known as trilogues, which bring together, at appropriate levels of seniority and responsibility for the proposed legislation in question, relevant actors from the Commission, the EP, and the Council. A typical trilogue includes: the individuals/teams mainly responsible for drafting the proposal in the DG that is *chef de file*, plus line managers; the chair of the committee mainly handling the proposal in the EP, plus the *rapporteur* and representatives of other political groups; and senior officials from the Permanent Representation of the incumbent Presidency and from the General Secretariat of the Council. Trilogues try to resolve differences before formal decisions are taken in the Commission, the Council and in EP committees and plenaries. As such, though trilogue agreements are informal and must be approved by the formal procedures applicable within the decision-making institutions, they have become the drivers of the ordinary procedure. In the 2009–14 Parliament there were no less than 1,500 trilogues on approximately 350 ordinary procedure files (European Parliament, 2014a).

If the Council and the EP do not reach agreement at the first reading, the Council, on receipt of the EP's opinion, adopts a common position – with QMV being available for this purpose – or lets it be known what its common position could and could not include.

Second reading

At its second reading, the EP can approve, amend, reject, or take no action on a common position or likely common position. To assist the EP in its deliberations, the Council must provide the EP with an explanation of the common position and the Commission must also explain its thinking, including in respect of whether or not it will accept EP amendments.

If the EP and Council can negotiate an agreed text after the former's first reading but before the latter's first reading, an early second reading agreement can be reached (see Box 19.2). If the EP approves or takes no action on a common position the Council can, within three months, adopt it as a legislative act (using the same voting rules as applied at the first reading). If the EP rejects the common position by an absolute majority of its members, the proposal falls. (In practice this rarely happens.) And if the EP amends the common position by an absolute majority of its members and the Council at its second reading is unable to accept the text approved by the EP, a third legislative reading occurs.

Around 13 per cent of proposals are adopted at second reading – with 8 per cent at early second readings and 5 per cent after complete second readings. This means that about 98 per cent of proposals that are adopted by the EP and Council are adopted by the end of second readings (European Parliament, 2014a and b).

BOX 19.2

Final agreem

Whilst the ordina
trilogue negotiati

1 **First reading** a
ing vote. The a
by the Council
2 **Early second r**
reading positio
by the Council
position).
3 **Second reading**
reading vote. Th
tion) and the Co
4 **Conciliation.** If
co-legislators can
approved at third

Source: Adapted from Eu

Third reading

This reading – which
stage – opens within si
to approve the text supp
ested proposal being re
mittee composed of an e
of the Council and the
the figures given above,
egislative proposals – mo
proposals that are politi
convening of a conciliati
ng the 2009–14 Parliame
were referred: less than 2
of proposals.

Almost 60 people, draw
and the EP, make up th
tion meetings, which make
nal negotiations. Accordi
are almost invariably prec
informal trilogues. In arou
are referred to a conciliatio
agreed in a trilogue meeting,
committee to approve the te

9.2

agreements under the ordinary legislative procedure

the ordinary procedure involves three possible readings, there are four stages at which, following negotiations, the co-legislators can reach agreement and conclude the procedure.

st reading agreement. The co-legislators agree on a compromise text prior to Parliament's first reading vote. The agreement reached is adopted by the plenary (Parliament's first reading position) and then the Council (Council's first reading position).

ly second reading agreement. The co-legislators agree on a compromise text after Parliament's first ading position but before the Council's first reading position. The agreement reached is then adopted the Council (Council's first reading position) and the EP plenary (as Parliament's second reading sition).

cond reading agreement. The co-legislators agree on a compromise text prior to Parliament's second ading vote. The agreement reached is then adopted by the plenary (Parliament's second reading posi-on) and the Council (Council's second reading position).

nciliation. If the Council does not approve all of Parliament's second reading amendments, the o-legislators can agree on a joint text within the Conciliation Committee. The joint text must be pproved at third reading by both the Parliament and the Council.

Adapted from European Parliament, 2014(b): 20.

d reading

reading – which is known as the conciliation – opens within six weeks of the Council failing prove the text supported by the EP, with the con- proposal being referred to a conciliation com- composed of an equal number of representatives the Council and the EP. As can be deduced from figures given above, only a very small number of slative proposals – mostly confined to very difficult posals that are politically sensitive – require the eting of a conciliation committee. Indeed, dur- the 2009–14 Parliament, only nine such proposals referred: less than 2 per cent of the total number proposals.

Almost 60 people, drawn equally from the Council the EP, make up the membership of concilia- meetings, which makes them rather unwieldy for negotiations. Accordingly, conciliation meetings almost invariably preceded by smaller and more mal trilogues. In around half of the cases that referred to a conciliation committee, a joint text is ed in a trilogue meeting, leaving the full conciliation mittee to approve the text without much discussion

If the conciliation committee agrees on a joint text – and it normally has six weeks to do so – the proposal is referred back to the Council and the EP for final adoption within a period of six weeks. In this final vote the Council acts by QMV and the EP by a majority of the votes cast. Failure by the Council and the EP to agree on a text means the proposal cannot be adopted.

It is unusual for legislative proposals to fail at this third legislative stage. When a proposal does fail, it is common for the Commission to subsequently re-present it in a form that enables it to be approved by the Council and the EP.

The consent procedure

The consent procedure, which was established as the assent procedure by the SEA, appears at first sight to be simple in form, being a single-stage procedure in which proposed measures have to be approved by both the Council and the EP. The procedure does not allow the EP to make amendments, which might be thought to confine it to a rather limited confirmatory/

withholding role, but by having the power to say 'no' to proposals it also has the power to indicate to what it will say 'yes'.

However, the procedure is in fact rather more complex than initially it appears. This is primarily because although unanimity is normally required in the Council it is not always so, whilst in the EP a majority of those voting suffices for some measures but an absolute majority is required for others. The complexity is extreme in respect of breaches and potential breaches by member states of the fundamental principles on which the EU is founded, as the extracts from Article 7 TEU post-Lisbon on pp. 116–17 show.

The consent procedure is not used for 'normal' legislation but is mostly reserved for special types of decision, such as certain international agreements, EU enlargements, and the multiannual financial frameworks. As a legislative procedure, it is used only for new legislation on combating discrimination and for legislation that has no clear treaty base.

EU Legislation After Adoption

There are considerable variations in what happens to proposals after they are adopted as EU legislation, what use is made of them, and how they are applied. Many of these variations are considered at some length in other chapters – notably in Chapters 9, 13, and 16 – but it will be useful to pull together the more important variations here in order to give an indication of the overall picture.

The need for additional legislation

Much legislation requires the adoption of additional legislative/regulatory measures:

- Legislation often needs to be supplemented by implementing legislation so as to fit it to particular circumstances, to adapt it to changing conditions, and to keep it up to date. Indeed, on a quantitative basis the vast bulk of EU legislation is implementing legislation, usually issued in the form of Commission regulations and decisions. The ways in which most of this legislation is issued are examined in Chapter 9, in the section on Commission rule-making.
- Some legislation needs to be followed up not just with implementing legislation but with further 'policy' legislation. This is most obviously the case in respect of 'framework' legislation, which is legislation that lays down general principles and basic rules that member states have to follow in a policy area, but which needs usually to be complemented by more narrowly focused legislation that covers in a reasonably detailed manner issues/initiatives/actions that fall within the remit of the framework.
- Legislation that also requires further measures is the 'new approach' legislation that constitutes an important part of the internal market legal framework. Under the approach, the EU does not try to harmonise all the specifications and technical standards of marketed goods, but confines itself to producing relatively short texts that lay down 'essential requirements', in particular requirements relating to health and safety and to consumer and environmental protection. As long as member states abide by the 'essential requirements' they can have their own national standards – subject to them not being protectionist in nature – which are subject to mutual recognition by other states. However, national standards are generally supposed to be replaced by European standards that are agreed by European standards bodies. The main such bodies are the European Committee for Standardisation (CEN) and the European Committee for Electrotechnical Standardisation (CENELEC). Both CEN and CENELEC include non-EU countries amongst their membership, and both use weighted voting procedures for the taking of final decisions on standards. Once European standards are agreed, EU states must adopt them within a fixed time limit, and within the same time limit must remove all conflicting national standards.

The need to transpose legislation

Once they have been approved at EU level, regulations and most decisions do not require any additional measures to be taken at national level before the scheduled date of application. But directives do not normally assume legislative force until they have been transposed into national law by the appropriate national authorities. The member states them-

which are the appropriate national authori-
case and by what process the transposition
made. As a result, the mechanisms by which
are transposed at the national level varies
member states according to differing national
procedures and differing perceptions of the
of particular directives. The general pat-
ever, is for transposition to be achieved by
the necessary legal text to existing legisla-
introducing new legislation, or by adding new
to already planned legislation. States are given
from a few weeks to a few years to effect the
sition – the final date being specified in the
– and are obliged to notify the Commission
national legislation, regulations, or administra-
provisions that have been adopted to give formal
each directive.

For the most part, transposition is not a major
for the EU, with Commission 'scorecards'
average transposition rates for all member
consistently being well over 90 per cent. Some
– including Denmark, Malta, and Ireland – do,
ever, have better average transposition records
others, with the consequence that there are some
between member states in terms of the
at which, and extent to which, directives are
orated into national law. There are variations
in terms of the frequency with which states are
ect to Commission and Court action for non-,
plete, and incorrect transposition of EU law.

The need to apply legislation

Responsibilities for applying EU legislation are
ared between EU authorities and national agencies.
The main EU authorities are the various DGs that
are responsible for particular policies: Agriculture,
Fisheries, Regional Policy, Competition, Research,
and so on. EU executive agencies (see Chapter 14) also
undertake a limited amount of EU-level implementa-
tion. The national agencies are mainly the numerous
national and subnational authorities whose respon-
sibility it is to collect excise duties, read tachographs,
monitor fishing catches, check that agriculture pro-
duce for which payments are made is of the quality
that is claimed, and so on.

In very broad terms the division of responsibilities
between the two levels in terms of day-to-day policy
implementation is that the Commission oversees and
the national and subnational authorities do most of
the 'front line' work. Only in a few policy areas, of
which competition is the most important, does the
Commission directly implement itself. This means
that the Commission needs to move carefully and,
because it does not wish to stoke up national resent-
ments, must negotiate and discuss implementing
problems with authorities in member states rather
than rush to initiate legal proceedings against them.

However, despite – or in some respects because of –
the range of agencies that have some responsibility for
policy implementation and implementation control,
it is evident that all is not well with the application
of some EU policies. Three types of difficulty may be
taken to illustrate the nature of the implementation
challenge. First, the Anti-Fraud Office (OLAF) and the
Court of Auditors have identified serious implementa-
tion failings in connection with aspects of EU spend-
ing, especially in connection with the CAP and ERDF.
According to some estimates, fraud might account for
as much as 5 per cent of the EU budget. Second, there
are a number of high-profile and sensitive policy areas,
of which competition and fishing are examples, where
national implementation agencies are well aware that
vigorous policy implementation could sometimes be
damaging to national interests, and are therefore not
over-zealous in taking action against suspected irregu-
larities. In respect of such policy areas, the Commission
sometimes must, as was shown in Chapter 9, display
political sensitivity. And, third, many implementa-
tion problems arise not from deliberate deception
but from incorrect understanding and application of
the EU's highly complex body of legislation. The con-
trol mechanisms and administrative procedures for
applying this legislation have been strengthened over
the years, not least in respect of flows of information
between the Commission and the national agencies.
But the fact is that with the Commission being unable
to conduct very much direct surveillance of its own
because of limited powers and resources, and with
much EU legislation being so complicated that it is
barely comprehensible even to the expert, it probably
will never be possible to ensure that all laws are fully,
properly, and uniformly implemented.

Taking this last point a little further, some sense
of the difficulties the EU has in attempting to apply
its policies in a uniform and efficient manner can be
gauged by reference to the sheer volume of overlapping

laws that exist in some areas of EU activity and the large number of contracts the EU has to deal with in some funded areas. Regarding overlapping laws, there are, for example, over 50 directives in force on labelling, nearly 40 on professional qualifications, over 20 on approval of types of vehicles, and around 15 on packaging. Regarding the large number of contracts, development policy makes the point, with over 40,000 development aid projects running at one time.

Concluding Remarks

Until the mid-1980s, the EC had a unicameral legislative system. That is to say the Council was the sole legislator, with the EP being restricted to a consultative position. Starting, however, with the SEA and continuing through every round of treaty reform since then, the EP's powers have been extended, to such an extent that the EU now has a genuinely bicameral legislative system. Few policy areas now remain in which the approval of both the Council and EP are not necessary to enable legislation to be made.

The main legislative procedure, the now-named ordinary procedure, is formally a somewhat complex three-reading procedure. In practice, however, the EP and the Council agree on the content of most legislative proposals well before the third stage is reached. This working flexibility greatly assists with the production of most legislation within reasonable time limits. Of course, particularly controversial legislative proposals can run into considerable difficulties, but that is a consequence not so much of the nature of the EU's legislative procedures as of the political divisions within the EU and of the fact that the EU is not a majoritarian political system.

The implementation of legislation is a problem for the EU. The difficulty is not so much with the transposition of EU laws into national law as with the 'ground-level' application of EU laws. Some of the problems that exist stem from attempts to evade the law, but most are a consequence of unintended administrative irregularities. The reliance of the EU on national agencies for the great bulk of direct application of EU laws is a central underlying reason for many of the difficulties. It just is a fact that, notwithstanding extensive Commission overseeing and promotion of best practice, there remain many differences – of size, competences, working patterns, and cultures – between national administrations.