

EU financial services – the rule-making/legislative process in charts and diagrams

A series of 6 charts and diagrams illustrating the legislative and rule-making process.



Overview

Pre-legislative process

The **Commission** has the ‘right to initiate’ legislation, which it does by adopting a legislative proposal; but before this happens, various consultations will take place.

Ordinary legislative process

The EU legislature has two chambers: the directly-elected **European Parliament**, and the **Council of the EU** (which is made up of representatives from Member State national governments). While the formal legislative procedure goes on, informal triologue negotiations take place behind the scenes.

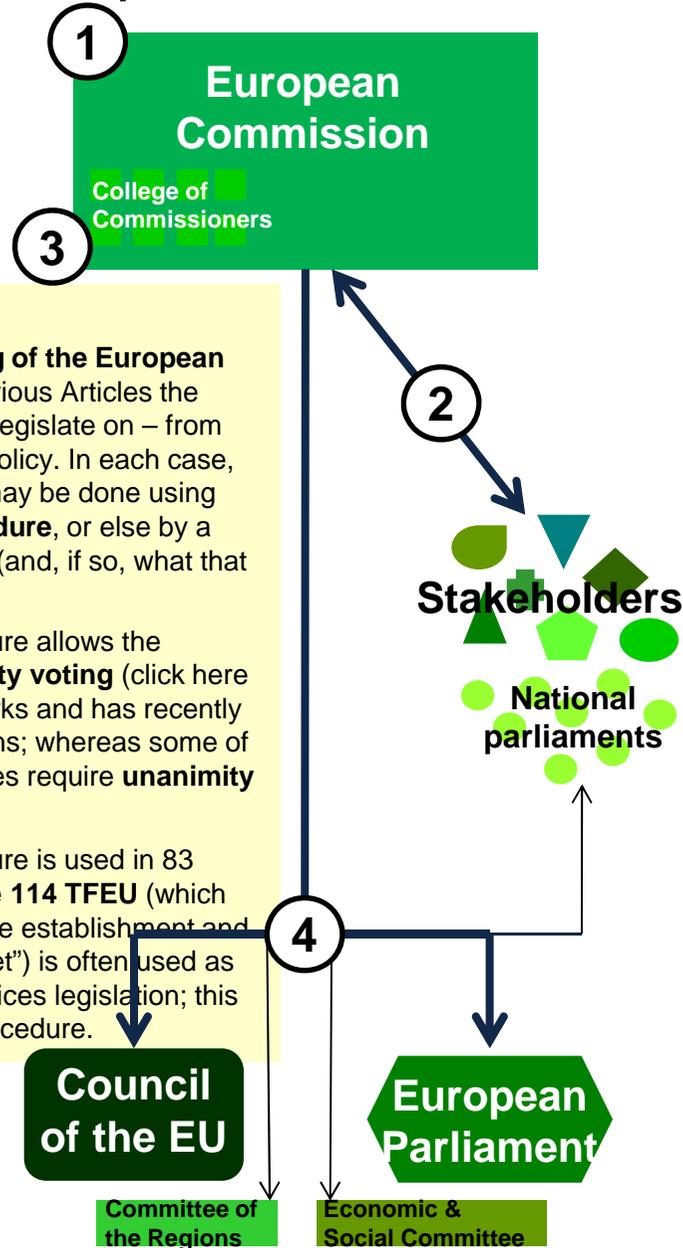
Non-legislative acts

Binding Technical Standards

ESA guidelines etc.

Although the Parliament and Council are entitled to enact full and comprehensive regulations, leaving the **Commission** only to ensure their harmonised implementation, for financial services they now pass broader, less specific ‘framework legislation’, which delegates to the Commission quasi-legislative powers to fill in the details with delegated acts and (with the **ESAs**) binding technical standards. This process reflects the 2002 Lamfalussy process and the subsequent changes to it reflect the enhanced role of the ESAs introduced in 2011.

Pre-legislative process



Which legislative procedure?

The **Treaty on the Functioning of the European Union (TFEU)** sets out in its various Articles the different areas that the EU can legislate on – from consumer protection to space policy. In each case, the Article states whether this may be done using the **ordinary legislative procedure**, or else by a **special legislative procedure** (and, if so, what that procedure will involve).

The ordinary legislative procedure allows the Council to use **qualified majority voting** (click here for an analysis of how QMV works and has recently changed [link]) in some situations; whereas some of the special legislative procedures require **unanimity** among the Council.

The ordinary legislative procedure is used in 83 policy areas. In practice, **Article 114 TFEU** (which allows the EU to legislate on “the establishment and functioning of the internal market”) is often used as the legal basis for financial services legislation; this uses the ordinary legislative procedure.

1. The European Commission has the ‘right of initiative’ to draft and adopt EU legislative proposals for Regulations and Directives*.

2. The Commission will usually begin by consulting relevant stakeholders, followed by a more formal Green Paper (with broad policy thinking) and then White Paper (with more detailed proposals).

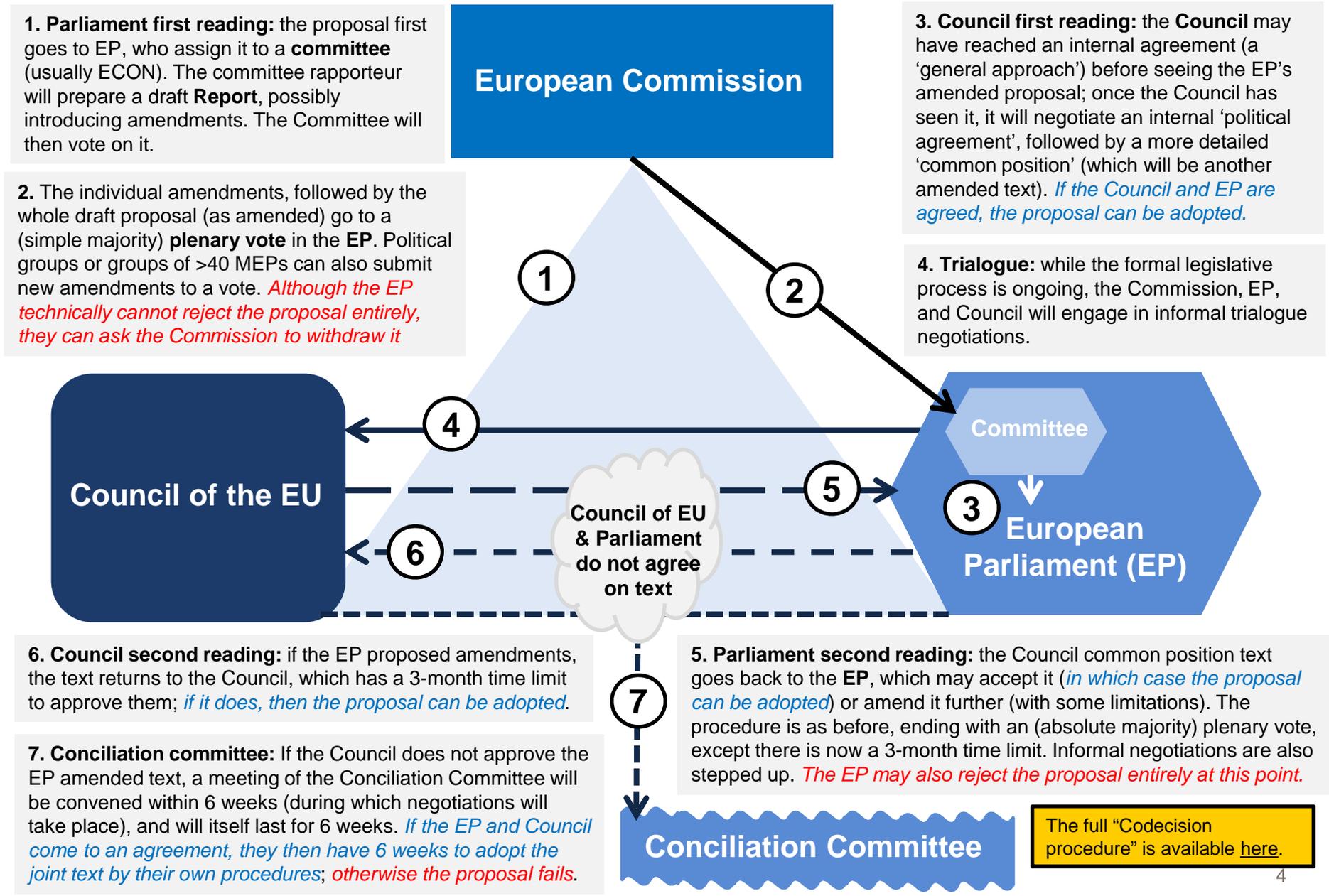
3. There will also be an ‘inter-service consultation’ within the Commission itself. A draft legislative proposal will then be prepared, which will be formally adopted by the College of Commissioners.

4. The draft legislative proposal will be published in the EU Official Journal, and also submitted to:

- the European Parliament;
- the Council of the EU;
- National parliaments (who will check that it complies with the principle of subsidiarity);
- The EU Committee of the Regions; and
- The EU Economic and Social Committee

*most EU legislative proposals come from the Commission. The European Parliament and Council of the EU may ask the Commission to submit a proposal. In certain specific areas – using special legislative procedures – other EU bodies (e.g. the ECB) can instigate the legislative process.

EU ordinary legislative procedure (Lamfalussy level 1)



Taxonomy

Directives

(Require Member States to **transpose** them into national law before they apply)

Regulations

(Have **direct application** in Member States without needing to be transposed into national law)

Primary legislation

(made by the European Parliament and Council of the EU, based on a legislative proposal from the European Commission, via the ordinary legislative process or a special legislative process)

Directives

of Parliament & Council

Min. harmonising: Max. harmonising:
 Old style - Sets min. standards which Member States can add to ('gold-plating').
 New style - Sets fixed or max. standards across EU; no 'gold-plating' allowed.

Regulations

of Parliament & Council

Secondary legislation

Non-legislative acts

(made by the European Commission with advice from the ESAs)

Binding Technical Standards

(drafted by the ESAs and adopted by the European Commission)

Art 290 TFEU
 Delegated Acts & Regulatory Technical Standards (RTS)

Commission Delegated Directive

Commission Delegated Directive ... with regard to RTS*

Art 291 TFEU
 Implementing Acts & Implementing Technical Standards (ITS)

Commission Implementing Directives

Commission Implementing Directive... laying down ITS*

Art 290 TFEU
 Delegated Acts & Regulatory Technical Standards (RTS)

Commission Delegated Regulation

Commission Delegated Regulation ... with regard to RTS

Art 291 TFEU
 Implementing Acts & Implementing Technical Standards (ITS)

Commission Implementing Regulation

Commission Implementing Regulation... laying down ITS

*Although these two combinations may be possible in theory, there do not appear to be any real life examples so far.

EU rule-making in financial services

Framework legislation
(Level 1)

Directives and Regulations passed by the Parliament and Council - primary framework legislation - must specify each instance of the Commission's power to make delegated acts and RTS; this must include the objectives, content, scope, and duration of the power; and it may also specify any limits to the exercise of the power, as well as the legislators' power of scrutiny (opposition).

Non-legislative acts (Level 2)

Delegated Acts (Art 290 TFEU)

- Directives and Regulations made by the Commission under the (quasi-legislative) powers delegated to it by primary legislation. Delegated acts must be "*to supplement or amend certain non-essential elements*" of primary legislation (and also subject to any other conditions imposed by the primary legislation). They will typically be used in order to keep legislation up-to-date, or to flesh out the details where regulators "*choose to regulate the field in question only partially, leaving the Commission the responsibility for supplementing the regulations*".
- **Scrutiny:** power of scrutiny ('opposition') by Council and Parliament will be as is set out in relevant primary legislation.

Implementing Acts (Art 291 TFEU)

- Directives and Regulations made by the Commission under the (purely executive) power delegated to it where "*uniform conditions for implementing legally binding Union acts are needed*" for harmonised implementation across Member States.
- **Scrutiny:** no scrutiny available to the Council or Parliament (although they may see the text); instead, there will be 'comitology'-style scrutiny by internal committees of experts.

Binding technical standards
(Level 2.5 / 2+)

Regulatory Technical Standards (RTS) (Art 290 TFEU)

- Article 290 delegated acts (see above) made under a different procedure (see below), used in cases where the matter is "*technical [and] shall not imply strategic decisions or policy choices*".
- **Procedure:** the ESA specified in the primary legislation consults on and drafts the RTS, then submits them to the Commission, which has 3 months to decide whether to adopt them; if not, it can send them back to the ESA for amendment. The Commission has final say on what it adopts as law, but may not change the wording without the ESA.
- **Scrutiny:** Parliament and Council have 1 month to object to the RTS from the date on which the Commission adopts it, unless the Commission required amendments, in which case they have 3 months.

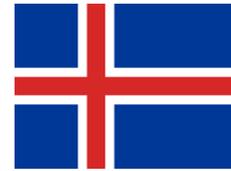
Implementing Technical Standards (ITS) (Art 291 TFEU)

- Article 291 implementing acts (see above) made under a different procedure (see to the left), used in cases where the matter is "*technical [and] shall not imply strategic decisions or policy choices*".
- **Procedure:** as for RTS.
- **Scrutiny:** as for implementing acts: 'comitology'-style scrutiny by committees, but no scrutiny by Parliament and Council (although they may see the ITS)

Guidelines
(Level 3)

Interaction between ESAs and Member States; and, in particular, **guidelines** issued by the ESAs. These are 'hardened soft law': national regulators and financial institutions "shall make every effort to comply", and are obliged to explain any failure to comply.

European Economic Area (EEA)



What is happening in the EU:

How the EEA is involved

Pre-legislative process

The pre-legislative stage is the EEA's main opportunity to influence EU legislation.

The EEA can do this by means of:

- EEA experts attending Commission committees as state representatives;
- other, informal meetings between EEA experts and the Commission; and
- formal comments submitted by EEA states on potential legislative proposals

Ordinary legislative process

Once the legislative process has begun, the EEA has little or no formal influence on the decision-making that follows.

Once legislation (including delegated acts, RTS, ITS, etc.) has been adopted:

- EEA experts will consider whether the legislation will require technical adaptations for implementation on the EEA
- They will also decide if there any constitutional requirements such as a referendum or parliamentary ratification. (This is because EEA states have not actually transferred any legislative powers to the EEA Joint Committee.)
- A subcommittee will decide if the act is EEA-relevant.
- “as closely as possible” to the adoption of the legislation by the EU, the EEA Joint Committee will decide whether to make an amendment to the relevant annex of the EEA Agreement*, which will name the legislation to be incorporated, along with any relevant ‘adaptations’ required for the EEA. This will be done “with a view to permitting a simultaneous application” of the legislation in the EEA as in the EU.

*Financial Services legislation is contained in Annex IX

November 2015

203212599

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