


EU Law:
2. EU Legislative
Process and
Democracy



Last week's recap



- Definition of the European Union
- Objectives of the EU
- Development of the EU
- Expansion:
 - Competences/Powers, through Treaty amendments
 - Geographical, through enlargements
- Underpinning rationales and tensions
- Brexit

Today's Lecture:

Key EU institutions

Principles of EU lawmaking: conferral, subsidiarity, democracy

Types of EU legislation

The Ordinary Legislative Procedure

Is there a democratic deficit?

Which
institutions
are 'the EU'?

Article 13 TEU

EU Institutions:

- **European Parliament (Articles 14 TEU & 223-234 TFEU)**
- **European Council (Articles 15 TEU & 235-236 TFEU)**
- **Council of the EU/Ministers (Articles 16 TEU & 237-243 TFEU)**
- **Commission (Articles 17 TEU and 244-250 TFEU)**
- **Court of Justice (Articles 19 TEU and 251-281 TFEU)**
- European Central Bank
- Court of Auditors

Other EU bodies:

- Committee of the Regions
- Economic and Social Committee
- Agencies and offices such as EU Ombudsman



Art 17 TEU: The European Commission

- *'The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, [...] It shall oversee the application of Union law [...] It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Treaties ...'*
- The 'executive'. Near-monopoly over making proposals. But also legislative and administrative powers
- Headed by a President, who is elected by the Parliament following nomination by the European Council
- A team of 'Commissioners' work in distinct 'portfolios', e.g. trade, environment. Appointed by the Council after nomination by Member States and approval (including hearings) by the EP
- Despite Lisbon Treaty reforms, 1 Commissioner per MS, although they do not represent MS interests → EC = independent
- 5 year term

Teresa Ribera Rodríguez
Executive Vice-President
Clean, Just and
Competitive
Transition



Maroš Šefčovič
Commissioner
Trade and Economic Security
Interinstitutional Relations
and Transparency



**Ursula
von der Leyen**
President



Valdis Dombrovskis
Commissioner
Economy and
Productivity
Implementation
and Simplification



Dubravka Šuica
Commissioner
Mediterranean



Henna Virkkunen
Executive Vice-President
Tech Sovereignty,
Security and
Democracy



Olivér Várhelyi
Commissioner
Health and
Animal Welfare



Wopke Hoekstra
Commissioner
Climate,
Net Zero and
Clean Growth



Andrius Kubilius
Commissioner
Defence and
Space



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Executive Vice-President
Prosperity and
Industrial Strategy



Jozef Sikela
Commissioner
International
Partnerships



Costas Kadis
Commissioner
Fisheries and
Oceans



Maria Luís Albuquerque
Commissioner
Financial Services
and the Savings
and Investments
Union



Hadja Lahbib
Commissioner
Preparedness
and Crisis
Management
Equality



Kaja Kallas
*High Representative/
Vice-President*
Foreign Affairs
and Security
Policy



Magnus Brunner
Commissioner
Internal Affairs
and Migration



Jessika Roswall
Commissioner
Environment,
Water Resilience
and a Competitive
Circular Economy



Piotr Serafin
Commissioner
Budget, Anti-Fraud
and Public
Administration



Dan Jørgensen
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Housing



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Ekaterina Zaharieva
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Cohesion and
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**Christophe
Hansen**
Commissioner
Agriculture
and Food



Glenn Micallef
Commissioner
Intergenerational
Fairness, Youth,
Culture and
Sport



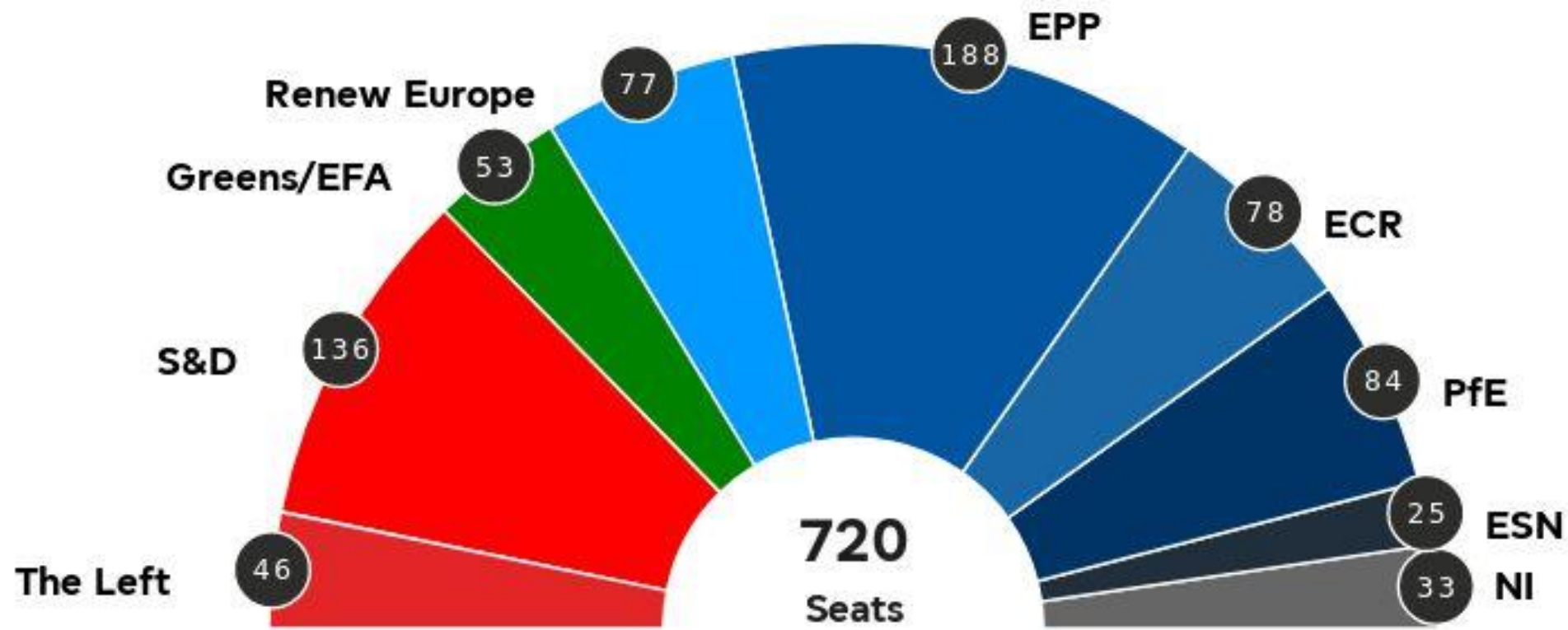


The European Parliament

‘The European Parliament shall, jointly with the Council, exercise legislative and budgetary functions. It shall exercise functions of political control and consultation as laid down in the Treaties. It shall elect the President of the Commission’ (Art 14 TEU).

- Directly elected since 1979 ... but on relatively low ‘second-order’ turnouts, albeit with an increase in 2019 and 2024; 5 year term.
- Gradually empowered from a consultative assembly to one of the world’s most powerful legislative bodies (Hix, Raunio, Scully)
- Co-Legislator → The ‘ordinary legislative procedure’ essentially gives the EP a veto over most EU legislative proposals.
- Political control: Must approve most international treaties which the EU concludes
- Budgetary functions and can hold the Executive to account

European Parliament 2024 - 2029



Source: Provided by Verian for the European Parliament



Council of the European Union/The Council/Council of Ministers: Art 16 TEU

***Note, this is not the Council of Europe, an international organization that is not related to the EU**

- 1. The Council shall, jointly with the European Parliament, exercise legislative and budgetary functions. It shall carry out policy-making and coordinating functions as laid down in the Treaties.***
2. The Council shall consist of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote.
3. The Council shall act by a qualified majority except where the Treaties provide otherwise.'

In the past, main decision-making body

Legislative and Executive powers; Co-ordinating role; Big role in international treaties; rotating Presidency every six months – needs 55% of Member States, 65% of population for a qualified majority

European Council:

Art 15 TEU

'1. The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof. It shall not exercise legislative functions.'

2. The **European Council shall consist of the Heads of State or Government of the Member States, together with its President and the President of the Commission.** The High Representative of the Union for Foreign Affairs and Security Policy shall take part in its work.'

Formalised under SEA; subsequently empowered;
became official institution in Lisbon

Important political role: sets the agenda. No
legislative role

President has limited power, appointed for one or two
2.5 year terms





The Court of Justice of the European Union (CJEU): Art 19 TEU

- Court of Justice
 - 1 judge per MS; Assisted by 11 AGs → AG Opinion may be issued for a case; Different configurations
- General Court
 - 2 judges per MS; 2024 reforms: possibility of permanent AGs; Different configurations; (Limited) appeals to Court of Justice
- Specialised Courts
 - formerly the Civil Service Tribunal (now abolished)
- Judgments: collegiate and sometimes cryptic; no dissenting or concurring judgments
- 'Integration through law' (Cappelletti, Secombe, Weiler 1986)

Functions of the CJEU

- Article 19(1) TEU: 'The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed'.
- Art 19(3) TEU: the CJEU (a) ***rule[s] on actions brought by a Member State, an institution or a natural or legal person***; (b) ***give[s] preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions***; (c) rule[s] in other cases provided for in the Treaties.
- Different procedures: e.g. preliminary references, annulment action, etc.

The cases



45 482 judgments and orders deliv

- Court of Justice: 25 723
- General Court: 18 210 (since 1989)
- Civil Service Tribunal: 1 549 (2005 - 2016)

Court of Justice

- 821 cases brought
- 783 cases closed
- 1 149 cases pending
- average duration of procee

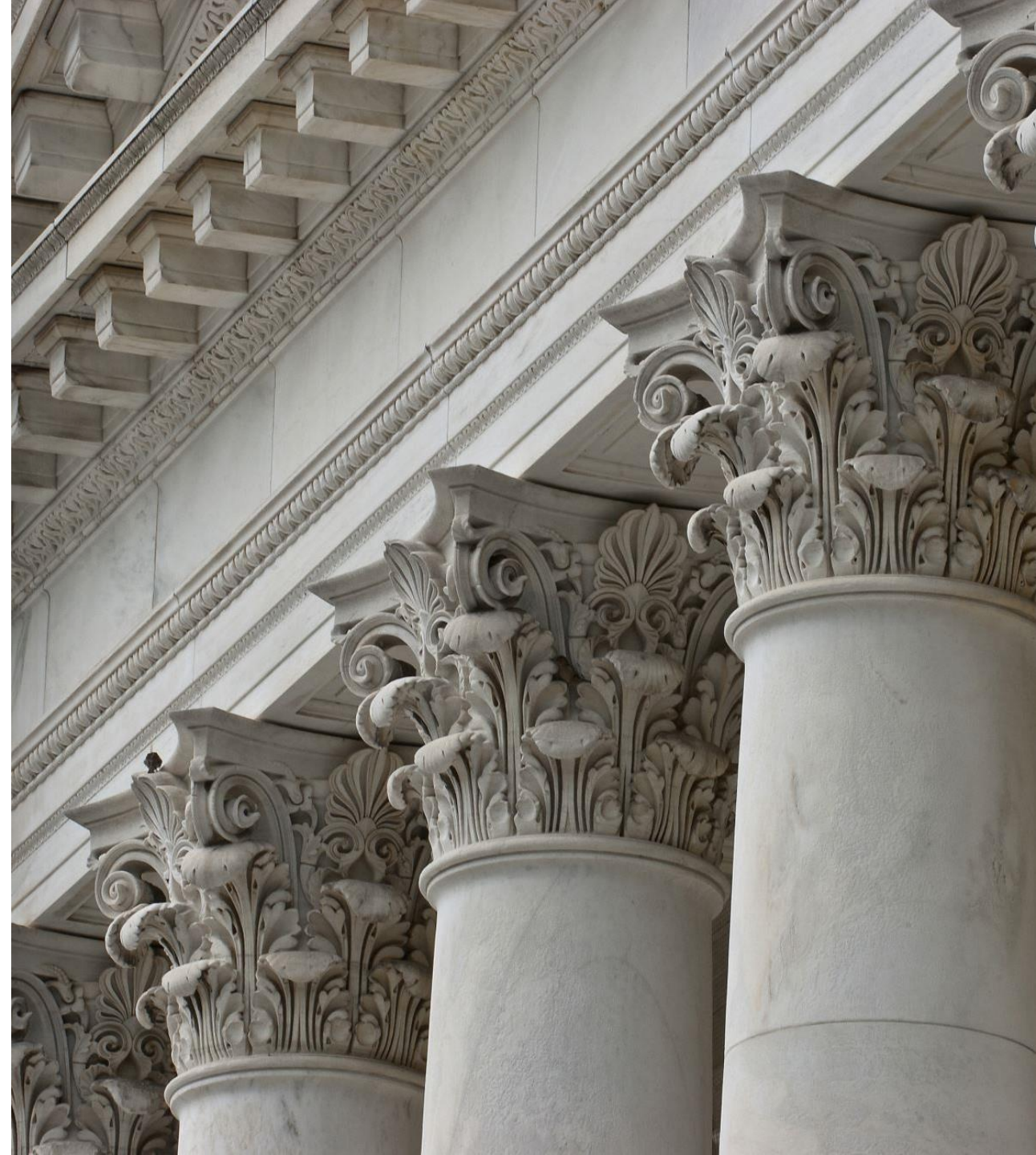
General Court

- 1 271 cases brought
- 904 cases closed
- 1 841 cases pending
- average duration of procee

Figures as of 31.12.2023

The institutions

- No rigid separation of powers; shared roles
- Powers and balance changed over time with Treaty amendments
- Different institutions, different interests?
 - Commission → EU's interests
 - Parliament → EU citizens' interests
 - Council → Member States' interests



1. When can the EU institutions make laws?

2. More broadly, when can the EU institutions take action?

The principles of conferral, subsidiarity and proportionality

Article 5 TEU

- Conferral: EU has power (competence) to act in an area only to the extent the Treaties confer on it the power to do so (A5 TEU, A296 TFEU)
- For the areas in which the EU has the power to act, the Treaties lay down rules on the division of competences between the EU institutions and the Member States (A2-6 TFEU):
 - Exclusive, e.g. customs union, common commercial policy, competition rules, etc.
 - Shared, e.g. internal market, social policy, environment, consumer protection, etc.
 - Supporting, e.g. human health, industry, culture, tourism, education, etc.
- Subsidiarity: EU refrains from acting, in deference to the MS, unless the objectives of the proposed action can be better achieved at EU level (A5(3) TEU)
- Proportionality: EU action must be suitable, necessary, and not impose an excessive burden (A5(4) TEU)

Conferral, Subsidiarity and Proportionality in Practice

- Legal basis and justification in every proposal
- Possibility of review by MS Parliaments through Early warning System
- Judicial challenges:
 - Case C-84/94 Working Time Directive
 - Case C-376/98 Tobacco Advertising

3. LEGAL ASPECTS

Legal base

The proposal is based on Article 13(1) EC Treaty.

Subsidiarity and proportionality

The principle of subsidiarity applies insofar as the proposal does not fall under the exclusive competence of the Community. The objectives of the proposal cannot be sufficiently achieved by the Member States acting alone because only a Community-wide measure can ensure that there is a minimum standard level of protection against discrimination based on religion or belief, disability, age or sexual orientation in all the Member States. A Community legal act provides legal certainty as to the rights and obligations of economic operators and citizens, including for those moving between the Member States. Experience with the previous directives adopted under Article 13(1) EC is that they had a positive effect in achieving a better protection against discrimination. In accordance with the principle of proportionality, the proposed directive does not go beyond what is necessary to achieve the objectives set.

Moreover, national traditions and approaches in areas such as healthcare, social protection and education tend to be more diverse than in employment-related areas. These areas are characterised by legitimate societal choices in areas which fall within national competence.

The diversity of European societies is one of Europe's strengths, and is to be respected in line with the principle of subsidiarity. Issues such as the organisation and content of education, recognition of marital or family status, adoption, reproductive rights and other similar questions are best decided at national level. The Directive does not therefore require any Member State to amend its present laws and practices in relation to these issues. Nor does it affect national rules governing the activities of churches and other religious organisations or their relationship with the state. So, for example, it will remain for Member States alone to take decisions on questions such as whether to allow selective admission to schools, or prohibit or allow the wearing or display of religious symbols in schools, whether to recognise same-sex marriages, and the nature of any relationship between organised religion and the state.

What laws can the EU
institutions actually make?

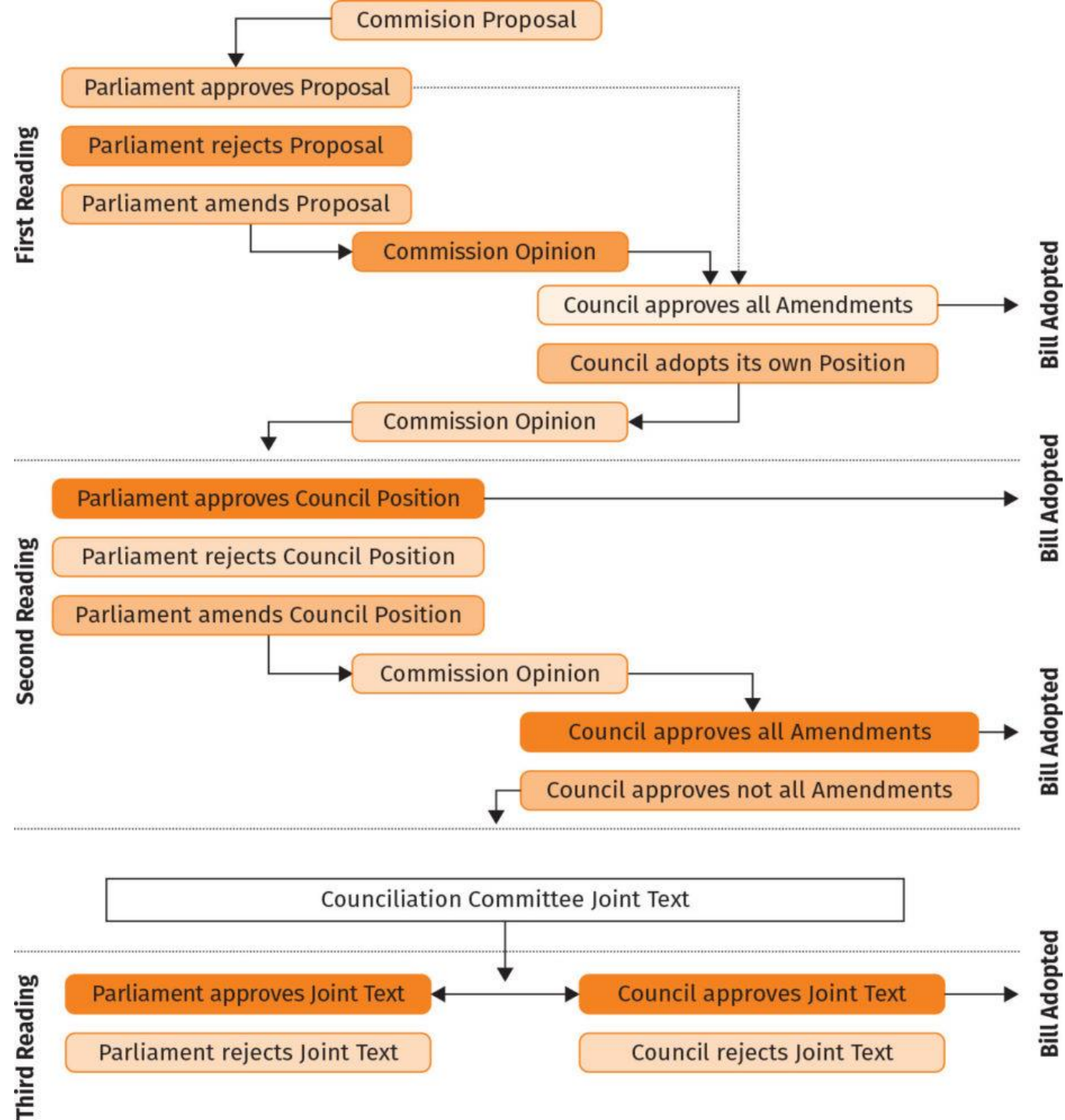
Types of EU Legislation: Article 288 TFEU

- Regulation: general application, binding in its entirety, and directly applicable in the MS
 - E.g. Regulation (EC) No 261/2004 (Air Passenger Rights)
- Directive: binding as to the result towards the MS to which it is addressed; way of implementation by a set deadline left to the MS
 - E.g. Directive 2000/78/EC → Equality Act 2010 in the UK
- Decision: binding in its entirety (towards its addressee, if there is one)
 - E.g. Decision to impose fine on Microsoft for abuse of dominant market position
- Recommendations and Opinions: non-binding

How can the EU
institutions legislate?

Ordinary legislative procedure (Art 294 TFEU)

- Involves the Commission, the Parliament and the Council
- Usually a first reading deal – Commission makes proposal; European Parliament and Council agree negotiation positions; they hold ‘trilogue’ negotiations between them; if there’s a deal it’s approved at ‘first reading’
- Otherwise: second reading and possible third reading
- Ends up in the adoption of secondary EU Law: e.g. Directives and Regulations
- NB. There are also special legislative procedures



That sounds
very
democratic ...



Why do people say there is a democratic deficit?

Key piece: Føllesdal and Hix, see further reading.

The EP is nowadays formally very powerful; but its elections tend to be 'second-order' and reflect national politics rather than European ones.

No-demos thesis. Given number of MS, difficult to create public space for democratic debate and accountability. There are no effective pan-European political parties or media.

'De-Parliamentarisation' EU takes competences away from elected national Parliaments and into their executives. They are also elected but may escape effective domestic control; they may bypass domestic preferences.

Very rarely veto power afforded to a single Member State (Qualified Majority Voting the norm); see also concerns around transparency of informal arrangements in Ordinary Legislative Procedure

Article 10 TFEU: Provisions on Democratic Principles (added at Lisbon)

Article 10

1. The functioning of the Union shall be founded on representative democracy.
2. Citizens are directly represented at Union level in the European Parliament.

Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.

3. Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.
 4. Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union.
- Also, think about the role of the principles of conferral, subsidiarity and proportionality
 - More broadly, consider what “democratic” means in any critiques of the EU, and discuss it in that context. Are arrangements similar to those found in the EU institutional architecture common in sovereign states?

Recap

Key EU institutions

Principles of EU lawmaking: conferral, subsidiarity, democracy

Types of EU legislation

The Ordinary Legislative Procedure

Is there a democratic deficit?

Any questions?

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What is meant by 'subsidiarity'?

- Decisions or action taken at EU level
- Decisions or action taken at national level
- The relationship between national law and EU law
- Where decisions or action are taken at EU level, rather than at national, regional, or local level, there must be reasons to support why it is better-placed to do so at the EU level

What is the composition of the Council?

- Representatives elected by the citizens of the EU
- Representatives elected by the European Parliament
- Ministers of the Member States
- Individuals appointed by the European Commission

Which of the following statements about the Ordinary Legislative Procedure is false?

- The Commission proposes almost all legislation but cannot decide whether they will become law
- Once the legislation has been approved by the European Parliament and the Council of Ministers, the Commission has a veto
- The directly elected European Parliament must approve legislative proposals
- The Council of Ministers, which consists of the ministers of each Member State, must also approve the proposal if it is to become law

How does qualified majority voting currently operate?

- Any one Member State can veto a legislative proposal
- Legislation cannot be adopted without the agreement of at least 80% of the Member States
- As a system of double majority voting
- Unanimity is required for all legislation save for legislation concerning the internal market

What is the composition of the European Commission?

- Representatives of Member State governments
- Individuals who are directly elected by the citizens of the Union
- Individuals who are nominated by the President of the Commission and Member States and approved by Member States and the European Parliament
- Individuals appointed by the European Court of Justice

Which of the following statements correctly describes a key feature of a directive?

- A Directive must be implemented by Member States
- A Directive must be implemented by the European Parliament
- A Directive has retrospective effect
- A Directive is binding on the governments of third countries

What is meant by the 'legal base' of an EU measure?

- The draft measure proposed by the European Commission
- The Treaty Article conferring the power to legislate in a particular area
- The Council's decision to adopt an EU measure
- The approval of a measure by the European Parliament

What is meant by the principle of conferral set out in Article 5 TEU?

- The EU can only legislate in areas set out in the Treaties. The Court of Justice protects this by examining all legislative proposals and giving permission for them to proceed if the EU has the legal power to continue. .
- EU laws should only be passed if the EU is better-placed to achieve their objective than a Member State (e.g. the EU was best-placed to create uniform regulation of mobile phone roaming charges across Europe). .
- The EU can pass legislation in any area it wishes, so long as the European Council votes in favour (e.g. the EU could pass legislation that regulates the price of shoes in Denmark, if the Council agreed). .
- The EU only has the legal power to pass legislation if the Treaties have provided it with the power to act in the relevant area (e.g. the EU can pass law about the free movement of workers because Article 45 TFEU allows it to do so).

Which of the following statements does not form part of arguments that the EU suffers from a 'democratic deficit'?

- The EU's competences were created with no input from Member States.
- The EU's competences mean that power is taken away from national Parliaments. This can reduce the amount of influence that national Parliaments have, and gives that influence to national governments and to EU institutions which may not be fully representative of national interests.
- There are 27 different countries in the EU. It is not possible to create the sort of public space for democratic debate and accountability that we would find in a nation-state. This makes it difficult for the EU to replicate the democratic functions we see at national level, such as national media.
- The European Parliament is directly elected, but generally speaking, turnout in elections is low and is based on national issues rather than European ones. This means it does not represent Europeans as well as it might wish to, despite its very significant powers.

Fill in the gaps (NB. these are not authoritative definitions)

- Article ... TFEU sets out three main kinds of EU legislation. They are:
- A ... is directly applicable. This means that it will normally form part of domestic law automatically, from the moment that it comes into force.
- A ... is binding as to its effect. Usually, this legislation sets out a series of legal objectives or requirements and provides a deadline for Member States to 'transpose' it into their domestic law. If the deadline passes and the law has not been transposed, the Member State may be in breach of their EU law obligations.
- A ... is binding only on those to whom it is addressed.

Fill in the gaps (NB. these are not authoritative definitions)

- The ... consists of the heads of government of all EU countries. They meet several times a year to set EU objectives and deal with crises such as Brexit.
- The ... is appointed by the European Parliament. Its role is to act as the EU's executive, by for example proposing legislation in keeping with the parameters set by the European Council, bringing enforcement procedures for breach of EU law, and by developing policies across the various areas of EU law.
- The ... is directly elected by the people of Europe. It is a legislative body and also holds the Commission to account.
- The ... consists of ministers from each Member State which meet to discuss their particular policy area. The Council, along with the European Parliament, has legislative powers.
- The ... is the EU's judiciary. It is responsible for ensuring that EU law is observed, for example by reviewing the legality of EU acts, by deciding if a state has breached EU law, and by providing authoritative interpretations of EU law.