



**DR. JUR. KLAUS KAMMERER**

## Column 6

Dear citizens of Georgia,

With this column, as recently announced, I would like to introduce you to the legislative process in the Union as a first step, before we then turn to the exciting topic of the legal nature of Union law, the principle of priority of application over national law and the different views of the ECJ and the Federal Constitutional Court on this in another column.

### **Legislation in the Union - legislative process**

**Articles 289 et seq. TFEU** (Articles 289 to 294 TFEU) as well as **Articles 13** and **324 TFEU** are decisive for the legislative process. Furthermore, **Article 48(7) TEU** (subparagraph 2) contains a so-called bridging clause that allows the *European Council* a special legislative process.

**Articles 290** and **291 TFEU** are also of particular importance. They regulate the so-called **Comitology Procedure**, according to which the *European Parliament* and the *Council* lay down in advance, by means of regulations in accordance with the ordinary legislative procedure, general rules and principles enabling Member States to control the *Commission's* exercise of implementing powers. This was done with the Comitology Regulation (EU) No. 182/2011 of the European Parliament and of the Council of 16 February 2011.

All details of the treaties can be found in the current consolidated version of 2016 under the link:

***AEUV and EUV – Consolidated Version 2016 – English version***

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2016:202:FULL>

The legislative process is characterized by the **cooperation of several bodies**, i.e. the *European Council* and the *European Parliament*, as well as the *Commission*, the *Economic and Social Committee* and the *Committee of the Regions*. Legislation is bound by the *principle of conferral* laid down in the Treaties, according to which the Union is not free to choose the procedure for adopting legal acts. It can only legislate within the framework of the powers conferred on it by the Member States at a supranational level.

The **Treaty of Lisbon** reformed the legislative process and introduced the term "legislation" into the Treaties. A distinction must now be made between legislation on the one hand and other legislation on the other, and between *ordinary* and *special* legislative procedures (Article 289, paragraphs 1 and 2 TFEU).

**Legislative acts** are legal acts that are adopted in a legislative procedure and in which the essential aspects of an area are regulated. Since legislative acts always have their basis in primary law, they are themselves always secondary law.

The legislative procedure is occasionally supplemented by the so-called **informal triologue**, an "informal" meeting of a few representatives of the *Commission*, *Parliament* and *Council* outside the regular procedure with the aim of reaching an agreement at an early stage. In this respect, they prepare the legislative procedure through *informal agreements*, which is then initiated. This applies in particular to the **budget procedure**, which is regulated in **Article 324 TFEU** and is thus formalized.

**Other legislative procedures** include in particular *delegated acts*, *implementing acts* and acts within the framework of the CFSP (they are not considered here) as well as all other legal acts provided for in the Treaties. Further details can be found in the cited standards themselves.

The **concept** underlying lawmaking in the Union is determined by the *public interest*. The **majority principle** therefore applies to the *Council as a body*, in order not to make legal acts aimed at the common good dependent on the de facto veto right of individual Member States, which is inherent in the unanimity principle. The majority principle is therefore intended to counter the fear that only solutions at the smallest common denominator. The basis of the Council's decision is the *Commission's proposal*. Since it is obliged to remain neutral, its independence guarantees proposals that are oriented towards the common good. The Commission's proposal is thus given a *privileged acceptance*.

The Commission's **initiative function** is therefore indispensable, and is only breached in two places: when setting up a *Conciliation Committee* (Article 293(1), Article 294(10) and (13) TFEU - "joint" draft of the Conciliation Committee) or for *rights of initiative* provided for in the Treaty in relation to a legislative act to be adopted, which are exercised by the bodies designated for this purpose, such as a group of *Member States*, on the recommendation of the *European Central Bank* or at the request of the *European Court of Justice*. If the right of initiative is exercised by one of these bodies and a corresponding legislative act is adopted, the Commission's right of initiative is no longer applicable (Article 294(15) TFEU in conjunction with Article 289(4) TFEU).

It should be emphasized that, according to the **principle of democracy**, the legislative procedure cannot (yet) be reconciled with the principle of separation of powers. In this respect, the Union would first have to develop accordingly, which, however, requires its own, **supranational statehood**.

The ordinary legislative procedure is regulated in **Article 294 TFEU**. It is used when the treaties refer to this procedure for the adoption of a legal act. It can comprise up to three readings and is divided into eight steps (see *ibid.* for details).

In addition to the ordinary legislative procedure, **special legislative procedures** apply in certain cases provided for in the treaties in accordance with **Article 289(2) TFEU**. Thus, under the **bridging clause** (Article 48(7)(2) TEU), the European Council can unanimously decide to allow the Council to adopt legislative acts in ordinary legislative procedures in cases where the TFEU currently provides for a special legislative procedure.

***Article 48(7), second subparagraph, TEU reads:***

.....

*Where the Treaty on the Functioning of the European Union provides for legislative acts to be adopted by the Council in accordance with a special legislative procedure, the European Council may adopt a decision allowing for the adoption of such acts in accordance with the ordinary legislative procedure.*

However, according to the constitutional law of the Federal Republic of Germany (**Article 23, Paragraph 1, Sentence 2 of the Basic Law**) and the complementary requirements of the **Federal Constitutional Court** (BVerfG) in the *Lisbon judgment*, the German government representative may only agree to such a proposed resolution in the European Council if he has previously been authorized to do so by the Bundestag and the Bundesrat through a

corresponding law. This is intended to safeguard the **integration responsibility** of the Bundestag and the Bundesrat as laid down in the Basic Law.

For all member states, this means that **every national parliament** can equally exercise the option of not agreeing to a proposed resolution of the European Council within six months in accordance with Article 48, Paragraph 7, Subparagraph 2 of the TEU. In this case, the transitional decision may not be adopted.

As part of the **consultation procedure**, the Council decides on the legal act to be adopted *after consulting Parliament* either unanimously or by a qualified majority. In some cases, the TFEU allows legal acts to be adopted in a special legislative procedure only after a prior proposal from the Commission. The Treaty may also provide for the *consultation of the Economic and Social Committee, the Committee of the Regions, the European Central Bank or the European Investment Bank*.

According to the case law of the **ECJ**, however, a failure to hold a consultation, which is required by the TFEU, violates a formal requirement considered essential and therefore leads to the **invalidity** of the legal act.

Two basic constellations must be distinguished in the **consent procedure**: The **Council** can adopt legislative acts with the consent of the European Parliament. Or the **European Parliament** can legislate with the consent of the Council.

If the Parliament adopts a legislative act with the consent of the Council, the TFEU also requires either a consultation of the Commission or its consent for the legislative act to come into being. However, the body endowed with a right of consent has no right to shape the content of the legislative act:

See Articles 19(1), 25(2), 223(2), 226(3), 228(4), 314 TFEU

The basis of **delegated acts (Article 290 TFEU)** is the power conferred on the **Commission** by legislative acts to adopt such acts. These are legal acts in which certain parts of a legislative act are specified or amended within the framework of an authorization set by the legislator. Such delegation, which is subject to strict regulations, serves the purpose of easing the burden on the Union's legislative bodies. However, apart from other formal and substantive restrictions (see Article 290(1), second subparagraph, paragraph 2(a) and (b) TFEU), the essential provisions of the area to be regulated must remain reserved for the underlying legislative act.

**Implementing acts (Article 291 TFEU)** are legal acts for implementing legislative acts and other legal acts, including delegated acts. This is done in connection with the need of the Member States to standardize the conditions underlying the binding basic legal act of the Union. The corresponding implementing powers are transferred either to the *Commission* or - in certain special cases - to the *Council* ("tiered secondary legal relationship").

In contrast to the legal acts of an ordinary and a special legislative procedure, both forms of legal acts belong to the *other legislative procedures*. They differ in turn and essentially in that the **Commission** uses legislative powers in the case of delegated legal acts, while it primarily exercises executive powers when adopting implementing acts.

The rules and general principles concerning mechanisms for **controlling the Commission's exercise of implementing powers** are laid down in the **Comitology Regulation** No 182/2011 of the European Parliament and of the Council of 16 February 2011, pursuant to Article 291(3) TFEU.

#### ***Comitology Regulation, English version***

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011R0182>

#### ***Article 291 paragraph 3 TFEU states:***

*3. For the purposes of paragraph 2, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.*

According to this, *two legislative procedures* can essentially be distinguished when exercising implementing powers: the **advisory procedure** and the **examination procedure**. The regulation regulates the details (see in particular Article 3 and Article 11). Which of the two procedures regulated in the regulation is to be applied in a specific case must be determined by the **Council** together with the **European Parliament** in the respective basic legal act that transfers the corresponding implementing powers.

Only **implementing powers** may be transferred. However, the **ECJ** requires in its case law that the essential elements of a matter must be regulated in the procedure provided for in the Treaty itself and may not be delegated (ECJ, case 25/70, para. 6 ff. - *Köster*, case C-104/97, para. 76 - *Atlanta*). This concerns the fundamental orientation of the Union policy to be regulated, which means that the delegated powers must be described in sufficient detail in the

implementing act and the limits of the Commission's competence must be clearly indicated (ECJ, case 291/86, para. 13 - *Central-Import Münster*).

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*The subject of the next column will be the topics of "the legal nature and priority of application of Union law" - including the presentation of the opposing positions of the ECJ and the German Federal Constitutional Court on the principle of priority of application and the review powers - as well as the current controversy in politics and law on priority of application and the opening clause of Article 72 TFEU, triggered by the limitation of the flow of refugees and the tightening of the right of residence on the occasion of terrorist acts of violence committed in recent months by individual refugees in several German cities, initiated in the Bundestag by the opposition party CDU/CSU with reference to this article and put to the vote in a bill on January 31, 2025 in second reading.*

(signed) Dr. Kammerer