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LEGISLATIVE PROCEDURES OF THE EUROPEAN UNION AFTER THE TREATY OF LISBON

The Treaty of Lisbon modifying the Treaty on the European Union and the Treaty establishing the European Community, signed in Lisbon on 13 December in 2007, known in short as the reforming (revisioning) treaty or the Lisbon Treaty, came into force as of 1 December in 2009 (DzUrz UE 2007 C 306 z 17 grudnia 2007 r.; DzUrz UE 2008 C 115 z 9 maja 2008 r. – wersja skonsolidowana).

Its abbreviated name of the „reforming treaty" is fully justified as it has changed for example the architecture of the European Union, the institutional nature of its organs and their competences. The most important change involved an introduction of a single structure and a legal status of the Union. These changes affected the EU's structure marking its transition from the so far existing three-pillar structure, embracing two Communities and common policies (I pillar), foreign affairs and security policy that has an international character (II pillar) and cooperation in the area of police and justice (III pillar) to a single system. In consequence, the European Community of Nuclear Energy was excluded from the European Union and the European Community was transformed into the European Union – according to art. 1 paragraph 3 of TEU (consolidated version) „The Union shall replace and succeed the European Community". Simultaneously, art. 2 point 1 of the reforming treaty replaced the name of the „European Community" by the „European Union", changing also the title of the Treaty establishing the European Community into the treaty on the functioning of the European Union (TFEU) and introducing appropriate horizontal changes in the treaty's contents (DzUrz UE 2007 C 306).

The dissolution of the pillar structure of the EU is a debatable issue. As much as Pillar III was indeed dissolved and its competences were included in the TFEU regulations, the principles concerning the

common foreign and security policy were clearly set apart in the Treaty on the European Union (art. 23–46 TEU consolidated version), which still allowed for defining a two-pillar structure of the EU. In my opinion, the separation of competences in this area has been preserved, since Pillar I consists of common policies that are defined by regulations of TFEU and partly TEU, while Pillar II consists of the common foreign and security policy that has preserved inter-governmental characteristics. It needs to be stressed that the concept of the three-pillar Union was a doctrinal and political concept and not a legal one, as TEU, both in the version of the founding Treaty of Maastricht and the treaties of Amsterdam and Nice that amended it, did not feature such an expression.

The changes introduced by the reforming treaty affected legislative procedures (decisions) in the EU as well. It must be highlighted that the term „decision" *sensu largissimo* means any resolution adopted on the basis of primary laws by an institution of the EU that has been granted competences to do so. „Decision" *sensu largo* includes all acts passed by the EU (Michałowska-Gorywoda 2002: 68). „Decision" *sensu stricto* is a concept referring to only one type of legal act, named exactly „decision".

Legislative procedures in the European Community before the implementation of the Lisbon Treaty

In the European Community, acts of derivative law adopted in the framework of legislative procedures were determined by provisions of art. 249 TEC (DzUrz UE 2002 C 325 z 24 grudnia 2002). That article indicated legal acts and EC institutions participating in the procedure. The provisions included in art. 249 enummeratively stipulated that the European Parliament together with the Council and the Commission adopt regulations, directives, decisions and issue recommendations and opinions.

It unequivocally indicated three subjects participating in the passing of legal acts: the European Parliament, the Council and the Commission. Basing on analyses of the TEC provisions, the Council was the main decision-making institution, which was also called the Council of the European Union. When the Single European Act was introduced in 1986 (DzU RP 2004 nr 90, poz. 864/5), its provisions increased the role of the European Parliament that might, in certain cases, block the

adoption of an act. The legislative procedure itself was initiated by motion of the Commission. In some cases, it was necessary to ask other organs for an opinion, including the Socio-Economic Committee, Committee of Regions or the European Central Bank.

The European Parliament took decisions regarding the proceeded proposal by means of an absolute majority. It had three months to articulate its position. Failure to communicate its position by the EP within the indicated temporal frames resulted in consequences identical to its support for the proceeded proposal. The Council acted by means of a qualified majority or unanimously. Unanimous decisions were required in cases specified by TEC provisions or when the Council's decision would contradict the position articulated by the European Parliament – provided that the given procedure allowed for such an option. The European Commission took decisions by a majority of its members. In some cases, the Council acted without involving the European Parliament, taking a decision as requested by the Commission (cf. art. 96 paragraph 2, art. 100 p. 1 TEC or European Central Bank (art. 111 p. 1 TEC.

Despite differences in the particular procedures, it could be demonstrated that conflict-free collaboration between the Council, the Commission and the EP in the legislative process meant that the Council would act by means of a qualified majority – as long as the provisions did not require its unanimous decision. In case one of the participants of the procedure took a negative position, the Council had to act by taking a unanimous decision – as long as the provisions allowed for taking such a decision by the Council.

In the area of legislative procedures that were used to create derivative legal acts, six procedures were distinguished: traditional consultation procedure, the co-operation procedure, the agreement procedure, the co-decision procedure, the international agreements procedure, the budgetary procedure.

The qualified majority in the Council, called also the weighted majority, was determined by weighted votes that were attributed by TEC to particular Member States depending on their demographic potential. This majority was used only when it was clearly envisaged by the TEC provisions, including:

a) the number of votes attributed to the particular Member States,

b) the number of votes (states) necessary to take the given decision,

c) so called blocking minority that consisted of the number of votes (states) enabling the members of the Council to block the taking of the decision.

The additional element in the voting by means of the qualified majority included the rule of making voting dependent on a certain number of states involved; if the motion was proposed by the Commission, the decision could be already taken if the weighted votes were representing at least half of the Member States in the Council. If the motion was not proposed by the Commission, the weighted votes that supported the motion had to be expressed by 2/3 of the States in the Council.

As far as the adoption of legal acts is concerned, it is worth noting that the Council has an intergovernmental nature, consisting of representatives of the governments of the Member States. By contrast, the European Parliament consists of elected deputies. In consequence, in the case of the European Community, and at present the EU, the situation was different from the one that is typical of the political systems of the Member States where governments are supported by parliamentary majorities.

Table 1. The qualified majority in the Council in 1995–2009

Period of time		Number of states	Number of weighted votes in total	Qualified majority	Blocking minority
from	to				
1.01.1995	30.04.2004	15	87	62	26
1.05.2004	31.10.2004	25	124	88	37
1.11.2004	31.12.2006	25	321	232	90
1.01.2007	30.11.2009	27	345	255	91

Source: The author's own calculations.

The Nice provisions introduced an additional facultative demographic test – each of the states could demand checking if states voting for the given motion represented at least 62% of the EU population (Barcz 2008: 65).

The traditional consultation procedure used e.g. according to art. 94, art. 107 p. 6, art. 111 p. 1 s. 1, art. 181a p. 2, art. 308 TEC was the oldest procedure. In accordance with this procedure, the Council adopted the proposed act at the request from the Commission and after the European Parliament had been consulted. According to this procedure, the Council could pass the given act even if the EP opposed it, but it did require that the Council was unanimous. This evidenced the low status of the European Parliament, earlier called Parliamentary Assembly, for which the founding treaties had initially not envisaged any par-

ticular competences. This procedure was most commonly used in the initial period of the Communities' operation and gradually lost its significance. The majority of TEC provisions regarding the procedure of consultation were replaced with the procedure of co-operation as a result of the implementation of the Single European Act (SEA) as of 1 July in 1987 that had been signed on 17, 28 February in 1986 (DzU RP 2004 nr 90, poz. 864/5).

The position of the European Parliament was strenghtened by the agreement procedure introduced by the Single European Act. In case of certain decisions, for the given legal act to be adopted, the European Parliament had to express its unequivocal agreement. The lack of such an agreement could not be substituted even by the Council's unanimous decision. The introduced changes included inter alia the need for EP to agree to admit new members to the Communities (previously art. 237 TEC and subsequently art. 49 TEU) and to conclude agreements concerning association with the Communities (previously art. 238 TEC and subsequently art. 310 in connection with art. 300 p. 3 TEC). The agreement procedure was gradually extended to include the following areas:

- enhanced co-operation (art. 11 p. 2 TEC)
- special tasks of the European Central Bank (art. 105 p. 6 TEC)
- change in the statute of the European System of Central Banks (art. 107 p. 5 TEC)
- structural funds and cohesion funds (art. 161 TEC)
- the single election procedure (art. 190 p. 4 TEC)
- some international agreements (art. 300 p. 3 TEC)
- infringments upon human rights (art. 7 TEC)

According to this procedure, the significance and role of the European Parliament increased. It is worthwhile stressing on this occassion that it was the Single European Act that introduced in the treaty the name of „European Parliament" that had been informally used already since 1962.

Alongside the agreement procedure, SEA introduced a new procedure of co-operation. Basing on art. 6 SEA in the previous art. 7, art. 49, art. 54 p. 2, art. 56 p. 2, art. 57 of the Treaty on European Economic Community, the procedure of co-operation was introduced to replace the consultation procedure. In the TEC version as consolidated by the Amsterdam Treaty, this procedure was defined in art. 252 and included two readings (K. Michałowska-Gorywoda 2002: 221 and ff.). The first reading resembled an extended consultation procedure. If the position

of the European Parliament was positive or if the EP did not take any position (within 3 months), this procedure allowed for the adoption of the given act by the Council by means of a qualified majority already at this stage of the procedure. The second reading was initiated if the EP rejected the joint position of the Council or introduced amendments to this position. In case the joint position of the Council was rejected by the EP, the Council could adopt the act only unanimously. The introduction of amendments by the EP necessitated an opinion by the Commission within 1 month. Within three months the Council could adopt the given act in the wording compliant with the draft approved by the Commision by means of a qualified majority or to adopt the act against the proposal of the Commission by its unanimous decision. TEC as consolidated by the Amsterdam Treaty, retained this procedure in art. 99 p. 5, art. 102 p. 2, art. 103 p. 2, art. 106 p. 2.

The Treaty of Maastricht of 1992, by introducing an amendment to the Treaty on the European Economic Community, changed its name to a new one – the Treaty on the European Community and introduced a new co-decision procedure in which the role of the EP was markedly increased. The procedure of co-decision was the co-operation procedure extended by the third reading that was based on the mechanism of the agreement procedure. According to this procedure, defined in art. 251 of the TEC as consolidated by the Amsterdam Treaty, the EP could reject the given proposal, similarly as in the agreement procedure – which ended its proceeding and resulted in the failure to adopt the proposed act. Introducing amendments to the draft by the EP had results identical to the second reading in the co-operation procedure. However, in the situation that the Council did not accept all of the amendments introduced by the EP, the Conciliation Committee was called consisting of an equal number of members or representatives of the Council and EP deputies. The Committee was established within six weeks by the Council's President in co-operation with the Chairman of the EP. The Conciliation Committee had to work out a joint project within six weeks and this project was to be approved of by the EP and the Council also within six weeks in order to become a legal act. The defined deadlines of three months and six weeks respectively could be prolonged by, respectively, one month or two weeks by the request of the EP or the Council. The subsequent amendments to TEC introduced by the Amsterdam Treaty and the Treaty of Nice extended the scope of use for the co-decision procedure marginalizing the procedure of co-operation.

The budget procedure was defined in art. 272 TEC and the procedure used to conclude international agreements as defined in art. 300 TEC. Depending on the area that was the subject of the given international agreement, the procedure of consultation, of agreement or of co-decision was to be used.

The procedure to change the primary law, that is the treaties, was defined relatively briefly. It was determined by art. 48 TEU, indicating the initiating action by the Member States or the Commission. The Council, having consulted the EP, and in some cases also the Commission, was then to take a decision to call a conference of the Member States. The amendmends in the primary law that were agreed upon during such a conference came into force following their ratification by the Member States.

The legislative procedures in the European Union after the enforcement of the Treaty of Lisbon

The coming into force of the Treaty of Lisbon decidedly changed the terminology used to describe the legislative procedures in the EU.

The basic change involves the introduction of a division of legal acts of the EU into legislative acts and non-legislative acts. Preserving in art. 288 TFEU[1] the names used so far for legal acts that were defined earlier in art. 251 TEC, the legal acts have been divided into:

a) legislative acts (art. 289 p. 3 TFEU),

b) delegated acts (art. 290 TFEU),

c) implementing acts (art. 291 TFEU).

At the same time, the legislative procedures have been defined in a more precise manner, as specified in two forms, as:

a) ordinary legislative procedure (art. 289 p. 1, art. 294 TFEU),

b) special legislative procedure (art. 289 p. 2 TFEU).

The ordinary legislative procedure resembles the co-decision procedure that was introduced by the Treaty of Maastricht in art. 289 p. 1 TFEU: „The ordinary procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission". This procedure is now defined by art. 294. Art. 294 TFEU that lays down the earlier co-

[1] The TEU and TFEU regulations changed by the Treaty of Lisbon are quoted here in their versions consolidated in 2008.

decision procedure and makes the old co-decision procedure of art. 251 TEC more precise, while preserving the option of three possible readings as well as that of establishing the Conciliation Committee.

The special legislative procedure could be used in exceptional cases envisaged by TFEU. It entails „the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council or by the latter with participation of the European Parliament" (art. 289 ust. 2 TFEU). In the majority of cases, this corresponds to the agreement procedure as defined in the previous provisions of TEC and TEU. It is reflected inter alia in art. 127 p. 6, art. 223, art. 226 paragraph 3, art. 314, art. 352 p. 1 TFEU.

Apart from both of the legislative procedures, defined in the provisions of art. 289 p. 1 and 2 TFEU, one must also take into account decision-making procedures in the EU that - producing certain political and also legal consequences - do not, however, aim at creating a legislative act. These are defined both by TEU and TFEU provisions. This type of decision-making procedure must be labelled as a non-legislative procedure. In some cases, determined in accordance with this procedure, it is necessary to consult the EP or to obtain its agreement. These cases include among others:

a) an infringment by a Member State upon values defined in art. 2 TEU; the procedure is then defined by art. 7 TEU and art. 354 TFEU,

b) an admission of a new member to the EU (art. 49 p. 1 TEU),

c) a secession of a member state from the EU (art. 50 p. 2 TEU),

d) deployment by the Council of means necesitated by a difficult economic situation (art. 122 p. 1 TFEU),

e) the specification by the Council of prohibitions as defined by art. 123, 124 i 125 TFEU (art. 125 ust. 2 TFEU) for the purpose of their implementation,

f) the adoption by the Council of measures aimed at harmonization of denominations and technical specifications of euro coins issued by the Member States (art. 128 p. 2 TFEU),

g) the adoption by the Council of certain regulations pertaining the ESCB and ECB statutes (art. 129 p. 4 TFEU),

h) the concluding of international agreements on the basis of art. 218 TFEU (following the agreement by the EP or in consultation with the EP, or – in the area of an exchange-rate system – after consulting ECB).

The legislative procedure pertaining the primary law that is intended to make a revision of both of the treaties – TEU and TFEU,

which was defined in art. 48 of TEU has a different nature. Changes in the treaties could be effected according to the ordinary revision procedure or according to a simplified revision procedure.

In the framework of the ordinary procedure, the Government of any Member State, the EP or the Commission may submit to the Council their proposals to amend the treaties which, if adopted by the Council, are then submitted to the European Council whereas the national parliaments are notified. The European Council, having consulted the EP and the Commission, approves the proposals by means of a simple majority, while the President of the European Council convenes a convention consisting of representatives of the national parliaments, the heads of states or governments of the Member States, of the European Parliament and of the Commission. The convention examines the proposals for changes and adopts, by consensus, a recommendation for the conference of the representatives of the governments of the Member States. The European Council may take a decision, by means of a simple majority, provided it obtains the EP's consent, not to convene such a convention if the extent of the proposed amendmends does not justify its convening. Otherwise, it defines the terms of reference for the conference. The proposed amendments come then into force following their ratification by all of the Member States, in accordance with their respective constitutional procedures (art. 48 p. 2–5 TEU).

The simplified procedure of revision refers only to internal policies and activities of the Union that are defined in the third part of TFEU. According to this procedure, the aforementioned actors submit the proposals to the European Council; the Council acting in unison after consulting the European Parliament and the Commission, may take a decision changing all or some of the contents of the third part of TFEU. Such a decision comes into force only after it has been approved of by the Member States (art. 48 p. 6–7 TUE).

In case of institutional amendments in the area of finance, in both procedures the European Central Bank is consulted as well.

The above indicated procedures of decision-making in the framework of the EU include an increased number of participating subjects and modify the principle of a qualified majority.

Apart from the Commission that has enjoyed this right already previously (art. 289 p. 1 TFEU), the right to the legislative initiative has also been granted to other actors. As defined in art. 289 p. 4 TFEU, „In the specific cases provided for by the Treaties, legislative acts may be adopted on the initiative of a group of Member States or the European

Parliament, on a recommendation of the European Central Bank or at the request of the Court of Justice or the European Investment Bank", and in some cases also basing on a proposal by the High Representative of the Union for the Foreign Affairs and Security Policy.

Among the subjects that may take binding decisions, the treaties have recognised the European Council that participates in selected decision-making areas (e.g. art. 7 p. 2, art. 48 TEU), even though these do not have a legislative character.

The principles of a qualified majority are to be changed as well; as stated in art. 16 p. 3 TEU, unless otherwise specified by the Treaties, the Council acts by a qualified majority. After the adoption of the principle of a qualified majority by the Treaty of Nice, its modification was envisaged from 1 November of 2014 as specifying that the qualified majority would not be constituted by weighted votes but by the number of states representing at least 65% of the EU population while the blocking minority would be constituted by at least four members of the Council (art. 16 p. 4 TEU). The detailed rules of voting as from November of 2014, as constituting an exception to art. 16 TEU, were defined in art. 238 TFEU. Three such situations were foreseen:

1) where the Council does not act on a proposal by the Commission or from the High Representative for the Foreign and Security Policy, the qualified majority will be defined by at least 72% of the members of the Council representing the participating Member States comprising at least 65% of the population of these States (art. 238 ust. 2 TFUE),

2) where not all of the Council's members take part in the voting, the qualified majority is constituted by at least 55% of the members of the Council representing the participating Member States, comprising at least 65% of the population of these States (art. 238 p. 3 a TFUE),

3) by way of derogation from point (a) para. 3 art. 238 TFUE, where the Council does not act on a proposal by the Commission or from the High Representative for the Foreign and Security Policy, the qualified majority shall be defined as at least 72% of the members of the Council representing the participating Member States comprising at least 65% of the population of these States (art. 238 p. 3 b TFUE).

In art. 238 p. 3 a TFUE, the blocking minority was defined more precisely, stating that it consists of „at least the minimum number of Council members representing more than 35% of the population of the participating Member States plus one member, failing which the qualified majority shall be deemed attained". In the new formula, art. 238

p. 4 TFUE defines the principle of unanimity, indicating that abstaining from voting „does not prevent the adoption by the Council of acts which require unanimity". In addition, in Protocol on transitional provisions, a possibility to revert to the Nice system was envisaged, meaning also the system of weighted votes, while Declaration no. 7 envisages a possibility to deploy in an adequate manner the Ioannina system that entails a joint action by the states that do not agree with taking a given decision by means of 3/4, involving one of the elements of the blocking minority, that is 34% of the number of states or 26% of the demographic potential (Barcz 2008: 66).

The analysed legislative procedures – before the Lisbon Treaty came into force and after it came into force – indicate a tendency towards their simplification. At the same time, mechanisms have been created that allow for securing interests of smaller states owing to the recognition of the Ioannina mechanism. This evidences the continued state of the hybrid nature of the EU within which the decision-making mechanisms take into account the diversity of state interests alongside the necessity to maintain cohesion of the EU. Also, the role of the European Parliament has been increased, while the Commission has lost its monopoly of the legislative initiative which has been extended to other subjects. In the present discussion, I have omitted the specificity of decisions in the framework of the common foreign affairs and security policy that has been evident both before and after the Lisbon Treaty came into force.

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