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Contribution of the European Parliament to multilevel governance: Building on a potential for a fuller legislative initiative for the European Parliament

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Contribution of the European Parliament to multilevel governance

Building on a potential for a fuller right of legislative initiative for the European Parliament

STUDY

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Contribution of the European Parliament to multilevel governance

Building on a potential for a fuller right of legislative initiative for the European Parliament

Peter Vavrík

This analysis was prepared in the framework of the EU Fellowship Programme and presents the results of research on the full right of legislative initiative of the European Parliament in the light of the US Congress experience. It is based on data gathered for the purposes of the research from national parliaments of 26 EU Member States, analysis of 59 replies by the European Commission to the European Parliament's legislative initiative reports, and a case study on three complex US laws, carried out on the basis of 15 interviews with Congressional staff.

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ABSTRACT

This study aims to examine the role of the European Parliament (EP) in European Union (EU) legislative agenda-setting by means of its full right of legislative initiative. As well as considering the evolution of the EP's powers to initiate legislation, it outlines the current situation, where Parliament's possibilities to trigger the legislative process are limited. Even though EU decision-making has its own specificities, the study attempts to explain how the EU could benefit from the EP's full right of legislative initiative. By examining constitutional traditions common to all EU Member States, available data on legislative procedures applicable in the Congress of the United States and selected acts adopted recently by the Congress, the study attempts to formulate how the EP's full right of legislative initiative could work in practice and to touch upon obstacles that this new right would bring in the context of EU decision-making.

In the second part, the study focuses on the EP's role in the negotiation of international free trade agreements to which the EU is a party. By analysing EU negotiating positions for the Transatlantic Trade and Investment Partnership (TTIP), the study suggests that the time has come to redesign the EU mechanism for the adoption of negotiating directives, by fully involving the EP in the process in order to ensure that the EU speaks with one voice.

TABLE OF CONTENTS

1. Introduction 3
2. Problem definition 3
3. Chapter I: EP full right of legislative initiative 5
3.1. Some theory to start with 5
3.1.1. Democratic deficit 5
3.1.2. Legitimating beliefs 5
3.2. A brief history of EP legislative powers 6
3.2.1. The Paris Treaty 6
3.2.2. The budgetary Treaties (1970) 7
3.2.3. Single European Act 7
3.2.4. Treaty of Maastricht 7
3.3. History of the EP right of legislative initiative 8
3.4. Where do we stand now? 9
3.4.1. Citizens' initiative 9
3.4.2. National parliaments 10
3.4.3. European Parliament's initiative 10
3.4.4. Right to amend 12
3.5. Agenda setting 13
3.6. Do we need to change the status quo as regards the legislative initiative? 14
3.7. What do MEPs think about it? 15
3.8. Where can we look for inspiration? 16
3.9. Who has the right of legislative initiative in the EU Member States? 16
3.10. How does the right of legislative initiative work in the US Congress? 17
3.10.1. Legislative initiative is a position taking tool 19
3.10.2. Length 19
3.10.3. Co-sponsorship 20
3.10.4. Is it the member of Congress or rather the member's office who drafts a bill and has the necessary expertise? 20
3.10.5. Role of Congressional committees 21
3.10.6. S.1177: Every Student Succeeds Act (ESSA) 21
3.10.7. H.R. 22: Fixing America's Surface Transportation Act or the FAST Act 23
3.10.8. H.R. 2146: Bi-partisan Congressional Trade Priorities and Accountability Act of 2015 (TPA) 24
3.11. Summary of legislative initiative applied in US Congress 24
4. Conclusions on the right of the legislative initiative 25
4.1. How can the EU benefit from the EP's full right of legislative initiative? 26

4.1.1. EP - promoter of new (reformed) policies 26

4.1.2. EP – link with citizens 26

4.1.3. EP – open arena for discussing policies (not just ideas)... 27

4.1.4. EP – its influence at international level through legislation 28

4.2. Challenges of EP full right of legislative initiative... 29

4.2.1. Erosion of legislative initiative 29

4.2.2. EP internal procedures – 'winner takes it all'? 29

4.2.3. Role of the other legislative branch – Council (Member States) 30

4.2.4. EU institutional triangle... 30

4.2.5. Transparency and ethics 31

4.2.6. EP and Council capacities 31

5. Chapter II: Role of the European Parliament in negotiations on agreements between the Union and third countries – scope for improvement in the next treaty change?.... 32

5.1. A bit of necessary history 32

5.2. Why is the post-Lisbon arrangement not sufficient?... 33

5.3. The EU needs to speak with one voice... 34

5.4. Two 'mandates' for TTIP, a problem?.. 35

5.4.1. Quantitative analysis of the 2 texts.. 35

5.4.2. Qualitative analysis of the 2 texts 37

5.4.3. What does the Commission say about the texts?... 39

5.5. Role of the US Congress in negotiations of international trade agreements 41

5.5.1. A very brief history 41

5.5.2. Trade Promotion Authority... 42

5.5.3. Mock markups and side agreements, side letters 44

5.5.4. Is Congress satisfied with TPA? 45

6. Conclusion on the EP role in negotiations of trade agreements............................... 46

7. Annexes 50

7.1. Annex I: list of legislative initiative reports adopted by European Parliament.... 50

7.2. Annex II: Holders of legislative initiatives in the EU Member States and corresponding statistics.. 56

7.3. Annex III: Extract from TFEU relevant for the common commercial policy......... 61

7.4. Bibliography.. 64

1. Introduction

The EU continues to be an attractive project. Whether you are a fan of 'more Europe', or you belong to those who are less enthusiastic about the EU's constant 'grab' of more powers, or you are somewhere in between, it is clear that certain key EU features, such as security and peace, and respect for human rights and freedom, are attractive to many – be it states in the EU's vicinity, or just ordinary individuals who are coming to the EU as legal or illegal immigrants, or who seek international protection given the situation in regions which are facing major conflicts.

It is evident that the EU has its own problems and that there is room for reform or innovation as regards its policies and institutions. The challenges, such as the influx of refugees, terrorism, climate change, the financial crisis or matters resulting from the 2016 UK referendum, appear in the headlines on a daily basis. Opinions as to how those problems should be tackled are very diverse. It is, however, important that a well working institutional framework provides a platform for discussing responses to the issues and is subject to democratic scrutiny. Some suggest that the EU institutions are engaged in a system of governance that defies easy categorization. 'The Commission has executive responsibilities but is not analogous to a national government. The European Council plays a key governing role […] but is not the EU's government. The EP's legislative responsibilities resemble those of a national parliament, though the EP is not allowed to initiate legislation…'.

Although the EU is an international organization with a very high degree of integration, it is not a state. It nevertheless contains features of a (federal) state, such as (exclusive or shared) competences and its own legal system, which is binding on a defined territory and is overseen by a set of supranational institutions, the decisions of which are binding on and enforceable in the Member States. Despite all the specificities recognisable in the EU, the constitutional set-up was inspired by the features of national institutions. It is therefore natural that a comparison between national and EU mechanisms is made.

2. Problem definition

A modern parliament in a democratic society fulfils three basic functions, namely: (i) to adopt legislation; (ii) to appropriate the money necessary for the operation of a state and (iii) to exercise oversight over the other institutions, in particular the government; to monitor the proper use of the budget and to ensure that policies are implemented to achieve the objectives set.

Without trying to rank those roles, the focus of this paper is to look more closely at the legislative functions of a democratic parliament, in particular the process of initiating a legislative process, or in other words the right of legislative initiative, which is to be understood as the right to submit draft laws to the legislator with a view to their adoption by a parliament. According to parliamentary law, this right covers both the right to introduce a legislative proposal and the right to amend it by other holders of that right.

The separation of powers combined with the system of checks and balances is an essential part of the constitutional order of every democratic society. Montesquieu, in his famous *The Spirit of the Laws (1748)*, described the separation of political power among a legislature, an executive, and a judiciary. His approach was to present and

defend a form of government which did not excessively centralize all its powers in a single monarch or similar ruler.

While the basic idea of separation of powers is key to a democratic form of government, no democratic system exists with an absolute separation of powers. Governmental powers and responsibilities overlap and are too complex and inter-related to be neatly separated. As a result, there is an inherent measure of competition and conflict, but also cooperation, among the branches of power.[1] Concerning the right of legislative initiative, there are two basic models: one where a complete separation of powers applies and results in introducing all legislative proposals (or bills) exclusively by the members of a legislative body. This model is represented by the US where all bills and resolutions are introduced by Members of Congress. The second model is found in countries in which the right to initiate the legislative process is shared among members of parliament and an executive power, represented by the majority of parliaments of the EU Member States, as explained later.

The constitutional architecture of the EU is markedly different from a national political system, even if the EP's legislative powers may be said to resemble those of national parliaments. Still, although the EP belongs to the biggest directly elected parliaments in the world, it doesn't have the full right of legislative initiative. Is this fact a real problem that would need to be addressed in future modifications of the relevant Treaty provisions or it is a 'non-problem', the assessment of which is a purely academic concern? Would the EP full right of legislative initiative bring anything positive to the EU? If so, how would it work in practice, in particular given the need to take into account the common good of the whole EU as ensured by the European Commission (Commission) when exercising its monopoly to introduce a bill? How would the EU legislative process run, if 751 EP Members (MEPs) only used this right with restraint and tabled 2-3 legislative proposals every year? Is there anything we can learn from the Congress? Or is agenda setting in broad terms the only domain to be developed, while leaving to the Commission the 'technical' right to introduce a concrete bill? As well as replying to these questions, this paper will go even further and aims to assess what role the EP should/could play in the field of setting negotiation directives for international trade law negotiations. The reason for this special focus is to assess what the EP's contribution could be to multilevel governance.

[1] National Conference of State Legislatures, Separation of Powers -- An Overview.

3. Chapter I: EP full right of legislative initiative

3.1. Some theory to start with

3.1.1. Democratic deficit

There are a number of publications which cover the general development and gradual increase of EP powers throughout history.[2] There are nevertheless not that many sources that would give an answer to the question as to why the EU is the only international organisation that contains a powerful representative institution (EP), and why the EP has been successively empowered by the EU Member States. Many scholars and politicians have over the years referred to a democratic deficit as the main reason for empowering the EP. But as B. Rittberger explains in his article,[3] the situation is more complex. As he describes, when political elites delegate sovereignty to agents such as the Commission, they opt for institutions which best serve their interests, and delegate powers to agents only if the expected benefits of delegation exceed the expected costs.[4] Powers can be then delegated to majoritarian institutions (parliaments) which derive their legitimacy from accountability to voters (procedural legitimacy) and to non-majoritarian institutions (Commission) (consequentialist or output oriented legitimacy). Procedural and output oriented legitimacy need to be balanced.

As the EU competencies have grown, the EU started exercising functions that traditionally belonged to the Member States. Consequently, to keep those legitimacies balanced, EP powers needed to be reinforced to ensure that the increased efficiency and output of non-majoritarian institutions is balanced with procedural legitimacy to keep non-majoritarian institutions accountable to the majoritarian ones.

3.1.2. Legitimating beliefs

Rittberger continues by differentiating 3 legitimating beliefs:

1. Source of legitimacy of a *federal state legitimating belief* is based on popular sovereignty at state and federal (union) level. The delegation of powers in favour of the federal level creates an accountability gap that needs to be addressed by empowering a federal (union) parliament.[5]

2. *The intergovernmental cooperation legitimating* belief is based on national sovereignty. The accountability gap caused by the delegation of powers to an international entity needs to be addressed domestically, e.g. by increasing the scrutiny powers of national parliaments.[6]

3. *The economic community legitimating belief* bases the legitimacy of a supranational policy on economic efficiency. As long as the efficiency is not hampered, there is no problem to proceed with the empowerment of majoritarian and non-majoritarian institutions.[7]

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[2] A very good publication which covers a number of sources is 'Fifty Years On: research on the European Parliament', Hix, Raunio, Scully, JCMS 2003, Vol 41, pp. 191-202.

[3] B. Rittberger, The Creation and Empowerment of the European Parliament, JCMS 2003, Vol 41, pp. 203-225.

[4] This is described as functional approach to institutional choice, see p. 204.

[5] This theory explains why 'EU federalists' call for 'more Europe'.

[6] This theory explains some of the demands made by the then UK Prime Minister, Mr. Cameron, presented in his speech of 10 November 2015.

[7] These theories are further explained in Rittberger (2003) on pp 209 and 210.

These theories are very useful when analysing historical development of EP powers, in particular those in the field of legislation.

3.2. A brief history of EP legislative powers

3.2.1. The Paris Treaty[8]

The history of the EU institutions is well covered by a number of books and articles.[9] This part will therefore focus on what relates directly to EP legislative powers.

Although there is no direct reference to any parliamentary dimension in the Schuman Declaration of 9 May 1950, it became apparent shortly after the negotiations on the coal and steel community started, that some mechanism whereby the High Authority (Commission) would be answerable to a parliamentary assembly had to be put in place.[10] From the archive documents it is evident that the creation of a parliamentary assembly was motivated by separation of powers.[11] It is nevertheless interesting that creation of a parliamentary assembly was not considered 'optimal' according to the report of the French delegation from summer 1950.[12]

It is of course evident that institutional matters played a role during the negotiations of the Paris Treaty; from the outcome it is clear though that the economic community legitimating belief was considered the key and the main powers of the European Coal and Steal Community (ECSC) were vested to non-majoritarian institutions – the High Authority and the Court of Justice. “Given the Benelux Governments' focus on the potential socio-economic effects of the ECSC, the legitimacy deficit was perceived differently for France and Germany; it was evaluated with reference to potential implications for policy-making effectiveness and decision-making efficiency. The Common Assembly, if endowed with legislative powers, as proposed by Germany, might impede efficiency”.[13] In addition, the Benelux states obtained one post in the High Authority, while Germany, Italy and France obtained two each; they promoted the role of the Council of Ministers (Council), which was under a sort of direct control by national governments. 'The Benelux states accepted the Common Assembly on condition that it had no legislative powers and hence could not affect policies in a potentially unpredictable manner.'[14]

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[8] Signed on 18 April 1951, effective from 23 July 1952.

[9] E.g. j. McCormic, European Union Politics, Palgrave Macmillan, 2001.

[10] In his report to the French National Assembly of 25 July 1950, R Schuman mentioned: 'Aussi est-il nécessaire d'assurer la responsabilité effective de cette Autorité devant des représentants élus, de prévoir d'autre part des recours juridictionnels, notamment contre des excès ou contre des détournements de pouvoirs, et enfin d'établir une liaison organique entre la Haute Autorité et les gouvernements des pays participants, sans lui enlever cependant son indépendance.
En ce qui concerne le premier point, la responsabilité de la Haute Autorité, il est prévu une Assemblée commune, émanation directe des parlements nationaux représentant la volonté populaire.'

[11] Compare against the speech of J. Monnet of 11 September 1952 at the opening address to the Assembly concerning the High Authority's programmes, p. 58 of publication.

[12] Il a donc semblé normal d'instituer une Assemblée commune, formée de délégations des divers Parlements. C'est en l'état actuel des choses, la solution la moins imparfaite que l'on puisse trouver au problème de la responsabilité de la Haute Autorité.

[13] Rittberger, p. 213.

[14] Idem.

3.2.2. The budgetary Treaties (1970)[15]

The Rome Treaties brought only cosmetic changes, the Common Assembly of ECSC was renamed the European Parliamentary Assembly (ECSC, Euratom, EEC) in 1958 and became the European Parliament in 1962. The Budgetary Treaty of 1970 gave the EP the last word on what was (until the Lisbon Treaty known as) "non-compulsory expenditure". This was directly linked to the fact that all agricultural customs duties were paid directly to the Communities as of 1975. Consequently, national parliaments lost control over a considerable amount of money. Although France was advocating the intergovernmental legitimating belief, the remaining 5 Member States were in favour of the federal state legitimating belief and consequently called for removing the imbalance between procedural and consequentialist legitimacy by empowering the EP.

3.2.3. Single European Act[16]

Even though the consultation procedure was in place since the Rome Treaty, it was the cooperation procedure, introduced by the Single European Act, which gave the EP limited possibility to influence agenda setting. Some say that the consultation procedure was the procedural basis for codecision and also a first step towards building trust and developing cooperation between the institutions.[17]

The assent procedure, which applied to e.g. the accession treaties, was inserted in EU primary law.

Qualified majority voting in Council became the rule for all internal market legislative proposals. Consequently, the possibility of national parliaments to hold their executive to account under qualified majority voting was diminishing. It was therefore decided that if the EP adopted amendments to or rejected a Council common position, unanimity would be required in Council to adopt a legislative act under the cooperation procedure.

It is also interesting to add that perceptions by some Member States as to what should be the EP role in legislative process were contradictory. The Danish Parliament initially rejected the treaty change on the grounds that it gave too much power to the EP. This opposition had to be overcome by a referendum that approved the modifications of the Treaties. On the other hand, the Italian and Greek parliaments hesitated to approve the modifications on the ground that the European Parliament's powers were insufficient.

3.2.4. Treaty of Maastricht[18]

The following treaty change introduced the codecision procedure that was gradually expanded to almost all policy areas and became the ordinary legislative procedure under the Lisbon Treaty.[19] Although there is a lot to be said about codecision, it is not the main focus of this paper. The gradual application of codecision to the legislative areas in which Council decided by qualified majority resulted in placing the EP on an equal footing with Council.

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[15] Signed on 22 April 1970, effective from 1 January 1971.

[16] Signed on 17 February 1986, entered into force on 1 July 1987.

[17] 20 Years of Codecision, Conference Report, Conciliations and Codecision Secretariat, European Parliament, 5 November 2013.

[18] Signed on 7 February 1992, entered into force on 1 November 1993.

[19] Signed on 13 December 2007, entered into force on 1 December 2009.

3.3. History of the EP right of legislative initiative

Reading the title, some might think that this chapter will be very brief, given that the EP has, strictly speaking, limited possibilities to trigger the legislative process with the legal consequences which that entails.

As described above, the EP acquired the right to amend (a part of the budget) with the 1970 budgetary treaty. It had the power to propose amendments in the framework of the consultation procedure since 1958. There was no obligation for the Council to accept such amendments. With the budget it was different as the EP had the last say (by means of its amendments) on non-compulsory expenditure.

In preparation for the intergovernmental conference that preceded the Maastricht Treaty, the EP adopted its position as regards the upcoming Treaty changes. The Treaty amendments contained in the resolution of 22 November 1990 went quite far as regards the right to introduce a proposal.[20] The Commission's power of initiative was maintained. However, the EP proposed that it could ask the Commission by a majority of its Members to submit a legislative proposal. If the Commission refused to do so, the EP would continue directly with the first reading.

The result is well known: the Maastricht Treaty did not change the Commission's monopoly to introduce a legislative draft proposal. The EP nevertheless obtained a right to request the Commission to submit any appropriate proposal on matters on which it considered that a Community act is required for the purpose of implementing the Treaty.[21] Plus, one cannot forget the codecision procedure[22] which was introduced by the Maastricht Treaty and by which the EP acquired the right to influence a number of policy areas.

There was another change which had an impact on the EP views on its right of legislative initiative. With the Maastricht Treaty, a 3-pillar structure was introduced and remained in place until the Lisbon Treaty. In addition to the first Community pillar, there were two other intergovernmental pillars created - common foreign and security policy and justice and home affairs. By their very nature, it was the Member states that had a formal right of initiative in those areas.

The codecision procedure and the logical right of Member States to propose legislation under the second and third pillar were decisive in developing the EP's priorities for the upcoming decade, as regards the right of legislative initiative.

From its resolution of 13 March 1996 on the convening of the Intergovernmental Conference[23] it is clear that the EP priority was not its full right of legislative initiative but rather the extension of codecision.[24] As regards the legislative initiative, the EP expressly stated that the right of initiative of the Commission should be maintained[25] and should

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20 See amendments on Article 188a (new), OJ C 324, 24.12.90, pp. 232 -233.

21 Article 138b.

22 Article 189b.

23 OJ C 96, 1.4.96, p 77.

24 Point 21.6.

25 Point 21.4.

also apply to justice and home affairs.[26] In a way, the EP was fighting so that the right of legislative initiative would be centralised in the Commission in all cases.

A similar approach was also evident from the EP resolution of 18 November 1999 in which the EP expressed 'its opposition to any attempts to challenge at the IGC the Commission's monopoly of the right of initiative under the first pillar'.[27]

The next attempt to introduce a right for the EP to make legislative proposals came with the unsuccessful Constitutional Treaty that among other important issues, dealt with the involvement of national parliaments in EU decision making. According to available documents[28] it seems that some Convention members were in favour of extending the Commission's right of legislative initiative to the European Parliament.[29] However, the EP's official position was very clear. The EP resolution of 16 May 2002[30] in its para 12:

“Considers that legislation - Community 'law' – must be adopted on the sole initiative of the Commission by the two branches of the legislative authority, the Council and Parliament, which are responsible for political choices…”

And, in para 34: 'Takes the view that the exercise by the Union of its competences, whether exclusive, shared, additional or coordinating competences, must no longer be thwarted by paralyzing (no power of initiative, unanimous decision making, ratification by the Member States)'

We know what the result was. The Constitutional Treaty was rejected by the referenda in France and the Netherlands and the upcoming intergovernmental conference leading to the conclusion of the Lisbon Treaty was limited in scope. Although there was an attempt to include the right of legislative initiative in the EP resolution of 11 July 2007 on the convening of the Intergovernmental Conference (IGC), amendment 16[31] was rejected and the final text doesn't contain any reference to this matter.

3.4. Where do we stand now?

The Lisbon Treaty brought a number of innovations which can influence the EU legislative process at its early stages. Although none of them has changed in substance of the Commission's monopoly they aim at bringing the decision making closer to citizens, involving more national parliaments and ultimately also the European Parliament.

3.4.1. Citizens' initiative

On the basis of Article 24 of the Treaty on Functioning the European Union (TFEU) the European parliament and Council adopted a Regulation on the citizens' initiative.[32] In line with that Regulation at least one million EU citizens, coming from at least 7 out of the 28 Member States, can invite the European Commission to propose legislation on matters

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[26] Point 5.2

[27] OJ C 189, 7.7.2000, p. 222, para. 26.

[28] The European Convention, Note on the plenary meeting - Brussels, 23 and 24 May 2002, Point 20.

[29] The European Parliament and the Proceedings of the European Convention, A Study of the proceedings of the European Convention accompanied by archive documents, 2007.

[30] OJ C 180E, 31.7.2003, p. 493.

[31] Amendment 16 was tabled by F. Speroni, on behalf of the UEN Group and read: '19a. Hopes that the IGC may provide an opportunity, in the light of the anticipated modification of the Treaties, to give the European Parliament the right of legislative initiative;' It was rejected by a simple vote (show of hands). Not even a roll call vote was requested.

[32] OJ L 65, 11.3.2011, p. 1.

where the EU has competence to legislate. As shown on the website dedicated to the Citizens initiative[33], this innovation has attracted people's attention and already triggered discussion in a number of sensitive areas, such as 'Water is a public good, not a commodity' or 'One of us'.

3.4.2. National parliaments

'The Treaty of Lisbon set out for the first time the role of national parliaments within the European Union. National parliaments can, for instance, scrutinise draft EU laws to see if they respect the principle of subsidiarity, participate in the revision of EU treaties, or take part in the evaluation of EU policies on freedom, security and justice.'[34] In practice, within eight weeks any national parliament may submit a reasoned opinion arguing why it considers that a legislative proposal does not comply with the principle of subsidiarity.[35] The 2014 Annual Report on relations between the European Commission and national Parliaments suggests that national parliaments do use this possibility. Of 509 contributions, there were 21 reasoned opinions that questioned the principle of subsidiarity.[36] 2013 was more interesting as there were 88 reasoned opinions submitted and in one case (on the proposal for a Council regulation on the establishment of the European Public Prosecutor's Office) the number of reasoned opinions submitted reached the threshold that activates the yellow card procedure. Although this mechanism is important for relations between the EU and the Member States and the role of national parliaments in the EU decision making, their involvement is not decisive from the point of legislative initiative. It is nevertheless interesting to follow the debates linked the reinforced role of national parliaments, which was one of the key points made by the former UK Prime Minister Cameron.

3.4.3. European Parliament's initiative

The Treaty of Lisbon maintained the Commission's monopoly whilst nevertheless reinforcing the role of the European parliament. Its right to request the Commission to submit a proposal, which was already introduced by the Maastricht Treaty, was developed further in Article 225 TFEU which reads:

> *'The European Parliament may, acting by a majority of its component Members, request the Commission to submit any appropriate proposal on matters on which it considers that a Union act is required for the purpose of implementing the Treaties. If the Commission does not submit a proposal, it shall inform the European Parliament of the reasons.'*

As compared to the Maastricht treaty, the novelty of the above provision is that the Commission is obliged to justify when it doesn't follow the EP request, described by some as an 'indirect initiative right'.[37]

Looking at the list of legislative initiative reports which are based on Article 225 TFEU (or its 'predecessors') the EP has used this option in 59 cases.[38] In eight instances the procedure is either pending or just finished; there is therefore no yet follow up by the Commission. The remaining 51 occasions on which the EP made concrete

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33 http://ec.europa.eu/citizens-initiative/public/basic-facts

34 http://www.europarl.europa.eu/aboutparliament/en/20150201PVL00007/National-parliaments

35 http://www.eipa.eu/files/repository/eipascope/20090709111616_Art3_Eipascoop2009_01.pdf

36 Annual Report 2014 on relations between the European Commission and national Parliaments, COM(2015) 316, (http://eur-lex.europa.eu/resource.html?uri=cellar:967e4243-20be-11e5-a342-01aa75ed71a1.0023.02/DOC_2&format=PDF).

37 Parliament's legislative initiative, Library Briefing, 24.10.2013.

38 Situation at the end of 2016. See Annex I.

recommendations were treated by the Commission in a very similar way: the Commission looked at the EP's suggestions and listed all the ongoing or planned initiatives focusing on the points raised by the EP. One cannot conclude that the Commission would disrespect the EP or would not justify its reasoning. Nevertheless, as showed in Annex I, of the 51 legislative initiative reports, the Commission admitted only in three cases that the EP's recommendations might actually lead to a new legislative proposal. In the remaining 48 cases, the Commission concluded by saying that the relevant legislative proposal was under way, or would be under way upon completion of preparatory work, such as an impact assessment, or that there was no need to address the issue by means of legislative instruments. There was also the following remark:

“Whilst the [EP] report sets out an interesting attempt to tackle what is a difficult subject and to propose a general European solution … study would have to explore the implications”[39] [of EP recommendations]. The Commission continued by saying that its resources were now focused on other matters and had therefore no time to carry out the study right now.

In general, although the language of the reasonably detailed Commission's answers to EP recommendations is respectful, it makes it nevertheless clear that it is up to the Commission to ultimately decide whether and how the EP's recommendations are followed and that the Commission's right of initiative needs to be respected.[40]

Five years after the Lisbon Treaty entered into force, one can conclude, that modification of the provision corresponding to Article 225 TFEU didn't change institutional cooperation much as regards the legislative initiative and that the Commission considers EP recommendations as one of many sources of ideas for EU legislative activities. In a way, as regards the effects produced by the EP resolutions adopted pursuant Article 225 TFEU, they don't differ much from the usual own-initiative reports containing all sorts of input for the upcoming legislative work by the Commission.

Plus, these recommendations are adopted by the EP as a body implying that the right of legislative initiative of individual EP Members is lagging even more as they are not mentioned in any of the Treaties in relation to initiating legislation. To be 'fair' with the Treaties provisions, there are references to the EP as the 'legal' initiator of decision-making procedures, namely in these cases:

- Article 7 TEU - serious breach by a Member State of the EU's values
- Article 14 TEU - decision establishing the composition of the EP
- Article 48(2) TEU - proposal for the amendment of the Treaties
- Article 223(1) TFEU - provisions necessary for the election of EP Members
- Article 223(2) TFEU - conditions governing the performance of the duties of its Members
- Article 223(2) TFEU - political parties at European level
- Article 228(4) TFEU - Ombudsman's duties

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[39] See Commission's reply to EP resolution on the limitation periods in cross-border disputes involving injuries and fatal accidents (2006/2014(INL)).

[40] See Commission's reply to EP resolution on Heating and cooling from renewable energy sources, (2005/2122(INL)).

- Article 231 TFEU - EP Rules of Procedure

Although the list contains references to 'heavy' procedures, such as Article 7 TEU or treaty changes, a number of instances in which the EP applies its 'real' legislative initiative is limited to its internal business and is thus logical that such areas are initiated by the institution directly concerned. The same patterns apply (e.g.) to the rules of procedure of the Court of Justice of the European Union.

To finish the chapter on the EP initiative, according to Article 225 TFEU, the EP Rules of procedure lay down that “any Member may table a proposal for a Union act on the basis of the right of initiative granted to Parliament under Article 225”.[41] Despite this option, it is mostly political groups or parliamentary committees who initiate the Article 225 process, rather than the individual Members who rarely trigger the procedure.

3.4.4. Right to amend

The report on legislative initiative by the Venice Commission[42] considers both the right to introduce a legislative proposal and the right to propose amendments as two basic components of the right of legislative initiative. While the former is rather limited as regards the EP, the latter is very much developed.

Historically, the EP's role in the legislative process was to present its position to the Commission's proposal or Council position through amendments. Depending on the type of procedure, the adopted amendments had different consequences. Amendments adopted in the framework of consultation and cooperation procedures were not binding on Council. The situation changed with codecision which requires that both legislative branches agree on the text. That naturally leads to compromises or, in rare cases, in failure to agree and finish the legislative process without adopting a piece of legislation.

The Lisbon Treaty marked a shift from adopting amendments towards adopting Parliament's position. Article 294 (3 and 4) TFEU expressly refers to a 'position at first reading' as the document which the EP adopts. Also 'If the Council approves the EP's position, the act concerned shall be adopted in the wording which corresponds to the position of the European Parliament.' This may sound like a cosmetic linguistic adaptation. It nevertheless means that the EP no longer amends but takes its own position which is presented in a consolidated form rather than a set of individual amendments. By doing so it presents its view on the whole legislative proposal rather than simply on bits and pieces. This practice has already been applied by the Council for a long time as the Council takes a legislative proposal, 'processes it' and produces an amended bill.

Unlike the right to recommend that the Commission in line with Article 225 TFEU presents a legislative proposal, the right to amend is widely used by EP Members acting either individually or with other Members or by means of political groups or parliamentary committees. According to statistics covering the 7th parliamentary term (2009-2014), in total 44 472[43] amendments were tabled at plenary stage, of which nearly half were adopted and the other half rejected. To interpret the figures carefully, they correspond to the amendments tabled and voted at plenary stage when the right to table amendments is limited to political groups and 40+ Members, in some cases to committees. And, the above figure covers both legislative and non-legislative

[41] Rule 46(2).

[42] Adopted at its 77the Plenary Session, 12-13 December 2008.

[43] 'Number of session amendments tabled' - document available on the EP web page.

documents. The part falling under legislation would approximately be half of those numbers.

To get a precise idea about the number of amendments tabled at committee stage, in principle by individual Members, the plenary figures would have to be significantly multiplied, e.g., in 2012, two years after a new tool facilitating the creation and handling of amendments was launched, 100 000 amendments were tabled via that tool, again this figure covers both legislative and non-legislative texts. That suggests that there were several hundred amendments tabled at different stages and by different actors in the 7th parliamentary term which proves that the 'amendment' culture is very advanced and widely used by Members in order to adopt their position on the points of their (constituency) interests.

3.5. Agenda setting

Public policy making is a complex process which can be divided into 4 stages: 1. setting of the agenda, 2. specification of alternatives from which a choice is made, 3. an authoritative choice among the specified alternatives in a legislative vote or a presidential decision and 4. implementation of the decision.[44]

As shown above, the EP is extensively involved in stage 3. Although its possibilities to directly initiate legislation are limited, it uses relevant platforms to get involved in stage 1 and influence the agenda setting process which narrows the set of conceivable subjects to the set that actually becomes the focus of attention.

Then-President Schulz in a number of speeches criticised 'summitisation', by which one EU institution dominates agenda setting and attempts to exclude EP from the decision-making process or to put it in a position of a 'yes man'.[45] The EP Secretary General Welle often refers to the 'unused potential of the Lisbon Treaty' when he outlines ideas about the role the EP should play in the legislative cycle. As Welle mentioned on a number of occasions it is important 'who is setting the agenda? As you know, if somebody else is setting the agenda then 80% of the decision is made by this somebody else'.[46] Rather than waiting for future changes of the Treaties which might or might not address setting the agenda, the EP uses the means available to have an impact on Commission's priorities developed into legislative initiatives.

What are the EP's possibilities to set the agenda? A reference was made to legislative initiative reports which would be one possibility, not the most decisive one though.

Article 17 TEU is another option. Its last sentence provides that the [Commission] 'shall initiate the Union's annual and multiannual programming with a view to achieving interinstitutional agreements.' Details of this provision are developed in the latest Interinstitutional Agreement on Better Law-Making which was adopted by EP on 9 March 2016.[47] The Agreement foresees joint conclusions signed by the EP, Council and Commission on multiannual programming priorities (Point 5) and engagement of the 3 institutions in a dialogue before and after the adoption of the Commission annual Work Programme (points 6-11) resulting in a joint declaration (EP, Council and Commission) on

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[44] John W. Kingdom, Agendas, Alternatives, and Public Policies, Longman, p. 3.

[45] Speech by EP President Martin Schulz to the Members of the European Commission, 26.4.2012.

[46] The European Union and Democracy, Klaus Welle at the Krieger School of Arts and Sciences, Johns Hopkins University, Washington, 25 August 2015.

[47] OJ L 123 of 12 May 2016, p. 1.

annual interinstitutional programing. The agreement also stipulates that the 'Commission will give prompt and detailed consideration to requests for proposals for Union acts made by the European Parliament or the Council pursuant to Article 225 or Article 241 of the Treaty on the Functioning of the European Union respectively.' (Point 10). It remains nevertheless to be seen whether the Agreement will change anything as regards the readiness of the Commission to develop EP ideas contained in its legislative reports more extensively, how much effort will be needed to reach an agreement on the multiannual or annual programing and, more importantly, to what extend are the agreement followed in practice.

Another important feature of the above Agreement is the Commission's commitment "to respond to any issues raised by the co-legislators in relation to analyses concerning 'European added value' and concerning the 'cost of non-Europe'." (Point 10).

The Cost of non-Europe study[48] prepared by the European Parliament Research Service, contributed significantly to setting the agenda of the current Juncker Commission. As underlined by Welle, 'the cost of non-Europe means what we are missing because we don't have enough Europe.'[49] As he underlined, the Ten-Point Juncker Plan for Growth without debt contains a number of elements that appear 'in our cost of non-Europe exercise, especially the focus on digital Europe, the Single Market, the service sector, and the completion of the EMU'. Whether we accept calculations contained in the study, the exercise produced an important element in the ongoing discussion about e.g. 'ever closer Union', as it turns the discussion from defending the EU and its policies into a positive discussion focused on the gains if the EU develops further in the respective policy field. In this way, the EP and its services contributed significantly to the setting of overall principles by the current Commission who, using its prerogatives, is in the process of translating them into legislative initiatives.

3.6. Do we need to change the status quo as regards the legislative initiative?

There are surely a number of issues that are much more pressing than theoretical disputes as to whether the right of legislative initiative should be 'liberalised' by involving more actors to launch legislative proposals.

At the same time a number of actors, not necessarily belonging to the 'Eurosceptic' camp but also the general public and media refer to Brussels being too remote, dealing with technicalities and being detached from the everyday problems of EU citizens. It is not easy to respond to these vague statements, not necessarily based on scientific facts. One has to nevertheless think about what would be the ways to bring Brussels closer to citizens or engage citizens more in EU decision making. The citizens' initiative is one possibility. The other possibility is to allow EP members and/or political groups to use their natural ties with their constituents and reflect their wishes and concerns in a proposal for action. Today an MEP can ask the Commission a question as to what is or will happen in a sphere of Citizen's concern, an EP committee can organize a hearing devoted to a problem, the EP can ask the Commission to come up with a legislative proposal, can express its wishes in countless non-legislative reports, can table thousands of amendments to a legislative proposal, can use its institutional weight to influence

[48] The last version of the mapping dates back to April 2015.

[49] The EP as a Democratic Gatekeeper - Evolutions and Future Challenges, Klaus Welle, A talk with Master Students at the Catholic University of Leuven, 13 February 2015.

agenda setting, can use its services to draw up analysis outlining needs for action. The EP can set up special committees or committees of inquiry. Despite all that, there is still a very important element missing – the ability to directly define the agenda setting that would trigger the legislative process.

In this context it is very interesting to follow the recent EP resolution of 16 February 2017 on possible evolutions of and adjustments to the current institutional set-up of the European Union, which contains the following paragraph:

> *'62. Proposes, moreover, that in line with the common practice in a number of Member States, both chambers of the EU legislature, the Council and, in particular, the Parliament, as the only institution directly elected by citizens, should be given the right of legislative initiative, without prejudice to the basic legislative prerogative of the Commission;'*

It seems that the EP is, after 27 years, officially requesting the right of legislative initiative.

3.7. What do MEPs think about it?

Officially, the idea of a full legislative initiative by the EP is not on the agenda. As demonstrated, the last time the EP requested the right to launch a legislative process dates back to the IGC preceding the Maastricht treaty more than two decades ago. Since then the EP has focused on the interinstitutional balance leading to the conversion of codecision into the ordinary legislative procedure. It also stressed that the initiative should only be in the hands of the Commission, implying that the Council should not have that right in specific areas, which was the case prior to the Nice Treaty.

In the 2000 MEP Survey, nearly 80% of MEPs either strongly agreed or agreed that the EP should have the right to initiate legislation.[50]

Richard Corbett, British Member of the European Parliament, doesn't however consider the monopoly to initiate the legislative process as being decisive. As he mentions 'Even if the Commission has a monopoly on producing the first formal draft, it does not have a monopoly on ideas. Most Commission proposals are made in response to the desiderata of the European Council, the European Parliament, the ordinary Council of Ministers and individual Member States.'[51] More than the formal right to introduce a draft, he underlines the importance of the detailed legislative work by MEPs throughout the amendment process after the Commission draft has been published. 'In some national parliaments, when a government publishes a legislative proposal, it is usually clear what will come out of the procedure […]. Such is certainly not the case in EP. A draft directive [submitted by Commission] really is a draft – MEPs go through it paragraph by paragraph amending and rewriting it'.[52] R. Corbett also stresses that a good MP in a national context is someone who is a good debater. An effective MEP is somebody who is good at explaining, persuading and negotiating with colleagues from different countries.

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[50] Scully, Farrel, MEPs as Representatives: Individual and Institutional Roles, JCMS 2003, Volume 41, Number 2, p. 281.

[51] Initiation of EU Legislation, House of lords 2008, p. 139.

[52] Corbett, Jacobs, Shackleton, The European Parliament at Fifty: A View from the Inside, JCMS 2003, Volume 41, Number 2, p. 358.

3.8. Where can we look for inspiration?

One of the points discussed in the framework of the new settlement for the United Kingdom in the European Union[53] in 2015-2016 was the role of national parliaments and in particular a more effective possibility to block a legislative initiative in case it is not in line with the principles of subsidiarity and proportionality. While the whole reasoning behind this issue outlined by Mr Cameron in his speech of 10 November is much more complex than the initiation of legislation, rather than creating 'breaks' or additional 'checks and balances' in the current system, one might consider whether there are ways how some features of the current legislative process could be improved to ensure that decisions are taken as closely as possible to the citizens.

The EU is not the United States. One cannot nevertheless ignore the fact that the right of Members of US Congress to introduce a bill is fundamental to the task of representing voters.[54] Before going into details as regards the US legislative process a consideration of the legislative practices of the EU Member States has to be made.

3.9. Who has the right of legislative initiative in the EU Member States?

The concept of 'constitutional traditions common to the Member States' is already part of the TEU in its Article 6(3) in relation to EU fundamental rights. Suggesting that this 'legal base' could serve as a justification for legislative initiative becoming the right of MEPs would, of course, not be correct. At the same time, in case of proposing new procedures in the field of EU institutional mechanisms, the EU Member States often compare the EU to their own national procedures. Looking closer at the data contained in Annex II, Table 5, that cover 26 EU Member States[55] there are two things which are clear:

1. EU Member States are classical parliamentary democracies where government depends on and is supported by a majority in the respective national parliament. That implies that the government/executive is the place where policy (legislative) proposals originate as demonstrated by the 85 % success ratio of governmental proposals that became law.
2. Despite the fact that the EU government success ratio in proposed/adopted legislative proposals is very high, the government is not the sole holder of the legislative initiative. In every Member State there are other actors who have the right of legislative initiative - individual members of parliament, political groups, regions, citizens etc.

The overall numbers are clear; it is nevertheless worth looking at the details. It is very interesting to conclude that holders of the legislative initiative other than the government use their right despite the fact that the government is primarily responsible

[53] See European Council conclusions of 18-19 February 2016.

[54] M. Oleszek, Introducing a House Bill or Resolution, Congressional Research Service, August 6, 2015, R44001.

[55] The data cover recent legislative terms of respective national parliament and were collected thanks to a kind help of Lawyer Linguists from the EP Directorate for Legislative Acts. Even though the gathered data don't cover exactly the same reference periods, they show a clear trend as to who the holders of legislative initiative are in the EU Member States and what is their success ratio.

for drawing up policy proposals or their adaptations. 48.7 % of all legislative proposals were tabled by the holders of legislative initiative other than the government while 47.2 % of legislative initiatives originated in a government (Annex II, Table 5)[56]. The data also shows that one out of seven adopted laws didn't originate in the government.

Looking closer at the respective Member States or waves of enlargement it is possible to draw a number of conclusions. In the Benelux countries (Annex II, Table 1), a number of governmental proposals significantly prevail over those made by other actors. Although the government success ratio of the remaining EU founding Member States is still high, the numbers from Germany and in particular from France and Italy show that other players are very active in using the right of their legislative initiative. As the Benelux states' position in creating the EP predecessor prevailed, this might be one of the reasons why the EP wasn't equipped with the right of legislative initiative. This argument is surely very indicative as the exact numbers were surely different 65 years ago. It nevertheless provides indications as regards the constitutional traditions of the Member States and their preferences as regards the right of legislative initiative.

The data also show that in a number of Member States which joined the EU in 2004 (Annex II, Table 3), individual members of Parliament are active in introducing legislative proposals and also successful in having their proposals 'converted' into laws, e.g. In Hungary every 3rd law was proposed by a member of parliament. In Lithuania, on average, every second law originated on the side of a member of parliament.

There are many ways of interpreting the data collected. The facts enable us to conclude that:

- In every Member State a government is by far more successful in having its legislative proposals adopted into laws,
- In every Member State either an individual MP (or a prescribed number of MPs) have the right to introduce a legislative proposal and by doing so take a position on the respective topic,
- The extent to which MPs use that right and the degree of their success varies.

3.10. How does the right of legislative initiative work in the US Congress?

While both in the EU and the US ideas and recommendations for legislation come from a wide variety of sources the situation is different as regards the formal introduction of a proposal. As mentioned, save for specific cases, in the EU the Commission has a monopoly on presenting a legislative proposal. In the US, only a Member of the House or Senate may formally introduce legislation, though occasionally a member introduces legislation by request of the President.[57] By doing that a Senator or a Representative takes a position on a sphere of his/her interest. MEPs can take a position by means of amendments as far as legislation is concerned.

Although there are many similar features in both EU and US legislative decision making, there are also a number of differences. The legislative initiative is not the only one.

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[56] These statistics are not perfect as it is perfectly possible that the proposals tabled by 'non-governmental' players may well include a proposal introduced by e.g. members of parliament or a political group that belongs to a ruling party.

[57] V. Heitshusen, Introduction to the Legislative Process in the U.S. Congress, Congressional Research Service, November 30, 2012, R42843 p. 5.

Unlike in the EU Member States, in the US the executive doesn't have to be backed by a majority in Congress. It is nothing exceptional that the president and the majority in the US Congress don't come from the same political camp. In the 114th Congress, the administration was led by president Obama who was nominated by Democrats while both chambers of the Congress were dominated by Republicans. However, in the 115th Congress for the first time since 2010 Republicans hold a majority in both chambers of Congress and at the White House.

It surely has an impact on legislative effectiveness and underlines the necessity that both Republicans and Democrats need to cooperate in order to get their ideas enacted into laws.

Article I of the US constitution lays down that 'All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives'. The constitutions of many EU Member States contain similar provisions. Article 1 nevertheless implies that Congress legislates with everything that that implies, including the legislative initiative.

There are a number of very good tools that offer either an overview or data on the proposals introduced. The website www.congress.gov gathers all data on legislation, e.g. it shows that there were 10 084 bills[58] introduced by sponsors coming either from the House or Senate in the 114 Congress (2015-2016). However, this number is very high as compared to the number of legislative proposals in any EU Member State, and it underlines the fact that the right to introduce a bill in US is widely used; the reality is that only a fraction of the bills introduced become law. Data made available by govtrack.us show that only 3% of the bills introduced in the 114 Congress became laws, and this rate varies between 3 and 5 % after 2000.

The webpage provides other interesting data calculated on the basis of predefined algorithms, e.g. it predicts the probability as to whether a proposal which has been introduced will make it to a committee or the floor (plenary) or it eventually becomes a law. Taking into account data covering the first 10 months[59] of 2015 (6257 bills introduced in that period) available on govtrack it provides a number of interesting outcomes:

- only 1 200 bills have more than 10 % probability of becoming law
- half of all bills are shorter than 5 pages,
- 2 200 bills are bi-partisan meaning that there is at least one cosponsor from another party
- 1 800 bills have more than 10 cosponsors (supporters of a bill whose names were added to the bill either at the moment of its introduction or later).

What could that indicate?

[58] The Congress is not a continuous body and therefore whatever is not enacted under a given Congress is usually introduced again under the subsequent Congress, which contributes to explain the high number of bills introduced by each Congress (many of which are identical texts precisely for this reason).

[59] The data had to be downloaded and further processed to be able to filter them in excel format, for which I am very grateful to my colleague R. Mallia from DLA.

3.10.1. Legislative initiative is a position taking tool

Why do members introduce an act? For some it might not seem very logical but introducing a legislative proposal doesn't necessarily mean that the author's primary objective is to have it adopted. Kingdom[60] notes that introducing a bill gets people talking and gets people to examine the issue. He then continues and describes three incentives that drive 'Hill people' to engage in agenda-setting activities:[61]

g) Satisfying constituents (including donors) and to get publicity for new policy incentives,
h) Enhancing intra-Washington D.C. reputation of members of Congress and
i) To promote the member's conception of good public policy.

As described by Koger,[62] a member may introduce a bill that aims to stop another bill which is another reason why a legislative proposal is introduced. As underlined by another source 'in fact, the passage isn't always the objective'.[63]

No matter what the actual objective of a bill is, what seems to be a common feature by the author is the will to take a position on the respective policy area or a problem without necessarily focusing on the adoption of a bill. There are number of factors that determine the survival factor of a bill, such as technical feasibility, value acceptability within policy community, tolerable costs, anticipated public acquiescence and reasonable chance for receptivity among elected decision makers.[64]

In this regard the situation on both sides of the Atlantic is not fundamentally different meaning that both members of Congress and MEPs take positions, while the former introduce a bill in order to take a position, the latter table amendments.

3.10.2. Length

In general, save for a small number of very complex bills, most of the bills are less than five pages long.[65] The length of a bill that makes it through Congress is a different story as very often a short and noncontroversial bill can serve as a 'vehicle' for a more important and complex bill[66] or the adopted bill gets longer in the amendment process. According to the Economist, the average length of an adopted bill in 1948 was two and half pages, now it is 20.[67]

It is not easy to compare the length of US and EU position taking tools as in the US members of Congress introduce whole bills and in the EU MEPs table amendments to

[60] John W. Kingdom, Agendas, Alternatives, and Public Policies, Longman, p. 129.

[61] Idem, p. 38.

[62] G. Koger, Position Taking and Cosponsorship in the U.S. House, Legislative Studies Quarterly, XXVIII, May 2013, p. 230.

[63] Strand, Johnson, Climer, Surviving in Congress, The Congressional Institute, 2015, p. 92.

[64] John W. Kingdom, Agendas, Alternatives, and Public Policies, Longman, p. 139.

[65] The length is a complex issue. Like in the EU, where legislation adopted by the European Parliament and Council in ordinary legislative procedure often provides a delegation for adoption of detailed rules by means of delegating or implementing acts by the Commission, the acts adopted by the Congress in the legislation process often delegate adoption of more detailed rules to the executive or US agencies in the rulemaking process. This paper, however, focuses on norms adopted by legislature.

[66] That was the case, e.g. of H.R. 22, formerly the Hire More Heroes Act, that has become the Senate's vehicle for passage of the DRIVE Act.

[67] Outrageous bills, The Economist, November 23 2013.

proposals presented by the Commission. Plus, internal EP rules stipulate that each amendment should concern only a very small text unit which leads to the fact that amendments are usually not longer than one page. If figures concerning the length are considered from a general perspective one can conclude that, save for complex texts, the length of a majority of position taking tools in the EU and the US is not too different.

3.10.3. Co-sponsorship

Co-sponsorship is an important aspect to consider as regards legislative effectiveness. Of 86 acts adopted in 11 months in 2015, only 9 (10%) had no cosponsors. The average number of cosponsors for an act adopted in that period is nearly 20. Looking at the bills that 'died' in the adoption process during that period (6142), 1,336 had no cosponsors (22%) and the average number of cosponsors for a bill was 12. Those numbers indicate that co-sponsorship increases the chances of getting the act adopted and the vast majority of bills with no cosponsors never get adopted or are 'dead on arrival'. These are very simplistic conclusions as regards co-sponsorship, which is developed in greater detail in the paper by G. Koger, where the above date come from.

3.10.4. Is it the member of Congress or rather the member's office who drafts a bill and has the necessary expertise?

The answer is 'not necessarily' or 'rarely', in particular in the case of complex proposals. It is hardly possible to use relevant statistical data as to who really wrote a respective bill. As in the EU, although only strictly defined players have the right to formally introduce a legislative proposal, there is no monopoly as regards ideas for legislative action. There are therefore countless number of sources where the idea for a draft bill can emerge. It could be a citizen, NGO, interest group, business or any sort of institution with a public interest who will develop an idea for legislative action and at some point will start searching for a member of Congress who will formally introduce a bill. Of course it includes a possibility that a member of Congress comes up with an own idea that is materialised in a legislative proposal.

Although a number of sources consider the introduction of a bill as a formal and necessary step that triggers the legislative process,[68] there is more than a formal procedural step involved.

Save for bills that are 'dead on arrival' and the purpose of which is not necessarily to have them passed, the personality of the bill sponsor, but also the cosponsors and their variety is important too. Using the search engine on www.congress.gov page it is easy to find out that Charles Rangel (D-NY), a very influential Representative sponsored 15 bills that became law (2009-2016). There are probably more possibilities as to how to interpret the fact that he is on the top of the list for that period, one of them referring to his position of a chair in the most powerful committee in the House of Representatives, the Ways and Means Committee. In that capacity Mr Rangel sponsored a number of bills that paved the way for the economic agenda of President Obama. Among a number of very complex acts, he sponsored the Patient Protection and Affordable Care Act ('Obama Care').[69] As well as promoting policy changes brought by those bills and later acts, he also became an active promoter of the bills which differs from the position of an EP rapporteur who has a different role given that the Commission is the author and the EP rapporteur is preparing the EP position on the legislative proposal.

[68] Strand, Johnson, Climer, Surviving in Congress, The Congressional Institute, 2015, p. 99.

[69] H.R.3590.

3.10.5. Role of Congressional committees

In a search for who is behind bill drafting a few acts were selected based on these criteria:

- Complex acts counting several hundreds of pages of considerable expertise which often exceeds the possibilities of rather small offices of Congress members to draft them,
- Acts adopted recently to increase the chance of identifying actors involved in drafting who would still remember this phase,
- Acts that were adopted with bi-partisan support and are technical rather than politically controversial, in other words acts that could be described in EU culture as 'ministerial'
- The success ratio of a sponsor in his/her legislative activity and easy understandability of an act was an optional criterion

On the above basis I had a closer look at the Every Student Succeeds Act and the FAST Act. In particular, I focused on the following questions:

- What happened before a bill was introduced?
- Who was involved in the drafting of a bill and what role did the sponsor play in this pre-introduction process?
- How drafters addressed a lack of expertise?
- What was the role of government in the pre-drafting process?

After contacting the offices of the sponsors of those acts I was advised to discuss details with the relevant Senate committee where the core of the drafting took place before the respective bill was introduced.

3.10.6. S.1177: Every Student Succeeds Act (ESSA)

The Act represents a bi-partisan educational policy reform that expands state responsibility over schools and reduces the federal test-based accountability system of the No Child Left Behind Act of 2002.[70] It is a very complex piece of legislation that comes to nearly 400 pages in its PDF version, and was supported with unusually high support – final vote in the House (359-64), in the Senate (85-12). It was sponsored by the Chair of the Senate Committee on Health, Education, Labor and Pensions (HELP), Senator L. Alexander (R-TEN). According to govtrack, the bill had a 46% chance of being enacted.

After meeting legislative staff members from both the majority and minority offices of the HELP committee I was able to expand my research questions.

> *What happened before a bill was introduced? Who was involved in the drafting of the bill and what role the sponsor played in this pre-introduction process? How did the drafters address the lack of expertise?*

Anybody with a continental legislative background would probably work with a presumption that given the expertise required for drafting such a complex piece of legislation, one has to liaise with a ministry/directorate general or state department for education where the necessary expertise is concentrated.

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[70] More details could be fined in an overview published on the web page of the Senate HELP Committee.

I was therefore surprised to learn that the work on a discussion draft of the above bill started in the HELP committee under the leadership of Mr L. Alexander whose staff (majority office) prepared the first draft. The discussion draft was discussed with the minority office (Dem) and the outcome of those debates was presented to an informal public consultation. In addition five hearings were organized by the HELP Committee. All that aimed at ensuring the support of stakeholders that was very important and also generated massive feedback from interest groups, teachers, intendants and others. As underlined by both offices, it takes an enormous effort to reflect the received feedback in the draft. And in a situation where it is impossible to have expertise on all aspects of such a bill, one has to find a way how to learn from experts and also find a way how to keep a general overview and balance of different elements of the bill that are interlinked. As pointed out, every stakeholder often stresses a specific point of interest not necessarily taking into account another related issue. The person or rather a team of legislative drafters have to take that into account.

Mr L. Alexander has a long track of activities in the field of education. He has been the U.S. Education Secretary and University of Tennessee president. In combination with the chairmanship of the HELP committee it made him a 'valuable' sponsor for such an important bill in driving the relevant discussions. To paint a full picture, one has to stress the cooperation between both camps of the HELP committee since the early stages of the bill.

The role of the chair acting in a sponsor capacity is very important also due to procedural reasons. Although every Member can introduce any number of acts, only 381 bills out of 7,304 were finally reported by a House or a Senate committee. That means that the fate of 95 % of bills finished after those bills were referred to a relevant committee but never made it on the committee agenda or, if they were debated the relevant committee didn't adopt a report that would move them upstream of the legislative chain to a floor debate. A decision as to what bill is put on the committee agenda lies in the hands of its chair or a broader political consensus.

What was the role of government in the pre-drafting process?

This is a 'million dollar question' for anybody from the EU continental legislative culture. Even if members of parliament of every EU Member State have a right of legislative initiative, proposals like the one above on education policy are drafted by the relevant government body, e.g. a ministry.

I was therefore surprised to learn that the majority office (Rep) had no contacts with the administration led by the president coming from Democratic political camp. It was admitted that later in the legislative process the administration was asked to comment on specific technical questions but it was nothing that would imply substantial policy changes in the piece of legislation debated. The input from the administration experts appeared in the pre-introduced draft bill only via contacts between the Minority office (Dem) and the administration. That communication also provided an opportunity to send signals from the administration that had to be taken into account later in the process to avoid a presidential veto.

In conclusion, both legislative staff members stressed that Congress legislates and the administration implements. The ESSA provides a number of areas that will need to be followed up by means of implementing legislation, the field where the possibilities of the Congress to influence the implementation process are limited.

The above description focuses on the drafting stage that precedes the introduction of a formal bill. The legislative process is naturally much more complex, as the bill after being reported by the HELP Committee to the Senate floor had to be debated in the senate and after a similar process finished in the House, both chambers had to settle their differences leading to an identical act that still had to be signed by the President.

3.10.7. H.R. 22: Fixing America's Surface Transportation Act or the FAST Act

The Act authorizes budgetary resources for surface transportation programs for the financial years 2016-2020; reauthorizes taxes that support the Highway Trust Fund, and expenditure from that Fund; reauthorizes the Export-Import Bank; and improves the Federal permit review process for major infrastructure projects.[71] Despite the fact that the quality of surface infrastructure is something that was heavily criticized and is brought up by many presidential candidates in the 2016 primaries, the topic was considered as not being partisan as was also confirmed by the study of John W. Kingdom quoted earlier.

The Act was adopted with bi-partisan support, and the figures corresponding to the final votes in the House (359-65) and in the Senate (83-16) are not that different from the act referred to earlier. Its PDF version comes to 490 pages.

Its sponsorship is a bit more complicated than ESSA but is nothing unusual in the US legislative process.

H.R. 22 was initially introduced by Representative R. Davis (R-IL) under the name Hire More Heroes Act. After contacting the office of the sponsor with my questions on what happened in the pre-introduction phase, I was immediately directed to the Senate Committee on Environment and Public Works. That way I learned about bill S.1647 - Developing a Reliable and Innovative Vision for the Economy Act (DRIVE Act) which contains the core of the FAST act. It has become apparent that H.R. 22, formerly the Hire More Heroes Act had become the Senate's vehicle for passage of the DRIVE Act. There are many reasons why one bill is used as a vehicle for another bill. In this case, one of the reasons was that a spending bill has to originate in the House, that is why a vehicle was found for ideas that were developed mostly in the above Senate committee. Looking closely at bill S.1647 it is clear that this legislative proposal was to be considered as a heavyweight one. It was sponsored by the committee chair, Senator J. Inhofe (R-OKL) and was cosponsored by another 3 Senators (1 Rep, 2 Dem), one of them being Sen. Barbara Boxer (D-CAL), the ranking member (minority leader) in the same committee. It was therefore clear that the bill would have a prominent place on the committee agenda and would belong to the 5 % of bills that are reported by committee even though govtrack predictions were that there was only a 22% chance that the bill would become law.

When discussing my questions with a legislative staff member of the majority office many of the previous conclusions were confirmed.

The starting point for putting policy objectives in a legislative proposal was the previous reauthorization act and bill S.2123 that was introduced in the previous Congress. New elements added to that platform were based on input from a number of stakeholders coming from the administration, state departments, other members of Congress and industry. Like in the ESSA, the challenge was to reflect the various inputs in one text that

[71] Statement by the Press Secretary on H.R. 22, The White House, Office of the Press Secretary, December 04, 2015.

would work and would get passed. On the other hand, unlike in the case of ESSA, contacts with the US Transportation Department were more intensive. Like in the case of ESSA those contacts with the administration were limited to very technical issues aiming at workable legislative language. The role of the administration was to stay as technical as possible and provide the requested technical expertise. The White House was not involved and 'stayed silent' throughout the process.

3.10.8. H.R. 2146: Bi-partisan Congressional Trade Priorities and Accountability Act of 2015 (TPA)

TPA is a 'famous' Act that enables legislation approving and implementing certain international trade agreements to be considered under an expedited legislative procedures for limited periods, provided that President observes certain statutory obligations.[72] On US side, TPA enables that the ongoing negotiations on the Transatlantic Trade and Investment Partnership (TTIP) are concluded and the outcome submitted to Congress for a 'fast track' approval. It also applies on the Trans Pacific Partnership (TPP).

Like the FAST Act, TPA is the act that was adopted with a bi-partisan support, not that overwhelming though (House 219-211, Senate 62-37). Another act (Defending Public Safety Employees' Retirement Act) served as a vehicle for the adoption of TPA.

As regards sponsor(s) TPA was introduced simultaneously in the House by Paul Ryan (R-WI), the chair of the Ways and Means Committee who has meanwhile become the Speaker of the House and in the Senate by Orrin Hatch (R-UT), the Chair of the Senate Finance Committee. Like in previous cases, both sponsors were chairs of powerful committee and in line with a longstanding legislative practice, these chairs traditionally introduce this type of a bill.

Meeting Sandra Strokoff and Mark Synnes who represented the House Office of the Legislative Counsel and provided drafting assistance to the House Ways and Means Committee I learned that the core of the pre-introduction activities took place in the relevant congressional committees. Although they largely based their starting version on the previous TPA granted to President Bush in 2002, new elements had to be incorporated in the 2015 TPA.

3.11. Summary of legislative initiative applied in US Congress

In order to generalise an outcome one would need to study many more bills that eventually became laws. The three above case studies nevertheless provide an opportunity to conclude that:

- Congress legislates and the administration (executive) implements,
- The role of the administration at the early stages of the legislative process is limited to technical questions based on concrete requests made by the relevant committee,[73]
- Complex bills are drafted by the Congressional committee (staff) with the help of legislative drafters, who invest a lot of effort in the preparation of bills before they

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[72] Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy. CRS Report RL33743, June 15, 2015.

[73] With this statement I don't want to undermine the position of the executive. The White House issues Statements of Administration Policy that express its views on ongoing legislative activity. One cannot also ignore the fact that the US system of checks and balances provides the President with the right to veto a bill passed by Congress.

are actually introduced,

- The drafters are the ones who manage the feedback seeking exercise, liaise with stakeholders and translate their feedback into legislative proposals,
- Although Congressional committees do not have all the relevant expertise necessary for drafting a complex bill, they are the places where a limited number of drafters put the input received from stakeholders (who might have very specific interests) together, thus ensuring that the bill is balanced, and its different elements can work together,
- Despite the fact that any Member can introduce a bill, in order to get the bill on the committee agenda it is important that the bill gets bi-partisan support and is sponsored or supported by a committee chair and a ranking member.

4. Conclusions on the right of the legislative initiative

The principle of separation of powers into the legislative, executive and judiciary has an impact on who the constitutional holders of legislative initiative are.

On the one hand, the purist approach, which applies in the United States, reserves legislating with everything that that includes to the US Congress.

On the other hand there are other models in which the executive (government, President) play a more active role and share the initiation of legislation with members of parliament (or groups of members or political groups) of legislative power. In the EU Member States the executive dominates the process of initiating legislation which is implied by the fact that a stable government normally disposes of a parliamentary majority that enables it to implement their program priorities.

A third 'sui generis' model in this regard is the system that has been operational in the EU and which reserves the right to formally introduce a legislative proposal to the Commission which has effectively a monopoly on the legislative initiative. This independence of the Commission 'was intended to grant it a “unique position” to identify the general interest of the Community. In their intentions, such an interest was not to be conceived as a sum of the national interests of the Member States, the prevailing interest of one of the big Member States, or that of the founding Member States. Rather, the Commission was supposed to be able to adopt legislative proposals that would be based on the most advanced national legislation or on innovative regulation that pursued the interest of the entire Union.'[74]

While the objective of this paper is not to question the rationale behind the motives of the EU legislative process and architecture laid down 60 year ago, one has to consider the question of whether successive treaty changes, a gradual shift from intergovernmentalism towards supranationalism and evident changes of the institutional architecture which reinforced the position of the EP, haven't reached the point where the EU agenda setting mechanism could be improved by upgrading the EP's right to amend, to a full right of legislative initiative.

[74] P. Ponzano, C. Hermanin, D. Corona, The Power of Initiative of the European Commission: A Progressive Erosion?, p. 25.

4.1. How can the EU benefit from the EP's full right of legislative initiative?

4.1.1. EP - promoter of new (reformed) policies

The EU goes through turbulent times when one crisis is followed by another. One cannot argue that there is a lack of solutions to different crises. The problem seems to be a lack of leadership, willingness to take action and go for solutions that don't have to necessarily offer a complete answer to a crisis but could be a 'startup' version 1.0 that is upgraded over the time.

The Commission is sometimes accused of being bureaucratic and not having the necessary legitimacy gained through elections. Although this kind of argument is presented mostly by a Eurosceptic camp, it causes the situation that mainstream political parties might not be eager supporters of Commission ideas either. They might instead take a 'wait and see' approach and comment on a proposal once it comes, taking into account the 'political costs' necessary for its approval. Consequently, the EU has ended up in a situation in which Commission proposals are very much developed on facts, 'scientifically' based and take into account the EU-wide interest which is all fine but may lack decisive political support at the 'arrival' time.

The EU institutions cooperate very well. The language used by stakeholders during the legislative process is very seldom undiplomatic. Thus, many times a rapporteur appointed by the relevant EP committee will praise the Commission for its very good proposal and will at the same time table a number of amendments which, combined with modifications coming from other Members or political groups, result in a legislative outcome that might radically depart from the 'entry' version. An open and inclusive discussion that involves the possibility to generate diverse ideas is by all means a good feature of the legislative process. It might nevertheless lead to a situation where the amendment process resulting in text that is markedly different from the initial form dilutes the initial idea into a compromise that is not easy to interpret and even more difficult to apply in real situations.

It is not just different terminology but the notion of 'rapporteur' and 'sponsor' offers a different perception of the role of a legislative body. A Rapporteur is an independent person, that scrutinises a Commission proposal and brings his/her views, very rarely approving everything that was proposed by the Commission. A sponsor, on the other hand, is an owner of the proposal, and has therefore a good reason to advocate it throughout the process with much more involvement than an 'independent' rapporteur.

If the EP had a full right of legislative initiative, sponsors would have an interest in supporting their proposals, organising hearings, using media to increase support for their legislative ideas, work on the ground with stakeholders to get them on board and start building a support coalition right from the beginning.

4.1.2. EP – link with citizens

The fact that EP is the only directly elected EU institution doesn't provide it only with a legitimacy directly derived from the holders of power but also offers a natural link between elected MEPs and their constituency where they spend a lot of time. This is not to say that Council members (Member States executive representatives) or the Commission with all its members of staff that are present in EU delegations, don't have direct contact with citizens. The 'quality' of the direct link between voters and the representatives they elect (MEPs) is nevertheless different. The EU negotiating directives for TTIP are not a perfect example. But imagine if those directives were adopted jointly

with the Council on the basis of a proposal initiated by the EP to which the Commission would provide its input based on the technical expertise gained over the years. In that situation, once the mandate was adopted, the EU would have all the institutions on board which would naturally support what they voted for and communicate their message to their constituents. Instead, the EU has two sets of negotiation mandates, a *de iure* mandate contained in the Council negotiating directives and another a *de facto* mandate contained in the EP own initiative report. The documents overlap in many areas but also offer different views on some TTIP aspects, such as ISDS, GMO or data privacy. This resulted in a situation in which the EP was presenting different views on a number of areas under negotiations. Not only was it not an example of the EU institutional unity that is necessary in negotiations with third partners, but it also sent a negative signal to EU stakeholders on the overall negotiation way. Combined with a legitimate campaign of TTIP opponents, the public support for the deal is declining.[75]

Admittedly, the above example is not ideal given the current EU institutional mechanisms in the field of international trade. It nevertheless shows that EP support, rather than a reservation or opposition, for a sensitive political project is crucial from the outset as it sends a strong message to the general public.

The EP with a full right of legislative initiative would play an important role in enhancing support by EU citizens for projects that require EU wide solutions.

4.1.3. EP – open arena for discussing policies (not just ideas)

Bearing in mind the EP statistics (the number of procedures) for the 7th term (2009-2014) the EP plenary dealt with 1798 non-legislative procedures (e.g. own initiative reports, motions for resolutions) and 919 legislative ones (e.g. ordinary/special legislative procedure, budget). Comparable numbers from the US Congress show that there were more than 9,000 bills before the 113th Congress (2013-2014) and 1700 other texts which one can describe as the equivalent of EP non-legislative documents (resolutions). If a similar comparison is made with the national parliaments of the EU Member States the gap between legislative and non-legislative business would be even bigger. The Slovak Parliament, for example, very rarely deals with resolutions of a non-legislative nature. The vast majority of Slovak MP activities is devoted to legislative work.

In the Slovak case the explanation is that the country belongs to a traditional continental parliamentary democracy where the government is supported by a parliamentary majority. Legislative ideas are submitted to the parliament either directly by government or by MPs. Legislative proposals by the opposition are tabled directly by opposition MPs thus leaving very little margin for other items which would have to be tabled by non-legislative resolutions. It should be mentioned that there isn't much sympathy or a constitutional tradition to debate and adopt documents of a declaratory nature that do not have the power of an act.

The US Congress case shows that the right to initiate bills directly by members of Congress results in much more focus on legislative activities.

Why is this relevant? For a simple reason, the language, focus, feasibility or impact assessment of ideas is considered much more in depth in the case of legislative proposals than non-binding resolutions. A simple comparison of a legislative text and a non-legislative resolution suggests that while the latter can contain a list of objectives (wishes) to be achieved the former needs to contain clear ways as to how to achieve

[75] Standard Eurobarometer 84, Autumn 2015, p. 31.

those objectives. It would be too easy to start to criticise the content of EP non-legislative reports, but one should not be surprised to see that the same report asks for maintaining flexibility on the labour market while ensuring full employment. Such a statement doesn't have much space in a legislative text which needs to outline how to achieve either one or the other objective.

The EP's full right of legislative initiative would enable the EP to grow in its legislative shoes and balance its powers with its constitutional significance, in light of the fact that the EU is founded on the principles of representative democracy.[76] It has a potential to generate resource savings given that the House would be dealing predominantly with procedures that produce binding outcomes rather than non-binding ideas which are not difficult to ignore.

The last remark under this heading is linked to the ongoing 'Brexit' discussions, namely the reinforced roles of national parliaments that would result in an enhanced possibility to oppose EU legislative initiatives. While there is no reason to comment on the roles of national parliaments in this paper, another possibility as to how to influence EU topics would be bringing forward proposals that are of interest for EU citizens. Given that any standard political party in a given Member State usually has its representatives in the EP, one way of addressing the concerns of EU capitals is proposing topics that are of their interest, in case the Commission doesn't come with the relevant initiative.

4.1.4. EP – its influence at international level through legislation

The EP's influence in international relations through legislation is limited. Not necessarily due to the lack of full legislative initiative but mainly due to the fact that 'communitarisation' of the foreign policy pillar happened only recently. The EP is fully involved in codecision in fields such as immigration, visas and different funds dedicated to e.g. support of human rights in the world. It must grant its approval to international agreements to which the EU is a party by means of a yes/no vote.

In addition to legislative activities the EP influences EU foreign relations by other activities of a non-legislative nature, such as election observation missions, or different resolutions on human rights or awards granted to human rights defenders (Sakharov Prize).

The example of the US Congress shows that a legislative body has, by means of a legislative initiative, a great potential to influence relations that go beyond the borders of a given state. The Justice Against Sponsors of Terrorism Act (S.2040) is a bill that was introduced in 2015 by Sen. John Cornyn [R-TX] and was cosponsored by another 22 Senators on a bi-partisan basis. It opened a quite lively discussion in which a number of presidential candidates got involved (e.g. Clinton, Sanders) who voiced their support. Its main objective is to allow victims of 9/11 and other terrorist acts to sue foreign countries and others that funded Al Qaeda or ISIS. Commentators agree that the most affected foreign country is Saudi Arabia, who allegedly supported the hijackers of the planes involved in the 9/11 attacks.

If it was one of thousands of bills that was introduced by an individual Member there would probably not have attracted much attention. Its bi-partisan support by 'heavyweight' Senators and the fact that the Senate Judiciary Committee passed this bill unanimously by 19 votes, changed the situation. The White House statement was that it was highly unlikely that the then-President Obama would sign the bill in its current form.

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[76] Article 10(1) TEU.

Saudi Arabia already warned the US that it would sell off billions in American assets if the U.S. Congress passed a bi-partisan bill that would allow victims of 9/11 and other terrorist attacks to sue foreign governments.

The bill meanwhile became a law and was the only piece of legislation in the 2nd Obama term that was passed despite the presidential veto with massive majority in the Senate (97-1) and the House (348-77).

The case shows that a mere proposal, if adopted, has far reaching consequences and has greater potential to start a serious discussion rather than a non-binding tool which can be easily forgotten.

4.2. Challenges of EP full right of legislative initiative

4.2.1. Erosion of legislative initiative

If the EP had a full right of legislative initiative as of the next Treaty modification, its benefits would have to be carefully considered in the light of expected 'costs'.

If an individual Member alone had a right to table a legislative proposal, it is reasonable to expect a very high number of proposals. The US example shows that one member of Congress introduced 16 bills in the 113th congress over two years. Even if the 'productivity' of EU legislators would be 50% of their US colleagues, it would result in 3,000 new legislative proposals every year. That would significantly influence the current practice where every Commission proposal is submitted to and considered by other legislative stakeholders. This practice is tenable with a few hundred proposals but surely not with thousands of procedures every year. Even if proposals that are dead on arrival are disregarded, the situation with that many proposals would lead to competition between them, coalition building, co-sponsorship and other activities that make the idea in the respective legislative proposal so appealing that it gets its agenda slot. That also corresponds to what is happening in the US where less than 10% of the bills introduced are reported to congressional committee and thus moved on in the legislative process. More than 90 % of bills are never treated by any of the legislative stakeholders and serve more for the purposes of taking a position rather than bringing about a change. That brings us to a couple of hundred procedures on the US side that make it down the legislative chain, the number that is not far from the number of procedures corresponding to current EP capacities.

Another argument against the right of initiative for individual MEPs which is linked to legislative capacity is the fact that the constitutional practices of the parliaments of EU Member States ensure that every proposal gets treated. Thus even if an MP from a minor political party makes a proposal, it is added to the agenda and voted.

These considerations suggest that the holders of the right of initiative should not be individual MEPs but rather larger groups of MEPs requiring some threshold, such as a minimum number of MEPs. Such a requirement would limit the number of proposals coming from the EP. It would also be reasonable to expect that a legislative idea from a larger group would pay attention to the wider EU interest and such proposals would therefore be of a quality that is necessary to trigger serious legislative debate and not just to take a stance on something.

4.2.2. EP internal procedures – 'winner takes it all'?

Another argument against the right of initiative for individual MEPs is based on the system of political parties at the EU level. Unlike the US or in a few EU Member States, the organisation of work in the EP is currently influenced by the eight political groups.

In the US a chair, be it at committee or floor level, decides which bill is added to the agenda for further consideration. Such a model is easier to apply in a system of two parties and less so in situation in which a majority is formed by a coalition of more political parties or groups. Although that the two biggest political groups (EPP and S&D) cooperated in a sort of 'grand 'coalition mode prior to the EP President elections in January 2017, the EP culture is such that all political opinions are at least formally taken into account and get a point on the agenda be it at the committee or plenary stage. The system in which political groups or a defined number of MEPs are holders of a legislative initiative would address this point too and would imply that all legislative proposals would get a place at least on the committee agenda.

4.2.3. Role of the other legislative branch – Council (Member States)

The right of legislative initiative granted to the EP would naturally open the same possibility for the other legislative branch – the Council. The question would therefore be whether such a right would be granted to an individual Member State or to a group of Member States and thus require some threshold.

In the past, the EP was sensitive about the possibility of Member States being able to initiate the legislative process in the field of justice and police cooperation. As the EP didn't have a corresponding right, instead of focusing on being entitled to initiate the legislative process the EP stressed that the community method should be used and that the Commission monopoly preserved.

4.2.4. EU institutional triangle

Enabling the EP and Council to legally initiate the EU legislative process would no doubt have a significant impact on the position of the Commission.

It would be a challenge to ensure that the current procedures that precede the adoption of a proposal by Commission are somehow respected by the other legislative initiative holders. Namely:

- the impact assessment process in which the Commission assesses the need for EU action and the potential economic, social and environmental impacts of alternative policy options,
- interservice consultation – the process that takes into account views of other Commission Directorate Generals (ministries) that might have an interest in addressing their point of view relevant for the proposal,
- and, in particular, ensuring that the general interest of the Union is taken into account in a proposal and not an interest that is conceived as a sum of the national interests of Member States or EP political groups.

As Treaty changes concerning the EP role in codecision were made in an incremental way, it is reasonable to suggest that if the EP had the full right of legislative initiative one day, it would coexist with the right of legislative initiative of the Commission and the Council. The redesigned system would have to contain a system of checks and balances. E.g. if the commission opposes a proposal introduced by the EP or the Council, the quorum necessary for its adoption would increase. This is already happening in situations in which Council unanimity is required for points that are opposed by the Commission. Such a mechanism would introduce a sort of veto.

Time would then show whether the modified roles as regards agenda setting would lead more towards the continental model in which the executive introduces the core policy initiatives and keeps a very high success adoption ratio of its proposals. Or it would go

more towards the US model in which the legislative branch legislates and the administration focuses on implementation.

4.2.5. Transparency and ethics

Parker and Alemano consider the 'formative' stage of legislation – in which draft legislation is conceived and crafted – as more reliably open and inclusive in the EU than in the US. They argue that 'legislation that goes from the Commission to the European Parliament and Council is the product of an elaborate administrative process that will generally include extensive stakeholder consultations, Impact Assessment (IA), Inter-Service Consultation (ISC), and final adoption by the EU College of Commissioners'.[77] As regards the deliberative (post-proposal) stage for implementing and delegated acts, they consider the EU rulemaking system less transparent than the one present in US given that, unlike in the US, there is normally no impact assessment process for implementing legislation in EU.

The EP has focused on the pre-legislative phase quite seriously. Given that there were instances when the EP was not satisfied with Commission impact assessments, the EP has established internal procedures by which it undertakes scrutiny and oversight of the executive, particularly through ex-ante and ex-post evaluation of EU legislation - before and after it is adopted by the Union's institutions - and analyses the need for, or effectiveness of, action at European level.

Once a Commission proposal reaches the EP, it is referred to the lead committee with other committees invited to submit their opinions. As in the case of the Commission Directorates General, EP committees bring different standpoints to bear on the relevant Commission proposal.

These examples are mentioned to demonstrate that the EP has been focusing on agenda setting from a very early stage and created services that could offer to future holders of legislative initiative a focus similar to the one applied by the Commission in the pre proposal phase.

A legislative initiative for other stakeholders than the Commission would surely attract the interest of lobbyists and interest groups that might find it easier to convince a MEP or a political group or a Member State to submit a proposal, rather than convincing the Commission to take an action. It is therefore likely that the transparency register, which has been set up to answer core questions such as what interests are being pursued, by whom and with what budgets, would have to be redesigned as it is currently operated jointly by the EP and the Commission on a voluntary basis.

4.2.6. EP and Council capacities

The main focus of this paper is to consider the constitutional necessity and advantages offered by endowing the EP with the right of legislative initiative. Such a broad matter naturally opens other practical issues one of them being the capacity of new holders of the legislative initiative to draw up legislative proposals of the required quality and supported by the relevant facts. Comparing the typology of legislative services offered by the staff of the Congress and the EP there isn't any significant difference. Like the Congress, the EP has as its disposal policy expertise within committee secretariats who

[77] R. Parker, A. Alemano, Towards Effective Regulatory Cooperation under TTIP: A Comparative Overview of the EU and US Legislative and Regulatory Systems. 13 May 2014, p. 59.

can get support from other departments.[78] Further research in the relevant policy field is ensured in the US by the Congressional Research Service, and in the EP by the EP Research Service (EPRS). Drafting support is provided by Legislative Counsels on the US side and EP legislative drafters from Directorate for Legislative Acts on the EU side. It would be very bold to conclude that because the EP services to some extent mirror those in Congress, the EP is therefore ready to start introducing legislative proposals like members of Congress. The scheme of EP services nevertheless shows the EP's readiness to get seriously involved in agenda setting and play an important role not only in the current system in which the EP needs to convince the Commission to submit a proposal but to get upgraded to a level whereby the EP can trigger the legislative process with its own proposals.

5. Chapter II: Role of the European Parliament in negotiations on agreements between the Union and third countries – scope for improvement in the next treaty change?

This chapter will look at the EP role in negotiations on agreements between the EU and third countries, more specifically international trade agreements, with a view to reflect the EP's role in EU agenda setting in areas that go beyond EU borders. There will be opponents who would consider this debate not very useful or perhaps premature given the recent Lisbon arrangements by which the EP acquired the right to consent also to international trade agreements to which the EU is a party.[79]

International trade agreements to which the EU is a party have different dimensions or dilemmas, such as bilateralism versus multilateralism, 'simple' versus 'mega' free trade agreements, the degree of transparency of negotiations, involvement of non-governmental organisations, civil society, etc. This paper will primarily focus on roles of the different EU institutions and the benefits of uniting the voice of the EU by empowering the EP to take part in negotiations on EU international trade agreements from the beginning, on an equal footing with the Council.

5.1. A bit of necessary history

As there are publications that offer a very comprehensive and detailed overview of EU trade policy mechanisms,[80] this chapter will only briefly refer to pre and post Lisbon mechanisms.

Before the Lisbon Treaty entered into force in December 2009, the negotiations of international trade agreements were fully controlled by the Member States via the Council. The negotiations were conducted by the Commission on the basis of a mandate approved by the Council. Before concluding the negotiations by the Council, in a few cases such as association agreements, the EP was required to give its consent; in some

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[78] Though the EP does not have the same supporting capacity that benefits Congress, suffice to mention the Congressional Agencies such as CBO and GAO.

[79] Article 218(6)(a) TFEU.

[80] See for example articles of R. Leal-Arcas: Is EC Trade Policy up to Par?: A Legal Analysis over Time—Rome, Marrakesh, Amsterdam, Nice, and the Constitutional Treaty, Columbia Journal of European Law, Spring, 2007.

The EU Institutions and their Modus Operandi in the World Trading System, Columbia Journal of European Law, Winter, 2005/2006.

cases, the EP was consulted. In the area of international trade agreements the EP had no say. As suggested by some authors, rather than being a well thought out mechanism, this situation was a consequence of the unwillingness of Member States to allow the EP to have a substantial say on the common commercial policy. Consequently, following the Nice Treaty, 'The European Parliament was the big loser with regards to the new Article 133 EC [Treaty][81] (the predecessor of Article 207 TFEU concerning the common commercial policy). 'The Commission's Opinion at the IGC in January 2000 suggested the extension of co-decision to the common commercial policy. This proposal did not see the light because the European Council refused to apply the principle of parallelism and, in the words of the Commission, this failure to increase the role of the European Parliament in EU decision-making under Article 133 EC is regrettable for the democratic accountability of the Union's trade policy.'[82] Although 'the European Parliament [did] its best to provide some scrutiny of EC commercial policy … it [had] has very limited powers'[83] to do so.

Against this model, the Lisbon Treaty has brought a considerable change as regards the EP's role given that 'measures defining the framework for implementing the common commercial policy' are adopted by the EP and Council in accordance with the ordinary legislative procedure since December 2009.[84] In addition to that, the EP's consent is now required for all international trade agreements to which the EU is a party. This shift is, no doubt, a step forward as compared to the pre-Lisbon time. Many EU parliamentarians would surely agree that the Lisbon change was a very important step towards EP participation in EU international trade relations. Maximalists would argue that this shift was unsuccessfully suggested already a decade before Lisbon, the fact that democratic oversight over EU international negotiations in the field of trade was achieved by the Lisbon Treaty should therefore be viewed as a minimum rectification of the institutional architecture 'bug'.

5.2. Why is the post-Lisbon arrangement not sufficient?

Economic globalisation is the 'gradual integration of national economies into one borderless global economy'.[85] It encompasses international liberalized trade and foreign direct investments.

As underlined by the EP President Schulz in his speech of 21 April 2015 delivered in Rome, “In today's world, parliaments don't stop their work at the national borders anymore. Parliaments have to think about the consequences of international events on their work. Because the borders between what is decided nationally and internationally are blurring. Whether they are about trade, data exchanges or strategic partnerships – many international treaties have consequences on national policies and practices. They should therefore be a concern for parliaments from the moment negotiations start until their final conclusion and implementation.”

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[81] Rafael Leal-Arcas, Is EC Trade Policy up to Par?: A Legal Analysis over Time—Rome, Marrakesh, Amsterdam, Nice, and the Constitutional Treaty, Columbia Journal of European Law, Spring, 2007.

[82] *Idem.*

[83] Rafael Leal-Arcas, The EU Institutions and their Modus Operandi in the World Trading System, Columbia Journal of European Law, Winter, 2005/2006.

[84] Article 207(2) TFEU.

[85] P. Van den Bosche, W. Zdouc, The Law and Policy of the World Trade Organisation, Cambridge University Press, 2015, p. 5.

The EU is naturally different from the US where trade and tariffs were a major cause of the tensions that led to the American revolution at the end of 18th century and was expressed by the slogan 'No taxation without representation' implying that if taxes or import/export tariffs were necessary, then the Americans wanted their own assemblies to impose them.

What is trade policy about? According to The Commission Directorate General for Trade, EU trade policy is working to (a) create a global system for fair and open trade, (b) open up markets with key partner countries and (c) make sure others play by the rules. Although the cross border dimension of international trade is its essential part, the ultimate goal of a mega free trade agreement, such as the negotiated Transatlantic Trade and Investment Partnership (TTIP), is to make it easier for companies to sell their products or provide services in new territories and eventually cut red tape that firms face when exporting and create a set rules to make it easier and fairer to export, import and invest.[86] Going even more closer into the concrete details, trade includes trade in goods, services, public procurement, vehicles, cosmetics, textile, food safety and animal and plant health, engineering, intellectual property, medical devices, pesticides, pharmaceuticals and others, which have to meet some standards and fulfil agreed conditions to be allowed by trading partners to enter their territory.[87] That brings us to the sphere in which any parliament has its say given that policy areas such as the protection of the environment, public health, economic affairs and the internal market, that traditionally come under detailed parliamentary scrutiny. This justifies the EP interest in the common commercial policy and more specifically in international trade matters.

5.3. The EU needs to speak with one voice

Although there is a clear parallel between traditional internal policies and international trade, the latter requires that specific procedures apply. Namely, it is necessary that there is one negotiator on the EU's behalf which is the Commission and the remaining EU players involved in the process speak with one voice. While the current Treaty provisions provide a clear mechanism: the Council adopts mandate - the Commission negotiates and keeps both EP and Council informed - the Council concludes the negotiations after the EP gives its consent, there is still room for improvement as regards the EP role in defining the binding negotiation mandate.

At the moment, in line with the statutory provisions of the treaties, the EP 'shall be immediately and fully informed at all stages of the procedure'[88] and 'the Council shall adopt the decision concluding the agreement […] after obtaining the consent of the European Parliament in the following cases: […] (v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.'[89]

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[86] Inside TTIP, An overview and chapter-by-chapter guide, Directorate-General for Trade of the European Commission, Publications Office of the European Union, 2015.

[87] There are number of publications on TTIP, one of the first books focused on TTIP was put together by J. Roy, R. Dominguez, The TTIP, Miami-Florida European Union Center/Jean Monnet Chair, 2014.

[88] Article 218(10) TFEU. The relevant Treaty provisions are in Annex III.

[89] Article 218(6)(a)(v) TFEU.

The practice shows that the information stage is implemented via frequent reporting to the EP Committee on International Trade (INTA) and the possibility for MEPs to consult negotiating texts.

As regards the consent phase, nobody questions that this procedure allows only for a 'yes' or 'no' vote in line with the fact that agreements agreed internationally cannot be subject to unilateral changes made by the approval bodies like a parliament. It nevertheless implies that the EP naturally scrutinises the outcome of the negotiations against the objectives (mandate). In the early years following the Lisbon treaty this exercise was far from an 'obligatory ride'. The SWIFT, PNR and ACTA cases and some fisheries agreements showed that the EP has its expectations as regards the content of agreed international agreements and doesn't hesitate to refuse to consent. Rather than 'manifesting' its power, this situation shows that the EP is active in getting involved early in the negotiation process and wants its voice to be heard along with the voice of the Council. It seems therefore very beneficial, that the Commission effectively listens to both the EP and Council and de facto recognised that the EU negotiating mandate in the case of TTIP consists of two parts[90] – one is the official mandate adopted by Council on 17 June 2013 (and declassified more than a year later on 9 October 2014) and the second is the EP resolution with recommendations for TTIP adopted on 8 July 2015.

5.4. Two 'mandates' for TTIP, a problem?

Statutorily, there is only one binding mandate – the text adopted by the Council. The Commission is nevertheless in a very complicated position. As well as conducting negotiations on the basis of the Council directives and trying to achieve as much as possible in direct talks with the US negotiating team, they have to bear in mind the de facto requirements which the EP voted with a large majority (436/241). Even though the EP text is not legally binding, the Commission takes it seriously as the EP will use it to assess the negotiated text as compared to the EP's objectives and is therefore an important part of the consent procedure that concludes the TTIP negotiations on the side of the EP one day.

Against this background it appears useful comparing the two mandates in order to see whether the EU players speak with one voice.

5.4.1. Quantitative analysis of the 2 texts

The first impression after reading both texts is that they have a comparable structure and there doesn't seem to be an obvious contradiction.

Length

The EP text (more than 7,700 words in English) is nearly twice as long as the Council text (more than 4,300 words). Given that the general scope of both texts is not that different, the qualitative analysis will show that the EP text is more concrete and detailed in a number of issues.

WTO terminology

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[90] 'Trade and investment policy is an exclusive competence of the EU. Democratic oversight of EU trade negotiations lies with the governments of the Member States, represented in the Council, and with the European Parliament. In addition to the mandate given by Member States before the start of the negotiations, the European Parliament adopted in May 2013 and July 2015 resolution on the EU trade and investment negotiations with the US, providing guidelines to EU negotiators for the conduct of the negotiations.' The Transatlantic Trade and Investment Partnership (TTIP) – State of Play, 27 April 2016.

In some places the Council text appears to refer to standard notions of WTO texts more than the EP text, e.g. the EP text makes it clear that the 'highest levels of protection of health and safety [shall be secured] in line with the precautionary principle laid down in Article 191 TFEU'[91] while the Council text calls for 'recognising the right for the Parties to appraise and manage risk in accordance with the level of protection that each side deems appropriate, in particular when relevant scientific evidence is insufficient'.[92] The latter is a notion contained in the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), in particular in its Article 5(7). Rather than referring to the precautionary principle that is contained in the EU document (TFEU), the Council refers to the document that is a benchmark for both negotiating parties. Nobody should question that Council is giving up the precautionary principle in the mandate, it just uses different ways of referring to it.

Normativity

The Council text contains 31 places in which its language uses a clear binding formulation 'shall', e.g. 'The Agreement shall provide for the reciprocal liberalisation of trade in goods and services'. There are 50 places where less prescriptive language is used by employing 'will', e.g. 'The goal will be to eliminate all duties on bilateral trade…'. 15 places containing 'aim' formulations, e.g. 'The aim of negotiations on trade in services will be…' and 41 places with open formulations 'should', e.g. 'The Agreement should develop a framework…'.

The EP text contains one 'shall' and 16 'will' formulations. There are 52 references to the less obligatory 'ensure' form, e.g. 'to ensure that the negotiations on rules of origin aim at…'. 'Aim' appears in the text 14 times, 'should' formulations 26 times. Although this mechanical counting of different formulations might so far give an impression that the EP text is more open to negotiations, there are 10 places in the EP text where a rather categorical 'must' wording is used, e.g. 'quality standards for energy products must be respected'. Plus there is a formulation that 'there will be no agreement' on matters on which the EU and the US have very different rules, such as GMOs, the use of hormones in the bovine sector, REACH.[93]

The normativity evaluation is far from perfect and requires more detailed analysis that can provide an answer as to which text is more categorical or more open to consider the results of the negotiations. It is nevertheless possible to assume that the EP and Council used their own language to define their respective priorities by formulations 'shall' or 'must'. Given the 'must' formulations and the 'there will be no agreement' notion, it is possible to believe that the EP text contains a few 'hand breaks' that are likely to 'kill' the deal if it contains provisions that were practically excluded by EP.

Timeline

The Council text was adopted nearly two years before the EP text. The advantage of Council adopting the text earlier was that the Council negotiating directives were a prerequisite for launching the actual negotiations with the US side, and had to be followed by the EU negotiators (Commission). Although the EP text came later, it doesn't mean that the EP didn't take a position on TTIP. The EP adopted two resolutions on the

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[91] Point 2(c)(i) of the EP text.

[92] First indent of point 25 of the Council text.

[93] Point 2(c)(iii) of the EP text.

TTIP negotiations before they were launched, one in October 2012[94] and the second one in May 2013.[95] The fact is, however, that detailed EP recommendations for TTIP negotiations comparable to the Council negotiation mandate came two years after the Council. As a consequence, the EP text appears to be more detailed and reflects issues that were not present at the moment of adoption of the Council text, e.g. the Council text is open to an investor-to-state dispute settlement (ISDS) which has since become highly controversial. Consequently, the EP calls for replacing ISDS with a new system and takes the word of the Commission President Juncker who stated that 'he will not accept that the jurisdiction of courts of Member States is limited by special regimes for investment disputes'.[96] This is not to say that Council was in favour of a 'wild' ISDS, quite to the contrary bearing in mind the condition for ISDS stipulated under points 22 and 23 of the Council text. There is nevertheless a clear difference in the approaches of the two institutions, while Council considers ISDS as an option, provided that the conditions were met, the EP makes it clear that ISDS has to be replaced with a different mechanism, which was effectively followed up by the Commission who presented a new scheme based on a permanent basis.[97]

5.4.2. Qualitative analysis of the 2 texts

The quantitative analysis of the 2 texts provides preliminary hints as to how those papers differ. In order to see whether there are differences as regards the actual wording of provisions on relevant subjects a more detailed textual analysis is needed.

Normativity

As mentioned, EP text contains several 'must' provisions

a) Point 2(a)(iv) lays down that TTIP '**must not** prevent efforts made in order to reach significant improvements on the multilateral level; TTIP **must ensure** synergies with other trade agreements currently being negotiated. The Council text appears less strict, its point 6, third indent, reads: 'The preamble […] will refer, inter alia, to: […] The commitment of the Parties to an Agreement in full compliance with their rights and obligations arising out of the WTO and **supportive** of the multilateral trading system'. Although the wording of both texts adopt a different approach, one cannot argue that the texts are contradictory or not homogeneous given that it is still to be seen what impact TTIP would have on a multilateral system.
b) the EP further requests in point 2(b)(i) that 'different proposals for [market access] areas **must** be balanced'. A mirror provision appears in point 2 of the Council text that reads 'The Agreement **shall be** ambitious, comprehensive, balanced …'. It seems therefore that both institutions put the same emphasis on this aspect.
c) Another 'must' that appears in point 2(b)(xii) of the EP text is more difficult to compare with a relevant provision in the Council text. The EP asks the Commission 'to incorporate, as a key point, a comprehensive and unambiguous horizontal self-standing provision, based on Article XIV of the General Agreement on Trade in services (GATS), that fully exempts the existing and future EU legal framework for the protection of personal data from the agreement without any

[94] P7_TA(2012)0388.

[95] P7_TA(2013)0227.

[96] Recital P of the EP text.

[97] For more details consult the factsheets on investment protection.

condition that it **must** be consistent with other parts of the TTIP'. As well as using a strong 'must' formulation, there is another element here – the key EP request not to make compromises as regards standards of EU data protection rules. The Council text doesn't contain any specific reference to data protection or privacy. Some of the provisions are open to the inclusion of other sectors (point 25, 4th indent) or point 42. The emphasis of the EP in this regard seems to go much further than any general provisions of the Council text.

d) In point 2(b)(xvi) the EP emphasises that 'the digital economy **must** be central to the transatlantic market'. Although there doesn't seem to be a corresponding provision in the Council text, the EP wording is to be understood more as an emphasis on the digital economy rather than a strong requirement towards TTIP.

e) Further on in point 2(d)(ii) the EP stresses that 'provisions [on sustainable development] **must** be aimed at further improving levels of protection of labour and environmental standards; an ambitious trade and sustainable development chapter **must** also include rules on corporate social responsibility based on OECD Guidelines for Multinational Enterprises and clearly structured dialogue with civil society'.
Although the Council would surely not want to go in the opposite direction, its formulations in points 31 and 32 are less normative as the relevant text reads: 'The Agreement **will include** commitments by both Parties in terms of the labour and environmental aspects of trade and sustainable development. **Consideration will be given** to measures to facilitate and promote trade in environmentally friendly and low carbon goods […] The Agreement will also include provisions **to promote** adherence to and effective implementation of internationally agreed standards and agreements in the labour and environmental domain as a necessary condition for sustainable development.''[…] It **should also include provisions** in support of internationally recognised standards of corporate social responsibility'.
This comparison suggests that the above points are important for the EP as reflected in the rather normative language used and one should therefore expect that the absence of those matters in the final deal could cause problems on the EP side when considering its consent for the agreement.

f) Point 2(d)(vii) of the EP text stipulates that the 'energy chapter **must integrate** clear guarantees that the EU's environmental standards and climate action goals must not be undermined'.
As regards the energy sector, the Council text states in point 37 that 'The Agreement will include provisions addressing trade and investment related aspects of energy and raw materials.
As regards environmental standards point 25 of the Council text reads:
'Regulatory compatibility **shall be without prejudice** to the right to regulate in accordance with the level of […] **environmental protection** […] that each side deems appropriate.
Although the wording is not the same in both texts, it appears that both institutions put the same emphasis on the energy chapter.

g) Intellectual property rights, Geographical indications
The EP text calls in its point 2(d)(xvi) on the Commission 'to ensure that TTIP includes an ambitious, balanced and modern chapter on and precisely defined areas of intellectual property rights, including recognition and enhanced protection of geographical indications'. In point 2(d)(xix) the EP asks to '**to secure full recognition** and strong legal protection of EU geographical indications'.
The Council text in its point 29 reads:

'The negotiations **shall aim to provide for enhanced** protection and recognition of EU Geographical Indications through the Agreement, in a manner that complements and builds upon the TRIPS, also addressing the relationship with their prior use on the US market with the aim of **solving** existing **conflicts in a satisfactory manner.'**

If the text is interpreted as a guideline or an objective to be achieved, and not taken 'word for word', one could argue that the goal is the same. There are nevertheless differences, while the EP demands full recognition of EU geographical indications, the Council calls for enhanced protection and outlines that conflicts should be solved in a satisfactory manner. This wording could imply that the Council is more open to a compromise on this matter than the EP is.

Red line

The wording of the EP text in point 2(c)(iii) could be interpreted as an EP red line as it states that:

> *'where the EU and the US have very different rules, **there will be no agreement**, such as on public healthcare services, GMOs, the use of hormones in the bovine sector, REACH and its implementation, and the cloning of animals for farming purposes, and therefore not to negotiate on these issues'.*

Although the Council text doesn't contain a provision that would be openly drawing a red line, one may nevertheless interpret some of the Council provisions in the sense that negotiations should not be conducted in areas where the two negotiating parties are far apart.

On the other hand, in theory, if any of the 'banned' sectors appear in the deal, the EP would probably have no choice but to vote against the deal while the Council could still vote in favour of such a deal as the Council mandate seems to be open to different scenarios.

Other points from the EP text

Compared to the Council mandate, the EP text is more detailed as regards e.g.

- Market access for services (point 2(b)(v)),
- It calls for the removal of current US restrictions on maritime and air transport services (point 2(b)(vi))
- The EP underlines the point (point 2(b)(ix)) on visa facilitation and asks to increase political pressure on the US to guarantee full visa reciprocity and equal treatment for all EU citizens. There is no 'mirror' provision in the Council text.
- Both institutions agree that prior to initialling the agreement, there should be a sustainability impact assessment that will examine its economic, social and environmental impact. While the Council vaguely sates that consequently measures should be proposed to minimize potential negative impacts (point 33), the EP suggests that 'adjustment costs could partly be taken up by EU and Member State funding.' (point 2(d)(vi)

5.4.3. What does the Commission say about the texts?

It might be a deficiency of the research but there doesn't seem to be an official follow up to the Council text in the form of comments. This is in a way understandable because, for the Commission, this is a binding mandate that they have to follow and in case there are issues, those are probably discussed between the Commission and Council.

On the other hand, as the EP text is formally speaking not binding, the Commission presented a follow up report to the EP text on 21 October 2015.[98]

In general, the Commission's follow up to the EP text is written using very positive language, welcoming EP support.

Except for one point on the full visa reciprocity, which the Commission says goes beyond the negotiating mandate, there doesn't seem to be a disagreement with what the EP demands. It is nevertheless useful to look at different wordings:

- 'On the EP request to ensure that TTIP preserves the EU high standards [...] the Commission wishes to stress again that TTIP will in no way lower or undermine the EU's high standards [...]'
- 'The Commission can *reassure* the Parliament that it will remain a strong defender of the multilateral system [...]'
- 'The Commission *shares* the EP's view that [...]'
- 'The Commission *takes note* of Parliament's request on [...] those issues go beyond trade policy'
- 'The right to regulate by EU and Member States' regulators will not be put in question. The European Parliament's role within the EU decision-making process and its democratic scrutiny will be preserved, the Commission will for its part not accept any changes in its right of initiative.
- 'The Commission *agrees* that [...]'
- The Commission *will give careful* consideration to EP request for [...]'
- 'The Commission *takes very careful note* of EP concerns'
- 'The Commission *fully shares* Parliament's view on [...]'
- 'The EP's recommendations are in line with the Commission's negotiating objectives [...]'
- 'The Commission *broadly agrees* with EP recommendations on [...]'

The objective of the above quotes is to show that there are many EP recommendations that the Commission agrees with, others that will be carefully considered, on some the Commission takes note of the EP's requests and there are a few which it deems go either beyond the (Council) mandate or beyond the trade area.

The Commission is in a very difficult position which they seem to manage very well. They have to follow the negotiating directives adopted by Council, ensure that the EP voice is heard, conduct the actual negotiations while keeping in mind both texts which offer, in a number of places, different options for interpretation, report back to the EP and Council and hope that all that effort will one day result in a well agreed deal with the United States.

[98] Follow up to the European Parliament resolution containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP), adopted by the Commission on 21 October 2015.

5.5. Role of the US Congress in negotiations of international trade agreements

According to the US constitution the Congress shall have the power to regulate commerce with foreign nations.[99] In practice the Congress lays down guidelines before negotiations start, is consulted during the negotiation process and the outcome of such negotiations is submitted for its approval. Plus, the Congress needs to pass the bills that implement a trade agreement into the US legal order. It is the executive power led by the president who has the exclusive authority to negotiate treaties and exercise broad authority over the conduct of the nation's foreign affairs.[100]

Congress thus plays an important and direct role in designing and implementing US international trade policies and in assessing the impact of trade agreements on the US economy.[101] Congress has made it clear that trade is an important aspect of US foreign economic and security policy because it generates broad benefits for the US and the global economy.[102] The impact of trade on the economy is nevertheless a divisive topic everywhere, as is clearly seen in the EU as regards the negotiations on TTIP and also in the US with regard to the Trans Pacific Partnership that was concluded in 2015 .

There are number of possible answers as to why trade is controversial. Some would argue that as well as importing goods from a trading partner, also lower standards, e.g. in the field of environment, food safety or labour are imported and thus lower domestic norms. Others would add that trade deals are negotiated in a non-transparent manner without public scrutiny. Although trade agreements generate profits overall, their welfare effects are asymmetric as they produce uneven distribution of losses.[103] Consequently, this controversy generates political competition in which the US legislative and executive branches actively participate. As probably everywhere, trade policy debates at such a high level like the US Congress include those who are 'ideologically' pro or anti trade focused and those who decide on the basis of the outcome provided by the negotiated trade deal.

5.5.1. A very brief history

The tariffs, set by Congress, were the main trade policy instruments for the first 150 years of the United States.[104]

Two legislative events that influenced significantly US trade policy occurred in the 1930s. The first was the 'Smoot-Hawley' Tariff Act[105] which set prohibitively high tariff rates and led to retaliatory tariffs by major US trade partners. In 1934 Congress enacted the Reciprocal Trade Agreements Act[106] that authorized the President to enter into reciprocal trade agreements that reduced tariffs within pre-approved levels. The latter

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[99] Article I, Section 8 of the US Constitution.

[100] Article II, Section 2 of the US Constitution.

[101] Trade Agreements: Impact on the U.S. Economy, J.K. Jackson, Congressional Research Service, RL31932, February 4, 2010.

[102] Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy. CRS Report RL33743, June 15, 2015, p. 11.

[103] J. Kucik, A. Moraguez, The Domestic Politics of Trade Agreement Ratification. September 2013.

[104] Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy. I.F.Fergusson, Congressional Research Service, June 15, 2015. RL 33743, p. 2.

[105] P.L. 71-361.

[106] P.L. 73-316.

act presented the first version of trade negotiating authority on the basis of which 19 tariff-cutting trade deals were concluded between 1934 and 1939 (e.g. with the UK, Czechoslovakia and Canada). Trade negotiating authority granted to the president worked well for a couple of decades and was extended 11 times until it was reformed in 1974 by the Trade Act of 1974.[107] Before 1974 trade negotiations were predominantly about cutting tariffs. It was a straightforward process – Congress determined what the President's margin to agree tariff reduction was, which was consequently followed by the negotiators and introduced in the US legal order. In the 1960s it became apparent that the GATT rounds could not provide further room for trade liberalisation by cutting tariffs as those were already low. Therefore, to continue liberalizing world trade, non-tariff barriers need to be addressed. To address the issue and process agreements that required changes in US law going beyond tariff modifications, the Trade Act of 1974 stipulated that non-tariff barrier agreements could only enter into force if Congress passed implementing legislation.[108]

Some in Congress argued that such implementing legislation could not be subject to the ordinary debate and amendment process as US trading partners might be reluctant to negotiate agreements that are subject to unlimited congressional debate and amendments. As a solution a fast track mechanism was established that is referred to as Trade Promotion Authority (TPA).

5.5.2. Trade Promotion Authority

TPA has the following features:

- In the first place Congress passes a bill that defines the negotiating objectives for the executive which conducts trade negotiations.
- It stipulates the way the executive consults with Congress during the negotiations and prescribes time limits for notifications.
- If TPA conditions are met, Congress will consider trade agreements and the necessary bills implementing them under expedited legislative procedures, with time limited debate and with no possibility to table amendments.

Strictly speaking, TPA doesn't grant a new authority to the President as the President poses inherent authority to negotiate with other countries. However, if such an agreement requires changes in the US legal order, the modifications can only be enacted by Congress. TPA therefore provides an opportunity for the President to ensure that the relevant bills will be treated as a priority and will not be amended during the legislative process. As every trade deal provides benefits to all parties to the deal, Congress doesn't offer this generous option 'for free' but lays down conditions. Although, in theory, the President can go ahead with trade negotiations without TPA, in reality, no trade agreement was approved without TPA in the last 30 years. The executive finds it easier to wait for the Congress mandate, conduct negotiations, consult with Congress and other stakeholders in the course of the negotiations and get 'priority' treatment with an up or down vote for the implementing bills at the end. This process inevitably requires that the relevant actors cooperate and find consensus on the key trade negotiations objectives.

[107] P.L. 93-618.

[108] Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy. I.F.Fergusson, Congressional Research Service, June 15, 2015. RL 33743, p. 4.

The practice shows that this process is complex, complicated and controversial as shown by the majorities secured for the TPA adopted in this century.

Following the request of President G.W. Bush, TPA was renewed in 2002 by the Bi-partisan Trade Promotion Authority Act of 2002 (BTPA).[109] The original House version was passed by one vote (215-214), the Senate version was passed by 66 to 30. The compromise version contained in the conference report was adopted by the House (215-212) and by the Senate (64-34). The BPTA was used for approving implementing legislation for trade agreements with e.g. Australia, the Central American countries, Peru, Colombia and South Korea. As BPTA expired in 2007 a new TPA needed to be passed by Congress to enable the executive to proceed with the upcoming trade deals, such as the Trans Pacific Partnership and TTIP. That happened by adopting H.R. 2146, Bi-partisan Congressional Trade Priorities and Accountability Act of 2015.[110] The final vote on the 2015 TPA was nearly as narrow as the one in 2002, given the House final vote 218-206 and the necessary 60 vote majority required in the Senate (60-38).

The legislative history of the 2015 TPA might appear rather complicated and was already touched on in the previous chapter. The fact is that the bill was introduced along the tradition by the chairs of the House Ways and Means Committee P. Ryan and of the Senate Finance Committee O. Hatch. The bill was drafted by the legislature with the support of committee staff and Legislative Council. As outlined by the Legislative Council S. Strokoff, although the 2015 TPA is a 'brand' new act, it's drafting process was largely launched on the basis of the previous TPA and was developed further during the legislative process on the basis of the compromises reached.

In the 2015 TPA, Congress sought to achieve four major goals:[111]

- To define trade policy priorities and to have those priorities reflected in trade agreement negotiating objectives,
- To ensure that the executive adheres to these objectives by requiring periodic notification and consultation with Congress,
- To define the terms and procedures under which the President may enter into trade agreements and under which the respective implementing bills may be approved,
- To reaffirm Congress's overall constitutional authority over trade.

Including the possible extension the 2015 TPA will expire in 2021.

Like the EU negotiating directives or the EP text, the current TPA consists of several parts and starts with the objectives that are classified into Overall Trade Negotiating Objectives (section 102(a)) and Principal Trade Negotiating Objectives (section 102(b)). Under the former there are 13 goals such as obtaining more open and reciprocal market access, reduction or elimination of trade barriers etc. The Principal objectives are divided into 21 chapters that develop more in detail the Overall Objectives, e.g. as regards trade in goods, services and agriculture, digital trade, intellectual property and investment etc.

[109] P.L. 107-210.

[110] P.L. 114-26.

[111] Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy. CRS Report RL33743, June 15, 2015, p. 8.

The sections that follow, i.e. 103, 104, 105 and 106 stipulate important procedural requirements for TPA, such as Congressional oversight, consultations and access to documents, notice and implementing bills.

It is very interesting to have a brief look at the TPA language. The part devoted to objectives uses broad legislative language that uses the present tense 'The […] objectives […] are: to obtain […], to ensure […], to promote […], to recognize […], to take account […], to expand […]' etc. That wording cannot be interpreted as being non mandatory. At the same time, one could argue that there doesn't seem to be imperative provisions like the ones present in the EP text. TPA seems to provide a clear set of objectives and gives the necessary room for manoeuvre to the negotiators as to how far they would be able to go to achieve those objectives.

Looking at further sections of TPA, the language becomes normative in several provisions that lay down what the President or the United States Trade Representative (USTR) shall do as regards, e.g. the consultation process or deadlines.

Although it is not the purpose of this paper it seems that the TPA wording is closer to the Council text rather that the EP text, setting out objectives with reasonable detail while keeping the language general enough to leave the space for negotiators to manoeuvre, if needed. As regards procedural provisions, there is no need for the EU texts to be more detailed, as in the case of TPA, bearing in mind the detailed provisions contained in TFEU.

5.5.3. Mock markups and side agreements, side letters

A committee markup is the key formal step a Congressional committee ultimately takes in order for a bill to advance to the floor. Normally, a committee chair chooses the proposal that will be placed before the committee for markup: a referred bill or a new draft text. At this meeting, members of the committee consider possible changes to the proposal by offering and voting on amendments to it, including possibly a complete substitute for its text.

While the markup is a traditional element in a congressional legislative process, there is, strictly speaking, no markup for bills implementing a trade agreement, that are submitted to a yes or no vote under TPA. There is therefore no room for a markup as modifications to introduced implementing bills are not allowed. It is nevertheless important for all stakeholders to engage in an early consultation process and avoid a situation where the implementing bills fail. Over the years a mock markup process has been developed which has become a traditional method for the House Ways and Means Committee and Senate Finance Committee to provide their views on the implementing bills before they are formally sent to both houses. That also provides an opportunity to the two committees to organize hearings on the implementing bills. The whole process is purely advisory and it is up to the president to accept the advice.[112]

Outside of formal TPA, Congress sometimes insisted on additions or clarifications to trade agreements resulting in side agreements or side letters that can involve additional obligations accepted by the relevant parties after the signature of the trade agreement. Some examples are the environment and labour side agreements of NAFTA.[113]

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[112] TPA, Frequently Asked Questions, CRS Report 43491, p. 26.

[113] Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy. CRS Report RL33743, June 15, 2015.

5.5.4. Is Congress satisfied with TPA?

The EU post Lisbon mechanism applicable to the negotiation and conclusion of international trade agreements is still in the early stages and therefore probably still a bit too early to evaluate. It is nevertheless clear that the EP takes its role seriously and uses all means available in order to make its voice heard. The near future will show to what extent the EP was successful in securing its priorities in the negotiated trade deals.

The US Congress is in a different situation. Unlike the EU system, both chambers are involved in the process of defining negotiation objectives and other relevant conditions on the US side.

Congress has a number of possibilities as to how to effectively influence upcoming trade agreements:

(a) by defining negotiation objectives and other procedural requirements in TPA,
(b) by being regularly informed and consulted by USTR,
(c) by approving the negotiated deal and the necessary implementing bills (yes or no vote),
(d) by influencing the content of implementing bills through a 'mock markup',
(e) by requesting additional guarantees from the other party to a trade agreement in a form of side letters.

While Congressional involvement in actions under points (a) and (c) could be described as unilateral and are thus under the full control of the US legislative body, the other areas require cooperation or at least discussion with other players such as the President and USTR. Given that the actions under points (a) and (c) are well established and nobody seems to question whether and to what extent the US Congress should be involved, the attention will be paid predominantly to action under point (b) – consultations with USTR. As examined by a detailed Analysis of Free Trade Agreements and Congressional and Private Sector Consultations under Trade Promotion Authority,[114] this phase appears to be decisive for Congress in order to influence the final outcome of the negotiations.

The Analysis looks closer at the TPA that was in place in the period 2002-2007 on the basis of which the US concluded 10 free trade agreements and took part in the WTO Doha Round.

According to the Analysis, 83 % of the consultations took place at staff level, 9 % with individual senators or representatives, 3% with the staff of individual senators or representatives, 2 % with other committees and only 1 % with the newly created Congressional Oversight Group (COG), a bicameral institution that involved Members from all committees that has something to say as regards jurisdiction over free trade agreements. While elected Members play an essential role when political decisions are taken, the above numbers show that the congressional staff from the relevant committees are the ones who can make relevant contributions in the time when it is possible to have an impact during the negotiation phase.

In practice, however, it is not that easy to fully exploit this opportunity. More than half of the congressional staff interviewed for the purposes of the analysis viewed the consultations as a good conduit for information flow from USTR but not as a good forum for working together and developing policy jointly, or in other words they felt well briefed but not consulted.

[114] Published by the US Government Accountability Office (GAO-08-59) on Nov 7, 2007.

As regards timing, the staff felt that one way to achieve more meaningful input was to allow more time for feedback that would allow them to consult with their committee or member and develop a response to USTR. An interesting point that demonstrated how complex the area of international trade is was a remark that if the staff asked a question, they received a full reply. But if staffers didn't know what to ask, they were at a disadvantage in obtaining pertinent information. This might sound like a point that addresses the incompetency of the staff that should not be that difficult to solve. How can USTR answer questions if Congressional staffers don't know what to ask? The issue is, however, more complex. The way trade agreements are drafted is very complex. There are numerous references to WTO texts that are often used as reference documents. The language involves a great deal of specialised terminology and jargon that not everybody understands. All that leading to the fact that principles that are heavily discussed by the media or politicians look quite different in the text of a free trade agreement. It was therefore underlined that it is necessary to have access to expert staff, e.g. through the Congressional trade office.

Another issue raised by most congressional staff was that the committees didn't have meaningful input into the selection of the trading partner. Some staff also criticized USTR for not fully informing them about important changes in draft texts under negotiation.

Although most trade staff were familiar with the mock markup process, it was also underlined that it is too late to focus on a deal at the end when the deal is essentially done and it is difficult, if not impossible, to change the terms of the agreement. That implies that earlier attention by Congress is important.

Some also mentioned that technical obstacles, such as access to the classified negotiating documents by staff with security clearance in a special room, don't make the process of providing congressional input easier.

The above criticism doesn't mean that the consultation process is bad; it simply implies that the discussion as to how to make the congressional voice heard is probably further advanced than the discussion in the EU where it appears useful to coordinate better the kick off phase (mandate) first and then discuss how to translate priorities defined in the mandate into a negotiated text.

6. Conclusion on the EP role in negotiations of trade agreements

One can suggest that **option 1** is keeping the mechanism that is currently applicable in line with the relevant Treaty provisions, meaning that Council adopts the official negotiation guidelines, the Commission negotiates and keeps the EP and Council informed and the EP's consent is granted at the end, followed by the Council concluding the process. This procedure has been in place since December 2009 and it would probably be unfair to conclude that the process is failing at this moment. Yes, there were international instruments such as SWIFT or the Fisheries agreement with Morocco to which EP didn't consent but many others made it to the end.

The above analysis of the Council and EP TTIP texts shows that they are drafted in a different manner and the degree of homogeneity varies. There aren't probably obvious contradictions but a number of nuances are drafted differently, in a number of provisions one or the other institution used a different level of normativism thus placing an emphasis on not entirely the same aspects of the negotiation outcome.

Those who are in favour of keeping the status quo might use the following arguments:

(a) Under the Treaties there is just one negotiating mandate, the one approved by Member the States gathered in Council. Like it or not this is how the Treaties are designed.
(b) The EP's role is fully recognised under the Treaties, it is regularly and fully informed, has access to the negotiating texts and has at its disposal a 'nuclear power' at the end by which it can stop the deal.
(c) More deep involvement of the EP in the shaping of the official EU mandate would make the process longer and more complicated if not impossible.
(d) It is not an exception that different constitutional systems offer different options as regards the involvement of respective chambers of legislature in the negotiation and conclusion of international trade agreements.
(e) If the EP wishes to do so, it can adopt its own recommendations for the outcome of the negotiation, despite its power to stop the deal at the end; such a position is its own paper that can differ from the official mandate but at the same time should not expect to be followed in the areas that depart from the official position.
(f) It is legitimate to expect that there would be EP representatives who would not be in favour of changing the status quo, which enables the EP and Council to use their 'liberty' in drafting their respective papers. If the EP doesn't agree with the Council text or its approach or language, it is not forced to compromise but has room for outlining its own position. Plus, in case the situation evolves as was the case with ISDS in TTIP, the EP has a possibility to update its position to negotiations.

Option 2 is redesigning the current mechanism by ensuring that both chambers of EU legislative power – the EP and Council act on equal footing. In practical terms it would mean that the relevant treaty provisions would have to be adapted in order to ensure that e.g. the decision to enter into negotiations on an international trade agreement and a negotiating mandate as such would be adopted by the EP and Council by means of the ordinary legislative procedure (OLP).

Those who are in favour of such a change could argue this way:

(a) While the current Treaties provisions are clear and the EP uses its options provided in this regard, it is not sustainable to keep the status quo long-term. The EP has showed its legitimate interest in the negotiations of international trade agreements and outlined its priorities. Some might describe this as 'power grabbing' but the fact is that rather than waiting for the final vote going against a negotiated deal, the EP needs to indicate openly what are its requirements for the deal in order to give its consent when the time comes. The EP has shown that nobody can take a 'yes' vote for granted.
(b) The common commercial policy belongs to the field of EU exclusive competence. It is therefore necessary that full democratic oversight is ensured in a procedure that leads to EU commitments at the international level.
It is worth mentioning at this point a reference to legitimating beliefs that were discussed more in detail in chapter I. If trade agreements where the EU is a contracting party were signed solely by the EU institutions, this question of how to address the lack of involvement of Member States would have been on table. And the involvement of the EP in defining 'official' negotiating directives would have been tackled a long time ago. The fact is that no free trade agreement is is based on the exclusive EU competence given that trade agreements usually have other elements that come from mixed or other competences, such as national

security or defence, what makes those agreements mixed and requires that they are also ratified by Member States. That is probably one of the reasons why it has taken time to enhance EP role in the field of the common commercial policy under the Lisbon Treaty.

(c) It is important that the EU's 'mouth' that speaks at international trade negotiations on the EU's behalf (the Commission), speaks with one voice - a joint EP and Council mandate that serves as a reference point. This prevents the other negotiating party from exploiting differences in the negotiating mandates against the EU.

(d) Adoption of such a negotiating mandate by means of a decision in OLP addresses transparency issue that proved to be very controversial in the case of TTIP. OLP doesn't leave any room for keeping the negotiating mandate secret as the OLP procedure has prescribed steps in the Treaties, is scrutinised openly by the respective institution and its outcome is published at the end.

(e) If the EP is involved in writing the negotiating mandate, it takes its responsibility for the planned objectives and uses its influence to communicate the expected achievements to the public and respective constituency of individual MEPs who become Council and Commission allies. TTIP case showed that at some point EP with its recommendations acted as one of many contributors to TTIP, even criticizing the Council for not releasing the mandate.

(f) OLP is a procedure that might take time, in average 19 months were necessary to conclude an OLP procedure in the last EP legislative term 2009-2014.[115] This time might be longer or shorter depending on priorities put to the respective agenda point. Even if the negotiating mandate would be a top priority, it is likely that the OLP would not last shorter than 12 months from the moment the institutions start discussing first draft until the final outcome is published in the Official Journal.

Adding a new player in the process of defining the EU binding mandate would not make it easier, it is nevertheless very likely that this aspect would not block the procedure or make it unreasonably longer. On the other hand, resolving differences between the approval bodies at the beginning of the process would bring the above advantages, it is therefore worth investing that time at the beginning.

(g) The US experience shows that clear statutory requirements that involve both chambers of Congress on an equal footing in defining the mandate, don't solve all problems regarding the involvement of the legislature in negotiations on international trade agreements. At the same time, well established procedures that put both legislative chambers on an equal footing allow the US trade actors to focus on how the negotiation objectives are practically translated into the negotiated trade deals and try to answer questions: how to achieve a true consultation process that works both ways.

The EU is developing its own pace taking into account its own specificities. I therefore don't want to conclude the paper by saying that EU trade procedures need to be redesigned to copy those of the Congress. Going towards Option 2 would nevertheless mean that the EU addresses the reasons of some of the current institutional deficiencies in the field of international trade agreements rather than the consequences. It seems

[115] A guide to how the European Parliament co-legislates under the ordinary legislative procedure, p. 35.

that the EU invests a considerable amount of time and energy in order to ensure that the EP is fully informed and feels 'on board'. This is happening not only by applying the relevant Treaty provisions but also by means of the EP and Commission Framework agreement that has provisions on the involvement of EP Members in international delegations. Once the EP, together with the Council, controls the negotiation process from the beginning, all actors can focus more on the substance of the negotiations and save time and energy by eliminating unnecessary interinstitutional discussions.

7. Annexes

7.1. Annex I: list of legislative initiative reports adopted by European Parliament[116]

Title	Follow up by Commission (COM)
Statute for social and solidarity-based enterprises 2016/227(INL)	Not yet adopted by the JURI Committee
Establishment of an EU mechanism on democracy, the rule of law and fundamental rights 2015/2254(INL)	Adopted by the EP plenary on 25.10.2016, not yet followed by COM
Civil law rules on robotics 2015/2103(INL)	Not yet adopted by the JURI Committee
Common minimum standards of civil procedures 2015/2084(INL)	Not yet adopted by the JURI Committee
Protection of vulnerable adults 2015/2085(INL)	Not yet adopted by the JURI Committee
Cross-border recognition of adoptions 2015/2086(INL)	Not yet adopted by the JURI Committee
Limitation periods for traffic accidents 2015/2087(INL)	Not yet adopted by the JURI Committee
Reform of the electoral law of the European Union 2015/2035(INL)	Adopted on 11.11.2015, not yet commented by COM
Bringing transparency, coordination and convergence to corporate tax policies in the Union *'Luxleaks'* 2015/2010(INL)	COM refers to **a number of legislative proposals made following the EP vote**
European system of financial supervision (ESFS) review 2013/2166(INL)	COM will not introduce a new legislative proposal, it will be the task of the new COM
Review of the European Arrest Warrant 2013/2109(INL)	COM will not introduce a new legislative proposal, instead will focus on improving the implementation of EAW

[116] Situation at the end of 2016

Improving the practical arrangements for the holding of the European elections in 2014 2013/2102(INL)	COM will prepare a report after the 2014 elections
Parliament's rights in the appointment procedure of future Executive Directors of the European Environment Agency - amendment of Article 9 of Regulation (EC) No 401/2009 of the European Parliament and of the Council on the European Environment Agency and the European Environment Information and Observation Network 2013/2089(INL)	COM will not introduce a new legislative proposal until 2016
EU donor coordination on development aid 2013/2057(INL)	COM doesn't propose to follow up with a legislative proposal
Combating violence against women 2013/2004(INL)	**One area raised by EP might be followed by a legislative proposal**, others don't require new proposals
Composition of the European Parliament with a view to the 2014 elections 2012/2309(INL)	European Council Decision reflected EP proposal
Better governance for the single market 2012/2260(INL)	COM doesn't propose to follow up with a legislative proposal
Towards a genuine Economic and Monetary Union 2012/2151(INL)	COM has already acted or will follow up with non-legislative measures
Access to basic banking services 2012/2055(INL)	**COM might make a legislative proposal**
Information and consultation of workers, anticipation and management of restructuring 2012/2061(INL)	COM will make a report which might make ground for future legislative proposal
Statute for a European mutual society 2012/2039(INL)	COM launched a consultation, once closed, COM will consider legislative proposal
Law of Administrative procedure of the European Union 2012/2024(INL)	COM will launch a detailed stocktaking exercise and consider all options to address EP recommendations

Application of the principle of equal pay for male and female workers for equal work or work of equal value 2011/2285 (INL)	COM is or will carry out studies which might lead to preparing a legislative proposal
Jurisdictional system for patent disputes 2011/2176(INL)	COM accepted the EP recommendations, there was nevertheless no action needed as the matter was already addressed in other legislative instruments
14th company law directive on the cross-border transfer of company seats 2011/2046(INL)	COM already launched public consultation on the matter and its reflection on the future action will be finalised in the near future
Insolvency proceedings in the context of EU company law 2011/2006(INL)	COM is currently carrying out an in-depth evaluation of the application of the Insolvency Regulation, its report and a public consultation for the future policy options are foreseen by end 2012
Improving the economic governance and stability framework of the Union, in particular in the euro area 2010/2099(INL)	COM presents a list of actions already taken and refers to upcoming MFF instruments that are on the way in the near future
Cross-border crisis management in the banking sector 2010/2006(INL)	COM will push with urgency to deliver a new framework and will provide further details in its communication in autumn 2010, to be followed up with legislative proposals in Spring 2011 (not necessarily following EP recommendations)
Proposal for a regulation of the European Parliament on the detailed provisions governing the exercise of the European Parliament's right of inquiry 2009/2212(INL)	No COM follow up found
Proposed interim measures for the freezing and disclosure of debtors' assets in cross-border cases 2009/2169(INL)	COM welcomed the EP recommendations and support which is likely to facilitate forthcoming negotiations for adoption which should start under the Polish Presidency

Amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) 2009/2170(INL)	No COM follow up found
Cross-borders transfers of company seats 2008/2196(INL)	It is appropriate for the next COM to decide on how to proceed
Guidelines for a proposal of a regulation of the European Parliament and the Council on the implementation of the citizens' initiative, pursuant to Article 11(4) of the Treaty on the European Union 2008/2169(INL)	COM will make a proposal once the Lisbon treaty is in place, not necessarily following all EP recommendations
Lamfalussy follow up - Future structure of supervision 2008/2148(INL)	Many of the recommendations are already being addressed, or are included in current COM work. A list of EP recommendations is commented in detail by COM, there doesn't seem to be a one recognition that COM would admit that EP idea is good and will trigger further COM action.
E-justice 2008/2125(INL)	COM lists initiatives already taken or planned for future
European Authentic Act 2008/2124(INL)	Given the complexity of the issue COM intends to initiate broad consultation on this subject by publishing a Green Paper
Legal protection of adults: cross-border implications 2008/2123(INL)	The Hague Conference on Private International Law needs to enter into force first, COM might consider afterwards whether anything more needs to be done at EU level.
European initiative for the development of micro-credit in support of growth and employment 2008/2122(INL)	COM lists initiatives already taken or planned for future
Alignment of legal acts to the new Comitology Decision 2008/2096(INL)	COM lists initiatives already taken or planned for future
Recommendations on the application of the principle of equal pay for men and women 2008/2012(INL)	COM lists initiatives already taken or planned for future. “As regards Parliament's actual recommendations in the annex to the

	resolution, the Commission stresses that it cannot prejudge the results of the ongoing analysis at this stage.”
Statute of the European Ombudsman 2006/2223(INL)	COM agreed to the EP amendments to the statute of the Ombudsman
Transparency of institutional investors 2007/2239(INL)	COM lists initiatives already taken or planned for future. A list of EP recommendations is commented in detail by COM, there doesn't seem to be a one recognition that COM would admit that EP idea is good and will trigger further COM action.
Hedge funds and private equity 2007/2238(INL)	COM lists initiatives already taken or planned for future
Proposal to amend the Treaty provisions concerning the composition of the European Parliament 2007/2169(INL)	No COM follow up found
The limitation periods in cross-border disputes involving injuries and fatal accidents 2006/2014(INL)	“Whilst the report sets out an interesting attempt to tackle what is a difficult subject and to propose a general European solution … any study would have to explore the implications” [of EP recommendations]. COM has no time to do it right now.
The European private company statute 2006/2013(INL)	“The Commission has taken note of the Parliament's Resolution. Before any initiative can be adopted, the Commission, in accordance with the better regulation principles, has to carry out a detailed impact assessment, considering possible alternatives, as well as examining the added value that an EPC statute could bring.”
Protecting European healthcare workers from blood borne infections due to needle stick injuries 2006/2015(INL)	**In principle the Commission would be willing to launch a legislative initiative with a view to amending Directive 2000/54/EC in the way requested in Parliament's resolution.**
Succession and wills. Green Paper 2005/2148(INL)	COM lists initiatives already taken or planned for future
Heating and cooling from renewable energy sources	EP text backs the COM strategy for the promotion of renewable energy use in the

2005/2122(INL)	EU and will therefore be considered for future COM strategy. "Obviously the Commission's right of initiative will need to be respected".
Access to the institutions' texts 2004/2125(INL)	COM lists initiatives already taken or planned for future.
Regional and less-used languages in Europe in the context of the enlargement and cultural diversity 2003/2057(INL)	No COM follow up found
Adoption of the statute of European Members 2003/2004(INL)	Specific case. It was not up to COM to present leg proposal.
Price system for books 2001/2061(INL)	No COM follow up found
Car insurance: third part liability, better legal protection of accident victims, 5th directive 2000/2126(INL)	No COM follow up found
Protection of the financial interests of the European Union using criminal law 1999/2184(INL)	No COM follow up found
Electricity network access for renewable energies 1998/2101(INL)	No COM follow up found
European health card 1995/2189(INL)	No COM follow up found
Regulation of claims resulting from traffic accidents occurring in another Member State 1995/2078(INL)	No COM follow up found
General Community strategy for the forestry sector 1994/2195(INL)	No COM follow up found

7.2. Annex II: Holders of legislative initiatives in the EU Member States and corresponding statistics

Table 1 - Founding Member States

Country	Legislative initiative	Tabled/adopted laws	Percentage of all proposed/adopted	Success ratio in %
Belgium[117]	Government	712/708	22,75/75,2	99,4
	Members of parliament (MPs)	2418/233	77,25/24,8	10
Germany[118]	Government	484/434	57,3/78,5	90
	Political groups (Bundestag)	273/86	32,3/15,6	31,5
	Group of 5% MPs (Bundestag)	5/2	0,6/0,3	40
	Bundesrat	82/17	9,7/3,1	21
France[119]	Government	320/230	19,5/78,7	71,8
	MPs (both chambers)	1317/62	80,5/21,3	4,7
Italy[120]	Government	422/322	11,6/79,1	76
	MPs	3227/85	88,4/20,9	2,6
	Citizens (50000)			
	The Economy and Labour National Council[121]			
	Regional Parliaments			
Luxembourg[122]	Government	228/173	93,4/98,2	76
	MPs	16/3	6,6/1,8	18
Netherlands[123]	Government	1245/1137	90,4/95,8	91

[117] 2010-2014.

[118] 2009-2013.

[119] Data cover XIV legislature which started in June 2012.

[120] Data cover XVI term (2008-2013).

[121] On economic and social matters only.

[122] 2011-2013.

[123] 2005-2015, budget bills are not included in the figures.

	MPs	131/49	9,6/4,2	37
Founding Member States summary	**Governments** **MPs**		**49,15/84,2** **43,83/12,2**	**84** **18,7**

Table 2 - Enlargements 1973-1995

Country	**Legislative initiative**	**Tabled/adopted laws**	**Percentage of all proposed/adopted**	**Success ratio in %**
United Kingdom[124]	Government MPs	26/26 100/5	20,6/84 79,4/16	100 5
Ireland	Government MPs	100-120[125] 1/87[126]		
Spain[127]	Government MPs Senate Regional parliaments Citizens (500 000)	147/120 292/17 10/2 28/0 23/0	29,4/86,3 58,4/12,2 2/1,4 5,6/0 4,6/0	81,6 5,8 20 0 0
Portugal[128]	Government MPs (political groups) Citizens (35 000)	345/266 1050/139 4/1	24,7/65,5 75/34,2 0,3/0,3	77 13 25
Greece[129]	Government MPs	178/0		
Finland[130]	Government	944/914	22,8/99	96,8

[124] Data for UK represent 2013-2015 yearly averages.

[125] This figure represents number of acts proposed by government every year.

[126] 2002-2007, as precise data for government bills are not available, IRL figures are not included in the EU averages.

[127] 2011-2015.

[128] 2011-2015.

[129] According to the electronic archives of the Greek Parliament (from 1993 to today) of 178 law proposals tabled by members of the parliament, zero became law in 22 years. All adopted laws were initiated by the government.

[130] Data cover period 2011-2014.

	MPs Citizens (50000)[131]	3191/9	77,2/1	0,3
Sweden	Government MPs Parliamentary committee	179[132] 2900/20[133]		
Enlargements 1973-1995	**Government** **MPs**		**24,4/83,6** **72,5/15,85**	**88,9** **6**

Table 3 - Enlargement 2004

Country	**Legislative initiative**	**Tabled/adopted laws**	**Percentage of all proposed/adopted**	**Success ratio in %**
Czech Republic[134]	Government MPs, Senate Regions	347/271 248/65 26/3	55,8/80 40/19,2 4,2/0,8	78 26 11,5
Cyprus	Government MPs			
Estonia[135]	Government Political groups Committees MPs	430/395 148/16 40/36 36/6	65,7/87 22,6/3,5 6/8 5,7/1,5	91,8 11 90 16
Latvia[136]	President Government Parliamentary committee At least 5 MPs Citizens (10%)	7/7 859/855 176/173 208/123 1/0	0,5/0,6 68,6/73,8 14/15 16,6/10,6 0,07/0	100 99,5 98 59 0

[131] Complete data are not available. The only 1 law adopted on the bases of citizen initiative concerns gender neutral marriage.

[132] In 2014 the SV government introduced 179 bills, nearly all of become laws.

[133] SV MPs proposed 2900 motions in 2014, of which 20 were adopted. As they are both legislative and non-legislative, they are not taken into account in calculating EU averages.

[134] Data cover period 2010-2013.

[135] 2012-2015.

[136] 2011-2014.

Lithuania[137]	President[138] Government MPs	99/88 990/929 2257/875	3/4,5 29,6/49,2 67,4/46,3	89 94 39
Hungary[139]	President Government MPs Committees	0/0 596/572 901/272 22/20	 39,2/66,2 59,3/31,5 1,5/2,3	 96 30 91
Poland	President Government Senate (upper chamber of the Parliament), a group of at least 15 members of the Sejm (lower chamber) or a committee Citizens (100 000)			
Slovenia[140]	Government MPs National Council (Lower House) 5000 voters	386/322 77/22 4/1 7/0	81,4/93,3 16,2/6,3 0,8/0,3 1,5/0	83,4 28,5 25 0
Slovakia[141]	Government MPs Parliamentary committee	269/249 668/55 3/3	28,6/81 71/18 0,3/1	92 8 100
2004 Enlargement	**Government** **MPs**		**54,1/75,8** **39,5/19**	**90,7** **29,5**

Table 4 - Enlargements 2007-2013

[137] 2012-2015.

[138] Doesn't include proposals for ratification of international treaties, which drafted by the Government and tabled by the President.

[139] 2010-2014.

[140] Data cover period 2011-2014.

[141] 2012-2015.

Country	Legislative initiative	Tabled/adopted laws	Percentage of all proposed/adopted	Success ratio in %
Bulgaria[142]	Government MPs	515/429 425/92	54,7/82,3 45,3/17,7	83,3 21,6
Romania[143]	Government MPs Citizens	618/445 1081/51 1/0	36,4/90 63,5/10 0.05/0	72 4,7 0
Croatia[144]	Government Members/(political)groups	986/800 91/20	91,5/97,5 8,5/2,5	81 22
Enlargements 2007-2013	**Government** **MPs**		**61/90** **39/10**	**78,7** **16,1**

Table 5 - EU global overview

EU[145]	Legislative initiative	Percentage of all proposed/adopted	Success ratio in %
	Government **MPs**	**47,2/83,4** **48,7/14,3**	**85,6** **17,6**

[142] 2009-2013.

[143] 2012-2015.

[144] 2011-2015.

[145] Data from 20 Member States were used to calculate averages.

7.3. Annex III: Extract from TFEU relevant for the common commercial policy

Article 207

(ex Article 133 TEC)

1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

2. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy.

3. Where agreements with one or more third countries or international organisations need to be negotiated and concluded, Article 218 shall apply, subject to the special provisions of this Article.

The Commission shall make recommendations to the Council, which shall authorise it to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules.

The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations.

[…}

5. The negotiation and conclusion of international agreements in the field of transport shall be subject to Title VI of Part Three and to Article 218.

6. The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation.

Article 218

(ex Article 300 TEC)

1. Without prejudice to the specific provisions laid down in Article 207, agreements between the Union and third countries or international organisations shall be negotiated and concluded in accordance with the following procedure.

2. The Council shall authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them.

3. The Commission, or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the

common foreign and security policy, shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team.

4. The Council may address directives to the negotiator and designate a special committee in consultation with which the negotiations must be conducted.

5. The Council, on a proposal by the negotiator, shall adopt a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force.

6. The Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement.

Except where agreements relate exclusively to the common foreign and security policy, the Council shall adopt the decision concluding the agreement:

(a) after obtaining the consent of the European Parliament in the following cases:

(i) association agreements;

(ii) agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms;

(iii) agreements establishing a specific institutional framework by organising cooperation procedures;

(iv) agreements with important budgetary implications for the Union;

(v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.

The European Parliament and the Council may, in an urgent situation, agree upon a time-limit for consent.

(b) after consulting the European Parliament in other cases. The European Parliament shall deliver its opinion within a time-limit which the Council may set depending on the urgency of the matter. In the absence of an opinion within that time-limit, the Council may act.

7. When concluding an agreement, the Council may, by way of derogation from paragraphs 5, 6 and 9, authorise the negotiator to approve on the Union's behalf modifications to the agreement where it provides for them to be adopted by a simplified procedure or by a body set up by the agreement. The Council may attach specific conditions to such authorisation.

8. The Council shall act by a qualified majority throughout the procedure.

However, it shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of a Union act as well as for association agreements and the agreements referred to in Article 212 with the States which are candidates for accession. The Council shall also act unanimously for the agreement on accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms; the decision concluding this agreement shall enter into force after it has been approved by the Member States in accordance with their respective constitutional requirements.

9. The Council, on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, shall adopt a decision suspending application of an agreement and establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.

10. The European Parliament shall be immediately and fully informed at all stages of the procedure.

11. A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.

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