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EU LAW-MAKING **IN PRINCIPLE AND PRACTICE**

EDWARD BEST



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Edward Best



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EU LAW-MAKING IN PRINCIPLE AND PRACTICE

This book explores how European Union (EU) law is made, examining the ways in which legally binding rules are produced through interaction between the European Commission, the Council and the European Parliament.

EU Law-making in Principle and Practice highlights the main ideas and structures involved and places the different steps in context around a 'policy cycle', thus making it possible for students, researchers and those interested in EU law-making to understand the main principles underlying the system. This cycle is illustrated not only by examples and mini-cases at all stages, but also by a more detailed case study which looks at the EU Timber Regulation with regard to the whole law-making cycle. As the EU has grown in size, scope and complexity, it has become increasingly difficult for people to gain a clear idea of what the EU actually does, how it really works and how individual actions in the EU setting fit into the overall policy process. This book aims to answer these questions, as well as to suggest some parameters for evaluating the process in terms of 'good governance'.

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EIPA Managing the European Union Series

This series is linked by a common theme which reflects the special expertise of the European Institute of Public Administration (EIPA—the leading centre of European learning and development for the public sector): bridging theory and practice regarding the management of the European Union (EU).

The contributions to the series explore specific aspects of this common theme by examining relations between and within the EU institutions themselves, between the institutions and the member states, and between the EU and its global partners, as appropriate in each case. The theme applies with equal validity to specific issues or policy areas, ranging from the budget, to the internal market and to how the EU should respond to broader global changes. The implementation of the Lisbon Treaty, the global financial crisis and the associated cuts in the public sectors throughout the EU, as well as rapid changes in the international order, all demand fresh thinking and perspectives on managing the EU at a time of upheaval and transition.

The volumes in the series are each written primarily with public servants in mind, not only in the EU institutions themselves, but also the civil services of the member states and beyond. For this reason, the emphasis is upon analysing issues and challenges in the context of public administration and offering practice-oriented conclusions. The series is also designed to appeal to a more general readership who may wish to benefit from the clear identification and incisive analysis of these questions.

Series Editors: Simon Duke and Cosimo Monda

Microfoundations of Policy Implementation

Phedon Nicolaidis

EU Law-making in Principle and Practice

Edward Best

Preface and acknowledgements

The starting point of this book was to show in detail how European Union (EU) laws are made: what they are, where they originate, how they are drafted and how they are adopted. It is born of a decade of delivering regular courses on 'understanding EU decision-making' in the EU institutions and agencies, as well as for national officials, and many more years of analysing the EU in comparative perspective as a system of regional governance.

The courses have aimed both to provide an overview of the EU institutional system and to explain in some detail how the main procedures operate. They offer analytical insight into the principles and issues involved, as well as practice-oriented understanding of how things actually work. At the end of these courses, I have often been asked whether I could suggest a book that followed the same kind of approach. I could not.

There are many excellent publications that analyse the EU's institutions and laws, its policies and politics. Few of these, however, offer a coherent overview of how particular pieces of EU law are produced, while many are edited volumes which shed much light from different perspectives without necessarily giving a clear overall picture. There are also many online EU sources where people can find information about the practices of EU decision-making. Yet most of these do not provide an overall framework of analysis which would make it easy for people to see who did what in the process.

I hope that this book will fill the gap. It aims to show how pieces of EU law are actually adopted, from start to finish, and to offer an account of the process that is of both practical and academic interest. It has three objectives.

First, it sets out to give a holistic view of EU law-making using an adapted 'policy cycle', which is explained in the first chapter. The next three chapters present a concise account of the principles and practices involved in policy initiation, legislative decision-making, and delegated and implementing acts, showing who does what at each stage. I have included many procedural details, as well as illustrative examples, which are not found in other books.

Second, it applies the same model to a particular policy issue in a way that I hope will seem original and helpful. The EU Timber Regulation was originally only one possible candidate for selection, as a file in which the EU had adopted, since the entry into force of the Lisbon Treaty, a legislative act, a delegated act and an implementing act. However, it proved to be a procedure of particular interest in its own right with regard to the background and the negotiations. I should add that it was not clear to me at first how far this was

a case in which the UK had played a leading role. This was in the end considered a positive aspect, not because I am myself from the UK, but because this example of how a country can influence EU law-making from within seemed to me of particular topicality at a time when there was debate in the UK about the possible benefit for the country of leaving the EU. I am deeply grateful to various persons who were directly involved in this story for their kindness and generosity in helping me to understand how things happened. I have done my best to confirm the account I give, but any remaining errors of fact or judgement are of course my own responsibility.

Finally, the book looks at EU law-making in the perspective of good governance. Much criticism is heard of how the EU works, a lot of which seems to be based on insufficient information or inappropriate criteria. I try to offer a more balanced and objective view. I therefore recall the underlying principles at stake in each stage—why are things as they are?—and suggest how these have evolved. The concluding chapter then briefly looks back over the whole cycle in normative terms, with the aim of fostering more focused and appropriate debate. In particular it suggests that assessments of the democratic quality of EU law-making have to distinguish between three levels of analysis: the quality of the process; the appropriateness of the measures taken; and the underlying legitimacy of the system.

Some institutional acknowledgements are called for. Both for the case study on the Timber Regulation, and the procedural account of the Offshore Drilling Directive, the Council Secretariat responded positively to my request to release the documents that were not originally available to the public. I would like to thank the Secretariat-General of the Commission for access to information, as well as for the input kindly provided by several of its officials. In the European Parliament, I have been particularly grateful for the advice of Klaus Baier and Sarah Blau.

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Within EIPA, I have benefited from collaboration with Sabina Lange, particularly with regard to the Council and the Presidency, as well as from her comments on the draft. I am grateful for comments by Theo Jans on Commission internal procedures; for the support of Frank Lambermont on some European Parliament questions; and for the work of two student assistants, first Sibe de Bok and then Ann-Kathrin Kühner. Simon Duke and Cosimo Monda have been welcome company in the process.

Abbreviations

GENERAL TERMS

EEA	European Economic Area
EU	European Union
SEA	Single European Act
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

MAJOR POLICIES

AFSJ	Area of Freedom, Security and Justice
CAP	Common Agricultural Policy
CFSP	Common Foreign and Security Policy
CSDP	Common Security and Defence Policy

PROCEDURES

APP	Consent (inter-institutional file code)
CNS	Consultation (inter-institutional file code)
COD	Codecision (inter-institutional file code = OLP)
OLP	Ordinary legislative procedure
QMV	Qualified majority voting
RPS	Regulatory procedure with scrutiny (also known as PRAC)
SLP	Special legislative procedure

EUROPEAN PARLIAMENT (EP)

CCC	Conference of Committee Chairs
CoP	Conference of Presidents
MEP	Member of the European Parliament

Political groups (2013)

ALDE/ADLE	Group of the Alliance of Liberals and Democrats for Europe
ECR	European Conservatives and Reformists Group

ABBREVIATIONS

EFD	Europe of Freedom and Democracy Group
EPP	Group of the European People's Party (Christian Democrats)
Greens/EFA	Group of the Greens/European Free Alliance
GUE/NGL	Confederal Group of the European United Left–Nordic Green Left
S&D	Group of the Progressive Alliance of Socialists and Democrats in the European Parliament
NI	Non-Attached

Standing Committees (2013)

AFCO	Committee on Constitutional Affairs
AFET	Committee on Foreign Affairs
AGRI	Committee on Agriculture and Rural Development
BUDG	Committee on Budgets
CONT	Committee on Budgetary Control
CULT	Committee on Culture and Education
DEVE	Committee on Development
DROI	Sub-Committee on Human Rights
ECON	Committee on Economic and Monetary Affairs
EMPL	Committee on Employment and Social Affairs
ENVI	Committee on Environment, Public Health and Food Safety
FEMM	Committee on Women's Rights and Gender Equality
IMCO	Committee on Internal Market and Consumer Protection
INTA	Committee on International Trade
ITRE	Committee on Industry, Research and Energy
JURI	Committee on Legal Affairs
LIBE	Committee on Civil Liberties, Justice and Internal Affairs
PECH	Committee on Fisheries
PETI	Committee on Petitions
REGI	Committee on Regional Development
SEDE	Sub-Committee on Security and Defence
TRAN	Committee on Transport and Tourism

Parliament Secretariat

EPRS	Directorate-General for Parliamentary Research Service
EXPO	Directorate-General for External Policies
IPOL	Directorate-General for Internal Policies
PRES	Directorate-General for the Presidency

Parliament procedures

EV	Electronic vote
RCV	Roll call vote

ABBREVIATIONS

COUNCIL

Council configurations (ministers)

AGRIFISH	Agriculture and Fisheries Council
COMPET	Competitiveness (Internal Market, Industry, Research and Space) Council
ECOFIN	Economic and Financial Affairs Council
ENV	Environment Council
EPSCO	Employment, Social Policy, Health and Consumer Affairs Council
EYCS	Education, Youth, Culture and Sport Council
FAC	Foreign Affairs Council
GAC	General Affairs Council
JHA	Justice and Home Affairs Council
TTE	Transport, Telecommunications and Energy Council

Preparatory bodies

CATS	Article 36 Committee
CIVCOM	Committee for the Civilian Aspects of Crisis Management
Coreper	Committee of Permanent Representatives
COSI	Standing Committee on Operational Cooperation on Internal Security
DPR	Deputy Permanent Representative
EFC	Economic and Financial Committee
EPC	Economic Policy Committee
EUMC	EU Military Committee
FoP	Friends of the Presidency
PSC	Political and Security Committee
SCA	Special Committee on Agriculture
SCIFA	Strategic Committee on Immigration, Frontiers and Asylum

For a full list, see the latest 'List of Council preparatory bodies', issued by the Council Secretariat each January and July.

EUROPEAN COMMISSION (EC)

Commission departments

AGRI	Directorate-General for Agriculture and Fisheries
DEVCO	Directorate-General for Development and Cooperation
ENER	Directorate-General for Energy
ENTR	Directorate-General for Enterprise and Industry
ENV	Directorate-General for Environment
MARKT	Directorate-General for Internal Market and Services

ABBREVIATIONS

SANCO	Directorate-General for Health and Consumers
SG	Secretariat-General
SJ	Legal Service

For a full list of the Commission departments and their abbreviations, see Commission website.

Commission internal procedures

CWP	Commission Work Programme
DDG	Deputy Director-General
DG	Directorate-General, or Director-General
GIS	Groupe de coordination interservices (Interservice Coordination Group)
GRI	Inter-institutional Relations Group
IA	Impact Assessment
IAB	Impact Assessment Board
IASG	Impact Assessment Steering Group
ISC	Interservice Consultation

OTHER BODIES

CoR	Committee of the Regions
COSAC	Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union
ECB	European Central Bank
EDPS	European Data Protection Supervisor
EEAS	European External Action Service
EESC	European Economic and Social Committee
EIB	European Investment Bank
EPPO	European Public Prosecutor's Office

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1 Introduction

EU law-making and the policy cycle

This book is about how European Union (EU) law is made. It is about the ways in which legally binding rules in the form of EU Regulations, Directives and Decisions are produced through interaction between the EU institutions: the independent European Commission; the Council, bringing together the member states; and the European Parliament, directly elected by EU citizens. It has a particular approach that distinguishes it from the many other books published on EU law, institutions, politics and policies. The aim is to make it possible for people not only to see the 'big picture' of EU law-making, and to understand the main principles that underlie this system, but also to find a lot of the practical details.

It therefore offers a concise overview of EU law-making, which highlights the main principles and structures involved, and it places the different steps in context around a 'policy cycle'. This cycle is illustrated not only by examples and mini-cases at all stages, but also by a more detailed case study which looks at the EU Timber Regulation around the whole cycle. In addition, the book supplies details about the procedures and practices of law-making that are often sought by EU policy 'practitioners', as well as students of EU decision-making, and which so far have not been easily, if at all, found in published literature.

While the book should be of use and interest to all those interested in how the EU works, it is written with a certain emphasis on what it all means for public actors. Almost all public officials in Europe are affected in one way or another by decisions taken in the EU, and an increasing number of officials are directly involved in shaping or implementing these decisions. National officials are now part of what can be seen as a multi-level administrative system, albeit one which operates in varying modes and with uneven intensity across sectors. Yet, as the EU has grown in size, scope and complexity, it has become increasingly difficult for people to have a clear idea of what the EU actually does, and how it really works. It is not always obvious, even to officials who are personally involved, how individual actions in the EU setting—such as participation in an expert group, a working party or a comitology committee—fit into the overall policy process. This book aims to answer that question.

THE POLICY CYCLE AND THE SYSTEM OF EU BINDING ACTS

We start with an adapted version of the policy cycle. This is a simple model developed to assist analysis of public policy-making, in which five stages are usually identified in a cyclical process:

- *Agenda-setting*: identifying a problem and agreeing to do something to address it
- *Policy formulation*: elaborating a specific proposal for what to do
- *Policy decision*: adopting the final decision on that basis
- *Implementation*: putting the decision into practice
- *Evaluation*: reviewing actual outcomes and identifying possible modifications, which may be seen as both the final stage and/or as part of the beginning of a new cycle

This cycle cannot be taken as more than a heuristic device, and it has been the subject of criticism. For example, the stages are often not as discrete in practice as the model suggests; the cycle may not adequately capture the interaction between different policy processes affecting a particular domain; and there may be more than one kind of policy cycle involved. Nevertheless, the notion of the policy cycle remains the most useful way to structure the different steps involved in EU law-making and to contextualize the different roles of individual actors.¹

This basic policy cycle is adapted in two ways in this book. First, since it may be hard to separate evaluation, agenda-setting and policy formulation, and these do not always occur in this sequence in reality, we group them under the heading of ‘policy initiation’. In the EU context, this means looking primarily at the role of the European Commission in exercising its right of initiative, and the accompanying processes of evaluation, consultation and impact assessment.

Second, we introduce a subdivision within the policy decision stage, reflecting the post-Lisbon system of EU legally binding acts.² Before Lisbon, there was no clear formal hierarchy between general rules and implementing measures, all of which tended to be lumped together as ‘secondary legislation’. All legally binding acts, whether adopted by the Parliament and Council as basic norms or by the Commission as technical decisions, were subject to the same (deliberately) non-legislative- and non-parliamentary-sounding terminology as Regulations, Directives and Decisions. Nor was there any differentiation between the acts that the Commission was adopting as implementing measures, even though these ranged from purely technical decisions that had no impact whatsoever on the basic rule, to the adaptation to scientific and technical progress of annexes in the basic act. The Treaty stated only that, ‘the Council shall ... confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down’.³ The Commission would be obliged to consult committees chaired by itself and composed of representatives of the member states: the so-called comitology committees. There was thus one rather loose concept—the conferral of implementing powers—and a set of different procedures affording varying degrees of control over the Commission. In the past, therefore, it was natural to address all these acts equally in the ‘implementation’ phase of the policy cycle at EU level.

The post-Lisbon system, after nearly a decade of efforts to reform the system, has introduced a hierarchy of norms, and recognizes the role of the European Parliament (which was previously not even mentioned in the Treaty in this respect) with regard to non-legislative acts. The result is not as clear as would have been the case if the Constitutional Treaty had been adopted. In that event, Regulations and Directives adopted by Parliament and Council would have become European Laws and European Framework Laws, respectively, while everything else that was adopted at lower levels in the hierarchy of norms would have conformed to Regulations and Decisions.

Instead, the EU now explicitly has the concept of 'legislative acts'. These are mostly adopted by the 'ordinary legislative procedure', with equal formal powers for the Parliament and Council, or, in some cases, by a 'special legislative procedure' in which Parliament participates but without the power of codecision. Other legally binding acts are considered 'non-legislative'. The acts previously treated as variants of implementing measures are now split into two separate categories. Those cases in which the Commission is empowered to adopt acts that amend or supplement non-essential elements of a legislative act are classified as 'delegated acts'. Those cases in which the Commission (or sometimes the Council) is empowered to adopt decisions because uniform conditions are required to put legally binding EU acts into practice are 'implementing acts'. Although in practice the distinction has proven neither as obvious nor as uncontroversial as had been hoped, some fundamental differences are indeed involved. In terms of principle, in the case of delegated acts, the Commission exercises 'quasi-legislative' powers—which affects the scope or nature of the obligations contained in the basic act, albeit only in its 'non-essential' elements—and the Commission is therefore accountable to the two legislative bodies of the EU. In the case of implementing acts, the Commission adopts measures that are required to bring about the practical results sought by the legislator, with no consequences for the basic act itself, and the Commission is under the control of the member states, which are primarily responsible for implementing EU law, through the comitology committees. In terms of procedure, delegated acts are adopted by the Commission following consultations with national authorities and other experts, which is similar to the preparation of a legislative proposal, whereas implementing acts have to be approved by a committee.

Figure 1.1 shows the adapted EU policy cycle which is the structure of this book. Chapter 2 looks at the phase of policy initiation, and the key role played by the European Commission. Chapter 3 explains how the European Parliament and the Council work internally on legislative proposals and how they interact in legislative procedures. The roles of national parliaments and the advisory bodies are also presented. Chapter 4 then moves on to the arrangements for adopting delegated and implementing acts. We do not include implementation by the member states through transposition of Directives.

The same underlying scheme is applied in Chapter 5 to a case study concerning the EU Timber Regulation (generally known as EUTR),⁴ which came