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## The Author

**Dr Lee Rotherham** is a veteran from behind the stage scenery of European Union politics. After researching for the "Westminster Group of Eight" Eurorebels, he advised three successive Shadow Foreign Secretaries, a role part-based within the European Parliament. This expertise led to his appointment as 'Chief of Staff' to the Rt Hon David Heathcoat-Amory MP, British parliamentary delegate to the Convention on the Future of Europe, and a central role behind delegates opposing the European Constitution and the drafters of the Minority Report. He has also advised ministers and frontbenchers on a peculiarly wide array of fields.

A freelance media and political consultant, he has been closely involved in a number of grassroots EU campaigning organisations over the years, most notably the Bruges Group, CAFE, the TaxPayers' Alliance, and as a columnist for the *European Journal*.

He has been extensively and internationally published on a broad range of subjects, perhaps most notably as co-author of the two hit *Bumper Books of Government Waste*, which won an innovation award from Washington DC's Atlas Foundation.

An army reservist, he has served in Iraq and Afghanistan; has stood for the Conservative primaries for the London Mayoral selection on a ticket of localism and abolishing waste; and is a fluent French speaker.

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# HOW EU LAWS ARE MADE

EU governance takes place in a landscape of complex, half-hidden structures that in other societies would suggest the ossified residue of centuries of struggle and compromise. This paper offers a sketch of this landscape.

## BASIC TERMINOLOGY

It is best to start, perhaps, with the most basic terms, such as those in the chapter title. Having driven away the dull fog we can then turn to the analysis proper.

### 1.1 EC versus EU

Before the Lisbon Treaty came into effect, in December 2009, the European Communities (EC, formerly the EEC) and the EU had different voting rules. The Treaty of Maastricht added the so-called Common Foreign and Security Policy (CFSP), and Justice and Home Affairs (JHA) to the existing EC. Central decisions in the CFSP and JHA "pillars" required unanimity, so that each member state had a veto, and the balance of power therefore rested with the governments of the member states. In the EC, on the other hand, Qualified Majority Voting (QMV) dominated. Prior to the Treaty of Lisbon, the trend was for the CFSP and JHA to be communitarised": that is, for more decisions to become more subject to QMV. The EU Constitution (in its new guise as the Treaty of Lisbon) took this process a major step further, so that the EU and the EC are essentially the same.

### 1.2. "Laws"

What is often described as "EU law" — and what will be meant by that term in this chapter — comes in a variety of shapes and forms.

**Regulations** have full legal force in all member states. They do not need to pass through national parliaments to acquire this status.

**Directives** do require enactment by the governments of member states and come into force only after their passage through a state's parliament. Moreover, the exact wording bringing directives into force is left to national governments. The enactment of Directives, however, is subject to a strict schedule. Delays in passing these into national law, or drift from the intent of the original source directive, leaves a government open to legal challenge.

**Decisions** do not require approval by the parliaments of the member states, but are binding on the entity or agency to which they are addressed.

Finally, there are **Recommendations** and **Opinions.** These do not have the force of law, though they might be referred to provide moral support for the legislative and legal actions of others.

### 1.3 The ECJ

Another form of legal process also plays a key role in the development of European law. This is the interpretation of laws by the European Court of Justice (ECJ), which has the power, for example, to strike down national legislation that is not consistent with the treaties.

## 2. LEGISLATIVE PROCESS

Three key institutions affect the path of new legislation. They are the Commission, the Parliament, and the Council. The relationship between them changes over time, and, generally, each institution tries to increase, or at least maintain, its own role.

### 2.1 The Commission

The Commission views itself as the arbiter of the Union and the guardian of the European project. The European Parliament (which has been steadily gaining powers along with a directly elected membership) views itself as the sole Communities entity with a democratic mandate. Meanwhile, the ministers or heads of government attending meetings of the Council claim that it is they, as representatives of the governments of member states and responsible to national parliaments, who have the true democratic mandate.

As a rule of thumb, the Commission alone has the power to propose legislation, and to draft it. The European Parliament and the Council have the power to amend the Commission's proposals, and to accept or reject them.

Which institution has what power, however, is not a straightforward matter. The nature of the legislation being proposed, and the basis of the Communities Treaty, will determine the powers the institutions have over the adoption process.

The Commission's first task is to define issues in which there is an EU interest to act. This might be something that has appeared on the political radar, or it may be the result of

in-house observation. There must be a readily-identified legal basis for the Commission to act. Fortunately for the Commission, however, the treaties contain three “rubber articles” (94, 95 and 308 Treaty Establishing the European Community in old parlance) that provide it with a considerable amount of leeway. The Commission also has something of a track record in interpreting treaty clauses loosely in order to initiate legislation in areas in which it sees an interest. Perhaps the most famous instance of this was its move to bring in working time legislation, which the UK had legally opted out of, through the health and safety clauses, where the UK had no opt-out.

The Commission must also act consistently with the principle of subsidiarity, which says, in basic terms, that the EU shouldn’t act where national or regional governments could do the job as well. In practice, however, as former Commissioners have privately admitted the Commission too often merely pays lip service to this principle.

The Commission’s first drafting role is to consult, in order to better identify the limits and practicalities of the legislation, and to precisely frame the wording. Problems often arise at this point. A poorly worded or vague text can create havoc.

An example is the longstanding debate over whether the pipes of church organs are covered by legislation regarding industrial waste. The issue was effectively settled only when the Commission, with a nod and a wink, allowed an exception to legal terminology which was itself more binding. This approach, which some criticise as bending the rules, is an occasional feature of the European process that can be either disconcerting or frustrating to observers, but is described by supporters as ‘realpolitik’ or statesmanship where so many lobbies may be involved. Nevertheless, since the terminology remains open to legal challenge by parties before the European Court of Justice, there remains ultimately an element of ambiguity and potential cost hazard (especially to business) from this process.

With a draft settled, the proposal will go forward under one of three procedures: co-decision; assent; or consultation. The route taken depends on the legal base of the proposed legislation, as set out by the treaties. When a measure could be justified under two articles, the Commission has to choose which is the more appropriate.

## 2.2 Parliament and Council

Under **Co-decision**, a proposal goes first to the Parliament and then to the Council. If there is a difference of minds on aspects of the proposal, a joint Conciliation Committee is formed to try to agree a compromise. This agreement then goes back to the EP and to the Council for a third reading for final adoption. Co-decision is today the main modus operandi, and is styled the “ordinary legislative procedure” in the Lisbon Treaty.

The **Assent Procedure** follows a different line. Under it, the Council has to obtain the Parliament's assent before the legislative process is confirmed. The Parliament, however, has only the power of veto. It has no legal power to amend the proposal.

The **Consultation Procedure** gives the Parliament much weaker powers. Here, the Commission passes its proposals to the Parliament, which produces an Opinion that is forwarded to the Council. But the amendments contained in the Opinion have no legal force, and the Council can ignore them or adopt them, in part or in whole, as it so chooses.

A form of Consultation Procedure operates with other two Communities bodies – the European Economic and Social Committee (EESC), and the Committee of the Regions. These have no real powers of amendment, and so critics correspondingly see these institutions as expensive talking shops.

In the Council phase, representatives from COREPER, the Committee of Permanent Representatives' discuss the proposals. Each national government has a pool of delegated civil servants based in Brussels, whose task it is to attend such committee meetings.

The FCO has historically taken the lead within the UK delegation (also known as UKREP), though other departments have over the years increased their voice. Furthermore, the devolution of certain powers, in particular to Scotland, means that at Council level, discussion is taken under a devolved lead. This is particularly the case in fisheries matters given the decline of the English fleet relative to that of the United Kingdom as a whole.

COREPER is the main venue for the national bartering that takes place in specialist working groups. When the civil servants can come to an agreement on the text, a measure becomes "Ready for Adoption". It is then listed as an "A list" agenda item on the next Council meetings, where national ministers accept it without further debate.

A "B List" agenda item is one on which the civil servants cannot agree and that ministers will discuss between themselves. If a ministerial meeting reaches agreement, the proposal is accordingly amended, and the legislation becomes effective.

A proposal that is directly binding then becomes law as soon as it is published in the *Official Journal of the European Union*. The OJ, containing information on all EU legislation, is regularly and frequently published. This act of publication signals the end of the direct Brussels process. The final text is published in all the official languages of the EU. Each linguistic version usually carries the same legal weight as any other.[1]

1 This incidentally sets it apart from internal communications, where the informal *de facto* requirement is that one of the three working languages of the Community (English, French, and to a much lesser extent, German) are used.

## 2.3 “Comitology”

The role of committees in legislation is little known, even to some professional observers of the EU. Committees are important, however, and they deserve more attention. The very number of these working groups (they run into the hundreds) provide some hint as to their importance, much of which is based upon their very positioning in the legislative process – right at the very outset, well before MEPs begin their own committee reviews, and often with issues resolved considerably before any ministerial input is provided.

Participants in these committees fall into two categories. The first is the traditional appointee to the British-style ‘quango’, typically either a subject matter specialist such as an academic, or someone nominated for having sat in similar committees in the past. The second form of nominee is a government official, perhaps working in the civil service or a branch of government touched by the work of the committee.

There are three types of management committee:

**Advisory Committees** mostly cover aspects of the single market, and are made up of national government representatives with a Commission official in the chair. The Commission official puts forward a draft, and the committee provides an opinion. There is no legal obligation for the Commission to act on the opinion, although it is considered bad form to simply ignore it.

**Legislative Committees** are working groups that look into draft material on a massive range of subjects. A Legislative Committee is made up of national delegates, and reaches its decision by qualified majority voting (QMV).

This type of committee has strong powers. If it rejects or sits on a proposal, the Commission has to go directly to the Council in order to revive it. After first asking for MEPs to assess whether the proposal passed the ‘proportionality test’, the Council would follow this up with a vote by QMV. Positive responses would authorise the Commission to continue, as also would inaction by the Council following the initial challenge.

The third type of committee, **Management Committees**, are used particularly for handling established but developing policies such as the CAP and the CFP, or where large budgets are already allocated. Again, national representatives are consulted, and they give an opinion by QMV. The European Parliament may have a role depending on the nature of the primary legislation, which is potentially significant if the Commission is using this process to expand its activities, and so requires Council approval.

Comitology, as it is known, remains very much part of the substrata for those involved in monitoring the legislative process. While the number of these committees is surprisingly high,

it is worth noting that at any one time, scores of Committees remain on the books but do not actually meet, because the Commission is not currently considering legislation in their area of competence.

Committees may, however, be spurred into action by crises. A classic example of this is the legislative spurt that has come from the Commission since 9/11. The Council had blocked many of the proposals that have since emerged.

One reason for the lack of awareness of committees lies in their very nature. At the best of times, the Commission is less than public in explaining its early drafting intentions. This can be attributed to a variety of obvious reasons. Historically, a number of contentious items have leaked to newspapers and caused damage to the integrationist cause have been from early on in the process. Furthermore, it is not the habit of the civil servants themselves to publicise their role (or non-role) in the procedure.

It may help to list some of these committees in order to provide a cross section of the areas of competence each might face. Here are twenty historic examples drawn at random:

- Advisory Committee on protection against dumped imports
- Quota Administration Committee
- Committee on economic aid to the countries of central and eastern Europe and for the coordination of aid to the candidate countries under the pre-accession strategy (Phare)
- Advisory Committee on the special system of assistance to traditional ACP suppliers of bananas
- Standing Committee for the approximation of the laws of the Member States relating to lifts
- Standing Committee on medicinal products for human use
- Advisory Committee on employment
- Advisory Committee on the implementation of the Community action programme to combat social exclusion
- Committee for the implementation of the action programme to promote gender equality
- Regulatory Committee (possible joint meeting with management) in the field of agriculture, subsection agrimonetary questions
- Advisory Committee on Transport

- Advisory Committee on measures to be taken in the event of a crisis in the market in the carriage of goods by road and for laying down the conditions under which the non-resident carriers may operate national road haulage services within a nation state
- Committee on the reciprocal recognition of national boat masters' certificates for the carriage of goods and passengers by inland waterway
- Committee on the driving licence
- Committee for the adaptation to technical and scientific progress of the Directive on the protection of the environment, and in particular of the soil, when sewage slush is used in agriculture
- Committee on the Community action programme in the field of civil protection
- Banking Advisory Committee
- Insurance Committee
- Advisory Committee on the training of dental practitioners
- Committee on the movement of air or sea passengers' baggage (principles)

Several points emerge from this random assortment. The first is the very mixed nature of the legislation being covered, indicating to what extent laws ostensibly passed in Westminster, and for which our national government claims credit, are actually sourced (and legally have to be sourced) in Brussels.

Second, the "sexiness" of the committees varies massively. Some have a focused remit with an extremely narrow impact. Others can be much more wide ranging, impacting upon a number of business, social and governmental interests, with cost effects potentially in the billions of pounds.

Third, it is worth noting again that all of this process is in the main decision taking by a committee, chaired by a Brussels-based civil servant who is unelected, around whom sit national civil servants, also unelected. So this part of the decision-making process is somewhat different from that of the minister-inspired process of national governments.

John Redwood, who as a member of the Cabinet was occasionally required to attend Council of Ministers' meetings, recalled once encountering a reference to ongoing work being done by one particular committee. Taking an interest in the agenda, he insisted on turning up for the meeting as the national representative, in place of the civil servant. Those attending were astonished a minister was both so interested and so presumptuous.

It makes sense to avoid the centralisation of an Escorial-style system. It also makes sense to avoid the situation James Callaghan once found himself in, when he noted the absurdity

of Western European Prime Ministers gathered round a table for hours on end arguing over where the mirror should go on a tractor. But by the same token, the system does lack a degree of early ministerial awareness of the political agenda in Brussels. With that lack comes a greater gap in accountability before parliament, and consequently, a higher degree of alienation from the electorate.

## 3. ROLES AND POWERS

A full account of the EU legislative process would contain massively more detail than is contained in the brief description above. It would, for example, say which majority triggers what result down the chain. Rather than piling detail on detail, though, more is to be gained by looking at the legislative process from alternative vantage points, and at the motivations and drives of the various participants.

### 3.1 The Commission

The Commission, as already suggested, is very much in the driving seat. Technically, it has three roles. First, it is the initiator of legislation. Second, it monitors the application of EU law by the member states. In this second role, it is a kind of public prosecutor, and it has on a number of occasions taken member-states to the European Court of Justice when it perceives them to have transgressed EU law.

Third, when agreed policies fall within its management remit, it carries out those policies through its agents and representatives. This includes its burgeoning foreign affairs entity, since Lisbon has given actual legal form in the shape of the External Action Service. It also includes representing the EU in areas of international trade. This explains why, for instance, the President of the Commission attends G8 meetings.

But there remain many areas of contention over the respective powers of the Commission and national governments. This was most patently observed in the crossover of responsibilities at the Rio Earth summit, where national delegations and the Commission representatives did not see eye-to-eye over primacy, resulting in a clash over delegation rights and access. Also, at international conferences in areas covered in part of the Communities Treaties (Health, for example), there have been arguments over whether the Commission or the member states should take the lead role.

These arguments are likely to increase over time. A key pointer lay in the failed EU Constitution. The UK government refused to acknowledge - despite apparently clear treaty

language - that the proposed EU Foreign Affairs supremo would have the authority to dictate the UK role in international meetings on subjects that ministers have agreed (by unanimity) were areas of common concern, even if specific policies have not yet been adopted (by QMV). Whether that means that a British prime minister would have to make way for a delegate from the Commission in a Commonwealth Heads of Government Meeting, or read from a script prepared by the Commission at a NATO meeting, remains a matter of dispute and controversy given that this part of the text survived into the Lisbon Treaty. The ambiguity remains even though the EU post officially came into existence in December 2009.

The workings of the Commission, however, are complicated by internal stresses and tensions. There is, for example, the question of nationality. Incoming Commissioners are required to swear an oath of neutrality. The intent, of course, is to prevent national loyalties from subverting a Commissioner's role as a neutral civil servant, without national allegiances and immune to behind-the-scenes string-pulling by former colleagues in national governments. A measure of the importance placed upon this in certain quarters lies in the challenge to British Commissioners – for example, Kinnock, Mandelson and Patten — that in taking the oath of neutrality, they breached the oath of allegiance to the Crown that they made on being sworn in as Privy Councillors.

The oath of neutrality, of course, is not a total protection. Individual Commissioners have come under specific criticism. This tends to happen to the holders of high-profile portfolios, where strong national interests clash with Commission or with majority Council positions, and when the Commissioner is a national of the minority. When such a person has personal advisers who share his nationality and is reported to have been in private contact with his Prime Minister or President, suspicion is likely. Examples have included fisheries (the Spanish), trade (Germany and later the UK), and Agriculture (the French). In 2009, the question of the appointment of a French Commissioner to the portfolio overseeing the City of London highlighted the issue again. Further, reports that the new EU Foreign Affairs supreme received regularly briefings from the FCO were raised by the French as part of a challenge to her impartiality in January 2010.

Personal factors are an additional complicating factor. Personal interactions, vanities, and ambitions can enter decision-making. The issues may be trifling or it can be more serious, threatening operational efficiency, as in the pre-Lisbon Treaty conflict between the Commissioner for External Affairs and Xavier Solana's former role as would-be EU Foreign Minister.

A final element is the Commission's role is as a motor of integration. It is in the Commission's interest to legislate and to expand. Its staff is typically chosen from the more integrationist element of the European elite, so there are few in-built internal brakes. As guardian of the treaties, it is predisposed against the surrender of the *acquis communautaire* (the Community's

accumulated powers). As inheritor of the Treaty of Rome, it was set up under the principle of "ever closer union". The Commission, by its very nature, is subject to "competence creep", which sets it at odds with the Council, composed of national governments; and a European Parliament, which, although its members by and large share the Commission's zeal for piecemeal integration, views itself, in the light of its perceived democratic credentials, as the sole legitimate power among the EU institutions.

### 3.2 The Parliament

The functions of the European Parliament (EP) are clear-cut. The manner in which the political tides tug and turn and affect the carrying out of those functions is not.

The EP has long argued and campaigned for more power, viewing itself as the sole EU body with any real degree of democratic legitimacy. This legitimacy is challenged by the Council of Ministers, is nudged by the representatives of the regions (on subsidiarity grounds), and, while the Commission often supports a greater role for the European Parliament in a variety of decision-making roles, this is often in tandem with those powers being taken further away from national parliamentary control.

The EP's first formal role is to consider legislation that comes to it as a draft from the Commission. Its second role involves, along with the Council, surveillance of the operation of the Community budget. It also monitors the Commission, though its powers are limited. For instance, it confirms the nominees put forward for a new Commission. Famously, it refused to ratify the appointment of an Italian Commissioner, Rocco Buttiglione, after he had indicated his own support for traditional Catholic values on the family, which set him at odds with the European Socialists over his interpretation of gay rights (notwithstanding his having made a clear distinction between his personal views and his professional ones).

The European Parliament also has the power to dismiss the entire Commission in a vote of no-confidence. This 'nuclear option' is rarely used. There are several reasons for this. First, many MEPs are 'pro-European' and are mindful of the bad publicity for the European institutions and for European integration as a whole that would follow such a step. Second, critics might be prepared to sack individual Commissioners, but not to throw dirt on Commissioners deemed to be blameless. Third, party politics comes into play, so that MEPs from one party may be unwilling to condemn Commissioners from sister parties. An example of this was the issue of British Conservative, Roger Helmer, being censured by the leader of the EPP for attacking the EPP-affiliated head of the current Commission for alleged improper business connections. Another example of the importance of party connections is the collapse of the Santer Commission. It was occasioned by the actions of Hervé Fabre-

Aubrespy, a French member of a small Euro-sceptic bloc without party chains stretching back to the national capital, behind whom others subsequently swung.

The fall of the Santer Commission displayed a further complication inherent in the nuclear option. In accordance with EU law, disgraced Commissioners were kept in role while a new Commission was slowly formed.

Finally, national governments themselves have been known to lobby for the retention of the Commission in the interests of stability. A classic case, again in the fall of the Santer Commission, was the lobbying by Labour ministers of the Labour MEP leadership (particularly Pauline Green) to keep the Commission in place, despite an increasing media furore.

The last element of the EP's role comes in overall supervision. Parliamentary practise from Westminster has been adopted to improve scrutiny. MEPs can now put down both written and oral questions.

Although the practice of questions may be modelled on Westminster, the nature of responses is very different. A House of Commons Parliamentary Question (PQ) is an art form in its own right, asking in a convoluted and highly-circumscribed manner for a minister to provide a comment or statistic relating to a set detail. Answers are often crisp, particularly when the questions are difficult or the respondent is the Prime Minister. A Lords PQ tends to be a little more generous, and can even be informative when the questioner is a policy expert on a contentious area, such as Lord Avebury on overseas human rights; Lord Stoddard or Lord Pearson on illegalities in EU actions; or Lord Tebbit on political correctness.

A European PQ (styled by some an EPQ) is a different beast. The question itself tends to be argumentative and frequently long-winded, almost a press release in its own right. The response can take months to come back, though the speed of the turnaround has increased substantially over the last few years.

But at least there is a lengthy answer that provides data and a background to policy that is often lacking in Whitehall responses. In any event, the potential importance of this parliamentary tool have resulted in many leading news stories, giving it a prominence within the system that may yet in the future lead to limitations on its use and the quality of responses it yields.

The EP meets monthly in a plenary session to debate the decisions taken in committees the rest of the time. Here, reports are voted upon that affect the legislation in passage. It is at this point that party politics becomes most evident, though critics suggest that so much of what happens in Plenary is stage managed between the big two political groups that real political distinction and debate is impossible. These critics claim that so much is decided at meetings of the permanent staff and key MEPs that the parliament is in reality a rubber stamp.

An example of how such compromises work is that of a British MEP who decided to put forward a draft declaration for parliamentary agreement following harsh storms that had caused damage in his county. The declaration simply recognised that the storms had hit his patch hard as they passed over the United Kingdom. In itself, it was a meaningless gesture, but it would provide a mechanism for a press release showing that he had his constituents' interests at heart. This was fed 'into the system' for the next Plenary. The text later emerged several days later, after meetings had taken place between staff members from various delegations. Other British MEPs in the region had added their counties; Germans and Dutch had included theirs; and the Irish staffers had replaced reference to the British Isles on the grounds of nationalism. The final compromise text was reached without the MEP being asked for his opinion.

## 4. PARLIAMENTARY DYNAMICS

The political dynamics of the parliament might be summarised as a tangled web of interests and objectives. The most important of these are discussed below.

### 4.1. Bloc Power

The EP power structure is one of party blocs (or Groups) that are agglomerations of MEPs elected on a national basis. The Groups represent the basic tenets of the national parties, though there can be major differences in ideological opinion within a bloc. The PES, or European Socialists, for example, is divided between old style socialists and quasi-Blairite socialism-lite. The British Conservatives and some other allies used to be part of the EPP-ED alliance, forming a Group, but retained their own whip.[2]

This general set of circumstances creates a series of currents, dynamics, and repelling forces within the Parliament.

2 This alliance was eventually broken, and a distinct new group formed, to fulfil a pledge to his party by David Cameron. The pledge was controversial. On the one hand, some suggested that leaving the EPP-ED alliance weakened the bargaining power of the Conservatives in the parliament and that some of the new allies held extreme views. In response, supporters of the change pointed to highly controversial partners in all Groups, and suggested that in a continental style of politics (as opposed to the British Parliament's bear pit approach), the style of business meant that the new Group would still be needed to secure majorities and so would maintain its bargaining power. Moreover, the Conservatives gained a distinct voice as an official grouping opposed to further European integration, and with control over their own budgets and staff recruitment.

(i) Group vs Group

Obviously, since each bloc has its own philosophy, there will be traditional political tensions. These could be Capitalist vs Socialist, Green vs business, Marxist vs Socialist and so on.

A mechanism to settle these controversies comes in the form of the Conference of Presidents, where the heads of Groups meet to plan out agendas and discuss controversies.

(ii) National Party vs National Party

Naturally, since they compete with each other for votes in elections to the Parliament, MEPs will take every opportunity to attack MEPs from their own country who belong to other parties. A complicating dynamic can also play out. The Groups consist of disparate elements, so national delegations themselves will often be at variance with the policy formulated by the Group's rapporteur (the individual tasked with drafting the report that will be voted on), since this latter may come from a foreign sister party whose policies differ. In turn, this may on rare occasions leave the Group in the paradoxical situation of being supported by MEPs from a given country in another Group, while opposed by MEPs from that same country within its own ranks.

(iii) Groups vs Individuals

This dynamic comes about when MEPs in a Group target Commissioners from another party. The majority of Commissioners are party people (sometimes in both senses of the expression) who have been nominated by their heads of government. Leon Britton and Chris Patten, for example, were targets for Labour MEPs. Neil Kinnock and Peter Mandelson provided political point scoring opportunities for Conservative MEPs.

The same is true of the representatives of national governments. MEPs from opposition parties take every opportunity to highlight failings by their country's delegate in the Council of Ministers, and can use the visit of Government leaders to the European Parliament as an opportunity for party politicking. Dan Hannan's celebrated attack on Gordon Brown became an international YouTube phenomenon.

## 4.2 Agendas

Sometimes politicking goes beyond policy debate. In some areas, a form of consensus arises which unites a large number of MEPs across Groups or parties, making bedfellows of politicians from very different ideological backgrounds. There are two classic examples.

(i) The Anti-Extremism Agenda

This is a subject on which critics claim that there is a knee-jerk reaction amongst the parties of the Left and Centre Left. Essentially, a number of individuals and groups have been identified as extremists, following allegations of racism.

These allegations may, or may not, be fair and accurate. In one case, the allegations may be pursued at least in part by elements of the national media because the party in question is a nationalist party that threatens the unity of the state (the case in point being the Vlaams Bloc, now superseded by the Vlaams Belang). It may be deemed a *populist* threat, because it is ***popular***. Wider foreign reporting on a party may be based on preconceptions, as revealed by the major change in the BBC's analysis of Pim Fortuyn's politics and personality after his murder. The key point for this analysis is that a perception supported by national parties opposed to the party in question is developed by national media, and that labelling then appears on the political scene at Brussels.

An example of this appeared when Jorg Haider's Freedom Party was invited into a power-sharing national government, which led to calls for the Austrian Representation to have all of its rights suspended as per the Treaty of Amsterdam. The Freedom Party had been described by leading politicians in Brussels as xenophobic and racist, and a consensus emerged on the Left that the Austrian (mainly Centre Right) coalition government should be punished by isolation.

The basic objective of such a cross-group alliance is that parties that are neo-fascists and racists should be isolated. However, this is not without democratic risk. An attempt to blackball the politics of hate, despite good intent, may be interpreted by many ordinary citizens as a move to suppress their own freedom of choice in a democracy. The claim also arises that a 'cosy consensus' of establishment politicians is trying to suppress opponents who will open up debate on issues that are important to many voters, complaining that important issues have been swept under the carpet. There is also massive controversy over who decides whether parties are extremist (that is to say, xenophobic) or radical (with a policy agenda vastly different from their critics): by establishing a consensus lock, divergence is seen as radicalism and extirpated, and only extremism is left for the disillusioned. Hence, a cross-party alliance, rather than crushing extremism, can ultimately fan it by endorsing censorship.

(ii) The Reformist Agenda

The fight against corruption is another issue that unites politicians across the divide. Here, the unity is one not of political groups, but rather of ideals. Paul van Buitenen is an example. He spoke out as a whistleblower against corruption in the system, and was subsequently elected as an MEP. There have been others like him who have come out against fraud and waste, but

who believe that a form of European governance or system is needed. This puts them in the same boat as people like former MEPs Chris Heaton-Harris and Jens-Peter Bonde, both of whom are Eurosceptic and have been heavily engaged in the anti-corruption campaign.

The activities of these campaigners has been set against the apathy or indeed collusion of a number of MEPs (especially in the leadership) who prefer to sweep things under the carpet. An example was the fate of an attempt to get the whistleblower Marta Andreasen to testify to a parliamentary committee. The Centre Right members and the EPP chair blocked her appearance. When she herself subsequently became an MEP, further collusion occurred to block her from being appointed vice-chair of the committee charged with scrutinising the budget, despite such nominations traditionally being accepted.

### 4.3 Nationality

Aside from political beliefs, there is the accident of birthplace. A small number of MEPs have represented countries other than their own. David Steel failed in his bid to become an Italian MEP, but Daniel Cohn-Bendit (the student leader of the 1968 Paris riots) has been both a German and a French Green, and Marta Andreasen provides an example in a British context.

(i) National vs National

In some political debates, MEPs from different countries are ranged against each other, and in the process unite political parties along national lines. This is where national identity or national interest is deeply engrained, and demonstrates how far the EU is from being a *demos* (or 'people'), divided merely by ideology.

One example of this is he issue of post-World War II expulsions, where the Poles and Czechs oppose German MEPs, accusing them of being influenced by the Former-Sudetanlander lobby. Another example is the Common Fisheries Policy, which unites in their respective interest groups the Spanish MEPs, the Portuguese, and to a lesser extent the French and the British. Other examples of divides over the national interest include the old 8/7 voting splits over bananas (subsidised small Caribbean ex-colony bendies, versus cheaper larger Central American US-owned), and chocolate (animal fats versus vegetable fats).

(ii) National Philosophical

As well as clashing as national groups over national interests, MEPs may also unite on a national basis over what one might call a psychological profile. This occurs where there is a political consensus on a fundamental tenet as to how the world should operate, which goes beyond the narrow national interest (though it might incorporate it).

The CAP is an example. While clearly it is in the French national interest to preserve the CAP on financial grounds, the subsidisation of agriculture is also part of the French political psyche. It has been since the sixteenth century and the emergence of French manpower as a cause of French strength in Europe; it was a prime concern after the bloodletting of the Napoleonic Wars; it was an area of worry during the population decline relative to the German states; it was recognised as an issue after the Franco-Prussian War, and with the mechanisation of the farming industry; and hence it was uppermost in de Gaulle's mind when assessing the urbanisation of France and how to find subsidies to halt rural decline. On the other hand, German farmers as a body also do well out of the CAP. But the German government is historically more interested in trade in goods, and therefore is more likely to range alongside the UK when reform is discussed (in instinct, at least, if not always in the final negotiations).

Free trade is a similar issue. Certain countries are more liberal, while others have a more Colbertist tradition. Protectionism is a part of the national psyche in traditional areas. The Germans still view state support for their inefficient coal industry as essential, whereas in the UK that philosophy was overturned in the 1980s. Other countries have seen their MEPs unite over the state airline (Belgium, France, Italy), telecoms (France), postal services (the Netherlands), or the steel industry (Spain, Italy, France, Germany), despite these industries patently being hugely uncompetitive, demanding a market-bucking subsidy, and draining the public purse.

Then there is the international situation. MEPs share and mirror national sentiments and conceptions on their position in the world around them. Naturally, there may be ideological complexities, particularly on the far left. But traditional national splits emerge among MEP delegations from time to time; on the Atlantic alliance, for instance, which pits the more Nordic or maritime North against the more central Europeans, famously branded together as "Old Europe" by Donald Rumsfeld, with the post-Eastern Bloc remembering the Warsaw Pact and uniting with the former. The Med Belt (Portugal, Spain and Italy) here are more party orientated, a throwback to the Cold War. Similar polarisations appeared over Iraq, which united the issues of the establishment of the EU as a global power, opposing US hegemony, and the very different conceptions on whether the Europe Union should be a hard or a soft power. National experiences in decolonisation have obviously carried in this latter debate. Historically, the Israel debate has also provoked some strange alignments. So has the question of whether Turkey should ever be admitted to the EU, uniting religious concerns with those of immigration. Finally the principle of subsidiarity brings together British MEPs with Germans mindful of the role of their länder.

(iii) MEPs vs MPs

While they may come from the same political parties, MEPs and MPs sometimes operate on different wavelengths. MEPs tend by their very background, interests and ambitions to prefer EU-level politics than to address matters at the national level. They tend to be more accepting of EU actions in which they are involved, leaving MPs the tail end of the process. This can cause friction, particularly when there is a perception of a power grab that has been taking place, or where MEPs are seen not to be following the national party line. Sometimes, spokesmen in Brussels say things that are the complete opposite of national policy. Even Liberal Democrats have quietly admitted that the federalism of some of their spokesmen goes far beyond their own ambitions for integration.

### 4.4. Personal Dimension

Individualism can be a complicating factor in Brussels power play. MEPs have personal opinions, and are not members of a government with collective responsibility or agents of a civil service.

As a politician, an MEP's primary concern (notwithstanding his protestations to the contrary) is likely to be his reselection. At the close of play, every MEP knows he has five years in which to make sufficient mark that his local associations reselect him or her, preferably with a very high place on the regional list. Some MEPs focus near-exclusively on this agenda.

Other MEPs are more ambitious. While a number of MEPs are ex-MPs who have shifted to Europe after losing their seats, many an MEP has used the position as a stepping stone in the other direction. To achieve this calls for an element of fame, if not notoriety. Loudly pushing an agenda is a means to an end.

As individuals, they are of course subject to rancour and personal animosity, sometimes displayed to the point of comic extremity. But an MEP also will have personal opinions and interests. As a rapporteur, guiding a report, his personal views will determine in part his direction beyond party affiliation, even so far as to initiate change. A peripheral example is Dr Charles Tannock's activities highlighting the case of the Italian royal family under existing human rights law, which allowed them (and others) back into their home country. The European Parliament's motor may in such an instance prove to be a single campaigning Member.

A politician's opinions may even kill legislation stone dead. One MEP from the Europe des Nations (EdN) group famously became rapporteur and deliberately sat on a text for years. He never produced the document, so it never went to Plenary and thus never become law.

## 4.5 Integration

The final set of power relations comes into play over the issue of integration and ever-closer union.

(i) EP Supremacy

The manner by which the EP can attempt to push for a greater role in the legislative process as an overseer to the Commission, and how it tries to set itself up as a legislative superior to the Council of Ministers, or even move against minorities within the Council of Ministers, has already been noted. This is through the process of 'gold-plating' legislation, that is to say, adding complexities to draft legislation that expand the remit and add to the costs.

It is a misconception that gold-plating only happens when national civil servants get involved in legislation. It is certainly true that this happens. Civil servants take opportunities to tack onto European-sourced legislation elements that their department has sought to set in law, but has not had the parliamentary time or the ministerial support to pass the necessary national law. Bolting such measures on to EU legislation also makes it easier to either claim the credit for whatever new agency has been created, or to blame the EU if it all goes wrong.

In fact, gold-plating first happens in the European Parliament. Amendments to draft legislation obviously alter the text. They can alter the scope, the impact, and the cost. Just as with debate in the Council, it is a perfect opportunity for pork barrelling, for grandstanding, and for doing your constituents' competitors in other countries out of business, whether they build vans, make outboard motors, produce Feta cheese, create chocolate, sell artwork, or work in the Square Mile.

(ii) The Eurosceptic Angle

The final dimension to address is that of the MEPs' opinion on integration. This is not uniform across the continent. Some political parties are more in favour of integration than others. Some go with the flow. Others are hugely hostile, and organise themselves in small anti-integrationist Groups.

The main example of such cross-Group activity has been SOS Democracy. Realising that not all MEPs are prepared to sit in the same Group because of domestic or ideological differences, and given that some MEPs are more Euro-critical than their party colleagues, an 'intergroup' was formed which provided a forum for Euro-sceptic MEPs from all parties and Groups to meet in a 'rainbow alliance' (excluding the Far Right).[3] SOS Democracy acts as a clearing-house for information sharing, and a mechanism to mobilise MEPs on particular

3 "Intergroups" may be formal or informal: there is a high threshold.

cross-party campaigns. A smaller version, the Democracy Forum operated during the Convention on the Future of Europe.

Often, politicians, journalists and commentators consider European legislation from the viewpoint of the European Centre Right and the Centre Left. But the Euro-sceptic versus Integrationist angle is always there as well, questioning whether Brussels should be passing the legislation at all, whatever its impact on social conditions or the marketplace.

## 5. DECISIONS OF THE COUNCIL

After its passage through the European Parliament, legislation goes to the national ministries. Since Council meetings have historically been held behind closed doors, the debates and arguments that betray the shifting alliances operating within are far from transparent.

It is necessary to again underline the distinction between what is being argued about (the B Points), and that which the civil servants have already settled between themselves (the A Points).

Another example offered by John Redwood from his time in Cabinet and attendance at these meetings is illuminating. He recalls how the all-male provisions of Mount Athos, a monastery, were set to be outlawed by a draft directive against sex discrimination. The Greek Minister was isolated. However, Redwood offered his support by saying that he didn't himself wish to live in an all-male monastery, but thought it wrong of the EU to ban them. This helped mobilize the support needed to grant an Athos exemption. Thereafter he could always say to the Greek Minister when he needed help, "Remember Mount Athos".

### 5.1 National Inputs

#### 5.1.1 Media

As already noted, the Fourth Estate plays a massive role in the legislative process. On numerous occasions, the British Government has been stung into action by negative reporting of proposals under discussion. A veto or a stronger negotiating position has been forced even though civil servants would otherwise have been able to settle – even though in a way that would, from a Euro-sceptic position, have been less satisfactory. From the vantage point of political opposition, such an event constitutes a victory.

An example was the massive outcry in the Express, Mail, Sun, Telegraph and other papers at the time the Convention on the Future of Europe was about to finalise its draft. The son

of an extremely senior official travelled over to Brussels to meet his father, bringing the latest newspapers with him. The official was reportedly shocked by this massive backlash against the proposals, which somehow had not been included in the Convention's own press clippings. It certainly fed into the system, and seems to have alerted some people to the crisis that was set to hit the Constitution, even if the lessons were not learned in time to avoid the shocks that followed at the ballot box.

### 5.1.2 National parliaments

National parliaments, on the other hand, play only a small role. Their input is minor. Their power is negligible. They have committees dedicated to monitoring legislation, where material goes through practically on the nod.

Owen Paterson MP once recalled how as a member he had turned to address a colleague, turned round again, and in the meantime a piece of legislation he had wanted to object to had already gone through along with three or four others.

But even if MPs objected (and with a government majority, that is unlikely), the outcome would merely be that the measure was discussed on the floor of the House, where a Government majority typically reigns. MPs would be debating material which had already been agreed in international negotiations, and which the Government was obliged to get through the House. Under the Ponsonby Convention, if the Commons voted down such a measure, it would still become law, but the Government would fall. Few government MPs are likely to back such a vote.

There are also those elements of EU law that come into force notwithstanding the position of Parliament. Typically, these are witnessed through the passage of the Statutory Instrument, a shady type of administrative legislation that is increasingly used and that deserves far greater scrutiny.

There were attempts in the Convention on the Future of Europe to redress the balance, but these were watered down. An attempt to introduce a Red Card procedure, or veto by a national parliament, was blocked. In its place, a Yellow Card/Orange Card hybrid solution was offered. A Yellow Card is created when one third of national parliamentary chambers unite in opposition to a measure. This power they already had in any event, and the fact that such a coming-together would be extraordinarily difficult, plus the fact that there is no requirement for the Commission to do anything in response, makes it a weak substitute. An Orange Card would be triggered if a majority of national parliaments carried on with the action. Given that this would mean a majority of Governments in the Council would be

opposing the Commission's activity already, it is hard to envisage the circumstances where that would come about.

National Parliaments could in any event do more individually. Some of the Nordic countries regularly append a 'scrutiny reservation', meaning that laws would only come into force if consented to by parliament. Clearly, governments dislike this form of restriction, so this is not as widely used as would be useful for democratic purposes.

A final complication here comes in the form of devolved or federal governments, where regional representatives (in the UK's case, MSPs in particular) and their committees have an end-process and monitoring role.

### 5.1.3 Bit parts

Two of the institutions that drip feed into the evolution of law have already been mentioned. The Committee of the Regions and the European Social Committee both provide a caucus for interested parties to supply opinion and input, which may or may not be accepted. But there are other official EU institutions whose publications may indirectly be taken up by legislators as sources for proposals, or whose experts may be drafted to provide input. These are the Community Agencies, set up as arms of policy enablement, such as the European Environment Agency, the European Monitoring Centre for Drugs and Drug Addiction, the European Food Safety Authority, the European Defence Agency, or the European Monitoring Centre on Racism and Xenophobia (now called the Fundamental Rights Agency). Like the European Central Bank, these are elements of EU policy in action whose activity and research indirectly feeds back into the legislative programme. Their powers and influence are likely to increase over time. EUROPOL is a case in point.

Three other agencies within the European system can impact more directly. The first, and most important, is the European Court of Justice. Books could be written – and are written — on how decisions made by the judges of the ECJ have modified policy by interpreting law, or equally have circumvented attempts by the Commission to make exceptions by rigorously upholding it. A number of Bruges Group papers cover examples in depth.[4] The key is that there is a permanent tension between the Council of the Ministers and the Commission on the one hand, and the ECJ on the other, in drafting legislation that means what it says so that future cases do not lead to surprises. Critics sometimes accuse certain supporters of integration of using the ECJ's decision-making process to push integration further than ministers have agreed.

4 The reader is invited to dip into past publications on www.brugesgroup.com

### 5.1.4 Sharks and Dolphins

Not all players in the EU actually belong to the institutions of the EU. A number of active groups impact directly and indirectly upon the process. Regions, for instance, are increasingly setting up offices to lobby in Brussels, bypassing their national representation. Then there is the influence wielded by NGOs, lobbying for particular causes and campaigns. They are increasingly being accepted into the mainstream as negotiating partners in the early drafting process. The Convention on the Future of Europe co-opted a number of NGOs into a parallel process, though it was subsequently and embarrassingly discovered that a number of them were financially supported by the Commission, and so looked like an instance of "Brussels talking to Brussels".

Then there are the trade organisations, representing for instance Japanese car manufacturers or British beer or small businesses or the club of mega-corporations. Other interested companies hire professional lobbyists to do their lobbying for them. Occasionally, academics might be brought in to discuss and debate policy developments. The contentious C*orpus Juris* proposals for a European Public Prosecutor were first floated at one such conference. They provide the Commission drafters with a form of authoritative support, a moral casus *legisferandi*.

## 6. TRENDS AND TENDENCIES

This paper has flown at some speed over the steel and glass structures of Brussels, providing a brief overview of the powers at play and how they interrelate. What conclusions might be drawn?

One is that the balance of legislative power has shifted away from the Council and into the hands of the Commission and the European Parliament and will continue to do so. Both of these institutions support integration, so it is likely that the process of integration will accelerate. An important supporting element in this acceleration is the Passerelle clause, which allows powers to shift to Brussels without formal ratification by member states, or (in most cases at least) any referenda.

The bit players in the system – the academics, NGOs, youth parties, and so on – will play an increased and more visible part. They will be seen as indispensable motivation for legislation, particularly if subsidiarity is ever properly revisited. As each will argue for a law in its own area of interest, they are collectively an integrationist factor.

The Commission will expand its competences almost by default, as various opt-outs slip away, and ministers decide to carry out joint activities in declared areas, with designated

Communities representatives assuming responsibility. After each crisis, the Commission will propose new actions, which, in a knee-jerk environment governments will accept and the media will decline to oppose. The Council will find it impossible to halt this drain of power, while the veto, where it remains will be criticised as an anachronism, and ministers and especially civil servants will feel less and less confident in applying it – rather like the British UN veto.

An illustration of this kind of voluntary abdication of power is the Hague Preferences, which gives the UK and Ireland a right to claim a larger share of fish quota when stocks are low. But Whitehall's diplomats have historically declined to use it fully, on the grounds that its use would arouse hostility among other fishing countries.

This will, however, lead to an extended period of tension as holders of new EU posts attempt to exercise their new powers and members of national governments discover what their predecessors signed away. It will not be a calm and orderly transfer, and it will raise questions in some capitals as to how the balance might be redressed.

In the meantime, whistleblowers are a wild card. There will be many more Bernard Connollys, and their revelations will unsettle all three of the main institutions, and provide brief opportunities for critics of integration to challenge the agenda. The inevitable failure to carry out meaningful reform will, however, lead to the growth of either unconventional or extremist parties in countries which have a cross-party consensus on Europe-level policies such as immigration and taxation, and where voters are looking for choice.

In an attempt to address this, EU leaders will carry on with the Convention mechanism, using draftees from national parliaments, institutions, NGOs, youth groups, unions, and big businesses, to try to provide legitimacy and a cloak of 'consensus' to further changes in the EU structure. Having failed to identify the previous flaws, however, these hearings will still be run by an inner core in their respective Praesidia, and will not provide the sense of public ownership that the elite seeks.

Finally, the European lawmakers will continue to cut legal corners. Measures like the Lisbon Agenda will be proposed and passed to look good in the papers, but such cases of grandstanding will disappoint when they achieve nothing of practicable value, or worse, when they are acted upon as a basis for doing something completely different.

John Redwood, one of the more open of former ministers about their time in Brussels meetings, gives us an example already ten years in the past;

> *"I also remember an occasion when the Presidency decided they wanted a Council for Retail Ministers. As the UK fortunately does not have such a thing, I was asked to do it as well in my Single Market*

*Ministerial capacity. The aim was to get us to agree to an apparently harmless declaration that shopping was a good thing and we should have more of it. The problem with such apparently harmless activities to keep Ministers for Shops amused, is that as soon as the EU starts agreeing anything, however harmless, it starts to create a competence – then who knows where you are going to end up?"*

The answer to that, of course, is openly admitted if you ask the right people: an ever-greater footprint for the developing United States of Europe.

## THE BRUGES GROUP

The Bruges Group is an independent all–party think tank. Set up in February 1989, its aim was to promote the idea of a less centralised European structure than that emerging in Brussels. Its inspiration was Margaret Thatcher's Bruges speech in September 1988, in which she remarked that "We have not successfully rolled back the frontiers of the state in Britain, only to see them re–imposed at a European level…". The Bruges Group has had a major effect on public opinion and forged links with Members of Parliament as well as with similarly minded groups in other countries. The Bruges Group spearheads the intellectual battle against the notion of "ever–closer Union" in Europe. Through its ground–breaking publications and wide–ranging discussions it will continue its fight against further integration and, above all, against British involvement in a single European state.

## WHO WE ARE



## BRUGES GROUP MEETINGS

The Bruges Group holds regular high–profile public meetings, seminars, debates and conferences. These enable influential speakers to contribute to the European debate. Speakers are selected purely by the contribution they can make to enhance the debate.

For further information about the Bruges Group, to attend our meetings, or join and receive our publications, please see the membership form at the end of this paper. Alternatively, you can visit our website www.brugesgroup.com or contact us at info@brugesgroup.com.


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