



Rethinking EU institutions' rules of procedure after COVID-19

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Up to now, little attention has been paid to how EU institutions adapted their internal functioning to cope with the confinement measures. This policy brief offers an early overview and assessment of these internal arrangements. Their analysis is of utmost importance for democratic reasons, notably accountability. From ensuring security and publicity of virtual meetings to finding valid methods for adopting acts, challenges posed to EU institutions were enormous. Five out of the seven institutions were not ready for operational changes. This paper shows that although a great variety of rules do exist, many need to be adapted, modernised or created. The upcoming Conference on the Future of Europe might constitute a timely opportunity to this end.¹

How could EU institutions members validly meet and vote in time of COVID-19? What type of acts could they adopt? Have all adopted acts followed a valid procedure? These questions of crucial importance have attracted very little attention so far. From ensuring publicity and security of virtual meetings to finding valid methods for adopting acts, challenges posed to

EU institutions were enormous. The COVID-19 pandemic served as a real crash test for assessing the resilience of EU institutions' internal procedures. The institutions had to adapt swiftly to uphold their decision-making capacity. While the ECB's internal rules provide its bodies with handy procedures regarding teleconferencing, written procedures and remote voting, similar to what the European Court of Auditor's own rules of procedures and implementing rules of the latter do foresee, all five other institutions faced troubles to cope with the circumstances. The following institution-by-institution brief analysis highlights some remarkable realities about those five institutions and the urgent need to rethink working methods, drawing on the lessons learned from the COVID-19 crisis.

EUROPEAN COMMISSION

The European Commission's rules of procedures did not foresee any procedure for teleconferencing, although the 2010 version of the rules of procedures invited the Commission to "adopt supplementary measures relating to [its] functioning (...) taking into account developments in technology and information technology"². It is only on 22 April 2020³ that the European Commission adopted a revision of its

rules of procedure to allow Commissioners' participation in meetings "by means of telecommunication systems". Concerning remote voting, the Commission's rules of procedure did already foresee the adoption of acts by written procedure, "provided that the approval of the Legal Service and the agreement of the [relevant] departments (...) has been obtained". If no member makes (and maintains) a request for suspension of the procedure up to the specific set time limit set, the text is considered adopted. In such circumstances, this procedure appears particularly useful. This is a similar procedure to the one used by the European Court of Auditors and to the Council's "silent procedure". However, this method seems workable only for certain institutions, or acts of minor importance.

EUROPEAN PARLIAMENT

The European Parliament was certainly the most severely hit institution from an operational point of view. This is due to its size but also to the intrinsic activity of an elected assembly: debating. It came with no surprise that those online – video-streamed – sessions have drastically affected the functioning of the institution. The inherent characteristics of video conference pushed MEPs to keep their meetings as short as possible and limit the number of interventions. Inevitably, sessions presented a drastically reduced number of agenda items and votes (and so of amendments) compared to normal sittings. Moreover, the "catch the eye" and blue cards procedures were suspended in order to ease the running of plenary sessions. In addition, urgency made texts move as quickly and possible through the different adoption stages. All these elements made debates practically impossible.

As the European Parliament's rules of procedure do not foresee any written voting procedure (nor any rules governing teleconferencing), the main challenge was to find an alternative to the traditional "by show of hands"⁴ voting system

that would ensure MEPs could vote simultaneously, confidentially, securely and in sequence. The European Parliament can revise its rules of procedure by simple majority vote⁵, but it is naturally not possible to vote such a revision if the latter is about how to organise a valid vote. Fortunately, the Bureau is entitled to take "financial, organisational and administrative decisions on matters concerning the internal organisation of Parliament"⁶. In order to allow possibilities of contesting the results, it agreed on a rather complicated and old-fashioned method. MEPs had – and still today have – to print out voting lists, fill them in with their name and vote, sign a solemn declaration on the ballot paper, scan or photograph them and send them back (using their official email address) for manual (turned automatic later on) counting by Parliament staff. Luckily, the rules of procedure foresee that the quorum⁷ is met by default.

COUNCIL

The Council's rules of procedure were not designed to allow virtual meetings either. Travel restrictions made it difficult to reach the required quorum⁸ and therefore formal Council meetings could not be held⁹. Next to a "silent procedure" which only concerns a few minor decisions, the Council's rules of procedure foresee a written procedure for acts "of an urgent matter" or "in special circumstances". The major sticking element was that the use of the written procedure required – for every single act – a decision taken by unanimity by the Council or COREPER. The challenge was to make the Council agree to revise the rules of procedures and lift this unanimity requirement, make the voting rule for the adoption of the Council act concerned applicable instead, and let COREPER decide on it, as it was the last body to be able to meet physically in Brussels. Although such revision formally only required a simple majority vote¹⁰, this proved to be a very difficult negotiation. The debate was indeed going beyond technicalities. It was about

deciding where the power would lie during the crisis: among the Permanent Representatives in Brussels, or in the 27 EU capitals.

It ended up being a win for the diplomats, as the Council agreed on a temporary derogation¹¹ for one month, renewable. Like any lifting of unanimity requirement, this is also a win for the proponents of the community method over the intergovernmental approach. The act concerned by the use of this procedure should however “be subject to prior political discussion by ministers, for example by informal videoconference, in order to ensure to the maximum extent possible, among others, national coordination, public transparency, and the involvement of national parliaments in accordance with the practices of Member States”. Some Member States understood this decision meant losing influence over the decision-making process. This explains why Hungary, Poland and Slovenia added a declaration¹² emphasising the temporary aspect of the measure.

As a result, the different Council configurations only held informal – publicly video-streamed when required – virtual meetings preceding formal decisions by written procedure. As for other institutions and internal bodies, security and bandwidth concerned limited the number of devices from which one could attend these meetings, and the type of information that could be exchanged (only unclassified, non-sensitive content).

Doubts were raised concerning what type of act could be adopted through this procedure. The Council Legal Service¹³ took the position that the ordinary written procedure should be limited to the adoption of legal acts. As this is a procedure to vote, ‘atypical’ acts, on which the Council does not formally vote, fall out of its scope. It conceded an exception for “the approval of those Council conclusions which are a necessary step in an established process, like enlargement or European semester, or are part of a regular

process, like annual conclusions on the EU policy towards different regions in the world. However, this should not be the case for one-off political texts. For these, the Council Legal Service advised to use “ministerial statements, prepared by COREPER in advance of ministerial VTCs”. Nevertheless, on the request of a number of Member States, COREPER decided to use the procedure for the approval of Council conclusions “on a case by case basis.” The European Council did not follow the same path.

EUROPEAN COUNCIL

As the European Council’s rules of procedure do not foresee any rules for virtual meetings, all its virtual meetings were labelled as informal. Those rules do nevertheless foresee the possibility of casting written votes for decisions “on an urgent matter”¹⁴. However, all members need to agree unanimously to make use of this procedure. Unlike the Council, the European Council did not amend its rules of procedure, although it could have done so by simple majority – provided it would have agreed unanimously¹⁵ to hold the vote.

After almost each meeting, European Council President Charles Michel issued “Conclusions of the President”, in default of European Council conclusions or decisions. The above-mentioned written procedure would have allowed the adoption of typical acts such as European Council decisions but leaders did not make use of it. Atypical acts, such as political acts (e.g. European Council conclusions), are – in line with the above-mentioned opinion of the Council Legal Service – not concerned by this procedure. The adoption of European Council conclusions is therefore theoretically only possible in ordinary physical meetings. The leaders did however adopt a “joint statement”¹⁶ after their virtual meeting on 26 March 2020, although it is unclear what procedure they used. Could they avoid a formal vote by using the default rule of consensus¹⁷? If

it is the case, why not adopting European Council conclusions? Or is a joint statement an ‘atypical’ atypical text, adopted informally? To note that the absence of European Council conclusions made possible to avoid all the intense and detailed negotiations that usually precede and take place during a summit. This new type of meetings unexpectedly put President Michel “in an unusually assertive position”¹⁸.

COURT OF JUSTICE OF THE EUROPEAN UNION

The CJEU made full use of existing written procedures and of e-Curia¹⁹. Nevertheless, some decisions have highlighted the lack of concrete reflection on the openness of the CJEU in the last years. Although some authors²⁰ have called for the use of, for instance, online streaming of hearings, the CJEU has still not taken a step in this direction. In pandemic circumstances, this would have proven to be particularly useful. As hearings have – in principle – to be public²¹, all hearings scheduled until 25 May were postponed. The CJEU was not ready for remote public hearings. The same problem appeared in two other types of situations. First, the new Advocate-General Richard de la Tour took oath remotely on 23 March²². The ceremony did not take place publicly, although required by both the Statute of the CJEU and the Court of Justice’s rules of procedure. Second, several judgments and opinions of Advocates-General were waiting to be delivered. This led the President of the Court of Justice to deliver alone in bundles several judgments, in an empty courtroom, accompanied by an Advocate-General that did the same for opinions. The President of the General Court did the same for his court. Despite the fact that these judgments and opinions were made immediately available online, their delivery should have been made in open court. This crisis might speed up efforts to improve the (remote) openness of the institution.

TO SUM UP: AN URGENT NEED TO RETHINK THE WORKING METHODS

This brief analysis shows that some institutions made full use of existing exceptional procedures, while some others accelerated the implementation of new rules or urgently created new ones. Some rules have been breached; others extensively interpreted. It is a fact that many rules need to be adapted, modernised or created. Existing rules cannot be stretched forever.

Virtual meetings often ended up with participants speaking at each other instead of with each other, one after the other in a pre-established order. Keen observers of the EU institutions will see a tendency to go back to ‘business as usual’ as soon as possible. The claim that there should be a “before” and an “after” COVID-19 certainly also applies for the EU institutions’ rules of procedure. The revamped single seat debate for the European Parliament is only the top of the iceberg. In most institutions, the temporary or pragmatic solutions found are not ideal to ensure a smooth functioning but also accountability. EU institutions need to find more sustainable, adequate and carefully thought through procedures. They would benefit from exchanging best practices among each other but also with national and international institutions, and rethinking their working procedures. This should go hand in hand with an appropriate revision of transparency rules. These have not changed, and COVID-19 was not an excuse²³ to bypass them. However, they should be – where relevant – adapted to the new working methods. Lobbying strategies have adapted more rapidly. The upcoming Conference on the Future of Europe might constitute a timely opportunity to draw those institutional lessons.

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Endnotes

¹ This policy brief, written mid-June 2020, is a short version of an upcoming paper entitled 'EU institutions' operational resilience in time of COVID-19' to be published in *L'Europe en formation*.

² Article 28, 2nd subparagraph of the European Commission's rules of procedure, added by Commission Decision 2010/138/EU, Euratom of 24 February 2010 amending its Rules of Procedure, OJ L 55, 5.3.2010, p.60-67.

³ Commission Decision (EU, Euratom) 2020/555 of 22 April 2020 amending its Rules of Procedure, OJ LI 127, 22.4.2020, p.1-2.

⁴ Rule 187 of the European Parliament's Rules of Procedure.

⁵ *Ibid.*, Rule 237.

⁶ *Ibid.*, Rule 25.

⁷ *Ibid.*, Rule 178.

⁸ Article 11(4) of the Council's rules of procedure.

⁹ Recital (2) of Council Decision (EU) 2020/430 of 23 March 2020 on a temporary derogation from the Council's Rules of Procedure in view of the travel difficulties caused by the COVID-19 pandemic in the Union, OJ LI 88, 24.3.2020, p.1-2.

¹⁰ Article 240(3) TFEU.

¹¹ Council Decision (EU) 2020/430 of 23 March 2020 on a temporary derogation from the Council's Rules of Procedure in view of the travel difficulties caused by the COVID-19 pandemic in the Union, OJ LI 88, 24.3.2020, p.1-2.

¹² Council of the European Union, "Summary Record - Permanent Representatives Committee - 20 and 22 April 2020", 7709/20 CRS CRP 20, Brussels, 7 May 2020, p.2.

¹³ Ibid.

¹⁴ Article 7 of the European Council's Rules of Procedure, Annex to the European Council Decision of 1 December 2009 adopting its Rules of Procedure, OJ L 315, 2.12.2009, p.51-55.

¹⁵ Ibid., Article 6(1).

¹⁶ European Council, "Joint statement of the members of the European Council", Brussels, 26 March 2020.

¹⁷ Article 6(1) of the European Council's Rules of Procedure.

¹⁸ Herszenhorn, D. M. and Wheaton, S. (2020) How Europe failed the coronavirus test: Contagion's spread is a story of complacency, overconfidence and lack of preparation. *POLITICO Europe*, 7 April. Available at: [<https://www.politico.eu/article/coronavirus-europe-failed-the-test/>]

¹⁹ Decision of the Court of Justice of 16 October 2018 on the lodging and service of procedural documents by means of e-Curia, OJ L 293, 20.11.2018, pp.36-38.

²⁰ See e.g. Alemanno, A. and Andreea, O.-S. (2014) 'Openness at the Court of Justice of the European Union: Toppling a Taboo'. *Common Market Law Review* 51/1, p.97.

²¹ Articles 31 and 53 of the Protocol n°3. See also the hypothesis foreseen by Article 79 of the Court of Justice's rules of procedure and Article 109 of the General Court's rules of procedure.

²² Court of Justice of the European Union, Press release n°34/20: "Entry into office of a new Advocate General at the Court of Justice", Luxembourg, 23 March 2020.

²³ As it was timely recalled by the European Ombudsman. See European Ombudsman, "Transparency of the EU Covid-19 crisis response", case SI/1/2020/TE, opened on 20 April 2020. Available at: [<https://www.ombudsman.europa.eu/fr/case/en/56900>]