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Why inter-institutional cooperation matters: the example of the EU?

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Inter-institutional cooperation between the legislature and the executive:
European lessons learnt and the model for Ukraine
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Discussions on institutional issues and on cooperation and inter institutional agreements between bodies of the state belong to the most boring issues in any public debate. But they are important. Especially in Ukraine where difficult reforms of systemic nature are at stake. Those reforms are fundamental for building XXI century market economy and modern democracy. These reforms can contribute to the irreversibility of the change that one day will make Ukraine member of the European Union.

Inter institutional cooperation lies at the heart of a successful democracy. In a modern political system the Constitution defines the bodies of the state, their competences, the way they are elected or appointed, basic principles for their interrelation, the fundamental rights of citizens, the main principle of organisation of social and economic life, but much is left to the political process. For this process to run smoothly, institutions must function correctly, respect for the rights of citizens must be a guiding principle for all the institutions, cooperation between those institutions in the respect of each other competences must be a constant leitmotiv for a variety of political forces. Otherwise, even the best drafted constitution may produce an inefficient political system, causing public dissatisfaction and political instability.

We all know examples of political systems that became paralyzed because of the incapacity of the institutions, or due to lack of cooperation amongst political forces represented in them and lack of political will to overcome their differences and allow for results to be delivered.

This is why the capacity of the institutions (or political forces) to cooperate with each other (and be open to civil society input) is very important to guarantee the success of a functioning democracy.

It is legitimate to ask whether one can find good practice of efficient inter institutional cooperation in the European Union. It is also true that to learn from others is an art. It is certainly not about copy pasting, it is about adapting the experience of others to our own reality and specificity. But yes, Europe is a source of good practice on inter institutional agreements.

Actually, in the EU we have always been particularly exposed to this challenge. EU is a rather young polity but it is often considered a kind of laboratory to test the role and their interaction in the policy making. Our treaties (which play the role of our constitution) deal in quite a detailed way with the role and competences of the institutions. For every policy area they prescribe rather detailed substantive principles, goals, requirements. Still they leave lots of issues to the institutions to agree amongst themselves on how they will act with each other if the system is to work while preserving their own powers.

To avoid the risk of blockage in joint decision making, the institutions of the EU, mainly the two branches of the legislative (the EP and Council) and the executive (the Commission), were naturally pushed to establish specific forms of cooperation among them, which in some cases lead to the conclusion of interinstitutional agreements.

There is a history of IIAs in the EU. There are three dimensions of institutional cooperation. First, there is the intra institutional dimension, collaboration within institutions, a very extensive coordination system which is absolutely crucial for achieving consistent output.

Second, there is the inter institutional cooperation within the institutional triangle: the European Commission, as the executive, the European Parliament and the Council as two legislators. The history provides evidence that the cooperation between Commission and the Parliament has been easier than the one between the Parliament and the Council.

And the third, the cooperation between the EU level institutions and the national level.

The obligation for member states and European institutions to cooperate has been enshrined in the treaties through article 4 of the Treaty on European Union which creates obligation to engage in sincere cooperation.

It seems fully justified to ask why the inter institutional cooperation is needed. To understand the commitment of European institutions to reach out to inter institutional agreements it is worth pointing to a rather high potential for inter institutional conflict due to competition for power, different interests and representation roles on the one hand and the need of coherent outcome in joint policy making, on the other.

Through inter institutional cooperation we can avoid the danger of a gridlock between institutions. We can foster mutual trust. But we can also foster the emergence of shared norms. These are serious added values that this cooperation can give birth to.

In a serious political situation, which is a fact of life today, the risk of conflict and an inconsistent outcome, or of no outcome at all, is even higher. Well oiled machinery of institutional cooperation matters even more.

In the European Union , a wide range of mechanisms for inter institutional cooperation has been developed, in the area of both internal and external policies. These mechanisms are key for achieving common outcomes, as well as for providing order and predictability into policy making.

Many authors refer to the first IIA (although not formally called like that) of 1964, when the so called “procedure Luns-Westertep” was agreed. This was an informal arrangement on how the Presidency of the Council should keep the European Parliament informed about the negotiations of international agreements between the European Communities and third countries or international organisations. Many other followed, some called really IIAs, other having the form of Joint Declaration, Common Understanding, conclusions, etc. By then, these IIAs were established on the basis of the principle of loyal cooperation, whose content has been developed by the Court of Justice, and which constitutes an essential principle of the organization of the institutional set up of the Union. Institutions may disagree, have political differences, but they are bound to cooperate loyally among them, and the Court has sometimes sanctioned the behavior of the institutions when it considers that their action or inaction does not respect this principle.

A very simple example concerns deadlines: the institutions sometimes are bound by deadlines fixed in the treaties or in the legislation to react to another institution position in a given domain, silence meaning agreement with this position. It would thus be unacceptable if this last institution would transmit its position in such a way that it renders impossible the reaction of the first institution. As such, the EP, the Council and the Commission often agree among themselves on practical modalities to transmit their positions to the other institutions in order to avoid that problematic situations arise (for instance, in order to avoid that the deadline for Parliament to react falls during a period of parliamentary recess).

So, one could say that, in first instance, interinstitutional cooperation, and IIAs in particular, were born out of necessity. Their importance was fully recognized by incorporating into the Treaty of Lisbon a solid legal basis for those agreements. Article 295 TFEU enshrines interinstitutional agreements in the Unions legal order, by establishing that:

“The European Parliament, the Council and the Commission shall consult each other and by common agreement make arrangements for their cooperation. To that end, they may, in compliance with the treaties, conclude interinstitutional agreements which may be of a binding nature”.

Interinstitutional cooperation seen in the national perspective brings new elements into consideration. The need for cooperating is also strongly felt in national terms. It can be less noticeable than in European context because, contrary to the Union level, at national level the system of government has more to do with the political division between the ruling majority and the opposition. Potential conflicts relate more to political forces than to different bodies of the State.

In this context, the main concern would be rather focused on establishing political agreements on specific policy areas where different political forces have a shared interest and recognise they require long term political coherence. and should not be changed only because a political force in power becomes opposition. The so called “pactes de régime” aim at establishing a long term program of reforms in a given area which different political forces want to accomplish even going beyond the current electoral cycle.

The need to agree how the institutions shall proceed in their mutual relations is seen as beneficial to all political parties involved. This is well explained by the so called “ignorance veil” paradigm. Those who today are in the majority and may feel constrained by some of those agreements, may tomorrow find themselves in the opposition and will then discover the utility of those agreed rules.

Of course, national political systems have much longer political traditions than the EU and it is not usual to find in their functioning the terminology of "inter institutional agreements”. But the substance is the same: it is about sub-constitutional understandings between the main political bodies of the state establishing rules or practices on how they should interact in the course of different procedures related to their functioning, policy making and interactions.

Nevertheless, interinstitutional agreement is a term sometimes used between different bodies of a state. We can find examples of agreements between the lower and higher chambers of parliaments on concrete modalities and calendar for transmitting their respective positions in bi-cameral legislative systems; agreements between the different entities of composed states on how they may better exchange theri points of view or express common positions; agreements between the legislative and the executive on practical modalities for transmitting documents, counting deadlines, participating in debates, etc.

With regard to the content, role and legal status of IIAs one can say that they fill the space left by constitutional rules. Important constitutional developments have been reached via IIAs.They facilitate the common work of institutions and, in the Union’s experience, tend to increase parliament’s powers.

In the EU experience, IIAs can relate to procedural issues. An IIA may concern only procedural issues. It was the obvious case of the aforementioned “Luns-Westerterp” procedure, or of the IIA between the European Parliament, the Council and the Commission on the application of the principle of subsidiarity of 1993.

The so called Joint Declaration of the Assembly the Council and the Commission of 4 March 1975 instituted the so called “conciliation procedure” recognising for the first time a certain degree of intervention of the EP in the legislative procedure (until then, the EP was only consulted). As such, it opened the way for the “cooperation procedure” established in the Single Act of 1986, which gives to the EP, in some circumstances, the power of obliging

the Council to accept its amendments to the proposal of the Commission. This constituted the ancestor of the current codecision procedure, by which EP and Council decide, on a equal footing, on the fate of the proposals of the Commission.

A common trend toward this kind of agreements, at least in the EU, is that they tend to increase the role of the Parliament (indeed, many of them prepared substantial changes in the treaties that increased the powers of the European Parliament).

But there are IIAs on substantial policy issues. For instance, in the budgetary field, an interinstitutional agreement from 1988, renewed in 1994, 2000 and 2007, settled the permanent battle of the annual budget, which lead to the rejection by the EP of the budget for 1982 and 1986. It established not only commonly agreed rules on the way the budgetary procedure should run every year. It also provided agreement on limits of the annual expenditure of the EU, globally and by different big categories. These agreements were of a great importance as they allowed for the normalisation of the relations between the two branches of the budgetary authority (the EP and the Council). They facilitated the financing of the policies of the Union, and here the Agenda 2000 is worth mentioning. This was the basis on which the enlargement of 2004 brought the 10 countries of Central and Eastern Europe into the Union. The budget related inter institutional agreements provide a stable framework for the financing of the policies of the EU.

Moreover, through such agreements the institutions have also agreed on important issues like the respect of Fundamental Rights in their activity (for instance, Joint Declaration 5 April 1977 on the respect of Fundamental Rights and of the European Convention on Human Rights) which anticipated the recognition of Fundamental Rights by the Single Act of 1986 and further on the Charter of Fundamental Rights which since the Treaty of Lisbon has the same value as the treaties.

In 2010, the EP and the Commission have established Framework Agreement in which both institutions agree on a comprehensive set of rules and guidelines for their relationship, covering areas so diverse as legislative programming, the treatment by the Commission of requests for legislative initiatives from the EP, the withdrawal of legislative proposals by the Commission, the hearing of new commissioners by the competent committees of the Parliament, demission of individual commissioners on request of the Parliament, etc..

Just at the beginning of this year, the three institutions concluded an IIA on Better Law Making which embraces, in a tripartite relationship, also some of the aspects bilaterally settled in the Framework Agreement mentioned and updates and expands the previous IIA on Better law making from 2003.

As such, this new and very important IIA covers matters like multiannual and annual programming, withdrawal of legislative proposals by the Commission, treatment by the Commission of legislative initiatives by the EP or Member

States, public consultation during the pre-legislative phase, transparence of legislative procedures, administrative burden reduction, impact assessments, etc. It is a broad and very ambitious IIA through which Parliament trusts to help producing legislation which is more citizens and companies friendly, in a more transparent manner, streamlined in accordance with the main political priorities agreed for each legislature among the institutions (the Framework Agreement between the EP and the Commission continues applicable in the bilateral relationship between those two institutions though).

The exceptional relevance of these two comprehensive IIAs to help ensuring a proper institutional balance, as foreseen in the Treaties, is self-evident.

Also, over recent years the European Parliament has invested a lot of effort into developing a pre legislative cooperation with the European Commission. This practice while not undermining the power of both institutions allows to reach common understanding on many issues and contributes to developing the feeling of co ownership.

Legal value of IIAs has been an issue raising interest for decades. IIAs are somehow informal means of establishing rules for the concrete activity of the institutions. So, naturally, the issue of their legal value has been debated on many occasions. The jurisprudence of the European Court of Justice explains that they may or may not have a legally binding nature, depending on the specific language used by the institutions that subscribed to them ("the institutions shall..." or "the institutions will, in as much as possible, provide for..."). This approach was confirmed by the Lisbon Treaty. This means that the institutions have to be particularly attentive to the drafting of their mutual agreements, in order for these to have the kind of effects that they really wish.

The constitutional role of IIAs is another aspect worth mentioning. IIAs are, at least in general, constitutional law in the material sense, as they normally deal with issues that concern the organization of relations between main bodies of a polity. Does this mean that they are also part of the formal constitution of a given polity? Judging by the European experience, this would be going too far. As the mentioned article 295 states, the institutions are free to agree on how to organise their cooperation "in compliance with the treaties".

The most reasonable approach seems to be that they have an infra-constitutional but supra-ordinary legislation value. Indeed, IIA may not restrict the powers of institutions according to the treaties or the Constitution. But, if they are to be found legally binding, they would only make sense if an act taken in violation of an IIA be considered illegal by violation of the obligations assumed voluntarily by the institutions. In the European case, this has been confirmed by the Court of Justice.

Sometimes, IIAs are forerunner of treaty provisions, meaning they anticipate future Treaty changes. In addition to the examples mentioned above, this happened, for instance, with the IIA which recognised the right of petition of Citizens (1988). It anticipated the recognition of this right in the Treaty of

Maastricht of 1992. And the IIAs establishing the financial discipline and the cooperation between the branches of the budgetary authority was transformed into hard law by the treaty of Lisbon. According to it, the multiannual financial framework (MFF) should become a regulation adopted by the Council by unanimity after obtaining the consent of the EP.

Of course, this transformation into hard law means more legal security, but it may mean also some loss of flexibility. Moreover, it does not completely exclude the need of new IIAs to deal with issues left open by the treaties or the new hard legislating put in place. For instance, even if the new regulation on the MFF 2014-2020 was approved at the end of 2013, the institutions felt the need to complete it with a new IIA on the budgetary cooperation. It established some practical procedures for a better development of the budgetary procedure (for instance, agreeing on the mode of transmitting institutions' respective positions, on the procedure to establish an interinstitutional dialogue - called trilogues - at a certain key moment of the procedure, in order to prepare a global political agreement that adopts the budget, etc).

Now, let me say a few words on the Ukraine case. In Ukraine, you have now decided to use the instrument of interinstitutional agreement in order to discipline and facilitate the relations between the legislative and the executive, notably in what concerns the legislative and budgetary procedures. I cannot but felicitate you for this choice. It is obviously not for me to judge on the content of the draft agreement you have been drafting, but if I could leave you an advice, I would underline some issues to which we normally do not pay much attention. First of all, let me say that language matters. Our experience is that it is useful to be the most precise possible in your drafting and carefully chose the elements of language used in view of the results you wish to obtain and the possible legal relevance that you wish that is given to the agreement. In our inter institutional negotiations we spend a lot of time on arguing on the choice between "shall", "will", "may", "should" etc. It is also rather important to agree on a mechanism that would be efficient and transparent and truly facilitate the procedures within the limits of the powers of the institutions as defined in your Constitution. It is worth also to remember that an effective cooperation framework between the parties involved will be beneficial for all of them. If thanks to the agreement the institutions may work better, this will be to the benefit of all political forces, independently of the position they occupy today. A good functioning political system is a win-win game for everybody. And never forget that even if you are governing today, you can be in opposition tomorrow. So put on your face what I mentioned before and what is called in theory (John Rawls concept) “ignorance veil”.

But, to conclude, let me say the following. It is certainly not the case that these mechanism, when in place, lead automatically to an efficient decision making process and more coherent and effective outcome.

Their success will depend on many factors related to politics, interests, ideas, historical path dependencies. In general, political action cannot be explained in terms of institutional logic or substantive appropriateness. Relationship

between politics and policy making is very complex. But well and jointly developed rules on co decision ensure that actors involved are more willing to proceed according to those rules. They become shared rules.

It is of course legitimate to ask how we can account for this high level of cooperation between the two institutions despite the high potential for conflict. Ministers and members of parliament will differ in their preferences and representative roles.

But if they are responsible politicians, they do share one objective which is to ensure effective and efficient decision making in Ukraine. They all want efficient problem solving machinery and thus seek consensus.

When I look at the inter institutional cooperation I know I think that it has been exactly this high potential for conflict amongst institutions that has created inter institutional mechanisms that promote consensus.