



european
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Steering through the maze # 1

**Your eceee guide to the recast of the Energy
Performance of Buildings Directive (EPBD)**



Updated 9 March 2010



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This is a document that is regularly updated by eceee to reflect the status of the approval process of the recast of the Energy Performance of Buildings Directive (EPBD).

Introduction

The European Commission published its proposal for a recast of the Energy Performance of Buildings Directive (EPBD) in November 2008. Throughout 2009, the recast proposal went through the approval process, described below. In November, a political agreement was achieved. Now what remains is for the recast to become official.

The original Directive was approved in 2002 and was to have been fully transposed and implemented by January 2006, with a possible extension until January 2009 for certain articles. This extension would only be granted by the Commission if Member States could prove that there was a shortage of building certifiers and/or inspectors of heating and cooling systems.

As the Commission stated in the published proposal, the aim of the recast is to “clarify and simplify certain provisions, extend the scope of the Directive, strengthen some of its provisions so that their impact is more effective, and to provide for the leading role of the public sector. In doing so, the transposition and implementation of the EPBD are to be facilitated and a significant portion of the remaining cost-effective potential in the buildings sector will be reaped. At the same time, the objectives and principles of the current Directive are retained and it is again left to Member States to determine the concrete requirements, performance levels and ways to implement it as before.” However, a number of additional obligations are placed on the Member States in the way of a cost-optimal calculation methodology, reporting requirements, technical building systems, low- and zero-energy and carbon buildings, control and monitoring of implementation and penalties for non compliance.

Prior to the publication, the Commission undertook an extensive consultation with Member States and interested parties. It also had the normal “inter-service” consultation within the Commission itself, allowing all Directorates to comment on and influence the proposal from their own perspective.

The EPBD is the main legal instrument in Europe for improving energy performance in buildings. It provides for a comprehensive and integrated approach towards improving the efficient use of energy in both new and existing buildings, residential as well as commercial. The EPBD's provisions cover energy needs for thermal insulation, space and hot water heating, cooling, ventilation and lighting. Most of the existing provisions apply to all buildings, regardless of their size and whether in residential or non-residential use.

The purpose of this short paper is to help everyone make sense of where we are and where we are going with this proposal. For most people, other than the policy analysts and decision-makers who follow this daily, the path is confusing and not even entirely obvious when you read press reports.

eceee will do its best to keep members and relevant stakeholders abreast of progress in as clear a way as possible. This way you may be able to have some influence within your own country or organisation.

About eceee's involvement

eceee is following the process of the recast of the EPBD with great interest because we are firmly committed to doing everything possible to achieve the significant energy

savings potential remaining in the buildings sector. And ecee is committed to the recast, while not fully accepting all the limitations of the elements set out in the proposal and pushing for some further refinement.

ecee started by providing detailed comments to the Commission before it published its original proposal in December 2002. It has also done so in the run-up to the Commission adoption of the recast EPBD in November 2008. Encouragingly, most of ecee's suggestions have been taken into account, in one form or another, in both instances.

ecee surveyed stakeholders in Member States to get a better understanding of the state of implementation, to get reaction to the Commission's proposal and to get some sense whether there is acceptance of the recast.

ecee also kept in contact with the Commission, relevant Members of the European Parliament, representatives of industry associations and involved NGOs.

Throughout 2009 ecee provided a range of briefing notes and other forms of communication in order to ensure the best possible agreement on the recast. Those documents are available on the ecee website.

ecee will follow the progress and intervene, where possible and appropriate, throughout the rest of the process in order to ensure the most effective and ambitious new Directive possible. The official directive is affected by new requirements under the Lisbon Treaty that was recently approved. Also, aspects of the recast Directive have to go through the comitology process.

The decision-making process explained

The below diagram shows the complex nature of decision-making in the European Union. An annex gives a brief written overview of the process.

What happened during the approval process

This section will be revised on a regular basis, following significant milestones for the approval process.

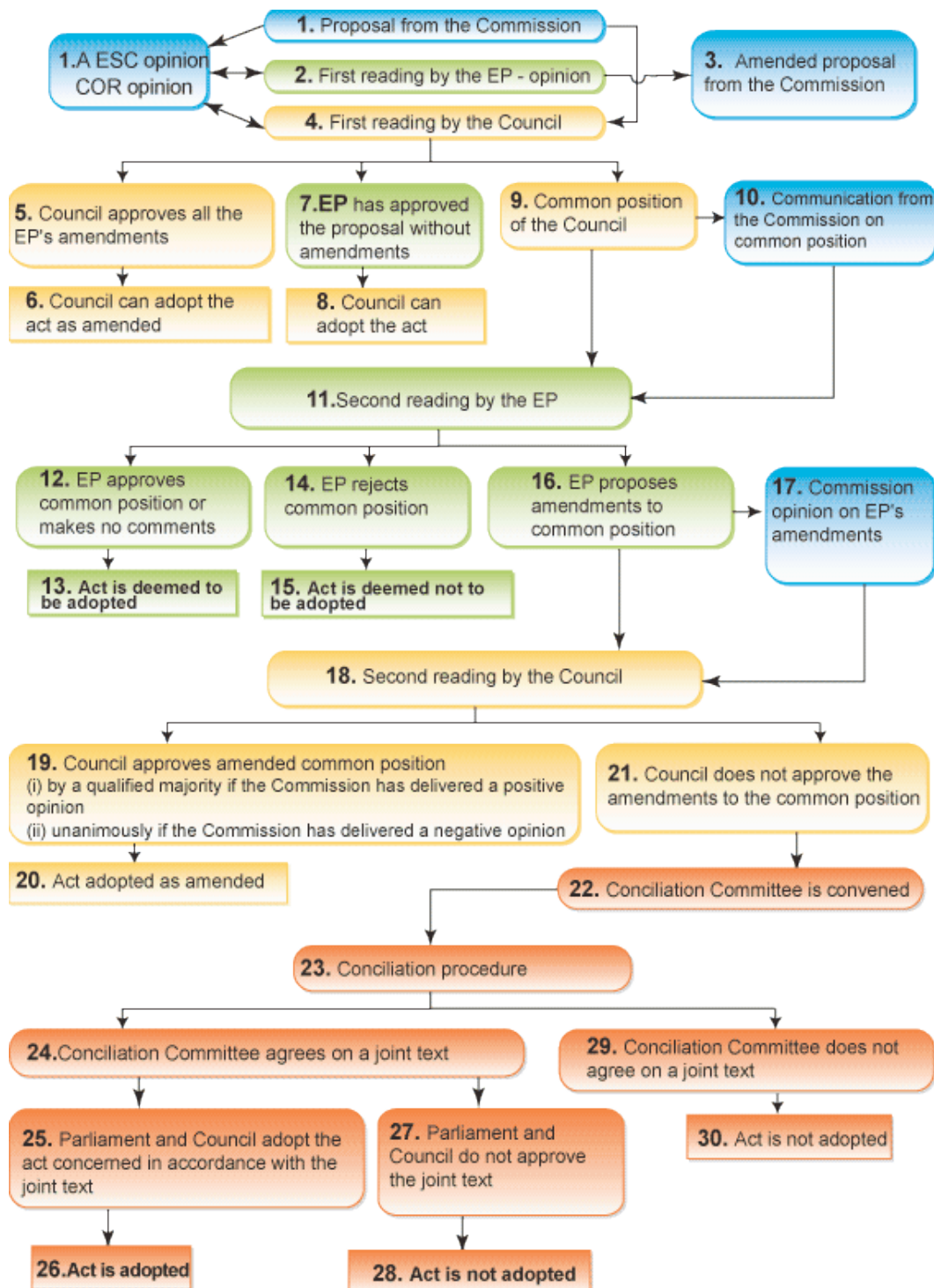
- the proposal was published by the Commission on November 13 as part of a larger energy and environment package
- ecee put out a press release giving its initial reaction
- ecee prepared a Position Paper on the recast that was approved by its board
- President of ecee wrote all ecee members in January to inform them of progress

Parliamentary approval process

- EP named a rapporteur (Ms Ticau from Romania) for the recast and ecee wrote her on January 19th with the ecee Position Paper
- the ITRE Committee started reviewing the recast proposal on January 19th
 - discussion in ITRE (lead committee) – week of 19 Jan
 - ecee separately contacted all members of the ITRE committee. There was one letter to target members who are strong supporters of energy efficiency and who should take an active role in supporting the recast.
 - There were other letters to the rest of the ITRE Committee (total of 107 members and substitutes) explaining the ecee position with the Position Paper attached. Because of resource constraints, we could not contact personally every member of the ITRE Committee, although some have been.
 - Draft Ticau report¹ - mid-Feb

¹ Report (Parliament) is defined as: Under the co-decision procedure, a Parliamentary report prepares Parliament's position. Drawn up by an MEP chosen from within the competent Parliamentary committee (the "rapporteur"), it basically contains suggested amendments and a statement of reasons explaining the proposed amendments. The Rapporteur is the MEP responsible for preparing the Report.

Figure: The co-decision process, step by step according to the old treaty²



² http://ec.europa.eu/codecision/stepbystep/diagram_en.htm. Flow chart as of 2008/02/28. Note that the flow chart on the Commission's web site has been updated in 2010 to reflect the Lisbon treaty.

- 485 amendments were proposed
- ITRE Committee voted on proposal that included 70 amendments on 31 March – the vote was 36 for, 10 against and 3 abstentions³. Eight EPP members voted against it.
- Plenary vote – 1st reading – was 23 April
- The vote was 549 for, 51 against and 26 abstentions⁴.

Voting against in the plenary vote:

- 7 Independence/Democracy Group (Batten, Clark, Coûteaux, Lundgren, Natrass, Titford, Zelezny)
- 7 Non-attached Members (Allister, Bobosikova, Hannan, Helmer, Knapman, Mote, Wise)
- 37 European People's Party Group (Boge, Cabrnoc, Caspary, del Casatillo Vera, Chirita, Dess, Fajmon, Ferber, Gahler, Gewalt, Gomolka, Grässle, Hieronymi, Jackson, Jeggler, Kastler, Klamt, Koch, Konrad, Langen, Lechner, Lehne, Mayer, Nassauer, Niebler, Ouzkky, Pack, Pieper, Quisthoudt-Rowohl, Reul, Sommer, Thyssen, Ulmer, Weber Manfred, Weisgerber, Wieland, Wohlin)

By country:

- 30 Germany
- 11 UK
- 5 Czech Republic
- 2 Sweden
- 1 France
- 1 Romania
- 1 Spain

- At the end of August and following the EP elections in June, ecee wrote the new Chairman of the ITRE Committee, the Rapporteur for the recast, and all members of the ITRE Committee to encourage them to maintain their support for the recast proposal.

Council approval process

- the Czech Presidency for the first six months of 2009 stated that the EPBD recast was not a priority for approval during its term. It was discussed in Council at Energy Working Party level, although mainly as a means of gathering information from Member States on their general impressions of the Commission proposal. Written comments to this end were also submitted.

³ Members of ITRE Committee present for the vote were: Šarūnas Birutis, Jan Březina, Jerzy Buzek, Jorgo Chatzimarkakis, Giles Chichester, Pilar del Castillo Vera, Den Dover, Adam Gierek, Fiona Hall, Rebecca Harms, Erna Hennicot-Schoepges, Mary Honeyball, Ján Hudacký, Romana Jordan Cizelj, Werner Langen, Pia Elda Locatelli, Eugenijus Maldeikis, Eluned Morgan, Antonio Mussa, Angelika Niebler, Reino Paasilinna, Atanas Papanicolas, Aldo Patriciello, Francisca Pleguezuelos Aguilar, Anni Podimata, Miloslav Ransdorf, Herbert Reul, Teresa Riera Madurell, Mechthild Rothe, Paul Rübig, Andres Tarand, Britta Thomsen, Catherine Trautmann, Claude Turmes, Nikolaos Vakalis, Adina-Ioana Vălean, Alejo Vidal-Quadras. Substitutes present were: Ivo Belet, Danutė Budreikaitė, Edit Herczog, Gunnar Hökmark, Bernhard Rapkay, Esko Seppänen, Silvia-Adriana Țicău, Lambert van Nistelrooij. Substitute(s) under Rule 178(2) present for the final vote were: Jill Evans, Ona Juknevičienė, Marusya Ivanova Lyubcheva, Willem Schuth

⁴ For details of the vote, including roll call, see:
<http://www.europarl.europa.eu/activities/plenary/home.do?date=20090502&tab=LAST&language=EN>

- the Swedish Presidency for the second half of 2009 gave the recast a high priority:
 - ecee met with Swedish officials in January to discuss their approach and to offer any help possible
 - the EPBD was discussed at the informal Council July 23-24 in Åre, Sweden
 - The Council Energy Working Party met on a regular basis since July, with much time being dedicated to discuss the proposal
 - The Swedish Presidency is expecting to reach a Political Agreement at the Energy Council meeting on 7 December 2009, based on a document that takes into account amendments from the 1st reading in Parliament
- there were many informal discussions among Member State governments leading to the Council's final position. There was no final position until after the trialogue process started.

Triologue

- Discussions started the 1st of October between Council, the European Parliament and the Commission in order to reach agreement on blocks of articles in the proposal where COREPER⁵ had provided the Council with a negotiating mandate based on texts supplied by the Presidency. These compromise texts, although not officially agreed by all the Member States, are judged to reflect what could be agreed upon by the Member States. They also take into account amendments from the Parliament's 1st reading.

“Informal trialogue”: the true negotiating forum

The briefness of the periods laid down by the Treaty for reaching an agreement, combined with the complexity of dossiers and the constricted timetable make it necessary to organise work on an informal basis upstream of conciliation. Thus, the negotiators frequently meet well in advance of the opening of formal conciliation. These meetings, mostly on a trilateral basis, constitute informal dialogues at technical or political levels, with a limited number of participants in the interest of effectiveness. For the European Parliament, the participants are the chairperson of the delegation (usually the Deputy Ambassador to the EU from the Presidency, the chair of the parliamentary committee (in this case ITRE) and the rapporteur, assisted by the shadow rapporteurs, members of the European Parliament's conciliations secretariat and, usually, a member of the European Parliament's legal service. For the Council, the permanent representative of the Member State holding the Council Presidency is assisted by members of the Council's secretariat, including its legal service.

Lastly, the Commission is represented in the dialogues by the Director-General of the department in charge of the dossier—although this may be delegated to the responsible Director-, assisted by experts, the Commission legal service and the Secretariat-General. The participants in the dialogues operate on the basis of negotiating mandates given to them by their respective delegations. They explore possible avenues of compromise in an informal manner and report to their delegations. Informal technical dialogues are also organised, attended for the most part by the three institutions' experts and secretariats.

from http://ec.europa.eu/codecision/stepbystep/text/index5_en.htm

⁵ Committee of the Permanent Representations to the EU, consisting of Deputy Ambassadors meeting in the Council.

Final Approval

- The trilogue meetings continued through October and November.
- A Political Agreement was achieved on November 17, 2009. Information on the political agreement is available on the ecee website.

What Happens After the Political Agreement

The entry into force of the Lisbon Treaty has delayed the final approval of the EPBD Directive. This delay has been due in particular to two factors:

1. Introduction by the Lisbon Treaty of special provisions on energy and the change of the EPBD legal basis from environment to energy,
2. Impact on the EPBD of the amendments to the ‘comitology’ procedures introduced by the Lisbon Treaty.

The EPBD Directive is now expected to be adopted by the end of April.

The EPBD legal basis

The EPBD has been adopted on the basis of the environmental provisions of the old EC Treaty. Now, the Lisbon Treaty introduced a new energy chapter. This new energy chapter will be used as new legal basis of the EPBD Directive.

The impact on the EPBD of the amendments to the ‘comitology’ procedures introduced by the Lisbon Treaty

The EPBD requires certain issues be regulated by **delegated acts**. Under the Lisbon Treaty delegated acts, adopted previously under the comitology, will not be adopted via this procedure any longer. Details concerning the delegation of powers for the adoption of delegated acts shall be established in each particular legal act separately. They shall be also established in the EPBD. However, there seems to be no agreement between EU institutions on all details concerning delegations of powers for the adoption of EPBD delegated acts. Until such an agreement is reached, the EPBD recast cannot be adopted. Taking into account that the EPBD is one of the first legal acts including a reference to delegated acts under the new Lisbon Treaty rules, the EU legislator seems to be cautious about these provisions thinking that they might serve as a precedent for some future similar acts. This lack of agreement on delegated acts’ modalities causes a delay in the final adoption of the EPBD.

Following provisions of the Lisbon Treaty, the acts which will now be adopted via ‘comitology’ procedure are called **implementing acts**. The Lisbon Treaty only provides a general framework concerning implementing acts and requests details to be established in a regulation (to be adopted through the ordinary legislative procedure by the Council and European Parliament). Such a regulation has not been adopted yet (see: explanatory box below). Until it is in place and in view of not blocking pending legislative procedures, the EU institutions seem to have reached an interim agreement and agree to refer to the existing rules of the Comitology Decision 1999/468/EC (as amended in 2006). This concerns also the EPBD recast.

Further information explaining ‘comitology’ under the Lisbon Treaty is provided in the box below.

Fact box: More on comitology

The committees in the comitology process are forums for discussion, consist of representatives from Member States and are chaired by the Commission. They enable the Commission to establish dialogue with national administrations before adopting implementing measures. The Commission ensures that measures reflect as far as possible the situation in each of the countries concerned.

The following are excerpts from *Comitology*, ClientEarth Legal Briefing, February 2010:

In the majority of cases EU legislative acts are adopted by the European Parliament and the Council.

In some cases, a legislative act will provide that the Commission (or, in specific cases of foreign and security policy, the Council) can adopt measures ensuring harmonised implementation of specific elements of this act throughout the European Union (*implementing acts*).

The purpose of the authority for the Commission to adopt implementing acts is to facilitate the adoption of acts which have executive and operational character and do not require undergoing the whole legislative procedure. Implementing acts involve executive action by the Commission.

It is important to distinguish implementing acts from *delegated acts*. Delegated acts involve quasi-legislative action. Although in the past delegated acts were considered comitology acts, they are not any longer treated as such under the Lisbon Treaty.

Comitology before the entry into force of the Lisbon Treaty

In order for Member States to keep control on the Commission when it developed and adopted implementing (or delegated) measures, the Commission had to consult on its proposal with a committee composed of Member States' representatives (this is where the term 'comitology' comes from). The influence of the committee on the final text of an implementing (or delegated) measure depended on the form chosen for the committee. In some cases the committee was only formally consulted, while in other cases its objection to the Commission's proposal could lead to the rejection of the proposal by the Council. In 2006, a new comitology procedure was introduced. The new procedure reinforced the powers of the Council and the European Parliament and allowed the European Parliament to reject the Commission's proposal. These comitology procedures are described in the Council Decision 1999/468/EC (the Comitology Decision).⁶

Comitology after the entry into force of the Lisbon Treaty⁷

The Lisbon Treaty provides that implementing acts will be adopted by the Commission (or, in specific cases of foreign and security policy, the Council) to establish uniform conditions for implementing specific provisions of legally binding acts. However, the Treaty does not set out in detail all the rules that will govern implementing acts. These will be adopted by the European Parliament and the Council through the ordinary legislative procedure in the form of a regulation. The Commission's proposal for this regulation is expected to be presented in March this year.

Taking into account the time necessary for adopting such a regulation, the EU institutions seem to have reached an interim agreement to continue referring to specific articles of the existing comitology rules of the Comitology Decision in legal acts which are being adopted now and which include provision for certain issues to be dealt with through implementing acts.

It could be expected that, once a new regulation on implementing acts is adopted, these references to the existing Comitology Decision would be replaced by references to the new regulation.

⁶ Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 184, 17.7.1999, p. 23, as amended.

⁷ According to definition provided by the EU institutions in the Glossary published on: http://europa.eu/legislation_summaries/glossary/comitology_en.htm

Annex - Decision-making in the European Union

Decision-making* at European Union level involves various European institutions, in particular

- the European Commission,
- the European Parliament (EP),
- the Council of the European Union.

In general, it is the European Commission that proposes new legislation, but it is the Council and Parliament that pass the laws by amending them and, based on a common text, reaching agreement between themselves and with the Commission. In some cases, the Council can act alone. Other institutions also have roles to play.

The main forms of EU law are directives and regulations. The rules and procedures for EU decision-making are laid down in the treaties. Every proposal for a new European law is based on a specific treaty article, referred to as the ‘legal basis’ of the proposal. This determines which legislative procedure must be followed. The three main procedures are ‘consultation’, ‘assent’ and ‘co-decision’.

1. Co-decision

This is the procedure now used for most EU law-making. In the co-decision procedure, Parliament does not merely give its opinion: it shares legislative power equally with the Council. If Council and Parliament cannot agree on a piece of proposed legislation, it is put before a conciliation committee, composed of equal numbers of Council and Parliament representatives. Once this committee has reached an agreement, the text is sent once again to Parliament and the Council so that they can finally adopt it as law. Conciliation is becoming increasingly rare. Most laws passed in co-decision are, in fact, adopted either at the first or second reading as a result of good cooperation between the three institutions. This co-operation takes the form of frequent contacts between the institutions during the legislative process and in the form of “trialogues”. During trialogues, the Parliament and Council, together with the Commission, negotiate compromises in a joint text of the proposal under discussion.

2. Assent

The assent procedure means that the Council has to obtain the European Parliament's assent before certain very important decisions are taken.

The procedure is the same as in the case of consultation, below, except that Parliament cannot amend a proposal: it must either accept or reject it. Acceptance (‘assent’) requires an absolute majority of the votes cast.

The assent procedure is mostly used for agreements with other countries, including the agreements allowing new countries to join the EU.

3. Consultation

The consultation procedure is used in areas such as agriculture, taxation and competition, and even energy. Based on a proposal from the Commission, the Council consults Parliament, the European Economic and Social Committee and the Committee of the Regions.

* http://europa.eu/institutions/decision-making/index_en.htm



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Parliament can:

- approve the Commission proposal,
- reject it,
- or ask for amendments.

If Parliament asks for amendments, the Commission will consider all the changes Parliament suggests. If it accepts any of these suggestions it will normally send the Council an amended proposal.

The Council examines the amended proposal and either adopts it or amends it further. In this procedure, as in all others, if the Council adopts a proposal for which the Commission has delivered a negative opinion, it must do so unanimously. However, in the negotiating process, this is not always strictly adhered to.

Although the opinions on Commission proposals set out in the reports that are prepared by the European Economic and Social Committee and the Committee of the Regions are usually carefully studied, they are not binding. These institutions are only consultative.