Henry Farrell and Adrienne Héritier

The Invisible Transformation of Codecision:

Problems of Democratic Legitimacy

Sieps
Swedish Institute for European Policy Studies

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PREFACE

Sieps, the Swedish Institute for European Policy Studies, conducts and promotes research, evaluations, analyses and studies of European policy issues, with a focus primarily in the areas of political science, law and economics.

Sieps has commissioned a number of reports relating to issues that, in the opinion of Sieps, will be of importance in the upcoming intergovernmental conference. The reports will be dealing with a range of constitutional, procedural and material questions. Each report will outline the key principal problems of the issue area, the work and the proposals of the Convention and analyse these proposals from clearly stated assumptions or aims and finally to be firmly grounded in the academic debate. The reader shall consequently be able to get an overview of the state of the art as well as a comprehensive introduction to the issues in question.

One of the missions of the Institute is to act as a bridge between academics and policy-makers and one of the primary aims of these reports is to build this bridge. Furthermore, in a broader sense the reports shall contribute to increased interest in current issues in European integration as well as increased debate on the future of Europe.

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THE INVISIBLE TRANSFORMATION OF CODECISION: PROBLEMS OF DEMOCRATIC LEGITIMACY

1 INTRODUCTION

1.1 Question

The relationship between Council and Parliament within the codecision procedure involves a plethora of informal and semi-formal meetings in which many of the real decisions about legislation are taken, with little scope for public oversight. In the light of the current debate of the future of European Union, the report will address the question what this informalization of the decision-making process means for the legitimacy of the legislative process.

1.2 Outline

The report will start with a summary followed by conclusions and some possible solutions to the problems addressed (Part 2). Then, the main text of the report will begin with a brief overview of codecision, concentrating less on the formalities of the process – which are reasonably well understood – than on the informal practices and institutions that have sprung up around it (Part 3). It then goes on to highlight the problems that have arisen from the codecision process, for both Parliament and Council (Part 4).

2 SUMMARY AND CONCLUSIONS

2.1 Summary

The codecision procedure was introduced in the Maastricht Treaty in order to increase the European Parliament's say in the legislative process, and thus to strengthen the democratic legitimacy of the European Union (EU). In many respects, it has succeeded beyond initial expectations. Parliament has consistently sought to increase its own powers through careful legislative tactics. Legislative relations between the Council and Parliament are now relatively stable and productive. The Parliament does provide stronger democratic oversight in the areas subject to codecision. However, codecision has also had unexpected side-effects; some of which have negative consequences for transparency and accountability. The relationship between Council and Parliament involves a plethora of informal and semi-formal meetings in which many of the real decisions about legislation are taken, with little scope for public oversight. We dub this process the "invisible transformation" of the codecision procedure has affected relations among governments within the Council, as well as making it more difficult for national parliaments to supervise how EU business is conducted.

What does the increasing informalization of the decision-making process under the codecision procedure mean for the legitimacy of the EU legislative process? Debates on democratic legitimacy in the European Union have typically advocated one of three positions. The first view, which is often advocated by federalists, supporting the notion of strong supranational institutions, suggests that the European Union should assume many of the features of the parliamentarian democracies of the nation state. The second is that of the member state governments, which are, after all, democratically elected representatives of their respective citizenries. In this argument, the primary source of legitimacy in the EU lies in the Council, where the heads of government come together to make policy choices on behalf of their countries. The third potential source is national parliaments, which some critics see as an alternative source of democratic legitimation, if they exercise scrutiny and control over EU level politics

How does the creation and expansion of the codecision process and informal trialogues/agreements affect these three different sources of democratic legitimacy? First among these developments is the institution of "trialogues;" meetings between figures in Parliament, Council and Commission, which seek to reach compromise on politically contentious matters. While these trialogues greatly increase the efficiency of decision making, they weaken the standards of democratic accountability that Parliament is supposed to live up to. Second are the even more shadowy meetings, also called trialogues, between Council representatives and certain figures within the Parliament that frequently occur in the context of early agreements. Third is a growing trend, which stems in part from the first two problems discussed above; the increasing possibility that larger member states to use their clout in Parliament to manipulate the legislative process in a non-accountable, and non-democratic fashion.

In addition to this first type of trialogue, which prepares the meetings of the Conciliation Committee, another type of trialogue has been created, in order to avoid conciliation altogether. These informal meetings take place much earlier, during first reading, and seek to hammer out an "early agreement" between members of Coreper 1 and the Parliament. These trialogues and the informal agreements resulting from them have increasingly gained overt recognition as "fast track legislation" and as such a vital part of the legislative process. They have formally been incorporated into the Amsterdam Treaty.

It is difficult to see how the legislative process could be conducted without trialogues, or something like them. Informal negotiations between Council and Parliament, with the Commission acting as (relatively) honest broker, are necessary to reach agreement on legislative texts. However, there are problems associated with the process. Most obviously, there is the problem of transparency. Trialogues conduct important business on an informal and relatively secretive basis, at the expense of more visible parts of the codecision procedure, such as the Conciliation Committee.

The success of the codecision procedure, and of the trialogue system, spurred the Council Secretariat – as pointed out – to propose Treaty amendments at Amsterdam, which would allow for "early agreements" on certain codecision dossiers. Under early agreements, the Parliament and Council seek to reach agreement on a proposed piece of legislation before the Council adopts a formal Common Position, or the Parliament provides its official opinion. This fast track legislation places a premium on informal negotiations between the respective representatives of Parliament and Council, that seek to reach agreement before it is necessary to invoke the formal machineries of Parliament-Council negotiations.

Thus, the new trialogues to avoid conciliation and early agreement provisions at Amsterdam have even more marked implications for openness and transparency, than the trialogue system instituted in the wake of codecision. Negotiations on early agreement dossiers are almost entirely informal – it is often extremely difficult for others within the Parliament, let alone outsiders, to have any idea of what exactly is going on in a specific brief. This lack of accountability poses clear risks for Parliament's democratic legitimacy. to discuss dossiers, and thus transfer some of the negotiation process to a more formal and publicly accessible environment. The Council has indicated its continued unwillingness so to do,[1] and it is by no means clear that Parliament can credibly deliver on its threat of non-cooperation – many key power brokers within the Parliament actually benefit from current arrangements. Nor is it clear that Parliament will not be prepared to sacrifice openness for increased power over the longer term.

Early agreement also has consequences for democracy at the national level. Each member state now has a specialized committee in its national-level Parliament dealing with European Union legislation However, when legislation is brought through

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[1] This said, some figures within the Council Secretariat admit that they expect they will be forced to accept this in time; see Farrell and Héritier, forthcoming.

under early agreement provisions, it is difficult for these committees to exercise oversight; decisions are typically taken before the member states have even had the chance to reach a consensus on a Common Position, let alone to defend their negotiating strategies to their respective domestic Parliaments. Efficiency is enhanced at the expense of accountability.

The third important consequence of codecision and the changing relationship between Council and Parliament is still in its birth-throes but may perhaps have the most important consequences of all in the long run. This is the creation of new alliances between member states, as represented in Council, and their national representatives in the European Parliament. As the Parliament's influence over the legislative process has increased, individual member states have begun to realize that they may sometimes achieve outcomes which would otherwise have been difficult or impossible, through influencing MEPs. First, member states may seek to sway MEPs from their respective national delegations. Where they are successful in so doing, larger member states, will, *ceteris paribus*, be better able to influence legislative outcomes than smaller ones. It allows larger member states a "second bite at the cherry." Even if they find themselves marginalized in discussions over a specific piece of legislation within the Council, larger member states may be able to mobilize support among MEPs so that the piece of legislation in question is amended to their satisfaction, or rejected.

Second, an effect of the early agreement practice under codecision, more specifically, is that countries which hold the Presidency are in a privileged position in certain early agreement negotiations. Where the member states have not yet reached a Common Position, the country holding the Presidency may be in a position of unique influence within the Council, reporting the member states' negotiating positions to the Parliament, and the Parliament's position to the other member states. It may potentially use this leverage to affect other actors' perceptions of what is possible and what is not, and thus bring through outcomes which reflect its own preferences rather than the preferences of the Council as a whole. What is most worrying is

that these two asymmetries of power may come to reinforce each other if, as some have suggested, the Presidency system is changed so that larger member states hold it more often than smaller ones.

2.2 Conclusions

Our policy recommendations are relatively modest in scope. This reflects the reality that formal institutional change will very nearly *always* have unexpected knock-on consequences. Actors will always seek to bargain over the ambiguities in new formal institutions, to their own advantage, and it will never be possible fully to eliminate these ambiguities. Thus, it would be unrealistic to recommend that these informal arrangements be legislated out of existence; further, this would fail to recognize that they do have some important advantages in smoothing the course of law-making within the EU. However, we do suggest that increased *monitoring and control* may mitigate the problems that we identify, even if it doesn't eliminate them. We group our recommendations according to the three types of democratic legitimacy that we identified in the beginning of this report. We have extra reason for caution in that we seek to improve democratic accountability according to each of these three types. Very likely, major reforms seeking to increase accountability according to any one of these criteria is likely to have negative implications for accountability under the other two. By keeping the scope of our proposals modest, we hope to mitigate this risk.

The European Parliament

We propose that Council figures should indeed address Parliamentary committees – but that this is not be done as if the Council was directly accountable to the Parliament. Rather, this should involve information on the reached position, indications as to the joint rationales behind Council's willingness or unwillingness to accept certain amendments (without revealing which governments oppose or support

these amendments). To preserve parity, this should be combined with the rapporteur's responsibilities to keep the committee updated regarding the process of negotiations.

The European Parliament finds itself in an awkward position. On the one hand, its power to shape legislation has increased very substantially due to codecision; all the more so given its success in bargaining under the informal institutions surrounding the codecision process (Farrell and Héritier, forthcoming). On the other, it is finding that such power comes with a price – it is increasingly finding itself embroiled in secretive and unaccountable forms of decision making. The Parliament has, in a somewhat self-serving fashion, laid the blame for this on the Council. Certainly, the Council has been eager to draw figures in Parliament into informal relationships; but figures in Parliament, for their part, have been equally eager to accept the Parliament's overtures. Further, the Council's strategies reflect the realities of Parliament as they see it; in the absence of strong parties, the Council must necessarily turn to informal power brokers in order to ensure that legislation does not fall at the committee and plenary stages. Thus, the undemocratic aspects of codecision reflect both the imperatives of the Council, *and* internal problems within Parliament of looseness, unaccountability, and weak party structures.

This said, Parliament's suggestions for reform – such as having figures in Council brief committees on specific dossiers – would, in some respects, improve democratic accountability. However, we note that this need by no means imply a typical parliament-government relationship, as is found in many national level parliamentary democracies. This would be misconceived because the Council is a legislative body as well as an executive body. There is no reason why one legislative body (the Council) should be forced to appear in another legislative body (the Parliament) to be held accountable for their positions on specific dossiers. However, members of the Council coming to

EP committees to give information, if not to justify their position, might increase transparency and merely reflect the reality that important negotiations take place out of the public eye, and that accountability requires that there be some public scrutiny of them.

We thus propose that Council figures should indeed address Parliamentary committees – but, in order to assuage some of Council's fears, that this is not be done as if the Council was directly accountable to the Parliament. Rather, this should involve information on the reached position, indications as to the joint rationales behind Council's willingness or unwillingness to accept certain amendments (without revealing which governments oppose or support these amendments). To preserve parity, this should be combined with the rapporteur's responsibilities to keep the committee updated regarding the process of negotiations.

The Council

We suggest that Council members should pay direct attention to the long term consequences of seeking to manipulate Parliament through contact with their national MEPs, and modify their behaviour accordingly. There is a clear danger in the longer term of these states' actions weakening the democratic legitimacy of Parliament, by "re-nationalizing" European political questions, and, even more pertinently, of undermining confidence within the Council itself by offending the principle of "mutual diffuse reciprocity over time", meaning that no member state or group of member states ever finds itself as part of a permanent structural minority. Normative consensus of this sort is inherently fragile, and requires trust between member states. The Commission has functioned as an honest broker in this context, seeking to maintain the balance of interests among national governments. The trust which has been established in this principle over time may be undermined if some member states come to suspect that they are systematically losing out on im-

> portant questions, even though they are capable of winning "within" the Council, because other member states are using their contacts with Parliamentarians to overturn common positions at the codecision stage.

We identify two threats to consensual patterns of decision making within the Council, both of which stem from the increase in informal relations between Council and Parliament, and the possibilities that these offer for individual member states to act strategically. We note that the Council has already significantly strengthened its codecision *dorsale*, in part to make such opportunism more difficult for individual member states. However, we also note a significant new threat to Council's underlying rationale, stemming from the greater power of member states to influence Parliament (through contacts with national MEPs), and how this may be reinforced by proposals to greatly increase the weight of larger member states in the Presidency. Both of these would mean that larger member states would have greater opportunity to play politics in a non-transparent fashion in the codecision process.

Two conclusions follow. First, our argument provides yet another reason for smaller member states to oppose the larger member states assuming a disproportionate share of control over the Presidency. This weakens the smaller member states in purely formal terms; but weakens them even more when one examines the informal processes through which decisions are actually taken within codecision. Second, we suggest that Council members should pay direct attention to the long term consequences of seeking to manipulate Parliament through contact with their national MEPs, and modify their behaviour accordingly. There is a clear danger in the longer term of these states' actions weakening the democratic legitimacy of Parliament, by "re-nationalizing" European political questions, and, even more pertinently, of undermining confidence within the Council itself by offending the principle of "mutual diffuse reciprocity over time". Decision making within the Council

rests on an informal norm-driven consensus of what kinds of behaviour are appropriate, and what kinds are inappropriate. The most important norm has been a principle of diffuse reciprocity over time (also called the "solidarity" principle of the Council) meaning that no member state or group of member states ever finds itself as part of a permanent structural minority. Normative consensus of this sort is inherently fragile, and requires trust between member states. It has worked quite well in the past because each member state set great store by this principle, refraining from putting other member states into structural minority situations for fear of being put into a minority situation itself. The Commission has functioned as an honest broker in this context, seeking to maintain the balance of interests among national governments. The trust which has been established in this principle over time may be undermined if some member states come to suspect that they are systematically losing out on important questions, even though they are capable of winning "within" the Council, because other member states are using their contacts with Parliamentarians to overturn common positions at the codecision stage.

National Parliaments

The exchange of information between the European Parliament and members of the national parliaments should be increased at all stages of the codecision procedure. Very likely the institutional context for such an exchange will be COSAC (Committee for Selected Community Affairs). Further, the early monitoring mechanism which has been discussed at the Convention allowing national parliaments to stop a Commission legislative draft if it is not in compliance with subsidiarity principles should leave it to the Commission whether to pursue the proposal or not.

As we have previously discussed, national parliaments find their powers of scrutiny to be very nearly useless when decisions are taken in informal negotiations, before national parliamentary committees have time to examine the relevant policy questions,

and issue recommendations. Therefore the exchange of information between the European Parliament and members of the national parliaments should be increased at all stages of the codecision procedure. Very likely the institutional context for such an exchange will be COSAC (Committee for Selected Community Affairs).

Further, the early monitoring mechanism which has been discussed at the Convention allowing national parliaments (if a third of national parliaments decide to do so) to stop a Commission legislative draft if it is not in compliance with subsidiarity principles, offers national parliaments a possibility to intervene at an early point in time. Although – according to the proposal – the Commission only has to "reconsider" the draft, the ability of national parliaments to challenge the Commission proposal before the European Court of Justice can give this right of monitoring a real "bite". This would carry all the more weight, if, as has been suggested by the British representatives, the Commission would have to drop the proposal. Our general argument regarding the European Parliament – that the informal bargaining over the interpretation of ambiguous formal rules, if linked to a veto position, can provide rapid gains in power for an institution which previously had been provided with only few formal rights – could be applied to national parliaments as well.

If in the future national parliaments – under the early monitoring mechanism – with the possible support of the European Court of Justice could stop legislative drafts, they could use this veto power to negotiate a stronger formal position for themselves in the future institutional architecture of Europe, and thus transform their pawn into a queen. Or as one member of the Convention said it would be "tantamount to introducing a third chamber through the back door" (European Voice, 20-26.3.03, p. 6). In view of these possible far reaching implications we recommend an early monitoring mechanism of national parliaments that is only of advisory nature.

3 CO-DECISION AND DEMOCRATIC LEGITIMACY

The codecision procedure was introduced in the Maastricht Treaty in order to increase the European Parliament's say in the legislative process, and thus to strengthen the democratic legitimacy of the European Union (EU). In many respects, it has succeeded beyond initial expectations. Council officials were initially worried that Parliament was incapable of playing a responsible role in helping to draft legislation – Members of the European Parliament (MEPs) were perceived as being undisciplined lightweights. These worries were unjustified; while Parliament has consistently sought to increase its own powers through careful legislative tactics, legislative relations between the Council and Parliament are now relatively stable and productive. The Parliament does provide stronger democratic oversight in the areas subject to codecision. However, codecision has also had unexpected side-effects; some of which have negative consequences for transparency and accountability. The relationship between Council and Parliament involves a plethora of informal and semi-formal meetings in which many of the real decisions about legislation are taken, with little scope for public oversight. Parliament has repeatedly complained that this undermines its democratic purpose. What is less frequently commented on is the negative effects this has for decision making within the Council; larger member states may now have greater influence, and in extreme cases, may have a "second bite at the cherry", through their influence on their respective national MEPs in Parliament.

What does the increasing informalization of the decision-making process under the codecision procedure mean for the legitimacy of the EU legislative process? Debates on democratic legitimacy in the European Union have typically advocated one of three positions. First, and most commonly invoked, is the argument that the European Union will achieve democratic legitimacy if it reproduces the same institutions on the supranational level that have provided legitimacy at the national level. This view, which is often advocated by federalists, supporting the notion of strong supranational institutions, suggests that the

European Union should assume many of the features of the parliamentarian democracies of the nation state.

However, this theory of legitimacy has its critics, who point to the absence of a European demos or general public to underpin democratic institutions on the EU level. Many of these critics point to a second and/or third source of democratic legitimacy in the EU. The second is that of the member state governments, which are, after all, democratically elected representatives of their respective citizenries. In this argument, the primary source of legitimacy in the EU lies in the Council, where the heads of government come together to make policy choices on behalf of their countries. Additionally, the mutual control that member states may exercise over each other is also considered to be an important source of accountability (Héritier 1999) The third potential source is national parliaments, which some critics see as an alternative source of democratic legitimation, if they exercise scrutiny and control over EU level politics.

How does the creation and expansion of the codecision process affect these three different sources of democratic legitimacy? As we have already noted, codecision may best be interpreted as an effort to enhance legitimacy through increasing the powers of the European Parliament; thus, it is primarily inspired by the first conception of legitimacy that we have described above. However, as we note below, it has not been as successful in providing legitimacy as one would like. In part, this may be attributed to mass publics' continued lack of interest in elections to the European Parliament; voters do not seem to realize how important Parliament has become. Alternatively, voters may be uninterested in the Parliament because it does not have the power to elect a government as is the case in parliamentarian democracies. However, as we discuss below, there are also internal problems – codecision has played out rather differently in practice than was initially expected, giving rise to a wide variety of informal relationships, some of which are of dubious democratic merit. We dub this process the "invisible transformation" of the codecision procedure – but note that this transformation, while mostly invisible in terms of formal institutional

change, has had very substantial effects. Moreover, we argue that these informal relationships have had real consequences for the second and third conceptions of democratic legitimacy too, affecting relations among governments within the Council, as well as making it more difficult for national parliaments to supervise how EU business is conducted.

4 THE EVOLUTION OVER TIME

Codecision involves Council and Parliament acting as effective co-legislators on the basis of a Commission proposal. The Parliament delivers its Opinion before the Council adopts a Common Position on the relevant proposal; when the Council delivers its position, the Parliament can then make amendments, which the Council in turn accepts or rejects, in a second reading. If the Council does not approve all amendments, it and the Parliament meet in a Conciliation Committee to hammer out a compromise. Originally, under the Maastricht Treaty, the Council could reaffirm its Common Position if the Conciliation Committee failed to reach agreement; the Parliament could then overturn this position only on the basis of an absolute majority. The Treaty of Amsterdam amended this, so that a legislative proposal fails if there is no agreement in the Conciliation Committee. The Treaty of Amsterdam also introduced the possibility of "early agreement," so that the Parliament and Council can now reach agreement on first reading; it also greatly expanded the subjects covered by the codecision procedure.

Thus, the introduction of the codecision process seems to have achieved many of its key aims. The Parliament now plays a much more active role in legislation, and frequently acts to improve proposals, or to bring them more in line with the perceived wishes of national electorates. The Council has overcome its initial reservations, and has come to accept that the Parliament can play a responsible and useful role in preparing legislation.[2] Indeed, figures in the Council secretariat were the key movers behind the "early agreement" procedures introduced at Amsterdam, which rely on close and detailed collaboration between Council and Parliament in the preparation of legislation. It is less clear that the very considerable increases in Parliament's political power have been reflected in greater legitimacy

Endnotes

[2] See the comments of Mr. Navarro, Spanish Deputy Permanent Representative in COREPER I, available at http://www.europarl.eu.int/code/events/20021104/minutes_en.pdf.

for Parliament among European voters. Elections to the European Parliament remain "second order elections" (Hix ; Lord 1998), in which voters typically seek to punish or reward politicians for the performance of the national government, with little reference to the policies that MEPs are likely to pursue at the European level.[3]

All of the above is well known, and often discussed in policy debates, and the academic literature on the EU, institutional change, and democratic legitimacy. However, other developments associated with codecision have received much less attention, even though their implications for democracy, transparency and openness are equally profound. These have led to the "invisible transformation" of codecision, as informal changes have followed on the formal introduction of the codecision procedure. First among these developments is the institution of "trialogues;" meetings between figures in Parliament, Council and Commission, which seek to reach compromise on politically contentious matters. While these trialogues greatly increase the efficiency of decision making, they weaken the standards of democratic accountability that Parliament is supposed to live up to. Second are the even more shadowy meetings, *also* called trialogues, between Council representatives and certain figures within the Parliament that frequently occur in the context of early agreements. Third is a growing trend, which stems in part from the first two problems discussed above; the increasing possibility that larger member states to use their clout in Parliament to manipulate the legislative process in a non-accountable, and non-democratic fashion.

These three problems are interlinked; they all stem from the plethora of informal contacts between Council and Parliament that have sprung up in the wake of codecision. We discuss each in turn below.

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4.1 The Trialogue System

Perhaps the most important unexpected consequence of codecision was the creation of trialogues; these informal structures paved the way for later changes. The trialogue system results from an informal compromise reached between Council and Parliament in the wake of Maastricht. Initially, the Council Secretariat and COREPER had sought to impose a minimalist interpretation of the new codecision procedure, in which the Parliament would continue to play a subservient role (Farrell and Héritier, forthcoming 2003). They were unwilling to engage in bargaining with the Parliament, instead preferring to make a "take it or leave it offer," indicating which Parliament amendments the Council was prepared to accept, and which it opposed. Parliament, however, refused to go along with the Council's behavior, instead arguing that codecision involved Council and Parliament as co-equal partners in the legislative process, so that both should be actively engaged in the process of drafting legislation. This led to bitter battles between Council and Parliament in the early years after Maastricht, in which Parliament withheld its approval from particular items of legislation in order to strengthen its institutional position vis à vis Council; the battle over comitology, where the Parliament wished to share authority with the Council over matters of implementation (Corbett, 2000; Hix, 2002; Bergström, Farrell and Héritier, unpublished) in the decision on open voice telephony directive is maybe the most well-known example. Eventually the Council was forced to back down, and to accept an active role for Parliament in the legislative process. Over 1994–1995, the Council, Parliament and Commission began to create a system of regular meetings, which would allow them to negotiate over legislative matters subject to codecision (Shackleton, 2000). These meetings gradually assumed semi-recognized status as "trialogues" (variant spelling, "trilogues.") The original trialogues usually take place after the second reading, but before the Conciliation Committee's meeting, in order to hammer out compromises over issues of dispute. It is fair to say that Conciliation Committee meetings are increasingly *pro forma*; much of the real politics and bargaining takes places in the informal trialogues that

precede them. These meetings involve, *inter alia*, the vice-presidents of the Parliament, representatives of the Council's Presidency, Parliament's rapporteur, and the chairpersons of the relevant Committee and Council working party. Trialogues are not formally binding; neither Council nor Parliament is obliged to adhere to agreements reached in these meetings. However, because Council and Parliament engage with each other repeatedly in the legislative process, it is usually in their interest to make agreements stick; otherwise the defaulting party is likely to lose credibility, and to be punished in future interactions.

In addition to this first type of trialogue, which prepares the meetings of the Conciliation Committee, another type of trialogue has been created, in order to avoid conciliation altogether. These informal meetings take place much earlier, during first reading, and seek to hammer out an "early agreement" between members of Coreper 1 and the Parliament. These trialogues and the informal agreements resulting from them have increasingly gained overt recognition as "fast track legislation" and as such a vital part of the legislative process. They have formally been incorporated into the Amsterdam Treaty.

It is difficult to see how the legislative process could be conducted without trialogues, or something like them. Informal negotiations between Council and Parliament, with the Commission acting as (relatively) honest broker, are necessary to reach agreement on legislative texts. However, there are problems associated with the process. Most obviously, there is the problem of transparency. Trialogues conduct important business on an informal and relatively secretive basis, at the expense of more visible parts of the codecision procedure, such as the Conciliation Committee. As the Council's guidelines to codecision acknowledge:

> The trialogues and technical meetings prior to the first meeting of the Conciliation Committee will often make it possible to bring the conciliation to a conclusion during this first meeting, sometimes even in the form of a simple declaration of the pre-arranged agreement.

However, these meetings are not open to public scrutiny, leading to criticisms that the Parliament is failing in its responsibility to provide democratic accountability. For example, Parliament-Council discussions on freedom of information and the code of access to EU documents were themselves held in trialogues behind closed doors leading to acid criticism from public interest groups.[4]

While the Parliament is unhappy with the lack of transparency in the trialogue system (see below), it also sees trialogues and other committees as providing it with opportunities to increase its influence over the legislative process.[5] The Council, for its part, views trialogues as a way to speed up legislation, and make it more efficient. Although it has recognized their existence in the Amsterdam Treaty a, it is unwilling to have the Treaty prescribe any specific formal structure for them, in case that limits their flexibility.[6]

4.2 Early Agreements

The success of the codecision procedure, and of the trialogue system, spurred the Council Secretariat – as pointed out – to propose Treaty amendments at Amsterdam, which would allow for "early agreements" on certain codecision dossiers. Under early agreements, the Parliament and Council seek to reach agreement on a proposed piece of legislation before the Council adopts a formal Common Position, or the Parliament provides its official opinion. This fast track legislation places a premium on informal negotiations between the respective representatives of Parliament and Council, that seek to reach agreement before it is necessary to invoke the formal machineries of Parliament-Council negotiations.

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[4] See the comments of Tony Bunyan, of the watchdog organization, Statewatch, at *http://www.statewatch.org/news/2001/feb/07evoice.htm.*

[5] See Parliament's discussion document on the subject, available at *http://www.statewatch.org/news/2001/mar/codecision.pdf.*

[6] See the comments of M. Jacqué, Director of the Codecision Unit of the Secretariat of the Council, available at *http://register.consilium.eu.int/pdf/en/02/cv00/00341en2.pdf.*

Originally, the early agreement procedure was intended for non-controversial dossiers, where there was little likelihood of substantial disagreement between Parliament and Council, and thus, little need for formal negotiations. However, it has increasingly been expanded to non-technical and politically salient dossiers which have some degree of urgency. Thus, for example, the conclusions of the Lisbon European Council stated the need for the EU to make rapid steps towards improving its approach towards information technology, and laid down hard deadlines by which legislation had to be adopted. This led to the use of the early agreement procedure in areas such as "the unbundling of the local loop" in telecommunications, an area of policy that was highly technical, but that was also highly controversial (control of the local loop has allowed traditional telecommunications firms to maintain a stranglehold on high speed Internet access).

Again, the early agreement procedure has negatively affected openness and transparency. Early agreement places a far greater emphasis on informal negotiations than the standard co-decision procedure; when it works successfully, the Parliament and Council do little more than sign off on a deal that has already been negotiated among a small group of actors. In contrast to the trialogues preparing conciliation, there is no set of standard procedures governing the meetings that lead up to early agreement. However, there are emerging patterns of interaction and there are attempts on the part of Parliament to institutionalize specific procedures. Typically, the Council's Presidency negotiates with the Parliament's rapporteur for a specific legislative dossier; depending on circumstances, "shadow rapporteurs" and power brokers from the major parties in Parliament (leaders of the political groups) may also be involved. On occasion, the chairman of the relevant Parliamentary Committee may also play a role; this, however, is by no means guaranteed. On the Council's side, the Presidency's power and influence is clearly enhanced. Coreper may be sidelined by the successful attempts of the Presidency to dominate the policy making process in the thrashing out of early agreements. The latter offer it

a unique possibility to realize its policy agenda within six months. Who appears to be losing at are the national ministers from non-Presidency parties, and national parliaments.

The Parliament clearly derives some very significant advantages from early agreements. It not only has gained increasing power in ist negotiations with Council representatives because its time horizon on average is longer than the Council´s which is committed to self-set deadlines and whose Presidency is eager to use the six-months window of opportunity (Farrell and Héritier, forthcoming 2003), it also can, if it plays its cards well, use early agreements strategically to affect deliberations within the Council itself; negotiations between the Parliament and Presidency take place before the Council has adopted a formal Common Position.

However, the early agreement provisions also pose important problems for Parliament, both in terms of internal organization, and Parliament's relations to Council. They have negative implications for some figures within the Parliament, such as committee chairmen, while enhancing the power of others (rapporteurs, leaders of the political groups). Smaller parties, such as the Greens are put at an especial disadvantage. They have traditionally relied on their ability to propose formal amendments at committee stage as a means of influencing legislation. Now, they are finding themselves increasingly marginalized, as larger parties and the Council reach pre-arranged informal deals, which the large parties then push through by voting down amendments at Committee. The Council, in contrast, sees this as a more efficient way of doing business, and at one stage advocated a more direct formal role for large parties in trialogues; this proposal caused furore in Parliament, and had to be withdrawn.

Thus, the new trialogues to avoid conciliation and early agreement provisions at Amsterdam have even more marked implications for openness and transparency, than the trialogue system instituted in the wake of codecision. Negotiations on early agreement dossiers are almost entirely informal – it is

often extremely difficult for others within the Parliament, let alone outsiders, to have any idea of what exactly is going on in a specific brief. This lack of accountability poses clear risks for Parliament's democratic legitimacy. If Parliament does not take steps to redress the balance, it will mean that:

> open and public debate in committee and plenary with the full participation of all political groups and members would tend to be reduced in importance by informal negotiations taking place elsewhere. The essential transparency of the legislative process would be put at risk, threatening the agora function of this institution.[7]

Thus, Parliament fears that it may be paying too high a price for influence, by being drawn into the kinds of secretive bargaining that better characterize inter-state negotiations than democratic deliberation. Parliament has sought to respond to these pressures by opening a new round of bargaining with the Council, suggesting that it will not participate in the informal trialogues that are required to reach early agreements unless the Council agrees to assume new responsibilities towards Parliament. Specifically, it has demanded that Ministers and other Council representatives be prepared to come to Parliamentary Committee meetings, to discuss dossiers, and thus transfer some of the negotiation process to a more formal and publicly accessible environment. The Council has indicated its continued unwillingness so to do,[8] and it is by no means clear that Parliament can credibly deliver on its threat of non-cooperation – many key power brokers within the Parliament actually benefit from current arrangements. Nor is it clear that Parliament will not be prepared to sacrifice openness for increased power over the longer term.

See the Vice-President's discussion document on "Improving the functioning of the codecision procedure," available at www.statewatch.org/news/2001/mar/codecision.pdf

[8] This said, some figures within the Council Secretariat admit that they expect they will be forced to accept this in time; see Farrell and Héritier, forthcoming.

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Early agreement also has consequences for democracy at the national level. Each member state now has a specialized committee in its national-level Parliament dealing with European Union legislation (Caporaso 2003), although the effective power of these committees varies substantially from country to country. However, when legislation is brought through under early agreement provisions, it is difficult for these committees to exercise oversight; decisions are typically taken before the member states have even had the chance to reach a consensus on a Common Position, let alone to defend their negotiating strategies to their respective domestic Parliaments. Efficiency is enhanced at the expense of accountability.

4.3 New Alliances across Council and Parliament

The third important consequence of codecision and the changing relationship between Council and Parliament is still in its birth-throes but may perhaps have the most important consequences of all in the long run. This is the creation of new alliances between member states, as represented in Council, and their national representatives in the European Parliament. Traditional political science is ill-suited to categorizing these relationships, precisely because the European Union is neither a standard democratic nation state, nor an intergovernmental organization, but something in between. There is no "government" as such in the European Union, with a party to support it in Parliament; rather, there are fifteen governments, each with specific mandates from their domestic population. As the Parliament's influence over the legislative process has increased, individual member states have begun to realize that they may sometimes achieve outcomes which would otherwise have been difficult or impossible, through influencing MEPs.

There are two situations in which member states will be able to exercise unusual influence. First, and most obviously, member states may seek to sway MEPs from their respective national delegations. Where they are successful in so doing, larger member states, will, *ceteris paribus*, be better able to influence legislative outcomes than smaller ones. Because larger member

states have greater numbers of MEPs, they are likely to be more effective in influencing Parliament's behavior. This emerging trend may have important repercussions for decision making. It allows larger member states a "second bite at the cherry." Even if they find themselves marginalized in discussions over a specific piece of legislation within the Council, larger member states may be able to mobilize support among MEPs so that the piece of legislation in question is amended to their satisfaction, or rejected.

This possibility came to public attention in the controversy over the Takeovers Directive, where Germany found itself outvoted in the Council on a matter that it perceived as being of vital national interest. Continued disagreements between Parliament and Council culminated in a Conciliation Committee meeting, where Germany found itself with little choice but to accept the text agreed between Council and Parliament (Cioffi 2002). However, most unusually, the Conciliation Committee's text was rejected by the Parliament in plenary session. Klaus-Heiner Lehne, a German Christian Democrat, who had been rapporteur on the Directive, played a key role in mobilizing opposition against the legislation, leading to accusations that Germany had sought to use Parliament to overturn a decision that it had been forced to accept in the Council. These accusations were based on rumours; there is no convincing evidence that Lehne coordinated his behavior with the German government (although he was clearly responsive to many of the same concerns that had motivated German opposition within the Council) (Farrell and Heritier 2003). However, interviews with MEPs and members of Coreper do suggest that coordination between governments and national delegations in Parliament is becoming increasingly prevalent. In the words of one MEP, "in a very important issue (MEPs) would mostly be advised by the governments what way they wish it to go ... and they very often comply."

Second, an effect of the early agreement practice under codecision, more specifically, is that countries which hold the Presidency are in a privileged position in certain early agreement negotiations. Where the member states have not yet reached a

Common Position, the country holding the Presidency may be in a position of unique influence within the Council, reporting the member states' negotiating positions to the Parliament, and the Parliament's position to the other member states. It may potentially use this leverage to affect other actors' perceptions of what is possible and what is not, and thus bring through outcomes which reflect its own preferences rather than the preferences of the Council as a whole. It is important to note that current constraints greatly limit the Presidency's power to do this. Other member states than the Presidency are likely to have their own informal lines of communication with Parliament. Furthermore, the Council Secretariat's *dorsale* dealing with codecision issues has recently been strengthened, precisely to ensure uninterrupted communication flows among the member states. Nonetheless, as one COREPER member describes it, "there is always the risk that the Presidency runs its own race and then just presents the deed when it is finished." (Farrell and Heritier 2003).

What is most worrying is that these two asymmetries of power may come to reinforce each other if, as some have suggested, the Presidency system is changed so that larger member states hold it more often than smaller ones. In this set of circumstances, large member states would be considerably more powerful in formal terms, but more powerful still when their informal clout was measured. Larger member states' extensive access to networks of MEPs within the Parliament, when combined with disproportionate access to the office of the Presidency, would allow them considerable influence over the codecision process that would go considerably beyond their formal competences.

4.4 Policy consequences of the "invisible transformation"

The "secret history" of codecision has important lessons for policy, and for the discussions taking place at the Convention (and indeed, for later discussions among the member states). First, it shows how formal reforms may have unexpected con-

sequences, when one takes proper account of the informal dimension. When the codecision procedure was introduced in the Treaty of Maastricht, no-one could have anticipated that it would give rise to the plethora of new relationships that it has. Furthermore, these informal relationships have in their own turn been the spur for new formal Treaty changes (Farrell and Héritier, 2003). The creation of trialogues, and their success in expediting the legislative process was the main reason why figures in the Council Secretariat pressed for the introduction of the early agreement provisions at Amsterdam. Thus, it can be seen that not only may formal changes to the Treaty have unexpected consequences in the short term – they may lead to new, and previously unanticipated, paths of long term institutional development.

Second, these informal relationships have important implications for democratic legitimacy that are not immediately obvious from an examination of the formalities of codecision. As discussed above, codecision was introduced in order to bolster the democratic legitimacy of the European Union. It strengthened the European Parliament, which is the appropriate Europe-level repository of democracy, according to one concept of legitimacy. And indeed, there is now more publicly-accessible debate of European legislation than there used to be. However, the proliferation of informal meetings and early agreements mean that this debate is not as open or transparent as it might be. Important decisions are made in meetings outside the formal legislative process, with little accountability. New relationships are being created between power-brokers in the European Parliament and figures within the Council, which may lead, in extreme cases to the short-circuiting of democratic processes of deliberation in committee and extensive plenary discussions. Certainly, the less powerful parties within the Parliament are finding their influence to be ever more limited.

The informal relationships that have sprung up around codecision have even more pronounced implications for the second and third sources of democratic legitimacy in the European Union – member states who represent their national interests in

the Council, and national level Parliaments. As we have discussed, informal relations between Council and Parliament provide the larger member states with a greater degree of influence than they otherwise would have over policy – they may be able to overturn agreements made in Council at later stages in the codecision process. This may over time come to erode the famed emphasis on consensual decision making within the Council which has been recognized as another source of legitimation under the principle of negotiating democracy where each actor has a veto and hence would not be forced to support a pareto-inferior policy measure. There is some evidence to suggest that it is already giving rise to heightened suspicions among member states. We note that this asymmetry is likely to increase, if, as has been suggested, the Council is reformed so that the larger member states come to dominate the Presidency. The extreme case – of a *directoire* of larger member states dictating EU policy – is unlikely, but intermediate cases, in which smaller member states have diminished ability to represent their national interests are quite possible.

Finally, informal relationships, especially those occurring in the context of early agreements have demonstrable negative consequences for the third facet of democratic legitimacy; national parliamentary control. Early agreements under codecision, involve the Council and Parliament making a deal before either body has adopted a formal position on the matter in question. Our interviews with officials in Coreper and the Council Secretariat suggest that this presents serious problems for those countries which have strong European Affairs committees in their parliaments, that are supposed to vet and approve their governments' EU policies. Early agreement negotiations are often informal, and seek to conclude bargains swiftly, so that it is difficult for national parliamentary committees to gather information, and to reach a consensus on appropriate action speedily enough to have any impact on the final outcome of an early agreement dossier.

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