The Co-decision Procedure: Effective and Legitimate?

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1. Introduction

Since the ratification of the Maastricht Treaty, the EU’s democratic legitimacy was a major issue in the debate on European integration. A commonplace topic in the study of the EU institutions is that they lack the legitimacy the European constituencies confer to their national political systems. Claims that the EU suffers from a ‘democratic deficit’ have been made both by Euro-federalists who would like to see the Parliament gain more power in its relations to the other institutions of the EU, and by Euro-sceptics who claim that a supranational Europe is infringing on member states’ sovereignties. Discontentment with the EU’s democratic credentials and deficits in terms of legitimatory procedures and outputs have essentially compelled EU actors and institutions to improve the public perception of their legitimacy. The EU constitution-making process has started from this consensus on the need to democratise the EU in line with the normative principles of a democratic social and political order.

2. Problem statement

The issue of democratic deficit is central to the study of the EU institutions and processes, as it represents a challenge to their nature, functions and goals, and ultimately calls for their redefinition. The question whether the EU’s democratic deficit is real or merely perceived and the difficulty of many scholars to agree on the characteristics of this deficit represent the first problems that require clarification.

Some scholars acknowledge the fact that the EU is a very different polity than its Member-States and question the assumption that representative democracy is a valid model at both national and European level as being problematic from a normative standpoint, since the EU is neither a state, nor a classic international organization and, as such, it cannot replicate the national patterns at a supranational level. According to these accounts, the EU polity is not held together by a genuine public sphere and cannot rely on the political identity and solidarity of a unified constituency. Therefore, the perception that the EU lacks legitimacy can largely be attributed to the tendency to analyze it against ideal and isolated circumstances, while its institutional setting, far from being ideal, is instead a highly practical form of government whose legitimacy rests on its contribution to problem-solving.
Others claim that the institutions of direct representation, namely the European Parliament, have no great power, and even the little the EP has is mainly a brake upon other institutions, which are in full control of both the political agenda and legislative promotion. According to them, the EP is weak, as its legislative powers are merely consultative in the face of a determined Council that can pass legislation the EP disapproves of. Moreover, the veto power of the Council members weakens further the consensual nature of the EP, as a small number of Community citizens represented by their minister in the Council could block the collective wishes of the rest of the Community. Therefore, the partisans of this view claim that institutional reforms that would increase the powers of the EP and would generalize QMV in the Council reduce the democratic deficit and restore legitimacy to the Community decision-making process.

However, these arguments are based on the view that the European Parliament is the main repository of legitimacy in the Community structures, while certain scholars consider that the legitimacy of the output of the Community decisional process was due precisely to the public knowledge that it was controllable through veto power. They fear that the current shift to majority voting might exacerbate legitimacy problems, as citizens of the Member-States might be less willing to comply to a decisional process in which their national voice becomes a minority that can be overridden by a majority of representatives from other European countries.

3. Hypothesis

In the next section of my thesis, I will use the criteria derived from the theories of legitimacy to test whether the generalization of the co-decision procedure as the ordinary legislative procedure at Community level contributes to enhancing the legitimacy of the EU decision-making process. As this institutional reform has been introduced by the Amsterdam Treaty with the intention to increase the legislative influence of the European Parliament, I will apply these criteria for legitimacy to cases initiated before and after the treaty ratification in order to test whether there is variation between the samples or not, which might indicate an altered impact of the EP upon decision-making.

The next section of this paper will deal precisely with the definitions of legitimacy in an attempt to come up with operational criteria that could be applied to the
EU decision-making process. For the purposes of this conference, I will only deal with the way the expansion of the co-decision procedure brought by the Amsterdam Treaty provisions has increased the transparency and accountability in the three EU institutions involved.

4. Theoretical discussion

4.1. Dimensions of legitimacy

In *Legitimacy and the European Union*, David Beetham and Christopher Lord describe legitimacy as a three-tiered concept consisting of the following dimensions: **identity**, understood as the recognition of the people as the source of political authority; **democracy**, which defines the way in which this political authority is institutionally organized for the exercise of power; and **performance**, which evaluates the way in which the exercise of power by the political authority conforms to the public agenda and to the agreed standards of government.

These dimensions of legitimacy can be found in different forms in the works of other scholars, which reflects once more the complexity of the term: for Bellamy and Castiglione, legitimacy “possesses an internal and an external dimension, the one linked to the values of the political actors, not least to the European peoples, the other to the principles we employ to evaluate a political system and assess its effects for outsiders as well as insiders” (Bellamy and Castiglione 2003, 8). According to their account, the internal dimension of legitimacy reflects the subjective perceptions of citizens, while the external dimension is evaluated against more objective criteria. Thus, the **internal** dimension of legitimacy incorporates **identity** and **democracy**, while the **external** dimension is represented by **performance** in the exercise of power.

On his turn, Weiler draws a distinction between **formal** (legal) and **social** (empirical) dimensions of legitimacy. The formal legitimacy of the EU institutions implies that their foundation rests on the strict observance of democratic laws and procedures. The notion of social legitimacy complements the legal approach, as it requires institutional commitment to and guarantee of public values such as justice, freedom and welfare. Social legitimacy of a political system requires its formal legitimacy, while a system that has formal legitimacy does not necessarily need to enjoy
social legitimacy (Weiler 1999, 83-86). From this definition, it could be inferred that Weiler’s formal legitimacy mirrors the democratic dimension of legitimacy, while the social legitimacy of a political system is given by the identification of its members as subjects of its authority.

However, Weiler’s typology does not take into account the evaluation of the governance by the governed, without which the democratic process is an “empty ritual”, according to Scharpf. He argues that decision-making in a political system must be driven by the preferences of citizens, which creates a chain of accountability between the government and the governed, and that it must achieve a high degree of effectiveness in meeting the citizens’ expectations (Scharpf 1999). In Scharpf’s view, output legitimacy is simply derived from the performance of governance as perceived by the general public, while input legitimacy is derived from procedures that include the public in the decision-making: “Input-oriented arguments must ultimately derive legitimacy from the agreement of those who are asked to comply, whereas output-oriented notions refer to substantive criteria of buon governo, in the sense that effective policies can claim legitimacy if they serve the common good and conform to criteria of distributive justice. For collectively binding decisions, therefore, democratic procedures are essential in input-oriented arguments, whereas they have only instrumental value in the context of output-oriented arguments” (Scharpf 1997, 153). Thus, identity and democracy play an essential role in securing the input legitimacy of a political system, while the output legitimacy is derived from its performance with regard to the public values and expectations.

As the three dimensions of legitimacy identified by Beetham and Lord seem to encompass the definitions given by other authors, I will use them as a basis for developing a matrix of criteria for legitimacy of the EU decision-making process. Nonetheless, a further distinction should be made here regarding the very nature of the EU as a political system. As Bernard points out, “the EU could be described as a system of multi-level government. By multi-level, I refer … to a system of organization of public power divided in two (or more) layers of government, where each layer retains autonomous decision-making power vis-à-vis the others” (Bernard 2002, 12).
Majone also asserts that the EU is not a superstate (nor a superstate in the making) but a form of mixed rule where power is not divided in separate branches of government (executive, legislative and judicial), but among the stakeholders in the political system (states, political parties, expert and interest groups, magistrates etc.) in a pattern of collaboration that closely resembles a political division of labour (Majone 1998).

Thus, it has been said that the EU comprises of a supranational, a national and a regional level, where different EU institutions involved in the decision-making process operate: the European Parliament, the European Commission or the European Court of Justice have a supranational approach, the Council of Ministers also operates on the supranational level although it has an intergovernmental approach, the Member-States governments who send delegates to the Council of Ministers and the Member-States parliaments operate on the national level, while the regional governments and the Committee of the Regions made up of their representatives operate on the regional level.

The multi-level structure of the EU requires a redefinition of its legitimation principles. Apart from identifying the three dimensions of legitimacy mentioned above, Beetham and Lord also distinguish between three types of legitimacy: the direct legitimacy of a nation-state, based on the recognition of the people as the source of political authority, the indirect legitimacy of an international organization, based on the recognition of its political authority by the legitimate authorities that compose it, and the technocratic legitimacy of a body of experts, based on the public recognition of their expertise as the source of their professional authority (Beetham and Lord 1998). Unlike the first two types of legitimacy, the third type is considered by its own proponents as rather undemocratic because “technocratic forms of rule suffer from the characteristic delusion that the decision-makers ‘know best’, that their decisions are merely technical or instrumental, and that they can be assumed to be benevolent agents of the public good” (Beetham and Lord 1998, 22). While the first two types of legitimacy (direct/indirect) are related to political systems (nation-state/international organization), the third type, technocratic legitimacy, is not related to a political system in general but rather to a particular style of governance.

4.2. Criteria for legitimacy
The next step in this research is to identify the legitimacy criteria that are applicable to the EU polity, which requires an accurate description of the type of polity the EU is. As stated above, the EU is a multi-level governance setting that bases its legitimacy on multiple sources. According to some accounts, “the most fundamental source of the EU’s legitimacy lies in the democratic accountability of national governments” (Moravcsik 2003, 93), so the perception that the EU lacks legitimacy can largely be attributed to the tendency to analyse it against ideal and isolated circumstances: “We cannot draw negative conclusions about the legitimacy of the European Union from casual observation of the non-participatory nature of its institutions” (Moravcsik 2003, 95).

This intergovernmental approach sustains that the legitimacy of the EU is derived from the mutual negotiations between its Member-States and from their participation to the decision-making process. Although Moravcsik notes that “there is no demos underlying European integration” and “citizens in the Member-States of the EU share little underlying sense of distinct ‘European’ national identity” (Moravcsik 2001b, 178), he does not link the lack of a common identity to the EU’s democratic deficit but to its weak political nature, as Moravcsik defends a strict intergovernmental approach of EU as only the sum of its parts. Thus, “it is not the direct cooperation of ordinary citizens that is required to maintain the authority of the UN, of GATT, of NATO, etc. but that of the member-states and their officials and it is for the behaviour of these alone, therefore, that considerations of legitimacy are important” (Beetham and Lord 1998, 11).

However, the direct impact of the EU upon the political authority of the Member-States and upon their citizens cannot be minimized: “the legitimacy of political authority in the European political space is an interactive or ‘two-level process’ between the EU and its member-states, which cannot be analysed at one level alone” (Beetham and Lord 1998, 16).

Unlike Moravcsik, Beetham and Lord argue that indirect legitimation, based on the contention that the EU derives its legitimacy from the legality and legitimacy of the Member-States, is not a sufficient condition: “the electoral authorization of ministers at the national level, and their accountability to their national parliaments” is unsatisfactory (Beetham and Lord 1998, 15). Since the authors believe that the EU is more than the sum
of its parts, political powers that impose regulations on citizens and Member-States are in need of direct legitimacy: “The indirect conception of legitimacy, based on the model of international institutions, which derives from legality at the one hand and recognition by other legitimate authorities on the other, is insufficient on its own to provide legitimacy for the institutions and decisional authority of the EU. At the same time, a purely technocratic model of direct legitimacy is inadequate to the political character of its decision-making. Only the direct form of legitimacy which is based upon the liberal democratic legitimacy of normative validity and legitimation will be able to ensure citizen support and loyalty to its authority. These are the criteria of effective performance in respect of agreed ends, democratic authorization, accountability and representation, and agreement on the identity and boundaries of the political community, respectively” (Beetham and Lord 1998, 22).

As a consequence, the EU has committed itself to a direct and independent form of democratic legitimacy that was not derived from the Member-States but that rested on a combination of legitimation principles: international, parliamentary, technocratic, procedural and corporate legitimacy (Magnette), formal (legal) and social (empirical) legitimacy (Weiler), input and output legitimacy (Scharpf), indirect, direct and technocratic (Beetham and Lord).

After having devised a conceptual framework for the legitimacy of the EU as a multi-level system of governance, in the next section of this paper I will touch upon the operationalization of the legitimacy dimensions.

5. Operationalization of the dimensions of legitimacy

5.1. Identity

Beetham and Lord remark that the EU polity is more than an inter-governmental system of governance and, as any political order, requires a common identity of the subjects of collective decision-making in order to secure their allegiance and commitment to the laws. However, as it is less than a state, the EU cannot rely on a European demos sharing a common history and cultural traditions, so it has to incorporate various demoi with a “multi-tiered sense of belonging” (p. 47) by building national governments into its own political system and by involving non-governmental actors in policy formulation and
implementation (p. 57). In this way, the EU actually contributes to the de-legitimation of national identities (p. 101) and to the advancement of collective transnational decision-making. Thus, the authors’ observation that the citizens of the Member-States do not feel allegiance towards the EU has to do less with the perceived lack of a common European identity and more with the democratic character of the EU structures of governance.

Other authors claimed that, in the absence of a demos, there can be no democracy but it is possible to have a polity, and that the EU is in fact a polity with no demos but with a number of demoi (Chryssochoou 2001). This does not necessarily mean that the EU cannot be democratic, as suggested by Weiler who argues that “the authority and legitimacy of a majority to compel a minority exists only within political boundaries defined by a demos” (Weiler 1998, 237), but that “although it is most unlikely that the Union could function as an ethnocultural unit, it could conceivably construct a demos around shared civic values” (Lord 1998, 321). Scharpf agrees, stating that “given the historical, linguistic, cultural, ethnic, and institutional diversity of its member states, there is no question that the Union is very far from having achieved the ‘thick’ collective identity that we have come to take for granted in national democracies – and in its absence, institutional reforms will not greatly increase the input-oriented legitimacy of decisions taken by majority rule” (Scharpf 1999, 9).

Considering that this criterion for legitimacy has a very limited applicability to co-decision procedure (or to any other decision-making procedure), since an institutional arrangement is unlikely to generate the kind of ‘thick’ collective identity required to establishing a politically conscious demos, I decided not to pursue with it further in my research on legitimacy.

5.2. Democracy

In this light, the second criterion for direct legitimacy – democracy – should be given a dominant role in the assessment of a supranational political system. According to Beetham and Lord, the lack of a European electorate, of a party system at the EU level and of a fully empowered European Parliament maintain the EU political system in “a kind of sub-optimal equilibrium” (p. 81) between two sources of legitimation: through its Member-States and through its supranational structures – the European Court of Justice
and the European Parliament. The domestic authorization of the EU through its Member-
States is a necessary but not a sufficient condition for democracy insofar as this entails
that the Member-States must comply with democratic criteria that do not apply to the EU.

The European institutions have made certain steps to address the issues raised by
the public perception of their alleged legitimacy crisis. This can be clearly seen in the
decision made at the 2001 Laeken European Council to set up a future European
Convention with the specific mandate to recommend ways to bring the EU institutions
closer to the European citizenry, to make them more transparent, efficient and
democratic, as it was assumed that there was a clear link between the concepts of
efficiency and legitimacy. The European Convention proposed a number of measures
designed to make the EU institutions more legitimate, such as: the increase of the
legislative areas subject to qualified majority voting, a simpler system of voting in the
Council, greater transparency of decision-making and a wider use of the co-decision
procedure in order to strengthen the influence of the European Parliament over the
content of legislation.

i. Accountability

The notion of accountability is intimately connected to the principle of
transparency seen as more than the right to access the official documents, as it has been
acknowledged by the European Ombudsman: “Processes of decision-making should be
understandable and open. The decisions themselves should also be reasoned and based on
information that, to the maximum extent possible, is publicly available” (Deckmyn and
Thomson, 1998, 75) and by the Articles 41 and 42 of the EU Charter of Fundamental
Rights which deal with the right to good administration and the right to access the
documents.

This view of accountability as not only the right to documents but also as the right
of the public to monitor the EU institutions is held by the European Court of Justice in its
European Councils in order to allow the public the widest possible access to documents is
essential to enable citizens to carry out genuine and efficient monitoring of the exercise
of the powers vested in the Community institutions.” (Arnall and Wincott, 2002, 83)
Therefore, transparency can be considered as a pre-requisite for accountability, as it allows for scrutiny of decision-making before and during the process itself, not only after it, as well as for active participation of the public to the process: “Transparency allows for scrutiny and accountability of the decision-making (ex post). Within the framework of the parliamentary model, transparency ensures that the parliament can control the executive, while citizens may go to elections well-informed. Within a more participatory model of democracy, transparency also ensures that citizens or interest groups can ensure accountability through access to courts or to an ombudsman. Moreover, within a participatory democracy, transparency plays a role in enabling the participation of citizens and organized interests in the policy process ex ante. (…) In particular the Commission has linked transparency to the idea of participation in the decision-making process ex ante” (Smismans 2004, 22-23).

In order to measure the degree to which the EU institutions ensured the proper exercise of these rights in the selected legislative cases, I will appeal to the 5 attributes identified by Settembri: physical access, access to documents, transparency of debates, intelligibility of voting and clarity of interests (Settembri 2005, 642-43). By measuring the degree of accountability in the co-decision procedure in relation to the 5 attributes mentioned above, I will determine whether the Treaty reforms and the subsequent changes in the institutional rules of procedure have successfully addressed this issue or not.

I. The road from Maastricht to Amsterdam: establishing the public right of access to documents

The extension of co-decision to most first-pillar policy areas and the reform of its mechanisms offer the most visible indications of the EU’s willingness to change its law-making style. It is usually assumed that successive Treaty amendments have resulted in a progressive democratisation of the Union law-making procedures. This argument holds that the EP has seen its powers slowly but steadily strengthened. From being a merely advisory institution, almost on a par with the Social and Economic Committee in the founding Treaties, the Parliament would have emerged as a central institution in the law-
making process, equipped with the right to veto any piece of legislation which has to be approved through the co-decision procedure.

The first steps were taken in the 1970 and 1975 Treaty amendments, which granted the Parliament limited but far from negligible powers in the budgetary process. One of the oldest decision-making procedures, consultation only allows the EP to present an opinion to the Council on the new policy proposed by the Commission. The Single European Act of 1986 turned Parliament into a decisive institution in the law-making process. The cooperation and the assent procedures, both introduced by the Single European Act, allow for more parliamentary involvement. The assent procedure requires the EP to approve or reject Council decisions, while the cooperation procedure also allows the EP to make amendments to the Council proposal during the second reading of a legislative file, which have to be accepted by the Council with QMV or refused by unanimity. Since unanimity is more difficult to achieve than QMV, the EP has assumed a significant agenda-setting power, being in a position to determine the content of a proposal to a certain extent.

The Maastricht Treaty increased the salience of Parliament’s role by means of granting it a veto power in the new co-decision procedure, the scope of application of which was successively increased in the Treaties of Amsterdam and Nice. Thus, under the Maastricht Treaty provisions, the EP and the Council could choose whether to accept the joint text of the conciliation committee or to return to the common position of the Council that the EP had formerly rejected. The Amsterdam Treaty revised the procedure so that the EP and the Council could choose whether to accept the joint text resulted at the conciliation stage or to cause the failure of the legislative case. Under its provisions, a legislative proposal can be adopted:

- after the first reading if the Council approves all EP amendments or if both co-legislators approve of the Commission initial proposal;
- after the second reading without further EP amendments to the Council’s Common Position;
- after the second reading with EP amendments to the Common Position that are all accepted by the Council;
Tsebelis and Garrett argue that the procedural reform operated by the Amsterdam Treaty has ultimately rendered the EP equal to the Council in terms of decision-making power, since both institutions are equally represented in the Conciliation Committee, which makes the final decisions (Tsebelis and Garrett 2000). Notwithstanding these benefits for the EP influence, the Amsterdam Treaty has also introduced some changes that could impact negatively on the democratic legitimacy of decision-making. The “early agreement” procedure that allows informal meetings between Council delegates (usually from COREPER I) and EP representatives to take place at earlier stages, even at first reading, has greatly increased the efficiency of co-decision while decreasing the standards of democratic accountability. This is why a comparison between the two versions of co-decision could provide a very useful insight into the way the EU has addressed the alleged democratic deficit of its decision-making from one treaty to another.

After the reforms carried out under the Maastricht and Amsterdam Treaties, the Draft Treaty will further increase, if adopted, the EP legislative power by means of turning co-decision into the standard law-making procedure in Union law (cf. Articles I-34, III-396).

However, the academic debate on the impact of these procedural reforms has revolved around the increasing role of the European Parliament in the adoption of EU legislation and the potential for greater democratic accountability, whereas the important implications for the EU institutional setup and the way in which they interact with each other have been so far neglected. Therefore, the purpose of this research is to cover the gaps in the current debate on co-decision with regard to its role in the legitimization efforts of the EU institutions and processes.

The first phase of the transparency process focused around the gradual construction of a right of access by the public to certain documents held by the Community institutions. The principle of transparency was for the first time provided for in a declaration annexed to the Maastricht Treaty, while the European courts played in this phase a crucial role in creating a body of case law that extended the scope of internal
measures adopted by the Community institutions to cover public access to their documents which put extra pressure on the institutions to devise adequate scrutiny mechanisms.

The Maastricht Treaty contains a series of articles on the access to official documents such as Article 191 on the obligation to publish EU’s legal acts, Article 190 on the obligation to state the reasons upon which the legal acts are based, Article 214 on the non-disclosure of information subject to professional requirements of secrecy or Article 223 on non-disclosure by Member-States of information contrary to the EU’s security interests. These articles complement the previous Community rules dealing with the right of access to information, such as the Article 18 of the Merger Treaty on the mandatory annual publication of a General Report on the activities of the European Communities, the Council regulation of 1 February 1983 on the opening to the public of historical archives after 30 years (OJ L43 15 February 1983), the Commission decision of 7 July 1986 on classified documents and security measures applicable to them (SEC (86) 1132), the Council Regulation of 11 June 1990 on data subject to statistical confidentiality (OJ L151, 15 June 1990), Council directive of June 1990 which allows any legal or natural person resident in any Member-State to have access to information on environmental issues held by the public authorities in the Member-States (excluding the Community institutions) (OJ L158, 23 June 1990) and Commission rules on the protection of personal data, free movement of data and individual access to such data (COM (92) 422). However, the interest for more transparency in the dealings of the EU institutions began in earnest with the non-binding declaration on the access to information attached to the Maastricht Treaty.

The importance of the right of access to documents was stressed, for the first time, in the Maastricht declaration on the right of access to information, which links that right with the democratic nature of the institutions. Annexed to the Final Act of the Treaty on European Union, signed in Maastricht on 7 February 1992, the Maastricht declaration provides that: “The Conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public’s confidence in the administration. The Conference accordingly recommends that the Commission
submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions.”

In October 1992, the Commission presented during the Birmingham European Council a package of measures to increase transparency and to bring the Community closer to its citizens, such as holding open debates on Council Presidency or Commission work programmes as well as on major issues of EU interest under the reserve of the Council’s unanimous decision to start the proceedings on a case-by-case basis; recording the formal votes; televising the debates for viewing in the press area of the Council building; improving the communication with the press through regular press briefings.

These measures were taken up by the Edinburgh European Council in December 1992 which called for a more intelligible Community legislation and for quality controls to be implemented within the Commission, Member States’ delegations and the Council. Furthermore, the latter’s Legal Service was given specific responsibilities for reviewing draft legislative acts before their adoption by the Council in order to ensure that they met the intelligibility and quality criteria.

On December 2, 1992 the Commission adopted a complementary communication on transparency (Increased Transparency in the Work of the Commission, SEC (92) 2274) and one on special interest groups (An Open and Structured Dialogue between the Commission and Interest Groups, SEC (92) 2272). These measures were seen as a means to bring the public closer to the EU institutions by laying the ground rules for an open and transparent dialogue with the European constituency as well as between themselves. Under their provisions, lists of COM documents on general issues were to be published weekly in the Official Journal, including papers of general interest that would otherwise not be accessible, a list of topics on which White and Green Papers would be prepared was also to be published and an inter-institutional yearbook describing the internal organization of the EU institutions was to be prepared.

With the purpose of bringing the Community closer to its citizens, the European Council called on the Council and the Commission to implement such a right on several occasions. In response to the Maastricht Declaration and to those calls, the Commission undertook a comparative survey on public access to documents in the Member States and in some non-member countries. The results of this survey were summarized in a
communication entitled *Public access to the institutions’ documents* and were sent to the Council, the Parliament and the Economic and Social Committee. In Annex II to a second Communication entitled *Openness in the Community*, the Commission formulated some basic principles and requirements which should govern access to documents, with a view to subsequently discussing them with the other institutions. It invited the other institutions to co-operate in this process and proposed that the policy of access to documents might take the form of an inter-institutional agreement.

At the meeting held in Copenhagen on 22 June 1993, the European Council invited the Council and the Commission to pursue their work on the basis of the principle of citizens’ having the fullest possible access to information. Following the *Inter-Institutional Declaration on Democracy, Transparency, and Subsidiarity* issued in 1993, the Council and Commission adopted decisions under which individuals were granted a general right of access to their documents, subject to numerous exceptions. Thus, instead of enacting more encompassing rules on public access to documents, the Council and the Commission preferred a rather limited approach, presumably in order to avoid interference of the European Parliament.

On 6 December 1993 they adopted, by common agreement, a Code of Conduct (93/730/EC) concerning public access to Council and Commission documents which enumerated the principles governing public access to documents in their possession. Each institution was to implement those principles by means of specific measures before 1 January 1994. By Council Decision 93/731/EC of 20 December 1993 on public access to Council documents, the Council adopted provisions for the implementation of the principles set out in the Code of Conduct. Similarly, the Commission adopted, on 8 February 1994, Decision 94/90/ECSC, EC, Euratom on public access to Commission documents.

As these measures provided for a limited right to access official documents, the Dutch Government challenged the legal basis for the adoption of Council decision 93/731 before the European Court of Justice. It argued that the Council improperly relied on Article 207 EC (ex-Article 151 (3)) and Article 22 of its Rules of Procedure, both of which are concerned solely with the Council’s internal organization. The European Parliament intervened in support of the Dutch Government, arguing that, by basing the
contested rules on Article 207 of the Treaty, the Council exceeded the powers of its internal organization conferred upon it by that provision. The Parliament argued that the requirement for openness constituted a general principle common to the constitutional traditions of the Member States enshrined in Community law and that the right to information is a fundamental human right recognized by various international instruments. Therefore, the conditions, procedures and limits for public access should not be left at the discretion of the institutions concerned.

In its judgment in Netherlands v. Council, the Court of Justice did not expressly confirm that the right of access to documents held by public authorities constitutes a fundamental principle of Community law. However, the Court considered that Decision 93/731 must only be regarded as a “measure intended to deal with requests for access to documents in its possession”; nevertheless, “so long as the Community legislature has not adopted general rules on the right of public access to documents held by the Community institutions, the institutions must take measures as to the processing of such requests by virtue of their power of internal organization, which authorizes them to take appropriate measures in order to ensure their internal operation in conformity with the interests of good administration” (Case C–58/94 Netherlands v. Council [1996] ECR I–2169). Consequently, the Court rejected the application on the ground that under the provisions of the Community law at that time, the Council was empowered “to adopt measures intended to deal with requests for access to documents in its possession”. While Advocate-General Tesauro in his opinion argued that the right of access to information was a fundamental civil right, the Court of Justice only noted a “progressive affirmation of the individual's right of access to documents held by public authorities” and maintained that the Council was entitled to regulate access to documents by virtue of its powers of internal organisation.

This view on the limits of the right to access Community documents was challenged soon afterwards in a series of legal cases, as the European Courts began to base their rulings on the “presumption of openness” which the EU bodies should observe: in Carvel and Guardian Newspapers v. Council (Case T-194/94 [1995] ECR II–2765) the Court of First Instance stated that Council Decision 93/731 was the only legislative measure that dealt with public access to documents and with the implementation of the
principle of transparency; in *WWF UK v. Commission* (Case T-105/95 [1997] ECR II–313) the Court of First Instance ruled that Commission Decision 94/90 on internal organizational measures conferred to third parties legal rights to access its documents – in doing this, the Court of First Instance laid down a narrow interpretation of the exceptions set out in the Code of Conduct, arguing that “the grounds for refusing a request for access to documents, set out in the Code of Conduct as exceptions, should be construed in a manner which will not render it impossible to attain the objective of transparency expressed in the response of the Commission to the calls of the European Council”; in *Hautala v. Council* (Case T-14/98 [1999] ECR II-2489) the Court of First Instance explicitly referred to the “principle of the right of information” as a standard for judicial scrutiny and introduced new procedural grounds for the annulment of negative decisions on access in cases where “there has been a manifest error of assessment of the facts or a misuse of power”; in *Interporc v. Commission* (Case T-124/96 [1998] ECR II–231) the Court of First Instance went a step further and ruled that Commission Decision 94/90 was “a measure conferring on citizens a right of access to documents held by the Commission” and that any person may require access to any of its unpublished documents without having to give a reason for this request; in *Svenska Journalistförbundet v. Council* (Case T-174/95 [1998] ECR II–2289) the Court ruled that Council Decision 93/731 confers to citizens the right of access to documents held by the Council without having to give reasons for it, while in *van der Wal v. Commission* (Case T-83/96 [1998] ECR II–545) it held that exceptions to the right of access to documents held by the Commission must be applied strictly according to the principle laid down in Commission Decision 94/90.

Article 254 of the future Amsterdam Treaty partially addresses this issue, as the Council and the Commission are required to publish directives and regulations in the Official Journal, but excludes the other EU institutions from such obligations, which indicates the reluctance of the Member-States to allow a broader access of the public to the documents of all EU institutions and to open up the decision-making process to public scrutiny. However, even before the entry into force of the Amsterdam Treaty, this reluctance was already manifest in 1996 when the European Ombudsman, an institution created by the Maastricht Treaty, launched an inquiry into the public access to documents
held by Community bodies other than the Council and the Commission on the basis of the Court decision in the case Netherlands v. Council according to which the due commitment to the principle of transparency is in conformity with the interests of good administration. In addition, the European Ombudsman took advantage of this occasion to make recommendations to all the institutions concerned to adopt rules on public access to documents, which they duly observed:

- the European Parliament Decision 97/632/EC, ECSC, Euratom of 10 July 1997 on public access to European Parliament documents;
- the Court of Auditors Decision no. 18/97 of 7 April 1997 laying down internal rules for the treatment of applications for access to documents held by the Court;
- the European Investment Bank Rules on public access to documents adopted by the Bank's Management Committee on 26 March 1997;
- the Economic and Social Committee Decision on public access to ESC documents;
- the Decision of the Committee of the Regions of 17 September 1997 concerning public access to documents of the Committee of the Regions.

In a Special Report addressed to the European Parliament on 15 December 1997 regarding the results of his inquiry, the Ombudsman concluded that the rules on public access to documents held by the Community institutions are quite limited in scope as they do not give access to documents held by one body but originating in another and do not require the establishment of registers of documents that would facilitate the citizens’ access to their content.

Following this Special Report of the Ombudsman, the European Parliament adopted on 16 July 1998 a resolution endorsing its conclusions while avoiding to put forward any recommendations on the substance of the internal rules to be adopted by each institution. As a result, the institutions concerned have tended to interpret the Court decisions and the Ombudsman recommendations in a way that was favourable to their interests. Thus, for instance, the Council Decision 93/731 and the Commission Code of Conduct lay down a number of exceptions that could be invoked by the Community institutions as grounds to reject a request for access to documents:
- the protection of the public interest (public security, international relations, monetary stability, court proceedings, inspections and investigations);
- the protection of the individual and of privacy;
- the protection of commercial and industrial secrecy;
- the protection of the Community’s financial interests;
- the protection of confidentiality as requested by the natural or legal person who supplied any of the information contained in the document or as required by the legislation of the Member-State which supplied any of that information (Article 4(1) of Council Decision 93/731).

As a consequence, Council negotiations were covered by a rule of extensive confidentiality and therefore public access to certain Council documents (minutes of meetings, explanatory statements of the reasons for adopting a certain decision, preparatory documents etc.) could be denied on these grounds. Article 255 of the subsequent Amsterdam Treaty has loosened this rule of confidentiality while the Article 207 has rendered the decision-making process more open by stating that when the Council acts in its legislative capacity the results of votes, explanations of votes and the statements made during voting shall be recorded in the minutes and made public.

Prior to its adoption, the decisions of the European Courts in these cases have significantly broadened the scope of the rights of access to documents by extending them to issues not covered by the existing access regulations and by shaping them in line with a fundamental principle of openness. Nevertheless, until the entry into force of the Amsterdam Treaty, the reformatory drive of the European Courts was hindered by the absence from the Treaties of a legal basis that would have required the Community institutions to adopt binding rules on access to their documents.

II. The post-Amsterdam phase: towards a comprehensive legislative framework on transparency

The adoption of the Amsterdam Treaty marked a new phase in the process of opening up the EU institutions to the European citizens as it explicitly introduced the
principle of openness, avoiding thus references to the vague concept of transparency. Article 1 of the Treaty states that openness of the Community institutions practices and rules is a fundamental principle of European Union law and that decisions are to be taken “as openly as possible”. Therefore, this principle should be respected by all the Community institutions and Member-States (as provided by Articles 1, 6 and 7) and may be used by the European Courts as an interpretative devise. Moreover, the Amsterdam Treaty establishes a right of any citizen to have access to the European Parliament, Council and Commission documents under the institutional arrangements adopted by each institution within two years following the entry into force of the treaty, according to the Article 255:

2. Any citizen of the Union and any natural or legal person residing or having its registered office in a Member-State shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and conditions to be defined in accordance with paragraphs 2 and 3.

3. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 264 (ex-Articles 189b) within two years of the entry into force of the Treaty.

4. Each institution referred to above shall elaborate in its own rules of procedure specific provisions regarding access to its documents.

This clear and unequivocal statement on the public right of access to the European Parliament, Council and Commission documents provided not only a legal basis to the principle of openness that the Community institutions should uphold, but also a common framework for the standardization of the internal rules and practices set up by the three institutions involved in the co-decision procedure. The adoption of the Amsterdam Treaty compelled them to reach a common position on the new version of co-decision, which led to the issuing in May 1999 of a Joint Declaration on practical arrangements for the new co-decision procedure, in which they undertake to “examine their working methods with the view to making effective use of all the possibilities afforded by the new co-decision procedure” and to “do what is necessary, in accordance with their rules of procedure, to promote reciprocal information about co-decision proceedings” (Joint declaration on
practical arrangements for the new co-decision procedure (Article 251 of the Treaty establishing the European Community) - 0. Preamble, Bulletin EU 5-1999).

Furthermore, in the first chapter of their Joint Declaration, the institutions commit to “cooperate in good faith with a view to reconciling their positions as far as possible so that wherever possible acts can be adopted at first reading”, to coordinate their calendars of work in order to facilitate the conduct of proceedings at first reading in a coherent and convergent manner in the EP and Council, and to “establish appropriate contacts to monitor the progress of the work and analyse the degree of convergence.”

The second chapter maintains that “appropriate contacts may be established with a view to achieving a better understanding of the respective positions and thus to bringing the legislative procedure to a conclusion as soon as possible”. Such informal contacts between the European institutions have emerged from repeated interactions and have had an important impact on institutional outcomes. The introduction of the co-decision procedure in the Maastricht Treaty and its subsequent revision at Amsterdam had complex rather than predetermined effects on the roles of the Council and the EP in the legislative process, as each side bargained to ensure that the outcomes would serve its interests. In the short span between the two treaties, the bargaining power of these actors was not determined by existing formal institutions, as the weaker body, the EP, succeeded in getting important concessions by showing its willingness to block specific pieces of legislation that were important to the Member-States in order to secure its overall institutional position.

In order to assess the bargaining power of the two co-legislators, Henry Farrell and Adrienne Héritier devised a theoretical framework that combines game theory’s explanation of how institutional structures produce equilibrium in one-shot games with a constructivist emphasis on identity as a factor affecting institutional change. Their main assumption is that institutional change is not driven by the preferences of actors, but results from a dynamic process of bargaining in which formal institutions are influenced constantly by the social interaction between the relevant actors. These actors (the European Parliament and the Council) behave as if different instances of the co-decision process are linked, conditioning their cooperation on their past experience of the behaviour of others instead of the specific issues involved in a piece of legislation. As a
result of this interaction, informal institutions that affect the actors’ behaviour independently of the formal institutional framework come into being and modify the effects of this framework. These informal institutions reflect the relative bargaining power of the actors that is based on their capacity to block or retard the legislative process.

Farrell and Héritier’s understanding of the strategic setting within the EU goes beyond the game theoretic accounts that view interactions in the co-decision procedure as one-shot games, suggesting that “equilibrium is possible in infinitely repeated games with sufficiently low discount rates” (Farrell and Héritier 2003, 580). According to the authors, the EP and the Council did not treat each piece of legislation as a one-shot game, but linked several of them to a bargaining phase in which both actors negotiated over the general terms under which they would interact in the legislative process. This gave rise to informal institutions, such as “trialogues”, under which the EP got a much greater role in the legislative process than the Council would have initially accepted.

The triilogue system results from an informal compromise reached between the Council and the EP in the wake of the Maastricht Treaty. Unwilling to give more bargaining power to the EP, the Council and the COREPER tried initially to impose a minimalist interpretation of the co-decision procedure that would limit the negotiations to a “take it or leave it” offer in which the Council would indicate the EP amendments that could be accepted. However, the EP insisted on being treated as an equal co-legislator in accord to its interpretations of the Treaty. Over 1994–1995, the Council, Parliament and Commission began to create a system of regular meetings in which they would negotiate over legislative matters subject to co-decision (Shackleton, 2000). These meetings gradually assumed semi-recognized status as “trialogues”.

The original triologues usually take place after the second reading, but before the Conciliation Committee’s meeting, in order to allow compromises over issues of dispute to be reached. They involve the vice-presidents of the EP, representatives of the Council’s presidency, EP rapporteur and the chairpersons of the relevant EP committee and Council working group but are not formally binding. Triologues 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 more binding agreements, otherwise the defaulting party is likely to lose credibility and to be punished in future interactions.

The Amsterdam treaty brought new changes in the co-decision procedure that led to a new round of bargaining between the two main actors, one in which the Council tries to limit its direct cooperation with the EP to informal forms of dialogue, while the EP intends to use its new leverage in order to oblige Council representatives to come before the EP committees. As a consequence of this Treaty reform, such informal meetings could take place at earlier stages of the co-decision procedure, even at first reading, in order to reach an “early agreement” between the EP and COREPER I and avoid the conciliation stage altogether. This system was formalized in the Amsterdam Treaty and its outcomes have gained recognition as “fast-track legislation”. Negotiations on a specific legislative dossier are held between the Council’s Presidency and the EP rapporteur, with shadow rapporteurs or chairpersons of the relevant parliamentary committees being sometimes involved.

This arrangement permits the Council’s Presidency to enhance substantially its power by imposing its own policy agenda in brokering the early agreements, at the expense of the other Member-States representatives who did not have the time or occasion to reach a Common Position. The country holding the Council’s Presidency may be in a unique position of influence when intermediating the communication between the Council and the EP by reporting the Member-States’ bargaining positions to the EP and the EP’s opinion to the other Member-States. Therefore, it could use its position to reach agreements that reflect its own preferences rather than the preferences of the Council as a whole.

On its turn, the EP draws considerable advantages from the early agreement procedure at informal levels, as its bargaining power is increased by a longer time horizon than the Council’s Presidency, which must take full advantage of the six-month window of opportunity, and by the possibility to influence deliberations within the Council before its members could adopt a formal Common Position. But the side effects of its increased power in these informal negotiations are the marginalization of smaller parties within the EP which traditionally relied on the possibility to propose amendments
at formal stages, and the sacrifice of the democratic accountability the EP is deemed to respect in favour of the speedy case resolutions and of the overall efficiency of the decision-making procedure.

Notwithstanding the benefits it draws from this arrangement, the EP has become increasingly aware of the threat to its democratic legitimacy standards represented by the informal meetings and the resulting early agreements. In a report drafted in January 2001 (Imbeni, Provan and Friedrich, *Discussion document: Improving the functioning of the co-decision procedure*, Brussels: European Parliament, 2001) three EP officials indicate the increasing number of informal negotiations at the first stages of the procedure as a conscious strategy to improve the collaboration between the EP and Council, but warn the European Parliament on the risks to its openness and legitimacy associated with the Council’s working methods, advising that “without prejudice to the prerogatives of either institution, the Council should be encouraged to become more like the EP, not the other way around” (Imbeni, Provan and Friedrich, p. 2). A report of a joint co-decision reunion held between the EP, Council and Commission in November 2000, drafted by the same EP officials and published in July 2001, reiterates the suggestions they made in their previous report with regard to the common programming of co-decision negotiations before conciliation, a wider reporting of all legislative negotiations combined with a joint verification of legal texts, a common set of guidelines for the co-decision procedure in all the institutions involved and the extensive use of the fast-track legislative mechanism (*Report by the Presidency and the General Secretariat of the Council on making the co-decision procedure more effective* 13316/1/00 REV 1, 14144/00, 2000).

However, on a different report on the same matter released in August 2001 and titled *Non-Paper sur la procédure de codécision*, Dietmar Nickel, a Director-General within the EP, acknowledges the fast-track mechanism as an efficient instrument for speeding up the legislative process but recommends its use only in the cases of the “dossiers susceptibles”, that is, legislative files likely to be concluded at first reading, and again only in accordance with Articles 64 (regarding transparency in the legislative process), 66 (regarding Commission and Council positions on the EP amendments) and 69 (on the adoption of amendments to the Commission proposal) of the EP Rules of Procedure. On these grounds, Nickel criticizes the Council practices in dealing with co-
decision files as reflected in Council’s Rules of Procedure (especially in the Articles 5, 8 and 9 that deal with the informal negotiations that in Nickel’s opinion are not adequately reported to the EP rapporteurs, shadow rapporteurs and members of parliamentary committees concerned) and proposes on his turn the harmonization of the Rules of Procedure of both the EP and Council so that the entirety of the procedure conforms to the principles of democracy and openness. He also recommends the active presence of Council representatives to the EP committee negotiations and of the EP representatives to Council debates on specific co-decision files (Parlement Européen, Direction Général des Commissions et Délégations, Non-paper sur la procedure de codécision, Bruxelles, le 29 août 2001).

The view that the informal negotiations between the two institutions is a risk to the democratic legitimacy of decision-making in the EP was shared by Julian Priestley, the Secretary-General of the EP, who, in a note addressed to the Conference of Presidents on 3 May 2001, pointed out that the Council had been primarily responsible for the increase in the number of informal contacts between the two co-legislators (Note of the EP Secretary-General to the Conference of Presidents, Brussels, 3 May 2001; see also Hubert Iral, Between Forces of Inertia and Progress: Co-decision in EU Legislation, ZEI Discussion Paper C119/2003). In order to ensure that the principle of openness in the decision-making process is respected by both institutions, Priestley proposed that the triilogue meetings at the first stages of co-decision should be limited to 10 persons or less from each institution, that the EP rapporteurs, shadow rapporteurs and committee chairmen be informed in advance about the place, date and topic of these meetings and afterwards of their outcome, and that the EP and Council hold joint press conferences, as it was attempted for the first time in February 2001 (Note of the EP Secretary-General to the Conference of Presidents, Brussels, 3 May 2001, p. 2).

Since the repeated appeals of the EP to the Council seemed to have a minor impact on Council’s working methods, the EP Conference of Presidents decided to write a letter to the Council Presidency in order to express their discontent for Council’s lack of commitment to the spirit of the Amsterdam treaty and to the objectives of the Joint Declaration on practical arrangements for the new co-decision procedure. They required the Council representatives to attend parliamentary committee meetings, to discuss the
proposed pieces of legislation and to bring the negotiations into an open and formal arena (The European Parliament Conference of Presidents Letter to the Council, Brussels, 15 May 2001; see also Huber Iral 2003).

In its reply, the Council referred to the principle of mutual respect for each institution’s rules and practices of procedure as reflected in the Joint Declaration and affirmed its commitment to “explore the possibility on a case-by-case basis (…) in accordance with the EP Rules of Procedure” but refused a change in its informal negotiation practices (The Council of the European Union, The President Letter to Ms. Nicole Fontaine, Brussels, 23 June 2001, p. 3; see also Huber Iral 2003).

A partial solution to the deadlocked inter-institutional power play was offered in 2001 by Commission’s White Paper on Governance which envisaged the principle of openness as a means of increasing the democratic legitimacy of decision-making. Motivated by the objectives of the Commission’s White Paper, the three institutions involved in co-decision decided on a binding legal instrument under the provisions of Regulation 1049/2001, adopted on 9 April 2001 on the basis of the EP Cashman Report and entered into force on 3 December 2001. This Regulation introduced more transparency in the Community decision-making process and completed the legal framework on the right of access to documents held by the Community institutions. As a result, the three Community institutions involved in the co-decision procedure amended their Rules of Procedure to accommodate the provisions of Regulation 1049/2001.

In order to increase the transparency of the procedure in its early stages, the EP has single-handedly established guidelines for the first and second reading and attempts to revise the Joint Declaration on practical arrangements for the new co-decision procedure. First, the EP calls for the parliamentary committees to make full use of potential at the three stages of the co-decision procedure in an open and transparent manner. Second, it encourages informal meetings between the three institutions (Council, EP and Commission) with a view to speeding up the resolution of the legislative dossiers, provided that the parliamentary committees and the shadow rapporteurs concerned are informed of their existence and content and that the EP negotiator has a mandate from the committee binding him to represent its position and to report on the results of the
Presidency in parliamentary committee meetings to argue on the Council’s official position in a move to make the Council aware of its accountability towards the EP.

Thus, it can be affirmed that, under the pressure of the practices they developed in the exercise of the co-decision procedure, the three institutions concerned (especially the European Parliament) have taken advantage of the Amsterdam Treaty provisions to expand the concept of transparency of EU decision-making to include not only the public access to their documents but also the openness of their negotiations. In the following section I will show how the revisions of their respective Rules of Procedure have led to a greater inclination in all the three institutions involved towards the spirit of openness promoted by the Amsterdam Treaty and towards the redefinition of the concept of transparency in line with the Treaty stated goals.

a) Council of the European Union

Access to documents

The Council of the European Union has often been blamed for the lack of transparency regarding its legislative activities. However, since 1996 the Council publishes a monthly summary of its acts that was initially available only at the Council’s premises but after the ratification and entry into force of the Amsterdam Treaty, these summaries have been made public on the Council’s website. They contain in Annex I, a summary of definitive legislative acts adopted by the Council that month, accompanied by statements in the minutes which the Council decides to make public in Annex II. The summary also mentions the vote results, as well as explanations of votes and the voting rules applicable. Annex III is composed of a list of the other acts adopted by the Council, with a reference, where appropriate, to voting results, explanations of voting and statements which the Council has decided to make public. However, these annexes do not contain the actual documents nor any information on other acts of limited scope such as procedural decisions, appointments, decisions of bodies set up by international agreements, specific budgetary decisions, etc.
In order to facilitate the access to its documents, during a Justice and Home Affairs meeting on 19 March 1998 the Council decided to make public a register of unclassified documents according to the following guidelines:

- the register of Council documents would be developed by the Council’s Secretariat-General as a complement to the existing system of electronic storage of Council documents;
- this register would contain titles, dates and document codes of unclassified Council documents but not their content, as a means to preserve the Council’s right to deny full access to certain documents;
- it would be made available on the Internet;
- the Council’s Secretariat-General would guarantee the reliability and exhaustiveness of the register;
- its implementation would not require additional budget and staff;
- the Council’s Secretariat-General would publicize the existence of this register and would submit a report on its functioning after six months of operation.

While this public register of unclassified documents represented a step forward for Council’s transparency process, the public did not have yet full access rights to the content of these documents, which meant in practice that the Council still maintained the secretive character of its legislative proceedings. Therefore, the political members of the Council asked two senior Council officials, Jürgen Trumpf, the Council’s Secretary-General, and Jean Pirris, the Director-General of Council’s Legal Service, to draft a Report on Operation of the Council with an enlarged Union in prospect that would contain Council’s reform proposals for the Helsinki European Summit of December 1999. The Trumpf-Pirris Report, published on 10 March 1999, contained a series of proposals regarding the ways to improve the transparency and public openness of Council’s legislative activities to the same level as in the EP.

In this report, Trumpf and Pirris advocated that the Council adopt greater openness by making public at a later time all documents relating to preparatory work on legislation, opening some legislative debates to the public and improving the provision of information on its work in order to increase the efficiency and the transparency of the co-
decision procedure. However, they also warned that “a general opening to public of the Council when acting in its legislative capacity could impact the effectiveness of negotiations (…) and would run counter to project of exercise” (Council of the European Union, *Operation of the Council with an Enlarged Union in Prospect (‘The Trumpf-Pirris Report’)*. Report by the Working Party set up by the Secretary-General of the Council. Brussels: General Secretariat, 1999, p. 19).

The recommendations made in the Trumpf-Pirris Report were taken up again in the *Guidelines for Reform and Operational Recommendations* approved by the Helsinki European Council in 10-11 December 1999, where “the Presidency and General Secretariat are invited to propose by the end of 2000 further changes in the Council’s working methods in dealing with co-decided acts in the light of the experience acquired in implementing the Joint Declaration of May 1999” (Council of the European Union. *Guidelines for Reform and Operational Recommendations*, Helsinki, 1999, p. 5).

Following the recommendations of the Trumpf-Pirris Report and the Helsinki European Summit *Guidelines for Reform*, as well as the requirements of the Regulation 1049/2001, the Council not only published a public register of its unclassified documents but also enabled public access to its non-sensitive documents through this register.

The register allows access to the full text of a large number of documents which, pursuant to Article 11 of Annex II to the Council's Rules of Procedure, must be made directly available to the public as soon as they have been circulated, such as:

- provisional agendas for Council meetings and for its preparatory bodies (with the exception of certain bodies dealing with military and security questions);
- documents originating from a third party which have been made public by the author or with his agreement;
- in the legislative field, "I/A" and "A" item notes submitted to Coreper and/or the Council, as well as draft legislative acts, draft common positions and joint texts approved by the Conciliation Committee to which they refer;
- any other text adopted by the Council which is intended for publication in the Official Journal;
- documents regarding a legislative act after a common position has been adopted, a joint text has been approved by the Conciliation Committee or a legislative act has been finally adopted;
- documents which have been made available in full to a member of the public who made an application.

The number of documents made available through this register has increased steadily over time: the Council’s Annual Report for 2004 points to an increase of nearly 42% in the number of documents directly accessible to the public via the register (354,054 in 2004 as compared with 249,935 in 2003), while the total number of visits to the Council register increased in 2004 by 19.2% compared with 2003 (919,584 in 2004 against 768,725 in 2003 – that is, approximately 2,500 visits per day). These visits represent around half of all the visits made to the section of access to documents on the Europa server, that is 5,250 visits per day in 2004, almost three times more than in 2003 (European Commission Report on the application of Regulation nr. 1049/2001 of the European Parliament and of the Council regarding public access to EP, Council and Commission documents, COM (2005) 348 final).

As of 19 January 2006, the date of the latest Council’s Annual Report available, the register listed 697,111 documents (all languages taken together), of which 459,033 (65.8% of those registered) were public. This represented an increase of 19.4% on the number of documents appearing in the register in 2005 (583,713 in February 2005 against 697,111 at the beginning of 2006) and an increase of 19.3% in the number directly accessible via the register (354,054 in February 2005 against 422,297 at the beginning of 2006). Moreover, in January 2006 the register contained 10,076 documents bearing the code "P/A" (i.e. partially accessible), including 1,302 which were accessible on-line. "P/A" documents registered before 1 February 2004 (from when all new documents classified as partially accessible have been directly available to the public via the register) are not published on the Council’s website but may be made available on request. In 2005, 259,106 different users logged on to the Council's public document register. The total number of visits increased by 15.7% (1,064,039 visits in 2005 against 919,584 in 2004), representing more than 2,950 visits per day.
Furthermore, of the 9,457 documents requested during the reference period, access to 1,669 was refused (initial and confirmatory phases taken together), giving an access percentage of 67.3% (documents requested and disclosed in full) or 81.2% (documents approved for partial access). While the rates of access to Council documents in 2005 were lower than in the previous year (85.7% in 2004), these figures must be viewed in the light of the significant numbers of documents (77,832 in 2005 compared with 68,996 in 2004) which are made directly available via the register as soon as they have been circulated. The enhanced practice of partial access should also be taken into account. In 2005, 1,096 documents were partially released to the public in reply to initial applications (902 in 2004), 76 following confirmatory applications (47 in 2004) and 2 documents after examination of complaints to the European Ombudsman (1 in 2004).


**Physical access to the premises**

The Trumpf-Pirris Report contained also recommendations to open some of the Council’s legislative debates to the public, especially those at the initial stages of a legislative proposal. In addition to these, the Helsinki European Summit Guidelines for Reform suggested that “the general Affairs Council and the ECOFIN Council shall each hold a public debate every six months on the Presidency’s work programme. At least one public Council debate should be held on important legislative proposals. COREPER shall decide on public debates by qualified majority (Council of the European Union. *Guidelines for Reform and Operational Recommendations*, Helsinki, 1999, p. 5).

After the Seville European Council in June 2002, the Council amended its Rules of Procedure (*Council Decision of 22 March 2004 adopting the Council’s Rules of Procedure, OJ L106*) so as to improve the openness and transparency of its formal meetings and to provide access to its documents to a wider audience. Thus, when the Council acts under co-decision, the public has access to its deliberations during:

- the presentation by the Commission of all legislative proposals that are presented orally in a Council meeting;
- all of the Council’s final deliberations after the other institutions have delivered their opinions;
- the vote, whose result is displayed on a screen.

The Council decided in December 2005 (Council conclusions of 21 December 2005 - Improving openness and transparency in the Council, 15834/05) to allow the access of the public to some of its deliberations on legislative proposals that are not covered by co-decision, to policy debates on the Council’s operational programme and the Commission’s annual work programme, as well as to its deliberations on non-legislative items that present a high public interest.

However, the visitors to the Council do not have access to the conference rooms, thus being only able to follow the debates on a large video monitor in the press area next to the conference room.

**Transparency of debates**

The Council’s open deliberations are made public through audiovisual broadcasting within the Council’s press center and by video streaming on the Council’s Internet site from July 2006 onwards. This openness is also the result of a recommendation made in the Trumpf-Pirris Report for the Council to acquire “the necessary technical infrastructure to supply Member-States television channels with pictures, in particular the press conference room and all conference rooms” (Council of the European Union, Operation of the Council with an Enlarged Union in Prospect (‘The Trumpf-Pirris Report’). Report by the Working Party set up by the Secretary-General of the Council. Brussels: General Secretariat, 1999, p. 22). Moreover, according to its Rules of Procedure, in the cases when the Council acts as legislator, the results of votes, the explanations of votes by Council members and the statements entered in the minutes are made public and can be also found in the monthly summary of Council acts on its Internet site.

While the Council’s rules on transparency of debates and access to documents seem open and generous, the Council officials were more than willing to follow the warning of the Trumpf-Pirris Report concerning the risks to efficiency of informal tripartite negotiations posed by too great a transparency. Therefore, the annexes to the
minutes of the Council meetings on cases where informal tripartite negotiations were held mention the date, the number and identity of the participants but do not reveal the content or the results of such informal contacts, which casts a doubt over the sincerity of the Council’s inclination to the transparency of debates.

**Intelligibility of voting**

Council’s Rules of Procedure provide that in the cases when the Council acts in its legislative capacity, the vote results, as well as explanations of votes, statements entered in the meeting minutes and the voting rules applicable are made public and can be also found in the monthly summary of Council acts on its Internet site (Rule 9). Thus, it can be affirmed that the Council complies fully with this criterion for transparency.

**Clarity of interests**

The *Staff Regulations of Officials of the European Community*, entered into force on 1 May 2004, provide at Article 11 that “Officials are required to be objective and impartial; to be independent from any government, authority, organisation or person outside their institution; not to accept honours, decorations, favours, gifts or payments of any kind without permission from the appointing authority. The same article specifies that officials have to report any personal conflicts of interest, especially family and financial interests, to the appointing authority, and to seek permission, two years after retirement, from the institution before engaging in any activity with which they were actively involved in an official capacity during their last three years of service and in respect of which a conflict with the interests of the institutions could arise.

Furthermore, the *European code of good administrative behaviour*, first published by the European Ombudsman in March 2002 and subjected to some revisions, the most recent one being from January 2005 provides clear information about the administrative duties of Community staff towards the citizens. The right to good administration is laid down in the Charter of Fundamental Rights of the European Union and therefore this non-binding code intends to explain in depth what the Charter’s right should mean in practice. The code requires officials to act lawfully; to treat all members of the public equally; to ensure that all measures are proportional; not to abuse of their power; to act
independently and impartially; to be objective and fair and to protect confidential information and personal data. Unfortunately, however, the code is not binding to the institutions and it remains unclear how and if the provisions in the Code are actually implemented in the different institutions. Only the Commission has adopted its own code of good administrative behaviour, which comprises the Ombudsman’s code’s main points.

Therefore, Council members are currently bound only by their national laws and regulations, while the civil servants at COREPER, where acts adopted by the Council are prepared, or the Council Secretariat, are not required to follow any specific code of ethics. There are no formalised consultations between COREPER and the public, and although the COREPER may be a focus for lobbyists, it has no system of registration of lobbyists and no minimum standards for consultation.

b) The European Parliament

Access to documents

In the resolution of 16 July 1998 on the European Ombudsman’s Special Report, the European Parliament took note of the Council’s initiative to introduce a public register of its documents and called on all Community institutions to establish such public registers accessible via the Internet. Such a progress in the field of access to Community documents was a direct result of the explicit introduction of the principle of openness in the Amsterdam Treaty. Article 255 required implementing rules to be laid down within two years (that is, before 1 May 2001) under the provisions of the new co-decision procedure on the basis of a proposal from the Commission, which was presented on 26 January 2000. The Commission proposal included documents originating in other institutions within the scope of the right to access the documents of a Community institution and a right of partial access to sensitive documents was granted.

However, the list of restrictions and exceptions to this right was long and lofty so that the confidentiality interests of the Community institutions could be protected on the grounds of such vague principles as “the effective functioning of the institutions “ or “the stability of the Community legal order”. In July 2000, the High Representative of the
Council, Javier Solana, issued a decision regulating the openness of sensitive documents for security or defense reasons which in effect restricted their public accessibility. In response, the EP rapporteur Cashman proposed six exceptions to the right of access to documents, namely defense, public order, monetary stability, international relations, the protection of individuals’ private lives and professional confidentiality. Since the Council amended its Rules of Procedure on 19 March 2001 in order to extend the number of exceptions to twelve and to change the rules of majority voting on security issues, the EP took a case to the European Court of Justice against the Council’s decision to extend confidentiality to civil and military crisis management.

This crisis was solved in 2001 by the suggestions made in the Commission’s White Paper and taken up in the legally binding Resolution 1049/2001. Since January 1998, the GEDA-ADONIS system for the electronic management of administrative documents has been used for recording mail and in 2004-2005 the system was extended to the recording of administrative documents. Thus, the European Parliament has its own public register of documents and has been issuing annual reports on the access of documents through it since 2001. The 2005 Annual report is the fourth such report and the latest available.

According to the data provided by the EP in its 2005 Annual report, at the end of 2005 the public register contained 121,671 references (737,345 files) and 90% of documents were directly accessible via the Internet. None of the documents published in the year 2005 was classified as ‘sensitive’. The number of searches carried out on the register has increased to an average of 1000 per day. The number of requests for documents has also increased in the reference period: from an increase of 13% between 2003 and 2004 (from 1106 to 1245 requests) to an increase of 45% in 2005 compared with the previous years (from 1245 to 1814 requests). Moreover, the number of requests for non-public documents has also increased in absolute numbers from 165 in 2003 and 186 in 2004 to 298 in 2005.

The explanation for the lower number of requests concerning non-public documents in comparison with the Council and the Commission is that, by virtue of the nature of its activities, most of European Parliament’s official documents are public or can be released to the general public, even in cases where they have not yet been made.
available. On the other hand the applications submitted to the Council and the Commission are more frequently concerned with documents whose public release would supposedly harm the interests to which the Regulation 1049/2001 provides protection from the public view.

**Physical access to the premises**

Paradoxically, the European Parliament has less open and transparent internal arrangements in force than the Council, given the fact after the adoption of the transparency principle in the Maastricht Treaty the EP was much more advanced in the transparency process. The EP Rules of Procedure state that “debates in Parliament shall be public” and “Committees shall normally meet in public, unless they decide, under specific circumstances, to debate behind closed doors” (Rule 96) but access to visitors in the EP premises was nevertheless restricted by a decision of the Bureau in October 2001 (PE 308.918/BUR) to groups organized by the EP Visits Service or upon invitation from an MEP or an EP staff member. Thus, public debates are open only to visitors admitted to the EP premises under these rules, while the minutes of the meetings in the plenary are made available on the EP website.

**Transparency of debates**

The latest version of EP Rules of Procedure adopted in July 2004 provides that the debates in the plenary and in the committees are public, although the committee debates can be split according to the issues discussed in public and non-public meetings (Rule 96), the results of the votes are recorded in the minutes of the meetings (Rule 159, Rule 160, 161), the minutes are to be published within a month from the meeting in the Official Journal (Rule 172), the verbatim reports of the meeting are to be published in an annex to the Official Journal (Rule 173). However, the Annex VII to these rules specifies that debates on sensitive issues may be held behind closed doors according to Article 4 of the Regulation 1049/2001 and that only their results not their content may be recorded in the minutes of the meeting. In this matter, the EP provisions are very similar to the Council’s.
Intelligibility of voting

Unlike the Council’s recording of the votes of each national delegation in the meeting minutes published on its website, the voting in the EP plenary can be done in three ways: visual, electronic or by roll call (Rule 159). In the case of visual voting, no results are made available, only its outcome. In the case of electronic voting, only the number of yes/no votes and abstentions is recorded, not the preference of each participant MEP. The only type of vote that accurately records the results and the preferences of each MEP is the roll-call vote, which is nevertheless the least used (in approximately 15 percent of the cases and only at the request of 37 MEPs or of a political group on issues that they consider to be sensitive, according to Carruba et al. 2003). As for the explanations of voting, Rule 163 provides that at the end of the debate any MEP or any political group may give an oral explanation on final vote or written explanation (of less than 200 words) included in the verbatim report of proceedings. However, the time allowed for the explanation of vote is limited to 1 minute for an individual MEP and to 2 minutes for a political group and, in addition, no further requests to give explanations of vote shall be accepted once the first explanation of vote has begun.

In what concerns voting in the EP committees, the only information reported in the minutes is whether the committee has approved an amendment or not without specifying which committee members actually supported or opposed it. Thus, not only the results of votes are missing but also any other explanations on the MEPs voting preferences, quite unlike the situation in the Council.

Clarity of interests

Annex I to the EP Rules of Procedure consists of a code of conduct for the MEPs, who are required to disclose any direct financial interest in the subject under debate before they speak in the Parliament, to fill out a declaration of interest (stating professional activities and any other remunerated functions or activities) which is kept by the EP Quaestors in a register that may be open to public for inspection, and not to accept any gifts or benefits in the performance of their duties. In case an MEP refuses to fill in such a declaration, he/she can be suspended from his function by the President of the European Parliament.
The European Parliament has not issued formal rules for consultation, but consultation and participation of members of the public can take place in the form of hearings in committees or in informal intergroups. Hearings of experts or members of the public may be organised by any committee of the Parliament if it considers such a hearing essential to the effective conduct of its work on a particular subject (Rule 183, parliamentary Rules of Procedure), when dealing with petitions to the Parliament (Rule 192) or in the course of investigations by committees of inquiry (Rule 176). These hearings are recorded in a register available on the EP website.

In addition to the code of conduct for MEPs, the Rules of Procedure contain also provisions for lobbyists. They are allowed on the EP premises if in possession of nominative passes valid for a maximum of one year, which are issued by the Quaestors to lobbyists. They are also required to respect the code of conduct devised especially for them and published as Annex IX to the Rules of Procedure, as well as to identify themselves in a register kept by the Quaestors and available online (Rule 9-2). The provisions of the EP Code of conduct require the lobbyists to state their interests, refrain from obtaining information dishonestly or circulate EP documents for a financial profit. In case of breaching the provisions of this Code, the Quaestors may withdraw their passes or refuse to renew them.

The European Parliament is the only decision-making body whose Code of conduct contains formal sanctions, and therefore the vested interests of the MEPs may be most clearly visible.

c) European Commission

Access to documents

The legislative databases created by the Commission contain not only the texts of the official documents, but also information that was previously confidential, such as the number, composition, schedule, agendas and meeting minutes of the committees and working groups. Such information regards not only the access to official documents, but also the intelligibility of the decision-making process, as the Commission indicated in its White Paper that decisions are more likely to be accepted when the European citizens can
actually understand the basis upon which they are taken and can control the work of the Community institutions by accessing the information they pro-actively made available.

The various Directorates of the European Commission produce databases of their own materials, principally for internal use, but they are increasingly being released on the Internet. CELEX was the first of these databases derived from the activities of the European Union. It is the official legal database of the European Communities and is built and operated by the European Commission through the Office for Official Publications of the European Union. Its data are acquired from each decision-making body of the European Union and shows thus how they interact with each other. Although CELEX is regarded as a single database, in reality it consists of a number of individual databases which are distinct yet interdependent and linked by cross-referencing.

Each document in CELEX has a distinct structure reflecting the institutions of origin but is being analysed by the legal staff of the Commission that assigns to it a set of standard headings that describe the document and is therefore a useful aid to the end user. These headings are referred to as ‘fields’. The bibliographic fields that are common to all CELEX documents are:

- the unique CELEX document number;
- the author of the document (e.g., the Commission, the Council, the Court);
- the legal form of the document (e.g., Directive, Regulation, Decision);
- the Treaty from which the document draws its authority (e.g., the EEC Treaty, the EURATOM Treaty);
- the type of document;
- the publication reference of the document (e.g., Official Journal No. …, date…, p. …);
- the subject matter of the document (policy area);
- the dates relating to the document (e.g., notification, entry into force, publication).

Other legislative databases created or maintained by the Commission include:
EUR-Lex - a free service set up by the Office for Official Publications that contains the following documents, accessible by a common register, in all of the official languages:

- the Official Journal L and C
- the Treaties
- Consolidated versions of legislation in force
- Preparatory texts for legislation
- Judgments of the European Court of Justice
- Parliamentary Questions

PreLex, a database on inter-institutional procedures that follows the major stages of the decision-making process between the Commission and the other institutions:
  - stage of the procedure;
  - decisions of the institutions;
  - services responsible;
  - references of documents …etc.

PreLex monitors the works of the various institutions involved (European Parliament, Council, ESC, Committee of the Regions, European central Bank, Court of Justice, etc.). PreLex follows all Commission proposals (legislative and budgetary dossiers, conclusions of international agreements) and communications from their transmission to the Council or the European Parliament, and allows users to access directly the electronic texts available (COM documents, Official Journal, Bulletin of the European Union, documents of the European Parliament, press releases).

Oeil, a database set up by the General Secreatariat of the EP, monitors inter-institutional decision-making procedures, the role pf Parliament in the European legislative procedure and the activities of the institutions involved. The procedures are outlined by documents that make it possible to follow a procedure, to find out what stage it has reached and to make use of the forecasts for the stages to come in English and French.

RAPID, a full-text database, updated daily and searchable via a menu system or by using a retrieval language, contains:
  - Press releases (brief documents giving details of events, decisions and/or reactions to them);
  - Memos (background information);
- Speeches by EU Commissioners;
- Council of Ministers press releases;
- Proceedings of the European Court of Justice (summaries of judgments and opinions of the Court delivered during the preceding week);
- Declarations of the European Union (covering common foreign and security policy);
- Economic and Social Committee press releases;
- Committee of the Regions press releases;
- Court of Auditors information notes.

The umbrella European Union portal contained 6 million pages and received 50 million visits per month in 2005 (European Commission White Paper on a European Communication Policy, COM (2006) 35 final). However, one should also keep in mind the fact that despite the impressive increase in the documents made available in the public registers of Community institutions, only one in 33,000 European citizens has so far exercised the right of access to EU documents (European Commission White Paper on a European Communication Policy, COM (2006) 35 final), which renders the legislative battle around the right of access to documents highly ineffective.

As the European Commission is not a legislative body, the only other criterion that applies to it concerns the clarity of its members’ interests.

**Clarity of interests**

At its first meeting of 24 November 2004, the Barroso Commission adopted a non-binding Code of Conduct for Commissioners that requires the Commissioners not to engage in any professional activity, whether paid or unpaid; not to accept any form of payment for delivering speeches or attending conferences; not to hold any public office; to avoid conflicts of interests; to respect the principle of collective responsibility; to fill in a declaration of interests for them and their spouses, stating activities their activities for the past 10 years; to inform the Commission of activities they want to pursue in the year following their retirement from office. However, this Code does not include any formal sanctions against breaching its provisions.
In what concerns lobbying, there are no formal rules or codes of conduct in the Commission, nor is there a public register of the interest groups apart from the CONECCS database which is more of a forum for exchanging information on the Commission’s initiatives to which the civil society organizations may participate on a voluntary basis. As registrations in this database are voluntary and the data are provided by the organizations themselves without any Commission control, the reliability of the information it contains is questionable. Moreover, the General Principles and Minimum Standards for consultation of interested parties, adopted by the Commission on 11 December 2002 and entered into force on 1 January 2003, represent nothing more than a general framework for the consultation of the civil society organizations and stakeholders, and, as such, is not legally binding, nor does it contain any formal sanctions.

III. Inter-institutional developments

The Article 15 of Regulation (EC) No 1049/2001 provided for the establishment of an inter-institutional committee whose mission is to examine the internal practices, address possible conflicts between the EU bodies and coordinate further developments on public access to documents. This Inter-institutional Committee was created in 2002 and has been holding several meetings between the Council, Parliament and Commission departments responsible for applying Regulation (EC) No 1049/2001. On the 11 November 2005 meeting, the members of these departments have proposed a future revision of Regulation No 1049/2001 in the light of the Commission's evaluation report (COM(2004) 45), the establishment of the new Commission register of comitology, and the scope for improving the institutions' document registers in order to make them more user-friendly and accessible to the general public.

As a result of this inter-institutional dialogue, these proposals were taken up by the Council in its meeting of 21 December 2005 and a general programme on the improvement of the public access to documents was adopted by the European Council in June 2006. According to the provisions adopted by the Council in December 2005 and by the European Council in June 2006, all Council deliberations on co-decision files are
open to the public, as are the votes and the explanation of votes by Council members. This means that all documents mentioned on the agenda for a Council meeting open to the public are published before that Council meeting is held (Council of the European Union, *Council Annual Report on Access to documents 2005*, Brussels: General Secretariat, 2006, pp. 19-20).

On 9th of November 2005, the *European Transparency Initiative* was formally launched with a view to improve transparency and ethics in EU policy-making, including a debate on both lobbying transparency and the European institutions’ codes of ethics and consultation practices.

6. Conclusions

The transparency process went hand in hand with the reform of the decision-making process achieved by the co-decision procedure, since both were initiated by the Maastricht Treaty, expanded by the Amsterdam Treaty and, most importantly, involved the three Community institutions in a complex power game that forced each of them to exchange information that was previously confidential among themselves and with the general public, as well as to open up their internal mechanisms to public/institutional scrutiny.

This process focused in the beginning on the establishment of a right of public access to the documents of the Community institutions but gradually shifted towards creating a more comprehensive legal framework that would take into consideration not only the accessibility of the documents but also the intelligibility of the decision-making processes and the identification of the institutional interests behind them. In this respect, the road from Maastricht to Amsterdam has not always been straightforward, as the Amsterdam Treaty has also introduced some changes that could impact negatively on the democratic legitimacy of decision-making. The “early agreement” procedure that allows informal meetings between Council delegates (usually from COREPER I) and EP representatives to take place at earlier stages, even at first reading, has greatly increased the efficiency of co-decision and the power of the EP while decreasing the standards of democratic accountability. This is why a comparison between the two versions of co-
decision could provide a very useful insight into the way the EU has addressed the alleged accountability deficit of its decision-making from one treaty to another.

Due to the reform of the procedural mechanisms and of the transparency rules operated by the Amsterdam Treaty, one would assess that there should be a significant difference in the availability of reports on the informal tripartite meetings/trialogues and on the transparency of the debates between the cases initiated before and after the coming into effect of the Amsterdam Treaty.
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