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An improvement or a subversion of the legislative procedure?

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Olivier COSTA

Olivier Costa is Senior Research Fellow at the CNRS (at the Centre Emile Durkheim, University of Bordeaux). He is also Professor at the College of Europe since 2000 and Professor of political sciences at the Université Libre de Bruxelles and Sciences Po Paris. Author of many books, articles and editorial contributions dealing with European institutions and policies and parliaments. Responsible of the European studies section of the French association of political science (AFSP). Member of the editorial board of the *Journal of European Integration*.

Renaud DEHOUSSE

Jean Monnet professor at the Paris Political Studies Institute ("Sciences Po") and director of the European Center. Renaud Dehousse is also advisor at *Notre Europe*. He studied law in Liege University (Belgium) and in the Florence European University Institute (Italy). He was a teacher in this institute and also in Pisa University (Italy). Later he was a lecturer at Michigan University and Florence University. Renaud Dehousse has been a consultant for several European Union organisations. His research work has focused on comparative federalism and the institutional evolution of the EU. Recently he has worked on the transformation of governance in the EU, and on the Court of Justice.

Aneta TRAKALOVÁ

Graduate of Master in Political Science at the Université libre de Bruxelles, she specialises in the study of European institutions and obtains professional experience as a parliamentary assistant and policy advisor to the European Parliament.

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Foreword

On 9 May 1950 in a famous speech made in the gilded *Salon de l'horloge* at the *Quai d'Orsay*, the French foreign minister Robert Schuman invited Germany and other European countries to join France in creating an independent authority charged with regulating the coal and steel markets. This short elocution is today considered a defining moment of European integration – not only because it was an essential step in the Franco-German reconciliation, but also because it laid the foundations of a new type of institutional organisation, what would become known as the "Community Method". The main components of this model are today well known: the transfer of legislative powers to the European level; an independent executive – at first the High Authority, today the Commission – with a mandate to initiate legislation; the possibility of voting binding laws; and a supranational jurisdiction, the Court of Justice, with powers of sanction.

One of the most remarkable features of this institutional system has been its stability. Sixty years on there are four times the number of Member States, the Union is home to more than 500 million citizens and the founding treaties have been revised numerous times. A transnational parliament has been created along with dozens of administrative agencies, and today's Europe is involved in areas

central to state sovereignty such as currency, justice and defence. But in many ways the original model remains unchanged. Indeed, a need to protect the essence of the "Community Method" is often cited when institutional changes are envisaged.

And yet this model has been under growing pressure since the Treaty of Maastricht. Its legitimacy is sometimes questioned. The Commission itself has shown great interest in what have been called "new modes of governance" and Member States governments seem reluctant to transfer new powers to the European level. In a much-remarked speech to the College of Europe*, the German chancellor Angela Merkel attempted to sketch out an alternative model, the "Union Method". Does all this mean that the "Community Method" has had its day?

To make a documented response to this question we thought it essential to look closely at how the "institutional triangle" has evolved and adapted to new circumstances. What use does the Commission make today of its right of initiative? Is voting practice the same in an enlarged Union as previously? The European Parliament's growing power is surely the most remarkable change of the last twenty years – what has been its impact? This study, together with those which will follow, deals with such questions. Together they aim to provide an up-to-date picture of the "Community Method" as practiced, and thus to give us a better understanding of its relevance in today's Europe.

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* Speech by Federal Chancellor Angela Merkel at the opening ceremony of the 61st academic year of the College of Europe in Bruges on 2 November 2010:
http://www.bruessel.diplo.de/contentblob/2959854/Daten/945677/DD_RedeMerkelEuropakollegEN.pdf

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Introduction

The codecision procedure introduced by the Treaty of Maastricht and revised by the Treaty of Amsterdam endowed the European Parliament (EP) with legislative power equivalent to that of the European Council. A product of the progressive broadening of the scope of the Treaty of Lisbon, codecision (which is not referred to by that term) was established as the "ordinary legislative procedure" and its application was extended to 40 new areas. Since then, the other procedures (consultation and assent) have been confined to certain aspects of the Union's foreign policy, its conventional policy and co-operation in criminal matters. In most of the sectors in which the European Union legislates, the Parliament and the Council act as the two chambers of a bicameral parliament called upon to rule on proposals in areas in which the executive power (in this instance, the Commission) exercises a monopoly.

In the years following the Treaty of Maastricht's entry into force, codecision proved to be the source of countless disputes: numerous issues required convening a "conciliation committee" composed of representatives of both institutions, and therefore three readings in the EP, as well as in the Council. In a 1995 resolution, the EP proposed institutionalising a procedure which would enable an agreement

to be reached at first reading. Although the Commission did not vote in favour of it, this option was ultimately retained by the Treaty of Amsterdam. The reform has limited the number of disputes, yet until the end of the 1990s, no text was adopted at first reading. It was not until 2005 that resorting to the Conciliation Committee began to occur much less frequently. Since then, the situation has even reversed: most texts are now adopted at first reading, after an informal round of negotiations between the three institutions, known as the "trilogue"[1]. While 40% of the texts considered during the 1994-1999 legislative term had called for a Conciliation Committee meeting, a clear majority of them are now being adopted at first reading and the conciliation procedure is occurring only exceptionally.

Although several studies – including our own[2] – have highlighted this trend and measured its effects, current research leaves two questions unanswered. The first concerns the origin of these early agreements: were they formulated to temporarily pacify inter-institutional relations in legislative matters in order to alleviate EU enlargement shock and to avoid exacerbating the Union's political crisis by creating inter-institutional tensions or, to the contrary, to implement a sustainable change in the nature of the Union's decision-making system? The second question deals with the impact of such practice on the way the institutions function and their respective actors relate to them. Although the Commission and the Council are institutions sufficiently centralised to ensure that the decision to favour inter-institutional co-operation does not cause disputes – or at least not explicit ones – this may not be true of the EP. How do Members of Parliament (MEPs) perceive a process which more or less amounts to stripping them of their formal right to debate, or even to amend, legislative proposals in plenary? To answer such questions, this report is based on a systematic study of official documents, scientific literature and available data, as well as on an in-depth field survey within European institutions, notably the EP, in which a variety of actors (MEPs, EP officials and members of the political groups) were interviewed.

We will first recall the codecision procedure's origin and the institutional environment in which it emerged, which undoubtedly contributed to the trilogue's

1. The Council uses the word "trialogue" and the EP the word "trilogue". We will use the second.
2. O. Costa, R. Dehousse and F. Deloche-Gaudez, "L'activité législative. Moins mais mieux" in R. Dehousse, F. Deloche-Gaudez and O. Duhamel (Co-Eds.), *Elargissement : Comment l'Europe s'adapte* (Paris: Presses de Sciences Po, 2006), pp. 21-38.

development (Section 1). We will then provide an overview of the practice of early agreements (Section 2), before examining how it is viewed within the institutions, and particularly the EP, in which it gave rise to a regulatory effort (Section 3).

1. Pacifying the legislative process

1.1. Origin of codecision

The European institutional system has long been deceptive. The Parliamentary Assembly, whose duty is to represent the people's interests, along with those of the States as defended by the Council, and the "general European interest" as embodied by the Commission, was in fact deprived of any real power. In legislative matters, the so-called "consultation" procedure led European MEPs to formulate opinions on legislative proposals before the Council reached a conclusion, without anyone being required to take such opinions into account. In actuality, the European Parliament's opinions were often not even read. This situation was tolerated by European MEPs until the first direct election to the European Parliament. Certainly, these MEPs were first and foremost national parliamentarians chosen by their peers to sit in this European-level institution in addition to their national mandate. The June 1979 elections redefined the problem. Nearly 80% of the 410 newly elected members were no longer serving another legislative mandate. In order to establish their authority and to bolster their European mandate, they attempted to establish a power relationship with the Commission and the Council, notably by wielding their budgetary powers. They thus obtained implementation of the so-called "con-

certation" procedure, which enhanced their ability to amend legislative proposals having budgetary implications.

The Draft Treaty establishing the European Union, adopted in February 1984 under Altiero Spinelli's leadership, notably called for the establishment of a "codecision" legislative procedure which would have vested the Parliament with a power equivalent to that of the Council. Despite its failure, the Spinelli report laid the groundwork for institutional decision-making: certain of its provisions may be found in subsequent treaties. Under this impetus, the Single European Act (1986) introduced a "co-operation" procedure which called for an initial legislative dialogue between the Parliament and the Council. Although far from matching the EP's proposals, since the Council always made the final decision, this procedure enabled the MEPs to demonstrate their ability to play a constructive role in the decisional process. This initial positive experience convinced the Member States' representatives to agree to include in the Treaty of Maastricht (1992) a codecision procedure which strengthened the influence of the EP, whose approval was required from that point on in order for any measure to be adopted. In the event of a disagreement with the Council, the task of finding a solution was entrusted to a joint "conciliation committee."

This procedure's implementation met with considerable objections inasmuch as the MEPs demanded equal footing with the Council, which was not provided for in the Treaty, as well as a change of attitude on the part of the ministers, who were somewhat reluctant to accept the idea of directly negotiating with the parliamentarians. After a genuine form of institutional warfare, the States' representatives finally agreed to the MEPs' demands and to amend the codecision procedure in the Treaty of Amsterdam (1997). As already pointed out, it was then that the right to conclude legislative procedures at first reading was acknowledged. Furthermore, over time, as additional treaties were ratified, the codecision procedure underwent a formal two-fold development: its scope was progressively broadened to include new areas which until then had been governed by other procedures or were deemed to be outside of the Union's jurisdiction, until the Treaty of Lisbon recognised it as an ordinary legislative procedure. Moreover, the growing use of the qualified majority voting rule within the Council enhanced the EP's negotiation capacity. The codecision procedure also evolved in terms of inter-institutional momentum.

Boxed text: The codecision procedure known as the "ordinary legislative procedure" (Art. 294 of the TFEU)[3]

This procedure can consist of up to three readings and its main stages are as follows:

Proposal:

The Commission submits a proposal to the European Parliament and the Council.

First reading:

The European Parliament adopts its position at first reading (simple majority) and communicates it to the Council;

- If the Council approves the European Parliament's position, the act concerned is adopted as presented;
- If the Council does not approve the Parliament's position, it adopts its own position at first reading and communicates it to the Parliament. The Treaty provides that the Council and the Commission inform the Parliament "fully" of their respective positions.

Second reading:

The European Parliament has three months in which to examine the Council's position. It may:

- approve the Council's position or not take a decision, the act concerned being deemed to have been adopted in the same wording as that of the Council's position;
- reject it by a majority of its component members [currently 369 out of 736], whereupon the proposed act is deemed not adopted and the procedure is terminated;
- propose amendments by a majority of its component members. The text thus amended is forwarded to the Council and to the Commission, and the latter delivers an opinion on those amendments;

The Council must review and rule on the Parliament's amendments within three months, acting by a qualified majority for amendments approved by the Commission, and unanimously for amendments on which the Commission has delivered a negative opinion. It may:

- approve all of the Parliament's amendments, in which case the act is deemed to have been adopted;
- not approve all the amendments, in which case the President of the Council, in agreement with that of the European Parliament, convenes a meeting of the Conciliation Committee within six weeks.

Conciliation:

The Conciliation Committee, which is composed of the members of the Council or their representatives and of an equal number of members representing the Parliament, is responsible for reaching an agreement on a joint text, by a qualified majority of the members of the Council and by a majority of the members of Parliament, within six weeks of its being convened. The Commission takes part in the Committee's proceedings and may take initiatives to promote a consensus.

If, within the allotted time limits, the Conciliation Committee fails to reach an agreement, the proposed act is deemed to have not been adopted.

Third reading:

If the Conciliation Committee manages to agree on a joint text, the Parliament, acting by a majority of the votes cast, and the Council, acting by a qualified majority, each have a period of six weeks in which to adopt the act. If they fail to do so, the proposed act is deemed to have not been adopted.

The allotted time limits of three months and six weeks can be extended by a maximum of one month and two weeks respectively at the initiative of the Parliament or of the Council.

3. Consolidated version of the Treaty of Lisbon: http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2008:115:SOM:EN:HTML (9.5.2008 EN *Official Journal of the European Union* C 115/173).

1.2. Inter-institutional agreements relating to codecision

As soon as it was introduced by the Treaty of Maastricht, the codecision procedure gave rise to lengthy negotiations aimed at specifying the rules for its application. It notably appeared necessary to formulate specific guidelines for promoting good relations between the institutions and for determining how the Conciliation Committee would function. Such discussions resulted in an inter-institutional agreement. Agreements of this sort do not constitute a homogeneous category of acts and, may take diverse forms; inter-institutional agreements *per se*, but also joint declarations, presidential statements, exchanges of letters, notes, communications, codes of conduct, *modus vivendi*, framework agreements, Secretary Generals' decisions, *etc*. Since 1957, more than 100 agreements of various sorts have been made to formalise the relations between the three institutions, primarily in the legislative and budgetary areas. They stipulate the procedures provided for by the treaties and, without opposing them, may include alternative arrangements which limit inter-institutional disputes and expedite the decision-making process.

As for codecision, the Parliament immediately called for establishing a structured dialogue with the Commission and the Council. The latter, however, proved reluctant to agree to this and even expressed reservations about the conciliation procedure. The ministers thus initially sent to sit on the committee only members of the permanent representations. This attitude led MEPs to demonstrate firmer resolve. By rejecting a certain number of texts, they induced the Council to agree to a change of procedure in the Treaty of Amsterdam and to provide for a direct dialogue between the two institutions.[4] Declaration no. 34, annexed to the Treaty of Amsterdam, called on the institutions "to make every effort to ensure that the codecision procedure operates as expeditiously as possible." After this, the number of institutional agreements multiplied.

In May 1999, the three institutions adopted a "Joint Declaration on Practical Arrangements for the Codecision Procedure." In this text, the institutions agreed 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." The practice of

4. S. Hix, "Constitutional Agenda-Setting Through Discretion in Rule Interpretation: Why the European Parliament Won at Amsterdam", *British Journal of Political Science*, Vol. 32, No. 2, 2002, pp. 259-280.

early agreements originated in this agreement. The prospect of the early adoption of legislation nonetheless quickly provoked reservations, particularly among the EP's ranks, where some voiced objections to what was viewed as a lack of transparency. The December 2003 inter-institutional agreement on "Better Regulation"[5] is, in part, a response to such concerns. In this text, the three institutions make a series of commitments to improve the quality of legislation. They agreed to abide by general principles – such as democratic legitimacy, subsidiarity, proportionality, and legal certainty – and to promote more transparency, simplicity and consistency in the legislative process. This included ensuring a better coordination of the legislative process from the earliest preliminary stages of the proposal by formulating an indicative timetable to synchronise the treatment of dossiers and information exchanges and to intensify contact between the institutions.

This Agreement marked a clear change in attitude on the part of the Council which, until then, had refused to actively participate in a trilogue with the EP and the Commission. As from the 2000s, the three institutions formed the habit of putting a limited number of representatives in charge of negotiating legislative proposals outside of the formal procedure at an increasingly earlier stage in order to shorten the duration of the adoption procedure and minimise potential conflict. The option of concluding the codecision procedure at first reading was confirmed by a 2007 joint declaration which clarified certain procedural aspects of the 1999 declaration, notably the importance of coordination, the inter-institutional exchange of information and of text consistency. The institutions promoted the practice of trilogues by means of this declaration. They view this inter-institutional cooperation system as a way to facilitate first reading agreements, which should be used more often to comply with the principles of transparency and efficacy. The declaration defines a series of "best practices," notably providing that, should an informal negotiation result in an agreement, its content should be included in an exchange of letters between the President of COREPER and the Chairperson

5. The European Parliament, the Council and the Commission: Joint Declaration on Practical Arrangements for the Codecision Procedure of 13 June 2007 (Article 251 of the EC Treaty). See also the Commission's "Better Regulation" website: http://ec.europa.eu/governance/better_regulation/index_en.htm; as well as E. Van den Abeele: "L'agenda Mieux légiférer de l'Union européenne", in *Courrier hebdomadaire du Crisp*, No. 2028-2029, 2009; C. Radaelli: "Whither better regulation for the Lisbon agenda?", in *Journal of European Public Policy*, Vol. 14, No. 2, 2007, pp. 190-207.

of parliamentary committee in charge of the dossier, which would be binding for them, and of which the Commission would be informed.

The Joint Declaration on the Practical Arrangements for the Codecision Procedure of 13 June 2007 stipulates each institution's role in the various phases of the procedure.[6] In its Article 295 of the TFEU, the Treaty of Lisbon also recalls the usefulness of inter-institutional agreements outside of the Treaties: "The EP, the Council and the Commission shall consult each other and make arrangements for their cooperation by common agreement. To that end, they may, in compliance with the Treaties, conclude inter-institutional agreements (IIA) which may be of a binding nature."

In short, since the Treaty of Amsterdam, the desire for institutional solidarity has been evident among both the leaders of the Union's institutions and the Member States' representatives.

1.3. How the institutions internally adapted to codecision

This resolve also translated into unilateral decisions by which the institutions strived to improve their decision-making capacity and to promote the smooth course of the codecision procedure.

The EP adapted to the codecision procedure within the framework of an older process initiated in anticipation of the entry into effect of the Single European Act. To make their opinions more effectively heard and to overcome the constraints of the new cooperation procedure (binding time limits, need to win a majority of members, and not just voting members, in order to adopt a text), the MPEs chose to streamline the way in which their Assembly functioned. To do this, they had to overcome many political constraints (complex relations with the Commission and the Council, the political groups' heterogeneity) and organisational restrictions (set number of sessions and their limited duration, excessive workforce, agenda density, technical nature of the texts).

6. The European Parliament, the Council and the Commission: "Joint Declaration on Practical Arrangements for the Codecision Procedure of 13 June 2007" (Article 251 of the EC Treaty).

These changes primarily took the form of multiple revisions of the Parliamentary Assembly's Rules of Procedure.[7] Since 1979, the year of the first direct elections to the European Parliament, this text was revised 17 times, not counting minor reforms. Over time, it became increasingly detailed: from the 1979 version consisting of 42 pages, 54 provisions and 2 annexes, it now includes 126 pages, 216 articles and 20 annexes; the regulation now consists of a total of 239 pages. These changes have translated into a constantly growing influence on the part of the governing bodies and of the political groups, an increasingly preponderant role of parliamentary committees, a stricter organisation of plenary debates, and a reduction in the MEPs' individual rights.

In terms of legislation, every effort has been made to increase the EP's "efficiency" in examining texts within the parliamentary committees, and later in plenary. Moreover, the permanent members of the EP's delegation to the Conciliation Committee have strived to ensure that the Assembly would take a more non-conflictual approach to the procedure, limit the number of its amendments and improve the latter's legal quality, which they have viewed as too often inadequate. At present, "inter-institutional negotiations in legislative procedures" are the subject of Article 70 of the EP's Rules of Procedure, which provides that:

1. "Negotiations with the other institutions aimed at reaching an agreement in the course of a legislative procedure shall be conducted having regard to the Code of Conduct for negotiating in the context of the ordinary legislative procedure.
2. Before entering into such negotiations, the committee responsible should, in principle, take a decision by a majority of its members and adopt a mandate, orientations or priorities.
3. If the negotiations lead to a compromise with the Council following the adoption of the report by the committee, the committee shall in any case be reconsulted before the vote in plenary."[8]

7. Olivier Costa, Nathalie Brack and Clarissa Dri, "Structural and political consequences of procedural changes in the European Parliament," Ninth Workshop of Parliamentary Scholars and Parliamentarians, Wroxton College, Oxfordshire, U.K., 24-25 July 2010.
8. http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+RULES-EP+20101110+RULE-070+DOC+XML+V0//EN&language=EN&navigationBar=YES

The Code of Conduct to which the regulation refers is the Joint Declaration of 13 June 2009, which details the procedure and which was integrated into the regulation in the form of an annex (see 3.3. below).

1.4. Institutions in torment

Although it would be ill-advised to attribute changes in the codecision procedure to any particular phenomenon, it is worthwhile to note the specific institutional context in which this pacification process took place.

Of particular interest is the weakening of the European Commission: the Santer Commission's resignation in March 1999 marked the climax of a radical questioning of its effectiveness (its handling of the mad cow disease crisis), its ability to manage European funds (the scandal involving technical assistance offices) and the probity of certain commissioners. The selection of a left-wing European Commission President, Romano Prodi, a few weeks prior to the June 1999 European Parliament election – which was a landmark victory for Christian-Democrats and Conservatives – nonetheless proved to be counter-productive. Relations between the two institutions worsened as a result of this partisan hiatus. In broader terms, Romano Prodi failed to give a greater political aspect to the Commission's presidency, despite the new powers vested in him by the Treaty of Nice. His successor, José Manuel Barroso, was also appointed in the strained context of the accession to the EU of 10 new members (2004) and the signing in Rome of the Constitutional Treaty. The EP proved to be particularly demanding during the new executive's investiture process, which took place several months late, at the end of November 2004. The Commission chose to focus on simplifying European law and on globally improving the effectiveness of the Union's policies, following the direction taken by Jacques Santer and Romano Prodi, who were also proponents of the "do less, but do better" approach. The failure of the French and Dutch referendums to ratify the Constitutional Treaty (29 May and 1 June 2005) was the final act which plunged the Union into a deep crisis.

This period was also difficult within the Council and the European Council. The year 2000 was marked by inter-governmental disputes of unprecedented scope during the negotiation on institutional reform with a view to enlargement. The debate – unmatched since 1957 – on the respective weight which each Member State should be given in the institutions (number of commissioners, voting privileges within the Council, number of MEPs) provoked a considerable tension between the Heads of State and Government. The partial failure of the Treaty of Nice attested to a sense of powerlessness on the part of the States' representatives, who chose for the first time to entrust the debate on institutional reform to an *ad hoc* Convention. The latter managed to formulate a rather ambitious draft European Constitution, but the hurdles surrounding its adoption, notably the December 2003 failure of the Brussels European Council, led to what all had hoped to avoid: the Union's enlargement on the basis of the Treaty of Nice. Within the Council, and mainly within its General Secretariat, the prospect of increasing from 15 to 25 members without a fundamental reform of the Union's institutional architecture caused many to fear a generalised decision deadlock. Even before the enlargement occurred, it was obvious that codecision procedures were slowing down the decision-making process.[9] EU-15 representatives were mainly worried that the newcomers, who already had their hands full coming to grips with the body of EU laws and policies, would oppose any new European integration progress. The failure to ratify the Constitutional Treaty further exacerbated doubts about the enlarged Union's ability to function.

In comparison, the European Parliament is the institution which suffered the least from this troubled period. The difficulties encountered by the Santer Commission gave MEPs the opportunity to assert ability to maintain control and to appear to be the guarantors of a certain orthodoxy. The Treaties of Nice and of Lisbon considerably strengthened their legislative power (and, by extension, the scope of the codecision procedure) and supervisory power (by strengthening the Commission's investiture procedure). The Convention on the Future of the European Union (January 2002-June 2003), within which they were strongly represented, gave them a first-time opportunity to actively participate in the Treaties' reform process and

9. H. Schulz and T. König , "Institutional Reform and Decision-Making Efficiency in the European Union," *American Political Science Review*, 2000, 44(4), pp. 653-666.

to promote the new scope of their powers.[10] Lastly, the Parliament adapted to the consequences of enlargement without any great difficulty. Thanks to the work done by European political parties within the new Member States in the early 1990s, the great majority of EU-10 MEPs chose to join the European Parliament's historical groups. Concerns about the potential emergence of large Eurosceptic groups or of an East-West split turned out to be unfounded.

Such an institutional and political context no doubt contributed to the development of inter-institutional relations in codecision matters. The Council has sought to promote the smooth functioning of the European institutions in order to pacify the Union's decision-making capacity. To this end, it eventually acceded to the MEPs' former demand that a constant dialogue be maintained between the Council and the EP on the proposals of the Commission. The latter, motivated by the same operational concern and by a desire to improve the quality of European legislation, also proposed to the EP that it be associated early on with formulating all legislative proposals. This is one of the components of the Better Regulation strategy launched in 2005 by the Barroso Commission. Moreover, the Commission wished to find a *modus vivendi* with the EP and the Council in order to allow for the simplified adoption of the numerous legislative acts required for the codification or quick recasting of a part of European law.

As for the EP, the Council's and the Commission's dialogue overtures were well-received, at least by key officials (President and Vice-Presidents, committee chairpersons, presidents of key groups, and permanent members of the Conciliation Committee), who viewed them as an opportunity to further the "streamlining" of EP deliberations undertaken since the Single European Act's entry into force. As with the budgetary process two decades earlier, the legislative process was thus swiftly alleviated of many causes for dispute.

10. O. Costa, "La contribution de la composante Parlement européen à la Convention européenne," *Politique européenne*, 13, 2004, pp. 21-41.

2. Early agreement practices

2.1. Informal procedures…

It is common knowledge that it is the European Commission's responsibility to formulate legislative proposals. To that end, it consults the Council's groups of experts and more and more often relies on exchanges with the competent EP parliamentary committee, notably based on communications which customarily precede the formal proposal. After it is adopted by the College of Commissioners, the proposal is transmitted to the Council and to the EP, where it is respectively reviewed by a working group and by a parliamentary committee. The latter appoints a rapporteur, as well as some "shadow rapporteurs" who belong to other political groups than that of the lead rapporteur. Once the rapporteur has formulated a first version of his/her report and the Council's working group has expressed an opinion, discussions between the two institutions may begin.

In principle, early-stage conclusion of legislative procedure is reserved for technical texts devoid of controversy or political agendas, or for emergencies. A large portion of first reading agreements entered into by the EP's Committee on Legal Affairs, for example, concerns proposals which introduce new procedures in existing legisla-

tion (i.e., the new comitology system: "Regulatory with Scrutiny Committees") or which implement a codification of existing standards on the basis of established law. These dossiers very often are not even debated in plenary but are directly submitted to a vote by the MEPs, who rely on the rapporteur's opinion and on those expressed during the debates in committee which they have had within their respective political groups. On the other hand, texts concerning key issues likely to mobilise public opinion are more rarely the subject of early agreements, except in urgent cases.

However, there is no objective criterion for assessing the importance of dossiers: a new text dealing with an "unchartered" area of European law may be totally unrelated to any critical issue; conversely, a seemingly minor change in existing provisions may have significant political, economic or social consequences. The difficulty also resides in the fact that the institutions' representatives often have opposing views on this matter. The Commission's services in particular tend to interpret the notions of codification and recasting in a much broader way, which causes frequent disputes with the EP. Determining the Union's legislative timetable and the possible urgent nature of a given proposal is essentially the responsibility of the Council Presidency. Despite the adoption of a "trio" system designed to harmonise the Union's political agenda, each six-month presidency retains some degree of freedom and chooses the proposals which it wishes to see adopted by the end of its mandate. First reading agreements constitute privileged instruments in this regard.

If the EP and the Council agree to expedite the decision-making process on a particular text, they set up a trilogue between their representatives and those of the Commission. Indeed, Commission representatives monitor negotiations between the two branches of legislative authority in order to ensure that the compromise does not deviate too much from the initial proposal. These representatives are serving a mandate from the College of Commissioners, which entitles them, on its behalf, to express opinions on possible concessions and changes. In the Council, it is the COREPER which defines the negotiators' mandate, whereas in the EP this role belongs to the competent parliamentary committee. The number of negotiators, as well as the frequency of trilogues, vary on a case-by-case basis. In the years

following the ratification of the Treaty of Amsterdam, the first reading agreements were facilitated by the considerable freedom of action afforded to the rapporteur. The latter was not really bound by a specific mandate from the committee responsible; he could negotiate with the Council on his or her own, or accompanied by the chairperson of his/her committee, and was not required to give a precise account to the other MEPs. This naturally could give the impression that the agreement had been reached through back-stairs bargaining with some of the Council's and Commission's representatives. Once concluded, the agreement was presented in plenary as a not-to-be-missed event.

Certain dossiers are completed in four negotiating sessions involving a small number of people; while others may require very lengthy negotiating in full meeting rooms. Such was the case, for example, with the "telecommunications package" deliberated in the first half of 2009. During the trilogue, negotiators work with a four-column document: one column presents each of the three institutions' positions and the last one is reserved for compromise proposals. Negotiations are pursued until an agreement is reached. As previously indicated, it consists of an exchange of letters between the President of COREPER and the Chairperson of the competent parliamentary committee. The compromise is voted on first in plenary and then by the Council. If approved, it assumes the form of the common position of the Council, which deliberates on the text adopted by the EP. If the two institutions manage to reconcile their differences of opinion, the standard proposal is deemed to have been adopted.

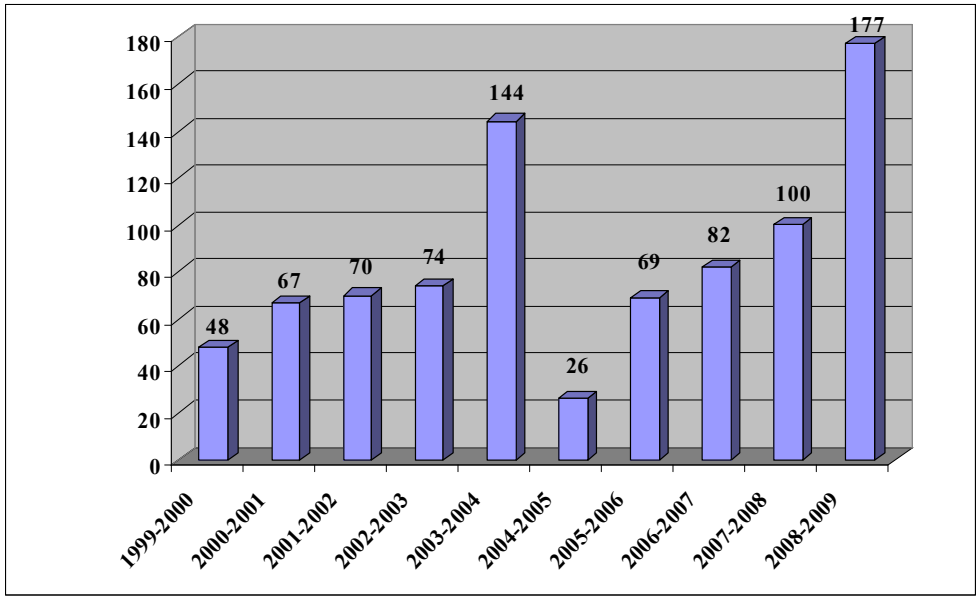
2.2. Escalating inflation

Since its introduction in November 1993, the scope of the codecision procedure has been constantly broadened: originally limited to 15 areas, the number covered rose to 38 with the Treaty of Amsterdam, to 43 with that of Nice, and is now 83.[11] The widening of the procedure's scope has led to an overall increase in the number of dossiers to be dealt with in codecision – with a noticeable dip after

11. European Parliament, *Activity Report, 1 May 1999 to 30 April 2004 (5th parliamentary term) of the delegations to the Conciliation Committee*, presented by Vice-Presidents Giorgos Dimitrakopoulos, Charlotte Cederschiöld and Renzo Imbeni, p. 7.

each European election. Managing this work flow has been one of the key parameters in the development of institutional activities, inasmuch as the three institutions' leaders have ensured that their capacity to adopt texts would be preserved.

Graph 1: Number of proposals adopted in codecision (1999-2009)



Source: European Parliament, *"Codecision and conciliation: A Guide to how the Parliament co-legislates under the Treaty of Lisbon,"* November 2009, p. 8.

Graph 1 shows that the number of agreements reached rises sharply prior to every European election. Adopting the texts before the end of the legislative term avoids having to start over negotiations with new protagonists. EP leaders are particularly firm on this point. They know from experience that their institution is quite limited in the year following a European election. They are also concerned about the uncertainties surrounding the appointment of a new Commission and possibility that a rapporteur may not be re-elected, which would require the decisional process to be restarted from scratch. "Contrary to doubts expressed by some, Parliament and Council, with the help of the Commission, have successfully adapted to the large increase in the number of procedures to make it possible to find agreement in nearly every case."[12]

12. *Ibid.*

The extent of this phenomenon varies widely according to the areas concerned. Before codecision became quasi-generalised by the Treaty of Lisbon, all European public action sectors were not equally concerned by this process. Review of a breakdown of dossiers within the Parliament nonetheless reveals some stable trends, with the exception of the Committee on Civil Liberties, Justice and Home Affairs (LIBE), which experienced a large increase in texts adopted in codecision during the 6th parliamentary term after the procedure was broadened by the Treaty of Nice.[13] It is the Committee on the Environment, Public Health and Food Safety (ENVI) which handles the largest number of codecision dossiers: during the 2004-2009 legislative term, these represented 66% of the dossiers processed by this Committee,[14] and 20% of all proposals under codecision received by the EP.[15] The Committee on Transport and Tourism (TRAN) also manages a large number of codecision dossiers (11.4% for 2004-2009).[16] The Committee on Culture and Education (CULT) and the Committee on Employment and Social Affairs (EMPL) logically show a small percentage of texts under codecision: 5.1% and 5.9% respectively for the 6th parliamentary term.

The following graph and table illustrate the broadening trends of the early agreements, showing the percentage of texts submitted to this procedure respectively adopted at first, second and third reading. After the option of a first reading agreement was institutionalised by the Treaty of Amsterdam (which entered into force on 1 May 1999), the percentage of dossiers concluded at this stage significantly increased.

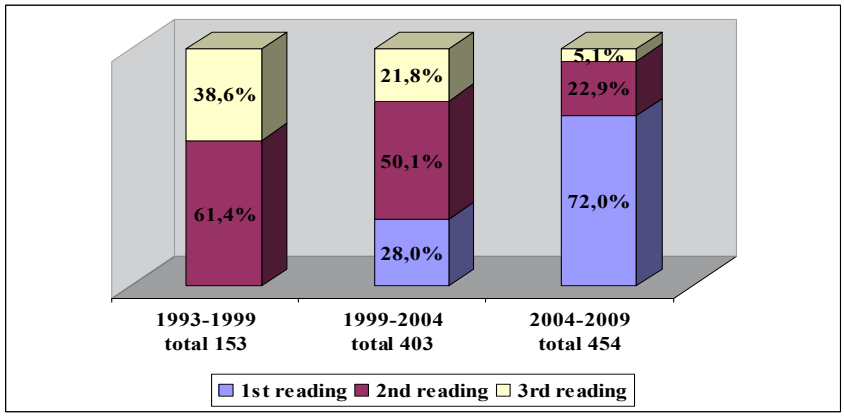
13. European Parliament, *Activity Report, 1 May 2004 to 13 July 2009*, *op cit.*, p. 7.
14. European Parliament, *Activity Report of the Committee on the Environment, Public Health and Food Safety 2004-2009*, Brussels, 31 March 2009, p. 6.
15. *Ibid*., p. 8.
16. European Parliament, *Activity Report, 1 May 2004 to 13 July 2009*, *op. cit.*, p. 7.

Table 1: Number and percentage of codecision texts adopted at first, second and third reading (1 November 1993-2009)

	Total codecision	Dossiers completed at 1st reading		Dossiers completed at 2nd reading		Dossiers completed at 3rd reading	
		Number	%	Number	%	Number	%
1994-1999 (Annual average)	30	-		18	60	12	40
1999-2000	48	8	17	30	62	10	21
2000-2001	67	17	25	28	42	22	33
2001-2002	70	21	30	32	46	17	24
2002-2003	74	15	20	38	51	21	29
2003-2004	144	52	36	74	51	18	13
2004-2005	26	18	69	8	31	-	-
2005-2006	69	45	65	17	25	7	10
2006-2007	82	48	58	30	37	4	5
2007-2008	100	74	74	20	20	6	6
2008-2009	177	142	80	29	16	6	4

Source: European Parliament, *Activity Report, 1 May 2004 to 13 July 2009, of the delegations to the Conciliation Committee*, presented by Rodi Kratsa-Tsagaropoulou, Alejo Vidal-Quadras and Mechtild Rothe, PE427.162v01-00, p. 10.

GRAPH 2: PERCENTAGE OF CODECISION TEXTS ADOPTED AT FIRST, SECOND AND THIRD READING (1 NOVEMBER 1993-2009)



SOURCE: EUROPEAN PARLIAMENT, *ACTIVITY REPORT, 1 MAY 2004 TO 13 JULY 2009, OF THE DELEGATIONS TO THE CONCILIATION COMMITTEE*, PRESENTED BY RODI KRATSA-TSAGAROPOULOU, ALEJO VIDAL-QUADRAS AND MECHTILD ROTHE, PE427.162V01-00, P. 8.

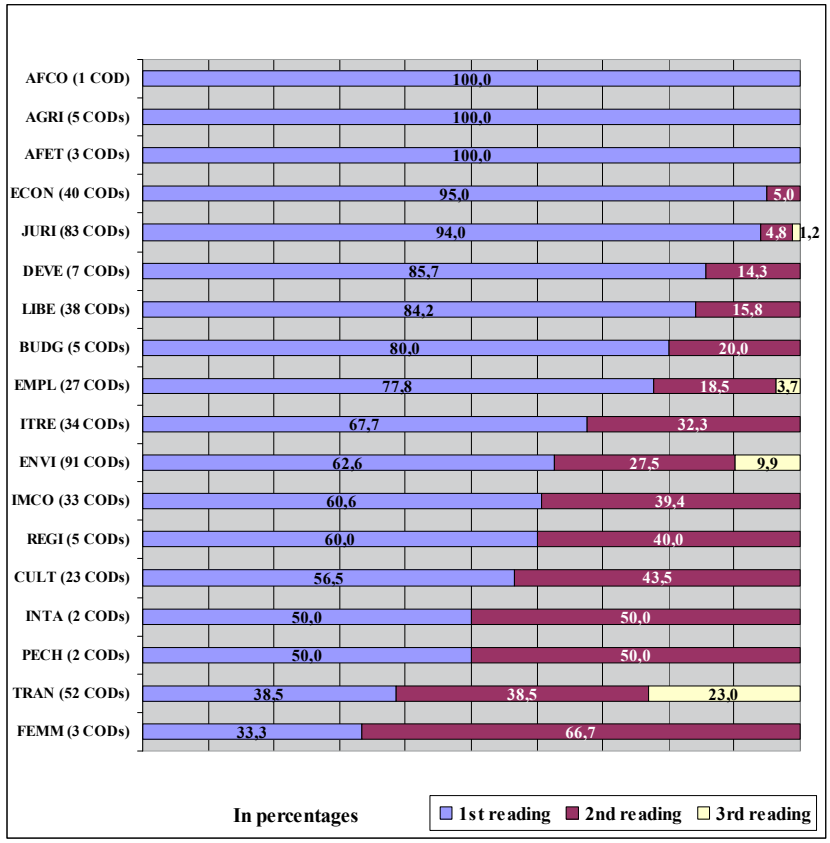
We have already mentioned some of the primary reasons for this trend. In their Activity Report for the 6th parliamentary term, the Vice-Presidents responsible for conciliation pointed out the following factors: "(…) first, the increasing familiarity with the codecision procedure – and in particular the possibility to conclude in 1st reading following a simple majority vote in Parliament – by all institutions involved. Linked to this is, secondly, the greater number and better contacts between the institutions whose representatives now start talking to each other routinely very early in the procedure. A third possible explanatory factor seems to be the higher number of uncontroversial and rather technical proposals. Fourthly, the objective, perceived or political urgency of proposals presented by the Commission also seems to play a role. Fifthly, since the enlargement of 2004, it seems to become increasingly difficult to find a [common] Council position among the now 27 Member States and an early input of the Parliament can be seen as a factor facilitating the Council's internal consensus-building. Finally, Council Presidencies seem very eager to reach quick agreements during their Presidencies and they seem to favour 1st reading negotiations for which the arrangements are much more flexible than in later stages of the procedure. Perhaps the major factor

is the trend to prepare more exhaustively the 1st reading (through evaluation of the Commission's Impact assessment, systematic evidence gathering, studies, public hearings, *etc.*"[17] The economies realised as a result of early agreements are also mentioned: concluding an early agreement enables costs to be minimised (interpreting and translation) and lightens the agenda of the institutions concerned, particularly the EP's which is always full.[18]

Graph 3, however, shows that practices vary greatly from one committee to the next. While some systematically favour trilogues and adopting texts at first reading, others are more apt to leave parliamentary work to the plenary. The Committees on Economic and Monetary Affairs (ECON), Legal Affairs (JURI), Industry, Research and Energy (ITRE) and the Environment thus conclude most of the dossiers for which they are responsible at first reading, unlike the Committee on Transport and the Committee on Women's Rights and Gender Equality (FEMM). These differences are not just due to the specific approach developed by each committee's members, but also to the type of dossiers with which they are entrusted, and their urgency.

17. *Ibid*., pp.11-12.
18. Interview with an ALDE MEP's parliamentary assistant on 27 May 2010.

Graph 3: Breakdown of the phases of adoption of codecision texts by parliamentary committee



Source: European Parliament, *Activity Report, 1 May 2004 to 13 July 2009, of the delegations to the Conciliation Committee*, presented by Rodi Kratsa-Tsagaropoulou, Alejo Vidal-Quadras and Mechtild Rothe, PE427.162v01-00, p. 11.

Lastly, it should be noted that although the average duration of codecision procedures has slightly decreased (20.7 months during the 6th parliamentary term vs. 22 in the preceding one), that of first reading agreements rose significantly in that same period from 11 to 16.2 months. According to the EP's Activity Report, this trend can be explained by the higher number of first reading agreements dealing with "more and more controversial dossiers which need time to be negotiated (...)".[19] As plausible as it may seem, this theory is nonetheless disputable.

19. *Ibid.*, p. 13. See also the figures cited in a note from the Commission (http://ec.europa.eu/codecision/institutional/analysis/codecision_stat_en.pdf).

Data provided by the Observatory of European Institutions for the period 2002-2008[20] show that although the rate of first reading agreements for "controversial" dossiers put to a vote in the Council is certainly high (43%), it remains below the average (53.8%). At the very least, this shows that there is no systematic tendency to evade thorny questions. In fact, there is some logic to it: if there is a debate, it is bound to be made public.

2.3. Examples of early agreements

In May 2010, the EP adopted Vital Moreira's report recommending that the EU provide macro-financial assistance to Ukraine.[21] It was to be an exceptional assistance, requiring a prompt decision, and therefore the text was adopted at first reading. As a result, less than seven months passed between the appointment of the rapporteur and the plenary vote. However, the EP somewhat slowed down the process in anticipation of the entry into effect into force of the Treaty of Lisbon, which enhanced its influence. This sort of dossier, which previously was considered under the consultation procedure, is now subject to codecision. Determining which "comitology" system should be applied to this aid also aroused differences of opinion between the EP and the Commission. Nonetheless, as there was inter-institutional consensus on the need to grant assistance to Ukraine, these technical difficulties were ultimately overcome. Within the EP, the dossier was not deliberated in plenary, since it was deemed less important by the Conference of Presidents, the political body responsible for preparing plenary session agendas, composed of the EP's President and of those of the various political groups. Under the best scenario, it could have been posted on the agenda only at a time of minimal attendance by elected officials, therefore the rapporteur and members of the parliamentary committee did not insist on it being reviewed in plenary.[22]

An early agreement was also reached on a proposal for a Directive on "Standards of quality and safety of human organs intended for transplantation".[23] This text,

20. Legislative production of the European Union 2002-2008 [database], the Centre for Socio-Political Data (CDSP) and the Centre for European Studies (CEE) of Sciences Po [producer], Centre for Socio-Political Data [distributor].
21. Report A7-0058/2010 of 23 March 2010, procedure (COM(2009)0580 – C7-0277/2009 – 2009/0162(COD).
22. Interview with an administrator of the Secretariat of the INTA parliamentary committee (International Trade), 21 May 2010.
23. Report A7-0106/2010 of 26 March 2010, procedure (COM(2008)0818 – C6-0480/2008 – 2008/0238(COD).

whose rapporteur was Miroslav Mikolášik, was adopted by the EP in May 2009. Contrary to the preceding example, this proposal dealt with a sensitive subject involving ethics and morality. It quickly split the political groups into two camps: the Christian-Democrats (PPE) and Greens on one side and the Socialists (PSE) and the Alliance of Liberals and Democrats for Europe (ALDE) on the other. The dossier was nonetheless concluded at first reading through a combination of several factors. First, the report was part of a "package" of standards which European institutions have been working on since 2001. Therefore, the subject was not new and a consensus already existed on the need to adopt this directive. Secondly, the rapporteur's personality and reconciliatory attitude helped to diffuse some of the emotion in the debates. The Spanish Presidency had made adoption of this standard one of its key priorities. Lastly, the EP was "neutralised" because it was divided into two camps. It was not in a position to impose its viewpoint and the decisive debate took place between the Council and the Commission, which, as a whole, were on the same wavelength.[24]

The Regulation on Textile Names and Related Labelling of Textile Products, for which Toine Manders was the rapporteur, was also the subject of a trilogue, although one that was less conclusive.[25] Originally, this was a technical text likely to be adopted at first reading. However, the EP voted in favour of a political amendment which was rejected by the Council, thus preventing the text from being adopted at first reading. Here, too, the rapporteur's personality played a key role. Toine Manders, a member of the ADLE group, objected in principle to first reading agreements, a procedure which he viewed as detrimental to democracy and the rights of the EP. Within the trilogue framework, the Council's representatives voiced their opposition to the EP's amendment. The alternative was simple: either the EP should withdraw its amendment so that the text could be adopted at first reading, or it should maintain it and the procedure would then proceed. Toine Manders chose the second option, believing that the Council could be compelled to support it. As of this writing, the Council's position at first reading is not yet known; it is possible that it might eventually approve the EP's amendment or, if not, adopt it at an early second reading.[26]

24. Interview with an ALDE MEP's parliamentary assistant on 27 May 2010.
25. Report A7-0122/2010 of 30 April 2010, procedure (COM(2009)0031 – C6-0048/2009 – 2009/0006(COD).
26. Interview with Toine Manders on 19 May 2010. Interview with an administrator of the Secretariat of the INTA parliamentary committee (International Trade), 21 May 2010.

Early agreements may also concern dossiers of great political importance. That was the case with the "climate change" package. The Council placed considerable pressure on the other institutions to ensure that this body of texts would be adopted by the end of the year, since it was to be the French Presidency's main priority in the second half of 2008. The package was submitted to a plenary vote just a few days after the last trilogue, which left very little time for the various political groups to carefully consider its terms. According to one EP official, "Actually, that meant that they did not want people to think about it or question the negotiation's conclusions."[27] In an unusual move, the European Council, bowing to pressure from the French President, became directly involved in the process in order to expedite the dossier. Short of time and under enormous pressure, the EP's representatives were unsuccessful in getting their opinions heard properly in the trilogue. The Green MEPs therefore voted against certain aspects of the "package," which nonetheless carried the vote at first reading. In fact, a majority of the MEPs felt that these texts were indispensable and they were determined to see them passed before the June 2009 elections. "I think that this is not a practice which necessarily allows the EP to make the most of its prerogatives. But there were very few alternatives. The elections were scheduled for June 2009 and the first reading could not take place before the end of 2008. It was inconceivable at the time to have a second reading between December 2008 and the last plenary in May 2009. So we had no choice. If we wanted the climate change package to be adopted, we needed to conclude it before the elections. Fortunately, the French Presidency had taken charge of the dossier and concluded it in December."[28] This example clearly shows the importance of the Council Presidency, the time factor, and the institutions' determination to conclude a maximum of procedures prior to European elections, which cause a lengthy interruption in the legislative process.

27. Interview with an official of the Secretariat of the Parliamentary Committee on Environment, Public Health and Food Safety (ENVI) on 8 June 2010.
28. *Idem*.

3. The early agreements debate

3.1. Who benefits from these agreements?

The practice of early agreements does not seem to have triggered any significant debates within the Council. With the growing use of codecision, inter-institutional relations have necessitated increasing attention on the part of its services; some members have also feared a surge in parliamentary vetoes. A consensus thus emerged to enter into negotiations with the EP as soon as possible in order to prevent the first reading process from giving rise to a slew of amendments without consultation or consistency.[29] However, the Council has remained determined to maintain its influence, first by using relatively clear mandates, and then by striving to present a united front during informal trilogues: its representatives do not disclose the positions of the various Member States, but do share the position of the Council as a whole.

29. H. Farrell and A. Héritier, "Interorganizational Cooperation and Interorganizational Power: Early Agreements under Codecision and Their Impact on the Parliament and the Council," *Comparative Political Studies*, Vol. 37, 2004, No. 10, pp. 1184-1212; H. Farrell and A. Héritier, "Codecision and Institutional Change," *EUI Working Paper RSCAS* No. 2006/41, Robert Schuman Centre for Advanced Studies, Florence, Italy.

The situation is more complicated with regard to Parliament, whose negotiating power varies according to the different phases of the procedure *(see Table 2)*. Formally speaking, it is in conciliation that the EP carries more weight, since it then has a veto power. At second reading, a comparison of the Council's position and the EP amendments with the final outcome shows that the EP often tends to concur with the Council's views. At first reading, the EP is in a relatively weak institutional position: its representatives cannot take advantage of the full Assembly's support, because at the time of the trilogues the dossier has not yet been put to a vote in plenary. Actually, the position "of the EP" represents only the opinions of a small number of MEPs, while at the same stage, the Council has already adopted a common position supported by a qualified majority of the Member States. The rapporteur's personality, command of the dossier and talents as a negotiator then become decisive factors, but these factors alone cannot compensate for the structural weakness of the EP's position.

Table 2: Main differences between the 1st and 2nd readings

First reading	• No deadline • The Commission's proposal is reviewed by the committee responsible and the committees to which it is referred for an opinion • Broad amendment admissibility criteria • Parliament decides (to approve, reject or amend the Commission's proposal) by simple majority (majority of MEPs taking part in the vote)
Second reading	• Strict deadlines of 3 to 4 months • The common position is reviewed only by the committee responsible • Strict amendment admissibility criteria: Parliament approves the common position by simple majority, but rejects or amends it by absolute majority (majority of all MEPs in the European Parliament).

Source: European Parliament, *"Codecision and conciliation: A Guide to how the Parliament co-legislates under the Treaty of Lisbon,"* November 2009, p. 13.

Critics also stress that from the visibility standpoint, it is not in Parliament's best interest to use early agreements. A dossier in which everything is concluded in advance and which does not give rise to confrontation cannot engage media attention. As noted in one parliamentary report: "The public and the media (…) are looking for political confrontation along clear political lines and not for a flat, 'technocratic' debate where the representatives of the three Institutions congratulate each other on the 'good work' done."[30] Only the rapporteur can hope to benefit from a first reading agreement, but experience shows that this rarely happens. Ultimately, the only factor which may work to the EP's advantage in this context is the possible desire of the Council or of the Presidency to reach a quick agreement, which may induce them to make some concessions.

Thus, although the Treaty places both institutions on equal footing as co-legislators, the Council's influence is usually perceived to be greater than that of the EP.[31] In fact, in most cases it is the Presidency which pushes for an early agreement, since it will benefit the most from it in that the number of agreements concluded constitutes a key element of its half-year report.[32] The Council's position is also more advantageous in that it relies not only on the political support of a majority (at least) of the national governments, but also on the competences of national and European experts. This dual backing is invaluable in negotiations with the EP, but limits the Council representatives' flexibility, as they are bound by a sort of mandate. The Conference of Presidents took note of the Council's advantage and wished to increase the amount of expertise made available to the European MEPs.[33] Since 2004, a series of instruments have been implemented to make up for this shortcoming: "(…) the policy departments within the Directorate-Generals for internal and external policies (…) provide the parliamentary committees with internal (notes and fact sheets) and external (studies, briefing notes, invitations of experts to hearings, workshops)."[34] Every MEP may also ask the EP library to conduct research on a specific subject. Despite these efforts, there is a substantial imbalance in terms of expertise.

30. Working Party on Parliamentary Reform, *Codecision and Conciliation*, Working Document No. 12 (Part II), 11 December 2007, p. 3.
31. Interview with an official of the Secretariat of the Parliamentary Committee on Environment, Public Health and Food Safety (ENVI) on 8 June 2010.
32. Interview with an official of the Secretariat-General of the European Commission on 26 May 2010.
33. Interview with an official of the Parliamentary Committee on Environment, Public Health and Food Safety (ENVI) on 8 June 2010.
34. European Parliament, *Activity Report, 1 May 2004 to 13 July 2009*, *loc. cit*., p. 27.

The Commission is often presented as the main loser in situations involving early agreements.[35] It can, however, benefit from them, in that the longer the decisional process, the more likely it is that the outcome will differ from its initial proposal. A first reading agreement is advantageous to the Commission only to the extent that its key proposals are not watered down; it therefore has no reason to seek an agreement at any cost. Its representatives are wary of the pressures exerted by the Council Presidency to conclude as many agreements as possible. From the Commission's vantage point, it is the second reading which appears to be the most propitious time for a compromise, since the number of parliamentary amendments is limited by the Assembly's Rules of Procedure and since the conditions imposed by the Treaties for approving a proposal (simple majority of voters) are not as strict as those required for amending or rejecting it (majority of the MEPs comprising the EP). It makes sense that the Commission should markedly prefer second reading agreements; however, it justifies this position on the basis of principles of transparency, democracy and efficacy, and not on a mere strategic interest.[36]

As seen in the previous point, the trilogues may concern very dissimilar dossiers and give rise to a variety of negotiation approaches. The number and identity of the actors involved and the nature of the relations which they develop play a decisive role in the outcome of the negotiation. Therefore, no general rule can be established in terms of who benefits from this procedure.

The key role played by interpersonal relations in negotiating early agreements may be prejudicial to the role assigned to the institutions by the Treaty, and thus impact the balance of powers in the Union. In any event, such agreements also modify the power relationships within each institution: some actors may win and others lose. It is therefore no surprise that the principle of early agreements and the generalised use of trilogues may at times trigger lively debate within their midst.

35. CEPS 2008, *The European Commission after enlargement: Does more add up to less?,* pp. 30-31.
36. Interview with an official of the Secretariat-General of the European Commission on 26 May 2010.

3.2. Debate within the institutions

In some respects, the growing percentage of first reading agreements may be viewed as positive, since it has allowed the Parliament to seamlessly infiltrate the legislative process without adversely affecting the Union's decision-making capacity or inter-institutional relations. A number of individuals involved see it as proof of the procedure's flexibility and of the quality of the relationships between the institutions, stressing that the development of early agreements would have been impossible without mutual trust between the actors concerned.[37] The EP's Activity Reports for the 5th and 6th parliamentary terms provide a positive overall assessment of these agreements, pointing out that "(…) the European Parliament has demonstrated on a number of occasions (in dossiers such as the Cosmetic Regulation, the Ozone Depleting Substances Regulation, the Reduction of CO_2 Emissions from Passenger Cars Regulation or the Trade in Seal Products), that 1st reading agreements can be an adequate and successful instrument for shaping legislation and obtaining a clear parliamentary added value."[38] However, in the past few years, the practice of early agreements has given rise to increasing criticisms.

Many objections have been heard within the European Parliament to fight against generalisation of this process and its excessive lack of transparency. Informality, which is the strong point of trilogues, is also perceived as a problem, in some respects. These meetings do not allow witnesses or media coverage, nor do they produce any report or minutes accessible to the public. Furthermore, negotiations are sometimes held at the level of the experts of the three institutions but not European MEPs, minister and commissioners. There is even less transparency in such cases. From the EP's vantage point, this is a paradoxical situation, since MEPS have always invoked the need for more democratic accountability and for publicising the decision-making process in order to strengthen their institution's powers. The Assembly's authorities are aware of this difficulty. For example, this statement appeared in a 2009 EP report: "The time pressure to conclude within the six months of the respective Presidency puts too much focus on fast-track negotiations, at the expense of an open political

37. Interview with an official of the European Parliament's Committee on Industry, Research and Energy (ITRE) on 28 May 2010.
38. European Parliament, *Activity Report 2004-2009*, *op. cit.*, p. 12.

debate within and between the institutions, with the involvement of the public in its various forms."[39]

Some MEPs also oppose what they view as a hindrance to the democratic nature of the Assembly itself, and denounce the fact that in the event of a trilogue, the elected officials who are not directly or indirectly (via a parliamentary committee) involved in the procedure lose all control over the latter. As the Dutch (ALDE) MEP Toine Manders commented: "(…) in a committee which I am not a member of, and my colleagues from my party are not members of, then it is possible that the rapporteur and the 3 or 4 shadow rapporteurs negotiate and change the position of the EP and then the EP can vote in favour or against. Then it is a lack of democracy because you cannot control what you are voting for. And the original system – first reading and then second reading and then trialogue and then the conciliation, that is I think more democratic than having a first reading agreement because that gives few people the possibility to find an agreement though the other 700 members are not aware what is happening. And that is a lack of democracy I think."[40]

According to a senior official of the ITRE Committee, "(…) sceptical back benchers (…) of course have the feeling that they are not sufficiently associated to the process so as to have a real influence which, by the way, is what happens in the national parliaments also."[41] Conversely, actors experienced in trilogues are induced to favour them for at least three reasons. First, they derive personal advantages from a mediation process between the institution and its environment which affords them considerable influence. Second, participants in trilogues are affected by socialisation phenomena as a result of their talks. Even though negotiations are often tense, they develop a certain empathy and trusting relations with their colleagues which cause them to gain a particularly positive view of trilogues and to be more inclined to make concessions. Lastly, ego factors may lead actors in trilogues to globally overestimate the benefits which their institution derives from such talks, and thus to be more favourably disposed towards them than their non-participating colleagues.

39. European Parliament, *Codecision and conciliation: A Guide to how the Parliament co-legislates under the Treaty of Lisbon*, November 2009, p. 14.
40. Interview with Toine Manders, 19 May 2010.
41. Interview with an official of the European Parliament's Committee on Industry, Research and Energy (ITRE) on 28 May 2010.

This highlights a more systemic problem: the widespread use of informal trilogues has, within the EP, led to a concentration of decision-making power profiting the Assembly's top-level hierarchy (members of the Bureau, parliamentary committee chairpersons, *etc.*) and the large political groups, which creates tension between the hierarchy and members of the small political groups. The latter, who do not usually participate in informal discussions, tend to consider early agreements as a rather undemocratic innovation. Their officials therefore advocate instead complying with the institution's formal powers.[42]

Data from the Observatory of European Institutions clearly show the stranglehold which the large groups have on codecision procedures. Not only do the three leading groups produce four-fifths of the reports on measures adopted by the codecision procedure, but recourse to early agreements is more frequent when they are in charge of the dossiers. While the average frequency of early agreements for rapporteurs from small groups is less than 40%, it jumps to 50.6% for PPE rapporteurs, 59% for those of the PSE (now called "S&D") and 68.2% for those of the ALDE group.

42. H. Farrell and A. Héritier, "Interorganizational Cooperation and Interorganizational Power: Early Agreements under Codecision and Their Impact on the Parliament and the Council," *Comparative Political Studies*, Vol. 37, 2004, No. 10, pp. 1184-1212.

Table 3: Frequency of first reading agreements by political group

Political Group	1st Reading Agreements (%)	Total Number of Reports
ALDE	68,2	44
EDD	66,7	3
ELDR	36,7	30
GUE	40	15
IND-DEM	33,3	3
NI	42,9	7
EPP-ED	50,6	161
PES	50,9	237
TDI	0	1
UEN	60	10
G/EFA	32	25

Sources: Legislative Production of the European Union 2002-2008 [database], the Centre for Socio-Political Data (CDSP) and the Centre for European Studies (CEE) of Sciences Po [producer], and the Centre for Socio-Political Data [distributor].

Parliament is not the only institution which tends to be more critical of first reading agreements. The Commission has also raised the issue of lack of transparency and consistency, since procedures vary from one parliamentary committee and one Presidency to the next and has pointed out that the three institutions' representatives are inclined to exceed their negotiation mandate. "As far as the Council is concerned, the Presidency is regularly confronted by critics in COREPER when it undertakes to explore, with the EP, the option of a first reading agreement without prior adequate coverage from the Committee."[43] Similarly, under pressure from the EP, and particularly from the Council, the Commission's officials often accept changes in the initial proposal without having been formally authorised to do so, in the hope of facilitating an agreement. Such practices jeopardise the principle of collegiality, which is supposed to govern the work of the Commission, and undermine the position of the Secretariat-General responsible for the consistency of the institution's positions. The Secretariat-General therefore requires that each agreement be compatible with the Commission's initial proposal, that any major problem be submitted to the College or to the Inter-Institutional Relations

43. Interview with an official of the Secretariat-General of the European Commission on 26 May 2010.

Group (GRI),[44] and that the dialogue between the DG and the Secretariat-General be improved. A first reading agreement "should not be pursued rashly for dossiers which are more sensitive in terms of their substance, or of their budgetary, legal or institutional aspects."[45]

3.3. The European Parliament's internal regulation efforts

Although all of the institutions have internally debated trilogue relevancy and methods, Parliament is the one in which they have been increasing in scale, to the point of paving the way for regulation efforts. In early September 2001, the permanent members of the EP's delegation to the Conciliation Committee called for the procedure to be formalised. It was not until 2004, however, that the Conference of Presidents approved guidelines for improving legislative practices. The latter notably focused on the first reading agreements and trilogues in order to standardise the practices of the various parliamentary committees and to enhance the transparency of inter-institutional negotiations. For example, the guidelines recommended that negotiations be opened only after parliamentary amendments had possibly been voted on in committee, that all the political groups be informed of it and even participate in the negotiations, and that any compromise reached be submitted to the entire committee responsible.[46] These rules were not always fully followed, since the actors concerned (officials and MEPs) were visibly not all aware that they existed.[47] The various committees have continued to develop specific practices with regard to the opening of negotiations (before the vote in committee, with or without a specific mandate conferred by an orientation vote, or after the vote in committee), while the number of early agreements experienced its well-known exponential growth, when codecision texts soared from 28 to 72%

44. This meeting includes the persons responsible for inter-institutional relations within the commissioners' cabinets, under the chairmanship of the head of the cabinet of the Vice-President in charge of Inter-Institutional Relations. His mission is to ensure that the positions taken in contacts with the other institutions accurately reflect the views of the Commission as a whole.
45. *Ibid*., p. 3.
46. "First and second reading agreements: Guidelines for best practice within Parliament", Conference of Presidents, 12 November 2004, in European Parliament, *Conciliations and Codecision Activity Report of July 2004 to December 2006 (6th parliamentary term, first half-term) of the delegations to the Conciliation Committee*, presented by Vice-Presidents Alejo Vidal-Quadras, Antonios Trakatellis and Dagmar Roth-Behrendt, Annex B. [http://www.statewatch.org/news/2007/jun/ep-co-decision-rep.pdf].
47. Working Party on Parliamentary Reform, Codecision and Conciliation, Working Document No. 12 (Part II), 11 December 2007, p. 4.

between 2004 and 2009.[48] In 2007, President Pöttering, aware of the criticisms that this trend provoked within the Assembly, proposed that a working group be set up on Parliament reform. Based on its findings, the Conference of Presidents adopted several procedural changes which, in 2009, were compiled in a "Code of Conduct" appended to the Rules of Procedure in order to endow them with a more official status.[49]

The aim of several provisions of this Code is to ensure a more collegial management of the trilogue procedure. The decision to undertake negotiations with the Council must be taken by the parliamentary committee responsible for the dossier, either by consensus or by vote; a balance must be maintained between the political groups represented in the negotiation team, and the latter must have a clear mandate and be accountable to the committee. The committee must have an opportunity to scrutinise the agreement ultimately concluded with the Council and the Commission. Other measures focus on ensuring negotiation transparency (publicised trilogue meetings and formalisation in writing of the agreement with the Council). Lastly, "adequate time" is required between the vote in committee (or the completion of negotiations with the Council) and the vote in plenary to give the political groups an opportunity to formulate their definitive position (Art. 6). According to one of our interviewees, this mechanism is not merely intended to provide a framework for the negotiators' work: "(…) the indirect goal of this code of conduct (not said explicitly) is to reduce the number of early agreements by making it more difficult to start negotiating."[50]

Once again, it is evident that the way in which these measures are implemented differs from one committee to the next. The ITRE Committee formed the habit early on of giving the negotiating team a formal mandate to involve in the negotiations shadow rapporteurs[51] and all interested MEPs and to inform the entire committee of the trilogues' conclusions. This working method accounts for the high number of plenary votes in favour of the reports issued by this committee's members. The Code of Conduct is primarily based on the experiences and practices of the ITRE

48. See 2.2. above.
49. *Ibid*., p. 3.
50. Interview with an official of the unit responsible for conciliation and codecision in Parliament on 27 May 2010.
51. The option for each political group to designate shadow rapporteurs to monitor the various dossiers, participate in negotiations and keep their political group informed of the outcome was also formalised in 2009 under Article 192.3 of the Rules of Procedure.

Committee.[52] The Committee on the Environment also includes shadow rapporteurs in the trilogues, but their presence in the negotiations themselves is not systematic, and the Committee is not always informed of the negotiations' outcome. Moreover, the mandate is often given indirectly, in the form of a list of amendments adopted in committee. According to a senior official of the committee's Secretariat, the Code of Conduct contains provisions which are not easy to apply for an institutional body such as the ENVI Committee, which handles a large number of dossiers simultaneously and often lacks time and resources.[53] Similarly, the practices of the LIBE Committee – which still has limited experience in codecision matters – is perceived as lacking transparency. As for the timeframe provided prior to a plenary vote, it is not necessarily respected, as we saw in the case of the "climate change package."[54] In other words, the framework represented by the Code of Conduct has so far produced only modest results.

52. Interview with an official of the unit responsible for conciliation and codecision in Parliament on 27 May 2010.
53. Interview with a member of the Secretariat of the EP's Committee on the Environment on 8 June 2010.
54. European Parliament, *Activity Report, 1 May 2004 to 13 July 2009*, *op. cit.*, p. 26.

Conclusion

Agreements constitute one means – which the Union has always eagerly sought – to evade disputes, whether national, partisan or inter-institutional. These last few years have brought about a change in practices: although trilogues initially gave rise to some early agreements on mainly technical subjects, they are currently also leading to agreements which have been less "early," but still informal, on much more sensitive dossiers, which explains why they are being more criticised now than they were in the past. Understanding this trend calls for a review of this practice's impact on the political clout of the various institutions and their internal power relationships.

The soaring number of early agreements in the course of the preceding legislative term stems from choices made by the institutions. By adopting codes of good conduct and directives, or by changing the Rules of Procedure, they have institutionalised compromise efforts and thereby formalised the cleavage between the actors involved. This has certainly facilitated legislative production, but it has also raised the problem of what impact a process based on informal negotiations and interpersonal contacts may have on the institutional balances provided for by the

Treaties. The prevailing opinion is that the Council Presidency is both the driving force and the top winner in terms of first reading agreements, which allow it to show a flattering report at the end of its mandate. The Commission, on the other hand, only benefits from this if the final agreement includes the basic components of its proposal. As for the European Parliament, it appears to be the institution with the least to gain from the codecision process. The EP's representatives have much less expertise at their disposal than do those of the Council and Commission and are less inclined to use institutional pressure as a pretext for refusing to make concessions in the course of negotiations. Moreover, although it was in the name of transparency that the EP acquired its powers, its need to seek early agreements is inducing it to replace public deliberations with a non-transparent and elitist governance.

In addition, trilogues alter the balance of power within the institutions themselves. Indeed, the generalisation of this practice is strengthening the positions of the actors who are directly involved in the negotiation, to the detriment of their peers, who, at most, are ratifying the agreements without always being informed of the issues covered. This situation prompts lively disputes and discussions within all of the institutions, even though the problems in each of them are not the same: in the Commission, some are worried that centrifugal forces may weaken the Secretariat-General, whereas in Parliament, the source of concern seems to be the way in which the large political groups control these procedures. The split is much more evident within the EP than in the other institutions: the representatives of small groups and the elected officials most committed to the Plenary Assembly's sovereignty oppose this trend, which they feel will ultimately circumvent debate.

These factors, which affect actors and institutions alike, account for the current resolve to resort less often to early agreements. Is this a battle over a lost cause waged by backward-looking actors, or the sign of a new trend after the truce of the 2000s? Will the entry into effect of the Treaty of Lisbon, which partially ended the Union's constitutional crisis, induce the institutions' actors to return to a more orthodox, and thus more conflictual, codecision process? It is difficult to definitively answer such questions, but it should be pointed out that, in both the Commission and Parliament, increasing discussions are occurring on the trilogues'

benefits and limitations, on the various parties' strategic interests served by participating in them, and on the means to best identify the dossiers which should be dealt with through an expedited process. Within the EP in particular, criticism of first reading agreements has intensified: MEPs, who are paying closer attention to the issue, no longer accept compromise at any cost. It remains to be seen whether that will translate into a real and sustainable reorientation of legislative practices.

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Olivier COSTA

Olivier Costa is Senior Research Fellow at the CNRS (at the Centre Emile Durkheim, University of Bordeaux). He is also Professor at the College of Europe since 2000 and Professor of political sciences at the Université Libre de Bruxelles and Sciences Po Paris

Renaud DEHOUSSE

Renaud Dehousse is Jean Monnet professor at the Paris Political Studies Institute ("Sciences Po") and director of the European Center. He is also advisor at *Notre Europe*.

Aneta TRAKALOVÁ

Graduate of Master in Political Science at the Université libre de Bruxelles, Aneta Trakalová specialises in the study of European institutions and obtains professional experience as a parliamentary assistant and policy advisor to the European Parliament.

European Democracy in Action

Codecision and "early agreements":
An improvement or a subversion of the legislative procedure?

Is the community method still relevant? To give a documented answer to this question, we needed to take a thorough look at how the institutional triangle has changed to accommodate new demands. What use does the Commission make today of its right of initiative? Is voting practice the same in an enlarged Union as previously? The European Parliament's growing power is surely the most remarkable change of the last twenty years – what has been its impact? This study, with those which will follow, is concerned with such questions. Together they aim to provide an up-to-date picture of the community method as practised, and thus to give us a better understanding of its relevance in today's Europe.

Of all the institutions, the European Parliament has undoubtedly changed the most in the last two decades. It has more members and above all more functions. The Lisbon Treaty makes it a fully-fledged legislator, on the same level as the Council. This development has meant considerable changes in the assembly's procedures. Of these, the most important is related to the emergence of "early agreements", the subject of this study.

This practice, while doubtless effective, poses real questions about transparency. The agreements in question are negotiated by a small number of individuals with only limited possibility for debate, whereas the European Parliament's powers were increased precisely to democratise decision-making. Numerous are those, particularly among parliamentarians, calling for better regulation of the practice.

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