

***Visibles and Divisibles: Institutionalism
and the Council of Ministers ten years on***

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Introduction

Co-decision and the extension of qualified majority voting modified the face of EU policy-making, and in particular the culture of decision-making in the Council of Ministers. Both the internal mechanisms of the Council, and the inter-institutional dialogues with the Commission and the European Parliament altered, with institutionalist perspectives receiving renewed life as a means to make sense of EU policy dynamics. There have been significant and intellectually important contributions to the debate over the life of co-decision. This paper seeks to enquire into the 'state of the art' on co-decision and *de facto* an evaluation of scholarly exchanges on institutionalism and their contribution to our appreciation of institutional and policy-making dynamics arising out of the decade of experience of co-decision. Whilst some would avoid labelling, institutionalism as an approach is inherent in discussions of co-decision. Attention in this paper is focused upon how this locates within contemporary discourses of EU governance. Currently, there is a proliferation of political scientific approaches to the study of EU politics, with a distinct American feel that advance quantitative studies of co-decision primarily based on rational choice modelling. In contrast, there have also been valuable studies on the qualitative effects of co-decision, identifying significant shifts in the way EU institutions interact. Whilst these knowledge contributions appear to be competing with each other in terms of appropriate methodological tools, on closer examination, they all reach similar conclusions. Without wishing to be an intellectual consensus-seeker, this does beg the question whether there is less of a distinction to be made between rationalist and constructivist institutionalism within EU studies, at least when analysing the decade of co-decision.

The premise of this initial phase of research is to re-examine co-decision with a decade of experience behind us, both at a practical politics and epistemological level. This paper first explores existing debates, identifying the particular approaches that have been used to deconstruct co-decision. It argues that whilst the methods may be substantially and intellectually different, they are institutionalist in flavour, and actually reach similar conclusions. It distinguishes between those approaches which focus on the divisibles of co-decision – voting patterns and outputs, and those which examine the visible (or perhaps as some might argue the less visible or invisible) effects, namely structural and cultural change within and between EU institutions. This paper is part of a larger project on the legacy of co-decision, and its consequent effects upon the inter-institutional dynamics of the EU. It is significantly orientated towards the cultural and procedural changes within the Council of Ministers (Council). However, at a preliminary stage, one glaring omission from existing research became obvious. There has been a natural and predictable emphasis on the European Parliament (EP) – Council dichotomy of co-decision. Consequently, the European Commission (Commission) has been analytically sidelined. The second part of this paper identifies why it is timely to bring the Commission back into our thinking on co-decision. The final section of this paper identifies the implications of co-decision, addressing the underlying

and political factors that have enabled co-decision to evolve into an EU decisional norm, but focusing upon the implications for our appreciation of the Council and its legitimate role within the EU system of governance.

Discourses of co-decision

For the purposes of this discussion, a distinction has to be made in the scholarly approach to co-decision. It can be placed between those who offer formalised modelling approaches often grounded in game theory, and those who provide more discursive accounts of the evolution of co-decision, focusing upon the formal and informal interactions between participating institutions, but primarily the Council and EP. In other words, in examining the decade of co-decision analysis, we can identify rational and sociological variants of institutionalism respectively. As a broad heading, new institutionalism makes a persuasive case that norms and practices are fundamental to our appreciation of institutions, no more so than in the EU given the complex and hybrid nature of the EU as a form of governance. Institutionalism is a combination of rational, historical and sociological approaches, which serve to emphasise that norms and values are inherent and apparent. Institutions are the sum of their parts, so do not act as unitary actors, but provide the frameworks in which negotiation can occur and policy outputs arrived at. Given that co-decision is embedding itself as the primary legislative procedure, and continues to do so, institutionalism affords us with useful tools for appreciating the implications of the changing relationships and structures within and between the key institutional actors under co-decision.

In examining existing research on co-decision, this paper does not seek to stand one conceptual approach against the other, but to reflect the view there is merit in all these approaches. Rational choice and in particular rational institutionalism seeks to expose the influence of formalised and regularised structures upon EU legislative processes, and how these institutions may constrain actors. Sociological institutionalism explores the socialisation processes and the importance of such for constructing norms and values within institutions. For constructivists, institutions are the actors and interests, which combine to enable interaction and outcomes. Historical institutionalism tends to fit somewhere between these, positing that the effect of these processes will have future consequences. Whilst the further consequences of co-decision are only just being realised, and discussed further in the final section of this paper, existing scholarly contributions to understanding co-decision tend to reflect the rational and sociological institutionalist approaches. In some way, this can be seen as an emphasis on the divisibles or the visible outcomes of co-decision experiences. Divisibles refer to the outputs and outcomes of co-decision, concentrating upon voting records and the success in securing amendments to legislative proposals. Visibles, or what some may argue as less tangible or invisible, refer to the norms, values, and informalities that have been developed and are now embedded in co-decision processes.

The numerical history of co-decision 1993-2002.

Period	Total number of completed co-decision procedures	Agreement at 1 st reading	Agreement at 2 nd reading without amendments to common position	Agreement at 2 nd reading with amendments to common position	Agreement after conciliation procedure	Failures after conciliation procedure
Nov 1993 – April 1999	165	-	63 (38%)	36 (22%)	63 (38%)	3 (2%)*
May 99 – July 2000	65	13 (20%)	18 (28%)	17 (26%)	17 (26%)	0
August 2000 – July 2001	66	19 (29%)	19 (29%)	8 (12%)	20 (30%)	1**
August 2001 – July 2002	73	19 (26%)	17 (23%)	20 (27%)	17 (23%)	0

Source: Adapted from EP Activity Reports 1999-2002. See references.

* Voice telephony 1994, Biotechnology 1995, Securities 1998.

** Takeovers file 2001

For the period July 1 – Dec 31 2002, there have been 6 procedures completed at first reading, 18 at second reading, and 11 after conciliation but these have not been included here because there is some overlap with the official data that has not yet been confirmed.

The table has a humble purpose, namely to illustrate the bedding down of conciliation, and what appears to be relatively consistent levels of agreement at the various stages in the co-decision procedure over time, and in particular as a result of the Treaty of Amsterdam alterations. Co-decision appears to have been relatively successful in terms of the few failures. This is primarily due to the simplification of the procedure by the Treaty of Amsterdam, possibly reflecting the initial experiences of conciliation and the fact that three dossiers were lost. A two per-cent failure rate is not hugely significant given that this was a new experience for all concerned. However, the Amsterdam Treaty reflected a belief by member states that if co-decision was going to become the norm, then it should avoid such losses for the sake of legislative efficiency and quality. Consequently, the Treaty allowed for the Council and EP to conclude negotiations at first reading rather than the Council having to adopt a common position. More importantly, the new procedure meant that the Council could not reintroduce its position if conciliation failed. Whilst this could have been seen as having a negative effect because it meant that without agreement in conciliation, the dossier would be lost, it has actually facilitated agreement, with only one loss since 1999 (see below). The data highlights that more proposals are concluded prior to conciliation as a percentage of the total number of procedures. Overall, the data speaks of relative success, and counters claims that the co-decision procedure would result in a declining efficacy of EU legislative decision-making.

The decade of co-decision has been subject to a significant amount of scholarly attention. In analysing the history of co-decision, there has been a conceptual split between those who focus on the divisibles, and those who prefer to examine the visible effects of the co-decision procedure on inter-institutional relations. Recently, we have witnessed rather an interesting intellectual discourse between a growing band of scholars arguing that rationality is the

means by which to view the EU, and using analyses of co-decision to do so. Kreppel's study of the ability of the EP to act under the cooperation procedure, and her developing work on co-decision is illustrative of this.¹ Tsebelis and Garrett's analysis of co-decision is also firmly rooted in this approach.² Crombez's work also fits within this genre.³ Given their rational choice perspective, it is not surprising that they focus upon the beneficiaries of co-decision, and affirm that that EP has strengthened its ability to secure its desired amendments to a variety of policy proposals falling under the co-decision procedure. However, and as Corbett argues, one of the difficulties with modelling approaches is how they do not account for the more subtle nuances of co-decision and the importance of informal interaction and negotiation between conciliation partners.⁴

Somewhere between rational and constructivist approaches sits the work of Farrell & Héritier, arguing that the formal rules governing co-decision resulted in the establishment of what they term "informal institutions".⁵ They believe that the evolution of new informal mechanisms arising out of formal Treaty changes may result in further formal alterations to EU patterns of governance. They employ a power differentials framework borne out of their view that rational actor theory needs to be taken further than existing studies of co-decision. They suggest that the incremental informal interactions that developed as a result of co-decision led to institutional tweaking, a general enhancement of co-decision and its formal extension and simplification as set out in the Treaty of Amsterdam.

Sociological institutionalism emphasises the internal norms and values, and horizontal relations between institutions. There is little doubt that co-decision is having an exponential effect upon Council-EP relations. From early on in co-decision history, and stemming back to reflections on the relative success of the cooperation procedure, new norms emerged in inter-institutional relations. In its infancy, research identified the cultural shifts in Council-EP relations arising out of the need to cooperate that cooperation and co-decision procedures inspired.⁶ Insiders, adding to the heuristic value of initial research and countering the generally pessimistic welcome to co-decision further validated these observations.⁷ This intensification of inter-institutional dialogues resulted in subtle but important changes to the internal workings of the Council and the EP. There appeared to be a cultural shift in Council perceptions of the EP, and how Article 189B experiences of conciliation generally resulted in

¹ Kreppel, A 'What Affects the European Parliament's Legislative Influence? An Analysis of the Success of EP Amendments.' *Journal of Common Market Studies* Vol.37, No.3, 1999, pp.521-538.

² Tsebelis, G & Garrett, G 'Legislative Politics in the European Union.' *European Union Politics* Vol.1, No.1, 2000, pp.9-36.

³ Crombez, C 'The Treaty of Amsterdam and the co-decision procedure' in Schneider, G & Aspinwall, M (eds.) *The rules of integration. Institutional approaches to the study of Europe.* Manchester: Manchester University Press, 2001, pp.101-122.

⁴ Crombez, C, Steunenberg, B & Corbett, R 'Understanding the EU legislative process: political scientists' and practitioners' perspectives.' *European Union Politics* Vol.1, No.3, 2000, pp.363-381.

⁵ Farrell, H & Héritier, A 'Formal and Informal Institutions under Codecision: Continuous Constitution Building in Europe.' *European Integration Online Papers (EJOP)* 6 (3), www.eiop.or.at/eiop/texte/2002-003a.htm, 2002.

⁶ Earnshaw, D & Judge, D 'The Life and Times of the European Union's Cooperation Procedure.' *Journal of Common Market Studies*, Vol.35, No.4, 1997, pp.543-564. Sherrington, P *The Council of Ministers: Political Authority in the European Union.* London: Pinter, 2000.

legislative efficiency. Early studies of the post-Amsterdam context of the conciliation procedure suggested that it was not as confrontational and divisive as some were predicting. Moreover, it appeared that the EP was responding by entering into informal dialogues with the Council at a much earlier stage, and in particular prior to the conciliation meetings.⁸ Hayes-Renshaw also acknowledges that the Council was beginning to take the EP more seriously.⁹ The Council Presidency now holds meetings before the first reading under co-decision to establish whether agreement can be reached, a practice begun by the Finnish Presidency in 1999. Data shows the increased frequency of formal contacts between the Council and its institutional partners. Obviously, these figures cannot account for the daily, informal, and unrecorded meetings, corridor chats, and business over lunch, but the trend in formal encounters is still significant. There is still concern about the intermittent attendance of Council representatives at EP committees, and about the Council's willingness to provide the EP with documents. The unofficial view from practitioners in Brussels is that there has been a discernible impact of Swedish and Danish traditions of more open government upon EP access to Council documents. Both Presidencies have provided MEPs with significantly greater numbers of Council reports, minutes and alike. Whilst there is still patchy evidence to suggest that the Council does not whole-heartedly embrace its relationship with the EP, the significance of these changes should not be dismissed.

What is evident from existing studies of co-decision are the similar messages about the legacy of co-decision. The role of the EP has been strengthened and deepened over the last decade by co-decision. Rational institutionalists assert this in by identifying the victories of the EP over the Council. Constructivist accounts emphasise the significant cultural shifts in inter-institutional dialogues between the Council and EP, yet also highlight the demonstrable abilities of the EP to shape legislative outcomes under co-decision. The inherent difficulty with spatial modelling though is that it can obscure as much as it discovers because who wins and who loses is no longer the essence of co-decision. As Westlake argues, viewing legislative activity in terms of quantity counters the need for "legislative clarity and quality".¹⁰ Shackleton, using a different approach, however also highlights the relative success of the EP in securing its amendments, which continues to be so according to EP activity reports.¹¹ Whether one prefers data or qualitative observations, the findings on the changing internal practices of the Council and EP, the intensification of dialogues between them, and the manner in which co-decision has still produced legislative outcomes, there is a sense that discourses of co-decision are speaking a similar language. There seems to be place for differing conceptual approaches to co-decision.

⁷ Shackleton, M 'The Politics of Co-decision', *Journal of Common Market Studies* Vol.38, No.2, 2000, pp.325-342.

⁸ For an interesting discussion of pre-Amsterdam examples of co-decision, see in particular Garman, J & Hilditch, L 'Behind the scenes: an examination of the importance of the informal processes at work in conciliation.' *Journal of European Public Policy* Vol.5, No.2, 1998, pp.271-284.

⁹ Hayes-Renshaw, F 'The Council of Ministers' in Peterson, J. & Shackleton, M. *The Institutions of the European Union*. Oxford: Oxford University Press, 2002, pp.47-70, here p.61.

¹⁰ Westlake, M 'The Council', in Lynch, P, Neuwahl, P & Rees, W (eds.) *Reforming the European Union. From Maastricht to Amsterdam*. Harlow: Pearson, 2000, pp.9-31, here p.19.

The missing relative?

From this initial discussion into the evolution of co-decision and its legacy after a decade, the variety of conceptual approaches used to analyse co-decision essentially produce similar findings. Put briefly, rational institutionalism focuses upon Council-EP legislative outputs and the notion of institutional rivalry. More constructivist accounts lend support to the idea of informal engendering within and between the Council and EP. Both identify the visible or invisible shifts in the inter-institutional relationship and the changing nature of these partners in EU governance. The point here is that we have tended to brush the canvas rather than paint the portrait. Analyses are located in EP or Council perspectives. What has been overlooked in the evolution of co-decision is the detailed role of sub-structures of the Council (see final section of this paper), and the contribution of the Commission.

Explorations into the world of co-decision have, so far, either ignored the role of the Commission or been rather dismissive of its input and value. This seems to arise out of a dual logic. Firstly, given that co-decision has enhanced the legitimacy of EU legislative processes by increasing the role of the EP, the emphasis has naturally been upon Parliament's input and interactions with the Council, whether viewed from a Council or EP perspective. This is not a criticism and can be seen as a predictable reaction to, or embracing of, a new experience in EU decision-making, and the broader analytical and practical implications for EU governance. Secondly, the establishment of the co-decision procedure effectively meant that the Commission's right of initiative was constrained because it is unable to withdraw a proposal once conciliation processes started. Consequently, the focus was upon what were seen as the dominant two institutions in co-decision – the Council and EP.

The overarching view was that the Commission had been excluded from this legislative process. This may have been a partial truth in the early days of co-decision, but the evolving patterns of inter-institutional interaction suggest that there is a need to re-evaluate. Some commentators have been rather dismissive of the Commission. In his 1997 analysis of the Commission as an agent, Pollack argued that one of the consequences of co-decision was to exclude the Commission from inter-institutional bargaining in the conciliation phase.¹² His argument seems to be based primarily on this interpretation of the Commission as agenda-setter and initiator rather than mediator. Crombez's spatial modelling of co-decision also arrives at the conclusion that the Commission's role has been undermined, yet is arguably adopting a rather narrow interpretation of what the Commission does beyond the formal right

¹¹ Shackleton, M 'The Politics of Co-decision', *Journal of Common Market Studies* Vol.38, No.2, 2000, pp.325-342.

¹² Pollack, M 'The Commission as an Agent' in Nugent, N (ed.) *At the Heart of the Union. Studies of the European Commission*. Basingstoke: Macmillan, 1997, pp.109-128, here p.120.

of initiative.¹³ In Tsebelis and Garrett's analysis of co-decision, they make a two-fold claim that warrants reconsideration here.¹⁴ They argue that the strengthening of the conciliation procedure post-Amsterdam undermines the role of the Commission as agenda-setter or legislator. Stemming from this, they believe that any residual Commission influence rests upon the informal channels available. This is stated in a rather dismissive way, perhaps reflecting that there is little room for informality in their analytical conception of EU legislative politics.

What has been omitted from considerations of co-decision is the role that the Commission fulfils as mediator and negotiator. We can agree that the Commission's ability to initiate, or flexibility to revise its proposal is somewhat circumvented by the procedural stages in co-decision. Moreover, the Commission's right to propose is also constrained by the fact that often the outcomes of conciliation set down a timetable for subsequent new legislative proposals (and the Commission has complained about this).¹⁵ However, this does not negate its function as an institutional partner in legislative discussions. Within discourses on co-decision, commentators seem to be speaking in tongues when it comes to the Commission, obscuring its role and significance, and failing to 'square the institutional triangle'. This may be due to the analytical distinction between visibles and invisibles as discussed above, or because of the heightened interest in Council-EP relations. Whatever the reason, there is a danger of painting a rather two-dimensional picture of co-decision, serving to mislead observers and to undermine the valuable research already undertaken. After all, Article 251 specified that there was a role for the Commission by laying down its right to participate in the conciliation process and to take "all the necessary initiatives with a view to reconciling the positions of the EP and the Council". Formally, speaking, the historic function of the Commission as a negotiator was given just as much emphasis by the Treaty.

Certainly, within the conciliation phase of co-decision, the Council and EP are at liberty to negotiate and seek agreement without the Commission. However, we all recognise the value that that inclusion of the Commission can bring to the bargaining table in terms of its experience as a negotiator, its expertise within policy sectors, and its function as a mediator. The Commission is also a valuable source of technical information, on the views of non-institutional actors and groups, and on the development of Council and the EP positions on a dossier before the commencement of negotiations. Essentially, the Commission's role in co-decision is transposed to its other noted function of a consensus-seeking actor. EP and Council officials recognise the value of Commission participation in co-decision processes. This is also reflected in the bedding-down of trilogues as part of co-decision negotiations, and

¹³ Crombez, C 'The Treaty of Amsterdam and the co-decision procedure' in Schneider, G & Aspinwall, M (eds.) *The rules of integration. Institutional approaches to the study of Europe*. Manchester: Manchester University Press, 2001, pp.101-122.

¹⁴ Tsebelis, G & Garrett, G 'Legislative Politics in the European Union.' *European Union Politics* Vol.1, No.1, 2000, pp.9-36.

¹⁵ Interview, European Commission, Brussels, November 2002. Interview, European Parliament, Brussels, December 2002.

in the informal exchanges between the three EU institutions before the meeting of the Conciliation Committee. The trilogues, comprised principally of the EP Chair and rapporteur for the particular dossier, the corresponding Deputy Permanent Representative (Coreper), the Director-General or Director from the Commission, plus supporting officials from all three institutions have become an integral part of co-decision. There has been a concerted effort in recent times to keep numbers to a workable minimum as it is felt that a small trilogue is more conducive to agreement.¹⁶ Obviously, trilogues are not bilaterals, so by implication the presence and role of the Commission should be given more prominence when dissecting the history of co-decision. Given their relative success in affording the way forward on dossiers, they signify the important inter-institutional triangular representation of EU policy-making. Indeed, trilogues are possibly a contemporary expression of a return to the original blueprints of EU dialogue between the Commission, Council, and EP. We should also remember that trilogues were first used in budgetary discussions and the inter-institutional agreements of the 1980s so are not a new experience, and within the parameters of co-decision have become an important 'managerial' mechanism for the Council Presidency. The trilogue allows the Commission back into the conciliation process in a more formal manner. Obviously, the key institutional power rests with the Council and the EP, yet the participation of the Commission is both necessary and appears to have been cumulative in its impact upon negotiation outcomes. The current view is to extend the practice of trilogues, perhaps reflecting their relative value in enabling co-decision to work.¹⁷

The academic focus and emphasis in official EP accounts of co-decision has been on the increasing relative success of the EP to obtain its amendments. However, as discussed, this does not denote the inter-institutional interchange that allowed for 'successful' legislative outcomes, nor the role of the Commission in helping to secure agreement on amendments. Whilst the Commission cannot be involved in the voting in conciliation, it contributes to the inter-institutional exchange by seeking to reconcile EP and Council positions. This role has largely been ignored within academic analyses of co-decision, presumably because it is invisible. Nevertheless, the Commission is not excluded and continues to perform its function as interlocutor as it does in formal Council sessions, and background networking within and between the Council and EP. It plays an important a consensus-seeking part in co-decision.¹⁸ Even the Council's official *aide-memoire* on co-decision procedures recognises the role that the Commission performs within the Conciliation Committee.

The 2001 Takeovers dossier has been the only co-decision failure since the Treaty of Amsterdam came into force. It failed because as the plenary EP rejected the Conciliation Committee's agreement. As the EP report highlights, this was comparable to the

¹⁶ Interview, General Secretariat of the Council, Brussels, October 2002.

¹⁷ Interview, European Parliament, Brussels, November 2002.

¹⁸ European Parliament *Activity Report 1 May 1999 – 31 July 2000*. Delegations to the Conciliation Committee. European Parliament, 418584, 2000, p.19.

biotechnologies failure of 1995.¹⁹ It is interesting to note, although not that surprising, that the EP's analysis places the blame upon the Council. It argues that whilst the EP rejected the proposal (the vote was 273 in favour, 273 against and 22 abstentions), this indicated democracy at work especially given that this was the highest turnout ever for an EP plenary vote. For the purposes of this analysis, what is more interesting is how the EP also felt that the Commission's ability to help find a suitable resolution in conciliation was lacking.²⁰ Whilst this is only a single example, it highlights the EP's view that the Commission has a role to play and perhaps indicates how the EP felt let down by the Commission on this occasion. This is reminiscent of traditional views of the three institutions, of how the Commission and EP were once seen as allies in the legislative process, fighting on the same side to "win" over the Council. As discussed above, we must recognise that the policy-making process is far more nuanced than that, and the role of the Commission should serve to remind us that co-decision is not simply a bi-lateral game between the Council and EP. This is difficult to illustrate unless comparatively focused on many dossiers. Nevertheless, it should become an important part of our ruminations on co-decision.

The introduction of co-decision engendered the need for the Commission to establish a role within the process, and this is certainly ongoing. The November 2002 Joint Conference on the operation of co-decision reaffirmed the need for greater transparency, and the important role played by the Commission.²¹ The Conciliations Secretariat, as one would expect, has specified tasks to enable the smooth functioning of the procedure. Of note is the phrase "to maintain and develop contacts" with Council officials and the Commission. Superficially, this may not seem of great significance, but it posits a strong evolutionary feel to co-decision and the emerging role of the Commission as more than an agenda-setter. Whilst the Commission's right of initiative is erased in the conciliation process, it still performs other essential functions within EU policy-making. There seems to be a growing emphasis upon its pivotal role in the informal, invisible inter-institutional dialogue of negotiation. True, this is contingent upon the policy sector, the capacity of Commission officials and representatives, the internal and external context, and all other dependent and independent variables that need to be accounted for. Yet, this notion of the triangle of co-decision is an important shift in the debate in terms of the participation of formal institutions and the legitimisation of EU governance.

Co-decision, legitimacy and the elusive Council.

There appears to be intellectual value in all the analytical variants of institutionalism for framing analyses of co-decision. There is also consensus that co-decision has been made to

¹⁹ European Parliament *Activity Report 1 August 2000 – 31 July 2001*. Delegations to the Conciliation Committee. European Parliament, PR445571, 2001, p.13.

²⁰ European Parliament *Activity Report 1 August 2000 – 31 July 2001*. Delegations to the Conciliation Committee. European Parliament, PR445571, 2001, p.14.

²¹ Interview, European Parliament, Brussels, November 2002

work, and does work as a legislative process. If the experience of co-decision is progressively positive, then this lends weight to the prospects of co-decision becoming the legislative norm. This would serve to further enhance the public legitimacy of the EU as a whole. Member state governments would be prepared to accept this because the historical experience of co-decision is that it has not threatened the ability of member states acting in the Council to secure their desired outcomes. Concessions on particular amendments to dossiers have been made, but overall, this has not loosened the grip of member state governments over their desired legislative outcomes. This reflects historical institutionalist arguments that the experience of co-decision will have a resultant effect of it being strengthened. This can be set within Moravcsik's recent claim that the EU's legitimacy crisis is over-stated, in part given the EP's increasing and progressive input through co-decision.²² This leads us to ponder on three interwoven issues: what enabled such a relatively painless shift to co-decision; what factors enabled member states through the Treaty of Amsterdam to build upon the positive experience of Maastricht co-decision; and what have been the consequences for the role and power of the Council.

The answers centre upon the tangible implications of co-decision for legitimising EU governance, as espoused in notions of manageability, accountability, and transparency. The relative power of the Council can be seen as being checked by the presence and role of the Commission and EP, and the co-decision procedure has further enhanced this. Proponents of multi-level governance would argue that the Council's role is in effect declining with the increased use of QMV and EP powers through co-decision, and thus legitimacy has been enhanced. For them, decision-making is now shared and not solely dominated by national executives. To some extent, this is a valid observation, and the relative success of co-decision in not undermining the efficiency of EU policy-making strengthens this argument. However, until such time that co-decision becomes the decision method for all policy sectors, this legitimacy is only partial. Moreover, it is a well-rehearsed argument that QMV is not as common place as Treaty articles oblige.²³ Since the publication of Council minutes where a vote has been taken, it is now possible to identify who voted against a proposal or who abstained. To this extent, 'Brussels' can no longer be blamed by any particular government for the decisions taken at the Council level, and has somewhat improved its accountability. Nevertheless, the culture of the Council is such that compromise is striven for to avoid those difficult explanations at home, even under co-decision. Ironically, the 'shadow of the vote' encourages this consensus-seeking approach, and despite qualified majority provisions and the extension of co-decision, member states prefer to reach agreement in this manner.

²² Moravcsik, A 'Reassessing Legitimacy in the European Union.' *Journal of Common Market Studies* Vol.40, No.4, 2002, pp.603-624.

²³ Sherrington, P 'The Council of Ministers and the European Council' in Warleigh, A. (ed.) *Understanding European Union Institutions*. London: Routledge, 2002, pp.25-40.

In terms of transparency, measures that have been introduced remain rather detached and have focused primarily upon the public face of the Council. Some of these have resulted in a more transparent Council, at least at a superficial level, but do not really enhance the Council's representative character, nor make it significantly more accountable to EU citizens. An EP report highlights the recent trend in holding meetings on EP premises, referring to this as a dubious honour.²⁴ The experience of co-decision and in particular the conciliation process can allow for dissenting member state voices in the Council to be more clearly identified. An EP report cites the example of the Road Transport Workers Directive No.7 and how the opposition of Spain, Greece, and Finland was identified.²⁵ The Seville European Council approved that debates on legislation falling under the co-decision procedure will now be open to the public via the usual transmission room. However, the public will only be able to watch the initial stages - the Commission's presentation of the proposal, and the final voting and explanation of voting. Therefore, the actual substance of negotiations will remain in camera.²⁶ As with transparency measures in the past, the scale of this is minimal, and plays primarily to an informed audience. The value of transparency measures within the context of the Council has to be linked to the question of how transparent we expect governments and legislatures to be.

Measures at improving transparency tend to be a first step in the process of strengthening the legitimacy of a system, and are particularly 'safe' in the context of the EU and the Council given that the role of Coreper remains untouched. In any discussion of institutional contributions to EU decision-making, there are implicit assumptions that we are also talking about the sub-structures. As Bostock claims, the role of Coreper should not be ignored in analysing co-decision processes.²⁷ Coreper officials have a significant part to play, whether in facilitating agreement on the Council's second reading, or as representatives in the Conciliation Committee. Their working practices in other areas of Council activity translate over into co-decision and conciliation, with the norms and constraints needing to be teased out by detailed research on specific dossiers. Coreper and the plethora of working parties are the mechanisms by which effective decision-making is achieved in the Council. This face of the Council is kept private precisely to remain aloof from the legitimacy debate. To shift or remove Coreper from the Council would seriously undermine the Council's ability to reach legislative decisions and threaten the manageability of EU legislative decision-making. Any questioning of the effectiveness of Coreper and the working groups opens national administrations to scrutiny, which is something that national governments may prefer to avoid.

²⁴ European Parliament *Activity Report 1 August 2001 – 31 July 2002*. Delegations to the Conciliation Committee. European Parliament, PR\474889, 2002, p.7.

²⁵ European Parliament *Activity Report 1 August 2001 – 31 July 2002*. Delegations to the Conciliation Committee. European Parliament, PR\474889, 2002, p.14.

²⁶ Council of the European Union *Presidency Conclusions. Seville European Council, 21 and 22 June 2002*. Brussels: General Secretariat of the Council, 2002.

²⁷ Bostock, D 'Coreper Revisited.' *Journal of Common Market Studies* Vol.40, No.2, 2002, pp.215-234.

Most discussion on questions of the EU's legitimacy tends to ignore the Council, probably because this is an indeterminate problem. It is impossible to enhance the legitimacy of the Council when it rests on being indirect, and is part of the EU polity. Whilst this traditional representation, and partial accountability may not satisfy those who argue for a 'purer' form of legitimacy, it is shown to produce effective structures by which member states can reach agreement on EU policy decisions within the Council. This is pivotal. Legitimacy requires us to examine the representative character and accountability of a system, yet it also embraces notions of performance. The Council's legitimacy may be indirect but it is legal, and justified. Its structure permits certain levels of representation, and its working methods do legitimise its outputs. Moreover, the Council works. Performance and effectiveness are as much a part of the legitimacy of a system as the levels of representation permitted. Co-decision has become a self-fulfilling means to greater inter-institutional cooperation and dialogue, and more broadly the further legitimisation of EU governance. However, even by enhancing the direct legitimacy of the EU through co-decision, the inner workings of the Council that facilitate agreement remain.

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