Co-decision – the panacea for EU democracy?

Anne Elizabeth Stie
Abstract
This thesis pursues two main goals. The first is to evaluate the EU’s co-decision procedure for its putative democratic qualities. The second is to contribute to the operationalisation of deliberative democracy by developing an analytical framework/evaluative scheme that can be applied to co-decision in particular and to public policy-making procedures in general.

Deliberative democracy states that democratic decisions are those that have withstood testing and critique in a publicly accessible manner. Since the people are never present to make decisions, the realisation of this claim can only be redeemed if the decision-making procedures fulfil certain democratic qualities. Democratic decision-making cannot be realised without elected politicians as the main decision-makers. Only they can establish the necessary link to citizens. From a deliberative perspective, it is, however, not enough to be elected. The link between politicians and citizens must also be visible in between elections and not just during election campaigns. Politicians can only claim to speak on behalf of citizens if they regularly justify their positions in public so that citizens can actually know what decision-makers are up to. In short, democracy is understood as a justificatory and reason-giving process where citizens are brought in and can hold politicians to account through public debate. Also experts have a legitimate place in decision-making, but their job is to provide technical and scientific expertise and should not make choices and take decisions on politically salient issues. The procedural conditions framing public policy-making processes should therefore seek to approximate the following procedural criteria: (1) democratic deliberative meeting places, (2) inclusion of affected and competent parties, (3) openness, (4) neutralisation of asymmetrical power relations and (5) decision-making capacity. The co-decision procedure is evaluated against these criteria.

The main conclusion is that there is a tension between the formal provisions and the established practices of the co-decision procedure. In the thesis it is shown that the formal set-up of the co-decision procedure has many democratic qualities: the main decision-making bodies (the EP and the Council) have a popular anchoring; the procedural set-up ensures an intelligible decision-making process with up to three readings where there is time for deliberation prior to
final decision-making; the EP provides publicly accessible settings where the citizens can follow the MEPs’ discussions and decisions; legally the co-decision set-up respects the principle of separation of powers; and the ECJ and the Ombudsman represent ex post accountability mechanisms where citizens can file complaints if they find that co-decision acts violate their rights. In other words, the democratic potential of the formal co-decision set-up is definitely there. The problem is that the co-decision-makers have established practices that work against rather than in accordance with the formal provisions. In this way, the democratic qualities are effectively rendered passive due to so-called informal and secret ‘trialogues’. The scope and scale of these meetings between a limited selection of participants from the EP, the Council and the Commission run counter to and are largely incompatible with democratic decision-making. This problem is also exacerbated by the internal organisation of the Council where decisions are formulated and basically decided in camera by unelected officials. The procedural incentives for decision-makers to justify their positions are hence not encouraged under such procedural conditions.

From a deliberative democratic perspective the problem is that both the extensive use of trialogues and the undemocratic character of the Council’s internal organisation have resulted in a situation where co-decision-making largely take place behind closed doors. In this regard also the EP is affected for even if it formally conducts its legislative work in openness, the salience and scope of the trialogues interrupt and curtail the parliamentary process of opinion- and will-formation. This contributes to empty the EP committees as the place where positions are discussed and formulated. In sum, the democratic legitimacy of the co-decision procedure suffers from two main deficits: Firstly, the relationship between elected politicians and unelected experts is biased towards the latter in the sense that co-decision acts are to a large extent made by experts and bureaucrats. Secondly, the trialogues move the policy-making process behind closed doors where only a limited number of participants are present and of which only a half is elected politicians. In sum, the established practices of co-decision-making lead to a situation where politically and publicly salient issues are canalised into closed settings. A privatisation of politics has never been compatible with democratic decision-making.
Preface

The former Secretary General of the United Nations, Dag Hammarskjöld, supposedly once said that “Only he deserves power who every day justifies it.” This quote may sum up the essence of the normative argument defended in this thesis. It goes to the heart of what democracy should be about, namely a publicly, open and justificatory practice. This thesis defends not only a deliberative, but also a procedural approach to democratic legitimacy. The main argument is therefore that a legitimate policy outcome is only partly justified by the quality of its content, it is just as important how it was reached. For decision-making processes to be democratically legitimate it should therefore be a daily practice of reason-giving and public justification. For this to happen, the institutional and procedural arrangements must be conducive to democratic deliberation. A major task of this thesis is to specify how we can approximate deliberative principles into mechanisms that most likely will maximise the conditions for this happen. Many will, nonetheless, call deliberative democracy utopian or unrealistic. My aim is to show that this is not the case and simultaneously admit that deliberative democracy is hard to achieve and perhaps more fragile than many other models of democracy. However, the difficulties we encounter in bringing it about, does not give us reasons to render the enterprise futile. It rather urges us to investigate the conditions under which deliberative democracy is possible and thoroughly discuss the potential normative trade-offs that can and cannot be made. My hope is that this thesis can be a small step in this direction.

*      *      *

Many people have helped during the process. First, I want to thank my supervisor – Erik Oddvar Eriksen – for articulating and addressing the types of issues that I find most worthwhile pursuing and for helping me to pose the right question. Apart from Jürgen Habermas’ theories on deliberative democracy, it is easily detectable that his work has been the most important inspiration and influence on my own position. I admire his ability of analytical clarity and his courage to present and articulate bold and encompassing theoretical ideas. I am grateful to him for reading and commenting on the various versions of the thesis – for guiding me through and pointing me in the right direction when needed. Helene Sjursen has been a very important support for me. I do not think I know a better, but critical reader. In other words, she has the unique ability to keep analytical focus and dissect a text so that it has the potential of getting
so much better. I am thankful for Helene’s scholarly and personal guidance at critical junctures of the process.

I am particularly grateful to Marianne Riddervold, Chris Lord and Kari M. Osland for taking the time to read the whole or large parts of the manuscript and for providing me with very helpful comments and suggestions for improvement. The thesis has also benefited from discussions with colleagues who kindly took the time to comment on individual chapters of the thesis. In this regard I am grateful to Maria Martens, Guri Rosén, Daniel Gaus as well as to the participants in the ‘LEGO group’. Thanks also to Sindre Hervig for technical assistance.

This thesis was funded jointly by the CIDEL project (a three years research project financed by the European Commission’s Fifth Framework Programme) as well as by Arena, Centre for European Studies, University of Oslo. These settings – including the now ongoing RECON project – have provided me with direct access to a first class international research environment. Discussions, seminars, workshops and conferences in these various formats have been invaluable, inspiring and extremely educational.

I also wish to express my gratitude to all my colleagues at Arena for collectively creating and maintaining a stimulating and challenging work place. A special note of thanks goes to Maria Martens – my colleague and very good friend – for sharing the same humour, for endless encouragement and care, and for being a person who intuitively understands. As a rule of no exceptions, it is always a better day at work when she is around. I should also like to thank Daniel Gaus, Cathrine Holst, Marianne Riddervold and Guri Rosén for friendship and fantastic support.

Last, but not least, life is luckily more than research. I am grateful to family and friends for love, support and incredible patience. This work is dedicated to my parents.

Anne Elizabeth Stie
Oslo, July 2009
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<th>Full Form</th>
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<tbody>
<tr>
<td>ALDE</td>
<td>Alliance for Liberals and Democrats for Europe</td>
</tr>
<tr>
<td>CFI</td>
<td>Court of First Instance</td>
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<td>CFSP</td>
<td>Common Foreign and Security Policy</td>
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<td>CoR</td>
<td>Committee of the Regions</td>
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<td>Coreper</td>
<td>Committee of permanent representatives</td>
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<tr>
<td>CSO</td>
<td>Civil society organisation</td>
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<tr>
<td>CULT</td>
<td>EP Committee on Culture and Education</td>
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<tr>
<td>DG(s)</td>
<td>Directorate General(s)</td>
</tr>
<tr>
<td>ECJ</td>
<td>European Court of Justice</td>
</tr>
<tr>
<td>EFA</td>
<td>European Free Alliance (cf. The Greens/European Free Alliance)</td>
</tr>
<tr>
<td>ENVI</td>
<td>EP Committee on Environment</td>
</tr>
<tr>
<td>EO</td>
<td>European Ombudsman</td>
</tr>
<tr>
<td>EP</td>
<td>European Parliament</td>
</tr>
<tr>
<td>EPP-ED</td>
<td>Group of the European People’s Party (Christian Democrats) and European Democrats</td>
</tr>
<tr>
<td>ESC</td>
<td>European Social Committee</td>
</tr>
<tr>
<td>EUR-Lex</td>
<td>The online portal to European law</td>
</tr>
<tr>
<td>GUE/NGL</td>
<td>Confederal Group of the European United Left – Nordic Green Left</td>
</tr>
<tr>
<td>IMCO</td>
<td>EP Committee on Internal Market and Consumer Protection</td>
</tr>
<tr>
<td>ITRE</td>
<td>EP Committee on Industry, Research and Energy</td>
</tr>
<tr>
<td>JURI</td>
<td>EP Committee on Legal Affairs</td>
</tr>
<tr>
<td>LIBE</td>
<td>EP Committee on Civil Liberties, Justice and Home Affairs</td>
</tr>
<tr>
<td>NGO</td>
<td>Non-governmental organisation</td>
</tr>
<tr>
<td>OEIL</td>
<td>European Parliament Legislative Observatory</td>
</tr>
<tr>
<td>PES</td>
<td>The socialist Group in the European Parliament</td>
</tr>
<tr>
<td>PJCC</td>
<td>Police and Judicial Cooperation in Criminal Matters</td>
</tr>
<tr>
<td>Prelex</td>
<td>The Commission’s monitoring service of the decision-making process between the institutions</td>
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<tr>
<td>SEA</td>
<td>Single European Act</td>
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<tr>
<td>TEC</td>
<td>Treaty establishing the European Community</td>
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<td>TEU</td>
<td>Treaty establishing the European Union</td>
</tr>
<tr>
<td>TRAN</td>
<td>EP committee on Transport and Tourism</td>
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<td>UEN</td>
<td>Union for the Europe of Nations</td>
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PART I
Theory, approximation and background
Chapter 1

Introduction

The institutions and procedures of the European Union (EU)\(^1\) are usually not celebrated for their democratic character, but rather criticised for their bureaucratic, elitist, non-transparent, executive-driven and undemocratic decision-making processes – hence the democratic deficit debate.\(^2\) Moreover, some also conceive of the EU as the main threat to democratic government in that the move towards more supranationalisation means that the member states lose their influence and competence to the bureaucrats in Brussels. To meet such accusations, the EU has over the years expressed a strong commitment and has attempted to democratise its institutional structure, practices and procedures. The explicit commitment for more openness\(^3\) as well as the establishment of Union citizenship, the

\(^1\) I refer generally to the ‘European Union’ throughout the thesis although the co-decision procedure technically belongs to the first pillar framework of the European Community (EC).


\(^3\) Cf. Article 255 (TEC), protocol 17 of the Amsterdam Treaty, the establishment of the Ombudsman, the Commission White Paper on Governance (COM (2001) 428 final) etc.
Charter of Fundamental Rights and the Convention on the Future of Europe, which resulted in the now publicly declined Constitutional Treaty, are perhaps the most visible examples. But also the introduction and steady extension of the co-decision procedure (cf. Article 251, TEC) to new policy areas has been celebrated as a democratic improvement, first and foremost because of the involvement of the European Parliament (EP): ‘(...)the goal was to enhance the input legitimacy of the EU by giving the only institution whose members are directly elected more powers to shape EU policies’ (Häge and Kaeding, 2007: 342, see also Farrell and Héritier, 2003b: 6).

Unlike other decision-making procedures in the EU, co-decision – as the name indicates – warrants equality between the EP and the Council of Ministers, that is, the institutions are to be co-legislators. Under the co-decision provisions, the EP is not an appendix to the Council in the legislative process, but an equal partner equipped with the possibility to both amend Commission proposals and to veto them. However, is the inclusion of the EP in itself a guarantee for more democratic decision-making in the EU? The above quote from Häge and Kaeding (2007: 342) continues in the following manner:

But, besides empowering the EP, the co-decision procedure also introduced a somewhat cumbersome formal decision-making process, consisting of three readings by both the EP and the Council. The result was a considerable prolongation of the legislative process. To counteract these tendencies, the three main EU institutions started to engage in informal negotiations before and between their formal readings. While these so-called trilogue negotiations increase EU output legitimacy in terms of decision-making efficiency, the opaqueness of these processes and the disproportional influence of the few actors that are directly involved in the negotiations endanger the original goal of fostering the input legitimacy of the EU.

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5 In the following, ‘the Council’ will function as shorthand for the Council of Ministers and should therefore not be mixed up with the European Council.
Hence, it is seemingly too easy to equate democratisation with the inclusion of the EP. The question, then, is if it is enough to just include a directly elected body to mend the democratic shortcomings or whether the matter also – and perhaps first and foremost – depends on how the procedure itself is constituted, organised and practiced. In other words, are the procedural qualities (formal and informal) of the co-decision procedure conducive to democratic decision-making? This is the topic of this thesis.

Filling a gap in the co-decision literature
The co-decision procedure was introduced with the Maastricht Treaty and is regulated in Article 251 (TEC). It belongs to the first pillar and is thus part of the Community method and has in comparison to the other EU decision-making procedures received quite a lot of attention not only within the EU itself, but also from the research community. The majority of studies on co-decision are focused on the inter-institutional balance of power (first and foremost) from a game theoretical perspective and often with a special emphasis on the EP’s position. Other studies use the development of co-decision as an empirical case to explain institutional change from a rational institutionalist approach (Farrell and Héritier (2003a, 2004, 2007). In addition, there are studies that have a more qualitative approach and often include EU practitioners, usually with the EP as their primary research object.

The focus of the co-decision literature has thus mostly been on the institutional power balance, not on the democratic qualities of the procedure itself. And whereas comments on the state of affairs concerning issues of transparency, accountability and legitimacy often appear in the concluding remarks, there is – as far as I know – only one study that has conducted a more systematic democratic evaluation of the co-decision procedure (see Farrell and Héritier,

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7 Burns (2006); Corbett et al. (2007); Rasmussen (2005); Rasmussen and Shackleton (2005); Settembri and Neuhold (2008); Shackleton (2000); Shackleton and Raunio (2003). Some also look at the Commission’s inter-institutional position under co-decision, see Rasmussen (2003); Burns (2004).

8 See e.g. Farrell and Héritier (2004); Häge and Kaeding (2007); Shackleton and Raunio (2003).
Farrell and Héritier (2003b) use three positions in the debate about democratic legitimacy in the EU as their analytical framework: the first is the federalist position, the second basically amounts to the ‘no-demos thesis’ position and the third is an in-between position in holding that the current legislative system should in addition be more accountable to and controlled by national parliaments. Farrell and Héritier (2003b: 9) call these three positions ‘sources of democratic legitimacy’, but they never present a democratic yardstick explaining why, when and in what way accountability and transparency are important and necessary criteria for democratic decision-making. They are seemingly just taken as theoretical givens and in themselves self-explanatory.

No doubt, the claims Farrell and Héritier and all the other studies make concerning the lack of transparency and accountability are easy to find plausible, but how and when do they know that co-decision dossiers are made in a democratically legitimate or illegitimate manner? According to which model of democracy are such conclusions made? For instance, is accountability understood in the same way from the federalist, the no-demos-thesis and national parliament perspectives? There may be a wide-reaching agreement on the normative superiority of the principle of democracy as such, but major differences remain about which model is the best one (cf. Lord, 2007b). Without an explicit democratic standard against which co-decision-making can be assessed, the conclusions about the democratic shortcomings of co-decision remain provisional still awaiting (a more) conclusive and normative endorsement. How is it possible to account for the putative democratic qualities and/or shortcomings of co-decision? What are the underlying standards that carry the normative force of statements like these? In other words, what is missing is an argument about ‘(...)what role democracy ought to have in the governance of the European Union’ (Lord, 2007b: 70).

The aim of this thesis is therefore to conduct an assessment of the co-decision procedure where the democratic yardstick is identified,

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9 The co-decision procedure is, however, part of the overall democratic evaluation of the EU system in Menéndez (2009), but is not the main topic of his assessment.

discussed and ‘operationalised’ in order to make explicit when and under what kind of circumstances we can expect that the co-decision procedure will produce legitimate and acceptable outcomes. In this regard, I will assess co-decision against the normative standard prescribed by the discourse-theoretical version of deliberative democracy (cf. Habermas, 1998: 107). Hence, if we apply deliberative democracy, when and under what kind of conditions could we expect co-decision acts to be democratically recognised? Or put rhetorically and hypothetically, if Union citizens were asked to actually give their consent to co-decision acts, what kind of conditions must the co-decision procedure ensure in order to make it likely that citizens will find such acts acceptable and thus legitimate constraints on their actions?

Institutional and procedural design matters
This thesis starts from the assumption that the way decision-making processes are organised and institutionalised can tell us something about the likelihood of whether a procedure is (at all) able to generate democratically acceptable results. Focusing on procedural qualities, then, means to look at the conditions and the structure of the decision-making framework. For instance, if decision-makers are not in any shape or form subjected to two widely shared minimum requirements, namely periodic elections (i.e. a procedural mechanism regulating access to decision-making posts) and public debate, the outcomes resulting from the decision-making process can simply not be labelled democratic as the two most important conditions for democratic law-making have not been met. Institutional and procedural features matter as they shape the behaviour of actors and consequently also the outcome of interaction – they function as ‘rules of the game’. What I am after in this thesis, then, is how the procedural design and the informal rules that follow from there do or do not function as constraints, possibilities and incentive-structures for ensuring and promoting democratic decision-making. On this basis, the thesis addresses and assesses the question of the co-decision procedure’s democratic qualities from the perspective of deliberative democracy.
Deliberative democracy

Deliberative democracy is a normative theory based on the idea of ‘(...)a form of government in which free and equal citizens (and their representatives), justify decisions in a process in which they give one another reasons that are mutually acceptable and generally accessible, with the aim of reaching conclusions that are binding in the present on all citizens but open to challenge in the future’ (Gutmann and Thompson, 2004: 7; see also Forst, 2001: 346; Chambers, 2003: 308). Hence, deliberative democracy underlines the importance attached to arrangements where (reversible) policy proposals can be tested through reason-giving conducted in inclusive and open processes prior to actual decision-taking. Hence democracy is not only about participation, but also that the political process ensures quality of decision-making and brings about better results in the rational and epistemic sense. In this way, then, there is, from a deliberative perspective, an internal connection between rationality and deliberation.

However, all representative democracies face the challenge of finding legitimate ways to translate institutionally the democratic requirement of ensuring the inclusion of ‘all those affected’ given that the citizens are never actually participating in public law-making. The deliberative solution is the reliance on satisfactory decision-making procedures: ‘[T]he democratic procedure no longer draws its legitimizing force only, indeed not even predominantly, from political participation and the expression of political will, but rather from the general accessibility of a deliberative process whose structure grounds an expectation of rationally acceptable results’ (Habermas, 2001: 110). The reference to procedure should here be understood in the wider systemic perspective of capturing the constitutional set-up of a democratic order and not just a narrowly defined policy-making procedure producing secondary law (such as co-decision). Rather, the reliance on procedure in the wider sense refers to how the institutionalised decision-making centre is constituted and linked to civil society, the public sphere and to the market (see, Habermas, 1998, 2001, 2006).

Consequently, the deliberative democratic account of this wider perspective on the democratic procedure warrants decision-making processes that are sufficiently open and accessible to the views of
affected and competent parties. In representative systems the threat is always that those in government become too independent and detached from the control and influence of citizens. This is also a theoretical challenge to which deliberative democracy is subjected. In putting the burden of democratic legitimacy of policy outcomes on the decision-making processes and procedures themselves, the challenge is to ensure that these processes and procedures do not become self-contained or self-sufficient immune to popular input and scrutiny (Habermas, 1998: 183-4). There must be a link between strong and general publics in order to ensure the subjection of will-formation and decision-making processes in formal decision-making institutions to a third-party audience.11 The ultimate goal is to ensure that the deliberative processes are not reduced to elite/technocratic deliberation, but is exercised in front of a public where societal voices can respond and criticise policy proposals through the public debate. In other words, a democratic decision-making procedure is characterised by reflexivity which means that it ensures institutional and procedural mechanisms spurring internal critique, scrutiny and justification of policy proposals. Consequently, from the perspective of deliberative democracy, then, ’(...)it is not the simple consent that contains the moment of legitimacy but rather a process of accountability in which citizens have objections answered and hear and evaluate the reasons. The approval or disapproval of other people’s deliberations reduces democracy to voting’ (Chambers, 2004a: 397).

What kind of deliberation?
The difference between Europe and other parts of the world is that the EU member states display a significantly higher degree of willingness and ability to define, solve and cooperate on a strikingly more comprehensive set of issues at the supranational level. Moreover, the EU reaches decisions that are complied with without the traditional state sanctioning mechanisms such as monopoly of violence, (direct) taxation or a common European identity (Eriksen, 2009: chapter 3). In this regard, many have pointed to the importance of the lengthy and cumbersome processes of reaching consensus among the actors even when majority vote is possible (Heisenberg, 2005; Lewis, 1998, 2000). Several studies attribute this ability to

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11 Strong versus general publics (see Eriksen and Fossum, 2002) originally stem from Nancy Fraser (1992) who termed them strong versus weak publics.
deliberation and arguing – and not just hard-nosed intergovernmental bargaining – as the important feature explaining why the EU actors are able to reach agreement during various types of decision-making processes. Generally, then, this means that the processes of reaching binding decisions in the EU are marked not only by bargaining and strategic action, but also by the exchange of viewpoints and arguments aiming at justifying and convincing the counterparts to change their original position and to reach a common understanding of a given situation.

But these studies do not necessarily talk about the same ‘type’ of deliberation. For instance, on the one hand, comitology studies are concerned with how networks of experts situated in EU committees are oriented toward intelligent and efficient problem-solving in relation to a cognitive standard and reach decisions through deliberation as a coordinating mechanism rather than through the mechanism of bargaining (see Cohen and Sabel, 2003; Eriksen, 2003: 208-9). On the other hand, studies concerned with the EU constitution-making process, especially the Convention on the Future of Europe were also concerned with approximating the mechanism or interaction mode through which the actors potentially reached an agreement on Treaty revision, but the case they describe – constitution-making – is qualitatively different than regulatory and expert committees. What these latter authors want to investigate is instead whether the process was characterised by less bargaining and more deliberation, and if yes, to conclude that constitution-making in the EU was more democratically legitimate or at least more legitimate than the traditional IGC processes. Normatively speaking, then, these two examples do not belong to same category even if the actual and observable interaction between the actors can both be labelled deliberative. The point is that these studies refer to different types of deliberative quality. Whereas studies on committees do not claim that the type of deliberation conducted in these settings are democratically legitimate, they are rather, presumably, more inclined to argue that it contributes to ‘output’ legitimacy in enhancing

12 Cohen and Sabel (2003); Eriksen (2003); Eriksen and Fossum, (2000); Fossum and Menéndez (2005); Joerges and Neyer (1997); Joerges (2006); Magnette, (2004); Rhinard (2002).

13 See for instance many of the contributions in Closa and Fossum (2004).
efficiency and effectiveness and/or that they enhance the epistemic or scientific quality of the outcomes.

In other words, however deliberative a decision-making process may be, this does not automatically mean that the outcome is democratically legitimised (Eriksen, 2003: 211, 217; see also Nanz and Steffek, 2005: 268-9). Whereas deliberative democracy is a normative theory prescribing norms and ideals for the realisation of democratic government, the deliberative theoretical field is not coextensive with deliberative democracy. Building on the Habermasian notion of communicative action, deliberation can also simply be used as an explanatory theory of action coordination – and thus function as an alternative explanation to rationalist theories based on bargaining and strategic action.

However, when the purpose is not (only) to explain the likelihood of whether a result or agreement was reached through the mechanism of bargaining or deliberation, but rather to evaluate the democratic qualities of decision-making process it immediately becomes important to be aware of the three different qualities/dimensions of deliberation: (1) As a mode of interaction deliberation is oriented towards reaching a common understanding among the participants about the nature of a given case. Hence it is an alternative interaction mode to bargaining which is based on strategic action. The focus is on how deliberation has the potential for testing and possibly transforming and changing preferences/positions. (2) As an interaction mode, deliberation is also highlighted as a mechanism conducive to problem-solving and to enhancing the epistemic quality of decisions. The epistemic quality of deliberation contributes to bring out the cognitive or expert (scientific or technical) knowledge aspect of a case. 14 (3) Finally and most importantly, deliberation is –

14 Here it could/would arguably be logical to label the potential deliberation taking place in expert and/or regulatory committees for epistemic deliberation. However, even if it is common to label the networks of experts working in the many EU regulatory committees for epistemic communities, the term ‘epistemic deliberation’ may cause confusion when discussed from the point of deliberative democracy. The problem is that the philosophical discussion on the epistemic dimension of deliberative democracy is (still) unresolved and roughly concerns the debate between correctness theories versus purely procedural accounts. The disagreement pertains to whether it is the process of deliberation in and of itself (i.e. the procedural account) that constitutes the quality of the outcome or whether it must also rely on procedure-independent principles (such as equality, liberty etc.) for setting up a fair process in
given the fulfilment of certain institutional and procedural preconditions – also a conflict-regulating mechanism that is suitable to determine questions of justice and impartiality and consequently provide a procedure for reaching legitimate collective decisions. This level of deliberation is normatively more demanding as the moral content of deliberation can only be redeemed if it ensures the inclusion of all those affected by the decisions (cf. Habermas, 1998: 107; Eriksen, 2005: 16-17). These issues are more closely presented in the second chapter which contains a more thorough presentation of deliberative democracy.

How to approach deliberative democracy empirically?

The purpose of this study is not only to develop an evaluative scheme for the assessment of the co-decision procedure alone, but on a more general level also to present a scheme that can be applicable to other empirical studies seeking to evaluate the democratic quality of public policy-making procedures. Hence, the aim is to establish a first step in showing that it is possible (and important) to distinguish empirically between the different types of deliberative qualities and thus to facilitate a more nuanced normative account of what deliberation can contribute with in different types of situations, that is, whether it is only likely to enhance problem-solving or whether it also has the potential to enhance the democratic quality of collective decision-making.

The theory of deliberative democracy has over the last two decades not only received major philosophical attention15, it has, as we have seen, also become an increasingly important perspective on European integration.16 In addition, there are also other empirical approaches which do not have the EU as its main target, but that deal with the

the first place. If the latter is the case, the question becomes whether the whole process of deliberating is redundant for the overall achievement of democratically legitimate outcomes (See, Estlund, 1997). For these reasons, then, I find it more prudent and precise to label this type of deliberation for elite deliberation instead of epistemic deliberation.


16 Eriksen and Fossum (2000); Eriksen (2009); Closa and Fossum (2004).
operationalisation of deliberative theory more generally.\textsuperscript{17} Whereas the philosophical debate on these issues has lasted longer and is thus already sophisticated and advanced, the task of operationalising and thus making deliberative theory relevant for research on concrete empirical cases (e.g. European integration) is still under-developed. This thesis aims to contribute to the ongoing endeavour to operationalise deliberative theory to non-ideal conditions. This is important not only because it contributes to test empirically the claims and assumptions of the theory of deliberative democracy, but also because empirical research can contribute to correct, nuance and further substantiate under what kind of conditions deliberative democracy is applicable, viable and desirable.

Deliberation can be a good thing in many situations; it can be useful in the private sphere, in the public sphere as well as in formally institutionalised decision-making settings. With the different types of deliberation in mind, we must also be careful about taking heed of the context or situation in which deliberative democracy is supposed to be applied. When, where and how deliberative democracy is used is critical for the types of conclusions that can be reached. Thompson (2008: 503) notes that ‘Until recently nearly all studies – and much of normative theory – investigated deliberation by ordinary citizens rather than politicians.’ Consequently, given that the majority of empirical studies investigating the effect of deliberation are concerned with small groups and away from actual public decision-making, this limits their value ‘(...)not only because what is being studied is several steps removed from what deliberative theory is ultimately concerned about\textsuperscript{18}, but also because discussion alone is likely to produce different empirical consequences than those of decision-oriented discussion’ (Thompson, 2008: 513). In other words, the conclusions and findings resulting from studies of small groups without the power to make binding decisions cannot and should not

\textsuperscript{17} Fishkin (1999); Steiner et al. (2004); Rosenberg (2007); Warren and Pearse (2008); Acta Politica, 2005, Vol. 40, No. 2 and 3.

\textsuperscript{18} That is, ‘Deliberative democracy is focused on the circumstances in which a group must make a decision to which all members are bound whether they agree with it or not. Although even political deliberation can have various purposes, its essential aim is to reach a binding decision. From the perspective of deliberative democracy, other purposes – such as learning about issues, gaining a sense of efficacy, or developing a better understanding of opposing views – should be regarded as instrumental to this aim’ (Thompson, 2008: 502-3).
automatically be generalised as valid for institutionalised decision-making settings.

It is important to specify the circumstances on what could and should be expected normatively in different situations. There is for instance a major difference between what can and should be expected from actors in institutionalised decision-making settings as opposed to actors participating in public sphere experiments such as ‘Deliberation Day’, ‘Deliberative Poll’ or other types of citizens’ assemblies (Ackerman and Fishkin, 2004; Fishkin, 1999; Fishkin and Luskin, 2005; see also Warren and Pearse, 2008). For participants in the first type of setting, there is decision-making resulting in binding decisions involved, that is, will-formation processes that have a strong connection and lead directly to binding decisions. For the latter types of settings the connection between deliberation and decision-making is at best very weak, that is, deliberation functions here merely as opinion-formation as it does not directly affect the setting of norms/goals and the (re-)distribution of interests, i.e. such discussions are non-binding upon the participants. This does not mean that studies of smaller groups or debates in the public sphere are unimportant, they are all relevant for the larger democratic process. The point is that a research design must be carefully devised so that it suits the object of study (Thompson, 2008; Warren, 2007: 286). What, then, should we expect from a decision-making procedure such as co-decision?

The co-decision procedure belongs to the category of institutionalised decision-making settings and consequently contains both opinion- and will-formation as well as decision-making processes. Moreover, the outcomes of co-decision processes are either EU regulations, directives or decisions, that is, they are binding on the addressees. The first requirement, then, is that the provisions regulating co-decision-making have allocated time and space so that there is (at least) a chance for deliberation to occur prior to actual decision-making. Secondly and as we have seen, the goal of deliberative democracy is not only to ensure that there is reason-giving and deliberation, but also that the reasons or deliberation are of a certain quality. However, in order to determine the democratic quality of decisions it is not enough only to assess the validity and consistency of the speech acts or arguments themselves. The democratic quality is first and foremost redeemed when and if it can be ascertained that
the context in which these arguments were uttered meet certain procedural standards for democratic decision-making such as inclusion, transparency etc. The quality of decisions is primarily determined and related to the overall quality of the setting or the conditions under which they are presented. In other words, outcomes resulting from deliberation in closed settings with flexible mandates not warranting open accountability and justificatory processes neither during nor after the meetings have a normatively inferior status than outcomes resulting from settings where policy proposals must withstand critical scrutiny in a process that is either open during the meeting or after. Thirdly, the final requirement is to make deliberation relevant for decision-making, that is, argumentation should have an impact on the outcome.

**Deliberative democracy applied to institutional decision-making settings**

The aim of this thesis is to assess how far the co-decision institutional arrangements meet the *procedural conditions* for legitimation through deliberation between elected representatives. Hence, in order to avoid confusion it should immediately be underlined that the task is not to assess whether co-decision-making is in fact characterised by deliberation rather than bargaining or to assess the quality of the putative deliberations. Instead, this thesis is concerned with evaluating the democratic quality of the conditions under which co-decision-making is exercised and more precisely to answer the following research question: *Are the institutional and procedural qualities regulating the co-decision procedure organised in such a way that the process of co-decision-making warrants the presumption of acceptable and thus legitimate decisions?* In other words, is co-decision organised in such a way that it makes possible deliberation and discussion prior to final decision-making? And if yes, does the putative deliberation taking place in these debates approximate standards of democratic reason-giving? An important distinction in this regard is the difference between elite/expert and democratic deliberation. To put it bluntly, the latter question pertains to finding out whether discussions are only between experts and bureaucrats or whether it also opens up for the viewpoints of affected parties.

In chapter 3 I have developed an evaluative scheme in order to determine the putative democratic qualities of the co-decision
procedure. The scheme contains five criteria that are deemed necessary in order for a decision-making procedure to fulfil the procedural qualities of democratic deliberative policy-making. Hence, a deliberative democratic decision-making procedure must have (1) democratic deliberative meeting places, (2) it must ensure inclusion of affected and competent parties, as well as (3) openness. It must provide (4) neutralisation mechanisms to level out asymmetrical power relations and, finally, (5) it must have decision-making capacity. Each criterion is then provided with indicators.

The way to determine these differences in normative quality of deliberation is to pay attention first and foremost to the actors and how – given the procedural formal and informal rules – they (are likely to) behave in different settings. First of all, there is a main distinction between elected and non-elected participants and it is only the former who are eligible for the normatively highest status as representatives of affected parties. Moreover, it is only they who are – through elections – authorised to make collective decisions on behalf of citizens and who thus possess the key to connect the deliberation that takes place inside institutionalised decision-making settings to the public deliberations in the general publics outside formal decision-making nexus. However, even if the electoral link is a necessary precondition, it is not sufficient. Elected actors must earn their status as representatives of affected parties on a daily basis by the way they behave. They must justify their positions in clear and intelligent ways, they must conduct their business in openness, they must ensure that all types of views are voiced and heard. In this regard we could think of a rephrasing of Ernest Renan’s famous definition of the nation as a ‘daily plebiscite’ with Dag Hammarskjöld’s ‘Only he deserves power who every day justifies it.’ In other words, the elected decision-makers should think of their work as a daily justificatory and account-giving practice. As we can see, the justificatory duty put on individual elected representatives is tied to the democratic requirement of public debate which again provides a link back to elections as the mechanism that authorise elected representatives (see also Eriksen, 2009: 229).

However, democracy is not only a principle of legitimation, it also warrants an organisational interpretation in order to realise its

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19 Cf. the right to justification, Forst (2001); Chambers (2003: 308); Bovens (2007).
aspirations. The organisational structure of modern democracies has systems to translate principles and arguments into action. There are rules for law-making, for representation, for argumentation, for how to sanction power abuse etc. and there are resources allocated to make sure that these goals are realised. In other words, to put such a heavy burden solely on the representatives alone without steeping the above principles into formal rules and practices is too demanding. Hence to avoid weakness of will in situations where it may be tempting to revert to closed and unaccountable settings, the institutionalisation of formal and observable rules also represent necessary mechanisms to help ensuring that elected participants behave in accordance with what is expected from those who are set to represent affected parties. Hence the procedural rules should institutionalise mechanisms that ensure inclusion, openness, accountability and equality.

There is a major debate about how to provide empirically researchable indicators that can distinguish between deliberation and bargaining in real-life settings. When the purpose of this thesis is to assess the procedural qualities of co-decision this means looking at the preconditions for deliberative democracy, that is, whether the procedural circumstances regulating co-decision-making – in general – are more or less likely to contribute to democratically legitimate decisions. In other words, I do not assess the interaction between the Commission, the EP and the Council in the adoption of concrete co-decision dossiers in order to determine whether the policy-making processes were in fact characterised more or less by deliberation (or bargaining). Moreover, I do not assess whether the quality of the actual arguments in co-decision debates come closer to expert/technical or to political deliberation. This is not the task of this thesis. Hence, here the debate on how to empirically distinguish between deliberation and bargaining is only indirectly relevant, but it functions as an important background context. In this regard and as underlined above, my contribution to this debate on developing indicators that can tell deliberation from bargaining when we see it, is to underline that in order to know what kind of deliberation we potentially face when studying concrete empirical cases we need to investigate more than just the arguments or utterances. We also need to know the structural conditions under which they were expressed. In other words, merely investigating speech acts is insufficient for determining empirically whether a case was characterised first and
foremost by the one or the other interaction mode because only the way in which arguments and counter arguments are included and scrutinised, can tell us whether the decision-making result deserves democratic recognition. In sum, the overall structure or context of deliberation and decision-making must be taken into account.

The co-decision procedure

The EU has many decision-making procedures. So why should the focus be on co-decision? My interest in the co-decision procedure is both general and specific. Generally speaking, however important the extraordinary events of the IGCs and the (so far) two Conventions leading up to the adoption of the Charter of Fundamental Rights and the Constitutional Treaty respectively may have been for the current state of European integration, the importance of the mundane and every-day processes of ordinary decision-making also needs to be addressed more thoroughly. Whereas constitution- or treaty-making is undoubtedly important, the assessment of the co-decision procedure can tell us something about the potential democratic qualities of ordinary decision-making in the Union which has arguably a stronger direct effect on the daily lives of Union citizens. Moreover, the argument of studying a policy-making procedure which introduces binding secondary law can be seen as a microcosm and thus a test or at least an indication of the democratic quality of the larger EU system. In this sense, the co-decision procedure also provides a fruitful intake to a normative assessment of the conditions for democracy in a multi-level structure outside the traditional nation-state framework. Indirectly, then, this thesis also contributes to the ongoing discussion on the conditions for democracy beyond the nation-state framework in general.

In addition, the steady extension of new legal bases has made co-decision an increasingly influential procedure and, according to the EP, the co-decision procedure ‘(...)is the most important of the legislative procedures of the European Union.’ Moreover, it is also suggested to become the ‘ordinary legislative procedure’ both in the

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20 See also Ulbert and Risse (2005) who argue the same and share many of the same points. They are, however, not primarily concerned with democracy. Hence they do also not make a distinction between when arguing can generate democratic outcomes versus when arguing is merely generating more consensual outcomes.

Introduction

Constitutional Treaty as well as its successor, the Lisbon Treaty. Whatever the future of the Lisbon Treaty, it seems quite certain that the usage of co-decision will grow rather than decrease. This in itself warrants more attention not only to how co-decision alters the inter-institutional power balance, but also to how it potentially alters the conditions for democratic decision-making in the EU and thus for popular influence on policy areas where the EU exercises independent competence.

More specifically, the co-decision procedure – which belongs to the first pillar or what falls under the so-called Community method – is often referred to when the Union’s efforts to democratise its legislative practices is justified. In contrast to pillars II and III which first and foremost have an intergovernmental character; where the dominating decision-making procedure is unanimity; and where the EP only has a minor role, the co-decision procedure involves all the main European institutions. Moreover and particularly important for an assessment of the Union’s democratic qualities, it includes the directly elected EP as well as the majority principle. It is, in other words, this policy making method that comes closest to a ‘normal’ or democratic decision-making structure characteristic of domestic/national politics. Within the framework of the Community method the decision-making structure involves a combination of the three main EU institutions: the Council, the EP and the Commission. Hence, (the interaction between) these three institutions together form the formal decision-making structure/framework of the Union. It should be noted that also the European Court of Justice (ECJ) plays a role under co-decision, but the Courts are not part of ordinary decision-making, but intervenes when appealed to if there is a legal basis for it. The ECJ will not as such be neglected in this thesis, but will not be the prime target of the assessment and thus not subject to the same attention as the three main institutions. Other relevant topics/aspects for analysing democratic qualities such as the wider

22 E.g. the Council’s transparency requirements are stricter when dealing with co-decision dossiers than under other legislative procedure and is often mentioned as an example in this regard, see Article 8 in the Council’s rules of procedure.
23 I use the ‘ECJ’ and the ‘the Court’ interchangeably. This also includes the Court of First Instance (CFI) unless otherwise specified.
24 The ECJ is dealt with mainly in chapter 8 under the indicator of judicial review.
public sphere, the comitology committee system\textsuperscript{25}, the member state level as well as decision-making within pillars II and III, that is, foreign and security policy\textsuperscript{26} (CFSP) and police and judicial cooperation in criminal matters (PJCC)\textsuperscript{27} are left out due to time and resource limitations.

But why subject the EU to a democratic evaluation in the first place? The EU is a supranational polity for collective problem-solving – a polity that through its decision-making makes choices about what norms and goals to pursue and about the way burdens and goods should be distributed. The choices made by EU institutions influence and legally bind those affected by them. Through its decisions, the EU consequently creates winners as well as losers – its decisions have redistributive effects (Eriksen, 2009: 22, 164-166; Føllesdal and Hix, 2006). On this basis, such decision-making processes require democratic justification. In other words, I disagree with those (Majone, 1996) who thinks that EU policy-making does not need to be subjected to democracy because the outcomes are merely of a regulatory and not a redistribute kind or because EU policy-making is satisfactorily democratised through the current practice (Moravscik, 2002).\textsuperscript{28} Moreover, the broad scope of the EU’s activities has not only resulted in more autonomous European institutions. They have also obtained a more direct influence on European citizens’ lives than is common for traditional intergovernmental organisations. I shall take this claim of the EU polity as a given that will not be further discussed and justified on the basis that all types of public policy-making that claim to be legally binding should be subjected to democratic procedures (Menéndez, 2009).\textsuperscript{29}

\textsuperscript{25}Comitology committees are in charge of the implementation of legislation (Egeberg et al., 2006: 66) and are therefore largely excluded from this thesis, but see chapter 8 under separation of powers.
\textsuperscript{26} For an assessment of the democratic deficits in the security and defence pillar, see Stie (2008).
\textsuperscript{27} It should be noted that after 2005 some justice and home affairs issues were moved from the third to the first pillar and now falls under the co-decision procedure, see chapter 4, section 4.1.1.
\textsuperscript{28} That the EU is not only involved in regulatory-, but also redistributive policies, see Pollack (2000: 537); O’Brennan and Raunio (2007: 1-2).
\textsuperscript{29} Whereas I disagree with the ideas of directly-deliberative polyarchy, Cohen and Sabel’s (1997: 317) basic argument for when democracy is necessary and suitable is not difficult to corroborate with: ‘Democracy is a political ideal that applies in the first instance to arrangements for making binding collective decisions. Generally
What is more, I will also not comment further on the character of the EU polity, but from the above it becomes clear that I side with those who argue that the EU is a polity in need of its own legitimacy. It cannot merely rely and be parasitic upon the democratic qualities of the member states. Democratically legitimate polities making policies that are binding on the citizens ought to ensure – as all modern constitutional orders – that ‘(...)legitimation stems from the trust in procedures’ (Eriksen, 2009: 26). As mentioned above, for Union citizens to trust the EU’s decision-making procedures, these procedures need to be of a certain kind, that is, it must be possible for Union citizens to believe that the results they produce are ‘worthy’ of their respect and obedience which, in short, means that they must be institutionalised and organised in such a way that they warrant the presumption of ensuring equal concern and respect for all citizens.

In applying the deliberative democratic framework to the EU, I will then put the Union to the same test as nation-states. Many will possibly argue that deliberative democracy is too demanding even for nation-states given the emphasis on deliberative processes prior to decision-making. The reason why I did not choose a less demanding and less comprehensive approach is due to the supranational character of the EU’s Community pillar to which the co-decision procedure belongs and the direct consequences these decisions have for affected parties. In other words, just because the most likely findings will be negative is not in itself a good reason to relax the normative standard. Rather, the democratic shortcomings are important to uncover, especially since co-decision has become increasingly more important and will become the ‘ordinary legislative procedure’ if the Lisbon Treaty is finally ratified.

speaking, such arrangements are democratic just in case they ensure that the authorisation to exercise public power – and that exercise itself – arises from collective decisions by the citizens over whom that power is exercised.’ And in the footnote on the same page: ‘The ideal of democracy also has considerable force for organisations whose collective decisions are not binding. But the rationale for democratic decision-making is most compelling in the case of binding collective choices: that is, when members of the collectivity are expected to regulate their own conduct in accordance with its decisions.’
Structure of the thesis

There are two main parts in this thesis. The first is devoted to the development of the theoretical framework as well as a background presentation of the co-decision procedure (chapters 2-4). The second part contains the evaluation proper (chapters 5-10).

There are three chapters in the first part. Chapter 2 introduces the theory of deliberative democracy with a special emphasis on the discourse theoretical version which is applied in this thesis. This chapter describes the democratic standard against which co-decision will be evaluated. More precisely, the deliberative approach to democracy is first contrasted to bargaining and aggregative approaches underlining the deliberative democracy as a ‘talk-centric’ (as opposed to ‘vote-centric’) theory where accountability is conceived as an ongoing reason-giving practice. Here I also discuss the types of outcomes that can be expected from deliberative democratic processes (from rational consensus to working agreement) and how this can be achieved, that is, the need for an egalitarian law structure. In the second part of chapter 2, I address how other studies have approximated deliberative democracy and what can be learned from these and potentially applied to the evaluation of the co-decision procedure. As we have seen, many empirical approaches do not take proper heed of the difference between the conditions under which deliberation can lead to democratic government and when they merely lead to deliberative governance (that is, ensuring efficiency, problem-solving and/or improving the cognitive-scientific foundation for decisions).

In chapter 3, the understanding of democratic legitimacy is approximated from being solely a legitimacy principle to also become an organisational principle. Here I present an evaluative scheme containing five normative criteria which are subsequently ‘operationalised’ to empirical indicators. The criteria are: (1) democratic deliberative meeting places, (2) inclusion of affected and competent parties, (3) openness, (4) neutralisation of asymmetrical power relations, and, finally, (5) decision-making capacity. In the last part of this chapter, methodological issues are raised.

Chapter 4 provides background information on the co-decision procedure. Here the legal provisions and stages of the procedure is
presented as well as a brief historical outline of the major developments and changes to the co-decision procedure since its inception in the Maastricht Treaty. Furthermore, it is situated within the larger Community method or first pillar framework and supplemented with some numbers on how the co-decision procedure performs.

The second part of the thesis holds the evaluation. Following the criteria, there is one chapter for each criterion. Chapter 5, then, addresses the requirement of democratic deliberative meeting places. A minimum requirement for such meeting places is that they are composed of a representative selection of elected representatives. Only five co-decision settings meet this initial threshold, hence in this chapter the following settings are considered: the EP committees, the EP plenary sessions, the EP conciliation delegation, the ministerial level in the Council and the Conciliation Committee. The question is if these meeting places are settings where discussion, testing and justification of positions on co-decision dossiers are/can be conducted in a publicly accessible manner.

In chapter 6 I move on to evaluate the conditions for inclusion of the views of affected and competent parties. The first indicator evaluates whether the elected institutional actors as collective bodies possess final veto power. The second indicator is more demanding in assessing whether the co-decision procedure respects the normative hierarchy between elected and unelected actors on an individual level, that is, it looks at how the division of labour inside the institutional actors pattern between experts and elected politicians.

The 7th chapter is devoted to the issue of openness and transparency. At a minimum, the co-decision proposal should be available before the decision-making process is over. This is the first indicator. The second indicator builds on the first and appraises the conditions for access to documents and whether they are stored and easily available in a digital register. The third indicator looks at the openness of debates whereas the fourth deals with the intelligibility of voting.

In chapter 8 the focus is on mechanisms that can neutralise asymmetrical power relations. In this regard, two ex ante mechanisms are considered: intelligibility of procedure and separation of powers. In addition, I look at two ex post mechanisms that can contribute to
neutralise unequal power conditions, namely, the possibility for judicial review and/or recourse to the soft law possibility represented by the European Ombudsman.

In chapter 9, the fifth and final criterion of *decision-making capacity* is addressed. The issue to be assessed here is whether there are informal networks or structures where co-decision acts are actually taken and consequently whether the formal decision-making framework assigned in Article 251 (TEC) is bypassed and at worst made redundant. Two potential candidates are appraised. Firstly, historically, legally and actually, the Council is the stronger party in relation to the EP. It is therefore not unlikely that the Council would in fact also be the locus where decisions were taken and thus reduce the EP to rubber-stamp take-it-or-leave-it deals. Secondly, throughout the thesis the informal meetings – so-called ‘trialogues’ – between the EP, the Council and the Commission is a recurring topic. The importance of these meetings for reaching agreement is continuously underlined and they are now taking place at all stages in parallel with the formal processes. The question to be discussed is therefore whether they have taken over and made the formal processes redundant apart from ensuring formal approval through the vote.

Finally, chapter 10 holds the concluding remarks summing up the findings and the lessons that can be learned by using the evaluative scheme. Here I first discuss the co-decision procedure’s democratic qualities and subsequently its democratic deficits. Given the severity of the latter, it is argued that the former can only be conceived as potentials rather than how co-decision is actually practiced. The last part of the chapter is devoted to a discussion on the strengths and weaknesses of the evaluative framework – on what it permits us to conclude and which direction it can be improved.
Chapter 2

What is democratic legitimacy?

Empirical enquiry can more effectively influence – and in turn be influenced by – normative theory if both theorists and empiricists proceed with a clearer conception of the elements of deliberation (Thompson, 2008: 498).

Introduction

In the previous chapter I briefly introduced the concept of deliberative democracy and how the co-decision procedure could be assessed for its potential democratic qualities against five criteria (democratic deliberative meeting places, inclusion, openness, neutralisation of asymmetrical power relations, and decision-making capacity) developed from this theoretical position. The purpose of this chapter is to present in a more systematic manner the deliberative version of democratic legitimacy on which these criteria rest. Over the years, deliberative democracy has become a large research field. It is consequently impossible to do justice to all positions here¹, but the account of deliberative democracy defended

¹ For survey articles, see for instance Bohman (1998), Chambers (2003); Thompson (2008). There are also quite a few anthologies covering different theoretical positions, e.g. Bohman and Rehg (1998); Elster, (1998), as well as some contributions on
What is democratic legitimacy?


The chapter contains two parts. In the first part, I present the deliberative understanding of democratic legitimacy which, in short, is ‘talk-centric’ emphasising the institutionalisation of practices of accountability and justification. Here I discuss the types of outcomes that should be expected from democratic processes (from rational consensus to working agreement), whether the deliberative model of democracy is realistic as well as the need for an egalitarian law structure. The second part is focused on how other studies have operationalised deliberative democracy and what can be learned from these and potentially applied to the evaluation of the co-decision procedure. The problem with many empirical approaches is that they, as alluded to in the first chapter, do not pay enough attention to the difference between the conditions under which deliberation can lead to democratic government versus merely deliberative governance. Or put differently, when can deliberation qualify as an expression of democratic legitimacy and when is it only contributing to efficiency, problem-solving and/or improving the cognitive-scientific foundation for decisions, that is, to deliberative governance? In sum, the crux of the matter pertains to the type of evaluation standards that are being applied.

Democratic legitimacy from a deliberative perspective

The modern idea of democracy basically amounts to the notion of the self-governing human being and a just society where free and equal individuals give themselves laws that in the next step can be seen as legitimate constraints on their actions. How can this ideal scenario honouring the principle of individual autonomy be translated to real life circumstances? Under conditions of pluralism where there is no prospect of reaching a consensus on how everyone should live their life, the way to determine whether decisions are legitimate cannot merely be about their substance. The chance that everyone will find a

empirical approaches to deliberative democracy, see Steiner et al. (2004); Acta Politica, Vol. 40, No. 2 and 3, 2005; Rosenberg (2007); Warren and Pearse (2008)
policy proposal equally good is unrealistic. Consequently, given that
the substance of a proposal cannot function as the sole motivation to
support a decision, the deliberative argument is that the legitimacy of
decisions must first and foremost rest on the decision-making
procedure itself.\textsuperscript{2}

The assumption is that if an issue has been properly treated in a fair
process, the likelihood that those who were opposed to the outcome
will nevertheless respect it as a legitimate constraint on their
behaviour despite the fact that their position was rejected in the final
decision-taking moment. The theory of deliberative democracy
assumes that if there is a prospect for such a fair process preceding
decision-making, majority vote can be democratically legitimised.
Moreover, when the requirement of a prior process is respected,
majority votes ‘(…)therefore represent only temporary stops in the
continuous discussion about what should be done. Such a procedural
interpretation of the majority principle makes it consistent with the
concept of freedom when not applied to irreversible decisions.’
(Eriksen, 2009: 48; cf. also Chambers, 2004a: 397). Without such prior
processes the actual act of voting becomes nothing more than an
arithmetic number at a given point in time (Eriksen, 2007a: 92-3). If
fair procedures are established they can provide the reason and
motivation for minority positions to support majority decisions and
can thus compensate for the unrealistic prospect that everyone will
come to agreement on the substance of a decision.

The difference between the theory of deliberative democracy and
other theories of democracy is consequently locus. Deliberative
democracy is ‘talk-centric’ not ‘voting-centric’ (Chambers, 2003: 308).
To emphasise the process preceding the actual decision-making
moment differs significantly from aggregative theories of democracy
where the aim is to find the best mechanism to translate already fixed

\textsuperscript{2} I rely on an understanding of deliberative democracy which is not simply
procedural, but which also acknowledges that the procedure itself is grounded on a
certain minimum normative foundation. This foundation amounts to the principle of
equal worth of persons, i.e. that for a decision-making procedure to be legitimate it
must honour the principle that individuals are equals in the sense that they all have a
right to justification when laws and regulations limit their actions. In other words,
‘Procedural-independent standards are needed for securing a fair process’ (Eriksen,
2009: 46). See Forst (2001) on the right to justification. For a discussion on procedure
versus substance, see Gutmann and Thompson (2002); Bohman (1998).
What is democratic legitimacy?

individual preferences as accurately as possible into a collective decision by ensuring that every citizen counts for one and only for one in the final outcome (ibid; Nanz and Steffek, 2005: 370). The argument of the theory of deliberative democracy is that preferences are not given once and for all – they are not impermeable of human interaction, but rather shaped socially and discovered and influenced by the very process of interacting with others. What is more, even in situations where preferences are not altered through social interaction, the preferences of the majority still need to be justified and legitimised through reason-giving so that the minority can know that their views were set aside for better reasons, instead of just bypassed by a mere act of will (Dewey, 1927; Mill, 1861). Hence, a prior deliberative process is not pointless, but bears the hope and anticipation that divergent positions can be collectively moulded and potentially transformed into a consensus. For this to happen it is important that the process itself is regulated in such a way that different views, desires and knowledge can dominate the process rather than partial arguments, unjustified positions and insufficient knowledge. The problem with voting-centric theories is the lack of a mechanism that can ensure a just and non-arbitrary way of aggregating individual preferences. Aggregative theories thus not only lack a mechanism to take heed of the conflict regulating, learning and problem-solving potential of conducting a deliberative process prior to actual decision-taking. More importantly, they lack a mechanism to test the quality of individual preferences and consequently also a basis on which political outcomes can be justified and legitimised towards those whose positions did not win the vote, but must nevertheless accept and respect the law as binding on their actions. By testing and ‘laundering’ preferences through open public debate, the presumption is that the remaining positions which have withstood critical scrutiny can also be accepted by those who initially

3 However, even perfectly performed processes will not always end in consensus as there may be good reasons for people to stick to their original arguments and not change position. Hence the ‘evidence’ of whether a decision-making process has met the criteria of deliberative democracy cannot alone be the change of position (even if it can be an important and decisive indicator).

4 The problem is that ‘(...)there is no rule for aggregating individual preferences that is obviously fair and rational and thus superior to other possible rules; and that virtually every rule is subject to strategic manipulation, so that even if it would produce a plausible outcome for a given set of preferences if everyone vote sincerely, the actual outcome is liable to be distorted by strategic voting’ (Miller, 2000: 14).
were against. Purely self-interested preferences do usually not survive this kind of public and inclusive interrogation unless those advocating them are in an extremely disadvantageous position. In short, deliberative democracy ‘(...)moves the heart of democracy away from the vote and into the public sphere and practices of accountability and justification’ (Chambers, 2003: 311).\(^5\)

Even if bargaining driven theories are more tuned in – than are vote-centric theories\(^6\) – on the potential represented by conducting a collective process prior to the decision-making moment, they still revolve – as do vote-centric theories – around a rational choice logic where actors are conceived as utility maximisers only conceding to others what they deem necessary given their relative bargaining strength. Consequently, what takes place prior to decision-making is not what deliberative theorists would call deliberation or arguing, but bargaining and strategic action and the outcome of a bargaining process is, by deliberative democracy, defined as compromises and not true agreements because the logic inherent in rational choice assumes the alteration of the outcome the moment there is a change in the relative bargaining strength among the actors. Hence, outcomes reached through bargaining are inherently unstable and, even from a purely instrumental perspective, there are thus good reasons to strive for other, more stable types of outcomes. However, and more importantly from a democratic perspective, they are also potentially unfair because in basing their practical decision-making arrangements on a bargaining logic (i.e. that self-interested actors will maximise their self-interest), such arrangements only perpetuate the power inequalities among the actors as the participants are not expected or encouraged to take into consideration the needs and arguments of others (unless it is in their interest to do so) and see themselves as part of a collective process where an outcome should

\(^5\) ‘A legitimate political order is one that could be justified to all those living under its laws. Thus, accountability is primarily understood in terms of ‘giving account’ of something, that is, publicly articulating, explaining, and most importantly justifying public policy. Consent (and, of course, voting) does no disappear. Rather, it is given a more complex and richer interpretation in the deliberative model than in the aggregative model. Although theorists of deliberative democracy vary as to how critical they are of existing representative institutions, deliberative democracy is usually not thought of as an alternative to representative democracy. It is rather an expansion of representative democracy’ (Chambers, 2003: 308).

\(^6\) Cf. Schumpeter (1942); Downs (1957); Riker (1982).
be acceptable and reasonable for all the parties involved (see Miller, 2000). This does not mean that bargaining procedures have no place in a decision-making process, it only means that the entire process cannot be based on a bargaining logic alone. And more importantly, such arrangements must be (discursively) justified in a prior process as only procedurally regulated bargaining arrangements can claim legitimacy.

How can the political process be arranged in order to reduce or compensate for the power inequalities between actors? According to the theory of deliberative democracy, the key is to maximise the likelihood that actors will take their decisions argumentatively, that is, on the basis of giving, receiving and possibly being convinced by arguments and good reasons rather than that the actors first and foremost take into the equation the size and strength of opponents and thus the threats of being punished if they do not adhere to what stronger actors want. Or, alternatively if they are the stronger party, that they abstain from using threats and punishment to get their way. In other words, a democratic decision should not be based on extra-argumentative elements, but must rather as far as possible be based on good reasons as this provides a much more stable and legitimate foundation for public policy-making. Moreover, by its very nature deliberation, as a conflict coordinating mechanism, stands a much better chance – than to do other mechanisms such as money, power, tradition, religion etc. – at respecting democratic principles such as inclusion, autonomy, freedom and respect for individuals (Warren, 2007: 274).

There is, however, also an additional reason why deliberation should be the dominant mode of interaction during decision-making procedures. Deliberative processes not only increase the likelihood of respecting the principle of equal consideration of all viewpoints, such processes are also apt to ensure the epistemic and cognitive quality of decisions. As mentioned, deliberation is also a mechanism for problem-solving, fact-finding and fact-sharing which can enhance the knowledge foundation of decision-making. In this way, deliberation is not only an interaction mode facilitating the distribution of burdens and benefits (as is the case with bargaining), it is also a mechanism to clarify differences and potential misunderstandings, to shed light on facts and elaborate on ethical and moral dilemmas. In sum, deliberative processes can (at least in principle) enhance the
likelihood that policy proposals will be put both to an impartiality test as well as to a cognitive test (Eriksen, 2009: 44). But when do we know that decisions have passed these tests, that is, when do we know that decisions have been reached legitimately?

From rational consensus to working agreements

We must first of all identify the normative/democratic standard that must be respected. In discourse theory this amounts to the discourse principle: ‘Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses’ (Habermas, 1998: 107). The discourse principle establishes that legitimate decisions are those that can be consented to after withstanding scrutiny and critique by those who are going to be bound them. In representative democracies it is, however, not the case that all citizens and all affected parties are involved in actual decision-making. Hence the formulation ‘(...)could agree to(...)’ may be taken to indicate that the principle can be used as a hypothetical litmus test for assessing the legitimacy of actual decisions (ibid, my emphasis). It should immediately be added that the hypothetical test cannot replace actual public discourse (Eriksen, 2007a). A viable democracy cannot do without public debate where policy proposals are tested and discussed in front of and involving the public at large. What is more, the discourse principle implies that legitimate decisions are achieved if certain conditions for discourse are met. When translated to the institutional and procedural level, the discourse principle contains ‘(...)four ideal claims on institutions and processes: freedom, rationality, equality and publicity’ (Eriksen, 2007a: 95-6).? The bottom line is that democratically legitimate

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? ‘The reciprocal deliberations are free in the way that the participants are bound only by the results and premises of their own deliberation. The institutions are not tyrannical and do not impose norms and conditions on the citizens that they themselves do not approve of. The deliberations are rational in the way that the parties justify their standpoints and their proposals. It is a justificatory burden in relation to unequal treatment and it is the power of the arguments that governs collective decision-making. The parties are equal, i.e. all speech-competent individuals can participate and promote their views on equal terms. Differences in relation to power and resources should either be compensated for or eliminated. This can be done, for example, by means of appointing advocates for those who are in a less favourable position. The deliberation take place in public, and the outcomes of the deliberations are legitimate only when they have been approved of in a free discourse with identical or at least mutually acceptable reasons’ (Eriksen, 2007a: 95-6).
decisions have been validated through a particular type of process which entails that they have been defended, tested and criticised argumentatively in a publicly accessible debate and that minority positions have been included, listened to and taken into account during the course of a collective and inclusive process (Chambers, 2004b). Decisions that are to be labelled democratic have to comply with elements of the four procedural requirements presented above. But how, more concretely, can these ideal claims be approximated to non-ideal conditions?

The normative standard for democratically legitimate decisions is the ‘rational consensus’, i.e. an outcome the involved actors can support with identical reasons (Habermas, 1998: 339). To evaluate whether an outcome fulfils or falls short of a rational consensus, a decision must be assessed against the criteria of an ‘ideal procedure’ ‘(...)which specifies the contra-factual conditions for a public discourse in which all limitations on time and resources have been suspended, and where the authority of the better argument prevails’ (Eriksen, 2009: 45). The problem is, as is usually pointed out by political scientists, but also by deliberative theorists themselves (Habermas, 1998: 323, 326), that decision-making under the above conditions is very far from the reality of modern democracies where the heterogeneity of individual conceptions of the good life renders rational consensuses supported by identical reasons unlikely to materialise. Hence, the problem is that if a rational consensus is not achievable under non-ideal conditions why should it be a standard with which decision-making outcomes should aspire to comply?8 Moreover, if the rational consensus is not helpful as a normative standard, how can actual decisions then be tested? The suggestion in this thesis is to apply Eriksen’s concept of a ‘working agreement’ instead of Habermas’ demanding ‘rational consensus’ as the normative standard for legitimate outcomes under real-life conditions (see Eriksen, 2007a and b, 2009).

8 In addition, it may also be that there is no consensus even when a process has been conducted in an impeccable manner as there may be situations where actors hold equally reasonable and acceptable, but irreconcilable arguments (see Eriksen, 2007a: 106-7).
A working agreement is normatively less demanding than a rational consensus, but more demanding and thus more legitimate and stable than a compromise:\(^9\):

\[(\ldots)\text{an outcome may fall short of a rational consensus but still be the result of a deliberative process based on intersubjectively justifiable reasons. (\ldots) In line with this, one may think of the possibility of reaching an in-between consensus, an agreement which testifies to some movements of positions and normative learning, which does not result in a rational consensus, but in a working agreement. Such a conclusion rests on different, but reasonable and mutually acceptable grounds (Eriksen, 2009: 51).}\]

On the one hand and in contrast to a compromise, to achieve a working agreement requires a prior process where all relevant positions and viewpoints can be presented and tested argumentatively. On the other hand and differently from a rational consensus, a working agreement does not have to be supported by the same, but by reasonable reasons.\(^10\) A working agreement, then, is (arguably) possible to achieve under non-ideal conditions and thus seems like a suitable empirical approximation of the rational consensus. But how can the political process be designed in order to increase the likelihood that decision-making outcomes have working agreement qualities?

Is deliberative democracy realistic?
Critics of deliberative democratic theory often argue that the reliance on deliberation is naïve and unrealistic, i.e. the preconditions under which deliberation can dominate the decision-making processes are so demanding that they are unfeasible under real life circumstances.

\(^9\) Since rational consensuses are unlikely to achieve under non-ideal conditions also deliberatively reached decisions become – to some extent – unstable. Deliberatively reached agreements hold as long as the better reason does not come along, and, presumably, only as long as there is not sufficient time to consider what those best reasons are. However, deliberatively reached agreement are nevertheless more stable than compromises which are likely to change if there is a shift in the relative power relations (I am grateful to Chris Lord for reminding me about this point).

\(^10\) That is, reasons that are ‘(...)intersubjectively justifiable(...)’, they are different, but ‘(...)become understandable and mutually acceptable(...)’ through deliberative processes (Eriksen, 2007a: 107, 108).
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(for critics, see Thompson, 2008; Bächtinger and Steiner, 2005). In short, the argument is that power is absent in the equation. This is a partial reading of deliberative theory at least in the discourse theoretical variant. Discourse theory has a nuanced and multidimensional concept of power ranging from social, communicative, administrative and legal power (Habermas, 1998: chapter 4). Social power refers to the capability an individual has in social relationships to assert her own will and subsequently to realise goals despite opposition. It reflects resources and interests in civil society which are obviously unequally distributed. This understanding represents the traditional definition of power held by Weber and Dahl (see Habermas in Eriksen and Weigård, 2003: 172). From a democratic perspective, the problem is that social power has not been normatively assessed and will more often than not restrict the exercise of political autonomy. Unless social power is argumentatively tested both in the general publics as well as in the institutionalised settings of formal decision-making, political outcomes will only perpetuate social inequalities.

Communicative power, then, is the kind of power resulting from public deliberation and is an expression of a cooperative and united citizenry where each citizen’s equal right to communicative freedom collectively generates political power. Hence communicative power is a collective type of power resulting from a cooperative process in both the general and the strong publics (cf. Fraser, 1992; Eriksen and Fossum, 2002). The source of legitimate power thus stems from free communication. Communicative power must, subsequently, be transformed into binding and committing rules. This is done through the medium of law where political power is finally legitimately transformed into administrative power (Habermas, 1998: 169-70). In this regard Habermas’ discourse theory relies on a two-track model of how democratic law-making can be achieved (see also Bohman, 1998: 415). The aim is to balance two spheres of power – the formal political institutions and the informal networks of society – so that they do not collapse into each other, that is, administrative power must not become self-programming and thus alienate the citizens. The constituted political system consists of a centre and a periphery. In order for citizens to influence the centre, that is, the parliament, the courts and administration, the communication of influence has to pass from the periphery through the ‘sluices’ of democratic and constitutional procedures. Needless to say, for the public to actually
know what decision-makers are up to and thus be able to make public debate relevant for actual decision-making, publicity obviously represents an important precondition in order to facilitate a public debate of a certain quality and enough critical bite.

For the realisation of this system of democratic decision-making, deliberation as the mode through which decisions should be taken, is consequently inherently tied to the existence of law which is the binding element between communicatively reached decisions and their actual implementation. And vice versa, democratically legitimate law cannot do without prior communicative processes where arguments have been tested and scrutinised. Moreover, as Gutmann and Thompson (2004: 4) put it: ‘Assertions of power and expressions of will, though obviously a key part of democratic politics, still need to be justified by reason.’ In other words, what critics often miss in their evaluation of deliberative theories is the relationship between these dimensions of power and particularly how democratic deliberation and law mutually presuppose each other in the realisation of democratic government. The reliance on law obviously makes deliberative democracy more realistic, but its communicative aspirations are still quite demanding. The challenge is to identify mechanisms that contribute to establish and enhance the autonomy of deliberative settings and thus contribute to compensate for social inequalities and entrenched power structures at the institutionalised level of formal decision-making processes. In other words, the aim is to maximise the likelihood that social power is translated into communicative power before it becomes administrative power. How can settings for the communicative testing of policy proposals before they turn into law (as in co-decision) be realised and organised in practical terms?

**The need for egalitarian law structures**

Given the lack of a traditional nation-state democracy at the European level, other strands of deliberative theory part with the discourse theoretical variant defended here. In addressing the prospects for a democratic and deliberative model in the EU, defenders of directly-deliberative polyarchy hold that the Union’s democratic deficit can be mended through a different model which does not possess the standard characteristics of the state, that is, it is
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neither sovereign nor hierarchical (see Cohen and Sabel, 1997, 2003\textsuperscript{11}). Rather, it is capable – through the mechanism of deliberation – to ensure intelligent problem-solving and decision-making by involving a plethora of different actors in committees, networks, publics etc. at the European level. The actors represent both private and public interests such as business, experts, governmental interests, civil society organisations, NGOs and none of them are capable of dominating the processes and outcomes completely. The EU is consequently seen as an advanced inter-institutional ‘checks and balances’ system where there is no absolute power and which ensures deliberative inclusion and testing in many forums and on many levels. This system of deliberative governance can then function as a democratic equivalent on the supranational level.

However and unlike proponents of directly-deliberative polyarchy, discourse theory assumes that the prospect of actually transforming social power into communicative power in a democratic sense is not possible without the existence of representative institutions and formal legal arrangements for adjudication, execution and implementation in whose absence political equality cannot be ensured. At best, directly-deliberative polyarchy can only ensure deliberative governance not democratic government, that is, ‘(...)authorized rule through accountable and popularly elected institutions for policy-making and implementation under the supervision of courts’ (Eriksen, 2009: 177). It is not enough that a decision reflects the ‘acquisition and employment of knowledge and the force of reasons’ in the limited sense of providing a setting where the mode of interaction is dominated by arguing. It rather involves that decisions have been subjected to the public use of reason and hence that it satisfies the basic right to justification that all affected parties by definition possess, i.e. congruence between the addressees and authors of the law.

Consequently, from a discourse theoretical perspective the quality of decisions not only depends on their epistemic value in a limited sense, but in an extended version depicting the relevant knowledge all affected parties have brought to the debate. The only way to ensure that affected parties are included is to provide them with

\textsuperscript{11} Bohman (2005) defends a deliberative, polyarchical federalism as a solution for the EU.
rights to be exercised in a democratic procedure protected and founded in an egalitarian law-making system which have institutionalised settings where arguments can actually be discussed in this way. Only when affected parties have obtained rights enabling them to become co-authors of law can the (pragmatic, ethical-political and moral) quality of decisions be tested and trusted. The bottom line is that deliberation in itself is no guarantee for democratic government:

(...) deliberative governance cannot bear the burden of legitimacy as there is no possibility that all can participate on an equal basis, so that the laws that they have to obey could be consented to in a free, open and rational debate by all the affected parties. It compensates for the lack of influence brought about by globalization but is no substitute for democracy. When deliberation is seen as a cooperative activity for intelligent problem-solving in relation to an independently defined cognitive standard, as is the case with DiDeP [i.e. directly-deliberative polyarchy], it is not an argument about what is correct in the sense that it can be approved by everyone (Eriksen, 2009: 175)

The institutional model defended by directly deliberative polyarchy is thus not capable of distinguishing properly between when deliberation is democratic and when it is merely cognitive-scientific/technocratic. The outcomes resulting from such a system is subsequently also not democratically trustworthy even if they may have been reached deliberatively.

The solution to this problem, then, is not unique to deliberative democrats as they draw on the already well-established practices and principles underpinning the modern democratic Rechtsstaat (cf. Habermas, 2006: 412-3). It is no coincidence that this model has been so successful – its viability is based on a strong emphasis on establishing and maintaining checks and balancing mechanisms such as basic rights catalogue (citizens are given participatory rights also against political authorities), separation of executive, legislative and judicial powers, competence catalogue, separation of state, market and civil society and introduction of separate decision-making-, accountability-, electoral- and representation procedures. These are standard mechanisms aiming at ensuring that not only the strong and
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powerful, but also weaker and less resourceful groups get to influence decision-making processes. In a deliberative reading, the purpose of these mechanisms, then, is to induce – to promote and protect – argumentative behaviour as far as possible. Hence, deliberative democracy should be seen as a supplement to liberal democracy not a replacement.

In bringing up the democratic Rechtsstaat as a model some readers will perhaps question whether democracy is achievable beyond and without the apparatus of the nation-state. Whereas this is obviously a pertinent issue in this context, I shall, however, not discuss this topic here, but contend that it is (arguably) possible to transfer some of its basic principles and mechanisms/practices also to the European level such as inclusion, publicity, accountability, separation of powers etc.\textsuperscript{12} The point is that regardless of constitutional framework, political institutions aspiring for democratic legitimacy should, according to the deliberative perspective, be judged ‘(...)by whether they serve to enable the medium of deliberation, which is in turn valued because of its intrinsically desirable normative properties relative to other possible means of doing politics’ and subsequently whether it can be argued that the outcomes it brings about were reached in a process that comply with basic democratic procedural standards (Warren, 2007: 274). This point is equally valid for EU institutions and will be the departure for the evaluative scheme developed below for the assessment of the co-decision procedure. What, then, can be learned from other studies aiming to operationalise deliberative theory?

Deliberative legitimacy versus democratic legitimacy

From the above presentation it becomes clear that there are certain pitfalls that should be avoided when the aim is to approximate deliberative democracy to empirical conditions and that this pertains first and foremost to the flawed assumption that deliberation as such can automatically be equated with democracy. As argued above, there is a major normative difference between the legitimacy that stems from a deliberatively reached agreement among experts and

\textsuperscript{12} For a discussion of whether democracy presupposes a national identity, see Stie (2002). For a discussion of whether democracy presupposes a state apparatus, see Eriksen (2009: chapter 9) and Gaus (2008).
technocrats versus the legitimacy that stems from a deliberatively reached agreement among popularly elected representatives defending and justifying decisions in a publicly accessible manner such as a parliamentary setting. The first can claim respect for its assumed cognitive-scientific superiority and/or efficient way in dealing with a difficult problem, but it does not deserve respect because it is democratically legitimate. Only the second type can claim respect for its putative democratic legitimacy because its validity has been tested in a publicly accessible manner. In other words, deliberation yields different types of merits which we can label under the category deliberative legitimacy, that is, problem-solving, effectiveness, efficiency, cognitive-scientific quality. As we can see, deliberative legitimacy is not the same as democratic legitimacy as there is a major normative difference between outcomes resulting from either of the two types of processes.

When deliberative democracy is ‘operationalised’ and applied to empirical studies this difference is, as argued above, not always taken properly heed of and thus results, in my opinion, in many misunderstandings. With regard to the EU, the study of Gehring and Kerler (2008) is in this regard interesting and at the same time unclear as they are seemingly aware of the difference between democratic legitimacy and technocratic legitimacy, but nevertheless end up confusing the reader. From the outset, their study seems specifically helpful in offering a ‘(...)blueprint of an institutional arrangement that promises to stimulate deliberative decision-making, thereby producing legitimate and problem-adequate regulatory decisions’. This can be achieved if the procedure is designed in such a way that it separates ‘(...)the two tasks to be fulfilled in a deliberation, namely the definition of the broader lines of governance and their

13 Moreover, the discussion on what deliberative democracy demands in empirical terms has resulted in indeterminacy of the very concept of deliberation. Although widely used, ‘deliberation’ as a normative as well as an analytical concept is not a precise term and is applied differently in various accounts. Authors use ‘public deliberation’, ‘political deliberation’, ‘democratic deliberation’ (Neblo, 2005), ‘epistemic deliberation’, simply ‘deliberation’ but also ‘arguing’ (Ulbert and Risse, 2005), ‘discursive behaviour’ (Rosenberg, 2007) etc. in a variety of ways. The point is that there is no yet an intersubjectively shared definition of what we mean when we talk about deliberation as when we talk about bargaining. I shall not go more into detail on this as the focus of this thesis is on the preconditions for reaching deliberative-democratic decisions.

14 See particularly pp. 1003, 1005.
specification in concrete situations’ (Gehring and Kerler, 2008: 1003, 1019). In other words, the key institutional mechanism is to ensure a division of labour between those actors setting the overall principles and goals (political level), on the one hand, and those applying these goals and principles to particular cases (technical level), on the other. The separation of the two tasks will, according to the authors, contribute to neutralise the incentives actors have to bargain and instead opt for deliberation. The fulfilment of deliberative legitimacy thus requires both political and technical/expert legitimacy (ibid: 1018-19). The problem with Gehring and Kerler’s argumentation is, however, that while they are steeping the article in a democratic jargon (cf. references to ‘affected parties’, ‘democratic deficit’), they are not really talking about democratic legitimacy but deliberative legitimacy where the goal of the latter is first and foremost to ensure that decisions are reached deliberatively instead of through bargaining:

Collectively binding decisions may be considered legitimate if they emerge from deliberation, or if they are based upon a deliberative rationale. Their legitimacy is based upon the fact that they have evolved as the most convincing solutions from discursive exchanges of reasonable arguments. To create legitimacy, a deliberation must consider all possible convincing arguments that might have an impact on the collective decision, but does not necessarily have to include all those possibly affected by the decision. Deliberative legitimacy will be undermined if the decision is reached by resources other than reasonable arguments, such as threats, promises, and package deals or other forms of horsetrading (Gehring and Kerler, 2008: 1018).

As we can see, deliberative legitimacy is not the same as democratic legitimacy. Gehring and Kerler are not primarily concerned with establishing the conditions under which democratic decision-making can be ensured. They are simply taking for granted that the current system where the Commission, the Council and the EP take the political decisions automatically ‘(...)mobilize ‘democratic legitimacy’” (ibid: 1003). This political level of the EU decision-making system is at no point in the article further problematised. They are rather concerned with arrangements where decisions can be taken deliberatively and where bargaining incentives can be kept to a
minimum. Deliberative legitimacy is thus concerned with minimising the space for bargaining and as far as possible hindering decisions from being taken through other means (e.g. bargaining) than deliberation.

Democratic legitimacy, on the other hand, is first and foremost concerned with advancing institutional arrangements that can ensure a certain congruence between decision-makers and those affected by them. In this equation, deliberation obviously plays an important role, but democratic government is not co-extensive or limited to deliberation alone. Moreover, democratic legitimacy, as we shall see, is not incompatible with bargaining as such as long as it is conducted under conditions that have in advance been democratically authorised.

So even if the authors are aware of the difference between deliberative democracy and technocratic authoritarianism, their approach is not analytically equipped to take heed of this foundational normative difference as their institutional arrangement does not underline clearly the normative hierarchy between popularly elected representatives and unelected experts/bureaucrats (ibid: 1019). In short, their theoretical apparatus cannot account for the distinction between democratic legitimacy and deliberative legitimacy.

As Gehring and Kerler, also Steiner et al. (2004) do not distinguish sufficiently between deliberation as a theory of human interaction and as a theory of democratic legitimacy. They collapse the difference between deliberative legitimacy and democratic legitimacy. These authors are not concerned with the EU as such, but they look at deliberation in institutionalised decision-making settings – that is, parliaments – and are therefore of immediate interest for my study. Their research design is more comprehensive than Gehring and Kerler’s as it contains both a so-called ‘discourse quality index’ which measures the quality of actual discussions/speech acts as well as a list of context-specific or institutional indicators they claim to stimulate deliberation. This is clearly one of the strengths of Steiner et

15 See also their contribution in Bächtiger et al. (2005).
16 Their case studies are parliamentary discussions in Germany, Switzerland, the UK and the US.
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al.’s approach. For this thesis it is first and foremost the latter that are of interest as the aim here is to assess the procedural qualities of co-decision not actual discussions of concrete dossiers. They offer a list of five institutional antecedents they assume spur deliberation and hypothesise that deliberation is more likely to occur: (1) in consensus as opposed to competition democracies; (2) when there are strong- as opposed to weak veto players; (3) in presidential as opposed to parliamentary systems; (4) in second as opposed to first chambers; and finally (5) in non-public settings as opposed to public settings. Also Steiner et al. steep their contribution within the framework of deliberative democracy, but, as mentioned, also here it is not entirely clear whether they merely look for institutional arrangements that spur deliberation as such or whether they aim at institutional arrangements where deliberation is conducive to democratic decision-making. The main problem is that they both do and do not treat deliberation as a normative concept distinct from its action-coordinating status. The confusion becomes discernible when they discuss consensus versus competition democracy and strong versus weak veto players (see pp. 79-84). Here they only consider deliberation among elites, not whether parliamentary bodies are sufficiently open and inclusive towards input from the general publics, i.e. they take as a given that this is the case. Moreover, the hypothesis that non-public settings are more likely to spur deliberation than public settings is not followed by a discussion on if and when closed settings are legitimate from a democratic point of view (see pp. 87-8). In other words, the criteria presented in Steiner et al. are not equipped to distinguish between a democratic deliberative decision-making procedure as opposed to merely a deliberative decision-making procedure. The reason for this is primarily the lack of a criterion that can account and check for if popularly elected representatives have earned/still deserve their status as representatives of citizens/affected parties when they revert into closed settings.

Moreover, they underline the existence of grand coalitions as a precondition for inducing deliberation in consensus systems because when ‘(...)they are made permanent and parties obtain relative secure power positions, the importance of electoral competition among them is reduced(...)’ and they also contribute to ‘(...)obscure policy making clarity’ (see Bächtinger et al., 2005: 226-7). It is highly questionable whether these qualities of grand coalitions will pass a democracy test.
as they hinder transparency of policy alternatives and policy disagreements. In sum, the point is that what they are measuring/evaluating is not primarily democratic legitimacy, but deliberative legitimacy. The institutional mechanisms that are more likely to induce deliberation, according to Steiner et al., can, however, not at the same time automatically be used as indicators of democratic legitimacy as democratic government (even in the deliberative democratic version) is agnostic towards choices between consensus versus competition systems or majoritarian versus presidential systems (etc.). Whereas it seems more plausible to argue that consensus systems are more likely than majoritarian system to enhance deliberation (rather than bargaining), it does not seem equally plausible to argue that consensus systems are automatically more democratic than majoritarian systems, especially when consensus systems have a tendency to hide conflict.

What these studies show, then, is that we should be careful to describe the situations and conditions under which various conclusions about the theory of deliberative democracy are reached in order to capture the normative variation empirical findings uncover: ‘While claiming (correctly) that deliberative theories share a common core of values, the empirical studies actually adopt diverse concepts of deliberation and examine different consequences under a range of conditions’ (Thompson, 2008: 501). As with the EU studies, there is a need for a more nuanced approach that respects the normative difference between deliberative legitimacy and democratic legitimacy. In my opinion this is the main problem when the theory of deliberative democracy is subjected to empirical testing. It blurs the distinction between the assumptions of deliberation based on social theory (i.e. communicative action) versus the normative theory of deliberative democracy. Whereas the aim of the former is to map, describe or explain action co-ordination, the purpose of the latter is to establish if and when deliberation can contribute to democratic decision-making. There is also a difference between evaluating the quality of deliberation versus evaluating the quality of democratic legitimacy. A main argument in this thesis is that in order to determine the latter it is not enough to look at what has been said and discussed - i.e. the deliberative sequences among the participants. Whether deliberation and deliberative processes contribute to democratic legitimacy depend on the context in which they occur.
Another interesting study seeking to apply deliberative democracy to empirical conditions is conducted by Nanz and Steffek (2005). Their focus is somewhat different than Steiner et al. in the sense that they establish criteria for the assessment of the potential democratic quality of deliberation in international governance bodies. However, as opposed to the other studies mentioned above, Nanz and Steffek distinguish clearly between elite versus democratic deliberation and hence also between democratic legitimacy and other sources of legitimacy. The purpose is to establish empirical indicators that can ‘measure’ the level of inclusion and the influence the views of affected parties have on international decision-making. Since international decision-making structures are even more remote from ordinary citizens than national bodies, Nanz and Steffek hold that the arguments of affected parties are usually (and perhaps most effectively) voiced through CSOs.17 Hence these organisations function as democratic intermediaries voicing the concerns of affected parties at the international level where democratic institutions are lacking. Their point of departure is therefore that it is possible to assess the level of inclusion of affected parties by investigating the degree to which such organisations are included and heard as participants in international governance structures. Hence also they evaluate procedural preconditions and not actual deliberation (apart from the criterion of responsiveness). The democratic quality of international deliberations are consequently evaluated according to whether civil society organisations (1) get access to deliberations; (2) whether the policy process is characterised by transparency and access to information; (3) responsiveness to stakeholder concerns; and finally (4) whether all voices are included.

Though Nanz and Steffek’s criteria resemble mine (see chapter 3), their evaluative target is different as they define democratic quality of international organisations according to whether CSOs are included as participants in international policy-making deliberations. This thesis, on the other hand, has a different starting point in the sense that it is concerned with polities that at least comply with a minimum

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17 ‘…in global governance direct stakeholder access to deliberation in international organisations is extremely difficult to realise, so that we rely on CSOs [i.e. civil society organisations] to transport arguments from stakeholders global deliberation. It is therefore essential for a democratic procedure that CSOs will have institutionalised access to these deliberative settings. Only in this way can it be secured that stakeholder arguments can be voiced’ (Nanz and Steffek, 2004: 13).
of what is expected from democratic institutions. From their article, it is unclear whether their framework includes a political organisation such as the EU as they only mention WTO, UN and ILO as representatives for the kind of international organisations they have in mind. In contrast to these organisations, the EU has a directly elected parliament and have to a greater degree institutionalised procedures and rights for ensuring the inclusion of citizens’ rights (e.g. Union citizenship, Charter of Fundamental Rights, ECJ, Ombudsman, treaty provisions on openness). Hence it is not the CSOs, but the elected representatives who are set to voice the views of affected parties. The possibility of discharging decision-makers through elections provides Union citizens, then, with a greater potential for holding decision-makers accountable. In addition to how the views of affected parties are included, I also evaluate the democratic quality of how competent parties are involved as well as whether the organisation of decision-making procedures more generally promote or hinder democratic decision-making. This is important in the EU as even if CSOs may provide a link between citizens and decision-makers and thus contribute to the establishment of a European public sphere, to reduce the assessment of the participation of affected parties solely to the inclusion of CSOs is not enough in order to assess the level of inclusion in EU decision-making processes. The Union has constitutional traits and the scope of its tasks is more comprehensive and wide-reaching. In terms of assessing the democratic qualities, these aspects set the EU apart from other international organisations.

Conclusion
In this chapter, I have presented the discourse theoretical version of deliberative democracy defended in this thesis. The first part of the chapter was devoted to how the deliberative perspective – in contrast to bargaining and aggregative perspectives – approaches the question of democratic legitimacy. This basically amounts to ensuring communicative testing of policy proposals in decision-making processes where the views of all those affected stand a chance at influencing the discussion. I argued that this warrants a system that ensures political equality and thus egalitarian structures of law-making.
In the second part the focus was on the significance of the normative difference between deliberative legitimacy and democratic legitimacy. This difference is often not taken heed of in empirical studies applying the deliberative perspective and results in misunderstandings regarding the normative standing of the findings as well as the subsequent conclusions that are reached about what deliberation can and cannot do. The task of the next chapter, then, is to develop an evaluative scheme that takes into account these distinctions and which specifies the conditions under which decision-making processes can be assumed to warrant respect for being reached in a democratic legitimate manner.
Chapter 3

Approximating ideal principles to non-ideal conditions: The evaluative framework

Introduction
The purpose of this chapter is to develop an evaluative scheme which can be employed in the assessment of the co-decision procedure. The aim is thus also to contribute to the debate on the feasibility of deliberative democracy by discussing and making explicit the institutional and procedural conditions that is deemed necessary for its realisation. Hence the problem formulation: Are the institutional and procedural qualities regulating the co-decision procedure organised in such a way that the process of co-decision-making warrants the presumption of acceptable and thus legitimate decisions?

More specifically, I develop an evaluative framework for empirical studies of democratic legitimacy in institutionalised decision-making settings. This means that I leave out the general publics situated in civil society, the media’s role and coverage of political events, as well as the interaction between the institutionalised system and the general publics. Ideally, a full evaluation of the EU’s institutional nexus as well as the public sphere/civil society would have been preferred. However, due to time and resource limitations, this thesis is confined to the institutionalised decision-making setting and is
thus only concerned with how the formal rules and informal interpretation of these rules affect the putative democratic qualities of the co-decision procedure.

The evaluative scheme is based on a discourse-theoretical version of deliberative democracy.\(^1\) To concretise the necessary preconditions, I have synthesised and further developed criteria from Eriksen and Skivenes (2000) and on the basis of Eriksen and Weigård (2003, chapter 10) and Eriksen and Fossum (2002) further substantiated them.\(^2\) In short, a deliberative-democratic decision-making procedure must:

1. …facilitate *democratic deliberative meeting places*
2. …*include* the viewpoints of *affected* and *competent* parties
3. …*take* decisions in *openness* so that the relevant information and documents are accessible and the opportunity for public debate and scrutiny are possible
4. …*provide* structures and procedures for *neutralising* and balancing asymmetrical power relations
5. …*have* decision-making capacity\(^3\)

The chapter has two main parts. In the first part, the normative criteria are discussed, including a section towards the end of each criterion where the empirical indicators are presented and developed. The second part is devoted to methodological considerations.

### How to approach evaluation of decision-making procedures

Eriksen and Weigård (2003) present mainly two ways of conducting a discourse theoretical evaluation of the democratic qualities of a polity’s institutional and procedural structure. The first is to assess argumentation procedures. Eriksen and Weigård (2003) suggest

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2 See also Fraser (1992).
3 Apart from the fifth criterion, the other criteria are taken from Eriksen and Skivenes (2000). Eriksen and Skivenes’ study is about the influence and impact of deliberative politics in public bodies such as the Norwegian Biotechnology Advisory Board and child welfare system. As these organs are not public policy-making bodies or law-making institutions, I have consequently adjusted the criteria in order to facilitate an assessment of the co-decision procedure. I have also developed and specified the indicators accompanying the criteria.
following Alexy’s process-, validity- and justification rules of argumentation. See Alexy, (1989: 188, 193, 169f). Here the intention would be to study how interaction actually takes place by following concrete policy processes in order to find out whether they are in compliance with the discourse principle. Just to illustrate: An evaluation of argumentative procedures could for instance be based on (1) an assessment of deliberative processes from the perspective of the five types of discourses (pragmatic, ethical-political, moral, negotiation or legal); or (2) an assessment could be based on an empirical classification of what kind of and how a phenomenon is understood and perceived; or (3) it could be a dissection of arguments in terms of detecting inconsistency and perversion.

The second, which is the task of this study, is to assess the formal procedures. This means looking at the institutional and procedural mechanisms and preconditions (e.g. meeting places, group compositions, mandate, decision rules, complaint mechanisms, openness, power neutralisation etc.) necessary for the realisation of the discourse principle. The democratic Rechtsstaat testifies to the fact that institutions and procedures matter and empower as well as limit certain types of actions in a desired direction. However, formal principles do not usually provide clear-cut recipes for action as rules in themselves never determine action. Consequently, the aim is not only to discuss the formal rules and design of the co-decision procedure as regulated in the Treaties, but also to see how the formal rules and design are ‘interpreted’ by the actors into practices and patterns where also informal norms are important for the assessment of the democratic quality of the co-decision procedure.4 The point is to see how formal rules and informal norms work in favour or disfavour of democratic decision-making under co-decision. Just like formal rules open up or limit the possibility for action, so do informal norms and practices (Farrell and Héritier, 2003a, 2007).5

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4 As Farrell and Héritier (2003a: 577) note: “Empirical evidence suggests that the Treaty articles governing codecision and other legislative procedure only a beginning point for interactions between the EP and the Council.’

5 In this sense there is an overlap with the institutionalist terminology in that ‘institutions’ are (formal or informal) ‘set of rules’ and practices wherein actors (individuals and collective organisations) and organisations (collective actors such as the EP, Commission and Council) are situated. As this thesis is not based on an institutionalist approach as such, I do, however, not follow its terminology in the sense that I often refer to the EP, Council, Commission etc. as the ‘institutions’. This
The criteria for democratic legitimacy developed below reflect a discourse-theoretical reading of the principles and procedures known from the democratic Rechtsstaat. This means that whereas the criteria are well-known also from other theories of democracy and in this sense not ‘new’, they are interpreted and emphasised from a deliberative point of view. For instance, the first criterion of democratic deliberative meeting places underlining the importance of actual settings where policy proposals can be tested and justified in openness will probably not figure on top of the list of aggregative theories of democracy.

What is more, in the following, I make a (strong) distinction between elected politicians and unelected experts/bureaucrats. This distinction represents a central principle of democratic constitutional states which justifies the separation of powers in general and the normative hierarchy between democratically elected legislators and bureaucrats in particular. Thus the democratic Rechtsstaat defines and discriminates between various institutional spheres where different types of actors and tasks find their legitimate roles. In other words, unelected officials have a justified place in decision-making, but when the task is to set norms and goals and to decide on the (re)distribution of goods and burdens into binding law, elected representatives ought to be in the front seat. Scientists are needed to settle and determine questions such as ‘what is the case?’, ‘what are the available options and alternative solutions among which politicians can choose?’, and ‘what are the likely consequences of the various choices?’ In short, as long as religion is no longer a valid source of authority in settling how things should be done, elected politicians are the only ones that can decide how normative questions should be answered and made into binding law. Unelected experts and officials thus have a secondary (even if important) position in public policy-making. This distinction is reflected explicitly in both the first and the second criteria, but it also forms the subtext of the other three criteria.

is in accordance with how the EU itself refers to these bodies. Moreover, in the text, if not otherwise mentioned, I use the ‘institutions’, ‘institutional actors’, ‘bodies’ etc. interchangeably. For institutionalist approaches, see March and Olsen 1989; 1998; Olsen (2007); Bjurlf and Elgström (2004); Farrell and Héritier (2004)

6 For a discussion on the relationship between democratic citizenship and bureaucracy related to the EU, see Olsen (2007; part II)
Criteria of democratic legitimacy
First criterion: Meeting places conducive to democratic deliberation

For decisions to be taken deliberatively there must be arenas where such discussion can take place. Meeting places as such can have many purposes; some are merely for discussion and preparation of decision-making whereas others are joint discussion and decision-making forums. Others again may be designed for negotiation/bargaining, aggregation/voting or conciliation. From a deliberative perspective, however, it is vital that there are some settings that are conducive to democratic deliberation. In other words, the relevant decision-making bodies must facilitate forums organised and regulated in such a manner that they facilitate a publicly accessible debate where the arguments and positions relevant for co-decision dossiers are presented, scrutinised and tested before a final decision is taken. This is important for two reasons. Firstly, arguments and positions need a quality check, that is, they must be tested and scrutinised in order to be deemed publicly acceptable. This alludes to the epistemic dimension. Secondly, citizens must be assured that their concerns, interests and preferences have in fact been raised, considered and justified during the decision-making process (and if this is not the case, they can – on an informed basis – criticise this in public debate). Hence the moral dimension respecting the inclusion of affected parties: ‘Even measures that have been agreed to by impeccable democratic procedures are likely to be seen as forms of arbitrary domination, if they are not also accompanied by a public forum that allows those who would have preferred alternative outcomes to see for themselves that their views have been argued and reasons given for setting them aside’ (Lord, 2007a: 147-8). In short, this is the approximation of how representative systems can ensure ‘(...)the general accessibility of a deliberative process whose structure grounds an expectation of rationally acceptable results’ (Habermas, 2001: 110).

The task here is therefore to find an empirical way in to singling out those settings that have the potential for ensuring such a democratic deliberative test of co-decision dossiers. There are two important elements characterising this type of setting: it must be (1) deliberative, and in the (2) democratic way. We should consequently distinguish analytically between democratic deliberative meetings places where
the views of citizens/affected parties are included, and expert deliberative meeting places where only the views of competent parties/experts meet to discuss matters relevant for decision-making.

In other words, a democratic deliberative meeting place is not just any kind of setting. Rather, the nature of a democratic deliberative meeting place is political – it is an open and public setting where popularly elected representatives engage in discussions on matters of common concern7 and where policy alternatives are formed and articulated. The citizens do not participate directly, but their ‘presence’ is reflected in their role as audience – a third-party judge towards who decision-makers are accountable by the duty to present and justify their positions in a manner that is not only oriented towards their political opponents (a dyadic relationship), but which can also be deemed convincing if all those affected had in fact been physically present (a triadic relationship). Moreover, the influence of the public as audience is also linked to the fact that it is periodically empowered to replace decision-makers if the former do not want the latter to continue as their representatives, that is, the politicians are constrained by the ‘anticipation of retrospective control’ (cf. Elster, 1998b: 2). Democratic deliberative meeting places are therefore manifestations of how and where the views of citizens/affected parties are included.

This means that even if a discussion forum of experts can be deemed deliberative in the sense of being dominated by an argumentative mode of interaction, it does not qualify as a democratic deliberative meeting place since it lacks the inclusion of citizens and hence the democratic aspect of deliberation. In other words, the type of actors is highly relevant for the definition of a democratic deliberative meeting place.8 Moreover, through the above type of discussion positions are not only tested and scrutinised, decision-makers are also engaging in a process of collectively moulding a common will. When will-formation processes in institutionalised settings are organised in this way, it (arguably) opens up for a situation where decision-makers are

7 Cf. the difference between institutionalised deliberation settings and the unorganised, spontaneous deliberations taking place in the general public spheres.

8 The question of actors is further dealt with under the next criterion concerning inclusion.
learning, being convinced and potentially change their position during the process. As argued earlier, agreements reached in this way are more stable and legitimate than those that merely go through a process of aggregating individual (or party political/national) preferences. The archetypical theoretical example/ideal of a democratic deliberative meeting place is naturally the parliament and this is part of the reason why we may argue that there is a parliamentary bias in deliberative democracy.

However, as we have seen, the cognitive-scientific element of policy-making is highly important in order to reach rational decisions and expert discourses thus have a natural place in the legislative process. Expertise is here covering scientific, technical, procedural and legal knowledge, but excludes the type of knowledge affected parties have about their own situations, desires and needs and which are relevant when decision-makers make political choices about the (re-)distribution of burdens and goods and which goals and norms to pursue. Consequently, an expert deliberative meeting place refers to forums where competent parties/expert participants formulate, and exchange views in an argumentative and reasoned manner. Such a setting does not have to be as public and political as a democratic deliberative meeting place, but it is not completely exempt from such requirements.

The point is that in legislative processes expert deliberative meeting places are subordinate to the democratic deliberative settings in the sense that it is not here actual decision-making is supposed to take place. Opinions, arguments, criticism and concerns should be raised, aired and forwarded in order to prepare the ground for the formulation of policy proposals, but since an expert deliberative meeting place cannot be equipped with decision-making capacity it can afford to be less public and less political than a democratic deliberative meeting place. It is less political in the sense that the discussions are focused on scientific and technical information rather than assessments of moral and ethical-political considerations. The discussions are, however, political in the sense that they are related and relevant to the given policy proposal in terms of pointing at possible dangers, consequences and outcomes connected to different

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alternative avenues of such proposals. It is less public in the sense that it does not have to be responsive to the arguments from the wider public sphere. It has, however, a publicity responsibility in making its reports, deliberations and opinions easily accessible for everyone interested. This means that meetings may be held behind closed doors, but the minutes and information about the participants of the meetings should be available. In other words, it must be possible for the public to examine the assumptions behind and the validity of expert recommendations/solutions.

In analytical terms deliberative meeting places (democratic and expert) is then distinguished from voting/aggregative and bargaining meeting places. In a purely voting/aggregative arena there is hardly any prior deliberation or bargaining and does therefore not provide for the possibility of collectively moulding a common position. It is rather designed for the mapping and/or counting of various preferences. This is more or less also the situation in bargaining settings although here there is a longer process of exchanging positions/threats before a decision is finally taken. In a bargaining setting, the actors get acquainted with each other’s positions, but it is the relative strength of the various actors that decide the outcome. In other words, in both voting/aggregative and bargaining settings a process of collective opinion- and will-formation is missing, opinions and arguments do not need to be tested. The direct outcome of a voting setting is thus only an arithmetic fact signifying the majority at a given point in time whereas the direct outcome of a bargaining setting is a compromise. It is only deliberative settings that can produce more consensual outcomes.

At this point we should keep in mind that discourse theory neither expects deliberation all the way through the decision-making process, nor does it dismiss bargaining as such. Rather, it qualifies when and under what kind of circumstances bargaining is acceptable. If it follows after one or several settings where the preconditions for democratic deliberation are maximised, institutionalised bargaining settings where issues can be finalised within a shorter time frame, are legitimate. Legitimate bargaining settings are therefore formally regulated, dominated by a representative selection of elected decision-makers and they appear after one or several settings that are regulated for discussion. When bargaining is about the distribution of goods and burdens and when it occurs in a decision-making
framework where the end product is binding law, the actors must be elected representatives. From a discourse theoretical perspective, competent parties do not have the normative authority to bargain for settling outcomes with binding effect. Moreover, a legitimate bargaining setting can be closed during session in order to more easily facilitate agreement among the participants, but the discussions must be recorded and become available to the general public after the meeting is over.

Here, however, our task is to look for democratic deliberative meeting places. The indicator for democratic deliberative meeting places is that there is at least one setting per legislative house (i.e. the EP and the Council) that fulfils the following requirements:

- It is dominated by (a representative selection of) elected representatives;
- There is easy (electronic) access to the documents that are used and discussed in the setting; discussions are conducted in openness by securing (translated) verbatim records and preferably (live and stored) internet transmission of meetings; there are (in the verbatim records) explanations and identification of who voted what if votes are cast;
- There are rules for ensuring and inducing equality among the participants: Rules should be (formally) described in the Treaties and/or rules of procedures/inter-institutional agreements stating the purpose of the setting and that elected representatives are the main actors. The rules must describe the competences, rights and duties of the setting. There must be rules for when and how the meeting ends (e.g. voting) and a commitment to make the meeting agenda announced to all involved actors at the same time. There must be speaking rules that respect the principle of equality among the participants (unless there are good reasons given for why this should not be so);
- There is time allocated for debate and judgement prior to decision-taking.

Second criterion: Inclusion of affected and competent parties
From a discourse theoretical perspective, democratically legitimate decisions have – as discussed above – both a moral and a cognitive
element, i.e. they should both be ‘right’ and ‘true’ in the sense that they are founded on the arguments of both affected and competent parties. In institutional and procedural terms this means that decision-making bodies must be able to include the viewpoints of those individuals who are going to be bound by the decisions as well as the relevant expert perspectives as mentioned under the previous criterion. Let us first look at the inclusion of affected parties.

It is the degree to which a polity is capable of including affected parties that represents the real quality test because there is no basis for democratic policy-making unless citizens are not somehow recognised as rights-holders/co-authors of binding law (Habermas, 1998). Consequently, the requirement to include affected parties is at the same time both the most important and the most difficult criterion to satisfy, for how do we know that all relevant views have been heard and included in the debate when modern democracies are based on representative systems? How can citizens be recognised as co-authors of decisions when they are never present to make them?

We have already touched upon this problematique, but in the literature there are different answers to this question. With regard to the level of broad-based participation or direct citizen involvement outside general elections, deliberative theory parts significantly from republican inspired theories defending direct/participatory democracy. Unlike the latter, discourse theory is not based on the requirement that everyone has to participate in decision-making, but rather that everyone’s views, needs and interests have access to the debate as it is neither possible nor (arguably) desirable in large and complex polities that everyone should participate directly (Eriksen and Weigård, 2003: 210-2; see also Gutmann and Thompson, 2004: 31). In discourse theoretical terms, the point is not the number of people who participate, but how well all views are represented in the

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10 “The flip-side of inclusion and argumentation is the need to discipline discourses with regard to spatio-temporal and substantive claims. It seems fair to assume that a high degree of inclusion only translates into successful deliberation if it is accompanied by provisions which structure the discourse and limit the access of premises. Legal procedures regulate which topics and questions may be raised, the use of time, the participants, the distribution of roles etc. Modern law is a medium for discourse because it is not only a decision-making system but also because it contains principles for the allocation of the duty to argue’ (Eriksen and Neyer, 2003: 12).
discussions, i.e. the ‘representativity of opinions’ (Eriksen and Skivenes, 2000: 28). In fact, too many participants can disturb and obstruct the process and hence also the quality of the debate under non-ideal conditions (Eriksen and Weigård, 2003, 210-2). The key argument is to include the plurality of needs, interests, preferences, facts and positions so that an as qualified as possible decision can be made. Hence as underlined above, discourse theory relies on the existence of satisfying procedures (Habermas, 2001: 110). That is, in a situation where it is physically and realistically impossible for everyone to participate, democratic decision-making warrants suitable and adequate arrangements, provisions and rules for the (s)election of decision-makers, for how they take decisions and for how they can be held to account.

Since discourse theory does not rely mainly on direct participation from citizens, it is, consequently and as argued above, not unimportant who participates in the deliberative process. The reason for this is due to the normatively important difference between democratic deliberation and expert deliberation. Just because actors involved in decision-making adhere to the logic of arguing this does not necessarily mean that these decisions can be deemed democratic, that is, the actors must be of a certain kind. In other words, the gap between affected parties and decision-makers must be squared by ‘(...)the parliamentary principle of establishing representative bodies for deliberation and decision-making’ (Habermas, 1998: 170). Again,

11 The logical consequence of the participatory model is that it makes the legitimacy of political decisions dependent upon the actual participation of all (or at least a significant majority of) citizens. This is possible neither practically nor normatively. Normatively because citizens also have a right not to participate or engage in politics if they so desire. It is, of course, detrimental also from a discourse theoretical perspective if citizens do not take part in elections and public life in general as even representative democracy is defined and dependent upon a certain level of participation and engagement to be deemed democratically legitimate (Eriksen and Weigård, 2003: 148-9).

12 “What is important to its notion of public reasoning is not so much that everyone participates but more that there is a warranted presumption that public opinion is formed on the basis of adequate information and relevant reasons, and that those whose interests are involved have an equal and effective opportunity to make their own interests (and their reasons for them) known. As an ideal, inclusion allows for maximum expression of interests, opinions and perspectives relevant to the problems and issues for which a political body seeks solutions’ (Nanz and Steffek, 2005: 370).

13 See also Gutmann and Thompson (2004: 9-10) for a deliberative, but not discourse-theoretical position.
the parliamentary bias in the discourse theoretical version of deliberative democracy demands that a democratic procedure entails the active participation of popularly elected representatives. Only they can be regarded as the spokespersons of affected parties in institutionalised decision-making settings because they can be controlled and potentially dismissed in the next election. This does not mean that all actors involved in decision-making processes must be popularly elected, it only means that they must have a central position and be ‘hands-on’ throughout the decision-making process. The obvious reason for this is due to the fact that public decision-making is never only about finding scientifically correct answers, but also about applying such knowledge and hence make (political and ethical) choices about what should be done and how burdens and benefits should be distributed among affected parties. Public decision-making cannot therefore be left to bureaucrats and experts alone as this will amount to nothing more than technocracy or epistocracy (Eriksen, 2009). Democratic deliberation, as opposed to expert deliberation, can only be fulfilled if it contains active participation by elected representatives.

It is, however, also important that decisions exhibit a certain cognitive quality. Expert knowledge is an intrinsic and increasingly more important part of every modern governance structure as modern societies are complex, differentiated and specialised. To include actors who have competence in scientific, technical, legal, procedural and local issues is therefore a sensible and unavoidable way of meeting this challenge. Competent parties represent a manifold group ranging from government officials/advisers, bureaucrats, scientific, technical and judicial experts to representatives of NGOs/civil society organisations. We may say that the requirement of including competent parties enhances the epistemic dimension of deliberation democracy in underlining quality and rationality in decision-making.

In sum, there is a normative hierarchy between representatives of affected and competent parties where the latter are subordinate to the former in the sense that affected parties’ representatives should be the main decision-making actors whereas the competent parties have a more facilitating and advisory role in providing and mediating knowledge, viewpoints and information.
The indicators of inclusion are:

- The main institutional decision-making bodies are **popularly elected** and have collective **veto** power over the final outcome.\textsuperscript{14}

- **Hierarchy of actors**: The elected representatives are the **deciding actors** when **discussing and deciding** how consequences and burdens are distributed. It is required that elected representatives sit together and **collectively** mould an opinion and discuss a case prior to decision-taking. The involvement of **competent parties** is limited to preparing policy-making.

**Third criterion: Openness and transparency**

Transparency (…) is regarded as an absolutely essential component of (…) liberal democratic systems (…). *Information is the currency of democracy* (Curtin, 1997: 23, my emphasis). The principle of openness and transparency is crucial for establishing a democratic dialogue between official political bodies and the wider public and for the latter to perform any kind of enlightened and informed critique and scrutiny of ongoing legislative processes. In other words, to facilitate public scrutiny and thus actual opinion-formation in the general publics, deliberation processes leading up to decision-making must be as open and transparent as possible. This criterion thus concerns how well the political system has institutionalised ‘direct’ communication and accountability with the general publics in the sense of providing easily accessible and unambiguous information on actual cases. This is needed in order for citizens, civil society- and other social/economic actors to have a fair opportunity to form their position and participate in opinion-formation processes in the public sphere. In the wider picture this, of course, serves the important task of establishing and maintaining a European public sphere by providing the means to free opinion- and will-formation.

The principle of openness is consequently inherently linked to democracy as a precondition for the establishment and maintenance of realistic accountability mechanisms as well as to give citizen

\textsuperscript{14} Contrary to proponents of direct deliberative polyarchy, the version of deliberative democracy defended here requires that there must be some kind of congruence between affected parties and decision-makers and that this is not feasible without arrangements ensuring popular elections of representatives to the most important decision-making bodies. In other words, the availability of and access to networks and a plethora of deliberative settings are important, but not sufficient.
participation outside general elections any realistic basis. To meet this end, the principle of transparency requires that policy related documents and information are easily accessible and understandable. On a more detailed level, decision-making bodies also have a responsibility and duty to present background information about the case in question, i.e. the substantial elements pertaining to the nature and characteristics of the case. For the official political institutions this means that their rules and procedures are designed and organised to inform and communicate to the general publics the relevant aspects of decision-making processes, i.e. both procedural and content specific aspects. This includes open meetings or easily accessible verbatim records of meetings, openly announced agenda, decision-making rules, actors involved, when and if affected parties should be consulted as well as the results from open hearings, relevant laws, regulations, costs and benefits analyses, administration practices and other policy areas that will be affected, expert reports, other relevant documents and knowledge about the case. Nanz and Steffek (2005: 375) make a general distinction between background and policy documents, where the former provide ‘...information on an issue or problem and policy documents provid[e] information on political options and proposals.’ Background documents are thus less important than policy documents and the level of transparency is higher if easy access to the latter is made possible.

Openness does not only concern the extent to which documents and information are available, this criterion also prescribes that information should be easily accessible, that is, easy to get an overview of the main points, what is at stake etc. (Curtin, 2007b). Sometimes it can almost seem as an intended strategy to provide enormous amounts of information in order to overwhelm or preoccupy the public, stakeholders or opposing parties with processing all the information. Decision-making bodies therefore have a duty to present the main points, dilemmas and/or inter-related issues as clearly as possible. To achieve such a goal, a public and digitally accessible register of documents is a vital tool (cf. Curtin, 2000). In addition, the competing political visions and solutions should be communicated to the public so that citizens can get an overview over the relevant choices and alternatives available. Finally, in a multilingual polity, it is also a requirement that citizens are able to express themselves and that political authorities communicate with them in a language they understand and master.
The empirical indicators of openness are:\(^{15}\):

- All the involved institutional actors and the public can get **access** to the **policy proposal** before it is finally decided.
- **Access to documents**: There is a digitally accessible register of documents (or other ways of ensuring easy access to documents).
- **Transparency of debates**: There are either verbatim records, video streaming of debates through the internet or minutes available in all official languages.
- **Intelligibility of votes**: There are available voting records which include information and explanation about who voted and what position they defended.

**Fourth criterion: Neutralisation of asymmetrical power relations**

Under this criterion I distinguish between two broad categories of power neutralising mechanisms. The first covers mechanisms that are internal to the procedure and hence detectable in the procedural set-up. I call these ex ante mechanisms. The second category covers external mechanisms that kick in after the decision-making process is over. These are labelled ex post accountability mechanisms.

The ex ante mechanisms cover all those (formal, but also informal) rules that contribute to induce equality among participants and to induce argumentative behaviour in an as open, equal and inclusive manner as possible. The rules governing the co-decision procedure should be easily accessible and understandable both to the involved actors as well as the public at large. The crux here is that information about how the decision-making procedure functions – its rules, stages, applicability etc. – must be regulated and easily accessible in writing preferably in the Treaties (describing the normal decision-making method(s)) or in ordinary statutes (special procedures). In

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\(^{15}\) See in comparison Settembri, 2005. I share many of the same indicators, but they are not always interpreted in the same way. Settembri lists physical access to the buildings of decision-making bodies as one important indicator. I find this indicator less relevant as long as there is a digital register of documents as well as verbatim records or video transmissions of meetings available online. Online access to documents and debates levels out the playing field so that those not situated or in close proximity to Brussels/Strasbourg are not disadvantaged. Hence physical access is, in my opinion, in principle redundant from the perspective of ensuring a transparent decision-making procedure, unless perhaps for the media.
addition, it must be predictable, understandable and consistent – that is, from the general guidelines it must be possible for citizens to get an unambiguous overview of the rules and different stages/phases of a decision-making process, but the outcomes of policy processes must not be predictable from these guidelines.

The demand is also that the rules have a particular content.\(^{16}\) Firstly, the procedural set-up as well as its functioning should reflect an explicit duty to explain and give reasons for positions and decisions towards fellow institutional members, to other institutional actors as well to the public at large. This involves precise rules and regulations on when/how often as well as what kind of setting decision-makers must attend. Secondly, the division of labour between the institutional actors should respect the principle of separation of government powers both informally as well as formally in the Treaties. Thirdly, the involvement of representative institutions must be underlined in the legislative process, i.e. recognition of the parliamentary principle. Fourthly, the procedure should be organised so that the process has roughly the following sequencing: argumentation, potential bargaining and final decision-making. Fifthly, inter-institutional agreements as well as the rules of procedure organising the internal life of each institutional actor should be in accordance with the above principles.

In addition to ex ante mechanisms, the democratic Rechtsstaat also offers well-functioning accountability mechanisms that can be activated after a procedure is closed. In knowing that ex post accountability measures can be triggered if an actor does not adhere to the prescribed rules, this can make her stick to a responsible and argumentative behaviour rather than ceasing the opportunity to deviate from such behaviour in cases where her immediate self-interest can be satisfied without adhering to arguing and justification. Ex post accountability mechanisms such as judicial review and ombudsman are thus mechanisms that have proven to be helpful in neutralising asymmetrical power relations.

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\(^{16}\) By ‘particular content’ we are still on a principled level. The point is not to prescribe in detail (for instance whether a polity should have a consensus instead of a majoritarian system) how the organisational set-up should look like, but to ensure that certain foundational principles (e.g. separation of powers etc.) are respected.
We could also have added parliamentary control as an additional ex post accountability mechanism. However, given that the EP and the Council both have an electoral anchoring (even if only indirectly with regard to the Council), it does not seem necessary, from a democratic point of view, to have more parliamentary bodies involved during the legislative process. More actors could potentially also obstruct the process and lead to inefficiency. It is well-known that the time dimension is critical and that the national parliaments are pressed to find time to perform a meaningful control function of EU policy-making (see Lord, 2004: 178-82). In addition and as argued above, to ensure intelligibility and transparency of the decision-making procedure is an important democratic virtue and too many actors can violate this principle. What is more, the national parliaments have first and foremost a popular mandate in their respective national constituencies and not one collectively at the European level. They can therefore logically only hold their own government to account and not the Council as a collective body or the EP. Instead, there should be more focus on ensuring openness so that national parliaments can better hold their own government to account. Consequently, for the above reasons it seems reasonable to exclude national parliaments when assessing the co-decision procedure as the procedure already has a substantial parliamentary component represented by the EP.

Critics would perhaps argue – and rightfully so – that neutralisation mechanisms such as separation of powers and/or judicial review/Ombudsman can also be undemocratic. For instance, the debate on the juridification of politics and judge-made law refers to the fear of too autonomous Courts acting beyond their mandate by altering – expanding or limiting – laws on their own and without any authorisation of democratically elected legislatures. While these are important debates, I will not discuss them here, but simply argue that all neutralisation mechanisms must be democratically vindicated and authorised (cf. Gutmann and Thompson, 2004: 3).

The empirical indicators are the following:

- *Ex ante mechanism (I)*: *Intelligibility of the procedure*: There is a precise description of the rules governing co-decision-making. The Treaties contain information about the main actors and what powers, rights and duties they have. In addition, there is information about the decision-making rule (unanimity/majority vote) and the
sequencing of policy stages. The institutions’ rules of procedure and/or inter-institutional agreements are in line with Treaty specifications.

- **Ex ante mechanism (2): Separation of powers**: The institutional actor presenting a policy proposal is not at the same time the decision-maker.\(^\text{17}\) There is a clear legal division between executive, legislative and judicial powers.

- **Ex post mechanism (1): Judicial review**: Affected Union citizens and other legal subjects can appeal to and get their complaint reviewed on which basis the Court can scrutinise (and possibly sanction) not only adherence to procedural rules, but also the content of co-decision-making.

- **Ex post mechanism (2): Ombudsman**: Affected Union citizens or other legal subjects can appeal to and get their complaint reviewed on which basis the Ombudsman has a mandate to scrutinise (and possibly ‘sanction’) adherence to procedural rules and can also consider the content of co-decision outcomes.

**Fifth criterion: Decision-making capacity**

To make a difference a legislative procedure must have the capacity to produce outcomes (whatever the quality of the decision). Decision-making capacity here refers whether the institutional frameworks that are formally inscribed in and thus authorised through the Treaties are also the institutional frameworks within which decisions are actually taken. From a deliberative democratic perspective, the answer to this criterion can give us an indication of whether the potential for publicly accessible deliberative processes that we find under the first criterion can in any shape or form be connected to and thus be said to influence the decision-taking moment. If we find that the co-decision procedure ‘scores’ well on the four first criteria, it is important that actual decision-making takes place within the framework of that procedure. Otherwise, it simply rubber stamps

\(^{17}\) This indicator is adapted to EU context in the sense that since the Commission is not an executive with a popularly mandate generated from EP or national elections it is important to underline that the Commission should not also have final decision-making powers. Hence the importance of separating the policy presenter from the decision-makers is underlined from the perspective that the Commission should not both be agenda-setter and legislator and not because the EP and Council should not have the right to initiate legislation. That democratically elected legislators should have the right to initiate legislation is a commonly agreed principle even if it is not so often a fact (see Corbett et al., 2007: 238-9).
decisions taken in other forums or by other actors. This does not mean that informal meetings are automatically deemed ‘illegitimate’. Formal institutions prescribed and described in legal provisions are usually not ready-made recipes in no need for practical interpretation when applied to actual empirical circumstances. The point is that the actual practice of a procedure can be more or less in line with the intention of the formal legal provisions and that informal structures/meetings have not taken over and thus made the formal set-up redundant.

The empirical indicator of decision-making capacity is:

- There is absence of informal networks where powerful actors ‘pre-cook’ proposals that are not subsequently sanctioned by democratic organs and which consequently have taken over as the locus where actual co-decision-making takes place.

Table 3.1: Criteria and indicators

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<td>At least one democratic deliberative meeting place per legislative body</td>
<td>Elected representatives are main decision-makers and have veto power</td>
<td>Access to policy proposals prior to decision-taking</td>
<td>Ex ante mechanism (1): Intelligibility of procedure</td>
<td>Absence of competing decision-making structures/groups</td>
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<td>Hierarchy of actors</td>
<td>Access to documents</td>
<td>Ex ante mechanism (2): Separation of powers</td>
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<td>Transparency of debates</td>
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<td>Intelligibility of votes</td>
<td>Ex post mechanism (2): Ombudsman</td>
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Methodological considerations
Normative status and relationship between the criteria
Whereas all five criteria are important in determining empirically the democratic quality of decision-making procedures, it could be argued that the inclusion of affected parties is the normative source feeding or ‘explaining’ the importance of the other criteria. The reason for this is that, from a discourse theoretical point of view, the only entities possessing moral significance in and of themselves are individuals (not communities or polities) (see Stie, 2002). Hence, democracy is meant as a framework aiming at the realisation of a type of collective self-government that respects this moral status of all involved and affected individuals (see also Eriksen, 2009: 46-7). In this sense, openness, neutralisation mechanisms, democratic deliberative meeting places and decision-making capacity are derived from the moral status of affected parties and stand in the service of its realisation. I have also added inclusion of competent parties as a necessary criterion of democratic legitimacy. Competent parties bring quality and knowledge into the decision-making process, but if affected parties are not included a polity governed solely by competent parties is nothing but a technocracy characterised by elite deliberation. Hence normatively, the inclusion of competent parties is also derivative of the status of affected parties.

Status and relationship between the criteria – notes on the research design
Whereas all five criteria represent distinct categories or components of democratic legitimacy on a theoretical/analytical level, we cannot expect that they will occur in a clear-cut and distinct manner when we turn to the empirical realm. The criteria are empirically not mutually exclusive, but rather support, complement and build on each other. It is, for instance, difficult to conceive of a decision-making procedure where there is full inclusion of affected parties, but no mechanisms to neutralise power asymmetries. Or, where there is full openness, but absolutely no inclusion. For instance, to get a more reliable picture of the degree of inclusion, it is required that we also have in mind and take into consideration how well the other criteria score as such information can qualify, modify and nuance the findings under each criterion.
What is more, criteria 2-5 are aimed at the overall procedure. The first criterion, however, refers to a specific but crucial component of deliberative democracy, namely the importance of ensuring that there are meeting places regulated in such a way that democratic deliberation is likely to happen. I shall argue that the emphasis on safeguarding such meeting places represents the intake to a deliberative reading of the principles and procedures on which modern democratic polities are founded as it epitomises the ‘(...)institutional structuring of incentives to deliberate’ (Warren, 2007: 273). Now, from the presentation made above, the characteristics of meeting places seem more or less to be the same as criteria 2-4. It is correct that to determine the democratic quality of a meeting place involves looking at its membership, its level of openness as well as whether there are procedural rules and practices that contribute to neutralise asymmetrical power relations. However, the properties of a democratic deliberative meeting place are not co-extensive with criteria 2-4. And whereas the findings resulting from the evaluation of individual meeting places can tell us something about the overall procedure, it should be remembered that the findings from a single meeting place is not necessarily and automatically valid for the whole procedure. It needs to be qualified in relation to how well the other criteria apply. In other words, the conclusion reached about the potential democratic qualities of the co-decision procedure must be based on a qualified judgement of how it approximates compliance with all five criteria.

With regard to democratic deliberative meeting places some further methodological comments should also be made. Firstly, in actual decision-making processes there are usually many types of settings – some are better described as deliberative (democratic or expert) and some more accurately as bargaining or voting sites. This does not mean that the procedure under evaluation cannot be deemed democratic if not all relevant and important meeting places are deliberative according to the democratic definition. That would obviously be an unrealistic requirement. It would, however, be impossible to argue that a decision-making procedure could be democratic if none of the relevant settings had deliberative-democratic qualities. In sum, we could instead realistically expect that democratic deliberative qualities will be on display at different junctures of the process, i.e. prior to bargaining and decision-taking/voting.
Secondly, it should be underlined that data on the procedural and institutional aspects only tell us so much about the deliberative democratic qualities of meeting places. We know that a setting does not qualify for the democratic category unless it contains elected representatives, but readers will most likely wonder how we can determine the deliberative aspect of these meeting places. This is not an easy task and it should be iterated that this type of assessment cannot give conclusive answers to whether a setting is actually dominated by deliberation, bargaining and/or any other type of interaction mode. It can, however, point to the likelihood that deliberation will occur and one tool in this regard is to look closer at the rules for the proceedings of the meeting. Is there for instance a chair person and/or formal rules to enforce equality among the participants, e.g. that every participant gets the chance to speak or that there is a fair balance between opposing parties to get their views heard etc. The analytical framework can give answers to whether the institutional and procedural conditions are more or less likely to enhance (or hinder) democratic deliberation. In other words, it evaluates the procedural conditions. If the setting is formally described or if it is somehow possible to find out what its purpose is, this can presumably give an indication of whether it is devoted to discussion, bargaining, voting or combinations of these. Although this is not necessarily a very reliable source of what is actually going on, it nevertheless provides us with information on what is supposed to be going on and henceforth helps us to single out those settings whose purpose is not discussion, but bargaining.

Thirdly, whereas the above list of requirements may seem fairly clear empirical situations are always more complex and difficult to get an overview over than theoretical models. It can therefore be harder to decide on how to categorise empirical findings as there may well be settings that come close to but that do not entirely comply with all the indicators. Hence conclusions can be difficult to reach. As a rule of thumb the setting cannot under any circumstances pass as democratic unless the main actors are elected representatives. Being elected is, however, not enough as the representatives can lose their normatively superior status as the trustees who voice the views and speak on behalf of affected parties if the meeting place is completely closed to the general public and if there is no possibility for others (either other institutional actors or the general public) to hold them accountable for their actions in this particular setting.
Relevance of the findings

As mentioned above, the criteria and indicators presented above do not automatically ensure or lead to democratic deliberation. It is important to underline that they do not guarantee democratic decision-making as such, but rather represent institutional and procedural conditions assumed necessary in order for democratic decision-making processes to take place whatsoever. In this sense they are necessary, but not sufficient preconditions for ensuring democratic deliberation. Or put differently, they are probabilistic not deterministic. The findings and conclusions in chapters 5-9 are consequently not able to say something about how decision-making under co-decision is carried out in each individual case, they rather tell us something about whether the institutional and procedural setup hinders/limits or broadens/enables the likelihood of deliberative-democratic decision-making to occur under the co-decision configuration. The data that will tell us about the likelihood for this to take place are drawn from other studies of how co-decision works in practice. I come back to the sources of data below.

Critics would perhaps argue that institutional and procedural design is not the right target of analysis when the aim is to assess the co-decision procedure for its putative democratic qualities. They would maybe hold that it is the quality and content of legislative outcomes that really matters when we want to study democracy under co-decision. It is of course true that much can be learned by investigating policy outcomes. However, we should be careful about judging democratic legitimacy from the perspective of outcomes alone as even dictatorships can produce desirable decisions. In contrast, the claim guiding this thesis is that the institutional and procedural design surrounding and underpinning legislative processes make a difference and that it is not completely random which types of institutional design are chosen as all types of design are not capable of producing democratic decisions. What is more, democratic decisions are not only about outcomes, but also about how they came about, hence the importance and careful choice attached to the type of procedure and institutions involved when decisions are taken concerning and affecting citizens in their daily lives. This is why modern democracies have rules for securing representation, contestation and opposition so that different political alternatives can
be articulated and identifiable for the citizens.\textsuperscript{18} Democratically legitimate decisions demanding general obedience are therefore just as much recognisable for the way they have been reached as discussed in chapter 2.

However, good intentions are not enough as institutional designs are never realised exactly they way they are intended. To study the informal practices and processes accompanying the formal ones are therefore important in order to take stock of the (unintended) consequences institutional and procedural mechanisms open up for once they are put into practice. This is also the case with co-decision where the informal trialogue system has given momentum to the intensified informal relationship between the EP, the Council and the Commission. Particularly the EP and the Council have developed close ties and a ‘shared legislative culture’ with strong emphasis on informal mechanisms due to the requirement under co-decision that both houses must agree in order for a law to be adopted. To understand and to evaluate the way decisions come about under co-decision these informal settings cannot be ignored (see also Farrell and Héritier, 2003a and b; 2007).

Putative normative standing of findings

The claim made in this thesis is that the extent to which the procedural criteria are complied with can tell us something about the quality of the outcomes. In this regard, we should recall the discussion in the previous chapter where the concept of a working agreement was introduced. Under non-ideal conditions where citizens themselves cannot participate in actual decision-making and where deliberation cannot go on until a consensus has been reached (or an agreement that a rational consensus cannot be reached), some compromises must be made with regard to how rational and acceptable decisions can expected to be. Hence, citizens – as decision-

\textsuperscript{18} See also Føllesdal and Hix (2006: 548-9) for a similar argument in the EU context. Here they contest Majone’s claim that the EU is sufficiently legitimate because it only deals with regulatory and not redistributive politics. Majone’s argument hinges not only on the EU’s ability to produce Pareto-efficient outcomes, but also that these decisions are strictly limited to the domain of regulatory politics. The critical point for Føllesdal and Hix, then, is how Majone can prove that the EU is not also taking decisions that are redistributive and hence create winners and losers. Their argument is, among other things, that it is not sufficient to look merely at policy outcomes without taking into account how such decisions came about. 
makers – are replaced by elected representatives and the deliberative expectations are lowered in the sense that the deliberative process is punctuated by temporary stops (voting) so that decisions can be taken even if a rational consensus has not yet been reached. If all the five criteria are met, then there is a basis for arguing that co-decision acts have the normative qualities expected from working agreements as discussed in chapter 2. Should that be the case, co-decision agreements yield more stable consensuses than mere compromises. In other words, for empirical studies the principles characteristic of the ideal speech situation has been approximated to the five criteria and the types of outcomes the ideal speech situation endeavours to achieve – the rational consensus – has been approximated to the working agreement.

**On evaluation**

It is important to keep in mind the nature of this study. It is an evaluation according to normative standards not a causal analysis trying to explain or understand a certain empirical puzzle or phenomenon. By deducting a normative standard of democratic legitimacy from discourse theory, the institutional and procedural characteristics of the co-decision procedure are rather assessed for their compatibility or compliance with the theoretical criteria.

The theoretical criteria presented below are ‘regulative ideals’, that is, they are not expected to be fully met in an empirical analysis. That does not mean that they are inappropriate or wrong. Rather, this is exactly the nature of normative or regulative ideals/criteria as they ‘(...)are goals toward which to strive (...), not standards that can be fully met.’ (Mansbridge, 2003: 515).19 Regulative ideals lose their force as normative compasses if they are not to be approximated when applied to empirical conditions. To determine the putative level of congruence between normative criteria and empirical reality therefore requires contextualisation and a qualitative discussion on how deep the expected discrepancy between ideal and reality is to be judged. It could therefore be argued that we need three categories: ideals, standards of how close the procedural qualities of a decision-making procedure can reasonably be expected to get to the ideals,

19 Or in the words of Gutmann and Thompson (2004: 37): “Deliberative democracy (...) is not intended to be a description of current political reality. It is an aspirational ideal’ (See also Thompson, 2008).
and procedural performance. The methodological consequence of this argumentation is thus in line with Mansbridge’s understanding of democratic legitimacy as a spectrum rather than a dichotomy: ‘Conceiving of democratic legitimacy as a spectrum and not a dichotomy, one might say that the closer a system or representation comes to meeting the normative criteria of democratic aggregation and deliberation, the more that system is normatively legitimate’ (Mansbridge, 2003: 515). Hence, aided by the operationalisation of the abstract democratic ideals, the evaluative framework providing a specification of concrete criteria and indicators provides the means to determine the threshold of procedural compliance a decision-making procedure should reasonably be expected to meet in order to be deemed democratic.

To put in the European context, then:

It goes without saying that democracy is always unfinished. It is a contested concept and an ideal that can never be fully realized. We can therefore only talk about democratization of established power structures as a measure of democracy. Thus the end product is not democracy tout court but a state of affairs that complies better with proper standards than the present state of affairs in Europe. By democratization we generally mean curtailing the level of domination in society and increasing the possibilities for collective self-determination. In line with the theory of deliberative democracy, democratization is here further specified to mean increasing the possibilities for offering the citizens justifications for the power structures they are subjected to (Eriksen, 2009: 2).

Even if we may argue that to determine the degree of congruence between the normative criteria and the empirical reality involves a kind of ‘measurement’, an evaluation requires first and foremost a judgement where the findings are qualified and discussed (Lord, 2004: 14). Hence in order to avoid that the evaluation of the co-decision procedure will not end up just being my personal account, it must also satisfy ‘(...)the coherence test of knowledge where they are based on an internally consistent set of indicators and the correspondence test where they are supported by externally verifiable data’ (Lord, 2004: 9). In this regard the scientific requirements of an evaluation are no different than explanatory
studies where there must also be internal validity ensuring that the
effects are actually caused by the given variables and where external
validity warrants caution to the type of generalisations that can be
made based on the findings of the co-decision case. My task, then, has
been to ensure this kind of intersubjectivity and specify the five
normative criteria, delineate the empirical indicators and present the
data as precisely as possible so that the thresholds and conclusions
reached are clear and logical to the readers.

Single case study and the lack of a comparative design
In this thesis I have chosen a single case study approach and I assume
some commentators will criticise me for the lack of both theoretical
and/or empirical examples against which a discourse theoretical
assessment of the co-decision procedure could be nuanced and put
into a larger perspective. However, the choice of a single case study
design is based, firstly, on the need to elaborate on how to make
deliberative theory applicable to empirical conditions. As mentioned,
studies on deliberative theory have until now mostly been confined
to political philosophy and it is only recently that political scientists
have begun to operationalise the theory of deliberative democracy to
empirical conditions. An important goal of this thesis is to contribute
to this endeavour and much space is therefore devoted to specifying
what the criteria would amount to in empirical terms.

Secondly, a single case study approach provides me with the
opportunity to go more into depth of the workings of the co-decision
procedure. Subjecting co-decision to two competing theoretical
perspectives (e.g. by adding an aggregative approach in addition to
the deliberative one) would require space that would exceed the
format of this thesis. What is more, applying an aggregative approach
in addition to a deliberative may arguably not be so fruitful since
comparing the aggregation of preferences in the EU context would
not be as easy as it is in national contexts given the low election
turnouts and the fact that the EP does not have full legislative
powers.

In sum, then, even if the general applicability of the findings from a
single case study is more limited in contrast to a comparative study
with more cases, the advantage outweighs the shortcomings in that it
allows me to both to contribute to the operationalisation of
deliberative democracy in developing the evaluative scheme as well as to contribute to fill a gap in the co-decision literature in conducting a systematic assessment of the procedure’s putative democratic qualities. The study is, however, not without comparative elements as the theoretical model provides a standard against which empirical reality is assessed. What is more, the evaluative scheme can be used to study other procedures and is thus generally applicable to similar types of empirical cases (that is, other public policy procedures). However, the empirical findings in this thesis are not immediately generalisable as such, but they provide us with in-depth knowledge about the workings and dynamics of the co-decision procedure. In this sense we may argue that it is a theory-developing case study (see Andersen, 1997) as the aim is not only to say something about the particularities of the co-decision procedure itself (even if this is the main goal), but also further develop, perhaps reorient or modify the ways in which the theory of deliberative democracy is usually applied in empirical studies. Given that this thesis has an evaluative and not an explanatory purpose the aim is not to test the theoretical assumptions of deliberative democracy against empirical data. The research task is deductive in providing a normative test of the empirical co-decision arrangement.

Scope and time frame
To assess a decision-making procedure in general and co-decision in particular is a formidable task as it can be related to almost all aspects of the EU. There is hardly any EU topic that is not in some shape or form interesting or relevant in relation to co-decision ranging from expert committee influence, lobbying, Commission agenda-setting power, inter-institutional relations between EP and Council (and also Commission), transparency, relationship between elected and appointed decision-makers and so and so forth. Consequently, to delineate exactly what should be included and excluded in an assessment of the democratic qualities of the procedure is therefore very difficult.

First of all, I aspire to say something about the democratic qualities of how decisions are reached in the EU, hence the exclusion of implementation procedures. Co-decision is a legislative procedure confined to policy formulation/development and decision-making. The procedure is formally over when agreement is reached or
alternatively fails. This does, however, not make bureaucracy absent in the thesis as the process of decision-making is very much a joint effort between bureaucrats, experts and politicians (elected as well as appointed ones). One of the main aims in this thesis is to evaluate the relative importance and influence of competent versus affected parties on decision-making. Needless to say, the role of bureaucrats and experts is by no means marginal. When the objective is to assess the democratic qualities of the co-decision procedure, the task is to appraise when the involvement of unelected experts and bureaucrats is justifiable and when it is not.

Secondly, the evaluation of co-decision is confined to the current legal situation, that is, the provisions of the Nice Treaty. This means that I will not conduct a comparison in time between co-decision now and its historical predecessors. However, the coming into being of the present framework is often discussed in relation to how the situation was before, but this is not the main objective and is not done systematically. A brief historical presentation of the co-decision procedure can be found in the next chapter. Co-decision was introduced with Maastricht and amended by Amsterdam. The Nice Treaty extended the number of policy areas, but did not alter the basic provisions and workings of the procedure. Hence it is the Amsterdam Treaty that represents the most important revision of the procedure. Unless otherwise noted, I always refer to the Amsterdam/Nice version.

The potential ratification of the Lisbon Treaty will also most likely not alter the general institutional and procedural patterns of co-decision as the full-time President of the Council will mainly deal with European Council meetings and not legislative issues. In this field the six-months rotating presidency will continue:

With the creation of the full-time president, the rotating presidency does not disappear. The European Councils and external relations Council sessions will be chaired by the new president and the high representative for foreign policy. But all other Council meetings for specific policies and a General Affairs Council will be chaired by ministers from a different member state every six months. The General Affairs Council could become a new policy co-ordinating body working to prepare European Councils, as capitals might not send their

Thirdly, since January 2007 Bulgaria and Romania became new members of the EU. The reader should, however, keep in mind that most studies consulted in this thesis are analyses and assessments of EU-15 as the experiences of the 2004 and 2007 eastern enlargements are still rather meagre and the subsequent academic studies of them even more so. How and if the addition of 12 new members will (substantially) affect the workings of the Union in general and the co-decision procedures in particular, are consequently a topic for future analyses.\(^{20}\) In sum, the lack of a constant number of member states will potentially weaken the conclusions reached in this thesis as the patterns and practices may be significantly affected once the new member states have become more accustomed and confident with EU decision-making. However, there seems to be agreement among co-decision students that the procedure has been through its obligatory years of trial and error and that the years after the changes made in the Amsterdam Treaty (see chapter 4) have matured and for the time being ‘settled’ both the formal and informal practices of decision-making under co-decision. The last few years have seemingly intensified the use of informal practices which is linked to the tendency of closing co-decision dossiers already after the first reading. However, how substantial enlargement alone has impacted on this trend is hard to tell and not the task of this study.

Sources and data
My account relies on an interpretation of official documents and academic studies on the co-decision procedure in particular and the EU legislative system in general. More specifically, it relies on official sources such as the Treaties, the institutions’ respective rules of procedure, the joint declarations on co-decision between the EP, Council and the Commission as well as material presented on the EU’s websites such as activity reports, the institutions’ co-decision guides, co-decision online video transmissions of EP and Council sessions etc. To find one’s way around the jungle of documents in the EU can be difficult and overwhelming. Apart from spending much time browsing around the EU’s website in order to get acquainted with where to find information, I have therefore often used academic

\(^{20}\) For a preliminary analysis, see Settembri (2007); Hagemann (2009).
sources as a guide to single out which documents are (more) relevant and important.

In addition to these official sources, I use articles written by actors in the system\textsuperscript{21} as well as academic studies by researchers of which many also contain interviews with central and relevant co-decision actors.\textsuperscript{22} I also use more general or overview accounts of the EU system to look for how the authors of these books write about the workings and mechanisms characterising the co-decision procedure.\textsuperscript{23} What is more, I have looked for studies discussing the EU’s democratic deficit in relation to decision-making processes in particular (Settembri, 2005; Farrell and Héritier, 2003b), and studies evaluating the democratic deficit in more general terms.\textsuperscript{24}

In the thesis I make a distinction between formal and informal rules. Where to draw the line more specifically is, however, tricky. Farrell and Héritier (2003a: 581) hold that ‘One may (…) distinguish between formal institutions, written rules enforced by a third party, and informal institutions, which are enforced by the actors themselves.’ Whereas Treaty provisions clearly fall into the category of formal rules, it is more difficult to categorise rules stemming from the institutions’ internal rules of procedure, inter-institutional agreements etc. when these are not in line with Treaty provisions. These rules are probably more correctly labelled semi-formal since they are recognised by being put into writing and thus more easily available to others. Finally, there are those rules and norms that are not written, but simply recognised by the actors as rules of the game or norms for appropriate behaviour (cf. March and Olsen, 1989, 2006a and b). The latter type clearly falls into the category of informal rules. These rules are obviously more difficult for outsiders to detect and understand correctly. Hence many researchers conduct interviews

\textsuperscript{21} E.g. Corbett et al. (2007); Collins et al. (1998); Shackleton (2000); Shackleton and Raunio (2003); Shackleton and Rasmussen (2005); Cortes (2000).

\textsuperscript{22} E.g. Farrell and Héritier (2003a and b, 2004, 2007); Héritier (2003); Foilleux et al. (2005); Burns (2004, 2006); Hagemann and De Clerck-Sachsse (2007); Rasmussen (2003, 2005); Rasmussen and Shackleton, (2005); Rhinard (2002); Settembri and Neuhold (2008); Lewis (1998, 2000); Bjurulf and Elgström (2004); Maurer (2003); Tsebelis et al. (2001).

\textsuperscript{23} Corbett et al. (2007); Hayes-Renshaw and Wallace (2006); Hix (2005); Westlake and Galloway (2004) Nugent (2001); Richardson (2006).

\textsuperscript{24} Eriksen and Fossum (2002); Eriksen (2005); De Leeuw (2003); Follesdal and Hix (2006).
with relevant actors who are insiders to the system. It should be noted that this thesis does not rely on interview material that I have conducted and collected myself. Instead, I rely on other studies which are based on interview and/or observation data when I describe and assess how the semi-formal and informal rules are put into established practices. As mentioned above, many of the studies on co-decision are written by actors in and/or long-time observers of the system. These studies provide insiders’ description of how the procedure works in practice. What is more, the contributions to this literature all point in the same direction and provide a rather unambiguous account and description of how the informal/semi-formal rules and practices unfold. I contend that together these sources provide me with the sufficient data material to also say something about the informal and established practices that cannot be found in official written accounts.

I have attempted to get acquainted with the ways and approaches co-decision is presented, assessed and explained. I have systematically gone through central journals focusing on the study of European integration including the European Research Papers Archive (Journal of Common Market Studies; European Public Policy; European Integration Online Papers; European Law Review; European Journal of Political Research, British Journal of Political Science; EUI Working Papers; ARENA Working Papers). Another main channel of information on co-decision is of course the bibliography of other articles/books. In addition to these scientific studies, I have searched for policy papers and memos published at think tanks with an EU focus such as FedTrust. I have also consulted the websites of a few civil society organisations and newspapers committed to monitoring the EU decision-making processes such as Statewatch, EurActive, European Voice etc. Finally, I have done random searches on the internet under Google or Google Scholar using search words such as ‘co-decision’, ‘trialogues’, ‘access to documents’, ‘Regulation 1049/2001’, ‘co-decision and democracy’, ‘Commission consultation procedures’ etc.

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25 E.g. Richard Corbett, Francis Jacobs, Michael Shackleton, Pierpaolo Settembri (an academic, but has worked in the Council Secretariat), Karlheinz Neunreither, Ken Collins etc.
26 http://eiop.or.at/erpa/
27 The list of search words is not exhaustive.
It should perhaps be noted that with regard to the appraisal of the openness criterion, the conclusions drawn are based on my own data when the accessibility of information and documents on the EU’s web page is evaluated. No studies have actually conducted detailed investigations of how much information is available for citizens if they want to follow the progress of a co-decision dossier. Hence the assessment of how the three institutions’ websites function as citizens’ primary sources of information is conducted by the author if not otherwise noted.

There is, of course, no guarantee that I have consulted a representative selection of co-decision studies as there is no exhaustive ‘list’ available that can tell me whether I have missed important information and/or a central ‘school of co-decision’. It should be noted that I often found interesting readings just by searching on random words on the internet. This naturally adds to the feeling that there is probably a lot ‘out there’ that I have missed and had I just used other search words or combination of words I would have found crucial information. However, through the different sources mentioned above, I hold that it is possible to argue that the triangulation between different sources of data used in this thesis represent a balanced set of sources for present purposes. This contention is also strengthened, I would argue, by the fact that after a while, the seemingly endless combinations of searches one can do on the internet, the pool of articles and documents popping up tended to be repeated.

Conclusion
This chapter has been devoted to the development of the evaluative scheme that will be applied to the co-decision case in the following chapters (5-9). From deliberative democratic theory five criteria have been developed and substantiated: (1) democratic deliberative meeting places, (2) inclusion of affected and competent parties, (3) openness, (4) neutralisation of asymmetrical power relations and (5) decision-making capacity. Each criterion is accompanied by empirical indicators. The chapter ends with some methodological considerations. Here it has been underlined that the evaluative scheme is focused on the conditions under which democratic decision-making is more/most likely to occur and consequently not whether co-decision-making is actually dominated by democratic deliberation
or not. Moreover, although the analytical framework cannot determine whether deliberation (and/or bargaining) is actually taking place, it can clarify what kind of deliberation the procedural and institutional circumstances are capable of and thus likely to generate. Before delving into the evaluation proper, the next chapter introduces the co-decision procedure more closely.
Chapter 4

Background: The co-decision procedure

Introduction
The co-decision procedure is one of several decision-making procedures in the EU, but since its inception with the Maastricht Treaty an increasing number of policy areas have been subjected to it and covers today ‘(...)more than half of Community primary legislation’ (Corbett et al., 2007: 218). It is (arguably) also the procedure under which the directly elected EP has the most power and can in this way be seen as the current culmination of the EP’s steady growth of influence in legislative matters (I come back to this below). According to the Council official website, the co-decision procedure is ‘(...)by far the most important legislative procedure’ and in the Lisbon Treaty it is renamed to (potentially) become the ‘ordinary legislative procedure’ of the EU (cf. also the Constitutional Treaty). The co-decision procedure belongs to the Community method framework and is thus supranational in nature in contrast to decision-making in the second

1 Note that this amounts to legislative acts, i.e. binding legal decisions taken within the first pillar and consequently excludes decisions taken under the other pillars.

2 See Council (2006b).
and third pillars as well as soft-law policy-coordination mechanisms such as the Open Method of Coordination (OMC).

The term ‘co-decision procedure’ was and still is an ‘unofficial’ name in the sense that it is not mentioned in the Treaties due to opposition from the British government during the Maastricht negotiations (Shackleton, 2000: 339-40). In the Treaties (TEC) it is merely described as ‘Article 251’. As mentioned, this is supposed to change with the Lisbon Treaty which refers to the co-decision procedure as the ‘ordinary legislative procedure’, thus simplifying and reducing the number of the EU’s legislative procedures. However, the term ‘co-decision’ quickly came into usage and is today uncontested and widely used by all parties (Shackleton, 2000: 340).

One of the main features of the co-decision procedure is the development of a more intense and common inter-institutional culture, especially between the EP and the Council, but also the Commission. Contrary to other decision-making procedures in the EU, under the co-decision procedure a proposal does not become law unless both the Parliament and the Council accept it. It is particularly to make the recourse to the Conciliation Committee – a formal arena where the EP and the Council (as well as the Commission) meet to negotiate if agreement after second reading cannot be achieved – worthwhile that first spurred the development of closer ties between the EP and the Council. In short, the formal inter-institutional interdependence prescribed in Article 251 forced the Council to take the views of the EP more seriously into consideration and in the longer run this has altered the character of the institutional triangle between the Commission, the Council and the EP (Maurer, 2003: 244).

All in all, the net winner seems to be the EP although with some costs (I come back to this below). The formal institutional interdependence prescribed in Article 251 has also triggered the development of an

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3 In fact, the British wanted to name the procedure the ‘negative assent procedure’ (Shackleton, 2000: 340).
4 Article 189b prior to the re-numbering at Amsterdam.
5 As we shall see, the assent procedure also requires the acceptance of both the Council and the EP, but the latter must accept proposals on a ‘take-it-or-leave-it’ basis, i.e. it is not possible for the Parliament to make amendments to the Commission proposal and there is no recourse to the Conciliation Committee should agreement not be obtained. For this reason Corbett et al. (2007: 231) call assent a cruder version of the co-decision procedure.
important informal inter-institutional culture, also called the trialogue system, which refers to the informal talks between the EP and the Council with the Commission acting as a kind of broker between the two former.

As the name indicates, ‘co-decision’ signifies the decision-making method where the Council co-legislates with the EP. In contrast to the other first pillar decision-making procedures (consultation, cooperation and assent), co-decision introduced particularly two new elements. Firstly, the possibility for extending the decision-making process to a third reading⁶ and thus the establishment of the Conciliation Committee and, secondly, since Amsterdam, the possibility for early agreements ending the decision-making process already after the first reading. Together with the above-mentioned informal contact structures (i.e. the trialogues), these two elements represent the most important changes to the Union decision-making system with the introduction of the co-decision procedure.

This chapter has four parts. The next section contains an introduction to the co-decision procedure – which areas it covers and how it generally works. Section two provides a presentation of the historical development of the co-decision procedure. Section three gives an overview of other legislative procedures within the larger Community method or first pillar decision-making context. Fourthly, I provide some general numbers on co-decision-making.

How the Co-decision procedure works
Which areas does it cover?
The co-decision procedure is currently applicable in the following policy areas (43 legal bases TEC)⁷:

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⁶ As will be seen below, the consultation procedure only allows for one reading whereas the cooperation procedure has two readings.

⁷ Scope of legal bases after implementation of the Nice Treaty, see European Commission (I).
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<td>47(2)</td>
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<td>absence of controls on persons crossing internal borders (Council acts unanimously)</td>
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<td>63(1)</td>
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<td>175(1-3)</td>
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Article 179: development cooperation
Article 191: political parties at European level (statute and political rules) (new in Nice)
Article 255(2): access to institution documents
Article 280(4): prevention of and fight against fraud
Article 285(1): statistics
Article 286(2): independent supervisory body for monitoring the protection of personal data

Article 251 TEC
The co-decision procedure is formally described in Article 251 of the Treaty establishing the European Community:

Article 251
1. Where reference is made in this Treaty to this Article for the adoption of an act, the following procedure shall apply.

The Council, acting by a qualified majority after obtaining the opinion of the European Parliament:
- if it approves all the amendments contained in the European Parliament's opinion, may adopt the proposed act thus amended,
- if the European Parliament does not propose any amendments, may adopt the proposed act,
- shall otherwise adopt a common position and communicate it to the European Parliament. The Council shall inform the European Parliament fully of the reasons which led it to adopt its common position. The Commission shall inform the European Parliament fully of its position.

If, within three months of such communication, the European Parliament:
(a) approves the common position or has not taken a decision, the act in question shall be deemed to have been adopted in accordance with that common position;
(b) rejects, by an absolute majority of its component members, the common position, the proposed act shall be deemed not to have been adopted;

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(c) proposes amendments to the common position by an absolute majority of its component members, the amended text shall be forwarded to the Council and to the Commission, which shall deliver an opinion on those amendments.

3. If, within three months of the matter being referred to it, the Council, acting by a qualified majority, approves all the amendments of the European Parliament, the act in question shall be deemed to have been adopted in the form of the common position thus amended; however, the Council shall act unanimously on the amendments on which the Commission has delivered a negative opinion. If the Council does not approve all the amendments, the President of the Council, in agreement with the President of the European Parliament, shall within six weeks convene a meeting of the Conciliation Committee.

4. The Conciliation Committee, which shall be composed of the Members of the Council or their representatives and an equal number of representatives of the European Parliament, shall have the task of reaching agreement on a joint text, by a qualified majority of the Members of the Council or their representatives and by a majority of the representatives of the European Parliament. The Commission shall take part in the Conciliation Committee's proceedings and shall take all the necessary initiatives with a view to reconciling the positions of the European Parliament and the Council. In fulfilling this task, the Conciliation Committee shall address the common position on the basis of the amendments proposed by the European Parliament.

5. If, within six weeks of its being convened, the Conciliation Committee approves a joint text, the European Parliament, acting by an absolute majority of the votes cast, and the Council, acting by a qualified majority, shall each have a period of six weeks from that approval in which to adopt the act in question in accordance with the joint text. If either of the two institutions fails to approve the proposed act within that period, it shall be deemed not to have been adopted.
6. Where the Conciliation Committee does not approve a joint text, the proposed act shall be deemed not to have been adopted.

7. The periods of three months and six weeks referred to in this Article shall be extended by a maximum of one month and two weeks respectively at the initiative of the European Parliament or the Council.

The co-decision procedure step by step
The co-decision procedure is divided into three stages or readings which can be concluded at each stage depending on the ability to reach agreement (different types of majorities are required – see below). It is common to say that the procedure begins with the Commission launching its proposal to the EP and the Council. However, prior to formulating the proposal, the Commission has conducted an extensive consultation process both inter-institutionally with the EP and the Council, externally with the civil society organisations and corporate interests etc. as well as with other EU institutions, such as the Economic and Social Committee (ESC) and the Committee of the Regions (CoR) in those areas their opinions are required. In other words, prior to launching a policy proposal and formally opening a co-decision procedure, the process has usually lasted quite some time in order for the Commission to have an idea and anticipate the various positions and identify contested issues.  

In the Commission the proposal is then finally and officially adopted either through the written (no discussion/ ‘A’ point) or oral (with discussion/ ‘B’ point) procedure among the Commissioners and then sent to the EP and Council as well as published in the Official Journal in its ‘C’ series.

First reading
The first reading starts when the Commission – which has the formal monopoly of initiative – launches its policy proposal simultaneously to the EP and the Council. (At this stage it is also possible for the CoR

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9 If the Commission does not think that it will gain the sufficient majority either in the EP, or particularly in the Council or worst case scenario in both, the proposal is usually never tabled. This is why the success rate of co-decision dossiers is so high and hardly any cases fail. For numbers, see Hayes-Renshaw and Wallace (2006: 213).

10 European Commission (II).
and the ESC to submit their positions on the proposal). The difference between the first reading, on the one hand, and the second and third readings, on the other, is that there are no time limits in the former. Discussions can therefore go on as long as deemed needed both in the EP and the Council. The proposal is officially announced in plenary in the EP and allocated to the relevant parliamentary committee (potentially joint involvement of two or more committees if the nature of the case so requires). The task of the committee is to prepare the Parliament’s ‘Opinion’ on the Commission’s proposal and the committee thus appoints a rapporteur who is put in charge of producing a report suggesting amendments and changes to the Commission proposal. The report is firstly subject to internal committee discussion and, when agreed among committee members (simple majority required), recommended to and discussed in the Parliament in a plenary session. The report is also adopted by simple majority\(^{11}\) in the plenary and consequently made the ‘Opinion’ of the EP and then submitted to the Commission (as well as the Council). The Commission reviews the amendments from the EP and if it agrees, adopts a modified proposal in order to accommodate the suggestions of the Parliament.

Meanwhile, the responsible Council working party(ies) has started the first reading process in the Council. The Council working parties are subcommittees of the Council of Ministers which discuss, make recommendations and table amendments to the (modified) Commission proposal. The process is supervised by the members of the Committee of Permanent Representatives (Coreper) and attended by national representatives sent from the member states. The process then moves on to Coreper which examines the agreements reached in the working parties and attempts to resolve outstanding points of disagreement before the proposal is sent to the Council of Ministers. On the basis of the EP’s Opinion and the Commission’s potential recommendations, the Council discusses the proposal and reaches a Common Position by a qualified majority vote\(^{12}\) if the Council agrees with the recommendations made by the Commission. If the Council disagrees with the alterations the Commission has made to the EP’s amendments, this requires unanimity in the Council.

\(^{11}\) A simple majority is a majority of the MEPs voting, see EP (2007b: 7).

\(^{12}\) Or actually most often decisions are adopted by consensus. I come back to this issue more closely below.
If it turns out that the Council approves all the amendments made by the EP (or if the EP did not make any amendments to the Commission proposal) and the Commission, the proposal can be adopted and become law for implementation right away without the Council having to agree on a Common Position. This kind of ‘fast track legislation’ or ‘early agreement’ where the procedure can be closed after first reading was made possible after the changes in the Amsterdam Treaty. If, on the other hand, the Council does not approve and a Common Position is adopted, this signals the end of the first and the start of the second reading.

**Second reading**

One difference between the first and the second reading is the shift from simple to absolute majority voting in the EP. There are no changes to the Council’s QMV rule. Another difference is that during the first reading of the co-decision procedure there are no time constraints neither on the EP nor on the Council when formulating their ‘Opinion’ and ‘Common Position’ respectively. In the second reading, however, a strict timetable is prescribed (see below). Finally, the end of a second reading is different from a first reading sequence in the sense that the former opens up for the possibility of convening the Conciliation Committee.

Apart from the above, the second reading is more or less a copy of the first. The second reading process starts with the EP taking a stance on the Council’s Common Position within 3 months (with the possible extension to 4 months) after receiving it. If it approves or does not respond, the act is deemed adopted. If the Parliament rejects the proposal by an absolute majority, the act fails. If, on the other hand, the Parliament makes amendments to the Common Position (supported by an absolute majority), the dossier is sent back to the

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13 With the exceptions of where the Treaties require unanimity (see above) and when the Council is disagreeing with the Commission’s comments on the EP’s amendments.

14 Here no absolute majority is needed. Høyland and Hagemann (2007) argue that this gives the Council an advantage as it is harder for the EP to introduce its own amendments than it is to adopt the Council’s Common Position.

15 With the inception of Romania and Bulgaria, there are 785 MEPs (this number will be reduced to 750 in June 2009). This means that at least 393 MEPs must vote in favour in order to achieve an absolute majority, that is, ‘(...)at least 393 votes in
Council (and the Commission for its opinions). Within 3 months (with the possible extension to 4 months), the Council can either approve the EP’s suggestions (by QMV if the Commission has approved them or otherwise through unanimity) or it can reject either all the amendments or just one single amendment. If approved, the Common Position with EP amendments is adopted. If rejected, the Conciliation Committee is convened within 6 to 8 weeks. For conciliation processes, both the EP and the Council select a delegation to represent them. In the Conciliation Committee the members attempt to find a compromise position. The Conciliation Committee consists of an equal number of members from the Council and the EP with the participation of the Commission. If no agreement is reached within 6 to 8 weeks the act is rejected. If, however, agreement\textsuperscript{16} has been reached within the same time limit and a Joint Text has been adopted, the third reading starts.

**Third reading**

The members of the Conciliation Committee then take the agreement back to their respective institutions where the conciliation compromise – the Joint Text – is presented and the proposal with amendments is voted upon. For the act to be adopted both institutions must approve – the EP with a simple majority of the votes cast and the Council with a qualified majority. Agreement in both houses must be reached within 6-8 weeks. If one of the institutions rejects the proposal, the act is not adopted. At this stage it is not possible to again open the process and the EP and the Council must take a vote on a take-it-or-leave-it basis. A rejected act can only be re-opened if the Commission tables a new proposal.

**The trialogues**

In parallel with the formal procedure as described above, trialogues are now an important characteristic of co-decision-making. These meetings are crucial for the understanding of how the co-decision works and therefore deserve some space here. The trialogue is an inter-institutional arena containing a limited number of participants

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\textsuperscript{16} An agreement is reached if the Joint Text is supported by an absolute majority of the EP delegation and a qualified majority in the Council delegation (Rasmussen, 2005).
from each institution. From the EP, the rapporteur, the chair of the responsible committee and, in addition, often the shadow rapporteurs (especially those from the large political groups) meet. In trialogues prior and during conciliation, one of the three permanent EP Vice Presidents also participates. The Council is usually represented by the Presidency in the form of the chair of Coreper I (the deputy permanent representative)\textsuperscript{17}, the chair of the relevant working group as well as the Council Secretariat ‘backbone’ which provides legal expertise (Häge and Kaeding, 2007: 344; Rasmussen, 2005: 1018). The incoming Presidency is usually also included, but only with observer status (Shackleton and Raunio, 2003: 186, footnote 8). The Commission is represented by the relevant Commissioner in the trialogues that are conducted ‘(...)just before or on the fringe of the Conciliation Committee.’ For the other meetings, a high-level official, usually the relevant Director-General or Director meet assisted by the Secretariat General (the Codecision Unit and the Legal Service) (Häge and Kaeding, 2007: 344). In sum, there are not more than 10 persons from each institution (EP, 2007b: 14).

In the beginning trialogues were only common prior to the Conciliation Committee, but are today conducted throughout the procedure. Hence, whereas the Treaties formally describe the co-decision procedure in a sequential manner, i.e. that each institution deals with the dossier in turn, responding to each other’s suggestions as outlined above, Farrell and Héritier (2004) point to the simultaneity of the procedure due to these informal practices and contacts as they take place throughout the whole procedure. In other words, it is not the case that one house sits and waits until the other has come up with a response. Rather, while the formal process proceeds in a sequential manner, selected representatives from all three institutions are in constant contact with one another in order to reach agreements, broker deals and sound out each other’s positions. In 1999 with the inception of the Amsterdam Treaty and the possibility for closing the procedure after the first reading, the EP, Commission and the Council signed a Joint Declaration committing them to cooperate on a

\textsuperscript{17} Earlier the chair of Coreper I was replaced by the permanent representative only in a very few cases mostly in the financial field (Shackleton, 2000: 334). After 2005 a handful of legal bases previously figuring under the third pillar were moved to the first and now fall under the co-decision procedure. As it is Coreper II that deals with justice and home affair issues the permanent representatives are now more often involved in co-decision.
constructive basis. The agreement was revised in 2007 with a particular emphasis on how the first reading trialogues should be conducted. There is now a strong emphasis on reaching so-called ‘early agreements’, i.e. closing the procedure after the first reading.

Access to trialogues is thus privileged and restricted to the above actors who are the key figures throughout the process. Trialogue meetings are conducted behind closed doors. During first reading trialogues it is only the official Commission proposal (and accompanying public documents such as impact assessments etc.) that are publicly available. As the whole purpose of trialogues is secrecy, the debates are obviously not openly accessible and there are no verbatim records or minutes. Consequently, with regard to individual and ongoing dossiers, there is no information available from first reading trialogue meetings. In the second reading, the EP’s opinion, the Council’s Common Position as well as the Commission’s comments thereon are available, but again there are no available documents from the trialogues themselves. This is also the case with conciliation trialogues.

The trialogues are not mentioned in the Treaties, but have obtained a more or less semi-formal status in the two aforementioned Joint Declarations between the Commission, the EP and the Council. In general it is stated that the (... )trilogue system has demonstrated its vitality and flexibility in increasing significantly the possibilities for agreement at first and second reading stages, as well as contributing to the preparation of the work of the Conciliation Committee. Such trialogues are usually conducted in an informal framework. They may be held at all stages of the procedure and at different levels of representation, depending on the nature of the expected discussion. Each institution, in accordance with its own rules of procedure, will designate its participants for each meeting, define its mandate for the negotiations and inform the

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20 Earlier in the document it is even stated that ‘The institutions confirm that this practice should be extended to cover all stages of the co-decision procedure’ (my emphasis).
other institutions of arrangements for the meetings in good time.

There is (arguably) a strong consensus among commentators that the swiftness and efficiency of the co-decision procedure in large part should be credited this informal contact structure which has eased and strengthened the cooperation climate between the EP and the Council (Shackleton and Raunio, 2003). It is particularly the latter that favours this practice whereas the EP has expressed ambivalence as the process has become less transparent, only involve a handful of MEPs and the debate is partly moved out of the formal channels and the Parliament itself. The character and functioning of the trialogues will be discussed extensively below.
Figure 4.1 The co-decision procedure
The development of the co-decision procedure
Prior to Maastricht
The process leading to the introduction and then the further development of the co-decision procedure can perhaps best be illustrated from the perspective of the EP. Hence, even if the Council is still the dominating house in EU decision-making, the introduction of the co-decision procedure has increased the EP’s role in legislative tasks significantly. Prior to the Single European Act (SEA) the EP was only scarcely involved in legislation through a *simple consultation procedure* which, as the name indicates, means that the EP was only consulted, but the Council had no obligation to follow the wishes of the Parliament (see more on the consultation procedure below). Despite this, ‘(...)by the mid 1970s, Council consulted Parliament on virtually all legislative proposals referred to it except those of a purely technical or temporary nature’ (Corbett et al., 2007: 205). The introduction of direct elections to the EP and the MEPs becoming full-timers from 1979 together with the important ‘isoglucose ruling’\(^{21}\) of the ECJ in 1980 signalled the more active role the EP was going to play in future EU decision-making. Now it was made clear that the Council was obliged to await the EP’s opinion before it could adopt an act. However, the isoglucose ruling was more a power of delay than a veto and consequently more effective in situations where decisions required urgency. What is more, the Council could still disregard the EP’s position if it did not agree (Hix, 2005: 78).

With the SEA, the powers of the EP grew as two additional decision-making procedures were introduced, namely the *assent* and the

\(^{21}\) Cases 138/79 and 139/79, *The Isoglucose Cases* [1980] ECR. 3333; 3393. The ‘isoglucose’ ruling of the ECJ from 1980 states that the EP must be consulted prior to the Council taking a decision. In the ruling, the ECJ annulled the law adopted by the Council on the grounds that the Parliament had not yet given its opinion on the proposal. The Court linked the ruling to the question of democratic legitimacy: ‘(...)the means which allows the Parliament to play an actual part in the legislative process of the Community. Such a power represents an essential factor in the institutional balance intended by the Treaty. Although limited, it reflects at Community level the fundamental democratic principle that the people should take part in the exercise of power through the intermediary of a representative assembly. Due to consultation of the Parliament in the cases provided for by the Treaty therefore constitutes an essential formality, disregard of which means that the measure concerned is void” (ECJ ruling quoted in Corbett et al., 2005: 199). Another ruling by the ECJ in 1995 modifies this right and obliges the EU institutions to loyal cooperation (ibid: 200).
cooperation procedures. Now both the number of policy areas where the EP was involved as well the powers of the EP were strengthened. The cooperation procedure meant that the power of the EP was increased as it was now involved also in a second reading in decision-making processes. Procedurally this means that after the EP has produced its opinion, the Council must respond and agree on a Common Position prior to the second reading can take place: ‘As a result, the habit of two readings gave the impression of a classical bicameral legislative procedure at European level, and helped pave the way towards full co-decision’ (Corbett et al., 2007: 214).

Maastricht – Co-decision

The co-decision procedure was introduced with the Maastricht Treaty in order to improve the Union’s democratic legitimacy through the strengthening of the EP’s position and powers (Farrell and Héritier, 2003b: 6). The EP was going to be a more equal partner to the Council in Community legislation. As mentioned above, the rules regulating co-decision introduced the formal requirement that a proposal must be accepted by both houses in order to be adopted. This formal equality was symbolised by the establishment of the Conciliation Committee. Under the Maastricht provisions, recourse to the Conciliation Committee was, however, not necessarily the final stop. If conciliation negotiations failed, the Council could re-introduce its Common Position and adopt the act unilaterally if the EP failed to drum up an absolute majority among its members to support its rejection within a six weeks deadline. The Council only tried this option once in the 1994 Voice Telephony case where the EP managed to gather an absolute majority and voted the act down. The Council obviously found this strategy too costly and refrained from using this right in subsequent procedures (Corbett et al., 2007: 215-6;

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22 The EP acquired budgetary powers in the 1970s.
23 To distinguish between co-decision before and after the changes made in Amsterdam, I use the term ‘co-decision I’ to indicate the regulations under the Maastricht regime, whereas ‘co-decision II’ signifies the rules from Amsterdam and onwards (the Nice Treaty did not alter the basic workings of the procedure, only added new policy areas to the co-decision). Note, however, that when I use simply ‘co-decision’ elsewhere in the thesis this means the current rules (i.e. Amsterdam co-decision II).
24 Then Article 189b, and now after the renumbering Article 251, of the Treaty establishing the European Communities.
Background: The co-decision procedure

Another provision that made the EP inferior to the Council was the former’s obligation before the second reading to announce its ‘intention to reject’ the Council’s Common Position ‘(...)and then confirm this in a new vote following an option conciliation meeting with the Council’ (Corbett et al., 2007: 215). This provision was deleted in the Amsterdam Treaty.

Even if not as accentuated as the well-known budgetary quarrels in the 1970-80s (Hayes, Renshaw and Wallace, 2006: 215), the beginning of the Maastricht period was characterised by confrontation and lack of cooperation between the EP and the Council, as the legislative procedures hitherto had not warranted as close cooperation and interdependence as required in co-decision. The institutions were thus not accustomed to work together on a more equal footing. The weaker EP struggled to win influence whereas the more powerful Council tried to minimise the former’s new-won formal clout. The Council had no tradition for paying attention to or taking seriously the views of the EP. In these initial years of the co-decision procedure the EP, on its side, demonstrated a remarkable ability to act collectively and thus won long-term victories and more power, e.g. through the aforementioned Voice Telephony case in 1994 (see e.g. Shackleton and Raunio, 2003; Burns, 2006).

Over time, the EP and Council have developed its well-known and quite efficient arrangement of informal trialogue contacts and meetings where disagreements can be discussed and aired prior to formal discussions. The ‘trialogues’ or ‘trilogues’ were originally introduced in relation to conciliation meetings and the very first trialogue was held during the SOCRATES report in 1994 on the dispute over comitology and the budget (Benedetto, 2005: 70;

25 The EP majority was 377 votes in favour of rejection. Consequently, ‘(...)in 1998, when the conciliation committee failed to reach an agreement on a directive on a Securities Committee, Council decided to anticipate the provisions of Amsterdam and not take advantage of its right to challenge the Parliament to overrule its position” (Corbett et al., 2007: 215-6). For a more thorough presentation and analysis of this case, see Rittberger (2000).

26 If the EP declared an intention to reject the Council’s Common Position, the Conciliation Committee could be convened right away. ‘This ‘petit conciliation’ has only been used twice (Engine power in 1994 (COD 1991 371) and European Capital of Culture in 1999 (COD 1997 0290))’ (Rasmussen, 2005: 1030, footnote 4).
Shackleton and Raunio, 2003: 177). In the second half of 1995 under the Spanish Presidency, the EP and Council agreed to hold regular trialogue meetings prior to the Conciliation Committee (Neuhold, 2001: 5). The reason was that the Treaty was and still is silent on what shall happen between the Council’s rejection in the second reading and prior to convening the Conciliation Committee. In addition to making the formal conciliation meetings much more prepared, the conciliation trialogues grew out of a frustration over conciliation meetings with over 100 people present and the lack of productive dialogue and negotiations between the EP and the Council (Shackleton, 2000: 334). Moreover, the formal conciliation meetings could be very time-consuming and difficult as the dossiers and hence the discussions are often of a very technical nature. The trialogues prepare the conciliation meetings and function as an arena for sounding out differences and trying to find common ground. No formal decisions are taken here as the participants must refer back the possible solution to their respective conciliation delegations for potential approval (Shackleton and Raunio, 2003: 177).

In sum, trialogues are not described in the Treaties, but now play a crucial role in the workings of co-decision. Their normative status are, however, highly ambivalent. I will discuss the trialogues thoroughly in this thesis, but for now it suffices to say that the trialogues represent an important feature in the development of a ‘new legislative culture’ between the EP and Council and that under co-decision I, trialogues were first and foremost confined to the stage prior and during conciliation.

Amsterdam – Co-decision II

So far the introduction of the Amsterdam Treaty has represented the most important change to the co-decision procedure. Firstly, the number of policy areas subjected to co-decision increased considerably, from 15 to 40 – spread over 31 articles (Shackleton,

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27 Conciliation trialogues were, however, known from the budgetary procedure, but it is first and foremost under co-decision they have gained momentum, Hayes-Renshaw and Wallace, (2006: 216).

28 ‘It is no surprise that Ministers prefer to send civil servants rather than attend themselves. Meetings can be highly technical and/or focused on very specific issues. In some cases, discussion has lasted for an hour or more over the position of one word!’ (Garman and Hilditch, 1998: 280).

Secondly, the provision whereby the EP had to announce an 'intention to reject' a Council Common Position was repealed. If the EP now votes to reject the common position, the legislation fails. This reform largely corresponds to the practice of co-decision: in the intergovernmental conference (IGC) negotiations, the Member States, the Parliament and the Commission all declared this part of the procedure to be moribund (Maurer, 2003: 230). Thirdly, Amsterdam also removed the possibility of the Council to re-introduce its 'Common Position' after the second reading thus depriving the Council of its relative power to impose decision-making upon the EP unless the latter was able to mobilise an absolute majority and veto the proposal. After Amsterdam the future destiny of a policy proposal rests with the outcome of the Conciliation Committee – if no agreement is reached in conciliation the act fails and the procedure is closed. This puts the Council and the EP on a more equal footing in legislation under co-decision (Shackleton, 2000; Benedetto, 2005: 69, Maurer, 2003: 230; Garman and Hilditch, 1998: 276). 'As a result, more than one observer has called the Parliament the big winner of the Amsterdam Treaty negotiations' (Shackleton, 2000: 326). Fourthly, Amsterdam reduced the time limits for the duration of the co-decision procedure after the adoption of the Council’s Common Position from 16 to 14 months (Maurer, 2003: 239).

Finally, Amsterdam opened for the so-called 'fast-track procedure' allowing the legislative process to close already after the first reading if the EP and Council agree. This also resulted in the aforementioned Joint Declaration between the EP, Commission and Council on the practical arrangements for the co-decision procedure. Here, the institutions committed themselves to cooperate in an amicable manner and, in short, we may arguably say that the document semi-formalised the usage of triaologue. Moreover, this was also followed up by the Council – which is the institution that has had to change its

30 ‘Interestingly, both institutions anticipated this reform in March 1998, when no agreement on the comitology issue could be found within the conciliation committee on draft directives 93/6/EEC and 93/22/EEC. Instead of reshuffling the draft according to the Maastricht Treaty provisions, the two institutions declared the failure of the procedure after conciliation” (Maurer, 2003: 230).

31 However, as under the Maastricht provisions, also under Amsterdam there are no time constraints during the first reading, i.e. prior to the adoption of the Council’s Common Position. This is also the rule today.

working methods the most. In a report from the Presidency and the Council Secretariat where closer and more accommodating cooperation with the EP was underlined, the trialogues were mentioned as a means that had made co-decision more effective, i.e. reduced the number of conciliations and increased closure at first reading.\(^{33}\) Whereas the Maastricht period and co-decision I can be seen as the trial and error period where the institutions tried to come to terms with the new legislative arrangements (i.e. the Council accepting and taking seriously the EP as a co-legislature), the Amsterdam period and co-decision II solidified the informal cooperation arrangements that developed under co-decision I. From Amsterdam onwards, the aim has been to reduce the number of dossiers going to conciliation and trying to reach agreement as early as possible, hence the need for more continuous cooperation and contact on an informal basis. Partly for this reason, Hix (2005: 77-8) argues that ‘(...)by the mid 1990s the EU legislative system had developed into something much closer to a traditional bicameral model.’

**Nice**

The Nice Treaty did not represent big changes with regard to structure of the co-decision procedure and only increased the number of policy areas ‘(...)by five, immediately after ratification, and by five more, at a later date’ (Shackleton and Raunio, 2003: 186). Today the co-decision procedure covers over 40 areas of Community action. With regard to co-decision, the big question during the IGC was whether it should concur with all areas where decisions are taken by qualified majority vote (QMV) in the Council, as the EP fought for. This was, however, only partially implemented as ‘(...)among the new cases under QMV, three legislative ones remained outside the co-decision procedure: financial regulations, internal measures for the implementation of co-operation agreements, as well as the Structural Funds and the Cohesion Fund’ (Rittberger, 2007: 135, see also Nugent, 2003: 88). The new policy areas subjected to co-decision after Nice were measures to combat discrimination, judicial cooperation in civil matters (excluding family law), specific industrial support measures, economic and social cohesion actions (outside the

\(^{33}\) See Council (2000).
Background: The co-decision procedure

Structural Funds), the statute for European political parties and measures relating to visas, asylum and immigration.34

Lisbon: from co-decision to ‘ordinary legislative procedure’

Even if the French and Dutch referenda formally put an end to the Constitutional Treaty, the majority of its content survived the 2007 IGC and was adopted at Lisbon. Whether it will survive a second ratification process still remains to be seen and the future prospect for the Treaty after the Irish turned it down in 2008, is currently undecided. One of the main tasks for the Convention on the Future of Europe was to simplify the legislative procedures in order to make the EU system more transparent and comprehensible. The constitutional treaty suggested to make the co-decision procedure the ‘ordinary legislative procedure’35 and to increase the number of Community areas subjected to it from 43 to 92, i.e. the majority of EU legislation. This is also the case in the Lisbon Treaty.36 As in the Constitutional Treaty, the pillar structure is also almost abolished in the Lisbon Treaty thus paving the way for more EP involvement. Co-decision or the ‘ordinary legislative procedure’ will henceforth apply to important policy such as agriculture, fisheries, structural funds as well as the whole current third pillar area of justice and police cooperation (see also EP, 2007b: 22). Other decision-making procedures such as consultation and assent will be brought together under ‘special legislative procedures’. To make co-decision the default procedure in policy areas where the Council decides by QMV has been a principle advocated by the EP for a long time and the constitutional treaty seems ‘(...)finally to establish this link’ (Hayes-Renshaw, 2006: 216). The Lisbon Treaty also adopted the clause providing for a more permanent leadership in the Council. However, the President of the European Council will presumably not affect the current set-up of co-decision-making as the Council of Ministers will retain its rotating six months presidency when dealing with legislative acts. In sum, the Lisbon Treaty will arguably not alter the

34 See Europa Glossary (I).
35 Cf. Article I-34(1) and III-396.
36 The Treaty establishing the European Community (TEC) will be renamed Treaty on the Functioning of the European Community (TFEU) and co-decision or the ordinary legislative procedure will then be found in Article 294, see Folketinget (2008).
structure and workings of the co-decision procedure as was the case in Amsterdam, but it will make it more important as it will apply to the majority of EU legislation.

The co-decision procedure in the larger first pillar legislative context.
The co-decision procedure belongs to the so-called Community method framework which is located in pillar 1.37 The Community method framework is supranational in character and involves different configurations of the EU institutional triangle: the Commission, the EP and the Council with the ECJ as the overall watchdog. Within the so-called Community method there are four different types: the consultation, the assent, the cooperation and the co-decision procedure. The four can be distinguished by how much power the EP has as a legislature in relation to the Council. Under the consultation procedure the EP has the least power, then follows assent, cooperation and finally co-decision where the Parliament at least formally enjoys equal legislative powers with the Council. Let us have a brief look at the three first procedures.

The consultation procedure38 is the oldest of the four procedures and was already introduced by the Treaty of Rome and until the Single European Act (SEA), this was the only decision-making procedure (Nugent, 2001: 255). For a long time it was also the most important legislative procedure in the sense that the majority of EU legislation was adopted under this procedure.39 Over the last few years (2005-9), however, the number of acts adopted under the consultation procedure has sunk (see table 2 below). According to this procedure, the EP is only allowed to give a non-binding opinion to the Council

37 See the thoughts of an EU veteran, David Williamson (2006), on the inter-institutional balance under the various legislative procedures in the first pillar.
38 According to the EU official definition, the consultation procedure is defined as follows: ‘Under the consultation procedure, the Council consults Parliament as well as the European Economic and Social Committee (EESC) and the Committee of the Regions (CoR). Parliament can: approve the Commission proposal, reject it, or ask for amendments. If Parliament asks for amendments, the Commission will consider all the changes Parliament suggests. If it accepts any of these suggestions it will send the Council an amended proposal. The Council examines the amended proposal and either adopts it or amend it further. In this procedure, as in all others, if the Council amends a Commission proposal it must do so unanimously” See, Europa Portal (I).
39 See Maurer (2003) for an overview.
before a new piece of legislation is adopted. The Council is obliged to consult the EP, but it is not bound by its opinion. If the Council agrees with the EP’s opinion, it can then ask the Commission to amend the proposal, but the latter has no obligation to accommodate such a request. The consultation procedure applies to important policy areas such as agriculture, competition policy and other Community policies, in addition to institutional and budgetary policies, citizens’ rights and police and judicial cooperation (i.e. third pillar) policies. If the Lisbon Treaty comes into force, the consultation procedure will fall into the category of ‘special legislative procedures’.

The assent procedure was introduced with the Single European Act and was extended at both Maastricht and Amsterdam. This makes the EP more on a par with the Council in cases concerning the accession of new members, association agreements with third states as well as other important agreements with third countries, the appointment of the Commission President, citizenship issues, the tasks of the European Central Bank and amendments to the Statutes of the European System of Central Banks and the ECB, the Structural and Cohesion Funds, the procedure for elections to the EP and in cases where sanctions imposed on Member State for breaching fundamental rights are considered. The procedure requires the support of a simple majority in the EP under most of these policy areas, but there are three exceptions where an absolute majority is required, namely those concerning EP elections, accession of new member states and in cases where member states are in breach of fundamental rights. In any event, an act is not adopted if the EP rejects the proposal. However, the EP cannot make amendments to the Commission proposal as is the case with the consultation, cooperation and co-decision procedures. It can only accept or reject it as it stands. There is also a reverse version of the assent procedure.

40 For an overview, see Corbett et al. (2007: 212-3).
41 Again, for an overview, see Corbett et al. (2007: 212-3).
42 The official definition of the assent procedure: ‘The assent procedure means that the Council has to obtain the European Parliament’s assent before certain very important decisions are taken. The procedure is the same as in consultation, except that Parliament cannot amend a proposal: it must either accept or reject it. Acceptance (‘assent’) requires an absolute majority of the vote cast” See Europa Portal (I). For a more thorough presentation of the assent procedure, including its historical development, see Corbett et al., (2007: 230-8).
applying to cases where the Council can only accept or reject the statutes or rules of procedure of the Ombudsman as well as the EP. Corbett et al. (2007: 231) call the assent procedure a crude version of co-decision as it requires the acceptance of both legislative houses, but assent does not provide for amendments, but only a ‘take-it-or-leave-it’ practice. In the provisions of the Lisbon Treaty the assent procedure is renamed ‘consent’ procedure.43

The SEA also introduced the cooperation procedure44 (Article 252). This procedure gives the EP more power than both the consultation and assent procedures as the Parliament is here involved also in a second reading of legislative acts. Even if the cooperation procedure was originally covering only 10 treaty articles it was, until the introduction of co-decision, still an important procedure as it covered around one third of all legislation (Hix, 2005: 78). The cooperation procedure is, as mentioned above, the forerunner of the co-decision procedure, but since the latter’s inception, the former has lost its competence in many areas to the latter (Benedetto, 2005: 68).45 After the Amsterdam Treaty the procedure has a rather reduced scope:

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44 The official definition of the co-operation procedure: ‘The cooperation procedure is always initiated by a proposal from the Commission forwarded to the Council and the European Parliament. In the context of a first reading, Parliament issues an opinion on the Commission proposal. The Council, acting by a qualified majority, then draws up a common position, which is forwarded to Parliament together with all the necessary information and the reasons which led the Council to adopt this common position. Parliament examines this common position at second reading; and within three months may adopt, amend or reject the common position. In the latter two cases, it must do so by an absolute majority of its members. If it rejects the proposal, unanimity is required for the Council to act on a second reading. The Commission then re-examines, within one month, the proposal upon which the Council based its common position and forwards its proposal to the Council; at its discretion it can include or exclude the amendments proposed by Parliament. Within three months, the Council may adopt the re-examined proposal by qualified majority, amend it unanimously or adopt the amendments not taken into consideration by the Commission, also unanimously. In the cooperation procedure, the Council may still exercise a veto by refusing to express its opinion on the amendments proposed by the European Parliament or on the amended proposal from the Commission, thereby blocking the legislative procedure’ See Europa Glossary (II).
45 Benedetto (ibid) seems to be of the opinion that the cooperation procedure has lost so much of its power that it is no longer effectively in force. The ‘golden years’ of cooperation was from 1987 to 1999, (see also Burns, 2004: 4).
The main reason for the shift from co-operation to co-decision is the procedural change applied to one legal basis - namely Article 95 TEC. The general basis for harmonization measures in the framework of the internal market. With Maastricht, the procedure to be applied for Article 95 shifted from co-operation to co-decision, and 45.9 per cent of co-decision procedures concluded between November 1993 and December 2001 fell under this article (Maurer, 2003: 231).

The cooperation procedure was originally established to apply to Single Market policy areas.⁴⁶ Now it only applies to certain fields of the economic and monetary union. The effort to reduce the number of decision-making methods in the EU, the Lisbon Treaty suggests to repeal this procedure altogether and replace policy-making usually falling under it with the ‘ordinary legislative procedure’ (i.e. the current co-decision procedure) or by non-legislative acts of the Council.

The cooperation procedure shares many similarities and is identical with the co-decision procedure up until the second reading, but has no possibility for recourse to the Conciliation Committee. The difference occurs after the EP has either accepted and/or amended or rejected the proposal during the second reading. A policy proposal falls altogether under co-decision if the EP rejects it, whereas under the co-operation procedure the Council can still adopt the proposal if it can reach unanimity. It can also be argued that the Commission has more power under the cooperation procedure as it has to approve the second reading amendments made by the EP before they are sent to the Council. It is consequently important that the Commission is backing the EP’s suggestions so that they remain in the proposal.⁴⁷ As we have seen, this provision does not apply under co-decision as the Council and the EP do not need the formal approval of the Commission to adopt amendments (although the Council must drum up unanimity if the Commission’s comments are to be rejected). In

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⁴⁶ I.e. Article 99(5) – Rules for the multilateral surveillance procedure; article 102(2) – Definitions for the application of the prohibition of privileged access; article 103(2) – Definitions for guarantees against Community liability; and article 106(2) – Measures to harmonise the denominations of Euro coins (Corbett et al., 2007: 213).

⁴⁷ It is, however, possible for a unanimous Council to disregard the Commission’s choice and approve the EP’s amendments, but the chance that the Council will go against the will of the Commission is very small (Corbett et al., 2007: 216).
other words, the difference between the co-operation and co-decision procedures is that in the former the Commission has more power and the Council has the final word. In fact, it is argued that it is the Commission that loses most power in the move from co-operation to co-decision.\textsuperscript{48}

In this regard, it should be mentioned that the inter-institutional power balance has been a major topic in the co-decision literature. This debate has a strong game-theoretical emphasis.\textsuperscript{49} By measuring conditional agenda setting and veto powers, these studies aim to determine the relative legislative influence of the Commission, the EP and the Council. Prior to the revision of the co-decision procedure with the inception of the Amsterdam Treaty, the debate was focused on the whether the EP was more powerful under co-operation rather than co-decision. One strand argued that the EP had more power under the co-operation than the co-decision procedure.\textsuperscript{50} The argument was that under the co-operation procedure the EP (together with the Commission) has conditional agenda-setting power which means that if the Commission supports its amendments, it would be hard for the Council to reject them since unanimity instead of QMV is then required. Hence given that the member states were more interested in passing legislation rather than none whatsoever, the assumption was that it was easier to support the EP’s amendments and get an agreement even if the outcome was not the preferred one.

\textsuperscript{48} "In the co-operation procedure, it is critical for the Parliament to win the support of the Commission for its amendments. If the Commission accepts them, they are incorporated into the Commission’s proposal and can only be taken out or modified by Council, if it is unanimous, whereas a qualified majority will suffice to approve the text as a whole. Amendments not accepted by the Commission need unanimity, which, against the will of the Commission, is unlikely and they are therefore effectively dead. Under the co-decision procedure, the Commission does not express its views on the Parliament’s second reading amendments, but whether or not the Commission is favourable to them, as soon as it emerges that the Council cannot accept all the amendments, attention turns to the conciliation committee negotiations. In those negotiations Council (normally acting by qualified majority voting) and Parliament are free to reach an agreement on individual amendments independently of the opinion of the Commission" (Corbett et al., 2007: 216).

\textsuperscript{49} See for instance, Kreppel (2002); Tsebelis (2002); Tsebelis and Garrett (2000, 2001), Tsebelis et al. (2001); Häge and Kaeding (2007); König et al. (2007); Napel and Widgrén (2006); Crombez (1997, 2000).

\textsuperscript{50} E.g. Tsebelis et al. (2001); Tsebelis and Garrett (1996, 1997a and b).
Under the co-decision procedure (that is, ‘co-decision I’), the EP has absolute veto power, but because the Council could re-introduce its Common Position if conciliation failed, the Council could put pressure on the EP and present the Joint Text as a ‘take-it-or-leave-it’ offer. On this basis, it was assumed that the EP was more influential under the cooperation than the ‘co-decision I’ procedure. This position attracted many opponents and was highly disputed. However, with the Amsterdam Treaty and the revision of the co-decision procedure, the Council’s right to re-introduce its Common Position was repealed. Hence if no agreement is reached in the Conciliation Committee the act now fails and there is no second round for the Council. Consequently, after Amsterdam the argument that the EP wields more influence under the cooperation procedure is hard to sustain. There is now widespread agreement that the EP is more powerful under co-decision than under the other legislative procedures and that the EP and the Council have now become genuine co-legislators (Hix, 2005: 105-6).

In sum, the situation after Nice concerning decision-making procedures within Community method framework is that the co-decision and consultation procedures are the most important and most frequently used legislative mechanisms. Co-decision covers almost all areas of the internal market, whereas the consultation procedure was until 2008 used in the majority of cases (see table 2). The cooperation procedure, on the other hand, is almost never used and the assent procedure is only important in cases of international agreements (Hix, 2005: 79). If the Lisbon Treaty is ratified, this picture will change as co-decision becomes the default or ‘ordinary legislative procedure’ and consultation will figure under ‘special legislative procedures’.

51 E.g. Moser (1996); Hubschmid and Moser (1997); Crombez (1997); Scully (1997a, b and c). In a study comparing the adoption of EP amendments under the cooperation and co-decision procedures respectively, the authors found that under ‘co-decision I’ there was ‘(...) a higher success rate of parliamentary amendments under co-decision (I) than under co-operation (...). However, controlling for one of the conditions of conditional agenda setting (agreement by the Commission under co-operation), conditional agenda setting empowers the EP more than veto powers. Finally, control of Commission behaviour in both procedures indicates no difference in acceptance rates between co-operation and co-decision” (Tsebelis et al., 2001: 573; see also Kreppel, 1999)
The co-decision procedure in numbers – efficiency and effectiveness

The acts coming out of co-decision are either regulations, directives or decisions (EP, 2007b: 5). The number of concluded co-decision acts has grown steadily from Maastricht until today. In the first co-decision period between Maastricht and Amsterdam there were 165 concluded dossiers. Within the last parliamentary term (1999-2004), the total number of concluded co-decision files was 403.52 In the current parliamentary term (2004-2009) from 2005 to 2008, the number of adopted dossiers has increased from 122 in 2005 to 217 in 2008. Moreover, whereas acts adopted under the consultation procedure has declined, the number of co-decision acts has in contrast increased and in 2008 the number was actually higher than consultation. In their study on the impact of enlargement on decision-making in the Council, Hagemann and De Clerck-Sachsse (2007: 11) found that the number of co-decision acts was high just before the accession of the ten new member states and then dropping immediately after enlargement (see also Settembri, 2007). This trend is now reversed ‘(...)into an increase that even exceeds the years prior to enlargement.’ Below I have made a table on the number of adopted first pillar acts during the last four years.

Table 4.1: Adopted legislative acts 2005-200853

<table>
<thead>
<tr>
<th>Year</th>
<th>Consultation</th>
<th>Co-operation</th>
<th>Co-decision</th>
<th>Assent</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Reading:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>1st</td>
<td>2nd</td>
<td>3rd</td>
<td>Total</td>
</tr>
<tr>
<td>2005</td>
<td>113</td>
<td>2</td>
<td>90</td>
<td>32</td>
</tr>
<tr>
<td>2006</td>
<td>158</td>
<td>0</td>
<td>74</td>
<td>34</td>
</tr>
<tr>
<td>2007</td>
<td>157</td>
<td>0</td>
<td>119</td>
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</tr>
<tr>
<td>2008</td>
<td>110</td>
<td>0</td>
<td>140</td>
<td>29</td>
</tr>
</tbody>
</table>

52 For overview of adopted acts until 2002, see Maurer (2003).
Background: The co-decision procedure

Length of procedures
Many had predicted that greater involvement of the EP would mean slowing down and making the legislative process less efficient. Studies show that this was not the case prior to the enlargement in the EU15, rather to the contrary: ‘A more detailed analysis indicates that the average duration of co-decision fell from 769 days (for the period November 1993 – December 1994) to 409 days for proposals made between July 1999 and July 2002’ (Maurer, 2003: 239, see also Hayes-Renshaw and Wallace, 2006: 212, Hix, 2005: 79). However, in a recent study by Settembri (2007: 29) where he takes heed of the impact the 2004 enlargement has had on EU decision-making, he found that with regard to length of decision-making process, his data also shows that the average number of days to complete a co-decision file has now gone up to the same level as in the 1993-94 period. More specifically, prior to enlargement he found an average of 600 days to close a co-decision dossier whereas after enlargement this number has raised to about 730 (ibid). In comparison, the average length of consultation acts has decreased from around 510 to 310 days.

Fast-track procedure – early agreement
Despite the fact that the duration (number of days) of the legislative process is now on a par with the early Maastricht situation this could imply that the dossiers also go through all the three readings. This, however, is no longer the case and as can be seen from the table above, the overwhelming number of co-decision acts is now adopted after the first reading. As we have seen, this type of ‘fast-track legislation’ or ‘early agreements’ was made possible with the coming into force of the Amsterdam Treaty.

During the pre-Amsterdam parliamentary period (1993-1999) when it was not possible to conclude a co-decision procedure at the first reading, 60% or 99 dossiers were closed at second reading and 38% or 63 dossiers agreed after conciliation (Hayes-Renshaw and Wallace, 2006: 213). In the fifth parliamentary period 1999-2004, 28.5% of all

54 For sceptics, see list in Maurer (2003: 239).
55 In terms of length of co-decision dossiers, that is, number of words, Settembri (2007) found that the 2004 enlargement has also involved an increase. Interestingly, this is not the case with legislative acts adopted under the consultation procedure.
56 In this period, 3 procedures failed, i.e. 2 % of the total number of co-decision dossiers (ibid). Under Amsterdam there were totally 403 concluded co-decision procedures.
co-decision dossiers have been closed after first reading (i.e. 115 dossiers) whereas 49.6% (i.e. 200 dossiers) were closed at second reading and 21.4% (i.e. 86 dossiers) were finalised at third reading (see Hayes-Renshaw and Wallace, 2006: 213). For the current parliamentary period (2004-2009) the pattern of reaching agreement after the first reading has increased significantly: Of the 122 dossiers adopted in 2005, 74% was completed at first reading. In 2008, a total number of 217 dossiers were adopted of which 65% was adopted after the first reading (see table 2, see also Settembri, 2007: 30).

The emphasis on first reading also means that there is hardly any dossier that goes all the way through the third reading which is consequently almost abolished. It is first and foremost the Council that has been eager to close agreements in the first reading and seeks to avoid conciliation as much as possible and to ‘(...)reach agreement as swiftly as possible whenever possible(...)’ (Hayes-Renshaw and Wallace, 2006: 212). This ‘commitment’ to reaching agreement at first reading is also followed up in the aforementioned Joint Declaration from 1999 and revised in 2007 between the Commission, the EP and the Council on the workings of the co-decision procedure.

**Conclusion**

The aim of this chapter has been to provide some background information on the rules and practices of co-decision-making ranging from a historical synopsis of major developments from Maastricht until today, a presentation of the legal bases and the functioning of the procedure (both the formal (three readings) and informal (trialogues) aspects), a comparison of the legislative procedure in the first pillar and finally a more quantitative summary of the efficiency and effectiveness of the co-decision procedure. Altogether this provides a foundation for the evaluation starting with the first criterion of democratic deliberative meeting places in the next chapter.

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57 In two cases (0.5%) no agreement was reached and the procedures failed (ibid). Under Maastricht there were totally 165 completed co-decision dossiers.

58 See also EP (2007b: 9).

PART II
Evaluation
Chapter 5

A forum for the public? Are there democratic deliberative meeting places?

Introduction

In order to be able to assume that the adoption of co-decision dossiers have democratic qualities, the first criterion warrants the existence of democratic deliberative meeting places. As argued earlier, it is not necessary (or possible) for a procedure to display democratic deliberation at every stage and in every setting of the decision-making process. However, in order to claim that the co-decision procedure is at all capable of producing democratic outcomes, the perspective of deliberative democracy depends – at a minimum – on the existence of at least one open setting where those decisions are tested and critically examined by popularly elected representatives in a manner that is publicly available and accessible. Since there are two decision-making institutions under co-decision, the requirement is that both legislative houses provide one such setting each.

As presented in chapter 3, the indicator for democratic deliberative meeting places is that there is at least one setting in the EP and one in the Council that fulfils the following requirements:
• It is dominated by (a representative selection of) elected representatives;
• There is easy (electronic) access to the documents that are used and discussed in the setting; discussions are conducted in openness by securing (translated) verbatim records and preferably (live and stored) internet transmission of meetings; there are (in the verbatim records) explanations and identification of who voted what if votes are cast;
• There are rules for ensuring and inducing equality among the participants: Rules should be (formally) described in the Treaties and/or rules of procedures/inter-institutional agreements stating the purpose of the setting and that elected representatives are the main actors. The rules must describe the competences, rights and duties of the setting. There must be rules for when and how the meeting ends (e.g. voting) and a commitment to make the meeting agenda announced to all involved actors at the same time. There must be speaking rules that respect the principle of equality among the participants (unless there are good reasons given for why this should not be so);
• There is time allocated for debate and judgement prior to decision-taking.

Now, it may very well be that further investigation will reveal that the setting is not very important for actual decision-making or that it is not the popularly elected representatives who are the real decision-makers. These are valid and important points and will be tested through the other criteria (especially through criteria 2 (inclusion) and 5 (decision-making capacity)). Initially, however, we leave such connections (or lack thereof) aside and concentrate on determining whether there are relevant co-decision settings that come close to meet the requirements for a democratic deliberative meeting place.

Moreover, in order to determine the question of democratic deliberative meeting places we need to know which settings are relevant under co-decision-making and on that basis select those that are likely to pass the threshold. As we can see from the indicator, for a meeting place to be eligible for the democratic category it must contain elected participants. Hence, this will be the mechanism for selecting the settings that will be considered further.

In this regard we can exclude all the meeting places that occur prior to the Commission’s official launch of a co-decision dossier as neither the internal Commission meeting places (such as the College, Chefs de Cabinets meetings, Special Chefs meeting, the DGs or inter-service
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Consultation etc.) nor the externally oriented consultation settings (such as the expert committees, online consultations, the policy/dialogue forums etc.) consist of popularly elected representatives. However, when we move to the official part of the co-decision procedure, the following settings clearly meet the initial threshold: (1) the EP committees, (2) the EP plenary sittings, (3) the meetings of the EP conciliation delegation and (4) the ministerial meetings in the Council. These settings are (even if only indirectly in the Council) all dominated by popularly elected participants and they are composed in a representative manner according to the numerical strength of the political groups in the EP and the national make-up in the Council.

There is, however, also a setting which is more difficult to determine, namely the (5) Conciliation Committee. The Conciliation Committee has seemingly a kind of ‘in-between’ status as half of the meeting consists of a representative selection of MEPs, whereas the Council is at best only represented by the minister holding the Presidency. The Conciliation Committee will consequently be included for further examination.

If we look at membership, we could, in addition, mention the trialogues as also they contain elected representatives, that is, the handful of MEPs representing the Parliament. However, the composition is not representative and is biased especially towards the two largest political groups (EPP-ED and PES). In addition, the Council is usually only represented by the deputy permanent representative (Coreper I) from the member state holding the Presidency as well as a few of the most central officials from the working groups. The ministers are never present apart from the minister holding the Presidency who may participate from time to time. Based on the above, the trialogues are not eligible for further assessment.

Some readers will perhaps wonder why I have excluded the EP political groups as relevant meeting places given that they are also dominated by elected representatives. The reason for this is that these meetings do obviously not contain a representative selection of MEPs. In addition, they are not conducted in openness – there is hardly any information neither from the political groups’ own
sites nor in the academic literature on what is going on in these meetings with regard to co-decision dossiers.

For co-decision-making, the Council working groups and Coreper play crucial roles. These settings are, however, excluded as they only contain non-elected officials. In addition, many co-decision legal bases require the opinions of the European Social Committee and the Committee of the Regions respectively, but these settings do also not contain popularly elected representatives.

The structure of the chapter follows the assessment of the five meeting places respectively: (1) EP committees, (2) EP plenary sessions, (3) EP conciliation delegation, (4) the ministerial level in the Council and (5) the Conciliation Committee.

**EP committees**

**Elected participants?**

In the EP, the committees play by far the most important role in parliamentary work, so also in co-decision-making. Hence it is first and foremost the members of the responsible committee(s) who are involved in the drafting process. The composition of the committees is regulated in rule 177 of the EP’s rules of procedure and reflects the balance between the political groups in plenary. Committees have both full members and substitutes which mean that most MEPs serve as full members in two committees and substitute in a third or are full members of only one committee and substitute in two. Substitutes

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1 When I, in the following sections on the EP, refer to rule numbers these are all taken from the EP’s rules of procedure, (EP, 2008a).
2 Rule 47 in the EP’s rules of procedure opens up for so-called ‘procedure with associated committees’ where there may also be more than one committee involved (see also Settembri and Neuhold, 2008).
3 The representativity of EP committees is also confirmed in McElroy (2006: 25).
4 The reason behind multiple memberships is because some committees are more influential and important than others and it would therefore be hard to get MEPs to commit themselves solely to those committees that are deemed less important (Corbett et al., 2007: 128). Earlier, a seat in the Foreign Affairs and/or Budgets Committees was deemed the most high-status, but over the years committees with more legislative clout have become increasingly popular (Judge and Earnshaw, 2003: 185-6). This is the case for influential committees such as the Environment Committee and Economic and Monetary Affairs Committee which both handle a considerable number of co-decision dossiers (ibid: 185-6, 187-8).
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have the right to speak in committees, even if the full members for whom they are substituting are present, but they only have the right to vote when a full member of their political group is absent. The allocation of committee memberships is decided by the political groups (which set the broader guidelines) as well as the individual MEPs (in expressing their personal interests) (Judge and Earnshaw, 2003: 186). The number of seats for each political group is allotted according to numerical strength.

Committee meetings are also attended by the Commission and the Council. They have speaking rights, but no voting rights. The Commission sends officials (the rapporteur/chef de file) from the DG responsible for drafting the proposal and/or someone higher up in the hierarchy, sometimes even the Director-General or the Commissioner herself if the dossier is deemed particularly important (Corbett et al., 2007: 143). The Council is represented by officials from the Secretariat, Coreper and/or Presidency, but also from the Council working parties. In sum, EP committees are composed and dominated by a representative selection of MEPs, but also open for other actors.

Access to documents and debates?
In its rules of procedure, the EP provides a list of all EP documents that are available through its register of documents. With regard to committee work, the relevant documents are: agendas, minutes, working documents, draft reports, amendments to draft reports, reports, draft opinions, amendments to draft opinions, opinions, records of attendance. These documents can be found on the EP committees’ own websites and even if a translated version is not obtainable in all the official EU languages (at least not the working documents), many of them are still available in several of the official languages.

In contrast to plenary sessions, it is not required to write full verbatim records of committee meetings, there are consequently only minutes

5 See, EP (I).
6 See EP rules of procedure, annex XV, 1.4. See also Corbett et al. (2007: 335).
7 The EP also keeps a Legislative Observatory (OEIL) which is an internet access point providing a procedure file on every legislative dossier received and dealt with in Parliament. I come back to the OEIL in chapter 7 under the criterion of openness and transparency.
from committee meetings (cf. rule 184, rules of procedure). When seen in isolation, the minutes themselves are consequently not satisfactory as the exact wording of every speaker’s intervention is not documented, that is, we do not get to know who advocated what. The minutes contain information about who attended the meeting, who spoke (but not what they said), the purpose of meeting, the number and which amendments adopted and the votes cast (but not who voted in favour, against or abstained). In other words, to take stock of how discussions proceeded thus becomes difficult just by consulting the minutes. Here video streaming of debates could have compensated for the lack of verbatim records. Committee meetings are open to visitors, but space is limited and the access has become much stricter after 11 September 2001.8

Much information is obviously lost in the absence of verbatim records. However, even if minutes represent a substantial drawback in terms of easy access to committee debates this does, however, not mean that it is impossible to trace what took place in committee meetings. For instance, amendment documents contain the name of the MEP making the proposal, the suggested wording of the new amendment as well as a justification for why the amendment should be adopted. In order to get a good overview of the impact of the amendment, the working document of the EP committee is organised in two columns with the Commission’s version placed in the left and the MEP’s suggested formulation in the right column. The words to be changed/deleted/inserted are in italics which makes it easy to get an overview. The second reading follows the same procedure, only this time the columns contain the Council’s Common Position and the EP’s second reading version.

The EP is a highly multilingual setting and whereas full translation is always ensured in plenary sessions, the policy is more flexible at the committee stage. According to rule 138, interpretation of meetings shall be provided by request of the members and substitutes.9

8 Lobbyists are the most active committee meetings visitors, followed by the press and causal visitors, according to Corbett et al. (2007: 334-40).
9 Due to the enlargements in 2004 and 2007 the pressure on interpretation has been particularly heavy. Hence rule 139 provides exceptions to the translation regime in a transition period ending with the sixth parliamentary period in June 2009.
Hence and as we shall see, in contrast to the Council which prefers to keep the preparatory processes almost confidential, it is possible to reconstruct what took place in EP committee meetings through the public availability of the other working documents. The lack of verbatim records, however, makes it more cumbersome since one has to gather all the documents in order to piece together what was decided. This is obviously a drawback if the aspiration is to ensure the conditions for deliberative democratic scrutiny and testing of arguments in a publicly accessible manner. In comparison, we should, however, note that many national parliaments keep their committee sessions in camera (e.g. German Bundestag).

Rules ensuring and inducing equality among the participants?
The EP committee meetings are not as such mentioned in the Treaties (neither in Article 251 nor in Articles 189-201 TEC), but they are described in great detail in the EP’s rules of procedure.10 Overall, the EP has by far the most regulated settings (and, as we shall see, the provisions on plenary sessions are even more comprehensive). As an illustration, whereas the Commission’s and the Council’s rules of procedure are between 20-30 pages each, the EP’s rules of procedure contains 225 pages!

In legislative procedures, the committees prepare the parliamentary report to be discussed and voted upon in plenary. There are currently (2005-2009 Parliament) 2011 standing parliamentary committees in the EP, but they are not all involved in co-decision-making. In the EP’s Activity Report (EP, 2007a: 9) for the last parliamentary term it is estimated that ‘Six committees have been responsible for three-quarters of

10 See Title II, chapter 1-6 covering the provisions on committee involvement in co-decision and Title VII, chapter 1-2 on committee work in general. In addition, temporary committees can be set up to deal with specific issues (cf. rule number 175). These committees operate outside the standing committee framework. Sub-committees and working groups, on the other hand, can be established within the permanent committee structure. Neither of these types of committees will be assessed in this thesis. For more information see Corbett et al. (2007: chapter 7).
11 During the previous Parliament (1999-2004) the number was 17 whereas the 1995-1999 Parliament had 20.
dossiers dealt with under the codecision procedure during the period under review’ (see figure 5.1 below).  

![Figure 5.1 Co-decision dossiers in EP committees](image)

Figure 5.1 Co-decision dossiers in EP committees
Figure referred in EP (2007a: 9) indicating the distribution of co-decision dossiers in the first half-term of the sixth legislature by parliamentary committee.  

12 In comparison, in the previous (fifth) parliamentary term, the following committees were more involved in co-decision: Committee on Environment, Public Health and Consumer Policy (117 dossiers); Committee of Regional Policy, Transport and Tourism (72 dossiers); Committee on Legal Affairs and the Internal Market (48 dossiers); Committee of Industry, External Trade, Research and Energy (39 dossiers); and Committee on Economic and Monetary Affairs (32 dossiers), see EP Activity Report 1999-2004, p. 11. Note, however, that the committee system was reorganised in the beginning of the sixth parliamentar y term (EP, 2007a: 9). The more substantial change was the increased importance of LIBE due to the introduction in 2005 of the former pillar three legal bases in the field of justice and home affairs (ibid).

13 It should also be noted that there is a different pattern with regard to when the various committees tend to reached agreement. The EP (2007a: 10) reports that it is first and foremost the Legal Affairs (JURI) and the Civil Liberties, Justice and Home Affairs (LIBE) Committees that stand conclude dossiers in the first reading. The Transport (TRAN) and Culture (CULT) Committees, on the other hand, have a tendency to reach agreement in so-called early second reading, that is, after the EP, but before the Council has dealt with a dossier in the second reading. Finally, the Environment (ENVI), the Industry, Research and Energy (ITRE) as well as the Internal Market and Consumer Protection (IMCO) Committees usually conclude their dossiers after a full second reading. According to the EP itself, the reason for these differences among the committees ‘(...)might be explained by the different ‘cultures’ of the major codecision committees, perhaps reflecting the smoothness of their working relationships with their counterparts in the Council formations and Commission Directorates-General. However, in part, such differences can only be
In the committee there are a few key positions that are particularly important, namely the rapporteur, the committee chairs, the vice-chairs, the political group coordinators and also the shadow rapporteurs (Mamadouh and Raunio, 2003: 339; Neuhold, 2007: 14-15). These actors do not only play a crucial role in the legislative activities inside the Parliament, some of them are also important participants in the trialogues. For this reason Benedetto (2005) calls them 'legislative entrepreneurs'.

Traditionally, the committee chair has perhaps been the most important position of the four.\textsuperscript{14} The chair represents and speaks on behalf of the committee in plenary discussions, in the regular meetings of the Conference of Committee Chairs, she is the committee’s representative outside the Parliament and is also automatically member of the Parliament’s delegation to the Conciliation Committee.\textsuperscript{15} Inside the committee, the chair, assisted by three vice chairs, sets the agenda, organises and leads the meetings and decides who get speaking time (Whitaker, 2001: 78). Along with the rapporteur, the chair is also taking part in the informal trialogues and is informally consulted by the Commission before the latter tables a policy proposal marking the opening of the first reading.

Formally, each committee elects a chair and three vice-chairs (who together form the committee bureau) once every two and a half years. Actually, the election of the chair and vice-chairs is not a proper election, but mainly reflects the size of and agreement between the political groups as well as the size of the national quota within the

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\textsuperscript{14} This seems also to be confirmed by the MEPs themselves in the ‘MEP Survey 2000’ where they were asked to put the following positions in a prioritised order according to preference; president of their party group, leader of their national party delegation, President of the Parliament and committee chair (rapporteurships were not included in the survey). ‘The chair of a committee came out as the most attractive position, mentioned by 62 respondents as their first choice, followed by EP President (46), leader of the national party contingent (30), and chair of the party group (27)’ (Mamadouh and Raunio, 2003: 339-40).

\textsuperscript{15} Rule 64(3).
political group\textsuperscript{16} which is similar to the situation in most European national parliaments (Mamadouh and Raunio, 2003: 340, Judge and Earnshaw, 2003: 187). The political groups nominate their candidates and there are seldom competing candidates within the same committee (Corbett et al., 2007: 131). The allocation of positions is also determined by the composition in the previous parliamentary period.\textsuperscript{17} The chair is allowed to take part in discussions and may vote, ‘(...)but without having a casting vote’ (rule 185(4)).

Each political group has its own coordinator within the parliamentary committee. This person is chosen among its members and the position as coordinator is more informal than the chair as it is not described in the EP’s rules of procedure. The role as group coordinator is powerful in the sense that she coordinates and sets the agenda of her political group in the respective committee, she distributes rapporteurships and decides who is allowed speaking time in plenary. Moreover, she also functions as a party whip articulating the political group’s position and makes sure that the voting turnout is high (Whitaker, 2001: 68). Group coordinators from the various political groups within a parliamentary committee meet regularly to discuss pending issues, not least the distribution of rapporteur positions (Mamadouh and Raunio, 2003: 340).

According to rule 42(2) in the rules of procedure, the committee responsible for drafting the report shall appoint a rapporteur to be put in charge of the work. The rapporteur is thus, and in contrast to the committee chairs and the political group coordinators, appointed on a singular basis as upcoming legislation is presented and allocated to the relevant committee. S/he is chosen through a special weighting/auction system (not specified in the rules of procedure) reflecting the

\textsuperscript{16} The allocation of posts between the political groups is based on the d’Hondt’s system of proportional representation reflecting the size of the various groups. For more see, Mamadouh and Raunio (2003: 340), Bowler and Farrell (1995: 237).

\textsuperscript{17} ‘If a national delegation within a Political Group has already provided a President, Vice-President or Quaestor of Parliament, or the chair of its Political Group, its chances of gaining a major committee chair will normally diminish since other delegations will want to get their turn. In other cases, a national delegation may benefit from the distribution, as in 2004 when a single delegation within the EPP, the German CDU, was able to claim the chair of the two largest committees’ (Corbett et al., 2007: 130).
size of the political groups\textsuperscript{18} – the guiding principle is thus proportionality. It is the chair and the political group coordinators who set the agenda and nominate rapporteurs for up-coming reports. Formally, rapporteurs are appointed once a dossier has been allocated to the responsible committee in plenary. However, rapporteurships have increasingly been distributed earlier, for example in relation to the presentation of the annual legislative programme, in order to begin ‘(...) prepartory work in advance of the formal presentation of a legislative proposal by the Commission, thus saving valuable time later on. It provides the possibility for rapporteurs to enter into talks with the Commission, before the latter finalises its proposal, as well as, in the case of co-decision, with the Council’ (Corbett et al., 2007: 141).

To be a rapporteur thus involves considerable legislative influence as it puts the person in charge of drafting the report to be presented and defended to the EP in plenary sittings as well as in dialogues and the Conciliation Committee (Benedetto, 2005: 70). The rapporteur follows the dossier all the way through the legislative stages. Moreover, the report itself plays a central role in the decision-making process and is a vital channel for influencing EU legislation, ‘(...) particularly where the Parliament can generate support in the Commission or where it enjoys a potential veto’ – as in co-decision (Collins et al., 1998: 6; see also Benedetto, 2005; Mamadouh and Raunio, 2003: 341).

Apart from drafting the report, the task of the rapporteur is to initiate the discussions in the committee and to amend the report in accordance with the process of committee debates. Her role is to be a broker who builds up consensus among the members and defends the collective- or at least the majority position even if this runs counter to her own position (Bowler and Farrell, 1995: 242). Besides drafting the report, the influence of the rapporteur is thus dependent on his or her ability to build consensus, first among committee members and secondly the MEPs in plenary (Benedetto, 2005: 85).

It is, however, not only the responsible committee members who participate in the preparatory work. MEPs from other committees

\footnotesize{\textsuperscript{18} See, Mamadouh and Raunio (2003: 342); Benedetto (2005: 71). Also substitutes may take on rapporteurships or contribute to the drafting of the EP’s position - especially if they have expertise and experience in the relevant policy field (Judge and Earnshaw, 2003: 186).}
contribute and also other committees send their opinions.\textsuperscript{19} When a case is deemed important, the political groups, especially the larger ones, often appoint so-called \textit{shadow rapporteurs} to follow the work of the dossier closely. Shadow rapporteurs perform important functions in the sense that they provide well-prepared opposition (e.g. suggesting amendments) and mobilise their group both in plenary and committee sessions and sometimes also participate in trialogues.

What is more,

In some cases they (or Group coordinators) practically constitute informal sub-committees. A particularly striking example of this was the REACH chemical legislation, where the rapporteur and shadow rapporteurs as well as the draftsmen of the two opinion-giving committees met on an almost weekly basis over an extended period of time to identify the main area of agreement and possible solution for the key problems at stake (Corbett et al., 2007: 141).

To sum up, even if all committee members have an equal status and have the right to suggest amendments (rule 185), the above key positions make some actors more powerful than others. This is in principle not a problem as long as access to such positions is open for all and not constantly occupied by the same individuals. If all MEPs have a fair chance to take on the different positions, it can serve as a practical arrangement dividing committee work among its members. As we have seen above, all the key positions are open to all committee members and are in this regard not contrary to the principle of equality. However, they are more often occupied by the MEPs from the largest political groups (EPP-ED, PES, ALDE). In fact, it is the political groups that ‘run’ the EP in the sense that all key positions are distributed according to group membership and group strength. Hence the two largest political groups (EPP-ED and PES) are in charge of how positions are allocated in the EP to the disadvantage of especially non-attached MEPs, but also the MEPs

\footnotesize{\textsuperscript{19} In the first reading, also other committees can propose amendments to the proposal. They must send their opinion to the responsible committee where the rapporteur is in charge of incorporating them in to the draft opinion to be presented in plenary, see rules 46-7, EP’s rules of procedure.}
from smaller political groups. On the other hand, taking on rapporteurships is, for instance, a quite demanding task and even if all MEPs obtain assistance from the EP Secretariat when preparing the report, it is time-consuming and resource-demanding and thus easier for MEPs with a sizeable and organised political group to back them. Partly for such reasons, it is not entirely straightforward to determine the level to which the rules work to the disadvantage of non-attached MEPs and MEPs from smaller parties (see Corbett et al., 2007: 98).

The Council is famous for its consensual way of reaching agreements even in policy areas where QMV is the rule (Hayes-Renshaw and Wallace, 2006). Interestingly Settembri (2006) investigated voting patterns in EP committees during the 1999-2004 parliamentary period. He looked only at legislative reports (i.e. including co-decision procedures) and found that the average majority of MEPs endorsing committee reports was as high as 93.7%. Co-decision was no exception with an average majority above 90% on all reports adopted. Moreover,

(…) the size of the consensual bloc does not decrease (or increase) as co-decision procedure moves from the non-binding first reading to a final vote on the compromise reached in the conciliation committee. The size of this majority does not vary significantly over time or across parliamentary committee either (Settembri, 2006: section 2.3).

There is one important difference between the first and the second reading with regard to who can table amendments. Whereas all MEPs are allowed to table amendments in the first reading, only full members and permanent substitutes in the responsible committee have this right in the second reading (rule 59(4)). In the third reading,

20 It should, however, be noted that in the sixth parliamentary term, there were only 30 non-attached MEPs.
21 This finding is also supported by Neuhold (2007: 11-12) who found very similar numbers studying the situation both before and after the 2004 enlargement. In both the fifth and sixth parliamentary term ‘On average, a majority constantly above 90 % endorses reports under co-decision: 93.3 % and 92.5 % in EP5 [i.e. fifth parliamentary term] and EP6 [i.e. sixth parliamentary term], respectively (all readings taken together).’
the dossier goes directly to the plenary. According to rule 62, the committee chair decides which amendments are admissible. The committee session in the second reading ends by putting the amended proposal to a vote and is adopted if there is a majority of the votes cast.\textsuperscript{22} The reasoning behind limiting the number of MEPs who are allowed to suggest amendments in the second reading is arguably an efficiency choice. However, it may be legitimated on the basis that the responsible committee is composed of a representative selection of MEPs. Hence it can be argued that the rules still ensure a representative selection of opinions and positions even if not all MEPs individually have a say in the second reading.

It is the chair or the EP President who can convene committee meetings (rule 183(1)). Even if the seating arrangement is formal with the chair and vice-chairs sitting on a podium vis-à-vis the other members (cf. Corbett et al., 2007: 134), the atmosphere in committee meetings is less formal than in plenary sessions. This is the case both with regard to translation and voting.\textsuperscript{23} In committee meetings non-translated or oral amendments can be accepted especially if these are presented by the rapporteur, the chair or the group coordinators in an effort to find compromise solutions (Corbett et al., 2007: 144). Voting procedures in committee are also less formal and unfortunately often to the detriment of transparency.\textsuperscript{24} Whereas it is technically possible to conduct roll call votes or calling for a quorum, this is hardly ever used. Instead, voting is usually conducted through the showing of

\textsuperscript{22} See rules 57-59 for second reading treatment in committee.

\textsuperscript{23} Voting in committee is regulated in rule 185 (EP’s rules of procedure): ‘(1) Any Member may table amendments for consideration in the committee responsible. (2) A committee may validly vote when one-quarter of its members are actually present. However, if so requested by one-sixth of its members before voting begins, the vote shall be valid only if the majority of the component members of the committee have taken part in it. (3) Voting in committee shall be by show of hands, unless a quarter of the committee’s members request a vote by roll call. In this case the vote shall be taken in accordance with Rule 160(2). (4) The chairman may take part in discussions and may vote, but without having a casting vote. (5) In the light of the amendments tabled, the committee may, instead of proceeding to a vote, request the rapporteur to submit a new draft taking account of as many of the amendments as possible. A new deadline shall then be set for amendments to this draft.’

\textsuperscript{24} See rule 185.
hands. The report must contain the suggested amendments with short justifications ‘(...if appropriate(...))’, a draft resolution and possibly also accompanied by an explanatory statement (rules 42 and 48, EP rules of procedure). It is also possible to attach a short statement if there is a minority position (ibid, rule 48).

**Time for debate prior to decision-taking?**

Time for discussion is not specifically mentioned in the EP’s rules of procedure, but is implicit in the very purpose of committee meetings. However, the proceedings of the meetings are described in the academic literature on the EP. On average, busy committees meet ‘(...)at least twice a month for two, three or four half days on each occasion’ (Corbett et al., 2007: 134). In the first reading, the work of the committee is focused on responding to the Commission’s initial proposal. More specifically, the opening of a dossier is devoted first to a presentation of its content by the rapporteur subsequently followed by a discussion where committee members as well as the Commission and the Council can take part (Corbett et al., 2007: 143). This is an open discussion which seems to be oriented towards mapping the nature of the case and sounding out problematic issues: ‘At the end of the initial discussion it is often clearer as to whether the issue is controversial within the committee or not’ (Corbett et al., 2007: 144). After this initial discussion, the rapporteur produces a text that is sent (after it is translated into all official working languages) to the MEPs and subsequently presented in committee where ‘There

25 When the report is moved from committee to plenary treatment it is then very hard for other MEPs to orient themselves on what each committee member has voted (Settembri, 2005: 648, see also Neuhold and Settembri, 2008: 237). More on this in chapter 7.

26 One more concrete indication is that the committee may convene hearings or that the Commission, the Council or other relevant persons can be invited (see rule 183, EP rules of procedure).

27 Whereas the Commission is more used to and comfortable with explaining and defending its position, the Council has been reluctant to answer questions in committee meetings. Most MEPs - being ambivalent about the increased use of trialogues - prefer and have encouraged the Council to come to Parliament to present and defend its position during open committee and plenary sessions. The Council representatives have, however, preferred to use committee meetings as listening posts, but Corbett et al. (2007: 144) report that this is, although very slowly, ‘(...)beginning to change, with chairs of Council working groups sometimes being mandated to give Council’s position on issues of substance.’
follows a fresh discussion, with committee members and the Commission commenting on the rapporteur’s text. A deadline for amendments may then be set. The rapporteur can also decide to make modifications to his or her text or even to draft a new if there are a large number of amendments’ (Corbett et al., 2007: 144).

The EP itself also reports that it is quite common to conduct hearings on ‘(...)controversial or ‘technical’ dossiers (...) with experts or to commission impact assessments.’28 In other words, to quite an extent committee work is, as is the whole legislative process, a down to earth and very concrete affair as it amounts to building up support for the proposed text or deleting, inserting or reformulating amendments to the Commission proposal. Neunreither (2002: 53) even suggests that the focus on amendments often hinder more principled and overarching debates as it skews the attention to voting on single amendments rather than on the dossier as a whole: ‘There are serious complaints that quarrels about amendments have to a great extent replaced a truly parliamentary debate. Some committees occasionally have to deal with 300-400 amendments on one proposal, a nightmare in itself.’

Towards the end of the process, the committee first votes separately on each amendment and finally on the whole report. A simple majority is needed for the whole report (Mamadouh and Raunio, 2003: 342), but before the vote is cast, it is customary to ask both the Commission for its position and the Council for comments. The intention is to sound out the reactions before the report is sent to the EP plenary, but also to ‘(...)put pressure on the Commission’ (Corbett et al., 2007: 144). This invitation notwithstanding, it is very rare that the Commission or the Council take the opportunity – the Commission because it has ‘(...)usually made its approach clear in the preceding committee discussions’ and the Council because ‘(...)it normally has no position at that stage’ (Corbett et al., 2007: 144). In the end, a legislative report from the committee should comprise suggested amendments and justifications for these, a draft resolution and an explanatory statement (including a statement on potential financial impact) (see rule 42). In other words, the EP committee meetings are organised to ensure debate prior to decision-making.

In sum, the set-up and practice in EP committees comply with the institutional conditions for a democratic deliberative meeting place. The committees are composed of a representative selection of MEPs and the access to documents and debates thus appears to be satisfactory even if the lack of full verbatim records and roll-call votes are missing. Moreover, the rules and practices for committee work are (presumably) organised according to the numerical strength of the ideological groupings. In this way we may say that the principle of equality is operationalised to reflect the proportionality principle underpinning the outcomes of EP elections and can consequently be justified from a democratic perspective. What is more, the organisation of EP committees also allocate time for debate although the nature of co-decision legislation, where the focus is on tabling and voting on amendments, seems to hinder a more principled and overarching debate about the political impact of the dossier as a whole.

**EP plenary sessions**

**Elected participants?**

After the committee has finished its report, it is presented and discussed in EP plenary sessions where all MEPs are included. Plenary sessions are also open to other types of actors even if some are more privileged than others. The Commission\(^{29}\) and the Council have special seats in the Parliament and there are also seats available for special guests such as heads of state and government. There is of course also space allocated for the translators. Whereas other actors may be invited to speak in Parliament, it is only the MEPs who have the right to vote.

**Access to documents and debates?**

Plenary meetings are conducted in full openness and there are both verbatim records\(^{30}\) and video streaming of the sessions in all the

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\(^{29}\) The responsible DG and the General Secretariat are always represented at EP plenary sessions (Nugent, 2001: 150).

\(^{30}\) In addition, according to the EP’s rules of procedure (Annex XV, 1.2) the following plenary documents are available through the register: draft agendas, final draft agendas, agendas, verbatim report of proceedings of sittings, minutes (both provisional and final editions), registers of attendance, results of roll-call votes, texts adopted, consolidated texts, budget-related decisions, amendments contained in
official languages (rule 138). The public, together with lobbyists, the press, diplomatic services etc. cannot enter the room as such, but can follow the discussions from the gallery given that they have a valid admission card (rule 137). When the EP treats a dossier in plenary it works with two types of documents, the Commission’s proposal (with potential amendments) as well as the Parliament’s draft legislative resolution. The suggested amendments are presented, discussed and voted upon on an individual basis before the entire document is put to a final vote. The voting procedure also follows this sequencing, that is, first the plenary votes on the Commission proposal with suggested amendments (individually and the whole text). Then the Commission is invited to react to the vote. Further, ‘If the Commission gives an unsatisfactory response, or is not in a position to react immediately, the vote on the draft resolution may then be postponed for a period [of max two months] sufficient to allow the responsible committee time to examine the situation’ (Corbett et al., 2007: 177). The procedure is not finalised until the EP has also voted on the draft resolution. However, the sequencing of discussion and voting is separated so that a report with or without amendments is not followed directly by a vote. EP plenary sessions have special voting times, usually scheduled to noon Tuesdays, Wednesdays and Thursdays during the week of plenary sessions (see Corbett et al., 2007:174-6).

After a report has been adopted with or without changes, it is accordingly amended by the rapporteur and her staff and subsequently sent to the Official Journal for official publication as well as to the Commission and the Council. The text of the EP’s official position is not as pedagogical as the committee report with two columns providing the possibility of comparing the Commission’s and the EP’s formulations all the way through, but also the official text is quite easy to get an overview over in the sense that the EP’s proposed amendments are clearly highlighted in italics.

reports, other amendments intended for plenary, amendments to joint motions for resolutions, draft amendments and proposed modifications to the draft budget, motions for resolutions and proposals for decisions, joint motions for resolutions, see EP (I).

31 I come back to this point more closely in chapter 7.
Rules ensuring and inducing equality among participants?
The provisions on plenary sessions are even more extensive than those organising the parliamentary committees. In the first reading there are no time limits, but legislative dossiers are given priority when the agenda for plenary sessions are drawn up (Corbett et al., 2007: 172). After more informal consultation among the committee chairs, the agenda is adopted by the Conference of Presidents at their meeting Thursdays before the monthly Strasbourg plenary sessions. There is a long description of the rules for how to adopt the draft and the final agenda (see rules 130-132). In the end, the final agenda is ‘(...)distributed to all MEPs and voted on by Parliament at the beginning of the part-session on the following Monday. The draft concerns the whole monthly ‘part-session’ (i.e. includes any subsequent Brussels sittings that month)’ (Corbett et al., 2007: 172). Amendments to the agenda can be announced to the EP President up until one hour before the sessions starts given that it has the support of one political group, a committee, or 40 members. The ‘President may give the floor to the mover [the MEP suggesting the amendment], one speaker in favour and one speaker against, in each case for not more than one minute’ (rule 132). Moreover, the President ends the plenary session by announcing the time, date and agenda for the next session (ibid). In sum, we may say that the rules to ensure that the agenda is made known to every MEP are complied with.

According to rule 140, the relevant documents for the plenary session shall be distributed to the MEPs beforehand. The legislative focus is now on responding to the committee report and it is possible to table amendments if these are suggested by the responsible committee, one

32 See EP’s rules of procedure, Title VI for the general provisions guiding plenary sessions and Title II, chapters 1, 3-6 for the provisions on legislative work (first and foremost co-decision).

33 Moreover, this rule also ensures that ‘(...)Members and political groups shall have direct access to the European Parliament’s internal computer system for the consultation of any non-confidential preparatory document (draft report, draft recommendation, draft opinion, working document, amendments tabled in committee).’
of the political groups or at least 40 MEPs (rule 150). In plenary it is the EP president who decides which amendments are admissible or not. Amendments shall be presented in writing and before voted upon, they shall be translated into all the official languages (ibid). In the first reading, there are no restrictions with regard to who can table amendments whereas the second reading is in this regard more restrictive. In order to narrow down the process only amendments that have a foundation in already tabled suggestions or that seek to establish a compromise between the EP and Council may be considered. The MEPs vote on every single amendment which requires absolute majority in order to pass. Only a simple majority is needed in order to approve the Council’s Common Position without amendments. In the end the whole proposal is put to a final vote. In contrast to the first reading where Parliament divides the voting sequence between the Commission proposal with the EP’s suggested amendments and the responsible EP committee draft resolution, in the second reading there is only voting on the legislative text (i.e. draft resolution is excluded) (rule 152, see also Corbett et al., 2007: 177). Whereas the first reading only requires that a simple majority of MEPs support a proposal in order to formally adopt it, the second reading requires absolute majority.

In the third reading, the dossier is taken directly to plenary session without any further treatment in committee. According to rule 65, the Joint Text shall be accompanied by a report and a statement which shall be presented by the chairperson of the Conciliation Committee or another designated member of the delegation, usually the rapporteur who is the author of the report and statement. At this

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34 The general provisions on voting (also on individual amendments) and quorum are found in chapter 5.
35 Apart from more general restrictions such as if the amendments do not directly relate to the dossier etc. (see rule 151).
36 Cf. rule 62(2): only amendments that seeks ‘(...) (a) to restore wholly or partly the position adopted by the Parliament in its first reading; or (b) [seeks] to reach a compromise between the Council and Parliament; or (c) [seeks] to amend a part of the text of a common position which was not included in – or differs in content from – the proposals submitted in first reading and which does not amount a substantial change within the meaning of rule 55; or (d) [seeks] to take account of a new fact or legal situation which has arisen since the first reading. The President’s discretion to declare an amendment admissible or inadmissible cannot be questioned.’
37 Cf. rule 40 (3).
stage there is no room for opening up a debate on individual amendments and the task of the plenary setting is to vote on the Joint Text as a whole within six (possibly eight) weeks after agreement in the Conciliation Committee. A majority of the MEPs must support it in order to approve the act. If, however, the Joint Text fails to obtain a majority in its favour, the chairperson or another MEP from the delegation is obliged to make a statement which is then followed by a debate.\textsuperscript{38}

The latest revisions of the rules of procedure have resulted in that the non-attached MEPs now have less influence over when and which questions that can be posed to the Council and the Commission, they are less likely to be able to table amendments, they have now less speaking time and they have less influence over the nominations of officers (Settembri, 2004: 152-3). Moreover, for these MEPs the situation has become worse than earlier as they have usually focused on making an impact in plenary settings rather than in committee ‘(...)through participation in debates, points of order or even demonstrations and challenges to the authority of the presiding offices. Their protests are rarer in committee and non-attached members are seldom allocated the more significant rapporteurships’ (Corbett et al., 2007: 98, see also Settembri, 2004). Hence, the non-attached members do not have anyone to represent and are therefore excluded from the possibility to participate. The same logic applies to the Conference of Presidents where two seats are reserved for non-attached MEPs, but unlike the other MEPs, they do not have the right to vote (Settembri, 2004: 156). The bottom line is that a non-attached member will most likely never obtain one of the above-mentioned key positions. We should, however, remember that there were only 30 non-attached MEPs in the sixth parliamentary term. The situation of non-attached members have been hotly debated in the Parliament with the establishment of the TDI group – a group of non-attached MEPs forming a purely and explicitly apolitical, technical group in order to obtain the benefits of belonging to a political group (more financial resources, administrative staff, more speaking time etc.). This group was after treatment in both the EP and the ECJ eventually dissolved and it is now a clear requirement for the formation of

\textsuperscript{38} The provisions on voting and calling of quorum are detailed in chapter 5 of the rules of procedure.
political groups that they have to have share political affinities. In sum, also the rules underpinning the workings of the plenary sessions are seemingly conducive to ensure equality among the MEPs even if the non-attached MEPs come out disadvantageously when it comes to time and resources to fill key positions which would arguably make them more influential.

**Time for debate prior to decision-taking?**

The EP plenary sessions are held for one week once a month. It is the President of the EP who draws up a proposal for the allocation of speaking time for upcoming plenary sessions. The proposal is discussed and authorised by the political groups. In addition to MEPs also Commission and Council representatives are allowed to speak in EP plenary sessions. A dossier is usually first introduced by the Commission and subsequently commented by the rapporteur who is presenting the committee report. In addition, other committees may present their opinions. Then follows a debate where the largest political group starts followed by the next biggest group etc. and ending with the non-attached members (rule 142). In order to keep the timetable, plenary debates have strict speaking rules which are overseen by the EP President who chairs the meetings (see rules 141-145). When a political group or other actors have used their allocated time, the chair asks the current speaker to stop and if this is not complied with the microphone is simply switched off (Corbett et al., 2007: 174). Apart from the President, other MEPs are (in principle) not allowed to interrupt a MEP when she is speaking (rule 141). What is more, a debate cannot be closed before the list of speakers has been exhausted unless it has been voted on (rule 169).

Debates on legislative dossiers end with the Commission indicating its position and reactions to the discussion and the amendments suggested in the committee report. Unlike other speakers, the Commission is, according to Article 140 TEC, in this situation under no time pressure and has ‘(...) an unlimited right to intervene’ (Corbett...

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39 For the full story of TDI group and a thorough discussion of the position of non-attached MEPs, see Settembri (2004).
40 Rule 142 of the rules of procedure provides the guidelines for the allocations of speaking time between political groups and the non-attached members.
41 Chapter 6 lists the instances where it is possible to bypass the agreed speaking list, see especially rule 166.
et al., 2007: 174). The Commission thus often ‘eats’ into the time allocated to others. Also the Council will often reply towards the end of such a debate, but it has no ‘carte blanche’ with regard to speaking time. For MEPs ‘Time for debates is thus strictly limited, with a corresponding lack of scope for spontaneity, or cut-and-thrust exchanges between individual members. This is reinforced by a tendency for some members to read out their speeches, repeating set positions that have often already been aired in committee’ (Corbett et al., 2007: 174). The multilingual character of the EP obviously also hinders spontaneity, at least for some MEPs (Corbett et al., 2007: 180). Still, even if its debates may not attract as much attention as those in national parliaments, ‘(...) it has developed a method to enhance the role of its members in actually shaping policy outcomes rather than being a rubber stamp or a simple forum’ (Corbett et al., 2007: 183).

This last point notwithstanding, the number of participants present in plenary sessions, the speaking rules and the time limitation are all factors that seemingly challenge the possibility for thorough argumentative exchanges between the MEPs. However, we can see the organisation of the EP as sequential starting with the committee and ending or finalising the process in plenary settings, i.e. as a division of labour between deliberation and decision-making:

The committee is engaged in drafting (and redrafting) proposals; in giving detailed consideration to line-by-line; in fact-finding and in framing appropriate responses to the facts found. This is creative, cooperative work. The parent assembly, in contrast, is more in the business of disposing of proposals, affirmatively or negatively. Discourse in the former venue is aimed more at refining proposals. In the latter venue, it is aimed more at rationalizing acceptance or rejection (Goodin, 2005: 188).

This also reflects the relationship between committees and plenary in the EP. Hence, in addition to the level of openness to which these meetings are subjected, the EP’s heavy reliance on treatment in committee prior to more general discussion in plenary can be justified on the basis of the representativity of the composition of the

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42 Cf. Holzinger’s (2005) findings in the German Bundestag.
committees. That is, ‘(...)the parent assembly delegates certain elements of its deliberative task to these other subgroups’, i.e. committees, where it assumingly stands a greater chance of being subjected to deliberation (Goodin, 2005: 187).43

In sum, EP plenary sessions are carefully described and regulated through detailed provisions in the rules of procedure where the foremost objective seems to be ensuring a certain level of equality between the MEPs. The rules range from the convening of sittings to proposal of amendments, speaking rules, access to documents, translation, voting procedures etc. Hence also the set-up and practice of the EP plenary sessions comply with the necessary requirements for a deliberative democratic meeting place even if the number of participants and the time constraints condition and restrict the type of debate that it is likely to expect. It is, however, due to the openness of debates and access to documents that it is possible for Union citizens and the public in general to follow the debates and to know the position and argumentation of individual MEPs.

**EP delegation meetings**

**Elected participants?**

For every dossier reaching conciliation, the EP appoints a ‘new’ delegation.44 The EP delegation is based on the political composition45

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43 See also Holzinger’s (2005) study on the German Bundestag where she argues that the procedural set-up of parliamentary plenary settings is not necessarily likely to induce deliberation as we usually think of it, i.e. transformatively where the opponent is not only convinced by the other’s argument, but is potentially also ready to act upon it. The reason for this is that plenary settings are usually the final decision-making setting where parliamentarians present arguments that are already well-known as they have been debated in the committees where the more substantial discussions take place. This has seemingly an impact on the type of deliberation that is likely to occur in the respective settings (in this regard, Holzinger makes an analytical distinction between arguing and deliberation which describes debate in plenary and committee settings respectively). Plenary sessions serve a different purpose than committees and they can be seen as arenas where MEPs present to the audience what they stand for and have defended. This is a form of public accountability where the deliberative task is sequenced between the committees and the plenary sittings.

44 Cf. rule 64 of the EP’s rules of procedure.

45 Or more precisely, the Conference of Presidents decides a quota for each political group reflecting the composition in the Parliament and then the political groups themselves decide on an individual basis who their representatives are going to be –
in Parliament and is assisted by the Conciliations and Codecision Secretariat (‘CODE’). Based on the results from the 2004 EP election and with the 2007 accession of Bulgaria and Romania this means that ‘(...)the EPP-ED has 11 Members, the PES 9, the ALDE group 4, and the UEN, Greens/EFA and the GUE/NGL groups have 1 Member each’ (EP, 2007b: 13; Corbett et al., 2007: 223). Of these, one of the three EP Vice Presidents is always part of the delegation as is the rapporteur and the chair of the responsible EP committee (the two latter as ex officio). It should be noted that in the sixth parliamentary period the non-attached MEPs were excluded. The Vice President is the head of the delegation. The political groups may also appoint substitutes who can attend meetings, but who can only vote when the full member is absent (Corbett et al., 2007: 223). The majority of the delegation members come from the EP committee responsible for the dossier. The name of the MEPs participating in the various

usually those who are members of the EP committee responsible for the dossier and thus familiar with the issues (Rasmussen, 2005: 1023). According to Rasmussen (2005: 1031, footnote 12), ‘In the fifth session of the Parliament, 75 per cent of the full conciliation delegates were either full or substitute members of the committee which had dealt with the file prior to conciliation. If we exclude the permanent members, i.e. the vice-presidents, the figure rises to 92 per cent.’

This is a unit in the EP Secretariat which steps in when the conciliation process is launched. The conciliation secretariat does not have the same sectoral knowledge of the particular case (like the units in the Secretariat that assist the MEPs during the first and second reading), but is a ‘(...)general service with an overall interest in ensuring that the conciliation system functions in such way as to secure the best possible outcome for Parliament in the negotiating process’ (Rasmussen and Shackleton, 2005: 12).

The Vice Presidents were included in the informal talks in 1999 ‘In order to improve effectiveness, fully monitor negotiations and ensure greater transparency, it was thought desirable to increase the number of persons taking part in direct negotiations with the Council outside actual meetings of the Conciliation Committee. This ensures greater continuity in relations between our Institution and the Council and strengthens Parliament’s role in the procedure’ (EP, 2007a: 13). One of the three Vice Presidents meets on all conciliation meetings for a period of 12 months. These representatives are selected by the political groups and must at least represent two different political groups.

Rasmussen (2008: 103) notes that after enlargement to 27 member states, the EPP and PES ‘(...)are even more overrepresented [than in the fifth parliamentary term] because the extreme right and left groups (...) plus the non-attached have been excluded from conciliation work altogether. This means that the PPE and the PES groups have one seat more than they would have had if strict proportionality between the plenary and the delegation had applied, and all the other groups except the liberals are underrepresented.’
conciliations can be found on the EP’s internet site on conciliation.\(^{49}\) As in all other EP meetings, the Commission is represented, but the Council is (obviously) excluded (EP, 2007b: 13, 16). The EP delegation thus consists of both permanent and temporary representatives. Since the composition of the delegation almost reflects the political landscape of the Parliament and all the delegates are elected politicians, it can be argued that the institutional set-up of the parliamentary delegation facilitates the conditions for including the views of affected parties. It should, however, be noted that MEPs from small parties as well as non-attached members appear more seldom than MEPs from the largest groups.

**Access to documents and debates?**

In order not to reveal the limits of flexibility and negotiation points to the Council, the meetings of the delegation are held behind closed doors (cf. rule 64, EP rules of procedure; Shackleton and Raunio, 2003: 178). The most interesting document at this stage is the ‘joint four-column working document’ which is confidential throughout the conciliation period, but released and made available on the EP’s register of documents after the process is over (EP, 2007b: 21).\(^{50}\)

According to the EP’s rules of procedure (Annex XV, 1.5), the following EP delegation documents shall be publicly accessible from the register: agendas, minutes, working documents, records of attendance, recommendations and statement.\(^{51}\) As in the EP committees (and unlike plenary sessions) the translation policy is more flexible in delegation meetings (cf. rule 138(3-4)). As we can see, the EP delegation meetings do not comply with the requirements of access to documents and debates that are expected from democratic deliberative meeting places.

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\(^{49}\) Go to the heading ‘ongoing conciliations’ where the names of the MEPs are provided along with other information on each individual dossier, see EP (II).

\(^{50}\) The ‘joint four-column working document’ consists of four columns (or five columns given that the Commission’s opinion on EP second reading amendments is known) containing the Council Common Position, the EP second reading amendments, the Council’s position on the EP’s second reading amendments and the EP delegation position.

\(^{51}\) For access, see, EP (I).
Rules ensuring and inducing equality among the participants?
The EP delegation meetings are not as such described in the Treaties, but are regulated in rule 64 of the rules of procedure and contain provisions on membership (and substitutes), voting rules (majority rule), who is chairing the meetings (the Vice President), that meetings are held in camera, that the delegation is accountable to the Parliament through reports and to the Conference of Presidents that decide the long-term guidelines of the conciliation delegation. The meetings of the delegation are further described in the EP’s Activity Reports on conciliation and co-decision as well as in a co-decision guide (see EP, 2007a and b).

Whereas all the delegation members meet in the Conciliation Committee proper and are thus on an equal footing, only a selected number of MEPs participate in the trialogue meetings that take place in between meetings in the delegations and the Conciliation Committee. From the EP, it is the rapporteur, the chair and the relevant vice-president that are the so-called ‘negotiating team’. Hence by virtue of their participation in trialogues, they become key actors also in the delegation meetings. And even if the meetings are closed to the public, MEPs not participating in the conciliation delegation have – unlike the situation in trialogues – access to the meetings. Moreover, the rules were changed in 1998 in order to make:

(...)proceedings less confidential and to enable substitute members to enjoy greater participation in the conciliation committee. In general, the deliberations of the delegations are open to all those working inside the Parliament, and the conciliation secretariat makes a summary record of each delegation meeting (Rasmussen, 2005: 1025).

The EP conciliation delegation meeting is not an official decision-making arena. Hence there are no formal provisions on voting or how the delegation shall reach agreement, but according to the EP (2007a: 6) itself: ‘The delegation aims to act by consensus and the key point is that the views of the individual political groups are expressed and

52 The purpose and tasks of the EP delegation is further described in the EP (2007b).
that proper account is taken of these.’ In order to ensure this an important task of the Vice President, who chairs the meetings, is to build up consensus and decide when there is agreement.

During conciliation, the institutions work on a common document, i.e. the aforementioned ‘joint four-column working document’. It is the Secretariat that prepares the documents and sends them out to the MEPs. Prior to meetings, the note contains information on the aims of the upcoming meeting, the amendments, the state of the dialogue and negotiations with the Council etc. After each meeting a summary report is drawn up and circulated to the members (EP, 2007b: 14).

Moreover, the two last enlargements have created a problem of ensuring full translation of all meetings. However, the joint working document is available in the languages of all delegation members, but not always in all the languages of the substitutes (EP, 2007b: 14).

In sum, as with the EP committee and plenary meetings, it can also be argued that the delegation meetings are organised with a view to ensure equality among the MEPs.

**Time for debate prior to decision-taking?**

For the EP delegation, the initiation of a conciliation procedure starts with a constituent meeting whose foremost purpose is to agree on a mandate for the conciliation trialogue team. According to the EP (2007b: 13), the meeting is described in the following manner: ‘(...) there is often a short exchange of views on the substance of the issues at stake, particularly when the initial reaction of the Council to Parliament’s second reading amendments is known.’ In addition, the Commission lays out its position on the EP’s second reading amendments and potentially provides information about the Council’s position.

The dynamic of the delegation meetings is to respond to the proceedings in the trialogues, to discuss compromise texts and to provide the negotiating team (i.e. the trialogue participants) with further mandate and instructions on how to proceed in the next informal meeting. The delegation is kept continuously updated (also in written form) on the proceedings of the trialogues and on this basis
discusses whether to accept or reject potential points of agreement. Moreover, ‘(...)prior to each delegation meeting, members receive a note about the aim of the meeting and the status of the negotiations plus other relevant documentation, in particular a revised version of the joint four column working document, where positions of the different EU organisations and possible compromises are presented’ (Rasmussen and Shackleton, 2005: 14). In this sense, we may say that delegation meetings have allocated time for discussion, but given the circumstances of conciliation, none of these discussions are conducted in openness.

In sum, the EP conciliation delegation meetings are not designed for ensuring publicly accessible discussions and testing of arguments. Rather, the intention of delegation meetings is to prepare the final negotiating rounds with the Council in the trialogues and subsequently in the Conciliation Committee. Hence even if these meetings have certain democratic qualities pertaining to the inclusion of an almost representative selection of MEPs as well as access to meetings also for those MEPs who are not members of the conciliation delegation, they are closed to the public. This does not mean that the meetings are unjustified in themselves, but it means that they cannot figure as a representative of a democratic deliberative meeting place under co-decision-making.

The Council of Ministers
Elected participants?
A Council ministerial meeting includes all the ministers of the relevant configuration assisted by their national delegation officials.54

54 The number of Council configurations was reduced from 21 to 9 after the Seville summit in 2002. The reduction was prepared by the Trumpf & Piris report from 1999, cf. Hagemann and De Clerck-Sachsse, 2007: 5. Today the Council has nine configurations: (1) General Affairs and External Relations; (2) Economic and Financial Affairs; (3) Justice and Home Affairs; (4) Employment, Social Policy, Health and Consumer Affairs; (5) Competitiveness (internal market, industry and research); (6) Transport, Telecommunications and Energy; (7) Agriculture and Fisheries; (8) Environment; (9) Education, Youth and Culture. The list of council configurations is regulated in Annex I in the Council’s rules of procedure. Whereas the General Affairs and External Relations Council has a coordinating role when differences of interests between the other Councils conflict, the most prominent of the sectoral configurations are the Agriculture (and Fisheries)-, the ECOFIN- and the Competitiveness Councils. Although to varying degree, all configurations deal with
The Council Secretariat is present as it has the responsibility for preparing and coordinating meetings. Whereas officials may speak in these meetings, it is only the ministers themselves who have the right to vote. If one minister is absent and represented by the national permanent representative, she cannot vote on behalf of her minister, but this right can rather be entrusted to a minister from another member state (cf. Article 206, TEC). Whereas the Commission does not have the right to vote, it participates almost as an equal partner or a 28th member state in Council meetings and ‘(...)speaks, proposes and defends its positions, and is a full participant in negotiations within all areas where there is a clear Community competence’ (Hayes-Renshaw and Wallace, 2006: 192, see also p. 199). In contrast, the MEPs do not have access to ministerial meetings (or any other relevant co-decision settings in the Council such as working group and Coreper meetings). Finally, interpreters attend the meetings, but they have no right to speak or vote. The ministers of the member states are the main actors in ministerial meetings and are the only ones with both speaking and voting rights. In addition, they have popular backing and can therefore – at least initially – be seen as representatives of affected parties and thus as a potential deliberative democratic meeting place.

Access to documents and debates?
According to the Council’s rules of procedure, it is:

(...) underlined that with a view to increasing the confidence of citizens in the European Union, it is important to enable them to acquire first hand insight into its activities, notably through further increasing openness and transparency. Therefore, as agreed at the European Council, and fully respecting the need to ensure the effectiveness of the Council’s work, the work of the Council should be further opened up, particularly when the Council deliberates on legislative acts under the codecision procedure (Council, 2006a).

co-decision dossiers and although they all have distinct features of their own, I will not highlight them here (but see Hayes-Renshaw and Wallace, 2006: chapter 2).
In this regard, there are provisional agendas\textsuperscript{55}, minutes\textsuperscript{56} and voting charts\textsuperscript{57} available on the Council website. In addition, the Council also offers monthly online summaries\textsuperscript{58} of adopted acts and minutes of ministerial meetings. The minutes are, however very schematic and not very informative for ordinary citizens (Hayes-Renshaw and Wallace, 2006: 54).\textsuperscript{59} Council minutes covering legislative acts are accompanied by relevant statements\textsuperscript{60} made by the member states or others as well as the results and explanation of votes (cf. Article 207(3) TEC). Another source of online information is the press releases.\textsuperscript{61} Although there is some documentation of ministerial meetings, neither of the above-mentioned documents provide a record of the substantive content on dossier discussions.

However, in July 2006, the Council decided to open up all deliberations on co-decision dossiers including voting procedures if conducted.\textsuperscript{62} This is reflected in Article 8 of the Council’s rules of procedure where open ministerial meetings when treating co-decision dossiers is required under the following conditions:

\begin{quote}
(...) (a) the presentation, if any, by the Commission of its legislative proposals and the ensuing deliberation in the Council shall be open to the public; (b) the vote on such legislative acts shall be open to the public, as well as the final Council deliberations leading to that vote and the explanations of voting accompanying it; (c) all other Council deliberations on such legislative acts shall be open to the public, unless, on a
\end{quote}

\textsuperscript{55}See, Council (I).
\textsuperscript{56} See, Council (II).
\textsuperscript{57}See, Council (III).
\textsuperscript{58} See, Council (IV).
\textsuperscript{59} In general, Council minutes informs about the name and number of the dossier, the relevant documents, legal basis, the outcome and, as we have seen, statements and result of voting (cf. Article 9 and 13 in the rules of procedure, cf. also Westlake and Galloway: 2006: 348).
\textsuperscript{60} These statements are optional and can thus be used strategically to the member states and do therefore not provide a systematic source to detect disagreement within the Council. However, they can nevertheless provide the public with an indication of where member states disagreed.
\textsuperscript{61} See, Council (V).
\textsuperscript{62} See Council (2006d).
case by case basis, the Council or Coreper decides otherwise with regard to a given deliberation.

The Council is at its most open when dealing with co-decision dossiers.

The sessions are in many of the cases televised and accessible from a video streaming service on the internet in all official languages (usually available in 3 or 4 languages and always in English and French). A recorded version of these public sessions must be stored and available on the Council’s internet site in at least one month. The General Secretariat is obliged to announce upcoming sessions in due time so that the citizens can orient themselves on the legislative work of the Council. Like the EP’s online service, also the Council’s is easy to manoeuvre one’s way around. There is a table of contents attached so that viewers can skip and scroll down to the topics they are most interested in. Unlike the EP service, there is no presentation of the speakers. Moreover and more importantly, when doing a few blind tests cross-checking provisional agendas indicating that co-decision issues were supposed to be discussed with the stored live footage, there were only taped press conferences available.63

Despite shortcomings, the Council ministerial meetings, in sum, ‘score’ better than working parties and Coreper with regard to openness.64 Access to documents is quite good, so is openness of debates/votes with a combination – at least in many instances – of both minutes (not verbatim records65) and live video streaming. It

63 See for instance, Council (2008), point 7 on the agenda where two co-decision dossiers are involved (‘Proposal for a Regulation of the European Parliament and of the Council setting emission performance standards for new passenger cars as part of the Community’s integrated approach to reduce CO2 emissions from light-duty vehicles’ and Proposal for a Directive of the European Parliament and of the Council on the coordination of procedures for the award of certain public works contracts, public supply contracts and public service contracts in the fields of defence and security’). In the video service there is only a press conference available form this meeting.

64 Cf. Annex II (particularly Articles 10 and 11) in the rules of procedure, the Council is obliged to keep an online register of documents where documents intended for publication in the Official Journal are publicly available.

should, however, be noted that since the Council is legally a unitary body it is not always the case that the responsible configurations are taking all the decisions concerning their cases. It is not that unusual that a decision is taken at the first upcoming Council even if this is not the sectoral configuration to which it belongs. This is often the case with regard to decisions that have been agreed upon at the lower levels of the Council hierarchy and been labelled ‘A’ points. Hence, we may ask whether there is a difference between ‘A’ and ‘B’ point items with regard to openness. As with the EP, the separation of discussion and voting processes is a disadvantage from a transparency perspective, but is not detrimental to the overall compliance with this indicator.

However, the Council has informal meetings prior and in between the formal meetings in order for ministers to discuss in a more low-key format. Transparency of these meetings is obviously low as there are no minutes or reports available from such encounters (Hayes-Renshaw and Wallace, 2006: 49). After enlargement, the frequency of these meetings has seemingly increased (Hagemann and De Clerck-Sachsse, 2007). Hence what has been ‘won’ with regard to the introduction of public deliberations available on the internet has arguably been lost in the sense that the ‘real’ discussions take place informally out of the public eye.

Rules ensuring and inducing equality among the participants?

The various Council configurations usually meet every four to six weeks. In contrast to the working parties and Coreper, the ministerial meetings are subject to more formal rules. Attendance, convening and the chairing of meetings (i.e. the rotating presidency) are regulated in Article 203 and 204 (TEC) and followed up in Article 1, 5 and Annex I in the Council’s rules of procedure. Only representatives at ministerial level can meet as full members, but the member states

66 Cf. Article 3(6) Council rules of procedure: ‘The provisional agenda shall be divided into Part A and Part B. Items for which approval by the Council is possible without discussion shall be included in Part A, but this does not exclude the possibility of any member of the Council or of the Commission expressing an opinion at the time of the approval of these items and having statements included in the minutes.’
decide themselves which minister to send. In addition and as mentioned above, the Commission and lower level officials may attend. It is mainly the Council president or the Commission that can initiate ministerial meetings. Upcoming meetings and agendas shall be announced in advance both on an 18 and 6 months basis (see Article 1 (1-2), 2(4-5) and 3). Moreover, the Presidency is responsible for ensuring that the agenda and accompanying documents are sent to all the members at least 14 days in advance (rules of procedure, Article 3). Hence, the member states must announce items for the agenda 16 days in advance. The rules of procedures also describe the division of the agenda into ‘A’ and ‘B’ parts signifying those items that do and do not require discussion respectively. Whereas the general framework for ministerial meetings is regulated in Article 5 and basically states that these meetings shall be conducted behind closed doors, as we have seen, more specific transparency rules for co-decision is covered in Article 8 of the rules of procedure. Article 9 of the rules of procedure also obliges the Council to provide an explanation of votes. As we can see, many of these formal rules will arguably contribute to level out the playing field between the member states.

In the meetings, the Presidency has a leading role as it convenes and chairs the meetings, including the informal bilateral and multilateral talks. This role in addition to its participation in the inter-institutional triologues with the EP and Commission put the Presidency in a powerful position as it has an information advantage in relation its fellow members which can be use to manoeuvre the discussions in the desired direction (Bjurulf and Elgström, 2004: 261). However, given that the Presidency is a rotating office, every member state (still) gets their turn at the wheel.

Due to enlargement, the time for debate in the ministerial meetings have decreased which may arguably make the relationship between the member states less equal as the discussions take place outside the formal meeting room. In their study, Hagemann and De Clerck-Sachsse (2007: 12, 14) found that after enlargement more dossiers were contested, but without voting against majority. Instead, the usage of formal statements/explanations attached to the Council minutes has increased:
One such measure is the use of formal statements, which are included in the official Council decision records, to signal a country’s reservations or even outright opposition to an act, even in cases where this was not expressed through voting. Hence, while the Council records now show an even-greater degree of consensus as far as voting behaviour is concerned, the governments are at the same time able to ensure the recording of their political positions in these formal statements. The use of formal statements has risen considerably since enlargement, and the proportion of legislation adopted in 2006 with one or more governments voicing reservations either through direct voting or in the formal statements amounted to a surprising 45%. Adopting legislation in the Council hence seems to be a two-sided political game that is increasingly accepted even in the official records (Hagemann and De Clerck-Sachsse, 2007: 34)

The Council ministerial meeting is an official decision-making setting and the rules for qualified majority voting are extensively documented both in the Treaties (Article 205, TEC) and in the rules of procedure (Article 11 and Annex III). However, the consensus reflex is strong and even though the rules allow for qualified majority voting, as is the case under the co-decision procedure, decisions are usually not taken before everyone agrees (Heisenberg, 2005). This consensus culture is based on the principle of ‘diffuse reciprocity’ ‘(...)in which member states agree to respect each other’s vital interests and not to create structural minorities that are consistently overruled in decisions’ (Farrell and Héritier, 2004: 1195). When a dossier reaches the ministers, Mattila (2004, 30-1) describes the process like this: ‘A proposal can be adopted with a single sentence from the Chairperson when he or she knows that there is unanimity in the Council. If the Council is not unanimous, the Chairperson still knows the Member States’ positions. If he or she decides that enough Member States are on board, the proposal is accepted and those opposing or abstaining from the decision can record their views officially.’ Moreover, the Presidency chairperson may declare that agreement has been reached ‘(...)without being contradicted’ (Hayes-Renshaw and Wallace, 2006: 269). This type of implicit voting and agreements made on the lower levels, of course, makes it very hard for the untrained eye to detect where the differences between
member states lie unless, as mentioned above, member states attach a statement with the vote.

With enlargement and a significant increase in the number of ministers around the table, the meetings have become more formalised and streamlined which means that many substantial discussions take place more informally (more on this below). Hence ministerial meetings are characterised by more informal sessions in-between the formal plenary meetings where the Presidency conducts bilateral and/or multilateral talks. Or according to an interviewee in the Council:

Negotiations now take place elsewhere, presidencies have bilateral contacts with people (...) it happens in a much more informal manner outside the meeting room, in bilateral or multilateral contacts (...) so the presidency has to go round and hear all the major member states and actually push them to see how far they will go and that helps to put together a compromise proposal(...)the bilaterals have, in a way, become more important than the plenary sessions (Hagemann and De Clerck-Sachsse, 2007: 24).

Moreover:

(...) enlargement has brought about (...) important atmospheric changes related to the work processes and conduct of negotiations in the Council. It was reported that our 52 interviewees (though, of course mainly the interviewees from the old members commented on this) have experienced an increasing impersonality in the style of the meetings. The legislators do no longer necessarily know each other, let alone are able to connect across an increasingly longer negotiation table. Some observers therefore emphasise the increasing tendency towards ‘statement reading’ in the Council formations rather than actual negotiations. This has been seen as one of the reasons why negotiations have now moved elsewhere (Hagemann and De Clerck-Sachsse, 2007: 39)
These developments could have implications for the internal solidarity and willingness to abide by the aforementioned principle of ‘diffuse reciprocity’.

**Time for debate prior to decision-taking?**

As we have seen, the Council ministerial meetings follow the structure of ‘A’ and ‘B’ points. Hence, the time allocated for debate on dossiers appearing as ‘A’ points is already reduced. ‘B’ points on the Council agenda warrants discussion, but it is often pointed out that the amount of ‘B’ points is much lower than the ‘A’ points as the majority of items are decided in the lower echelons of the Council hierarchy (working groups and Coreper) (see Hayes-Renshaw and Wallace, 2006: 58) and the share of ‘B’ points is even further reduced after the last enlargement. In his study, Settembri (2007: 29) found that whereas the number of dossiers adopted as ‘A’ points have increased slightly, the usage of ‘B’ points has decreased significantly and ‘(...)is particularly pronounced for major acts’.

Moreover, enlargement has also had an impact on how the Council now conducts its meetings (see Article 20 and Annex V in the rules of procedure). An increased number of member states imply more speakers and thus more time pressure during the formal meetings. A typical Council meeting starts with the Presidency presenting the issue, subsequently usually giving the floor to the Commission representative who goes more into details about the legislative proposal. Earlier, this used to be followed by a ‘tour de table’ giving each minister time to state their opinion on the dossier. It is this practice that has more or less been abandoned or rather modified so that only those members opposing the proposal are asked to speak. For instance, the Council rules of procedure now states that the Presidency is encouraged to:

(...)

(c) organise the time allotted for discussion of a particular item, in particular through limiting the time during which participants may speak and determining the order in which they may take the floor; (d) ask delegations to present in writing their proposals for amendment of a text under discussion before a given date, together with a brief explanation if appropriate; (e) ask delegations which have identical or
similar positions on a particular item, text or part thereof to choose one of them to express their shared position at the meeting or in writing before the meeting (cf. Article 20(1c-e), Annex V, Council rules of procedure, see Council, 2006a).

This trend is not very conducive to deliberation, especially if we take into consideration that there is ‘A tendency towards reading out statements and keeping to the formal procedures of negotiations has prevailed. (...) The formalised tone and structure that now characterise the meetings and work culture have led to an emphasis on the formal statements instead of merely voicing either concerns or opposition on a more casual basis’ (Hagemann and De Clerck-Sachsse, 2007: 12, 14). Following some of these sessions, most representatives usually read out loud prepared statements and there is seemingly few/none spontaneous responses to the positions presented (see also Hayes-Renshaw and Wallace, 2006: 125-6). However, having said this, Bauer (2006: 373) argues that ‘Nevertheless, the majority of public debate on ‘B’ items which have taken place are not mere ‘shows’ of pre-cooked agreements for the public, but real discussions’.

But there are also other obstacles to debate in the Council as the participants come and go during the formal meetings and are also disturbed by ‘Whispered conversations within and sometimes between delegations (...) It demands real power of concentration and stamina for the participants to listen carefully, as well as to speak, not to mention to observe and interpret the ‘body language’ of other participants’ (Hayes-Renshaw and Wallace, 2006: 51). Consequently, even if free discussion does take place, Council ministerial meetings seem to be organised and conducted in a way that do not seem very conducive to deliberation.

So, do the Council ministerial meetings comply with the requirements for a democratic deliberative meeting place? In the Council it is the working groups and Coreper that prepare the dossiers. In this sense the sequencing in the Council is similar to that of the EP where it is also the parliamentary committees that prepare the report. However, the major difference is that the division of labour in the Council is not compatible with what should be expected from democratic legislators as the elected ministers are hardly there.
It is the unelected officials in the working groups and Coreper who do the collective preparatory work. In the EP, in contrast, there are always MEPs at both the committee and the plenary levels (I come back this under the next criterion). For this reason the Council’s way of organising the preparation of its policy position is not compatible with a democratic opinion- and will-formation process. This is also underlined by the fact there are many implicit rules governing the ministerial meetings that are not accessible and self-explanatory for citizens and other interested parties (cf. Lewis, 1998, 2000).

The Conciliation Committee
Elected participants?
The Conciliation Committee is unique to the co-decision procedure and is the first and only formal setting regulated in the Treaties where Council and EP representatives meet face to face (Article 251(3-7), TEC).67 The Committee consists of an equal number of participants from the EP and the Council (27 each), i.e. their respective conciliation delegations. In reality, however, a lot more than 54 people meet in the Conciliation Committee as the delegates also bring staff members to assist them (political advisers, technical and legal experts, other supporting staff members etc.). Whereas the EP, as we have seen, appoints a new delegation for each dossier, the Council delegation to the Conciliation Committee is always the same, that is, the deputy permanent representatives and the minister from the member state holding the Presidency (hence one representative from each member state).68 In addition, ‘The relevant Commissioner usually represents the Commission’ (Corbett et al., 2007: 224). At this stage, the Commission does not have the right to vote or withdraw a proposal,69 but functions as a mediator and facilitator for reaching agreement between the EP and the Council.70 In sum, whereas the EP’s delegation consists of directly elected MEPs reflecting the political balance in the Parliament, the Council has, at best, only one

67 The trialogues are, at best, semi-formalised. I come back to this in the following chapters.
68 Whereas Coreper II is from time to time involved, it is first and foremost the deputy permanent representatives in Coreper I who are responsible for co-decision dossiers.
69 Navarro (Spanish Deputy Permanent Representative in Coreper (I)), see EP (2002).
70 Article 251(4) TEC; see also Rasmussen (2005); König et al. (2007: 291).
representative with a popular foundation. This makes the Conciliation Committee a setting with a fifty-fifty share of participants representing affected and competent parties respectively. It is thus difficult to determine for which category of meeting places it qualifies and additional information is therefore needed.

**Access to documents and debates?**

All Conciliation Committee meetings are closed to the public when they are in motion and information is not accessible before the process is over. This rule also covers access to the strategic documents. Neither the working documents nor the other preparatory documents used during conciliation meetings are publicly accessible prior and/or during the process.\(^71\) Afterwards, however, ‘The joint text agreed in conciliation is posted in a provisional version in one language (subject to legal-linguistic revision) on the Parliament’s website as soon as possible after the end of negotiations, thus enabling the general public as well as the representatives of the institutions to assess the outcome.’ (EP, 2007b: 18).\(^72\) The Conciliation Committee does not have an internet site on its own, but other documents that are publicly available can be found at the EP’s conciliation and co-decision website which is the only place where information on conciliation issues are collected and stored systematically.\(^73\) Here one can find information about the members of the Conciliation Committee, what conciliation and co-decision are, summaries of ongoing dossiers broken down on individual basis from procedural history, background papers to official texts as well as activity reports and a co-decision newsletter with monthly updates and summaries of conciliation proceedings. The Council hardly provides any information about the Conciliation Committee, let alone its proceedings. In sum, access to documents and debates are complied with on an ex post basis.

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\(^71\) According to the EP’s rules of procedure (Annex XV, 1.6), the following documents shall be publicly accessible through its register of documents: Joint working documents, joint texts approved by the Conciliation Committee, Conciliation manual, records of attendance. See EP (I). Being a formal decision-making arena, the Conciliation Committee operates in all the official EU languages.

\(^72\) If successful, the EP, the Council and the Commission usually also host a joint press conference to announce the result of the Conciliation Committee (cf. EP, 2007b: 17-8).

\(^73\) See EP (III), see also, EP (I).
Rules ensuring and inducing equality among the participants?

Unlike other settings during co-decision, the Conciliation Committee is well-documented in Article 251(3-6). It describes the membership (cf. above) as well as the competencies of the Committee. The latter involves the right to negotiate and to vote. The Conciliation Committee is thus an official decision-making setting and the voting rules for the EP and the Council are consequently described in the Treaties (cf. Article 251(4)). In fact, the powers of the Conciliation Committee are further elaborated on by the ECJ with regard whether amendments beyond what has already been suggested in the second reading can be considered. The Court ruled that ‘The wording of Article 251 EC does not (...) include any restrictions as to the content of the measures chosen that enable agreement to be reached on a joint text’ (cited from the EP, 2007a: 7). Hence also new amendments can be tabled.

The Commission is also present, but has no voting rights. It rather functions as a broker aiming at facilitating agreement. In this sense there are some actors (the MEPs and Council participants) who are more important than others (the Commission). However, the Commission is not a legislative body and the Conciliation Committee is convened as a last resort to reach agreement between the EP and the Council as the two legislative houses. Hence it would not be legitimate for the Commission to have rights on a par with the EP and the Council. In addition, we may say that the EP and Council chairs possess key positions (see below).

The Joint Declaration fleshes out the treaty article in detail. To ensure equality between the EP and the Council, the two legislative bodies alternate with regard to chairing (EP Vice President and Presidency minister) and hosting the meetings (rule 28, 32). It is also the EP and Council chairs who together set up the agenda, the dates and the

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74 An absolute majority is required for the EP delegation and a qualified majority is required for the Council delegation (Article 251(4). However, Article 251 does not specify the type of majority required from the EP delegation for a Joint Text to pass, but ‘After the failure of the takeover directive (...) the legal service of the EP clarified that the delegation needs not merely a simple but an absolute majority to adopt the joint text’ (Rasmussen, 2008: 111, footnote 3).

items for Conciliation Committee meetings (rule 29-30). In sum, we may say that the Conciliation Committee arrangement is compatible with the principle of equality.

**Time for debate prior to decision-taking?**

In Article 251 it is stated that the Conciliation Committee shall seek to reach ‘(...)agreement on a joint text (...) In fulfilling this task, the Conciliation Committee shall address the common position on the basis of the amendments proposed by the European Parliament.’ Hence, the purpose of the inter-institutional Conciliation Committee is to reach agreement on a Joint Text which the Council and the EP then take back to their respective institutions for a final approval or rejection in the third reading.

To ease cooperation between the EP and the Council, it was agreed that they should work from a common document in order not to waste time on talking past each other (Shackleton and Raunio, 2003: 177). The joint working draft has an ‘A’ and ‘B’ part: ‘(...)part A contains the elements of the compromise already agreed during the preparatory work [i.e. through trialogues] and part B the unresolved points with the respective negotiating positions’ (Cortes, 2000). Hence, the Conciliation Committee – as the Council – works according to the ‘A’ and ‘B’ point procedure where time for debate is reduced to the latter points and as many points as possible are resolved in trialogues prior or in between the meetings of the Conciliation Committee (see EP, 2007b: 16-8).

However, as the name of the committee indicates, its purpose is to reconcile the remaining differences between the EP and the Council after two unsuccessful readings, but where there is still hope of reaching an agreement. This situation arguably focuses the Conciliation Committee meetings on negotiations rather than discussion and debate. The positions are elaborated and well-known through discussions and amendments in the EP report and the Council’s Common Position. However, the perception among the participants is that it is too difficult to reach agreement in a room with over 100 people. Hence, the Conciliation Committee has proved

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76 Hence, a Conciliation Committee meeting thus usually deal with more than one case at each meeting.
rather ill-suited for the above purpose. In short, this has made the Conciliation Committee more of a final voting arena than a conciliation and bargaining arena as the more substantial inter-institutional discussions are instead taken in the trialogues. This does not mean that the Conciliation Committee is reduced merely to voting, but as we have seen above, ‘The discussion is normally limited to these outstanding [B points] issues’ (EP, 2007b: 17; Rasmussen, 2005: 1025).

From the above it becomes clear that the Conciliation Committee is neither designed, intended nor does it function as a setting where co-decision dossiers can be tested and justified in a publicly accessible manner. Instead, we could argue that the Conciliation Committee is designed as a bargaining and voting arena in the sense that it is convened at the end of the process when positions are known and consensus has not yet been reached, but where there is still hope for an agreement if both parties are willing to give and take. This does not make it democratically illegitimate, in principle it seemingly serves a perfectly legitimate cause in providing a shielded setting where the parties can discuss and potentially agree on outstanding points of disagreement. It is legitimate because it appears towards the very end of the procedure when the positions are known, but where the process needs new momentum in order to potentially reach settlement on a Joint Text. However, due to the growing importance of trialogues, discussions in the Conciliation Committee have become less important.

Conclusion
The first criterion – deliberative meeting places – seeks to identify those settings where it can be possible for co-decision dossiers to meet critical argumentative scrutiny in a manner that is openly accessible to citizens and affected parties. The existence of democratic deliberative meeting places is thus a necessary condition in order for representative systems to rely on the legitimacy of procedure instead of actual citizen participation without breaking the promise of government by the people. Failing to provide such meeting places (without replacing them with similar mechanisms) would hence render the polity to merely governance for the people.
However, this does not mean that the co-decision-making process needed to consists of such meeting places only. Rather, the first criterion requires that each legislative body provides at least one setting where it can be assumed that arguments can be raised, discussed and justified in a publicly accessible manner. A minimum requirement for such a setting is that the participants are popularly elected and, further, that it is composed in a manner that can be deemed representative of the institutional actor they represent. In this regard, five co-decision settings where considered: the EP committees, the EP plenary sessions, the EP conciliation delegation meetings, the Council ministerial meetings and, the Conciliation Committee meetings although the latter with initial reservations due to the fact that only half of the participants are popularly elected.

The evaluation showed that the EP committees and plenary sessions are both settings where it is likely that there can be an open testing of different positions on co-decision dossiers. Both settings are composed of elected representatives - the committees of a representative selection of the plenary. Meetings are conducted in openness, there is access to both debates and documents although the transparency situation could have been better in committee with regard to verbatim records or video streaming as plenary sessions offer. From an openness perspective, however, both settings lack satisfactory voting procedures as roll call votes which is the optional choice are only conducted upon demand. Instead, most votes are taken without a full record of names. There are also an extensive set of rules to ensure equality among the MEPs, especially for the plenary sittings, but also for committee meetings. These rules range from speaking time, the right to change the agenda, the right to suggest amendments to the report etc. It should, however, be noted that the formal rules as well as the informal practices favour the two largest political groups to the disadvantage of the small political groups and especially the non-attached MEPs.

Due to the number of participants, speaking rules and time limitations, it was argued that the type of deliberation that could be expected in the EP committees and plenary sessions respectively were probably different. In other words, the committees are smaller and less formal than the plenary sessions and thus have more time for discussion. Moreover, the committee is the setting where the draft
work is done whereas the plenary sitting considers the report prepared by the committee. Presumably, these aspects make the committee a setting more conducive to argumentative exchange of positions than plenary sittings. In this connection, I argued in line with Goodin (2005) who suggests that under non-ideal conditions we should think of and expect a sequencing of the deliberative tasks.

The EP conciliation delegation meetings were also appraised. In many respects they comply with the requirements for a democratic deliberative meeting place since they are composed of a more or less representative selection of elected representatives (although non-attached MEPs are no longer part of the delegations), meeting documents are available (although only ex post) and because the meeting rules are designed to ensure a certain level of equality among the MEPs. In addition, there is time for debate. When the EP conciliation delegation meetings do not fully meet the expectations of a democratic deliberative meeting place it is because they are not intended to be open settings for testing and scrutinising arguments and positions. Rather, meetings are deliberately held in camera in order not to give away bargaining points to the Council prior to the conciliation trialogues. Moreover, it is a meeting place where the MEPs discuss strategies and provide the trialogue-MEPs with tasks and mandates to the final negotiations with the Council.

The evaluation of the conditions on which the second legislative house, the Council of Ministers, is organised revealed that also this setting comply with many of the requirements of a democratic deliberative meeting place. It is composed of a representative selection (even if only indirectly) elected representatives and the meetings are now conducted in more openness than they used to earlier. There is video streaming and minutes available, but not verbatim records. In addition, provisional agendas, voting charts, monthly summaries and press releases are accessible from the Council website. However, the problem is that the ministerial meetings are not the setting where the preparatory Council work is conducted. This is done in the working groups and in Coreper and neither of these settings are open to the EP or the general public. Moreover, Settembri (2007) also found that after enlargement there is an increasing number of informal (bilateral/multilateral) meetings in between the formal ministerial meetings. He also found that
enlargement has seemingly significantly reduced the number of ‘B’ points discussed at the ministerial level and the number of ‘A’ points has increased slightly. In sum, it is highly questionable whether these features make it likely for ministerial meetings to provide the necessary conditions for open and critical scrutiny of co-decision acts.

The Conciliation Committee is neither intended nor does it function as a deliberative democratic meeting place. Rather and as also the name of the committee indicates, it is a meeting for settling outstanding issues towards the end of the legislative process in order to exhaust all possibilities for reaching an agreement. Formally, the intention behind the Conciliation Committee is presumably to be a bargaining or a final conciliation setting, but the impact of the trialogues has skewed its role more towards a final clearing or voting arena where what has been agreed in trialogues is formally approved in the Conciliation Committee.

In sum, then, it is only the EP committees and plenary sessions that comply with the requirements for a democratic deliberative meeting place. Since the Council ministerial meetings fails in this regard, it cannot be argued that the co-decision procedure fully comply with the first criterion.
Chapter 6

Inclusion of affected and competent parties

Sir Arnold: ‘Humphrey! Have you written your department’s evidence to the think-tank yet?’
Sir Humphrey: ‘More or less…’
Sir Arnold: ‘What do you mean, ‘more or less’?’
Sir Humphrey: ‘Well, the Minister’s written it…’
Sir Arnold: ‘Humphrey!’
Sir Humphrey: ‘Yes, I know, I know, it’s all very unwise, but he insisted. He’s been working on nothing else for more than a week now…’
Sir Arnold: ‘You should never have ministers so deeply involved (...first they start writing the draft, the next thing we know they’ll be starting to dictate the policy…’

(From the BBC TV series’ Yes Minister’, episode 5: ‘The Writing on the Wall’. Sir Humphrey is the Permanent Secretary to the Minister of Administrative Affairs, James Hacker whereas Sir Arnold is the Cabinet Secretary)

Sir Humphrey: ‘Oh, Minister I’m neither pro nor anti anything. I’m merely a humble vessel in which the Ministers pour their fruits of deliberations.’
(From the episode ‘The Devil You Know’, series 2).
Introduction

There is no foundation for democratic government without the inclusion of the views of affected parties. Representative democracy always faces the problem of finding a mechanism to convert the slogan ‘by the people’ into an acceptable reality in the eyes of the citizens as the latter are never actually present when decisions are taken. In this chapter, we shall have a closer look at the type of actors who are most involved in co-decision-making. More precisely, we shall take stock of how the balance between affected and competent parties patterns. The first indicator refers to the institutional actors and requires that the main decision-making bodies are popularly elected and that they – as collectives – possess veto power. The second indicator is oriented at the level of individual actors and seeks to determine whether co-decision-making respects the normative hierarchy between representatives of affected and competent parties inside the Council and the EP. In addition, the Commission’s consultation system is also assessed in order to find out whether the inclusion of civil society actors in the preparatory process can somehow compensate for the Commission’s lack of popular anchoring.

**Elected decision-makers with veto power**

| Indicator: The main institutional decision-making bodies are *popularly elected* and have collective *veto power* over the final outcome. |

The first indicator of inclusion demands that the main and most important decision-makers are popularly elected representatives situated in bodies that have veto power. According to Article 251, the main institutional actors in co-decision-making are the Commission, the EP and the Council, but it specifically stipulates that it is the EP and the Council that jointly exercise the right to either accept or reject a proposal, that is, both institutions have to agree in order for an act to pass. Hence even if the Council is only indirectly elected and many hold that the EP elections are only second-order (Reif and Smith, 1980), the power to veto a proposal is in the hands of two bodies with a popular mandate.

As we have seen, the Commission does not have the final say on co-decision dossiers – it cannot formally veto decisions on a par with the EP and the Council. This point notwithstanding, the Commission is a
powerful actor and wields considerable influence especially due to its monopoly to formulate and table proposals. What is more, during the first and second readings, before the conciliation process starts, the Commission must also be consulted and give its opinion on the amendments made by the EP. The Council can only adopt the EP amendments the Commission rejects if it is able to drum up unanimity. In some way we may argue that the Commission also possesses a form of veto with regard to its right to withdraw legislation before the conciliation process starts, that is, ‘If it considers the final consensus at Council level as conflicting with its proposal, it can withdraw this and thus exert veto power’ (Van Schendelen, 2006: 34-5). In addition, the Commission acts as a facilitator and broker throughout the process and is the only institutional actor that has access to all the central settings both in the Council and the EP. Even if it is short on veto power, the Commission has strong agenda-setting powers, especially in the preparatory phase prior to official tabling of a dossier and to some extent during the formal procedure through its gate-keeping role.

The Commission’s lack of an electoral link is consequently a democratic shortcoming, especially when there is no real balance of power dynamic between the Council/EP and the Commission. Having said that, it should be remembered that however important the Commission is in setting its stamp on co-decision dossiers, it is nevertheless only the EP and the Council that have final veto power to turn a dossier down and both these institutions have (at least) formal direct and indirect popular anchoring respectively. In this respect, then, we may say that the first indicator requiring that the main decision-makers possessing veto power must be popularly elected, is met. But from a deliberative perspective, this in itself is not enough to determine whether the co-decision procedure fulfils the procedural qualities of democratic inclusion. In emphasising the process leading up to final decision-making, we also need to know which individual actors shape the will-formation process and how

1 However, the long and complex consultation process prior to the Commission formally tables a dossier, provides the Commission with a good indication of the viability of a policy proposal. The ‘success’ rate of adopted dossiers indicates that the Commission does not forward legislation it does not believe will pass.

2 Apart from the Council meetings where internal matters are discussed (Hayes-Renshaw and Wallace, 2006: 34). I come back to the Commission’s powers under the fourth criterion on the indicator on separation of powers.
the balance between representatives of affected and competent parties patterns more precisely.

**Hierarchy of actors**

| Indicator: The elected representatives are the deciding actors when discussing and deciding how consequences and burdens are distributed. It is required that elected representatives sit together and collectively mould an opinion and discuss a case prior to decision-taking. The involvement of competent parties is limited to preparing policy-making. |

The second indicator of inclusion refers to the overall involvement of the various individual actors operating within the decision-making bodies and seeks to establish whether the normative hierarchy between affected and competent parties is respected. In other words, is there ‘vertical accountability’ between elected and non-elected representatives under co-decision?

**The Council**

From the previous chapter on meeting places we already have an impression of the relative importance of the various co-decision actors. In the Council, the lower level bodies (working parties, Coreper, Secretariat) play a significant role for the preparation and articulation of the Council position. It is therefore pertinent to address how the internal relationship between the working parties and Coreper, on the one hand, and the ministerial level, on the other, affects the Council’s status as an institutional actor with (indirect) popular anchoring. The question is whether the indirect electoral link is still ‘valid’ given the heavy involvement of the non-elected officials in the legislative process. In other words, to what extent can it be argued that the national ministers can be seen as the citizens’ representatives also at the European level when they are acting in the Council and thus validate the intergovernmental view that the Council is a democratising factor in the EU?

My conclusion, as we shall see, is that they cannot. The reason for this is expectedly due to the indirect nature of democratic representation in the Council, but not because deliberative democracy is necessarily incompatible with indirect representation as such. The problem with the indirect chain of representation in the Council is that this is not the primary work setting of national ministers and thus that their job
as ministers in the member states are too time-consuming in themselves to be compatible with the time and attention needed for legislative work at the European level (cf. chapter 5). By this I do not mean that the Council as such neglects its duties and tasks. The problem is the extent to which the ministers are forced to neglect their duties as democratic representatives in the Council since they must delegate the majority of the work on legislative dossiers to Coreper, the Secretariat and the working parties.

More precisely, the Council’s composition of national ministers may have a sound intergovernmental or national logic, but it does not withstand the logic of democratic representation in a deliberative sense as long as the national ministers do not really have the time to sit together and collectively mould and discuss legislative proposals prior to actual decision-making. The difference between the EP and the Council is here striking and illustrative. MEPs are ‘hands on’ throughout the legislative process and do most of the work themselves. And, more importantly, they sit together first and foremost in committee, but also in plenary sessions to discuss and find solutions.

In the Council it is the working parties, Coreper and the Secretariat that take care of the day-to-day business concerning co-decision dossiers, including the contacts with other actors. As mentioned above, co-decision dossiers have been prepared first by the working parties and then filtered and further refined by Coreper before they reach the ministers. ‘Insiders’ to the Council system estimate that 85% of all decisions taken in the Council are not subject to any discussion, but simply adopted without any further ado as ‘A’ points at the ministerial level. Now, it may be objected that the work of the Council officials is hardly a ‘one-man-show’ where they can operate independently of or sideline the ministers – at least not without repercussions. Rather, they are highly dependent on maintaining good relations and trust in their respective capitals (Hayes-Renshaw and Wallace, 2006: 80). Although the ‘A’ and ‘B’ point procedure says something about the importance of the preparatory bodies, Hayes-Renshaw and Wallace (2006: 79-80) underline that a dossier – and particular a controversial one – is usually sent up and down the

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Council hierarchy before a final decision/vote is taken. In other words, when a final decision is to be taken at the ministerial level it is not the first time the ministers hear of the case. In addition, Hayes-Renshaw and Wallace (2006: 48) also point to the fact that ministers have to prepare themselves prior to the meetings and thus that ‘(...the heavy and repeated engagement of many national ministers in the Council reveals a pattern of transnational involvement that marks the EU out from other forums for negotiations between governments.’

However, the permanent representatives are not at all times following strict orders from member states. Given the permanent character of Coreper, the shifting Council configurations as well as the rotating nature of the Presidency, Coreper, in particular, represents a much needed continuity, expertise and institutional knowledge. Many times - and especially with regard to smaller member states – there is initially even no official opinion and the permanent representatives are more or less free to form a member state’s position (e.g. Lewis, 1998: 490-1). This obviously opens up for a considerable room of manoeuvring and influence (Rihnard, 2002: 202).

Moreover, the problem is that issues labelled as ‘A’ points may be known to the ministers individually, but they have hardly been dealt with by them as a collective body before a final decision is taken. The whole point about the ‘A’ point procedure is to relieve the ministers of their work pressure. The legislative process always starts below the ministerial level and if agreement can be found here, the issue is moved up to the ministers where it is formally decided on the first upcoming Council meeting regardless of whether this is the Council configuration in charge of the given dossier. Here, the ministers ‘(...)rubberstamps all these A-dossiers in one minute’ (Van Schendelen, 2006: 34). In this sense we could argue that at the minister level decision-making is most of the time merely the result of an aggregation of preferences. In contrast, it is at the working group and Coreper levels that decision-making is characterised by a collective processes resulting in more deliberatively reached agreements.

What is more, the working groups and Coreper are arguably not just preparatory, but also decision-making settings (Rihnard, 2002: 195). This is also more or less confirmed by Fouilleux et al. (2005: 614). In
interviews with Coreper, the Secretariat and working party officials, they found that the respondents only mentioned concretely that budget issues as well as ‘(...)deal-making involving inter-sectoral trade-offs is left for ministers to handle’ (ibid). Moreover, Settembri (2007: 29) also found that after enlargement acts adopted as ‘A’ points has increased slightly whereas the number of acts subjected to ‘B’ point discussions has decreased significantly, especially for important dossiers. In other words, enlargement seems to significantly affect the time allocated for debate. Settembri (ibid) also looked at the balance between ministerial and diplomatic representation when decisions were taken. After enlargement this balance has tilted even further away from the ministers.4

It may be that this procedural set-up is a ‘(...)sensible solution to the problem of ministerial overload(...)’ as Hayes-Renshaw and Wallace (2006: 80) argue, but from a democratic perspective it illustrates well the problem of part-time ministers. True, the ministers can at any time convert ‘A’ points into ‘B’ points and thus demand discussion on the topic. They can also veto the proposal as they are the only ones with formal decision-making power. This point notwithstanding, it is the lower level officials and not the ministers who have been part of a thorough collective moulding process prior to final decision taking. From a deliberative democratic point of view, it can therefore be argued that the meetings among ministers in the various Council configurations are more often than not reduced to rubber stamp settings. Hence it can also not be argued that the ministers function as representatives who voice the views of affected parties. The ‘A’ point procedure may improve efficiency, but it does not improve the democratic quality of decision-making and it does consequently not respect the normative hierarchy between affected and competent parties. In the Council it is the unelected officials (the working groups, Secretariat and Coreper) who are the real movers of co-decision dossiers and the ministerial level is more or less reduced to a setting that adopts what has already been decided at the lower levels. In this way, the organisational set-up or division of labour inside the Council upsets the democratic connection between opinion- and will-formation processes, on the one hand, and final decision-making or voting procedures, on the other.

4 See also table 3 in annex III.
The EP
With regard to the EP the situation is different. Unlike the ministers in the Council, the MEPs do the preparatory work themselves – the EP Secretariat helps out, but does not do the political work for them. In this sense, the EP’s organisation of legislative work is respecting the hierarchy between affected and competent parties’ representatives and ensures incentives for affected parties’ representatives to sit together and collectively shape a position.

Moreover, if we look at the EP committees and the plenary sessions together, the division of labour between the two types of settings is also compatible with a democratic deliberative perspective. The EP – first in committee(s), then in plenary settings – conducts the preparation and discussion of co-decision dossiers in a publicly accessible manner. In the previous chapter, it was argued that the way the EP is organised is conducive to democratic deliberation and hence also the inclusion of affected parties’ views. So even if the major work is done in the committees, this is (in principle) not a problem as the composition of EP committees follows the numerical strength of the various political groups and can thus be deemed representative of the EP in plenary (McElroy, 2006: 25). When seen in isolation, then, the division of labour between committees and plenary sessions makes sense not only from a practical perspective, but can also be defended from a normative point of view.

However, the EP does not operate in a vacuum and when we change the perspective from how the EP is organised internally to how the inter-institutional co-decision-making system seems to affect the EP’s working methods, a more dubious pattern appears. The committee has always been an important setting in the EP. However, the trialogues seemingly contribute to undermine the importance of committee work and consequently also downgrade the committee as a central legislative setting. Earlier, all the substantial discussions took place in the formal arenas such as the committees and plenary. Now, many of these discussions take place in trialogues. Although the committee is obviously not void of importance, the trialogues

5 Even if the officials in the EP Secretariat also assist their MEPs quite closely, the type of involvement by the various departments in the EP Secretariat cannot be compared to that of the Council (or the Commission for that matter). See Neunreither (2002) for an introduction to how the various departments assist the MEPs.
seriously challenge it as being the place where the EP makes its major policy choices. Moreover, when the majority of dossiers are now the result of ‘early agreements’, this enhances the importance and impact of first reading trialogues to the detriment of the committee which is the only setting open to public scrutiny in the very beginning of the formal decision-making process. Let us have a closed look at how the trialogues affect the internal organisation of the EP.

The trialogues are exclusive to the participants. Hence other MEPs are dependent on the information provided by the trialogue-MEPs. Those who do not have access to trialogues only learn what has been agreed afterwards and are seemingly then only left with a choice of approving or rejecting the agreement. And the rejection does not come without costs as the MEPs voting down the proposal are then responsible for the failure of the legislation. According to Farrell and Héritier (2003b: 24) when agreement in first reading ‘(...)works successfully, the Parliament and the Council do little more than sign off on a deal that has already been negotiated among a small group of actors.’ Unlike the conciliation process where the trialogue-MEPs are controlled by the EP delegation, there is no similar (neither formal nor informal) control system for the responsible EP committee to hold trialogue participants accountable during the first (and second) reading. This situation is not completely uncontroversial in the Parliament: ‘The basic problem is that the positions expressed to the Council during such ‘unlawful’ contacts do not necessarily represent the points of view of the majority of the members of the committee concerned.’

Fouilleux et al. (2005: footnote 23) reported that in an interview with a Commission official s/he argued that:

The problem is that this procedure is a little too quick and not transparent enough. When we reach agreement on the first reading, the essential work is done between the President of COREPER and the EP’s rapporteur. It is up to the rapporteur to consult the other members of Parliament (...) So MEPs are often confronted with the choice between ‘yes’ and ‘no’ – there is no deliberation.

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6 The quote originates from the EP’s ‘Delegations to the Conciliation Committee: Activity Report 1 August 2001 to 31 July 2002’, but is cited from Rasmussen and Shackleton (2005: 15) as the report is no longer available on the EP website.
Moreover, first reading is different from the other in the sense that the EP and the Council have not yet formed a formal position and this gives the key actors considerable room for manoeuvring as there are no limitations on how many and what kind of amendments can be presented at this reading (in contrast to the second and third readings) (Rasmussen and Shackleton, 2005: 12).

The problem with first reading trialogues is that until the Council has formally adopted its Common Position there are no time limits so the process of moulding and shaping a policy proposal can go on for a long time in secret trialogue meetings before they enter the formal decision-making arenas (Farrell and Héritier, 2003b: 23). Moreover, ‘Negotiations on early agreement dossiers are almost entirely informal – it is often extremely difficult for others within the Parliament, let alone outsiders, to have any idea of what exactly is going on in a specific brief’ (Farrell and Héritier, 2003b: 8). Knowing how important the first stages of a decision-making process are, this is, of course, problematic. But there are also critical comments to be made concerning second reading trialogues. Even if the co-decision process is subject to strict time limits after the adoption of the Council’s first reading Common Position, and even if the positions of the EP and the Council are known by then and the possibility of proposing amendments are constrained in scope, the problem is nevertheless that the:

(...) Council interrupts Parliament’s second reading with a view to persuading it to adopt amendments that it (Council) can accept, thereby making conciliation unnecessary. In this case, it has become common for Council and Parliament to meet after the committee responsible has voted and to seek to negotiate compromises. At the very least, such an approach poses a challenge to the role of the parliamentary committee meeting as the place where interests are aggregated. Decisions are effectively being taken elsewhere in a body meeting far from public view (Raunio and Shackleton, 2003: 178).

With regard to the conciliation trialogues, there seem to be much better control with the participants through the EP delegation which consists of a more balanced selection of MEPs. According to the EP itself, delegations keep close contact and monitor the trialogue participants. The latter;
(...) receive its mandate from the delegation before every trilogue, and (...) report back to the delegation after each trilogue. Thus, it has been the delegation which has taken all important procedural decisions (e.g. whether another trilogue meeting should be arranged, or whether the Conciliation Committee should be convened). And it has remained the delegation which had determined the strategy vis-a-vis the Council position at every stage of the procedure; which has approved or rejected compromise proposals; and which, at the end of the conciliation procedure, and always by a vote in which the support of an absolute majority of members of the delegation (i.e. at least 13 votes) has been required, has formally approved or rejected the agreement reached (EP, 2007a: 6).

Hence, they work on a mandate from the conciliation delegation and cannot take formal decisions, but have to refer back for approval the agreements reached in trilogues. However, it can be questioned if the EP at large can sufficiently control the delegation. In fact, Rasmussen (2005: 1028) holds that ‘(...)it is considerably easier for delegations to monitor and sanction the key negotiators than for the legislative bodies to do so in regard to the delegations as a whole.’ The problem, however, is that the process in the committee is in this way to a considerable extent sidestepped and thus challenges the committee as the locus where collective opinion- and will-formation processes are conducted.

This emptying of the committee meetings has resulted in a fear (widely shared by the MEPs) that especially first reading trilogues will reduce committee meetings to rubber stamp settings (Héritier, 2003: 827). There have been attempts at remedying this, among other things, by suggesting that ‘(...)the committee should define a mandate to negotiate with the Council and then come back to the committee and report or that the Council should come to the relevant committee to present its (...)common position and to negotiate with the EP before its second reading and not just talk to the rapporteur’ (Héritier, 2003: 827). As we know, the Council has not been willing to do so and prefers to attend the EP committee and plenary meetings as listeners. According to an MEP interviewed by Héritier (2003: 827), the Council has responded that:
They do not want to come, partly because it is a public meeting, whereas a meeting with the rapporteur is a private meeting; nobody will report it later. Partly it is out of solidarity with the Council. They are not willing to say ‘We are confident to get a qualified majority provided that X, Y, Z. It would give the EP, and indeed everybody, an opportunity to look into the Council’. Instead of such a committee, ‘the Council would prefer to have more trilogue meetings with members of the political groups, a little representative sample of the committee put in a little room, which of course would not be open.

However, trialogue meetings are, as we have seen, not representative in the democratic sense. Moreover and in order to anticipate where the majority in the EP will lie, the Council prefers to consult the large political groups to sound out and influence the result in Parliament. It is also the large political groups that usually sit on the key positions in committee such as the rapporteur, committee chair and shadow rapporteur etc. To illustrate, the allocation of reports in the two previous parliaments, Mamadouh and Raunio (2003: 346) found that ‘(...)the larger groups were over-represented (especially the EPP) while the smaller ones were under-represented. (...) only PES and EPP can normally afford the most expensive reports, such as those falling under the co-decision procedure’ (see also Kaeding, 2005: 100). The political groups’ control of the distribution of key positions means that particularly non-attached-, but also MEPs from small political groups come out disadvantageously. These MEPs do obviously not have the same apparatus to take on the time-consuming work of being a rapporteur and will thus not be consulted by the Council or participate in trialogues. What is more, the requirement of an absolute majority supporting the EP’s second reading position also results in consensus-seeking among the two largest political groups (EPP-ED and PES): ‘Representatives of the two Groups meet with each other to strike deals over political or patronage issues without smaller Groups to left or right always being consulted. These latter may then be forced to conform on a take-it or leave-it basis’ (Corbett et al., 2007: 109-10). These ‘grand coalitions’ are quite characteristic of EP outcomes (Lord, 2004: 119-20), but the
process towards reaching them has been conducted without the non-attached and small political group MEPs taking part in it.  

Overall, small political groups increasingly find themselves excluded from the 'real debates' and negotiations. In an interview a Green MEP admitted that ‘(...)as a small group, we would not be as involved as the larger groups (in formal trialogues) (...) we are not part of that informal consensus’ (Farrell and Héritier, 2004: 15). In other words, the moulding and policy-shaping deliberations to a large extent take place with less committee members being part of the process. Based on the above, it does not seem unreasonable to argue that if not all then at least a significant amount of the real discussions now take place informally and outside the committee framework. In this sense the smaller political groups have lost an important mechanism to exert influence over the legislative process, namely by formally proposing suggestions for amendments in committee (Farrell and Héritier, 2004: 16). Overall, the trialogues, especially if agreement is reached during the first reading, ‘(...)threaten to short-circuit debate in committee and to create an élite amongst committee members who are privileged to deal with the Council’ (Shackleton and Raunio, 2003: 177-8). This could, in effect, result in ‘(...)the increasing possibility that larger member states to use their clout in Parliament to manipulate the legislative process in a non-accountable, and undemocratic fashion’ (Farrell and Héritier, 2003b: 20).

To sum up, when the committee loses its central position as the core legislative setting where dossiers are discussed and shaped among a representative selection of MEPs, this affects the whole division of labour between the committees and the plenary sessions within the EP. Whereas the committee, like the trialogue, contains a reduced number of participants, the former has a democratic character as its composition is representative of the plenary. As we have seen, to legitimise that the major chunk of legislative work is conducted in the committees is dependent on two factors, firstly, a representative composition of committees and, secondly, that they conduct their work in a publicly accessible manner. On this basis it was argued that the plenary sessions can afford being less probing and that the

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7. As we have seen, Settembri (2007) even talks about ‘giant coalitions’ as he found that co-decision reports adopted in EP committees were generally supported by over 90% of the MEPs.
division of labour between the committees and the plenary sessions can be defended from a democratic point of view. When the most important discussions are now conducted in the trialogues this obviously also alters the assumed democratic quality of the EP settings (Farrell and Héririer, 2003b: 30). The paradoxical situation is that whereas studies have shown that the EP as an institution seems to be more influential in the trialogues than the Council due to the latter’s shortage of personnel and resources to follow all co-decision dossiers all the way through the conciliation committee, this does not empower those MEPs not participating in trialogues: ‘Thus while increasing the output legitimacy through more efficient decision-making, informal trialogues are counterproductive in terms of input legitimacy’ (Häge and Keading, 2007: 358; see also Warleigh, 2003: 32). Chalmers et al. (2006: 155) put it even more bluntly: ‘The trilogue is the biggest challenge to democratic legitimacy, for it centralises power in those actors who represent the Council and the Parliament at the trilogue’ (see also Farrell and Héririer, 2003b: 8).

Even if the trialogue-MEPs are popularly elected and can thus be held to account in the next election, the possibility of holding trialogue-MEPs to account for what they have decided in trialogues suffer. In other words, their duty to explain and justify the positions and actions defended in trialogues towards the citizens is not sufficiently respected as trialogue agreements are often just presented as a ‘take-it-or-leave-it’ offer in committee. When trialogue-MEPs neglect this duty, they also cease being spokespersons voicing the views of affected parties. Hence the gain won in power is seemingly lost in democratic legitimacy due to the lack of representativeness of trialogues. In this way it cannot be argued that their participation in trialogues contribute to respect the hierarchy of actors because the collective opinion- and will-formation processes among elected actors is seriously challenged and is seemingly taken over by a small group of key trialogue participants – many of whom do not have any popular backing.

The Commission’s consultation system
Also the Commission is an important contributor to co-decision-making and even if its main problem obviously is that it has no popular anchoring it wields quite an elaborate consultation system prior to the official launch of a dossier. This aspect should not be
Inclusion of affected and competent parties

overlooked with regard to the question of inclusion and the relationship between representatives of affected and competent parties. The question is whether the inclusion of the various societal voices during the preparatory phase can compensate for the Commission’s lack of a popular basis?

In fact, a tension between efficiency and legitimacy can be discerned in the Commission’s consultation system. On the one hand, the Commission is a small organisation with scarce resources and personnel in comparison to the many tasks it has to fulfil. To ensure efficiency and at the same time quality the Commission is therefore dependent upon external expertise ranging from scientific knowledge to information about the preferences of national governments. The expert committees play a pivotal role in the fulfilment of this end. On the other hand, the Commission is also in need of legitimacy which it has sought to ensure in complex processes of consultation with so-called stakeholders through mechanisms such as online consultations, policy and dialogue forums as well as by including some NGOs and civil society organisations representation in the expert groups.

Partly on this background it is commonly argued that the Commission is a rather open institution that facilitates a pluralist interest representation system and that is in contact with many types of groups (Mazey and Richardson, 2006a and b). There is no doubt that the Commission consults and includes a plethora of different interests, including many civil society and non-governmental organisations. We should, however, be careful about over-emphasising the democratic significance of consultation processes. Basically, the problem is lack of representativeness and

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8 This is not only due to the post-Maastricht lobbying boom and the fact that the sheer number of external actors participating and approaching the Commission has steadily arisen to a level where it is practically impossible to meet them all with equal consideration and intensity (Broscheid and Coen, 2003). This ‘overload’ or ‘oversupply’ of lobbyists has led to a ‘management’ problem to which the Commission has responded by introducing a more institutionalised consultation system which seemingly reflects the difficulty in balancing the need for information with openness and equal access. Prior to the latest enlargements, Broscheid and Coen (2003: 167) estimated that ‘The Commission bureaucracy has approximately 16,000 members, the size of a larger city administration.’

9 See Quittkat and Finke, 2008; see the contributions in Kohler-Koch and Maloney (2008). See also the Commission’s consultation website (European Commission (III)).
accountability. Firstly, the individual delegates participating in the consultation processes are usually self-selected, that is, they have not been popularly elected, but are appointed by their organisation/group (at best, they are elected among their own membership). Self-selection is often biased towards those who are best organised, most educated, have more money and/or scream the loudest and to the detriment of those who do not possess these means/skills (Warren, 2008: 56). Moreover, interest groups approaching the EU level often lack a proper grassroots anchoring (Greenwood, 2003: 12).\textsuperscript{10} It is also questionable how democratic it is to put too much emphasis on interest representation given that many civil society organisations only promote single issues. What is more, the participants themselves cannot be held to account for their positions by those who are going to be bound by them. Hence, ‘At the system level, expanding the opportunities for participation can actually exacerbate deficits in democratic representation’ (Warren, 2008: 56, see also Olsen, 2007: 130-1).\textsuperscript{11}

Secondly, there is also discrepancy between the principle of democratic representativeness and actual practice within the group of those who do have access to the Commission’s consultation system as civil society involvement is only minor to other types of interests such as national government experts, scientific advice and/or business interests. The Commission expert groups play a far more important role than other consultation groups and the former consist almost exclusively of competent parties, that is, national experts and officials, scientists as well as private interests.\textsuperscript{12}

The Commission is seemingly concerned with both the epistemic and the democratic aspects of consultation: ‘(...)good consultation serves a dual purpose by helping to improve the quality of the policy outcome

\begin{itemize}
\item[\textsuperscript{10}] The lack of grassroots anchoring is also indicated in news article in European Voice 21 April 2005.
\item[\textsuperscript{11}] Moreover, ‘On a system-wide level, more participation may increase the overrepresentation of those who are already well represented, generating the paradox that increasing citizen opportunities for participation may increase political inequality’ (Warren, 2008: 56).
\item[\textsuperscript{12}] Gornitzka and Sverdrup (2008: 15) found that ‘(...)it is about fifty per cent chance that you will find only national officials seated around the table. (...) [Moreover,] expert groups composed only by societal actors or only by scientists are rarely found.’ See also Larsson and Murk (2007); Egeberg et al. (2006).
\end{itemize}
and at the same time enhancing the involvement of interested parties and the public at large’ (Commission, 2002b: 5). It is nevertheless the Commission that orchestrates the consultation system according to its most pressing needs. The result is that the balance between those representing the views of competent versus those representing affected parties’ views tilts towards the former. Hence the playing field does not ensure equal access. The consultation system has a top-down approach where it is the Commission that draws and steers the pattern of interest group representation.13 According to Menéndez (2009: 303), the problem is that ‘(...)in the absence of functional European general publics, it is obvious that the Commission’s strategy runs the risk of being the embellishment of lobbying, or truly a smart way to co-opt certain societal interests with a view of giving a legitimacy aura to technocratic decision-making.’ Moreover, when the boundaries between the Commission and the interest groups participating in organised consultation processes are blurred, this also violates their democratising potential as:

‘Participation is not about institutionalising protest. It is about more effective policy shaping based on early consultation and past experience’ (...). As it is participation by invitation, the principle of representation is violated, and the Commission emerges as the sole representative of a European ‘common interest’. Hence, governance comes down to participatory engineering as participation is mixed up with policy-making and implementation (Eriksen, 2009: 163).

Technical versus political

There is also another obstacle reducing affected parties’ opportunity to easily follow and access the political debate. This obstacle pertains to the practice of dressing up potentially controversial political questions in a technical language in order to speed up the co-decision-making process. The problem is obviously that a technical language often conceals the political salience and the normative dilemmas a policy proposal may contain. Democratic politics require

13 Moreover, the Commission has ‘(...)strategically fostered interest group participation that would be consistent with and conducive to further integration’ (Mahoney, 2004: 443). With regard to the Commission’s funding regime, Quittkat and Finke (2008: 214) found that ‘(...)the European Commission mainly supports associations representing either the weak or excluded, whereas CSOs representing general interests are less often supported.’
that such questions are dealt with in a language that spells out the normative dilemmas and that clarifies value choices and potential solutions in an intelligible way also for lay people such as citizens. This is in particular the task of parliaments, but also other elected bodies such as the Council when acting in its legislative capacity. Legislative bodies deciding on proposals that will have binding effect on others have a responsibility to voice what is politically at stake in a policy proposal.

The lack of ministerial involvement in the Council has consequences for the democratic division of labour between elected and appointed actors in public policy-making because the latter also makes political choices and not only the technical ones. In their study, Fouilleux et al. (2005: 612) found that ‘(...)when one delves deeper into the way the Council functions, the distinction between technical and political issues is rarely so clear-cut.’ There was also a tendency to define dossiers as ‘technical’ rather than ‘political’ in order to make them run through the Council hierarchy more efficiently. In other words, non-elected officials make important judgements that are not only of a pragmatic, but presumably also of an ethical-political and moral character. Hence, the difficulty of separating technical and political questions and the constant blur of ‘(...)the frontiers between (...) [working parties], COREPER and ministerial meetings(...)’ supports the above conclusion where it was questioned whether it is the ministers who are actually making the political choices. Moreover, given that politicians are generalists (even if many acquire special competence in certain policy fields) they are presumably also relying more on their advisers in the lower echelons of the Council than had the Council membership been their full-time job (see also Fouilleux et al., 2005: 610-1).

In addition to the highly technical nature of many dossiers, the domination of non-elected officials from the Council and the Commission seems to affect the way debates are conducted also among MEPs. In order to ‘(...)win credibility and legitimacy(...)’ with the experts especially in the Council working parties, the EP adopts ‘(...)the discourse of the bureaucrat(...)’ (Foilleux et al., 2005: 617). Moreover, in their study, Foilleux et al. (2005: 617-8), argue that the Council and the EP possess different types of legitimacies (technical and democratic legitimacy respectively), but that the former ‘wins’
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over the latter.\textsuperscript{14} Interestingly, also the Commission seems to be affected by the Council’s propensity to ‘technicise’ argumentation. According to Smith (2007: 232), the Commissioners adopt a more technocratic language when the official co-decision procedure has started in order to increase its chances of influencing the Council in the desired direction. ‘However, they appear most free to act politically during the phase of European problem definition and agenda formation’ (Smith, 2007: 232).

Initially, first reading agreements were ‘legitimised’ on the basis that they facilitated procedural efficiency when the issues at stake were only or highly technical and not politically contentious (see Farrell and Héritier, 2003a: 1197 and 2003b: 24). However, as we have seen, first reading agreements are today the rule and not the exception as the majority of co-decision dossiers are closed only already after the first reading.\textsuperscript{15} It is consequently doubtful that they are all just technical and politically uncontroversial.\textsuperscript{16} Another issue is whether there is such a thing as a purely technical co-decision dossier. Shackleton and Raunio (2003: 176) report the following:

Certainly there was and remains a recognition, for example, that ‘fast-track agreements’ at first reading are a legitimate element of the legislative procedure. All agree that for technical dossiers, where neither side \{i.e. the EP and the Council\} is concerned to modify the Commission proposal, it makes eminent sense to avoid the establishment of a common position.

But how can the EP and Council know that the dossier is only technical and consequently politically uncontroversial if it has not

\textsuperscript{14} ‘(...)the Parliament is often criticised not only for its inability to understand the constraints of the legislative procedure but more seriously for being uninformed or subjectively informed about the issues involved. The sources of information for European parliamentarians are often challenged by actors operating in working groups who consider that they have better, i.e. ‘more objective’, information than parliamentarians do. The latter are often stigmatised for supposedly relying upon information from self-interested lobbies and private companies. The second point, partly as a consequence of the first, is that most working group members regret the time ‘wasted’ by the new procedures’ (Fouilleux et al., 2005: 617-8).

\textsuperscript{15} Cf. in year 2008, 140 dossiers were adopted at first reading whereas 29 and 1 were adopted in the second and third readings respectively (European Commission, 2009: 228).

\textsuperscript{16} See Farrell and Héritier (2003b: 24) and Bunyan (2007a and b).
been subjected to public debate? Whether a matter is purely technical is not up to the Commission, EP and Council alone to define and decide. What is more, Rasmussen (2007: 5) also notes that dossiers are usually not either technical or political, but usually both at the same time. When seen in combination, the increased use of early agreements facilitated through secret trilogues, the limited number of actors (many of whom are unelected experts) as well as the procedural incentives to discuss in a technical rather than a politically explicit language, are all obstacles to an inclusionary will-formation process conducive to deliberative democracy.

To respect the normative hierarchy between representatives of affected and competent parties, then, is not only (even if mainly) about who is doing what (i.e. elected versus non-elected officials/experts), but also about in what form (in this case type of language) things are being done. To be a representative of affected parties involves making the latter aware of the normative dilemmas and trade-offs different solutions have. What is more, issues are never only technical and before they can be defined as such, they have to be ‘(...)identified, interpreted and specified in prior social processes. It has to be established through a ‘logic of discovery’ that depends on a perspective and hence is normatively charged. In addition, application gives rise to normative concerns of its own’ (Eriksen, 2009: 174). For citizens this type of issues must be presented in an as clear and non-technical manner as possible in order for the decision-makers to earn the label representative of affected parties. In this sense the ministers in the Council have obviously not earned the status of being representatives of their respective national citizenries. Even if this tendency is not as strong in the EP, the inclination to score points with the Council by adopting a technical language does obviously not strengthen the MEPs’ status as the affected parties’ representatives. That the MEPs buy into this ‘ethically neutralising’ path of how to make politics is arguably indicative of weak linkages between the EU decision-making system and the general publics.

Conclusion
In this chapter, two indicators were evaluated. The first concerned whether the main institutional decision-takers have a popular anchoring. Although the Commission is powerful, it is clear from Article 251 (TEC) that a dossier cannot be adopted unless both the
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Council and the EP agree. Consequently, as both houses have the right to veto a proposal and have an electoral link, the first indicator is satisfactorily met.

The second indicator is more demanding and is targeted at finding out whether the organisation of actors who are actually participating in the moulding and shaping of a policy proposal respects the normative hierarchy between representatives of affected versus competent parties. As we have seen, the internal organisation in the Council does not comply with the principle behind this hierarchy as the unelected actors in the working parties, Secretariat and Coreper rather than the (indirectly) elected ministers dominate the Council’s opinion- and will-formation processes. The fundamental democratic concern with the way the Council has organised its decision-making structure, highlighted in the ‘A’/’B’ point procedure where the ministers (usually) automatically accept ‘A’ points without any further ado, is that the ministers have actually abdicated from their role (and responsibility) as democratic decision-makers. The problem is just that the role as democratic decision-maker cannot simply be handed over to officials and deputies without at the same also degrading its normative status from democratic decision-maker to merely decision-maker. Hence,

(...)decision-makers may maintain that their [the working groups and Coreper] solutions are correct or fair as far as they have managed to talk themselves into a consensus and agree upon the ‘epistemic quality of the justification for political decisions’. This amounts merely to deliberation without democracy – to technocratic deliberation – as there is no chance for the affected citizens to say yes or no to the terms under which decisions are made (Eriksen, 2009: 173).

In this regard, Rhinard (2002: 195-6) notes that ‘This de facto decision-making authority is surprising in light of the fact that Council committees are not mentioned in the treaties and are only referred to once in the council’s institution-wide rules of procedure.’ The ministers are not ‘hands-on’, but depend too heavily on their officials. Moreover, being elected at one point in time does not give a carte blanche to speak on behalf of affected parties throughout the period

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17 Cf. Article 19 Council rules of procedure.
between elections unless affected parties can also see/control what their representatives say and do on their behalf on regular intervals. From the perspective of deliberative democracy, the normatively superior position of being the spokesperson for affected parties' views is a conditional status which the representatives have to ‘earn’ every time they claim to act on affected parties’ behalf. This is not the case in the Council.

Within the EP, the situation is different. When seen in isolation, the division of labour between the committee and plenary settings makes good sense, also from a democratic perspective as the committee composition reflects the numerical strength of the plenary. In addition, the EP conducts its meetings in openness and has not transferred the opinion- and will-formation process to unelected officials as in the Council. However, when the internal organisation of the EP was seen in the wider inter-institutional context of co-decision-making, the influence of the trialogues is affecting negatively the importance of parliamentary committees as the main place where decisions are discussed and prepared. This obviously also alters the legitimacy attached to the participation of directly elected MEPs. More specifically, the organisation of the EP where the rules of inclusion and exclusion are first and foremost controlled by the political groups become more difficult. The committee chairs, the group coordinators, the rapporteurs and to some extent the shadow rapporteurs all possess key positions in the decision-making process, they are ‘legislative entrepreneurs’ or ‘specialist legislators’ (Benedetto, 2005). Hence, when the key EP actors – first and foremost the rapporteur, committee chair, group coordinators – meet in trialogues even before they meet in committee, the problem is that this also affects the internal power structure of the Parliament to the detriment of small party groups and independent MEPs. The use of trialogues seems to have increased the gap between big and small political groups as the importance of the committee setting has decreased. What is more, when deals are struck in trialogues and then presented to the EP, the parliamentary process of preference formation first in committee and subsequently in plenary sessions is constantly interrupted and upset. In sum, the trialogues largely disconnect the link between the deliberative opinion- and will-formation processes that take place in the EP committees and plenary sessions and thus reduce the democratic quality of the organisation of division of labour within the EP.
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Even if the Commission is not a popularly elected body, it aspires to contribute to inclusion through its consultation system. On this background, also the Commission was assessed in order to see if the inclusion of the views of civil society organisations could somehow compensate for the lack of popular anchoring. The Commission is famous for its complex consultation system and includes a great variety of interests. However, it could not be argued that the system is capable of ensuring a democratic representation of societal positions. The reason for this is first and foremost because the Commission itself picks and chooses the types of interests that it finds more important. Moreover, to a considerable extent it also designs and shapes the types of interests that are included and involved (cf. co-optation argument). In addition, none of the groups or actors participating in the consultation system and thus contribute to influence the Commission’s position can themselves be held to account. In sum, these features of the organisation of the consultation system reduce the potential role external actors could play in contributing to democratise the Commission.

The last issue discussed in this chapter pertains to the type of ‘language’ within which co-decision dossiers are framed and discussed, namely whether dossiers are primarily steeped in a political or in a technical type of language. As we have seen, there is a tendency that dossiers are discussed in a non-transparent and technical manner and that it is seemingly the lower levels (particularly the working groups) in the Council that set the standard in this regard. In order to win credibility and authority in the Council, MEPs are also adopting a more technical type of language. Hence, for citizens and other affected parties the political process becomes (even) more difficult to follow. When decision-makers dress up political issues in a technical language the problem is that they implicitly also tend to exclude the possibility of forming a connection with the discussions taking place in the general public situated outside the institutionalised policy-making nexus. What is more, policy proposals are usually never just technical and it is not up to the decision-makers alone to define whether this is the case. Hence, when dossiers are not properly tested in an open and accessible manner, this only exacerbates the chances that the decisions that are reached will be deemed illegitimate as they have not been properly ‘tested’
Chapter 7
Openness and transparency

Bernard: ‘But what’s wrong with open government? I mean, why shouldn’t the public know more about what’s going on?’
Sir Arnold: ‘Are you serious?’
Bernard: ‘Well, yes sir. I mean, it is the Minister’s policy after all.’
Sir Arnold: ‘That is a contradiction in terms. You can have open or you can have government.’
Bernard: ‘But surely the citizens of a democracy have a right to know.’
Sir Humphrey: ‘No, they have a right to be ignorant. Knowledge only means complicity or guilt, ignorance has a certain dignity.’
Bernard: ‘But if the Minister wants open government…’
Sir Humphrey: ‘You don’t just give people what they want, it’s not good for them … Do you give brandy to an alcoholic?’
Sir Arnold: ‘If people don’t know what you’re doing, they don’t know what you’re doing wrong.’
Bernard: Well I’m sorry sir Humphrey, I am the Minister’s private secretary and if that is what he wants…’
Sir Humphrey: ‘My dear fellow, you will not be serving your minister by helping him to make a fool of himself. Look at the Ministers we’ve had, every one of them would have been a laughing stock in three months had it not been for the most rigid and impenetrable secrecy about what they were up to.’
Bernard: ‘What do you propose we do about it?’
Sir Humphrey: ‘Can you keep a secret?’
Bernard: ‘Of course’
Sir Humphrey: ‘So can I(...)’
(From the BBC TV series ‘Yes Minister’, episode 1: ‘Open Government’.
Bernard is the Principle Private Secretary and Sir Humphrey is Permanent Secretary to the Minister of Administrative Affairs, James Hacker whereas Sir Arnold is the Cabinet Secretary)

Introduction
The principle of openness and transparency is crucial for establishing a democratic dialogue between official political bodies and the wider public and for the latter to perform any kind of enlightened and informed critique and scrutiny of ongoing legislative processes. A democratic decision-making procedure must consequently meet certain standards of transparency. From a deliberative perspective which underlines an inclusionary and case-probing process prior to decision-making, it is vital to know not only what is on the agenda, but also where ideological positions diverge and dilemmas arise. In short, for citizens to develop an informed opinion about policy proposals, it is important that the decision-makers, their positions as well as the process leading up to the adoption of dossiers are easily identifiable. In this sense openness is a crucial precondition for ensuring democratic decision-making. The EU has been heavily criticised for its remoteness and lack of openness in decision-making and has been attempting since the early 1990s to change that reputation through the introduction of various transparency measures. The task under this criterion is to assess whether decision-making under the co-decision procedure fulfils the institutional and procedural requirements for openness in the co-decision legislative process.

In this chapter, the co-decision procedure will be assessed against four indicators. The first reflects a minimum requirement of ensuring public access to the policy proposal before the final decision is taken. The second indicator is a continuation of the first, but is more demanding, namely that the relevant co-decision documents shall be easily accessible from a digital register. The third indicator demands transparency of policy-making debates whereas the fourth and last indicator requires that there is openness and intelligibility of the votes cast in co-decision dossiers. As the trialogues and the
Conciliation Committee are inter-institutional settings and therefore not as such part of the individual institutions’ set-up, the transparency of these two settings are consequently briefly compared and assessed towards the end of the chapter.

**Public access to policy proposals**

**Indicator:** All the involved institutional actors and the public can get access to the policy proposal before it is finally decided.

One minimum transparency requirement is that the policy proposal is available prior to final decision-making. The Commission’s proposal is publicly accessible in the Official Journal once it is adopted in the College of Commissioners and sent to the EP and the Council. Hence, when formally launched, the document is easily obtainable from different sources such as the Commission’s register of documents as well as in its Prelex service, the EP’s Legislative Observatory (OEIL) and the EUR-Lex online service with regard to COM documents (which is the format in which Commission legislative proposals appear). The Commission’s Prelex service and the EP’s OEIL service are both databases following the inter-institutional procedures/dossiers through the different decision-making stages. The Council does not offer a similar service as the EP and the Commission, but the Common Position is available from its register of documents. The EUR-Lex service, on the other hand, is the EU’s common (online) access point to EU law (containing documents published in the Official Journal, case law, Treaties, international agreements, parliamentary questions). Whereas access to co-decision proposals is consequently easily available once the Commission has adopted a proposal and the formal procedure has started, access to the different versions of the draft proposal during the Commission preparatory process, is not publicly available. This fact notwithstanding, as co-decision proposals are easily available during the official process through the Prelex, OEIL and EUR-Lex services, the first indicator of openness is complied with.

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1 Prelex service (see European Commission (IV)), OEIL service (see EP (IV)), EUR-Lex service (see internet link in bibliography).
2 See, Council (VI).
### Access to documents

**Indicator:** There is a digitally accessible register of documents (or other ways of ensuring easy access to documents).

Generally speaking, the co-decision procedure is the best documented decision-making procedure in the EU. The reason for this is, firstly, that it belongs to the first pillar where, in comparison to the second and third pillars, access to decision-making acts is easier to get hold of (cf. Stie, 2008). There is quite a large literature on the EU’s policy on access to documents, both before and after the introduction of Article 255 (TEC) and the Regulation 1049/2001.³ Whereas a lot could be said, especially with regard to the exceptions to public disclosure that are allowed for in Article 4 and 9 of the Regulation, I shall not be dealing with this here. The reason is that the transparency situation with regard to co-decision is not as often as other policy areas (for instance in the second and third pillars) subject to these rules and thus more straightforward, that is, the basic rule is that both the Commission and the Council withhold preparatory documents whereas the EP does not to the same extent. Secondly, the co-decision procedure seems to be a ‘prioritised’ area for all three institutions in that there is comparatively much more information on this procedure than on all the others.⁴

According to Article 255 (TEC) and further specified in Regulation 1049/2001, the Commission, the EP and the Council are legally committed to make access to decision-making documents as publicly available as possible through digital registers (cf. Article 12(1) of the Regulation, see also Article 11). All three institutions have established

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³ See for instance, Davis, (1999); de Leeuw (2003); Driessen (2005); Dyrberg (2002); Heliskoski and Leino (2006); Öberg (1998, 1999); Curtin (2000, 2001, 2003); Peers (2002, 2006); Settembri (2005). The Regulation is currently under re-evaluation, see Commission (2008b). See also EU official documents in the bibliography. See also Statewatch’s Observatory on the Regulation on access to documents: 2008-2009 (for internet link, see bibliography). There has also been quite a lot of input from the public sphere on the issue EU transparency. A selection of media articles from EurActive, European Voice and Statewatch can be found in the bibliography.

⁴ I come back to this under criterion 4 and the indicator on intelligibility of procedure.
such registers and thus ensure formal compliance with access to documents.\(^5\)

All three registers are quite user-friendly and function well when one has a minimum of knowledge about the relevant document(s) one is searching for (such as number, title, key words, date etc.). However, if one would like to get a full overview of the relevant documents on a particular co-decision dossier, the registers are of less help. In such cases, the aforementioned online services – Prelex and OEIL – represent a much faster and easier path to a more complete picture of (ongoing) co-decision processes as they both provide chronological overviews of all publicly available co-decision documents on a case by case basis.

In order to use the *Prelex* system, it is an advantage to know which document (series, number, year) one is looking for, but it is also possible to find a given dossier by using key words.\(^6\) For every co-decision dossier, Prelex provides a very good overview of when the proposal reaches the involved institutions. It also provides links to other relevant documents and lists the name of documents, their legal basis etc. The *OEIL* service provides a similar, chronological overview of ongoing dossiers. In other words, for ordinary citizens to get an overview of ongoing as well as completed co-decision-making, both services are invaluable channels of information and important supplements to the institutions’ registers of documents.

It should be noted that the Council also offer an online service which provides information on a dossier by dossier basis as well as by stage of the procedure.\(^7\) There are, however, two specific drawbacks with this service. The first is that it is only available in French. The second is that it is not as complete and thus not as user-friendly as the Prelex and OEIL services. In addition and as opposed to Prelex and OEIL which both contain all publicly available documents from all institutions, the Council service only contains Council official

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\(^5\) For Commission register, see European Commission (V); for EP register, see EP (V); for Council register, see Council (VI).

\(^6\) The easiest way to get an overview of all co-decision dossiers either completed or still under consideration and with a direct link to the relevant Prelex site, is to access the Commission’s co-decision homepage (see European Commission (VI)).

\(^7\) See, Council (VII).
documents, neither drafts nor lower level working documents including documents from the working parties.

With regard to the institutions’ registers of documents, the Commission’s register contains C, COM and SEC documents in addition to agendas and minutes of Commission meetings. It is the four latter categories that are interesting from a co-decision perspective. Whereas COM documents represent proposed legislation, SEC documents are ‘internal documents associated with the decision-making process and the general operation of Commission departments’.8 The SEC category is obviously interesting, but there are seldom publicly disclosed preparatory documents available apart from impact assessments which also appear on the EUR-Lex online service on a regular basis.9 An obvious drawback/shortcoming with regard to the functioning of the Commission register is that for each document, interested citizens must fill out and send an online request form to the Commission who will then consider the matter. In other words, many of the documents are not directly retrievable from the website. What is more, other preparatory documents such as online consultation documents, Commission expert group documents as well as the DGs’ documents are, if at all publicly available, not posted on the register. Altogether this obviously makes public access to Commission documents cumbersome.

As can be anticipated on the basis of the foregoing chapters, access to EP documents are easily available in the register or at the websites of the various committees. The EP’s rules of procedure (Annex XV) provide a list of all the documents readily available in the register (cf. also Corbett et al., 2007: 335).10 These cover all EP documents relating to plenary sessions, committees, delegations and individual members, that is, all relevant co-decision documents originating from the EP such as minutes, amendments, agendas etc. Conciliation documents are only available on an ex post basis in order not to disadvantage the EP’s bargaining position by disclosing the Parliament’s flexibility/limits towards the Council in the Conciliation

8 See European Commission (VII). ‘C’ documents cover legal acts adopted by the Commission in the exercise of its own or delegated powers.
9 See, EUR-Lex (for internet link, see bibliography).
10 Cf. EP (I).
Committee. According to the EP’s annual report on access to documents 2007, 90% of all the documents in the register are directly available from the internet.\(^{11}\) Those documents that are not directly available to the public concern first and foremost correspondence and comitology procedures (p. 7).\(^{12}\) Hence with regard to co-decision documents, the register provides satisfactory access.

Whereas there are hardly any restrictions with regard to accessibility of EP co-decision documents, the Council\(^{13}\) – as the Commission – is generally a more secretive institution. According to Annex II in the Council’s rules of procedure, the following documents relevant for co-decision-making are available in the register: (1) provisional agendas for Council meetings and for its preparatory bodies; (2) documents submitted to the Council which are listed under an item on its agenda marked with the words ‘public deliberation’ or ‘public debate’ in accordance with Article 8 of the Rules of Procedure; (3) in the legislative field, ‘I/A’ and ‘A’ item notes submitted to Coreper and/or the Council, as well as draft legislative acts, draft common positions and joint texts approved by the Conciliation Committee to which they refer; (4) documents regarding a legislative act after a common position has been adopted, a joint text has been approved by the Conciliation Committee or a legislative act has been finally adopted; (5) any other text adopted by the Council which is intended for publication in the Official Journal; (6) documents originating from a third party which have been made public by the author or with his agreement; (7) documents which have been made available in full to a member of the public who made an application.

Whereas this seems like a nice list, it should be noticed that there are no preparatory documents available apart from the draft agendas. However, as we have seen in chapter 5, most decisions are taken in the working parties and Coreper so apart from provisional agendas,

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\(^{11}\) See EP (2008b: 5).

\(^{12}\) It could possibly be argued that access to comitology documents is indirectly important in the sense that after a co-decision act is officially adopted it moves to the implementation phase where it is dealt with in the many comitology committees. However, while this could be important, the question here is whether the documents produced during the legislative process as prescribed in Article 251 are accessible to the public.

\(^{13}\) For a brief historical presentation of the transparency developments of the Council, see Bauer (2006: 367-72).
there are in reality no documents available in the Council’s register (or in any other database) from these meetings. Hence, even if the Council is at its most open when dealing with co-decision dossiers, there are nevertheless restrictions on the availability of documents which represent a shortcoming from a democratic point of view.

A final note with regard to translation should be made. The many official languages of the EU obviously represent a challenge with regard to offering full translation in all official languages at all meetings, especially after the last enlargements. Documents accessed from the EUR-Lex database are available in all the official EU languages. Hence all the official versions of legislative (co-decision) proposals – the Commission proposal, (the ESC’s and the CoR’s Opinions when relevant), the EP’s Opinion, the Council’s Common Position, the Joint Text resulting from the Conciliation Committee – are translated into all the EU languages. This is not the case with all documents in the Prelex and OEIL services which are often only available in English and French (see also Hayes-Renshaw and Wallace, 2003: 39-40).

**Openness of debates**

| Indicator: There are either verbatim records, video streaming of debates through the internet or minutes available in all official languages. |

Through the assessment of meeting places, we already have an idea of how openness under co-decision-making patterns and that the transparency conditions differ depending on the institutional actor. Unsurprisingly, the EP is the most open.

Since 1999 both the EP’s plenary sessions as well as the committee meetings are open. As we have seen, plenary sessions are very easily accessible through video streaming available at the EP’s internet site. This multimedia library service provides both an archive of already conducted sessions (although quite meagre since it has only been operative from July 2006) as well as the possibility of following live debates as they take place. It is easy to manoeuvre one’s way around the archive as it not only provides viewers the opportunity to see and hear the MEPs discuss, there is also an overview of topics

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14 See also rule 96(2) EP Rules of Procedure.
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(subdivided into debate or vote) and speakers. This makes it easy to find one’s way around a meeting and possibly skip parts that are not of interest. When a MEP is speaking, her full name, party affiliation, nationality and current subject is presented. In addition, there is a translation access point where the audience can choose any one of the official languages. In sum, this new service is and will become an even more valuable source of information over the years as the archive is filled up. Live and stored video transmission of meetings in addition to minutes15 and electronic verbatim records in all the EU’s official languages consequently makes the openness of EP plenary debates very good and obviously contribute to more transparency of EU decision-making. However, since we know that the EP committee meetings are more important for policy-making these meetings should also be available in this format.

Whereas the conditionality rule allowing for closed plenary settings in exceptional cases was abandoned in the 1999 revision of the rules of procedure, the EP committee meetings can be closed under three specific circumstances: ‘First, committees may decide to discuss certain designated matters behind closed doors as long as such a decision is taken at the latest when the agenda of the meeting is adopted. Second, discussions on request to waive a member’s immunity must be held in camera. Third, the conciliation committee and the Parliament delegation meetings that precede the committee are not public’ (Corbett et al., 2007: 334, see also pp. 168-9). In short, this means that EP committee meetings as such are hardly ever closed under co-decision.

However and contrary to EP plenary sessions, committee meetings are not televised on the internet16 and there are only minutes, not verbatim records of the meetings. Of the three institutions directly involved with co-decision, it is the EP that historically has been and still is the most transparent of the institutions. This fact notwithstanding, transparency improvements are still needed. Even if the committee meetings are open, civil society organisations and

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15 According to Corbett et al. (2007: 182), due to the introduction of the video transmission service, full records of speeches are no longer (since September 2007) available.

16 According to the EP’s Annual Report 2007 on public access to documents, Parliament is also working on establishing televised committee meetings, but I could not find any committees offering such a service yet (EP, 2008b: 9).
lobbyists have complained about the lack of proper and enough technical equipment to follow the meetings. In the words of one of the proponents cited in European Voice: ‘At present, visitors to the Parliament must compete with each other for headphones for interpretation facilities, sit on the floor or stand for long periods of time and piece together the events in committee meetings through either conferring with others or pure guesswork.’ To mend the information obstacle, they called on the EP to broadcast its meetings live on the internet and/or provide more written proceedings immediately after the meetings. The EP, on its side, argued that there was not much it could do (ibid). Hence to reiterate the point made in chapter 5, from a democratic perspective this is not fully satisfactory, but it does not mean that committee meetings are in effect closed to the public. Committee meetings can be traced quite closely by combining minutes, draft reports and amendments.

There is also another possibility of getting to know more about ongoing processes. Under the ‘Conciliation and Codecision’ internet site, the Parliament provides more information about the progress of co-decision dossiers. Under the access point ‘ongoing procedures’, there is a list of all dossiers currently under treatment in the Parliament. The list informs about the responsible EP committee, name and political group of the rapporteur, title and number of the dossier as well as a column indicating the likelihood that there will be an early agreement/first reading agreement on the dossier.

In addition, each committee has their own website where they present information about their work and collect documents accessible for everyone interested. Here, a calendar with dates and agendas for upcoming meetings, minutes from meetings as well as committee reports can be downloaded. They contain different types of documents, ranging from Commission proposals, draft opinions, draft reports, working documents to minutes and agendas. As far as meeting documents are concerned, these are presented in all the official languages. In addition, all the committees provide additional

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17 European Voice, 1 April 2004.
18 See EP (III)
19 See, EP (VI).
20 As an example, the access point for the meeting documents of the Committee on Economic and Monetary Affairs, see EP (VII).
information about their work, some have their own newsletter like the Committee on Environment, Public Health and Food Safety\(^{21}\) and the Committee on Regional Development\(^{22}\) and references to relevant external links. Most committees also conduct hearings. The documents from these meetings are collected at a common access point\(^{23}\) as well as on the websites of each individual committee. These documents contain prepared statements, agendas and background reports. In sum, Corbett et al. (2007: 334) argue that this makes the EP on a par with, if not better than most national parliaments – even the Finnish, Swedish and Danish parliaments cannot compete with the EP in this regard as their committee meetings are mostly closed.

As argued earlier, the secrecy of EP delegation meetings and the Conciliation Committee is justified because it contributes to ensure that the EP is not disadvantaged in its negotiations with the Council and because the documents are disclosed on an ex post basis (I come back to the Conciliation Committee below).

Whereas the general rule with regard to the EP is that it conducts all its committee and plenary meetings in public, the Council and to some degree also in the Commission do not.

According to the Commission’s rules of procedure, the meetings of the Commission shall be confidential (Article 9) and this provision does not only apply to the College of Commissioners. Apart from open consultations and to some extent the dialogue and policy forums, the Commission co-decision settings are closed to the general public. There are no publicly accessible verbatim records or internet streaming service available. The principle of collegiality commits the Commission as a collective to defend all decisions issued in its name (see Nugent, 2001: 92) and thus guards its internal debates.

With regard to the Council, the implementation of the access provisions is found primarily in Annex II of the rules of procedure. To open up the Council decision-making processes has been and still is a recurrent theme on the EU agenda. We have seen that it is now committed to more openness when dealing with co-decision dossiers.

\(^{21}\) See, EP (VIII)
\(^{22}\) See, EP (IX).
\(^{23}\) See, EP (X).
Whereas the meetings of Coreper and the working parties are closed both with regard to verbatim records/minutes and video streaming, Council ministerial meetings are now required to be open when the Commission presents a co-decision proposal to the ministers and the ensuing initial deliberations. In addition, it is also required that the final discussions and vote on co-decision dossiers in the Council shall be open to the public (Article 8(1) Council rules of procedure). This means that it is not only possible to follow the adoption of ‘A’ points, but also more substantial discussions on ‘B’ points.

As we have seen in chapter 5, the Council provides a video streaming service similar to that of the EP where it is possible to follow some debates live either on the internet or in an overflow room in the Council building. The openness provisions on co-decision dossiers are obviously much better in comparison to other decision-making procedures in the EU, and especially so since it is required that the ministerial meetings are open when ‘B’ points are discussed. We have, however, also seen that the number of ‘A’ points have increased and the number of ‘B’ points have decreased significantly (cf. Settembri, 2007). In addition, enlargement has made recourse to more informal meetings outside the public eye more common. This obviously reduces the importance of the video transmitted policy debates.

What is more, the lack of openness in the deliberations of Coreper and the working parties cannot be ignored when most of Council decision-making pass as ‘A’ points without any discussion at the ministerial level. As we have seen, Hayes-Renshaw and Wallace (2006: 52) estimate that as much as 85-90% of all Council decisions are taken at the lower levels, 70% on working party level and 10-15% at the level of Coreper. The lack of openness in these settings is not only a serious problem for the citizens, it is also a major problem for the EP. Unlike the Commission which has access to all Council settings,
the Parliament is excluded from these arenas and MEPs must inform themselves about the progress in the Council either through the updates on the websites (like ordinary citizens) or through personal contacts within the Council. MEPs participating in triilogues are obviously in a better position as they are constantly in contact with both Commission and Council representatives. In sum, we may say that given that the currency of influence is very much dependent upon information, the lack of inclusion reported under the second criterion is intimately tied to the non-transparent nature of the preparatory bodies of the Council (see also Menéndez, 2009: 302). Moreover, the lack of openness in the Council systematically favours competent parties to the detriment of affected parties since the majority of MEPs are unable to properly follow the preparatory processes in the Council. This is not the case for Council ministers who, as we have seen, often have their officials positioned in the EP as listening posts throughout the legislative process.

Another openness aspect pertains to the rules on how to present/report legislative amendments. If we compare the EP and the Council, there is a striking difference between the two institutions with regard to transparency. In the EP, amendments must be made in writing indicating the place in the text where deletion and/or insertion of amendments should be made. The proposal must be accompanied by a written justification and the full name of the elected politician filing the amendment(s). This is not the case in the Council where there is no indication in the text (underlined in italics, bold or the like) with regard to where new, modified or deleted amendments can be found.

In comparison with the EP committees and the amount of relevant information that can be found both on each committee’s website, the internet information on each Council configuration is quite limited. When accessing the link to one of the configurations it is possible to find a short description of what it does, that is, in which policy areas

25 Bauer (2004: 368) notes, however that ‘One qualification (...) to this apparent veil of secrecy is the fact that Brussels journalists and lobbyists could always get a blow by blow account of what had gone on in Council meetings through press conferences and contacts with officials and civil servants. Indeed, there are few more leaky organisations than the European institutions.’ This point does not change the fact that for the general public it is still hard to keep track on preparatory process in the Council.
it is involved. Each configuration website provides a link to its press releases dating back to approximately 1999 when the Council register was first introduced. In addition, summaries of previous Council meetings which are rewritten from the minutes available under the aforementioned ‘documents’ access point can also be found.

There are many dead ends when trying to recapture what took place in Council meetings and outside actors must have patience and time to figure out where relevant information is stored (if it is openly available) and knowledge about how the system works. In sum, whereas the treatment of co-decision dossiers represents the Council at its most open, it still does not meet the democratic requirement of transparency of debates.

**Intelligibility of voting**

| Indicator: There are available voting records which include information and explanation about who voted and what position they defended. |

A public decision-making process must end in an outcome – either a proposal is rejected or accepted – and this should also be as transparent as possible. Generally speaking, EU decision-makers are, according to Article 253 (TEC), obliged to provide reasons for the results they reach: ‘Regulations, directives and decisions adopted jointly by the European Parliament and the Council, and such acts adopted by the Council or the Commission, shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty.’ As we can see, this also includes co-decision acts. But whereas Article 253 refers to the final result, it does not tell us anything about how the institutions voted individually. An important part of democratic decision-making is to make publicly visible and easily accessible the results of how representatives voted. Public display of voting results is an effective and undemanding mechanism that provides the citizens with the possibility to make an informed opinion about their representatives and to hold them to account in the next election: ‘A vote is in effect the manifestation of the responsibility of an individual (representing different interests, depending on the institution of affiliation) with regard to a decision’ (Settemibri, 2005: 642). Let us therefore have a look at the extent to which the institutions ensure intelligibility of votes.
As with the previous indicator, also intelligibility of voting in the Commission is affected by the principle of collegiality. Potential disagreements among the Commissioners remain internal as all decisions are expected to be defended collectively. The voting result on whether to launch a co-decision proposal is therefore always unanimous. It is, however, more important that the EP and the Council provide a public display of voting results as they are the final decision-makers with veto power.

According to the EP’s rules of procedure (rules 159-162), there are basically four ways of voting in the EP, either by the (1) show of hands, (2) electronically, (3) secret ballot or by (4) roll calls. From a transparency perspective, it is the latter that offers the best accountability protection as this is the only time where individual MEPs’ votes are formally registered ‘(...)first in the annex to the minutes which appears the next day, and later in the translated minutes which come out in the Official Journal about three months later (although unofficially a print-out is available in the press room within half an hour of the vote)’ (Corbett et al., 2007: 175). Roll calls are, however, not the most widely used as they must be requested on a case by case basis and need the support of one of the political groups or at least 40 MEPs before the vote is to take place. Settembri (2005: 647) estimates that only one-quarter to one-third of the total number of votes taken in the EP are subject to roll calls and that this result is not sufficient for a democratic monitoring of votes in the EP.

But note also that ‘Items adopted in committee by an overwhelming majority (fewer than one-tenth against) are taken in plenary without debate (unless requested by a Group of 40 members) and are subject to a single vote without amendments (unless one-tenth of the members – individually or by Group – requests that it be open to amendment)’ (Corbett et al., 2007: 172).

Secret ballots are rare and have not been used in co-decision processes. They are, however, obligatory for the elections of the Commission President, Ombudsman as well as the President, Vice-Presidents and Queaslers of the EP (Corbett et al., 2007: 176).

See rule 160 EP’s rules of procedure.

Cf. Neuhold (2007: 7) quoting Hix, Noury and Roland (2007) report that one-third of the votes cast are roll-call votes. It should also be noted that since roll-calls are optional, they are often used strategically for instance to embarrass and highlight internal divergence in other political groups and/or to signal to the Council the size of the majority supporting the EP’s position. For this reason, it should be remembered that the results from studies merely based on roll-calls must be treated
In most cases, votes are taken by the show of hands which gives no possibility of tracing who voted for what as it only shows how many supported and how many rejected the proposal. When votes are taken in this way, the group coordinators point their thumb up or down to indicate to fellow members the political group’s position on a specific vote. Electronic voting is used in cases where the EP President is uncertain about the vote and shows how many voted yes and no as well as the number of abstentions. Also in this case personal votes are not displayed.

With regard to explanations of votes the EP seems to have the opposite problem of what we are addressing here as rule 163 of the Parliament’s rules of procedure rather lists the restriction on how and when it is possible to state the reasons for the votes cast.

So far only voting in plenary sessions have been assessed. There are two ways of voting in committee, by the show of hands or by roll call votes (see rule 185, EP rules of procedure), although the latter is ‘(...)extremely rare(...)’ (Settembri, 2005: 648). Given that the openness of committee debates are not as good as plenary sessions, committee voting suffers and is consequently also less transparent. This also affects voting in plenary debates as:

(...) the only information reported in the minutes is whether the committee has approved an amendment or not, and there is no chance of finding out who actually supported or opposed it (unless the vote was unanimous). The procedural page of all reports gives only an indication of the result and does not say how each member voted (Settembri, 2005: 648).

Altogether, even if it is not impossible to find out how individual MEP’s voted in committee and in plenary, the Parliament’s system for reporting on the votes cast is not satisfactory. Settembri (2005: 650-1) sums up the EP voting system in the following way:

with caution as MEP’s may vote differently when they know that their individual vote will be publicly recorded. For studies on roll-calls, see, Carubba et al. (2004); Hix et al. (2005, 2006).
(...) the EP voting is neither entirely secret nor fully open, but somewhere in between. Where voting is not explicitly secret (ex Article 162) or deliberately fully transparent (by roll-call, ex Article 160), voting is public by name only, because the voting system excludes any possibility of individual accountability. Contrary to the practice in most national parliaments, the EP works on the basis of unrecorded deliberations with fully transparent votes taking place only where explicitly requested.

If we in addition take into consideration that the debate and the casting of votes are separated in time, i.e. that a vote does not follow directly after a debate, it can be very hard to get an overview of the situation. In order to provide full intelligibility of voting, the EP should go for roll-call votes on every dossier both in committee and in plenary sessions as this gives citizens the possibility to easily get an overview of the MEPs individual voting patterns.

According to its rules of procedure (Article 9), the results and explanations of votes taken in the Council under co-decision-making (among other procedures) shall be public.30 This covers both the adoption of the Common Position taken during the procedure, the final outcome of a legislative act as well as the results of votes taken in the Conciliation Committee (Bauer, 2006: 373). Again, transparency of Council procedures is better when it is acting in its legislative – as it does under co-decision – than in its executive role as it does under for instance the second pillar (cf. Article 207(3) TEC).

We saw that the EP votes mostly by raising hands and only occasionally by full roll call votes. In the Council the voting system is arguably even more implicit (due to the secrecy of meetings prior to the dossiers reach the ministers and the propensity to act by consensus even where qualified majority applies) even if roll calls do occur. However, with the establishment of the register (in 1999), the formal reporting of votes has become better and, unlike the EP, information is now given on who abstained and/or voted against an act, that is, on those acts where votes were explicitly contested. The voting chart attached to the Council minutes or in the monthly

30 For an overview of the historical development of Council voting rules, see Hayes-Renshaw and Wallace (2006: chapter 10).
summaries\textsuperscript{31} of legislative acts show the results of votes, who voted for, against or abstained. As we have seen, in these documents, the member states, the Commission or the Council can attach statements explaining what is in their view the weak part or the problem with the outcome of the vote, but attaching such statements is not obligatory. In addition, the Secretariat publishes a press release from each Council session.\textsuperscript{32} In other words, beyond the information of who voted what, the explanation of votes is voluntary and appear when the member states or Commission want to make a statement. As we have seen, Hagemann and De Clerck-Sachsse (2007) found that after enlargement member states have been using this opportunity more often and is arguably a way of stating disagreement without blocking the vote. Mattila (2004) contends that when the member states do not find it worthwhile – either because the issues are not very controversial and/or they will not get valuable media attention in the national public sphere – they will abstain from reporting dissent. Moreover, ‘In a system that requires agreed decisions to be implemented in domestic law, consensus encourages compliance, and an outvoted government might evade this’ (Hayes-Renshaw and Wallace, 2006: 278; see also Hagemann and De Clerck-Sachsse, 2007: 20).

Another point and similar to the situation in the EP, also Council voting procedures are separated from the debates on the relevant co-decision dossiers (Mattila, 2004: 48; see also Bauer, 2004). In other words, ‘A’ points in cases belonging to a different policy area may be decided by a different Council configuration in order for a decision not to have to wait until the next meeting of the responsible Council configuration.\textsuperscript{33}

In sum, intelligibility of voting is not complete in either of the institutions. The Council is doing well in that it provides a voting chart of how each member state voted, but explanation/justification of the votes is optional. Even if the votes are public in the EP, the

\textsuperscript{31} See, Council (IV).
\textsuperscript{32} This service has been available since 1997 (Hayes-Renshaw and Wallace, 2006: 278)
\textsuperscript{33} What is more, voting results are categorised according Council configuration and not for instance according to policy area, decision-making procedure or voting rule (unanimity or QMV) (Mattila, 2004: 35, 48). For numbers (until 2004) according to member states as well as policy area, see tables 10.3 and 10.4 in Hayes-Renshaw and Wallace (2006: 283-4).
Openness and transparency

Intelligibility of voting suffers seriously as roll-calls are not the mechanism most commonly used. Finally, the Commission’s principle of collegiality effectively precludes the possibility of holding individual Commissioners to account.

In this regard, critics will perhaps argue that the Commission should not be evaluated according to the same openness standards as the EP and the Council as the Commission is ‘(...)an institution that wields its responsibility collectively, control over internal debates and the votes of the individual commissioners would be inappropriate’ (Settembri, 2005: 644). Settembri does, however, not provide us with the reasons for what constitutes appropriate and inappropriate standards for Commissioners’ policy-framing powers. This is most likely due to the indeterminate status pertaining to the kind of organ or institution the Commission is and should be. In other words, is it/should it be conceived as a type or supranational version of ‘government’ or is it/should it be conceived as a supranational executive administration? In national contexts, it is common for both an elected government and the administration/bureaucracy to act with one voice. Hence internal deliberations may be shielded both during and after session thus ending up with a decision (and a justification) everyone is committed to defend (even when s/he is disagreeing). The difference between the national and the European levels is, however, that in the former the governments and bureaucracies form part of larger constitutionally settled accountability and responsibility structures. Hence the roles of governments and bureaucracies are more clearly defined and are subjected to better democratic control. In the EU, however, the Commission is appointed by the member states, but is not set to represent the national, but rather the European interest. In this regard the question arises of whether the Commission is legitimately authorised to speak on behalf of the European interest as long as it is not democratically elected. What is more, the Commission is exercising both political and administrative roles and is in this sense from a conventional perspective a ‘bastard’ institution in upsetting the principle of separation of powers.

The trialogue versus the Conciliation Committee
So far the inter-institutional settings – trialogues and the Conciliation Committee – have only been referred to indirectly. Both the
trialogues and the Conciliation Committee are closed forums, but unlike the former, the transparency rules are stricter with regard to the Conciliation Committee in that information is provided before and after such meetings have taken place. Moreover, the difference between them has very much to do with their different levels of formality. As we have seen, the mandate, rules, time limits, stages, participating institutions, rights and duties regulating the work of the Conciliation Committee are set out in the Treaties and further elaborated in the rules of procedures of the three institutions and the Joint Declarations. They are, in other words, well known and easily accessible.

The trialogues are not mentioned in the Treaties and lived a rather anonymous life until the first Joint Declaration between the institutions on the practical arrangements for the co-decision procedure was introduced in 1999 and then further elaborated in the 2007 revised version. With these declarations we may say that trialogues were semi-formalised and given a set of standard operating procedures pertaining to a commitment by all three institutions to conduct trialogues throughout the procedure. The strange thing, however, is that whilst the Joint Declaration from 2007 underlines a commitment to the principles of transparency, accountability and efficiency (paragraph 3), the whole set-up of trialogues violates the first two principles. The whole purpose with the trialogues is that they are conducted behind closed doors and there is henceforth no drafts or documents available neither prior nor after the meetings and there is obviously no openness of debates. Since trialogues are not official decision-making settings no votes are taken. Trialogues do not further transparency and accountability, only efficiency (see also Farrell and Héritier, 2003b: 9).

Peers (2006) particularly criticises first reading trialogues for their lack of ‘(...)information to the public as to whether first-reading discussions are even taking place, and no information as to the drafts under discussion.’ Peers points to the difference between first and second reading trialogues and conciliation trialogues finding the two latter more legitimate. The reason is that they at least operate under a semi-formal type of framework ‘(...)which entails public knowledge about the state of the procedure and the texts under discussion, as well as a public explanation of those texts (for example, the Council’s statement of reasons for adopting a common position’ (ibid). An
Openness and transparency

(ironic) illustration of the problem of transparency pertains to the treatment of Regulation 1049/2001 which covers the substantiation of Article 255 (TEC) on public access to documents. In the open letter directed to the EP, the NGOs particularly criticised the extensive use of trialogues. They argued that the Regulation:

(... has been adopted as a result of ‘trilogue’ negotiations with the Council (and the European Commission) which have taken place behind closed doors for over five months. At no stage has a full debate in the parliament taken place on the various substantive issues proposed. We believe that the procedure followed is not only inappropriate given the nature of the topic in question, citizens access to information, but also substantially weakens the nature and purpose of the co-decision procedure as such and parliament’s function in that respect.34

In other words, the problem is that outside actors do not know which issues are on (and which do not enter) the negotiating table in first reading trialogues. Moreover,

If the two institutions wish to conclude at first reading, without a common position being adopted, Council has to be able to convince Parliament to adopt in plenary amendments that it (Council) can accept. In other words, it has to intervene in the process by which Parliament determines its first reading, without itself having established its position, and thus both institutions are negotiating without either having finalized a point of departure for negotiation (Raunio and Shackleton, 2003: 178).

Even if closed, the meetings in the Conciliation Committee is in this sense a very different matter as ‘(...)the context of negotiations is very clearly defined: Parliament has adopted amendments to the common position by absolute majority (...) and the Council is obliged to respond to the amendments, accepting them, rejecting them or proposing a compromise (Raunio and Shackleton, 2003: 178). We also

34 See Statewatch (2001a). Moreover, right after an agreement was reached, Danish MEP Jens Peter Bonde approached the Council for the obtaining the minutes of the negotiations and concurrent drafts of the Regulation. The Council rejected Bonde’s request and could not even provide him with the number and dates of informal meetings, see European Voice, 10 May 2001.
know when the meetings are held, who the participants are and there are documents available after sessions are completed.\textsuperscript{35} In sum, the above conditions under which the Conciliation Committee works, make the secrecy of its meetings (more) legitimate as there is a certain ex post transparency (and thus also accountability) revealing what has been debated once decisions have been reached. What is more, as discussed in chapter 5, the Conciliation Committee is set up as a final bargaining setting when the preceding stages have been exhausted, but when the parties are still motivated to conciliate. Hence, the various positions are by then known and familiar.

The same cannot be said about the trialogues. Trialogues take place at all stages of the procedure, but the meetings are not publicly announced. There are no meeting records, hence who the participants are can only be known indirectly in the sense that it is usually the same actors (i.e. not persons, but by virtue of position: Coreper, EP rapporteur, chair and Commission official). There are also no documents available from these meetings neither during nor after the meetings are held. Hence for the public, the discussions are completely sealed off.

**Conclusion**

In this chapter, I have assessed the co-decision procedure against four transparency indicators. The first is a minimum and low-threshold indicator, namely that the policy proposal should be publicly available prior to final decision-taking. Even if the proposal is not generally available during the Commission’s preparatory phase, it is published on the EUR-Lex service the moment the official co-decision procedure starts and the proposal is formally launched. Hence, co-decision had no problem complying with this requirement.

The second indicator is more demanding, but is in principle nevertheless quite easy to meet in the age of internet and computer

\textsuperscript{35} In addition, the 2007 Joint Declaration states that the working documents shall be publicly available from the institutions’ registers after a dossier is concluded, (see, European Parliament, Council, Commission, (2007), rule 37). It is also possible to follow the work in the conciliation committee on the internet as the EP provides a separate link with information about what conciliation under co-decision is, it provides a calendar of upcoming conciliation meetings, short summaries of ongoing and concluded procedures as well as meetings documents (see, EP (III)). There are no such calendars of trialogue meetings.
facilities. A good register is characterised by clarity, user-friendliness and also that it provides an exhaustive impression, i.e. that this is the source where all the relevant documents can be found (cf. Curtin, 2000, 2003). Ideally, there should be a centrally organised register instead of every institutional actor providing their own register, but the latter is also satisfactory. As we have seen, there is not one single and centralised register covering all three institutions where all the documents can be accessed. Each institution has its own system both concerning how documents are archived and the way they are presented. Hence the overall framework for accessing documents through the registers is quite complex and can be confusing and time-consuming for citizens to find their way around. From a democratic point of view, a central register would have made it easier for citizens to get an overview of Union documents.

The lack of a centralised register notwithstanding, the institutions’ registers and the Prelex and OEIL services together offer a good intake to the publicly available co-decision documents. The good news, then, is that in comparison to for instance documents concerning the EU’s foreign and security policy (see Stie, 2008), access to co-decision documents is quite good. More specifically, whereas the availability of EP documents ‘scores’ well, the lack of access to working parties and Coreper documents in the Council is not satisfactory given that so many decisions are actually taken here. In addition, it is difficult to get an exhaustive overview of the relevant documents during the Commission preparatory phase. Overall, access to documents under co-decision is not fully satisfactory.

36 This is also a shortcoming in the Regulation, 1049/2001 itself in that it does not commit the institutions to establish such a register (see, European Parliament and Council of the European Union, 2001). As mentioned above, the Regulation is under re-consideration and already in 2006, the EP urged the Commission to table a proposal to improve Regulation 1049/2001 (see EP, 2006). Among the suggestions is a common access point for preparatory documents, connecting the institutions’ registers in a better way, agreement on common rules for archiving documents and making it easier to follow decision-making processes. The EP has upheld its position of ‘(...)a single EU portal to ensure access to documents(...)’ in its first reading report, see suggested amendment to Article 12(4), in EP (2009). Steve Peers writing for Statewatch does not believe that the Commission’s suggestion represents an improvement and in certain areas rather to the contrary (see several of his articles at Statewatch’s Observatory on the Regulation on access to documents: 2008-2009, for internet link, see bibliography).
The third indicator concerned the openness of debates. In short, the Commission and the Council fail to meet this demand whereas the EP succeeds even if the transparency of committee meetings could have been better. The meetings of the Commission are bound by the principle of confidentiality and thus explain the secrecy of meetings. The Council under co-decision, on the other hand, are more open than under any other procedural arrangements. When it fails to meet the demand of transparency of debates it is because the major chunk of legislative discussions are not conducted in open ministerial meetings, but in the lower echelons of the Council hierarchy where the public is still excluded. In addition, the Council ministerial meetings are increasingly accompanied by informal meetings conducted outside the public eye. Again, there is a mixed result with regard to whether the co-decision procedure meets the requirements of transparency of debates.

The fourth and final indicator looked at the intelligibility of voting. Whereas the Commission’s principle of collegiality commits the Commissioners to unanimity and thus renders voting in this institution uninteresting, the Council provides a very useful voting chart attached to the Common Position. Here it is possible to find out who voted for, against and who abstained. There is, however, no duty to state the reasons behind individual votes and Council member states arguably only decide to attach a statement when political gains can be achieved. This reduces somewhat the intelligibility of votes in the Council, but this is far from detrimental and since the chart provides easy access to who voted what the Council clearly passes the formal requirement of intelligibility of voting. Also the EP meets this requirement although with reservations due to the difficulty of tracking down who voted what. Had roll-call voting been the default procedure instead of just reporting the number of for, against and abstained votes as is the result of show of hands and/or electronic voting, there would have been full intelligibility of voting in Parliament. However, as the discussions are open in the EP it is not impossible to know who voted what, but it is very cumbersome to keep track of what every MEP voted individually.

Finally, the openness situation in the trialogues and Conciliation Committee was also evaluated. Whereas the former fails in regard to all openness requirements (no access to documents or debates, no
information of meetings or participants), the latter does not. The reason is that even if the Conciliation Committee is closed during sessions the working documents are available after the meetings are over and this makes it possible for citizens to scrutinise the proceedings ex post. Moreover, the Conciliation Committee is only convened towards the very end of the process when the positions are well-known and where no agreement has yet been reached, but where there is still a possibility for this to happen. There is also information about who participants are and when the meetings are going to be held. Hence we may say that whereas trialogues are not, the Conciliation Committee provides an example of when non-public discussions are legitimated from a democratic point of view (cf. Warren, 2007: 282).
Chapter 8

Neutralisation of asymmetrical power relations

Introduction
One of the main tasks of a democratic polity is to provide institutional arrangements that are able to ideally transform, but in practice at least to some extent neutralise and/or alter the parameters of power politics, social inequalities and strategic action. As mentioned earlier, here, I distinguish between two broad categories of neutralisation mechanisms. The first covers mechanisms that are internal to the procedure and detectable in the procedural set-up, i.e. ex ante mechanisms. The second category covers complaint procedures that are external mechanisms kicking in after the decision-making process is over, i.e. ex post accountability mechanisms. In this chapter, I look at two ex ante mechanisms: (1) Intelligibility of procedure and (2) separation of powers. In addition, I investigate two ex post mechanisms: (1) judicial review and (2) Ombudsman.
Intelligibility of procedure

Indicator: There is a precise description of the rules governing co-decision-making. The Treaties contain information about the main actors and what powers, rights and duties they have. In addition, there is information about the decision-making rule (unanimity/majority vote) and the sequencing of policy stages. The institutions’ rules of procedure and/or inter-institutional agreements are in line with Treaty specifications.

There is power in knowing the rules of the game, hence to better the information asymmetry between those involved in decision-making and those affected by it, clear and unambiguous rules – or what figures under ‘intelligibility of procedure’ in this thesis – contribute to neutralise such inequalities. This is always easier when the rules are written down, when the procedural steps are predictable and consistent and when informal practices do not deviate too much from the formal set-up. Formal rules are, however, usually not precise enough to avoid the development of informal practices, but the extent to which the formal provisions are precisely elaborated and written down can at least contribute to ensure that the informal practices are not totally incompatible with the intention of the former. Moreover, this can also empower those affected and/or the media in the sense that if informal practices clearly deviate from formal provisions they can (try to) hold decision-makers to account by pointing out the discrepancy and claim justification and/or revision of the rules.

Precise and sufficient description of co-decision rules?
The co-decision procedure is described in Article 251 (TEC). It is, however, not easy to find one’s way around the Treaties and the co-decision procedure is not even named as such, but rather described as ‘Where reference is made in this Treaty to this Article for the adoption of an act, the following procedure shall apply’ (Article 251(1)). In other words, for Union citizens to get an overview of the basic content of the procedure, they need to know which article to look for in the Treaties. As mentioned, the reason why the co-decision procedure is constitutionally incognito is arguably due to opposition from the British during the Maastricht negotiations (cf. Shackleton, 2000). The term is, however, no longer disputed in the sense that it is used everywhere else but in the Treaties. Formal documents originating from the official EU institutions often use the term ‘co-decision’ procedure. As we have seen, it is also quite easy to find a
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Reference/link to the legal basis (Article 251) on the websites of the EU institutions.

Article 251 which lays down the basic rules of the procedure informs that the institutional actors eligible for participation are the Commission, the EP and the Council. It indicates that the Commission has the right to initiate policy proposals and otherwise function as facilitator whereas the EP and the Council serve as co-legislators both with veto power on the final outcome. Moreover, it provides detailed information about decision-making rules and time limits in the EP and the Council under the second and third readings (first reading has no time limits) and it describes the basic format of the Conciliation Committee (purpose, participants, voting rules etc.). In addition, it states how a proposal can be adopted after each reading.

It is, however, not so straightforward to get an understanding of when – in which policy areas – the co-decision procedure applies. This information is scattered around in the Treaties. To find out which policy areas are covered by the co-decision procedure, an easy way is to consult the EU website. In addition, different decision-making rules apply both with regard to the Council as well as the EP. The Council usually decides (at least formally) by QMV although unanimity under certain legal bases (such as social security for migrant workers etc.) is required. In cases where the Council sides with the EP, but where the Commission is in disagreement, the Council can only uphold the EP amendments if it is able to drum up unanimity. With regard to the EP, simple majority (both in committee and plenary) is required for the adoption of the first reading Opinion as well as on the Joint Text in the third reading whereas absolute majority is needed in the second reading.

The institutions involved in the co-decision procedure have themselves done quite a lot to ease the apparent obstacle of getting acquainted with the formalities of the co-decision procedure on their respective websites. From the point of view of this indicator, all three

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1 Cf. the overview in chapter 4. See also Hix (2005: 415-21) where he provides an easy and comprehensible overview of all the decision-making procedures in the EU. More precisely, Hix presents a table indicating treaty title; the relevant policy issue; treaty article; which institution has the right of initiative; voting rules in the Council as well as the degree of Parliament involvement.
institutions have provided satisfactory information on how the co-
decision procedure works through their own ‘step-by-step’
introductions to co-decision.\(^2\) In addition to the institutions’ rules of
procedure, it can also be argued that these documents together offer
rather detailed and helpful information on the formalities and
workings of the procedure and in comparison to the other EU
decision-making procedures, co-decision is thoroughly explained and
well-documented.

It may also be argued that Article 251 is fairly comprehensible and
thus describes the different stages in the co-decision process
satisfactorily, i.e. the possibility for three readings, potential recourse
to the Conciliation Committee, which actors are formally involved,
voting procedures etc. Maurer (2003: 244) also points out that the
procedure is not outstandingly difficult as it ‘(...)is as cumbersome as
the joint decision between the German Bundestag and the Bundesrat
or between the French National Assembly and the Senate(...)’
(Maurer, 2003: 244). In other words, co-decision is not necessarily
more complicated than many national decision-making methods. It
has, however, been argued that co-decision ‘(...)is a complex
procedure whose unwritten rules and behavioural norms have
developed, are still developing and are not easy to quickly grasp. If
all EU negotiating is a dark mystery, legislative co-decision is a
blacker shade of dark’ (Bostock, 2002: 222; see also Häge and
Kaeding, 2007; Fouilleux et al., 2005). The informal rules and practices
mentioned in the citation first and foremost allude to the trialogues as
well as the aforementioned grand coalition trend between EPP-ED
and PES in the Parliament (Andeweg, 2007: 108). The problem is that
these rules and practices tend to depoliticise co-decision politics as
both aspects contribute to hide political salient discussions outside
the public radar.

The co-decision procedure is one of many decision-making
procedures in the EU and it is no news that most people find the
Union system opaque and remote in the sense that it is hard to
orientate oneself and keep track of the different procedures to be
applied at different stages and in different policy sectors. The

\(^2\) See Commission (VIII); Council (VIII); EP (2007b). In addition, the EP’s Conciliation
and Codecision Secretariat has a link on the EP’s website for information about
conciliation processes, see, EP (XI).
accessibility and comprehensibility of the co-decision procedure naturally suffers from this, but over the years it has arguably become the best-known decision-making procedure in the EU. What is more, it was suggested as the ‘ordinary legislative procedure’ in the constitutional treaty – a clause that survived the IGC negotiations of the Lisbon Treaty. The number and variety of EU decision-making procedures have been a difficult issue on the political agenda for a long time and there have been many efforts to reduce and simplify the number in order to enhance both the transparency and the efficiency of the system.

Correspondence between Treaties versus Joint Declarations and rules of procedure
The trialogues are, however, not described in the Treaties, but rather in the two inter-institutional agreements specifying the goals and rules regulating them. Whereas the first Joint Declaration is more focused on the conciliation process, the second agreement is devoted to trialogues in the first reading. We may say that these two agreements contribute to semi-formalise the trialogues and thus somewhat alter the character of the co-decision procedure as it is described in the Treaties. As we have seen, the formal design is sequential or more accurately described as a relay between the institutions, but is in reality and as described in the Joint Declarations now more of an interlinked and continuous character where a limited number of participants from the EP and the Council are in constant contact with each other throughout the procedure (Shackleton and Raunio, 2003: 173; Farrell and Héritier, 2004). On this background it can be argued that the actual practice of co-decision as well as the Joint Declarations deviate quite substantially from the Treaty prescriptions and consequently obscure the fairly clear formal set-up of the procedure. In fact, Farrell and Héritier (2003b) argue that the trialogues have led to an ‘invisible transformation’ of the co-decision procedure. What is more, Settembri (2007: 32) even goes as far as arguing that the inter-institutional relations have been perverted: ‘The high frequency of codecision files concluded at 1st reading, the fact that emissaries of Council and Parliament get together to broker an agreement since the outset of the procedure, the practice of adopting package deals amalgamating amendments from both institutions suggest that a new type of procedure is surfacing.’

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In sum, the intelligibility of the formal co-decision procedure is generally quite good, but the discrepancy between Treaty provisions, on the one hand, and inter-institutional agreements and actual practice, on the other, obviously weaken the co-decision procedure’s fulfilment of this indicator as the extended use of trialogues also exacerbates the complexity of the procedure and thus its comprehensibility for the general public (I come back to this more closely in the next chapter).

**Separation of powers**

Indicator: The institutional actor presenting a policy proposal is not at the same time the decision-maker. There is a clear *legal division* between executive, legislative and judicial powers.

**Policy presenter versus decision-maker**

The rules governing co-decision-making distinguish quite clearly that it is the Commission that has the formal agenda-setting power in holding the right to initiate and formulate a policy proposal (Article 251(2) TEC) and the EP and Council that legislate (Article 251). This does, however, not mean that all proposals originate from the Commission. According to its own estimations referred in Lord (2004: 156), only 10 per cent of first pillar acts stem from the Commission itself. The rest originates from various sources: duty to honour international commitments, improvements to keep up with technological and social change, the European Council, the Council of Ministers, the member states, the EP, the ECJ, to fulfil Treaty obligations and/or follow up existing legislation (Lord, 2004: 156, Nugent, 2001: 236-7, 240-1). This means that the Commission is not initiating proposals in splendid isolation, but listens and is responsive to the views of the other EU institutions, particularly the European Council, the Council and the EP. In contrast to the European Council, the Council and the EP have a treaty-recognised right to request the initiation of legislation (cf. Article 208 and Article 192(2) TEC respectively). In addition, the EP also uses ‘own-initiative’ reports to address Commission to initiate new legislation (Corbett et al., 2007: 239). This mechanism has been used for this purpose more frequently the last few years (Hagemann, 2009: 15). However, neither the EP nor

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4 See also Nugent (2001: 236-7); Chalmers et al. (2006: 96).
the Council ‘(...)have the formal power to specify the contents of the proposals or to lay down a timetable for their submission(...)’ (Nugent, 2001: 239).5

Hence, the responsiveness towards other institutions and actors notwithstanding, the Commission possesses an important power in having the right to decide when a proposal should be launched and what the initial draft should look like, that is, ‘(...)the Commission has agenda-setting powers to structure – and restrict – the choices available to others’ (Lord, 2004: 157).6 What is more, the EP and the Council can only act on legislative issues if there is a formal Commission proposal. In sum, it is only the Commission that can present policy proposals. But what about its powers during the procedure?

Formally, the Commission has four important powers. The first is the monopoly to initiate policy proposals as mentioned above. The second and third are the broker and gate-keeping roles and the fourth is the right to withdraw proposals. Whereas the Commission has a strong position in the preparatory phase, its position changes once a dossier is officially launched. Then the Council and the EP become the major institutional actors. However, the Commission can exert quite a lot of influence by being a facilitator and broker between the EP and the Council. Throughout the procedure, the Commission – as the only institution – attends all the central meetings in the EP, the Council as well as the trialogues and the Conciliation Committee. Here it participates in discussions and presents revised solutions and modified proposals (Nugent, 2001: 257, 261).7 In fact, the Commission’s role can be very important for reaching agreement

5 It should be noted, however, that the European Council has a unique position in the Union and has – despite lacking formal Treaty-regulated discretion – the capacity to initiate and move politics in a desired direction due to its membership consisting of the heads of state and government. Because of the political standing of the European Council, the Commission really has no choice but to follow its instructions (Nugent, 2001: 239).

6 See also Nugent (2001: 261); Burns (2004); Rasmussen (2003); Mattila (2004: 32).

7 It is also indicated that the Commission is more influential when the co-decision dossiers are of a more technical nature: ‘Moreover, the Socrates cases cannot be regarded as particularly easy for the Commission to influence compared to more technical policy areas where its high level of expertise in relation to the Parliament and the Council is typically a greater strategic advantage’ (Rasmussen, 2003: 2; see also Burns, 2004).
between the EP and the Council (Farrell and Héritier, 2003b: 7; see also Lord, 2004: 133).

In addition, the Commission has a gate-keeping power in the sense that if it does not accept EP’s amendments, unanimity instead of qualified majority is needed in the Council. This is perhaps more accurately described as a power of delay since the EP and the Council can adopt the EP’s proposal in the Conciliation Committee if the Council can agree unanimously on the EP’s second reading amendments and thus sideline the Commission’s rejection (see Høyland, 2006: 32). Chalmers et al. (2006: 153) even argue that ‘(...)there is an 88 per cent probability that a Parliament amendment will be rejected by the Council if the Commission rejects it, whilst there is an 83 per cent probability that it will be accepted if the Commission approves it.’

The Commission is also free to withdraw a proposal far into the legislative process. There is, however, disagreement with regard to when the Commission’s right to withdrawal expires: ‘While the Commission maintains its right to withdraw a proposal at any stage, the Parliament and the Council based on Article 251(2) EC, consider that as soon as the Council has adopted a common position the latter – and not the commission proposal anymore – forms the basis for the further procedure. Consequently, the Commission cannot withdraw a text, of which it has not the ’ownership’ anymore.’ 8 It is, however, at least the case that the Commission’s position weakens towards the end of the procedure and that once dossiers reach the Conciliation Committee it has no longer the right to withdraw a proposal.9

Altogether, then, the Commission’s influence is significant, but despite the above powers, in the end, it is the EP and the Council that together decide the fate of co-decision dossiers as only these two institutions can decide to adopt a dossier or to veto it.10 Hence, the

9 See comment by Navarro who was Spanish Deputy Permanent Representative in Coreper (I), see EP (2002).
10 In her study, Burns (2004: 2) finds that in comparison to other decision-making procedures, the ‘(...)Commission’s formal and informal influence has declined under this [i.e. co-decision] legislative procedure. However, (...) many of the theoretical claims made about the Commission’s relative influence overstate its weakness as they overlook the institution’s agenda-setting and gate-keeping roles.”
provisions regulating the co-decision procedure respect the separation between policy-initiator and decision-taker.

**Legal distinction between executive, legislative and judicial powers?**

On the basis of the above, can it also be argued that the co-decision provisions are compatible with a clear legal division between the executive, legislative and judicial powers? We have already concluded that the co-decision provisions ensure separation between the executive and the legislative powers. What about the last chain in the separation of powers formula? In the first pillar, the ECJ has exclusive jurisdiction and, more specifically concerning co-decision acts, Article 229 (TEC) bestows upon the ECJ ‘(...) unlimited jurisdiction with regard to penalties provided for in such regulations.’ Hence the ECJ has the right to review acts adopted under co-decision and its decisions are legally binding.\(^{11}\) Formally speaking, there is a clear legal division between the executive, legislative and judicial branches under co-decision-making. But is this more of a checks and balances system rather than a separation of powers in the democratic meaning of the word?

The principle of legality and the separation powers ensure the democratic programming of administration – and not programming by experts or special interests – and bar against executive dominance and the self-acquisition of power by bureaucratic bodies. In a democratic perspective, governance is conditional on government as it is only the ‘shadow’ of law that governance bodies can, on the basis of delegation or audit democracy, legitimately operate (Eriksen, 2009: 174).

Whereas there are other policy areas in the EU where the problem of executive dominance is much more pressing and where the principle of separation of powers is clearly violated such as in the second pillar (see Stie, 2008), the above citation points to the difference between a democratic reading of the principle of separation of powers and the less demanding notion of a checks and balances system where influential actors balance each others’ powers thus preventing that none of them become strong enough to completely control the others.

\(^{11}\) More on how the Court can exert this right under the next indicator.
Although there are many aspects of this problematic, I shall here limit myself to the recurring point that has a more direct impact on co-decision, namely the heavy involvement of the unelected officials/experts.

We have already discussed the lack of respect for the normative hierarchy between representatives of affected and competent parties under the criterion of inclusion. Another aspect of this debate is the fact that many of the same national experts sitting in the Commission expert committees also appear in the Council working groups as well as in the comitology committees (cf. Rhinard, 2002: 196; Egeberg et al., 2006). Knowing how influential competent parties are in the overall adoption of co-decision dossiers, this practice is questionable with regard to respecting the principle of separation of powers as they act both as executives and legislators at the same time. This ‘recycling system’ of national experts in the lower echelons of the Commission and the Council contributes to blur the relationship between the executive and the legislative branch to the detriment of a democratic content of the principle of separation of powers. What is more, the extent to which both the preparatory and the formal co-decision processes are largely dominated by unelected officials (national experts as well as Council and Commission officials) only exacerbates the problem: The accountability that could potentially have been gained by the visibility of a responsible Commissioner and/or minister is in this way also not taken advantage of (cf. Cini, 2006: 16). In other words, when it is hard to find out who is doing what it is also hard to hold decision-makers to account. This is, however, not the main democratic problem.

\[^{12}\text{E.g. an assessment of how the wider EU context affects the power relations between the institutional actors, not least concerning the Council-EP relationship as the former is by far the more powerful actor seen from a more overall Union perspective. In addition, the Commission is not properly accountable to the EP and an appraisal of the institutional set-up pointing at the lack of a government-opposition dynamic between the Commission and the EP could also have been included (see Schmitt, 2005: 698; Føllesdal and Hix, 2006: 536). A more thorough analysis should also have included the impact of the comitology system where the member states – unlike the EP (even if it now has more substantial scrutiny rights through the 2006 revision of the Comitology Decision, (Council, 2006c) – get another chance to influence and shape co-decision-making through the implementation procedure (see e.g. Joerges and Neyer, 1997; Joerges and Vos, 1999; Vos, 2009; Menéndez, 2009; Curtin, 2007a). For a discussion on the accountability of the EU system in general, see also Lord (2004: chapters 6-8).}\]
The main democratic problem pertains to the failure of the system to (after the preparatory phase when it is common that unelected officials contribute to formulation of a dossier) to sufficiently subject a co-decision dossier to a democratic scrutiny and vindication at the level of elected representatives before they reach the implementation phase (where it is also common for unelected officials to have a significant role). More precisely, when the legislative process is not properly moved up to the political level of the ministers in the Council, but primarily kept at the non-elected working group and Coreper levels, this at least raises the question of to what extent the conditions for democratic control is pulverised as long as the public has no access to these forums. The democratic problem is consequently that the work of unelected officials goes largely unchecked. Whereas it can be argued that there is to some extent a political control with experts/officials by the Commissioners and the ministers, this is not coextensive with democratic control. As argued above, democratic accountability is exercised in openness where the lines of responsibility can be easily grasped and identified by the public. The organisation of executive and legislative tasks is in this manner not in accordance with a democratic reading of the principle of separation of powers even if it may be argued that the co-decision provisions comply with a formal legal distinction.

**Judicial review**

Indicator: Affected Union citizens and other legal subjects can appeal to get their complaint reviewed on which basis the Court can scrutinise (and possibly sanction) not only adherence to procedural rules, but also the content of co-decision-making.

The first ex post accountability mechanism is to consider the possibility for judicial review of acts resulting from the co-decision procedure. To determine whether the judiciary has the right to scrutinise co-decision acts, involves considering on behalf of whom this can be done. More precisely, the first aspect to look at covers the issue of who (persons/actors) can appeal. The second aspect to consider pertains to how (what kind of procedure) judicial scrutiny can be conducted. The third and final aspect addresses when (what kind of cases/situations) appeals can be filed.
The right to file an action for annulment of directives, regulations and decisions (cf. Article 249 TEC), that is, the type of acts resulting from co-decision-making, is protected in Article 230 (TEC):

The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties.
It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.
The Court of Justice shall have jurisdiction under the same conditions in actions brought by the Court of Auditors and by the ECB for the purpose of protecting their prerogatives.
Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.
The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

In other words, should the Court find that there are grounds for annulment, it can rule on the basis of Article 230 (TEC) and declare the decision void.

Firstly, co-decision is a first pillar legislative procedure and legal acts resulting from decision-making within this framework are – as the Treaty article indicates – under the jurisdiction of the European Court of Justice (the Court of First Instance) (cf. also Article 46(a) TEU). With regard to who can appeal, ‘(...)private parties seeking judicial review of behaviour of the EU institutions must bring their action before the Court of First Instance. However, if a member state or EU
institution is seeking judicial review of such behaviour, it brings the action before the Court of Justice’ (Chalmers et al., 2006: 122, my emphases). In other words, both natural\(^{13}\) and legal persons can seek judicial review, that is, both affected and competent parties can file a complaint, but as we shall see, the complaints of EU institutions stand a better chance at being reviewed than the ones filed by individuals.

Secondly, judicial review of co-decision acts can enter the legal system from two different channels. The first is the supranational channel where a complaint is filed directly to the ECJ(/CFI) and the other follows a national route and enters the European level indirectly through Article 234 (TEC) and the preliminary reference procedure where plaintiffs first appeal to a national court which then refers the matter to the ECJ for a preliminary ruling.\(^{14}\) In fact, the majority of Court rulings stems from the latter (Hix, 2005: 120, 128-131).\(^{15}\)

Thirdly, reasons for review are listed in the second paragraph of Article 230 and these constitute the situations and cases when appeals will be considered. These are lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to its application, or misuse of powers. According to Chalmers et al. (2006: 436), there are five general principles that constitute infringement of the above grounds: fundamental rights, proportionality, legal certainty, non-

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\(^{13}\) The possibility for individual citizens to file a complaint at the European level – the consequence of the principle /doctrine of direct effect – is one of the important features distinguishing the EU from intergovernmental organisations. Cf. also Hix (2005: 122-3).

\(^{14}\) ”The Court of Justice shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community and of the ECB; (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide. Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.”

\(^{15}\) Cf. the principles of direct effect and supremacy which constitute the immediate legal foundation for the importance of the preliminary reference procedure (Hix, 2005: 128).
discrimination and transparency. Consequently, the ECJ has the right not only to consider procedural-, but also content specific complaints.

It should, however, be noted that it can be hard for ordinary citizens to actually get one’s case accepted for review with the Court. According to Chalmers et al. (2006: 416), the application of Article 230 first and foremost favours the member states, Commission, EP and Council. These institutions are ‘entitled’ to bring cases before the Court. After them, the European Court of Auditors and the European Central Bank are what they called ‘semi-privileged’ applicants ‘(...)who are entitled to bring action but only where they do so ‘for the purpose of protecting their prerogatives’’ (ibid; see also Costa, 2003: 744). Finally there is ‘(...)everyone else: ordinary people and corporations may bring actions under Article 230 only where they have a ‘direct and individual concern’ in the matter’ where the Treaty formulation ‘direct and individual concern’ has been interpreted restrictively thus making it hard for ordinary citizens to get their case reviewed by the Court (ibid, my emphasis). Moreover, it is obviously more difficult and costly for individual citizens than for firms and corporations to establish that they have been directly and individually affected by a Community legal act (Costa, 2003). This is also underlined by the fact that judicial review is usually a time-consuming process and plaintiffs must be patient as ‘(...)the average length of proceedings being 21 months for direct actions and 18 months for references for preliminary rulings’ (Hix, 2005: 119).

The Court’s interpretation is, however, contested: ‘The problem insofar as there is one, is not with the words ‘direct and individual concern’, but with the restrictive interpretation of that the Court of Justice has given to those words. Changing that is not something that needs to be left to those with authority to rewrite the Treaties, but is the Court’s own responsibility’ (Chalmers et al.: 433). From a democratic point of view, it is, of course, problematic that it is so much easier for institutional actors to get their case tried before the Court than it is for individuals.


17 Chalmers et al. (2006: 433) do, however, note that the Constitutional Treaty would have improved the situation for individuals as Article III-365(4) (which would have replaced Article 230) stated that ‘Any natural or legal person may (...) institute
All in all, both natural and legal persons have the formal right to get their cases tried before the Courts even if there are some difficulties concerning the priority of institutions over Union citizens as well as the fact that the proceedings are time-consuming and can be expensive and thus reduces the de facto quality of the right to judicial review. However, the possibility of judicial review is real and can thus be seen as functioning as a formal accountability relation between affected parties and the institutions which can contribute to discipline the way they behave and decide.

**The European Ombudsman: ‘between parliamentary control and the rule of law’**

Indicator: Affected Union citizens or other legal subjects can appeal to get their complaint reviewed on which basis the Ombudsman has a mandate to scrutinise (and possibly ‘sanction’) adherence to procedural rules and can also consider the content of co-decision outcomes.

In contrast to the judiciary, the ombudsman is a soft law mechanism. The European Ombudsman (EO) was first introduced in the Maastricht Treaty and is appointed by the EP (following the Parliament’s electoral cycle).\(^{19}\) His task is to work against maladministration in the Union institutions and to be a mediator between citizens and EU authorities. As in the case of judicial review, the strength of the EO as an ex post accountability mechanism will be assessed with regard to the same three-fold aspects of who (persons/actors) can appeal, when (what kind of cases/situations) and how (what kind of procedure).

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proceedings against an act addressed to that person or which is of direct and individual concern to him or her, and against a regulatory act which is of direct concern to him or her and does not entail implementing measures.” When comparing the Constitutional Treaty to the Lisbon Treaty, this formulation has survived and, if ratified, Article 263 of the new Treaty will consequently make it easier for individuals filing a case for annulment to get it reviewed and thus to some extent level out the playing field between institutions and individuals.

\(^{18}\) Title borrowed from Magnette (2003).

\(^{19}\) The Ombudsman is appointed (by majority vote) by the EP for a five years term which coincides with the Parliament’s own term. The EO is under the direct authority of the Parliament, but shall conduct his work independently of instructions or pressure from others, including the EP (but of course within the parameters of his legally defined duties). The ECJ can dismiss the EO upon request from the Parliament if the EO does not fulfil his duties or in situations of misconduct. The first Ombudsman took office in 1995.
The legal basis designating the powers and tasks of the Ombudsman are defined in Article 195 (TEC):20

(1) The European Parliament shall appoint an Ombudsman empowered to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role. In accordance with his duties, the Ombudsman shall conduct inquiries for which he finds grounds, either on his own initiative or on the basis of complaints submitted to him direct or through a Member of the European Parliament, except where the alleged facts are or have been the subject of legal proceedings. Where the Ombudsman establishes an instance of maladministration, he shall refer the matter to the institution concerned, which shall have a period of three months in which to inform him of its views. The Ombudsman shall then forward a report to the European Parliament and the institution concerned. The person lodging the complaint shall be informed of the outcome of such inquiries. The Ombudsman shall submit an annual report to the European Parliament on the outcome of his inquiries.

(2) The Ombudsman shall be appointed after each election of the European Parliament for the duration of its term of office. The Ombudsman shall be eligible for reappointment. The Ombudsman may be dismissed by the Court of Justice at the request of the European Parliament if he no longer fulfils the conditions required for the performance of his duties or if he is guilty of serious misconduct.

(3) The Ombudsman shall be completely independent in the performance of his duties. In the performance of those duties he shall neither seek nor take instructions from any body. The Ombudsman may not, during his term of office, engage in any other occupation, whether gainful or not.

(4) The European Parliament shall, after seeking an opinion from the Commission and with the approval of the Council acting by a qualified majority, lay down the regulations and general conditions governing the performance of the Ombudsman's duties.

Firstly and as we can see, the right to lodge a complaint with the Ombudsman is not exclusive for Union citizens, but also applies for any other ‘natural or legal person residing or having its registered office in a member state’. Also business, associations and others who are registered in one of the EU’s member states can file a complaint. For Union citizens, however, the right is further protected in Article 21 (TEC). This right is also recognised in the Charter of Fundamental Rights (Article 43). In other words, the Ombudsman institution is accessible both for competent and affected parties.

Secondly, when receiving a complaint, the Ombudsman conducts an investigation of whether the matter is eligible for consideration as a case of maladministration. His main task, then, is to deal with instances of ‘maladministration’ – a word that is not further specified in the Treaties and which consequently has been up to the interpretation of the Ombudsman institution itself (Chalmers et al., 2006: 337). Over the years, the Ombudsman has defined maladministration as administrative irregularities, unfairness, discrimination, abuse of power, failure to reply, refusal of information and unnecessary delay.21 With regard to co-decision, it is mainly instances of access to information/documents that are relevant. One of the main goals the first Ombudsman took upon himself was to establish a written Code of good administrative conduct.22 This was achieved in 2001. The introduction of the Code implied a departure from the rather legalistic definition of maladministration in the initial years (1995-7) of the Ombudsman’s office also to cover non-legal aspects (Chalmers et al., 2006: 339-41).

Thirdly and in contrast to the Courts, to file a complaint with the Ombudsman is a much simpler and cheaper affair. Not only is the

21 See, European Ombudsman (I).
22 The first Ombudsman was the former Finnish Ombudsman Jacob Söderman. He retired in 2003 and the current Ombudsman, Nikiforos Diamandouros, then took over. Also Diamandouros has a prior Ombudsman experience as he held the Greek equivalent up until becoming the European Ombudsman.
service free of charge, it is also fast and flexible in comparison with a court procedure which can drag out. The complaint form can be accessed and filled out electronically on the Ombudsman’s website or be sent via mail or fax in all of the official EU languages. It should be noted, however, that the majority of the complaints received by the Ombudsman falls beyond his ‘jurisdiction’ and are therefore rejected. The Ombudsman can only investigate and assess the decisions and activities of the EU institutions (with the exception of the ECJ and CFI when acting in their judicial role), hereunder decision-making resulting from co-decision. In addition, he cannot investigate instances that are already dealt with by the Court.

However, once a complaint falls within his ‘jurisdiction’, the EO informs the given institution about the matter. If the institution does not respond to or resolve the issue, the Ombudsman tries to find a ‘friendly solution’. If this is successful, the case is closed by a ‘reasoned decision’. If, however, a ‘friendly solution’ is not successful, he can either make a ‘reasoned decision’ entailing a ‘critical remark’ or proceed to make ‘draft recommendations’, and finally, if the institution does not accept the ‘draft recommendations’, he can file a special report to the EP which is made public. This is the strongest ‘weapon’ or ‘sanction’ the Ombudsman has at his disposal (cf. Article 195, TEC). In addition and in contrast to the Court which only review cases when complaints are being filed by other actors, the Ombudsman is not constrained by such regulations and can on his own initiative start investigations of maladministration.

There are obvious limitations to the EO’s ‘sanctioning’ mechanisms as they are not legally binding or judicially enforceable. However, the lack of legal power has also proven to be a strength in the sense that the Ombudsman can allow himself to be more direct in his recommendations. Moreover, the source to his success lies both in the working method as well as the legitimacy of his position and the validity and general endorsement of the principles he is defending:

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23 See, European Ombudsman (II).
24 Consequently, decisions made by national, regional or local authorities (including national courts and ombudsmen) as well as actions by private firms and individuals fall outside the scope of his jurisdiction.
On the one hand, acting like a Court, he interpreted the cases submitted to him in a teleological way, in order to build a demanding doctrine of ‘good administration’. On the other hand, acting as a parliamentary organ, and with the strong support of the EP, he used his powers of inquiry and proposition to suggest wide-ranging reforms of European governance (Magnette, 2003: 690).

Consequently, even if limited, the EO’s powers:

(...) give him the opportunity to combine the instruments of parliamentary scrutiny and judicial control in an original way. Moreover, given the hybridity of its status and role, the Ombudsman is well equipped to scrutinize those agents that cannot be submitted to classic parliamentary controls without losing their independence, and thereby help to reconcile delegation with parliamentary democracy (ibid: 678).

His success is of course conditional and dependent upon balancing good relations with the institutions, on the one hand, and maintaining a certain independent legitimacy that gives room for manoeuvring, on the other. To publicly announce the results of his investigations can be a quite successful strategy as the institutions are presumably to some extent concerned about their reputation and want to avoid public shaming. The Ombudsman has in this way established a practice where EU institutions are forced to justify their positions and, if not complying with the EO’s recommendations, must provide explanations for why they do not find them convincing.

As mentioned, transparency has been one of the Ombudsman’s main concerns and has contributed considerably to ease the accessibility and quantity of documents available to the public. The first Ombudsman, Jacob Söderman, made this issue into one of his main tasks and worked to improve the openness standards in the Union: ‘The EO is playing an important role in correcting negative rooted institutional practices in the field of access to documents, and its decisions show that he is very much inclined towards openness’ (De Leeuw, 2003: 347; see also Magnette, 2003: 689; Curtin, 2007b). Moreover, Magnette (2003) argues that the Ombudsman is an important accountability mechanism particularly in very complex and technical polities such as the EU. The Ombudsman also
contributes as a complementing control mechanism along parliamentary and judicial control because the EP does not have the same powers as national parliaments do.

In this regard, an example of how the EO works can be illustrated by how he (as well as the EP) has pressured to open up Council deliberations. In 2003\textsuperscript{25} prior to the Council transparency improvements in 2006, the Ombudsman received a complaint from an MEP and a youth politician arguing that the Council’s rules of procedure were not in line with Treaty obligations to ‘act as openly as possible and as closely to the citizens as possible’ as they supported closed rather than open decision-making meetings. More specifically, the complainants argued that the Council is an institution that takes decisions directly affecting the lives of Union citizens and thus has an obligation to meet and discuss legislative proposals in public. They referred to the draft Constitutional Treaty which confirmed their interpretation that all legislative processes should be open. The Council, however, argued that the Constitutional Treaty had not yet been ratified; that the phrasing in the Treaties about openness and confidentiality of decision-making was more of a programmatic principle (to be realised some time in the future) than an exact rule; and consequently that its rules of procedure were neither violating the Treaties nor did they constitute a case of maladministration.\textsuperscript{26} Moreover, the Council further responded that ‘(...)the way in which the Council organised its internal procedures and the fact that the public was not admitted to all Council meetings was one of the political choices made by the Council when it organised its internal procedures’ (EO, 2005b). In other words, the Treaty principle of open decision-making had nothing to do with the way the Council organised itself. The Ombudsman supported the complainants in his draft recommendation and upheld his position in a Special Report to the EP which adopted it unanimously. The Ombudsman’s recommendation has then been followed up by an EP committee report urging the Council to open up its proceedings, especially when acting as a legislature (as under co-decision). The point is that the burden of evidence is reversed now falling on the Council instead of

\textsuperscript{25} The Ombudsman’s Special Report provides a good summary to the whole process (2005b). See also the EO’s Draft Recommendation to the Council (2005a).

\textsuperscript{26} The Council also held that the complaint was beyond the jurisdiction of the Ombudsman.
the complainants to show that they are in line with Treaty obligations.

We can, of course, only speculate about what kind of impact (if any) the Ombudsman has played in the Council’s decision to revise its rules of procedure to the current version where there are now more open deliberations, but it is not unlikely that the Council has also felt the pressure from a thoroughly written EO report that is publicly accessible. From a deliberative democratic perspective, however, it illustrates how the Ombudsman offers affected (and competent) parties an institutionalised procedure where the governing institutions are ‘forced’ to provide reasons and justifications for their decisions. In this sense the EO represents an important institutional mechanism for upholding the practice of account-giving and publicity.

Conclusion
In this chapter I have looked at four mechanisms to neutralise asymmetrical power relations. The first two are ex ante mechanisms which took stock of the potential intelligibility of the co-decision procedure and the degree to which it is possible to argue that it respects the principle of separation of powers respectively.

With regard to the first it could be confirmed that the co-decision procedure is overall intelligible, but not without critical weaknesses. Article 251 (TEC) prescribes a sequential organisation of the procedure with the possibility of up to three readings and where the formal processes take place in the EP and Council respectively as well as in the Conciliation Committee if necessary. The two Joint Declarations (and to some degree the institutional actors’ rules of procedure), on the other hand, describe a procedure where the informal trialogues play a highly significant role and which consequently challenge the formal processes in the EP and the Council. Moreover, the character of co-decision is now more correctly described as simultaneous not sequential. Hence the intelligibility of the co-decision procedure is seriously weakened, but when seen in isolation it is still possible to say that the indicator is complied with. However, when seen in relation to the other indicators and criteria,

this conclusion may change. I come back to this in the next as well as in the concluding chapter.

With regard to separation of powers, the picture is mixed. Whereas the Commission is the only institutional actor with the power to table policy proposals and also wields considerable powers during the formal co-decision process, it is nevertheless the EP and the Council that have final decision-making power. In this sense, the policy-presenter is not the same as the decision-makers. Moreover, from a formal perspective, there is also a clear legal distinction between executive, legislative and judicial powers under co-decision. However, when we look at the heavy influence of unelected experts and officials throughout the procedure – from the preparatory/agenda-setting phase to the official launch of co-decision dossiers and the main legislative process – the separation of powers is blurred as the many of the same experts participate both in Commission expert groups, Council working groups and in the comitology groups. But even more importantly, the internal organisation of the Council where the working groups and Coreper are dominating the preparation and the formation of the Council position and where the meetings at the ministerial level are not conducive to a democratic testing of proposals consequently violates the principle of separation of powers as the lines of responsibility become unclear.

The latter part of this chapter assessed the conditions for judicial review and the possibility for an Ombudsman inquiry when affected parties see their rights violated by the adoption and implementation of co-decision dossiers. These two ex post accountability mechanisms both proved to be met satisfactorily even if appeals for judicial review is easier for the EU institutions than for Union citizens to get accepted. This inequality is only exacerbated by the fact that judicial review is a protracted process and consequently easier for the institutions to cope with than individual persons. In this case, the Ombudsman can be seen as an alternative as the proceedings are easier, cheaper and less time-consuming. The EO is only a soft-power mechanism and does not have the same power as the Court, but its draft recommendations and reports can be quite effective in publicly highlighting and shaming instances of institutional maladministration. The EO has in particular focused on the issue of transparency and has presumably contributed to open up EU
institutions. Moreover, in exercising their powers both the Court and the Ombudsman provide settings and procedures in which decision-makers can be held accountable and where they have to justify their position in an open manner. In this sense they contribute to fulfil the deliberative democratic emphasis on institutionalising and maintaining publicly accessible practices of justification and accountability.
Introduction
Under the fifth and final criterion, the task is to evaluate the co-decision procedure’s decision-making capacity. By this is meant that decisions are also actually discussed and taken within the basic parameters of the co-decision framework as set up in the Treaties. This is important as the strength of the conclusions reached about the democratic qualities of co-decision-making under the other criteria are also dependent on whether it can be argued that decision-making actually takes place within the assigned framework of Article 251. If not, decisions taken in other forums and/or by other actors are simply dressed up and rubber-stamped as co-decision acts.

On the other hand, this does not mean that all types of informal meetings are automatically deemed illegitimate. What is more, it is also acknowledged that the formal institutions prescribed and described in the legal provisions are usually not ready-made recipes in need of practical interpretation when applied to actual empirical circumstances (cf. Farrell and Héritier, 2004). This is also the case with regard to co-decision and Shackleton (2000: 333; cf. also
Farrell and Héritier, 2004) remarked that the inception of the procedure only offered ‘(...)a framework which had to be filled in through practice.’ However, the concern here is how the type, scope and scale of such formally unauthorised meetings contribute to potentially undermine the formal processes by representing the locus where deals are actually struck.

The point is that the actual practice of the co-decision procedure should be in line with the intention of the formal legal provisions and that informal structures have not replaced and thus made the formal set-up redundant. As far as I can see, there are two ‘candidates’ that may represent a competing decision-making alternative. The first ‘candidate’ is the Council which is by far the more powerful institution in the Union and, as we have seen in chapter 4, did not originally interpret Article 251 as a genuine co-legislative decision-making framework (Corbett et al., 2007: 225). It is therefore not unlikely that the Council is in fact the stronger party also in co-decision-making as it is in all other areas of EU policy-making. The second potential ‘candidate’ is the trialogue arrangement. Throughout the thesis it has been underlined how important trialogue meetings are for the functioning of co-decision-making. The question is therefore whether they have in fact taken over the formal processes in the EP, Council and the Commission.

Indicator: There is absence of informal networks where powerful actors ‘pre-cook’ proposals that are not subsequently sanctioned by democratic organs and which consequently have taken over as the locus where actual co-decision-making takes place.

Is the Council a competing decision-making arrangement?

With the introduction of the co-decision procedure, a major question was obviously whether the Council would commit to the co-legislative scheme stipulated in the letter of Article 251 or whether it would try to by-pass the EP (Farrell and Héritier, 2004). Historically, the relative power balance between the two legislatures was (and still is), to say the least, very uneven. Up until the Single European Act with the introduction of the cooperation procedure and particularly after Maastricht and the inception of co-decision, the Council’s 30-40 years legislative monopoly was finally challenged (cf. chapter 4). The
development of a closer relationship and an atmosphere of cooperation between the EP and the Council were consequently not self-evident from the beginning and the first few years were also characterised by less cooperation and more antagonism between the two legislatures (Shackleton, 2000: 236).

As we have seen, under the Maastricht provisions of ‘co-decision I’ the formal cooperative incentives were also fewer than under the current ‘co-decision II’ regime. Then, the Council was allowed to re-introduce its Common Position if agreement on a Joint Text could not be achieved in the Conciliation Committee. The only way the EP could reject it was if it managed to drum up an absolute majority. This possibility could be seen as an incentive for the Council to take easy on the conciliation process with the EP or, in the words of Warleigh (2003: 31), the risk was that the ‘(...)Common Position (...) [would] always be a bargaining position rather than a legislative text.’ The Council only used this right once in the Voice Telephony Directive in 1994, but the EP managed to gather an absolute majority and turned the Council’s Common Position down (Shackleton and Raunio, 2003: 171, see also Burns, 2006: 235). Through this the Parliament sent an important message to the Council that it would and could block legislation if the Council did not work harder to find agreement with the EP during conciliation (Shackleton, 2000: 237). Or in the words of Burns (2006: 236) ‘(...)the EP showed that when confronted with a ‘take-it-or-leave-it offer’ from the council under co-decision I it would automatically reject legislation.’ The ‘warning’ paid off and throughout the ‘co-decision I’ period only two dossiers failed. By the time the negotiations on the Amsterdam Treaty started the Council anticipated and had acted according to the assumption that the right to re-introduce the Common Position would be repealed (ibid).

1 Cf. chapter 4. ‘Co-decision I’ labels the co-decision rules under the Maastricht Treaty and ‘Co-decision II’ signifies the revised co-decision rules after the Amsterdam treaty reform.
2 ‘(...)the directive on the patenting of biotechnological inventions in 1995 where the plenary of the Parliament declined to ratify the results of the conciliation negotiations, and the Securities Committee directive in 1998 where the Council took a decision not to reintroduce the common position in anticipation of the Amsterdam provisions’ (Shackleton, 2000: 237).
3 Contrary to the majority of commentators, Moravcsik and Nicolaïdis provide an intergovernmental view in holding that the ‘(...)member states’ decision to increase the powers of the EP was largely a consequence of left-wing victories in France and
The current ‘co-decision II’ provisions are consequently more in line with the co-legislative arrangement underpinning the formal letter of Article 251 in the sense that they do not make the Council await the possibility of side-stepping the EP after a ‘failed’ conciliation, but rather ensure that conciliation efforts are not rendered redundant (Warleigh, 2003: 31-2; Häge and Kaeding, 2007: 344). Moreover, the right to veto a position: ‘

(...) gave Parliament a bargaining position which it hitherto lacked regarding Community legislation, and was of fundamental importance to perceptions of its role – it could no longer be accused of lacking teeth. It is not that the Parliament necessarily says no (in fact, it has only done so on six occasions between 1994 and 2006) but rather that the Council recognises that this is a possibility if it does not negotiate seriously. The very fact that there have only been six rejections is a testimony to the fact the Council has been willing to look for common ground with the Parliament and to modify its common position in the process (Corbett et al., 2007: 216).

The development and expansion of the trialogue system is in itself an indication of the Council’s willingness to respect the EP’s position under the co-decision procedure. This commitment is also reflected in the two aforementioned Joint Declarations on the workings of the trialogue meetings (see also below). Moreover, that the EP is not only a rubber-stamp body signing whatever the Council decides is also (even if implicitly) corroborated by the many game-theoretical studies that I mentioned in chapter 1 and whose objective is to measure how co-decision has affected the inter-institutional balance in the EU. In this inter-institutional ‘game’ the EP comes out favourably because it is (usually) less impatient than the Council due to the latter’s cycle of six months rotating presidencies (see e.g. Häge and Kaeding, 2007). Consequently, if the EP did not matter at all, why would these researchers bother setting up fancy equations and continue to discuss these issues year after year? Hence, the fear that Germany. Thus, they imply, the EP’s efforts to remove from the path of play the Council’s right to reintroduce its common position was irrelevant to the later decision by the member states at Amsterdam formally to remove it’ (Farrell and Héritier, 2003a: 589).
the Council would be the actual decision-maker with the EP simply approving the former’s decisions is not correct.

**Do the trialogues represent a competing decision-making arrangement?**

The problem is seemingly no longer for the Council and the EP to cooperate. However beneficial the cooperative atmosphere between the EP and the Council has now become, the very institution of trialogues needs to be addressed with regard to whether it challenges the formal co-decision arrangement and thus represents a competing decision-making structure. As shown throughout the thesis, the trialogues have a central position in co-decision-making and many see them as a precondition for their successful completion, especially after first reading (e.g. Farrell and Héritier, 2003b). Having said this, it is obviously not easy to determine exactly when an informal practice constitutes a competing decision-making network or arrangement and when it is not, especially since the trialogues are, as we have seen, now more or less semi-formalised in the two Joint Declarations.

If we take a look at how Article 251 describes the procedure, this is, as we have seen in the previous chapter, *sequential* in character. The EP and the Council (with the Commission) are supposed to respond to each other’s suggestions in a *relay* fashion and they can afford to do so in up to three readings if disagreements cannot be settled in the first. Quite a lot of space is spent in Article 251 on describing how and when each reading can be terminated and when a proposal either fails or is adopted, that is, what kind of majorities is needed for an act to pass in each house as a collective body, *not* by the discretion of only a handful of people. Hence the intention behind Article 251 seems to be quite clear. The trialogue system obviously alters this framework as co-decision is no longer correctly described as sequential, but rather *simultaneous* in character. In this sense, then, the character of the procedure is no longer in line with the provisions of Article 251. Does this situation turn trialogues into a competing framework where the trialogue participants are the actual decision-

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4 Even if this is not stated explicitly in the latest Joint Declaration on co-decision that trialogues are necessary for reaching agreement, their importance is not to be misunderstood as, for instance, they ‘(...)must continue to be encouraged’ (European Parliament, Council, Commission, 2007).
makers thus rendering formal treatment in the EP and the Council a charade?

**Conciliation trialogues**

Originally, trialogues were only conducted prior to meetings in the Conciliation Committee. In the Treaties, the set-up of the conciliation process is (still) confined only to the formal meetings in the Conciliation Committee (cf. Article 251(3-6) TEC). Consequently and as a result of many and fruitless discussions in these meetings containing over 100 people in the room, trialogues were introduced in order to make conciliation work more smoothly and to fill the void in the Treaties on what should happen in the time span between a Council rejection of the EP’s position in the second reading and the scheduling of a Conciliation Committee meeting. Trialogues were thus established to prepare and anticipate the results of Conciliation Committee meetings proper. Many contend, however, that the trialogues dominate the conciliation process and that the Conciliation Committee meetings have become a mere formality where decisions already taken in trialogues are simply being let through on the nod.

As mentioned, it is commonly argued that the trialogues are necessary in order to reach agreement on co-decision dossiers, i.e. they function as settings where the institutions can sound out and discuss differences, flexibilities and limits in a more frank atmosphere (Farrell and Héritier, 2004: 1198). Hence the purpose is to prepare decisions, not to take them. However, the working method applied in conciliation trialogues is seemingly adopted from the Council’s practice, namely the ‘A’ and ‘B’ point procedure. This supports the above claim as it indicates (as in the Council) that during the conciliation process, many decisions (the ‘A’ points) are not only prepared, but actually also taken in trialogues and thus only rubber stamped in the formal Conciliation Committee meetings. The

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5 Whereas Article 251 is still silent in this regard, the Joint Declaration states that: ‘Trilogues shall take place throughout the conciliation procedure with the aim of resolving outstanding issues and preparing the ground for an agreement to be reached in the Conciliation Committee. The results of the trilogues shall be discussed and possibly approved at the meetings of the respective institutions’ (European Parliament, Council, Commission, 2007, rule 2, my emphasis).

6 See e.g. Chalmers et al. (2006: 151); Collins et al. (1998: 8); Rasmussen (2005: 1025); Bostock (2002: 222).

following quotation gives an indication of the relationship between conciliation trialogues and the Conciliation Committee as well as an indication of the relationship between those participating in conciliation and those who do not:

(...) although it is normal for trialogues and other informal contacts to narrow the ground before the Conciliation Committee meets (and sometimes to resolve all outstanding points so that conciliation becomes a mere formality), decisions sometimes have to be made on the spot in the Conciliation Committee, without the chance to refer to capitals (Bostock, 2002: 221-2).

The same is indicated by Farrell and Héritier (2003b: 21-2): ‘It is fair to say that the Conciliation Committee meetings are increasingly pro forma; much of the real politics and bargaining takes place in the informal trialogues that precede them.’ Moreover, according to Shackleton and Raunio (2003: 177), the conciliation trialogue:

(...) is a meeting where ideas can be exchanged without formal decisions being taken, each side accepting to refer back possible solutions to their delegation. Should the discussions be sufficiently successful, the full conciliation committee can be avoided and the issue concluded in writing or as an ‘A’ point, without discussion, a conciliation on another issues.

In sum, seen from the perspective of ‘A’ points, it seems highly unlikely that the Conciliation Committee is the main decision-making locus.

So what about ‘B’ points, are they still treated more substantially and not just voted on in the Conciliation Committee? In its Codecision and Conciliation guide, the EP (2007b: 15) states that:

Normally, a short trilogue meeting is held just before the meeting of the Conciliation Committee and sometimes the Conciliation Committee meeting itself is interrupted for negotiations in trilogue to clarify the situation, to find mutually acceptable compromises, and to avoid misunderstandings between the delegations.
From this quote one can at least get the impression that also ‘B’ points are to a substantial degree dealt with in the trialogues that take place in between the formal Conciliation Committee meetings and that the latter seem more like an arena where what has been agreed in trialogues are reduced to formal approval and the casting of votes in the Conciliation Committee.

Having said this, it should also be underlined that trialogue participants are more constrained by formal rules during conciliation than in the preceding stages. Firstly, during the conciliation process both the EP and the Council appoint delegations to ensure and monitor that the behaviour of trialogue participants are in line with the respective ‘mother’ institutions (cf. also Rasmussen, 2005). Moreover, the whole purpose of the delegations is to keep an eye on the trialogue participants and provide them with a mandate on how to proceed. As we have seen in chapter 5, in the EP the delegation receives information about when and where trialogue meetings are being held and who participate (EP, 2007b: 15). The time of the trialogue meetings is also published in the EP’s list of daily meetings (ibid). In the Council, the conciliation delegation amounts to the (deputy) permanent representatives in Coreper (I). In addition and more importantly, both the EP and the Council delegations must approve the results of the trialogue meetings (ibid: 15). In this sense the conciliation trialogues are better controlled than the first and second reading trialogues (Rasmussen and Shackleton, 2005), not least since the various positions by then are (arguably) well-known and articulated.

Secondly, trialogue participants are also constrained by the limitations on what kind of amendments and changes that can be made to dossier in the Conciliation Committee (i.e. that they cannot be completely new, but must be based on the EP’s second reading amendments to the Common Position). Like one of the interviewees in Rasmussen and Shackleton (2005: 12) argued:

In conciliation everybody knows what the starting point is: the amendments of the Parliament and the common position of the

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8 With the transfer in 2005 of some legal bases from the third pillar in justice and home affairs matter, Coreper II is now more often involved in co-decision-making.
Council, and it’s written down(...) we know where everybody is coming from and we know where they end up, but at first reading the ground is totally unclear and indeed the rapporteur is able to determine what the ground should be.

In other words, by the time the process reaches conciliation, the positions and discussions have (presumably) already revealed where the difficult points lie, which henceforth limit the trialogue participants’ room for manoeuvring. Moreover, in this regard the EP’s and the Council’s respective conciliation delegations represent an institutional mechanism that ensure a much tighter monitoring with the trialogue participants during the conciliation process than in the first and second readings. In the EP, the conciliation delegation has specifically assigned formal rules for how the trialogue participants shall behave, they receive both written and oral mandates and they have a duty to report and inform about the proceedings and how to move forward (EP, 2007b: 12-19). In the Council there are seemingly no particular rules for conciliation processes, but given that Coreper is in charge, the standard operating procedure of intra-institutional co-ordination applies.

The only fly in the ointment is that the importance of the conciliation procedure is (arguably) becoming increasingly obsolete as the overwhelming majority of co-decision dossiers are now concluded after the first reading and hardly any dossiers reach the conciliation stage anymore. As shown in chapter 4, in the fifth parliamentary period (1999-2004), 28% of all co-decision dossiers have been closed after first reading (115 dossiers), whereas from July 2004 to July 2006, 64% (125 dossiers) were concluded at first reading.10 And the early agreement trend only continues, in 2008 alone, 65% (140) of the dossiers were concluded at first reading and only one single case went all the way to conciliation.11 Moreover, the costs of rejecting a proposal at the conciliation stage are most likely higher than in the previous readings (even if the emphasis on early agreement make the stakes high from the very beginning) as the whole legislative process would have to start all over again (Rasmussen, 2005: 1025). This is

11 140 dossiers were adopted at first reading, 29 dossiers in the second reading and only 1 in the third reading, see General Report on the Activities of the European Union (2008: 9).
also shown by the very small number of dossiers that have been rejected after conciliation.\textsuperscript{12}

**First and second reading trialogues**

The trialogues are no longer merely a trait of the conciliation process, but take place and are strongly encouraged throughout the procedure.\textsuperscript{13} There is also an explicit commitment to reach agreement as early as possible, preferably during the first reading.\textsuperscript{14} In comparison to the conciliation trialogues, the first and second reading trialogues are, however, much less controlled as there are no conciliation delegations to monitor and keep them accountable. The scope for independent action by trialogue participants has also proven to be wider (Rasmussen and Shackleton, 2005: 12-3), especially in the first reading where the positions are usually more malleable and less fixed as: ‘(...)both institutions are negotiating without either having finalised a point of departure for negotiation. Trialogue at this stage is even more informal than during conciliation’ (Bjurulf and Elgström, 2004: 261). Moreover, during the first reading the trialogue participants can take advantage of the fact that there is not yet an official EP or Council position to defend (which is the case in the second reading). In addition, in Parliament there is no restriction on the kind of amendments that can be presented and only a simple majority is needed in order to adopt a proposal (see also Rasmussen, 2007: 6).

The problem with first reading trialogues is that the asymmetrical information gap between the Council and the EP actors is wider than in the subsequent readings as the Council is not open to MEPs (or to citizens in general) neither at the level of the working parties nor at the Coreper level. Hence, the MEPs who are not participating in trialogues must rely on information from their fellow MEPs who take part in trialogues or on personal contact with Council or other involved actors. Unlike conciliation trialogues, the responsible EP committee does not have the same capacity or mandate to monitor the trialogue participants in the first and second readings as the

\textsuperscript{12} Whereas the Council has never rejected a co-decision dossier after conciliation, the EP has voted down two dossiers (the Takeovers Directive in 2001 and the Port Services Directive in 2003) (EP, 2007b: 19).

\textsuperscript{13} European Parliament, Council, Commission (2007: rules no. 2 and 8).

\textsuperscript{14} Ibid, rule 11.
Decision-making capacity

The conciliation delegation has during the conciliation phase. Lately, the EP has developed guidelines for best practice for how MEPs should behave when participating in first and second reading trialogues with the Council (EP, 2007b: 10). These key MEPs should respect their delegated authority in discussions with the Council and the guidelines specifically underline that:

Informal contacts should be possible at all stages provided that the committee coordinators or shadow rapporteurs are kept informed of their existence and content. Concrete negotiations should not usually take place until the committee has adopted its first or second reading amendments. This position can then provide the mandate on the basis of which the committee’s representatives can negotiate with Council and Commission (EP, 2007b: 10, my emphasis).

The guidelines also underline that in cases where it is just the rapporteur who meet with the Council and the Commission, she has a duty to keep other committee members informed (both in writing and orally) – first and foremost through the committee chair, the group coordinators and the shadow rapporteurs. Moreover, there is an emphasis on the importance of the committee and a ‘(...)decision should receive broad political support and should be taken in a transparent manner and announced in committee. It should be justified in terms of political priorities, deadlines, risk of legal uncertainty, or the uncontroversial nature of the proposal’ (EP, 2007b: 10). In addition, ‘The rapporteur should report back regularly on the state of negotiations, if necessary to the whole committee. Any significant change in the negotiating position should have broad political support.’ Hence there is an intention or attempt to make the trialogue participants accountable to the responsible committee on a par with the role of the EP conciliation delegation.

In this regard, Rasmussen and Shackleton (2005: 19-20) note that ‘(...)the provisions are not binding but they establish a yardstick against which the behaviour of negotiators, above all, their ability to keep the confidence of their colleagues, both inside and outside the committee, can be judged.’ However, from the above we know that this principle of awaiting trialogue contact until the process has started in the EP committee is being violated. In many cases the rapporteur has already been in touch with the Council through
trialogues and the committee is often just presented with an already agreed deal that can be hard to reject. In this regard, Bunyan (2007b) draws the attention to a list of co-decision dossiers in justice and home affairs policy areas formerly figuring under the third pillar but since 2005 transferred to the first pillar. These controversial dossiers have been discussed and agreement reached before they have been properly dealt with in committee.

Even if the Council is the champion and defender of the trialogue system, early agreements are, however, also affecting the internal balance within the Council. Whereas the Council representatives not participating in trialogues probably have more information overall than their fellow MEPs (Benedetto, 2005: 70-1), this is not the same as actually being in the room when agreements are reached. In the Council, trialogues put the Presidency in a particularly favourable position as ‘(...)it can present its version of the Council position to the EP, and report back its version of the EP response. Its room for tactical manoeuvring is therefore substantial’ (Bjurulf and Elgström, 2004: 261; see also Farrell and Héritier, 2003b and 2004). Hence, ‘It may potentially use this leverage to affect other actors’ perceptions of what is possible and what is not, and thus bring through outcomes which reflect its own preferences rather than the preferences of the Council as a whole.’ (Farrell and Héritier, 2003b: 29). Moreover, early agreements presumably make the room for manoeuvring even wider simply because the positions have not yet been firmed up and a Common Position has not yet been formulated. However, the Presidency’s independence has obviously limits and is dependent upon trust from the other national delegations in order for the latter to accept ‘(...)the intrinsic disadvantage involved in so much activity taking place outside their direct vision at meetings to which they are not invited’ (Shackleton and Raunio, 2003: 175). As in the conciliation process, the trialogue participants (i.e. the deputy permanent representative of the country holding the Presidency) can obviously

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not deviate too much from the positions of her fellow Coreper-deputies.  

**Trialogues in general**

From chapter 6 we already know that trialogues upset the internal division of labour between the committees and the plenary sessions in the EP. Trialogues make non-attached MEPs in particular, but also MEPs from small political groups, less able to influence dossiers due to the informal liaisons between key persons in the two largest political groups (EPP-ED and PES) in the EP and the permanent representatives/Presidency in the Council. Deals are struck in trialogues and presented as ‘take-it-or-leave-it’ deals to the other MEPs (Foilleux et al., 2005: 622). This tendency also has a national dimension in the sense that the member states try to influence and form alliances with ‘their’ MEPs through the national delegations. Here the larger member states will presumably be more successful

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16 In this regard, Farrell and Héritier (2003b: 28-31) note that whereas the current system of rotating Presidencies contributes to balance the relationship between small and larger member states, the increased importance of the Presidency (i.e. the Coreper deputy permanent representative) in co-decision and the potential abandonment of six-months rotating Presidencies to more long-term Presidencies occupied more often by the larger member states, is likely to affect the principle of ‘diffuse reciprocity’: ‘(...)informal relations between Council and Parliament provide the larger member states with a greater degree of influence than they otherwise would have over policy – they may be able to overturn agreements made in Council at later stages in the codecision process. This may over time come to erode the famed emphasis on consensual decision within the Council which has been recognized as another source of legitimation under the principle of negotiating democracy where each actor has a veto and hence would not be forced to support a pareto-inferior policy measure. There is some evidence to suggest that it is already giving rise to heightened suspicions among member states. We note that this asymmetry is likely to increase, if, as has been suggested, the Council is reformed so that the larger member states come to dominate the Presidency. The extreme case – of a directoire of larger member states dictating EU policy – is unlikely, but intermediate cases, in which smaller member states have diminished ability to represent their national interests are quite possible.’ (Farrell and Héritier, 2003b: 31).

17 MEPs with good personal links to Council officials may exploit such channels for information. Høyland (2006: 31) has also found that there is seemingly a link between the degree of influence of EP rapporteurs depending on whether they come from the same political party as the ministers in the Council: ‘Compared with rapporteurs from parties not represented in the Council, EP rapporteurs from parties represented in the Council may incur lower costs in coordinating their proposals with the informed actors in the Council.’
than the smaller member states as size and resources are likely to matter:

This emerging trend may have important repercussions for decision-making. It allows larger member states a ‘second bite at the cherry’. Even if they find themselves marginalized in discussions over a specific piece of legislation within the Council, larger member states may be able to mobilize support among MEPs so that the piece of legislation in question is amended to their satisfaction, or rejected (Farrell and Héritier, 2003b: 27-8).18

It is also a widely recognised problem that when time is tight and the general level of workload is high as is the case for legislative actors in the EU, this create and/or deepen information asymmetries between those who are directly involved in a dossier (like the rapporteur, the committee chairs, the political group coordinators and the Council Presidency) and those who are occupied with other cases (the rest of the MEPs and Council permanent representatives/ministers). The overwhelming majorities with which co-decision dossiers are adopted in the EP can be seen to support the argument that shortage of time (and perhaps also interest in the particular dossier) tend to make the MEPs vote according to political group lines (cf. chapter 6; Settembri, 2007).

What is more, also the Joint Declaration seems to suggest that the balance between formal institutions and trialogues tilts towards the latter with regard to where agreements are formed and reached. The indication of this is that the former arguably more often become settings where these items only await formal approval and not substantial treatment. Here is only one example:

Where an agreement is reached through informal negotiations in trialogues, the chair of Coreper shall forward, in a letter to the chair of the relevant parliamentary committee [i.e. not the committee as such], details of the substance of the agreement, in the form of amendments to the Commission proposal. That letter shall indicate the Council’s willingness to accept that

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18 Farrell and Héritier (2003b: 28) mention the Takeover Directive as an example of this phenomenon.
outcome, subject to legal-linguistic verification, should it be confirmed [i.e. not discussed and then decided] by the vote in plenary (European Parliament, Council, Commission, 2007: rule 14, my emphases).

Consequently, even if lacking formal Treaty recognition and explicit decision-making power in the Joint Declarations, it does not seem unlikely that substantive decisions are taken here. What is more, the impact of trialogues on the overall outlook of co-decision dossiers is stronger if agreement is reached during first- than in the second and third readings. In this way the informal practices seem (at least to a considerable extent) to empty the formal processes.

This is also indicated by how the question of whether trialogues should be further institutionalised and formalised is conceived in the EP. The Parliament has been and is more ambivalent than the Council about the role trialogues have obtained. On the one hand, the trialogue system is a source of influence for the EP, but, on the other hand, the Parliament’s legitimacy suffers due to its lack of transparency and accountability (Farrell and Héritier, 2003b: 23). This is particularly a problem with regard to first and second reading trialogues and it has therefore been suggested to formalise and institutionalise these meetings in line with how the conciliation delegation controls the conciliation trialogues. In their study, Rasmussen and Shackleton interviewed central co-decision participants on this issue. According to one respondent, the rapporteurs ‘(...)do not wish there to be greater institutionalization at the moment, because they know this is what gives them ultimate power(...) it seems to me that it is a highly dubious instrument’ (Rasmussen and Shackleton, 2005: 13). Moreover, another respondent contended that ‘There are several reasons why many MEPs do not like to go to conciliation because for them conciliation means a loss of power(...) in conciliation we have rules, we have formal delegation, regular meetings, everyone is concerned, whereas in first and second reading there is an absence of rules.’ (Rasmussen and Shackleton, 2005: 14). What is more:

There are likely to be various circumstances where MEPs are willing to make a trade-off between more open procedures and the desire to achieve a result more quickly. At the same time, Parliament has resisted the Council argument that such
trilogues are the normal way of agreeing all legislation and wants Council to accept the norms of an open deliberative chamber by attending and participating in committees (Shackleton and Raunio, 2003: 179).

In other words, the question is if we have come to the point now where the trade-off has gone in favour of efficiency given the aforementioned overwhelming number of dossiers now completed at first reading. If that is the case, this in line with the Council’s wishes as it views trialogues as a ‘(...)way to speed up legislation, and make it more efficient. Although it has recognized their existence in the Amsterdam Treaty, it is unwilling to have the Treaty prescribe any specific formal structure for them, in case that limits their flexibility.’ (Farrell and Héritier, 2003b: 23)

Consequently, it is one thing if trialogues were confined to the conciliation process, but knowing that they take place continuously throughout the process, that they are regarded by the participants to be not only essential to reach agreement, but that it is most likely here deals are struck, at least indicates that actual decision-making also happens here. Seen from this perspective, the above supports the conclusion that trialogues represent a competing or at least a parallel decision-making structure where the actual decisions are taken. Chalmers et al. (2006: 155) have reasoned along the same lines and state even more explicit and forcefully that:

There is, in all this a sidelining of checks and balances and a lack of formality and transparency. A division is made between formal and substantive decision-making, with the locus of substantive decision-making being hidden away. Whilst formal decision-making takes place in the Council or in Parliament committees, in many instances substantive decisions are vested in these informal arrangements. The formal procedures do no more than rubber stamp the agreements. Only very well connected actors have the opportunity to lobby these informal processes because only they can know where they are taking place or who is important within them. Furthermore, only they will have the resources to arbitrage between these centres of power, lobbying both central protagonists in the trilogue and other important actors in the Council, the Parliament and the Commission (Chalmers et al., 2006: 155, my emphases).
This is also supported by Farrell and Héritier (2003b: 22):

Trialogues are not formally binding; neither the Council nor Parliament is obliged to adhere to agreements reached in these meetings. However, because Council and Parliament engage with each other repeatedly in the legislative process, it is usually in their interest to make agreements stick; otherwise the defaulting party is likely to lose credibility, and to be punished in future interactions.

In sum, the above points more strongly in the direction that the trialogues seemingly represent a competing decision-making arrangement than the other way around. What is at least clear is that the trialogue system in itself has at no point been tested and scrutinised in a democratic process, but rather introduced incrementally and through the means of inter-institutional agreements that are not always in line with Treaty prescriptions (cf. Curtin, 2007b). In this sense, it is clearly challenging and altering the intention of the formal set-up of how the co-decision processes are supposed to unfold.

**Conclusion**

In this chapter, the focus has been on the decision-making capacity of the co-decision procedure. To assess this criterion we looked for competing decision-making frameworks. In this regard two candidates were reviewed: the Council and the trialogues. Whereas it could be corroborated that the Council does not alone represent a competing framework of co-decision-making, the conclusion on the trialogue system is less straightforward.

From the above it seems safe to argue that the Conciliation Committee is not functioning as the locus where the final outstanding points are discussed and possibly agreed. Rather, it has seemingly been reduced to a mere voting arena whose (more or less) sole purpose is to formally approve the Joint Text. Instead the trialogue has become the inter-institutional setting where the substantive discussions are conducted and where deals are struck. However and in contrast to the first and second readings, during conciliation the trialogue proceedings have more formalised rules and
institutionalised practices for mandating and controlling the respective trialogue-participants through the EP’s and Council’s respective delegations. This compensates to some degree for the fact that the Conciliation Committee has partly been emptied of purpose and function as it is intended and prescribed in the Treaties. But again (and unlike the power of the conciliation delegation to mandate and control the trialogue-participants during the final stages of the co-decision procedure), the guidelines on first and second reading agreements are not binding upon the participants.

If we look at the trialogues merely from a power perspective the conclusion is difficult to reach in a decisive manner. On the one hand, especially the first, but also the second reading trialogues are difficult to control for the non-participating Council and EP representatives. Hence from the first and second reading perspective, trialogues could easily be conceived as a competing decision-making framework, particularly if we also take into consideration the extent and scope to which trialogues are now conducted. On the other hand, the conciliation trialogues are much better controlled than the first and second reading trialogues due to the respective EP and Council delegations. Hence these delegations represent an accountability mechanism that presumably make it easier for both the EP and the Council as collective legislative bodies to check and hold the trialogue participants to account. What is more, from a pure power perspective, it would also be pertinent to underline that in the end it is the formal settings of the EP and the Council that are the ultimate decision-making arenas as it is only the Parliament and Council as collective bodies that can adopt or reject proposals. In sum, from this perspective, then, the conclusion is unsettled. However, the task of this thesis is to frame the question of decision-making capacity in a democratic perspective and from this vantage point, the situation is more clear-cut. The trialogues obviously bypass the formal settings where the decisions are (even if not perfectly) discussed, challenged and taken in more inclusive and open ways. What the trialogues do – especially in the first and second readings – is largely to disconnect the link between the deliberative opinion- and will-formation processes that take place in the EP committees and plenary sessions and the following decision-making moment when the formal votes are cast. The trialogues constantly interrupt this process and effectively remove the substantial opinion- and will-formation process to a locus where the general public does not have
access neither during nor after the process is finished. This point does not apply to the same degree to the Council as its internal organisation already fails to ensure a democratic opinion- and will-formation process as we have seen in chapter 6. However, the usage of trialogues only adds to the impermeability of Council political processes. In sum, from the perspective of ensuring popular control of public power, the extensive usage of trialogues is detrimental to the whole idea of rule by the people.
Chapter 10

Co-decision – tried, but not acquitted

Introduction
The introduction of the co-decision procedure to the collection of EU legislative procedures is interesting for a variety of reasons and has been approached from different perspectives. What has, however, been missing is a more thorough analysis of the democratic qualities and implications of both the formal set-up as well as the informal practice of co-decision-making. This thesis has sought to contribute to fill this gap by specifying more thoroughly what the democratic standards should entail, when they are met and how and why they are relevant also at a supranational European level. As far as I can see, this is a pressing issue especially since co-decision is likely to be extended to a plethora of new legal bases as well as attaining the status as the ‘ordinary legislative procedure’ when (if) the Lisbon Treaty is finally ratified and implemented.

More specifically, the objective of this thesis has been to evaluate whether the procedural qualities of the EU’s co-decision procedure warrants the presumption of democratically legitimate outcomes. To
this end, I have approximated deliberative democracy to empirical conditions through the development of an evaluative scheme composed of five criteria with accompanying indicators. The findings reveal (as could be expected) that there is a rather large gap between the EP and the Council with regard to how they as individual institutional actors comply with the criteria, i.e. the organisation and practice in the EP are more conducive to democracy than the Council’s way of organising and doing things. On the basis of the findings under the various criteria – how does this affect the democratic qualities of the co-decision procedure as such?

In this last chapter, I seek to take stock of the findings from a more overall perspective. I start by looking at the democratic qualities of the co-decision procedure. I argue that co-decision does indeed have democratic qualities. It provides a democratic forum in the EP, openness, space allocated for debate prior to decision-making, ex post accountability mechanisms such as judicial review and Ombudsman etc. However, for the reasons outlined in the second part of this chapter, these democratic qualities are weakened due to severe democratic deficits and must therefore be conceived as potentials rather than fully realised practices of how co-decision-making is actually conducted. The democratic deficits discussed cover the Council’s internal organisation that due to the heavy involvement of the working groups, the Secretariat and Coreper hinders a democratic opinion- and will-formation process to occur. The second main democratic problem is the trialogues whose scope and magnitude has seemingly become one of the procedure’s most dominating features – to the extent that it is possible to speak of a competing decision-making structure, as argued in chapter 9.

**Democratic qualities – but not fully materialised...**

As we can see from the evaluation in the previous chapters, the co-decision procedure does not fully approximate all the criteria necessary for meeting the demands of a democratically legitimate decision-making structure. This does, however, not mean that co-decision is without democratic qualities:
Inclusion of affected parties and a democratic forum

Both the EP’s committee and plenary settings are organised in a way that make them conducive to democratic decision-making and hence qualify as democratic deliberative meeting places. This is important as modern democracies rely on representation rather than direct participation and the way decision-making processes are organised is crucial in order to ensure that there is a link between decision-makers and those affected. An important factor to achieve this end is the existence of a publicly open and accessible forum where elected decision-makers (or a representative selection among them) exchange, test and scrutinise arguments and positions. The evaluation revealed that the EP committees and plenary sessions are organised in such a way that makes it likely to expect that positions and counter-positions can be tested and scrutinised in an open and accessible manner (even if there should be roll-call voting at both committee and plenary levels as well as verbatim records of committee meetings).

Moreover, it is particularly the interplay and the division of labour between committees and plenary sessions that together meet the requirements of a democratic deliberative meeting place. On the one hand, the committees function as settings where dossiers can be discussed more thoroughly. Here the number of MEPs is reduced, but committees nevertheless ensure a representative selection of MEPs. The interaction is more informal and seemingly conducive to exchanging and responding to arguments. The plenary, on the other hand, is a setting with a significantly higher number of participants which from the outset makes a thorough discussion in the deliberative sense more difficult. Hence plenary sittings are more formal and less conducive to spontaneous discussion. However, even if these institutional constraints may make it possible that the MEPs themselves have already made up their mind and are presumably not very inclined to engage in thorough deliberation with each other, the plenary is a forum – to a greater extent than committees – where the MEPs present and justify their positions towards the outside world. What is more, the EP plenary sessions are easily accessible both with regard to documents and debates (even if the default voting procedure should be roll-call) and for interested citizens it is thus possible to monitor their MEPs by scrutinising the suggested
amendments and speeches they make. In addition, the plenary is a setting where it may be possible for the MEPs to hold each other to account for their conduct in other (more secretive) settings such as the triologues and the Conciliation Committee. In this sense, the plenary setting in particular thus becomes a setting compatible with public justification and account-giving. In sum, the division of labour between committees and plenary sessions can be conceived as an institutional set-up ensuring a sequencing of deliberative tasks where the former performs the more detailed and explorative work and the latter is a setting where the MEPs defend their positions.

The division of labour between committee and plenary also ensures inclusion of the views of affected parties at both levels as the MEPs are directly and substantially involved at all stages of the policy process. Unlike the Council, the process of moulding a collective will is not ‘out-sourced’ to unelected officials. Hence the normative hierarchy between affected and competent parties is respected in the Parliament. In this sense, the formal set-up in the EP does not only allow for deliberation prior to decision-taking, it also ensures a democratic opinion- and will-formation process. Even if not a democratic feature in itself, the importance of a democratic deliberative meeting place is crucial for representative democracies as it contributes to build trust among those affected and their representatives.

We may add that, although to varying degree, the open EP settings also help the public to get better acquainted with some of the reasons behind the Commission’s and the Council’s policy choices and amendments. As we have seen, whereas the Commission always participates in both the committee and plenary sessions – it explains and justifies its position in front of the MEPs, the Council is more hesitant to respond to the MEPs’ questions and usually prefers to use these meetings as listening posts.

Openness

In comparison to other EU decision-making procedures, the transparency rules governing the co-decision procedure ensure a greater degree of openness. The reason for this is first and foremost due to the full participation of the EP under co-decision which, as we
have seen, conducts its legislative processes in greater transparency than the other two institutions. Under the other Community legislative procedures\(^1\) when the Council is the main decision-maker and not as dependent on the Parliament, the transparency conditions are worse than they are under co-decision. Here, the policy-making process starts in the Commission and subsequently moves to the Council where the internal legislative processes are conducted more or less in secrecy before an agreement is reached and the act is adopted. This is also the case in the second and third pillars.\(^2\) Hence, when dossiers are treated according to the co-decision procedure where the EP is more involved, this also ensures a higher level of legislative openness.

What is more, the Council’s own rules of procedure commit the institution to open discussions at the ministerial level at all stages of the co-decision procedure (cf. Article 8(1)). In contrast, open discussions under other procedures are limited to the first debates on new and important dossiers and otherwise if the Presidency and Coreper decide to open the ministerial meetings (Article 8(2-5)). For the public discussions at the ministerial meetings, the Council provides internet video streaming which makes it possible for everyone with a computer and internet access to follow the sessions. In addition, the Council’s practice of publishing voting charts that are attached to the legislative dossiers ensures intelligibility of ministerial voting.

Altogether, when comparing to the current treatment of co-decision dossiers with the Council’s openness record in the past (prior to the Brussels Presidency Conclusions and the subsequent revision and improvement of the rules of procedure in 2006) as well as under the present rules concerning other decision-making procedures, openness is considerably better under co-decision than under the other EU decision-making procedures. While these improvements are acknowledged and underlined as important steps in the right direction of facilitating the formation of an informed public opinion, the sections below will further substantiate these findings in accordance with the other conclusions that can be drawn from the

\(^1\) Cf. chapter 4, section 4.3.
\(^2\) For an evaluation of the second pillar, see Stie (2008).
evaluation. More precisely, the democratic qualities of co-decision must be balanced against the democratic deficits of its actual practice.

**The formal set-up of co-decision – sequencing of decision-making stages**

From a deliberative democratic perspective, decisions should not be taken before a proposal has been properly discussed and examined from all relevant perspectives. Political choices that will be binding on citizens require argumentative testing. However, when positions have been presented and considered, an element of institutionalised bargaining is legitimate and acceptable in order to ensure that decisions are also taken efficiently. Bargaining and subsequently voting are mechanisms to reject or adopt the relevant legislative proposal when time is up and the parties have not reached a consensus. Moreover, voting can also represent a formal confirmation of a process where a consensus has been reached. Generally, the point is that the sequencing of policy-making stages is central.

When we look at the formal set-up of the co-decision procedure in Article 251, the lack of strict time limits gives the first reading an explorative character providing both the EP and the Council the opportunity to get familiar with the content of the proposal. It facilitates the possibility to discuss and reach an agreement on what is normatively and technically at stake and to collectively form their positions before a final decision is taken in each legislative house. In this sense the formal rules open up for deliberation prior to decision-making. The second reading is more structured with regard to time limits, but debate is still possible. What is more, if proceedings under the second reading are difficult but agreement is nevertheless conceived to be within reach, recourse to the Conciliation Committee opens up for a Treaty-regulated bargaining setting between the EP and the Council with the Commission as facilitator and broker. The reason why the Conciliation Committee can be seen as a legitimate bargaining setting is because it appears towards the end of the procedure when the positions and options are well-known to the participants and to the public, but where final agreement has not yet been achieved. Moreover, even if its members are not composed of elected representatives only, the Conciliation Committee can still be conceived as a legitimate bargaining arrangement. In this way, it
provides a legitimate mechanism to induce both efficiency and effectiveness in co-decision-making. The third reading does not open for debate, but a presentation of the agreement reached in the Conciliation Committee. Hence the third reading procedure in both the EP and Council respectively amounts to mere voting on a (reversible) piece of legislation. Again, the formal set-up of the co-decision procedure with an explorative potential in the first reading, more structured proceedings in the second reading with time for both debate and possibly regulated inter-institutional bargaining towards end of the process, make a third reading solely devoted to voting acceptable.

In sum, the Treaty-regulated set-up of the co-decision procedure ensures that deliberation can precede bargaining and decision-taking. Moreover, the sequencing of the procedure allows for intelligible stages of decision-making. However, the established practices of co-decision-making manifested by the trialogues obscures the democratic qualities of the formal Treaty set-up; thus, as we shall see below, render them merely potentials.

Intelligibility of procedure and separation of powers
A similar pattern can be found with regard to the ex ante indicators figuring under the fourth criterion regarding mechanisms to neutralise asymmetrical power relations.

With regard to the first neutralisation indicator – intelligibility of procedure – the description of the co-decision procedure in Article 251 is, I would argue, fairly comprehensible for citizens and other interested parties. This point is also supported by the fact that the Commission, the EP and the Council all provide easily accessible and comprehensible co-decision guides which explain the basic functioning of the procedure. Article 251 delineates a predictable and consistent procedure in the sense that it describes the three readings, its various time limits, voting rules and how it is possible to conclude a dossier at every reading. Moreover, Article 251 describes the actors involved and how the Conciliation Committee shall be organised and composed. In this sense, we may argue that co-decision is an intelligible legislative procedure.
This is also the case when we consider the principle of separation of powers. When seen in isolation from the larger EU system, the legal demarcation between the Commission as the policy-initiator and proposer, the EP and the Council as the co-legislative houses and the ECJ as the judicial branch is respected. However, when the larger EU inter-institutional relations and powers are under consideration, the EU system allows the Council another go on co-decision dossiers since the same national experts often sit in both the Commission expert groups as well as the Council working groups (and later in the Comitology committees).

Hence, again it can be argued that the formal arrangement as described in the Treaties is conducive to a democratic organisation of co-decision-making, but that the established processes and practices weaken the democratic quality intended by the formal provisions.

Judicial review and Ombudsman as additional accountability and justificatory settings

With regard to the two ex post neutralisation mechanisms we saw that both the ECJ and the Ombudsman offer settings where decision-makers can potentially be held to account.

As a first pillar legislative procedure, co-decision dossiers can be tried before the ECJ if (natural and/or legal) persons see their rights violated. Here, the Court has jurisdiction and is authorised to review not only compliance with procedural rules, but also whether the content of co-decision dossiers are in line with Community law. As a neutralisation mechanism, the Court functions as a setting where decision-makers have to provide reasons and justify their conduct/decisions in a publicly accessible manner. Hence, in knowing that they may be tried before the Court after an act is adopted can have a disciplining effect on the actions of decision-makers during the legislative procedure.

Even if only a soft law mechanism, the Ombudsman institution has a significant impact on opening up decision-making processes in the EU. The EO has steadily carved out a place as an important complaint organ, especially with regard to procedural aspects such as lack of openness. In such cases, plaintiffs can get their case reviewed in an
Co-decision – tried, but not acquitted

...easily accessible and inexpensive manner. In this sense, the EO offers a setting where individuals with limited means can get their complaints reviewed (given that the matter falls into the category of maladministration).

Both the Court and the Ombudsman thus provide third party scrutiny that can intervene between decision-makers and those affected when the latter see their rights violated by co-decision dossiers. They are both procedural mechanisms that function as limitations and incentives on decision-makers’ actions so that they are more likely to behave in accordance with Treaty provisions. In this sense, the Court and the EO have pre-emptive effect.

In addition and equally important from a deliberative democratic perspective, both the Court and Ombudsman represent publicly accessible settings where decision-makers must explain and justify their positions. We could also stretch this point even further and argue that even in cases where the plaintiffs do not succeed, the proceedings of the Court as well as the Ombudsman put the burden of argument and justification on the decision-makers rather than on the plaintiffs. They ensure that single individuals and/or other legal persons do not have to stand up against the EU institutions directly, but are rather helped by an adjudicative third-party. Such mechanisms are important as a direct address by individuals and others can be very easy to just ignore at the EU level due to the very asymmetrical relationship between the EU co-decision institutions and single individuals and/or other legal persons. This is especially so in polities without a well-functioning media structure and public sphere.

Democratic deficits
These democratic qualities notwithstanding, the co-decision’s overall problem is that the above-mentioned qualities are seriously weakened due to character and scope of informally established rules and practices. This pertains first and foremost to the extensive usage of the trialogues, but also how the Council is organised internally. More precisely, whereas the above shows that the formal set-up of the co-decision procedure clearly have democratic qualities, the way
co-decision-making is actually conducted and practiced largely renders these qualities latent rather than materialised.

The Council’s internal organisation – an obstacle to a democratic opinion- and will-formation process

Above, it was argued that in order for co-decision to fulfil the first criterion both legislative houses must ensure an open setting conducive to the requirements of a democratic deliberative meeting place. As we have seen, the Council does not live up to its role as a democratic legislator according to this understanding. The problem is that it is primarily the lower echelons – the working groups, the Council Secretariat and Coreper – that take care of the daily work on co-decision dossiers. Hence the important collective opinion- and will-formation process prior to actual decision-taking is not in the hands of the people and their (elected) ministers, but rather the unelected Council officials. It may be that the agreements accomplished in these settings are reached in a deliberative manner, but they do not have democratic qualities and can only qualify for the category of deliberative legitimacy as introduced in chapter 2. At the ministerial level, on the other hand, the process is better described as an aggregation of preferences rather than a collective forming of a common position. In this way, Union citizens are deprived of a setting where arguments are presented, tested and justified in a publicly accessible manner. The meetings below the ministerial level are all closed and conducted in camera. Apart from provisional agendas, there are no working documents available from these meetings and it is only the Commission that has access to Council meetings. The EP and the public, on the other hand, are generally excluded from knowing what and how dossiers are discussed in the working groups and in Coreper.

Consequently, the heavy influence of unelected officials renders the openness of ministerial meetings de facto less valuable from a democratic point of view. Open ministerial meetings function at best as settings where citizens can view the adoption of already reached agreements. In this way, the institutional interplay and division of labour between working groups/Secretariat/Coreper, on the one hand, and the ministerial setting, on the other, does not comply with the conditions for a democratic sequencing of deliberative
tasks/moments as is the case in the EP since the Council officials have no authorisation to speak on behalf of affected parties. It is only the ministers who have the electoral foundation to be the citizens’ spokespersons, but in leaving almost the entire legislative process in the hands of the unelected officials, they fail to live up to the requirement of public justification. As argued in this thesis, it is not enough merely to be elected as representatives they must also earn their right to speak on behalf of citizens. This is only achieved to the extent that they are willing to explain and justify their decisions in a setting where the public can actually watch them ‘in action’. In other words, Council ministers are not in line with the requirement in the Dag Hammarskjöld slogan ‘Only he deserves power who every day justifies it’ as the exercise of power is not satisfactorily fused with public justification neither at the EU level nor at the national level. The Council’s main challenge is therefore that there is no democratic process of collective will-formation only at best a democratic voting or decision-taking moment:

Unlike most other legislatures, the Council members do not pass policies according to a set of policy preferences publicly announced to the full population affected by these policies. It is thus often difficult for the constituencies to have a clear overview of all governments’ positions on a specific policy issue (Hagemann and De Clerck-Sachsse, 2007: 40).

There is much talk about the fragile status of the EP in the hearts and minds of European citizens, but they should perhaps have the same worries about the Council. It is difficult to ignore that the internal organisation of the Council suffers from serious democratic deficits which consequently also affect the democratic quality of co-decision-making. The indirect chain of representation is from the outset a weak democratic mandate. To function as a democratic legislator the Council should consequently be organised in a way that aims at compensating for this shortcoming, not the other way around where it shuns publicity and its obligation to justify decisions. The ministers do not even meet the legitimacy requirement on which the intergovernmental logic rests. Here, the ministers should at least comply with what the principle of indirect representation demands and have established a practice of reason- and account-giving in their respective constituencies at the national level. Instead, citizens are
merely cut off with a press conference or statement towards the end of the process and this does not comply even with the minimum democratic requirements. The implication of the intergovernmental logic underpinning the Council’s organisational set-up effectively distorts the legitimacy of the ministers’ indirect chain of representation:

Secrecy creates and reinforces the informational and capacity asymmetries which plague the relationship between national executives and national parliaments on European issues. It precludes national parliaments from having sources of information alternative to the accounts offered by national ministers(...) This renders it difficult not only to know what has actually been said in such meetings, but especially why decisions were adopted. (Menéndez, 2009: 303, see also Schneider and Baltz, 2005: 23).

In fact, the very basis on which the intergovernmental principle of indirect representation rests can itself be questioned. Many studies have shown that the Council is not so intergovernmental after all, but rather a highly integrated and supranational institution.3 Hence the principle of indirect representation is not enough to legitimise the ministers’ delegated powers which subsequently also renders the intergovernmental evaluation standard insufficient. This is not only detrimental for the supranational legislative process as we have been dealing with in this thesis. As mentioned above, it also seriously affects the national level and the national parliaments’ ability to conduct an informed and enlightened scrutiny of their government.

**Politicians and experts**

Some may find the conclusion on the internal organisation of the Council too harsh. They may side with the intergovernmental logic where the ministers work on delegated powers and where they are only accountable in their respective national constituencies. In this regard, it should be added that the second criterion of inclusion of affected and competent parties reflects an attempt to capture empirically the difference between the democratic and the epistemic

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3 This is so even in the second pillar. See, Lewis (1998, 2000); Curtin (2007b); Smith (2003); Duke and Vanhoonacker (2006); Sjursen (2007); Cameron (2007).
dimensions of decision-making. In holding that affected parties’ representatives shall always have the upper hand, critics may argue that the claim I make here is too strong. Modern decision-making is complex, technical and knowledge-demanding. Elected representatives are not experts in all fields (even if the sectoral division of EP committees have fostered many quite specialised MEPs), but are politicians with general knowledge. In expert terms, then, democratically elected legislators are considered ‘(...)to be seriously deficient as lawmaking bodies. They often lack, among other things, the expertise, staffing resources, organisation, cohesion and flexibility needed for the making of quality legislation. Thus, in no European country does the elected body act as the exclusive legislator’ (Van Schendelen and Scully, 2006: 2). In other words, experts in a variety of fields are needed to ensure that decisions meet certain scientific and cognitive demands. Numerous experts are included and consulted in many ways ranging from single events with outside lobbyists to permanent sector bureaucrats in the Commission or the national experts in the Council working groups. For the internal organisation of the Council, the working groups, Secretariat and Coreper indeed contribute to much needed (efficient) problem-solving, technical expertise and the ability to reach agreement among a heterogeneous set of member states positions. Hence they also play an important role in co-ordinating collective action and in enhancing the epistemic dimension of co-decision dossiers which are also valuable to democratic decision-making.

However, from a democratic perspective the fear is that they become too powerful thus out-maneuvring the elected generalists. As discussed above, this is a challenge in the Council. Here, the ministers play second violin to the working group, Secretariat and Coreper officials in the important opinion- and will-formation process prior to final decision-taking. The latter run the ‘daily show’ (much due to the fact that sitting in the Council is only a part-time job for the national ministers) and they also influence the way issues are formulated and talked about. As we have seen, issues are framed in technical terms which are subsequently adopted also at the political level where ethical and moral dilemmas, political choices and conflicting positions should be clearly articulated and communicated to the general public in order to bring out the normative implications of policy proposals. This type of technical language sometimes also
influences debates in the EP. However, co-decision dossiers are not merely apolitical and uncontroversial and the application of a technical language contributes to ‘neutralise’ and ‘disguise’ the political salience and stakes from citizens and others affected. The plea for more early agreements has partly been justified on the basis that there are many dossiers that are merely technical and can thus more easily and efficiently be dealt with if they are just fast-tracked through in a first reading where they – from the Council side – are hardly dealt with by any elected representative.

The fear of expert domination is not unique to the EU alone even if it is more critical at the European level due to weaker representative institutions to ensure democratic control. However, the Council’s problem is a general one, namely that:

(...) officials act on the basis of normative knowledge that is not regulated by democratic procedures. They use their ‘own’ perceptions and values or ‘internal’ professional standard when they evaluate societal problems. The question is from where the experts yield authorisation to deploy particular values when doing their job. Who has given them the right to act in this way and how can we know that they have applied correct values and valid knowledge? (Eriksen, 2001: 17-18, my translation).

In other words, the chain of democratically legitimate decision-making has here been turned up-side down as administrative power has not been democratically assessed and transformed into communicative power before the Council decides either to adopt or to reject a co-decision dossier (cf. chapter 2). The internal organisation of the Council hinders co-decision dossiers to be scrutinised by public reason because the balance between the politicians and experts tilts towards the latter to the extent that the fear of a self-programming ‘epistocracy’ or governance without democracy’ is imminent (Eriksen, 2009: 173-174). This is also underlined by the fact that there are no possibilities to hold these officials accountable neither through elections nor in public debate. Hence the scope and extension of the Council officials’ involvement should not be mistaken as a

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4 For instance, they concern cases on mandatory data retention, access to documents, privacy in telecommunications, (see Bunyan, 2007b)
democratically legitimate way of relieving the ministers of their heavy workload as the arrangement seriously violates the normative hierarchy between elected and non-elected actors.

From the outset, the strong emphasis on respecting the normative hierarchy between representatives of affected and competent parties may seem a bit rigid. True, the consequence of upholding this emphasis is that in cases of conflict the views of elected politicians will always have to trump those of the experts thus also running the risk that the representatives of affected parties’ views may not offer the qualitatively best choices and thus not the most optimal outcomes for all those affected. This is of course not the desired outcome, but it is arguably the price that must be paid if we want to retain a certain level of democratic control of decision-making. Since we cannot anticipate all the consequences of a decision, we can never really be sure about what the best solution is. No one possesses complete information and knowledge – not even experts. Unintended consequences must always be factored in – sometimes they go in a positive direction, but very often also in a negative direction. Unelected and unaccountable experts cannot and should not be entrusted to dominate the majority of the opinion- and will-formation process or the last decision-taking word. It is, however, impossible to fully avoid that experts deal with issues that raise ethical and moral questions, but it is the way and the extent to which they are involved in Council decision-making process that is worrying from a democratic perspective. However, to decide exactly how the balance between politicians and bureaucrats/experts should be drawn is difficult and ultimately a task to be settled via public debate between Union citizens and politicians. In other words, if the Council insists on keeping its secretive working methods and privileges the ministers should be prepared to defend and sustain them in a public debate.

The democratic deficits of the internal organisation of the Council does, however, not mean that dossiers are not tested argumentatively. Many studies show that the working groups and Coreper are settings where decisions are reached in a more deliberative way (Lewis, 1998, 2000; Heisenberg, 2005; Hayes-Renshaw and Wallace, 2006). The point (cf. chapters 1 and 2) is that this type of deliberation does not amount to a democratic test of
arguments as the ministers are not involved and the meetings are not publicly open. Whereas the more deliberative and consensus-building method characterising the lower level working groups in the Council seemingly represents a strong candidate for what I labelled ‘deliberative legitimacy’ in the introductory chapters, the evaluative scheme and the subsequent assessment above clearly illustrate that this working method does not meet the requirement of democratic deliberation and should thus not be confused with democratic legitimacy.

Having said this, the normative aspects and implications of experts and bureaucrats’ involvement in EU decision-making is, on the whole, still an under-developed research area that should be investigated and assessed more thoroughly. For instance, they do not as such have a ‘constituency’ to which their knowledge is attached, that is, they advocate and exercise theoretical and skill-based knowledge which is acquired through several years of education and training. On this basis, they could argue that their deliberations are mainly scientific and not political; that they decide within given parameters; that they are constrained by mandate, procedural rules and organisational setting; and that they are controlled by other colleagues. Hence even if the participation of experts and bureaucrats cannot, from a democratic perspective, dominate the decision-making process, the professional knowledge with which they contribute represents – in principle – a more general or universally valid kind that does not necessarily reflect and represent parochial or special interests situated in civil society, the market or the political system as such. It could perhaps rather be argued that their participation has been an important component for the development and stability of the constitutional state and that they in this sense represent important carriers of democratic values and principles. The more precise normative value of how experts and bureaucrats can and are contributing democratically in general and in the EU in particular can, however, not be decided in advance.

The democratic challenge of trialogues

It is not only the internal organisation of the Council that affects the co-decision procedure’s democratic credentials. Throughout the thesis, the impact of trialogues has been a topic in almost every
chapter and it is now time to address them from a more overall perspective. In short, the problem with how the trialogue system functions today pertains to the scope and scale with which it now influences the co-decision processes. This results in the following democratic problems: Trialogues (i) interrupt the collective opinion- and will-formation processes in the EP; (ii) they keep crucial parts of the decision-making process away from the public eye and thus reduce the level of openness; (iii) they reduce the number of decision-makers; (iv) they are not composed of a representative selection of elected participants hence citizens cannot be sure that all positions have been voiced and taken into consideration; (v) they make the co-decision procedure less intelligible for citizens as the emphasis is on informal and secret meetings; (vi) they make it harder for citizens to know what decision-makers are deciding and hence also more difficult to hold them account; (vii) they (may) weaken the quality of dossiers.

One of the democratic qualities of co-decision reported above was that the division of labour inside the EP is not violating the normative hierarchy between elected and unelected actors since it is, firstly, the MEPs who are involved in all stages of the decision-making process and, secondly, because the EP committees are representative of the EP as a whole. Moreover, the division of labour could be conceived as a sequencing of deliberative moments/tasks ensuring a democratic opinion- and will-formation process in the EP. However, the evaluation also revealed that this internal process between committee and plenary is to a significant extent disconnected due to the constant pace of trialogue meetings. When committees and plenary sessions become less important this also deprives Union citizens and other affected parties of their right to justification. Thus, trialogues represent a serious obstacle to the democratic process of opinion- and will-formation process taking place in Parliament and hence to a large extent disqualify the democratic features of the formal co-decision process discussed earlier. What is more, the impact of trialogues is exacerbated when agreement is reached in the first reading. The process is, as we have seen, even more informal at this stage and completely impermeable for citizens and other affected parties as the institutions have at this point not reached an official position. In this way, the trialogues circumvent the formal set-up of the EP which, in principle, at least ensures that there is one
democratic deliberative meeting place where decision-makers defend their positions on a regular basis. However, the established practice of co-decision-making is rather that the scope and scale of trialogues keep the majority of important and decisive legislative discussions more or less constantly outside the public radar.

Trialogues also harm the criterion of inclusion as there are only a handful of people present and neither the Council nor the EP participants constitute a representative selection of their respective houses. Rather, in the EP we have seen that the larger political groups have become more dominant as they are often occupying the key positions (rapporteurs, committee chair, group coordinators) and thus become decisive actors. In the Council, delegates from the country holding the Presidency dominate (i.e. officials from the working groups, Coreper, potentially the minister). From a deliberative perspective, the problem with closed settings under such circumstances is that the deliberation that may take place could be too narrow and fail to ‘(...)reproduce the pluralism of the public in the private’ (Chambers, 2004a: 390). Trialogues risk being dominated by ‘private reasons’ instead of ‘public reasons’ which means that the arguments presented are not arguments that all could generally accept if they were presented in a publicly open debate (i.e. egoistic and self-interested reasons). The problem is not necessarily that trialogues only contain a limited number of participants. This could be legitimate if they had been representative of the interests and positions in the EP and Council respectively and/or had the results of trialogue deals been properly tested in a publicly accessible manner after the meeting had taken place and before a final decision was taken. Instead, the composition of trialogue members challenges the principle of representation as we cannot be sure that all positions have been taken into consideration when, firstly, there is not a representative selection of MEPs and, secondly, when the Council is not represented by elected representatives. And with regard to the democratic testing of the trialogue outcomes, the assessment showed that these outcomes are often presented to the EP committees and plenary sessions as ‘take-it-or-leave-it’ deals and not as a starting point or basis for a democratic legislative process. As for the Council, the trialogue participants (that is, the permanent representative from the member state holding the Presidency) usually orient and consult the permanent representatives and not the ministers concerning the
acceptability of a trialogue outcome. How can Union citizens trust that their positions have been properly voiced and considered under such circumstances?

Whereas the interaction between the EP and the Council has increased significantly (at all levels) with the introduction of the co-decision procedure (Corbett et al., 2007: 242) and also improved the inter-institutional relations, this has seemingly happened at the expense of the intelligibility of the procedure. As we have seen, co-decision has been accused of being a complicated procedure where the protracted process of informal inter-institutional interaction through trialogues renders it very hard for the public to get a grasp what is going on during the process (e.g. Bostock, 2002; Andeweg, 2007; Bunyan, 2007: 2; Fouilleux et al., 2005: 617). The inclusion of elected representatives cannot compensate for the insulated and non-transparent procedural features because the latter deprives the citizens of the chance to put co-decision-makers to account. In this sense, the trialogue system is not a procedural feature that induces, but rather deters public reason-giving towards affected parties.

What is more, the trialogues have seemingly also made co-decision more bureaucratised, encumbering political input as the focus is on reaching deals as quickly as possible and then present it to the EP and Council for approval. Whereas the institutions have done a lot to improve the relations between them, such as coordinating calendars, working methods and streamlining the functioning of the trialogues in the Joint Declarations, their relationship to Union citizens has been neglected. It could thus be argued that the trialogues make the EP and the Council more inward-looking, minding their own deals and discussions thus ‘forgetting’ about the public’s right to know what they are up to. The effect is that the procedure could be conceived more as an inter-institutional battle between the EP, the Council and the Commission rather than a political battle over the best course of action as the citizens find it hard to detect what the political stakes really come down to. In other words, the institutions’ duty to identify and articulate politically salient issues and dilemmas in an open and easily understandable manner suffers. This is especially so concerning the commitment to close dossiers as quickly as possible in early agreements. The Joint Declarations underline efficiency and transparency, but whereas there are many paragraphs on how to
ensure efficiency, the transparency and accountability aspects are merely mentioned not developed.

Even if the Joint Declarations to some extent semi-formalise the trialogues, the Council and also some MEPs (mainly from the large political groups who are benefiting from current arrangements) are unwilling to overhaul and formalise trialogue rules and practices through an Intergovernmental Conference. They want to keep them as informal and flexible as possible because this enhances the opportunities for the key actors to influence the dossiers. What is more, there seems to be a general tendency within the EU at large to by-pass the formal procedure for Treaty reform and just use inter-institutional agreements (such as the Joint Declarations) to alter the formal, institutional set-up in a favoured direction even if this is not in line with Treaty provisions (cf. Curtin, 2007a). Without the authorisation of an intergovernmental conference, the development and semi-formalisation of the trialogue system through the Joint Declarations has changed the character of the co-decision procedure from a sequential to a simultaneous process which in effect is violating the current Treaty provisions as set-up in the Article 251. In turn, this has resulted in the situation that the trialogue system becomes a competing decision-making arrangement which largely empties the formal processes in the EP and the Council of legislative importance.

There is yet also another, but related problem regarding the extensive usage of trialogues pertaining to how they affect the overall quality of co-decision acts. Whereas the trialogue system plays an important part in explaining the successful adoption of co-decision dossiers, the efficiency gained may backfire the whole system and challenge the democratic improvement represented by the increased involvement and competence of the EP in the Union’s overall decision-making. The reason for this is again first and foremost pertaining to the negative effect early agreements has on the democratic quality of co-decision acts. Prior to Amsterdam early agreement was not an option and most dossiers went all the way through conciliation which meant that the institutions’ positions and arguments were better known, firstly, because the EP and Council had by then actually formed a position and, secondly, because after the first reading more documents are accessible (i.e. the EP’s report, the Council’s Common
Position etc.). Today, very few dossiers reach the conciliation stage, and even in a situation where the 2004/2007 enlargements significantly increased the number of participants and presumably also made it more difficult to reach agreement, the trend is still first reading agreements.

However, ‘(...)although more readings are not required before agreements can be made, it was at many occasions stressed that the meetings last longer, and that the legislative process may have been prolonged somewhat with regard to the time spent – rather than the number of readings – on each individual proposal’ (Hagemann and De Clerck-Sachsse, 2007: 25). In other words, even if dossiers are concluded in first readings, it should not automatically be concluded that the decision-making process is always much more efficient if a dossier is closed at first rather than at second reading. The reason for this is, as we have seen, that there are no time limits in the first reading. The process can continue as long as the institutions so decide. Even if the argument is that early agreements are preferable because they contribute to efficient legislative processes, it has also been shown that the reason why the institutions prefer and are in the majority of cases also able to close the process after the first reading, is because the decision-making situation is more flexible (but also more undemocratic) under the first reading. The absence of official EP and Council positions which function as a constraining factor on the key actors’ scope of independent manoeuvring in the second reading is a main aspect in this regard. However, the flexibility of the first reading is – as we have seen – also among the reasons why the usage of trialogues so early in the decision-making process is severely undermining the conditions for democratic legitimacy at this stage.

In this relation it should also be questioned whether reaching a deal early in the process only among a handful of people who meet in secrecy is rather a counterproductive means to ensure qualitatively good decisions. The extensive usage of trialogues may backfire as it becomes less open to new ideas and risks the recycling of opinions and positions which in the longer run can affect the quality of and subsequently jeopardise the legitimacy and trust in EU co-decision acts. What seems to be forgotten when urging for early agreements is that public policy-making must be able to master the difficult task of simultaneously balancing efficiency and democratic legitimacy.
Hence there are good reasons for arguing that the EU legislative processes can gain from striking a better balance between these two standards and take the time it takes to go through the formal stages of decision-making in a way that also the citizens can follow instead of just fast-tracking legislation through the EP and the Council ministerial settings as quickly as possible. In sum, a democratically legitimate procedure may turn out to be more efficient in the longer run because it produces qualitatively better and thus more stable outcomes.

**Co-decision acts as working agreements?**

The main conclusions that can be drawn from the analysis are two-fold and closely inter-linked. On the one hand, the formal rules of co-decision-making are in many respects compatible with democratic decision-making. Had the Council’s internal organisation been improved, the procedure could have represented a promising example of democracy beyond the nation-state. On the other hand, the established rules and practices, manifested in the trialogue system renders passive the democratic potentials characterising the formal procedural rules. When the main part of the decision-making process takes place in trialogues and not in the formal institutions, co-decision becomes ‘committee governance’ and loses its kernel of democratic government.

Based on the above evaluation, it can, in other words, not be argued that co-decision acts are likely to meet the quality of a working agreement. As shown in chapter 2, a working agreement is an outcome that is supported by reasonable reasons, that is, reasons that are ‘(...)inter-subjectively justifiable(...)’, they are different, but ‘(...)become understandable and mutually acceptable(...)’ through deliberative processes (Eriksen, 2007a: 107, 108). In other words, reasonable reasons are those reasons that have been tested and withstood critique in a publicly accessible manner and the only way to determine whether a decision-making procedure comes close to complying with this standard is if it meets certain procedural criteria such as those developed in this thesis. As we have seen, the procedural conditions underpinning co-decision-making do not ensure a proper testing of dossiers before they are adopted. Rather, the process of co-decision-making is largely held behind closed doors
and/or conducted by a handful of people - some elected, but also a significant number of unelected actors. These actors cannot be assumed to represent the plurality of views that characterise modern societies. This is clearly the case under early agreements, but also second reading agreements suffer from the extensive usage of trialogues. Under these conditions it is consequently unlikely to assume that co-decision acts are supported by mutually acceptable reasons.

But maybe we are judging co-decision too hard? In other words, is the working agreement a too demanding standard for a supranational decision-making procedure such as co-decision? In this regard we could reiterate the rhetorical question posed in the first chapter: If Union citizens were asked to actually give their consent to co-decision acts, what kind of conditions must the procedure ensure in order to make it likely that citizens will find such acts acceptable and thus legitimate constraints on their actions? What reasons could they have to obey co-decision acts? Most likely they will not all agree on one single democratic principle, but rather invoke different, but equally valid understandings of how co-decision should be democratically organised. Some would perhaps argue that co-decision should be organised according to an understanding of democracy as popular sovereignty based on the principle of one person, one vote. Others would defend the idea that democracy is defined according to how convincingly political organs have justified decisions towards affected parties. Others again would defend a principle of delegated powers where certain political organs have obtained competence to act on behalf of the collective such as the arrangement of national representation of member states in the Council. Seen from this vantage point, the working agreement seems like a suitable standard for assessing the co-decision procedure as it can accommodate all the above interpretations of EU democracy at the same time - but only as long as the various conceptions of democracy have themselves been discussed and vindicated as mutually justifiable in a democratic process.

Since its inception with the Maastricht Treaty, the co-decision procedure has become more important both with regard to expansion of legal bases as well as an overall increase in number of acts taken under this legislative framework. With the potential ratification and
implementation of the Lisbon Treaty, the co-decision procedure will become the ‘ordinary legislative procedure’ of the EU covering an extended number of policy areas of which have hitherto been conceived as too sensitive to let the EP have considerable influence, such as agriculture, fisheries and various areas within justice and home affairs. The growing number of policy areas will most likely increase the inclinations to close dossiers after the first reading in order to increase efficiency. Under the work of the Convention on the Future of Europe it was argued that co-decision ‘(...)was proving successful in reinforcing the legitimacy of European legislation and should become the normal way EU laws are adopted’ (Corbett et al., 2007: 220). Even if the co-decision procedure has an aura of democratic legitimacy due to the involvement and participation of the EP, we should urge a bit of caution against such a presentation of the procedure. The present evaluation has revealed that this picture must be balanced against the democratic deficits of the co-decision procedure. If we compare co-decision to the to the other EU decision-making procedures, it is at least easy to tell that these procedures are not democratically legitimate. In this sense, they have at least a certain sobering quality of realism. In contrast and put bluntly, we could argue that they way co-decision functions is sometimes more precisely described as a technocratic procedure in democratic disguise. This is not a promising prospect for democracy beyond the nation-state.

The evaluative framework and the way ahead
In this thesis, the focus has been on discussing and assessing the democratic qualities and shortcomings of the co-decision procedure. In this sense, the present study fills a gap in the academic literature on co-decision which has first and foremost been concerned with the issues of how co-decision affects the relative inter-institutional power relations, how to explain institutional change and/or how to understand the general developments of co-decision-making. Whereas one may argue that these debates indirectly touch upon democratic issues for instance by investigating the status of the EP, they do not provide an analytical framework that facilitates a discussion on the democratic credentials or shortcomings of the co-decision procedure. In other words, these studies do not answer the question of how we can know democratic government when we see
it. The evaluative scheme developed in this thesis both provides a
standard (i.e. working agreement) of what should be expected of a
democratic outcome as well as how to achieve and/or ‘measure’
whether a decision-making procedure complies or falls short of
meeting the standard (i.e. the criteria and the indicators). In
this sense the thesis contributes to make the academic debate on the
democratic merits and shortcomings of co-decision-making more
tangible. It could also be argued that it provides a more concrete
answer to Union citizens on when and why there are good reasons
and when and why there are less good reasons to obey and respect
EU law. In sum, the thesis contributes not only to make the debate on
co-decision richer, it also makes it more nuanced.

We now know how the co-decision procedure ‘scores’ with regard to
democratic procedural qualities, but how well did the evaluative
scheme itself perform? As argued above, an important aim of this
thesis is not only to assess the co-decision procedure, but also to
contribute to the ‘operationalisation’ of deliberative democracy. In
the final paragraphs, the task is therefore to consider the merits and
shortcomings of the evaluative scheme. What can be learned from
looking at procedural qualities? And where do we go from here?

Firstly, the evaluative scheme shows that deliberative democracy is
neither utopian nor too abstract. The criteria were all operationalised
into indicators that are clearly demanding, but, under favourable
empirical conditions, not impossible to realise given that there is
political will. What is more, both in the process of developing the
evaluative scheme and in the following assessment, I have sought to
underline that deliberative democracy is not merely about
deliberation, but is rather to be seen as complementing other
decision-making mechanisms (such as bargaining and voting).
However, even if deliberation is not a sufficient mechanism to ensure
democratic decision-making, without it, bargaining and voting will
not function in a democratically defensible manner (see also Warren,

5 Having said this, it should, as outlined in chapter 3, be remembered that in focusing
on procedural qualities the conclusions that can be drawn tell us something about the
preconditions and thus the likelihood of democratic decision-making to take place. In
other words, the conclusions about these general procedural characteristics of co-
decision-making cannot automatically be transferred to how individual co-decision
dossiers have been decided, but should be assessed on their own merits.
274. In sum, ‘(...)the proper idea of feasibility ought to be a normative one: it entails neither the surrender of the original ideals of deliberative democracy nor the mere accommodation to existing institutional and social facts’ (Bohman, 1998: 423). Even if readers may disagree with the way I have developed and operationalised deliberative democracy in this thesis, the argument that this model of democracy is unfeasible can consequently not be upheld.

Secondly, the main assumption underpinning this thesis is that democratic legitimacy is procedural and determined by the way decisions are reached. This does not mean that the quality of outcomes cannot be evaluated independently of the procedure. Outcomes can be assessed for how just or unjust, effective or ineffective etc. they are (i.e. according to other standards), but their democratic quality can only be determined by assessing the conditions under and the processes through which they were achieved. As argued in the introductory chapters, many EU studies have focused on the deliberative aspects of EU decision-making, but this does not mean that the normative quality we attach to agreements or practices characterised by deliberation is always the same. My argument was that without distinguishing properly between the different types of conditions under which deliberation takes place, we may wrongly overestimate the normative credentials of deliberatively reached agreements and mistakenly conclude that they automatically also have democratic quality. In underlining the difference between the role and participation of actors representing the views of affected parties (elected politicians) versus actors representing competent parties (experts, bureaucrats), the analytical framework is capable of conceptualising more clearly the conditions under which it is possible to expect democratic deliberation to occur rather than merely elite/expert deliberation.

Moreover, the evaluative framework is also equipped to show how and why it is not enough to include elected representatives, but that it is the level and type of involvement of these representatives that matter: ‘Only he deserves power who daily justifies it’. In other words, we cannot take for granted that just because the EP was included as a co-legislator on a par with the Council this will automatically make EU decision-making more democratic. Including the EP is not a guarantee in itself that the MEPs will behave
democratically. We can also not simply assume that the ministers meeting in the Council can be conceived as channels where the views of affected parties (i.e. their respective national constituencies) are voiced. Moreover, the evaluative framework provides the conditions for showing when co-decision acts are satisfactorily subjected to democratic scrutiny and when unelected participants become too dominant and autonomous to be compatible with democratic decision-making.

Thirdly, a central topic in this thesis has been the relationship between the more open, formal setup of the procedure versus the closed, informal (or semi-formal) trialogue structure. The evaluative framework brings to the forefront the normative dilemma inherent in this dualism. It takes us some way in specifying the conditions under which closed settings can be legitimate and when they are violating democratic principles. We have seen, that even though the Conciliation Committee did not fulfil the conditions for a democratic deliberative forum, it could be conceived as a legitimate despite the fact that it is closed to the public during session. The reason for this is because it provides openness ex post, because it appears towards the end of the procedure where positions are already known and because the EP’s delegation is (more or less) composed of a representative selection of Parliament as a whole. The weakness of the Conciliation Committee is consequently the Council delegation as only the Presidency is represented at the minister level. The point is that the evaluative framework provides us with some tools to determine when a closed setting such as the Conciliation Committee is legitimate. The same tools also helped us to evaluate the trialogues where it was shown that the procedural qualities are largely incompatible with democratic decision-making.

However, even if the trialogues fail in democratic terms, their existence and salience in co-decision-making indirectly raises an important issue concerning the apparent need also for more sheltered settings where decision-makers can speak more freely. There is a general perception both by many of those involved in as well as observers of co-decision-making, that trialogues are vital in order to reach agreement. More precisely, it is pointed out that the advantage of trialogues lies in the institutional conditions setting up the meetings: Attendance is limited and the participants often know each
other quite well, meetings are held in secret, no minutes or verbatim records are taken and hardly any information leaks out to the public prior or during the process. Trialogues function as flexible settings where actors can speak freely and honestly, where they can sound out differences and test alternatives without being held to account immediately after the meeting is over. In this sense, the trialogues induce trust among the participants which helps the process of reaching agreement. These qualities, it is argued, contribute to facilitate agreement and thus the successful adoption of co-decision dossiers.

The issue of how to balance the relationship between open and closed settings and the alleged need for the latter, link into the broader debate on publicity’s place in democratic decision-making. This debate is also important for deliberative democracy (Elster, 1998b and c; Chambers 2004a and b, 2005). Moreover and as mentioned in chapter 2, it is often pointed out that deliberation is fragile and difficult to achieve. One important reason for this is exactly because it is dependent upon a certain level of trust and confidence. In order for deliberation to function the actors must dare to believe that the other actors act truthfully and are actually interested in reaching agreements where the best argument is the decisive factor. In short, ‘Trust is both the pre-requisite for deliberation and the result of deliberation’ (Eriksen, 2003: 208). From a deliberative democratic perspective, deliberation is also assumed to ensure rationality and quality of decisions and many argue that publicity is not necessarily or always compatible with this aim (Elster, 1998c; Chambers, 2004a, 2005). Some empirical studies have shown that open settings often have a negative influence on the quality of deliberation (Naurin, 2007; Checkel, 2001). The argument is that publicity seems to trigger rhetoric, demagoguery and manipulation and the rationality of arguments thus suffer. Chambers (2004a, 2005) labels this ‘plebiscitory reason’. In contrast, closed arenas often invoke the opposite as it is easier for participants to respond to the content and quality of each other’s arguments when they are not constantly confronted with media pressure and public opinion polls. It thus seems pertinent to be attentive to the conditions under which trust

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6 Steiner et al. (2004) found a mixed result when assessing the effect on publicity on open versus closed settings.
and confidence can be nourished and protected.\(^7\) In a complex and heterogeneous polity as the EU where a common political identity is (still) lacking trust is found especially wanting. On this background, the trialogue system could be conceived as a valuable means to ensure trust-building among the decision-makers.\(^8\) Hence, perhaps this makes a legitimate need for closed settings as they can provide the conditions for trust-building and thus more efficient (speed), effective (ability to reach agreements) and rational (ensuring quality of) problem-solving which are, after all, also important for a functioning democracy. It is often argued that closed settings are so successful (and flexible) because they, according to involved actors, are informal (cf. Council’s reluctance to formalise trialogue rules). Hence the contention among participants seems to be that the more informal a setting is, the more successful it is at reaching an agreement.

As we can see, several issues are intertwined here (i.e. rationality, legitimacy, efficiency, effectiveness, trust etc.). The question is how and when, \textit{more precisely}, it can be argued that closed settings have a legitimate place in a democratic decision-making process. As argued, the evaluative framework takes us some way in providing the tools to answer these questions, but more research is needed in order to specify and disentangle the conditions under which closed and more informal settings can potentially be justified democratically. On a general level, Warren (2007: 286) argues that it is the \textit{purpose} or \textit{goal} of the setting that should decide the level of openness. Closed settings could be legitimate in situations where actors search for common ground and where a shielded setting is a means to reach goals that can otherwise not be achieved. However, the main message conveyed

\(^7\) In this relation, Thompson (2008: 510) also reminds us that ‘(...)the empirical conditions of publicity must be distinguished from the normative requirement that deliberation be conducted in terms of public reason. This requirement, the scope of which is controversial among theorists, is a conceptual criterion of deliberation, as noted above in the discussion on public-spiritedness. The two should be kept distinct because the empirical condition of publicity may affect the extent to which the conceptual requirement can be satisfied. It is important to know whether this hypothesis or its opposite is valid: The more public the discussion, the more likely the participants are to use public reason, and the more likely the discussion is to be deliberative.’

\(^8\) The need for confidential meetings in the Council and European Council are justified by the same reason.
in this thesis is that when the purpose of a setting is the adoption of public policy, secretly reached agreements must at some point be tested and justified in a publicly accessible manner. In other words, even if more shielded and informal settings can have a legitimate place in public decision-making, the balancing act between the open and formal versus the closed and informal should not tilt towards the latter. Privatising public policy-making is never compatible with democratic government.
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