UACES 38th Annual Conference

Edinburgh, 1-3 September 2008

www.uaces.org

THE INFORMAL POLITICS OF CO-DECISION:

TOWARDS A NORMATIVE ASSESSMENT

by

Christine Reh

Paper prepared for the UACES Conference on *Exchanging Ideas on Europe*,
University of Edinburgh, 1-3 September 2008

First draft—please do not quote without permission. Comments very welcome!

Christine Reh
Department of Political Science
University College London
c.reh@ucl.ac.uk

Abstract

This paper investigates a recent trend in EU decision-making, namely the shift of legislation from public and politicised into informal and sealed-off decision-arenas. Indeed, between 2004 and 2006 alone, 63% of successful co-decision dossiers were pre-agreed in "trilogues" and subsequently concluded as "fast-track legislation" at first reading. A similar recourse to "informal politics" is a widespread response to the growing complexity of national, supranational and global decision-making, and the informalisation of co-decision has certainly enhanced the efficiency of the EU's legislative *output*. At the same time, practitioners have repeatedly criticised the democratic trade-offs for the legislative *process*—a puzzling development, considering that co-decision was originally introduced as a means to bolster procedural democracy in Europe. Drawing on three standards of legitimate decision-making—1) efficiency, 2) deliberation, 3) accountability—this paper develops a normative framework to assess the recent transformation of the EU's legislative procedure, accounting for both the formal and informal dimension of co-decision.

Introduction

The observation that political decisions at the national, supranational and international level are taken under conditions of ever increasing complexity has become a commonplace in both academic discourses and public-political debates. Complexity stems from a variety of sources—the breadth of policy-problems to be tackled and the degree of expertise required to assess and solve them; the plethora of (non-state) actors and stakeholders involved in different stages of policy-making; and the overlap of domestic, European and global decision-arenas in the "de-bordering space" that is modern politics. In the European Union (EU) more particularly, two recent institutional and systemic developments have added further complexity: the introduction of the co-decision procedure, and the Union's enlargement to 27 member states. If the former has broadened the institutional rules, interests and interaction norms of EU legislation, the latter has increased the sheer number of actors and policy-preferences, as well as the Union's cultural and party-political heterogeneity.

Increasing complexity has triggered a variety of responses—political and intellectual, institutional and normative. At the more extreme end of the spectrum, observers have questioned the place of parliamentary democracy altogether and have advocated different forms of post-parliamentary governance (Burns 1999). More generally, we witness two contrasting developments, apparent at both the national and European level (Héritier/Mair 2007). On the one hand, political decision-makers are increasingly

"sealed off" from the wider constituency, as well as from the rank-and-file of elected representatives. The number of decision-makers is *de facto* restricted, with the main process shifting from comprehensive, open arenas to small, secluded settings. On the other hand, we can observe multiple attempts at opening up the decision-process by way of direct democratic procedures, increased transparency and civil society involvement. Supranational decision-making is a prime illustration of this trend. On the one hand, delegation to independent agencies and comitology committees becomes ever more frequent, as do "early agreements" under the co-decision procedure, with legislative dossiers largely pre-decided informally. On the other hand, the Lisbon Treaty would, for the first time, institutionalise elements of direct democracy at the European level; access to documents has been facilitated in recent years; and the consultation of civil society has become a cornerstone of the Commission's approach to policy-making.

This paper is interested in the strategies decision-makers choose to cope with complexity, and in the normative repercussions that their choices may entail. More specifically, the paper looks at a particular "coping strategy", namely the recourse to informal politics. It investigates this trend by looking at the informal politics of the EU's co-decision procedure, and develops an analytical framework to assess the normative consequences of informalisation. To do so, the paper proceeds in three steps. A first part conceptualises informal politics as a widespread yet under-explored phenomenon in modern democracies, introduces possible reasons for informalisation, and identifies the features that delimit informal politics from its formal variant. A second section focuses on the co-decision procedure, where an ever increasing percentage of legislative dossiers is pre-decided between the European Parliament (EP), the Council and the Commission in informal "trilogues", often at the expense of public debate in parliamentary committees and the plenary (Farrell/Héritier 2003, 2004; Raunio/Shackleton 2003). Here, informalisation is particularly puzzling since a series of constitutional changes has introduced and subsequently reformed co-decision as a means to bolster procedural democracy in Europe. This recent trend in EU decision-making also demonstrates that an assessment of formal politics alone is insufficient, as it can neither help us explain how the political process is played out in practice, nor evaluate the democratic credentials of the EU's legislative procedure. Based on a set of three alternative standards of legitimate decision-making—1) efficiency, 2) deliberation, 3) accountability—the paper's third part therefore suggests an analytical framework to assess the transformation of the EU's legislative procedure, with criteria

relating to both the formal and informal dimension of co-decision. The final section summarises the potential benefits and costs of informal politics, and suggests a few "rules of engagement" (Shackleton 2000) that could render the informal politics of co-decision more deliberative and accountable, without jeopardising its efficiency.

1. Informal Politics as a Coping Strategy

In order to cope with the increasing complexity of politics and policy-making in modern democracies, decision-makers have recurred to a number of different strategies.

First, decision-makers have invited experts and legal specialists, both to advise them on the content, production and likely impact of legislation, and to assist them with the implementation of technical rules. The role played by epistemic communities is an example of the former (Adler/Haas 1992); the EU's intricate system of comitology committees, composed of Commission officials and national experts and delegated to specify legislative decisions, is an example of the latter (Bergström 2005). Second, decision-makers have opened up different stages of the policy-process to private and public interest groups, often capitalising on the groups' informational advantages and expertise. The institutionalised consultation of civil society in Europe (Falkner 2000), or governance through sector-specific policy-communities at the national level (Richardson 2000) are cases in point. Third, decision-makers have delegated legislative and administrative decisions in different policy-fields to independent agencies—the "fourth branch of government" in the United States. The recent debate about a supranational financial regulator in response to Europe's banking and credit crisis is a good illustration. Fourth, decision-makers have delegated parts of the negotiation and decision-process to institutionalised groups and committees—discharging their principals by providing and generating information, discussing and clarifying legal and technical questions, tabling solutions, narrowing down options, and, in many cases, reaching agreement that is subsequently rubberstamped in the political arena. Prominent supranational examples are the Committee of Permanent Representatives (COREPER) in the Council and the pre-negotiation of constitutional choice in Intergovernmental Conferences (IGCs) (Fouilleux et al. 2005; Häge 2008; Reh 2007).

The following focuses on a ubiquitous yet under-explored coping strategy in the EU and in modern democracies more generally: the recourse to informal politics.

Politics is here defined as the struggle over the generation of binding rules and decisions (Patzelt 1992, 14). This process can be played out either in the framework of formal institutions or outside; in the latter case I will call politics informal. Informal politics can either complement or substitute formal politics.[1] In the first scenario, informal politics compensates for specific deficiencies of the formal process—increasing efficiency, easing decision-making, or facilitating negotiation; in the second scenario, informal politics will replace the more generally dysfunctional formal process and generate binding rules and decisions in and of itself. In functioning democracies informal politics will (or should) only play the first role. As discussed in more detail below, depending on the underlying rules and institutions informalisation can, but need not, be a challenge to legitimate decision-making.

In modern democracies informal politics has three defining features. First, if institutionalised, social interaction will be structured by informal or semi-formal rather than by formal institutions. Following the standard definition, institutions—be they formal or informal—are here understood as rules and procedures that structure social interaction so as to enable and constrain actors' behaviour and stabilise expectations (North 1990). Formal institutions more specifically are "conscious creations of political actors" (Stacey/Rittberger 2003, 861), enforceable by a third party (Knight 1992). Informal institutions are defined as "socially shared rules, usually unwritten, that are created, communicated and enforced outside the officially sanctioned channels" (Helmke/Levitsky 2004, 727I); where such rules are codified but cannot be enforced by a third party I will talk of semi-formal institutions. Second, formal politics is characterised by the inclusion and (possible) participation of the full set of legitimate decision-makers, or by recourse to a formally restricted sub-set. Informal politics, by contrast, will be conducted by a restricted set of decision-makers; membership of informal groups or networks is variable and not formally defined. In formal politics decision-makers will generally—but not always—meet in public; in informal politics they will generally—but not always—be sealed off. Third, in functioning

[1] For a related but more narrow discussion of formal and informal institutions see Helmke/Levitsky 2004. Following their interest in parallel societies and dysfunctional political systems in particular, they categorise the relationship between informal and formal institutions as complementary, accommodating, substitutive and competing.

democracies—and contrary to dysfunctional political systems—the outcomes of informal political processes are not binding in and of themselves but require legitimation through a formal process. Informal politics can, however, go a long way in constraining the scope of formal decision-makers. I will come back to this aspect in the evaluation of the informal politics of co-decision, where one normative criterion will ask in how far informal politics facilitates and enables, or *de facto* (if not *de jure*) constrains and by-passes formal decision-making.

Table 1: Formal and Informal Politics—Defining Criteria

Politics	
Formal	**Informal**
• formal institutions • full set of legitimate decision-makers • agreement on binding rules/decisions • (open arena)	• informal institutions • restricted set of decision-makers • agreement requires formalisation • (secluded setting)
⟵ complements (functioning democracies) ⟶ ⟵ substitutes (dysfunctional political systems) ⟶	

As argued above, informal politics is here analysed as a strategy to cope with the complexity of modern policy-making. Borrowing from the functional theory of delegation on the one hand (see a.o. Bendor et al. 2001; McCubbins/Page 1987; Miller 2005; Pollack 2003), and from the macro-variant of Sociological Institutionalism on the other (see a.o. DiMaggio/Powell 1983; McNamara 2002), I tentatively suggest two main reasons for the recourse to informal politics.[2] First, as a potential shortcut towards agreement, informalisation can reduce the transaction costs of decision-making. Following this logic, we would expect informalisation to be particularly prominent where a policy-issue is technical and uncertain in view of its benefits and costs; where conflict among negotiators is intense; and where the number of participants is high. Alternatively, proponents of the "Stanford School" of Institutionalism have argued that

[2] See Rasmussen 2007 for a first empirical analysis of the reasons for the informalisation of the EU's co-decision procedure. Helmke/Levitsky look at the origins of informal institutions more narrowly and identify three: 1) formal institutions are incomplete and must be complemented accordingly; 2) informal institutions may serve as a second-best strategy to reach a particular outcome; 3) informal institutions are used to achieve an outcome that would not be publicly acceptable (2004, 730Iff.).

institutional and behavioural patterns, once established, are likely to stick and that new norms of interaction will be modelled on pre-existing ones. Following this logic, we would expect informal politics to feature prominently in systems where informalisation has been used previously—in short, the recourse to informal politics would be a systemic feature rather than a function of issue-properties, levels of conflict, or the number of negotiators.

The informal side of supranational decision-making has been increasingly acknowledged and analysed in EU scholarship. First, recent studies have explored informal behavioural patterns in the Council of Ministers and their impact on decision-outputs—be they the "method of community" in COREPER (Lewis 1998, 2000) or the established "norm of consensus"—i.e. the priority of reaching an agreement through negotiation rather than through a vote (Hayes-Renshaw et al. 2006; Heisenberg 2005). Second, rationalist and historical institutionalists have investigated the conditions under which the informal institutions and practices of EU decision-making are likely to become formalised in subsequent rounds of constitutional change; the reform of the co-decision procedure has thereby been of prime interest (see in particular Farrell/Héritier 2003, 2007; Hix 2002; Stacey/Rittberger 2003). Third, both practitioners and EU scholars have described how the co-decision procedure has developed since its introduction in Maastricht, accounting for both the change in formal rules and the underlying "iceberg" of informal practices (Bostock 2002; Jacqué 2007; Shackleton 2000). Yet, we have seen little systematic investigation of why informal politics occurs more generally, why it has become such a prominent strategy in EU legislation, and what informalisation entails for the democratic quality of the procedure (for exceptions see Farrell/Héritier 2004; Rasmussen 2007; Raunio/Shackleton 2003). This is surprising, as practitioners have repeatedly drawn attention both to the increasing informalisation and seclusion of EU legislation, and to the accompanying democratic drawbacks (Bostock 2002; Bunyan 2007; Imbeni et al. 2001).

It is not the aim of this paper to explain why informalisation occurs or to describe the EU's legislative procedure in detail. Instead, after introducing the praxis of co-decision as an instance of informal politics, the paper will suggest a set of normative standards against which informalisation can be assessed. This attempt builds on a more general argument: if the complexity of policy-making has increased, and if informal politics has indeed become a prominent coping strategy, then any normative account of EU

decision-making—and any suggested remedy—must look beyond the framework of formal politics. Similar endeavours have been somewhat sidelined over the last decade—politically, by the predominance of the constitutional reform debate; academically, by accounts of the EP's empowerment in the course of integration (see a.o. Rittberger 2005), as well as by the controversy about how formal institutional change has affected the EP's power *vis-à-vis* the Council and the Commission (see a.o. Kasack 2004; Kreppel 1999; Tsebelis/Garrett 2000).

2. The Informal Politics of Co-Decision

As argued in the introduction to this paper, we can observe an increasingly widespread yet under-explored trend in both national and supranational politics: the shift of *de facto* decision-making from formal, politicised arenas to informal, small-scale and sealed off fora. In the context of EU decision-making this trend is particularly puzzling. Indeed, according to the general reading, co-decision was introduced and subsequently reformed as a means to bolster procedural democracy in Europe; parliamentarism offered a chance to make the EU's legislative process more accountable, inclusive and transparent, and to challenge—or complement—the "cartel of elites" that dominated negotiation in and between the Council and the Commission (Wallace 1996, 33). When looking at the formal side of the EU's legislative procedure such a picture is, indeed, accurate. Co-decision was introduced in the 1990/91 Maastricht IGC, turning the Parliament and the Council into co-negotiators and giving the EP a *de facto* veto over legislation, even though the Council initially retained the right to re-introduce its common position if conciliation failed. The procedure was reformed in the 1996/97 IGC, and the Parliament was widely seen as the "big winner" of Amsterdam (Shackleton 2000, 326): the new Treaty deprived the Council of the right to re-introduce its common position at the third reading stage, and extended co-decision to 38 areas of Community policy. The Nice Treaty further broadened the scope of co-decision, and should Lisbon be ratified co-decision would become the "ordinary legislative procedure" (for an overview of the development see Maurer 2003).

Yet, the Amsterdam Treaty also institutionalised so-called "early agreements", allowing Parliament and Council to adopt a legislative act at first reading (Farrell/Héritier 2003, 2004; Raunio/Shackleton 2003; Rasmussen 2007). This change of the formal rules of co-decision opened the door widely to informal politics and has, indeed, "led to a shift

from formal, sequential bargaining between Council and Parliament to a more informal, simultaneous, and diffuse set of relations" (Farrell/Héritier 2004, 1199). The mechanism behind such agreements is the following: after the Commission has tabled its legislative proposal, representatives of the three institutions enter into informal negotiations over the desired legislative outcome. These negotiations take place *before* the Council has adopted its common position, and *before* the Parliament has issued a formal opinion (Farrell/Héritier 2004, 1197). If the Council and the Parliament can reach an informal compromise, the EP will include the Council's propositions in its own amendments, voted at first reading and requiring a majority of votes cast to be accepted—a lower threshold than for second reading amendments. Subsequently, the Council, using qualified majority voting, will accept the Commission proposal as amended by the EP, with the procedure closed and the act adopted accordingly. If the two co-legislators cannot agree informally, the dossier will take the formal route where the Council's common position and the EP's second reading will be the next steps.

Early agreements under this procedure of "fast track legislation" have become more and more frequent: between 1999 and 2004 28% of successful co-decision dossiers were concluded at first reading; between 2004 and 2006 the number had gone up to 63%; and of the total of 635 co-decision dossiers concluded between the entry into force of the Amsterdam Treaty and the 30 June 2007, 274 (or 43%) were fast-tracked (European Commission 2007; European Parliament 2004, 2007).[3] This trend is unlikely to be reversed in the near future—on the contrary, the three EU institutions agree on the desirability of fast track legislation. In the *Joint Declaration on Practical Arrangements for the Codecision Procedure* they commit themselves to "cooperate in good faith with a view to reconciling their positions as far as possible and thereby clearing the way, where appropriate, for the adoption of the act concerned at an early stage of the procedure". Furthermore, while early agreements were initially foreseen for technical and non-confrontational dossiers only, their remit has become broader. In its *Guide to Internal Procedures* the Commission, for instance, talks of both "technical" and "certain politically urgent" dossiers as likely cases for fast-tracking, but excludes "more sensitive dossiers" due to their substantial, budgetary, legal or institutional consequences. A good example of a "politically urgent" dossier likely to be concluded

[3] As a caveat one must mention the Commission's ongoing programme to consolidate and streamline all existing legislation. All formally revised—but not substantially amended—dossiers are "re-adopted" as early agreements under co-decision but do not constitue novel legislation; an official in the Commisison's General Secretariat estimates that in 2008 alone more than 100 early agreements were in fact "re-adopted" dossiers.

as an early agreement is the Commission's package on "Climate Action and Renewable Energy" (CARE); here, the 2009 international summit in Copenhagen, designated to negotiate the successor of the Kyoto Protocol, imposes an external deadline, encouraging informal negotiation and a speedy conclusion of the procedure.

Fast track legislation has been praised for accelerating the speed of legislation; it is also seen as an expression of the newly established trustworthy relations between the Parliament and the Council—cooperative institutional interaction rather than confrontational institutional politics seemingly characterises EU decision-making post-Amsterdam (Jacqué 2007, 12). Thus, following the constitutional possibility of early agreements, informalisation has been a successful strategy to cope with the complexity of co-decision—initially feared to render EU decision-making cumbersome and inefficient (Scharpf 1994). As a struggle over binding directives and regulations, playing out outside—or next to—the formal process, fast track legislation is, indeed, a prime example of informal politics: a restricted set of decision-makers act in a secluded setting; social interaction is structured by informal and semi-formal institutions; and the agreement reached must be legitimised through the formal process to become binding.

The compromise behind an early agreement is reached in so-called "trilogues"—informal negotiation arenas that bring together a variable group of representatives from the three EU institutions. According to the *Joint Declaration* trilogues "may be held at all stages of the procedure and at different levels of representation, depending on the nature of the exptected discussion". In most cases, the EP is represented by the *rapporteur* for the dossier, the Council by the President of COREPER, and the Commission by the Director or Director General responsible for the legislative initiative. Yet, the *rapporteur* may also be accompanied by so-called "shadows" from other political groups and/or the chair of the responsible parliamentary committee; the Council can second the chair of a working group as well as a representative of the next Presidency; and in "political trilogues" the Commissioner him or herself negotiates on behalf of the Commission. All first reading trilogues are, however, characterised by three features. First, they bring together a variable but necessarily restricted set of decision-makers, rather than the full set (as does the EP's plenary or the Council's ministerial level), or a formally restricted set (as does a parliamentary committee or the conciliation committee). Second, trilogues are not only informal but secluded arenas: documentation of the process is not available, and the meetings can neither be attended

nor followed by non-members. Third, the main aim of a trilogue is to facilitate compromise and to coordinate the Parliament's and the Council's positions so as to close the procedure at first reading. As mentioned above, trilogues take place before the Council has adopted a common position and before the EP has issued a formal opinion on the Commission's proposal. Overall, its main function is therefore to provide a forum for inter-institutional negotiation rather than parliamentary deliberation, or, as a Council official puts it: «La procédure n'a dès lors que peu de rapport avec un examen parlementaire classique et se rapproche davantage du schéma traditionnel de négociation au sein du Conseil» (Jacqué 2007, 7).

In addition, social interaction under fast track legislation has become structured by a set of informal and semi-formal institutions. The most important document is the *Joint Declaration on Practical Arrangements for the Codecision Procedure*, an inter-institutional agreement concluded in 1999 and amended in 2007. In addition, the Commission and the Parliament have each developed guides to internal procedures, stipulating both the practice of reaching intra-institutional consensus and of interacting with the other participants. Observer of co-decision have also talked about «une série de pratiques dégagées au fil du temps dans le but d'organiser des contacts suivis entre le Parlement et le Conseil en vue de trouver rapidement un accord» (Jacqué 2007, 2), and have identified "rules of engagement" (Shackleton 2000). These rules have been generated by a first type of informal negotiations upon which fast track legislation is in fact modelled: trilogues set up in the wake of Maastricht to facilitate the work of the conciliation committee (see Rasmussen/Shackleton 2005 for a comparison of the two legislative stages). At the same time, not all interaction has been institutionalised, and informal practices are not always followed. The EP's *Guide to How Parliament Co-Legislates*, for instance, foresees that concrete negotiations should usually wait until the committee has adopted its first reading amendments. Yet, whether the EP's *rapporteur* does act on the basis of a committee mandate depends on the issue in question—the Committee on Civil Liberties (LIBE), for example, only votes once an informal compromise has been agreed, while the Committee on Environment, Public Health and Food Safety (ENVI) requires the *rapporteur* to be fully coordinated with the committee chair (Bunyan 2007; European Commission 2007).

Finally, as argued before, in democratic political systems informal agreements require formalisation, and while representatives can reach a compromise in a trilogue, their

agreement must be endorsed by the EP's plenary and the Council of Ministers to become binding law. Yet, informal politics under co-decision both facilitates the full use of the formal process (that does foresee early agreements in Art. 251II TEC), and heavily constrains formal politics. Formally, MEPS do have the rights to table amendments to the informal compromise in committee as well as in plenary, and no time limits apply at the first reading stage; *de facto*, however, they often face considerable political pressure not to challenge a deal reached informally with the Council. The *Joint Declaration* semi-formalises the constraining force of an "agreement reached through informal negotiations in the trilogues", and, indeed, rubberstamping the agreement in Parliament is a pre-condition for adopting it in the Council—and thus for an early conclusion of the procedure.

In sum, analysing the formal framework of co-decision is certainly important if we want to understand the EP's chances of influencing legislative outcomes or comment on the democratic credentials of the EU's legislative process. Yet, any more full-fledged normative assessment must go beyond the formal rules and look at the underlying "iceberg" of informal politics—changing the *de facto* rules of the game, transforming both inter- and intra-institutional relations, empowering specific actors such as the *rapporteur* and the Council Presidency, and heavily constraining formal parliamentary politics (Farrell/Héritier 2004; Rasmussen 2007).

This brief empirical account of the politics of co-decision immediately raises numerous normative questions: do early agreements really increase the speed of legislation and are they widely acceptable? Does the procedure allow for an open argumentative exchange? Is informal politics conducive to problem-solving and accommodation? Is a minimum of transparency and thus of accountability guaranteed? How much room for manoeuvre is actually left to formal decision-makers? The next section follows up on these questions and develops a framework to assess the informalisation of co-decision normatively, based on the three standards of efficiency, deliberation and accountability.

Table 2: The Informal Politics of Co-Decision

Informal Politics	Fast Track Legislation
• informal institutions	social interaction institutionalised informally and semi-formally through the *Joint Declaration*, the guides to internal procedures and established "rules of engagement"
• restricted set of decision-makers	trilogues bring together a restricted and variable set of representatives from the Council, Parliament and Commission
• agreement requires formalisation	legislative compromise as agreed in the trilogue requires formalisation in the EP's plenary and a ministerial session of the Council; the formal process is facilitated and constrained
• (secluded setting)	trilogues are closed settings, and documentation is not accessible

3. Towards a Normative Assessment

As mentioned above, the introduction of co-decision has been welcomed as a chance to increase parliamentarism at the supranational level, and to bolster the democratic accountability of the EU's legislative process. Early agreements, more specifically, have been praised for increasing the efficiency of a potentially cumbersome procedure and for epitomising the newly gained constructive relationship between Parliament and Council. Yet, the two co-legislators do not necessarily agree about the adequate mix of formal and informal politics: while the Council actively pushes for informal pre-negotiation, the EP is "more eager to retain the distinct nature of the first and second readings, insisting on the importance of the formal organs, committee and plenary, as the normal forums for contact and debate between the two institutions" (Raunio/Shackleton 2003, 177). Furthermore, scholars and practitioners—including the EP's Vice-Presidents responsible for the conciliation procedure—have raised concerns about the democratic credentials of fast track legislation. Criticism has touched on two aspects in particular: first, the secrecy of the procedure, and, second, the differential empowerment of actors in the Council and the EP.

Indeed, if decision-makers wanted to bolster procedural democracy by introducing co-decision, the recourse to informal politics is problematic, as it shifts decision-making from a "public accessible forum to one which is secret and thus removed from public scrutiny, comment, debate and possible intervention" (Bunyan 2007, 8). On the one hand, concerns relate to the secrecy of informal pre-negotiation: it is impossible to attend trilogues, or to follow deliberation and decision-making *ex post* through official documentation. On the other hand, informal politics changes the style of the legislative process, fostering negotiation at the expense of parliamentary deliberation. In the formal process, the *rapporteur* drafts a report for debate in the responsible committee, followed by the tabling, discussion and vote of amendments to the Commission's proposal. In the informal process, the Council intervenes in the Parliament's first reading: early agreements are only possible if the Council's concerns are accommodated at this stage, with the discussion in committee restricted accordingly and the compromise voted as a "done deal" (Bunyan 2007, 8). In sum, "the greater the volume of negotiation earlier in the procedure, the less transparent the proceedings" (Raunio/Shackleton 2003, 178).

Both concerns were raised by three EP Vice-Presidents soon after the Treaty of Amsterdam entered into force. While praising the successful avoidance of conciliation as well as the Council's willingness to engage with rather than sideline the Parliament, they anticipated two "manifest dangers" regarding the openness and style of fast-track legislation:

> "first, Parliament could find itself reduced to the role of the *16th Member State*, with reduced opportunities for wider societal and political interests to introduce their points of view into the decision making process. […] second, open and public debate in the plenary with the full participation of all political groups and members would tend to be reduced in importance by informal negotiations taking place elsewhere. The essential transparency of the legislative process would be put at risk, threatening the *agora* function of this institution" (Imbeni et al. 2001, 2; italics in the original).

Closely related, scholars and practitioners have pointed to the differential empowerment of actors through informal politics, "because the potential for different interests within the legislative bodies to affect the legislative outcomes varies considerably between the first reading to the other legislative stages" (Rasmussen 2007, 2). In particular, "relais actors"—first and foremost the *rapporteur* and the Council Presidency—are empowered at the expense of ordinary members from smaller party groups in particular (whose right to influence the process by tabling amendments in committees is *de facto* curtailed), and the political level of the Council of Ministers (as the Presidency of COREPER plays the key role in informal trilogues) (Farrell/Héritier 2004, 1200ff.).

Differential empowerment at the expense of committees and plenary is particularly problematic, as it is in these two bodies that the EP's "political balance […] is most fully protected" (Imbeni et al. 2001, 3).

In order to assess the concerns about the legitimacy of the EU's legislative procedure more systematically, the following looks at how the informal politics of co-decision would fare in view of its efficiency, deliberation and accountability. I introduce the core qualities that each standard would expect from a legitimate decision-process, link them to the debate about democracy in Europe, and assess the informal politics of co-decision against their backdrop. A key question will be whether institutionalisation can compensate for the potential normative drawbacks of informalisation, and how informal institutions would need to be constructed to do so.

3.1 Three Normative Standards: Efficiency, Deliberation and Accountability

Post-Maastricht Europe has witnessed a vivid political and intellectual debate about its democratic credentials—revolving around the question of whether the Union suffers from a "democratic deficit", how this deficit could be remedied given the EU's nature as a polity *sui generis*, and whether the pre-conditions for a functioning democracy can at all be fulfilled at the supranational level (see Kohler-Koch/Rittberger 2007 for an overview). Although scholars and politicians have evoked different standards depending on their underlying theory of democracy, one criticism was at the heart of the normative debate: the national level (and national parliaments with it) has lost powers to the EU, without adequate institutional and political structures put in place to guarantee a minimum of democratic representation and participation at the supranational level (Hix 2005). In a nutshell, scholars have suggested three possible sources for legitimating the EU: 1) *input*, asking about inclusion, participation and representation in the political process; 2) *throughput*, asking about the procedural criteria underlying the political process; and 3) *output*, asking about what the political process can deliver for the European citizens (Höreth 1999; Scharpf 1999).

Turning to the co-decision procedure more specifically, its formal framework reflects the EU's nature as a Union of states and people: input legitimacy is both direct through the elections to the European Parliament, and indirect through the representation of national governments in the Council (Weiler 1991). The formal process thus guarantees

minimum standards of inclusion and representation; the above-mentioned debate about whether the EP can actually use co-decision to effectively shape outcomes is an entirely different question. If we assume that the formal framework of co-decision is constructed so as to preserve input legitimacy in its direct and indirect variants, we need to next ask how informalisation affects the procedure's throughput and output; this will be done by evaluating whether informal politics undermines (or strengthens) three core standards of legitimate decision-making.

Efficiency is a value "that almost all constitutional orders seek to promote, whether they are democratic or not" (King 2007, 58). Put simply, the underlying quality of an efficient political process is to "deliver the goods" and to deliver them at the necessary speed. Rather than focus on who is allowed to input in the political process or on procedural criteria, efficiency is a utilitarian and often technocratic standard, asking about a system's capacity to enhance welfare for its citizens and to solve pressing problems (Höreth 1999, 251). In the European context, efficiency has been particularly popular with those scholars who see European integration first and foremost as a functional response to policy challenges that member states cannot solve in isolation; legitimacy is argued to come through the system's Pareto-efficient, welfare-enhancing outputs (Majone 1998; Moravcsik 2002). Proponents of such a standard have argued that the EU does not actually suffer from a democratic deficit, but have suggested two alternative procedural criteria: the recourse to independent agencies and experts on the one hand, and indirect legitimation via the Council of Ministers, on the other. More generally, democratic theorists have complemented the criterion of efficiency with the concept of effectiveness—asking not only about the speed of reacting to challenges, but also about a decision's goal-attainment and acceptability (Lijphart 1999; Neyer 2005).

In sum, when looking at co-decision through the normative lens of efficiency, the procedure should be played out so as to produce speedy responses to political, economic and social challenges, likely to be implemented and complied with across the EU's member states.

Deliberation in a Habermasian tradition has recently made inroads into the study of European integration, offering an "ontological shift away from the exclusive focus on the state and its institutions" (Kohler-Koch/Rittberger 2007, 2; see Neyer 2006 for an

overview). Here, however, deliberative democracy will be understood more broadly as denoting two general procedural qualities:

> "the notion includes collective decision making with the participation of all who will be affected by a decision or by their representatives: this is the democratic part. Also […] it includes decision making by means of arguments offered *by* and *to* participants who are committed to the values of rationality and impartiality: this is the deliberative part" (Elster 1998a, 8; italics in the original).

In addition to this core criterion—all relevant arguments must be considered, and they must be considered publicly to inform citizens about policy-alternatives of concern to them—two further aspects are here subsumed under deliberation: problem-solving and accommodation. The former links a particular style of interaction to an enhanced problem-solving capacity (Scharpf 1989); the latter argues that in a deeply divided society as the European Union "no section must be allowed to feel that its interests and concerns are being ignored" (King 2007, 52; see Lijphart 1999 for a classic discussion). When looking at the EU institutions, the Council of Ministers has traditionally been the forum for accommodation and problem-solving; the Parliament has been added as an arena for inclusive public deliberation.

In sum, when looking at co-decision through the normative lens of deliberation, the procedure should be played out so as to ensure that all arguments are debated publicly, that the Union's problem-solving capacity is enhanced, and that the accommodation of diverse interests is facilitated.

Finally, accountability has been a core standard in national democracies. As put by British constitutionalist Walter Bagehot in the 19th century already: "there ought to be in every Constitution an available authority somewhere. The sovereign must be *come-at-able*" (quoted in King 2007, 58; italics in the original). Accountability is often put crudely as the ability "to throw the rascals out"—but to be able to do so, "the voters need to know precisely who the rascals are and to have ready to hand an effective instrument for throwing them out" (King 2007, 59). Thus, as a standard that relates to the evaluation of a political process, accountability has two dimensions: first, the possibility to assign responsibility, which requires a degree of transparency; and, second, the possibility to sanction decision-makers, usually by ousting the responsible government or representatives from power. The European Union is a highly complex system that is difficult to grasp and, as such, prone to diffuse accountability (King 2007, 60). The Council of Ministers is particularly notorious in this respect. Although national

governments acting in the European arena are democratically controlled by, and held accountable to, their national constituencies and parliaments (Höreth 1999, 251), it is near-impossible to assign responsibility where the negotiation process is closed and based on consensual accommodation rather than voting. Such a procedure may be justifiable in the intergovernmental Council; introducing the Parliament as a co-legislator was hoped to bolster both sides of accountability: information through a more transparent process, and the possibility to sanction through direct elections.

In sum, when looking at co-decision through the normative lens of accountability, the procedure should be played out so as to ensure the transparency necessary to assign responsibility, and entail an instrument for sanctioning representatives.

3.2 The Informal Politics of Co-Decision: A Normative Assessment

This section follows up on the discussion of how the formal rules of co-decision are played out in the political praxis and evaluates the defining features of informal politics—1) a restricted set of decision-makers, 2) a secluded decision-process, 3) the need to formalise pre-agreement—against the backdrop of the above-established criteria. A final section then discusses whether institutionalisation can compensate for the potential normative drawbacks, and asks how informal institutions would need to be constructed so as to better meet the requirements of efficiency, deliberation and accountability.

Trilogues: Restricted Sets of Decision-Makers

As argued above, one reason for recurring to informal politics is the need to compensate for the inefficiencies of the formal process and to facilitate decisions—in short, to reduce the transaction costs of policy-making. As such, the use of trilogues fares well with regard to efficiency. Indeed, in spite of initial fears that the complicated institutional rules of co-decision would slow down the EU's legislative output, the procedure has proved highly efficient in delivering the goods: the average duration of co-decision fell from 769 days for the period of November 1993 to December 1994, to 409 days for proposals made between July 1999 and July 2002 (Maurer 2003, 239). A "managerial response to a problem of work overload" (Raunio/Shackleton 2003, 183) informal trilogues have been assigned an instrumental role in speeding up the formal

process (Imbeni et al. 2001; Jacqué 2007). This is hardly surprising, as delegation to an informal sub-set of actors is an established response to the complexity of international negotiation (Midgaard/Underdal 1977). Proponents of efficiency would also welcome the recent trend to fast track not merely non-confrontational and highly technical but also "politically urgent" dossiers; informal politics here gives the Union a means of reacting quickly to exogenous functional pressures. The current attempt to fast track the Commission's CARE initiative in the face of global concerns about climate change and energy security nicely illustrates this point. Finally, informal politics is the pre-condition for capitalising on the potential efficiency gains from formal rule change: the formalisation of early conclusion in the Amsterdam Treaty has made it easier *per se* to adopt legislation, as amendments require a lower threshold for adoption at first than at second reading; yet in order to translate into an actual early agreement these amendments need to include the Council's position as agreed and accommodated informally. In that sense, informal politics not only facilitates the formal process, but is the pre-condition for using Art. 251II TEC efficiently.

However, two aspects hamper an unequivocally positive assessment of informalisation. First, in contrast to the strict time limits imposed on the formal process, there are no deadlines that structure informal negotiation under the first reading (Maurer 2003, 240; Raunio/Shackleton 2003, 184). While observers have so far argued that early agreements increase the speed of legislation, they could in fact do the exact opposite—unless the two co-legislators agreed to limit the time available for informal pre-negotiation (European Commission 2007). Second, as argued above, output legitimacy does not only feed on the speed of legislation but also on acceptability and effective implementation. Scholars have argued that an inclusive, deliberative decision-style can increase the compliance with EU law (Neyer 2005); restricting the set of decision-makers and reducing the EP's plenary and the Council's political level to rubberstamping might jeopardise this link.

In sum, when focusing on efficiency we would assess restricted trilogues positively—provided a) that informal negotiation is used to accelerate rather than slow down the procedure, and b) that member states' positions are consistently accommodated and national governments informed so as to increase the chances of subsequent compliance.

When assessing trilogues through a deliberative lens, the picture is more mixed. First and foremost, a restricted set of decision-makers simultaneously restricts the scope of debate, the possibility for inclusive participation, and the diffusion of information that could facilitate a wider public discussion. Hence, restricted settings such as first reading trilogues run directly counter to any deliberative-democratic standard: not everyone concerned (or their representatives) is heard, it is unlikely that the full range of arguments is considered, and positions are not presented publicly to inform citizens about policy-alternatives. As discussed in more detail below, restricted settings are particularly problematic where they are not preceded by an inclusive, public debate and where citizens cannot follow the restricted deliberation through available documentation.

However, trilogues fare better with regard to the two other sub-categories of deliberation: problem-solving and accommodation. First, as demonstrated in the literature on arguing and policy-styles, social settings characterised by repeated interaction among a restricted group of participants are particularly conducive to problem-solving and persuasion (Checkel 2001; Elgström/Jönsson 2000). Furthermore, trilogue negotiators are likely to have expertise on the dossier, and will thus raise the quality of debate. Second, informal pre-negotiation can be crucial in preparing the ground for inclusive, accommodating agreements—creating an atmosphere of mutual trust and understanding, evoking empathy for different positions, and allowing all arguments to be tabled and discussed without time constraints (Reh 2008). As an observer of the EU's legislative procedure puts it:

> «L'ensemble de la procédure est dominée par la recherche d'un accord qui explique l'importance des contacts informels entre le Parlement et le Conseil. […] Toute négociation doit reposer sur la conviction que les deux branches du pouvoir législatif sont disposées à faire des concessions pour parvenir à un accord sans sacrifier pour autant leurs convictions essentielles. […] Les premières rencontres sont cruciales, car elles permettent d'établir le cadre de la discussion dans un climat d'entente mutuelle» (Jacqué 2007, 6).

A similarly inclusive problem-solving style rather than public, politicised confrontation may be best-suited to raise the quality of debate and produce sustainable legislation in the divided polity that is the EU. This is, however, the interaction style traditionally associated with the Council of Ministers—and it has clear normative trade-offs.

Indeed, when assessing the accountability of decision-making, trilogues pose huge normative challenges. On the one hand, the secrecy of the process makes it near-impossible to obtain information about the different positions and responsibilities in the negotiation—a point discussed further below; on the other hand, the trilogues' variable membership makes it difficult to grasp the functions, let alone responsibilities, held by different actors. Hence, informal politics challenges procedural legitimacy *per se*, as formal rules are

> "crucial safeguards for ensuring a distribution of power and authority which, even if it does not guarantee equality among actors, at least ensures transparency, political accountability and stability of expectations. Informality, on the other hand, implies that it is incumbent upon the actors themselves to allow different actors to partake and to define their relative authority" (Peters/Pierre 2004, quoted in Kohler-Koch/Rittberger).

Nevertheless, a set of codified informal institutions could be put in place—or strengthened—to improve the deliberative quality and accountability of the informal process. In particular, informal politics would need to be institutionalised for citizens to know 1) who represents them in the informal negotiations; 2) what the arguments are on the policy-options at stake and which positions are taken by different actors; and 3) why their representatives converge on a particular legislative outcome rather than another. Next to fully opening up the informal process—a point discussed below—such knowledge could be improved through two mechanisms. First, membership in first reading trilogues should be clearly defined, so that observers can discern who *de facto* commits the Parliament and the Council. Second, the EP representative should obtain a formal mandate from the responsible parliamentary committee, in the same way that the Council representative acts on a mandate from her working group or COREPER. This mandate should emanate from an inclusive, public debate, and negotiators should inform the committee on the course of negotiation, justifying any need to extend the mandate's boundaries. This way arguments would be tabled and publicly accessible—even if informal negotiations were played out before either the Council or the Parliament have established a formal position, and even if the particular reasons for and mechanisms of accommodation in the trilogues would not be made public. Both mandating by and feedback to the committee are established practices in the conciliation stage of co-decision (Rasmussen/Shackleton 2005, 13f.); they are also suggested as best practices in the EP's *Guide to How Parliament Co-Legislates*. Yet, as shown in section 2, this practice is not consistently applied for first reading trilogues.

In sum, when focusing on deliberation and accountability we would assess restriction in a more mixed way. While conducive to problem-solving and accommodation, restricted settings are wanting when it comes to public deliberation and accountability. This situation could be remedied—or at least improved—by clearly defining trilogue membership, and by institutionalising mandating by and feedback to the responsible committee, as such practices would firmly link the negotiator back to a public arena.

The Seclusion of Informal Negotiation

As argued in section 1, seclusion is not necessarily a defining feature of informal politics; pre-negotiation between a restricted set of decision-makers could well be open to the public or at least fully documented. Trilogues under co-decision, no matter at what stage, are, however, secluded: neither their meetings nor their minutes are public.

Seclusion is least problematic when it comes to the criterion of efficiency. In fact, a secluded setting may increase the speed of reaching an agreement—allowing participants to engage in a frank exchange, to construct acceptable packages, and to adapt their negotiation position without losing face. Furthermore, secluding the process from a broader set of actors—and thus from additional arguments and opinions—can prevent decision-makers from being side-tracked in their search for policy-solutions. Yet, while the seclusion—similar to the restriction—of decision-making is likely to speed up the procedure, there may be costs when it comes to effectiveness. As argued before, only the consistent national implementation of legislation can guarantee actual goal-attainment. Where relevant stakeholders are both excluded from and unable to follow the negotiation process—and it has been argued that even the political level of the Council is sidelined under fast-track legislation (Farrell/Héritier 2004; Jacqué 2007)—the procedure's efficiency may, in fact, hamper its effectiveness.

In sum, when focusing on efficiency understood as the speedy reaction to a current policy-challenge, seclusion would not only be unproblematic but desirable; when looking at effectiveness as an additional criterion, political actors and stakeholders responsible for implementing eventual legislation should be consulted and informed.

For similar reasons, seclusion would be unchallenging—or even desirable—for both problem-solving and accommodation. Seclusion allows the negotiation of inclusive package deals to accommodate all actors' concerns without loss of face, even if this requires negotiation positions to be substantially adapted. More fundamentally, deliberative theorists have argued that argumentation in small, insulated settings can trump both demagoguery and plebiscitory rhetoric (Chambers 2004, 390ff.); the quality of deliberation would, in turn, be enhanced:

> "[…] the greater difficulty of backing down from a position one has stated in public has several undesirable effects. It makes it less likely that speakers will change their mind as a result of reasoned objections, and encourages the use of publicity as a precommitment device. Also on the negative side of the sheet is the fact that large audiences serve as a resonance box for rhetoric" (Elster 1998b, 111).

However, seclusion blatantly violates the standards of public deliberation and accountability. Starting with the former, a secluded decision-setting aggravates the problems stemming from restriction: not only are citizens (and their representatives) prevented from participating in the relevant debate; they are also uninformed about the crucial (if informal) decision-stage. Seclusion thus prevents information about policy-options, let alone public opinion formation. This is particularly problematic as not only citizens but entire party-groups are *de facto* cut off from the decision-process. Indeed, MEPs from small parties risk losing their rights of participation, information and scrutiny where decisions are taken in secluded trilogues rather than in public parliamentary committees (Bunyan 2007; Farrell/Héritier 2004). Second, seclusion jeopardises one of the two core dimensions of accountability: voters may still be able to "throw the rascals out" in national and European elections, but they will be unable to identify them without information about the decisive decision-phase.

These normative concerns could only be fully remedied by making trilogue meetings public, but such a move could be detrimental to both efficiency and accommodation. However, the situation would already be improved if the informal institutions suggested above were put in place; these would 1) define the membership of trilogues, which would, ideally, let "shadows" accompany the *rapporteur* so as to diffuse information and increase participation across the political spectrum; 2) set up a system of mandating based on an open and inclusive debate in the parliamentary committee; and 3) institutionalise feedback about the informal process to public committee meetings. If these suggestions mainly target the EP's side, they could be further thickened by institutionalising interaction in the Council as well. In order to allow for public

information and thus for accountability, the President of COREPER could act on the basis of a mandate established in (public) ministerial sessions, and the Council could "come to committee" to justify its position—a claim long made unsuccessfully by Parliament (Imbeni et al. 2001). The Council has, however, put institutional mechanisms in place to foster feedback to national governments and parliaments: a centralised «dorsale» in its General Secretariat handles first and second reading dossiers, follows the negotiation process and informs the member states (Farrell/Héritier 2004, 1207)—a welcome move in view of both accountability and effectiveness.

In sum, even if efficiency and accommodation speak against opening up or officially documenting informal trilogues, parliamentary and public actors should at least be informed about the key arguments and positions in the crucial pre-negotiation stage. Systematically mandating the pre-negotiator and institutionalising feedback to parliamentary committees as well as the national level would guarantee a minimum of deliberation and accountability.

Compromise: The Need for Formalisation

As argued before, in functioning democratic systems informal pre-agreement requires formalisation to become binding. At the most general level, this condition is fulfilled under fast track legislation: even if agreed informally, early agreements need to be formalised though a vote in the EP's plenary and the Council of Ministers to become binding law. Yet, informal politics can constrain the formal process to varying degrees—and depending on the normative standard applied we would evaluate its constraining force differently.

In terms of efficiency, constraining the formal process—or, put differently, discharging it—would be assessed positively. As a strategy to cope with complexity the informal politics of co-decision can reduce transaction costs most efficiently where formalisation equals rubberstamping. From such a perspective the current political practice does not challenge the legitimacy of the procedure, albeit putting in place a number of informal and semi-formal mechanisms to favour rubberstamping in the EP's plenary and the Council of Ministers.

First, the negotiators' room for manoeuvre increases with the likelihood of adopting the informal compromise (Rasmussen/Shackleton 2005, 16). At first reading the dossier requires the majority of votes cast to be accepted, and negotiators are thus less constrained than by the higher thresholds at the second reading stage. Formally, however, at first and second reading texts approved by the parliamentary committee can still be amended; by contrast, at the conciliation stage the plenary can only accept or reject the compromise. Also, as mentioned above, the time allowed for fast track is not limited, giving potential opposition in the EP and at the national level the opportunity to mobilise against the informal deal (Rasmussen/Shackleton 2005, 16). Yet,

> "even though there is a formal possibility to table amendments in plenary at both first and second reading, it is not necessarily a feasible strategy to do so in practice. Thus, one consequence of doing so for the Parliament is likely to be that the Council will not be able to accept all of Parliament's amendments thus pushing the procedure into the next reading. Therefore, there will often be considerable pressure on members of Parliament not to use their power to table amendments but to agree to the compromise which has been agreed with the Council at first or second reading" (Rasmussen/Shackleton 2005, 17).

This political pressure is further upped by two semi-formal and informal institutions, designed to ensure rubberstamping. First, in the *Joint Declaration* the two co-legislators *de facto* commit to rubberstamping their formal deal; they stipulate that

> "[w]here an agreement is reached through informal negotiations in trilogues, the chair of Coreper shall forward, in a letter to the chair of the relevant parliamentary committee, 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 outcome, subject to legal-linguistic verification, should it be confirmed by the vote in plenary".

Second, the Parliament's *Guide* foresees that any compromise amendments agreed informally with the Council "should be subject to written information to all committee members. If they cannot be approved by the committee for submission to plenary, they should be co-signed by the rapporteur or coordinators of their political groups to demonstrate that the amendments enjoy broad support". Without introducing formal sanctions, such a rule clearly creates stable behavioural expectations.

By putting political pressure on ordinary MEPs these practices certainly increase the efficiency of the procedure. They make the adoption of legislation likely, and thus reduce the risks of sinking costs in informal negotiations that lead to no result. Yet, these practices are problematic in view of accountability and deliberation in particular; they curtail public debate and *de facto* deprive the committee of the chance to scrutinise and amend the informal compromise. In fact, the required vote in the parliamentary

committee, plenary and Council formally preserves the chain of representation and thus guarantees a minimum of accountability, but the political praxis of rubberstamping pre-agreements makes it difficult to clearly assign responsibilities for legislative outputs. Similarly, public deliberation is *de jure* favoured by the absence of deadlines under fast track legislation. *De facto*, however, the political process as it stands risks to undermine public debate both *before* informal trilogue meetings—if the committee does not issue a mandate—and *ex post*—if the formal bodies are deprived of their full potential to scrutinise the agreement.

Conclusion: The Benefits and Costs of Informal Politics as a Coping Strategy

Starting from the observation that political decisions at the national, supranational and global level are taken under conditions of ever increasing complexity, this paper zoomed in on one coping strategy: the recourse to informal politics. The paper looked at the transformation of the EU's legislative procedure post-Amsterdam as a case of informalisation, and checked the political praxis against three normative standards relating to the procedure's throughput and output: efficiency, deliberation and accountability. Where legislative dossiers are fast-tracked and adopted at first reading—a possibility constitutionalised in 1996/97—informal politics indeed complements (and heavily constrains) the formal process of co-decision. First, legislative compromise is pre-agreed in informal trilogues, joining a variable and restricted group rather than the full set of legitimate decision-makers. Second, trilogues are not only restricted but secluded arenas that are not documented and cannot be attended. Third, inter-institutional interaction in trilogues is institutionalised informally and semi-formally, if it is institutionalised at all. Fourth, any agreement reached informally requires formalisation to become binding; *de facto*—if not *de jure*—formalisation is often presented as a "take it or leave it" option to the committee and plenary, thus giving the trilogue representatives significant influence over the generation of binding rules.

Such informalisation entails both benefits and costs. On the one hand, informal politics can effectively compensate for the inefficiencies of a potentially cumbersome procedure. Indeed, the EU has legislated speedily and successfully under co-decision, and pre-negotiation in informal trilogues has allowed actors to fully capitalise on the efficiency leap intended when early agreements were formalised in Amsterdam.

Restricted and secluded inter-institutional trilogues are also conducive to the problem-solving and accommodating decision-style more suitable for the EU as a highly divided political system than would be adversarial majoritarian politics. However, informalising decision-making to cope with institutional and political complexity comes at a cost for public deliberation and accountability. In particular, where trilogues take place *before* the Council and the Parliament have established official positions that define the ground and scope for interaction, where decisive meetings are neither accessible nor documented, and where compromises reached informally are merely rubberstamped rather than scrutinised and debated in the EP's committees and plenary, public deliberation and transparency are severely curtailed if not lost altogether.

The preceding section argued that the institutionalisation of fast track legislation could remedy—if not fully heal—some of the normative challenges of informal politics. I identified three priorities. First, the membership of trilogues should be clearly defined so as to guarantee representation of the parliamentary majority; this would, on the one hand, allow citizens to discern who actually commits the Parliament and the Council, and, on the other hand, increase information and participation across the EP's political spectrum. Second, EP representatives should be mandated, and mandates should be subject to inclusive debate in the responsible parliamentary committee; this would inject publicity into at least one stage of the process, and make arguments, options and positions accessible for all affected citizens. Third, EP representatives should systematically provide feedback and inform their committees about the course of informal negotiations; this would guarantee a minimum level of transparency even if trilogues remained closed and undocumented in order to allow for effective accommodation and problem-solving. Finally, in order to off-set potential efficiency-losses stemming from the first three changes, time limits should be established for fast track legislation.

However, two caveats accompany any such suggestion. First, informal and semi-formal institutions can never put the same checks on the political process as the "crucial safeguards" that are formal rules. This is illustrated by the fact that several of the suggestions made above—in particular open mandating and systematic information—are already given high priority in the EP's *Activity Reports* and its guide to co-legislation. Yet, due to their informal character, these practices cannot be enforced and, as demonstrated above, their application varies between committees. Second, some of

the above reforms could bolster one normative standard while undermining another: institutionalised mandating and information could jeopardise the flexibility and seclusion necessary to conclude the procedure efficiently and to accommodate all concerns; time-limits to guarantee the efficiency of fast track legislation could deprive the committee and plenary from fully debating and scrutinising a dossier; and institutionalisation—even if informal or semi-formal—could deprive informal politics as a coping strategy of its potential to react speedily to policy-challenges, to compensate for the deficiencies of the formal process, and to facilitate decisions so as to capitalise on the formal rule change agreed in Amsterdam.

In sum, the informal politics of co-decision challenges the formal process in a way that seems to contradict the initial attempt to improve parliamentarism and procedural democracy in Europe. Yet, informal politics does not in and of itself render the process illegitimate. In fact, given the EU's nature as a complex political system divided by multiple cleavages, a Westminster-style focus on accountability and antagonistic public debate could, ultimately, harm rather than hinder the procedure's legitimacy. On the other hand, had indirect legitimacy, coupled with a problem-solving and accommodating negotiation style, been deemed democratically sufficient, there would have been no need to link the Council to the Parliament as a co-legislator. The current formal framework guaranteeing input legitimacy in its direct and indirect variant, combined with informal politics designed to compensate for the complexities of the formal procedure but requiring formalisation to reach binding decisions, thus seems to strike an appropriate balance. Nevertheless, in order to maximise parliamentary control over legislative outputs, rather than abdicate influence to a restricted and secluded set of decision-makers, the political praxis should be institutionalised more explicitly. Such a system of informal and semi-formal rules has indeed preserved parliamentary control under conciliation—despite the prominence of informal politics at this legislative stage too (Rasmussen/Shackleton 2005). The above-suggested rules of inter-institutional engagement would be a modest step towards preserving minimum standards of publicity as well as of parliamentary control and accountability.

Table 3: The Informal Politics of Co-Decision—Normative Standards and Assessment

Standard	Restriction	Seclusion	Constraints	Remedies
Efficiency - speedy response to policy challenges - effective implementation and compliance	reduces transaction costs + increases speed, yet the lack of time limits may delay the process and the exclusion of stakeholders may hamper effectiveness	allows frank exchange, trade-offs and conversion without loss of face, yet efficiency may hamper effectiveness where stake-holders are ill-informed	rubberstamping increases speed and reduces the risk to sink costs in informal negotiations with no results	time-limits should be introduced at first reading to guarantee efficiency + information of the national level should be guaranteed to bolster effectiveness
Deliberation - public debate of all relevant arguments - problem-solving - accommodation	severely curtails the public exchange of arguments and opinions, yet fosters a problem-solving style and accommodation	may limit demagoguery + plebiscitory reasoning, yet violates public deliberation	political pressure to rubberstamp *de facto* deprives the committee of its right to debate + amend; MEPs from small parties are particularly affected	the membership of trilogues should be fixed + representation broadened mandating should be institutionalised based on an open debate in the committee before negotiations in trilogue feedback to parliamentary committees should be institutionalised
Accountability - possibility to assign responsibility, based on a degree of transparency - possibility to “throw the rascals out”	does not undermine the voters' ability to "throw the rascals out", yet muddles responsibility, especially when combined with variable membership	does not undermine the voters' ability to "throw the rascals out", yet voters will be hard-put to identify them without information	rubberstamping preserves the minimum standards of accountability but makes scrutiny difficult	

Works Cited

Adler, Emanuel and Peter M. Haas. "Conclusion: Epistemic Communities, World Order, and the Creation of a Reflexive Research Program". In: *International Organization* 46:1 (1992), 367-390.

Bendor, Jonathan et al. "Theories of Delegation". In: *Annual Review of Political Science* 4 (2001), 235-269.

Bergström, Carl-Fredrik. *Comitology: Delegation of Powers in the European Union and the Committee System*. Oxford: Oxford UP, 2005.

Bostock, David. "Coreper Revisited". In: *Journal of Common Market Studies* 40:2 (2002), 215-234.

Bunyan, Tony. "Secret Trilogues and the Democratic Deficit". *Statewatch Viewpoint*. 2007.

Burns, Thomas. "The Evolution of Parliaments and Societies in Europe: Challenges and Prospects". In: *European Journal of Social Theory* 2:2 (1999), 167-194.

Chambers, Simone. "Behind Closed Doors: Publicity, Secrecy, and the Quality of Deliberation". In: *Journal of Political Philosophy* 12:4 (2004), 389-410.

Checkel, Jeffrey. "Why Comply? Social Learning and European Identity Change". In: *International Organization* 55:3 (2001), 553-588.

Di Maggio, Paul J. and Walter W. Powell. "The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields". In: *American Sociological Review* 48:2 (1983), 147-160.

Elgström, Ole and Christer Jönsson. "Negotiation in the European Union: Bargaining or Problem-Solving?" In: *Journal of European Public Policy* 7:5 (2000), 684-704.

Elster, Jon. "Introduction". In: Jon Elster (ed.). *Deliberative Democracy*. Cambridge: Cambridge UP, 1998a, 1-18.

------. "Deliberation and Constitution Making". In: Jon Elster (ed.). *Deliberative Democracy*. Cambridge: Cambridge UP, 1998b, 97-122.

European Commission. *Codecision Procedure—Article 251 EC: Guide to Internal Procedures*. Brussels, 2007.

European Parliament. *Conciliations and Codecision: A Guide to How Parliament Co-Legislates*. Brussels, 2004.

European Parliament (Delegation to the Conciliation Committee). *Activity Report 1 May 1999 to 30 April 2004*. PE 287.644. Brussels, 2004.

European Parliament (Delegation to the Conciliation Committee). *Conciliation and Codecision Activity Report July 2004 to December 2006*. DV/651053. Brussels, 2007.

European Parliament et al. *Joint Declaration on Practical Arrangements for the Codecision Procedure (Art. 251 of the EC Treaty)*. OJ C 145, 30.6. 2007.

Falkner, Gerda. "Policy Networks in a Multi-Level System: Converging Towards Moderate Diversity?" In: *West European Politics* 23:4 (2000), 94-120.

Farrell, Henry and Adrienne Héritier. "Formal and Informal Institutions under Codecision: Continuous Constitution-Building in Europe". In: *Governance* 16:4 (2003), 577-600.

------. "Interorganizational Negotiation and Intraorganizational Power in Shared Decision-Making: Early Agreements under Codecision and Their Impact on the European Parliament and Council". In: *Comparative Political Studies* 37:10 (2004), 1184-1212.

------. "Codecision and Institutional Change". In: *West European Politics* 30:2 (2007), 285-300.

Fouilleux, Eves et al. "Technical or Political? The Working Groups of the EU Council of Ministers". In: *Journal of European Public Policy* 12:4 (2005), 609-623.

Häge, Frank M. "Who Decides in the Council of the European Union?" In: *Journal of Common Market Studies* 46:3 (2008), 533-558.

Hayes-Renshaw, Fiona et al. "When and Why the Council of Ministers Votes Explicitly". In: *Journal of Common Market Studies* 44:1 (2006), 161-194

Heisenberg, Dorothee. "The Institution of 'Consensus' in the European Union: Formal Versus Informal Decision-Making in the Council". In: *European Journal of Political Research* 44:1 (2005), 65-90.

Helmke, Gretchen and Steven Levitsky. "Informal Institutions and Comparative Politics: A Research Agenda". In: *Perspectives on Politics* 2:4 (2004), 725-740.

Héritier, Adrienne and Peter Mair. *Seclusion and Inclusion in the European Polity*. Research Proposal. Florence, 2008.

Hix, Simon. "Constitutional Agenda-Setting through Discretion in Rule Interpretation: Why the European Parliament Won at Amsterdam". In: *British Journal of Political Science* 32:2 (2002), 259-280.

------. *The Political System of the European Union*. 2nd ed. Basingstoke: Palgrave Macmillan, 2005.

Höreth, Marcus. "No Way out for the Beast? The Unsolved Legitimacy Problem of European Governance". In: *Journal of European Public Policy* 6:2 (1999), 249-268.

Imbeni, Renzo et al. *Improving the Functioning of the Co-Decision Procedure: Discussion Document Presented by the Vice-Presidents Responsible for Conciliation*. Brussels, 2001. www.statewatch.org/new/2001/mar/codecision.pdf (accessed 5 March 2007).

Jacqué, Jean Paul. «Une vision réaliste de la procédure de codécision». Unpublished paper. Brussels, 2007.

Kasack, Christiane. "The Legislative Impact of the European Parliament under the Revised Co-Decision Procedure". In: *European Union Politics* 5:2 (2004), 241-260.

Kreppel, Amy. "What Affects the European Parliament's Legislative Influence? An Analysis of the Success of EP Amendments". In: *Journal of Common Market Studies* 37:3 (1999), 521-538.

Knight, Jack. *Institutions and Social Conflict*. Cambridge: Cambridge UP, 1992.

Kohler-Koch, Beate and Berthold Rittberger. "Charting Crowded Territory: Debating the Democratic Legitimacy of the European Union". In: Beate Kohler-Koch and Berthold Rittberger (eds.). *Debating the Democratic Legitimacy of the European Union*. Lanham: Rowman and Littlefield, 2007, 1-29.

Lewis, Jeffrey. "Is the 'Hard Bargaining' Image of the Council Misleading? The Committee of Permanent Representatives and the Local Elections Directive". In: *Journal of Common Market Studies* 36:4 (1998), 479-504.

-----. "The Methods of Community in EU Decision-Making and Administrative Rivalry in the Council's Infrastructure". In: *Journal of European Public Policy* 7:2 (2000), 261-289.

Lijphart, Arend. *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*. New Haven: Yale UP, 1999.

Majone, Giandomenico. "Europe's 'Democratic Deficit': The Question of Standards". In: *European Law Journal* 4:1 (1998), 5-28.

Maurer, Andreas. "The Legislative Powers and Impact of the European Parliament". In: *Journal of Common Market Studies* 41:2 (2003), 227-247.

McNamara, Kathleen. "Rational Fictions: Central Bank Independence and the Social Logic of Integration". In: West European Politics 25:1 (2002), 47-76.

McCubbins, Mathew and Talbot Page. "A Theory of Congressional Delegation". In: Mathew D. McCubbins and Terry Sullivan (eds.). *Congress: Structure and Policy*. Cambridge and New York: Cambridge UP, 1987.

Midgaard, Knut and Arild Underdal. "Multiparty Conferences". In: Daniel Druckman (ed.). *Negotiations: Social-Psychological Perspectives*. Beverly Hills and London: Sage Publications, 1977, 329-345.

Miller, Gary J. "The Political Evolution of Principal-Agent Models". In: *Annual Review of Political Science* 8 (2005), 203-225.

Moravcsik, Andrew. "In Defence of the 'Democratic Deficit': Reassessing the Legitimacy of the European Union". In: *Journal of Common Market Studies* 40:4 (2002), 603-634.

Neyer, Jürgen. "Explaining the Unexpected: Efficiency and Effectiveness in European Decision-Making". In: *Journal of European Public Policy* 11:1 (2004), 19-38.

------. "The Deliberative Turn in Integration Theory". In: *Journal of European Public Policy* 13:5 (2006), 779-791.

North, Douglass. Institutions, Institutional Change and Economic Performance. Cambridge: Cambridge UP, 1990.

Patzelt, Werner J. *Einführung in die Politikwissenschaft: Grundriss des Faches und studiumbegleitende Orientierung*. Passau: Wissenschaftsverlag Richard Rothe, 1992.

Pollack, Mark A. *The Engines of European Integration: Delegation, Agency, and Agenda-Setting in the EU*. Oxford: Oxford UP, 2003.

Rasmussen, Anne and Michael Shackleton. "The Scope for Action of the European Parliament Negotiators in the Legislative Process: Lessons of the Past and for the Future". Paper prepared for the Ninth Biennial International Conference of the European Studies Association. Austin, 31 March – 2 April 2005.

Rasmussen, Anne. "Early Conclusion in the Co-Decision Legislative Procedure". *EUI Working Papers, MWP 2007/31*.

Raunio, Tapio and Michael Shackleton. "Codecision Since Amsterdam: A Laboratory for Institutional Innovation and Change". In: *Journal of European Public Policy* 10:2 (2003), 171-187.

Reh, Christine. "Consensus, Compromise and 'Inclusive Agreements': Arguing Across Levels in Complex Negotiations". Paper prepared for the Workshop on *Arguing Global Governance: Lifeworlds, Reasoning, Persuasion, Power and Change*, University of Oxford, 21-22 June 2008

------. "Pre-Cooking the European Constitution? The Role of Government Representatives in EU Reform". In: *Journal of European Public Policy* 14:8 (2007), 1186-1207.

Richardson, Jeremy. "Government, Interest Groups and Policy Change". In: *Political Studies* 48:5 (2000), 1006-25

Rittberger, Berthold. *Building Europe's Parliament*. Oxford: Oxford UP, 2005.

Shackleton, Michael. "The Politics of Codecision". In: *Journal of Common Market Studies* 38:2 (2000), 325-342.

Scharpf, Fritz W. "Community and Autonomy: Multi-Level Policy-Making in the European Union". In: *Journal of European Public Policy* 1:1 (1994), 219-242.

------."Decision Rules, Decision Styles and Policy Choices". In: *Journal of Theoretical Politics* 1:2 (1989), 149-176.

------. *Governing in Europe: Effective and Democratic?* Oxford: Oxford UP, 1999.

Stacey, James and Berthold Rittberger. "Dynamics of Formal and Informal Institutional Change in the EU". In: *Journal of European Public Policy* 10:6 (2003), 858-883.

Tsebelis, George and Geoffrey Garrett. "Legislative Politics in the European Union". In: *European Union Politics* 1:1 (2000), 9-36.

Wallace, Helen. "Politics and Policy in the EU: The Challenge of Governance". In: Helen and William Wallace (eds.). *Policy-Making in the European Union*. 3rd ed. Oxford: Oxford UP, 3-36.

Weiler, Joseph H.H. "Problems of Legitimacy in Post 1992 Europe". In: *Aussenwirtschaft* 46:3/4 (1991), 411-437.