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**UACES Exchanging Ideas on Europe: Europe at a Crossroads**  
**Bruges, 6-8 September 2010**

**CONCILIATION IN THE SIXTH EUROPEAN PARLIAMENT: FORMAL  
TRANSPARENCY VS. SHADOWY LEGISLATING**

*Bilyana Petkova and Tomáš Dumbrovský*

*(University of Kent-Brussels and Charles University in Prague)*

*“...genuine participation of the Parliament in the legislative process of the  
Community... represents an essential factor in the institutional balance intended  
by the Treaty” ECJ IATA case 2006*

**Abstract**

This paper aims to analyze changes in the conciliation phase of the co-decision procedure in the 6th parliamentary term and to assess whether there is correlation between these changes and the Eastern Enlargement. Firstly, we inquire into structural changes brought to conciliation as a result of the Eastern Enlargement. Secondly, we analyze the impact of formal changes on the functioning of conciliation: a) the relevant provisions of the Lisbon Treaty and the new EP Rules of Procedure b) the new Joint Declaration on practical arrangements in co-decision; and c) the decision of the ECJ in the IATA case (C-344/04). The membership of the conciliation committee increased from 30 to 54, causing the body to poorly perform its original task, that is, to negotiate different views on legislative proposals in a small group. Instead, an even smaller group composed of representatives of the three main institutions has emerged – the so-called trilogue. The practice of trilogues has substantially expanded in the 6th EP, leading to a great number of draft legislation to be pre-agreed without open political discussion and impeding the involvement of MEPs from the new Member States. Despite the positive formal reforms, the transparency of conciliation was compromised.

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## **INTRODUCTION**

The ongoing revisions of the legislative process, which had commenced with the Single European Act, have pursued two primary goals – increasing the transparency and democratic accountability of the process and the actors involved in it on the one hand, and achieving more efficiency in EU decision-making, on the other. The parliamentarization of the legislative process sought to have important decisions affecting the citizens of the Union discussed, opposed and then reasoned, before actually being adopted in an open arena where the various citizens’ interests would be articulated. Efficiency and transparency have often been in contradiction though. We may, with a necessary degree of simplification, identify two major enemies of efficient law making – an increase in the number of actors and a corresponding increase of interests coupled with increased publicity of the negotiations preceding legislation. After the consecutive EU enlargement rounds, multiple interests need to be involved in the process – through an open discussion now the 27 domestic political arenas are taken into EU law making and the actors on the EU level have to defend their views not only vis-à-vis their European opponents but also vis-à-vis domestic opponents and local public opinion. This inevitably slows down the process and leads to compromises that can water down the end product. Every MEP is interested in having a saying on a piece of draft legislation and aims not only to satisfy the leadership of his or her European Parliamentary (EP) group but to mainly secure the approval of

party leaders back home that will later back his or her parliamentary re-election. Ensuring consensus on EU-wide policy matters thus becomes more and more difficult for the leadership of EP groups. One of the potential consequences could have been a decline in EU leadership positions such as that of the Council presidency and of committee chairmanships regarding the EP. The problem becomes visible in co-decision. In order to safeguard efficiency but also to maintain their leading roles in the process, high officials from the three legislative institutions – the Council, the EP, and the Commission have sought to find a cure through informal negotiations. This practice became known as the ‘trilogue’.

It started within the vital phase of co-decision – the conciliation phase – where divisions over a given issue are huge and where the final fate of a legislative act is being decided. The trilogue has over the years expanded into all stages of the co-decision procedure. At the same time, the intensive Treaty-revision processes from Amsterdam to Lisbon have continued to remedy the increasingly criticized ‘democratic deficit’ of the EU with allowing for further involvement of the EP in law making and by introducing new ways to increase the overall transparency of EU decision-making. The two processes – the ongoing Treaty revision seeking to curb the ‘democratic deficit’ in the sense described above on the one hand and the parallel development of alternative informal structures that implicitly exclude actors and citizens’ interests thereby diminishing public scrutiny in the sake of efficiency – are in startling tension. The real consequence of the trilogues – elitist shadowy legislating – may be to further threaten the already shaken public support for the EU and enhance scepticisms vis-à-vis the deepening of the integration process. The questions, which must be raised then, ask whether the trilogue excludes or substantively limits the representation of new MS citizens’ interests in the EU decision-making and whether the creation of alternative decision-making mechanisms is still within the scope of action that primary EU law grants to the EU legislative institutions.

The practice of the trilogue has decisive impact on the overall legislative decision-making in the EU. It affects the internal systems of decision-making in each of the three institutions. It leads to increasing ‘oligarchization’ and ‘bureaucratization’ of Parliament and Council alike. We witness a “growing ‘coreperisation’ and ‘presidentialisation’ of the Council’s working methods” (The Codecision Procedure. Analysis and Statistics 2009: 1). We can expect a similar deviation from collective decision-making within the Commission towards increasing the power of individuals who represent the Commission at the trilogue. In this paper the focus is on the

concrete consequences of the trilogue practice for the internal workings of the EP. Since the trilogues first appeared within the conciliation phase of co-decision, conciliation forms our research framework. There is another reason for placing the focus on conciliation – the trilogue held in conciliations is the most formalized one from all trilogues and therefore open to empirical research, with data being available on its composition. Only after a thorough examination of the role of the trilogue in conciliation we inquire broadly on the consequences of trilogues for the EP's legislative role and remotely for the legislative process as such.

The paper aims to examine the two specific questions raised above. After an overview of the conciliation procedure, as well as the purpose and the evolution of trilogues, we first, undertake an empirical analysis of the representation of new MS MEPs in the legislative process hypothesising an underrepresentation of their views in the legislative process as a result of trilogues. Second, we inquire into the constitutionality of the trilogue. In fact, the Treaty was careful to ensure a proportional equality between old and new MS in the European Parliament. This can be compromised in the various stages of the legislative process, as is apparently the case of conciliation committees that are not only created ad hoc, but are often even circumvented altogether, as the data on the trilogue will show. The formalization of informal trilogue practices took the form of Joint Declarations that provide us with legal bases for review of constitutionality. It is evident that such constitutionality-based scrutiny has to take into account both the purpose of the trilogue and the political realities. However, and here is where the two questions asked above merge, if an intentional exclusion of a certain group of actors and citizens' interests beyond the reason of assurance of suboptimal efficiency is proven, then such alternative structures ought to be declared unlawful and pervasive to the EU political model. The intentional exclusion of new MS MEPs from the decision-making process in the EP may give rise to such concerns.

## **I. CONCILIATION ON EXTINCTION?**

The Conciliation Committee (CC) is convened following the Parliament's second reading, where the Council is unable to accept the amendments proposed by the Parliament. Modelled on the German Mediations Committee (Foster 1994), its task is to agree on a joint text within six weeks, with the possibility for extension to eight weeks. The Council or COREPER members that

represent Council Ministers vote by Qualified Majority Voting (QMV), whereas the MEPs vote by simple majority. Very important at the earlier stages of codecision, the Commission plays no active role in the CC, making it possible for the Council and Parliament to rearrange its proposals at that point (Crombez 1997) as true co-legislators. It might be thought that, by the time the Committee meets, institutional positions would be so entrenched that there would be little possibility of movement and agreement. A preliminary study done by Chalmers shows that between 1999 and 2009 (5th and 6th EP terms), the CC was able to prepare a joint text that was subsequently accepted by both Council and Parliament on third reading for almost all proposals that went to it (112 out of 115, Chalmers 2010).

A minority of scholars believes that the Council assumes a leading role in the CC, behaving more proactively and recapturing the agenda (Tsebelis 1997). There is no empirical proof though that Council makes its own amendments as these could have already been made upstream in co-decision. Conversely, most parliamentarians and academics alike agree that the process of exchange between Council and Parliament during the conciliation phase leads to clear net gains for Parliament (Shackleton 2000 and Conciliation Committee Activity Report 2009). This certainly does not mean that the EP is always getting its way in the negotiations. In certain cases, the plenary may also reject at third reading the compromise reached in the CC, as was the case with the Takeover Directive and the Port Services Directive during the 6th EP term. It may also happen, as it did for the first time in the case of the Working Time Directive, that no agreement is reached within the timeframe of conciliation and the procedure is closed. Rather than being regarded as unsuccessful, these outcomes can be evaluated in the light of the maxim “better no legislation than bad legislation”. Parliament actually did manage to tilt the balance in favour of its positions in the cases of the Auto-Oil Package and the 5th Framework Programme for Research and Technology during the 5th EP term (Shackleton 2000: 5-6) or in the dossier on Civil Aviation Security during its 6th term (Conciliation Committee Activity Report 2009: 18-19), where the final results went further than what the Council was ready to concede to in 1st or 2nd reading. For instance, with regards to the Civil Aviation Security package the EP ensured a legislative commitment for the financing of aviation security measures and its own stronger involvement through the regulatory procedure with scrutiny in subsequent regulation of body scanner usage and on-board liquid permissions (ibid). In the case of the 5th Framework Programme for Research and Development, Parliament succeeded too in negotiating a figure just

short of €15bn in allocation to the Programme, thereby overcoming the reluctance of the UK and the Netherlands to move beyond the €14bn previously agreed upon in the common position (Shackleton 2000: 332). As parties are aware of each other's positions, negotiation becomes easier. New amendments are not continually being thrown in, but there is a stable set of issues on which discussion can proceed (Rasmussen and Shackleton 2005).

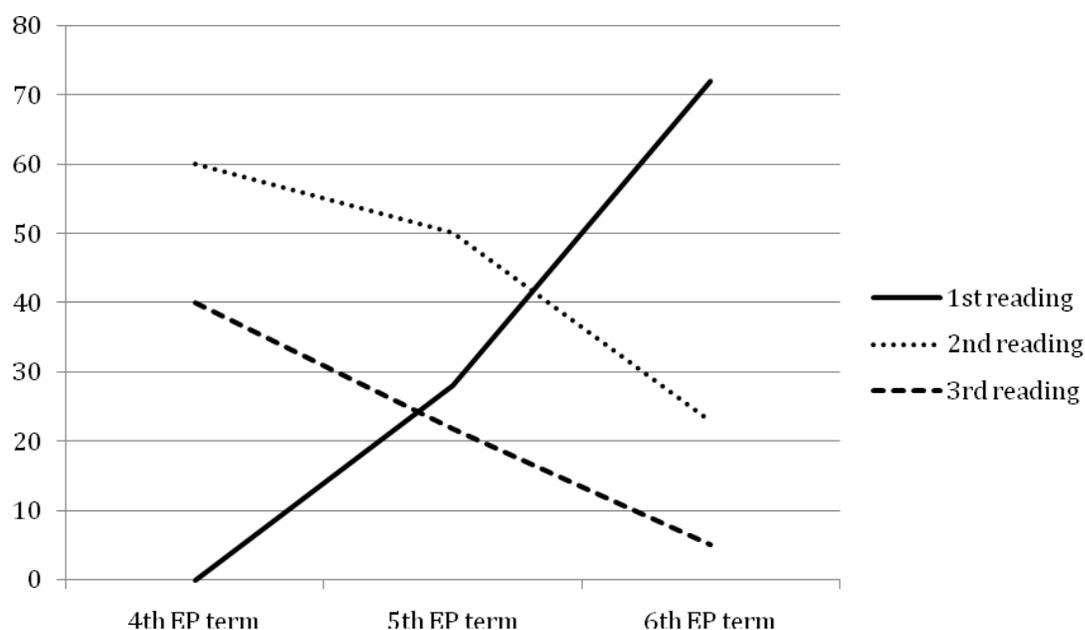
On the face of efficiency concerns with a gradual expansion of policy areas that fall within the scope of co-decision, the presumption for the conciliation procedure to be kept as a measure of last resort was maintained as far back as in the years after the adoption of the Treaty of Amsterdam. However, enlargement multiplied this effect to an extent that renders conciliation close to obsolete. According to Art. 294/10 TFEU the CC is composed of representatives of the Council and an equal number of members representing the EP. The increase in number of Council members to 27 after the past Eastern Enlargements led to an equal increase in number of EP representatives during conciliation. Overall, the size of the committee grew from 30 members in the 5th EP term to 54 members in the second half of the 6th term. In the 6th EP term we can see a substantial decline in the number of new conciliations that took place each year – these dropped from 93 to 24. The numbers show that from all acts adopted under co-decision in the 5th EP term 18.6% per year were decided in a CC, while in the 6th EP only 5.1% went to this final stage of co-decision. For the first nine months of 2010 in the 7th EP term the same pattern repeats, as there have been only 3 conciliations so far (2 concluded and one one-going). The data can be explained with an unprecedented simultaneous rise in legislation being adopted at first or second readings. In contrast with the situation in the 5th EP when 28% of the co-decision files were passed at first reading and 50.1% at second reading, in the 6th EP term 72% of the files were concluded at 1st reading, 22.9% at second reading, and a remaining insignificant portion of 5.1% via conciliation (Conciliation Committee Activity Report 2009 and own research). The discrepancy is sought also elsewhere<sup>1</sup>, though the main explanatory factor for this wider

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<sup>1</sup>First, defining the structure of co-decision as being responsible for “middle-range“ decisions as opposed to ‘history-making’ ones (Shackleton 2000) has largely become outdated with the expansion of co-decision. The Lisbon Treaty clearly recognizes this reality by re-naming co-decision into ‘the ordinary legislative procedure’. Second, the attempt to explain the higher number of first reading deals in the 6th EP with the “uncontroversial and rather technical proposals” presented by the Commission (Conciliation Committee Activity Report, 2009) is unconvincing too. The debate on and reform of comitology teaches us that the borderline between technical and non-technical in European policy matters is often blurred. Last but not least, issue salience and political will to reach an agreement early on can matter for a limited number of cases but can not account for the overwhelming majority of first reading deals.

tendency of fast-tracking 1st reading deals remains the conscious attempt of the institutions, reinforced after enlargement, to avoid going to conciliation by making frequent use of the trilogue practice, see Figure 1.

Figure 1: Changing ratio of 1st reading, 2nd reading, and 3rd reading in co-decision 1994-2009 [% annual average for each EP term]



Source: Own calculations based on data in Conciliation Committee Activity Report 2009: 10.

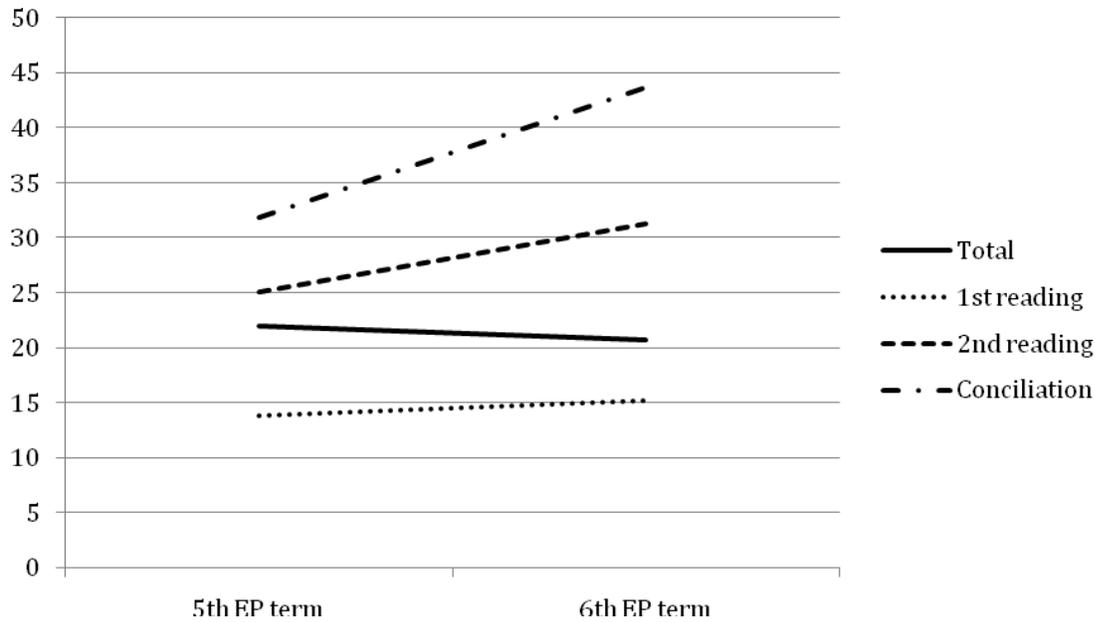
## II. DOUBLE LEGITIMACY GAP IN THE PRACTICE OF TRILOGUE

Ending co-decision through conciliation can look time-consuming. Moreover, ensuring consensus likely to get approved in plenary in a group that has bulged to 54 seems tedious. Trilogue first emerged in 1995 as an attempt to breach the gap left in the Treaty between the 2nd reading of the Council and the convening of the CC (Shackleton 2000). A clear need was felt for a structured dialogue between Council and Parliament to identify the exact points around which further discussions can revolve. Setting the agenda for the CC by a small group of officials was seen as an informal arrangement that could and did in fact allow the necessary degree of flexibility for the procedure to function. A trilogue is composed of three parties – two or three MEPs, normally from the respective issue-specific EP committee, a Deputy Permanent

Representative from the Council side, normally from the State holding the Presidency, and a senior Commission official at the level of Director-General. However, once used at the conciliation stage of co-decision only, today trilogue can be hold before all the readings and according to Kardasheva, do occur for some 76% of all Commission proposals (Kardasheva 2009).

Usually the trade-off in EU policy-making works as follows: you trade some input legitimacy (transparent law-making) to gain some output legitimacy (efficient law-making). As trilogue happen not only at conciliation but also before first readings, co-decision has presumably shortened and become more efficient at the expense of public dialogue, now foreclosed at 2nd and 3rd reading. Nonetheless, the EP's own empirical findings show that both 1st and 2nd readings take longer to conclude in the 6th EP. Since 1st reading is no longer what it says: an opportunity for initial considerations but is rather usually nearer to the moment of final decision (Chalmers 2010), it is logical that parties who seek to influence the process try and do so as early on as possible and that also controversial dossiers that were previously reserved for subsequent rounds, now have to be negotiated during the first two readings in co-decision. Consequently, the overall decrease in time has only been very moderate, as in comparison with the 5th EP where all co-decision files took 22 months to conclude, in the 6th EP they needed 20.07 months (Conciliation Committee Activity Report 2009, see Figure 2).

Figure 2: Length of legislative process 1999-2009 [Final agreement in 1<sup>st</sup> reading, 2<sup>nd</sup> reading, and conciliation in months from Commission proposal until signature]



Source: The Co-decision Procedure. Analysis and Statistics 2009: 7, and Conciliation Committee Activity Report 2009: 13.

At the same time, the other expected outcome from the informal reshuffle of the procedure – decreased democratic legitimacy of law-making, remains valid. 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 arbitrate between these centres of power, lobbying both central protagonists in the trilogue and other important actors in the Council, the Parliament and the Commission (Häge and Kaeding 2007). The process is coupled with an increase in the influence and power of those institutional actors directly involved in the negotiations at the expense of the other members of their institution. For the Council, the winner is undoubtedly COREPER. The new opportunity structures at the EP have in turn benefited the well organised and better connected with the Commission parties, as the Commission is still having greater weight during first reading. Farrell and Héritier have noted, therefore that small parties within the EP are excluded by the trilogue,

as they are never represented at it and the committee structure and its attendant public debates within the EP are bypassed (Farrell and Héritier 2004).

### **III. GOVERNING WITH COMMITTEES IN THE EP**

However disadvantaged due to the priorities of the bigger political groups, small parties in the EP are still given committee chairmanship seats according to the d'Hondt method – a consensus based on proportional distribution related to the number of votes gained in European elections. As usually large parties secure for themselves the chairmanships of the EP important for legislation issue-specific committees such as Transport and Tourism (TRAN), Environment, Public Health and Food Safety (ENVI), Internal Market and Consumer Protection (IMCO), Economic and Monetary Affairs (ECON) or Employment and Social Affairs (EMPL) and as committee chairmen and rapporteurs are always sitting at the trilogue, this leads to *de facto* empowerment of large parties. In Simon Hix's opinion, further politicisation of the EP in which more internal power materialises through committee chairmanships and rapporteurships allocation is desirable. If the stakes are higher in EP elections and a lot more power is given to the largest party or parties by *formally* granting the winner in EP elections the first five committee chairs and 40% of all rapporteurships next to a full 5-year presidential mandate, winning in EU elections would really matter for politicians (Hix 2010).

The problem with legitimacy and the trilogue exacerbates when one moves the level of analysis from the institutional to the individual though. One aspect of the more specific question that the present paper explores is whether after enlargement new MS EP representatives have been fully integrated in existing informal practices. Further research will be needed to show the factors that define successful integration of newcomers in EP party structures and decision-taking mechanisms in general – be that of MEPs coming from old or new MS. A recent study conducted by Julia De Clerck-Sachsse and Piotr Maciej Kaczyński (2009, p.5) claims that “generally speaking, integrating the new members has been less of a challenge that feared” and that once new MS MEPs learned the rules of the game during the 1st term of the 6th EP legislature, they integrated themselves at key offices already at the 2nd term of the 6th EP. As examples are given the seats of Mr. Jacek Saryusz-Wolski as chairman of the Foreign Affairs Committee (AFET) and Mr. Miroslav Ouzký heading ENVI in the 2nd part of the 6th EP term

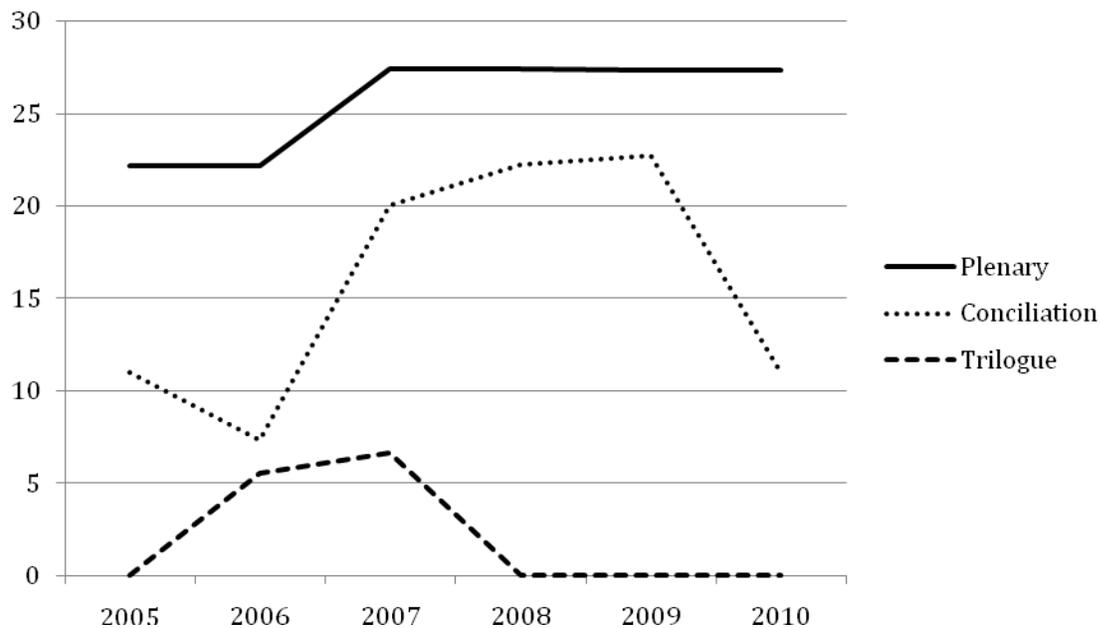
(from 2007 to 2009). From the 20 issue-specific committees in which the 6th EP was divided, these were in fact the only ones with any legislative input<sup>2</sup> chaired by a new MS (see Annex 1). Yet, the optimistic prognoses for gradual normalisation of this serious underrepresentation of new MS at EP leadership positions have anything but been fulfilled at the 7th EP (see Figure 3) term where currently out of the 24 issue-specific EP committees only one is chaired by a MEP from a new MS: this is the high-ranking EU official Mrs Danuta Hübner from Poland who served as a Commissioner for Regional Policy at the first Barroso Commission before taking up the post of a chairwoman for the EP Committee on Regional Development (REGI) since 2010. A similar development can also be traced in the case of rapporteurships. At first the parliamentarians from new MS were strikingly underrepresented. Though the total amount of reports prepared by new MS MEPs matched the share of their participation level in the chamber during the midterm of the 6th legislature (27% or 215 out of 785 MEPs after 2007, Ibid), as far as conciliation is concerned there was only one new MS MEP rapporteur for the whole 6<sup>th</sup> EP terms and up to the moment for the beginning of the 7th EP term!

Figure 3: Relative representation of new Member States MEPs in the legislative process 2005-

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<sup>2</sup> The legislative input of issue-specific committees is measured as amount of co-decision files (Ibid).

2010 [%]<sup>3</sup>



Source: Own calculations. Raw data on plenary available in the Treaty of Nice and the Treaty of Lisbon. Raw data on conciliation and trilogue available at [http://www.europarl.europa.eu/code/default\\_en.htm](http://www.europarl.europa.eu/code/default_en.htm). (retrieved 28 August 2010).

This paper focuses on the importance of committee chairs and rapporteurs as namely these always form part not only of the conciliation trilogues but also generally, of trilogues convened before 1<sup>st</sup> and 2<sup>nd</sup> readings. However, the role of shadow rapporteurs and committee coordinators in internal committee dynamics needs to be further examined. In any case, the findings of De Clerck-Sachsse and Kaczyński for the 6th EP term confirm the expectations of serious underrepresentation also among committee coordinators for the largest three political groups. Among the EPP-ED and PES committee coordinators, only one MEP from each group came from a new MS (whereas there were three from old MSs). In the ALDE group not a single coordinator came from a new MS, while all nine were from old MS (Ibid, p.6).

<sup>3</sup> For calculation of relative representation of new MS MEPs in the conciliation committees only conciliations concluded in the given year were taken into account with an exception of 2010, where there have been so far 3 conciliations – 2 concluded and 1 ongoing. Trilogue refers to formalized trilogue during the conciliation stage of codecision. In the year 2007, data for conciliation on the regulation Life+ are missing; therefore we have not taken this conciliation into account (Regulation of the European Parliament and of the Council concerning the Financial Instrument for the Environment (Life+)).

## **IV. CONSTITUTIONALITY OF TRILOGUE**

### **1. Conciliation after Lisbon**

The conciliation phase of co-decision did not substantively change after the adoption of the Lisbon Treaty. The wording of ex-Art. 251 TEC (now Art. 294 TFEU) changed in order to further underline the equality of the two legislative institutions – EP and Council. This affected the conciliation stage of the co-decision procedure (renamed into ‘the ordinary legislative procedure’) as well. The Treaty clarifies that the CC negotiates “on the basis of the positions of the European Parliament and the Council at second reading” (Art 294/10 TFEU) instead of that “the Conciliation Committee shall address the common position on the basis of the amendments proposed by the European Parliament” (Art. 251/4 TEC-Nice; see also The Codecision Procedure 2009: 7). Such clarification supports the reasoning of the ECJ in the *IATA* case (see below).

### **2. Trilogue and the Treaty**

The Treaty does not speak about the trilogue; this has evolved from practice. Soon after the co-decision procedure was introduced, its complexity – involvement of up to three readings with an additional stage of special conciliation between EP and Council with participation from the Commission in the procedure – pressed the three main institutional actors to inform each other about each one’s interests and intentions in order to avoid misunderstandings and reach some compromise. The practice of the trilogue, which started in 1995 within the conciliation phase of the co-decision procedure, has spread quickly into all readings and evolved over time into a dense net of negotiations at all stages of co-decision and throughout the whole legislative process as such. What has inevitably followed was a formalization of this practice. In 1999 the three legislative institutions agreed on a ‘Joint Declaration on practical arrangements for the new co-decision procedure’, published in the Official Journal (OJ C 148 of 28 May 1999). In 2006 a new Joint Declaration was adopted. The formalization of the informal processes within the co-decision procedure raises questions on the legal status of the Joint Declaration, the legal substance of the obligations imposed by it upon the three legislative institutions, and ultimately

about the relationship between the Joint Declaration and primary law, that is, on the constitutionality of the Joint Declaration.

The provision of Art. 295 TFEU stipulates that “[t]he European Parliament, the Council and the Commission shall consult each other and by common agreement make arrangements for their cooperation. To that end, they may, in compliance with the Treaties, conclude interinstitutional agreements which may be of a binding nature.” The Joint Declaration (JD) represents an interinstitutional agreement between the three institutions, which makes arrangements with an aim to enhance cooperation. According to paragraph 4 of the JD “[t]he institutions shall cooperate in good faith throughout the procedure 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.” The basic institutional framework for such cooperation is the trilogue.<sup>4</sup> “[T]rilogues ... 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...” (JD 2007: [8]).<sup>5</sup> The JD backs the spread of the trilogue into all stages of co-decision. As co-decision starts with the Commission’s proposal, the JD is not applicable on negotiations preceding that proposal. However, it allows, and even requires “wherever possible”<sup>6</sup>, agreement to be reached even before the first reading (JD 2007: [4] and [11]).

The JD requires the institutions to respect “principles of transparency, accountability and efficiency” (JD 2007: [3]). The transparency principle is further substantiated in paragraph 9 of the JD: “As far as possible, any draft compromise texts ... shall be circulated in advance to all participants. In order to enhance transparency, trilogues taking place within the European Parliament and Council shall be announced, *where practicable*.”<sup>7</sup> The highlighted reservation is

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<sup>4</sup> The three institutions declare that “current practice involving talks between the Council Presidency, the Commission and the chairs of the relevant committees and/or rapporteurs of the European Parliament and between the co-chairs of the Conciliation Committee has proved its worth” (JD 2007: [1]).

<sup>5</sup> Authors’ emphasis.

<sup>6</sup> The institutions shall cooperate in good faith with a view to reconciling their positions as far as possible so that, wherever possible, acts can be adopted at first reading.” (JD 2007: [11]).

<sup>7</sup> Authors’ emphasis. Such reservation is, however, omitted in the EP Code of Conduct 2008: [2]. Given the fact that according to Rule 127 of the EP Rules of Procedure, Rules of Procedure ought to be changed before the adoption of joint declarations, when the latter are conflicting with the Rules, reservation such as this in the JD shall be considered invalid.

doubtful and undermines the asserted principle. Moreover, trilogues meetings are closed to public and even to MEPs, who do not take formally part in the trilogue. This allows opposition to be effectively excluded. The Parliament, aware of the problem, enacted a *Code of conduct for negotiating in the context of the ordinary legislative procedures*, which got approved by the Conference of Presidents on 18 September 2008 and forms Annex XX to the EP Rules of Procedure. It requires that the composition of negotiating teams follows the principle that “political balance shall be respected and all political groups shall be represented at least at staff level in these negotiations” (Code of Conduct 2008: [3]). The decision to enter into negotiations with the Council is taken by the responsible committee by broad consensus or, “if necessary, by vote” (Code of Conduct 2008 [2]). The Code of Conduct provides broad discretion for the committee regarding the grounds for starting negotiation (Code of Conduct 2008 [2]). After each trilogue, the EP negotiating team shall report back to the responsible committee. “If this is not possible for timing reasons, the negotiating team shall meet the shadow rapporteurs, if necessary together with the coordinators, for a full update.” (Code of Conduct 2008: [6]).

The JD regulates the negotiations in all stages of co-decision. It further asserts binding nature of the negotiations and compromises reached in the trilogue as it requires agreements to be made in writing in formal way:

“Where 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... should it be confirmed by the vote in plenary. A copy of that letter shall be forwarded to the Commission... Where an agreement is reached [after the first reading but before the second reading], the chair of the relevant parliamentary committee shall indicate, in a letter to the chair of Coreper, his recommendation to the plenary to accept the Council common position without amendment, subject to confirmation of the common position by the Council... A copy of that letter shall be forwarded to the Commission” (JD 2007: [14] and [18]).

Same or analogous requirements follow for the second reading, the stage between the second reading and the conciliation committee, and for the conciliation stage. The question of the legal nature of such obligations is not an easy one. There has not so far been a case before the ECJ on the matter. Joint declarations are subject to approval in the plenary of the Parliament, voting take place with simple majority (Rule 127/1 of the EP Rules of Procedure).

The analysis of the Joint Declaration and relevant EP rules suggests that the JD is formally in compliance with the Treaty. However, we have raised few objections regarding the operation of the trilogue in practice. These objections question the representativeness of the trilogue, the transparency of its work, and the resorts of excluded MEPs to object the agreements. The broad discretion of the responsible committee both on grounds of starting negotiations with the Council (or with Coreper respectively) and the composition of the negotiating team plus the inherently secretive nature of deliberations during the trilogue contravene the very purpose of the democratic legislative process as foreseen in the Treaty. The review of constitutionality of the trilogue, however, cannot be based on the constitutionality of the Joint Declaration itself and has to take into account the practice as well. Moreover, the question of constitutionality has to be coupled with the question of enforceability of decisions. Supposing that the JD is in compliance with the Treaty, the reasoning goes, is it possible to enforce the obligations of the parties to the Joint Declaration? The ECJ has repeatedly ruled on the fact that the principle of loyal cooperation *also* binds the institutions when dealing with each other. If one of the institutions breaches its obligation stated in the JD in a concrete legislative process, the EP, Council or the Commission shall be entitled to bring an action for annulment after the legislative proposal is transformed into valid law or may be entitled to suit for inaction if the proposal fails.

### **3. Conciliation, Trilogue and the *IATA* case**

In the *IATA* case,<sup>8</sup> the European Court of Justice for the first time reviewed the powers of Parliament in the conciliation phase of co-decision. The International Air Transport Association (IATA) and the European Low Fares Airlines Association (ELFAA) contested the legality of the Regulation on passengers' rights regarding compensation and assistance in the event of denied boarding and of cancellation or long delay of flights<sup>9</sup> before the UK's High Court. The British court referred the case to the ECJ for a preliminary ruling. The questions asked were as follows: Is the conciliation procedure transparent and democratic and may the Conciliation Committee

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<sup>8</sup> Case C-344/04 *The Queen, on the application of International Air Transport Association and European Low Fares Airline Association v Department for Transport* [2006] ECR I-403.

<sup>9</sup> Regulation (EC) No 261/2004, establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, OJ 2004 L 46, 1.

agree on amendments to proposed legislation that were not subject to the second reading in Parliament?

The ECJ decided both questions in the affirmative and uphold the legality of the said Regulation. Although the Treaty (Art. 251/4 in the Nice version) stipulates that "... the Conciliation Committee shall address the common position on the basis of the amendments proposed by the European Parliament", the Court held that the CC "has the task not of coming to an agreement on the amendments proposed by the Parliament, but (...) of reaching an agreement on a joint text. The wording of Article 251 EC does not therefore include any restriction as to the content of the measures chosen that enable agreement to be reached on a joint text". According to the Court "in using the term 'conciliation', the authors of the Treaty intended to make the procedure adopted effective and to confer a wide discretion on the Conciliation Committee. In adopting such a method for resolving disagreements, their very aim was that the points of view of Parliament and Council should be reconciled on the basis of examination of all the aspects of the disagreement...".

On the second question raised on the transparency and democratic character of conciliation, the Court reasserts its long standing view that "genuine participation of the Parliament in the legislative process of the Community... represents an essential factor in the institutional balance intended by the Treaty." This function of the Parliament is not diminished in the case of conciliation for two reasons: first, the Parliament is represented in the Conciliation Committee "in accordance with the relative size of each political group in the Parliament"; and second, the agreement reached in the CC is still subject to approval in the plenary.

It is doubtful whether the ECJ decision was backed by an empirical study on the representative nature of the CC or was based solely on the interpretation of the relevant legal rules (foremost the Treaty and the EP Rules of Procedure).<sup>10</sup> Regarding the objection to the democratic nature of conciliation, the Court referred to the proportional representation of the Parliamentary groups only. We have shown, however, above (see figure 3) that Conciliation Committees in the 6th EP term underrepresented MEPs from the new MS. Moreover, the Court

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<sup>10</sup> The ECJ does not provide evidence on its account in the ruling. However, such studies are occasionally done by the Research and Documentation of the ECJ in the form of so-called research notes and are subject to secrecy. See Dumbrovsky, T. and Petkova, B. (2010) Structural Changes and Decision-Making at the European Court of Justice after the Eastern Enlargement, Paper presented at the ECPR Fifth Pan-European Conference on EU Politics, Porto, 23-26 June 2010.

did not take into account the practice of trilogues, whose representativeness in general and transparency was objected in this paper. Regarding the second question – the transparency of conciliation – the Court did not offer a convincing argument. The fact that the agreement reached in conciliation has to be voted in plenary does not suffice. If the plenary solely confirms complex legislative acts pre-cooked behind closed doors, then vital conditions of accountability are not fulfilled. This holds true, moreover, in the case when conciliation is driven by trilogues, excluding a number of actors from the debate. The Court, however, did not bother with this question at all.

## **CONCLUSION**

As pointed out by Börzel (2005) trading input for output legitimacy simply does not work. Rather than presenting clear net gains in the latter sphere at the expense of the former, we see the institutions slipping into a double legitimacy gap. We have argued in this paper that the practice of trilogues undermined the transparency and democratic nature of the legislative process. The transparency and democratic substance of decision-making consists in an open debate that allows all interests to be spoken out in a genuine public discussion. Sidestepping the voices of newcomers after the Eastern enlargement has signified a startling under-representation in decision-making for the new MS MEPs but more generally, points out to a serious problem of EU governance, namely that of the persistent dominance of entrenched interests. The positive developments enshrined in Treaty amendments that allow for a greater saying of the EP in law making have thus been compromised by day-to-day informal arrangements. The ECJ has not been mobilized enough by the other institutions and has not been contextual in delivering the only judgment so far that touches upon the problem of representativeness and transparency in the conciliation phase of co-decision. As murky as the purpose of the European project is, if we want *at least* a functional Union, after all, we have to ask ourselves the question who gets what in the EP and how.

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