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**Between Forces of Inertia
and Progress: Co-decision
in EU-Legislation**

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Introduction

Many observers claim that the implementation of the Co-decision mechanism with the ESA (1987) and its manifestation in the Maastricht/Amsterdam Treaties (1992/97) could be interpreted as a significant step towards more democratic legitimacy in European policymaking.

This conclusion could come close to reality under two conditions: The first, if the EP as the only directly elected decision-making body is comprehensively involved as an equal-footing Co-legislator beside the Council. The second, and even more important, is if the Co-decision procedure is sufficiently transparent for the European Citizens.

Therefore, this paper aims to explore, whether these two requirements are fulfilled. The following is that a too optimistic assessment of the Co-decision procedure, as a tool for more legitimacy cannot be justified.

In order to demonstrate my thesis, I will firstly discuss the general problem for European Citizens with legislation at the national and European level, specifically regarding the critical question, of how the EU can bring the people closer to the Union.

Secondly, it seems useful to deliver a more comprehensive description of the history of the Co-decision procedure, because this gives an insight into the development of legislation in the Community.

Thirdly, the importance of the Co-decision procedure in the legislation system should be examined. In doing so, special regard should be given to its integrational significance and to the increasing impact on the structuring of the daily life of Citizens

Fourthly, I will provide an overview of the significant documents concerning the reform discussions as they arose at the end of the 90's, especially since the of the Codecision in practice differed considerably from its intention in the Treaties.

Fifthly, I will reflect on my own research on the Co-decision practice in the European Parliament and the Council in 2001¹ and compare the adequate Rules of procedure with how they are really practised by the both institutions.

Methodology of analysis

According to the main guidelines, the paper was to focus on the practice of legislation and the accompanying problems.

Therefore, the paper will not research and discuss the entire theses concerning democracy in parliamentary bodies, two-chamber-legislation motions, articles written about the European legislation bodies etc. According to the above-mentioned research task, the paper will be much more a review of the practical research in both decision making legislative institutions, especially those in the Council. It will also describe the experiences of the author during his research activities with the questioned legislative bodies, committees, representatives inside the institutions etc. and their impact on the Co-decision procedure. These experiences combined with the findings and results of the research will enable the author to characterise the current situation of European legislation. Moreover this article assesses the changes and difficulties of a future reform in European legislation as part of broader and deeper Integration.

1 This paper drafted on a research project by the author at the EPP-Group in the EP. In 2001 he was assigned to analyse the Co-decision practice in the EP, and especially in the Council. The tasks of the project and the results are clearly described in part V. p. 35f of the paper.

According to the dual-nature of the research subject, the article does not only deal with political matters. A good portion of the writing is concerned with judicial questions.

Part I first addresses the psychological hurdles of the average Citizen in relation to legislation. In doing so, aspects of mentality, education, information etc. were regarded. Secondly, the special distance of Citizens to EU-legislation was examined.

Regarding part II (history), a real description of the development could not be delivered without a view of the structural deficits of democracy of the Community. This makes up the political-legal 'unique surroundings' of the Co-decision's implementation and development.

In part III, the paper analyses the systematic legal position of this legislative method in the legislation-framework of the EU, in the time before and after the Amsterdam Treaty. In a second step, the research focuses on the legal and technical aspects as well as on the concrete practice of the Co-decision.

The research in part IV will mainly give an opinion on the reform proposals made in different papers, announcements etc. and on the attitude of the involved institutions and persons to realise those proposals. In doing so it will be shown, whether and to what extent these institutions and their representatives have dealt with the matter of 'Co-decision' in practice. The research will also give an impression of to what extent the different reform approaches and reform proposals made in that paper lastly were realised.

Part V relates to the matter of Co-decision and the public sphere in the Council. The research will first show the grade of 'openness' in the Council when it was acting as Co-legislator. For this reason the real 'nature' of the Council's 'public debates' in comparison with the possibilities for the participation of different groups of people from outside in these debates must be discussed. Secondly, the questions of how the appropriate Rules of procedures in the legislative institutions have favoured a good Co-decision practice shall be examined. Additionally the approach and the practice of those Rules shall be compared.

Finally, the paper concludes with some thoughts on how these rules could or should be re-structured for more effective Co-decision legislation in the area of law and the administration of justice in the EU.

1. How to help Citizens relate to the Union and the increasing importance of Co-decision

Usually legislation of a country or a nation is interesting to lawyers, judges or other persons in another area of judicial affairs. However, their interest is more concentrated on the result of the legislation, the laws themselves, because those are the basis and the sovereign framework of their working. Much lesser regarded is the analysis of the legislative procedures; the procedures from the initiative of a law until its final implementation. This interest belongs more to the politicians and the politically interested people, but the specialities of the legislative procedures are only scarcely noted by them. Even when members of the various parliaments act as legislators, in fact only some experts in the appropriate committees are really experienced in the background of legislative procedure.

In regard to the interests of the people of the member states, there is somewhat more interest in the action of the persons involved in legislation, the actions of the politicians. These ‘actors’ are regularly the MP, their representatives in the parliaments, and the legislation or the laws are part of the politics they have promised to fulfil before the election. However, and for some reasons which to recount here would be too difficult, most of the citizens of these states are completely uninterested in the legislative procedures. The main reasons for their attitude are: the creation and structuring of laws in the parliaments is a strange business and the legislative procedure is an opaque process of political actors on a high and inaccessible level. In addition, with less information impact from other sides (schooling, public media etc.), these processes are too intransparent for them. It is a well-known sociological phenomenon that modern people do not take a great interest in matters, which they cannot understand. And because of the lack of transparency, one of the most important preconditions for a better understanding of the legislative processes is missed. On the other hand, it

could be said there is at least an acknowledgement of the legislation, or an indifferent feeling to the fact that the state is acting as a legislator. Therefore, it is not very surprising that there is at least only a little 'sense of interest' among the people towards the national legislation processes.

With regard to European legislation this kind of distance between the people and the legislator can also be seen. Between the European Citizens and the legislating institutions acting in Brussels and Strasbourg there is also an atmosphere of misunderstanding. The only difference to the national member state relationship is that the distance between the Citizens and the European legislation level is expressed in a much more disquieting manner. In the relationship between the European Citizens and the European legislators such a feeling is nearly invisible. Surveys show that only a small percentage of interested people are really informed about the (fact of) European legislation. This leads to the problem that the interest of European Citizens on European legislation is very low.

Thus, on the one hand, the discussion of legislation in the EU does not seem very helpful for the analysis of ways in which the European Citizens could be moved to come closer to the Community. And in the same manner it is hard to estimate, how they could be more motivated and encouraged to participate in the process of European Integration through a better European legislation. This is especially true due to the reason that processes of European legislation are generally less transparent than in the member states.

On the other hand, the subject 'Transparency in European affairs' is one of the most propagated measures of the European Union to make the European Union more attractive for European Citizens. For example in 1996, the Council created a new journal called Transparency. In this journal the progress of the Council's legislative activities were reported monthly.² Until 1999 this journal was only available in the office of the Council, since 1999 (after the ratification of Amsterdam Treaty), it was published for the

2 The Council of the European Union, Transparency, monthly summary of Council acts; website <http://www.ue.eu.int>; the summary contains: the voting rules, the results of votes, the explanation of the voting and the statement for the minutes.

public. In doing so there is also the hope that the readiness of the Citizens to build the Union will increase. Such progress on European Integration should not only be a passive acceptance by the Citizens, but much more an active adoption process, regarding it as their own affair. To reach these aims, a more transparent legislation at the European level is propagated and – formally – structured, but the questioned transparency needs much more than some legal orders or administrative acts of the Union. In addition, the realisation of these measures, especially in the field of legislation and especially by the Council, is a very slow process. Thus is the hope that more transparent legislation will be a significant step to a more accepted Union by the Citizens: Up to now this has been more a vision than a concrete aim.

However, against all these negative aspects, the increasing importance of European legislation as the *raison d'être* of EU-Citizens needs to be regarded and analysed. Within this research the most important aspect is the analysis of Co-decision, because this legislating method is institutionally the most important legislative procedure among all legislative processes of the Community.³ Of the many aspects which lead to this perception, the following three main reasons for the Citizens' view of Co-decision are described and discussed briefly below:

Firstly, there has been a quantitative increase in the use of the Co-decision procedure since the Amsterdam Treaty. According to Article 251 EU-Treaty, the legislative subjects to be regulated by Co-decisions have grown from 15 subjects in the Maastricht Treaty, to nearly 40 different matters of the Community's activity. In addition to these facts not fewer than 31 articles in the Amsterdam Treaty apply to Co-decision subjects. With the exception of six important legislative areas (e.g. agriculture, fisheries, taxation, trade policies and EMU) it includes all subjects of EU-legislation. Every year there are about 60 – 90 Co-decisions, which are discussed and (partly) decided in the legislative bodies of the Union.

Secondly, there is the obligation to use Co-decision procedure in all cases where qualified majority is used in the Council. With the exception of four legislative issues, which request an unanimous decision (in the Council), all

3 EP, Conciliation Handbook, 4 th edition, September 2002, p.2.

Co-decisions are required to be decided by qualified majority. Therefore the timetable of legislative acts (at least theoretically) could obviously be shortened and the goal of more effective timely EU-policy⁴ is much easier to reach if the laws of the Union are passed in the shortest possible time. In this case the law order of a co-decision will take effect near the time of the situation, which caused the law initiative. There is no doubt that such well-structured legislation near the arising problems and close to the reasons for a bill can strengthen the efficiency of the EU-Policy. For example a better and faster reaction to Citizens' policy anticipations by the responsible politicians on a fixed legal base could strengthen the trust of the Citizens in the purpose of the EU.

Thirdly, as the name of the procedure suggests, the two main actors in EU-legislation, the Council of Ministers, representing the government of the Member-State governments, and the European Parliament (EP), adopt EU-legislation jointly and on an equal footing with equal rights and equal obligations. And because of the fact that the MEP's are directly elected and represent the peoples of the European Union, Co-decision is the legislative procedure in which a close(r) connection to EU-Citizens is realised and thus legitimate.

These findings lead to a perception of the importance of the EU-legislation and especially of the Co-decisions from the side of the EU-Citizens.

Today more than 70 per cent of all laws in the (single) member state(s) are created and structured in Brussels/Strasbourg. The EU-regulations for instance, the most important group of Co-decision, offer no possibility for the national parliaments to give input into such a law. Therefore, the EU-Co-decisions embody the leading guidelines in the legal framework of the European Citizens.

Given that –normally– a law is a measure of the government to address a certain matter, problem, aim etc., and given that a law contains a legal order to be followed by the addressed persons, it becomes clear that Co-decisions have a great impact on the structuring of the (daily) lives of

4 EU-Commission: European Governance, A White Paper, Brussels, 25 July 2001, p. 10.

the European Citizens. This is irrespective of whether the Citizens will accept such an order or not and irrespective whether they are really aware of the circumstances or not. Thus, even though the European Union does not have a real government, which can be perceived by the EU-Citizens as the transmitter of the laws, Co-decisions still serve an important function in the sphere of the EU-Citizens.

II. The History of Co-decision and structural Legislation-Deficits

Since the beginning of the European Community, it has been the declared aim of most of the founding states that legislation should be made by the member states at the national and at the European level. In the last case this task was delegated to the sphere of an ‘Assembly of the Member states’, the European Council. Logically, no real legislative representational body of European Citizens was included in the Rome Treaties. The European Parliament with its current legislative rights did not exist; only a so-called European Assembly was structured. This Assembly lacked the competence to participate in European legislation. The Assembly was only structured as a consulting body in all matters of European Integration. The attempts of a few states during the consultations to the Rome Treaties, especially those of Germany, to strengthen the European Assembly and to invest it with legislative competence were rejected by the majority of the founding states. Later, some other attempts to give the Assembly a stronger position, including the European legislation process, failed as well. The competency on legislation did not increase when the Assembly was transformed into the European Parliament (EP) 1979. Only with the European Single Act (ESA) of 1987, the position of the EP in legislative matters was strengthened. Due to the then upcoming Common Market, which was started five years later with the Maastricht Treaty, there was an increasing intention that the rights of the EP should be strengthened in order to get easier and better majority decisions. After long lasting discussions and some later European Summits, these intentions were finally adopted by the Council. It accepted the necessity of greater power sharing with the EP.

However, only with the Maastricht Treaty itself and especially with the amendment of the Co-decision procedure in Art. 251 Amsterdam Treaty, the Council's legislative dominance was substantially reduced and in reality shared with the EP.

The described difficulties until the implementation of the Co-decision process were part of the structural deficits in the European Integration processes, especially expressed in the European legislation system. And at least partly, these difficulties are still ongoing vis- a-vis Co-decisions. The main problems in this case are based on two essential pillars and they raise up several questions:

Firstly, one matter concerns the structure of participation of the main institutions in the European legislation. With the Co-decision procedure the power of decision-making has changed more and more to a bicameral legislation system. Each law, which was decided by Co-decision, forces the Council and the EP to come to a final agreement, whilst the role of the Commission was increasingly reduced, conversely strengthening the decision-power of the EP. Thus in all cases of Co-decision, the legislative procedure at the European level came nearer to a real Two-Chamber-System as is generally used in the legislation at the national (member state) level. Formally, one can speak of a symmetrical power sharing between the EP and the Council. Therefore, it has been claimed that an increasingly formal agreement between the EP and the Council would finally strengthen the democratic legitimatisation of the European legislation.⁵ Despite these changes, this formal framework is only one side of the coin. The flip side is the lack of a structural foundation for a real two-chamber-system on the European level. Such a system needs a balanced structure between the participants, which is based on general common interest. However, this situation scarcely describes the European system. The European reality is marked by the dominance of national interests. Historical reasons, often a long lasting sovereignty of the nations, cultural diversities, language barriers etc. have established and fostered a more national orientation. This tra-

5 See: Hänsch, Klaus, Europäische Integration und parlamentarische Demokratie, Europa Archiv, 41, 1986, p. 1991-2000.

dition is mirrored in the behaviour of the Council. In contrast, the EP with its directly elected Members of Parliament and its trans-national structured Party-groups is much more oriented toward the cross-bordering interest of the European Citizens.

Thus, the question is, how can these formal rules of procedure of Co-decision be effective in the activities of the participating institutions, e.g. the EP and the Council. As described above the Council is the less democratically legitimated institution, but the image that the Council itself could make its inner decisions more effectively with deepened intergovernmental negotiations and/or improved decision-making procedures has failed. The reason for this is lastly the fact that the Council practices negotiation and debates generally behind closed doors. Thus, a second question must be: how can the Council move to more public Co-decision behaviour which is finally a question of transparency in the Council.

This transparency is undoubtedly evident in the activities of the EP; all its negotiations, committee consultations, debates etc. on Co-decision laws are public and they are (at least potentially) able to be followed by the European Citizens.

However, a third question immediately follows: how does the EP have the power to participate in Co-decision processes in an adequate manner? In a manner which upgrades a legislative decision from the smallest common denominator to a decision which is oriented on the wider supranational interest level; Thus, may be possible in relation with the Commission, since the Commission is also more oriented on supranational guidelines than on national particularism.

III. The Co-decision Procedure in the legal framework of the EU and the political contents of Co-decision

1) Legal-technical aspects

The inclusion of the Co-decision procedure in the Maastricht Treaty and its systematic placement near the top of Part 5, Title I, chapter 2 of the Treaty, called ‘The provisions common to several institutions’ shows that this method of legislation should be placed in an exposed position in the framework of the EU-Treaties. The granted competencies towards the different acting legislative institutions should also clearly express that the power of the Council to decide the fate of the Community and the guidelines of the common policies via legislation are formally shortened for the first time. In addition, the detailed rule contains all the orders of the necessary majority quorums and clearly structured procedures including the important conciliation rules to reach the aims: a more democratically legitimated legislation in the Union and the passage of laws within a reasonable time.

These aims were strengthened in the Amsterdam Treaty (1997), successor of the Maastricht Treaty. The procedure of Co-decision was reformed to grant more power to the EP to accelerate the laws. In Article 189 b Maastricht Treaty, the Council was generally enabled to adopt a Common position when receiving a proposal from the Commission. Originally, it aimed to implement a general Co-decision of the EP in all matters of EU-legislation in order to reduce the democratic deficit at the Community level.⁶ According to Art. 251 Amsterdam Treaty on the one hand the Council is only encouraged to act after obtaining the opinion of the EP on the questioned proposal. On the other hand, if the EP agrees, the Council has two possibilities to decide a proposal without the force of a long lasting legislative procedure. This means: excluding first to third reading and conciliation necessities.

6 See: Schwarze, Jürgen, EU-Kommentar, 1. Auflage, Baden-Baden, 2002, p. 2103.

The importance of the Co-decision rule increases further in comparison with the following Article, regarding the remaining cases of a final decision of the Council on European legislation: Article 152 Amsterdam Treaty and Article 189 c Maastricht Treaty are not only similar in their main contents, especially as the wording of both is nearly identical. Thus in the case of a Council's final decision, there was no necessity for reform.

In its functionality, Co-decision encloses a two-sided nature. On the one hand, it is a common juridical measure, directed toward the member states and their Citizens. Additionally, in the optimal constellation this measure should be based on the real interest and on the true will of the majority of European Citizens.

On the other hand, Co-decisions, like the other legislative acts of the Community, contain law orders, which are obligatory for the member state and compulsory for EU-Citizens.

2) Co-decision in practice

The usage of the Co-decision after the Amsterdam Treaty offers a mixed impression:

If the subject of a law proposal is a less controversial one, the detailed rules of the Amsterdam Treaty combined with adequate rules of procedure lead to a relatively uncomplicated and fast legislative procedure inside and between the participating institutions, committees, working groups etc. In these cases the intentions of the Maastricht/Amsterdam Treaties are really fulfilled and the Co-decision is able to work towards better Integration.

However, the number of the unpretentious law intentions is in the minority. Mostly the discussed law matters are highly argued over and controversial between the acting legislators. 15 sovereign states and nations seek to create an acceptable and workable compromise. Thus, problems and difficulties in the legislative procedure are pre-conditioned.

These difficulties and problems mark the practice of the legislative procedure. If the negotiations on a law proposal inside and between the acting EU-institutions infringes on their competencies, power positions, special

views and so on, differences will arise and controversies hinder the progress of a law initiative.

On top of that, it is not certain that all institutions act strictly along the lines of (their own) procedural rules in every case. With sometimes seemingly strange interpretation of such a rule, they erect additional hurdles against a successful piece of legislation. No one institution can sanction the other, and therefore the legislation progress in the particular institution is handicapped. It is sometimes possible to go to the European Court of Law, but this is usually a long lasting action and helps little in these situations.

In combination with the necessity of a final agreement and of a common adoption of a Co-decision between the opposed protagonists, the current Co-decision practice fails to contribute to better European legislation.

3) Institutional Integration significance

The increase of Co-decision to 85 per cent of all EU-legislation indicates the importance of this procedure as an integration measure.

If one of the most important Community activities, the common legislation suffers such an extension, the weight of Co-decision inside the frame of European Integration is not to be overestimated. The transfer of legislation areas into the 'Co-decision' competencies of the EP shows the intention of the Treaty-signatories and Summit participants at Amsterdam to take the law guidelines of the Union on a broad-based legislative procedure.

In addition, these upgrades of the EP competencies explain the increasing acceptance of the equal-based power sharing between the EP and the Council in the Maastricht and Amsterdam Treaties. However, this understanding was on the one hand hard to accept in practice, especially for the Council, since it was traditionally the 'owner of the decision-power' in the Community. This aspect explains the occasional attempts of the Council to regain small pieces of its former decision making power. Even if these attempts are not spectacular, they are ongoing; the attitude, to erode by short steps the Co-decision competencies of the EP and of the Commission are described and analysed below. On the other hand, the fact that the Council had formally accepted the divided legislative power shows the general

ability for reforming the Union's structure and a principal openness of the institutions for an amendment of their power positions.

4) Political and Practical Impact on the Citizens

The political, integration-valued contents of Co-decision can be characterised in a different manner. On the one hand, there is the above-described lack of interest. However, if the people are informed about the circumstance of a Co-decision, they regard it as a practical guideline for the structuring of their affairs. In this case, it is important to point out that the Citizens first ask for clear instruction from the laws. They do not like to read difficult rules with scarcely understandable contents. Secondly they want to be informed in time about the legislative procedure and the progress of a law initiative. If both pre-conditions are fulfilled by the Union the Co-decision could work as a mediating measure to bringing much more trust to the character and the purpose of Integration. Thus on the other hand, improving the described time factor and the transparency affair of Co-decisions is not only a formal matter, but more a political subject reflecting the belief of the Citizens in the Union's ability to look after their interest. And it is of good signifier, whether the Union is also willingly to do so.

The level of Citizen support for the Union could be strengthened or also weakened by the handling of the Co-decision procedure. Therefore, the handling and the practising of Co-decision are of enormous importance for the European orientation of the people.

IV. Reform-Approaches between 1999 and 2002

As mentioned above, there are a few problems with the practice of Co-decision. Regarding these results, particularly, after the adoption of the Amsterdam Treaty, many attempts to reform the Co-decision procedure were published. The reform intentions were additionally motivated by the upcoming enlargement of the Union. It became obvious that a Union of 25 or 27 member states would not be able to work reasonably without an institutional reform.

Thus, in the context of the discussion concerning the function of an enlarged EU different approaches, models, reports, discussion papers about a Co-decision reform were thought about, written and offered by the EP and the Council.

The Commission has not participated in a transparent manner on the reform proposals. Its task in the Co-decision procedure is in fact not extended to the nearer decision making processes; therefore the dividing lines of a different Co-decision practice do not primarily touch the relationship between the Commission and the EP or between the Commission and the Council. Such a line is much more noticeable in the relationship Council – EP. Thus the Commission's contribution to the reform activities was oriented towards a more consultative and less official role. Actually, with the exception of the Joint Declaration from May 2001, there was a reform paper published by this institution. However, the participation on that paper was more formal act and does not depend on a real conviction of the Council.

Thus, the most important papers of the EP and the Council regarding this subject shall be reported and analysed on their possible impact towards a reform progress of the Co-decision legislation. Among the reports, articles, papers etc. there are a few which are of great importance, such as a report of the Council of the Helsinki Summit 2000. Some of these papers were not so decisive for the reform results as the other one, for example a report out of the EP in April/September 2001. And a few activities were settled more on the administrative level with only negotiation announcements.

Such a difference is also to be seen in regard to the discussed subjects. Some of the reform proposals deal with Co-decision legislation itself; some of them discuss mainly the accompanying aspect of institutional transparency and a few regard special methods of negotiation during a Co-decision procedure.

Last but not least, the research papers of the author and of the working group in the EPP-faction, as well as the appropriate EP-resolutions, were sourced by that working group.

In addition to the above-described reasons for a co-decision reform of procedural lack in the Maastricht treaty, the reform discussion was often

marked by the repercussions of an increasing struggle between the Council and the EP. In spite of the formal implementation of Co-decision, its practice was still handled in relative confusion. There were no fewer than 22 different procedures, which made even the experts nearly unable to decide which of them was appropriate. In addition, the procedures were mostly too complicated, long lasting and bureaucratic. In that way the difficulties and problems with Co-decision procedures have been increasing. The differences between the EP and the Council on how to manage this method have been rising more and more. The increase acknowledgement of a failure to reform the 'Amsterdam'-Co-decision caused these disagreements and they significantly marked the attitude of the main players.

Therefore, it was no wonder that the EP, which had implemented a far-reaching transparency order in its legislation ⁷ and had finished its part much faster than the Council, steadily called for the reform of the Co-decision procedures.⁸ However, the reaction of the Council was rather slow and restrained. The EP waited for the result of the Helsinki Summit, but from its view the reform steps decided in the conference by the Council were much too few to better the practice of Co-decisions. In addition, it seemed to the EP that after Helsinki, the Council tried, to foster the inter-governmental conference (IGC) contacts (between the member states) in order to come to a result faster on difficult Co-decisions. The Council argued that this procedure would be necessary because the EP needed too much time to come to an agreement with the Council in the 'normal' conciliation procedures. The EP refuted this accusation and criticised these ICG-activities. The sharpness of tone in the discussion increased seriously and the animosities between the Council and the EP at their peak reached a level of accusation. Therefore, the EP decided to strengthen its request for a reform of the Co-decision procedure. As the strongest faction, the EPP-Group was the most reform-interested political organisation inside the EP. Especially the General Secretary of the Group, Klaus Welle, forced the reform activities. On the one hand he wanted to relax the relationship with

7 See: European Parliament, Rules of procedure, Articles 177, 172.

8 See: Brok, Elmar, Wer entscheidet in Europa, in: Eichholzbrief, Zeitschrift zur Politischen Bildung, Vol 2/99, p. 16.

the Council and to bring it back to a more business like level, but was keen to reform the Co-decision practice in the sense of the Amsterdam Treaty. Thus, a lot of the reform papers of the EP were structured firstly by the EPP-Group.

1) Imbeni-Rovan-Friedrich discussion document

One of the first important papers was a discussion document presented by the Vice-presidents of the Conciliation Committee of the EP⁹. At the beginning, the paper showed the positive aspects of Co-decision and the authors stated: There is no question that co-decision procedure works and works well¹⁰ and they attested a general change in the behaviour of the council towards a conscious strategy of developing contacts with the Parliament. These include an increasing number of informal negotiations before there is the necessity for a formal conciliation. But they also highlighted a few eminent risks in the way in which the Council has developed contacts with the Parliament. In general, they complained that the Council wants the Parliament to organise itself in a way that fits more easily into the Council's way of working. In these perceptions the authors saw two manifest dangers concerning the legislative actions of the EP. Firstly, the EP could find itself reduced to the role of the 16th member state of the Union. Secondly, the EP's open and public debates could tend to be reduced by those informal negotiations taking place elsewhere and the essential transparency of legislative processes would be put at risk, threatening the *Agora* function of this institution. Against these feared intentions, they explained, "without prejudice to the prerogatives of either institutions, the Council should be encouraged to become more like the EP, not the other way around".¹¹ Then the authors made a few procedural suggestions to reach a real functioning of Co-decision. They include a 'programming of the Co-decision before conciliation', 'fast track agreements', a wider reporting of all legislative negotiation, combined with a joint verification of

9 EP, Imbeni, Renzo, Provan, James, Friedrich, Ingo: Discussion document, Improving the functioning of the co-decision procedure, Brussels, January 2001.

10 Ibid, p. 1.

11 Ibid, p. 2.

legal texts and – of course – a secured transparency, based on the respect of legislative procedures.

In a report of a joint Co-decision seminar (Parliament, Council, Commission, held in November 2000), published in July 2001,¹² the same EP-functionaires suggested a fair compromise between both guidelines of the Co-decision procedure. Internal trust and confidentiality of negotiation procedure should not be diminished by a too strong transparency combined with an external visibility, even if the latter course is required by the necessity to enhance the legitimacy of EU-legislation in the eyes of the Citizens.

In these two papers a few important aspects of the discussion on the reform of the Co-decision are really reflected and the proposals of the authors for a solution of these problems were easy to understand.

2) EPP-Report

In a report of the EPP-Group to its General Secretary, the group dealt with the relationship Council/EP and their functions as the Co-legislators of Europe.¹³

In the introduction, the Group pointed out the purpose of the paper: the necessity of an improvement of that relationship, in order to make the Co-decision procedure more effective. This should be done on the basis of four principles: loyal co-operation, transparency, efficiency in the legislative procedures and a better structuring of the acting representatives of both institutions

According to the theme, the Group analysed several important subjects of the Co-decision procedure practice. Part one relating to the Co-decision procedure looked firstly at the specialities of the fast-track-method before the first reading. At that time this negotiation method caused a lot of scepticism on the side of the EP; the view of the Council at the practice of this procedure was especially criticised. The structure of this method will be

12 EP, Conciliation Committee, Activity Report, Annex VI to the Conclusions on the European Council Summit in Nice, 2000.

13 EP, EPP-Group, Report to the General Secretary of the EPP, Strasbourg, 12 June 2001.

described below. Only the resolution of the EPP-Group and its proposals for an adequate use of the fast-track-method from its view shall be explained in the following.

Accepting that this procedure guarantees great flexibility and implies a multiplication of the informal meetings, the Group however complained about a few problems and made some suggestions for avoiding the main problem, seen by EP. That is, before the first plenary-reading, the negotiation is difficult to check because the reporter of such a law proposal owns neither a mandate nor the text of the negotiations, which was how it was formulated in the fast track-negotiations.

Therefore the EPP-Group firstly suggested that before the legislation initiative is voted in the EP-plenary, it is to ensure a vote in the responsible commission(s). The Commissions would comment on the possible amendments, and then, before the final vote in the plenary, on the suggestion of the reporter, while the EP should have the right to ask for a return of the proposal to the Commission. In this case, the procedure is not completed in the first reading, but henceforth it exists as a text, that represents the position of the EP. On this basis, it can begin negotiation with the Council. That should introduce the ' fast-track ' procedure.

Secondly, the responsible commission, after hearing a representative of the Council-Presidency, decides to use this procedure and gives the mandate for negotiations. This mandate is to be given to the reporter, to the fictitious reporters of the political groups and to the president of the responsible commission. In doing so, the official delegation of the EP can start the negotiations, (but) on the base of formal trilogs in agreement with the Council and the Commission.

In addition: The members of the responsible commission should be informed regularly about the further-prosecution of the debates. Finally, a completely new vote in the plenary could take place on basis of the (changed) compromise of Commission and EP.

In part 2 the Group reflected on the time for the final decisions in the Council and criticised, that an average decision time of 2 years, 4 months is much too long. The Council was asked to adopt the procedures as far as

possible. These findings have been one of the main results during the author's researching in the Council; they will be dealt with in a special chapter below.

Another important aspect in part I dealt with the transparency of debates in the Council. The EPP questioned full information about all subjects discussed about a Co-decision matter inside the Council. This should include the papers with the final discussed text, voting details, and the position of each delegation participating in the voting.

Part II of the paper contains the questions on the presence of the Council in the EP and the presence of the EP in the Council. The EPP-group suggested that in the future a head of the representatives of the Council should be present in the final reading of a Co-decision in the EP-plenary. The same was questioned in regard to the presence of the EP in the Council. This procedure should mainly secure that a responsible representative from each of the legislative bodies could (help to) delete last hurdles for a final decision in critical moments of a final debate. In the last consequence, such an action could avoid a Co-decision failing at the last minute, as happened twice in the time between April and August 2001. In these cases long lasting legislative activities of nearly two years had failed in their purpose and aims. With these suggestions the EPP-Group tried to overcome that unsatisfactory situation, not only in regard to the legislation, but also in regard to the impression such a failure made in the eyes of the European Citizens

3) Report on the General Revision of EP-Rules/ Corbett-Report

Since the occasion of a General Revision of its rules of procedure, in February 2001, the EP has tried to bring these rules in line with the changing requirements of Co-decision procedure after the Amsterdam Treaty. Among the different reform intentions, regarding the necessity of improvement in the Council/EP relationship, there were two amendments, which could be able to substitute the practice of the Co-decision procedure. Amendment 20, regarding rule 71, suggested a new paragraph Nr. 4.: its wording is: " The Parliament shall, at the request of the Committee responsible, ask the Council to refer a proposal submitted to it by the Commission

pursuant to Article 251 of the EC Treaty again to Parliament where the Council intends to modify the legal base of the proposal with the result that the procedure laid down in Article 251 of the EC Treaty would no longer apply or where it intends to otherwise amend the proposal substantially, after Parliament has delivered its opinion, except where this is done in order to incorporate Parliament's amendments."¹⁴

Amendment 16 of the so-called Corbett-Report to these general revisions was related to rule Nr. 54 (Interinstitutional agreements), for example the above-mentioned fast-track-procedure. According to the report there should be a paragraph Nr. 2 added to the rule with the wording: "Where such an agreement imply the modification of existing procedural rights or obligations or establish new procedural rights or obligations for Members or organs of the Parliament, or otherwise imply modifications or interpretation of Parliament's Rules of Procedure, the matter shall be referred to the committee responsible for examination in accordance with Rule 180 (2) to (6) before the agreement is signed." In doing so, the EP made clear that such an agreement has to comply with primary and secondary Community law and can as such not modify nor replace the Rules of procedure of the EP.

Another intention of these reforms is to be found in the working document of this report.¹⁵ In part C 'Structural Reform', Title II, the paper propagated the combination of Chapter XIX and Chapter XXII of the EP's rules of procedure. This means that in the EP's rules of procedure the general order of openness and transparency in respect of all activities of the EP should be extended on the rules of public record of proceedings.¹⁶

14 EP, Committee on Constitutional Affairs, Draft Report on the General Revision of the Rules of Procedure, (2000/2040(REG)), p. 16, Rapporteur: Richard Corbett, 8 June 2001.

15 EP, Committee on Constitutional Affairs, Working Document on the General Revision of the Rules of Procedure, Rapporteur: Richard Corbett, Brussels, 26 March 2001.

16 Ibid, p. 16.

Both amendments are significant marks of the EP's attempts to prepare its own working base for a better functional Co-decision procedure oriented on the practice of interrelation with the Council.

In the final version of the report there are two further interesting amendments regarding the current matter. Amendment 36 suggested reforming the right of the EP President in the Conciliation procedure. Currently, after the Council does not approve all Parliaments' amendments to a common position, the EP-President in consultation with the chairmen of political groups, responsible Committee etc. agrees a time and place for the first meeting of the Conciliation Committee. In the future this agreement should be structured together with the Council. And it should be taken at a much more earlier stage, namely, when the EP is informed by the Council that it is unable to approve all amendments.¹⁷

Amendment 31 contains the problem of the representation of Parliament in Council meetings. According to a new Article 62 a, the chairman or the rapporteur of the committee responsible, or another Member designated by the committee should be asked by the President to represent the Parliament.¹⁸

4) Poos-Report

The paper, researched in the following, is not so useful despite the interesting title. 'The Report on reform of the Council' was published by the EP in September 2001 and it is usually called the Poos-Report (after the rapporteur, MEP Jacques F. Poos)¹⁹ According to the title, the central aspect of the report was the question of why and how to reform the Council as a whole. Therefore the report dealt with broad scale aspects, regarding the so-called dysfunctions of this institution. However, the only interesting aspect here is the concern to the Rules of procedures of the Council. As the report truly pointed out, the rules contain few orders for transparency in the

17 See: EP Session document, 1999 – 2004, Report on the General revision of the Rules of procedure (2001/2040(REG), p. 25.

18 Ibid, p. 22.

19 EP, Committee on Constitutional Affairs, Report on Reform the Council, (2001/2020(INI), Rapporteur Jacques Poos.

legislative acts in the Council. However, the report remains too superficial and it does not really give appropriate answers to the questions. Thus the suggestions for a reform of transparency, are formulated in a few vaguely sketched announcements and postulations.’ For example two formulations of this passage “A suitable procedure (press conference or press release) should be found to allow the presidency to comment on the items on the agenda of the General Affairs Council, when appropriate.” And later on there was written: ...”steps will have to be taken to ensure that deliberations and decision-making are also made public.”²⁰ However, press conferences and press releases are one of the current usual public activities; it is not really necessary to establish them. About the difficult questions, in which framework and to which extension such press information today happens, and how information abilities should be improved by the Council, the report provides no answer.

5) Nickel- Non-paper

The administration body of the EP made two reform proposals in those times.

The first was so-called NONPAPER sur la procédure de codecision.²¹ Dietmar Nickel, Director General of the General Directorate 2 of the EP, structured it. In the most important part B Nickel analysed the “Procédure en codecision. Les trois phases”

In phase B1 he suggested a well-organised program of the structure of the procedures together with the Council. In this program there should be a differentiation between the ‘dossiers susceptibles’ and the ‘dossiers prioritaires’. The first one regards law initiatives, which were able to be decided without longer discussions and negotiations in the first reading. The second one belongs to such law proposals, which need a complete Co-decision procedure since the subject is too difficult and controversial to be discussed in the Council.

²⁰ Ibid, p. 15.

²¹ Parlement Européen, Direction Général, des Commission et Délégations, NON PAPER sur la procédure de codécision, Bruxelles, le 29 août 2001.

The working base of all the activities should be a synchronised timetable of the activities of the acting commissions, of the meetings of the EP- working groups and of the COREPER (Council).

The Fast-Track-method in Co-decisions was dealt with in phase B2. Nickel agreed that this method could speed up the legislation process, but he wanted to only use it in the cases of dossiers susceptibles. And he pointed out, this method has to be used in accordance with Articles 64 par. 2 (Transparency in the legislation process), 66 (Commission and Council position on amendments) and 69 (Adoption of amendments to a Commission proposal) of the Rules of Procedure of the EP.

The central aspect in phase B 3 was the question of a harmonising the Rules of Procedures of the EP and the Council. Therefore it was a logical next step to start with an analysis of the Rules of Procedures of the Council in order to prove their pro-harmonising contents. Thus, requesting the results of the research of the author, he questioned the practice of the Council in the cases of Co-decisions. The practice according to Art 8, 9 and 5 were seriously criticised by him. There were too great differences between the rules' order and the legislative practice, he announced in accordance with the author.

Part C delivered a definition of the 'appropriate contacts' during a Co-decision. This means a procedure with pragmatic steps and flexible measures. However, according to Nickel, that procedure must be based on the principles of democracy and public openness. From this view he would like to welcome the so-called non formal contacts, as for example, the trilogies during the first and the second reading.

Regarding the other informal contacts with the Council he questioned their complete announcement to the rapporteur, to the acting members of a commission and to the President of it or alternatively to the shadow rapporteurs.

Part D dealt with the representation of the Council at the responsible Commissions of the EP and part C with the presence of the EP in the Council. Both activities were wanted again and again by the EP for a better and faster legislative process.

6) *Note on Co-decision and Conciliation*

Julian Priestley, General Secretary of the EP, structured the second approach. In April 2001 he wrote a NOTE to the Conference of Presidents on the subjects Co-decision and conciliation.²²

At first, Priestley took a summary of the discussion about these subjects in that time and then pointed out that the Council had primarily been responsible for a dramatic increase in the number of informal meetings.

Therefore, in contrast to the above described welcomed result of the joint Co-decision Seminar in November 2000, he limited it to a “well working conciliation procedure”²³ Then he reflected on the necessity of transparency and effectiveness in a good balance of Co-decisions and he propagated a development of joint press conferences at the Council and the EP, as was done for the first time in February 2001. For the same reason Priestley propagated an improvement with the respect to the Internet sites, of both institutions. Then he argued for restricted trilogies meetings. On the one hand they were a good compromise to overcome the entire conciliation Committee, often attended by more than 100 people.²⁴ On the other hand it would be important to ensure its success by informing the members of the EP-delegations, acting in the Council continuously and completely.

Part 2 of the NOTE was titled ‘Proposed Improvements in the procedure.

In this part Priestley at first propagated a maximum of transparency without endangering the effectiveness of that procedure. To reach these goals he suggested:

- In relation to Co-decision files in first and second readings, additionally the preparation of a legislative ‘tableau de bord’ by the Directorate B of Director General. This tableau shall provide a comprehensive overview of all Co-decision files as well as the differences between the EP and other institutions, e.g. the Council. In doing so the

22 EP, Secretary General, NOTE to the Conference of Presidents, Brussels, 3 May 2001.

23 Ibid, p. 1.

24 Ibid, p. 2.

called contents could be distributed to all MEP and all political groups in the EP.

- In relation to the organisation of conciliation meetings the fixing of a certain day each week, reserved for all kinds of meetings with the Council in conciliation.
- In relation to trilogies the receipt by a participation all at least important details of each trilogue, including timing, participants to all members of delegation, even when they are not in attendance.

A further aspect in the note was dealt with the attendance of trilogies. It should be restricted to 10 persons as previously agreed, the same limit on the number given to the Council. Between trilogies and delegation meetings for the reflection on trilogue results, there is to be given adequate time to enable members to consider fully the outcome of the trilogies and to consult before they are called to take decision.

With all these proposals Nickel and Priestly tried to contribute to resolve the differences in the relationship between the EP and the Council. With a lot of structural reform steps, they were keen to restructure the Co-decision procedures in accordance with the public interest.

7) Trumpf/Pirris-Report

Since the Amsterdam Treaty the only, but also most important reform approach of the Council was the ‘Report on Operation of the Council with the enlarged Union in prospect.’²⁵

Originally the report was ordered by the political Council members in order to deliver a few reform proposals to the Helsinki Summit in December 1999. As the title expressed clearly, the main reason for the task was to consult the politicians. They wanted to hear how a future Union of approximately 25 – 27 would be able to work reasonably. With the report, the

25 The Council of the European Union, Report by the Working Party set up by the Secretary General of the Council, (Trumpf/Pirris-Report), Operation of the Council with an enlarged Union in prospect, Press Release Nr. 2139/99, Brussels, 10 March 1999.

structural difficulties as well as the procedural problems in the Council should be analysed and discussed with a view towards that enlargement.

However, on the occasion of a far-reaching reform order, the authors of the report started with the attempt to improve all other flaws in the functioning of the Council. Thus a lot of the reform proposals are nearly of revolutionary character.

All chapters are structured in three parts: the Background, the Analysis and the 'Avenues to be explored'. With regard to the current paper the main important chapter is that of the "Legislation Role" (chapter 6). Afterwards there is also the interesting chapter 7 (External Communication) and of less interest Chapter 8 (Preparation for Council Meetings).

Regarding chapter 6, its importance is mostly due to its dealing with the aspects 'Background' and 'Analysis'. Up to that time such a clear and open description of the problems in respect to the Council's legislation acting had been very seldom seen, especially not out of the Council itself. As the authors explained, for a few important reasons the view was concentrated on the situation of Co-decisions. In the Background they truly pointed out that with the Amsterdam Treaty the role of the EP as a considerable Co-legislator was extended and strengthened. Therefore the Council needs to improve public information as it was already given yet in the EP. However, against these intentions the 'fathers' of that Treaty " bore in mind that a general opening to public of the Council when acting as legislative capacity could impact the effectiveness of negotiations driving from outside the chamber, which would run counter to project of exercise."²⁶ Therefore some rules in the Treaty open a door for the Council to escape from strict public orientation. Then the report argued that the legislation becomes additionally complicated because the current conciliation procedure is too complicated and needs too much time. It measured the length for a decision (common position) of two years ²⁷ and continued, "In respect of the

26 Ibid, p. 19:

27 Ibid, p. 19; this number is a little smaller than the result of the research of the author which counted two years and 4 months as average duration; see Table 1.

increasing number of Co-decision subjects since the Amsterdam Treaty, it is an unjustifiable situation”

The suggestions how to solve or at least to better this as they were given in the ‘Avenues’ of the chapter, significantly touch the problems and Avenues of the following chapter (7).

In the ‘Background’ of this chapter, the report agreed at first with the position of the author of this paper that the secrecy of the Council is one of its greatest problems, since due to this secrecy the existence of the Council as a legislator is less known by the public. This lack of knowledge enables the Council to act as a kind of secret institution – less susceptible to democratic control by the European Citizens. Therefore “‘positive’ Union decisions can be offered as a national political triumph, while the blame for results less favourable to national interests is placed on ‘Brussels.’”²⁸ According to the report, in the Council meetings all participants of course, eager to relate the course taken by decisions according to their own perception and their political interests.

However, the negative image of the Council is due not only to ‘inner affairs’ in the Council. In the same manner there is a serious problem with the external communication attitude of the institution. For example: Over 85 % of the public say their only source of information on European affairs is television, yet the debates for the present broadcasts on television are for the most academic set pieces, unrelated to the Council’s real political or legislative business.

These announcements in the report were similar to the findings of the author’s own research; they shall be more closely analysed in the chapter about this research below.

Even if the wording in the analysis is clear enough, much more unusual were the suggested Avenues in chapter 6 and 7. Under the general guideline ‘ensure that proper legislative practices’ the report offered a few interesting reform proposals.

28 Ibid, p. 21.

Between Forces of Inertia and Dynamics

At the beginning, the report asked for a greater openness in the Council when acting in a legislative capacity. The directive seeks to “Make public”, upon request and at a later time which might be the date of entry into force of Regulation or the deadline for transposing a Directive, all documents relating to the preparatory work on legislation. Thus not only the finished legislation is to be brought to a higher public level; in the report the same is questioned in respect to all stages of the legislative procedure. Significant for the tendency in this report are also the following two requests: “Open some of the Council’s legislative debates to the public” and “Improve public information on the role and work of Council and replace current practice of open Council debates by opening genuine debates to the public, e.g. at the initial stage of discussing a major legislative proposal.”

These requests were completed by a few more technically structured proposals, as stated in the above-analysed contents in the centre of the Council research of the author.

Thus the proposals to “step up the Council’s Presidency’s action in the field of communication” and “Equip the Council’s headquarters with the necessary technical infrastructure to supply Member states television channels with pictures, in particular the press conference room and all conference rooms” shows that the editors have seen this part of decision making process is lacking too.

To sum up: the whole tenor of the report is insofar surprising since the responsible editors of the report are/were leading persons of the Council’s administrative body. Jean Pirris is still Director General of the Legal Service and Hans Trumpf was for many years the Council’s Secretary General.

However, it must be said that Mr. Trumpf had published the report two years before he retired. This may have contributed to the brave reform amendments on the Council. Whereas during his research in the Council the author had the experience that the responsible administration members, he had talked with, are often much more willing to discuss the reform intentions of the Council. Sometimes the readiness of the administrative body to march through the reforms for more transparency and democracy in legislation was clearly expressed. And in many situations when the Councils

Co-decision procedures have been discussed, the Trumpf/Pirris-Report has been brought up as the most well-structured reform attempt of the Council up to now.

8) Helsinki-Recommendations

The importance of the report can be seen by the way it was viewed by the Summit Members of Helsinki. Most of the reform suggestions were refused by the Summit participants and only a small part; with relatively less meaningful intentions were adopted. This is shown in the title and the foreword of the “Guidelines for Reform and operational Recommendations” approved by the Helsinki European Council (10. /11. December 1999).²⁹

On 11 pages, the chapters A – K contains 54 adopted subjects. In comparison to the extension of the report, it is a very limited volume. This relationship is also to be seen in the corresponding chapters.

In the content of the paper there are two chapters relating to the Council’s future legislation. Chapter D is titled ‘The Council’s Legislative Role’. Its first guideline is called “Proper use of legislative instruments and improved drafting quality”, a very simple postulation. Guideline 2 titled ‘Improved codification procedures’; it is given in order to speed up work on the codification of legislative texts. However, a relatively small place is reserved for the guideline titled: ‘Making the co-decision procedure more effective. The first postulation states: “The Presidency shall, as an integral part of its programming; take due account of the requirement to schedule conciliation and preparatory meetings, bearing in mind the applicable for codecision procedures. Contacts with the EP at first and second reading stages must be undertaken with the aim of bringing the procedure to successful conclusion as swiftly as possible.”³⁰ In the same simple manner the second announcement is formulated: “The Presidency and General Secretariat are invited to propose by the end of 2000 further changes in the Council’s working

29 The European Council, Guidelines for Reform and Operational Recommendations, approved by the Helsinki European Council, Helsinki, 10/11 December 1999.

30 Ibid, p. 5.

methods in dealing with co-decided acts in the light of the experience acquired in implementing the Joint Declaration of May 1999.”³¹

Regarding the detailed structured reform proposals and broadly discussed amendments on the reform of the legislative procedure in the Council, written in the Trumpf/Pirris-Report, the announcements of the European Council are really less substantial. The vaguely formulated suggestions for a changing attitude of the Council in the legislation, e.g. the Co-decision procedures are poorly defined.

In the view of the Trumpf/Pirris-Report and in regard to the research of the author in the Council, chapter H is the second most important one. It deals with transparency, a matter that was also at the centre of the author’s own research.

Guideline 2 of the chapter is related to the problem of greater openness by the Council when acting in a legislative capacity. In doing so the European Council suggested: “The General Affairs Council and the ECOFIN Council shall each hold a public debate every six months on the Presidency’s work program. At least one public Council debate should be held on important legislative proposals. COREPER shall decide on public debates by qualified majority.”³² In order to ensure more interesting public debates, the European Council has finally made a few technical proposals, but they are not really helpful for more transparency in the legislation. In addition, the transparency chapter of the paper contains no suggestion for transparency of the Co-decision procedure itself. And nothing is said of how the Co-decisions could be distributed more widely in the sphere of the European Citizens, as was clearly proposed in the Trumpf/Pirris-Report. Even if the Council is not directly responsible for the proposals or recommendations of the European Council the connection between the first and the later is, in respect to reform proposals, significant. In both institutions the member states are the decisive body: in the Council of ministers and in the European Council the heads of government or the heads of state. If the European Council was willing to accept more transparency in Co-decisions, the

31 Ibid.

32 Ibid.

representatives of the member state in the Council would not really reject that decision.

Thus the low rate of acceptance of the Trumpf/Pirris-proposals by the European Council is transposed onto the Council itself in Brussels.

9) *Joint Reform approaches*

The most important joint approach of the three legislative institutions was the Joint Declaration of May 1999.³³

After the ratification of the Amsterdam Treaty by all member states, the acknowledgement of the EP, the Council and the Commission, it was necessary to create a common position on the new co-decision procedure, which led to their Joint Declaration.³⁴ In the preamble the (three) institutions “confirm that the practice should be extended to cover all stages of the co-decision procedure. The institutions undertake to examine their working methods with the view to making effective use of all the possibilities afforded by the new co-decision procedure.”³⁵

In regard to the researched subject the most important is chapter 1 of the declaration which ruled the first reading stage as follows: “The institutions shall co-operate in good faith with a good view to reconciling their positions as far as possible so that wherever possible.” To reach these aims, the institutions obligated themselves to co-ordinate their respective calendar of work, as far as possible, in order to facilitate the conduct of proceedings at first reading in a coherent and convergent manner in the EP and the Council.³⁶

In the second chapter regarding the procedure during the second reading the most important aspect is the postulation for appropriate contacts. This

33 European Communities, European Union, Selected instruments taken from the Treaties, Book 1 Volume 1, Interinstitutional texts, K, Joint Declaration of 4 May 1999 on practical arrangements for the new co-decision procedure, Article 251 of the Treaty establishing the European Community, Luxembourg, 1999, p.1039.

34 Ibid.

35 Ibid, p. 1041.

36 Ibid.

should lead to a better understanding and finally to legislative procedure to a conclusion as quickly as possible.

On the face of this declaration it seems that the new defined practice in Co-decision could contribute to the fulfilling of the order of Art. 251 Amsterdam Treaty, which regarded the tightening and the simplification of the Co-decision procedure as a matter of priority.³⁷ However, the formulation appropriate contacts ‘may be established’ was only a could-be-rule with at least only an appellation for a complementary practice by the signers of the declaration. Thus, the success of the declaration depended mainly on the good will of the acting organs and its important purpose, a more efficient i.e. a faster legislation, was based on the fulfilment of this contract. However with the declaration the central difficulties in respect to the Co-decision practice were not really diminished. Thus, it was not long after the adoption of the declaration, when the usual differences between the institutions and especially those between the Council and the EP had over-rolled the spirit of the declaration.

10) Exchange of Letters

During the first half of the year 2000 in an ‘exchange of letters’ between the Secretary Generals of the three institutions, an essentially technical issue was discussed with respect to the Co-decision practice. Since the end of 1999, the Council as the result of the first and second reading of the EP, has not received amendments as they were voted in the EP-Plenary, but instead consolidated texts that consist of a unilateral redrafting made by the EP services. These redrafted papers contain not only of the amendments voted by the Council, but also of the Commission proposal (in the case of the first reading), or of the common position (in the case of the second reading). Against that procedure, the Council’s (and the Conciliation Committee’s) work has always been based exclusively on the amendments voted in the Plenary. In its letter to the EP, the Council declared that the Council has

37 Callies, Christian, Ruff, Matthias (eds.) *Kommentar zum EU-Vertrag und EG-Vertrag*, 2. Auflage, Neuwied/Kriftel, 2002, p. 2230.

never approved this practice that in fact alters the presentation of the actual result of the vote in the EP.

In spring 2001 the differences between the Council and the EP on the practice of the Co-decision increased seriously and the tone between both institutions, on how to manage these problems had been sharpened in an unusual manner.

Therefore the Conference of Presidents of the Party-groups of the EP decided to write a letter to the Council Presidency in order to refuse this situation. In this letter the Presidents referred to the spirit of the Amsterdam Treaty and they asked, whether the Council would be willing to change its practice in several important points of the legislative procedure. Additionally the Presidents mentioned that the Council does not really fulfil its self-obligation towards a common legislative procedure, as it was fixed in the 'Joint Declaration'.

In concrete, the Presidents criticised the interpretation of the 'appropriate contacts' by the Council.³⁸ It seemed to the Presidents that the Council has disproportionately favoured the informal meetings and discussions without the participation of the responsible representatives of the EP. In connection with the usual practice of the Council to debate legislative matters, including those of the Co-decisions without public participation, the EP mentioned a proper democratic scrutiny for these procedures. Further on, the absence of information on the Council's position during the negotiations was criticised and it was asked whether the Council could be present in the meetings of the EP's committees, especially after the adoption of its 'common position'.

In its answer³⁹ the Council pointed out that the Co-decision is based on the principles of understanding and mutual respect of sometimes fundamentally different ways of procedure in each institution; these principles are reflected in the Joint Declaration. On these basic agreements, a new open

38 The European Parliament, The Conference of Presidencies, Letter to the Council, Brussels, 23 June 2001.

39 The Council of the European Union, The President, Letter to Ms. Nicole Fontaine, Brussels, 15. 05. 2001.

and result-oriented spirit of co-operation between the EP and the Council has been gradually established. This could be seen in the procedures of the ‘enlarged informal trilogies’ and of the ‘enlarged trilogies’. The first includes the participation of the shadow rapporteurs and of the co-ordinators of the political groups in the EP, whilst the second one only refers to the participation of the co-ordinators of the political groups.

Beside this, the Council agreed to the need for a proper democratic scrutiny of Co-decision procedures at the level of the EP and on the national parliamentary level. Additionally, it would be able “to explore the possibility on a case-by-case basis of presenting to the committee background information on the reasons behind its common positions in accordance with its rules of procedure.”

However, the Council refused a change in the present situation as far as negotiation practices are concerned.⁴⁰

V. Research in the EP and the Council

1) Research project of the EPP-Group

All the above-described aspects came to be the reason for the EPP-Group inside the EP to research the problems and difficulties in the Co-decision procedure and led the EPP-group –as it was mentioned above– to a research project on the necessary reforms of the practice and of the rules of procedure of the Co-decision. The findings of the research were to be shown possible measures for reforming Co-decision procedures.

At the core of their findings of the EPP-group tried to discover some intentions for the debate on the Co-decision reform, at first inside the EP. The research results were secondly to show how and which kind of proposals could be offered by the Group and by the EP in the negotiations with the representatives of the Council. Inside the responsible committees which worked in that time on the problem of a Co-decision reform, these findings were also be used as political and judicial arguments from the side of the

40 Ibid, p. 3.

EP. The aim and the main purpose of these negotiations were not a formal or theoretical improvement of the Co-decision, but much more the discussion of the possibilities for a faster legislating procedure in practice, and the chances of more transparency of these procedures.

The task was delegated first to the author of this paper in the spring of 2001. Later on he acted as the vice-chair of a faction-based working group in the EP. This group delivered five reports and the final study was finished at the beginning of 2002. During this time, the author/working group researched the basics of the Co-decision procedure in the EU.

As the EP was thinking about and working on a general revision of its own Rules of Procedure, at the same time the research was co-ordinated with those larger activities. However, at the centre of the Group's interest there were naturally the legislation attitudes of the Council in the case of Co-decision procedures. The attitudes in the first and second reading were of a great interest.

The research contained three main parts with a few chapters in each part.

The first part concentrated on researching the average time needed for a decision in both institutions. In doing so, they were to research the Co-decision steps of both institutions in all Co-decisions within a certain legislation period. It seemed useful to research the time between 1999 and the first half of 2001.

In that period of time a legislative procedure developed, which allows a meaningful view of the possibly changing practice in Co-decisions after Amsterdam. Additionally, in 1999 there were two important points to consider. Firstly, it was the year before the Helsinki Summit, which was planned to mainly discuss the institutional reform after the ratification of the Amsterdam Treaty. This includes the question on the success of the new Co-decision and especially of the practice of this legislative method. Secondly near the Summit the Council have prepared an important report, the Trumpf/Pirris-Report, which – see above – additionally researched the problems of the new Co-decision. Thus it would be interesting, if there was a significant, or at least a relative change, in the Co-decision practice of the Council after the adoption of that report by the Summit participants.

The second part was caused by the results of the first and related to the question of how many aspects of the reform proposals, regarding the Co-decision practice, from the Trumpf/Pirris-Report were adopted by the Helsinki Summit. This followed immediately from a closing question, what were the reasons for the (researched) results regarding the attitude on the Summit.

The third part focuses on the public access to Council meetings at which Co-decisions were debated. This should give a picture of the willingness of the Council to ensure (more) transparency.

The last part dealt with a comparison of the Councils Rules of procedures and its practice in regard to the adequate rules on Co-decision. This should explore whether the Council has adopted the recommendations of the Helsinki Summit or not. In addition this research should also show to what extent the (reformed) Co-decision rules were really heeded in its legislation practice.

Beside the Trumpf/Pirris-Report in the research, and especially in the assessment on the reform intentions and results included, the other above reform papers of the Council were analysed either independently or together with the other institutions

2) Co-decision procedures in the EP and the Council

At the beginning of the research a first view already showed that the legislation processes in the Council were much more extended than those in the EP. To justify or deny that image it was necessary to research the single Co-decision procedure during its different steps in both institutions. For this purpose the reported procedures to each initiative has to be analysed as they were published in The Legislative Observatory of the EP ⁴¹ according to the by-passed stages of a law initiative. The addition of all the time sections of each Co-decision-stage (readings and preparatory times), differed in both institutions, and the analysing of the researched Co-decisions led to the following result and the pictures in Table 1:

41 EP, The Legislative Observatory, Procedure file, Consult any historical information, published on the EU-website; www.europarl.eu.int/oeil.

After receiving a law proposal from the Commission, the EP debated the proposals until its first reading for on average of five months. In one case the EP needed one year, and in seven other cases the duration reached 9–11 months. Also interesting were the not shown data, regarding the different law subjects. The longest period, 11 months, was needed in the case of an Environmental law (regarding Water Protection policy). Of those needing (nine months) were two law proposals, regarding to Health policy, one in the area of Consumer protection, one regarding Trade-, and one on the Social policy of the EU. The two-needing 10 months were for laws in the field of Transport policy, and in the area of Youth protection.

The discussion until the second reading in the EP was finished within three months and two weeks on average. Eight months were needed for a proposal in the area of Transport policy followed by a proposal referring to the Culture policy, which needed 6 months. Five months were needed for two proposals on Health policy. Therefore only four law proposals passed the second reading after an over average duration and no less than 14 law proposals were decided in the EP below the average duration: four after one month and 10 within two months.

The consultations on the third reading (final or Co-decision) needed an additional two months. Within the 10-researched law initiatives in the third stage, only one proposal needed six months, two weeks; in contrast the fastest needed two months two weeks. And no lesser than eight proposals were decided below the average duration of a discussion, namely within one month.

The comparable legislative procedure in the Council showed the following data: Until the finding and adopting of a Common position (which was necessary in 92 per cent of all Co-decision processes) a law initiative in the Council was discussed in average two years and four months.

The ‘oldest’ proposals were made in the year 1994 and reached the stage of a Common position in 2001. One of them related to the field of Transport policy and one to Health policy. In the same policy area was a proposal, which needed three years and three months. The same time was needed for a proposal in Social policy. Four law initiatives, two in the fields of Health

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policy, the Trade policy and the Environmental policy needed more than two years; Only half of the law initiatives, approximately 14, were finished for a Common position within a year. Below that mark, the Council succeeded only in ten cases, whereas six of them needed between 11 and 10 months.

Even when the Council did not pass the one-year threshold to find a Joint text-formulation (final decision), the Council normally needed at least five months. The longest of nine months was used for a proposal in the field of Education policy. This was insofar surprising, because the Common position was found within only six months. Eight months were needed for a proposal in Health policy, followed by a six-month duration for two other proposals, one in the same policy field and one in Social policy. One joint text decision was made within five months and only eight of them needed one to four months, below the average duration.

This data shows, the EP was more readily to decide the Co-decision stages in relatively short periods of time. And especially for reaching the crucial point of a law initiative or of a co-decision process, the Council needs nearly five times the period needed by the EP for the same result. The Common position, which is comparable to the first reading in the EP, is the stage at which the progress of a law initiative suffers an important lack of progress. Only when the Council has passed this hurdle, could the proposal as a whole be debated and further decided upon. It was not possible to finish the Co-decision without this agreement, when Art. 251 Amsterdam Treaty asked for a common decision of the EP and the Council. Thus because of the long duration of the Common position the legislation processes in the EU were stretched to an extent which was not intended in the reform ideas of the Amsterdam Treaty.

These findings led to question for the reasons of such different decision making behaviour.

At first, there is of course the structural heterogeneity of the Council. As the Trumpf/Pirris-Report has truly pointed out, so many negotiations, conferences, formal and informal meetings etc are needed to find the compromise between perhaps 15 different positions of the member states. A lot of

attempts to persuade the representatives with national interest to accept a common position in the interest of the progress of the Community are needed. And even if sometimes representatives have adopted such a compromise, changing views in the national political institutions (government, parliament etc.) force them to think over their decision. In the worst case, especially if a qualified or absolute majority is needed for a decision, the processes of consultations, negotiations etc. start again and the decision is additionally delayed.

On the one hand, this is a major principle problem of the EU-structure and it is hard to find a solution.

On the other hand, the long lasting procedures were at least substituted by a decision procedure, which can be characterised in summary, as the 'closed shop attitude' of the Council. Based on its long lasting competence to decide alone the guidelines of the Community policies including the EU legislation, the Council hardly accepted the power sharing. A mentality of not being responsible towards anybody or anywhere on the European level has arisen. The responsibility – see above – was only projected towards the original member states. In doing so, the council members were not keen to making its decisions, the reasons for them, and of course more important their negative voting attitudes public. Therefore from its origin the Council was used to debate and to decide European affairs, including the legislative matters through a kind of secret negotiation. However this cabinet-attitude was not illegal, it was legally based on a few rules in the Treaties of the Community. The effect of this legally closed shop procedure was a self-security of the members against the danger of blaming each other. There was no necessity to justify a decision or non-decision to an external viewer, for example the European Citizens, and they were not forced to orient - and perhaps - to change its positions. In summary there was no real democratic control over the activity of the Council. Such a situation was more than comfortable and it is clear that the readiness of the Council to give up these privileges was not emphasised.

However, the reform intentions of the Amsterdam treaty asked the Council to review its procedure on Co-decisions. And the acknowledgement that in

the long view only a reformed Union will be accepted by the European Citizens was additionally important. Secondly, the declining voting rate in the EP – elections was truly seen as ‘writing on the wall’. – The Council was willingly to reform itself consequently. Therefore when the Maastricht/Amsterdam Treaties postulated a new quality of power sharing with the EP, e.g. via the Co-decision legislation, the Council made a few steps towards that reform. However, – maybe affectedly – it tried to preserve at least partly its former position.

One of the most succinct examples is to be seen in the huge differences between the proposals of the Trunpf/Pirris-Report and the adopted recommendations of the Helsinki Summit. As it was clearly shown above, the Political Council was not willing to follow the reform intentions of the heads of its own administrative body.

This self-preserving attitude could additionally be recognised in the forced method to find solutions in the way of intergovernmental contacts/conferences. The Council’s interpretation of the fast track-procedure during the conciliation stage of a Co-decision is aimed in the same direction. The most concise attempt was the new interpretation of the informal trilogies. During very intensively handled, secret ‘negotiations on the chimney’ the Council tried to bring a Co-decision to the Common position maturity. In a letter to the EP ⁴² he called this procedure as an ‘enlarged informal trilogies’ within the framework of ‘appropriate contacts’ ⁴³

Finally, the attempt of the Council to persuade the EP to slow down its own Co-decision procedure must be remarked. Because the Council – see above – always needed much more time, it tried to reach a public decision process of equal level. Especially in the first reading before the Common position, the EP should wait until the time the Council shows a sign of agreement.

All these together were regarded as well-balanced contributions of the Council to a new Co-decision practice.

42 See footnote 39.

43 Ibid, p. 1.

3) Research on Co-decision and the Public sphere

In the introduction it was questioned, whether dealing with the European legislation could promote European Integration. This question can be extended to the question of under which circumstances EU-legislation could contribute to the identification of the Citizens with the Union. According to the above-mentioned general neediness for adequate information for Citizens in modern times, it is to underline “a European identity will only develop if Europeans are adequately informed.”⁴⁴

Such an information could be delivered through the ability of the Citizens to participate in the legislation processes of the Union. If there were a real and substantial participation of the Citizens on the Council’s Co-decision procedures, the legitimacy of the EU-legislation would be strengthened significantly. In addition, a greater participation horizon includes a better possibility for controlling the legislative activities by the EU-demos. Thus an enlarged participation on the Co-decisions actions of the Council could make two major deficits in the European Union,⁴⁵ those of legitimacy and of democracy, less severe. Thus, the Co-decision procedure could be regarded much more as a process of a possible dynamic in the EU-legislation and therefore as a sign for a still possible dynamic of the Integration as a whole.

a) Co-decision and Transparency

As it was pointed out in the introduction, the measures for such increasing information should be reached via greater ‘transparency’ of the activities of the institutions. Since the beginning 2000, this clause is nearly magically propagated by the EU-institutions by representatives in meetings, conferences, in print media etc. Transparency should solve all the democratic problems of and in the Union. To reach these aims, a greater openness and

44 EP, Report Drawn up on Behalf the Committee on Youth, Culture and Education, Information on Sport, Radio and Television Broadcasting in the European Community, EP.Doc 1-013/818, 1982.

45 Höreth, Marcus, Das Demokratiedefizit lässt sich nicht wegdiskutieren, Über Sinn und Unsinn der europäischen Verfassungsgeschichte, in Internationale Politik und Gesellschaft, International Politics and Society, 4/ 2000, p. 11 ff. (15-17).

broader information attitudes of the Union towards the public were visualised.

Therefore 'transparency' also played a leading role in the announcements of the Council, but – as the analyses above have shown, in reality. e. g. in the practice of the Co-decision procedure this aspect has not so strictly formed the basis of its co-operation with the EP. Recognising this lack during the research was the immediate cause for a nearer view on the transparency practice in the field of Co-decision.

Transparency in the Council is mainly limited to the possibility of public access to its documents and to the amount of openness of its legislative action.

The following part shows a good example for the use of the first transparency category, access to documents.

(aa) Access to documents

Within a relatively short time of 14 days after the application for research in the Council, the author received permission. This included researching the archives of the institution and in all documents relating to the Co-decision debates and decisions. He was able to work without any control on the kind of documents and there was no limitation on the contents of the documents. The responsible administration representatives explained their interests on (the result of) the research and he was given every kind of support for proper research. Additionally, it was mentioned that the access, offered in the described manner was principally open to each person who fulfilled the access requirements.

(bb) Research guidelines

The research itself was based on a very statistical survey and concentrated on the analysis of the available documents, reports, protocols, press release etc. of the Co-decisions in the researched time.

The legislation periods, which were to be researched, were the same as in the duration of research,⁴⁶ from 1999 to June 2001. In doing so, a comparison

46 See above p. 36.

on the Co-decision practice of the Council on the researched subjects, duration of Co-decisions and their public debate was enabled.

In order to illustrate its practice as regards public access to codecision debates, in a first part it was necessary to state, by way of comparison, the number and nature of Council meetings that have been public. There were two questions of interest: How many public debates were held in the researched time and among them which kind of debates were really dedicated to Co-decisions.

In a second part, there were to be researched the structure of the forms of and facilities of public access to the Co-decision debates of the Council. This should give an answer to three central questions. How many people e.g. European Citizens have participated, or at least, could have potentially participated in the debates. Secondly what kind of public participation was given, and which media in how many cases were used to distribute the debates to the public.

The answers should illustrate the extent to which the Council allows public access to its debates and hence also ensures transparency as a Community legislator, with particular reference to its conduct as co-legislator.

Consequently, a meaningful analysis was at best possible regarding the question 'of whether' such debates were public. Though virtually impossible regarding the question of 'how', i.e. in relation to the content and actual conduct of its publicly accessible debates.

b) Co-decision number and decision nature

According to the first question in part 1 researching guidelines all Co-decision processes in that time were to be researched, in order to evaluate the total number of all public debates, within the researched time; the research showed the following picture:

Total number of 'public' meetings in the Council:

(a) 1999: 14 + 1 (14 limited content: 1 general debate on Charter of Fundamental Rights)

(b) 2000: 15 altogether

(c) 2001: 7 (to May 2001)

It was also interesting to evaluate the subject of those decisions, because this could give an image of which legislative matters the Council thought broader participation of the public were opportune. Maybe this could show too in which legislative subjects the Council was more willing to open its debates because this seemed necessary for an understanding by the public, or even if, such a matter was, in general, a topic of public interest.

The second question on the nature of the debated subjects in the different years was as follows:

(aa) 1999

- 4 programme presentations by Council Presidencies: basic explanations/discussions
- 1 Troika programme of work on the internal market
- 1 case-specific 'programme' (Kosovo)
- 7 (8)* single-/multi-subject debates *without* a Commission initiative concerning Co-decision provisions *) no sufficiently precise data is available for the debate held at the end of December 1999 on the Charter of Fundamental Rights. It is therefore not included in the lists and calculations
- 2 Debates on Commission initiatives in the Co-decision sector
- 1 x 2 legislative proposals concerning the environment policy
- 1 x 1 proposal concerning health policy

(bb) 2000

- 4 program presentations by Council Presidencies: two debates each: content: basic info /discussion
- 1 debate on the white paper on services of general interest (continuation)
- 1 debate on the Vienna action program
- 1 post-conference debate on the EU-Summit (Helsinki)

- 1 debate following Commission communication
- 5 single/multi-subject debates *without* Commission initiatives, concerning Co-decision provisions
- 2 debates following formal Commission initiatives, within those:
 - 1 debate on Co-decision matters
 - 1 debate related to agriculture (not available for a Co-decision)

(cc) 2001

- 2 programme presentations by the Council Presidencies: basic explanations/ discussions
- 1 debate on further refinement of the Council position concerning the internal Market at the conference in Stockholm in 2001
- 1 debate on agriculture
- 2 single-subject debates without Commission initiative
- 1 debate on Co-decision matters

Summary of the research results on the questions one and two:

It can be seen from the survey above, the Council has conducted only a small number of public debates at all and much fewer in the sphere of Co-decision. Only one of the public debated subjects really belonged to the Co-decision legislation.

The Nature and organisational background of the debates were also interesting.

The announcements of political programmes by the each relevant Presidency accounted for a relatively high number of the public debates. As an exercise, each Presidency held two debates per half an year to present their programmes at the beginning of their Presidency. From 1999 to May 2001, there were – including two work programmes and one Presidency programme on Kosovo – a total of ten such debates, at

which, in addition to the broad lines of financial and economic policy, current events (crisis, conflicts, etc.) were usually addressed.

Other programmes that were presented at public meetings included that of the 'Troika' (D. Fin. P) on economic affairs and a separate programme on the Kosovo crisis. Programmes accounted for almost 30% of all publicly accessible debates. The content of these programmes was at most only indirectly based on informal Commission initiatives. Consequently, none of these Council meetings related to specific codecision proposals or plans, such as are covered by the requirement for public debate laid down in Article 8 of the Council's Rules of Procedure. In particular in the case of programmes, a large portion of the debate was also devoted to presenting and describing the measures proposed and focused much less on a genuine exchange of possibly opposing views on their substance.

d) Forms of and facilities for public participation on Co-decision debates

(aa) Public sphere via mass media

Nowadays, public distribution of political events is often granted by using mass communication. In former times this kind of openness in the Council was not used often. But since the second half of the 1990s, the Council as well as the other EU-institutions reflected more and more on the use of modern mass communication. Therefore it was interesting to which extent and which form the Council had used as on the means for making Co-decisions public. Because the research of the number of public debates have delivered not a hopeful result, the distribution of the Co-decision-debates via public media could be a kind of compensation. Especially the Audio-visual media could contribute significantly to the emergence of political identification in the EU.⁴⁷ Indeed there was a relatively great number of recordings in the Council, but the research on that matter showed a different picture between the recording of the Council activities as a whole and the recording of the Co-decision debates.

47 See: Theiler, Tobias, Why the European Union failed to Europeanise its audio-visual policy, in: Cederman, Lars-Erik (ed.) Constructing the Europe's Identity, the external dimension,, Boulder Colorado, 2001.

The first researched matter was, in how many cases there were ‘Live-Transmissions’ from the Council debates. Besides the audience of such a debate, this method is the most important transmission because the ‘orator’ of the event in a high manner is committed to the ongoing processes. In addition, there is a high grade of authentic feeling, if such a close listening to the actual discussion is possible.

However, as Table 2 shows, none of the public debates following on from a Commission initiative, including Co-decisions, were transmitted 'live' to the public during the period under consideration. LIVE transmission was possible only for debates outside these two areas and then only to a relatively small extent.

(bb) Recording of Co-decisions

A record of the debates of the Council on mass media was made in Brussels or Luxembourg. That was not done only for the archive of the Council itself; any interested external institution, organisation, individual person etc., was offered access to the records. The only prerequisite was an application to the responsible Council administration. With regard to the contents of the recording, during the research no special system for such a record was recognised, i.e. only certain legislative subjects were recorded.

(aaa) Types of recording

A distinction is made between the two categories AUDIO/ VIDEO: these are the generally permitted forms of media recording at the Council's public debates. As the data show AUDIO transmission was used twice as often for debates not based on Commission legislative initiatives. Over 50% of debates based on Commission initiatives were the subject of AUDIO transmission. However, the overall very low frequency of debates in this sector puts this figure into context. In the case of non-initiative debates, VIDEO comes about half-way between LIVE and AUDIO. In the case of the other debates, VIDEO was less common than AUDIO.

(bbb) Recording (rights) in the conference room

In the respect of broader public distribution it is also of interest what the conditions for a record of the Co-decision debates are. In other words who is responsible for the recording. Is this, for example, a member state which

has a special interest on a certain legislation matter, or the media institutions, Broadcasting Stations, TV-Stations from the Member states, film organizations etc, actually external bodies with perhaps or even mostly large consumer base for these 'products'. The perception of such distribution lends itself easier to the broader public sphere than a recording by the EU-Institution itself. However the research on that matter showed, all recording and filming of debates was done exclusively by units belonging to Community or EU institutions and bodies. There are two administration bodies which were exclusively ordered to record the Council meetings. One from the Council itself, called *Internal Council Service* and one ordered by the Commission, known as *KANAKNA*. Both institutions made in general three kinds of media cassettes from the recordings: VHS and/or BETA and/or audiocassettes of the debates. This seems at first view a relatively broadly spread record base for the public consumers. However the small number of the recordings in the whole time 1999- 2001 reduces this image immediately. Only one VHS, one video OR and 5 audiocassettes were made of the Co-decision debates. It must be born in mind that three of the audio cassettes were made of the debate on 8 March 2001 alone, which means that, during the whole of the preceding period, only two audio recordings were made of debates.

In the Union with 11 official languages, the structure of the recorded languages is most important. One should think that in this regard the recording would have reflected this necessity, and the records would be available in many languages. However, as far as the language of the recordings is concerned, the emphasis was mainly on French and English. Only in very few cases were recordings made in other languages, e.g. German.

(cc) Presence and transmission of radio and TV broadcasting organisations

A good picture of the public distribution throughout the member state can give the research of the fullness of the broadcasting of Council meetings, respectively of Co-decision negotiations and decisions. The central question is, how many meetings of Council legislative activities, and especially those on Co-decisions, the broadcasting stations in member states transmitted. If there were a lot of them, this could also negate the lack of

mitted. If there were a lot of them, this could also negate the lack of other public participation on Co-decision. The kind of information which the member states broadcasting organisations sent out in regard of Council activities is also interesting. This could give a picture whether there is in the different member states more or a less interest on such a broadcasting service.

In Table 3 the broadcasting attitudes were listed. Here, too, a distinction is made between (General) debates not based on Commission initiatives, 'initiative'-type debates (INI) and codecision debates (COD).

As Table 3 points out clearly there was an almost alarmingly low number of broadcasts sent from Brussels/Luxembourg to public debates of the Council in that time.

This is not only true for both private and public broadcasters. The same can be said in regard to the number of countries from which the radio and/or TV broadcasters came.

Spanish broadcasters were present most often, on altogether five occasions, to transmit debates to the public, followed by French and German broadcasters (on three occasions each), and Portuguese, Swedish and UK broadcasters (on two occasions each). TV stations from Belgium and Austria were present on one occasion each, but broadcasters from Finland, Greece, Ireland, Italy and Luxembourg, i.e. a third of EU Member States, were not present at all.

On one occasion (in 2000), there was coverage by EUROVISION.

In comparison, a relatively high number of EU-external broadcasting stations have broadcasted from Council meetings in that time; the following non-EU broadcasting organisations were involved in broadcasting Council debates:

Reuters	1	(1999)
CNN	2	(once in 1999: once in 2000)
RTL -Hungary	1	(1999)
Radio Turkey	1	(2000)

(dd) Openness of meetings to individuals: reporters/observers/audience

While above in the paper, the indirect or personal participation on the Co-decision meetings of the Council was analysed, in the following part the participation in the Council-locations shall be examined. This means, on the one hand, the opportunities for local participation in the Council building, and on the other hand, the participation of different persons, groups, delegations etc. in the conference rooms of both conference locations Brussels and Luxembourg.

First it should be mentioned that the public participation in Council legislation is separated from the conference room. In contrast to the plenary of the EP in Strasbourg e.g., the public in the Council is clearly divided from the debating politicians. Even if the visitor area in Strasbourg is upstairs separated from the hemicycle, the atmosphere of the discussion carries over and the participation gives visitors an idea of what is happening live. In the case of the Council, the visitors have only the possibility to follow the discussions and debates on a large video Monitor in a press room beside the Conference room. Such a 'sterile' orator-location does not really transmit the debating culture, the personal aura of the politicians and their attitude towards this or another decision. The concrete event of the political struggle or the fight for positions and decision making, become more or less understandable and therefore some legislation act more or less acceptable by the public.

(ee) Presence of media representatives

Usually today journalists, correspondents, commentators etc. from print or communication media are the distributors of the policy to the public. In this respect, one of the most important groups even now, if not the most important participants, are the members or representatives of the media. Especially when they visualise the debates and report from the Council meetings. Thus, if these people or groups reported from the Council legislation e.g. Co-decisions in a regular and substantial manner, a good portion of openness or transparency in these legislation processes would be realised. Therefore it was necessary to research to which extent members of the

media organisations have participated as orators in the Council meetings and especially on the Co-decision activities in that time. Studying the appropriate press releases in the Council, the view of the average participation of those orators, essentially debilitated the transparency-function of those groups, persons etc.

In general, the number of journalists, reporters, commentators etc. following debates in the meeting room (as reporters/observers) fluctuated enormously, ranging from one to 130. At the first glance this result does not seem too serious, but in the vast majority of cases, there were only between five and ten reporters, correspondents etc. present.

On top of that, the data for Co-decision observation tended much more in a direction of less-transparency:

Codecision debates were observed only on five days by a total of 30 journalists in the whole time, i.e. an average of six. The highest number (10) were present on 18 November 1999 and on 8 March 2001, and with one the lowest number on 10 October 2000.

(ff) Audience

The above described authentic event of live participation on political discussions in fact is best realised by broad-based audience, i.e. in the Council meetings.

As in the case of journalists, the Council's public debates are sparsely attended; on the first view a very respectable number of members of the public attended the Council-meetings. The best-attended debate in this respect, with an audience of 80, was that of 16 March 2000. Next came three or four debates with an audience of about 70. However, this is only one side. On the other side, the vast majority of debates have an audience of less than 10, and in many cases there is no audience whatsoever. It should additionally be pointed out that only in the rarest of cases is there an audience comprising a random cross-section of EU-Citizens. In the case of almost 90% of debates, the members of the audience belong to organisations, delegations, groups, associations or school classes visiting the Council.

A distinction is also to be drawn between those voluntarily following the debates (called *vrais public*) and those specially sent to the Council or delegated by institutions with a professional interest (*délégués*), as well as diplomats observing the various debates. In the statistics, they are all lumped together under the heading 'public'. This fact helps put into context what are often, at first sight, surprisingly high numbers of visitors in quite a number of cases.

e) Time and duration of public debates

Not only the small number of public debates and the local arrangements should be mentioned. Even if a debate was offered to the public, the arrangements for such an event were additionally strange and not unhelpful for a better understanding of EU-legislation and the identification of the Citizens with the Union.

Many publicly accessible parts of debates were scheduled for the period before lunch and extended into the lunch break. Some were held at the end of the working day or towards the close of business at the Council. Few of them began in the early morning.

Public access to debates was more or less limited to two hours in every case. Only in a few cases was this amount of time exceeded, by a quarter of an hour to half an hour. In some cases, debates were accessible to the public for considerably less than two hours.

4) Council-Presidencies and public Co-decision practice

Finally it was interesting to analyse, whether there was a difference in the Co-decision practice in regard to the member state serving as Council Presidents. In other words, was Germany much more willing than for example France to open the Co-decision debates towards the public.

As Table 4 shows in the time between 1999 and May 2001 there were exactly 5 Co-decision issues discussed in a public manner. Two debates for instance were initiated by the Finish Presidency, whereby one debate included two different legislation initiatives. Each one debate was initiated by

the Presidencies of France and Sweden. No debates took place during the Presidencies of Germany and Portugal.

The low level of transparency.

To sum up the Council's Co-decision transparency practice and to answer the three questions in the second part of the research on Co-decisions and the public sphere, it is to say:

Irrespective of its change for the better at the Helsinki Summit and the corresponding amendments to its own rules of procedure, the Council has still not really managed to change its form. As before, the vast majority of debates are not public, and few debates on (formal) Commission initiatives - and almost none where these relate to codecision matters - are held in public.

Comparing the pre- and post-Helsinki situations, no difference can be detected as regards legislative activities. This is particularly true in the case of Council debates on Commission initiatives in the field of codecision. The Council's post-Helsinki practices thus do not differ from its pre-Helsinki practices.

The figures analysed here show instead that the greater transparency advocated has (still) not been achieved:

- A figure of only 15 public debates out of a total of over 90 debates a year run counter to the wording of Article 8(2) of the Council's Rules of Procedure (see below),
- The presence of at most four or five TV/radio broadcasting organisations per public debate yields far too low a transmission rate; in addition, no broadcasting organisations at all are present in the case of quite a few public debates,
- Media access is in any case also too low; recordings are in many cases confined to KANAKNA and the internal Council service (Service intern),
- There is relatively little coverage of debates by journalists. With no journalists present at 37% of the debates, and an even lower figure

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in the case of Commission initiatives and codecision, there is an obvious deficit in this area,

- Lastly, public attendance at debates in the form of an audience is far from satisfactory. Whilst large numbers were present at some debates, such figures are not representative of the figures for public attendance in general. For many debates, the audience was small, consisting of up to about 10 people.

Therefore, against the strong reform proposals on transparency in the legislation of the Trumpf/Pirris-Report, the practice of the Council in the Co-decision procedure is still restrictively handled. More over the more cautious formulated/structured suggestions of the Helsinki-Summit were not really adopted in its day-to-day work. And even the fact that both institutions were situated in its own 'camp', the Council hasn't moved to change substantially its practice on Co-decision procedure. Neither the total number of Co-decisions, nor in regard to organising the public background of its debates, a measurable change could be recognised. This is true in regard to the technical facilities as well as in regard to the attendance possibilities in the Council. Less encouraging is also the audience quota. The presence of representatives of the media and the audiences of Citizens in Co-decisions debates were far below a rate which would have justified a real participation, in contrast in both cases the quota could be marked as rather marginal.

Comparing the pre- and post-Helsinki situations, no difference can be detected as regards legislative activities. This is particularly true in the case of Council debates on Commission initiatives in the field of codecision. The Council's post-Helsinki practices thus do not differ from its pre-Helsinki practices.

For all these reasons, it would not be an exaggeration to say that the Council displays very little and totally insufficient transparency when acting in a legislative capacity.

VI. Rules of Procedure and Co-decision transparency

The not so exciting findings on the transparency in the Co-decision practice of the Council has promoted the question, whether the Council has been acting in correspondence with legal orders at all. The relevant rules for its legislating procedures were to be found in its Rules of Procedures⁴⁸, as a (self-) commitment instruction for its whole function as a supreme Organ of the Union.

Following the recommendations on the Helsinki-Summit, on June 5th, 2000 the Council reformed its Rule of procedure. This was also done in regard to its legislative activities e.g. the Co-decision procedure.

In this regard, the relevant articles are the Art. 8 and 9 Rules of Procedure of the Council (in the following RPC). In this amendment the newly formulated Art. 8 'public debates' was obviously directed towards a better transparency of the legislative working of the Council. First this intention is to be seen in the wording of both rules. The wording of Article 8(2) RPC of the Council's Rules of Procedure is cited above with regard to the adequacy of transparency. It is necessary now in conclusion to make a more detailed analysis and to consider the problems it poses in terms of its effects on the EU' s legislative procedure.

The words 'important new legislative proposals'⁴⁹ mean that all important Commission initiatives, i.e. those on topical subjects, must be covered. Otherwise, if only some of those proposals were to be subject to a requirement for public debate, then the relevant passage of the Rules of Procedure would have to read differently, so that the Council would be justified in making a selection, and the limiting of public debates to such a low number would at least be somewhat more plausible.

This interpretation of the Art. 8 2 RPC is secondly to verify the French and German version of the rule. In the French version Art 8 (2) RPC is formulated: "Le Conseil tient au moins un débat public sur les nouvelles

48 Official Journal of the European Communities, L 149/21 from 23. 6. 2000, Council, Council Decision of 5 June, adopting the Council's Rules of Procedure.

49 Ibid, L 149/24.

proposition législative importantes...⁵⁰ And the German version pointed out clearly. “Der Rat hält mindestens eine öffentliche Aussprache über die wichtigen neuen Gesetzgebungsvorschläge ab...”⁵¹ Both wordings make clear that each important legislative matter, initiated by the Commission is to be debated in the Council in a public sphere. In regard to the EU-law and its manifold wording it is an often and well used practice in cases of controversial rules to interpret it with the comparison of the different wordings.

As pointed out above – only a small percentage of all the legislation and especially of Co-decisions were debated and adopted with the public. Thus only this small number of legislative subjects or acts seems ‘important’ enough to the Council for public debate. However the problems and the subjects to be settled by law, i.e. economics, trade, finances, workforce, social, environmental matters etc. were so various and manifold that thus a low percentage of public debates seems much too few. The real situation to be regulated by means of legislation and the nature of the legislation actually adopted in that period tell a different story.

The actual right to make a selection based on the importance of a legislative matter should not and cannot be questioned here. There are two aspects, however, which need to be addressed:

The Pre-condition in Art 8 (3) that the Council or the COREPER may decide by qualified majority on a case-by-case basis that other public debates are to be held on important issues affecting the interests of the Union,⁵² substitute these interpretations of Art. 8 (2). Only in specially exposed cases should the Council decide, whether it wanted to discuss in public. In all other cases the public debates should be the regular procedure.

50 Journal officiel des Communautés européenne, L 149 du 23/06/2000, Conseil, Décision du Conseil du juin 2000, portant adoption de son règlement intérieur, p. 149/24.

51 Amtsblatt der Europäischen Gemeinschaften, RAT, Beschluss des Rates vom 5. Juni 2000 zur Festlegung der Geschäftsordnung, L 149/24.

52 Official Journal of the European Communities, L 149/21 from 23. 6. 2000, Council, Council Decision of 5 June, adopting the Council’s Rules of Procedure, L.149/24.

Further on: Art 8 (2) when to read together with Art. 9 (1) RPC orders a far-reaching public making of all activities and documents of the Council when it is acting in its legislative capacity.

In the same manner the ruling character of Art. 5 (1) RPC stated that public meetings of the Council, when it was acting in the case of Art. 8 are the regular procedure in its Co-decision activities.

Finally, there is the intention of the Trumpf/Pirris-Report respectively the spirit of the Helsinki-Recommendations which not only questioned a replacement of the current practice of open Council debates by opening genuine debates for the public e.g. at the initial stage of discussing major legislative proposals. Concerning that it was suggested ensuring more interesting public debates and discussens in the Council.⁵³

Therefore in a high percentage, the Council is required to debate Co-decisions in a public sphere. It's own Rules oblige it to such a legislation attitude.

The same can be said in regard to its duty towards media transmission of the debates to the public. According to Art. 8 (3), it is generally obliged to make debates public by transmission via audio-visual means⁵⁴

Conclusions and outlook

After the implementation of the rules of the Amsterdam Treaty in the Community law, it was shown that the procedure did not work well and the tensions between the three institutions participating on Co-decisions had been increased. The problems were to be found on the side of the Commission and of the EP, but much more in realm of the Council. However, the main intentions for a reform of the legislation practice i.e. the Co-decision procedures did not come from the Council.

Therefore, at the end of the 1990s, the EP had steadily tried to improve the Co-decision procedure; a lot of suggestions and proposals were made by

53 The European Council: Helsinki Summit 1999, Operational Recommendations Nr. 29.

different bodies, commissions, individuals etc. from that institution. The promoter of these requirements was the largest Party group in the EP, the EPP-Group. However, other sub-bodies of the EP, committees, commissions and its administration body participated substantially on those reform endeavours.

Only in connection with the decision for an Enlargement of the Community were two leading representatives of the Council able to suggest their intention for a reformed legislative procedure in the Council. These proposals, written in a report on the future 'Operation of the Council', included a far-reaching re-organisation of the Co-decision procedure in the Council. However, the Helsinki-Summit which was questioned about adopting the report did not agree with the most far-reaching intentions of the proposals on Co-decision practice. Therefore the Recommendation for the Reform only formally suggested a new structuring of the Council's Co-decision practice, e. g. the future organisation of the public debates. In contrast to its propagated increase of transparency in its work including the Co-decision procedure, the guidelines for the Council's Co-decision practice were not really structured towards a more open and public procedure.

Thus the following amendment to the Council's Rules of Procedure did implement these guidelines according to its formal character, but did not fulfil the true intention of changing the real Co-decision attitude of the Council. On the other hand the formulation in the reformed Rules of procedure of the Council contains a very clear order to allow much more transparency in the Co-decision practice. The wordings of the most appropriate rules give the deciding bodies a clear order for a process, which includes regular public discussion on Co-decision matters. In spite of this, the analysis of the Co-decision practice has shown, that the Council had not really changed its Co-decision after the Helsinki-Impulses; as before in 1999, in 2000 and 2001 the vast majority of debates were not public. Only a small number of debates on (formal) Commission initiatives – and almost none where these relate to Co-decision matters – were held in public. The low number/figure of public debates runs counter to the wording of the

54 See footnote 49.

Council's Rules of Procedure. In doing so the Council disregarded its own working-base and its self-obliged law order for its Co-decision practice. Therefore in its Co-decision practice the Council had been acting against its own legal order and rule base.

More over the Co-decision procedure has hurt the spirit of the necessity of a reformed Union, as it was the corner stone, propagated for betterment at the Helsinki Summit.

Up to 2001 the Council was not really ready for a substantial change in its closed shop attitude. Against the propagated necessity for change and against self-obliged commitments for more transparency in its work, the Co-decision practice did not justify that.

Structurally in these restrictively handled Co-decision procedures there were mirrored the old problems of the Union and its unique Integration deficits, as were described above. The excessive orientation towards the interests of its member states and the lack of democratic control can still be recognised in the Council; These problems and deficits have not been overcome by a new practice in its Co-decision. This Co-decision practice seemed much more a sign for the Forces of Inertia in the Union.

However, there is little hope for the future. One of the main intentions of the Second Convention of the EU is to implement a basic institutional reform into the currently structured European Constitution.

Within one of the most discussed proposals to the Convention, the German–French paper, there are a few interesting suggestions for reforming the Co-decision procedure.

Firstly, and in general, the Co-decision competencies of the EP should be strengthened essentially in order to relate the legislation competencies more into the EP, as the more democratically legitimatised institution. Secondly, the Council competencies should be divided more clearly. On the one hand in the executive competencies and on the other hand in that of the legislative competencies. Thirdly, the latter must be structured in a much more public and transparent manner. And last but not least the proposal has propagated the implementation of the

‘early warning system’ into the legislative part of the future Constitution. This means directing each Commission law initiative not only at the EP and the Council, but also at the same time directing it at the national parliaments. This should offer them firstly the ability to be informed at an early stage of a legislation proposal of the Union, and secondly they should have the possibility to contribute to make an impact on the legislative processes. With this method the parliaments are no longer referred to the information by the Governments, respectively the responsible ministers, but they are able to ‘react’ at very early stage of such a Co-decision.

If all these subjects would become binding rules in the new Constitution and if these rules would replace the relatively vague orders in the current legal basis it would help to lift the Co-decision to a new rank in the European legislative processes. Legitimated more by the participation of the national parliaments and more democratically controlled through more openness and transparency, such a Co-decision could be truly seen as a sign of dynamics and progress in the EU.

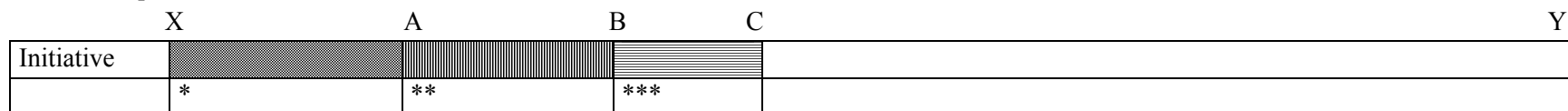
In summary, the results of this study lead to either optimistic or pessimistic assessment regarding the potential of the Co-decision-procedure. If you tend towards optimism, the formal rules of the Co-decision-procedure undoubtedly indicate progress. On the other hand, if you tend towards pessimism or more accurately realism, it is an irritating fact of inertia that the political actors especially in the Council do not meet their own standards, and obey the rules of the game sufficiently. Therefore the current state of the Co-decision procedure does not suffer from a lack of democratic well-meaning, but rather from a lack of political will. Thus, what is required to reach progress by enhancing the democratic legitimacy, is not primarily a comprehensive institutional reform. Rather it is necessary that the member state governments do not hurt their own rules of transparency, which is the minimum standard for democracy.

Annex

Tables 1-4

Table 1: Average Processing on Co-decisions in the period between 1999 – 2001

1 The European Parliament



2. The Council



X Receive of the Initiative

Y Final of Legislation Procedure

A First Reading

B Second Reading

C Third Reading

* Preliminary Time First Reading

5 Months

** Preliminary Time Second Reading

3 Months / 2 Weeks

*** Preliminary Time Third Reading (Co-decision)

2 Months

D Common Position

E Joint Text

**** Preliminary Time Common Position

2 Years / 4 Months

***** Preliminary Time Joint Text

5 Months

Table 2: LIVE transmission and records of the Council debates

Year	LIVE			AUDIO			VIDEO		
	General	INI	COD	General	INI	COD	General	INI	COD
1999	5	-	-	15	-	2	5	-	-
2000	4	-	-	12	1	1	13	1	1
2001/5	4	-	-	5			3	-	-
Total	13	-	-	32	2	3	21	1	1

General. Debates in generally
 INI: Debates on a Commission Initiative
 COD: Debates on Co-decision subjects

Member state	Sweden			Spain			UK		
Year	General	INI	COD	General	INI	COD	General	INI	COD
1999	-	-	-	2	-	-	1	-	-
2000	-	-	-	1	-	-	1	-	-
2001/5	2	-	-	2	-	-	-	-	-
Total	2	-	-	5	-	-	2	-	-

General: General public debate
INI Debate on Commission Initiative
COD Co-decision debate

Table 4: Nature of public debates in the Council between 1999 and 2001/ 5; Number of Co-decision-debates initiated by different Presidencies

Year	Presidency	Council acting on Co-decision Issues	Public Debates			
			General	Proposals/Initiatives	Co-decisions	all
1999 / I	Germany		6	-	-	6
1999 / II	Finland		7	-	-	9
		Environment	-	-	1**	
		Health	-	-	1	
2000 / 1	Portugal		8	-	-	8
2000 / II	France		5	-	-	7
		Environment			1	
				1*		
2000 / I	Sweden		6	-		7
until 31 May		Environment	-	.	1	
Total			32	1*	4	37

*) this debate referred to the Agriculture Council

***) two legislation issues

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