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LEGISLATIVE CHALLENGES FOR THE EUROPEAN UNION AFTER THE TREATY OF LISBON ENTERED INTO FORCE

The European Union currently experiences an exceptionally difficult period. The outburst of financial crisis in 2007 created unfavourable conditions and new challenges with which Member States have struggled by drafting an international treaty on fiscal regime. At the same time, it has been the time of implementing and testing the provisions of the Treaty of Lisbon of 13 December 2007, which entered into force on 1 December 2009. At present, most researchers focus on problems resulting from the crisis and solutions proposed. The objective of this article, however, is to analyse legislative issues that are less often discussed. In recent years, some negative phenomena connected with the process of establishing EU law became apparent. Should they become regular practices, they might lead to, to quote historical institutionalists[1], "unintended consequences" in the future.[2] Early identification of the threats and appropriate remedies is an important task and challenge for the entire European Union. Postponing it cannot be justified with the struggle against the financial crisis.

In this article, at least six problems of legislative nature that the EU will have to solve in the future are identified. In the first part an analysis is offered whose results demonstrate that the Treaty of Lisbon deepened the legislative exclusion of the European Parliament by increasing the number of areas where the EP has no competences, in terms of both relative and absolute numbers. In the second part the claim that the ordinary legislative procedure prevails in the EU is refuted by demonstrating that more than half of the treaty basis for enacting legislation includes other procedures. In the third part, negative consequences of trilogues, i.e. informal meetings of representatives of the Parliament, Council and Commission in the initial stages of the legislative procedure, are discussed. In the fourth part, the issue of the so-called early legislative agreements is debated. They result in almost complete disappear-

[1] See: C. Hay, D. Wincott, *Structure, Agency and Historical Institutionalism*, "Political Studies" 1998, vol. 46, no. 5, pp. 951-957; K. Thelen, *Historical Institutionalism in Comparative Politics*, "Annual Review of Political Science" 1999, vol. 2, no. 1, pp. 369-403.

[2] P. Pierson, *The Path to European Integration. A Historical Institutionalist Analysis*, "Comparative Political Studies" 1996, vol. 29, no. 2, pp. 136-139.

ance of the second and third reading and quicken the decision-making process. The fifth part contains an analysis of the effects of the degraded role of the European Parliament's committees in legislative proceedings. In the last part of this paper, the phenomenon of "the Council of Ministers without ministers" is characterised, i.e. the declining involvement of ministers in the legislative process.

LEGISLATIVE EXCLUSION OF THE EUROPEAN PARLIAMENT

For many researchers on the European Union, the entering into force of the Treaty of Lisbon (hereinafter also TL) marked a new stage of the functioning of the European Parliament. Most of them emphasised that the TL strengthened the legislative role of that institution by expanding the codecision procedure (the renamed ordinary legislative procedure, hereinafter - OLP) to cover farming and fishery, the Common Agricultural Policy, transport, structural funds, comitology, intellectual property and partly the former third pillar.[3] It was also underlined that the TL reformed the assent procedure[4] in a manner favourable for the Parliament, especially by introducing Article 218 to the Treaty on the functioning of the European Union (hereinafter - TFEU), under which EU international agreements "concerning the areas subject to the ordinary or special legislative procedure" would require the consent of the Parliament.[5] The power of that provision became apparent in February 2010, when MEPs refused to consent to the EU-USA agreement on banking data transfers to the USA via the SWIFT network (the so-called "SWIFT agreement"). [6] The TL also eliminated the cooperation procedure under which the European Parliament had the weakest position, i.e. after consultations.[7] In consequence, the European Parliament was to perform the most important role in the EU legal system.

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[3] J.-C. Piris (2010), *The Lisbon Treaty: A Legal and Political Analysis*, Cambridge, p. 118.

[4] The Treaty of Lisbon replaced the term *assent procedure* with *consent procedure*. Though both terms refer to the same procedure, the latter is more powerful. The word *assent* denotes agreement or acquiescence, i.e. relatively feeble approval, while *consent* designates absolute agreement without which no action can be taken. In the Polish versions of the Treaties, this change was not noted.

[5] *Consolidated versions of the Treaty on European Union and the Treaty on the functioning of the European Union,* "Official Journal of the EU" of 30 March 2010, C 83, p. 145.

[6] *Legislative resolution of the European Parliament of 11 February 2010 on the proposal for a Council decision on the conclusion of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Programme (05305/1/2010 REV 1 – C7-0004/2010 – 2009/0190(NLE))*, "Official Journal of the EU" of 16 December 2010, C 341 E, p. 100. Later on, after the introduction of some changes, the agreement was approved.

[7] *Decision Making under Different Institutional Arrangements: Legislation by the European Community*, "Journal of Institutional and Theoretical Economics" 1994, vol. 150, no. 4, pp. 642-669; C. Crombez, *Legislative Procedures in the European Community*, "British Journal of Political Science" 1996, vol. 26, no. 2, pp. 218-220. Other opinions in: G. Garrett, G. Tsebelis, *An Institutional Critique of Intergovernmentalism*, "International Organization"1996, vol. 50, no. 2, p. 290.

However, if one counted the provisions on the legislative competences of the Parliament or their lack, the conclusion can be completely different (Chart 1). Paradoxically, the Lisbon Treaty did not widen the general legislative competence of the Parliament but weakened it! Since the Roman Treaties of 25 March 1957 entered into force, the absolute number of primary law provisions that contained any procedure in which the Parliament was involved kept growing and the TL strengthened that trend. Since the establishment of the European Economic Community (EEC) and the European Atomic Energy Community (Euratom) an increase in the EP's legislative competences was not accompanied by the introduction of many articles excluding its competences but the TL (and the Constitutional Treaty) constituted a tipping point: the number of excluding provisions was increased by almost 2/3 (from 70 articles in the Nice Treaty to 112 articles in the TL). The above observations might, however, be distorted as in successive treaties the general number of provisions and EU/EC competence areas rose. That is why the issue should be considered in terms of relative numbers. Such an analysis leads to similar conclusions. From the entering into force of the Single European Act of 17-28 February 1986, the percentage share of primary law articles that did not grant legislative powers to the European Parliament gradually decreased, only to go up in the TL (from 33.8% in the Nice Treaty to 36.8% in the TL). To sum up, though the Lisbon Treaty notably expands the competences of the EU legislature, it simultaneously excludes the EP from some decision-making areas, whereby the latter effect is dominant.

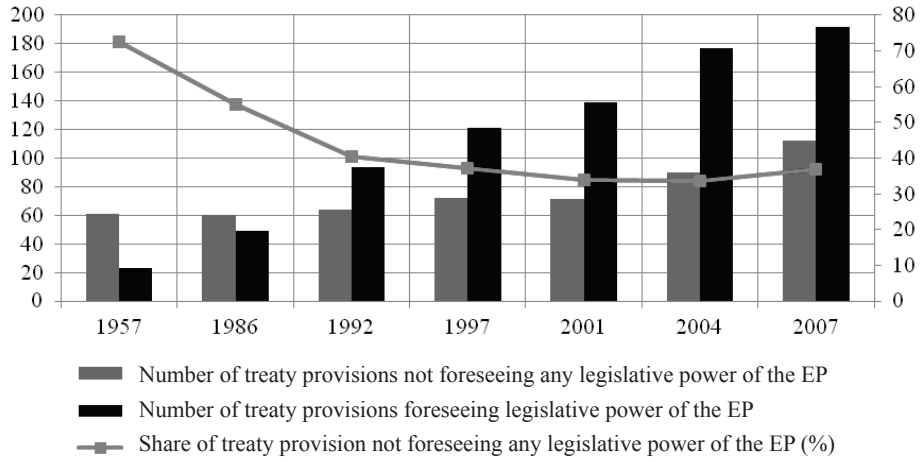
The legislative exclusion of the Parliament means that the EP loses its formal impact in many important areas. This refers mainly to the Common Security and Defence Policy and partly to the former third pillar[8], but also to issues previously covered by the EU first pillar policies, e.g. fixing the Common Customs Tariff duties (TFEU, Article 31), fixing quantitative limitations of fishing opportunities (TFEU, Article 43, Par. 3), establishing other sources of aid than those granted by a Member State for entities compatible with the internal market (TFEU, Articles 107 and 108) or the application of penal measures if a given Member State incurs excessive deficit (TFEU, Article 126). In those areas, the Council holds legislative monopoly. Some legislative power is also granted to other EU institutions and bodies (especially the European Council and the European Central Bank), while the role of MEPs boils down to exerting informal influence. The lack of mention of EP competences in 112 articles of the currently binding Treaties deepens information deficit in the EU. Making the entire documentation public results from the EP's participation in the

[8] For some researchers this is another argument confirming that the Treaty of Lisbon did not remove the pillar structure of the European Union. See: J. Gaspers, *The Quest for European Foreign Policy Consistency and the Treaty of Lisbon*, "Humanitas Journal of European Studies" 2008, vol. 2, no. 1, p. 35; S. Kurpas, *The Treaty of Lisbon – How Much "Constitution" is Left? An Overview of the Main Changes*, "CEPS Policy Brief" 2007, no. 147, p. 2; P. Kiiver, *Lisbon and the Lawyers Reflections on What the EU Reform Treaty Means to Jurists*, "Maastricht Journal of European and Comparative Law" 2007, vol. 14, no. 4, p. 338.

legislative process. Since other institutions are not obliged to publish all their documents, excluding the EU legislature is therefore tantamount to losing access to information on positions held by decision-makers, debates, the preparatory process and proceedings.[9] Marginalisation of the Parliament also means that legislative debates and public opinion control of the legislation have been brought to a halt. The above increases the distance between the European Union and its citizens and poses the risk of flawed legislation that is not suited to citizens' needs. Finally, it leads to excluding national parliaments, as – in compliance with the Treaties – they obtain information

Chart 1

Absolute and relative numbers of treaty provisions granting and not granting legislative powers to the European Parliament



Explanations: Left Y axis – absolute number of provisions, right Y axis – relative number (percentage).

Source: Author's own calculations based on EU Treaties. The years refer to the dates on which the Treaties were signed: 1957 – Roman Treaties, 1986 – Single European Act, 1992 – Maastricht Treaty, 1997 – Amsterdam Treaty, 2001 – Nice Treaty, 2004 – the Constitutional Treaty, 2007 – Lisbon Treaty.

[9] The Treaties only mention that all Member States shall engage in sincere cooperation (TEU, Article 4, judgement of the European Court in Case 204/86 *Hellenic Republic v Council* and judgement of the Court in Case 70/88 *Chernobyl*), as well as mutual consultations (TFEU, Article 295) between institutions, however, this is not tantamount to the automatic obligation to share information. History shows that the latter issue was the subject of informal agreements. See: R. Corbett, F. Jacobs, M. Shackleton (2000), *The European Parliament*, London, p. 176 ff. In the EU, the regulation on access to documents is still valid, but it is restrictive on public access to political documents drafted by the Council or other institutions. See: *Regulation (EC) no. 1049/2001 of the European Parliament and of the Council of 30 May 2001* regarding public access to European Parliament, Council and Commission documents "Official Journal of the EC" of 31 May 2011, L 145, pp. 43-48.

only about legislative acts[10], i.e. regulations, directives and decisions adopted "jointly by the Parliament and the Council, by the Parliament with the participation of the Council or by the Council with the participation of the Parliament".[11]

THE ILLUSION OF THE ORDINARY LEGISLATIVE PROCEDURE

A wide extension of the codecision procedure (as the OLP) with 44 new instances (30 articles where codeciding replaced other procedures, and 14 new articles) was positively evaluated by EU researchers. It was expected that as a result of the reform, approximately 95% of all EU secondary law would be adopted in accordance with the OLP.[12] Looking at the number of legislative proposals and acts adopted in the European Union in the years 1993-2011, one might consider the above prognosis to be accurate (Charts 2 and 3). Practically from the entering into force of the Maastricht Treaty (1 November 1993) to 2009, consultations were the prevailing legislative procedure. Initially, codecision was the procedure selected for the adoption of a few regulations, but after the Amsterdam Treaty entered into force (on 1 May 1999), it started to resemble consultations. This happened because the codecision process was extended from fifteen to thirty articles by that Treaty.[13] The adoption of the Nice Treaty (1 February 2003) did not lead to the strengthening of this procedure. In a way, it set the kinds of regulations adopted under this procedure. The above confirms critical opinions on the provisions of this Treaty (and references to the Treaty *not being so nice*).[14] The breakthrough did not come about until the Treaty of Lisbon. Although in the first years of applying its provisions, the number of legislative acts passed under the OLP was close to the prognosis, the number of the Commission's proposals presented in 2011 that will be examined at the end of the seventh term of the Parliament (2009-2014) shows that codecision clearly prevails over consultations (in 2011, 88.8% of legislative proposals were adopted under the OLP).

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[10] See: TEU, Article 12(a) and the *Protocol on the Role of National Parliaments in the European Union*, in: Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, "Official Journal of the EU" of 17 December 2009, C 306, p. 148, Article 2.

[11] TFEU, Article 289. See: *Consolidated versions of the Treaty on European Union*..., p. 172.

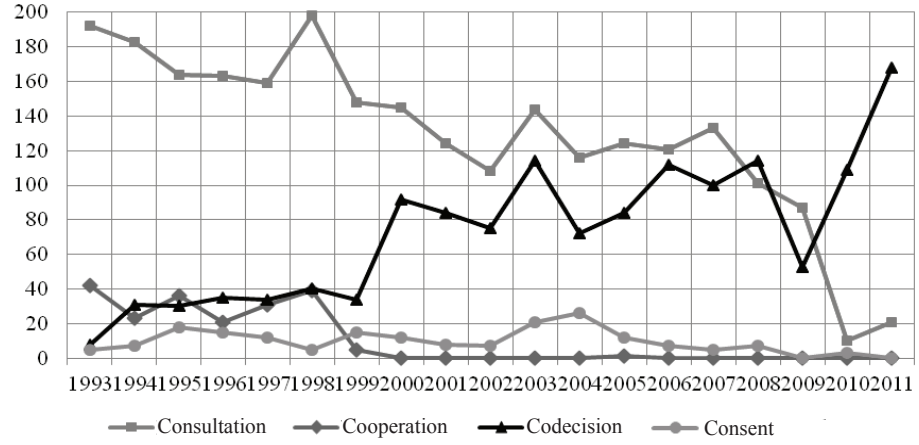
[12] J. J. Węc, *Reforma systemu instytucjonalnego Unii Europejskiej przewidywana w Traktacie lizbońskim*, "Rocznik Integracji Europejskiej" 2009, no. 3, p. 59.

[13] R. Corbett, F. Jacobs, M. Shackleton, *op. cit.*, p. 191.

[14] C. Neuhold, *The European Parliament and the European Commission: 'You Can't Always Get What You Want'*, in: F. Laursen (ed.) (2006), *The Treaty of Nice: Actor Preferences, Bargaining and Institutional Choice*, Leiden, pp. 351-367; M. Gray, A. Stubb, *The Treaty of Nice – Negotiating a Poisoned Chalice*, "Journal of Common Market Studies" 2001, vol. 39, no. 2, pp. 5-23; M. Hosli, M. Machover, *The Nice Treaty and Voting Rules in the Council: A Reply to Moberg (2002)*, "Journal of Common Market Studies" 2004, vol. 42, no. 3, pp. 497-521.

Chart 2

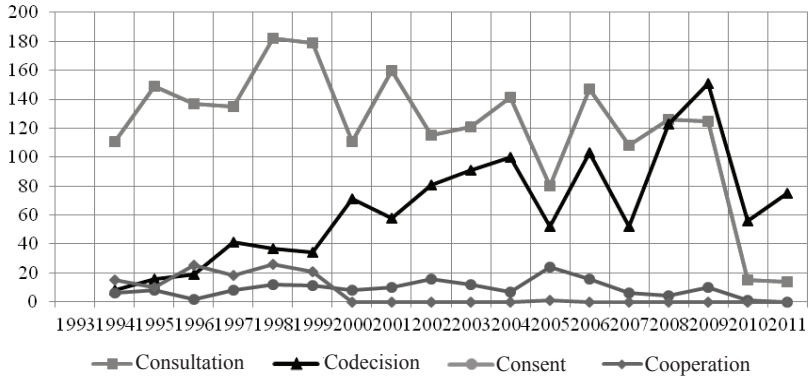
Number of legislative proposals put forward by the Commission in 1993-2011 and procedures applicable



Source: PreLex, the Commission's database on interinstitutional procedures in the European Union, http://ec.europa.eu/prelex/apcnet.cfm?CL=en.

Chart 3

Number of legislative proposals adopted under particular procedures in 1993-2011



Source: *The Legislative Observatory of the European Parliament*, http://www.europarl.europa.eu/oeil/index.jsp, own calculations.

The preponderance of the OLP, however, turns out to be an illusion if one looks at the number of treaty provisions that foresee this procedure (Chart 4). Although in the TL, for the first time in the history of the European Union, the OLP is mentioned in more provisions than consultation, the percentage share of the former procedure accounts for about 46% of legislative acts, which means that more than a half of primary law provisions require a different procedure of adoption. Both information and consultation, where the Parliament has a very weak position[15], are referred to in as much as 40.6% of all articles, which reveals that the OLP prevalence is an illusion. Of course, that becomes blurred in the every-day functioning of the EU as the provisions that foresee the OLP generate a very high number of legislative proposals. However, issues consulted and announced frequently refer to seldom regulated key areas such as the implementation of collective agreements at the European level (TFEU, Article 155, Par. 2), suspension of an international agreement (TFEU, Article 218, Par. 9-10), social security and social protection (TFEU, Article 21, Par. 3), provisions on passports, identity cards and residence permits (TFEU, Article 77, Par. 3), cross-border cooperation between judicial and police authorities (TFEU, Article 89), discrimination against carriers (TFEU, Article 95, Par. 3), prohibition of abusing the dominant position or agreements between enterprises that disrupt the internal market (TFEU, Article 103. Par. 1), harmonisation of indirect taxes (Article 113 of the TFEU), approximation of laws on internal markets (TFEU, Article 115), supervision of financial institutions (TFEU, Article 127, Par. 6), employment policy (TFEU, Article 148, Par. 2), decision on whether a Member State applying for accession to the Eurozone fulfils the necessary convergence criteria (TFEU, Article 140, Par. 2), special R&D programmes (TFEU, Article 182, Par. 4), measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply (TFEU, Article 192, Par. 2c), and decisions on the EU system of own resources (TFEU, Article 311). In those areas the position of the European Parliament is weak because formally they are regulated by Member States individually.

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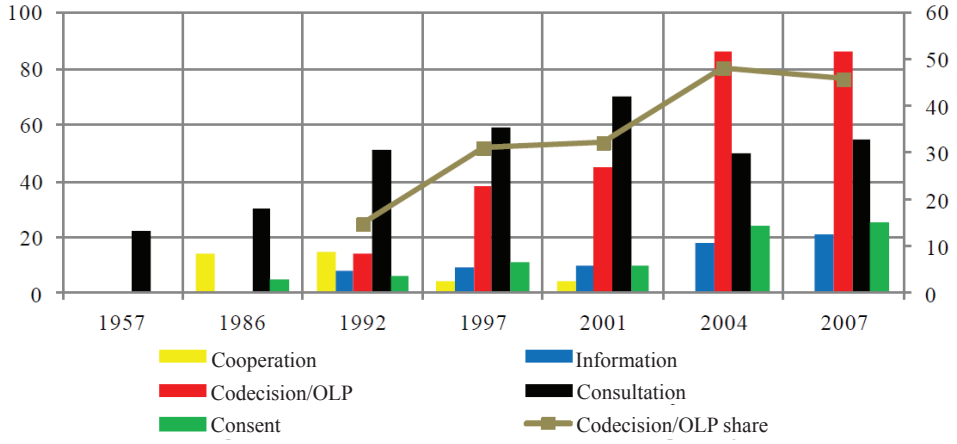
[15] See: C. Crombez, *Legislative Procedures...*, p. 205; S. Napel, M. Widgrén, *Strategic versus Non-strategic Voting Power in the EU Council of Ministers: The Consultation Procedure*, "Social Choice and Welfare" 2011, vol. 37, no. 3, p. 515; R. Scully, *The European Parliament and the Codecision Procedure: A Reassessment*, "Journal of Legislative Studies" 1997, vol. 3, no. 3, p. 60; B. Steunenberg, *op. cit.*, p. 651; G. Garrett, *From the Luxembourg Compromise to Codecision: Decision-Making in the European Union*, "Electoral Studies" 1995, vol. 14, no. 3, p. 294. In some situations, and when employing informal mechanisms, the Parliament is capable of attaining a strong position in consultations. See: R. Kardasheva, *The Power to Delay: The European Parliament's Influence in the Consultation Procedure*, "Journal of Common Market Studies" 2009, vol. 47, no. 2, pp. 385-409; A. Kirpsza, *Formalnie słaby, nieformalnie silny. Pozycja Parlamentu Europejskiego w procedurze konsultacji na przykładzie procesu uchwalania rozporządzenia ustanawiającego zasady dobrowolnej modulacji płatności bezpośrednich*, "Rocznik Integracji Europejskiej" 2011, no. 5.

Chart 4

Number of treaty articles that foresee application of specific legislative procedures



Explanations: Left Y axis – absolute number of provisions, right Y axis – relative number of provisions (percentage).

Source: Author's own calculations based on EU Treaties. The years refer to the dates on which the Treaties were signed, see: Chart 1.

THE TRILOGUE AND ITS CONSEQUENCES

The Maastricht Treaty introduced the codecision procedure, which created interdependencies between the Council and the Parliament.[16] The first symptom of this change was the application of the ONP to Voice Telephony Directive.[17] After unsuccessful negotiations in the Conciliation Committee, the Council decided to propose its own common position as the final version of the regulation. It believed that the Parliament would not be capable of obtaining the absolute majority of votes required to veto the regulation (the so-called third reading). However, the Council underestimated the Parliament, as 379 MEPs voted against the legislative proposal. That number of votes sufficed to reject the draft directive and demonstrated the strong position of the Parliament in the codecision procedure.[18] That was the

[16] M. Shackleton, *The Interinstitutional Balance in the EU: What Has Happened Since 1999?*, "EUSA Review" 2004, vol. 17, no. 3, pp. 2-3; M. Shackleton, T. Raunio, *Codecision since Amsterdam: A Laboratory for Institutional Innovation and Change*, "Journal of European Public Policy" 2003, vol. 10, no. 2, p. 173.

[17] *Proposal for a Council Directive on the application of open network provision (ONP) to voice telephony*, "Official Journal of the European Communities" of 12 October 1992, C 263, pp. 20-36, later amended.

[18] M. Shackleton, *The Politics of Codecision*, "Journal of Common Market Studies" 2000, vol. 38, no. 2, p. 327. The draft directive was presented by the Commission in 1992 while the common position of the Council was rejected by the Parliament in July 1994.

moment when both institutions understood that without direct and deep cooperation they would not achieve satisfactory, effective and quick agreements. That is why already in 1995, they established informal meetings of their representatives – the so-called trilogues. Trilogues are held before meetings of the Conciliation Committee and their objective is to get an agreement on amendments that would later be endorsed by the said Committee and involved institutions.[19] The interdependencies between the Parliament and the Council were tightened after the entering into force of the Amsterdam Treaty that introduced the possibility of ending the codecision procedure already at the first reading (the so-called fast track legislation) and cancelled the so-called special third reading. As a result, the Council could not impose its position on the Parliament after conciliation failure.[20] Consequently, in 1999 the Council, the Parliament and the Commission entered into an interinstitutional agreement in which they stated that pre-conciliation trilogues proved to be a success and therefore "this practice, which has developed at all stages of the codecision procedure, must continue to be encouraged".[21] In result, the trilateral meetings have become common practice also before the first and second readings.

Nowadays, the trilogues (also referred to as "trialogues")[22] are informal meetings of representatives of the Commission (heads of relevant Directorates-General, sometimes Commissioners), the Council (delegates of the Presidency, the head of COREPER, heads of working groups, sometimes Ministers), and the Parliament (heads of committees, rapporteurs, shadow rapporteurs, coordinators of political parliamentary groups and deputy presidents).[23]

Trilogues are held at the early stages of the legislative procedure and they are aimed at drafting the initial legislative agreement that will be adopted by the Council

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[19] *Ibid.*, p. 334.

[20] A. Maurer, *The Legislative Powers and Impact of the European Parliament*, "Journal of Common Market Studies" 2003, vol. 41, no. 2, pp. 228-230; H. Farrell, A. Héritier, *Formal and Informal Institutions Under Codecision: Continuous Constitution-Building in Europe*, "Governance" 2003, vol. 16, no. 4, pp. 589-590; C. Reh, A. Héritier, E. Bressanelli, C. Koop, *The Informal Politics of Legislation: Explaining Secluded Decision-making in the European Union*, paper prepared for the APSA Annual Convention, Washington, 2-5 September 2010, p. 8.

[21] *Joint Declaration on Practical Arrangements for the New Codecision Procedure (Article 251 of the Treaty establishing the European Community)*, "Official Journal of the European Communities" of 28 May 1999, C 148, p. 1.

[22] Both terms are used in EU documentation. In this article, I will use the term "trilogue".

[23] H. Farrell, A. Héritier, *Interorganizational Negotiation and Intraorganizational Power in Shared Decision-Making: Early Agreements under Codecision and Their Impact on the European Parliament and the Council of Ministers*, "Reihe Politikwissenschaft/Political Science Series" no. 95, March 2004, p. 12; P. Settembri, C. Neuhold, *Achieving Consensus Through Committees: Does the European Parliament Manage?*, "Journal of Common Market Studies" 2009, vol. 47, no. 1, p. 144; A. Héritier, C. Reh, *Codecision and Its Discontents: Intra-organisational Politics and Institutional Reform in the European Parliament*, paper prepared for the EUSA Biannual Meeting, Boston, 3-5 March 2011, p. 7. Trilogues are attended by up to 40 persons. See: *Codecision and National Parliamentary Scrutiny: Report with Evidence*, House of Lords: European Union Committee, 17th Report of Session, London 2009, p. 13.

and the Parliament in good faith and without significant amendments. Application of this mechanism is very widespread, which is reflected by the fact that already in the years 1999-2000, trilogues were held to discuss 41% of modified legislative acts adopted under the codecision procedure and this share grew every year (Table 1). The year 2007 turned out to be the culminating point of this trend. Under the new interinstitutional agreement[24], trilogues were institutionalised and since 2007 they are part of processing all legislative proposals adopted under codecision. They have also been used in consultations and the budget procedure, where they are traditionally referred to as "concertation".[25]

The impact of trilogues on the legislative procedure is ambivalent. Some researchers underline that trilogues have contributed to the creation of a culture of trust and cooperation between representatives of the three institutions, thanks to which the decision-making process is cooperative and based on mutual trust.[26] Other positive aspects attributed to trilogies include the strengthening of the legislative position of the Parliament. In trilogues, the Parliament has greater opportunities of effectively promoting its amendments than in isolation. In trilogues, the EP can put its strategic, negotiating and networking capacities to better use.[27] From the perspective of social constructionism, trilogues also strengthen the normative co-dependency which consists in the reduction of formal differences between legislative procedures.[28] Finally, trilogues facilitate interinstitutional negotiations and allow for reaching an agreement already at first reading.[29]

However, trilogues also generate many negative effects. First and foremost, they only allow selected entities to access the legislative process. Only a small group of representatives of the three institutions participate in the trilogues (in literature of the field, this group is referred to as "relais actors"[30]) and they control the course and results of the legislative procedure. This has three important consequences.

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[24] *Joint declaration on practical arrangements for the codecision procedure (Article 251 of the EC Treaty),* "Official Journal of the European Union" of 30 June 2007, C 145, pp. 5-9.

[25] R. Corbett, F. Jacobs, M. Shackleton, *op. cit.*, p. 183.

[26] M. Shackleton, *The Politics of*..., pp. 333, 335-336; H. Farrell, A. Héritier, *Interorganizational Negotiation*..., pp. 13-14.

[27] B. Steunenberg, T. Selck, *Testing Procedural Models of EU Legislative Decision-Making*, in: R. Thomson, F. Stokman, T. König, C. Achen (ed.) (2006), *The European Union Decides: Testing Theories of European Decision Making*, Cambridge, p. 81; F. Häge, M. Kaeding, *Reconsidering the European Parliament's Legislative Influence: Formal vs. Informal Procedures*, "Journal of European Integration" 2007, vol. 29, no. 3, p. 357; H. Farrel l, A. Héritier, *Formal and Informal*..., p. 594.

[28] See: A. Kirpsza, *Formalnie słaby, nieformalnie silny*...

[29] R. Kratsa-Tsagaropoulou, A. Vidal-Quadras, M. Rothe, *Activity Report of the delegations to the Conciliation Committee, 1 May 2004-13 July 2009 (sixth parliamentary term)*, PE427.162v01-00, p. 12.

[30] H. Farrell, A. Héritier, *Interorganizational Negotiation*..., p. 14.

Table 1

Trilogues under codecision and consultation in the years 1999-2007

	Codecision			Consultation		
	Trilogues	Absence of trilogues	Share of trilogues (%)	Trilogues	Absence of trilogues	Share of trilogues (%)
1999/2000	18	26	41%	0	53	0%
2000/2001	48	28	63%	3	76	4%
2001/2002	44	26	63%	0	75	0%
2002/2003	48	13	79%	1	73	1%
2003/2004	69	15	82%	1	77	1%
2004/2005	54	3	96%	5	43	10%
2005/2006	50	0	100%	12	51	19%
2006/2007	28	0	100%	4	29	12%
Total	**359**	**111**	**76%**	**26**	**477**	**5%**

Explanations: from 1 May of the given year to 30 April of the following year.

Source: R. Kardasheva, *Legislative Package Deals in EU Decision-Making: 1999-2007*, thesis submitted to the European Institute of the London School of Economics, April 2009, p. 26.

Firstly, an asymmetry between different members of the Council and the Parliament is apparent as those who do not participate in a trilogue cannot exert similar influence on the legislative procedure. Thus trilogues disturb the strongly enrooted norm of proportional participation in the decision-making process and have introduced a division into the weak and the powerful. In the case of the Council, informal negotiations strengthen the Presidency, and especially the chair of COREPER I who can adjust the given legislative proposal at will at the trilateral meetings while other ministers have no possibility to learn about the course of events.[31] In the Parliament, the winners are committee chairpersons, rapporteurs, coordinators and MEPs representing large groups as they participate in trilogues and decide who should join the trilateral meetings. The President and Vice President of the European Parliament, the MEPs who belong to small groups and the committees lose as their access to trilateral meetings is limited.[32]

Secondly, the dominant and elitist position of the *relais actors* enables them to escape the watchful eye of their mandators. Examples of such situations are, *inter alia*, as follows: transgressing the negotiation mandate, promoting solutions compliant with one's own preferences and employing the *fait accompli* tactics, i.e. presenting institutions with legislative proposals containing a note that this is the only

[31] *Ibid.*, p. 17.

[32] *Ibid.*, pp. 14-16; A. Héritier, C. Reh, *Codecision and Its Discontents*..., pp. 11-15.

acceptable solution.[33] In result, the Council and the Parliament cannot control and monitor the activity of its agents, but for the good of effective legislative processes they have to make do with their "legislative intermediaries".

Thirdly, the elitism of the legislative procedure might deform the culture of consensus so deeply embedded in the Council. The culture of consensus consists in reaching legislative compromises accepted by all Council members.[34] The representative of the Presidency that participates in trilogues is isolated from the institutional environment of the Council, and therefore might, in cooperation with MEPs, seek solutions that are especially beneficial for his/her Member State excluding preferences of other EU Member States. Already at the stage of trilateral meetings, the Presidency representative might build a coalition with Council members and secure the required number of votes and might later use this majority at the adoption stage. Such a strategy would be particularly feasible in the case of large and highly populated Member States that have large voting weights.[35]

Trilogues also generate coordination difficulties, in particular rivalry between negotiators representing the same institution.[36] This results mainly from point 8 of the interinstitutional agreement of 2007 which stipulates that trilogues "may be held at all stages of the procedure and at different levels of representation, depending on the nature of the expected discussion".[37] Those levels are decided upon mainly by group coordinators at their informal meetings. The issue of rivalry applies particularly the Parliament, which – in the course of procedures – is represented by many highly authorised entities that stem from various, sometimes opposing, political backgrounds.[38] The complex relations between those functions might affect the legislative process. This happened during the negotiations on the regulation on

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[33] N. Yordanova, *Plenary 'Amendments' to Committee Reports: Legislative Powers of the European Parliament Committees*, paper presented at the APSA 2009 Toronto Meeting and the EUSA 2009 Los Angeles Meeting, version: August 2010, p. 6.

[34] D. Heisenberg, *The Institution of "Consensus" in the European Union: Formal versus Informal Decision-Making in the Council*, "European Journal of Political Research" 2005, vol. 44, no. 1, pp. 65--90; J. Lewis, *Is the "Hard Bargaining" Image of the Council Misleading? The Committee of Permanent Representatives and the Local Elections Directive*, "Journal of Common Market Studies" 1998, vol. 36, no. 4, pp. 479-504; F. Hayes-Renshaw, W. van Aken, H. Wallace, *When and Why the EU Council of Ministers Votes Explicitly*, "Journal of Common Market Studies" 2006, vol. 44, no. 1, p. 163; A. Kirpsza, *Wpływ kryzysu finansowego na proces podejmowania decyzji w Unii Europejskiej*, "Studia Polityczne" 2012, no. 28, pp. 321-322.

[35] H. Farrell, A. Héritier, *The Invisible Transformation of Codecision: Problems of Democratic Legitimacy*, "SIEPS Report" 2003, no. 7, p. 31.

[36] *Ibid.*, p. 11; H. Farrell, A. Héritier, *Interorganizational negotiation...*, p. 19; P. Hausemer, *Participation and Political Competition in Committee Report Allocation: Under What Conditions Do MEPs Represent Their Constituents?*, "European Union Politics" 2006, vol. 7, no. 4, pp. 505-530; N. Yordanova, *The Effect of Inter-institutional Rules on the Division of Power in the European Parliament: Allocation of Consultation versus Codecision Reports*, Paper prepared for the 11th Biannual Conference of the European Union Studies Association Los Angeles, California, 23-25 April 2009.

[37] *Joint declaration on practical arrangements for...*, p. 6.

[38] P. Settembri, C. Neuhold, *op. cit.*, pp. 141-143.

advanced therapy medicinal products.[39] During its adoption, the main rapporteur, Miroslav Mikolášik, representing the European People's Party – European Democrats (EPP-ED, currently EPP), clashed with the shadow rapporteurs of the Party of European Socialists (PES, currently S&D), the Alliance of Liberals and Democrats for Europe (ALDE) and European United Left /Nordic Green Left (GUE/NGL) on the issue of "ethical" amendments to the legislative proposal. Failing to win the support of the Council and the Commission, he decided to break off the negotiations, threatening that the legislative procedure would be extended and the second reading would be held. However, the shadow rapporteurs decided to continue the trilogue without Mikolášik. They drafted a new legislative agreement that did not foresee "ethical" amendments. Next, they presented the agreement, in the form of a report, to a plenary of the Parliament, and – although it contained modifications that had not been consulted with the Commission and the main rapporteur, it won the support of MEPs and entered into force as an act of law.[40] Opposite situations also took place. Negotiations on access to EU institutions' documentation[41] reached a standstill caused by objections of the shadow rapporteurs. It was decided to exclude the shadow rapporteurs from the trilogue and the agreement was reached.[42] Conflicts between negotiators hamper coordination of the Parliament's position, which gives more leverage to the Council represented by one leader – the deputy ambassador of the Member State holding the Presidency (head of COREPER I).[43]

Trilogues are also a threat to transparency, proportional representation and democracy.[44] They are closed-door meetings and thus their course remains unknown to the public, the media, national parliaments and non-governmental organisations. Consequently, no entity is capable of controlling the legislative process.[45] Moreover, trilogues impair the influence of the weakest parliamentary groups on the legislative procedure. Their MEPs rarely participate in trilateral meetings and seldom have

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[39] Regulation (EC) No 1394/2007 of the European Parliament and of the Council of 13 November 2007 on advanced therapy medicinal products and amending Directive 2001/83/EC and Regulation (EC) No. 726/2004, "Official Journal of the European Union" of 10 December 2007, L 324, pp. 121-137.

[40] D. Judge, D. Earnshaw, *'Relais Actors' and Codecision First Reading Agreements in the European Parliament: The Case of the Advanced Therapies Regulation*, "Journal of European Public Policy" 2011, vol. 18, no. 1, pp. 59-66.

[41] *Regulation (EC) no. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents* "Official Journal of the European Union" of 31 May 2001, L 145, pp. 43-48.

[42] T. Bunyan, *Secret Trilogues and the Democratic Deficit*, Statewatch Viewpoint, September 2007, p. 9.

[43] M. Shackleton, T. Raunio, *op. cit.*, pp. 174-176.

[44] T. Bunyan, *op. cit.*, p. 9; B. Petkova, T. Dumbrovsk, *Conciliation in the Sixth European Parliament: Formal Transparency vs. Shadowy Legislating*, paper presented at UACES Exchanging Ideas on Europe: Europe at a Crossroads, Bruges, 6-8 September 2010, p. 3 and next. Contrary view in: A. Rasmussen, *Early Conclusion in Bicameral Bargaining: Evidence from the Codecision Legislative Procedure of the European Union*, "European Union Politics" 2011, vol. 12, no. 1, pp. 61-62.

[45] H. Farrell, A. Héritier, *The Invisible Transformation*..., p. 8.

the opportunity to play a major role in negotiations. They are overlooked by the Council's negotiators who prefer to contact representatives of large political groups as they guarantee the required support in the Parliament.[46] The trilogues also exclude MEPs representing Member States that joined the European Union in 2004 and 2007. In 2006 and 2007, around 6% of MEPs representing new EU Member States participated in trilateral meetings, but from 2008 to 2010 not a single one attended a trilogue.[47] This is mainly due to discriminating new MEPs in the process of appointing rapporteurs. In the sixth term of the European Parliament (2004-2009), they performed this function only in 9% of all codecisions, although new MEPs account for 22% of all Members of the European Parliament.[48]

The trilogues also pose the risk of establishing relations between governments of a Member State and its MEPs, which might influence the outcome of the legislative process. To provide an example: Germany has the largest national delegation to the Parliament, and its MEPs hold key positions in this institution.[49] The German government can count on their vast support in the European legislature and can make use of it while pressing for regulations it prefers in the course of interinstitutional negotiations.[50] The case of the Takeovers Directive speaks volumes here.[51] Germany opposed the proposal but did not manage to win enough votes to block it at the Council. Eventually, the Council adopted the agreement drafted by the Conciliation Committee. However, the regulation was rejected by the Parliament where rapporteur Klaus-Heiner Lehne, a German, effectively sought the support of MEPs.[52] Such national cooperation is possible, as trilogue participants include representatives of the Presidency and rapporteurs representing the same Member State or political party. Research shows that if the interests of the rapporteur participating in the trilogue and the preferences of the Minister representing the Presidency are convergent, which happens quite often if the two share common political or national identity, the likelihood of finalising the legislative agreement increases markedly.[53]

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[46] *Ibid.*, p. 25; M. Shackleton, T. Raunio, *op. cit.*, pp. 177-178; H. Farrell, A. Héritier, *Formal and Informal*..., p. 592.

[47] B. Petkova, T. Dumbrovsk, *op. cit.*, p. 12.

[48] M. Kaeding, S. Hurka, *Where are the MEPs from the accession countries? Rapporteurship assignments in the European Parliament after Enlargement*, "EIPASCOPE" 2010, no. 2, p. 23.

[49] Currently, German MEPs head three of the seven parliamentary groups: *S&D* (Martin Schulz), the Greens (Rebecca Harms) and *GUE/NGL* (Lothar Bisky). They also hold unduly numerous key positions such as heads of commissions and coordinators of political groups. See: *ibid.*, p. 23; A. Kirpsza, *Duch d'Hondta w Strasburgu. Zasada proporcjonalnej dystrybucji stanowisk w Parlamencie Europejskim*, "Przegląd Politologiczny" 2012, vol. 16, no. 4.

[50] H. Farrell, A. Héritier, *The Invisible Transformation*..., p. 9; A. Rasmussen, *op. cit.*, p. 13.

[51] *Proposal for a 13th European Parliament and Council Directive on company law concerning takeover bids*, COM/95/0655 final, "Official Journal of the European Communities" of 6 June 1996, C 162, pp. 5-8, later amended.

[52] H. Farrell, A. Héritier, *The Invisible Transformation*..., p. 28.

[53] C. Reh, A. Héritier, E. Bressanelli, C. Koop, *op. cit.*, p. 34; A. Rasmussen, *op. cit.*, p. 55.

THE "DEATH" OF THE SECOND AND THIRD READINGS

The trilogues produce legislative agreements that are adopted in the initial phases of legislative procedures. In the literature of the field, they are referred to as "early agreements" because they are reached before the Parliament adopts a legislative resolution and before the Council adopts its common position (*first-reading early agreements*) or between the adoption of the resolution by the MEPs and the adoption of a common position by the Council (*second-reading early agreements*).[54] Of course, not every trilogue ends with an early agreement. However, quantitative analyses demonstrate that in recent years they often have. In the fifth term of the European Parliament (1999-2004), the adoption of 20% of legal acts at first reading and 6% at second reading was the outcome of early agreements. In the sixth term of the EP, those values amounted to 72% and 18% respectively.[55] This proves that the trilogues are exceptionally effective in securing legislative compromises.

Early agreements have led to a remodelling of the legislative process which is reflected by the complete breakdown of the OLP system of three readings specified in the Treaties.[56] This is not accidental as, under the 1999 interinstitutional agreement, the Council and the Parliament undertook to cooperate with each other "in good faith throughout the procedure with a view to reconciling their positions as far as possible and thereby clearing the way, where appropriate, for the adoption of the act concerned at an early stage of the procedure".[57] In result, the number of legal acts adopted at the second and third readings dropped notably. The last year of the sixth term of the EP (2008-2009) was the turning point. The number of regulations adopted under codecision reached its all-time high (177 legal acts)[58]. Legal acts adopted at first reading accounted for 80% of all legislative acts (16% at second reading, 4% at third reading).[59] This trend continues also after the Lisbon Treaty, which means that the EU has witnessed the informal "death" of the second and third readings.

The diktat of the first reading means that legislative proposals presented to the institutions can hardly be modified. The compromise reached by the trilogue is forwarded, in the form of a letter with amendments to the proposal, by the chair of COREPER I to the chair of the relevant parliamentary committee. The letter reads that the Council "is willing to accept that outcome, subject to legal-linguistic verification, should it be confirmed by the vote in plenary".[60] This means that the Parliament has

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[54] *Codecision and National Parliamentary Scrutiny*..., p. 12.

[55] C. Reh, A. Héritier, E. Bressanelli, C. Koop, *op. cit.*, p. 9.

[56] See: Article 294 of the TFEU.

[57] *Joint Declaration on Practical Arrangements*..., p. 1, point I.1; *Joint Declaration on Practical Arrangements*..., p. 6, point 11.

[58] R. Kratsa-Tsagaropoulou, A. Vidal-Quadras, M. Rothe, *op. cit.*, p. 10.

[59] In the years 2009-2010, the share of legal acts adopted at first reading amounted to as much as 97%, but it ought to be noted that in this period a low number of legal acts was adopted. This has been shown in Chart 3.

[60] *Joint declaration on practical arrangements for*..., p. 6.

little room for manoeuvre. Its modifying proposals might ruin the compromise and lead to the launch of a long procedure that distorts the essence of interinstitutional agreements and would violate mutual trust. Moreover, the agreements reached by the elitist representatives put the ministers and MEPs in a difficult situation: either they accept the trilogue arrangements, or they modify them, i.e. reject them and risk the lack of any legislation (*take it or leave it*). In such circumstances, the ministers and MEPs are pressed to approve of the outcomes of trilateral negotiations, even if they do not correspond to the position of the institution. Still, adopting the early agreement is a better option than unleashing criticism of failed negotiations and the consequences of the legal loophole.[61]

The reaching of early agreements before the Council and the Parliament adopt common positions together with the agreements' rigidity lead to a situation where there is no point of reference for negotiations.[62] The mandate of the Presidency is not based on the formal decision of the Council[63] while the MEPs do not have to follow the mandate of the Committee and thus representatives of both institutions have vast liberty in reaching legislative compromises. In consequence, not only trilogues but also trilateral arrangements are beyond public control. They are part of the legislative process but at closed institutional forums. Heated disputes and social consultations held at the time are mere window dressing as everything has been decided beforehand. Votes are nothing more than a ceremonious approval of the agreements reached covertly and informally.

The finalisation of legislative procedures at first reading also speeded the OLP. In 1999-2000, it took 729 days on average to adopt one legal act. In 2006-2007, only 310 days were needed.[64] This change means that there is less time for deliberation, debates with social partners and political bargaining on the final wording of the legislative proposal.[65] Some scholars note that trilogues take long time if proposals are

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[61] C. Reh, *The Informal Politics of Codecision: Towards a Normative Assessment*, paper prepared for the UACES Conference on Exchanging Ideas on Europe, University of Edinburgh, 1-3 September 2008, p. 26; A. Rasmussen, M. Shackleton, *The Scope for Action of European Parliament Negotiators in the Legislative Process: Lessons of the Past and for the Future*, paper prepared for the Ninth Biennial International Conference of the European Union Studies Association, Austin, Texas, March 31-April 2, 2005, p. 17.

[62] M. Shackleton, T. Raunio, *op. cit.*, p. 178.

[63] H. Farrell, A. Héritier, *Interorganizational negotiation*..., p. 13. Sometimes the voting is based on the informal political agreement reached by ministers.

[64] R. Kardasheva, *Legislative Package Deals in EU Decision-Making: 1999-2007*, thesis submitted to the European Institute of the London School of Economics, April 2009, p. 27; S. Hix, *Memorandum*, in: *Codecision and National Parliamentary Scrutiny*..., p. 92. In comparison to the fifth term (1999--2004), in the EP's sixth term the average time of adopting a legal act in codecision was 1.3 month shorter. See: R. Kratsa-Tsagaropoulou, A. Vidal-Quadras, M. Rothe, *op. cit.*, p. 14.

[65] J. De Clerck-Sachsse, P. Kaczynski, *The European Parliament – More Powerful, Less Legitimate?*, "CEPS Working Document" 2009, no. 314, p. 11; C. Reh, *op. cit.*, p. 14.

crucial and then there is time for discussion[66]. They, however, seem to overlook the fact that these negotiations are held *in camera* and shy away from public communication platforms and institutions.

Early agreements also entail negative consequences for democracy at the national level. The Treaty of Lisbon notably strengthened the position of national parliaments to bring the citizens of each Member State closer to the EU decision-making process.[67] Special EU affairs committees have been established at the legislatures of Member States. Their task is to monitor the government's position and arrangements made at the EU level. However, early agreements make it practically impossible for these bodies to monitor the procedures, governments and collect information on interinstitutional negotiations as key decisions are taken at informal meetings before the Council and Member States adopt common positions. Consequently, when a minister presents the national parliament with the formal decision of the Council at first reading, the outcome of its evaluation by the MPs is insignificant as everything has been agreed already.[68]

DECREASING SIGNIFICANCE OF PARLIAMENTARY COMMITTEES

The Committees of the European Parliament are bodies that play a crucial role in the legislative process and thus are sometimes referred to as the "legislative backbone" of the EP. They have the final say on the legal position of the legislature.[69] In principle, amendments put forward by the committees are accepted by the Parliament without major modifications.[70] Their role is also important in the context of democracy deficit. Their meetings are public and even broadcast live on the Internet[71]. Furthermore, documentation of their activities is publicly available which is

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[66] D. Toshkov, A. Rasmussen, *Time to Decide: The Effect of Early Agreements on Legislative Duration in the EU*, http://www.dimiter.eu/articles/codecision%20duration%2029092011.pdf, p. 19. Contrary view in: C. Reh, A. Héritier, E. Bressanelli, C. Koop, *op. cit.*, p. 32.

[67] E. Popławska, *Rola parlamentów narodowych w świetle Traktatu z Lizbony*, "Przegląd Sejmowy" 2010, vol. 18, no. 5, pp. 157-174; J. J. Węc, *The Influence of National Parliaments on the Decision-Making Process in the European Union. New Challenges in the Light of the Lisbon Treaty*, "Politeja" 2008, vol. 10, no. 1, pp. 187-208.

[68] H. Farrell, A. Héritier, *The Invisible Transformation*..., p. 8.

[69] M. Westlake (1994), *A Modern Guide to the European Parliament*, London – New York, pp. 191-192.

[70] K. Collins, C. Burns, A. Warleigh, *Policy Entrepreneurs: The Role of European Parliament Committees in the Making of EU Policy*, "Statute Law Review" 1998,vol. 19, no. 1, p. 6; S. Bowler, D. Farrell, *The Organizing of the European Parliament: Committees, Specialization, and Coordination*, "British Journal of Political Science" 1995, vol. 25, no. 2, p. 234; V. Mamadouh, T. Raunio, *The Committee System: Powers, Appointments and Report Allocation*, "Journal of Common Market Studies" 2003, vol. 41, no. 2, p. 348; G. McElroy (2006), *Committee Representation in the European Parliament*, "European Union Politics" vol. 7, no. 1, pp. 10-13.

[71] At the website of the European Parliament television channel: http://www.europarltv.europa.eu/pl/home.aspx.

particularly important as it contains materials provided by the Commission and the Council. The strong position of EP committees is a positive element in the decision-making process.

Recently, however, the status of these bodies lowered which is reflected by the gradual decline in committees' amendments adopted in plenaries. This is primarily a consequence of early agreements. An analysis of legislative proposals debated in the sixth term of the EP demonstrates that if an early agreement was reached before the committee adopted the report, on average 90% of the committee's amendments was adopted in plenary, but if the agreement was reached after the adoption of the report, the percentage of approved modifications was only 31%.[72] The most drastic drop occurred in three committees: *ECON, ENVI,* and *TRAN*, i.e. in committees that focus on areas that usually evoke the heaviest contestation of the Parliament[73]. A less dramatic drop was observed in the case of *ITRE* and *EMPL*, which might result from the socialisation and deep feeling of community observed among members of those bodies.[74] Informal compromises prevail after the adoption of the report by the committee. In the sixth term of the EP that applied to 75.2% of all early agreements.[75] This means that should there be a large number of legislative proposals, the committees cease to be the "legislative backbone" of the Parliament.[76]

However, early agreements are not the only factor that contributes to the weakening of the legislative position of EP committees. Recently, some informal mechanisms have surfaced and moved negotiations on legislative proposals outside the committee frame. The Services Directive (also referred to as the "Bolkenstein Directive") is a good example.[77] During its adoption process, two negotiation groups composed of five to six MEPs of largest political groups – EPP and PES, were established. Their members were appointed to proportionally represent the "old" and "new" EU Member States and the Member State that held the Presidency at the time (Austria). The groups met once a week to prepare a legislative compromise on the Services Directive. Finally, their proposal of amendments was presented to the plenary and not the report of the committee.[78] Another phenomenon that can

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[72] If the agreement is reached before the report is adopted, then an average of 99% of committee amendments is accepted at the plenary.

[73] R. Kratsa-Tsagaropoulou, A. Vidal-Quadras, M. Rothe, *op. cit.*, pp. 34-35; F. Hayes-Renshaw, W. van Aken, H. Wallace, *op. cit.*, p. 171.

[74] C. Neuhold, *"We Are the Employment Team": Socialisation in European Parliament Committees and Possible Effects on Policy-Making*, paper presented at EUSA Tenth Biennial International Conference, Montreal, Canada, 17-19 May 2007.

[75] N. Yordanova, *Plenary 'Amendments' to Committee Reports:...*, p. 10.

[76] A. Kirpsza, *"Legislacyjny kręgosłup" czy techniczny organ pomocniczy? Pozycja komisji Parlamentu Europejskiego w procesie legislacyjnym*, "Polski Przegląd Dyplomatyczny", 2011, no. 4.

[77] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on the services in the internal market, "Official Journal of the European Union" of 27 December 2006, L 376, pp. 36-68.

[78] P. Settembri, C. Neuhold, *op. cit.*, p. 145.

be observed is the *ad hoc* establishment of informal structures composed of MEPs and representatives of non-parliamentary interest groups. The Bolkenstein Directive serves as a good example here as well. In order to reach a compromise on this issue, the EMPL appointed a Trade Union Intergroup consisting of one to two MEPs from each and every parliamentary group and delegates of the European Trade Union Confederation (ETUC). Arrangements reached within the Trade Union Intergroup had major impact on the final version of the committee's report, which indicates that the autonomy of the committee gets limited.[79]

The above developments that limit the position of the committee generate a number of negative consequences for the legislative process. Firstly, they give trilogue participants increasingly more options to escape the supervision of the Parliament because if the proper legislative process is moved outside the legislature, the committees are not capable of controlling and sanctioning the *relais actors*. Secondly, they disrupt the consensual nature of the decision-making process at the Parliament. Research shows that the average majority by which reports are adopted in committees amounts to about 95%.[80] This means that the adopted amendments are almost always legitimised by all EP groups. The consensus allows smaller groups to participate in the legislative process and weakens the diktat of the EPP-S&D coalition[81] facilitating deliberations and not the Westminster democracy model[82] founded on rivalry between major political groups. However, moving negotiations outside the committee to the elitist trilogues does entail a consensus breakdown because the commission's amendments are generally not accepted in plenaries. They lose to modifications agreed upon at trilateral meetings. In result, the position of the Parliament does not reflect the views of the proportional representation of all MEPs but is the resultant of bargains between three largest parliamentary groups (EPP, S&D and ALDE) that form victorious coalitions.[83] Thirdly, the degradation of the committees' position causes expertise problems for MEPs. Since most EU legislation is of technical and regulatory nature[84], MEPs need opinions of experts to take rational decisions. Previously, expertises were provided by the committees that drafted them in coop-

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[79] *Ibid.*, p. 143.

[80] *Ibid.*, p. 137; P. Settembri, *Is the European Parliament Competitive or Consensual... "And Why Bother"?*, paper presented to the Federal Trust Workshop 'The European Parliament and the European Political Space', 30 March 2006, London, p. 19.

[81] S. Hix, A. Kreppel, A. Noury, *The Party System in the European Parliament: Collusive or Competitive?*, "Journal of Common Market Studies" 2003, vol. 41, no. 2, p. 318.

[82] See: A. Lijphart (1984), *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-one Countries*, New Haven; Idem (1999), *Patterns of Democracy: Government Forms and Performance in Thirty-six Countries*, New Haven.

[83] See: S. Hix, *What to Expect in the 2009-14 European Parliament: Return of the Grand Coalition?*, "SIEPS Report" 200, no. 8, p. 11; *Voting in the 2009-2014 European Parliament: Who Holds the Power?,* "Votewatch Report" July 2011, http://www.votewatch.eu/blog/wp-content/uploads /2011/07/votewatch–report-july-2011-who-holds-the-power.pdf, p. 4.

[84] Regulatory and administrative proposals constituted 55.7% of all legislative proposals presented by the Commission in the years 1999-2007. See: R. Kardasheva, *Legislative Package Deals*..., p. 116.

eration with public organisations, having listened to the parties concerned, holding talks with specialists or tasking EU officers with drafting such reports.[85] When trilogues take decisions, MEPs, who do not have access to trilateral negotiations, are not provided with the required expertise and that puts them in a difficult negotiation position especially while negotiating with the Council and the Commission, which have a large group of specialists at their disposal (employees of the General Secretariat of the Council and employees of the Directorates-General at the Commission). Fourthly, the exclusion of an EP committee also leads to democracy deficit as the debates open to the public are held by committees and it is the committees that stay in touch with other EU institutions.

The Parliament attempted to combat these phenomena. In 2004, it adopted recommendations on good practices in codecision which strengthened the supervisory functions of the committees over trilogue participants.[86] These, however, were not obligatory and brimming with such words as "should" and "may", and were not universally implemented. Further attempts to introduce reforms were made in 2009, when the Rules of Procedure of the European Parliament were revised under the Corbett report. The reform consisted in adding Annex XXI to the EP Rules of Procedure. The new provisions included the Code of Conduct for Negotiating in the Context of the Ordinary Legislative Procedures that was drafted by the parliamentary reform working group.[87] The Annex granted four significant powers to the committee. Those rights facilitated controlling the trilogues and limiting the independence of *relais actors*. Firstly, the committee was granted the status of the EP competent body in trilateral negotiations which decides on entering a trilogue (point 1 and 2 of the Code). Secondly, the committee could also specify the composition of the EP's negotiation team participating in the trilogue. Generally, the composition of a negotiation team should be a politically balanced representation of all EP groups (point 3 of the Code). This change was significant, as previously it was the political group coordinators who took decisions on the team composition.[88] Thirdly, before the trilogues, the committee was to adopt a mandate for the EP negotiation team the basis of which would be the amendments adopted in the commission or in the plenary and the pri-

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[85] C. Neuhold, *The "Legislative Backbone" Keeping the Institution Upright? The Role of European Parliament Committees in the EU Policy-Making Process*, "European Integration online Papers" 2001, vol. 5, no. 10, pp. 8-9.

[86] *First and second reading agreements: guidelines for best practice within Parliament*, http://www.europarl.europa.eu/code/information/guidelines–en.pdf. The guidelines have been discussed in: A. Héritier, C. Reh, *Codecision and Its Discontents:*..., pp. 22-23.

[87] *Annex XXI:* Code of conduct for negotiating in the context of the ordinary legislative procedures, in: Rules of Procedure of the European Parliament, sixth term – January 2012 (hereinafter referred to as "the Code"). The revision entered into force at the beginning of the seventh term of the European Parliament.

[88] A. Héritier, C. Reh, *Codecision Transformed: Informal Politics, Power Shifts and Institutional Change in the European Parliament*, paper prepared for the UACES Conference on Exchanging Ideas on Europe, Ecole Supérieure des Sciences Commerciales d'Angers, 3-5 September 2009, p. 25.

orities and a time limit for the negotiations as specified by the committee (point 4 of the Code). Fourthly, the commission was authorised to control the trilogue. After each trilateral meeting, the EP negotiation team was to inform the committee about the negotiation outcomes and provide a draft agreement that was to be examined at the committee's sitting. The committee was also entitled to update the mandate of the EP negotiation team if further negotiations were required (point 6 of the Code).

It is difficult to state whether the above changes have boosted the committee status. First of all, some provisions of the Code contradict the Rules of Procedure of the European Parliament. In the Code, it is stipulated that the decision on entering trilogue negotiations is taken by "broad consensus" within a committee, while Article 70, Par. 2 of the Rules of Procedure states that a majority vote is required. The same provision in the Rules of Procedure foresees that before a trilogue, the relevant commission should adopt the "mandate, directions **or** priorities", while the Code mentions the defined mandate **and** priorities (point 4.1 of the Code). The Code also introduces the EP negotiation team of enigmatic composition which is contrary to the provisions of the Rules of Procedure that grant significant and independent legislative rights to the rapporteur. Moreover, the Code lists numerous exceptions that significantly limit the position of the committees. For example, if it is impossible for a committee to examine the draft agreement because of its timing (fast agreement ending with the committee's vote or an urgent agreement), "the decision on the agreement shall be taken by the rapporteur and the shadow rapporteurs, if necessary together with the committee chair and the coordinators" (point 6.2 of the Code), i.e. the committee as a whole hardly has a say there. Similarly, when trilogues are held before the committee's vote, the committee does not specify the mandate, only provides guidelines to the EP negotiation team (point 4.2 of the Code). In the Code expressions like "as a general rule", "as far as possible", "in the exceptional case", "if this is not possible" and "if necessary" are used and they allow for some freedom of interpretation. Let us take the following sentence as an example: "As a general rule, the amendments adopted in committee or in plenary shall form the basis for the mandate of the EP negotiating team". This means that in non-defined individual cases this rule does not have to be applied. It is also worth noting that the Code does not consist of imperative sentences but of guidelines, e.g. "The decision [of the committee – author's note] to seek to achieve an agreement early in the legislative process shall be a case-by-case decision, taking account of the distinctive characteristics of each individual file" (point 2 of the Code). This means that the committee does not have to examine each and every proposal to decide about the EP's participation in the trilogue but may adopt the general rule of participation in every trilogue. To sum up, the Code does not only fail to solve many of the the discussed problems but it largely contributes to the informality of the trilogues and all their negative consequences for EP committees.[89] On the one hand, the above poses a risk of "geometrical legisla-

[89] A. Héritier, C. Reh, *Codecision Transformed:...*, p. 28.

tion", i.e. a committees may reach its internal compromise on the right to supervise trilogues and another committee will not be capable of agreeing on the supervision. In the latter situation the role of the *relais actors* gets strengthened. On the other hand, sustaining the trilogue informal status entails the threat of path-dependence[90], i.e. the irreversible and enrooted actual degradation of the committees' legislative functions.

THE COUNCIL OF MINISTERS WITHOUT MINISTERS

From the above it follows that the Parliament is excluded from many EU areas, and, in result, it is the Council that is the most important legislator in the EU.[91] It takes part in all legislative procedures and in some cases e.g. consultation or information, it holds formal legislative monopoly. Full access to information about the decision-making process that takes place in this institution is crucial for transparency of EU institutional law. It is not simple as it depends on the Council's internal regulations on decision-making.

Although formally, the Council is composed of representatives of ministries, it actually has a complex organisational structure that consists of three levels: working groups (lowest level), special committees (COREPER and SCA – medium level) and ministers (highest level). The Council has developed its specific decision-making system reflected in the agenda structure of its meetings. On the agenda there are points A, B, I, and II. Under point A are legislative agreements agreed at lower levels which are adopted by ministers automatically and without further discussion. Under point B are proposals that remain problematic or unresolved after deliberations and negotiations at the two lower levels of the Council decision-making process and they are subject to ministerial debates and decisions.[92] Taking into consideration that only ministerial meetings are open to the public, the society can only control legislative proposals adopted in the latter case. If a legislative proposal is agreed at the lower levels of the Council decision-making process, civic monitoring is impossible as meetings of working groups and COREPER are held *in camera*, and documents they examine are in general confidential.

The problem is that the direct and actual involvement of ministers in the legislative process at the Council keeps decreasing. In 1994, the ministers debated 61%

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[90] P. Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, "American Political Science Review" 2000, vol. 94, no. 2, pp. 251-267.

[91] See: S. Hagemann, B. Høyland, *Bicameral Politics in the European Union*, "Journal of Common Market Studies" 2010, vol. 48, no. 4, pp. 811-833.

[92] The division of legislative work at the Council has been presented in a simplified version here, as in practice it is teeming with exceptions. See: F. Häge, *Politicising Council Decision-Making: The Effect of European Parliament Empowerment*, "West European Politics" 2011, vol. 34, no. 1, pp. 18-47; idem, *Who Decides in the Council of the European Union?*, "Journal Common Market Studies" 2008, vol. 46, no. 3, pp. 533-558.

of all proposals. In 2006, this percentage fell to a mere 15%. This means that the increasingly heavy burden of reaching common positions at the Council has been handed over to working groups and COREPER. In last five years (2003-2007), decisions on as much as 76% of legislative acts were *de facto* reached in those lower bodies (points A on the ministerial agenda). Consequently, the possibilities of supervising the legislative procedure have been significantly limited. The procedure is increasingly non-transparent which increases the democratic deficit and makes room for uncontrolled lobbying of big European companies and conglomerates.

Apart from impacting democratic procedures, activities of the "Council of Ministers without ministers" have other consequences. The dominance of lower-level entities, especially working groups composed of experts and not politicians or diplomats, leads to technocratisation of the EU law.[93] Legislative agreements reached at that level are often overregulated, complicated and incomprehensible for average citizens. The complicated nature of the EU law boosts the significance of lawyers and linguists. Their assistance in resolving abstract problems is absolutely indispensable but, on the other hand, it allows them to use their authority and expertise to manipulate the interpretation of the new law according to their own preferences. Sociologists increasingly point to the existence of the so-called juridical (social) field[94] in the EU, i.e. a highly-organised, professional and isolated group of legalists that hold symbolical authority over knowledge and procedures and thanks to it they can "colonise" the non-judicial world.[95] The example of the role of the Legal Service of the Council General Secretariat in preparing treaties and legal acts supports this thesis.[96]

CONCLUSIONS

In this article, at least six legislative problems which the EU will have to solve, have been identified. The first one is the observed exclusion of the European Parlia-

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[93] A. Harcourt, C. Radaelli, *Limits to EU Technocratic Regulation?*, "European Journal of Political Research" 1999, vol. 35, no. 1, pp. 107-122; W. Wallace, J. Smith (1995), *Democracy or Technocracy? European Integration and the Problem of Popular Consent*, "West European Politics", vol. 18, no. 3, pp. 137-157.

[94] P. Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, "Hastings European Law Review" 1986, vol. 38, no. 5, pp. 805-835.

[95] A. Stone Sweet, *Integration and Constitutionalism in the European Union*, in: A. Cohen, A. Vauchez (ed.) (2007), *La Constitution Européenne. Elites, Mobilisations, Votes*, Bruxelles, pp. 12-13.

[96] See: D. Beach, *The Unseen Hand in Treaty Reform Negotiations: The Role and Influence of the Council Secretariat*, "Journal of European Public Policy" 2004, vol. 11, no. 3, pp. 408-439; T. Christiansen, S. Vanhoonacker, *At a Critical Juncture? Change and Continuity in the Institutional Development of the Council Secretariat*, "West European Politics" 2008, vol. 31, no. 4, pp. 751-770; M. Mangenot, *L'affirmation du Secrétariat général du Conseil de l'Union européenne: les transformations du rôle d'une institution non codifiée*, "L'institutionnalisation de l'Europe", Table-ronde no. 5, VIIe congrès de l'Association française de science politique, Lille, 18-21 septembre 2002.

ment from legislative procedures. Although the Lisbon Treaty expanded the legislative competences of the EP, it also increased the number of areas where the EP has no formal authority to roughly 37%. This applies especially to the former second (CFSP) pillar and partly to the third pillar, as well as to numerous important elements of first pillar policies. In result, in these areas legislation has been monopolised by the Council, access to information is hardly possible, democratic control of the decision-making process is limited, and the monitoring capacity of national parliaments is provisional.

The second challenge is the illusory prevalence of the ordinary legislative procedure (OLP). Although after the entering into force of the TL about 90% of all legislative proposals have been adopted under this procedure, a more thorough analysis reveals that the OLP is foreseen in 46% of primary law provisions. The remaining provisions mention different legislative schemes, whereby as much as 41% of articles concern consultation and information, where the Parliament's position is weak. Both those procedures concern areas that are characterised by a low frequency of regulation, nevertheless they are very important. There the monopoly of the Council is less far reaching and the public has more possibilities to control the procedure. Still, the legislative impact of the Parliament has been significantly limited.

The third issue refers to the advancing de-formalisation of the legislative process. It is reflected in the composition of trilogues, i.e. informal meetings of representatives of the Council, Parliament and Commission at early stages of legislative procedures with a view to reach a legislative agreement. Although they foster cooperation and interdependence between the participating institutions, they also yield revolutionary side effects: they move negotiations outside the said institutions, allow only the elite to access the legislative process by granting a small group of representatives the function of "legislative intermediaries", introduce asymmetry between members of the Council and the Parliament in shaping EU legislation, reduce transparency, generate problems in coordination of and control over trilogue negotiators, and increase the significance of national bonds between representatives of the Council and the Parliament in the adoption process. These phenomena derail the formal picture of the legislative procedure that follows from treaties. Consequently, the procedure becomes unpredictable and difficult to monitor.

The fourth issue is the acceleration of legislative procedures which is reflected by the adoption of early agreements and the "death" of the second and third readings. Members of the Council and Parliament have become politically and formally limited in their capacity to present amendments to legislative proposals. Public control over the legislative process at the plenary level of both institutions has also been reduced. The time for deliberations, debates with social partners and political bargaining on the final version of a proposal has been notably reduced. The right of national parliaments to monitor the emergence of law has been blocked.

The fifth challenge is the degradation of the role of EP Committees in the legislative procedure. If after the adoption of the report by the committee, a trilogue is held and produces an early agreement, which is often the case, the percentage of committee's amendments adopted at the EP plenary falls from 90% to 31%. The Parlia-

ment also impedes its committees by establishing informal *ad hoc* groups composed of parliamentary and non-parliamentary representatives whose goal is to secretly work toward difficult legislative compromises without the involvement of committees. Moreover, EP committees keep losing their influence on the legislative process because of trilogies, as the composition and negotiation framework of the latter are in the hands of group coordinators. The weakening of the committee's status means that the participants of trilateral meetings escape the authority of the Parliament, which disrupts the consensual manner of adopting amendments at the European Parliament. Furthermore, the legitimisation of amendments by all, even the smallest parliamentary groups decreases; MEPs do not have access to expert opinions which puts them in a difficult situation while negotiating at trilogues and, finally, democratic deficit grows. The Parliament tried to reduce the impact of the above changes by reforming the 2009 Rules of Procedure. However, it seems that these efforts will not have much impact on the standing of the committees. The regulations are too open and blurry. What is more, informal norms and relations have become embedded in the EU legislative procedure and therefore they are difficult to uproot.

The sixth legislative challenge concerns the significantly lesser involvement of ministers in the legislative process. In 2003-2007, about 76% of legislative proposals were agreed at lower levels of the Council's organisational structure and ministers adopted them only formally, i.e. without discussing them. This phenomenon leads to technocratisation of the EU law, the increasing significance of lawyers and linguists and to the deepening democracy deficit.

Those phenomena remodel the legislative process, relations between institutions as well as relations between institutions and EU citizens. The European Union should therefore quickly respond to these challenged by developing appropriate formal and informal rules of procedure. If actions are not taken, these disadvantageous practices might become deeply enrooted in the EU and at some point they might prove irreversible. This would be an enormous problem for the institutional and public control of the legislative process.

ABSTRACT

The purpose of the article is to identify the legislative challenges of the European Union that became apparent after implementation of the Treaty of Lisbon provisions. At least six such threats are diagnosed. Firstly, the Treaty of Lisbon has deepened the European Parliament legislative exclusion by increasing the number of areas where it does not have any formal powers. Secondly, more than half of the Treaty bases for enacting legislation includes procedures other than the ordinary legislative procedure which relatively weakens the position of the Parliament. Thirdly, the habit of trilogues – informal meetings between the Council, Commission and Parliament in the early stages of the legislative procedure generates serious consequences for the status of institutions and democracy in the EU. Fourthly, the custom of so-called early agreements results in almost complete disappearance of the second and third reading and quickens the decision-making process at the expense of its transparency. Fifthly, trilogues and early agreements degraded the role of the European Parliament's committees in legislative proceedings. Finally, there is a declining involvement of ministers in the legislative process, resulting in technocratic and secret decision making.