



Statewatch analysis

European Parliament: Abolish 1st [and 2nd] reading secret deals - bring back democracy “warts and all”

by Tony Bunyan

As the European Parliament starts its new term major questions hang over the way it is doing its job. In the last parliament over 80% of new measures were agreed in closed “trilogue” meeting with the Council of the European Union (the 27 governments). This practice raises fundamental issues of transparency and openness.

Since 2005 the European Parliament (hereafter referred to as the “parliament”) acquired powers of codecision (both have to agree on the final text) with the Council of the European Union (the 27 governments) on most immigration and asylum measures. A *Statewatch* analysis in 2006, “Secret trilogues and the democratic deficit” (*Statewatch* vol 16 no 5/6), looked at “1st reading” deals between the parliament and the Council (plus European Commission) on measures before the Civil Liberties Committee (LIBE).[1] Then all eight immigration and asylum measures had been negotiated and agreed in secret trilogue meetings.

With the end of the 2004-2009 parliamentary term it is now possible to assess what happened over the whole period and how the parliament reacted to criticisms of 1st reading “deals” reached in secret - and to see what changes are planned to open up these closed meetings.

Moreover, if the parliament gets the same co-decision powers over police and judicial measures under the Lisbon Treaty will the same process happen with decision-making removed from public scrutiny?

Codecision and legitimacy

Prior to the Amsterdam Treaty (which came into effect in 1999) codecision measures could only be concluded at second reading or after the full conciliation procedure - under Amsterdam it became possible to conclude at first reading.

“Trilogues” are intended for an agreement to be reached before the Council adopts its “Common Position” or the parliament adopts its formal opinion. Fast-track

trilogues were originally intended, or rather legitimated, as being for non-controversial or highly technical measures - a practice that was soon to extend to highly controversial measures and can now be used for any co-decision measure on the grounds of "efficient" lawmaking. The aim of these secret informal trilogues is to by-pass the formal machinery in place on codecision measures.

It is very difficult for the people of the EU to follow and understand what is being done in their name. The "power brokers" from the two big parties can exercise hidden and often decisive influences on the "compromise" text - and the smaller party groups are marginalised. As Rasmussen and Shackleton note the power of "a small number of influential negotiators" may lead to the parliament losing control of the process.[2]

The parliament committees and plenary sessions (where all party groups and MEPs are represented) are not allowed to change a "dot or comma" of the "compromise" position agreed in trilogue meetings. Thus the open parliamentary meetings do not have a meaningful debate. The parliament negotiators are tied in a "deal" to deliver the votes to push through the "deal" agreed in secret negotiations.

Measures are agreed by the parliament through a number of different codecision procedures. First, there are 1st reading agreements when a deal is reached on a text between the Council and the EP's rapporteur(s) through secret trilogue meetings which then have to be voted through by committee and the plenary session without amendment. These deals are concluded *before* the Council agrees its "Common position" - in effect, when formally presented to parliament the "Positions" of the Council and the parliament are the same.

A 1st reading vote requires a majority of MEPs present to vote in favour. The next stage is a 2nd reading vote in plenary session where an *absolute majority of the total number* of MEPs have to vote in favour (an unusual formula which puts pressure on getting measures through on first reading). As we shall see there are now an increasing number of occasions when what are called "early 2nd reading" deals are agreed between the Council and the parliament. This can be followed by a 3rd reading and if this fails a Conciliation Committee is set up with a defined membership and timetable.

Codecision: immigration and asylum measures

Between 1999-2004 the parliament was only "consulted" on immigration and asylum. This meant it adopted a position, then sent it over to the Council who simply ignored it. At the time many MEPs said that when the parliament had codecision powers it would do a proper job of defending the rights of refugees and asylum-seekers. In 2005 the parliament obtained codecision powers with the Council on nearly all new immigration and asylum measures.

A survey by Professor Steve Peers (University of Essex) shows the following over the 2005-2009 period:

- 27 codecision measures were considered by the parliament [3]
- 19 measures: adopted by 1st reading deals with the Council

- 2 measures: a deal had been reached with the Council but not formally adopted
- 5 measures: EP 1st reading vote taken. Not known if there is going to be an early second reading deal.
- 1 measure: only one measure was agreed at 2nd reading in the parliament.

See: <http://www.statewatch.org/news/2009/aug/first-reading-ep-deals.pdf>

Most of these measures concern issues with significant implications for peoples' rights and freedoms. They include: short-term visas for researchers; Border Code for crossing of borders by persons; regime for local border traffic at external borders; Schengen Information System II (SIS II); Rapid Border Intervention Teams; the Visa Information System; Regulation on passport security measures (ie, biometric passports); Common rules for expulsion (the "Returns Directive"); Employer sanctions for "irregular" migrants; and a common Code on Schengen visas.

On one of these measures, the Border Code, Professor Steve Peers commented, that having examined the documents, it is true the parliament had some success in getting "a number of its modest amendments accepted" but:

"more radical changes were either rejected by the Council or not tabled at all by the EP."

Report to parliament on co-decision

In July 2009 an Activity Report, by three Vice-Presidents of the parliament, was prepared on co-decision.[4]

The Foreword of the report highlights the main issues. Over the five year period:

"The way the co-decision procedure works changed drastically during this term. 72% of the files were concluded at 1st reading and a further 10.8% at early second reading with the trend being a constant increase in early agreements."

While this indicates that the parliament's decision-making is "efficient" and shows:

"the institution's willingness to cooperate"

there had been concern about the transparency of trilogues, their undemocratic nature, lack of resources for rapporteurs and the quality of legislation.

Do 1st reading agreements get the "best deal possible", are they efficient as they increasingly take more time and only lead to a "very modest reduction in the average length of procedures".

In the last five year term covering all parliament business:

- 72% of files were concluded in 1st reading
- a further 10.8% were approved without amendment at "early second reading agreement"

- just 12.1% went to “classical” 2nd reading votes and [5]
- just 5.1% went to the Conciliation Committee

The report notes that “committees seem to have developed different cultures and practices” on completing files. In the last term, 2004-2009, the Civil Liberties Committee (LIBE) 84.2% went through on 1st reading deals, 15.8% at 2nd reading (including 2nd reading trilogue “deals”, none went to 3rd reading or conciliation.

It seeks to explain this general trend to 1st reading deals: i) there is the need for only a simple majority in parliament; ii) the familiarity of the “players” (Council and parliament) means “they start talking to each other routinely very early in the procedure”; iii) a factor may be a higher number of “uncontroversial” proposals (certainly not true of the LIBE committee); iv) since enlargement in 2004 the Council Presidency finds it increasingly difficult to find a common position among the 27 governments and the early parliament input “facilitates consensus-building” (ie: it uses the parliament to put pressure on Member States) and, finally:

“Council Presidencies seem very eager to reach quick agreements during their Presidencies and they seem to favour 1st reading negotiations for which arrangements are much more flexible than in later stages of the procedure.”

Another development, which started in the first half of this parliamentary term, was the “formalisation” of “early-second reading agreements”. Like 1st reading deals they are sorted out in secret trilogues:

“now the common position is increasingly approved by Parliament because it has negotiated it with the Council in the phase between the 1st reading of Parliament and the Council’s adoption of its common position.”

These negotiations are formalised by a letter from the chair of the responsible committee to the president of COREPER indicating a:

“recommendation to the plenary to accept the Council common position without amendment.”

An earlier mid-term report (2007) states:

“While, formally speaking, procedures concluded in this way are concluded at second reading stage, in reality a political agreement has already been reached before Council completes its first reading.”

How has parliament reacted?

The report recognises criticisms of these deals both inside the parliament and outside (House of Lords Committee on the EU and *Statewatch*) particularly concerning legitimacy, transparency and “visibility” (the media, it says, were uninterested in “plenary sessions without any remaining controversy”).

The Working Party on Parliamentary Reform’s report of October 2007 made a number of recommendations including a “cooling off period” between the vote in committee on 1st reading deals and the vote in the plenary session. Even this modest proposal has “not been consistently applied”.

More substantially the Code of Conduct for Negotiating Co-decision Files (September 2008, incorporated in the Rules of Procedure, 6 May 2009) says that a committee *may* decide on the negotiating team and its mandate.[6] And, belatedly, documents used in the trilogues should be made available to the negotiating team.

The Activity report says that the Joint Declaration on co-decision between the three institutions needs to be revised (13 June 2007) as many of its provisions are not sufficient. In particular, its notes regarding transparency:

“On the documents used for 1st and 2nd reading negotiations the declaration is silent.” (the Joint Declaration between the three institutions)[7]

The Vice Presidents’ report recommends improving the transparency of co-decision procedures and facilitate the work of Members:

“Every document related to a specific codecision procedure which is available in Parliament should be clearly marked with the COD-number identifying the procedure. This would allow - by means of an extended legislative observatory (which should also include data from the other institutions) - the direct identification of all documents related to a specific codecision procedure like studies, briefing notes, contributions of experts at hearings, proceedings of hearings, official letters (including those confirming an agreement), streamlined committee meetings, compromises negotiated with the Council, press releases, etc.”

This recommendation has yet to be agreed.

Where do civil society and the public come into the picture?

The current position of the parliament - after a number of reports - seems to be mainly concerned with improving its internal functioning so that it is better able to negotiate in secret trilogues and pays little attention to the transparency of the proceedings and openness (access to the documents under discussion) so that civil society and the public can follow what is going on. The report of the Vice-Presidents proposes the creation of an “extended legislative observatory” which would contain all the documents as well as other relevant background. This has yet to be discussed by the new parliament and until more detail is available it is not certain that these documents will be publicly available - the existing codecision rules only commit to making documents available *after* a measure has been adopted.

Conclusions

The view of the Council (the 27 governments) on access to 1st and 2nd reading documents was summed up by Mr Hubert Legal, of the Council Legal Service when

he appeared before the House of Lords Select Committee on the EU on 2 June 2009:

“During ongoing legislative procedures there is not a general right for the public to access documents if the fact of giving access would undermine the institutional decision-making process.” [9]

He goes on to say that when “the procedure is completed” (ie: the contents of a measure are agreed) public access is given. Thus the public and civil society have no right to know what is being discussed before it is adopted.

Just think of the uproar there would be if national parliaments behaved in this fashion. Imagine a national government publishing a Bill then negotiating in secret with *rappoteurs* from the other parties before presenting the full parliament with a *fait accompli* to be adopted without changing a “dot or comma”.

1st reading trilogue “deals” are held in secret where there is no record (Minutes) and no documents publicly available. The process removes meaningful debate, disagreements, options, votes from both the Committee meetings and the plenary session - both of which are open and the documents discussed are publicly accessible. The practice pre-empts a wider debate in parliament, the media and society at large.

The modest proposals agreed on 1st and 2nd reading deals may meet some of the needs of MEPs in the negotiations with the Council. However, they offer little or nothing to open up this procedure to civil society and the public.

The Council of the European Union (with the tacit support of the UK and other national governments) seems intent on trying to justify a process of decision-making reminiscent of colonial times when it was considered dangerous if the people knew what was being decided in their name.

If national parliaments were operated in the same way we would have a “fig-leaf” of a democracy. Why is it acceptable at the EU level?

One solution is to: i) make all the documents discussed available to the public as they are circulated; ii) published Minutes from 1st reading meetings; iii) publish a full transcript of the meetings as they happen and iv) introduce a “cooling off” period between the end of negotiations and the vote in Committee of at least 12 weeks so that national parliaments, civil society and the public can read, discuss and, if they wish to, present their views to the parliament. Detailed suggestions for reforms of this nature has been put forward as part of a Statewatch agenda for openness, transparency and democracy in the EU.[10]

The second, and more obvious, solution is to abolish 1st (and 2nd) reading deals and have open, transparent debates in the Committee and plenary meetings of the parliament.

Respect for the European Parliament has never been more fragile with the lowest ever percentage of people voting in the June 2009 election since the parliament was created, just 43%.

To gain respect from the people of Europe it has to cast aside the often repeated mantra of the need for “inter-institutional loyalty”, that is “loyalty” is to the Council (the 27 governments) and the Commission. Its primary loyalty would then be to the people who elected it.

Footnotes

1. See Analysis online:

<http://www.statewatch.org/analyses/no-64-secret-trilogues.pdf>

2. The scope for action of European Parliament negotiators in the legislative process: lessons of the past and for the future, Anne Rasmussen and Michael Shackleton, 2005.

3. In all there were 35 measures involving 1st reading agreements, eight were technical measures. See:

<http://www.statewatch.org/news/2009/aug/first-reading-ep-deals.pdf>

4. Activity Report: 1 May 2004 to 13 July 2009 (6th parliamentary term) presented by three Vice-Presidents of the parliament:

<http://www.statewatch.org/news/2009/sep/ep-activity-report-2004-2009.pdf>

5. “Classic” second reading agreements i.e. second readings in which the Parliament adopts amendments to the Council’s common position which have been agreed in advance with the Council.

6. See: <http://www.statewatch.org/news/2009/may/ep-corbett-rev-rules-of-proced.pdf>

7. See: <http://www.statewatch.org/news/2009/jul/ep-jt-cecl-on-codecision-jun-07.pdf>

8. See: <http://www.statewatch.org/news/2009/jun/eu-com-stockholm-prog.pdf>

9. House of Lords Paper 105, 21.7.09.

10. See: <http://www.statewatch.org/analyses/proposals-for-greater-openness-peers-08.pdf>

Tony Bunyan, September 2009

APPENDICES

Appendix 1: Report on codecision by UK parliament

The UK House of Lords Select Committee on the European Union published a report on “Codecision and national parliamentary scrutiny” in July 2009. As usual it is a

thorough and detailed report with evidence from the European parliament and the Danish, Finnish, Swedish, German, French and Irish parliaments.

Its concern is the lack of up-to-date documents given to national governments when 1st and 2nd fast-track trilogues take place. Too often in the past the parliament found itself looking at the proposal from the European Commission when the discussions in the Council and between the Council and the European Parliament had already made substantives changes.

The report says there had been a “tide of criticism” of the Council’s lack of transparency because “there was no public access to trilogues, nor to the discussions at which the mandates for informal trilogues are agreed.”

The Committee’s Conclusions say that informal trilogues may speed up legislation but they make effective scrutiny by national parliaments “difficult” for two reasons. First, trilogues are “informal and confidential” and therefore difficult to follow and comment on. Second, the Member State holding the Council Presidency tends not to share its position (worked out with the permanent General Secretariat of the Council) with other governments. The result is that:

“The increased use of informal trilogues to the point that they are now the primary form of negotiation between the European Parliament and the Council has magnified the difficulties we face.. Should the Lisbon Treaty come into force, these difficulties will be magnified [by new areas of codecision].”

Secret trilogues between the Council, the European Parliament and the Commission are usual preceded by meetings which are “not trilogues” but are equally informal and unrecorded “bilateral” meetings between the Council Presidency and the Chair of the relevant European Parliament Committee.

The discussion on “LIMITE” documents (which covers thousands and thousands of Council documents every year) is unreal. Evidence to the Committee from the Council’s Legal Service, presented by Mr Hubert Legal, who said though LIMITE is not a security classification it was a “distribution marking”. He emphasised that Council document 5847/06 states that LIMITE documents may only be given to national governments and the European Commission and “they may not be given to any other person, the media or the general public without specific authorisation.” Moreover: “LIMITE documents must not be published, for reading or downloading, in the Internet on a website”. Authorisation to make them public may “only” be made by “competent Council officials” and national governments “may not themselves decide to make LIMITE documents public”. Even though in oral evidence Mr Legal said it was up to national governments to decide whether to release them to their parliaments.

The legend of King Canute trying to stop the tide coming in spring to mind. Over 70% of the documents on the Council’s own public register are online with the full-text - and they are all LIMITE documents. Across the EU hundreds of LIMITE documents which are in circulation and, in the interests of democratic debate, are widely re-circulated. And the Brussels press are regularly given LIMITE documents by the Council and the Commission. Basically the Council wants to control the

release of information which Mr Legal spelt out as meaning: 1) Opinions of the Legal Service - despite the European Court of Justice ruling on the *Turco* case last year that Legal Opinions on legislation could be released in “the public interest” but not that on a pending legal case; 2) where documents contain the “views” of national governments in drafting new laws - we are not allowed to know what our governments are doing - a view which is likely to face a legal challenge soon; and 3) “drafting proposals”, including all the documents in the secret trilogue meetings.

In a classic statement to the Committee Mr Legal said:

“If the consequence of a document being given to a parliament is that it becomes immediately and automatically accessible to the general public then it is no longer LIMITE.”

The House of Lords Committee wants to be kept informed at every stage of secret trilogues and get access to all LIMITE documents as they are sent to UKREP (the UK permanent delegation in Brussels) and takes note of the French parliament which has its officials based in the French delegation in Brussels.

The House of Lords EU Committee is rightly concerned to ask for full access to the documents being discussed so that it can effectively carry out its job to scrutinise proposing legislation before it is adopted. However, all the arguments it makes for parliaments to be fully informed apply equally to the right of civil society and citizens to have the same information so that they can discuss, debate and, if necessary, make their views known.

It was perhaps logical that as the European Parliament was given equal powers of codecision with the Council - after the Amsterdam Treaty came into effect that the Council would seek to claw back the increased powers of the parliament’s committees and plenary sessions via secret, “informal”, unrecorded and cosy discussions.

See report: <http://www.statewatch.org/news/2009/jul/eu-hol-codecision-nat-scrutiny.pdf>

Appendix 2:

Judgment of the European Court of Justice in the *Turco* case

“The transparency of the legislative process and the strengthening of the democratic rights of European citizens are capable of constituting an overriding public interest which justifies the disclosure of legal advice.... The Court takes the view that disclosure of documents containing the advice of an institution’s legal service on legal questions arising when legislative initiatives are being debated increases transparency and strengthens the democratic right of European citizens to scrutinise the information which has formed the basis of a legislative act.” (Court press release) and:

“As regards, first, the fear expressed by the Council that disclosure of an opinion of its legal service relating to a legislative proposal could lead to doubts as to the lawfulness of the legislative act concerned, it is precisely openness in this

regard that contributes to conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in them by allowing divergences between various points of view to be openly debated. It is in fact rather a lack of information and debate which is capable of giving rise to doubts in the minds of citizens, not only as regards the lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process as a whole.”
(Judgment)

Appendix 3

I have often argued that the justice and home affairs *acquis* is “built on sand”. This is because each era in the construction of the *acquis* builds on and extends its predecessor. Thus the Recommendations, Conclusions, Resolutions (“soft law”) from the Trevi era (1976-1993) fed into and was built on by the Maastricht era (1993-1999) as did the Amsterdam era (1999-ongoing) plus the incorporated Schengen Agreement. What is significant about this *acquis*, comprising some estimated as 1,600 plus measures, is that all the measures were adopted without the European Parliament having the power of codecision - except for the tiny number of measures discussed in this article. Nor was the influence of national parliaments of much significance. On rare occasions, a handful, civil society managed to limit some of the more outrageous proposals through amendments and/or to put off decisions.

Nor have there been in place post-legislative scrutiny procedures - which could examine how laws have been implemented, conduct inquiries into broad, overarching issues and make recommendations for changes - in the European Parliament and most national parliaments.

Taken as a whole the justice and home affairs *acquis* utterly lacks democratic legitimacy.

The “knock-on” effect is that only the cognoscenti understand EU laws, how they were adopted or how they are used. There has long been a need to codify the *acquis*, conduct mandatory evaluations across the board and institute place post-legislative parliamentary scrutiny in the European and national parliaments.

Sixteen years after Maastricht and ten years after Amsterdam there is finally a recognition in the European Commission’s proposals on the Stockholm programme that there is a problem.

It says that the next five-year plan must have a “method” namely:

a) to “narrow the wide gap between the rules and policies” adopted at EU level and “their implementation at national level”. Currently “implementation” is judged solely on the formal legal transposition into national laws - not how they are used in practice!

b) the existing *acquis* in justice and home affairs is “already large” and the

new Treaties (Maastricht and Amsterdam) have “increased its complexity” which “*is certainly one of the sources of the difficulties encountered in implementing it.*” In other words, it is almost too complicated for EU officials and national governments to understand let alone civil society and the public.

c) “*Citizens expect to see the action taken by the Union produce results. Priority should be given to **improving the use made of the evaluation of the mechanisms created and the agencies set up.***”

This belated recognition - if acted on - would improve the inheritance of an *acquis* which few understand. But alone without pro-active changes to the role of parliaments, an engaged and critical media, and genuine space for civil society and individuals to be informed, discussed, debate and act it will have little meaningful effect.

Tony Bunyan, September 2009

Background:

Previous analysis: “Secret trilogues and the democratic deficit”:
<http://www.statewatch.org/analyses/no-64-secret-trilogues.pdf>

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