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Behind Closed Doors

The Destruction of Accountability in the EU

Sir Bill Cash MP
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Executive Summary - the EU Law-Making System at Work

This paper demonstrates that even since the referendum, the way the EU governs has changed, becoming less accountable, less democratic, and making more decisions behind closed doors.

It has been widely noted that the Withdrawal Agreement will keep the United Kingdom under EU rule-making, possibly indefinitely, through a customs union and with Northern Ireland in the Single Market for goods, though without representations in its institutions.

This paper outlines the little-understood system through which the EU actually makes our laws. It shows that a system which has prevented democratic controls since its inception is **becoming less accountable, concentrating decision-making behind closed doors.**

The EU system of law-making, consisting of the Commission, Council, and European Parliament, is becoming **dominated by little-known groups with even less oversight.** The most powerful are the ‘**Trilogue**’ negotiating groups, and **Coreper** (the Committee of Permanent Representatives including Member States’ EU ambassadors).

With its exclusive power to initiate legislation, the Commission has always been an obstacle to transparent decision-making. Europe’s highest law-making authority meets secretly, bans note-taking, and is wholly unelected.

However, after the Commission initiates proposals, the European Parliament and Council are intended to be able to amend, and occasionally block them. While the unelected Council rejects the vast majority of the Parliament’s amendments, even this little accountability is now seriously undermined.

When the ‘Conciliation Committee’ intended to reach compromise between Council and Parliament does not reach agreement, the Council may adopt legislation unanimously anyway. But **the Parliament’s power is weakened further by the Trilogues, and by Coreper.**

Coreper is unelected, its documents and meetings not publicly accessible, and how agreement is reached remains hidden. It aims to reach agreement on Commission proposals before they reach the Council: **70-90% of decisions are made this way, adopted by the Council without more discussion.** The Parliament does not participate in these discussions.

Thus while the Council increasingly overrides European Parliament oversight, Coreper does the same to the Council.

The dominance of the Commission and Coreper are enhanced further by the Trilogues, almost unknown negotiating groups called ‘a legislative body in [their] own

right', and 'possibly the most powerful, [governing] the overwhelming majority of legislative procedures'. Trilogues are small groups of a few Commission representatives, MEPs, and civil servants, whose aim is to **secure legislative agreements before any transparent process occurs**, giving the Commission greater control, and **preventing public knowledge of the real origins and process of laws**. Once Trilogues agree a text, neither the Parliament nor Council may change it, essentially nullifying their role.

Meanwhile, in the European Parliament itself, the UK is now the most often on the losing side, Germany almost the most frequent winner of votes.

In the Council, Qualified Majority Voting (QMV) has replaced Member States' veto, and Germany (with its Eurozone voting allies) now wins the most votes; the biggest loser is again the UK, consistently outvoted on issues of major national interest such as regulation for the City.

These developments describe a continent governed by an **increasingly closed system**, which since the referendum is moving **more systematically against democratic law-making**.

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Prologue – Sir Bill Cash MP

Why the Withdrawal Agreement is bad for Britain and why we cannot remain in the EU

The Withdrawal Agreement does not respect the referendum result, undermines the repeal of the European Communities Act 1972, and would require the UK to comply with laws and regulations it has not made itself.

Leaving the EU above all means regaining self-government

The British people voted to leave the European Union on 23rd June 2016 because they wanted to have their own laws in line with their wishes at general elections. Other European countries, most notably Italy, are now voting with their feet, frustrated by the imposition of European laws on their people.

The decision by the UK to leave the EU compares to other great watersheds in British history. The repeal of the 1972 European Communities Act is even more important than the repeal of the Corn Laws in 1846, or the 1867 Reform Act that gave the vote to working men. Up to 1972, our history was typified by voters taking gradual control of their laws and government through elections and an elected Parliament, taking power over the centuries from the Crown, to full democracy. The decision to join the European Economic Community reversed this process.

The Withdrawal Agreement is bad for Britain – more capitulation than compromise

The Agreement, and the Chequers White Paper it was derived from, was imposed on the Cabinet without consultation, led to eight resignations from the front bench and did not honour the result of the referendum. The common rulebook on goods does not take back control of UK laws, giving the EU the indefinite right to impose on the UK rules over a vast area of law and commercial policy. This will make things even more

uncertain for British business because they cannot know what changes to the rulebook will be made in future.

No more than consultation

The 'Joint Committee' under the Agreement proposals would not allow effective scrutiny of EU legislation; the 'parliamentary lock' is not even mentioned in the White Paper, and the so-called provisions of the Joint Committee proposed by the Agreement to examine EU legislation represent no more than consultation.

In 2007, the Prime Minister argued for sovereignty

I have sat on the European Scrutiny Committee for 33 years, and not once in all that time, nor at any time before that, have I seen Parliament overturn an EU decision. These are taken in the Council of Ministers behind closed doors, undemocratically, without transcripts or recordings. EU decisions or rules would never be overturned by Parliament in practice.

In a pamphlet published by Politeia in 2007, the Prime Minister herself was explicit about the failures of UK parliamentary scrutiny of European law,¹ even whilst the UK had representation in the EU bodies.

The UK would also be unable to change existing EU laws that do not work for us, and we cannot accept the indefinite application of the Common Rule-book with all the undemocratic implications mentioned above, including the undermining of the repeal of the European Communities Act 1972, under the Withdrawal Act itself which was passed on the 26th June, nor the interpretation of law by the European Court. Indeed, as I said in the debate on Monday 10th September 2018, this indefinite rulebook goes beyond the implementation period. If we did choose not to incorporate EU laws, the

¹ Theresa May and Nicholas Timothy, "Restoring Parliamentary Authority: EU Laws and British Scrutiny", Politeia (2017) <http://www.politeia.co.uk/wp-content/Politeia%20Documents/2007/Nov%20-%20Restoring%20Parliamentary%20Authority/'Restoring%20Parliamentary%20Authority'%20Nov%202007.pdf>

treaty would enable the EU to punish us by withdrawing market access to goods and agri-products, as Norway discovered in 2013.²

Uncertainty for business will take many forms. Roland Vaubel, Professor of Economics at Frankfurt University has shown that the majority voting system in the Council of Ministers has led to well over 50 labour regulations being imposed by the European Union. This amounts to regulatory collusion by the strategy of raising rivals' costs through those who dominate and control the majority voting system. Outside the EU, but subject to the common rulebook, the 27 would be free to impose changes on us: mere consultation through a joint-committee and being subject to majority votes would put us in an even worse position than before.

The Withdrawal Agreement will worsen the UK trade deficit

Within the Single Market the UK's trade deficit with the rest of the EU has grown dramatically, demonstrating that Single Market rules do not work for UK manufacturing and exports generally. The Agreement would maintain these rules and largely keep us under the Single Market. Since 2000, the UK's trade deficit with the EU has widened from £10bn, to £67bn in 2017. However, with non-EU countries, a trade deficit of £11bn in 2000 became a surplus of £41bn by 2017. When trade in goods is viewed separately, the position is worse for the UK. The UK's goods trade deficit with the EU grew from £5bn in 2000 to £95bn in 2017. Meanwhile, 65% of the goods trade deficit with the EU is with three countries: Germany (33%), the Netherlands (20%, although part of this is non-EU trans-shipments) and Belgium (12%). These imbalances are exacerbated by the Euro, which undervalues their currencies.

Broadly, this implies that goods that were produced in the UK are now produced in the EU; the EU will also have gained some of the related investment that has supported that increase in manufacturing capacity. This has had a disproportionate impact on the Midlands and North of England. Thus a fundamental problem with the Agreement is that it locks in all UK manufacturing, in perpetuity, to EU product standards, which are

² Henriette Jacobsen, "EU threatens to punish Norway for breaching EEA agreement," Euractiv, Jan 30, 2013.

especially to the benefit of German corporates. These standards (as well as related state aid, competition, consumer protection and employment rules) would ultimately be under the jurisdiction of the European Court of Justice.

So the Agreement would mean that UK consumers could only buy products that meet EU product standards; UK exporters could only manufacture and export products that meet EU product standards, and UK importers could only import goods that meet EU product standards. The White Paper therefore represents a major threat to the UK and its economy.

The level of German influence and why diplomatic appeals do not work

“What will be clear is that Germany’s leadership of the EU is geared principally to the defence of German national interest. Germany exercises power in order to protect the German economy and to enable it to play an influential role in the wider world”.

Sir Paul Lever - former British Ambassador to Germany and EU Director of the Foreign Office

Chancellor Kohl in 1997 told his party members that *“European integration and the Euro were the price Germany had to pay for dominating Europe without frightening its neighbours”*

Sir Christopher Meyer, former British Ambassador to Germany (September 2018)

According to a report from Süddeutsche Zeitung, Germans hold more key positions in the European Commission than any other EU Member State. Indeed, German influence has grown significantly, both at the political and administrative levels. Nine out of twenty EU Commissioners have placed the leadership of their cabinet in German hands. Sir Paul notes: *“now that we are leaving, it is Germany that is in charge... it is Germany whose voice will be decisive...the German government will effectively determine what sort of trade agreement Britain will be able to conclude... this element of our economic fate will be in German hands... we will face directly the reality of*

German power in Europe...Germany would also determine how the EU itself will develop after we leave.”

The EU is primarily to the economic benefit of Germany

The Euro allows Germany to run a huge surplus with the other 27 Member States, of £104.7 billion a year (ONS). A strong currency makes southern European countries less competitive abroad, whilst enhancing German competitiveness, strengthening economic dominance over other EU Member States with large debts. The architecture of the EU has translated this into effective political control by Germany, as Chancellor Kohl predicted in 1998, with the EU insisting on stringent austerity policies in countries bailed out using German money.

Britain in 2018 must reassess its attitude towards the EU, especially given its longstanding foreign policy of maintaining a balance of power in Europe, at odds with the historical German tendency for single European governance. While a balance of power is needed to maintain democracy, based on national self-determination, federalism demands centralisation, bureaucracy and the unification of people without a common identity.

Conclusion

Democracy is being undermined in the EU. Faced with an economic and immigration crisis, the people of Europe have voted against established parties throughout the continent, given no means of holding the authority exercised by the EU to account. This vacuum has enabled the far right to grow, as parties of the centre have seen their voter coalitions fragment, as people become frustrated with their unwillingness to assert national sovereignty.

If the government continues to pursue the Agreement, the UK will be reabsorbed into this authoritarian EU in dangerous respects, and subjected to undemocratic machinery of majority voting by the 27 Member States, plus legal interpretations by the ECJ. By

passing the Agreement we would transmute the gold of our own democracy into the base metal of EU subservience, a perverse alchemy indeed.

Introduction

This paper demonstrates that the core law-making bodies of the European Union are undemocratic, and indeed increasingly so, despite very limited reporting of the EUs' practices.

This paper seeks to establish this, by addressing the question at the heart of the United Kingdom's departure from the EU: *How has the EU governed us?*

The paper analyses the structure of the core EU institutions and assess their law-making functions against the core principles of democratic government (democratic elections of the officials that hold effective power, rigorous legislative scrutiny, cross-examination of ministers, procedural transparency and independence of the judiciary). The EU has the power to make decisions that bind all the citizens of its Member States, and its decisions have profound international repercussions. Concerns over democracy and legitimacy are therefore natural and appropriate.

It is the opinion of this paper that **EU law-making** has increasingly become dominated by 'informal practices', which concentrate decision-making within a limited number of actors. These curtail open discussion, and consequently severely **undermine a formal structure in which democratic procedure was already very limited**. The result is the **safeguarding of a limited set of interests, and the serious erosion in Europe of democracy itself**.

1. A COMPARATIVE OUTLINE OF UK AND EU LAW-MAKING

The irony of the EU is that **whilst membership of the Union is limited solely to democracies, the EU would fail its own membership requirements.**

The complex machinery of EU law making has traditionally been difficult to discern. There are countless actors involved in the process and numerous alternating procedures. This can prevent a casual observer understanding that decision-making power has ultimately become concentrated in the hands of a small group of officials (often unelected and thus lacking democratic legitimacy) operating and legislating behind closed doors, and, worse still, without publication of written or other records.

Before the specific chapters on the different institutions outline the core players involved in EU law-making, and expose the democratic deficit embedded in their operations, this chapter outlines the EU institutional machinery as a whole.

The EU has three main legislative institutions – each of them intended to represent separate interests. The first is **the European Commission**, designed to represent the interests of the Union as a whole. The second is **the European Council**, representing the interests of EU Member States' Governments. The third is **the European Parliament**, representing the interests of European citizens. Ultimately, however, these institutions do not function this way in practice. The power imbalances between the three legislative institutions, combined with their democratic deficiencies, ultimately results in the dominance of a particular set of interests.

The following summary section outlines the different law-making procedures of the United Kingdom Parliament and the European Union.

1.1 Law-making procedures

a. United Kingdom

UK laws are passed by elected Members of Parliament who introduce Bills. These Bills go through First Reading, Second Reading, Committee Stage (where they are subject to amendments), Report Stage and Third Reading, in both the House of Commons and the House of Lords. When a Bill is approved by one chamber, the other considers it. Both the Commons and the Lords must agree on the final shape of a bill before it can become law. Once approved, the Bill receives formal approval by the monarch (“Royal Assent”). The monarch always gives his or her approval on the advice of Ministers.

b. European Union

The European Commission (the unelected, administrative driving force of the EU) is the only body that can propose legislation. Its proposals have an inherent bias towards furthering European integration. Laws are passed in one of two ways:

The Ordinary Legislative Procedure is the most common law-making procedure, but is very labyrinthine. It is used to deal with policy areas such as employment, immigration, workers’ rights, the Single Market, free movement of workers, culture, agriculture and fisheries. The European Parliament (EP) and the Council of Ministers hold powers to amend proposals and both sides must approve the proposed law before it is adopted. The EP is not strictly a parliament: it cannot draft law (only the Commission can do that). It is often not consulted and can be ignored by the Commission. It is formed of 785 MEPs. In theory it can dismiss Commissioners with a two-third majority, but this has never happened. The Council discusses the policies drafted by the Commission. Who sits on it depends on the policy being discussed at the time. The Council passes EU legislation: in theory through qualified majority, in practice by consensus in private. Vetoes are now impossible. It meets in secret.

If both institutions have reviewed legislation twice without reaching agreement, a Conciliation Committee (with representatives of both the Council and EP) is set up to seek compromise. If it fails to reach agreement, the Council can adopt legislation unanimously without parliamentary assent, and the EP can only block legislation if it reaches an absolute majority.

The Special Legislative Procedure is used in those areas that are seen as so important to national interests that supremacy rests with government representatives in the Council of Ministers. There are two types of special legislative procedures. The first type is the consent procedure, which grants the EP with the possibility to either accept or reject legislative proposals by an absolute majority vote, but they cannot amend them. This is required in very specific cases, such as new legislation on combating discrimination or to non-legislative procedures, such as international agreements and arrangements for withdrawal from the EU (e.g. the UK Withdrawal Agreement from the EU). The second type is the consultation procedure, which applies to exemptions and competition law and international agreements adopted under common foreign and security policy. It grants the EP the power to approve, reject or propose amendments to a legislative proposal, but the Council is not legally obliged to take the EP's opinion into account. However, the ECJ has established that the Council cannot take a decision without having received the EP's opinion.

1.2 Transparency

a. United Kingdom

Full transcripts of the debates that take place in the process of law-making are recorded and published by Hansard for the public. All debates in the Commons, the Lords, and in the Committees can be streamed live at parliamentlive.tv. The system is fully transparent; both arguments and amendments are recorded, followed by the names of the MPs that put them forward.

b. The European Union

i. The European Parliament

Decision-making in the EP is somewhat transparent, as representatives from the Council and Commission are present at Committee meetings; plenary debates are held in public; and committee and plenary votes are recorded.

ii. The Council of Ministers

However, decision-making in the Council of Ministers is secretive. Council meetings on legislation are generally closed. Analysis of voting behaviour in the Council concludes that even where Qualified Majority Voting (QMV) is required, the Council does not vote formally and prefers to reach a consensus.

A Votewatch report found that during the period mid-2009 to mid-2012, 65% of Council decisions were taken by consensus, whilst other analysts have found that in around 80% of cases since 1993 decisions that could have been taken by QMV were taken without formal opposition. Consensus, however, differs from unanimity as it indicates that nobody voices opposition, rather than that everyone agrees. However, as opposition is not formally recorded it is impossible to know how decisions were ultimately agreed, with consensus being reached behind closed doors.

iii. Coreper

In the European Union the Council Working Groups and the Committee of Permanent Representatives (Coreper) function as the preparatory bodies for the Council of Ministers. With the exception of provisional agendas, working documents from Coreper and Working Group meetings are not publicly available. It is therefore unclear how agreement is reached before Council meetings, when, how or by whom pressure is applied, or what other elements affect ministers' behaviour.

1.3 Law-making power

a. United Kingdom

i. The Principle of Parliamentary Sovereignty

A fundamental tenet of the UK's unwritten constitution (unlike all the other 27 Member States, which have written constitutions) is the sovereignty of Parliament, making the British legislature the supreme power of the state, and passing the statutes that are the principal form of British law. Parliament is sovereign because the British people elect it, so its authority is founded on this democratic transfer of decision-making power that translates into binding laws.

ii. The Legislative Primacy of the Commons

The House of Commons, as the elected chamber of Parliament, holds ultimate law-making power. A report in 2006 stated that "Commons primacy rests on two things, the election of its members as the representatives of the people" and "power to grant or withhold supply" (i.e. taxation). The Lords "fulfil a different function" from the Commons and "defer" to the Commons "when there is a difference of opinion". The Lords is "a revising chamber not a vetoing chamber". Its role is "to scrutinise and revise legislation but not to operate in such a way that the democratic authority of the Commons was sabotaged." In other words, the Lords does not have an ultimate right to say no. Indeed, the Parliament Act 1911 removed the Lords' veto power.

b. European Union

i. The (formal) Legislative Primacy of the Council

Whilst the primacy of the Council is clear in the Special Legislative Procedure, the Ordinary Legislative Procedure seems to place the EP (representing European citizens) and the Council (representing European Governments) on an equal footing. Yet the EP's power to block legislation is weak. The block is seldom used, suggesting a belief that flawed legislation is better than no legislation.

The primacy of the Council in the legislative process is made clearer by the asymmetry of information between the Council and the EP. Whilst EP decision-making is relatively transparent, Council meetings on legislation are generally closed, so MEPs are dependent on Council members for information (so they receive an incomplete report of the Council's discussions). Also, while internal divisions in the EP are public, those in the Council are secret, which means the Council can exploit these divisions to attain its objectives, while the EP cannot. In addition, the EP is disadvantaged because it lacks the law-making expertise of the Council, which can draw upon ministerial knowledge of legislating.

ii. The (de facto) Primacy of Coreper

Coreper seeks to reach agreement on the proposals the Commission forwards to it before they reach the table of the Council of Ministers. It has been estimated that 70-90% of the Council's decisions are clarified at the preparatory level and then adopted by the Council of Ministers without further discussions. The EP does not participate in the negotiations at this stage but must reach agreement with the Council later.

Coreper sets the Council agenda and its members attend Council meetings as advisers to national ministers. The Council discusses A-points and B-points. A-points are decisions that Coreper has already taken and which can be adopted without further discussion in the Council. B-points are proposals which Coreper has not yet agreed and which need further discussion and possibly a vote. Coreper is unlikely to send a proposal to the Council if it is likely to fail following Council negotiations. This is shown by the fact that the majority of points passed to the Council for deliberation are "A points" on which no further discussion is needed.

Once Coreper has ensured that a decision will be adopted in the Council, the objective is to have it swiftly approved in the EP. As the ordinary legislative procedure is long and intricate (because of conciliation and the “option to reject” an already lengthy cooperation procedure), the loss of time is compensated for by rushed decisions made by EP committees after one reading, without any debates in plenary. Indeed, EU institutions are encouraged to reach agreement at first reading if possible.

Coreper also liaises between the Council and EP if a legislative proposal reaches the Conciliation Committee. Overall, the primary preoccupation for Coreper technocrats appears to be the success of the decision-making procedure over all other concerns. The next chapter will analyse the role of the Commission in more depth, followed by the other core law-making institutions.

2. THE EUROPEAN COMMISSION

- *The European Commission is the most powerful EU institution.*
- *Yet it is unelected and acts behind closed doors.*
- *The consequence is that it does not serve the common interest.*

2.1 The Extended Power of the European Commission

The European Commission is the administrative driving force of the Union. Formally, its role is to act as the neutral guardian of the EU treaties, and for this reason it enjoys constitutional independence from governments, as well as a good deal of moral clout as the representative of the common interest.

It has a number of **executive functions**, including managing the EU budget, and **quasi-judicial functions** such as enforcing competition law and policing Member State implementation of EU laws. Meanwhile, the provisions of the “economic semester”, an attempt to strengthen and co-ordinate economic policy at the EU level, as well as the fiscal compact and their associated regulations have made its role even more powerful. **National governments can now be censured and fined by the commission for missing fiscal targets; they have to submit draft budgets to the Commission even before laying them before their own legislatures.**

There have also been talks between Berlin and Brussels of “binding contracts”, forcing governments to make reforms at home.³ Thus power is disproportionately placed in its hands without the proper checks and balances to ensure that it does not act outside or against the scope of its mandate.

a. The Crucial Power to ‘Decide what is Decided’

Compared to the other two major EU institutions, the Commission’s power of influence is proportionately very great: **its members sit permanently for a 5-year**

³ ‘Elected, yet strangely unaccountable’. *The Economist*, 14th May, 2015.
<https://www.economist.com/briefing/2014/05/15/elected-yet-strangely-unaccountable>

term, as opposed to the Council of Ministers where different Ministers attend according to the matter in hand (agriculture ministers for the Agriculture Council, Finance Ministers for the Economic and Financial Council, and so on).

It is the only EU body that can propose legislation on its own initiative (which the Council of Ministers and the European Parliament itself cannot do). Indeed, the power of *proposing legislation* is extensive, as it is central to law making: it represents the **power to initiate, to “decide what is decided”**. This is heightened in the EU, as its institutions have a commitment to secure legislative deals at the first reading stage.⁴

We will return to the role of the European Parliament below, however over the whole of the 2009-14 legislature, 85% of legislative proposals were agreed at first reading, 8% at early second reading, 5% at second reading and 2% at third reading (conciliation). However, by the period 1st July 2014 to 5th April 2017, **75% of EU legislation was agreed at first reading**,⁵ and **no bills reached second reading in the year 2016**.⁶ For example, the Data Protection Package, Tobacco Products Directive, Clinical Trials Regulation and Medical Devices Regulation were all, controversially, agreed in this way. Thus, the Commission’s role is the very centre of the legislative process, which is becoming little more than a reviewing process (but with little time to conduct proper scrutiny and debate), with a ratifying process in pre-legislative stage, but which, as we will see, the Commission will already have dominated.

b. The Trilogue Negotiations

The Commission’s dominance is enhanced by ‘trilogue’ negotiations; these have been referred to as a **‘legislative body in its own right,’ which ‘can also be seen as**

⁴ Joint Declaration on Practical Arrangements for Co-decision Procedure (Art 551 EU Treaty), OJ 2007, C 145/2, para 11

⁵ Statistics on concluded codecision procedures (by signature date)
http://www.europarl.europa.eu/code/about/statistics_en.htm

⁶ Secret EU law making takes over Brussels. *EU Observer*, 24th January, 2017.
<https://euobserver.com/institutional/136630>

possibly the most powerful legislative body as it governs the overwhelming majority of legislative procedures’.⁷

Trilogues are negotiations which occur before the Council has adopted a formal position, and after the first reading of the European Parliament. Trilogues involve **1) a small number of representatives from the Commission; 2) MEPs from the parliamentary committee that considered the proposal; and 3) civil servants from the state holding the Council presidency.** The aim of trilogues is to secure legislative agreements before any transparent process occurs. This means the Commission acquires greater say over the review and adoption of the proposal, however, as within trilogue, it enjoys an equal say with the Council and the Parliament, and thus ceases to be solely a *proposer* of legislation. **There are no limits on the trilogue’s scope to amend and no constraints on the procedure by which this can be done. This means the Commission’s proposals can become unrecognisable, so it is not possible for the public to monitor the actual origins of laws. If the Commission believes these amendments are too extensive, it can simply reissue a proposal, allowing it to dominate the process.** The Commission is therefore able to unpack legislative checks and balances; this pre-empts subsequent debate, demeaning more considered deliberations in any second and third readings, increasingly being able to push through its will.

Once a compromise text has been agreed in trilogue negotiations, the chair of Coreper writes to the chair of the European Parliament committee informing them of the agreed compromise. **Neither the Council nor the European Parliament may change a text agreed in a trilogue, thus frequently nullifying its post-trilogue legislative role.**⁸

⁷ Chalmers, D. ‘*The democratic ambiguity of EU law-making and its enemies*’ (2015). In: Arnall, A. and Chalmers, D. (eds.) *The Oxford Handbook of European Union Law*. Oxford University Press, Oxford, UK, p. 324.

⁸ Chalmers, D. ‘*The democratic ambiguity of EU law-making and its enemies*’ (2015). In: Arnall, A. and Chalmers, D. (eds.) *The Oxford Handbook of European Union Law*. Oxford University Press, Oxford, UK, p. 324-325.

c. Horse-Trading in ‘Legislative Package Deals’

The so-called ‘legislative package deals’ represent a further distortion of the EU legislative procedure as it is usually understood in favour of greater power for the Commission. **Legislative package deals are informal bargains proposed by the Commission, which allow the linkage of issues and proposals and their simultaneous decision by Council members and MEPs.** However, these legislative compromises serve as binding commitments, and each of the legislative chambers has to accept the deals without further amendments. Such **horse-trading is unstructured and is not carried out in a transparent manner. Unrelated interests are treated as substitutable.**

This can only occur when significant concessions are made in each piece of legislation, as something of value has to be offered, with the consequence that balances between interests in the original proposal are liable to be discarded, with clear policy horizons altered in unpredictable ways. Kardasheva, for instance, has found that **about 25% of EU legislation is subject to these package deals.**⁹

d. Arbitrariness in the Subsidiarity Principle

In terms of the scope of the Commission’s legislative power, the formal position codified within EU treaties is that the Commission can only initiate legislation in areas where the Union holds exclusive competence to legislate. This is intended to set a finite line between the legislative competences of the EU and that of its Member States. However, according to the subsidiarity principle, the Union can act in areas that fall outside its exclusive competences if the objectives of the proposed action cannot be sufficiently achieved by Member States but can be better achieved at Union level. What is troubling, however, is the fact that it is the Commission itself **which judges whether national laws and policies (democratically enacted by the governments and legislatures of EU Member States) effectively pursue the Union legislative objective, also identified by the Commission.**

⁹ Kardasheva, R. ‘Package Deals in EU Legislative Politics’ (2013) 57 American Journal of Political Science, 858.

Meanwhile, although under the Early Warning Mechanism (EWM) the Commission must review a proposal if one-third of parliamentary chambers (or one quarter in fields of freedom, security and justice) issue opinions that it violates the subsidiarity principle (this is formally known as the issuing of a ‘yellow card’). However this process is constrained in a number of ways.

First, **the Commission can decide to maintain a proposal nonetheless, by sending a reasoned opinion setting out why it believes its proposal conforms with the principle** – indeed, its opinions are rarely confined to analysis of the subsidiarity principle, but rather discuss the merits of the proposal generally. While 55% of the Council members or a majority of votes cast in the Parliament could force the Commission to drop the proposal (turning the ‘yellow card’ into an ‘orange card’, signifying the proposal’s defeat), this has never happened.¹⁰ Second, **the period for review of eight weeks granted to national parliaments is insufficient for them to gather views and reflect on their contributions.** (indeed, twenty-four national parliamentary chambers have indicated that the EWM period is too short)¹¹. By March 2014, the threshold of opposition for the yellow card has been met only twice, in 2011 and 2012¹² (while nine proposals received three or more opposing opinions, four received five or more opinions, and one nine opinions). This demonstrates a difficult lobbying effort, rather than a truly democratic process.¹³ The prevailing *modus operandi* is thus the asymmetric uncoordinated intervention of individual chambers, a very unstructured form of review. **The result is that the Commission has extremely wide and essentially unrestrained discretion in the areas in which it can legislate.**

¹⁰ It is worth noting that the Dutch Tweede Kamer and the British House of Lords had also called for a green card, which would allow national parliaments to propose laws or review existing ones. This proposal was rejected.

¹¹ COSAC, Sixteenth Bi-annual Report: Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny (2011).

¹² One proposal, on the right to collective action, was withdrawn. The Commission refused to withdraw the other, a proposal establishing a European Public Prosecutor’s office.

¹³ Christiansen, T., Högenauer, A. and Nehold, C. “National Parliaments in the post-Lisbon European Union: Bureaucratization rather than Democratization?” Opal Online Working Paper Series 11/2012, 11.

e. Permanent Integrationist Agenda

The unrestrained power of the Commission is made more severe by its lack of elections. This means that Commissioners do not come to power on the basis of a political manifesto, which would include a time-limited range of proposals (to enact new laws or repeal existing legislation), which could be executed only during the time-span of the Commission's government, and against which the Commission's performance could be judged.

In addition, as argued by the LSE Professor of EU law Damian Chalmers, **the lack of manifestos allows legislative proposals to remain on the books until there is a window of opportunity for success.**¹⁴ There are numerous examples of proposals being left dormant until there is a moment for their reactivation, of which one of the most salient is the European Company Statute, which was first proposed in 1989 and only formally adopted in 2001.¹⁵ This can also be seen in the integrationist agenda pursued by the Commission despite a continental economic and migration crisis and resistance from increasingly resentful European populations (exemplified by the rise of the far right in Continental Europe). Indeed, the pursuit of "ever closer union" with supranational and centralised EU government is evidently still the EU's long-term ambition, in accordance with its very first "quasi-Manifesto", the Schuman Declaration on 9th May 1950, which stated unambiguously: "By pooling basic production and by instituting a new High Authority, whose decisions will bind... member countries, this proposal will lead to the realisation of the first concrete foundation of a European Federation".¹⁶ The Commission's proposals have an inherent **bias towards furthering European integration, even when there is no call for this from most Member States, which is** formally guaranteed by the oath which Commissioners swear on appointment at the European Court of Justice in Luxembourg.¹⁷

¹⁴ Chalmers, D. 'The democratic ambiguity of EU law-making and its enemies' (2015). In: Arnall, A. and Chalmers, D. (eds.) The Oxford Handbook of European Union Law. Oxford University Press, Oxford, UK, p. 310.

¹⁵ Reg 215/2001 on the Statute of a European Company (SE), OJ 2001, L 294/1.

¹⁶ The Schuman Declaration – 9th May 1950. https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en

¹⁷ Commissioner's Oath. <http://en.euabc.com/word/2117>

Ultimately, the Commission's increasingly unrestrained power demonstrates **the absence of opposition in the EU, making it steadily less realistic for citizens to hold those who make their laws to account.**

2.2 Unelected, Unaccountable and Secretive

The Commission not only has disproportionate power but is also composed of unaccountable and unelected officials whose operations lack transparency. It is important to understand how they are appointed.

a. Unelected and Secretive College of Commissioners

The Commission's political leadership is the College of Commissioners, the 28 men and women (one from each EU Member State), which include the President and the Vice-Presidents, each appointed for a 5-year term. At no stage are union citizens involved in the appointment of the Commissioners. The Commissioners are first appointed by a majority of the EU Member States' Prime Ministers, and Presidents, who **meet behind closed doors at a European summit.** These proposed Commissioners are then subject to a hearing before the European Parliament's Committees. **The whole College of 28 must be approved by a simple majority of the MEPs, however the European Parliament cannot reject individual nominees.** Due to time constraints and political pressure, this all-or-nothing approach greatly impairs the ability of the European Parliament to be selective in the appointment of Commissioners. Indeed, **the European Parliament has never voted against a College of Commissioners.**¹⁸ Overall, the European Parliament's oversight of the Commission serves to create an illusion of accountability¹⁹ (this is heightened by the lack of transparency in the work of the Commission).

¹⁸ On limited occasions the European Parliament has been able to force national governments to withdraw a nominee who received an unfavourable opinion from the parliamentary committee which heard his or her evidence, by threatening that it would otherwise reject the entire Commission.

¹⁹ Tallberg, J. 'Executive power and accountability in the European Union' (Chapter 9), in Gustavsson, S., Karlsson, K. and Persson, T (eds.) *The Illusion of Accountability in the European Union*. Routledge (2009).

Indeed, **when the Commission College meets, taking minutes is banned and no one is allowed in the Commission Room without the Commissioners' permission.**²⁰ This secretiveness raises questions about the interests to which the Commission is responsive, and the style of relations it has with them.²¹ Indeed, a study of initiatives in 1998 found that the impetus for only **5% of Commission legislative proposals actually originated with the Commission itself.**²²

b. Unelected Commission President

The Commission is led by the Commission President, appointed by the European Parliament. According to the Lisbon Treaty (2007), the Council acts by qualified majority to first propose a candidate to the European Parliament – conventionally this has been the *Spitzenkandidat* ('top candidate') of the party group which won the majority in the latest European elections. The proposed candidate must be agreed, or rejected, by a simple majority of the European Parliament: if the European Parliament rejects the candidate, the European Council must propose someone else. However, **the European Parliament has never rejected a candidate proposed by the European Council.**

c. The European Parliament's Failure to Hold the Commission to Account

Theoretically, the European Parliament also has the ability to adopt a motion of censure of the Commission at any time, in which case the Commission is obliged to resign. However **the European Parliament has never removed a Commission.**²³ For instance, the Parliament failed to remove the Commission of 2004 to 2009, despite its including Siim Kallas – the Anti-Fraud Commissioner who was given this

²⁰ Tylecote, R. and Cash, W. 'From Brussels with Love' Duckworth New Academia (2016), p. 3.

²¹ Chalmers, D. 'The democratic ambiguity of EU law-making and its enemies' (2015). In: Arnall, A. and Chalmers, D. (eds.) The Oxford Handbook of European Union Law. Oxford University Press, Oxford, UK, p. 321.

²² Data can now be found in the House of Lords European Union Committee, Initiation of EU legislation (2008, 2nd Report) para 23.

²³ With the exception of the *indirect* removal of the Santer Commission which resigned 1999 due to a massive corruption scandal.

role despite being charged with fraud, abuse of power and providing false information after £4.4m disappeared during his tenure as head of Estonia's national bank.²⁴

d. Unelected and Secretive Directorates-General

The Commission is organised into policy departments, known as Directorates-General (DGs), which act as supranational government departments, each overseeing its own area of policy (including, but not limited to, Competition, Agriculture and Rural Development, Energy, Environment, etc.). There are currently 31 DGs and their number is rising. Sub-bosses called Directors General run these DGs – **none of these officials is elected, and the manner in which they are selected is un-transparent, often dependent on arbitrary decisions made by Commissioners.**²⁵

2.3 Growing German Influence

In theory, it is up to the European Commission to make legislative proposals, and for the European Council and the European Parliament to take the decisions. In practice however, it is especially troubling that it appears to be, as the former British Ambassador to Germany Sir Paul Lever has outlined, **'Germany's view which is sought by the Commission before it acts, and by other governments before they decide.'**²⁶

a. German Officials' Prevalence in the European Commission

German nationals now hold more key positions in the European Commission than any other EU Member State.²⁷ Indeed, German influence has grown

²⁴ "The Undemocratic EU Explained – It Will Never Change". *Huffington Post*, 21st March 2016. https://www.huffingtonpost.co.uk/matthew-ellery/eu-referendum_b_9514608.html

²⁵ Politico Europe has reported on the lack of open and fair competition in the appointment of a number of civil servants within the Commission (e.g. <https://www.politico.eu/article/brussels-selmayr-problem-too-many-germans-in-top-jobs/>)

²⁶ Lever, P.: *Berlin Rules: Europe and the German Way*. I.B. Tauris (2017), p 6.

²⁷ "Deutschland vergrößert seine Macht in Brüssel". *Süddeutsche Zeitung*, 31st July, 2015. <https://www.sueddeutsche.de/politik/eu-deutschland-baut-seine-macht-in-bruessel-aus-1.2588651#redirectedFromLandingpage>

significantly, both at the political and administrative levels. Nine out of twenty-eight EU Commissioners have placed the leadership of their cabinet in German hands. This includes Commission President Jean-Claude Juncker, who selected Martin Selmayr to be his (then) chief of staff (the Commission's top civil servant), with reports of a lack of open and fair competition over this appointment.²⁸ In addition, in Juncker's reorganisation of senior official posts in the Commission, six Germans were appointed to be Directors General – more than any other nationality. As succinctly put by Sir Paul Lever,²⁹ “Juncker has done nothing to dispel the impression of sensitivity, if not subservience, to German interests”³⁰

In total, twenty-eight Germans belong to the highest political decision-making bodies in the authority. This has allowed German interests to be coordinated at an early stage between Berlin and Brussels via German leaders. Sir Paul Lever has thus openly stated that **“The Commission services are now firmly under German influence. So too are the policies and initiatives which the Commission generates.”**³¹ This can be seen in the manner in which the EU handled Greece's relationship with the Euro, and in its response to the refugee crisis in the Mediterranean.

b. The Appointment of Jean-Claude Juncker

A clear example of the power which Germany, and Germany's Chancellor, exercise in the EU and in the Commission especially can be seen in discussions over the appointment of Jean-Claude Juncker as president of the Commission at the end of 2014.

Initially, Angela Merkel appears to have supported his selection as the *Spitzenkandidat* of the European People's Party group, mainly because he was a Luxembourger and thus perceived as more sensitive to German concerns than his rival Michel Barnier (the former French commissioner and foreign minister), whose

²⁸ “Brussels' Selmayr problem: Too many Germans in top jobs”. *Politico.EU*, 21st February, 2018. <https://www.politico.eu/article/brussels-selmayr-problem-too-many-germans-in-top-jobs/>

²⁹ His postings have also included service in NATO, in the European Commission, as Chairman of the Joint Intelligence Committee and as EU and economic director at the Foreign and Commonwealth Office.

³⁰ Lever, P.: *Berlin Rules: Europe and the German Way* (2017) I.B. Tauris, p 11.

³¹ Lever, P. *Berlin Rules: Europe and the German Way* (2017) I.B. Tauris, p. 11.

views on the Euro were believed to reflect a French perspective. However, when the EEP secured the highest number of votes in the European elections, Angela Merkel clearly did not regard Juncker as having any automatic right to the job, and insisted that, although the Parliament had the last word, it was for the Council to make the initial nomination.

On 27th May, five days after the election, Angela Merkel requested a ‘broad tableau’ of candidates from which the European Council might choose. Other heads of government (such as the Prime Ministers of the Netherlands, Sweden and Hungary) publicly shared their doubts on the suitability of Juncker as Commission president, with the Prime Minister of the United Kingdom, David Cameron, as the most vociferous in his criticism (several other governments were also alleged to have shared such doubts privately; it therefore seemed the Council might consider other names). Next, Angela Merkel appears to have changed her mind, coming under pressure from both senior members of her party and from Germany’s Social Democrats. This means two parties in the German governing coalition dominated negotiations on who should be president of the Commission.

Once it became clear that the German government was, after all, supporting Juncker and not interested in other possible candidates, opposition to him seems to have melted away. Sweden and the Netherlands had previously expressed opposition; other countries, such as France and Italy, which had not stated a position, now lent support. Only the British and Hungarian Prime Ministers maintained their position and voted against, the outcome being widely characterised as a humiliating defeat for David Cameron and the United Kingdom. A President of the Commission took office who did not, as far as is known, receive the support of a single British member of the European Parliament.

Ultimately, as Sir Paul Lever has put it, ‘so long as the position of the German government remains open, discussion and argument can thrive. But once that position is decided, it is usually the end of the matter. No one, it seems, has any appetite for challenging the German government once it has made up its mind.’³²

³² Lever, P.: *Berlin Rules: Europe and the German Way* (2017) I.B. Tauris, p. 11.

3. THE COUNCIL OF MINISTERS

- *The Council of Ministers is the EU's main legislative organ and takes primacy over the European Parliament, yet the relatively unknown and unelected Coreper exercises de facto legislative power.*
- *Laws in the Council are made through closed-door consensus.*
- *The result is that laws are made in the interest of a central core of rich countries, typically led by Germany, backed by EU Member States which are economically dependent on them.*

3.1 The Legislative Primacy of the Council and Coreper

The Council of Ministers is the EU's main legislative organ. Who sits on it depends on the policy being discussed at the time. Each EU Member State will send their Minister of Government according to the matter in hand: agriculture ministers for the Agriculture Council, Finance Ministers for the Economic and Financial Council, and so on.³³

At EU level there are two main legislative procedures, **the Ordinary Legislative Procedure and the Special Legislative Procedure**, under which the formal position is that the Council of Ministers and the European Parliament act jointly to adopt or reject the laws proposed and drafted by the Commission. However, in practice the Council takes primacy in both legislative procedures, thus distorting the balance of power which the EU claims exists between the institution representing the European citizens and that representing EU Member States' Governments.

a. The Council's Primacy in the Special Legislative Procedure

³³ Tylecote, R. and Cash, W. *From Brussels with Love*. Duckworth New Academia (2016), p. 3.

The primacy of the Council is clear in the Special Legislative Procedure as it is used to legislate in those areas that are seen as so important to the individual national interests of the EU Member States, meaning that supremacy must rest with their respective government representatives in the Council.

There are, furthermore, two types of special legislative procedures. The first type is the **consent procedure**,³⁴ which grants the European Parliament the possibility to either accept or reject legislative proposals by an absolute majority vote, but not to amend them. This is required in very specific cases, such as new legislation on combating discrimination or in non-legislative procedures, such as international agreements and arrangements for withdrawal from the EU (e.g. the UK Withdrawal Agreement from the EU). The second type is the **consultation procedure**,³⁵ which applies to exemptions and competition law, and international agreements adopted under common foreign and security policy. It grants the European Parliament the power to approve, reject or propose amendments to a legislative proposal, but **the Council is not legally obliged to take the European Parliament's opinion into account** (even if the ECJ has established that the Council cannot take a decision without having received the EP's opinion).³⁶

b. The Council's Primacy in the Ordinary Legislative Procedure

Instead, at first sight, the Ordinary Legislative Procedure³⁷ seems to place the European Parliament and the Council on an equal footing. This is the most common law-making procedure, but is very labyrinthine. It is used to deal with policy areas such as employment, immigration, workers' rights, the Single Market, free movement of workers, culture, agriculture and fisheries. The European Parliament and the Council of Ministers hold powers to amend proposals and both sides must approve the proposed law before it is adopted. If both institutions have reviewed legislation twice without reaching agreement, a Conciliation Committee (with representatives of

³⁴ Glossary of summaries. Consent Procedure. https://eur-lex.europa.eu/summary/glossary/assent_procedure.html

³⁵ Glossary of summaries. Consultation Procedure. https://eur-lex.europa.eu/summary/glossary/consultation_procedure.html

³⁶ Case C-65/93 EP v Council [1995] ECR I-643.

³⁷ Article 295 of the Treaty on the Functioning of the EU (TFEU).

both the Council and EP) is set up to seek compromise. If it fails to reach agreement, the Council **can adopt legislation unanimously without parliamentary assent, and the European Parliament can only block legislation if it reaches an absolute majority**. Yet the European Parliament's power to block legislation is weak. The block is seldom used,³⁸ suggesting a belief that flawed legislation is better than no legislation.

The primacy of the Council in the ordinary legislative procedure is made clearer by **the asymmetry of information between the Council and the European Parliament**. Whilst European Parliament decision-making is relatively transparent, Council meetings on legislation are generally closed, so MEPs are dependent on Council members for information (meaning that they receive an incomplete report of the Council's discussions). Also, **while internal divisions in the European Parliament are public, those in the Council are secret, which means the Council can exploit these divisions to attain its objectives, while the European Parliament cannot**. In addition, the European Parliament is disadvantaged because it lacks the law-making expertise of the Council, which can draw upon ministerial knowledge of legislating.³⁹

c. The de facto Primacy of Coreper over the Council

However, **the Parliament's de facto legislative power is further reduced by the little-known Council Working Groups and the Committee of Permanent Representatives (Coreper)**. Coreper functions as a preparatory body for the Council of Ministers and is described by the EU's official website as occupying "a pivotal position in the Community decision-making system, in which it is both a forum for dialogue (among the Permanent Representatives; and between them and their respective national capitals) and a means of political control (guidance and

³⁸ An LSE study concluded that the level of exercise of legislative veto provisions has not increased significantly since the Lisbon Treaty came into effect, suggesting that the ways in which the Treaty formally augmented the powers of legislative scrutiny have not resulted in appreciably greater formal exercise of these powers. <http://blogs.lse.ac.uk/europpblog/2016/10/25/a-dearth-of-legislative-vetoes/>.

³⁹ Chalmers, D. 'The democratic ambiguity of EU law-making and its enemies' (2015). In: Arnall, A. and Chalmers, D. (eds.) The Oxford Handbook of European Union Law. Oxford University Press, Oxford, UK, p 316-317.

supervision of the work of the expert groups)”.⁴⁰ **It is unelected, and its working documents and working group meetings are not publicly available or accessible.**⁴¹ It is thus not clear how agreement is reached before Council meetings, when, how or by whom pressure is applied, or what other elements affect Ministers’ behaviour.

Coreper seeks to reach agreement on the proposals the Commission forwards to it before they reach the table of the Council of Ministers. A European Scrutiny Committee investigation found that it has been estimated that **70-90% of the Council’s decisions are clarified at the preparatory level and then adopted by the Council of Ministers without further discussions.**⁴² The European Parliament does not participate in the negotiations at this stage but must reach agreement with the Council later.

The influence and power which Coreper exercises on legislation is demonstrated by the fact that the agendas for Council meetings reflect the progress made in Coreper. The Council discusses A-points and B-points: A-points are decisions that Coreper has already taken and which can be adopted without further discussion in the Council; B-points are proposals which Coreper has not yet agreed and which need further discussion and possibly a vote. Coreper, however, is unlikely to send a proposal to the Council if it is likely to fail following Council negotiations. **This is shown by the fact that the majority of points passed to the Council for deliberation are ‘A points’ on which no further discussion is needed.** In addition, Coreper members also attend Council meetings as advisers to national ministers.⁴³ This means that, while the Council is essentially overriding the European Parliament’s oversight of law-making, Coreper is doing the same to the Council.

Once Coreper has ensured that a decision will be adopted in the Council, the objective is to have it swiftly approved in the European Parliament. As the ordinary

⁴⁰ Glossary of summaries. Coreper. <https://eur-lex.europa.eu/summary/glossary/coreper.html>

⁴¹ Miller, V. and Lunn, J. House of Commons Library. *The European Union: a democratic institution?* Research Paper 14/25 (26th April 2014).

⁴² *Ibid.*

⁴³ Chalmers, D. ‘*The democratic ambiguity of EU law-making and its enemies*’ (2015). In: Arnall, A. and Chalmers, D. (eds.) *The Oxford Handbook of European Union Law*. Oxford University Press, Oxford, UK, p 316-317.

legislative procedure is long and intricate (because of conciliation and the ‘option to reject’ an already lengthy cooperation procedure), the loss of time is compensated for by rushed decisions made by the European Parliament’s committees after one reading, without any debates in plenary.⁴⁴ Coreper also liaises between the Council and European Parliament if a legislative proposal reaches the Conciliation Committee.⁴⁵ Overall, **the primary preoccupation for Coreper technocrats appears to be the success of the decision-making procedure over all other concerns.**

3.2 Undemocratic, Closed-Door Consensus

The Council of Ministers operates in a manner that is intrinsically undemocratic. This is especially caused by the Qualified Majority Voting (QMV) system, which has stripped Nation States of their veto. QMV has increasingly meant that national governments are unable to hold their own ministers in the Council to account and has led to the emergence of a culture of decision-making made by closed-door consensus.

a. EU Member States’ Undemocratic Loss of the Veto

The Council of Ministers is supposed to enable countries to protect their national interests, but the introduction of Qualified Majority Voting, removing national vetoes, and the substantial expansion of EU membership (especially through the two waves of 2004 and 2007) have changed this. For instance, **the UK’s share of the vote is now 8%,⁴⁶** and its ability to influence, let alone block, measures, is decidedly limited.

This evolution of EU law-making was never approved by, nor explained, to the British people, who were promised in the 1972 European Communities Act White Paper (which marked the UK’s accession to the EU) that **the UK would never give**

⁴⁴ Indeed, under the 2007 Joint Declaration on the Co-decision Procedure (Article 11), EU institutions have committed to reach agreement at first reading if possible.

⁴⁵ Chalmers, D. ‘*The democratic ambiguity of EU law-making and its enemies*’ (2015). In: Arnall, A. and Chalmers, D. (eds.) *The Oxford Handbook of European Union Law*. Oxford University Press, Oxford, UK, p 316-317.

⁴⁶ Miller, V. and Lunn, J. - House of Commons Library. *The European Union: a democratic institution?* Research Paper 14/25 (26th April 2014).

up its veto, as to lose it would endanger “the very fabric of the European Community.”⁴⁷ Now, when an elected UK representative (and indeed that of any other EU Member State) votes against a legislative proposal, **a measure could nonetheless be adopted under QMV, thereby contradicting the democratic will of citizens as expressed in their national elections.** Likewise, the unrepresentative and weak European Parliament is unable to defend the interests of other citizens, leading to institutionalised, undemocratic law-making.

Indeed, the UK, as one of the only Member States prepared to publicly vote against a majority, is arguably the most affected. A series of reports by Votewatch⁴⁸ (an independent think tank founded by two professors at the LSE) demonstrated that between 2009-2015 **the UK was on the losing side on an increasing number of occasions, more than any other Member State. It is also significant that Germany was the least likely to vote the same way as the UK, and most likely to vote against the UK.** (In practice, many key decisions are taken in private meetings between Prime Ministers and Presidents.)

b. The Illusion of Accountability

The claim that Ministers that sit in the Council underpin democracy at the EU level (as they have been elected by their respective national citizens) is ill-founded, because, as argued by Thomas Larue, there is no effective mechanism to hold them accountable.⁴⁹ At one level this is because of **‘the unpredictable nature of first reading deals and trilogue negotiations [that] render scrutiny at national level difficult, if not impossible’.**⁵⁰ As trilogues are generally secret, it is difficult for governments to follow the course of trilogue negotiations and to feed in their views. Indeed, Ministers involve themselves less in negotiations leading up to the trilogues,

⁴⁷ Parliament’s relationship with Europe. *Parliament.uk*. <https://www.parliament.uk/get-involved/education-programmes/universities-programme/university-teaching-resources/parliaments-relationship-with-europe/>

⁴⁸ Votewatch Europe. *Agreeing to Disagree: The Voting Records of EU Member States in the Council since 2009* (2012).

⁴⁹ Larue, T. ‘Delegation to the permanent representation and mechanisms of accountability’ (Chapter 7) in Gustavsson, S., Karlsson, K. and Persson, T (eds.) *The Illusion of Accountability in the European Union*. Routledge (2009).

⁵⁰ European Scrutiny Committee “Reforming the European Scrutiny System in the House of Commons” Twenty-fourth Report, HC 109-I (2013-14), 28 November 2013.

as they know that, lacking veto power, they would anyway be unable to push through their view, and that **any disagreement is anyways likely to be resolved by civil servants, with a corresponding weakening of ministerial accountability.**⁵¹ Also, “back-pedaling” along the chain of delegation would likely be extremely costly, if not downright impossible, not least because revoking a national standpoint entails a severe loss of credibility. **We therefore force a situation where accountability is a *de jure* possibility, but a *de facto* chimera.**

c. Closed Door Decision-Making

The Council of Ministers’ democratic deficit is heightened by the fact that decision-making is secretive: a claim that is supported by strong evidence and has been explicitly stated by leading authorities on EU law such as LSE’s Simon Hix: **‘The Council, I still think, is an incredibly secretive institution.’**⁵²

Council meetings on legislation are generally closed and the EU establishment is not keen to grant access to debates in the Council, where the most important decisions are made. These meetings cannot be watched online, and votes are not made public, nor is the way in which Amendments are tabled. Even representatives of the European Parliament cannot attend. In evidence to the European Scrutiny Committee, Simon Hix stated that: “Has the Government ever admitted to you who they co-sponsor amendments with? I doubt it. Why not? They have to do it. With 27 Member States and limited time, this is how they now organise Council agenda, but we do not see any of that as citizens, and I think that is appalling”. (As argued by Sir William Cash in his COSAC speech on Democratic control of EU Agencies: **‘This attitude is symptomatic of the endemic problem, as if information is regarded as a substitute for accountability.’**)

⁵¹ Häge, F. and Naurin, D. “The Effect of Codecision on Council Decision-making: Informalization, Politicization and Power” (2013) *Journal of European Public Policy*, 20: 953.

⁵² European Scrutiny Committee, Minutes of Evidence, HC 109-II.
<https://publications.parliament.uk/pa/cm201314/cmselect/cmeuleg/109/130612.htm>

d. Undemocratic Culture of Consensus

In addition, analysis of voting behaviour in the Council concludes that, even where Qualified Majority Voting (QMV) is required, the Council does not vote formally and prefers to reach a consensus. A Votewatch report found that during the **period mid-2009 to mid-2012, 65% of Council decisions were taken by consensus** (this is lower than the figure for the previous five-year period of 82%, but this appears to be a consequence of more aggressive voting by the United Kingdom). Other analysts have found that, in around **80% of cases since 1993, decisions that could have been taken by QMV were taken without formal opposition**. Consensus differs from unanimity, however: it indicates that nobody voices opposition, rather than that everyone agrees. **As opposition is not formally recorded, it is impossible to know how decisions were ultimately agreed, with consensus being reached in secret.**

Kenneth Clark (a pro-EU British Conservative MP)⁵³ gave a description of how decision-making in the European Council increasingly works in an arbitrary and closed-door manner in a speech in the House of Commons on 14th November 2017:

*‘Under the Major Government, we introduced a process whereby parts of the European Council meetings were held in public ... What happened was that each of the 28 Ministers gave little speeches entirely designed for their national newspapers and television, and negotiations and discussions did not make much practical progress. When the public sessions were over, the Ministers went into private session to negotiate and reach agreement. I used to find that the best business of the European Council was usually done over lunch... The dinners and the lunches tended to be where reasonable understandings were made. There were very few votes, but Governments made it clear when they opposed anything. When the Council was over, everyone gave a press conference. It was a slightly distressing habit, because **some of***

⁵³ President of the Conservative Europe Group, Co-President of the pro-EU body British Influence, and Vice-President of the European Movement UK.

*the accounts of Ministers for the assembled national press did not bear a close resemblance to what they had been saying inside the Council.*⁵⁴

This undemocratic, majoritarian decision-making process is liable to lead to the subjection of nations.

3.3 Growing German Influence

Undemocratic, closed-door consensus in the Council of Ministers has meant that laws increasingly appear to be made in the interests of a central core of wealthy countries led by Germany, backed by economically dependent Member States.

Germany has become the political and economic power in the EU, not least because of **the huge economic advantage the Euro has given to the nation**. As opposed to southern countries (Greece, Italy, Spain), who have adopted a currency which was worth more than their independent currencies, the Euro was worth less than Germany's Deutschemark. This has meant that German goods have become more attractive, and thus more competitive abroad, resulting in a high export surplus for Germany. **Indeed, the latest statistics show that Germany runs a £104.7 billion trade surplus (goods and services, 2017)⁵⁵ with the EU27**, in stark contrast, for example, to the UK's £67 billion trade deficit with the same EU27 (2017, goods and services).⁵⁶ This is related to **an important division of power between Germany as a lender country and southern EU Member States as debtor countries within the EU**.

Meanwhile, **the rule that no EU Member State can run a surplus higher than 6 per cent of its GDP remains unenforced by the Commission, with Germany's**

⁵⁴ *European Union (Withdrawal Bill) 14th November 2017*. Hansard.
[https://hansard.parliament.uk/Commons/2017-11-14/debates/B9A99D17-80B2-43F4-BFD8-620E40A24EE9/EuropeanUnion\(Withdrawal\)Bill?highlight=under%20major%20government%20introduced%20process%20whereby%20parts%20european%20council%20meetings%20were%20held%20public#contribution-9C1285EC-C657-40E7-914C-FB69A9D27AC1](https://hansard.parliament.uk/Commons/2017-11-14/debates/B9A99D17-80B2-43F4-BFD8-620E40A24EE9/EuropeanUnion(Withdrawal)Bill?highlight=under%20major%20government%20introduced%20process%20whereby%20parts%20european%20council%20meetings%20were%20held%20public#contribution-9C1285EC-C657-40E7-914C-FB69A9D27AC1)

⁵⁵ Deutsche Bundesbank, Balance of Payments Statistics, June 2018, statistical supplement 3 to the monthly report.

⁵⁶ ONS Balance of Payments: January to March 2018, 29 June 2018, Table C.

surplus amounting to 8% of GDP in 2017.⁵⁷ Thus excessive economic imbalances are inherent in the European architecture; at the height of the Euro crisis, this meant that Germany was the only country with the fiscal ammunition for the so-called ‘Euro rescue packages’, which superimposed Troika-led austerity. Germany has therefore largely dominated policy in the Eurozone. Leading national politicians (e.g. Italian EU-Affairs Minister Savona), are increasingly vocal about their inability to affect this situation, in this case describing the Euro as a ‘German Prison’).

a. **Institutionalised German Dominance through the ‘Double Majority’ System**

Germany’s legislative dominance in the Council was institutionalised when the ‘double majority’ system became obligatory in the Council of Ministers on the 1st April 2017. The ‘double majority’ system means that the Council of Ministers can reach decisions when approved by at least 55% of Member States comprising at least 15 States and including States representing at least 65% of the EU population.⁵⁸ Thus **if the Eurozone states vote as a caucus led by Germany, they represent 66% of the EU population, and would achieve the threshold of 65% of the EU population needed to adopt a proposal. The Eurozone therefore has ‘a permanent in-built majority’⁵⁹ in the Council, even though the Euro embraces only 18 of the 28 Member States, deepening an already present divide in EU decision-making between “ins” and “outs”. This ‘could leave the UK consistently outvoted on measures with a profound impact on its economy and the City of London, simply because it is outside this new inner core’.**⁶⁰

⁵⁷ What Trump gets right about Europe’s trade problem. *Politico*, 3rd April, 2018.

<https://www.politico.eu/article/what-donald-trump-gets-right-about-europe-eurozone-china-imbalance-trade-problem/>

⁵⁸ European Council. Voting system. <http://www.consilium.europa.eu/en/council-eu/voting-system/qualified-majority/>

⁵⁹ Miller, V. and Lunn, J. House of Commons Library. *The European Union: a democratic institution?* Research Paper 14/25 (26th April 2014).

⁶⁰ *Ibid.*

4. THE EUROPEAN PARLIAMENT

- *The European Parliament is unrepresentative and weak.*
- *Despite being elected, accountability is poor, and corruption is a serious problem, translating into a waste of resources.*
- *The European Parliament is undemocratic, also resulting in the emergence of a culture of consensus.*

4.1 A Passive Non-Parliament

The European Parliament, directly elected since 1979 and formally created to represent the interests of citizens, has been for many years the focus of arguments about what democratic legitimacy the EU has.

The premise has been that if the European Parliament were given more substantive legislative power to carry out the tasks of a real legislative assembly, the EU as a whole would become more accountable and the democratic deficit would be reduced. However, the European Parliament **lacks the main feature of any legislative assembly: the power to propose (or draft) new law.** Indeed, the only institution with that power is the European Commission.

Nonetheless, EU treaties formally stipulate that its legislative role should equate with that of the Council of Ministers: under the Ordinary Legislative Procedure (which the Lisbon Treaty established as the EU's default decision-making procedure) the European Parliament has the power to veto legislation when it reaches an absolute majority. **In practice, however, the European Parliament is a passive institution, restricted to ratifying decisions that have already been made.**

a. Lack of Veto Power

First, the European Parliament's power to block legislation is seldom used: research shows that **between 1st May 1999 and 1st January 2013 the European Parliament**

used its veto to block legislation in just 5 out of 1166 procedures.⁶¹ Similarly, an LSE study on the European Parliament's power to block secondary legislation⁶² showed that between 2006 and 2016, the European Parliament vetoed only eight Regulatory Procedures with Scrutiny (RPS) measures and five Delegated Acts, which amounted to **less than 0.8% of its files.**⁶³ This is because the costs of collective action in the European Parliament are especially high; also, veto procedures tend to be technical and demand significant investment to be understood, while the timing requirements to override Commission drafts are tight. Thus, while EU Treaties have formally augmented the powers of the European Parliament by granting it with a legislative veto, this institutional reform has had no visible effect on the legislative process: the European Parliament remains weak and its decision-making largely futile.

b. Lack of Power to Amend Legislation

The European Parliament's power to amend legislation is also limited in the extreme: **in the period between 1999-2007, Kardasheva found that 73% of the European Parliament's amendments are simply rejected by the Council, which does not have to give reasons for these rejections.**⁶⁴

Instead, **under the Special Legislative Procedure in particular, the percentage of amendments rejected by the Council is even higher, reaching 81%**⁶⁵. The reason

⁶¹ Chalmers, D. *'The democratic ambiguity of EU law-making and its enemies'* (2015). In: Arnall, A. and Chalmers, D. (eds.) *The Oxford Handbook of European Union Law*. Oxford University Press, Oxford, UK.

⁶² Until 2006, the Council of the European Union and the European Parliament did not have veto powers over the Commission's secondary legislation. This fueled criticism of an alleged democratic deficit, and ultimately the adoption of formal veto rights for the Council and the Parliament: first in 2006, with the creation of the so-called 'regulatory procedure with scrutiny' (RPS), and then in 2009 with provisions on so-called 'delegated acts', as part of the Lisbon treaty (Art. 290 TFEU). Under the Lisbon Treaty, the Parliament and Council can include a veto provision in their legislation which allows them to block subsequent secondary legislation drafted by the Commission.

⁶³ A dearth of legislative vetoes: why the Council and Parliament have been reluctant to veto Commission legislation. *LSE Europpblog*, 25th October, 2016.

<http://blogs.lse.ac.uk/europpblog/2016/10/25/a-dearth-of-legislative-vetoes/>

⁶⁴ Kardasheva, R. "The Power to Delay: The European Parliament's Influence in the Consultation Procedure" (2009) 47 *Journal of Common Market Studies* 385, p 12.

⁶⁵ Kardasheva, R. "The Power to Delay: The European Parliament's Influence in the Consultation Procedure" (2009) 47 *Journal of Common Market Studies* 385, p 12.

this number is slightly higher than that recorded under the Ordinary Legislative Procedure is because of the inherent possibility of a European Parliament veto. Piedrafita has therefore argued that as “the EU executive branch does not depend on a majority in the European Parliament [...] **unlike in liberal democracies, EU decision-making does not necessarily reflect the “will of the majority”.**”⁶⁶

In addition, the European Parliament’s working methods further curtail its power of review. A centralisation of power has also occurred even within the European Parliament, as parliamentary amendments, whilst voted on by the plenary session, are drafted by Committees, and it is here that they are debated at most length. The most influential person within the Committee is the rapporteur, who writes the report on the proposal that will act at the basis for discussions and, often, recommendations. The level of expertise and loyalty to party groups are the central determinants in allocation of these posts.⁶⁷ However, it appears that once chosen, the reports of rapporteurs tend to be closer to the preferences of their national government.⁶⁸ **The process is thus a highly managed one, with long-term observers bemoaning the bureaucratisation of the European Parliament at the expense of its role as a place of genuine debate.**

c. Unrepresentative of Member States and Citizens

It is therefore unsurprising that another major shortcoming of the European Parliament is that it is unrepresentative. At EU Member State level, **“the current distribution of seats of the European Parliament among Member States represents a substantial deviation from equality, with the larger Member States being underrepresented and the smaller states being largely overrepresented.”**⁶⁹

⁶⁶ Piedrafita, S. ‘Political Opposition and the European Union’, Government and Opposition 10 January 2007.

⁶⁷ Yordanove, N. ‘Inter-institutional Rules and Division of Power in the European Parliament: Allocation of Consultation and Co-decision Reports’ (2011) 34 Western European Politics 97.

⁶⁸ Costello, R. and Thomson, R. ‘The Policy Impact of Leadership in Committees: Rapporteurs’ on influence on the European Parliament’s Opinions’ (2010) 11 European Union Politics 219.

⁶⁹ Piedrafita, S. ‘EU Democratic Legitimacy and National Parliaments’, CEPS essay No 7, 25 November 2013.

At citizen level, unlike the case with national parliaments, voters rarely know who their MEP is. In part this is because the constituencies in many countries are vast. In written evidence to the House of Lords inquiry on the Role of National Parliaments in the EU, Roger Godino and Fabien Verdier further explained that MEPs “**are elected on lists organised by political parties and consisting primarily of those politicians who fail to win the support of their own countries’ electorates.**”⁷⁰

Thus leaders, not voters, choose who gets seats.

In addition, elections to the parliament also rarely change anything: whereas a national election can kick out an unpopular government, **the European Parliament barely changes course regardless of whether the centre-right European People’s Party (EPP) or the center-left Socialists and Democrats (S&D) form the largest group.** Indeed, Charles Grant of the Center for European Reform (CER) suggests that “Much of the time, the parliament’s priority appears to be more power for itself ... The parliament always wants ‘more Europe’ – a bigger budget and a larger role for the EU.”⁷¹ Furthermore, Hix and Follesdal have commented on the lack of opportunity for popular opinion to influence policy through a process of party political debate: “Because voters’ preferences are sharpened by the democratic process, a democracy would almost definitely produce outcomes that are different to those produced by “enlightened” technocrats. Hence, one problem for the EU is that its policy outcomes may not be those politics that would be preferred by a political majority after a debate.”⁷²

d. Steady Decline in Election Turnout

The European Parliament’s course of action is therefore out of touch with its voters. This is demonstrated by the fact that there **has been a general decline in turnout across the continent at every election for the European Parliament since 1979.**

⁷⁰ Godino, R. and Verdier, F. ‘Heading Towards a European Federation – Europe’s Last Chance’ (2014) Notre Europe Policy Paper 103.

⁷¹ Grant, C. ‘Can national parliaments make the EU more legitimate?’ Centre for European Reform Charles Grant, 10 June 2013.

⁷² Follesdal, A. and Hix, S. ‘Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik’ Journal of Common Market Studies, 2006 Vol 44 Number 3 p 533-62

The average turnout has fallen from 61.99% in 1979 to 42.61% in 2014⁷³ (this average is still artificially high because of consistently high turnout in States with compulsory voting, such as Belgium and Luxembourg). In contrast, national elections see higher turnouts almost everywhere. According to the Standard Eurobarometer (the EU's official center for Public Opinion surveys and analysis established in 1974) a majority of respondents in 13 EU Member States now distrust the EU, with respondents predominantly distrustful in Greece (69%), the United Kingdom (57%), the Czech Republic (56%), France (55%), Cyprus (55%), Italy (51%), Austria (51%), Slovenia (50% versus 44%), Spain (49% versus 42%) and Croatia (49% versus 44%).⁷⁴

4.2 Unaccountable, Corrupt and Expensive

What sets the European Parliament apart from other EU institutions is that, through direct elections, it appears to offer an institutional setting that allows the public actually to hold decision-makers accountable: should EU citizens feel that 'their' MEPs have done a bad job, they can simply not vote for them at the next election. It is important to distinguish, however, between formal accountability mechanisms and real opportunities to hold MEPs accountable.

a. Electoral Contests on non-European Issues

Reif and Schmitt,⁷⁵ and Hix,⁷⁶ argue that the real opportunities for citizens to hold MEPs to account are limited by the fact that European Parliament elections are second-order national contests fought out on domestic rather than European issues. Indeed, these electoral contests do not relate to the future design of European integration. Voters are not presented with alternative views on the issues decided at

⁷³ Results of the 2014 European election. European Parliament.

<http://www.europarl.europa.eu/elections2014-results/en/turnout.html>

⁷⁴ Standard Eurobarometer 89: 'Public opinion in the European Union, First results'. Fieldwork, March 2018.

⁷⁵ Reif, K. and Schmitt, H. 'Nine Second-order National Elections – A Conceptual Framework for the Analysis of European Election Results'. *European Journal of Political Research* 8 (1980) pp. 3-44.

⁷⁶ Hix, S. and Hagemann, S. 'Could Changing the Electoral Rules Fix European Parliament Elections?' (Monograph, 2008).

Intergovernmental Conferences (IGCs) where the big integration decision are made, and which they have no means to influence. In practice, therefore, **EU citizens have no effective means of sanctioning those responsible for deciding the treaties, as the European Parliament plays a minor role in that process.** As a result, Alexander Stubb, Finland's former Prime Minister and a former MEP, has commented that, in Europe today, "national MPs tend to have responsibility without power. MEPs tend to have power without responsibility,"⁷⁷ However this may lend too much to the real position of MEPs.

b. Lobbying, Waste and Expense

Godino and Verdier have argued that although the EP is **'the sole democratic element in the whole fabric, [it] is seen as a hotbed of lobbying rather than as a shrine of democracy.'**⁷⁸ Heather Grabbe of the Brussels-based Open Society Foundations has also criticised the European Parliament for acting less like a proper parliament than like a group of lobbyists who spend money and pass laws, but have any genuine connection to voters. Indeed, the European Parliament is highly exposed to external pressure: MEPs do not disclose with whom they have had meetings. **There are no general rules on maintaining an arms-length relationship with lobbyists; no ethics codes for lobbyists; no duties for national Parliaments to give sufficiently detailed reasons for their positions.** Lobbying can therefore take place in a hidden way. This is so commonplace that there is considerable obscurity about the provenance of many parliamentary amendments; it is not always clear whether they did, in fact, originate within the Parliament or whether an MEP was persuaded to introduce them on behalf of other actors, notably but not exclusively, national governments.⁷⁹

Meanwhile, the European Parliament costs more than the British, French and German national parliaments put together: €1.75 billion (\$2.5 billion) a year. A

⁷⁷ 'Elected, yet strangely unaccountable'. *The Economist*, 14th May, 2015. <https://www.economist.com/briefing/2014/05/15/elected-yet-strangely-unaccountable>.

⁷⁸ Godino, R. and Verdier, F. 'Heading Towards a European Federation – Europe's Last Chance' (2014) Notre Europe Policy Paper 103.

⁷⁹ Hix, S. and Høyland, B. "Empowerment of the European Parliament (2013) 16 Annual Review of Political Science 1711, 176.

quarter of this spending is a consequence of working in 24 languages, and as much as **€180m a year is the extra cost of being forced by the EU treaties to work in three places.**⁸⁰ Indeed, the European Parliament operates in Brussels, where most committee meetings are held; Strasbourg, the official seat, which stages a four-day plenary session once a month; and Luxembourg, where most support staff are based. However, the buildings in Strasbourg are empty for 317 days of the year while the EU tax-payer pays for its maintenance as well as for the travelling MEPs must do. Although three-quarters of MEPs say they would prefer Brussels as a permanent home, that would need a treaty change agreed on by all national governments (France will likely say no).

4.3 Growing German Influence

Ultimately, the European Parliament also fails the democratic test, resulting in a culture of consensus also emerging in its decision-making. As German delegates dominate the political groups that control the European Parliament, its legislative course is increasingly aligned to the German legislative position.

a. Consensus Decision-Making Mirroring the German Position

A study by Votewatch⁸¹ has looked at the percentage of times each Member State's MEPs were on the winning side in all votes cast in 2004-2009, 2009-14 and 2014-15. **This found that decisions were highly consensual (an average of 85%). However, their analysis of these results exposes significant variations between the EU Member States: from 93% for German MEPs to only 71% for British MEPs (the lowest amongst all Member States in 2014-1015).**

The reason why Germany is disproportionately on the winning side in the European Parliament is because **most German MEPs sit in the groups that dominate the European Parliament**, namely **the European People's Party** (where the Chairman

⁸⁰ 'Elected, yet strangely unaccountable'. *The Economist*, 14th May, 2015.

<https://www.economist.com/briefing/2014/05/15/elected-yet-strangely-unaccountable>

⁸¹ How often do UK MEPs get their way? *The Guardian*, 17th December, 2015.

<https://www.theguardian.com/news/datablog/2015/dec/17/how-often-do-uk-meps-get-their-way>

is German and there are 34 German MEPs, whilst the average number of MEPs per Member State within the group is 8);⁸² and the **Progressive Alliance of Socialists and Democrats** (S&D, where the leader is also German, and the number of German MEPs is 27, second only to Italy, with 31 MEPs).⁸³ **As these are the two biggest Groups in the EP, at least one of them will always be on the winning side.** In contrast, most British MEPs do not sit in the dominant groups. Even when they do sit in these groups – such as the Conservatives in the EPP before 2009, and Labour in S&D – British MEPs are often opposed to these groups’ majority positions. As a result, British MEPs often find themselves on the losing side in important votes.⁸⁴

⁸² EPP. Parties and Partners. <https://www.epp.eu/parties-and-partners/>

⁸³ Group of the Progressive Alliance of Socialists and Democrats in the European Parliament. <https://www.socialistsanddemocrats.eu/political-bodies/group-progressive-alliance-socialists-democrats-european-parliament>

⁸⁴ UK influence in Europe series: UK MEPs lose most often in the European Parliament. <http://eprints.lse.ac.uk/70789/1/blogs.lse.ac.uk-UK%20influence%20in%20Europe%20series%20British%20MEPs%20lose%20most%20often%20in%20the%20European%20Parliament.pdf>

Conclusion

Through the institutional analysis of the EU's system of law-making, this paper has shown how the Prime Minister's Chequers proposal, or any similar regulatory alignment, such as remaining under a customs union, would place the UK under a system that has always been seriously lacking in democratic accountability. Moreover, we demonstrate that the EU system is now moving in the direction of even less democratic oversight and less transparent decision-making.

For the nation states that remain in the EU, this means a foreseeable future of life under a progressively less democratic political system; for the UK, it must mean that Brexit allows the full return of democratic sovereignty, away from this EU system of law-making, as the EU becomes **dominated by little-known groups with even less oversight than the three core EU institutions of the Commission, Council and Parliament**. These are, especially, the 'Trilogue' negotiating groups, and **Coreper** (the Committee of Permanent Representatives that includes Member States' ambassadors to the EU).

These closed-door informal practices are driven by small groups of unelected actors, and appear to have established themselves as the standard, accepted procedures, resulting in the dominance of a limited set of interests. As such, the making of law in Europe, the originator of democratic civilisation, can no longer be said to exist under a structure of democracy. This, we propose, is an ominous and historic development.

Executive decision-making appears now to have been conferred upon unaccountable, unelected and technocratic institutions. Indeed, all the EU's core institutions now favour executive and technical power at the expense of any genuine democratic process. Ultimately, the idea of a European State increasingly embodies this bureaucratic and technocratic system. What remains for Europe, we propose, is therefore a *de facto* choice between **two forms of government: undemocratic government by groups of 'experts', or democratic government by elected and accountable officials at the level of the nation state**.

Crucially, **'rule by experts' is not an evolution of democracy, but rather an illiberal intellectual regression with profound and dangerous consequences**.

Appendix: Percentage of times MEPs are on the ‘winning side’ in the European Parliament (by Member State)

