The institutional dimension of the FSJA: the evolving role of the European Parliament

Emilio De Capitani([1])

Foreword

1. This Chapter will focus on the main factors that influenced the growing role of the European Parliament since the beginning of the eighties. In the same period the European Community and thereafter the European Union were progressively involved in the justice and home affairs related policies till to the more ambitious objective to transform the European Union in a freedom, security and justice area.

Not surprisingly the increasing political dimension of these policies has as a direct result to strengthen the parliamentary institution by so confirming a virtuous circle which can, hopefully, cover the democratic gap at European Union Level notably in the FSJA policies as denounced on June 30th, 2009 by the German Constitutional Court.

Our aim is to highlight the main institutional dynamics of what we see as a three phased evolution when:

- in the first phase (before the entry into force in 1987 of the Single European Act) the European Parliament was practically unable to influence the final content of legislative proposals which were drafted negotiated and concluded between the Council and the Commission,
- in a second transitional phase (from the Single European Act to the entry into force in 1999 of the Treaty of Amsterdam) the European Parliament engaged in a strong political interaction with the Commission and its first direct serious bilateral negotiations with the Council in the framework of the first codecision procedures
- and in this current phase (from 1999 to the possible entry into force of the Treaty of Lisbon) the Parliament has been able to influence also the agenda setting of the other institutions and their working methods as the final content of the EU legislative proposals notably when issues, such as the promotion and protection of fundamental rights or the issue of security and justice, are at stake.

Obviously some institutional dynamics prevailing in one phase can survive in the following notably when the European Parliament is called to play different roles (as co-decider or as a simple consultative body) as still happens in the Freedom Security and Justice domain, but it is our understanding that there is a clear evolution in the general decision making process which can hardly be reversed or continue to accept exceptional decisional regimes.
This evolution has already been anticipated by the lobbies who attend more and more frequently the parliamentary premises and have been recently followed by the press who, for the first time in the recent European Parliament elections, did not present this

---

[1] *Head of Unit – Secretary of the European Parliament Committee on Civil Liberties, Justice and Home Affairs.*
The content of the present article is under the full responsibility of the author and does not engage in any way the position of the Institution

institution as no more than a 'would-be' democratic assembly but as a real political and legislative player.
As confirmation of this trend this Chapter will focus on a rather recent phenomenon; the so-called “first reading agreement”. This agreement already covers more than two thirds of the codecision procedure and is where the European Parliament plays the role of a protagonist.

I. The first phase : when the European Parliament was out of the picture (before the Single European Act (1987)

2. It is well known that in the first three decades since the adoption of the founding Treaties the questions related to justice and home affairs as well to the protection of fundamental rights were considered out of the scope of the Treaties and a domain jealously preserved by the Member States from the intervention of the European Institutions.
Before the 1980's the cooperation by Member States in the field of free movement of persons, justice and home affairs (including immigration and asylum) were nonexistent, or on a very low level except for the part directed to free movement of workers.
But even for these cases, although art 235 ([i]) of the EEC Treaty could have given some possibilities to develop a free movement policy of the EU citizens, founded on the passive freedom of **obtaining services (in the sense that the persons who wanted to use services could travel to another Member State to use those services provided ([ii])) it was not possible to reach the required unanimity between the Member States.**

3. During that period the Member States were more willing to build their cooperation outside the EEC legal framework in the form of intergovernmental cooperation (such as for TREVI in '75, CELAD, Ad hoc Group Immigration etc..), by limiting the involvement of the EU institutions to the presence of the Commission-representatives at their meetings.
It has to be noted that for the European Parliament the situation was frustrating even in the EEC legal framework where it was only ever consulted and erratically informed by the other institutions. Furthermore, consultation of the Parliament was more close to a formality than a sign of a serious political dialogue.

An elected Parliament searching for a more credible role in the “legislative triangle”

4. As a matter of fact at that time in the institutional legislative arena, the Council and the Commission practically worked as closed partnership. They would cooperate on every legislative dossier for decades on a daily basis.
The Commission officials would work in the Council Working Groups and the ministerial representatives were the core of the Committees working for the Commission when the latter implemented Council decisions (9/10 of the binding acts adopted by the Commission).
This situation dated back to the time of the '65 Merger Treaty which imposed that "*...The Council and the Commission shall consult each other and shall settle by*

common accord their methods of cooperation."(Art 15 of the "Merger" Treaty, currently the first paragraph of Art 218 of the EC Treaty*).*
Following this Treaty provision, the internal rules of the two institutions were (and still are) drafted in a way that allowed them to influence each others agenda if they so wished.

5. Needless to say, such daily cooperation between the officials of the Commission and the Council has created, along the decades, a sort of administrative culture of complicity. Obviously this culture, for the good and for the bad, could strongly influence the decision taken respectively at a political level by the Commissioners and by the Ministers.
The proof of such an influence was (and still is) that less than only 20% of the Commission and Council decisions required a political discussion by the Council Ministers or by the Commissioners. Therefore, the real negotiations for shaping European compromises were (and to my understanding still are) the result of the intelligence and determination of some thousands of civil servants in the Commission and in the Council ([iii]).

6. On the contrary, the European Parliament was formally and even physically apart in the daily game of the legislative negotiations. Whilst the Council and the Commission worked in Brussels, the Parliament met in Strasbourg and Luxembourg. Consequently, it was difficult for Parliamentarians to meet a member of the other institutions outside the rare, formal occasions when an intervention in the plenary was required notably by the President or by a member of the Commission.
There was virtually no way to include a minister of the Council Presidency in a committee meeting. Additionally, the internal rules of the Council make only a very limited and formal reference to the relations with the European Parliament ([iv]).

7. As Council and Commission officials shared (and share) the same working space, it was at these times occasionally difficult to understand which institution was the real originator of messages to the European Parliament relating to the definition of European strategies for example, and even replies to parliamentary questions.
Such lack of transparency towards the European Parliament was even greater in the internal preparatory works of the Council decisions. The general secretariat prevented internal officials and ministerial representatives from having the opportunity to share preparatory documents and information with institutions other than the Commission. This administrative culture of the "arcana imperii" would soon be challenged after the negative result of the Danish referendum on the Maastricht Treaty in '92 but for the entirety of the eighties and nineties the European Parliament and civil society was cut out from the daily, practical work of the other institutions.

8. This situation was particularly frustrating for an institution which was directly elected since 1979 but had the feeling to be practically irrelevant and not taken seriously in account by the two other institutions as well by the public opinion and the press who presented the Strasbourg assembly more as a virtual than a real actor.
To overcome this situation as others national Parliaments did before in the history the European Parliament engaged then with the other institutions a sort of institutional "guerrilla" with the aim to strengthen its role starting by using its relatively large budgetary powers as well by engaging procedural quarrels linked with the protection

of its prerogative to be fully consulted on the future binding acts of the European Economic Community.

9. The European Parliament was keen on the CJCE jurisprudence according to which the consultation of the EP is *"an essential procedural requirement"* (Case 138/79 Roquette Freres SA A.Council -1980) failure to comply constitutes ground for annulment as "..*the effective participation of the Parliament in the legislative process of the Community, in accordance with the procedures laid down by the Treaty, represents an essential factor in the institutional balance intended by the Treaty. Such power reflects the fundamental democratic principle that the people should take part in the exercise of power through the intermediary of a representative assembly."* Building on this favourable orientation of the CJCE the EP started by asking for more and more information on the background of the proposals, by delaying the adoption of its opinion and by requiring a new consultation every time that new substantial elements were added by the Council to the Commission proposal after the first opinion of the European Parliament ([v]).

10. By all these initiatives the European Parliament was de facto challenging the seriousness of the other two institutions and pretending the loyal cooperation by the other institutions as required by the art. 10 (ex art. 5) of the EC Treaty.
To be frank not all the political and legal challenges launched by the European Parliament were always strongly founded so that in one case the Court of Justice slammed the European Parliament delaying tactic by recalling that the Council has the right to act if the Parliament does not deliver its opinion by the prescribed deadline without any particular reason ([vi]).
Apart from this 'incident', in other significant cases, the Court of Justice supported the European Parliaments willingness to play a more credible role in the EC decision making process and recognised in a landmark case the EP's "right to stand" before the Court ([vii]) when its prerogatives were at stake. Similarly it recognised that the European Parliament had the right to challenge the Commission by an action for default according to the art. 175 of the EC Treaty (currently art. 232 of the TEC) as the Commission was delaying the presentation of a legislative proposal required by the Treaty ([viii]).

11. In its jurisprudence in favour of only directly elected European Institutions, the Court of Justice was in fact fleshing out a more general political move shared by several Member States who wanted upgrade the political dimension of the European Community as well its internal ways to work and the balance of powers between the Institutions. A clear message in this direction was the adoption by the European Council in Stuttgart, on 19 June 1983 of the "Solemn Declaration on European Union".
With this text the Head of States and Governments expressed, among several other priorities, their willingness *"... to strengthen and develop European Political Cooperation...* " and "*...to promote, to the extent that these activities cannot be carried out within the framework of the Treaties.."* the need for an *"... approximation of certain areas of the legislation of the Member States in order to facilitate relationships between their nationals*" as well for ***"...a common analysis and concerted action to deal with international problems of law and order, serious acts of violence, organized international crime and international lawlessness generally***."

In the same Solemn Declaration the Head of State and Government recognised that the participation of the EP in the decision making process should have been strengthened and even extended if only on an optional basis, on some highly political domains where such a consultation was not formally required by the Treaty ([ix]). Needless to say, this such new political vision gave the opportunity to the European Parliament to adopt on 14th of February 1984 a Report of Altiero Spinelli who proposed a fully fledged (even if only of political nature) new draft Treaty on the European Union.

II. The transitional phase : from the cooperation to the codecision with the Council (from the Single European Act to the Amsterdam Treaty)

12. It would then have been necessary to wait for the European single act (February 1986) to see the implementation of some of the Stuttgart Declaration innovations. The main objective of the Treaty being the creation by the 1st of January 1993 of a single market without internal borders this Treaty extended the policies for which the unanimity in Council was abandoned by strengthening at the same time the association of the EP with the "cooperation" procedure.
Even if the Treaty was much less ambitious of the Draft proposed by the European Parliament, its innovations were successful and allowed for the realisation of a space without internal borders for services, capitals and goods. For the freedom of movement of people it appeared immediately clear that it would have been politically impossible to build on some articles (such the 7A, 100A, …etc) and declarations (on article 7A) a Community area even with the necessary compensatory measures in the domain of justice and home-affairs.
Faced with the deadlock of some Member States others launched, out of the Community framework, the Schengen Cooperation which would had been after 1999 the core of the future cooperation inside the European Union.

13. The EP reacted to the innovations of the Single European Union with a fundamental revision of its internal Rules of procedures by re-launching the interinstitutional game. Being aware of its impossibility to influence adequately the Council, it focused its pressure on the Commission to bring her closer to the EP or, at least, in a more neutral position where it could really play its role of guardian of the Treaty and of an honest broker between the EP and the Council.

The main elements which placed pressure on the Commission were, on a negative side, the power of the EP to vote a motion of censure (art. 144 of the EEC Treaty and 201 of the EC Treaty ([x])) and on a positive side the possibility to influence its nomination by the Governments of the Member States as announced in the Stuttgart Declaration where an opinion of the EP Bureau was foreseen ([xi]).
It is worth noting that even the Single European Act didn't change the appointment procedure decided at the very beginning by the Member States. A formal association of the EP by appointment to the Commission will come only in 1993 by the Maastricht Treaty and only the Lisbon Treaty, if ratified will give the final word to the EP by so establishing a direct relation between the EP and the Commission.

How to bring the Commission closer to the Parliament…

14. In the daily legislative work the European Parliaments strategy to bring the Commission closer was achieved by amending on January 16th, 1986 its internal rules ([xii]) with notably three different moves.

The first one was aimed to push the Commission to choose for its legislative proposal as often as possible a legal basis allowing the association of the EP in cooperation with the Council instead of the simple consultation. A systematic check of the legal basis by the Legal Affairs committee was (and still is) foreseen in the Rules.
This move opened the "legal basis" saga even if, as a matter of principle, the choice of the legal basis for a measure must rest on objective factor which is amenable to

judicial review so to avoid the situation of the EC violating the principle of attribution, according to which it can legislate only when it is specifically authorised by the Treaty.
The point is that the legal definitions in the treaties are often rather vague and some policies could cover different and sometimes conflicting objectives.
This could open the way to multiple solutions in shaping the legislative proposals with an impact also on the possible majority in Council or the level of participation of the Parliament. It is worth noting that in another landmark case**,** "Titanium Dioxide" ([xiii]), the Court made clear that in presence of a concurrent possible legal basis, solutions which should be avoided were those that "…*would divest the cooperation procedure of its very substance, the purpose of that procedure being to increase the involvement of the European Parliament in the legislative process of the Community. That participation reflects a fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly."*

The second, more "Machiavellian" move, was the prevision of a double plenary vote on each legislative proposal to open a negotiation space by which to obtain, if necessary, substantial amendments of the Commission proposal (and accessorily change the text on the Council table..) .
According to the EP rules the first vote is aimed to adopt, modify or reject the Commission proposal. At the end of this first vote the political will of the Parliament is established and could start (if the EP rapporteur so wishes) a political negotiation with the Commission to convince it to change, totally or partially, its proposal. If the Commission accepts to do so the original proposal will be modified not only for the Parliament but notably for the Council which, according to the Treaty (current art. 250 TEC) is bound by the Commission proposal and can change it substantially only by a unanimous vote and a re-consultation of the Parliament.
In more simple terms, through the double vote the EP use its new "privileged" relation with the Commission to influence the Council which is the real target of this sort of "knight" move on the chess board.
In fact, according to cooperation procedure the Council could practically ignore the EP amendments but could no more adopt at qualified majority the proposal if the Commission does not change the text again. But a new amendment by the Commission against the vote of the EP will become practically and politically impossible because the text will be resubmitted to the EP. By so doing the Commission was placed in an uncomfortable position and the Council was no longer able to obtain practically everything, as it was before.

The third move of the Parliament was to engage the two other institutions in the negotiation of the legislative programme. The explicit aim of such an exercise was apparently innocent and even sensible as a clear calendar made it possible to organise the different "readings" of the Parliament and of the Council notably required by the cooperation procedure. Therefore the impact of this transparency would have been less freedom of movement against the other institutions.
At that time this would have been unconceivable for the Council who still considered itself the master of its own agenda. On the contrary, the Commission and particularly Commissioner Sutherland, considered that a clearer planning would hadve strengthened the right of legislative initiative of the Commission by establishing a

minimum level of “discipline” and predictability in the work of the European Parliament .
The experience which followed showed interesting results even though they were very different to what each institution was expecting.
The Council became trapped in its internal six-month working plan and the Presidencies were increasingly dependent on the calendar of the new Commission proposals and of the Parliament votes. The Commission established a strict internal planning by regularly informing the other institutions which raised more and more requests of information on the preparatory phase of the Commission proposal.
The only institution which remained paradoxically free in its agenda (out of the deadlines established in the Treaty) was the EP who now had all the information needed to press the Commission and at the same time the Council Presidencies to agree the priorities to be debated in the following six months.
EP influence on the other institutions agendas became progressively clearer even if no mention of it was in the internal rules of the Council or Commission.

15. All this institutional progress in the “community” domain were unfortunately not transposable in the framework of the so called “European Political Cooperation” (EPC) covering the EU external and internal security (as outlined in ’83 by the Stuttgart Solemn declaration and formalised at Treaty level by the Single European Act).
Since then, and in parallel with the corresponding practice followed within the Political Committee of the European Parliament where four times a year, the Foreign Affairs Minister of the Council Presidency informed the parliamentarians of the major subject of the external policy (EPC), the Legal affairs Committee was even if on a less regular basis informed by a Presidency Minister of Interior or of Justice about the negotiations and achievements such as the definition outside the EC of the first phase of the Schengen cooperation after the signature of the Convention in '85.
A "contact-procedure” ([xiv]) was also created after insisting pressure from the EP in 1990 between the Presidency of the Council (Justice and Home Affairs) and the Legal Affairs Committee of the EP. In practice the President in office of the Council met a designated Vice President of the Parliament (and some Members of the Committee on Legal Affairs of the EP) in order to listen to the views of the EP.
According to some members who had participated in these meetings, the debates, although deeply prepared by the EP, were held behind closed doors and very often the Minister responsible was rather reticent and elusive.

…the Maastricht Treaty and the “third pillar ….

16. All these procedures where more theoretical than substantial and they have been substantially upgraded only after the entry into force of the Maastricht Treaty (1993). This Treaty was in fact the first serious answer to the problems raised by the fall of the Berlin Wall, by the pressure of the economic globalization and by the increasing intra-community movement of persons.
It created the European Union, launched the process for the EURO, made an explicit reference to the protection of fundamental rights (as already acknowledged for years by the ECJ) established a European Citizenship as well as a cooperation between the member states in the fields of justice and home affairs (the so called “third pillar”) ([xv]).

From an institutional point of view the main achievement of the Treaty was therefore the creation of the so-called "codecision" procedure where the European Parliament was (at last !) placed on the same level as the Council in several important domains of the Community competences. This was a historic moment for the institution, the members and the external world as the European Parliament was finally, for the good and for the bad, in the centre of the political scene. After some initial tentative attempts by the general secretariat of the Council to present the new procedure as a sort of strengthened "cooperation" of the EP to the adoption of a Council decision ([xvi]), it was accepted that the European Parliament should be treated by the Commission on the same level of the Council.
In the new framework the Commission preserved its right of initiative and was called to become more and more the "honest broker" between the other two institutions but also progressively losing the control of the content of the proposal as far as Council and Commission had closer cooperation.

17. The dialogue between the three institutions soon became very highly thought off and the European Parliament played its cards apparently very well if at the end of the legislature the Council Presidency recognised that the intervention of the parliamentarians constituted a real added value for the entire process bringing new ideas, new interests and more transparency in the decision making process of the European Community.
From the date of the entry into force of the Maastricht Treaty (1st November 1993) and the end of the fourth legislature (mid 1999) 153 acts have been adopted in codecision. It is interesting that for more than one third (38%) it was necessary to convene the conciliation committee foreseen by the Treaty and that in more than 60% of the cases was possible to reach an agreement at the stage of the second reading of the European Parliament.
The meetings between Parliamentarians, Ministers and Commissioners became increasingly frequent and the direct intervention of the "political authorities" downgraded, for the good and the bad, the role of the officials of the Commission and of the General Secretariat of the Council even if the latter tried by any means to frame the space of manoeuvre of the Presidency by continually recalling its duty to preserve the confidentiality of the internal negotiations of the Council and moreover the need not to reveal the names of the national delegation potentially interested to be a part of the qualified majority needed to adopt the act or part of the minority which can block its adoption.

Therefore, it soon became clear that the confidentiality rules which had been applied for decades in an hierarchical organisation such as the General secretariat of the Commission or of the Council would not resist in a political dialogue where each Council Presidency was keen to obtain as soon as possible a result, every Commissioner, Minister or Rapporteur was keen to be the first to reveal the impact of its role in the legislative procedure. Lobbyists and journalists started to place pressure on the parliamentarians and the Committee multiplied the public hearings where issues formerly negotiated in the working groups of the Council or of the General Directorate of the Commission where publicly debated and notably voted.

18. Faced with this Copernican revolution in regards to how the European legislation could be shaped, the European Parliament decided to establish a full parliamentary committee responsible for the policies linked to "justice and home affairs".

Created in January 1992, the Civil Liberties Committee (LIBE) [xvii] tried, as a first priority, to flesh out the obligation established in the art. K6 of the new Treaty according to which: *" The Presidency and the Commission shall regularly inform the European Parliament of discussions in the areas covered by this Title. The Presidency shall consult the European Parliament on the principal aspects of activities in the areas referred to in this Title and shall ensure that the views of the European Parliament are duly taken into consideration."*

Therefore, the Council and Commission, notwithstanding all the evolutions spreading out between the EU institutions in the same period within the codecision related domains, resisted the pressures of the LIBE Committee and refused to consider these Treaty obligations as comparable to the obligations to consult or inform the European Parliament in the community "pillar". The formal excuse was that even if the Treaty referred to the Council the initiatives were taken by the Member States and played out in an intergovernmental framework ([xviii])so that the Council was unable to collect more than the very weak documentation sent to the EP or give complementary informations on the draft Joint Positions or Joint Actions or Conventions foreseen by the art. K3 of the EU Treaty.

19. Faced with such a lack of cooperation from the other institutions and to the impossibility to challenge it before the Court of Justice (as the third pillar was explicitly excluded by the Treaty between the competence of the ECJ) LIBE decided to re-focus its activity on the annual political debate on justice and home affairs. Those very lively debates were extensively reported in the press and gave support to the committee in it's strive to develop community action.

But the main focus of the LIBE committee was on the protection of fundamental rights within the EU.
Formally this move was founded on an explicit reference in art. 6 of the TEU and on a phrase in article K2, first paragraph ([xix]) as well on the practice already followed by the EP External Affairs Committee who held an annual debate on the respect of human rights outside the EC.
Politically this initiative addressing the protection of fundamental rights by the Member States themselves was at that time considered somewhat provocative and rash, not only because the Member States considered themselves without any doubts in these domains (notwithstanding the hundred of judgment of the Strasbourg Court showing the contrary) but moreover because this kind of debate would export, to a European level, a lot of divisive questions at national level.

The first LIBE rapporteur on this subject was Karel de Gucht ([xx]) who had already been in 1989 the rapporteur in the Committee on Legal Affairs and Citizens' rights for the first Catalogue of Human Rights adopted by the European Parliament ([xxi]). Needless to say that the reports on fundamental rights became the periodic occasion of very lively debates in plenary and of political debates and initiatives by the other institutions. In particular by a resolution of 18 January 1994 the European Parliament reiterated the request to promote the Community accession to the European Convention on Human Rights, (OJ 1994 C 44, p. 32) and on April 26th, 2004 the Council decided to ask the formal opinion of the Court of Justice on this subject. Therefore on 28 March 1996 the Court of Justice after a strong reaffirmation of the importance of the fundamental rights in the EU legal system considered (Opinion

2/94) therefore that the accession by the EC *"..would be of constitutional significance and would therefore be such as to go beyond the scope of Article 235. It could be brought about only by way of Treaty amendment."*

III. From the Treaty of Amsterdam (1999) to the Treaty of Lisbon (..):the EP contribution to the European Freedom, security and area.

20. One and half years later (October 2nd, 1987) the Member States signed the Treaty of Amsterdam by which the European Union proclaimed to be founded on fundamental rights (art. 6 TUE) and stressed its objective " to maintain and develop the Union as an area of freedom, security and justice.." (FSJA) (art. 2 TUE).
Therefore, due mainly to the UK opposition it was impossible to amend the Treaty to allow the accession to the ECHR but consistent with the objective of transforming the EU in a freedom, security and justice area the new Treaty transferred new powers to the European Union, strengthened the measures in favour of the European citizenship (transparency, data protection) against any form of discrimination (art. 13 TEC), integrated the cooperation of Schengen, transferred some policies from the third pillar to the ordinary regime (migration, asylum, external borders, judicial cooperation in civil matters). Such an ambitious evolution had therefore only been possible at the price of accepting ambiguous formulations, evolutionary clauses, complex and tricky compromises mirrored in 13 Protocols, 51 Declarations adopted by the Conference and 8 Declarations by Member States.

21. To understand why the Member States (MS) were pushing so hard towards a political union and why there was so much emphasis on the founding principles and values one should recall not only the determination expressed by Chancellor Khol and President Chirac ***"… to put the finishing touches to the formation in Europe of a homogeneous space, where freedom of movement will be guaranteed by a common approach"*** but, moreover, that in the same period the European Union was negotiating its biggest enlargement with ten new member states (some of them only recently reinstituted as liberal democracies).
The MS's, building on the criteria set in Copenhagen for the accession negotiations, decided upon the creation in the EU Treaty of a political mechanism to preserve the decision making process of the Union in case one of its members was in serious and persistent breach by a Member State of principles founding the Union.
By so doing (and quite surprisingly) the MS were developing at the highest level an exercise that the European Parliament hand launched only some years before.

Therefore it was clear that once created these monitoring mechanisms would have covered also the founding Member States which were from then on, also in these sensible domains no more "above any reasonable doubt".
Per se, such a move was no more than to align on the same ground the EU member states as it is since decades before the Strasbourg Court or in the framework of the implementation of the art.52 of the ECHR when the violation of fundamental rights would have been at stake. De facto, as the following experience will show even the very existence of this mechanism inside the EU would have created some big embarrassment between the EU MS ([xxii]).

22. Needless to say the most difficult issue was the protection of fundamental rights as there was no agreed definition common to all the Members nor an internal EU interpreting mechanism (as even after Amsterdam the Court of Justice was excluded from the II pillar policies and a substantial part of the III pillar) nor the possibility for the EU to invoke the Strasbourg Court as the EU was not part to the ECHR.

To find a pragmatic even if transitional solution for the citizens and the institutions some weeks before the entry into force of the Treaty the European Council launched in Koln, with the support of a EP resolution, the process which would have drawn to the proclamation in December 2000 of the Charter of fundamental rights.

23. Faced with the ambitious but fragile perspectives opened by the Treaty of Amsterdam the European Parliament decided to become a driving force in shaping the future EU action in the freedom, security and justice area and by turning the other community and Union policy into a tool to promote and not only protect fundamental rights. It is worth noting that from the very beginning of the legislature the European Parliament (on initiative of its AFCO and LIBE committees) made clear to the other institutions that it considered the development of the EU as a freedom security and justice area much more than a simple consolidation of the policies previous listed in the administrative related formula of "Justice and home affairs".

In the EP vision the FSJA would have been a more ambitious political objective focused on the fundamental rights of the individual and on a more general vision of the European public order where the EU institutions and the national authorities act in a multilevel and legally integrated framework ([xxiii]). The LIBE Committee and the Political Groups submitted to the plenary several resolutions ([xxiv]) stressing this messages to the European Council and to the Member States in the perspective linked of the preparation and implementation of the first multiannual programme for the FSJA (Tampere 1999).

Therefore, despite their high political level (and somehow rhetorical) declarations In the following years the European Parliament and the other institutions have been confronted to several internal and external challenges which made evident the different culture and approaches. Some of these challenges are, ten years later, still sources of tension and political misunderstanding and some others (more linked with the internal procedural machinery) will only be settled by the Treaty of Lisbon (if and when it will enter into force).

How better monitor the respect of the founding principles of the EU (art. 6 and 7 TEU)

24. Since the entry into force of the Treaty of Amsterdam the "sanctions mechanism" foreseen by the art.7 of the TEU as well the "alert system" (inserted by the Treaty of Nice in the same context), have been evocated in several occasions but never formally activated for several reasons, the main being that the Institution which was more vocal in this context was never able to obtain the support of the political groups representing at least two thirds of the members of the EP as required by the TUE.

Therefore in two cases a majority was reached to establish temporary parliamentary Committees in charge of further (political and not formal) inquiries.

The first case was linked with **the global secret interception system called "Echelon"** which became a subject of public debate thanks to a study by the European Parliament and a public hearing of the LIBE committee.
After several contradictory declarations and some embarrassed positions of the Council Presidency ([xxv]) as well by the UK Prime Minister who invoked the right for its Country to take all the initiatives necessary to preserve its economic well being, the Parliament created a temporary committee who submitted a report one year later

without being able to obtain all the informations it was seeking for. The Temporary Committee report was adopted by the Plenary (367 votes in favour, 159 against and 34 abstentions) on September 5th, 2001 (only few days before the September 11th terrorists attacks..) and it ascertained the existence of this worldwide spy network dubbed "Echelon" led by the United States and associating also a member of the EU (UK). When presenting his report to the Parliament, Gerhard Schmid stressed how gruelling the task had been for the temporary committee. He brushed aside the idea that all telecommunications systems in Europe were being spied upon as this was physically impossible. Between the 44 recommendations the Resolution recommends the widespread use of date encryption and urges the EU institutions to set the example. Therefore it should be noted that Amendments 6 and 28, which called on Germany and the United Kingdom to stop allowing US intelligence-gathering services to eavesdrop within their borders, was rejected by a large majority.

The second case was on **the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners.**
Again, the decision to create a Temporary Committee was taken after a first debate in the LIBE committee founded on revelations in the US and European press as well on the parallel inquiry by the Council of Europe Assembly and moreover of a formal inquiry of the COE Secretary General according to art. 52 of the ECHR. It is also worth noting **that the Commission formally wrote to the EU Member States to ascertain if there was ground for an art. 7 of TUE initiative**.
On 14/02/2007 the European Parliament adopted (382 votes in favour, 256 against with 74 abstentions) a report drafted by Giovanni Claudio **FAVA** (PES, IT) which deplored the passivity of some Member States in the face of illegal CIA operations, as well as the lack of co-operation from the EU Council of Ministers.
In addition, it considered that it was wholly unacceptable that the Council should first have concealed and then, at Parliament's request, only supplied piecemeal information on the regular discussions held with senior officials of the US Government, asserting that this was the only available version. These shortcomings of the Council implicated all Member State governments ([xxvi]) since they have collective responsibility as members of the Council. Parliament also expressed its concern about the omissions in the statements made to the Temporary Committee by the Council and its Secretary-General, regarding the Council's discussions and knowledge of the methods used by the United States in its campaign against terrorism. It deplored the fact that he was unable to supplement the evidence already possessed of the Temporary Committee.([xxvii])

25. Faced with the difficulties in establishing a **neutral assessment of the state of fundamental rights as described by the Charter of Nice in each EU Member State** the European Parliament, in its 2000 resolution ([xxviii]), took into account a suggestion of the Cologne 1999 European Council to set up a fundamental rights Agency ([xxix]) and proposed the creation, as a preparatory measure, of a network of independent experts. The committee started its work soon after and its contribution was deeply appreciated by the members of LIBE. Furthermore, only three years later on 12 and 13 December 2003 at the European Council, a decision was made to convert the European Monitoring Centre on Racism and Xenophobia into a Fundamental Rights Agency.
In 2005 the European Parliament, after a LIBE hearing on the subject ([xxx]), called the Commission to submit a legislative proposal to build the new Agency. It asked that

the proposal be founded on the codecision between the Parliament and the Council to give the possibility to the legislators of a better shaped structure, better working methods and an increased role for the Agency. The EP objective was to build the Agency as a sort of a new authority, acting like the European Data protection supervisor foreseen by art. 286 of the Treaty, and which could be at the same time independent and willing to help the EU legislator in its legislative work and to obtain from the member states all the necessary information when protection of fundamental rights may be at stake.
It is worth noting that even the Council Legal Service considered this to be a sensible and legally founded strategy but this was not the position of the Commission. The Commission (probably with the support of several Member States) insisted on a simple data-collecting Agency and, by claiming that the future Agency should also cover policies outside the codecision, it submitted a proposal to be adopted unanimously by the Council after a simple consultation of the EP.
Not surprisingly the final mandate of the Agency as defined by the Council Regulation (EC) No 168/2007 of 15 February 2007 was then narrowed and didn't cover the most sensible areas of judicial and police cooperation in penal matters and prevented the Agency from establishing single EU Country reports.
The result was (and is) so absurd that even the Council one year later consulted the Agency on a draft legislative proposal which fell into the area of police cooperation in penal matters (the so called "EU-PNR" proposal). A revision of the Agency mandate or at least of its working methods and action plan will probably be needed after the entry into force of the Lisbon Treaty and of the Charter of fundamental rights which require more stringent verification of the future legislative proposal against the definition set out in the Charter.

Promoting and not only protecting fundamental rights

26. In a particular case, the difficult question of the compatibility between traditional economic liberties and the impact of fundamental rights was raised. It was the case dealing with the protection of Media Pluralism in the EU (and notably in Italy) in accordance with art. 11 of the European Charter of fundamental rights proclaimed in Nice in December 2000. On this subject, the LIBE committee submitted a general resolution to the EP plenary ([xxxi]) by which it considered that where Member States fail to take appropriate action, the Union has a political, moral and legal duty, within the limits of its powers, to guarantee media pluralism.
The EP considered that following an explicit judgment of the Italian Constitutional Court, there were sufficient grounds for concern to justify a comprehensive examination of the situation and the presentation of appropriate legislative proposals by the Commission. It took therefore three years for the Commission to submit a statement (January 16th ,2007) on this subject to declare that it was "appropriate for the Commission to continue to monitor the situation closely," but that there were not enough elements to justify a formal legislative initiative. On 25 September 2008 (on proposal of its Committee on Culture), the EP voted in a new resolution on media pluralism ([xxxii]) which asked the Commission to establish some objective indicators of risk of violation of pluralism but did not raise again the possibility of an EU intervention in case of difficulties in a Member State.

The EP as Robin Hood and the Council as the Sheriff of Nottingham?(The interinstitutional saga of "data protection" and "data availability" in the PNR and SWIFT cases)

27. Last but not least the more notorious example of the different approaches taken by the EU institutions has been the question of data protection when personal data are needed for security purposes notably in the aftermath of September 11th. It is worth mentioning that only two months after this horrific event the European Parliament was the only EU institution ([xxxiii]) who dared raise profound reservations about the impact of certain measures taken by the USA in the framework of the "war on terror" , such as the Patriot Act and the US President's executive order on military tribunals. On this occasion the EP notably demanded:*"-not to limit in a disproportionate manner data protection standards (even if under a sunset clause) on electronic surveillance provisions, - not to admit any discrimination between third-country and non-third country citizens that would be contrary to the ECHR,- to guarantee the protection of fundamental rights as regards the monitoring of communications between a prisoner and an attorney,*
- the procedural guarantees to a fair trial, as consolidated by the European Court of Human Rights;"
The main concern of the EP was to avoid the situation of the fight against terrorism justifying EU initiatives legalising massive data collection without previously being shaped by the European legal framework for data protection when public security is at stake (as Directive 95/46 is not applicable in this domain). The EP wanted to avoid the creation of a false feeling of security and moreover possible abuses as art. 8 of the ECHR allows for limits to personal freedoms as far as they are compatible within a democratic society and to the understanding of the EP, in democracies citizens should be allowed to control the institutions and not only the reverse.

Moreover it seemed bizarre to the Parliamentarians to endorse, at an EU level, a mass collection of ordinary European citizens data when the same Member States were unwilling to share the data on criminals, terrorists and EU Agencies, at least at that time, lacked the expertise for analysing the terrorism threat. It took in fact years after September 11th before that the Council was able to agree on the so called "Swedish Initiative" which granted a minimum level of sharing informations between EU Member States security and intelligence services.

With this background one can understand why the EP in the following years was the first Institution who asked for the transformation of Europol into a true EU Agency, was able to conclude in three months time the agreement on the EU Directive on data retention, strongly supported the interconnection of criminal records and the inclusion at the EU level of the Prum Convention (allowing the transfer between security services of the fingerprints of researched or convicted criminals DNA,). All these projects encountered resistance inside the Council even if they were a clear improvement in the mutual trust between security services at an EU level.

By the contrary the European Parliament was extremely reluctant in giving its support to data mining or profiling initiatives such as the systematic collection of personal data other than the ones needed to check the identity of a passenger already known as a terrorist or a dangerous criminal.

The ‘casus belli’ I would like to refer to is the protection of the personal data of airline passengers travelling to the United States (PNR). After September 11 the US took the strategic decision to prevent and combat terrorism by pooling both criminal investigation techniques when searching for a known terrorist (FBI) and the technique of detecting potential terrorists based on intelligence and sifting through ever-growing volumes of data (CIA). In particular, it demanded (and still demands) to be given all the data on airline passengers at the time the ticket is booked, for a dual purpose:
- to check their identity;
- to check how dangerous they might be.
While the first objective is perfectly logical and even indispensable, if only to compare against check-lists of terrorists or criminals in the national databases, the second objective seemed to Parliament to be more sensitive and disproportionate in relation to the implementation planned by the US authorities.
Indeed, it would mean systematically giving access to information such as e-mail addresses, credit card numbers, membership of clubs or parties, dietary preferences, lists of flights made and with whom.
For years after March 2003, members of the Commission and Council were pushing to obtain the support of the Parliament and this support was not given for the lack of factual elements showing the efficiency and the proportionality of these kinds of measures.
It is worth recalling that in a memorable hearing on 14th of May 2007, in the presence of the national parliaments and of the US Homeland Security Secretary Chertoff, Vice President Lambrinidis reacted to the pressure of Minster Schauble to give up on the PNR by claiming the good faith of the LIBE members by sayng *".. I do feel frustrated sometimes because I get the sense that we act in the Parliament like the Robin Hood, running around protecting data and we tend to treat you like the Sheriff of Nottingham as you were the only people who care about police measures and all that stuff. This is not true but you do get this impression ... We still do not have, as you know, the minimal procedural guarantees for defendants although for five years now, we have the European arrest warrant, ... (for) data protection in the third pillar,... we don't know where it is going to go... It wouldn't have hurt Council to make some statement on the extraordinary renditions issue. It was a big issue, Parliament had a huge debate on it. Mr President, if you consider it appropriate and it hasn't happened already, to maybe discuss in Council the report of the European Parliament...".*

The EP-Council relation: not only tensions but also an increasing loyal and fruitful dialogue with the growing phenomenon of the "first reading agreements".

28. Confronted with the previous examples, the dialogue between the European Parliament and notably the Council was mainly characterised by an increasing trust in many other domains of the freedom security and justice area.
This could be proved by the figure of more than 80% agreements in first reading on the freedom security and justice related codecision procedures during the last legislative term (2004-2009). As it is confirmed by the last activity report ([xxxiv]) of the European Parliament delegation to the Conciliation Committee, since 2004 following notably a "passerelle" decision ([xxxv]) the codecision procedure was applied to "...most legal acts regarding borders, visas, asylum, illegal migration and civil law cooperation ([xxxvi])". Compared to the previous legislative term (1999-2004), the number of codecisions of the main committee responsible for this area (the so called "LIBE" committee) rose sensibly from 8 to 38 procedures.

The same report highlights that "..very significant developments took place since the last legislature regarding the stage of conclusion. During the 6th legislature 72% of files were concluded at 1st reading, 22.9% at second reading ([xxxvii]) and 5.1% in conciliation. This contrasts strongly with the figures for.." the previous legislatures (see diagram below).

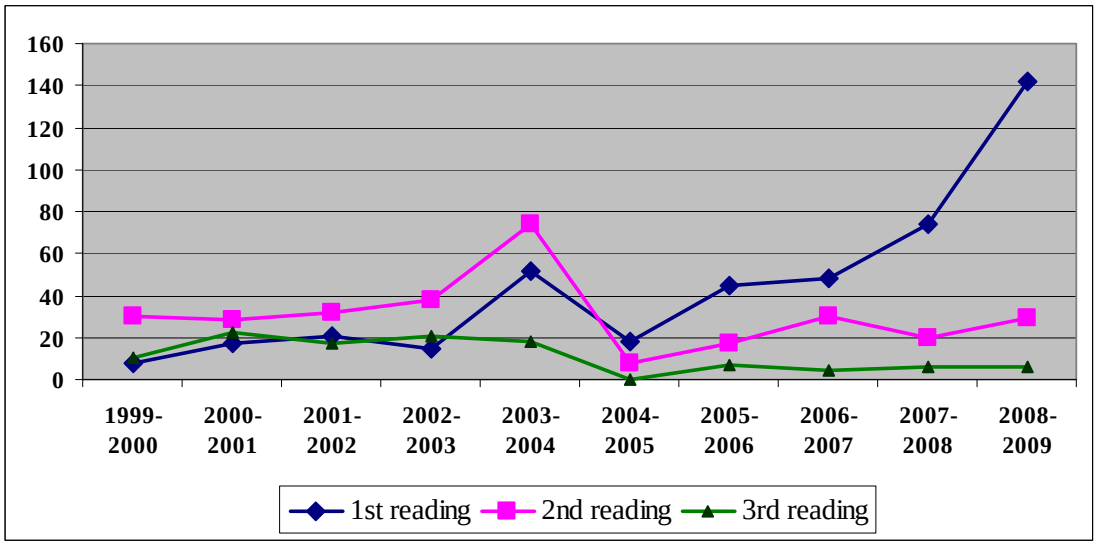

Figure 1: *Evolution of the stage of conclusion 1999-2009* (*Files adopted between 01.05. and 30.04. each cycle, except for 2008-2009 - all files included*)

Turning to the specific domain of Freedom Security and Justice area related policies, the figure of 72% of first reading agreements rises to 84%. This shows an even stronger will of the Council to reach a political agreement with the European Parliament as soon as possible.

It is worth noting that the move towards a closer institutional and political dialogue started in 2001 on two LIBE reports dealing with domains, such as transparency ([xxxviii]) and data protection ([xxxix]), which were highly controversial and where, on paper, the two institutions seemed to be more distant than in other more technical domains.
As a matter of fact for these two specific cases there was strong pressure on the institutions to reach an agreement. In the first case, the 1st of May 2001 was the deadline established by the Treaty of Amsterdam to define the principles on transparency and confidentiality to be applied by the three legislative institutions was ([xl]) and the 1st of January … 1999 was the deadline to establish "an independent supervisory body" ([xli]) to protect the data in the EU institutions.
LIBE negotiated the first proposal (data protection) with the Coreper 1 (which is the one in charge of the internal market legislative procedures) and the second with Coreper II (at ambassadors level) which was dealing for the first time with these kind of files and negotiations.

29. Why such an astonishing increase in the "first reading agreements" since 2004?

The EP delegation report cited above explains the trend with six (sometimes complementary) reasons:
a) with the possibility to conclude in 1st reading following a simple majority vote in Parliament;
b) with "…the greater number and better contacts between the institutions whose representatives now start talking to each other routinely very early in the procedure.";
c) the higher number of uncontroversial and rather technical proposals;
d) the objective, perceived or political urgency of proposals presented by the Commission also seems to play a role;
e) because the Council Presidencies seem more and more eager to reach quick agreements during their Presidencies and they seem to favour 1st reading negotiations for which the arrangements are much more flexible than in later stages of the procedure;
f) last but not least, because since the enlargement of 2004 it seems to become increasingly difficult to find a Council position among the now 27 Member States and an early input of the Parliament can be seen as a factor facilitating the Council's internal consensus-building.
I will add to these reasons the fact that in first reading there is no deadline as it is the case for all the phases following the Common position of the Council.

30. With the entry into force of the Lisbon Treaty this trend will inevitably amplify in the FSJA domain and codecision will be extended to judicial and police cooperation in penal matters, to legal migration and new a legal basis will be created for integration etc… it is worth looking closer at the impact of this phenomenon and the way the institutions behave with regards to relations between them and the external world. No one can doubt that for the European Parliament the codecision in the penal and security area will be a new important challenge as long as these domains are (and remain) a domain jealously protected by the Member States which also keeps the intervention of the European Commission at the lowest possible level.

Also, after Lisbon, the interinstitutional dialogue should be no longer be anecdotic and frustrating as art. 295 of the TFUE ask the three institutions (and not only the Council and Commission) to establish common agreements: *"The European Parliament, the Council and the Commission shall consult each other and by common agreement make arrangements for their cooperation. To that end, they may, in compliance with the Treaties, conclude interinstitutional agreements which may be of a binding nature."*

If these agreements are fairly negotiated it will be more than likely that the current trend of the first reading agreements will be reinforced. This has already happened since the 2004 enlargement when the growing role of the European Parliament has been accompanied by an increasing difficulty of the EU Council to build, between more than twenty seven member states, a qualified majority or to control several possible potential blocking minorities ([xlii]).
The Council found its way out from possible blockade by pushing the European Parliament towards an agreement at its first reading of the codecision procedure (as is possible since the entry into force of the Treaty of Amsterdam).
It has to be noted that, from a formal point of view a "first reading agreement" requires only a simple majority in the EP, a qualified majority in Council and the Commission's support to the Council qualified majority ([xliii]).

It should not be surprising that under such flexible conditions the first cases of “first reading agreements” took place already in 2001 in the freedom security and justice area ([xliv]).

31. What happens during the “first reading agreements”?
Formally all the political negotiations take place in the framework of the EP’s preparatory works which are virtually convened in the same working space as the Member States represented in the Council working groups, the Council Presidency as spokesperson from the Council side, the Commission and the EP rapporteur / shadow rapporteurs who refer back to their political groups.
During these preparations, different political dynamics take place.
On one side the EP tries to build its simple majority between the political groups and define a political orientation which can be supported by a qualified majority in the Council. Complementary to that move national representatives in the Council try to influence the position of the EP’s political groups by invoking a sort of national solidarity ([xlv]).
Therefore, the weight of national interests in the EP is not as heavy as it is in the Council so that there is a strong chance that as a possible compromise between the initial positions of the Commission, the Council and the Parliament could take shape. This "third way" is very often opened by external interventions such as independent authorities at European and national level (such as the European Data Protection Supervisor, the Fundamental Rights Agency , the UNHCR, the art. 29 Working Group, Europol, Eurojust...) the national parliaments, academic experts (such as the Odysseus network for migration policies), the civil society representatives (Amnesty International, Statewatch, Human rights Watch..) and even lobbyists who take advantage of the public debates in the parliamentary committees to give their own view of the situation in the member states and to try to influence the position of the political groups.

32. Needless to say, some external interventions have sometimes questioned the viability of the data on which a Commission or a Member State legislative initiative was built and even the impact assessment of the Commission (which in principle should motivate in an objective way all the possible alternatives) have not been considered conclusive or satisfactory. In some cases the European Parliament following the US Congress example, launched its own alternative impact assessment. This move was mirrored by the Council which recently requested the Fundamental Rights Agency to draw up a neutral assessment of the Commission’s proposal on the EU PNR system.
In some cases the European Parliament has even conducted several visits in the member states to ascertain the real conditions of the reception of asylum seekers in different EU Countries by visiting several reception centres and meeting the local regional and national authorities as well as the NGOs and the migrants themselves.

V Looking forward and strengthening the principle of loyal cooperation at EU and national level

33. Faced with this evolution in the negotiation making process, the proliferation of alternative sources of information and moreover the proliferation of the parliamentary hearings and public debates, alternative solutions to the original Commission proposals could emerge.

This increasing transparency and openness could not be limited to the work of the European Parliament and it is more that welcome the pressure from the Treaty of Lisbon for a stronger and loyal dialogue between the institutions of the legislative trilogue.

If well implemented, art. 295 of the TFUE could break down the current separations between the three institutions and not only between the Council and Commission as it is currently foreseen by art. 218 of TEC - see precedent paragraph.5) to establish common agreements: *"The European Parliament, the Council and the Commission shall consult each other and by common agreement make arrangements for their cooperation. To that end, they may, in compliance with the Treaties, conclude interinstitutional agreements which may be of a binding nature."*

34. At the same time the public debates in the European Parliament push the national parliaments to address their government's representatives and it becomes more and more difficult for the national administrations to escape questions on their positions in the working group of the Council related to new legislative proposals. As is showed by several inquiries at national level, the direct and indirect dialogue between European and national parliamentarians make it increasingly clear, at a national level, what is really at stake in Brussels and bring national parliamentarians to ask for progressively more comparative studies between the member states themselves.

At the crossroads of all these contacts and reciprocal influences, the "traditional" way to interact between the institutions and Member states on the implementation of the EU policies become more and more outdated and formalist.

It is therefore hardly defendable before an ordinary EU citizen, and compliant with the principle of loyal cooperation outlined in the art. 10 of the TEC, that fifty years after the entry into force of the founding Treaties the Commission should still be obliged to launch every year dozens of infringement procedures for the simple fact that the Member States did not notify the national measures implementing the EU/EC rules which in principle should be public as these rules affect the EU citizens freedoms.

35. This situation will be even less acceptable after the entry into force of the Treaty of Lisbon notably as far as the FSJA related policies will be concerned.
The Lisbon Treaty emphasis on fundamental rights, or the explicit reference to democratic principles (articles 9 to 12 of the TEU) and to the enhanced role of political parties as well as to the European citizenship (art.18-25 of the TFEU) together with the decision to place the individual at the centre of the new European Union will be worthless, if everything can be jeopardised by the resistance of the national and even European administrative bodies and procedures.

Predicting how far the European institutions could go following the EU obligation to *"…observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies."* (art. 9, 1p TUE).

36. As far as the MS are concerned it will not be only a question of granting loyal cooperation with the EU (ex art. 10 EC Treaty and 4 of the new EU Treaty) but also to actively build a common project where each national judiciary and national parliament ([xlvi]) could play a "European" role in the interest of the citizen itself enjoying at the same time the national and European citizenship.
Obviously in this new legal framework a peculiar role will be played by National Parliaments which, according to art. 12 TEU shall *".. contribute actively to the good functioning of the Union"* notably when FSJA policies are at stake.
It is worth noting that in the recent years the position of the European and national parliament is coming closer together notably on sensitive issues like the PNR, the CIA flights and the Framework Decision on terrorism. It is more and more frequent that at a national level the positions, or at least the arguments raised during the European Parliament debates, are mirrored. The presence of permanent national parliament's representatives in the EP premises, new informatics tools and networks (even if not comparable to the ones linking together European and national administrations) are all elements of a new virtual working area which can evolve in a inter-parliamentary "Agora".

37. Several signs notably in the FSJA show that the period of the institutional liturgies between the parliaments of Europe is drawing to an end and that some national parliamentarians are progressively more comfortable in approaching problems from a European point of view. This evolution could be strengthened by the creation of the a "joint evaluation system" described in Article 70 of the new Treaty on the functioning of the European Union according to which *"Without prejudice to Articles 258, 259 and 260* (NDR Commission infringement procedures and Court judgements*), the Council may, on a proposal from the Commission, adopt measures laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies referred to in this Title by Member States' authorities, in particular in order to facilitate full application of the principle of mutual recognition. The European Parliament and national Parliaments shall be informed of the content and results of the evaluation."*
This mechanism, which will associate closely the European and national parliaments in the political evaluation of the FSJA related policies, could become even more credible if the European and national Parliaments will connect it with the more specific evaluation of essential tools involved in the implementation of these policies such as Europol and Eurojust (as foreseen by art. 85 and art. 88 of the TFUE). Measuring political objectives with concrete figures and crossing the analysis of the same phenomenon from a national and an European perspective will be an essential asset to measure the real impact of the EU policies and enhance the mutual trust between parliamentarians and with them the political forces at European and national level.

38. A stronger link between the European and national Parliament is of the utmost importance notably in the FSJA policies as this could improve the democratic legitimacy of the overall European Union, as strongly asked by the German

Constitutional Court in '93 with its Maastricht "Urteil" ([xlvii]) and repeated, with even stronger words with its judgment of June 30th, 2009.
Therefore a question could arise: has the EU democratic deficit been increased between '93 and '2009 or on the contrary, has the European Parliament's appearance on the scene with the codecision procedures changed the perspective?
As I tried to demonstrate within this chapter, there are no common measures from a democratic point of view between these two different periods.

If the level of democracy should be measured by taking as a criterion the possibility for the citizens to influence the content of the legislation, there is no doubt that the intervention of the EP has fundamentally changed the way decisions are taken at an EU level. Until '93 there was practically no way for anybody who was not associated with the dialogue between the Council and the Commission to influence the content of the legislation. Obviously these institutions have also their own strong contacts with civil society but everything is filtered by their internal organisational logic: the rationale of a multinational bureaucracy in the Commission and the skilled diplomacy in the Council.

After no less than 858 codecision procedures, the European Parliament has now brought other disrupting elements to previous EU way such as a transparent debate and confrontation with thousands of democratic and verifiable votes (when the culture of the other institutions remain a hierarchical decision making process in the Commission and the consensus building in the Council).

The experience of the last decade, notably after the 2004 enlargement, shows that the parliamentarian method had some collateral positive effects on the ways in which the other institutions work by bringing more transparency to the position taken by the national delegations inside the Council or confronting the Commission services with alternative impact assessments of a given issue.

It is true that from a traditional point of view this growing role of the European Parliament takes shape without the parallel formation of a "European" government as neither the Commission nor the Council could play this role. But the absence of a real European government means that consequently, in the European Parliament, the political majorities could be built issue by issue and by the nominal vote each European citizen could verify the behaviour of the elected.

There is however to my understanding an essential need for the legislator and the EP in particular. Both often greatly need independent assessment of the situations where essential interests of the citizens could be at stake. Nobody can underestimate the role played under this perspective by the Court of Justice, the Court of Human rights and notably the National Constitutional Courts but this is not available when legislation is taking shape (contrary to what happens for instance in France with the Conseil Constitutional). Such an independent support could in fact be extremely helpful FSJA policies are at stake and bigger is the risk of exploitation for partisan political quarrels either at national or European level.

The creation of the European Data Protection authority has played as essential role in these years even if on several occasions the institutions have not followed its opinion.

Therefore, as these opinions were public the citizens had the opportunity to make their own judgment.
Will this approach be developed after the entry into force of the Lisbon Treaty, for instance in the case of the Agency for fundamental rights? It will soon be known as it will be the case for the other objectives of the freedom, security and justice area which will be decided by the European Council in December this year.

---

[i] It is the "implicit powers" clause (currently art. 308 of the TEC) according to which *"If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.")*

[ii] As it was suggested by the jurisprudence of the CJCE

[iii] According to Sabino Cassese the credibility of the EU administration founded on public competition is comparable to the excellent one of the French Hautes Ecoles which was designed on the system that formed the highest bureaucracy representatives in the Chinese Empire

[iv] Council Decision 2006/683/EC, Euratom of 15 September 2006 adopting the Council's Rules of Procedure (OJ L 285, 16.10.2006, p. 47). Rules of Procedure as last amended by Decision 2008/945/EC, Euratom (OJ L 337, 16.12.2008, p. 92) *"Article 26 Representation before the European Parliament. The Council may be represented before the European Parliament or its committees by the Presidency or, with the latter's agreement, by the following Presidency or by the Secretary-General. The Council may also be represented before those committees by its Deputy Secretary-General or senior officials of the General Secretariat, acting on instructions from the Presidency. The Council may also present its views to the European Parliament by means of a written statement."*

[v] On the Council obligation to re-consult the EP see Case C-65/90 European Parliament versus Council (1992).

[vi] In Case C-65/93 of **3**0 March 1995 "European Parliament v Council" (Art. 43 EEC Treaty - Obligation to consult the Parliament.) *European Court reports 1995 Page I-00643*

[vii] In *Case* 70/88 Parliament v Council (*Chernobyl*), it was shown that the EP was entitled to challenge ,via a special right action, the Council and the Commission where its prerogatives were directly affected.

[viii] By this judgment the CJCE stressed that *"..the fact that the European Parliament is at the same time the Community institution whose task is to exercise a political review of the activities of the Commission, and to a certain extent those of the Council, is not capable of affecting the interpretation of the provisions of the Treaty on the rights of action of the Institutions. Accordingly the European Parliament has the capacity to bring an action for failure to act."*

[ix] In Case 165/87 Commission v. Council (1988) the CJCE recognised the validity of such optional consultations

[x] *Article 201. If a motion of censure on the activities of the Commission is tabled before it, the European Parliament shall not vote thereon until at least three days after the motion has been tabled and only by open vote.If the motion of censure is carried by a two-thirds majority of the votes cast, representing a majority of the Members of the European Parliament, the Members of the Commission shall resign as a body. They shall continue to deal with current business until they are replaced in accordance with Article 214. In this case, the term of office of the Members of the Commission appointed to replace them shall expire on the date on which the term of office of the Members of the Commission obliged to resign as a body would have expired.*

[xi] *"2.3.5 Before the appointment of the President of the Commission, the President of the Representatives of the Governments of the Member States seeks the Opinion of the enlarged Bureau of the European Parliament. After the appointment of the members of the Commission by the Governments of the Member States, the Commission presents its programme to the European Parliament to debate and to vote on that programme."*

[xii] On a report of Sir Christopher Prout member of the Petitions and Rules Committee

[xiii] **See** Case C-300/89 of 11 June 1991. 'Commission of the European Communities v Council' - Directive on waste from the titanium dioxide industry. The Court declared (emphasis added) **"***2. Where an institution' s power is based on two provisions of the Treaty, it is bound to adopt the relevant measures on the basis of the two relevant provisions. However, where, as in the case of Article 100a of the Treaty, one of the enabling provisions requires recourse to the cooperation procedure provided for in Article 149(2) of the Treaty, on conclusion of which the Council may act by a qualified majority provided that it intends accepting the amendments proposed by the Parliament and put forward by the*

Commission, and the other provision, as in the case of Article 130s, requires the Council to act unanimously after merely consulting the European Parliament, ***use of both of them as a joint legal basis would divest the cooperation procedure of its very substance, the purpose of that procedure being to increase the involvement of the European Parliament in the legislative process of the Community. That participation reflects a fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly.*** *It follows that in such a case recourse to a dual legal basis is excluded and that it is necessary to determine which of those two provisions is the appropriate legal basis.*

[xiv] In practice the President in office of the Council would meet a designated Vice President of the Parliament (and some Members of the Committee on Legal Affairs of the EP) in order to listen to the views of the EP. The discussions, although well prepared by the EP, were behind closed doors and very often the Minister responsible was not very open.

[xv] The policies covered by the "third Pillar" in the Maastricht Treaty were listed in article K2.

"For the purposes of achieving the objectives of the Union, in particular the free movement of persons, and without prejudice to the powers of the European Community, Member States shall regard the following areas as matters of common interest:

1. asylum policy;

2. rules governing the crossing by persons of the external borders of the Member States and the exercise of controls thereon;

3. immigration policy and policy regarding nationals of third countries:

(a) conditions of entry and movement by nationals of third countries on the territory of Member States;

(b) conditions of residence by nationals of third countries on the territory of Member States, including family reunion and access to employment;

(c) combating unauthorized immigration, residence and work by nationals of third countries on the territory of Member States;

4. combating drug addiction in so far as this is not covered by 7 to 9;

5. combating fraud on an international scale in so far as this is not covered by 7 to 9;

6. judicial cooperation in civil matters;

7. judicial cooperation in criminal matters;

8. customs cooperation;

9. police cooperation for the purposes of preventing and combatting terrorism, unlawful drug trafficking and other serious forms of international crime, including if necessary certain aspects of customs cooperation, in connection with the organization of a Union-wide system for exchanging information within a European Police Office (Europol).

[xvi] The Treaty which makes a clear reference to the "consultation" and "cooperation" procedure avoids calling it a "codecision" procedure, but following a truly byzantine and warped style refers to this procedure with the formula "*The Council acting* in accordance with the procedure referred to in Article *251* of the Treaty…"

[xvii] The following Chairpersons, took initiatives to further develop the institutional position of the EP and of the LIBE Committee.

15.01.1992 / 18.07.1994 Amedée Turner
22.07.1994 / 28.10.1995 Antonio Vitorino
29.10.1995 / 15.01.97 Luis Marinho
16.01.1997 / 19.07.1999 Hedy d'Ancona
1999-2001 Graham Watson
2001-2003 Ana Palacio
2003-2004 Hernandez Mollar
2004-2005 Jean Louis Bourlanges
2005-2007 Jean Marie Cavada
2007-2009 Gerard Deprez
2009-…Juan Fernando Lopez Aguilar

[xviii] In fact even the Commission was often not informed of the background.

[xix] *Article K.2.* 1. The matters referred to in Article K.1 shall be dealt with in compliance with the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Convention relating to the Status of Refugees of 28 July 1951 and having regard to the protection afforded by Member States to persons persecuted on political grounds.

2. This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

[xx] See the EP resolution of 11 March 1993 on respect for human rights in the European Community published in OJ C 115, 26.04.1993, p. 178.

[xxi] See the EP Resolution of 12 April 1989 on the Declaration of Fundamental Rights and Freedoms published on the OJ C 120, 16.05.1989, p. 51

[xxii] There were several cases were the mechanism of art. 7 TEU has been invoked (even if never formally launched) such as the case for the Haider case, ECHELON, the Media Pluralism, or the CIA flights, and in many parliamentary resolutions.

[xxiii] This was the implicit message in the revision of the competencies of its LIBE committee as committee responsible for the freedom security and justice related policies area (FSJA) complemented by the policies on transparency, data protection and the fight against discrimination. Contrary to what was (and is) foreseen in the internal distribution of competencies in the Council and in Commission these policies even if not formally cited by the Treaties have been considered by the European Parliament as essential elements for the development of the FSJA.

[xxiv] Such as

-the Resolution recalled in the par. 43 of the European Council Conclusions in Cologne on June 3th *("43. The European Council calls attention to the action plan for the creation of an area of freedom, security and justice, which it approved in Vienna, and calls upon the institutions to press ahead swiftly with the action plan's implementation.* ***It welcomes the fact that the European Parliament has approved a Resolution on the Vienna action plan and gave due consideration to this subject at a conference with Members of Parliament from the Member States on 22 and 23 March 1999.*** *The results of the conference will be taken into consideration when the European Council establishes the political guidelines for future European justice and home affairs policy at its extraordinary meeting in Tampere on 15 and 16 October 1999.")*

- the Resolution on the extraordinary European Council meeting on the area of freedom, security and justice (Tampere, 15-16 October 1999) adopted at the beginning of the legislature on 16 September 1999. Minutes Part II, Item 10(b). *Official Journal C 054 , 25/02/2000 P. 0093 - 0094*

[xxv] On April 3rd, 2000 the Portuguese Council Presidency opening a debate in the European Parliament stressed that the EU could not accept the existence of a telecommunications system irrespective of national laws and fundamental rights, and expressed the hope that the Council would reach a political agreement on the question of interception of communications. On behalf of the European Commission, Mr Erkki LIIKANEN stressed that national security fell within the competence of member states, and drew attention to the non-transposition into national law of the 1995 Data Protection Directive.

[xxvi] The national governments specifically criticised by the report for their unwillingness to cooperate with Parliament's investigations are those of Austria, Italy, Poland, Portugal and Britain. The report also gave detailed evidence of investigations of illegal rendition or CIA flight cases involving Bosnia, Cyprus, Denmark, Former Yugoslav Republic of Macedonia (FYROM), Germany, Greece, Ireland, Romania, Spain, Sweden and Turkey.

[xxvii] Parliament questioned too the real substance of the post of EU Counter-terrorism Coordinator occupied by Gijs de Vries, since he was unable to give satisfactory answers to the questions raised by the Temporary Committee. It was of the opinion that a revision and strengthening of his competence and power, as well as the increased transparency and monitoring of his activities by Parliament must be undertaken in the near future. Parliament also criticised the lack of cooperation evinced by the Director of the European Police Office (Europol), Max-Peter Ratzel, and expressed its deep concern about the refusals of the former and current Secretaries-General of NATO, Lord Robertson and Jaap de Hoop Scheffer, to appear before the Temporary Committee.

[xxviii] See: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P5-TA-2001-0401+0+DOC+XML+V0//EN

[xxix] See: *"46. The European Council takes note of the Presidency's interim report on human rights. It suggests that the question of the advisability of setting up a Union agency for human rights and democracy should be considered."*

[xxx] See: http://www.europarl.europa.eu/hearings/20050425/libe/programme_en.pdf

[xxxi] See: http://www.europarl.europa.eu/oeil/FindByProcnum.do?lang=en&procnum=INI/2003/2237

[xxxii] See:http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2008-0459&language=EN&ring=A6-2008-0303

[xxxiii] See EP Resolution on EU judicial cooperation with the United States in combating terrorism accessible http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P5-TA-2001-0701+0+DOC+XML+V0//EN&language=EN . According to this text the EP considered "*... that the US Patriot Act, which discriminates against non-US citizens, and President Bush's executive order on military tribunals are contrary to the principles established above;*

3. Considers that, such being the legal situation, legal problems could arise from the fact that the USA considers terrorists as war criminals, whereas this is not the case in the EU; considers that, therefore, no extradition could be allowed to the US from Member States for people who are to be tried before military tribunals;

4. Expresses concern at the fact that the President's executive order does not specify the limits on the court's jurisdiction, makes no provision for the presumption of innocence and the right to an impartial judge and, above all, allows sentences, including capital punishment, to be decided by a two-thirds majority;

5. Reiterates its request for a complete abolition of the death penalty in the USA and reminds Member States that they are bound not only on the basis of their individual ratification of Protocol 6 of the ECHR but also as members of the Union, in accordance with Article 6 of the Treaty; a general EU-USA agreement cannot therefore be reached; extradition cannot take place if the defendant could be sentenced to death;

6. Requests that expulsion or deportation proceedings should not be used as "disguised" extradition proceedings, and calls on the EU to guarantee European data protection standards that are proportionate, effective and of limited duration and to ensure that no mandatory retention of data be allowed, which would undermine rights and guarantees;

[xxxiv] Accessible at the following address : http://www.europarl.europa.eu/code/information/activity_reports/activity_report_2004_2009_en.pdf

[xxxv] Council Decision of 22 December 2004 providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure laid down in Article 251 of that Treaty (OJ L 396, 31.12.2004, p. 45–46)

[xxxvi] For a first analysis of the increased codecision powers in this area and the role of the LIBE committee see part I.4 of the Conciliations and Codecision Activity Report 2004-2006; available like the previous reports under http://www.europarl.europa.eu/code/information/activity_en.htm (in the following the "Midterm Report 2007").

[xxxvii] In 10.8% of cases common positions were approved by Parliament without amendments ("early second reading agreement"), 12.1% went into a "classical" second reading.

[xxxviii] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43.)

[xxxix] Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 12.1.2001 p.1-22)

[xl] "Article 255

1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.

2. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251 within two years of the entry into force of the Treaty of Amsterdam.

3. Each institution referred to above shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents."

[xli] *Article 286.*

1. From 1 January 1999, Community acts on the protection of individuals with regard to the processing of personal data and the free movement of such data shall apply to the institutions and bodies set up by, or on the basis of, this Treaty.

2. Before the date referred to in paragraph 1, the Council, acting in accordance with the procedure referred to in Article 251, shall establish an independent supervisory body responsible for monitoring the application of such Community acts to Community institutions and bodies and shall adopt any other relevant provisions as appropriate.

[xlii] The enlargement didn't have the same effect in the EP as the number of political players has remained practically the same as well as the possible political combinations to build a majority.

[xliii] Otherwise according to art. 250 of the EC Treaty the unanimity of the Council will be required.

[xliv] The first cases of « first reading agreement » have been Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (see: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001R0045:EN:HTML) and Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (see: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001R1049:EN:HTML)

[xlv] It has also to be noted that when issues in the FSJA are particularly complex the EP does not really launch the negotiations with the Council before the representatives of the Member States have had their own "tour de table" and raised the reservations of each Country on the draft legislative text.

[xlvi] According to a consolidated CJCE jurisprudence national judges should consider "European judges" when interpreting and applying the EU rules.

[xlvii] Decision of the German Federal Constitutional Court of the 12 October 1993, 2 BvR L 134/92 and 2159/92.