

# Co-decision in the European Parliament: Comparing Rationalist and Constructivist Explanations of the *Returns* Directive

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## Abstract

This study uses rationalist and constructivist explanations of co-decision in the European Parliament (EP). It seeks to understand the change in the policy preferences of the EP during negotiations on the 'Returns' directive – dealing with the voluntary or compulsory return of irregular immigrants. This article shows that the introduction of co-decision contributed considerably to the EP's change of stance on immigration policies. A long-standing advocate of civil liberties in the Area of Freedom, Security and Justice (AFSJ), the EP was expected to raise the standards of protection for third-country nationals. In view of the inability of the EP to construct a more liberal policy, the study uses two institutionalist approaches to understand why the EP was unsuccessful in raising the standards. Therefore, the approaches aim at identifying the logics and layers of change. The empirical application of the models highlights the necessity to integrate rationalist and constructivist understandings of co-decision in order to understand motivations for policy change. Synergies in the direction of change also point to the importance of institutional motivations, in order to understand major changes in the policy preferences of the EP.

## Keywords

Co-decision; European Parliament; Returns directive; Rationalism; Constructivism; Justice and Home Affairs; Irregular migration

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IN 2008, THE AGREEMENT ON THE *RETURNS* DIRECTIVE (EUROPEAN PARLIAMENT and Council of the European Union 2008) caused scandal both inside and outside the EU (Acosta 2009a). The directive seeks to harmonise the conditions determining the voluntary or compulsory return of third-country nationals (TCNs) staying irregularly on the territory of Member States. The final text was seen by many human rights advocates and third countries as a restrictive alternative to facilitating expulsions (Amnesty International 2008; ECRE 2008). The outcome was especially surprising because it was the first text on irregular immigration decided under the co-decision procedure – giving equal powers to the

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European Parliament (EP) to amend and decide legislation. Given that the EP had, until that point, portrayed itself as a clear advocate of human rights and civil liberties (Papagianni 2006: 249), such an outcome was seen as a major U-turn in the position of the EP, particularly for its Committee on Civil Liberties and Justice and Home Affairs (LIBE).

Indeed, until 2005, there had been a clear opposition between the EP and the Council of the European Union (Council) in policy matters (Maurer and Parkes 2005). The Council had adopted a restrictive view on internal policies, especially since the terrorist attacks of 11 September 2001 (Geddes 2003; Kostakopoulou 2000; Uçarer 2001). The EP, on the other hand, had maintained more liberal views on the Area of Freedom, Security and Justice (AFSJ), persistently requesting higher civil rights standards (Guiraudon 2000; Maurer and Parkes 2005). There was therefore an expectation that, under co-decision, the EP would strive for a more liberal understanding of migration issues at EU level. However, the *Returns* directive confounded such expectations, because of its restrictive nature and the wide room for manoeuvre left to Member States (Baldaccini 2009; Acosta 2009b).

In view of the change in the policy preferences of the EP, the article examines the impact of co-decision on the formulation of such preferences. In this sense, the *Returns* directive offers a good starting point to analyse the impact of co-decision, because it was among the first directives to be negotiated just after the change in the decision-making rules. The AFSJ has evolved from a purely intergovernmental policy area under the Treaty of Maastricht (in the form of the third pillar) into a progressively *communitarised* area. The Treaty of Amsterdam provided for the partial transfer of internal policies to the first pillar (excepting police and judicial cooperation in criminal matters). However, this process of *communitarisation* was subject to a transitional period where the old intergovernmental decision-making rules applied. Therefore, it was not until 2005 that most first pillar issues (family law and regular immigration excluded) were effectively decided by co-decision with the EP and qualified majority voting (QMV) in the Council. It should also be noted that, since the change of procedure occurred during the same parliamentary term, the members of the LIBE Committee remained the same. Thus, it is an ideal occasion to bracket off the change of individual preferences and focus on the impact of co-decision alone.

The article aims to examine different logics of change, namely to maximise the number of explanations that can help us understand how and why the EP agreed to a text that was apparently opposed to its traditional policy preferences. In order to tease out these different logics of change, the article engages with two theoretical models – rationalist and constructivist approaches to new institutionalism. The two models seek to explore a maximum number of explanations in order to identify the different layers and mechanisms of change in the EP's policy preferences (Rittberger 2003: 12).

Bringing different approaches to new institutionalism can present serious ontological and epistemological challenges. However, the need for empirical research that transcends abstract theoretical debates has been underlined by proponents of both approaches (Checkel and Moravcsik 2001; Jupille *et al.* 2003: 16). Thus, this article attempts to investigate the assumptions and propositions of both approaches in order to explain the impact of decision-making rules on policy preferences. Such an enterprise can bring to light different mechanisms of change operating at different layers. Adding a constructivist approach to the more traditional rational-choice understanding of co-decision reveals tensions and synergies between mechanisms and provides a more complete understanding of the motivations guiding actors during processes of institutional change.

In this sense, although reference is made to these issues, the study does not seek to explain the final text, namely why the directive was closer to the Council's preferences than to the EP's, or the content of the preferences. It is an attempt to examine the impact

of co-decision on the policy preferences of the EP. In order to show the different motivations for change and conceptualise its layers and mechanisms, the first section of the article introduces the two theoretical models. Then, it proceeds to describe what happened during the negotiations. Finally, it applies the two models to the case study in order to explain how and why change occurred. The models show that, while rationalist approaches explain how change occurs, constructivist approaches identify more fully the motivations driving the change.

## Co-decision in theories

Co-decision has engendered an increasing amount of academic attention in the last decade, but the volume of research has not always brought more clarity. The way co-decision is examined varies greatly, not only between different theoretical perspectives, but also among authors using the same theoretical approach. Due to its formal structure, decision-making has been studied mostly from a rational-choice perspective. Most authors have examined the legislative side of co-decision – especially inter-institutional relations – through formal models, often using game theory (*e.g.* Tsebelis and Garrett 2000; for a review, see Dowding 2000). However, these models have often been criticised for their lack of empirical resonance (Aspinwall and Schneider 2000; Crombez *et al.* 2000; Jupille *et al.* 2003; Judge and Earnshaw 2008). Other legislative studies examining the internal politics of the EP have focused on voting behaviour, mostly using roll-call votes and thus focusing on the EP plenary as their object of analysis (*e.g.* Hix *et al.* 2009; Thomassen *et al.* 2004).

Given the diversity and variations in focus of existing research, it is difficult to choose one specific theoretical model to explain decisions made under co-decision, be it rationalist or constructivist. Most authors attempting to contrast or compare institutionalist approaches have opted for adapting their respective assumptions to their dependent variables (Kreppel and Hix 2003; Lewis 2003). Similarly, two models of co-decision have been developed here, based on rational-choice and constructivist assumptions that can explain why the EP modified its policy preferences. Like Kreppel and Hix (2003), the article will only draw on very schematic assumptions of each theoretical perspective in order to simplify the explanations and use the comparison heuristically.<sup>1</sup> However, in order to understand the alteration in EP preferences, the models of co-decision used in this study look at both inter-institutional relations and internal EP politics. Also, given the importance of committees in the functioning of the EP (Neuhold 2001; McElroy 2006; Bowler and Farrell 1995; Burns 2006; Settembri and Neuhold 2009a; Whitaker 2001; Yordanova 2009), committees – and not individual Members of European Parliament (MEPs) – are the unit of analysis, with a foray into political groups' behaviour when necessary to understand how and why change occurred.

### *Rational-choice institutionalism: a bargaining model*

Rational-choice assumes that co-decision is a formal procedure where rational actors calculate the costs and benefits offered by the formal rules of the game in order to maximise their preferences (Häge and Kaeding 2007: 346). Whether actors are individuals or institutions treated as a whole, there is an underlying individualist ontology, whereby the agent is the centre of attention and drives the political process. Therefore, actors follow a logic of consequentiality, where their actions are guided by a rational evaluation of future consequences.

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<sup>1</sup> More complex models may be found for instance in Napel and Widgrén (2006) or Rittberger (2000). However, their understanding of preferences and behaviour are less clear-cut and become closer to constructivist premises (Kreppel and Hix 2003: 79).

**Table 1:** Rationalist model of co-decision

	Rationalist model of co-decision
<b>Ontology</b>	Individualism: agent-centred
<b>Logic of action</b>	Logic of consequentiality: cost-benefits analysis; maximisation of preferences
<b>Preference formation</b>	Exogenous: re-election as the main objective
<b>Nature of institutions</b>	Constraining effects; emphasis on formal rules
<b>Mechanism</b>	Bargaining: formation of winning coalitions

*Source: author's own elaboration.*

In order to simplify the model, it is assumed that actors have exogenous preferences – *i.e.* their preferences are formed outside the EU institutions – and that these preferences do not change substantially during negotiations.<sup>2</sup> Since the main objective of political actors is re-election, it can be assumed that their preferences and interests depend on the national political arena, rather than on their success inside EU institutions. Thus, the preferences of Member States are formed at the national level and then uploaded in the Council (Moravcsik 1993). In the case of the EP, given the second order nature of EP elections, it can be assumed that MEPs will ultimately depend on re-election at the national level. In consequence, it is assumed that MEPs will be first and foremost concerned with maximising their policy preferences, rather than looking for a collective gain in the form of institutional power. Under co-decision in particular, where the EP enjoys as much influence as the Council in inter-institutional negotiations, there is no need to push for more institutional preferences, and actors can focus on policy objectives instead.

Institutions constrain the actions of individuals and change their cost-benefit calculations, but do not influence how they perceive the world or their underlying values and ideas. In consequence, rational-choice looks at co-decision as a game through which the EP tries to maximise its preferences. The final veto power and the chances to amend legislation given to the EP – all with different voting majorities – will shape the opportunities offered to the EP when attempting to maximise its preferences during negotiations.

However, the rules are modelled in slightly different ways. Some, like Napel and Widgrén (2006: 132), assume that it is not rational for actors to accept a sub-optimal agreement before they have exhausted the three rounds of negotiation. Others point at the conciliation procedure as an *ex post* veto that casts a shadow over the whole procedure. Hence, the EP can maximise its preferences without the need to exhaust the three readings; the shadow of conciliation – where positions are entrenched and failure close at hand – give the EP an opportunity to set the agenda at earlier stages of the process (Shackleton 2000; Shepsle and Weingast 1987). However, given that the EP is historically more integrationist than the Council, the model also assumes that the EP will prefer a sub-optimal outcome to no agreement at all (Kreppel and Hix 2003: 81).

<sup>2</sup> For a more complex understanding of endogenous institutional change from a rational perspective, see Greif and Laitin 2004.

Preferences are maximised by bargaining in order to form winning coalitions. Given the individualist ontology of rational-choice, the model treats the Council and the EP as individual actors when they negotiate with each other. However, given that the objective of the study is to explain the change of policy preferences in the EP, the article disaggregates the position of the EP and analyses bargaining in committee. In this sense, it is assumed that MEPs sharing similar preferences and objectives aggregate interests by organising themselves in political groups (Kreppel and Hix 2003: 80). These groups represent the Left/Right ideological spectrum, rather than national interests (Hix 2001).<sup>3</sup> Consequently, rational-choice looks specifically at the policy preferences of political groups in EP committees – while taking the Council's preferences into account, in order to understand why a specific set of policy preferences was chosen. In this sense, it emphasises strategies of bargaining and formal rules, such as voting majorities, as a mechanism for change in the policy preferences of the EP.

### ***Constructivism: an institutional misfit model***

If it is difficult to find a rational-choice model explaining day-to-day inter-institutional decision-making, it is even more complicated to build on specific constructivist literature in order to offer an understanding of co-decision. Constructivist studies have mostly focused on the formation of ideas and norms, rather than policy-making. However, we can draw on some studies dealing with the Council and the Commission (*e.g.* Lewis 2003, 2005; Fouilleux *et al.* 2005; From 2002), as well as work done on Europeanisation (Börzel and Risse 2003) in order to conceptualise decision-making and policy change. Also, some authors have studied specific aspects of co-decision and the EP, and put an emphasis on the norms of behaviour and informal institutions (Shackleton 2000; Shackleton and Raunio 2003; Judge and Earnshaw 2008).

**Table 2:** Constructivist model of co-decision

	Constructivist model of co-decision
<b>Ontology</b>	Holistic: mutual constitution of agents and structures
<b>Logic of action</b>	Logic of appropriateness: norm-observance and self-restraint
<b>Preference formation</b>	Endogenous: influenced and changed in relation to social and institutional context
<b>Nature of institutions</b>	Constitutive effects; formal and informal norms of behaviour
<b>Mechanism</b>	Discursive entrepreneurship: misfit between institutional and policy paradigms

*Source: author's own elaboration.*

Constructivism makes the study of decision-making more complex. Its understanding of rules and actors renders it less adequate for formal models of decision-making. First of all, actors and structures are not fixed elements, but interact with each other; that is, actors

<sup>3</sup> MEPs might dissent from the group line if they consider that an issue has direct implications for their constituency or if they receive pressure from their national party or government.

exist in a social context that gives sense to their behaviour and actions, but at the same time social actors can change the meaning and functioning of structures (Wendt 1987). Consequently, individuals cannot be analysed as independent actors aiming to achieve their own interests, but have to be considered as part of a larger structure. In this sense, it is possible to include more complex understandings of institutions in analyses of decision-making, namely not as individual units, but as holistic structures showing some collective rationality (Lewis 2003: 106). As a result, actors do not aim at maximising their own preferences by calculating costs and benefits and evaluating the possible consequences of their actions, but behave in a normative context that shapes their behaviour by indicating what is considered appropriate. The logic of appropriateness (March and Olsen 1989) renders some actions that might be considered rational unacceptable for the given normative context, thus not feasible in practice.

In co-decision, the principal norm of behaviour is consensus, both inter- and intra-institutionally (Shackleton 2000: 326). Inside the EP, the high majorities required both in committees and plenary, especially if Council and Parliament do not reach an agreement during the first reading<sup>4</sup>, have been essential in internalising the need for consensus inside the EP. This has in turn developed into a greater use of informal channels for inter-institutional negotiations. Informal trilogues bringing a small number of actors together – usually rapporteurs, shadow rapporteurs, Commission and Council officials, plus the Presidency – are now formed at the very beginning of the procedure (Settembri and Neuhold 2009b: 144). In addition, they often seek to find an agreement at the earliest possible stage (Farrell and Héritier 2004; Rasmussen 2007). Therefore, actors might prefer to achieve a sub-optimal result, rather than breaking the norm of consensus and end up with no result at all.

The internalisation of the norm is deep, since during the last parliamentary term (2004-2009), 72 per cent of co-decision procedures were agreed at first reading, while only five per cent reached the third reading (conciliation) and none failed, a steep increase compared to 28 per cent of first readings and 22 per cent of conciliations during the previous term (1999-2004) (European Parliament 2009: 14). There is therefore a clear preference for avoiding conciliation, which is seen as a failure of the trust created by the “rules of engagement” developed under co-decision (Shackleton 2000; Shackleton and Raunio 2003). In this institutional framework, actors develop preferences that are not just given by exogenous interests, but respond to the social context in which they are embedded. In this sense, endogenous preferences can be affected by wider norms of behaviour that enhance or foreclose certain actions or strategies. Institutional norms can act as cognitive and strategic guides of behaviour by highlighting the relevant elements when making a decision and providing legitimacy to political action (Dimitrakopoulos 2005: 678). Constructivism also foresees the possibility of understanding preferences beyond the purely individual interest level. In this sense, it envisages the formation of collective purposes (Ruggie 1998: 33). This is particularly important in the case of the EP, where collective institutional preferences can be distinguished from those of specific MEPs or political groups. As Priestley (2008) shows, the EP has strived over the years to achieve more power and enlarge its prerogatives in the EU institutional framework. This overall objective is at the core of the institutional preferences of the EP and thus works as the normative point of reference. Obviously, policy preferences vary depending on the policy area and the saliency of the issue; however, in general, they will have fewer chances to succeed if they contradict this primary institutional interest.

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<sup>4</sup> During the first reading, amendments are accepted by a simple majority, while, during the second reading, an absolute majority of its constitutive members is necessary. After the conciliation committee, the agreement has to be approved by the majority of the votes cast in the EP. Also, there is no time limit to reach an agreement during the first reading, while the second reading is restricted to three months (although this may be extended to four months)

However, the institutional paradigm is not homogeneous. It takes different shapes under each decision-making procedure. For instance, under consultation, the EP has almost no power, since it can only provide the Council with an opinion; therefore, the main interest for the EP is to lobby or pressure for an extension of its powers. Under co-decision, this preference is translated differently, since the EP is already acknowledged as a co-legislator. There, the main aim is to behave *responsibly* in order to match the norm of consensus prevailing in co-decision. In this sense, the EP perceives the pursuit of inter-institutional consensus as the appropriate behaviour in order to make full use of its powers. Thus, it prioritises in its discourse and actions the necessity to behave in a *responsible* way towards the Council, even if this contradicts other forms of responsibility, such as the necessity to respond to and represent the citizens. As will be shown later, this notion of *responsibility*, equating to institutional maturity and norm-compliance, has been deeply internalised into the discourse of the EP and illustrates the importance and preponderance of a collective institutional preference.

Therefore, in those cases where the traditional policy preferences do not match the institutional paradigm, specific actors might seek to close the misfit. As a result, they try to minimise the differences between policy and institutional interests. By entering into a process of discursive entrepreneurship, they try to convince those who promote a policy option opposed to the institutional framework of the necessity to change their policy preferences. In consequence, specific actors – usually MEPs, speaking generally through political groups – use discourse to present an alternative policy option as a more legitimate solution, by underlining its resonance with the norms and values of the broader institutional context (Schmidt and Radaelli 2004).

A constructivist model of co-decision proposes a different understanding of policy preference change. Concentrating on misfits between the current policy framework and the wider institutional normative context, it examines processes of discursive entrepreneurship aiming at replacing the traditional policy preferences with an alternative solution that fits better within the predominant institutional norms.

The following section will draw a descriptive explanation of the *Returns* directive in order to situate it in time and explain how inter-institutional negotiations and debates inside the EP occurred.

### The *Returns* directive

The *Returns* directive is one of the essential instruments in the construction of an EU immigration policy. Based on Article 63.3.b of the Treaty on European Community (TEC) (now Article 79.2.c. of the Treaty on the Functioning of the European Union (TFEU)), the directive is framed as an instrument to deal with the after-effects of irregular immigration. Its main objective is the harmonisation of conditions determining the voluntary or compulsory return of TCNs staying irregularly on the territory of Member States, including the return of rejected asylum-seekers. In this sense, a common returns policy is a very sensitive issue for Member States, since it affects their capacity to decide who enters and leaves the territory.

The sensitivity of the subject largely explains the slow progress of the negotiations. Although its origins can be traced back to the Tampere Programme in 1999 (European Council 1999: 26), its objectives were not fully defined until 2002 (European Commission 2002; Council of the European Union 2002). In spite of several attempts to put the matter on the Council table, the necessity to find unanimity made negotiations very difficult and proposals were watered down to a form of soft operational cooperation. Therefore, it was not until 2005 that the issue was proposed again.

On 1 September 2005, the Commission presented a *Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals* (European Commission 2005). Since it came after January 2005, the proposal was among the first to be discussed under co-decision. The proposal was more moderate than the previous Council proposals, but contained some controversial points, namely the *scope* of the directive (*i.e.* whether it should apply to individuals in transit zones or arrested at the border); the conditions for *voluntary departure*; the length and conditions of *re-entry bans* (forbidding the entrance of returned TCNs into Schengen territory); the extent of *legal aid* and the type of *remedies* (administrative or judicial); the possibility to *detain* TCNs during preparations for their removal from the territory and the length of detention; and finally the conditions determining the detention and expulsion of *unaccompanied minors*.

The EP appointed Manfred Weber (EPP-DE (European People's Party-European Democrats); centre-right) as rapporteur and designated the LIBE committee as the responsible committee. Due to the difficulty in reaching an agreement inside the Council, the dossier was shared by six different presidencies<sup>5</sup>, which affected negotiations with the EP. For instance, the Finnish presidency (second half of 2006) was the first to present a compromise solution, but it was rejected by those Member States that wanted more flexibility in the rules (Council of the European Union 2007a). Finland was followed by Germany, which had no interest in a *Returns* directive and tried to dilute the agreement. The German proposal stalled negotiations, both inside the Council (Council of the European Union 2007b) and with the EP. It was therefore not until the Portuguese (second half of 2007) and Slovenian (first half of 2008) presidencies that some constructive negotiations took place.

Since the goal was to reach a first-reading agreement, the Portuguese and Slovenian presidencies used both technical and highly political trilogues to achieve several compromise proposals (Council of the European Union 2008a, 2008b, 2008c, 2008d, 2007c). The policy positions of these compromises varied widely: while the agreements discussed in February allowed for substantial concessions to the EP, the text drafted in March changed track and headed back towards a more restrictive position and offered fewer concessions to the EP (Peers 2008). A political agreement was eventually reached during April 2008, yet almost broken again in May, when the Council attempted to draft a new compromise to include more Member States in the agreement (Council of the European Union 2008e). Eventually, the political agreement was submitted as an EPP-ED amendment for the plenary vote that took place on 18 June 2008. The report was adopted as amended with 367 votes in favour (composed mostly by EPP-ED, ALDE (Alliance of Liberals and Democrats for Europe), and UEN (Union for a Europe of Nations; right-wing), 206 against (Greens, radical Left and part of the socialist group) and 109 abstentions (mostly delegations from the socialist group) (European Parliament 2008b) and ratified by the Council on 9 December 2008 with only an abstention from Belgium<sup>6</sup> (Council of the European Union 2008f).

The final text depicts a bittersweet picture for the EP. Out of the six issues that were intensively debated, four were closer to the position of the Council, while only in two cases was the EP partially successful in raising standards of protection for TCNs (Acosta 2009b). The first issue decided in favour of the Council concerned the *scope* of the directive – which does not offer any protection to those TCNs apprehended shortly after their irregular entry or who are refused admission at the border (Article 2). Although this

<sup>5</sup> The United Kingdom during the second half of 2005, Austria and Finland in 2006, Germany and Portugal during 2007 and Slovenia in the first half of 2008.

<sup>6</sup> Denmark, Ireland and the United Kingdom did not participate in the vote due to their opt-outs from Schengen.

outcome clearly favours the preferences of Member States, it was also shared by the rapporteur (Interview 8).

Second, the Council was also successful in downgrading the option of *voluntary return*, since TCNs may end up having a very short time (or no time at all) to decide whether to opt for voluntary return. In addition, TCNs may be sent back not only to their countries of origin, but also to countries of transit (Articles 3§3 and 7§4). Third, member states are obliged to introduce a *re-entry ban* of up to five years (or longer if the person is considered a public danger) for those subjected to a forced departure; bans may also be issued to those who decide to return voluntarily (Article 11). Therefore, the incentives to choose voluntary return are very much reduced, while re-entry bans might reinforce irregular immigration (Baldaccini 2009: 9).

Finally, the EP was also unable to change the modalities of *detention*. Although the Commission proposal was more restrictive – since immigrants awaiting removal would have to be detained (European Commission 2007b, Article 14) – the current text still contains the possibility to detain individuals for up to 18 months, for which an administrative decision is sufficient (Article 15). Allegedly, the harmonisation of the detention period aimed at decreasing the length of detention foreseen in national legislation in some cases. However, in practice, the directive offers more chances to increase the length of detention than to shorten it (Acosta 2009b; Baldaccini 2009).

The EP was able to raise standards in two cases. The most successful modification provided for access to education and suitable institutions for *unaccompanied minors* (Article 17). Without the pressure of the EP, Member States would certainly not have included such provisions (Acosta 2009b: 35). In the second case – *procedural safeguards* – the success of the EP was more moderate. It introduced new provisions on free legal assistance, but these provisions depend on national conditions for legal aid. Additionally, the final version does not envisage an automatic *suspensive* effect during appeals. As a result, the decision to return an individual is not put on hold whilst it is reviewed and remedies are not necessarily provided by judicial bodies (Article 13).

In short, after a very long negotiation, the achievements of the EP were limited, especially in its attempts to raise protection standards. The directive is characterised by a high level of flexibility and discretion left to Member States. Thus, it is far from the traditional EP preferences, which originally aimed at raising protection standards.

### Constructing coalitions or closing the misfit?

This section will build upon the previous outline of the directive in order to explain the change in the EP policy preferences using the two institutionalism models. By explaining the change using rational-choice assumptions first and constructivist ones later, this section aims to determine the layers and mechanisms of change, as well as the points of friction and synergy between them.

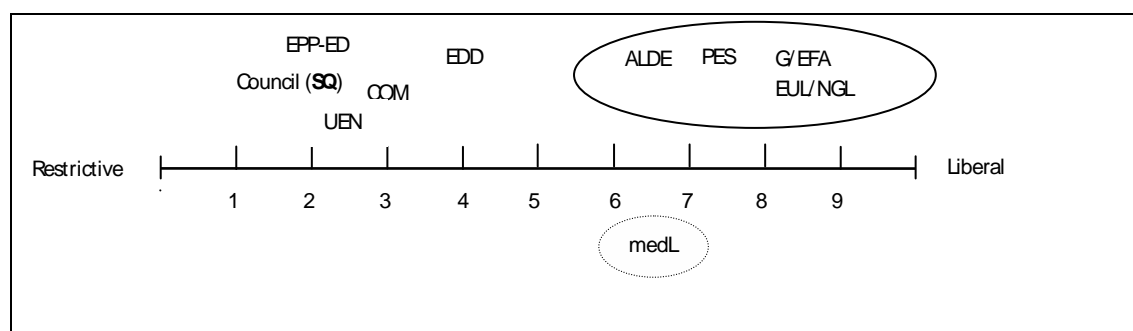
#### *Rational-choice: constructing successful coalitions*

As seen above, rational-choice institutionalism assumes that change occurs because EP political groups bargain in order to find a majority that will allow them to reach a compromise with the Council. It is also assumed that it is beneficial to the EP to maximise its interests in each reading by appealing to its *ex post* veto (the power to reject after conciliation). Therefore, the model needs to answer two questions regarding the case study. First, why did the EP accept a first-reading compromise; and second, why was there

a change in the EP winning coalition that ultimately produced a change in its policy preferences?

In order to answer these questions, it is first necessary to look at the traditional policy preferences of the EP in the area of migration before the change to co-decision. For this purpose, Hix and Noury's study (2007) analysing roll-call votes of legislation passed during the fifth EP term (1999-2004) on migration and integration issues is used to determine the position of the different groups. The study shows that positions were determined by political motivations (that is, liberal vs. restrictive outlooks towards migrants) rather than economic interests, which look at labour market competition in national constituencies. Besides, the political conflicts were situated in a Left-Right dimension, with left-wing groups being more liberal in migration issues while right-wing groups tended to be more restrictive. This can be translated into a distributional line showing the migration scores calculated by Hix and Noury (see figure 1).

**Figure 1:** Traditional policy preferences of the LIBE Committee in the area of migration



*Source: figure based on Hix and Noury (2007: 192)*

**Abbreviations:**

EPP-ED: European People's Party-European Democrats (Christian-democrats/conservative)

UEN: Union for a Europe of Nations (national-conservative)

COM: European Commission

EDD: Europe of Democracies and Diversities (anti-European)

ALDE: Alliance of Liberals and Democrats for Europe (liberals)

PES: Party of European Socialists (socialists)

G/EFA: Greens-European Free Alliance (green/regionalist)

EUL/NGL: European United Left-Nordic Green Left (radical Left)

medL: median legislator<sup>7</sup>

SQ: Status Quo

As the figure shows, the long-term coalition on migration issues was clearly left-wing (Hix and Noury 2007: 199). In the LIBE Committee, the left-wing coalition was even more pronounced, because right-wing groups such as UEN were almost absent. Therefore, it

<sup>7</sup> The median legislator has been calculated with the migration score given by Hix and Noury, but with the members of the sixth parliamentary term in the LIBE Committee, since it is there that coalitions were formed. Non-attached members (three out of 59) have been left out of the calculation because they do not form a group with a coherent policy position.

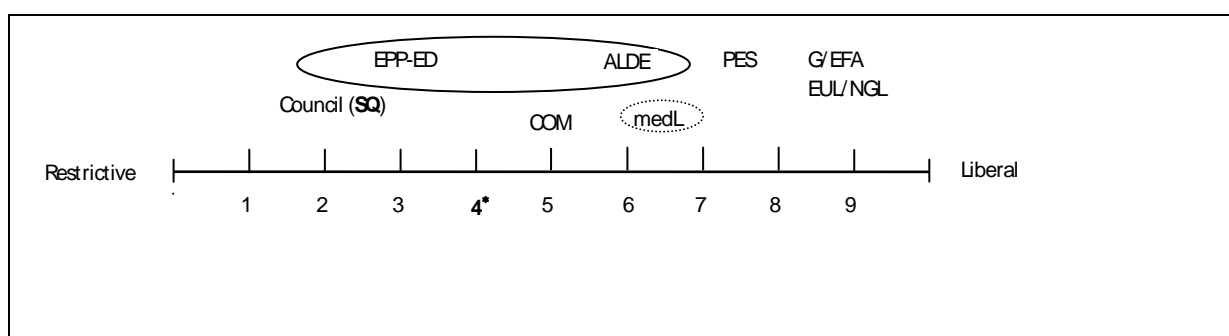
could be said that the traditional policy preferences of the EP were clearly liberal on migration issues, with ALDE usually voting together with PES and the Greens.

As regards the Council, literature on the policy preferences of the Council on immigration shows a long-standing preference for restrictive measures (Samers 2004; Cholewinski 2000). Also, the initial proposals made by the Council on *Returns* exemplify the preference of the Council for minimal legislation, wide margins of manoeuvre for Member States, and a restrictive stance on irregular immigration (Council of the European Union 2002).

Under consultation, the Commission had to take into account the position of the Council rather than the EP's preferences, since it was up to Member States to find agreement. In this sense, under consultation, the Commission might have tried to insert some of the EP's preferences (Varela 2009: 10), but ultimately it had to propose a text that could be accepted by the Council (Schain 2009; Acosta 2009b). If one looks at the first proposal issued by the Commission on *Returns*, it is close to the preferences expected from the Council on irregular immigration (European Commission 2002).

Assuming that these preferences did not change with the end of the transitional period in 2005, we need to find an explanation for the results of negotiations on the *Returns* directive. The positions during negotiations can be illustrated as follows:

**Figure 2:** Policy preferences and EP coalitions in the *Returns* directive



*Source: Author's own elaboration*

As explained above, the Council was very reluctant to have a *Returns* directive. Most Member States wanted as much flexibility as possible, and few were keen to extend the scope of the directive. The Commission took on a middle-ground position between the Council and the expected left-wing coalition inside the EP. In this sense, the Commission's proposal was clearly more liberal and offered more rights to third-country nationals than the final outcome (indicated with an asterisk in the graph (\*)). During the negotiations, the EPP-ED took positions that were very close to the Council's, although it backed issues important to other groups in the EP, such as legal aid and the protection of minors (Interview 9). The position of ALDE was expected to be quite liberal. However, since the shadow rapporteur was on the right of the liberal group (Interviews 5 & 7), it may be assumed that her position shifted the overall group's policy slightly towards the (Council's) *status quo*. PES and Greens both shared a negative opinion of the directive, considering that TCNs should not be returned (Interviews 5, 7, 8 & 9).

In view of these results, it is important to explain why the EP did not push for a second or third reading (conciliation). Further negotiations might have given it further chances to

maximise its liberal preferences. It is also important to understand why a coalition between EPP-ED and ALDE was formed.

As seen above, the limitation to a first-reading agreement could be explained by the pro-integrationist stance of the EP. In this sense, although it might be a sacrifice for their policy preferences, groups in the EP might have preferred to achieve a sub-optimal result, rather than end up with no legislation at all. Using a more sophisticated model proposed by Rittberger (2000), it could be argued that the Council was more patient than the EP, thus pushing it to find an agreement before the end of the procedure. This is reinforced by the fact that, during the last stages of the first reading procedure, MEPs realised that the Council, and especially the incoming French presidency, might actually prefer not to reach any agreement and continue with the *status quo* (i.e. national legislation regulating expulsion practices), which convinced the EP of the necessity to accept a first-reading agreement (Interviews 1 & 8).

The reluctance of the Council and the lack of cohesion inside the EP can also explain the final outcome, much closer to the *status quo* and the Council's position than to the traditional EP preferences (König *et al.* 2007). In a split EP, the EPP-ED rapporteur used the threat of the French presidency to bargain for a winning coalition at first reading. In this sense, the EPP-ED can be seen as the agent of policy change, since it was not happy with the traditional preferences of the EP, too far away from its own preferred policy options. By using the pro-integrationist bias of the EP, the EPP-ED was successful in bringing the preferences of the EP closer to its ideal policy position.

The central position given to the EPP-ED via the role of the rapporteur was a key factor in its ability to build a winning coalition with the liberals. However, ALDE's inclusion in the coalition and the subsequent change of policy preferences opens up a new puzzle: what motivated ALDE to abandon a left-wing coalition that would have been strong enough to force a second reading? If one understands co-decision not just as a one-shot game, but as an iterative game, then ALDE's behaviour can be seen as a strategy to be included in future games. ALDE, being a smaller political group, was afraid of being left out from future coalitions in the AFSJ (Interviews 1 & 6).

Therefore, the rational-choice model emphasises formal motivations for the change in policy preferences. The threat from the Council not to continue negotiations if a first reading failed, combined with the pressure to form long-term winning coalitions in an iterative game, explains the mechanisms behind the U-turn in its liberal preferences.

### ***Constructivism: closing a misfit between institutional and policy preferences***

In contrast to rationalism, the constructivist model looks at how the policy preferences pushed forward by the majority of the EP resonate with a wider institutional framework. The long-standing fight of the EP for more powers and full inclusion in decision-making has been transformed into an institutional paradigm that regulates the success of other preferences inside the EP. When a misfit appears between the institutional paradigm (that is, institutional power as the primordial interest of the EP) and a specific policy preference, then the necessary conditions (Börzel and Risse 2003) appear. They open a door for policy entrepreneurs to enter into a discursive practice that will seek to convince others of the necessity to change the policy preferences of the EP.

As it has been explained previously, the EP institutional paradigm can take different forms depending, for instance, on the decision-making procedure. In the case of co-decision, the willingness to expand the influence of the EP translates into a promotion of institutional *responsibility* or obligation, since it fosters a feeling among MEPs that they have to behave

*responsibly* (or be *mature*) in order to be effective in inter-institutional negotiations. Indeed, such a perception resonates with the discourse used by actors involved in the *Returns* directive.

Being among the first to be decided under co-decision after the end of the transitional period in 2005, there was a general impression that the EP had to behave *responsibly* in order to be taken seriously by the Council (Angenendt and Parkes 2009; Parkes 2009). This was even more the case in the LIBE Committee, since under consultation inter-institutional relations had been conflictive and neither side was used to working together (Interviews 2, 5 & 6). Although it was acknowledged that both institutions would have to adapt to the new situation, the LIBE Committee entered very quickly into a co-decision mode by developing early informal contacts and imitating the instruments, such as trilogues, developed by other legislative committees (Interview 3). These practices were easy to import, since most MEPs sit in different committees and are therefore used to working with them in other policy fields, such as environment or industry.

However, the willingness to fit into the institutional paradigm – requiring *responsibility* and consensus in order to be fully effective under co-decision – uncovered a misfit between the required institutional behaviour and the policy positions of the EP on migration issues. The liberal positions of the LIBE Committee had previously never been a problem because they did not have an impact on the actual decision-making process. Since EP opinions were often disregarded (Kostakopoulou 2000: 498; Peers 2006: 26), the promotion of liberal positions did not contradict the institutional attempt to obtain more powers by extending the use of co-decision to the whole AFSJ. On the contrary, the liberal views held by the EP on AFSJ issues gave it a good reputation and a positive external image (Acosta 2009b).

Under consultation, the liberal views of the LIBE Committee were too far apart from the Council and did not help to create points of agreement. Also, the misfit did not only underline the distance between the policy positions of the Council and the EP, but also the need to adapt the behaviour that accompanied such positions. Opinions drafted under the consultation procedure were considered by some (especially those not sharing the position taken in the opinions) as “Christmas wish lists” (European People's Party 2009). LIBE opinions tended to adopt rather extreme positions and were especially critical of Member States’ actions. On the contrary, under co-decision, the norms of behaviour and the formal structure of the procedure necessitated more moderate positions from all sides, tending towards the centre of the policy spectrum (Kreppel and Tsebelis 1999).

Therefore, with the change to co-decision, there was a misfit between the consensual behaviour that was required by the norms of co-decision, perceived by the EP as essential to consolidate its powers, and the confrontational policy positions characteristic of the LIBE Committee. This misfit was used by those groups that had been excluded from policy-making under consultation to change the policy position of the committee. The EPP-ED group principally entered into a process of discursive entrepreneurship where, by invoking the necessity to be *responsible* (namely, in order to be fully effective under co-decision), it convinced the other groups of the need to change their behaviour.

Even those further apart from the policy positions of the EPP-ED – such as the Greens – became engaged in negotiations (Interview 5). They left aside the old confrontational behaviour and tried to fit in with the behaviour that was expected from them. Those (such as the PES) that did not manage to change their behaviour, or those (such as the radical Left) that were unwilling to do so, were perceived as outsiders of the process and as *irresponsible* actors. The liberal shadow rapporteur, for instance, considered that the socialists pushed themselves out of the negotiations (Interview 6): the socialist shadow rapporteur would come back time and again with the same proposals, seen as unrealistic

by most and not suitable to achieve an inter-institutional compromise (Interview 5). Such a move was seen as a failure to adapt to the norms of co-decision, even inside the socialist group. For instance, a PES political advisor still regards the directive as a negative experience for the socialist group, unable to convince the other groups to include any of its amendments in the EP report (Interview 7). Indeed, the group even failed to find a common position inside the group, and a majority of socialist MEPs opted for abstaining during the final vote.

The use of discourse to legitimise the change of policy positions is especially relevant for ALDE's decision to form a coalition with the EPP-ED. Liberal MEP Alexander Alvaro (Interview 1) acknowledged that the directive was not completely to their liking, but it seems that the group saw the need to reach an agreement as a priority. It wanted to show that it could behave '*responsibly*' (Interview 6), even if it came at the expense of their policy preferences. There, the size of the group seems to have helped in convincing its members of the necessity to adapt. As mentioned above, the fear of being left out by the larger groups made its members more receptive. It convinced them of the necessity to change their position in order to fully participate in the negotiations. This unease resonated with previous co-decision negotiations in LIBE, where first-reading agreements had been encouraged by leaders of the larger political groups and had, as a result, marginalised ALDE in negotiations. For instance, the *Data retention* directive (European Parliament and Council of the European Union 2006) had been an institutional and policy learning curve, since the opinion drafted by the ALDE rapporteur, anchored in the traditional EP policy preferences, had been by-passed by the EPP-ED and PES political leaders. The latter considered that the LIBE position was too extreme and did not fit in with the image of *responsibility* they wanted to portray after the change to co-decision (Interview 4).

The Council also used the same discourse to try to change the behaviour of the LIBE Committee. Using the reticence of Member States towards the directive, they insisted that the EP had to show *responsible* behaviour and be a committed and serious partner in order to work towards a common agreement (Dragutin Mate in European Parliament, 2008b). Such discourses of the Council were in turn used by the rapporteur to convince the rest of the committee of the necessity to accept the first-reading agreement reached with the Council, even if it was far away from the EP's traditional policy preferences.

Therefore, the necessity to close the misfit offered a chance to those actors that had been previously marginalised from decision-making in the AFSJ to engage in a strategy of discursive entrepreneurship. By using discourses that resonated with the wider institutional preferences, they legitimated the policy change. ALDE being a comparatively smaller group was concerned about losing its voice under co-decision and therefore accepted the rules of the game more quickly, even if it came at the expense of its policy preferences. Those, such as the PES or the radical Left, which did not adapt their policy positions in order to fit in with the institutional paradigm, became outsiders in the process. Their behaviour was deemed to be unsuitable for the new rules of the game.

## Conclusion

What does the *Returns* directive tell us about change in the policy preferences of the EP? First, it shows that, contrary to the period when consultation was the main decision-making procedure, the EP cannot be taken any longer for granted as an unconditional advocate of civil liberties and human rights. Certainly, outcomes are now less restrictive than when they depended only on a Council decision. However, they do not fit either with the liberal image portrayed by the EP and especially by the LIBE Committee under consultation.

The case study also highlights different layers of, and motivations for, change that respond to various theoretical approaches. The use of models helps in making explanations parsimonious. At the same time, they identify frictions and synergies between the different theoretical explanations. The empirical application of the models has maximised the number of explanations and in turn pointed at two important elements. First, the analysis identifies two different layers of institutional change: a formal layer derived from the textual application of decision-making rules and an informal layer appealing to broader norms of behaviour. Second, the models point at synergies between the layers. Formal and informal explanations reinforce the directionality of change, which renders the change in policy preferences easier and more legitimate.

In this sense, the rational-choice model has shown how the formal aspects of co-decision can explain the reasons behind the EP's preference for a first-reading agreement, instead of pushing negotiations until conciliation. The fear of ending up with no text at all was powerful enough to prefer a sub-optimal outcome. Although it did not reflect the main preferences of the EP, it still managed to raise the standards vis-à-vis the *status quo*. It also shows that the role of the rapporteur was a key factor in building winning coalitions that ultimately favoured the position of the EPP-ED, much closer to the Council's *status quo* than the EP's traditional preferences.

On the other hand, the constructivist model offers an additional explanation, not only of how change in the policy preferences happened, but also of why it was so readily accepted by most political groups. It underlines the necessity to frame policy change in a broader institutional context filled with specific understandings and norms of behaviour. Only when policy preferences resonate and fit into this broader institutional context will they be seen as legitimate enough to become the mainstream preference of the institution. Therefore, once the liberal position of the EP on immigration issues began to create frictions with the prevailing norm of consensus, the liberal paradigm lost the legitimacy that it had enjoyed previously and started being seen as an obstacle. At that point, it was easy for actors willing to downplay the liberal tone of the EP to use institutional arguments in order to change the EP's position. They called for a more *responsible* and *pragmatic* behaviour that could ensure the trust of the Council and argued that only with more "*mature*"[sic] behaviour would the EP succeed in participating fully in those AFSJ issues subject to co-decision.

In consequence, rationalism and constructivism both have a place in studies of co-decision and more broadly in analyses of EU legislative politics. This article also shows that each theory might be more adequate for highlighting different logics and layers of change. While rational-choice institutionalism might be able to explain bargaining and coalition formation, as well as individual decisions, constructivist explanations might give us a better understanding of what makes certain choices acceptable or why specific coalitions and outcomes do not occur. In this sense, constructivism might provide the context and the depth that some rational-choice models lack, thereby complementing and challenging our acquired knowledge of EU institutions.

In terms of directionality, ALDE's behaviour exemplifies how rational-choice and constructivist explanations can reinforce each other by highlighting both formal and informal motivations for change. The fact that both layers point in the same direction (*i.e.* towards change in policy preferences) helps to understand why a U-turn in ALDE's priorities was possible and quickly achieved. It also explains why such a move was hardly contested inside the political group or by former coalition partners. In this sense, ALDE's willingness to be part of the winning coalition can be explained as a rational calculation in an iterative game; namely, since co-decision was the new rule of decision-making in the AFSJ, an early exclusion from bargaining could have had long-term consequences. The

change, however, could only be accepted and consolidated because it resonated with the new institutional norms of behaviour.

The fact that rational-choice and constructivist explanations move in the same direction highlight synergies with broader consequences. The primacy of institutional elements (both formal and informal) identified by both models has further implications for our broader understanding of EU decision-making and the role of the EP in it. Indeed, the empirical analysis confirms that institutional motivations are seen as more important by political groups than policy issues: when tensions between institutions and policies arise, the former take primacy. In consequence, frictions between institutional and policy preferences may have a substantial effect on policy outcomes. The need to push for more institutional power might come at the expense of full-fledged policy changes, which might have direct implications for the rights of those living in the EU.

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### List of interviews

- (1) Interview with A. Alvaro, MEP, January 2009.
- (2) Interview with a European Commission official, March 2010.
- (3) Interview with a European Parliament official, January 2009.
- (4) Interview with a European Parliament official, March 2010.
- (5) Interview with an MEP Assistant, March 2010.
- (6) Interview with J. Hennis-Plasschaert, MEP, March 2010.
- (7) Interview with A. Lemarchal, PES Political Advisor, March 2010.
- (8) Interview with M. Speiser, EPP-ED Political Advisor, January 2009.
- (9) Interview with M. Weber, MEP, December 2009.

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