

"LEGISLATIVE CO-DECISION: A REAL STEP FORWARD?"

**Paper produced for the Fifth Biennial ECSA Conference in Seattle
May 29 to June 1 1997**

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**(The views expressed in this article are personal and do not necessarily reflect
the position of the European Parliament)**

Introduction

Legislative co-decision for the European Parliament in certain areas of EU competence was one of the key changes introduced by the Maastricht Treaty. Further extension of the co-decision procedures to all EU legislature is probably the single most important European Parliament demand for itself at the current Intergovernmental Conference. And yet certain academic commentators have suggested that the co-decision procedure is less satisfactory than it first seems for the European Parliament, and that the latter's power to influence policy making may, in fact, be greater under the cooperation procedure than under the co-decision procedure.

In the light of this debate the present paper seeks to provide an up-to-date assessment of the institutional and other impacts of the co-decision procedure compared to the other legislative procedures in which the European Parliament is involved.

The paper begins by placing the co-decision procedure in context by means of a survey of the evolution of the European Parliament's legislative powers and of the main features of the consultation, cooperation and co-decision procedures. There then follows an assessment of the co-decision procedure compared to the parallel cooperation and consultation procedures, especially with regard to its impacts on EU legislative efficiency, on the overall functioning of the European Parliament and on the balance between the EU institutions. The paper concludes with a brief look at the European Parliament's calls for extension and simplification of co-decision at the present IGC, and at the Member States' responses to that request.

The paper concludes that it is still hard to measure the longer-term impacts of the procedure but that its unprecedented combination of a veto power and a negotiating mechanism have already had dynamic effects, such as a greater professionalization of the European Parliament's work and a reinforcement of its position vis-à-vis the Commission and Council, that have been underestimated by its critics.

Evolution of the European Parliament's legislative powers

Initial involvement: a gradual reinforcement of the European Parliament's consultative role

The Parliamentary Assembly of the European Coal and Steel Community did not have legislative responsibilities and it was only after the coming into force of the EEC and EURATOM Treaties in 1958 that the emerging Parliament was first given a legislative role. This was initially linked to only a few articles in the two Treaties, but legislative consultation of the Parliament by the Council was gradually created on a voluntary basis to a number of other areas in which consultation of the Parliament was not explicitly laid down in the Treaties.

This initial "consultation procedure", whereby the Parliament was given a single reading on a Commission proposal, was simple to understand but not very satisfactory for the European Parliament, in that it gave it very little weight in the legislative process. Once the Parliament had given its opinion on the Commission's proposal it was basically out of the picture, and the final deals were then done between the Council and Commission. Even the form of the Parliament's involvement was not very legislative, in that it was presented in the form of resolutions with general comments as well as suggested amendments to the legislation, rather than the present practice of submitting parallel Commission and Parliament texts and with the Parliament restricting itself to amending the legislation. In fact, the Parliament's role was initially not much greater than that of the Economic and Social Committee, although, unlike for the latter, no formal time limits could be set for the Parliament's opinion.

Over time, however, and even before the introduction of the cooperation procedure, the Parliament's legislative role became progressively more significant. In spite of the lack of Treaty base the Parliament came to be consulted on all EU matters of legislative importance and to be re-consulted when significant changes were made to a legislative proposal. Moreover, the Commission agreed to change proposals to incorporate Parliament amendments with which it agreed. The most important change of all, however, stemmed from the landmark "Isoglucose" case in 1980¹ in which the European Court of Justice found that the Council could not formally adopt legislation until it had given the Parliament a proper chance to give its opinion.

¹ 138/79.

This procedural decision gave the Parliament a chance to strengthen its hand by threatening to delay a legislative proposal. Although the limits to this power have never been properly tested (when would a delay become an unreasonable one, especially in view of some of the spectacular delays that have taken place in the Council?) the Parliament changed its own Rules of Procedure to maximize its position. The Parliament now concentrated on amending legislation rather than on presenting general comments and, after having first voted on the amendments, the Commission's opinion was then sought on the adopted amendments. If the Commission did not answer satisfactorily the proposal could be referred back to committee before the Parliament had voted on the legislative proposal as a whole.

The first major reform: the cooperation procedure and its consequences

While Parliament's position thus improved even where it was only consulted on legislation, a quantitative leap in its involvement in the EU legislative process came with the introduction of the "cooperation procedure" in 1987 as a result of the Single European Act. Firstly, the Parliament was given two readings rather than just one, thus extending the time of its direct involvement in the legislative process. Secondly, the Parliament was given an opportunity, acting by absolute majority of its members in the course of its second reading, to reject a Council common position and could only then be overridden if the Council did so unanimously. Thirdly, the Parliament, again acting by absolute majority of its members in its second reading, could adopt amendments to the Council common position. A decisive role would then be played by the Commission. If the Commission accepted a Parliament amendment in second reading it could only be rejected by the Council acting unanimously. If the Commission did not accept a Parliament amendment the Council could only reintroduce it unanimously. It only took a qualified majority in the Council, however, to adopt the re-examined Commission proposal.

The cooperation procedure has had a number of obvious and less obvious effects. The most obvious, of course, is the consequent increase in the Parliament's legislative power compared to the consultation procedure. This is undoubtably true and does not require lengthy discussion. On several occasions the Parliament has successfully rejected a common position because the Commission has withdrawn a proposal (i.e. sweeteners in foodstuffs) or because the Council has failed to override the Parliament (i.e. the Benzene directive). Parliament has also successfully modified legislation in second reading, most notably in 1989 in the case of exhaust emission standards for small cars, when the Parliament's amendments in favour of higher standards were

supported by the Commission and by the necessary minority of Member States in the Council. All this would not have been possible under the consultation procedure.

The cooperation procedure also had a number of perhaps less obvious dynamic effects. Firstly, the Parliament became better informed about what was happening to a legislative proposal, and over a longer period of time. The importance of this should not be underestimated since the Commission and the Council were now under some obligation to inform the Parliament of what was happening to the latter's amendments after the first reading, and of the reasons for the adoption of a Council common position. While the Council's so-called "reasons" were often cursory, and initially almost contemptuous, they have since somewhat improved. Moreover, the overall amount of information provided has been much greater than after Parliament has given its opinion under the consultation procedure, when it has been often almost non-existent, and dependent on good will from the Commission. The Parliament's own follow-up to its initial opinions also became much more systematic, with, for example, the same rapporteur being charged with following a proposal right through from first to second reading.

The cooperation procedure also led to better organization and voting discipline within the Parliament. The need to obtain an absolute majority of parliament's membership to reject or amend a common position in second reading led to better concertation between the political groups, particularly the Socialists and the EPP, and was also a stimulus for reorganizing voting time (by bunching key votes at central moments of the week) and for improving group whipping systems in order to increase attendance. Parliament's effort to become more disciplined was shown by its own change to its Rules of Procedure to ensure that amendments in second reading had to be those from the first reading and not entirely new ones unless they were responding to a new element in the common position: this change, which was not required at all by the Single European Act, was meant to demonstrate that Parliament would be internally self-disciplined and a predictable and reliable partner in the legislative process.

A final dynamic effect of the cooperation procedure was that it helped, in general terms, to promote inter-institutional dialogue on legislative matters.

In spite of all these positive elements of the cooperation procedure its limitations should not be under-estimated either. Parliament's position in the institutional triangle was still very much weaker than the Council or the Commission. The Council could always override Parliament if it wished to do so (as when it unanimously set aside Parliament's 1992 rejection of the common position on the

energy consumption of domestic appliances) and the Parliament's position remained too dependent upon support from the Commission. Those commentators like Tsebelis who have emphasized the advantages of the cooperation procedure for the Parliament in terms of conditional agenda setting¹ have tended to underestimate certain features of institutional behaviour which have reduced these theoretical advantages in practice. The first of these features is the continuing preference of the Council to aim at consensus if at all possible, often leading to a great reluctance, even by those Member States which would have liked to have gone further, to overturn the Council's carefully arrived-at consensus in its common position. A second and related feature is the tendency of the Council, perhaps particularly at COREPER rather than technical working party level, to act as a unified body to defend its institutional prerogatives against a perceived challenge from the Parliament.

A third, and particularly relevant, feature in the context of the cooperation procedure is the tendency of the Commission either to side with, or at least not to go against, the most powerful actor, the Council, in the final stages of the procedure. The Commission has not wanted its legislation to be lost at this stage, and, even if it has supported Parliament amendments in first reading, has been often more reluctant to go out on a limb to defend those amendments after the second reading stage.

For all these reasons Tsebelis' argument that the Parliament is in a strong position as a conditional agenda setter by being able to make a final take-it-or-leave-it offer to the Council under the cooperation procedure is an unconvincing one, as is his assertion that the Commission and the Parliament are put in a better position to be allies in order to promote a pro-integrationist agenda. Besides the fact that pro- or anti-integrationist agendas are usually not very relevant in the context of the technical internal market legislation that has been at stake, "realpolitik" has ensured that Commission/Council coalitions are more likely at the end of the cooperation procedure than Commission/Parliament coalitions. The exhaust emission standards case has tended to be the exception rather than the rule.

¹ Among the main papers discussing these issues are the following:

- "The Power of the European Parliament as a Conditional Agenda Setter" by G. Tsebelis, *American Political Science Review* 1994 (p.88);
- "Maastricht and the Democratic Deficit", G. Tsebelis, 1995 APSA, *Comparative Political Newsletter*;
- "Agenda Setting, Vetoes and the EU's Co-decision Procedure" by G. Tsebelis and G. Garrett, forthcoming publication in *Journal of Legislative Studies*.

The introduction of Article 189B "Co-decision"

It was in the light of all the above that the introduction of the "co-decision procedure", as a result of Article 189B of the Treaty of European Union, was viewed as a step of fundamental importance by all those involved in the EU legislative process, in spite of the undoubted complexity and occasional ambiguity of the new procedure.

This is not the place to go into a detailed description of the co-decision procedure and of its implementing mechanisms¹. Not only is it complex but several of those complicating features which make it so hard to understand, such as the intention to reject phase, and the so-called "third reading" have hardly been used at all². Rather than describe it again I will concentrate on those core features of the new procedure that make it so different from its predecessors.

The most important of these is that for the first time the co-decision procedure gives the Parliament the opportunity to reject draft EU legislation without the other institutions being able to do anything about it. This possibility of Parliament rejection can occur at several stages, at the intention to reject or rejection phase of Article 189B³, as a result of Parliament rejection of an agreement previously reached between the Parliament and Council delegations to the Conciliation Committee⁴, or finally as a result of overriding a Council imposition of a common position in third reading after a breakdown in conciliation⁵. All through the procedure, therefore, Parliament's position has to be treated seriously and not casually since it can credibly threaten to kill off the proposed legislation.

The second main feature of the procedure is that it establishes a new negotiating mechanism in the case of continuing disagreement between Parliament and Council

¹ A detailed paper on this was presented at the 1995 ECSA Conference in Charleston, "Post-Maastricht Legislative Procedures: Is the Council Institutionally Challenged" by Gary Miller. Also, see chapter 11 in the "European Parliament", third edition 1995, by Corbett, Jacobs and Shackleton.

² The former only in the directive on motorcycle power, the latter only in the proposal on Open Network Provision-Voice Telephony

³ As has never successfully happened so far.

⁴ As has only happened once in the case of biotechnological inventions.

⁵ As has only happened once in the case of ONP-voice telephony.

after Parliament's second reading. Instead of having to go through the Commission as intermediaries there is now direct and regular contact between Parliament and Council.

The present situation: four legislative procedures (with several variants) existing side-by-side

EU legislative procedures have thus changed greatly in a very short time, and the Parliament has become a much more significant actor. Unfortunately, the development of new procedures has not meant the simple abandonment of the old ones. The consultation, cooperation¹ and co-decision² procedures and in certain limited cases even the "assent procedure"³. (whereby the Parliament can only say yes or no), all exist side-by-side⁴. The co-decision procedure is currently used in 15 cases (but including the extremely important Article 100A on internal market harmonization, as well as a number of other significant Treaty bases), the cooperation procedure in 18 cases (notably transport and certain aspects of social policy), the assent procedure in a handful of legislative cases and the consultation procedure in all other cases (including on such vital matters as Article 43 on agriculture and Article 99 on tax harmonization). Although any figures have to be treated with caution because legislative workloads in particular policy areas vary from one period to another (and the legislative activism required for the 1992 internal market objectives has already declined significantly), the relative use of the three procedures is shown by the fact that of the 2534 European Parliament opinions given over the

¹ Its proper name is now the Article 189C procedure because of the knock-on effect of introducing Article 189B.

² Its proper name is now the Article 189B procedure because of the reluctance of certain Member States to accept that they were conceding "co-decision" to the Parliament. For a while the British Government even tried to call it the "negative assent procedure".

³ Assent is mainly used in a non-legislative context such as approval of enlargement, but is also used for such measures as those foreseen in Article 8A (measures facilitating right of residence and freedom of movement) or in Article 130D (definition of tasks, objectives, organization and co-ordination of the structural funds).

⁴ In addition there are a number of variants on these various procedures, such as ones involving the Economic and Social Committee or the Committee of the Regions. If you include the various variants it has been estimated that there are no less than 22 decision-making procedures.

period from 1989 until the present (with co-decision coming into force in November 1993), the consultation procedure has been used on 1536 occasions, the cooperation procedure on 636 occasions (318 first readings and 318 second readings), co-decision on 300 occasions (167 first readings, 102 second readings and 31 third readings¹) and assent on 62 occasions..

On 13 February 1997 there were 387 pending legislative procedures, including 193 cases of consultation (5%), 102 cases of co-decision (26%), 52 cases of cooperation (13%) and 40 cases of assent (10%).

Impacts of the co-decision procedure

To see whether legislative co-decision has constituted a real step forward, it is necessary to look at its impacts under a number of headings - democratization and legislative efficiency, overall functioning of the European Parliament, influence of the European Parliament on EU legislative policy-making, and the institutional balance. Let us look at these one by one.

(i) Impacts on EU democratization and legislative efficiency

It is worth underlining at the outset that the main motivation of those advocating co-decision at the Maastricht IGC was to improve the democratic quality of the European Union by making the European Parliament more of a co-equal with the Council in the EU legislative process. Complete equality may have been partially watered down by its adversaries (hence the reluctance to call it co-decision, and the introduction of cumbersome checks and balances within the procedures) but this was the basic intention of the negotiators. This was seen as particularly important in the context of increased use of qualified majority voting (QMV), where the position of individual national parliaments could no longer be decisive, and where last-resort democratic control could only lie with the European Parliament.

The extent to which this intention has worked out in practice is explored in more detail below, but it is striking that those who had been advocating further democratization of the European Union at the present IGC have tended to place a further significant extension of co-decision as one of their central demands.

¹ Third readings referring in all but one case to the approval of agreements in conciliation rather than overriding of an imposed Council position.

If, however, the overwhelming perception of co-decision is that it has strengthened the position of the European Parliament as part of a wider EU democratization, its impact on EU legislative efficiency has been somewhat more controversial, with some arguing that it is cumbersome and inefficient. What is the record so far?

By February 1997 there had been 77 completed co-decision procedures. In 50 of these cases conciliation was not required at all. In 30 of these cases the Parliament did not amend the Council's common position in second reading (either because the European Parliament agreed with the common position or because it failed to obtain the necessary absolute majority of votes to amend the text), and in 20 other cases all the European Parliament amendments in second reading were taken over by the Council and conciliation was thus averted. Only 27 cases actually went to conciliation and no less than 25 of these ended in final agreement on a text. Only 2 out of the total of 77 cases (2.6%) so far have ended in rejection of a text, in one case (ONP-voice telephony) because the Council's imposition of the original common position after breakdown of conciliation was overridden by the Parliament, and in the other (patenting of biotechnological inventions) because the agreed text which emerged from conciliation was then not adopted by the full Parliament. The co-decision procedure has thus so far led to fewer rejections of EU legislative proposals than the cooperation procedure. This is, of course, not the only index of legislative efficiency. Is co-decision too time-consuming and does it actually lead to delays in the adoption of legislation, or is it too cumbersome to work properly?

In spite of the fixed deadlines that are laid down for the later stages of the co-decision procedure (as they were for the cooperation procedure) it is true that some cases involving co-decision have taken a long time to resolve. A particular source of delay at later stages in the procedure (and one that some would like to mitigate at the present IGC) is that it has often taken a long time to hold the first conciliation meeting between the European Parliament and the Council, partly because of difficulties in finding mutually acceptable dates for meetings, but largely because the two sides have been informally exploring possible areas of compromise before entering into the formalized part of the conciliation process. In some cases it has thus taken several months to convene the first meeting.

There is no doubt, however, that the main cause of legislative delay has been the lack of any deadlines in first reading for the Parliament or for the Council. In this the co-decision procedure is no different from the cooperation or the consultation procedures. In fact, many of the spectacular cases of delay have involved simple consultations (like the merger control regulation which was pending for well over a

decade) and been due to problems in the Council which persisted long after the European Parliament had given its opinion. The degree of political sensitivity of a proposal (and the degree of political will to find a solution) has been far more important than the nature of the legislative procedure.

This is not to deny that the co-decision procedure can be very time-consuming for some of the participants, especially certain MEPs in those committees (such as the Economic or Environment Committees) with a heavy co-decision burden and the Parliament's Vice-Presidents specializing in co-decision, but also the Deputy Ambassadors in COREPER who tend to represent the Council in the vast majority of conciliation cases (and which helps to explain the lack of enthusiasm of some of the COREPER I representatives for extending the scope of the procedure, and also the proposals that have been put forward for reducing the size of conciliation delegations!).

While many of these time-consuming aspects of the procedure are unavoidable, the co-decision procedure does have a number of built-in inefficiencies and other weaknesses. Apart from the cumbersome nature of the intention to reject and third reading stages, a specific weakness of the procedure is that two legal bases in the Treaty (the framework programme for research and culture) provide for it to be combined not with QMV in the Council but with unanimity. Although agreement has been reached on the two occasions when it has been applied, the fact that the Council can only reach unanimous decisions is a serious constraining feature in any negotiations with the Parliament.

Another unusual structural feature of the procedure is that Parliament requires absolute majorities of its members to amend or reject a common position, yet only needs a relative majority to reject an agreement reached with the Council in conciliation. This has only happened on one occasion (patenting of biotechnological inventions). While this was subsequently much criticized by some Council members and within industry, the reason for the rejection seems to have been ethical issues that were raised, a division of opinion within Parliament's delegation, and the failure of the majority who had reached agreement with the Council to convincingly defend the outcome in front of their colleagues.

It seems clear that Parliament did not negotiate in bad faith on this matter, but the asymmetry in voting requirements would make it theoretically possible for the Parliament to negotiate an agreement on proposed legislation which it did not have

the strength to reject by absolute majority, and then to reject this agreement by simple majority¹.

Among the other weaknesses and ambiguities of the co-decision procedure are that the Council can, according to the letter of Article 189B, only explain the common position and not negotiate in case of the optional conciliation provided for after Parliament has voted an intention to reject, and that the rights of the Commission to modify its text in the latter stage of the conciliation procedure are unclear². Another controversial point has been whether the Council, in imposing a common position after a breakdown in conciliation, is restricted in its choice of Parliament amendments which it wishes to take on board to those formally adopted by the Parliament in second reading and not those put forward by the Parliament in the course of conciliation³.

The cases cited above have hardly arisen and have been much less of a practical problem than the much more general one of conflicts over the legal base. The fact that there are different legislative procedures, some entailing co-decision for the Parliament and others only cooperation or consultation, and that unanimity co-exists with QMV has led to inevitable differences of opinion between the Parliament and Council⁴, with good examples of potential confusion being in the fields of trans-European networks (co-decision on the general guidelines and cooperation on the implementing measures: how are these defined?) and the Framework Programme for Research and Development (co-decision on the overall action programme, consultation on the specific programmes).

¹ This is no more unlikely than the hypothesis mooted by Tsebelis that the Council might have no incentive to reach agreement in conciliation because they could get their way more easily under the third reading.

² The Commission claims that it can do so, and the Council has contested this interpretation of Article 189A. In spite of the possibility that it might have been tested in the Courts on one occasion (in the case of ONP-voice telephony) this did not occur.

³ This restrictive interpretation was that supported by the Council legal service in the case of ONP-voice telephony.

⁴ Such as the EDICOM case where there was dispute as to whether the legal base was Article 100A (co-decision and QMV), Article 129D (cooperation) or Article 235 (consultation and unanimity).

Another general problem caused by overlapping legislative procedures is lack of transparency. An example of this is in the field of EU environmental policy, where much of the policy entails co-decision, other sections the cooperation procedure and yet others mere consultation.

The above analysis risks over-emphasizing the negative features of co-decision. In spite of the factors outlined above, the co-decision procedure has been flexibly implemented¹ and has generally worked well in practice, as was acknowledged in the reports of the institutions on the workings of the Maastricht Treaty that were submitted before the outset of the present IGC. A well-known saying about Italy is "Eppur si muove" ("in spite of everything it moves") and this saying could also apply to the co-decision procedure. Two outright failures out of 77 is not a bad record, and one of these has already been rectified²

(ii) Impacts on the functioning of the European Parliament

Some of the dynamic effects of the cooperation procedure were described above. The co-decision procedure has already had more far-reaching effects.

Firstly it has proved a significant catalyst in terms of internal re-organization of the Parliament to face up to its new legislative responsibilities. Parliament was the first of the institutions to set up a new conciliation unit, with up to four administrators concentrating full-time on both conciliation logistics and horizontal problems posed by the co-decision procedure and working along with the individual committee specialists. They have been backed up by reinforced legislative planning units in both the Directorate-General for committees and that for sessional services and a strengthened European Parliament legal service. A major consequence of all this has been that the previous narrow-based specialist committee focus has been complemented by a much greater attention on practical and institutional problems

¹ For example, the use of written procedure and also informal contacts and more manageable dialogues between Council Presidency, Commission and Parliament to compensate for the cumbersome nature of the formal conciliation meetings where up to 100-150 people can be present.

² A good analysis of the legal uncertainties but generally successful functioning of the procedure is contained in "Maastricht and the Co-decision Procedure: A Success Story" by Sophie Boyron, *The International and Comparative Law Quarterly*, Volume 45, 1996.

affecting all committees, and on short- and medium-term legislative planning along with the Commission and Council.

This increased professionalization and specialization of Parliament staff has also been matched among the MEPs. There are now three European Parliament Vice-Presidents who spend much of their time on conciliations and on horizontal legislative matters, as well as a considerable and growing nucleus of members who have become familiar with the techniques and problems of conciliation, as well as with some of the horizontal issues such as "comitology". They also have far closer contacts with the Council and not just with the Commission as before (see below).

As a result of all this there is now a greater understanding among both staff and MEPs of how the EU legislative process works in practice and not just in theory. There have been a number of other changes in the way that Parliament works. While the situation is still unsatisfactory in a number of respects Parliament now generally receives better and more detailed information than it did before. There also appear to be more early contacts between Parliament rapporteurs and the chairmen of Council working groups (see below), although this is still the exception rather than the rule, a more careful choice of priority European Parliament amendments in second reading (not least since they may have to be individually defended by Parliament's spokesmen rather than just being left to the good graces of the Commission), and finally more intensive lobbying by industry and other interests than ever before.

(iii) Influences of the European Parliament on EU legislative policy-making

Have the changes outlined above led to greater influence of the European Parliament on EU legislative policy-making? How does its influence under co-decision compare with that under the cooperation and consultation procedure? Few things are harder to measure than legislative influence (whether that of individual Member States or of the European Parliament) in specific policy areas, and there can be no substitute for detailed area-by-area analysis. A pioneer study by Earnshaw and Judge¹, written

¹ David Earnshaw and David Judge: "Weak European Parliament Influence? A Study of the Environment Committee of the European Parliament". (Government and Opposition, 1994). A more recent article by the same authors, examining the impacts of co-decision, notably in the environmental area, is "Early days: The European Parliament, Co-decision and the European Union Legislative Process Post-Maastricht", Earnshaw and Judge in Journal of European Public Policy, December 1995.

before the co-decision procedure was truly up-and-running came to the still valid conclusion "that the real significance of this case study is that it points to the informal exercise of influence - to the flow of information, to the policy trade-offs - that occur beyond Treaty-prescribed institutional relationships. Only by examining the dynamic of the European Parliament's relationship with other EC institutions, only by looking further than formal powers and structures, can the actual influence of MEPs be assessed" (op. cit. p.14).

Analysis of influence is further complicated by the fact that co-decision tends to apply not to matter of "high policy" but instead often to very detailed and technical matters where individual amendment might be changing the policy balance but rarely the entire shape of the legislation. As I briefly mentioned above in my comments on cooperation, this also has implications for Tsebelis' and Garrett's arguments about conditional agenda setting and whether "winning" coalitions are more or less "integrationist" under co-decision¹. Co-decision is often more about deal-making than agenda setting on big issues, and whether a negotiator is more or less "integrationist" is not very relevant in coming to agreement on nitty-gritty detail. On policy as opposed to "institutional" issues, coalitions (as we shall see below sometimes between the European Parliament and Council as well as between the European Parliament and Commission) are often pragmatic and short-lived ones.

One traditional measure of influence has been the rate of acceptance of European Parliament amendments by the Commission and Council. This has to be treated with great caution for a number of reasons. Firstly, amendments vary greatly in importance. Amendments to recitals, for example, are generally less significant than those to a substantive article in a text. Secondly, a distinction has to be made between amendments in first reading and those in second reading. In first reading a number of amendments may reflect the specific constituency concerns of individual members and are adopted, sometimes as part of an overall package between members in different groups, without much realistic expectation that they will end up in the final legislation. In second reading there is more of a tendency to concentrate on priorities. This is almost certainly more the case under co-decision, where the amendments may have to be justified individually in conciliation discussions, than under cooperation where constituency-reinforcing amendments may still be tabled in second reading which the Parliament will not have to defend directly and which can

¹ "Winning Council proposals under Co-decision are likely frequently to be less integrationist than winning Commission/European Parliament proposals under cooperation", Tsebelis and Garrett, forthcoming article in Journal of Legislative Studies on agenda setting, vetoes, and the EU's co-decision procedure.

later be dropped by Commission or Council. A further reason for distinguishing between amendments in first and second reading is that the Commission may well accept certain European Parliament amendments in first reading and then abandon them after the second reading when the legislation is closer to its final shape.

Another problem relates to the measuring of European Parliament success when European Parliament amendments have not been fully but only partially accepted. This is true under consultation or cooperation when the Commission may say it has partially accepted a European Parliament amendment or accepted "the spirit" of European Parliament amendments but has not necessarily done so in a satisfactory way. Under co-decision a different problem is posed, whereby the European Parliament becomes much less dependent upon the Commission, but where the European Parliament's amendments in second reading may well be considerably modified in the course of conciliation negotiations. For all these reasons a qualitative analysis of the fate of European Parliament amendments is more useful than a mere quantitative analysis.

With all these reservations in mind some interesting overall statistics have been produced by the European Parliament's service for follow-up to parliamentary acts and covering the 48 co-decision procedures that had been completed by the end of June 1996¹. Compared to cooperation² there was a higher rate of acceptance of European Parliament amendments under the co-decision procedure. The percentage of first reading amendments accepted by the Commission was similar at 55% for both the cooperation and co-decision procedures, but the percentage of second reading amendments accepted by the Commission rose from 44% under the cooperation procedure to 75% under the co-decision procedure, almost certainly reflecting the European Parliament's greater legislative weight under the new procedure. As far as the Council was concerned their rate of acceptance of Parliament's first reading amendments rose from 43% to 48%. Figures for second reading are harder to gauge because of the difficulty referred to above of measuring European Parliament success in the course of conciliations with the Council. Nevertheless, in 12 of the 48 completed cases all European Parliament amendments in second reading were accepted directly by the Council without conciliation being required (and sometimes expressly in order to avoid conciliation, another of the consequences of the co-decision procedure!). The European Parliament's consequent second reading success

¹ These figures are currently being updated, but were not yet available at the moment of writing this paper.

² Figures referring to 332 procedures.

rate with the Council was higher in these cases alone (at 26%), and without taking later successes in conciliation into account, than after all second readings under the cooperation procedure (24%). These figures only give a rough indication of possible impacts and it will be interesting to see if they are confirmed in subsequent comparative figures.

Even more interesting, however, would be to have detailed studies of the European Parliament's impact on individual policy areas. There have been examples of obvious impact, such as when the Parliament's use of its co-decision powers helped to improve the proposed lifts directive by improving access for handicapped people, and more case studies of this kind are required. A hypothesis that would be worth exploring in this context is the extent to which the European Parliament's demands are more maximalist when it has less powers, as in the field of agricultural policy, than in fields where it has more powers and is directly involved in the bargaining.

Another matter worth exploring is the question of why the Parliament has sometimes failed to obtain the necessary absolute majorities to amend a text in second reading when there had been a handsome majority in the competent committee. This happened on the second Vittinghoff report on auto emissions and where the Parliament thus had less of an impact under co-decision than it had had under cooperation. Was this because of the procedure or because, as this author suspects, the obvious new powers of the Parliament led to a more intensive and successful lobbying effort by the industry against the amendments?

(iv) Institutional impacts of co-decision

If the implications of co-decision on legislative policy making are still uncertain the impacts on inter-institutional relationships are already much clearer. Compared to the cooperation procedure, the co-decision procedure has led to much closer contacts between the European Parliament and Council, has somewhat weakened or, at the very least rendered more complex the role of the Commission, and created a new overall balance in the institutional triangle of Council, Commission and Parliament.

European Parliament/Council relationships have changed in several ways. Firstly, and unlike the other EU legislative procedures, draft EU legislation pursuant to co-decision is now submitted to both the European Parliament and the Council, and finally agreed texts are now jointly signed by the European Parliament and Council Presidents after examination of the texts by the respective legal services.

Secondly, and as mentioned before, there are now much closer European Parliament/Council contacts at all levels. To personalize the point, the author of the present paper, who was then working in one of the European Parliament legislative committees most concerned by the new co-decision procedure, was contacted by a member of the Council secretariat almost immediately after the Maastricht Treaty came into force with an offer to meet in the Council cafeteria and to look around the building. "It is now time we got to know each other". For the first time many members of Parliament's staff got to know their Council counterparts and vice-versa, whereas in the past their institutional contacts had been almost exclusively with the relevant desk officers in the Commission.

Thirdly, although it is still the exception rather than the rule, there are increasing contacts between Parliament and Council in the early stages of legislation. There have even been a couple of occasions at which a Parliament rapporteur (Roger Barton, a British Labour MEP) has convened meetings with the chairman of the relevant Council working group, with other Council staff and the Commission, and with representatives of industry and of user groups. One of these meetings even took place before the Parliament had given its first reading, and helped to give an early insight into the main problems that were likely to arise on the draft legislation.

On the other hand, if Parliament/Council relations have become much closer under co-decision, the Commission's role has become a more difficult one. Under cooperation, and as described above, the Commission's role is a very powerful one indeed, and without Commission support the Parliament can achieve relatively little. Under co-decision the Commission's position after the adoption of a common position is formally a much weaker one, since it is perfectly possible for the Council and the Parliament to do a deal behind the Commission's back. In the early days of co-decision there were even such meetings at which the Commission was not present. The Commission is now routinely present at meetings, and can still play a very important intermediary role, but this is less dependent on its institutional position and much more on the force of its arguments and on the way it plays its negotiating cards.

Under co-decision there is thus a real institutional triangle, with shifting relationships between the three participants. The present author recalls one occasion (in the difficult discussions over the motorcycle power proposal) when the Commission was adopting the hardest line and when the Council was offering to be an intermediary between the Commission and the Parliament! Some in the Council and Commission may hanker for the greater simplicities of the pre-co-decision era, but these are unlikely to return.

Besides this shift in the institutional balance another important impact of co-decision has been that its knock-on effects on a number of other institutional issues have been much greater than those under other legislative procedures. The most striking example of this has been the conflict between the Parliament and Council on the question of "comitology" or implementing measures. The Parliament agreed that the old system whereby the Parliament was not even fully informed, let alone given a chance to comment on implementing measures, had become inappropriate in cases where the Parliament was acting as a co-legislator with the Council on the basic legislation. The long-running battle, which led to problems in a number of conciliations and to the Parliament actually throwing out the imposed common position on the issue of ONP-voice telephony, has been temporarily reduced in intensity by a "modus vivendi" that was reached between the two institutions, but may well be revived by the apparent failure of the present IGC to properly consider the issue (as was indeed required by the "modus vivendi").

Other horizontal institutional issues that have been raised in the course of conciliation include those of the amounts deemed necessary (or familiarly known by the French acronym of MENS - basically a dispute over the respective budgetary powers of the institutions in the light of the Council practice of seeking to introduce maximum figures for expenditure in the body of proposed legislation) and of secret declarations made at the time of adoption of a text whose existence has not been notified to the Parliament and which are of relevance to the legislative process.

The present paper will not enter into the details of these debates but would merely point out that the Parliament has been able to raise its profile on these issues because of the new institutional muscle given to it by the co-decision procedure. The Parliament had raised the issue of comitology, for example, in the days when it only had the cooperation procedure, but to much less effect.

Postscript: possible legislative changes at the present Intergovernmental Conference

The present paper has discussed the gradual evolution of the European Parliament's legislative role, and some of the impacts that this has had. What further steps are likely to be taken at the present IGC?

In spite of improvements that have taken place, EU legislative procedures still require further reform. In particular, they need to be made more democratic and open by further strengthening the position of the European Parliament and of national

parliaments and by increasing legislative transparency, and they need to be simplified and made more efficient by reducing the number of existing legislative procedures and by streamlining the co-decision procedure.

The European Parliament's main demand as regards itself at the present IGC has been for co-decision to be extended to all EU legislation. Extension of co-decision would also have the parallel advantage of eliminating the cooperation procedure and reducing EU decision-making procedures to only three - co-decision, consultation and assent. If there were also to be a great increase in use of QMV a major reform in terms of greater democratization and efficiency would have been achieved.

We are now entering the decisive phase of negotiations at the present IGC and it is too early to make firm predictions as to the nature of the final overall package of reforms. What seems likely at the moment of writing is a significant extension in the use of co-decision (22 new cases are currently proposed by the Dutch Presidency, including its introduction in a number of existing articles where other procedures are now used, as well as its inclusion in a few new Treaty articles). This would be combined with the effective abolition of the cooperation procedure for all except four legal bases in the field of Economic and Monetary Union (which would be left intact, at least temporarily, because of the clear objective of the IGC negotiators not to touch a comma in the existing EMU provisions¹). On the other hand, the consultation procedure would still be retained in a number of important areas of legislation, such as agriculture (Article 43 of the Treaty²), fiscal harmonization (Article 99) and proposed new Treaty articles in communitarized areas of the third pillar. The European Parliament has argued for all these areas to come under co-decision.

It is also likely that the role of national parliaments will be somewhat reinforced by providing for a minimum period (perhaps in a protocol to the Treaty) of four or six weeks for them to give their views on proposed legislation before it first comes up for a decision in the Council³. The principle of openness and of access to EU

¹ In principle the only one of these four which is likely to be of real significance in the future is that on the rules for multilateral surveillance.

² Where the European Parliament has strongly argued that it should be given co-decision on strategic legislative decisions affecting the future of the sector, but not on executive-type decisions like individual product price-setting.

³ It would also be necessary to reflect upon how to provide better information to national parliaments in the later stages of the legislative process. The Select Committee on European Legislation of the House of Commons, for example, has

documents will also almost certainly be introduced in the Treaty, but with the outcome then likely to fall short of the European Parliament's demand for the Council to act in public in its legislative capacity. More effective transparency on such matters as declarations and Council agendas and minutes would help to improve the EU legislative process.

The other reform that has been the subject of considerable discussion, and which is particularly relevant in the context of this paper, is the simplification of the co-decision procedure. Among the reforms that have been proposed (and that have been included in the Irish and Dutch proposals for the IGC) are ending the procedure if there is agreement after the first reading, setting a maximum time-limit for convening the Conciliation Committee (six weeks is the figure that has been mooted) and for the whole procedure between the second reading and the ending of work in the Conciliation Committee (nine months?), clarifying the scope of the issues to be addressed by the Conciliation Committee¹, ending the intention to reject phase of the procedure, and also eliminating the convoluted procedure of the third reading, whereby the Council could impose the original common position in the case of the breakdown of conciliation and the Parliament is then given an opportunity to override the Council by an absolute majority of its members.

Other reforms have also been suggested which do not necessarily require Treaty change. The idea of a more restricted composition for delegations in the Conciliation committee has been suggested, for example, partly because of irritation among some COREPER I ambassadors at the amount of time they spend in conciliation and partly because of concern about conciliation delegations expanding to 25 or more on each side in the case of enlargement. Ideas have been put forward, therefore, that conciliation delegations be reduced to between 5 and 10 on each side and that there might be more permanent members on Parliament's side. Parliament has replied that the existing balance between its permanent and committee specialist members would be hard to change and has called, on its side, for the Council to be represented at a higher political level than at present, with a proper ministerial presence.

called for more information on what is happening in co-decision conciliations.

¹ There has been concern among some Council members that issues too far away from those adopted in the EU's second reading amendments have sometimes been raised in conciliation. The European Parliament has insisted that there continue to be flexibility concerning the introduction of compromise amendments between the common position and the amendments adopted by the European Parliament in second reading.

While the final outcome of these discussions is still unknown there seems broad agreement at the IGC on ending the procedure after the first reading in the case of agreement between Council and Parliament, and at eliminating the intention to reject phase. The Parliament would thus be able to proceed directly to a rejection of a common position by an absolute majority of its members.

The most controversial remaining question, however, is that of the elimination of the third reading. The European Parliament has made a strong plea for its abolition and the Irish and Dutch Presidency drafts for the IGC have also proposed that it be deleted, but there are still a number of Member States who are calling for it to be maintained.

In the view of this author Tsebelis and Garrett have over-emphasized the importance of the third reading in terms of conditional agenda setting. The fact that it has only been used once, and not really even been seriously threatened in the course of subsequent conciliation negotiations, would indicate that it has not been a central part of the co-decision procedure. Moreover, its utility has been undercut by the fact that the council's own legal service has said that the Council can only pick and choose among European Parliament's adopted amendments in second reading and cannot use any of the compromise amendments mooted in the course of conciliation. In fact, on the only occasion when it was used the Council imposed the common position in its original form, and did not add any of the Parliament's amendments.

Finally, those arguing for its importance underestimate the institutional issues that are at stake if a common position is imposed by the Council. This would almost certainly be seen as a direct institutional challenge by the Parliament and there would be strong political group whipping to override the Council's action, just as there was in the case of ONP-voice telephony when the necessary absolute majority of European Parliament members was easily achieved. It may not always be easy to get an absolute majority of European Parliament members to vote for amendments in second reading, but if this majority has been obtained it is unlikely that there would be much subsequent erosion of that European Parliament majority if the Parliament felt that its institutional prerogatives were at stake.

The European Parliament has argued for the abolition of the third reading primarily with the objectives of simplifying and shortening the co-decision procedure. However, its abolition is apparently seen by some in the Council as a symbolic step that would appear to change the institutional balance, and their objections to its deletion thus seem to be based more on institutional than political grounds. Like

comitology, it risks becoming an almost theological dispute. It will be interesting to see whether the Dutch Presidency can get their way in the final stages of the IGC negotiations and achieve a real streamlining of the co-decision procedure.

Concluding remarks

This paper has argued that while the cooperation procedure was a considerable step forward for the European Parliament compared to the pre-existing consultation procedure, the introduction of the co-decision procedure has been an even more major step forward in terms of the European Parliament's influence in the European Union's legislative process.

In spite of its imperfections the procedure has generally worked well. There have been only two outright rejections and the problems that have been encountered have been because of serious political and institutional issues that would have had to be raised anyway. The introduction of co-decision has made it easier for Parliament to do so.

There is some evidence that the role of acceptance of European Parliament amendments at the vital second reading stage has gone up under co-decision. Institutionally, however, there is little doubt that the Parliament's position has been strengthened and the Commission's position weakened compared to the cooperation procedure. There have also been important dynamic effects for the Parliament in terms of the professionalization of its work, in terms of real contacts at staff and MEP level between the European Parliament and the Council, and in terms of real European Parliament immersion for the first time in EU legislative deal-making.

The IGC may result in further useful steps forward in terms of extending and simplifying the co-decision procedure, but is still likely to leave the consultation process intact in a few important areas of legislation. Tsebelis and Garrett are right in stating that it is constantly necessary to confront theoretical arguments with empirical evidence, and it will be important to carry out more research in specific policy areas as to the European Parliament's comparative influence under different legislative procedures.

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