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The European Parliament and Delegation to Comitology

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Abstract

In this article we argue that the delegation of implementing power to the Commission changes due to the fact that, under co-decision, two legislators (the Council and the EP) must agree to delegate. We first show that, with the introduction of co-decision in environmental policy, the legislators have relied more extensively on delegation. This indicates that the EP and the Council sought to save the political transaction costs associated with detailed legislation. Moreover, the finding that increased delegation preceded the ratification of the Amsterdam Treaty shows that the Council – anticipating its relative loss of power by having to share legislative power with the EP – was in a rush to delegate as much as possible to the Commission before the entry into force of co-decision. This is in accordance with a redistributive power-based bargaining argument according to which the Council prefers to delegate to the Commission, over which it has some control through comitology rather than sharing the legislative power with the EP.

We also claimed that with increasing formal powers in comitology the EP will less oppose delegation. Our results support this hypothesis, but call for some qualification: the EP opposes delegation less, if the increase in competences is important. If, however, it is only minor, it does not lead to less opposition to comitology. Quite the contrary, the EP appears to be prompted to systematically introduce amendments to restrict the scope of delegation. Which in turn may be used as a leverage in future negotiations over the revising of the rules governing comitology.

Key words: European Union, Implementation, Comitology, Delegation, Principal-agent theory, Transactions costs

The European Parliament and Delegation to Comitology¹

The problem of delegation is at the heart of politics. Why do democratically elected bodies delegate decision-making to executive bodies? To what extent does this delegation occur and how much discretion are delegates given? These questions of delegated decision-making have been of prime interest to political science since its very beginning and the object of much theorizing and empirical research.

Particularly, the decision to legislate or to delegate constitutes a central problem for all democratic political systems. With each issue on the legislative agenda, decision makers decide whether to introduce them through legislation or delegation (which in turn of course is based on an act of legislation). While clearly involving efficiency gains and facilitating integration, delegation also comes with a cost. Delegating the specification of legislative decisions to executive bodies and experts implies a loss of democratic legitimation. Having received the delegation mandate from a government, the link to a direct legitimation by the democratic electorate becomes more intermediate. Mechanisms of democratic accountability rendering may be cut off. Clearly, the problem of the need of delegation in order secure efficient and expert policy making on the one hand and the implied risks for democratically legitimate policy-making on the other has important repercussions for democratic politics.

In this paper, we focus on a particular political system – the European Union – and on a particular aspect of delegation: the member states’ assigning decision-making power to the Commission when implementing Community legislation (comitology). Indeed, it has been the Council of Ministers, that - as a legislator - delegated implementing powers to the Commission to flesh out details of legislation, while at the same time guaranteeing that member states cooperate with the Commission in this specification of decision-making in the comitology committees. Since the introduction of

¹ This paper was presented at the ECPR Joint Sessions Workshop 19: “Intra and Inter Institutional Relations in EU decision-making” (Rennes, 11-16 April 2008) by Catherine Moury (CIES-ISCTE). It is based on a chapter of a book manuscript on *Legislation vs Delegation – Contested Powers in the European Union*, co-authored by Adrienne Héritier (Robert Schuman Centre), Catherine Moury (CIES-ISCTE), Carina Bisschoff (Copenhagen University) and Carl Fredrik Bergstrom (SIEPS Stockholm).

codecision, however, the EP became a co-legislator with the same competences of the Council; but its role in comitology, despite important developments, has stayed very limited. Thus, the decision how to decide, to delegate or to legislate is a politically contested decision since it involves the distribution of decision-making power between actors. And if it has been decided to delegate, different procedures governing delegation will have different implications for the overall distribution of political influence.

Here, we argue that the choice between legislation or delegation is influenced by two processes which overlap: the saving of political transaction costs and a bargaining process over institutional power and thereby policy outcomes. On the one hand, in certain circumstances, overly detailed legislation may prove impossible to shepherd through the legislative process without high side-payments and it may be considered to be appropriate to supplement framework legislation with the delegation of *ex post* rulemaking and implementation powers. The introduction of co-decision, which obliges the Council to negotiate with the EP as an equal partner, might increase the transaction costs of reaching an agreement and then the necessity of delegation. On the other hand, the decision over whether to legislate or delegate is also a decision about the allocation of political power. Since we assume that actors' preferences over legislation or delegation are determined by the degree to which they have effective influence over policy and this influence to a large extent depends upon their institutional power, we expect them to ensure that policy will be enacted through procedures which maximize their own degree of control over the process of policy-making. In consequence, we argue that with a bigger role of the EP in legislation the executive will seek to use more delegation in order to save transactions costs and in order to maximize its own control over decision-making. We also argue that the EP will react to this pursue, but that the EP's opposition to delegation will diminish the more its formal powers in comitology will increase.

We organize this paper as follow: We first develop a rational institutionalist argument linking political science principal agent and transaction cost theory of why delegation expands when co-decision is introduced. We then go on to analyze on the basis of rational institutionalist theory why and how the contestation of the European parliament will evolve regarding comitology. For both questions we develop hypothetical answers which are then subjected to empirical assessment.

I. Why to delegate?

The literature on Congressional oversight is very useful to addressing the *why of delegation*. The *first* reason pointed out by this literature is the lack of time and expertise of legislators (Fiorina 1977; Epstein and O'Halloran 1999: 31).² The *second* reason of delegation emphasized by Fiorina (1982) extends to the argument that interest groups might mutually block each other in the legislative process and will be unable to come to an agreement on detailed legislation. In order to avoid this situation of gridlock, legislators linked with diverging interest groups will agree that authority be delegated to agents and legislation take only the form of a vague mandate or framework legislation. Such a framework may be agreed upon much more easily than a specific mandate and may offer a possible escape route out of a threatening decision making impasse (Héritier 1999). Legislators "...prefer the uncertainty of the regulatory process at some point down the road to any certain outcome in the present" (Epstein and O'Halloran, 1999: 31; McCubbins 1985). They compare the uncertainty and likely benefits of delegation to the uncertainty of bureaucracy and of courts fleshing out vague legislation in the future (Fiorina 1986). But the bureaucrats/agents while following the wishes of the legislators/principals may also pursue their own policy objectives and may inflate their budgets and increase their scope of control and their institutional power (Epstein and O'Halloran 1999: 8). In sum, the costs of one or the other "way to decide" and their "political" transaction costs" (as Epstein and O'Halloran term them)³ are weighed against each other: lengthy bargaining among principals with diverging preferences, the costs of collecting information linked to detailed legislation (expertise), the inefficiencies of the committee system of Congressional in-house production (delay, logrolling), procedural rules, such as bicameralism and large majority requirements are set against the

² Fiorina's (1977) original work on the subject further argues that "...legislators may gain by exposing their constituents to the vagaries of administrative regulation, content to play the role of ombudsmen who intervene if this process goes awry; ...the most sinister interpretation casts legislators in the role of leading an organized 'protection racket', threatening uncooperative constituents with harmful regulation if they do not contribute to legislators' coffers" "This class of explanations rests on a view of the legislative process as concentrating almost exclusively on the provision of private benefits...But this view of legislative activity is certainly a bit simplistic; legislators also spend their time dealing with issues of general import, delivering benefits to large classes of constituents rather than small, targeted interest groups (witness Social Security and Medicare)" (Epstein and O'Halloran 1999: 31)

³ "Thus, Congress's decision to delegate is similar to a firm's make-or-buy decision; hence our usage of the term 'transaction cost politics'" (Epstein and O'Halloran 1999:7)

uncertainties of delegation and vague legislation. The different avenues of decision-making and their political transaction costs are compared and the less costly one chosen. Franchino (2000), summarizing Mc Cubbins and Page (1987), in a similar argument emphasize that conflicts will render it difficult for a decisive coalition of legislators to specify and restrict the range of policy-making functions to be delegated to the agent because the exclusion of some issues may threaten the coalition. “Controversial aspects about implementation are hence deferred after the writing of the legislation and the agent’s mandate remains rather large” (Franchino, 2002)

A *third* reason for delegation is seen in the particular policy aspects, or more specifically the size and importance of group interests linked to the policy area at stake (Fiorina 1986). When interest groups of unequal size face each other in the legislative process, taking recourse to delegation may offer legislators a possibility to “shift the blame” for unpopular policies to the agent: Fiorina, building upon the argument of Wilson (1978) (who in turn extended the argument of Olson), argues that large and inclusive groups will find it more difficult to bring their weight to bear than small and more concentrated (exclusive) groups. In consequence, he argues, legislators will prefer to delegate to bureaucrats whenever the policy in question has concentrated benefits and dispersed costs, thereby shifting the blame for biased policy making to the agent, and, conversely, will wish to legislate themselves in the case of widely dispersed benefits and concentrated costs (Fiorina 1986). Along a similar line of argument Epstein and O’Halloran (1999) reason that legislators prefer to delegate if the political benefits of a policy are small and the costs are high (such as in the regulation of airline safety).⁴ The opposite case in which legislators would want to write detailed legislation themselves and not delegate decision-making power, is taxation. The political benefits – while not deriving from setting the overall tax rates - consist in the possibility of granting

⁴ They argue that air safety regulation is “characterized on the one hand by the need for technical expertise and on the other by an almost complete absence of potential political benefits. This is, policymakers will get little credit if things go well and no airline disasters occur, but they will have to withstand intense scrutiny when things go wrong: Airline regulation is an issue with only a political downside, and failures tend to be spectacular and well publicized. Furthermore, legislative and executive preferences on this issue will tend to be almost perfectly aligned: have fewer accidents rather than more as long as the costs to airlines are not prohibitive. The set of individuals receiving benefits, the flying public, is diffuse and ill organized, while those paying the costs of regulation, the airline companies, are well organized and politically active. And keeping in mind the easy observation of deficiencies in the system, delegated power is relatively simple to monitor. For all these reasons...delegation to the executive would be the preferred mode of policy making” (Epstein and O’Halloran, 1999: 8)

exemptions to large corporations and well-organized lobby groups. “If designed correctly, these benefits can target a specific industry or group and are paid for by the general public, either through taxes paid into general revenues or the decrease in tax revenue stemming from the tax break” (Epstein and O’Halloran 1999: 8).⁵

Following the line of argument developed by Epstein and O’Halloran (.....) Pollack (.....) applies political science principal agent theory explicitly including transaction costs to the context of the European Union and proposes that legislative principals delegate powers to agents in order to reduce the transactions costs associated with legislation and the implementation of laws. He argues that executive agents help solve problems of incomplete information by providing policy relevant expertise to legislators and securing credible commitments by controlling legislators’ compliance with the decisions they agreed upon (and later might be tempted to renege upon due to only long-term benefits) and by providing independent regulation of powerful economic actors.

Of interest to us is his argument, the delegation of implementing powers to the Commission, claims that “...member governments have delegated regulatory powers to the Commission in areas such as competition policy and international trade, where individual governments would otherwise face a temptation to renege rather than impose concentrated costs on important domestic constituents.” And where, by delegating detailed decisions to experts, the efficiency and speediness of European decision making is to be increased (Pollack 2003: 10).⁶ Majone (2001), too, argues that implementing powers have been delegated to the Commission in secondary legislation due to the need of expertise (2001:114-115).

⁵ Epstein and O’Halloran predict: “Our theory predicts...that policy will be made in the politically most efficient manner, be it through direct legislative action, through delegation to executive branch agencies, or through some combination of these two. Note the term ‘politically’ efficient; we make no claim that policy making under separate powers will be technically or economically efficient, allocating resources to their greatest advantage...Rather, we claim that policy will be made in such a way as to maximize legislators’ political goals, which we take to be reelection first and foremost.” (Epstein and O’Halloran, 1999: 9)

⁶ He more generally submits that “...member-state principals will delegate four key functions to their supranational agents, namely: (1) monitoring compliance; (2) solving problems of ‘incomplete contracting’ among principals; (3) adopting credible, expert regulation of economic activities in areas where the principals would be either ill-informed or biased; and (4) setting the legislative agenda so as to avoid the endless ‘cycling’ that might otherwise result if the principals retained that power for themselves.” (Pollack 2003: 6).

II: Does Codecision Spur Delegation?

A) Theory and hypothesis

How can we use this strand of political science principal agent theory for our argument that delegation might be used by the Council to avoid having to co-legislate with the EP? The argument of Fiorina (1982) and Huber and Shipan (1992) is very useful. They argue that conflicts among diverse interest groups make it more difficult for a decisive coalition of legislators to restrict the policy issues to be delegated to the agent. In order to avoid this situation of gridlock, legislators linked with diverging interest groups will agree that authority be delegated to agents and legislation take only the form of a vague mandate or framework legislation. Applying this argument to the EU context, we argued that, with an increase of the number of actors (i.e. the empowerment of the EP), the transaction costs, in particular the bargaining costs, necessary to adopt detailed legislation will increase and, in consequence, so will delegation to the Commission. A similar argument has been advanced by Huber and Shipan (2003), who claimed (and shown) that if the legislature is divided, the statutory discretion left to the agent would increase. Or formulated in redistributive power-based bargaining language: Actors who have to share decision-making power with a new actor seek avoid this sharing of power if possible, and delegation offers such a possibility.

Moreover, the decision to delegate or to legislate determines a contest of power over the rules governing comitology. With the introduction of the co-decision procedure, the Member states in the Council will loose effective influence in the legislative procedure, while their influence in implementing the laws will remained untouched. Since we assume that actors are competence maximisers, we expect that, in order to protect their own institutional power, the Council and the Commission will therefore be more inclined to delegate more to the Commission's implementing powers with the introduction of co-decision.

These two processes, of saving transactions costs and of bargaining about power, overlap and we thus expect:

H1: With increasing power of the EP, the Council and the Commission will be inclined to delegate more to comitology.

However, one also may develop the rationale for a contrary (null) hypothesis. A contrary expectation has been formulated (McCubbins and Page 1997, Moravcsik 1998; Pollack 2003) that the existence of conflicting preferences among multiple principals should reduce the desirability of delegation. The reason is that conflicts among principals should render it difficult to sanction a possible subsequent shirking on the part of the agent.

In consequence, establishing a co-equal legislator, could lead to *less* delegation because member states anticipate non-agreement in the case of the agent's non-compliance (Null H1b).

Null H1b: With increasing power of the EP, the more difficult it will be to sanction the agent, and therefore the less legislators will be inclined to delegate to the executive agent / Commission.

B) Specification of variables and empirical indicators

In order to test H1, we specify our hypothesis as follows: the values of the independent variable are the precise competence of the EP, i.e. the use of consultation and cooperation, or alternatively of co-decision as a legislative procedure. The values of the dependent variable are the proportion of adopted delegating acts, called 'delegating legislation' that grants implementing powers to the Commission over the proportion of all acts adopted by the legislator. The periods of time where a given legislative procedure is used for the selected issue area constitute our cases. We compare the proportion of delegating legislation adopted during the period where consultation or cooperation was in use to the proportion of delegating legislation adopted when co-decision was in use. According to H1 we would expect an increase in the proportion of delegating acts in the period where co-decision is in use. According to Null H1 we would expect a decrease.

However, there are three cautions to take into consideration. First, the average time for adopting legislation is more than two years. It therefore makes more sense, in order to assess the immediate effect of a change in the legislative procedure, to look at the

proportion of delegating legislative *proposals* introduced by the Commission just after the entry in vigor of a treaty revision introducing co-decision. Since we argue that increasing the EP's competences will render legislation more difficult and therefore delegation will be preferred by the Member states, we would expect Commission proposals to anticipate the Member states preferences⁷ and to include more proposals for delegation under the co-decision procedure than under the consultation or cooperation procedure.

Of course, this only indicates what the Commission proposes and would like to see enacted. In order to see our hypothesis confirmed, we should observe that *delegating* proposals made *after* the introduction of co-decision have at least a similar probability to be adopted than *delegating* proposals made *before* this change in the legislative procedure.

Secondly, we could argue that member states are likely to anticipate higher decision making costs due to the introduction of co-decision and that, therefore, an increase of proposals of delegating legislation are likely to be found a few months preceding this change.

Thirdly, we keep the issue area and the relevant Council decision rules constant in order to control for other influence factors.

Finally, to find our proposition empirically confirmed we would have to find a significant and long lasting increase in the proportion of delegating acts. We define a significant increase to be a proportion of 10 to 15% and more of all non-amending legislative items.

As regards the period of time under empirical scrutiny, we compare the period before co-decision to the period under co-decision until a few months before the large enlargement round of 2004 in order to control for the impact of enlargement on delegation.

⁷ Which also correspond to its own preference to delegate.

Table 1: Empirical indicators of (dis)confirmation Hypothesis 1

Independent variable	Dependent variable	Empirical indicators Confirmation	Empirical indicators Disconfirmation
Use, or not, of co-decision as a legislative procedure.	Proportion of delegating acts proposed by the Commission / all proposals	Significant increase of the proportion of proposed and adopted proposals after (or a few months before) the introduction of co-decision in a specified issue area ⁸ <i>And</i> Adoption rate of delegating proposals made after the introduction of co-decision is <i>equal or superior</i> to the adoption rate of the delegating proposals made before the introduction of co-decision.	Absence of a significant increase of the proportion of delegating proposals (proposed) and adopted after (or a few months before) the introduction of co-decision in a specified issue area. <i>Or</i> Adoption rate of delegating proposals made after the introduction of co-decision is <i>inferior</i> to the adoption rate of the delegating proposals made before the introduction of co-decision.

To sum up, we will consider our hypothesis to be confirmed (i) if we observe a significant (+10 to 15%) increase in the proportion of delegating proposals based on given treaty article after (or a few month before) the introduction of co-decision as a legislative procedure⁹ for this given article and (ii) if we observe that the adoption rate of delegating proposals made after the introduction of co-decision is *equal or superior* to the adoption rate of the delegating proposals made before the introduction of co-decision.

C) Data base

In order to test H1, we use the data base that was compiled on article 130s/175 (environmental policy). It enables us to look at the Commission proposals and trace them

⁸ In the preceding chapter, we have already show that the proportion of adoption of proposals of delegating acts is similar to proportion of adoption of non-delegating acts.

⁹ Or more exactly the entry into force of the treaty introducing co-decision.

until their adoption. This article was chosen because it is one of the few where the procedure changed from cooperation to co-decision under the Amsterdam Treaty only. To reiterate, this data base was built using Eur-lex, which allows us to scrutinize all Commission proposals in their full text that have been made since 1994. We selected secondary legislation based on one single Treaty article (article 130s, par. 1 - environmental policy) for which the voting role in the Council has always been QMV for the period under consideration (1994-2006), but for which the legislative procedure has been changed. Co-decision was introduced for this article under the Amsterdam treaty (1999). We exclusively analyze non-amending Regulations and Directives because this allows us to focus on new choices over delegation or legislation. Of course, we are aware of the fact that all delegation has to be based on legislation. However, the extent to which a new legislative act depends on legislation solely or includes delegation and, if yes, to what extent is measured here.

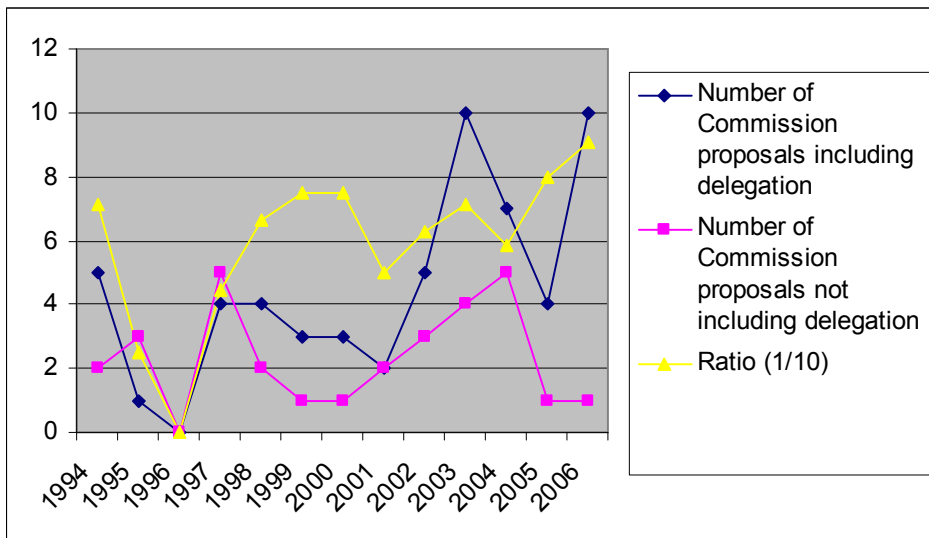
In order to scrutinize all legislative Commission proposals, we compiled from Eur-lex all documents based on article 130s/175 (environment), whose author is the Commission. We analyzed the path that the proposal took from the Commission proposal, to the first reading of the EP, then to the Council common position until the final act (if it was adopted).

D) Empirical findings: Environmental Policy (Art.130s/175)

How does our H1 *With increasing power of the EP, the Council and the Commission will be inclined to delegate more to comitology* hold up to empirical evidence when we look at the development of the number of proposals based on article 130s (environment, QMV) in the periods before and after the introduction of co-decision (1999)? Figure 1, presented in chapter three, showed the development of delegating and non-delegating Commission proposals and the development of the proportion of delegating proposals over the total of proposals from 1994 to 2007 (inclusive). Here, we will be concerned in comparing the period before and after the entry in vigor of the Treaty of Amsterdam (May 1999) which introduces co-decision for article 130s. In order

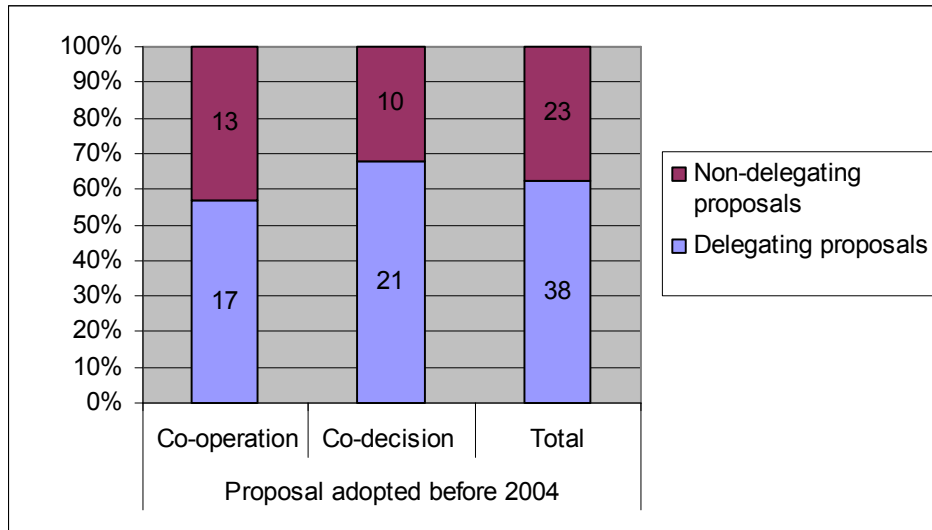
to control for the effect of enlargement, which, as we have seen, are at the roots of more delegation, we will only consider in our analysis commission proposals made before 2004.

Figure 1: Absolute numbers of delegating and non-delegating legislative proposals, and proportion of delegating legislation proposals (in per ten), N = 86 proposals



As noted in the preceding chapters, we observe an important increase in the absolute number of delegating Commission proposals in 2003 and in 2004. As regards the *ratio of delegating proposals to the total of proposals*, we observe an important increase in 1997, 1998, that is one and two years *before* the ratification of the Amsterdam treaty, and in 1999, the year of entry into force of the Amsterdam Treaty. This shows that since the year of the negotiation of the treaty revisions in Amsterdam (October 2, 1997) and up to its ratification by all Member states (May 1, 1999), the proportion of delegating proposals increased. This may be interpreted as an anticipation of a loss of power by Member states and a wish to delegate more. We further identify a decrease in 2001 and a discontinuous increase up to 2006.

Figure 2. Delegating Commission proposals introduced before 2004 under cooperation and under co-decision. N=61

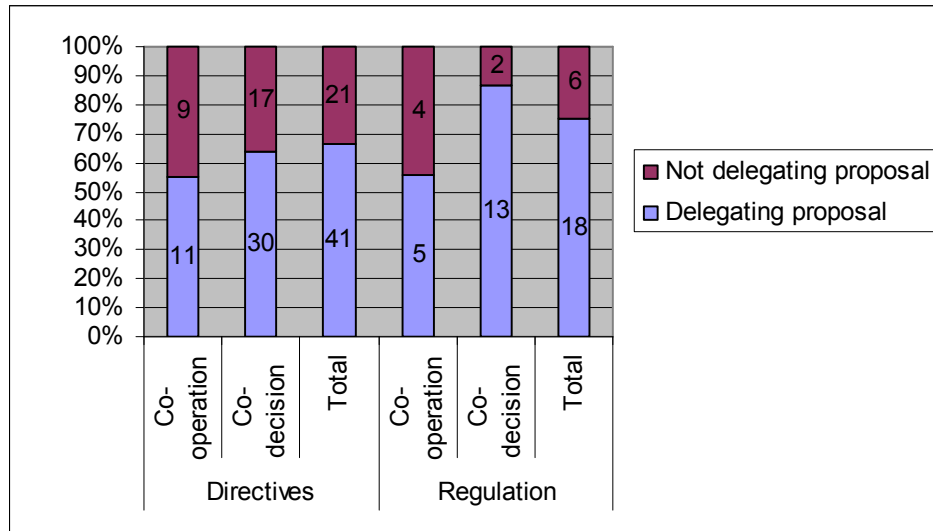


In figure 2, we sum up the number of delegating proposals and of non delegating proposals for the period when cooperation was used (January 1994-May 1999) and after co-decision was used as a legislative procedure up to a few months before enlargement (May 1999-January 2004). We observe a clearly higher proportion of delegating proposals under co-decision than under cooperation. The increase of 11% (68%-57%) can be considered as significant, according to our earlier definition. Hence, our empirical findings support hypothesis H1.

We additionally break down delegation into delegation under *directives* and delegation under *regulations* and compare the respective proportion to non-delegating proposals before and after the introduction of codecision (Table 3). It emerges that the increase in delegation is much more important for regulations than for directives (+31% and +9% respectively). This may be due to the fact that directives may also include a certain type of delegation to the Member states, because it requires member states to achieve a particular result without dictating the means of achieving that result. It can thus be distinguished from European Union regulations which are self-executing and do not require any implementing measures. Directives usually include delegation of implementing powers to the Commission (66% of directives propose to delegate implementing powers to the Commission) but the delegation to the Member states of the

choice over the means of achieving the results might have attenuated the need to delegate caused by co-decision and enlargement.

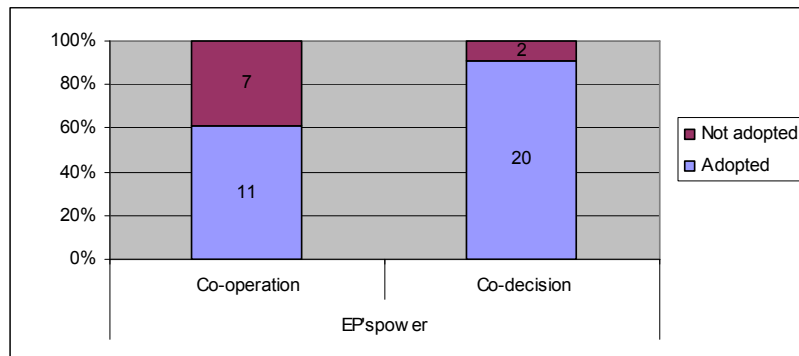
Figure 3: Delegating Commission proposal under cooperation and under co-decision, per regulation and directive. N=86



The numbers of Commission proposals only reflect the Commission's strategic preferences (or its anticipation of Member states' preferences). We therefore also look at the percentage of delegating Commission proposals that were adopted. We select all Commission proposals made up to 2003 included.¹⁰ It emerges that the percentage of delegating Commission proposals that were adopted is much higher (+25%) under co-decision than under cooperation (figure 3). In other words, the Commission tends to propose delegation under both procedures, but was much more successful in seeing this adopted under the co-decision procedure. Hence, both elements of our hypothesis H1 are supported by empirical evidence.

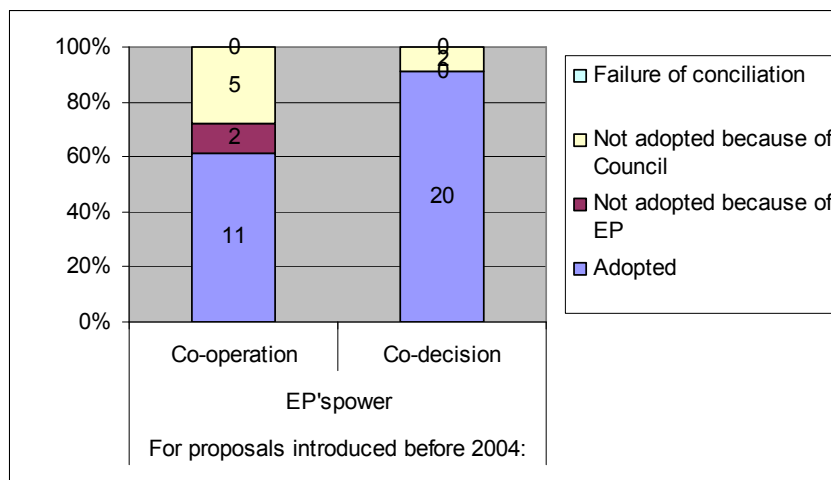
¹⁰ This we could not do for H1 in order to avoid counting Commission proposals not yet adopted as opposed those that will never be adopted.

Figure 3: Proportion of adopted delegating proposals (made before 2004), N=40



In figure 4, we show more details about the non adoption of Commission proposals. We have classified the items according to whether the draft was rejected by the EP or the Council or whether under co-decision it failed in the conciliation committee. We can see that in 2 and 5 cases out of 17 the EP and the Council, respectively, delayed or rejected a delegating proposals during the cooperation procedure, while the Council under co-decision rejected a delegating proposals in only two cases out of 20. This means that both legislative branches are more willing to delegate under co-decision than under cooperation. In consequence, this shows that the EP did not (or could not) oppose the adoption of delegating proposals, despite the fact that it is a co-legislator at equal foot with the council since the introduction of co-decision.

Figure 4: Proportion of adopted delegating proposals (made before 2004) and rejecting actor (before 2004), N = 40



II. The Parliament's Dwindling Opposition to Delegation?

A) Theoretical framework and hypothesis

In analyzing the behavior of the EP, we base our arguments on the same assumptions of bounded rationality, transaction costs and incomplete contracts, used in the first part of our analysis. This implies the assumption that actors' preferences over legislation or delegation and over which delegation procedure are determined by the degree to which they have effective influence over policy and that these actors – being utility maximizers – seek to increase their benefits in policy outcomes also through increasing their institutional power, i.e. that they are maximizing their competences. They will seek to ensure that policy will be enacted through procedures which maximize their own degree of control over the process of policy-making, and not through procedures where they have little or no control. As a result, in policy arguments, they will press for the widespread use of procedures that favor their own interests, and for less frequent use (and, where possible, the alteration or abandonment) of those procedures that do not.

We have shown that the Council, confronted with an increase of the EP's competences seeks to delegate more. We have also shown that the EP did not or could not prevent the increasing adoption of delegating proposals under co-decision. As we will show in details above, over time, in particular from 2006 on, with the revised Second Comitology Decision, the EP had obtained more formal power in comitology procedures (regulatory procedure with scrutiny). Based on the assumption expressed above, we claimed that the EP would try to limit delegation when its formal power in comitology is limited, but would oppose it to a lesser extent when these formal powers increase.

H2: The more formal power the Parliament has in comitology, the less it will oppose delegation to comitology

B) Specification of variables and empirical indicators

The values of the independent variable are the formal competencies of the EP in comitology procedures. These formal competencies have three values: (i) the formal competencies under the First Comitology Decision of July 1987; (ii) the formal competencies under the Second Comitology Decision of June 1999 and (iii) the formal competencies under the revised Second Comitology Decision of July 2006. Table 2 summarizes the competences of the EP under each of the Comitology Decisions. To summarize: under the First Comitology Decision, the EP had no authority at all. Under the Second Comitology Decision of June 1999, the formal competencies of the EP were only little increased. The Parliament obtained the right to be informed about planned implementing measures of legislation adopted under co-decision. It was also given the right to vote a resolution to oppose the measure if it considered that the Commission had exceeded its implementing power. However, the Commission was not bound by this resolution. As measured by its demands the EP was very discontent with the outcome of the Second Comitology decision in 1999 (Bergström 2005:249-285; Bergström and al. 2007; Bergström and Héritier 2007). Finally, under the revised Second Comitology Decision of July 2006 the EP saw its competencies considerably increased. It was given the right to block the Commission proposal in the case of quasi-legislative measures under co-decision (regulatory procedure with scrutiny). If rejected the Commission has to present a new draft measure or a new proposal for legislation. (Bergström 2005: 249-285; Bergström and al. 2007; Bergström and Héritier 2007).

The values of the dependent variable are the extent to which the EP opposes delegation to comitology. The periods where a particular comitology decision is in use constitute our cases: 1987-1999 (First Comitology Decision), 1999-2006 (Second Comitology Decision) and 2006-2007 (revised Second Comitology Decision). According to H2 we would expect a decrease of EP's opposition to delegation after the comitology decisions of 2006, which granted important formal competencies to the EP regarding comitology.

Table 2: Type of comitology decision

Comitology decision	Authority of the EP
July 1987	No competences
June 1999	<p>1. For all committees, under co-decision: Parliament has the right to be informed on a regular basis of the activities of the comitology committees and may vote a resolution opposing the measure if it considers that the Commission had exceeded its implementing powers. In such cases, the Commission is required to "re-examine" the draft measure although it is not compelled to accommodate Parliament.</p> <p>2. In the regulatory committee, in co-decision: if this committee delivers an unfavorable opinion or no opinion at all, the Parliament must be informed of the Commission's proposal to the Council. If the Parliament opposes the proposal, it informs the Council, which may "where appropriate in view of any such position" act on the Commission's proposal.</p>
July 2006	<p>1. For the new Regulatory procedure with scrutiny (for quasi-legislative measures¹¹), in co-decision: The Parliament has the right to block the Commission's decisions if they believe the executive body has exceeded its mandate agreed in the legal act, or that the measures are outside the scope of the legislation, or, finally, that they do not respect the subsidiarity or proportionality principle. The Commission can respond either by presenting new draft measures or a new legislative proposal. If Parliament does not oppose the implementing measures in the time provided, the Commission can adopt them.</p>

In order to measure the extent of opposition of the Parliament towards the application comitology procedures in a specific legislative project we scrutinized the proportion of legislative reports in which the EP (in plenary) introduced amendments aimed at restricting the scope of delegation in the Commission and Council proposals. By “scope of delegation”, we measure the extent of substantive areas covered by delegation. In order to see our hypothesis 2 confirmed we would need to find a significant and long lasting decrease in the number of reports proposing the restriction of delegation after the Comitology Decision of 2006. Since the revised Second Comitology Decision has been applied for only two years, the period to be empirically assessed is brief. In accordance

¹¹ A quasi legislative measure is when the basic instrument provides for the adoption of measures of general scope and those measures are designed to amend non-essential elements of the basic instrument, inter alia, by deleting some of those elements or by supplementing the instrument by the addition of new non-essential elements.

with our previous procedure, we define a significant decrease to be 10-15% less cases of the proposed comitology procedures rejected as compared to the previous time period.

Table 3 summarizes the empirical indicators used for the empirical assessment of H2.

Table 3: Empirical indicators of (dis)confirmation Hypothesis 2

Independent variable	Dependent variable	Empirical indicators Confirmation	Empirical indicators Disconfirmation
Competences of the EP as defined in the Comitology Decisions in force	Proportion of legislative amendments proposed restricting delegation / all legislative reports concerning delegating proposals	Significant decrease of the proportion of legislative reports restricting delegation after the comitology decision of 2006	Absence of a significant decrease of the proportion of legislative reports restricting delegation after the comitology decision of 2006

We additionally compare the proportion of the adopted reports restricting delegation under co-decision to those under consultation and cooperation. In these two latter legislative procedures, the EP has a limited power in legislation and no power in comitology. Moreover, we scrutinize which other types of amendments regarding comitology are adopted by the Parliament beyond those restricting the scope of delegation.

C) Data base

In order to empirically assess H2, we built a data base looking at all legislative reports deposited by the EP during the co-decision legislative procedure¹² (for all issue areas), i.e. those reports which introduce amendments to the Commission proposal, to the Council Common position and possibly to the joint text of conciliation. In this data base, thus, we do not distinguish by treaty article. We only focus on reports adopted under co-decision in order to keep the competences of EP constant. We include all readings for each legislative procedure. In a first step, we tried to identify the reports based on

¹² <http://www.europarl.europa.eu/activities/plenary/ta/search.do?language=EN>

delegating Commission proposals, by selecting reports using key words such as “comitology”, “commitology”, “Council decision”, “committee”, “implementation”.

From these reports we selected those which introduce at least one amendment aiming at restricting the scope of implementing powers delegated to the Commission, i.e. the extent of substantive areas covered by delegation. To give a few examples of restricting delegation: the EP introduces an amendment opposing delegation of implementing power to the Commission altogether; it defines in greater detail the provisions under which the Commission is allowed to adopt implementing acts; it eliminates provisions extending to the delegation of specific issues; it diminishes the budget under which the Commission can allocate financial resources to comitology; all these instances of parliamentary behaviour are classified as reducing the scope of delegation.

Thus, we compare the number of reports including amendments restricting the scope of legislation to the number of reports commenting on *delegating* proposals. We chose the report as a unit of analysis rather than the individual Parliamentary amendment, in order to calculate the *proportion* of reports including restriction to delegation vis-à-vis the sum of all reports regarding a delegating proposal.

However, for informative purpose, we also present the absolute number of amendments introduced by the EP which restrict legislation, together with other types of amendments related to comitology such as changing the committee, recalling the competencies of the EP, etc.). Our data collection starts with the reports of 1994 when data became available from the internet site of the EP and extends to March 2008.

D) Empirical findings: legislative reports restricting the scope of legislation

In figure 6, we first present the absolute number of amendments introduced by the EP which restricts the scope of delegation.

Figure 5: Number of EP's amendments restricting the scope of delegation, N=307



We observe a continuous increase from 1995 up to 2002, a strong increase in 2003, a decrease in 2004 (corresponding to the increase and decrease of Commission proposals made in 2003 and in 2004, respectively), an increase again in 2005 and in 2006 and a very important decrease in 2007 and 0 amendments introduced which restricts the scope of legislation in 2008 (January-March 2008). These figures, to remind, are absolute numbers and hence are obviously influenced by the increase or decrease of Commission proposals.

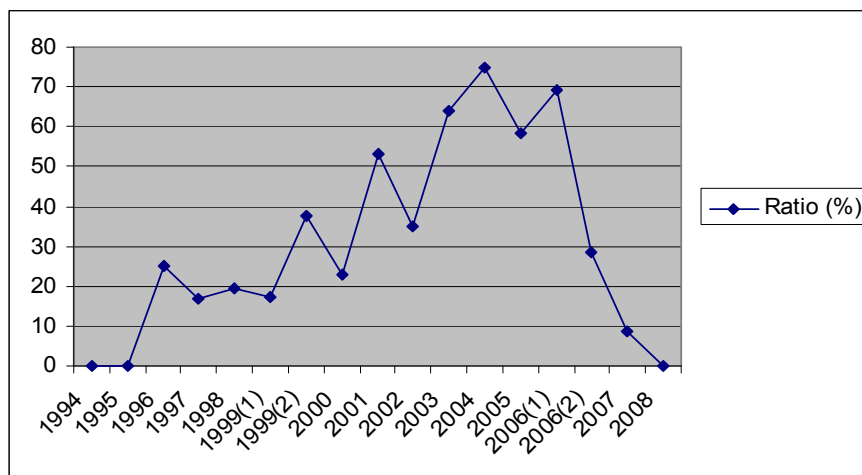
It is then more enlightening to look at the *proportion* of reports (out of reports regarding delegating proposals) which include amendments specifically restricting the scope of delegation allowed to the Commission. Figure 6 shows the percentage of EP legislative reports that contain amendments restricting the scope of delegation as proposed in the Commission draft in relation to all legislative reports regarding delegating legislation.

We compare three periods, 1987 (1994)¹³ to 1999, 1999 to 2006 and 2006 onward. For the first period under the first Comitology Decision of 1987 (1994-1999/1)

¹³ 1994 because the reports have only been available since 1994.

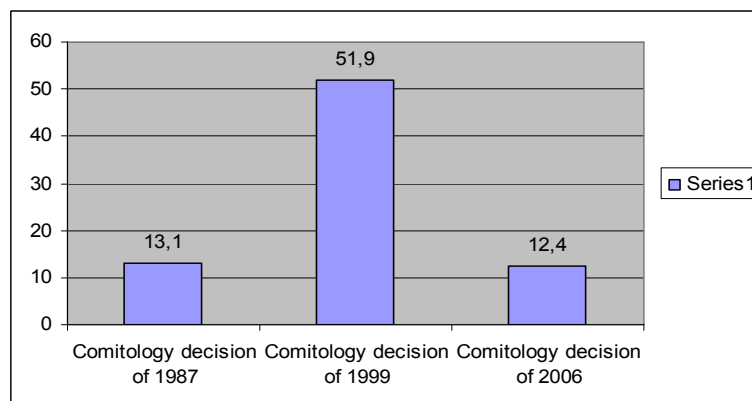
we observe a continuous increase in the proportion of reports restricting delegation. Under the Second Comitology Decision (1999/2-2006/1), we observe an important increase of the proportion of the legislative reports aiming at restricting the scope of delegation. In the third period (2006/2-2007) after the revision of the Second Comitology Decision we observe a very important decrease of these reports. as the proportion of legislative reports including a restriction of the scope of legislation goes down from 70% in the first part of 2006 to 9% and 0% in 2007 and 2008 (up to April), respectively.

Figure 6: Percentage of legislative reports restricting delegation/ all legislative reports regarding delegating proposals (N=315 reports)



In figure 7, we look at the average proportion of legislative reports that restrict legislation.

Figure 7: Proportion of legislative reports restricting scope of delegation/all legislative reports concerning comitology per period of Comitology Decision N=315 reports



We observe that the average proportion is divided by 4 after the revision of the Second Comitology Decision of 2006, which makes the percentage of reports restricting the scope of legislation come back to the same level of 20-10 years ago, when the first Comitology decision was in force. By contrast the average tripled in the period after the First Comitology Decision of 1999 up to the Second Comitology Decision in 2006. The causes for this development have been analyzed in the relevant literature. With the introduction of the Comitology Decision of 1999, the Parliament obtained – to its dissatisfaction – only very limited additional competences in comitology. “Even if the EP had received the new comitology decision (of 1999) as a great step forward, it had certainly not managed to satisfy all its demands. For this reason, it had been emphasized that the endorsement by the EP of the new decision did not prejudge its positions (...)” (Bergström 2005:302; Bergström and Héritier 2007 and Bergström et al. 2007). This has been also acknowledged by one of our interviewee from the EP: “Parliament under the old system (i.e. 1999 decision) was very reluctant to delegate any power to the Commission, because once we delegate, that is gone for ever, we had no say. (...) we were not happy with the previous deal: we do get the information, we have a right to look at it and we could say that we think and we could object, but basically they would ignore us”¹⁴.

In order to gain concessions in the negotiation over the revisions of the comitology decisions, the EP launched an offensive by systematically introducing amendments to restrict the scope of delegation (Bergström and al. 2007, Corbett 1998:258). Between 1999 and 2006, 50% of the legislative reports concerning delegating proposals that were adopted, restricted the scope of delegation left to the Commission. The EP as a co-legislator with the Council under co-decision effectively used this powerful tool to gain bargaining leverage (Farrell and Héritier 2003). The strategy was explicitly stated during the discussion of the second comitology decision : “I warn the Council... if the working continues to be so restrictive on Parliament’s right to intervene, then (...) we will continue in legislative procedure after legislative procedure to block the comitology measures” (Corbett, 1999 cited in Bergström and al. 2007:.....).

¹⁴ Interview with a Member of the EP, constitutional committee, 18 October 2006.

In the short period observed after the revision of the Second Comitology Decision of 2006, it emerges that the EP appears to more willing to delegate to the Commission: the reports restricting delegation decreased by half. As one of MEP declared: “the EP is happy with the new deal, we approved it by a large majority”¹⁵. However, the Parliament’s willingness to cooperate will depend on the actual functioning of the recent decision: “Basically we are pretty happy, but let’s see how it works.... This deal maybe is not a peace treaty, it may only be a cease-fire, depending on how it works”¹⁶.

The above empirical findings confirm our hypothesis 2 *The more formal power the Parliament has in comitology, the less it will oppose delegation to comitology*. However, they also show that the increase of formal power must be substantial in order to induce the EP to cooperate in delegation. A minor of competences, as introduced under the Second Comitology Decision of 1999 did not have this effect. On the contrary, the EP maintained its opposition to delegation.

Beyond co-decision, we additionally scrutinized the proportion of legislative reports restricting delegation under consultation and cooperation. In figure 8, we may observe, that a much greater percentage of EP’s legislative reports (35%) restrict delegation under co-decision and under cooperation (35%) and consultation (18%). In other words, with increasing competences in legislation the EP more strongly opposes an extensive use of delegation. This was underlined by several of our interviewees in the EP: “We have been critical for many years of the comitology system. It is perfectly normal to delegate implementing power, what is unusual in the EU is that we have equal legislative power in the Council in co-decision, but when we confer powers to the Commission (...) the Parliament does not have right to block a Commission decision”¹⁷. A similar argument had been advanced by Bergström and al. (2007; Bergström and Héritier 2007) emphasizing that the Maastricht Treaty, even if it left comitology untouched, had

¹⁵ Interview with a Member of the European Parliament, 18th October 2006.

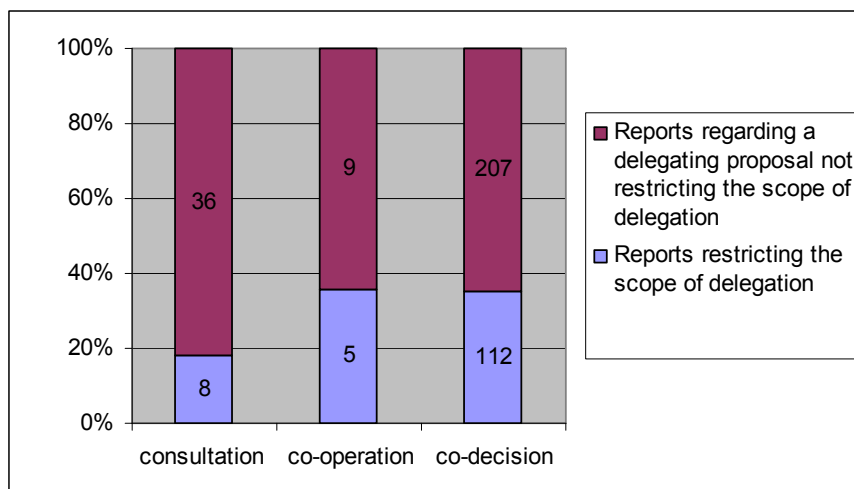
¹⁶ Idem

¹⁷ Interview with a Member of the EP, constitutional committee, 18 October 2006.

substantial indirect effect on comitology: The Parliament had become a co-legislator, able to block legislation, with a quite substantial increase in its veto power. In consequence, the EP would greatly prefer legislation under co-decision to delegation. We will further elaborate this argument under our hypotheses 8 and 9.

However, it is interesting to know that since the last comitology decision of 2006, 4 reports out of the 5 regarding a delegating proposal and adopted by the consultation procedure have been concerned with restricting the scope of legislation left to the Commission. This may signify that the EP has extended its battle for opposing delegation to the consultation procedure, now that it is satisfied of its new role in comitology under the codecision procedure.

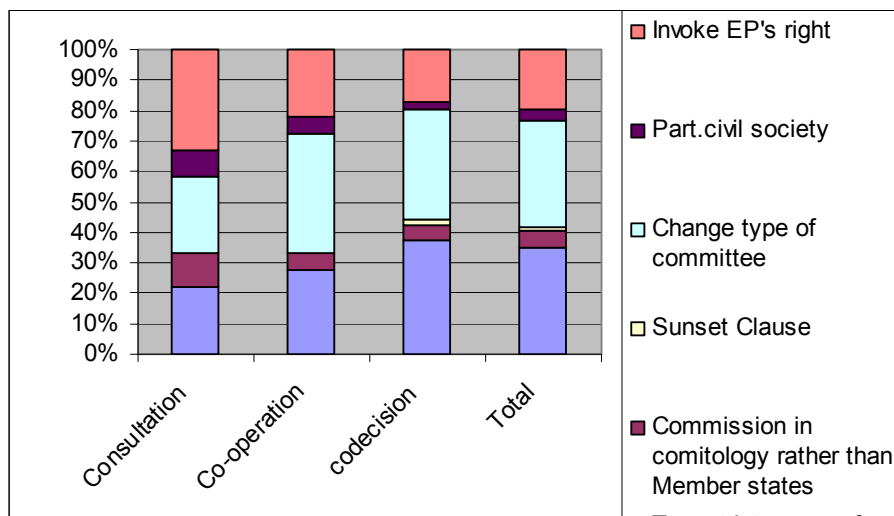
Figure 8: Proportion of reports restricting the scope of delegation/ all reports regarding delegating proposals), N= 377



We additionally look at more closely the kinds of amendments that the EP introduced by type of legislative procedure. We distinguish the following amendments regarding comitology: (i) amendments that restrict the scope of legislation. i.e. reduce the substantive extent of the issue area under delegation. (ii) amendments proposing a change of committee; (iii) amendments that merely invoke the rights of the EP, e.g. to be informed on a draft decision; (iv) amendments that propose a wider participation of civil society organizations in the committees; (v) amendments that introduce sunset clauses and finally (vi) amendments that ask for a delegation to the Commission rather than to the

Member States. It emerges that most of the amendments introduced by the EP aim at restricting delegation (34.9%) and to propose a different type of committee than proposed by the Commission or by the Council in the second reading (34.9%). This percentage reflects a change in the priorities of the EP, as we will see below, whose preferences regarding the type of committee favoured have changed over time. Another important proportion of amendments invokes the rights of the Parliament regarding comitology that it perceives to be disregarded (19.5%). The proportion of the last type of amendment is more important in the case of the reports adopted under the consultation procedure. It is moreover notable that only a small proportion of amendments requests a delegation to the Commission rather than to the Member states (5.5%), the participation of the civil society organizations in committees 3.5%) or the introduction of sunset clause (1.7%).

Figure 9: Type of reports concerning comitology to total of reports concerning comitology, N=377



Finally, it is interesting to look at those cases which go to conciliation because the EP is opposing the scope of what is delegated to the Commission. These cases are representative of cases which are very important to the EP, because it is willing to go up to conciliation for them. We can observe, in congruence with what has been observed earlier, that the restriction of what is left to comitology started to be an important issue in the period where the second comitology decision was in force (1999-2006) up to the last

comitology decision of 2006. In the first period since the introduction of co-decision (1993-1999), 3 cases went up to the conciliation committee because the EP wanted to restrict the scope of delegation (or an average of one case every two years); while 7 cases of this time in the period between 1999 and 2006 (i.e. between the second and third comitology decision (or an average of one case per year). No cases went to the conciliation committee restricting the scope of delegation in 2006 and 2007.

Table 4: legislation dealing with the restriction of delegation at conciliation

Date of conciliation committee	Title	The points of conflicts up to conciliation included (quests of the EP)
08-11-1994	Packaging waste	EP wanted that implementing measures amending the directive should be adopted by co-decision
08-11-1994	Volatile organic compound emissions	EP wanted that implementing measures amending the directive should be adopted by co-decision
07-03-1997	Trans-European telecommunications networks	Projects of common interest, identified in an annex, could not be amended in comitology
09-12-1999	Multiannual programme for the promotion of energy efficiency (SAVE) (1998-2002).	“going into greater detail on the categories of actions and measures which the programme should finance”.
08-10-2001	Vehicles used for the carriage of passengers comprising more than eight seats in addition to the driver's seat	Removing the technical annexes of the Directive.
11-06-2002	Community Environment Action Programme 2001-2010	“regulatory measures based on the program should be adopted by co-decision”
27-01-2003	Cosmetic products	Removal of exceptions to the timetable through co-decision and not comitology
25-04-2003	Animal-health requirements applicable to non-commercial movement of pet animals	European Parliament insisted on a clarification of the definition of the implementing measures to be adopted by the Commission under the comitology procedure.
19-05-2003	Recreational craft	Limits the scope of comitology
31-03-2004	Prevention and remedying of environmental damage	To reduce discretionary power of the Commission

Conclusion

In this paper, we have underlined that the delegation of implementing power to the Commission is complicated by the fact that, in co-decision, two legislators (the Council and the EP) must agree to delegate. As far as we know, most of the existing empirical researches about the EU has ignored the role of the EP in the decision to delegate to the Commission. As Franchino has recognized: “We (still) need to assess the impact of the European Parliament, now the second chamber in many areas, on delegation outcomes” (Franchino 2004¹⁸:293).

We have first shown that, with the introduction of co-decision in environmental policy, the legislators have relied significantly more extensively on delegation. This means that the EP and the Council could not overcome the transaction costs associated with detailing legislation, and this supports the hypothesis made by Huner and Shipan according to which a divided legislature would grant more discretion to the agency. This finding is supported by the fact that delegating proposals have a much higher chance to be adopted after the introduction of co-decision than before its introduction. Moreover, the fact that the delegation has preceded the ratification of the Amsterdam treaty shows that the Council had anticipated its loss of power at the benefit of the EP, and had been in a rush to delegate as much as possible to the Commission before the effective introduction of co-decision. This is because the Council certainly increasingly prefers to delegate to the Commission that it can supervise, rather than sharing the legislative power with the EP.

Interestingly, we have also shown that the increase of delegation following the introduction of co-decision is significantly much higher for regulations than for directives. We have explained this by the fact that the need to delegate to the Commission in a directive is softened by the fact that this type of decision already contains another type of delegation of implementing power (to the Member states). These results completed those of Franchino (2004) who have shown that the Council delegates greater authority to national institutions if legislation is adopted unanimously or in issues areas that require specialized and technical knowledge, while it relies to a greater extent to the

¹⁸ Delegating power in the European Community.

Commission when acts are adopted by qualified majority voting or require general managerial skills¹⁹.

We have also made the point that the EP would oppose less delegation the more its formal competencies in comitology. Our results support this hypothesis but oblige us to qualify it: the EP would oppose less delegation the more its formal competencies in comitology, if it is satisfied with these competencies. In other words, an increase of the EP's competencies in comitology which would leave the EP unsatisfied is not likely to diminish the EP's reluctance to delegate, on the contrary, the EP would systematically introducing amendments to restrict the scope of delegation, as an offensive in order to gain new concessions in comitology.

We have also shown that the EP would oppose delegation the more its formal competencies in the legislative procedure: the EP introduces amendments aiming to restrict the scope of delegation to a much greater extent in the co-decision procedure than in the cooperation or consultation procedure, which means that the EP will try limit delegation when it thinks it is entitled to do so.

To conclude, it is interesting to discuss the consequences of these evolutions for inter- and intra-institutional relations. Clearly, the development of inter-institutional relations (reduction of transactions costs during the negotiations between the three institutions and the bargaining about the allocation of power of these institutions) has created two important changes: an increase of delegation, a more active participation of the EP in comitology decision. These particular changes empower different actors inside each institution. On the one hand, the increase of delegation empowers the Member states and the civil servants working in committee, at the detriment of the Ministers in the Council and of the commissioners drafting legislation. On the other hand, the creation of committee with scrutiny (for "quasi-legislative measures!" will empower those particular individuals from the EP working in these committees at the detriment of MEPs in plenary which voted legislation. The empowerment of a smaller group of individuals, mainly non-elected, raises questions about the democratic legitimacy of this increased delegation.

¹⁹ These results were obtained by creating a data base of 158 legal acts and by creating a discretion index as described in the preceding chapters.

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