West European Politics,
Vol. 30, No. 2, 338–366, March 2007

Routledge
Taylor & Francis Group

Legislate or Delegate? Bargaining over Implementation and Legislative Authority in the EU

CARL-FREDRIK BERGSTRÖM, HENRY FARRELL and ADRIENNE HÉRITIER

This article explains how actors' ability to bargain successfully in order to advance their institutional preferences has changed over time as a function of the particular institutional context. Actors use their bargaining power under given institutional rules in order to shift the existing balance between legislation and delegation, and shift the rules governing delegation in their favour between formal treaty changes. A collective actor's preferences over delegation is a function of whether the actor has more ability to influence policy through delegation or through legislation. The degree to which a specific actor's preferences can prevail (in a setting in which different actors have different preferences) will depend upon its bargaining power under existing institutional rules, i.e. its ability to impede or veto policy in order to change the division between legislation and delegation and the rules of delegation. The primary focus in this article is on choice over procedure, i.e. the battles over whether or not delegation or legislation should be employed. A secondary focus is on change in procedure. The article examines the evolution of the debate over comitology and implementation over five key periods and scrutinises how actors within these periods have sought to shift the balance of legislation and delegation and the rules of delegation according to their preferences.

Why has delegated authority been the subject of so much controversy in the EU? This question is at the heart of debates about the relationship between member state authority and supranational organisation that have dominated EU studies over the last four decades. The EU legislative process, i.e. the process of creating laws and regulations at the EU level, provides for the possibility of both legislation and delegation. Legislation is directly based on a provision of the treaty and specifies appropriate rules and measures within the legislative item in question. Delegation consists of delegated rule-making authority to the Commission or, more rarely, the Council, and relates indirectly to a treaty provision. The balance between legislation and delegation and the appropriate forms of control over delegation have long

Correspondence Address: carl-fredrik.bergstrom@sieps.se

ISSN 0140-2382 Print/1743-9655 Online
DOI: 10.1080/01402380701239814

been contested issues between the Commission, the Council and the Parliament. In this article we examine how the division between legislation and delegation and the control over delegation among these actors has shifted between formal treaty changes.

Recent work has sought to understand delegation in terms of principal–agent theory, borrowing from the literature on relations between Congress and agencies in the US. The emphasis of much of this work has been on how the principals (primarily the member states) can reduce 'delegation slack', the ability of agents to pursue their own interests rather than the interests of principals. Recently, this literature has begun to focus on the subject of 'comitology', committee structures created by the Council of EU Member States to supervise and control the European Commission's exercise of its implementing powers.

Ballman *et al.* (2002: 556) claim that 'the Commission and the Parliament have always strongly opposed the Council's practice of setting up comitology committees'. The empirical evidence suggests otherwise. At certain conjunctures, the Commission welcomed the extension of comitology procedures that allow the Council to exercise some influence. The Parliament has often been more extreme in its demands for rolling back comitology than the Commission, even though the latter appears to be more directly affected. Nevertheless, the Parliament has for a long time sought to gain access to comitology procedures.

We start from a set of arguments about actors' preferences and seek to explain how actors' ability to bargain successfully in order to advance these preferences has changed over time as a function of the particular institutional context. We show how actors use their bargaining power under given institutional rules at a particular moment in time in order to shift the existing balance between legislation and delegation, and shift the rules governing delegation in their favour between formal treaty changes. A collective actor's preferences over delegation are a function of whether the actor has more ability to influence policy through delegation or through legislation. We predict that the degree to which a specific actor's preferences can prevail (in a setting in which different actors have different preferences) will depend upon its bargaining power under existing institutional rules, i.e. its ability to impede or veto policy in order to change the division between legislation and delegation and the rules of delegation (Ballman *et al.* 2002; Huber and Shipan 2002; Farrell and Héritier 2003). Our primary focus is on choice over procedure, i.e. the battles over whether or not delegation or legislation should be employed. We maintain a secondary focus on change in procedure, examining how different procedures of comitology have come into being and been removed from the table.

We start by providing a brief overview of relations between Council, Commission and Parliament in the areas of legislation and delegation. We then set out assumptions covering actors' preferences over legislation and delegation, and develop hypotheses about their ability to act upon those

preferences. Next, we examine the evolution of the debate over comitology and implementation over five key periods. We scrutinise how actors within these periods seek to shift the balance of legislation and delegation and the rules of delegation according to their preferences. The periods start with the origins of comitology and the 'empty chair' crisis, the development of comitology during the 'dark ages' of European integration, the consequences of the Single European Act and Maastricht and Amsterdam Treaties. Our conclusions assess our empirical findings on the basis of our model.

Relations among Legislative Actors and the Comitology System

The three key actors in the European Union's legislative process are the Council, the European Commission and the European Parliament.[1] The Council has traditionally been the dominant actor; it formally represents member state interests. Depending on the Treaty base of the issue in question, it may accept or reject legislation proposed by the Commission on the basis of unanimity or a qualified majority vote. It may only modify the Commission's proposal on the basis of unanimity among member states. The Council is able to exercise considerable control over the Commission's implementation of policy through so-called comitology procedures (see below).

The European Commission acts to initiate legislation by making proposals to the European Council (as well as to the Parliament in many areas of policy after the introduction of codecision). It is also charged with fleshing out the details of regulations and implementation.

Finally, the European Parliament has traditionally been the weakest of the three, but has recently seen quite considerable increases in its competences. Originally, the Parliament only had the right to be consulted on legislation; neither Council nor Commission needed to take heed of its opinions, and typically neither did. However, it came to have some control over the European Union's budget, and, after the Maastricht Treaty, a greatly expanded role in the legislative process. The introduction of the legislative procedure of codecision put it on a much stronger legislative footing in many policy areas, in which it became effectively co-equal with the Council. The Parliament has also had responsibility for supervising the Commission from the beginnings of the European Union. Formally, the Commission is responsible to the Parliament rather than the Council; the Parliament may call individual Commissioners to account and may vote to dismiss the Commission. However, the Parliament has only moderate effective influence over the comitology system (although its influence has increased over time).

Much important policy in the European Union is conducted on the basis of delegation to the Commission (or other policy actors). Many Directives and Regulations are relatively loosely specified, and provide the Commission with the power to arrive at rules and decisions that will lend specificity to the broad heads of legislation. Article 202 (ex. 145) of the Treaty spells out the right of the Council to 'confer on the Commission, in the acts which the

Council adopts, powers for the implementation of the rules which the Council lays down'. The Council also has the power to 'impose certain requirements in respect of the exercise of these powers', provided that these rules are 'consonant with principles and rules to be laid down in advance by the Council, acting unanimously on a proposal from the Commission and after obtaining the Opinion of the European Parliament'.

These Treaty articles are notable both for what they do say, and what they do not. First, they clearly identify the right to confer implementing powers as resting with the Council, rather than with the Council and Parliament. Second, they provide the Council with explicit authority to lay down the conditions under which the Commission exercises its delegated authority. Third, they do not specify those requirements, instead merely requiring that they be consonant with rules and principles laid down previously by the Council.

These Treaty rules (which date from the Single European Act) partially reflect principles that were reached through interstitial bargaining over previous decades. The principle that the Commission had to cooperate with oversight procedures laid down by the Council dates back to the founding of the Community, and was first formally articulated in 1961 in the field of foreign commercial policy. The requirement that procedures be consonant with 'rules and principles to be laid down in advance' is a later innovation, recognising an acceptance by the Council that it should choose among a limited number of fixed procedures rather than creating ad hoc solutions as it saw fit. This is a moderate limitation of the Council's power of choice. Nonetheless, one can observe two key features of the Treaty texts. First, they preserve a high degree of flexibility over choice of procedure. In contrast to legislation, the Treaty does not specify which procedure should be associated with which policy area. Thus, there is little scope for Parliament or Commission to exploit the kinds of 'procedural politics' that they have in the legislative process (Jupille 2004). Second, it reserves a primary role for the Council in determining which procedures should be applied in a given instance.

There are three main types of committee procedure. First are advisory committees, the weakest variety, in which the committee's vote is not binding on the Commission. However, the Commission is supposed to take 'utmost account' of the committee's opinion, and inform the committee of how it has lived up to this obligation. Second are management committees. If the Commission adopts an implementing measure that a management committee disagrees with, the Commission must forward the measure to the Council, which may then modify or annul it. In one variant of this committee form, the Commission must also suspend the measure while it is on appeal to the Council. Finally, regulatory committees, in their basic variant, have an extra *filet* or 'safety net'.

With these committees, the Commission is only able to adopt its envisaged rules if the committee explicitly approves. Should the committee not approve, or not be able to agree (on the basis of a qualified majority),

then the Commission has to submit a proposal to the Council almost as if it were a proposal for legislation.[2] If the Council, however, cannot reach a decision within a certain period of time, the Commission can proceed as it had originally planned. These committees have come to be used in situations in which the Commission was adopting long-term implementing rules rather than short-term measures. A more restrictive variant of the regulatory committee, which is no longer applied, not only had a *filet* but a *contre-filet* (double safety net). Under this procedure, the Council could stop the Commission from acting on the basis of a simple majority vote, even after the expiry of the relevant period, and even if the Council could not agree on an alternative measure.

The Theoretical Argument

The key EU legislative actors have a fundamental choice over desired policy measures – whether to introduce them through legislation or delegation. This, in part, turns on questions of transaction costs (Epstein and O'Halloran 1999) – overly detailed legislation may prove impossible to shepherd through the legislative process without high side-payments. Thus, it may be appropriate to supplement framework legislation with delegation of *ex post* rule-making and implementation powers. However, the decision whether to delegate or to regulate is also fundamentally a political decision. Different procedures will have different implications for the overall distribution of political influence. Different actors will have different levels of control over the procedures of legislation and delegation.

We argue that actors' preferences over delegation are determined by the degree to which they have effective influence over policy that takes place through delegation as opposed to legislation. Actors are competence maximisers – that is, they will seek to ensure that policy will be enacted through procedures which maximise 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 favour their own interests, and for less frequent use (and, where possible, the alteration or abandonment) of those procedures that do not. Moreover, given a formal distribution of competences in legislation and delegation, actors will try to shift the decision-making weight in their favour between treaty revisions, be it by changing the division between legislation and delegation or by changing the rules governing delegation. Whether they are successful in doing so depends on how the given formal institutional rules at that particular moment affect their relative bargaining power, reflected in their sensitivity to delay – their time horizons – and to failure of negotiations.

In the European Union, given the distribution of competences described in the previous section, we predict that the relevant collective actors will typically have the following preferences over delegation.

The *Council* will prefer extensive delegation to the Commission, along with extensive control by the member states. This allows it to minimise transaction costs by delegating authority to a specialised policy actor, but also to ensure that this specialised actor does not deviate from its preferences. It will, however, be strongly opposed to forms of delegation that might allow the Commission to escape member state control.

The *Commission* will in general prefer extensive delegation, without control of member states or with only minimal control from the member states. However, its preferences will to some extent depend on the availability of alternative forms of policy-making through legislation. Even though much previous work on comitology has treated the Commission only as an implementer of policy, the Commission has the ability to propose as well as to implement legislation. Thus, in periods in which the Commission has difficulty proposing legislation that will be successfully adopted, it will be more amenable to extensive member state controls on delegation than it otherwise would be so that it can have some hope of shaping policy, albeit under the control of member states.

The *European Parliament* will prefer minimal delegation with minimal control by the member states. This means that policy will be conducted primarily through the legislative process, but that where it is delegated, the Commission will more likely be influenced by the Parliament than by the Council. While the Commission is in theory responsible to the Parliament, in practice the Parliament is better able to influence legislation than delegated acts, at least since the European Court of Justice gave some teeth to its powers of consultation.

Thus, the preferences of the actors over delegation will be a function of the existing distribution of competences and given institutional rules, but they may change within these parameters as the attractiveness (or lack of it) of pursuing legislation changes. For example, when the Commission is confronted with a Council that makes legislative decisions under the unanimity rule, it will prefer delegation, which is likely to allow it more freedom in shaping policy. In a situation in which the Commission is confronted with a Council that decides on legislation through qualified majority voting, we expect the Commission to be more favourable towards legislation.

In order to understand how preferences translate into outcomes, we employ the analytic narrative strategy.[3] This allows us to reconstruct the processes that led to the division between legislation and delegation and the rules governing delegation during five specific periods in the EU's history. In order to construct these narratives, we turn to a rich body of empirical evidence covering the last 50 years, primarily based on the analysis of archival documents and interviews as well as the analysis of secondary literature.[4] Specifically, we examine the inter-organisational debates and strategic interactions surrounding delegation, through the analysis of public statements and actions taken by Council (including member states), Commission and European Parliament. We divide these debates and actions into

five major phases, corresponding to the periods between the key moments of institutional change in the European Union. These phases constitute our cases. We do not account for how the formal treaty changes came about, but take them as a given at the beginning of each period we analyse. Starting from different formal starting conditions (unanimity, Qualified Majority Voting (QMV), increased power of the Parliament), we seek to reconstruct the processes of bargaining over legislation and delegation in these periods based on the interactions between the Council, Commission, the Parliament and the ECJ.

We reconstruct actors' preferences on the basis of these structures, and then analyse the processes through which preferences were translated into outcomes. We invoke a common mechanism – bargaining – to explain how preferences – given specific institutional rules – translate into outcomes at each stage. Actors' bargaining strength will ultimately depend on the credible threats to impede or veto legislative measures that they may make to back up their arguments.[5] In order to make such a threat, the actor in question has to (a) have the *de facto* ability to impede or (even better) to block specific items of legislation, and (b) be less sensitive to the impeding or blockage of the legislation in question than the other relevant actors.

We predict that over time, as the bargaining options that are open to actors change with altered formal institutional rules at the treaty level, so will their ability to prevail in conflicts over the degree and kind of delegation that takes place. This will be reflected in their success (or lack of it) in changing the extent or rules of delegation between treaty changes.

However, even if there is a common mechanism, the stakes of bargaining are somewhat different in the five periods under examination. In the first period – in which procedures of oversight for delegation first came into being – actors bargained over the general rules that would spell out the treaty provisions over delegation, and thus allow control of the Commission's powers of implementation. In the second period, actors bargained over new kinds of committee structures and rules, and how they should be implemented. In the third, actors bargained over whether there should be procedures governing choice of committees, and informal rules involving the European Parliament's access to information, culminating in the First Comitology Decision. In the fourth, there were disputes over the relative extent of delegation and legislation, over choice of committee, and the Parliament's right to information. In the fifth, there were negotiations over whether the Parliament should have control over comitology, and over choice of committee, culminating in the Second Comitology Decision.

From the Beginnings of Comitology in CAP to the Luxembourg Compromise

How do our arguments explain the battles surrounding the birth of the comitology system? The institutional rules and division of competences

regarding implementation were minimal and ambiguous in this period, so that actors had considerable incentives to try to carve out as extensive a set of competences as possible. In the early years of the EU, the Council perceived the need to delegate powers of decision-making to the Commission in order to reduce transaction costs, but was unsure of the best way to do this while retaining control over the process. The circumstances under which powers of implementation could be delegated to the Commission were not clearly spelled out in the Treaty of Rome, the foundational text of the European Union. Article 155 of the Treaty (Article 155 EEC) stated that '[i]n order to ensure the proper functioning and development of the common market, the Commission shall . . . exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter'. However, it did not elaborate how and when the Council should confer these powers or how the Commission could be held accountable.

As noted in the previous section, the Council prefers delegation – but only under extensive member state control. The Commission, in contrast, will desire forms of delegation that increase its effective influence over policy – high levels of delegation without Council control or delegation with minimal Council control. The Parliament, which at this point had little power over the legislative process, and no role in delegation, but some powers of oversight over the Commission, would have been opposed to delegation because it impinged upon its right of oversight of the Commission. It would, thus, only have been interested in delegation if this indirectly increased its own powers. We would expect the main battle to have taken place between Commission and Council on terms that strongly favoured the Council. Parliament, which had no effective veto or power to impede legislation, would only have played an indirect and minor role in the negotiations.

Implementation and accountability were especially problematic in agriculture, a key policy area for the nascent European Union. Soon after the Treaty had entered into force, the Commission was invited to make policy proposals by the member states on the implementation of the Common Agricultural Policy (CAP). The Commission sought to use the lack of specific rules regarding implementation to give itself extensive powers under delegation. In its initial proposals, the Commission sought to become the central actor in implementing the CAP, and to give itself considerable leeway to make policy independently. In 1959, it proposed the creation of several European Offices to implement the details of agricultural policy, and to pursue a dialogue with both governmental and nongovernmental bodies through consultative committees.[6] In response, member states, which had effective veto power, created their own national offices to implement policy instead of the Commission (Fennell 1979).

However, member states, in turn, depended on the Commission for implementation.[7] Therefore, the member states began to discuss how they might monitor and influence the Commission's decisions more effectively than through the proposed consultative committees, across a variety of

policy areas. In 1960,[8] the Commission suggested a modified version of consultative committees, the directors' committees, which would only have member state representation, taking the member states' concerns into account. The Commission would be obliged to consult them, but would not be bound by their opinion.

The member states were not prepared to accept this proposal, but had difficulty in agreeing on an appropriate alternative mechanism. France proposed far-reaching independent management committees that would have all but deprived the Commission of its powers of independent decision-making. This proved a step too far in the opposite direction for other member states. Instead, the Special Committee on Agriculture, a body set up by the member states, suggested in 1961 that the Commission should take measures of 'a practical nature' if they corresponded to the opinion of the Management Committee. Otherwise, it would either have to accept the opinion of the committee, or make a proposal to the Council. This was not accepted by member states that wished to preserve the prerogatives of the Commission. A final solution was agreed when Walter Hallstein, then President of the Commission, suggested that the Commission should have the power to adopt measures relating to day-to-day administration, but should make its intentions known in advance to the management committees. Should the management committees disapprove, the Commission would alert the Council, which would then have one month to decide whether it wished to block the measure in question. If the Council did not come to a decision within one month, the measure would automatically apply.

This compromise gave the Commission considerable leeway in implementation, and went further than some member states would have liked. Nonetheless, it was agreed to by the Council in 1961. Both the Council and the Commission were eager to reach a swift resolution and avoid a confrontation with the Parliament, which had forwarded a Resolution protesting against the introduction of 'new organs' without the Parliament being consulted.[9] Although the Parliament could not block a Council decision, the Council wished to avoid lengthy debates on the Commission's responsibilities towards Parliament, and accordingly accepted the Commission's proposals with little further ado. While the new procedure was only provisional, and subject to review, it proved a long-lasting compromise, and the basis of a system of supervisory committees that came to be applied outside the area of agriculture. This was effectively the birth of the comitology procedure.

The fears of the European Parliament were justified. The creation of managerial committees deviated from the lines of responsibility laid down in the Treaty. In formal terms, the Commission was accountable to the Parliament alone. However, the system of managerial committees allowed the Council to hold the Commission responsible for its implementation of Community legislation. The Parliament feared that these committees would

blur responsibility, so that it would be difficult for the Parliament to hold the Commission to account.[10]

The Commission's aggressive pursuit of an increased policy role in general, and in particular in delegation, proved to be its downfall, leading to the famous 'empty chair' crisis, in which France temporarily withdrew from the Council. The consequent restrictions on qualified majority voting involved in the Luxembourg compromise should be understood as responses to the attempt of the Commission to overstep its authority.[11]

France's withdrawal from the Council and Committee of Permanent Representatives (COREPER) meetings was at least in part motivated by its more general worries about the Commission's aspirations to greater political power.[12] In particular, De Gaulle feared that the Commission would be virtually uncontrollable when qualified majority voting was extended, with especially serious implications for the delegation of powers:

> The Commission often proposes to the Council decisions which, instead of dealing with the substance of the problems posed, merely give the Commission powers to act later but without specifying the measures which it will take if such powers are conferred upon it . . . True, in certain sectors . . . the Council can intervene at executive level through . . . the Management Committees. However, it must be noted that . . . the Commission is endeavouring to replace the Management Committees by simple Advisory Committees which have no hold over it.[13]

The impending introduction of QMV would make it much easier for the Commission to create coalitions among member states for legislation that would free its hands at the implementation stage.

Following extensive discussions among the member states in January 1966, a compromise was reached. The 'Luxembourg compromise' most famously spoke to the issue of QMV within the Council (Moravcsik 1998). However, its direct consequences for relations between the Council and Commission were equally important. The Council formulated a set of 'methods of cooperation' with the Commission that closely reflected France's preferences, and structured the Council's future treatment of the Commission. France's concerns about the Commission's implementing powers were also addressed; the Council reiterated that the formal responsibility for defining the rules of delegation in the management committees lay with member states.[14] The Council's 'methods', together with its more rigorous attitude to implementing powers, served to clip the Commission's wings over the next several years. The Commission was forced to renounce its aspirations towards major political power and to adhere much more closely to member states' wishes and aspirations. The Parliament again voiced vociferous objections to the Council's new procedures, which it saw as encroaching on its rights to supervise the

Commission.[15] However, its protests were entirely ineffectual; the Parliament had no way to make others listen to it, since it could not credibly threaten action that would have had serious consequences for the Council.

Thus, preferences over competences, and the respective bargaining strength of the involved actors, in the given context of formal institutional rules provide us with significant insight into the development of the rules of delegation in this first phase. Each actor – under the given formal institutional rules – sought to make institutional gains and succeeded or failed according to its ability to make credible threats. The Council – as predicted – was prepared to delegate its powers, but only if it could maintain effective control of the Commission. Despite the Parliament's and Commission's wishes, it could institute implementation committees that allowed it such control; it had far greater bargaining strength than the other two actors. Thus, it rejected early Commission proposals that would have allowed the Commission a relatively free rein in implementing policy, in favour of more direct forms of control. The Commission was also enthusiastic for more implementation, but on its own terms. It sought to weaken the controls of the member states on its freedom of action, knowing that the Council depended on it both for implementation and to propose legislation. The Parliament was unequivocally opposed to forms of implementation over which it would have little direct say. To the extent that the Commission became locked into direct relationships of responsibility towards the Council, the Parliament's limited role in the political process would be further curtailed.

In the negotiations over the institutional rules governing comitology, the Council prevailed because of its stronger veto powers *vis-à-vis* the Commission and the Parliament, and a more extensive set of fall-back options. It had considerable leeway in determining the general circumstances under which delegation would take place. It was difficult for the Commission to push for greater delegation using its right of initiative – the unanimity rule meant that the lowest common denominator of member state preferences was likely to prevail. Member states, under the leadership of France, blocked the introduction of QMV, which would have given the Commission greater leeway in implementation.

From the Luxembourg Compromise to the Single European Act

Which forms of delegation developed under the conditions of the Luxembourg compromise? As before, we note the very considerable veto power of member states, and how it applied even more stringently in a context in which Council decision-making was to take place under unanimity for the foreseeable future. We therefore expect that the Commission would have been more amenable to delegated powers – even where those powers had substantial restrictions placed on them – than in the previous period, although it would try where possible to reinterpret the rules covering

delegation to its own liking. Delegated powers might have been thin gruel, but were greatly preferable to legislation that was likely to be blocked. Further, we predict that the Council, with a high degree of control over legislation, would only have been willing to delegate under strict conditions, i.e. in cases in which it had extensive control over the delegation process. The Parliament would have little to gain from delegation to the Commission, since such delegation would have involved an increase in the Council's influence over the Commission, and a corresponding decrease in that of the Parliament. However, as in the previous period, given the existing formal institutional rules, it would have had little bargaining strength to influence other actors. The Commission, too, would have had relatively little leverage – it had an effective choice between no policy (which would have undermined its legitimacy and viability as a political organisation) or policy processes which reflected the member states' desire for control. The Council, finally, would have been in a very strong bargaining position.

As matters transpired, continued blockages in the legislative process led to a renewed emphasis on delegated powers. However, given the strong bargaining position of the Council, these new forms of delegation went together with the extension of comitology as a means for member states to monitor and curtail the Commission's use of delegated powers. This applied to the CAP, in which nearly all Regulations invoked the need for the Commission to comply with the opinion of management committees. Such committees also came to be a regular feature in other policy areas in which the Commission had significant delegated powers. The Council demanded the right not only to be consulted, but to constrain and to control (Bertram 1967).

New forms of oversight came into being. So-called 'regulatory committees' were created by the Council to monitor the Commission's behaviour in the politically salient area of trade policy.[16] A second variant was introduced in the politically sensitive field of veterinary protection (veterinary standards were often employed to protect domestic markets). Member states allowed the Commission to reject member state legislation only under the condition that a Standing Veterinary Committee be created that would allow the member states to exercise collective oversight of the Commission's actions. After long discussions, the member states decided to employ a regulatory committee that not only had a *filet*, but a *contre-filet*.

These measures provided the Commission with new – but clearly restricted – powers. However, formal legislation as a means to influence policy was even less attractive under the Luxembourg compromise, since Council decisions were made 'as if' on the basis of unanimity, and the Commission had little ability to deviate from the lowest common denominator of member state preferences. Consequently, the Commission was prepared to accept more stringent controls as the necessary price for an increased role in implementation.[17]

The Parliament had no such interest in compromise. While it only had tenuous influence over legislation, it feared that the little influence it had was

being rendered less relevant by the new emphasis on delegated powers. In a series of resolutions and reports,[18] the Parliament expressed its worries that highly important political matters were being dealt with through implementation in a non-transparent manner. It passed a formal resolution to the effect that it should be consulted whenever important matters were being handled through delegation.[19] It furthermore demanded that committees should only be accorded a consultative role and not encroach upon the Commission's rights and responsibilities. The Commission's President, Jean Rey, in response to the Parliament's resolution, argued that:

> [t]he powers of the Commission are increasing for a very simple reason . . .: we have left the period of construction to enter the period of management of common policies. However normal it may be for decisions relating to construction to be taken by the Governments in the Council by unanimity, the daily administration of politics relating to tariffs, trade, agriculture, evidently requires an organ with sufficient powers . . . I do not believe that we can step back since the obvious necessity, by contrast, is to reinforce these powers with reasonable precautions.[20]

Yet, the reports and resolutions of the Parliament did not affect the extent and rules of delegation. Without the ability to impede or block decision-making in legislation or delegation, the Parliament could not make any difference. When Britain, Denmark and Ireland became member states, the institution of the national veto became even more strongly entrenched, with knock-on consequences for decision-making. The EU's decision-making machinery was becoming increasingly dysfunctional. In June 1974, the member states agreed in Paris that not all decisions should be conditional on unanimous agreement, and that more power should be delegated to the Commission. Given these increased political transaction costs, the so-called Tindemans report reaffirmed the importance of QMV, and the delegation of powers: 'there is one principle which . . . is essential: that of the delegation of executive powers. Delegation must become the general rule if we wish to develop that degree of efficiency which is vital to the institutional system'.[21]

Over the next several years, renewed efforts to unblock decision-making in the Council and to delegate more authority to the Commission had mixed success. Thus, in 1978, the Commission re-launched the debate with the Fresco report which argued both for an extension of QMV, and more delegation of powers to the Commission.[22] The report also suggested that the Commission should exercise 'administrative' and 'executive' powers (Article 155) without prior authorisation from the Council, although the Council would still be able to reserve a decision to itself when a matter was too politically sensitive. Here the Commission clearly sought to interpret the existing institutional rules in such a way as to expand its own powers in comitology.

Although the Council recognised that there were continuing problems with delegation, it was unimpressed with the Commission's radical (and self-serving) suggestions, and commissioned a group of senior European statesmen ('The Three Wise Men') to come up with alternative proposals not requiring treaty changes. This report suggested that voting become the norm, so that member states, if they wished to invoke a veto, should do so explicitly. They also pointed to increasing difficulties in delegation: the plethora of supervisory committees was cumbersome and often the object of dispute between Council and Commission. However, as they noted:

> When the Community moves into a new area of action, States find it difficult to anticipate all of the problems that may arise in execution; apparently small practical implementing decisions could create political difficulties or alter the impact of the policy itself in unforeseen ways. Hence the reluctance of some States to delegate any implementing powers to the Commission unless some kind of emergency procedure for dealing with cases of political difficulty can be agreed. And if anxieties of this kind are not satisfied, no delegation will take place at all.[23]

Thus, in this period from the Luxembourg compromise until the Single European Act, the Council increasingly began to rely on delegation as a means of making policy in a context in which unanimity governed the legislative process. However, as we expected, it did so on the basis of stringent oversight procedures. The new comitology procedures that were established all clearly reflect the superior bargaining power of the Council in negotiating the institutional set-up of the procedures with the Commission and the Parliament. While the Commission would have preferred a less restrictive approach, it was prepared to accept an expansion of the comitology system with restrictions as the necessary corollary to increased use of delegation. Given the blockages in the legislative process, it had little choice. However, it did try to ease the restrictions imposed by the Council and to create impetus towards less restrictive forms of delegation by issuing a report pin-pointing the weaknesses of current practices.[24] The Parliament, for its part, had nothing to gain from an expansion of delegation and made its hostility known. However, its lack of power in the legislative process meant that its reports and resolutions condemning the increased role of comitology went largely ignored by the other actors.

From the Single European Act to the Maastricht Treaty

The next period, which lasted from the Single European Act of 1987 (SEA) to the Maastricht Treaty, took place in a very different institutional context. The unanimity requirement had been eased in a number of important policy areas. New institutional rules of decision-making also marked the beginning

of a new phase in the relationship between legislation and delegation. The SEA provided for qualified majority voting in a variety of areas relating to the creation of the Single Market, a political project aimed at removing barriers to the free movement of economic assets within the EU. It paved the way for a significant increase in the power of the Commission in the legislative arena; the Commission's legislative proposals were no longer stymied by the Luxembourg Compromise. The Parliament, for its part, received a somewhat greater role in the legislative process, thanks to a new legislative procedure, cooperation, which gave it an enhanced voice in legislation (although it gave it relatively little power to veto legislation). However, contrary to the hopes of the Commission and the Parliament, the SEA did not grant the former special powers to adopt implementing legislation for the achievement of the internal market; nor did it give the latter a *droit de regard*, i.e. a right to be forwarded all draft decisions relating to legislation. How can the first comitology decision of 1987, the first real institutionalisation of comitology, be accounted for under these new institutional conditions?

Under the changed formal institutional rules of the SEA we would expect the Commission to be considerably more willing than in the previous period to argue for limitations on member state oversight and the comitology system. The Parliament would continue to be strongly opposed to comitology, and to delegation more generally. The Council, in contrast, would continue to prefer strong controls over delegated authority. Further, we would predict that both the Parliament and Commission would have greater bargaining strength *vis-à-vis* the Council in arguments over the institutions governing the legislative process and the politics of delegation than previously. The Council would no longer be able to use its effective veto power completely to dominate the development of the legislative and delegation processes, while the Commission, through presenting proposals to a Council that did not rely on unanimity, and the Parliament, through the cooperation procedure, would be able to use their veto power to bargain with the Council over the shape of legislative and delegation politics. The Parliament, long the weakest player in this game, now not only had new formal legislative powers under cooperation, but also had an enhanced role in the budgetary process[25] as well as a new ability to use the consultation procedure to impede the adoption of legislation.[26]

Debates over delegation were spurred by the SEA's requirement that the Commission present a proposal for a Council Regulation defining the procedures for the exercise of implementing powers of the Commission. The Commission's proposal aimed to simplify the Byzantine system, which in 1986 involved some 30 procedures and 310 committees. This multiplication of comitology procedures illustrated the degree to which delegation had become an established form of European policy-making; but it also demonstrated how delegated authority could generate its own problems. Therefore, the Commission suggested that the Council should in

future only be able to choose between a limited number of committee procedures: advisory, management and regulatory committee.[27] Initially, the Commission pressed for a formal commitment that internal market matters would be subject only to advisory committees. This, however, encountered strong opposition from the member states and culminated in a non-binding declaration of the Commission urging member states to use advisory committees in internal market matters.[28] Neither did it pursue the Parliament's demand for a *droit de regard*.

The Parliament was furious. It continued to view the comitology system as an interference with the appropriate institutional balance, which allowed the Council to undermine the Parliament's purported role of supervising the Commission.[29] In a report by the Parliament's Political Affairs Committee[30] and subsequent debate on the Commission's proposal, the Parliament articulated a maximalist agenda. It demanded that all Commission draft measures should be forwarded to the Parliament and that the latter should be involved through consultation in instances in which the Council 'took back' power through comitology; that the regulatory committee procedure should be eliminated and that precedence should be given to advisory committees in internal market questions. Even though the Commission considered Parliament's demands to be unrealistic and imprudent, complaining that Parliament 'always want[ed] the maximum',[31] it eventually agreed to many of Parliament's demands in a revised proposal. This was most probably spurred by the Parliament's threat to withhold its opinion and thus delay the proposal from going forward if changes were not forthcoming. The Commission's revised proposal included the Parliament's demand that the advisory committee procedure be given a predominant place in the field of the internal market and that the procedures of existing committees should be adapted to the new arrangement.[32] It also offered a unilateral commitment to comprehensively inform and consult the Parliament regarding draft implementation measures submitted to committees. As a result, the Parliament resumed its interrupted consideration of the proposal and delivered its opinion.

However, the Council, in its 'first comitology decision', proved entirely unreceptive to the more ambitious demands presented in the revised proposal. It chose the form of a Decision instead of a Regulation as proposed by the Commission.[33] Moreover, it excluded existing comitology procedures from the new rules. It also opted for a case by case approach to choosing committee procedures, which would preserve the flexible nature of implementing powers. Finally, the Council widened the set of basic committee procedures, and included additional and restrictive variants to the management, regulatory committee procedures as well as the safeguard procedure.[34]

The Commission deplored this decision (Corbett 1998: 258), but declined to withdraw the proposal, as was its right. Instead, it took a strategic procedural step and did not include the more restrictive variants of the

regulatory and safeguard procedure in its proposal, thus forcing the Council to make formal amendments on the basis of unanimity. It also sought – unsuccessfully – to take action in the European Court of Justice in order to expand its powers in the budgetary realm. Finally, it produced two reports criticising the Council for failing to live up to its promise to emphasise the advisory procedure for Internal Market issues, and for continuing to employ the *contre-filet* mechanism to the detriment of efficiency in the decision-making process.

The Parliament, which had less to lose than the Commission, took a far stronger stance. It used its powers under the consultation and cooperation procedures systematically to advocate less restrictive committee procedures in proposed legislation (Bradley 1997; Corbett 1998). However, while it could present its opinion to the Council and could delay this presentation, the Council had little reason to pay it any heed.[35] Further, while the Parliament had some powers to delay legislation, these were limited over time by a succession of ECJ decisions. The Court proved unwilling to engage with the thorny issues of delegation and institutional prerogatives, and declined to support Parliament's contentions.

In contrast, the Parliament was more successful in gaining ground in bilateral demands made upon the Commission, which had promised the Parliament information and consultation on matters placed before committees in the comitology system. The Parliament–Commission negotiations, in which the Parliament could use delaying tactics and budget competences as a bargaining chip, culminated in the so-called Plumb–Delors agreement between Parliament and Commission, which stated as a general rule that all draft decisions relating to legislative documents should be forwarded to the Parliament at the same time that they were forwarded to the committees (Bradley 1997). In this agreement, the Parliament had for the first time obtained a formal concession to its long-standing demand for a *droit de regard*. However, the Commission did not live up to its promises, leading to further criticism from Parliament, and a subsequent set of commitments formalised in the Klepsch–Millan Agreement of 1993.

The empirical account of the development of the delegation rules in this period only offers partial support for our assumptions regarding the preferences for legislation over delegation and our hypotheses regarding the interstitial shift of power. The Commission was more prepared than it was in the period of the Luxembourg compromise to advocate a weakening of comitology, but clearly would have been prepared to back down if the Parliament had not forced it to take a maximalist line. This is contrary to our predictions. The Parliament did, as we predicted, continue to strongly prefer legislation to delegation, and to demand changes to the delegation process that would have made it considerably less attractive to the Council (and thus, by extension, less likely to be frequently employed). It argued more vigorously for limitations on comitology than the Commission did – it had less reason to compromise – because it wished not only to minimise

member state control over delegation, but wished to minimise the extent of delegation itself. The Council, as expected, continued to prefer strong controls over comitology.

The bargaining over the first comitology decision shows that the new veto power gained by the Parliament for the first time allowed it to exercise some moderate influence over the circumstances under which delegation took place. The Commission had to take account of Parliament's aspirations in a way that it had not done previously, creating two informal (i.e. non-justiciable) agreements, and paving the way for more substantial future gains by the Parliament. However, contrary to our expectations, neither Parliament nor Commission seemed to have substantially increased bargaining strength *vis-à-vis* the Council, which continued largely to ignore the demands made by the other two decision-makers in shaping the first comitology decision.

From the Maastricht Treaty to the Amsterdam Treaty

The fourth phase provided the Parliament and Commission with new opportunities to seek to revise the procedures governing comitology. The formal institutional setting was redefined by the new Treaty of the European Union. The Commission presented an ambitious proposal: to introduce a hierarchy of legal acts. Under this proposal, the adoption of laws would have been reserved to the Council and the Parliament, the adoption of regulations and decisions to the Commission. However, member states had not taken up the Commission's proposal in their Maastricht negotiations, although they had acknowledged the need to reform comitology in yet another projected Intergovernmental Conference in 1996. But even if the Maastricht Treaty left comitology untouched, it had substantial indirect effects on the subsequent debate, through the new codecision procedure. The Parliament had become a co-legislator, able to block legislation, with a quite substantial increase in its veto power (Farrell and Héritier 2003).

Under these new formal institutional conditions we would expect the Council to have had a somewhat diminished preference for legislation because the Parliament had become a co-legislator in some areas. It would have continued to insist on strong controls over the Commission's role in delegation via comitology. The Commission would have continued to try to fend off the control of member states in comitology. The Parliament's preferences would have been straightforward: it would have greatly preferred legislation under codecision to delegation.

In trying to specify the terms of the application of the new treaty provisions, the newly self-confident Parliament demanded in a Resolution that the Council would no longer be able to claim an exclusive competence over political supervision of Commission implementation of legislation falling under codecision; that the Parliament should have a role in comitology; and that there was a consequent need to reform the provisions

governing comitology. In the meantime, only consultative committees consisting of national experts assessing the impact of the decisions in the various national and local systems should be allowed. Moreover, the Parliament claimed a legal right to full information about implementing 'legislation', as well as a mechanism to cancel such legislation.

While the Commission responded favourably to this proposal, the Council was unwilling to share its supervision of implementing powers. As a consequence, the Parliament launched an offensive, seeking to force the Council to take the Parliament seriously. Being a co-legislator under the codecision process, it used its power to block legislation in order to gain concessions on comitology. The issue was fought out on each individual item of legislation (Corbett 1998: 258). The first case was the Open Voice Telephony Directive in which the Commission had proposed the relatively weak advisory committee procedure and was supported by the Parliament in its opinion. The Council changed the procedure to a regulatory committee procedure to allow it greater control. In a second opinion, the Parliament requested that the original advisory committee procedure be reinstated and demanded a recognition of the Parliament's *droit de regard* and a substitution mechanism. Neither of these amendments were accepted by the Council (nor were the last two accepted by the Commission)[36] leading to a meeting of the Conciliation Committee, a procedure through which Parliament and Council resolve differences over codecision dossiers. The Conciliation Committee ended in a deadlock, so that the Council reintroduced its initial proposal, which, in turn, was rejected by an absolute majority of the Parliament in 1994.

After this showdown, the Commission began to take the Parliament's demand for a *droit de regard* more seriously, as it desired to avoid future blockages of legislation. At the same time, the Commission sought to use the Parliament's intransigence to its benefit in the dispute over comitology. It presented a draft inter-institutional agreement to be adopted by the Council and the Parliament, which provided for the use of generally defined committee procedures in the area of codecision. This document made a key distinction between legislative and non-legislative measures. The former were to be submitted to an advisory committee and the Parliament, the latter to the less restrictive variants of the advisory and management committee procedures. Not surprisingly, the Council rejected the draft, arguing that there was no need for an inter-institutional agreement and that Article 145 EC applied to all Council acts, including those adopted in accordance with the codecision procedure.

However, in contrast to previous junctures, the Council could not ignore the Parliament entirely. Not only did the Parliament have a new veto power over codecision; it also showed its willingness to use more traditional means of taking indirect influence by using its budget authority to put comitology funds 'into reserve'. The Council therefore agreed on a *modus vivendi* that met some of the demands of the Parliament for greater information.

Parliamentary committees should be sent any draft of an implementing act submitted to the committees and the timetable for it. Furthermore, under the *modus vivendi*, the Parliament would be informed when a measure was taken that was not in accordance with its opinion, and due account should be given to the Parliament's point of view. For the first time ever, the Council had entered into a direct responsibility towards the Parliament with respect to comitology. Having gained these concessions, the Parliament was willing to allow the Open Network Directive on voice telephony, which it had previously rejected, to pass.

Even so, this only met some of Parliament's less far-reaching demands. To underline its seriousness, the Parliament resumed its previous practice of trading short-term substantive policy gains against mid- and long-term institutional gains, sacrificing, for instance, the successful adoption of the regulation of financial services in order to underline its demand for more institutional power over comitology. Almost three years after the draft legislation had been presented, it was rejected by the Parliament because the Council insisted that the Commission should use the regulatory committee procedure. The Parliament furthermore sought to extend the *modus vivendi* beyond codecision to consultation and cooperation, applying its time-honoured tactic of delaying decisions by postponing votes and insisting on re-consultation whenever amendments were introduced by the Council. Thus, in the case of the Council Directive on Ambient Air Quality Assessment and Management, the Parliament took two years to deliver its final opinion. When it finally approved the proposal it was only under the condition that the regulatory committee procedure be replaced by an advisory committee procedure. However, the Council subsequently ignored the amendments.

The Parliament's resort to delaying tactics increasingly led both the Council and Commission to try to take issues out of the reach of Parliament by declaring them to be a matter of delegation, not legislation. This, in turn, led the Parliament to try to set limits to the Council and the Commission's ability to choose whether to deal with policy through legislation or delegation by seeking a ruling from the ECJ. In the Isoglucose case of 1980, the Court had ruled that the participation of the Parliament in the legislative process was 'an essential factor in the institutional balance' and an 'essential formality' which, if not observed, meant that the legislation in question was void. Several rulings in the 1990s confirmed this principle.[37] However, when the Parliament started to make active use of its new right[38] to protect its interests with increased applications before the Court, the latter began to set limits to its previous rulings, making it clear that it was not prepared to support the Parliament's expanded use of delay as a means of winning institutional concessions. It stated that the European Parliament was not entitled to complain when legislation was adopted *before* it had stated an opinion if it had failed to discharge its obligation to cooperate sincerely with the Council.[39]

More pertinently, in a number of key rulings, the Court defined the balance between implementation and legislation in such a way as to encourage rather than prevent the Council and the Commission from circumventing the Parliament, by allowing important matters to be dealt with in annexes as matters of implementation.[40] The Court not only confirmed the legality of concrete measures that were clearly designed to circumvent the Parliament, but also provided the Council and the Commission with a weapon for the future.

Even though the Parliament had gained ground through the creation of the inter-institutional agreement, the Commission failed to fully live up to its obligations under the *droit de regard*. Only a little more than a third of the relevant measures were transmitted to the Parliament. In response, the Parliament applied another of its sanctioning instruments and in 1994 placed 90 per cent of the proposed funding for committees in reserve while demanding that the Commission prepare a report on committee activities.[41] The Commission swiftly met this requirement, but then again failed to comply to the satisfaction of the Parliament, which continued to consign expenditure for committees to the budgetary reserve. The controversy finally led to a new inter-institutional agreement – the Samland–Williamson Agreement – which in large part answered the Parliament's demands.[42]

Thus, it is clear that the Parliament began to use its new bargaining power under codecision to try to shift the rules of delegation by insisting on its veto power in related areas. This resulted in several new informal rules – the *modus vivendi*, the inter-institutional agreement on comitology, and the concessions made by the Council regarding a *droit de regard* of the Parliament in matters relating to comitology.

What our account would not have predicted *ex ante* is that the Council and the Commission partially responded to the Parliament's assertiveness and willingness to block legislation by opting for an increased use of delegation under conditions that made it difficult for the Parliament to exercise influence. The Court, to which the Parliament turned to restrict these attempts, ruled in favour of the Council and the Commission, thus rendering the Parliament's threats with regard to comitology less credible than they might otherwise have been, and signalling to the Parliament that there were clear limits to its ability to use its blocking and veto powers to pursue its aims.

From the Amsterdam Treaty to the Second Comitology Decision

In the last period under scrutiny, the initial formal institutional conditions were again very different from those in the previous period. Codecision and qualified majority voting had been extended; a hierarchy of legal acts, however, had not been established. The Reflection Group that had been established to prepare the negotiations had opposed the introduction of a hierarchy of legal acts and the granting of executive powers to the

Commission, calling instead for simplified committee procedures and stressing the need to revise the comitology decision of 1987. In practice, this recommendation meant that the Commission's implementing powers should be taken from the IGC agenda and be dealt with through a mere decision. Reflecting the dominant views of governments, the Amsterdam Treaty had, on the one hand, strengthened the Parliament by giving it the right to approve the appointment of the President of the Commission and by extending the codecision procedure; on the other hand, it did not grant it any new rights regarding implementing powers. Member states had followed the Reflection Group's recommendations and had decided only to revise the comitology decision of 1987.

The bargaining process surrounding the new decision started with a Commission proposal in 1998, which sought to simplify the existing committee system and make it more open to parliamentary control. It proposed systematic criteria for choosing one committee procedure over another, linking them to the scope and quality of the measures to be taken. Such criteria would also have had important implications for the distinction between legislation and implementation. Unsurprisingly, the Commission proposed a very wide notion of executive authority that would have maximised its control of the implementation process. Additionally it proposed a modification of the regulatory committee procedure, according to which a draft implementing measure that was not explicitly approved by the regulatory committee could be transformed into a proposal within the normal legislative process. The Commission also included the *droit de regard* of the Parliament and suggested that the Parliament be kept informed of committees' work (including agendas and voting results) in areas under codecision. However, the Commission perceived a clash between some of the Parliament's demands and its own interests. Although it had previously shown some sign of support for a 'substitution mechanism' which would enable the Council and the Parliament to repeal an implementing measure, in its proposal it opted for an entirely different solution.

Again, the Parliament sought to use its powers of delay in order to win concessions. In its response, the Aglietta Report, it did not submit the necessary opinion under the consultation procedure, but instead adopted a Resolution. According to the Parliament, the Commission proposal would allow too many matters of legislative bearing to be adopted in the form of implementing measures, upsetting the institutional balance. It stated that the Parliament and Council should have an equal share in control over executive activity.[43]

As before, the Parliament sought to exploit its powers to delay and to veto in order to press Commission and Council to accede to its requests. However, it was less credibly able to deliver on this threat than in previous junctures; the Parliament was as keen on reform as the other parties. In 1999, therefore, it resorted to its second instrument of pressure, partial control over the budget, and put part of the comitology funding in reserve,

demanding the complete abolition of the regulatory committee procedure, a limitation of the substantive scope of implementing measures, the introduction of a mechanism for 'protection of the legislative sphere' consisting of a right to revoke a decision within codecision, and the right 'to blow the whistle' in other spheres. As it happened, this second Aglietta Report and the draft Resolution were debated on the same day that the Parliament voted on the approval of the nomination of the new Commission President Romano Prodi.

The new Commission supported the Parliament in all its demands except one, a legally binding mechanism for the protection of the legislative prerogative. Instead, the Commission only opted for a right to 'blow the whistle'. However, the Council refused to make any concessions. Given Council intransigence, the Parliament openly threatened to use all available means of pressure to force the Council to be more conciliatory. It withheld its opinion from the second comitology decision:

> I warn the Council ... if the working group continues to be so restrictive on Parliament's rights to intervene, then there will be no agreement and we will continue in legislative procedure after legislative procedure to block the comitology measures ... and we will be very restrictive on voting the budgets and the credits to allow comitology-type committees to continue to meet. We are not seeking to take powers to ourselves to intervene in the detail, but we are seeking to have the safeguard. ... It is the principle on which we will insist and unless agreement is reached in this matter, I can tell Council that co-decision procedure after co-decision procedure will have to go all the way to conciliation and time after time there will be difficulty on this problem.[44]

The Commission sought to intermediate between the Parliament and Council, proposing a compromise in which the Council would accept a mechanism for the protection of the legislative sphere if the Parliament, in turn, would accept regulatory committees. The Parliament conceded that regulatory procedures would be acceptable if the *contre-filet* double safety-net procedure was abandoned. When this concession was made, it was willing to deliver its opinion, allowing the Council to decide on an instrument, the second comitology decision.[45]

Three features of the second comitology decision are worthy of particular note. The Council accepted a limited simplification of the management and regulatory committee procedures, but refused to abolish the more restrictive variants. Under the new regulatory committee procedure, the committee has to approve a draft measure before the Commission can adopt it. If it does not, the Commission has to submit a proposal which the Council can adopt or oppose by qualified majority. The Commission can resubmit a modified proposal should the Council oppose the proposal or present a new proposal

within the normal legislative process. Against the wishes of the Commission and the Parliament, the Council authorised the continuation of the old procedures, but conceded that there should be a case by case adjustment of the old ones. The message was clear: if parliamentarians did not behave themselves, the adjustment would immediately be discontinued.

The Commission's proposal regarding the modification of the regulatory committee procedure was accepted. Additionally, the Parliament was granted the right 'to blow the whistle' if it felt that a draft implementing measure exceeded the powers conferred upon the Commission. The Commission would have to re-examine the measure in the light of the parliamentary position.[46] As regards the division of legislative and executive spheres, the Council preferred flexibility and accepted only a set of non-mandatory criteria. The Council retained complete flexibility with regard to the advisory committee procedure.

All the demands of the Parliament for increased transparency were met. The precise conditions were defined in the Fontaine–Prodi inter-institutional agreement. This also included a provision that the Commission should forward draft implementing measures which, although not adopted under the codecision procedure, were of particular importance to the European Parliament.

In sum, the period from Amsterdam to the second comitology decision again supports our claim that, given formal decision-making rules, actors strategically use their negotiation resources to try to change the delegation rules according to their preferences. The Parliament was determined to apply all available means of pressure to induce the Council to reconsider their views and negotiate a new comitology decision. While the Council had to give up the *contre-filet* mechanism, the Parliament for its part had to accept the regulatory committee procedure. Additionally, the Commission issued a unilateral statement – the so-called 'aerosol declaration' – in which it declared that if the Council was prepared to abandon the *contre-filet* procedure, the Commission would not go against a majority opinion of the Council.[47]

Conclusion

Evidence from inter-organisational debates over comitology over the last five decades suggests that actors' preferences are drawn from governing institutions, and bargaining is a key mechanism explaining outcomes, just as our account would lead one to expect. There is strong evidence that the actors in these debates, in particular the Parliament, are competence maximisers, willing to trade short-term losses in policy in return for possible long-term increases in their institutional ability to influence policy. This is, in itself, an unremarkable finding – however, it runs counter to the basic claims of much existing work on the European Union, which treats these actors as interested only in one-shot interactions over policy. Second, there

is considerable evidence that the preferences of these actors are less straightforward than previous work would suggest (Ballman *et al*. 2002). In particular, the relationship between Parliament and Commission is quite complex. While they both wish to minimise the control of member states over delegation, the Parliament, unlike the Commission, has historically wished to minimise delegation *tout court*, but then has also sought a say in comitology, leading it at times to advocate more extreme reforms of comitology than the Commission (which has been more prepared to make concessions to member states in order to allow delegation to continue).

More pertinently, the historical evolution of the comitology debate provides strong evidence that the bargaining strength of actors depends on their effective power to block or veto legislation. This means that the Council has always maintained a privileged role – especially given the unwillingness of the European Court of Justice to limit its control over comitology – but that the practical effect of this privilege on its ability to bargain successfully with Commission and Parliament has varied over time, together with institutional changes that have affected the bargaining strength of the other two actors. In particular, changes in voting within the Council and changes in the effective veto power of the Parliament have affected the preferences for legislation or delegation and bargaining strength of the Commission and Parliament respectively. In periods where unanimity voting applied, especially the period of the Luxembourg compromise, the Commission was both unwilling and unable to demand serious concessions on comitology from the Council. Unwilling, because it saw comitology as the necessary cost for having any influence over policy whatsoever, given blockages in the legislative procedure; and unable, because it had difficulties in making credible threats. There is evidence that this has changed in the wake of the Single European Act, so that the Commission has been increasingly willing to push for less member state control over its implementing powers, culminating in the European Constitutional Treaty (not described in this article), which would, if it were ratified, provide a hierarchy of legal acts that would greatly increase the implementing powers of the Commission.

There is even stronger evidence that changes in the Parliament's ability to threaten the delay or veto of legislation over time have increased its bargaining strength considerably. Parliament's fundamental preferences have remained unchanged (although we predict that they *would* change if Parliament were to achieve its goal of equal control with the Council over implementation. Parliament would then be much more amenable to delegation and implementation). As Parliament's ability to make credible threats has increased, from an almost entirely passive ability to influence, through its ability to use consultation to delay legislation, to its increasing influence over legislation through cooperation and codecision, so too has its ability to wrest concessions from Commission and Council over comitology. Furthermore, these processes of bargaining may sometimes lead to the

creation of new informal institutions. However, we note that the Parliament has had far less success in pushing for the creation of informal institutions that favour it in comitology than in codecision, and that indeed, more generally, there is a much 'thinner' informal institutionalisation of delegation than of many aspects of legislation. The Parliament has been markedly less successful in establishing control over comitology than it has been in creating informal institutions that instantiate its influence over legislation under codecision. This is largely because the formal Treaty texts provide far less scope for creative reinterpretation than do the texts governing legislative decision-making. The Treaty not only clearly emphasises the role of the Council, but provides little in the way of effective constraints on the Council's ability to pick and choose comitology procedures.

Finally, the developments that we describe are leading to a new set of battles, which are poorly described, if at all, in the current literature. As the Parliament has gained increasing influence in the legislative process, the Council and Commission have sought to circumvent Parliament by resorting to implementation as much as possible, dealing with sensitive matters not in the legislation itself, which is subject to Parliamentary control, but in implementation procedures set out in the legislative annexes. This is leading to a new set of disputes over the delimitation of the spheres of legislation and delegation, which will be complicated further still by the new Constitution, if it should enter into force. We predict that these disputes, too, will be characterised by the factors we discussed in this article: efforts by actors to maximise their competences, arguments that reflect this particular form of institutional self-interest, and results that are largely determined by actors' respective bargaining strength, which, in turn, will reflect their respective ability credibly to threaten delay or veto.

Notes

1. While the European Court of Justice (ECJ) also plays an important role, it is an indirect one; the ECJ interprets the Treaty and may adjudicate disputes over competences between the other legislative actors.
2. In contrast to a normal legislative proposal, the Council has no right to be consulted.
3. See Bates *et al.* (2000). The method of analytic narratives has been criticised (e.g. Elster 2000) for not paying sufficient attention to the sources of actors' preferences; we seek to address this objection through our argument that actors' preferences in any given period are a function of the formal institutional structures governing legislation and delegation.
4. Our analysis builds on the detailed research of Bergström (for a more detailed account, see Bergström 2005).
5. We do not examine the ability of argument itself to reshape politics.
6. *Bulletin EEC* 5-1959.
7. A bargaining process need not be around a table, but can also be conceived of as a looser strategic interaction between actors (Sebenius 1992).
8. *Bulletin EEC* 5-1960, p. 39.
9. Résolution (157) du 20 décembre 1961 EEC (*OJ* 1962 C 72/62), or *Annuaire-Manuel* 1961–62, pp. 468–9.

10. Rapport général sur l'activité de la Communauté économique européenne (rapporteur: Arved Deringer), PE Doc 74/1962–63, 5 October 1962.
11. The crisis began with the Commission's proposals on financing of the CAP in March 1965. The Commission proposed that not only agricultural levies, but also customs duties should be treated as 'own resources', to be spent at the Community, rather than member state level. Although the Commission had tried to win French support through a favourable allocation of spending, the French government was incensed, and withdrew from both Council sessions and the Committee of Permanent Representatives.
12. De Gaulle complained that the Commission wished to become a 'great independent financial power', and that 'those very states, having fed these enormous amounts to it . . . , would have no way of supervising it' (*Le Monde*, 10 September 1965; translation in Lambert 1966: 214–16).
13. *Bulletin EEC* 3–1966, pp. 6–7.
14. In a draft of COREPER that gave substance to the Luxembourg Compromise, a 'method' was envisaged according to which Council and Commission would together specify the implementing powers that the Council could delegate, and what the future role of the management committees would be. However, after a number of governments observed that delegation of implementing powers was the business of the Council alone, and did not need to be discussed with the Commission, this section was deleted. (Process-verbal Luxembourg, 17–18 et 27–28 janvier 1966, Conseil of the CEE, no C/12 f/66 (AE 1) final, p. 28 and 71.)
15. Resolution of 9 March 1966 (*OJ* 1966 769/66).
16. See Council Regulation 802/68/EEC of 27 June 1968 (*OJ* 1968 L 148/1); see also Council Regulation 803/68/EEC of 27 June 1968 (*OJ* 1968 L 148/6).
17. See below for evidence.
18. The most important is the so-called Jozeau-Marigné report, Legal Committee, Report on procedures for the implementation of secondary Community law (rapporteur Jozeau-Marigné), EP Doc No 115/1968–69, 30 September 1968.
19. *OJ* 1968 C 108/37. See also *Europe*, 3 October 1968.
20. Quoted in *Europe* 3 October 1968. While Rey promised the Parliament that the Commission would not accept the application of the *contre-filet* in future measures, the Commission itself proposed such a mechanism in a new area shortly thereafter (see 'Editorial Comments', *Common Market Law Review* 7 (1970).
21. *Bulletin EC*, Supplement 1/76, pp. 31 and 33.
22. *Bulletin EC*, Supplement 2/78.
23. *Bulletin EC* 11-1979, p. 47.
24. Fresco Report 1978. Commission Communication to the Council, 20 April 1978, 'The Transitional Period and the Institutional Implications of Enlargement', Bulletin EC Supplement 2-1978.
25. The Parliament's budgetary powers were increased by the 'Budgetary Powers' treaty of 22 July 1975. In 1978 the class of non-obligatory expenditure in which the Parliament has a say constituted over 20% of the budget.
26. The right to be consulted allowed the Parliament to delay legislation indefinitely according to one reading of the ECJ's ruling in the Isoglucose case; while this ruling's implications were narrowed considerably in later judgments, it provided the Parliament with a potent means of effectively vetoing legislation for a considerable period.
27. Commission Proposal of 3 March 1986 for a Council Regulation COM(86) 35 final (*OJ* 1986 C70/6). See *Bulletin EC* 1-1986, point 2.4.6. See also Ehlermann (1988: 233) and Bradley (1992: 695).
28. Apart from this attempt, the Commission did not propose rules determining which kind of committee should be used for fear that member states would substitute its own, harsher rules. House of Lords Paper 1986–87, Oral evidence by Claus-Dieter Ehlermann, at paragraph 83 (p. 19).
29. See the Report on the Proposal from the Commission of the European Communities to the Council for a Regulation laying down the Procedures for the Exercise of Implementing

Powers Conferred on the Commission (rapporteur: Klaus Hänsch), Political Affairs Committee, EP Doc. A 2-78/86, 2 July 1986.

30. Ibid.
31. Speech of Jacques Delors to Parliament, in Debates of the European Parliament of 9 July 1986 (*OJ* 1986 Annex No 2-341, p. 155).
32. See the amended Commission Proposal of 3 December 1986 for a Council Regulation COM(86) 702 final.
33. Under a Decision the addressees are not national administrations, and no rights are conferred on individuals.
34. The safeguard procedures do not require the use of a committee. The Council gives the Commission the powers to introduce safeguard measures. The latter should notify the Council of its decision to introduce such measures. The Council can stipulate that the Commission, before adopting its decision, must consult member states. Any member state can refer the decision to the Council. Then, either the decision of the Commission continues to apply unless the Council by qualified majority has not taken a different decision, or the measure is deemed to be revoked if the Council has not acted within a limited period.
35. Interviews with officials in Council Secretariat (October 2001).
36. The Commission rejected a supervisory role of the Parliament with respect to the exercise of the implementing powers. It felt that any changes in comitology procedures should be covered by an inter-institutional agreement, and it considers it inappropriate to consult the Parliament on technical issues.
37. European Court of Justice (1980). *Case 138/79 SA Roquette Frères v. Council of the European Communities* (ECR 3333), 29 October 1980.
38. The Maastricht Treaty for the first time in history had given the Parliament the right to bring cases to the ECJ.
39. The Court also questioned the right of re-consultation of the Parliament in case of considerable changes in the text by excluding amendments relating to the type of committee procedure.
40. In the case of the Council Regulation 2092/91/EEC on organic production of agricultural products the inclusion of Genetically Modified Micro-organisms (GMMOs) in the limitative list in the annex was not considered to go beyond the framework for implementation of the principles laid down by the basic regulation adopted following consultation of the Parliament. In another ruling of 1993 (*European Parliament v. Council* C-417/93) implementation was defined so widely as to permit provisions not in an annex but in the main text of a Regulation adopted under a normal procedure to be amended under a simplified procedure. A Commission proposal for a Council Regulation concerning technical assistance to economic reform and recovery in the independent states of the USSR and Mongolia (a follow up to the previous TACIS programme) was sent to the Parliament for consultation. The Parliament rejected the proposal because the Council decided to entrust the Commission with implementing powers on the basis of a regulatory committee procedure instead of a management committee procedure as chosen by the Commission. After the rejection, the Council adopted the proposal and added a supplementary procedure giving the Council the right to revise public contracts above a certain threshold of ECU (Council Regulation 2053/93/EEC/Euratom). The Parliament brought an action of annulment to the ECJ, arguing that the EP's prerogatives were undermined. The claim was rejected by the Court.
41. This was underlined by a Resolution of the Parliament.
42. Thus it was granted right of attendance at committee meetings.
43. 'In contrast to the Commission we believe that an implementing rule cannot be amended, updated or adapted, these being the key elements of the basic legislative acts, including the annexes, . . . we know perfectly well that, very often, key elements of the legislation are dealt with in the annexes' (Report on the Proposal for a Council Decision laying down the Procedures for the Exercise of Implementing Powers Conferred on the Commission

(rapporteur: Maria Adelaide Aglietta), Committee on Institutional Affairs, EP Doc A4-169/99, 24 March 1999).

44. Corbett, Debates of EP, 5 May 1999.
45. After the adoption of Decision 1999/468/EC the Parliament released the appropriations it had withheld.
46. The Commission can either submit a new draft measure, continue with the procedure or present a proposal for normal legislation.
47. Bolkestein, Debates of the EP, 5 February 2002.

References

Ballman, Alexander, David Epstein and Sharyn O'Halloran (2002). 'Delegation, Comitology and the Separation of Powers in the European Union', *International Organization*, 56:3, 551–74.

Bates, Robert H., Avner Greif, Margaret Levi, Jean-Laurent Rosenthal and Barry R. Weingast (2000). 'The Analytic Narrative Project', *American Political Science Review*, 94:3, 696–702.

Bergström, Carl F. (2005). *Comitology: Delegation of Powers in the European Union and the Committee System*. Oxford: Oxford University Press.

Bertram, Christoph (1967). 'Decision Making in the EEC: The Management Committee Procedure', *Common Market Law Review*, 5, 246–64.

Bradley, Kieran St. Clair (1992). 'Comitology and the Law: Through a Glass, Darkly', *Common Market Law Review*, 29, 693–721.

Bradley, Kieran St. Clair (1997). 'The European Parliament and Comitology: On the Road to Nowhere', *European Law Journal*, 3:3, 230–54.

Corbett, Richard (1998). *The European Parliament's Role in Closer EU Integration*. Basingstoke: Macmillan Press.

Ehlermann, Claus-Dieter (1988). 'Compétences d'exécution conférées à la Commission – la nouvelle décision-cadre du Conseil', *Revue du Marche Commun*, 316, 232–9.

Elster, Jon (2000). 'Rational Choice History: A Case of Excessive Ambition', *American Political Science Review*, 94:3, 685–95.

Epstein, David, and Sharyn O'Halloran (1999). *Delegating Powers: A Transaction Cost Politics Approach to Policy Making under Separate Powers*. Cambridge; New York: Cambridge University Press.

Epstein, David, and Sharyn O'Halloran (1999). *Delegating Powers: A Transaction Cost Politics Approach to Policy Making under Separate Powers*. New York: Cambridge University Press.

Fennell, Rosemary (1979). *The Common Agricultural Policy of the European Community: Its Institutional and Administrative Organisation*. London: Granada.

Farrell, Henry, and Adrienne Héritier (2003). 'Formal and Informal Institutions under Codecision: Continuous Constitution-Building in Europe', *Governance*, 16:4, 577–600.

Huber, John D., and Charles R. Shipan (2002). *Deliberate Discretion? The Institutional Foundations of Bureaucratic Autonomy*. Cambridge: Cambridge University Press.

Jupille, Joseph H. (2004). *Procedural Politics: Issues, Influence, and Institutional Choice in the European Union*. Cambridge: Cambridge University Press.

Lambert John (1966). 'The Constitutional Crisis 1965–1966', *Journal of Common Market Studies*, 4:3, 195–228.

Moravcsik, Andrew (1998). *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht*. Ithaca, NY: Cornell University Press.

Sebenius, James K. (1992). 'Challenging Conventional Explanations of Cooperation: Negotiation Analysis and the Case of Epistemic Communities', *International Organization*, 46:1, 323–65.