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EIF Working Paper Series

The European Parliament in Treaty Reform: Predefining IGCs through Interinstitutional Agreements

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Working Paper Nr: 20

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Abstract

Despite the fact that Interinstitutional Agreements (IIAs) are an established part of the mass of informal and formal rules structuring EU decision-making and interinstitutional relations, there is as yet no common understanding of their role and functions in the institutional and legal system of the EU – neither in political science nor legal studies. Tracking the evolution of the EP’s competencies in three areas where IIAs figure prominently – comitology, legislative planning and the establishment of procedures to hold the Commission accountable – this article seeks to show that the European Parliament strategically uses IIAs as instruments to wrest competencies from the Council and the Commission. Having no formal say in treaty reform, the EP ‘creates facts’ through informal but politically binding IIAs hoping that, once established, it can achieve a later codification of its new rights at IGCs. Viewed this way, the analysis of the role of IIAs in Treaty Reform could help to explain a still under-researched puzzle in European integration theory, namely the incremental parliamentarisation of the institutional system of the EU over the last two decades.

Interinstitutional Agreements (IIAs) have been concluded between the Council of the European Union, the Commission and the European Parliament (EP) ever since the founding of the European Union. Despite the fact that they are an established part of the mass of informal and formal rules structuring EU decision-making and interinstitutional relations, there is as yet no common understanding of their role and functions in the institutional and legal system of the EU - neither in political science nor legal studies. The legal nature of IIAs is the subject of disagreement among legal scholars; IIAs form part of the grey area of the EU’s nomenclature of norms which has been referred to in both legal and political science literature with terms such as *soft law* or *informal conventions* etc. Albeit non-binding in a strict legal sense, there is minimal agreement on the fact that IIAs are in effect politically binding - at least for the signing parties.¹

¹ F.v. Alemann, Die Handlungsform der interinstitutionellen Vereinbarung. Eine Untersuchung des Interorganverhältnisses der europäischen Verfassung (Springer, 2006); Hummer, ‘Interinstitutionelle Vereinbarungen und „Interinstitutionelles Gleichgewicht“ in W. Hummer (ed), Paradigmenwechsel im Europarecht zur Jahrtausendwende (Springer, 2004), 111-180; J. Monar ‘Interinstitutional Agreements: The Phenomenon and its new dynamics after Maastricht’, (1994) CML Rev 31, 693-719; F. Snyder, ‘Interinstitutional Agreements: Forms and Constitutional Limitations’ in G. Winter (ed), Sources and Categories of European Union Law. A Comparative and Reform Perspective (Nomos, 1996), 453-466.

Linked to this observation, there is evidence that the EP strategically uses IIAs as instruments to wrest competencies from the Council and the Commission. This argument forms the focus of our article. Having no formal say in treaty reform,² the EP ‘creates facts’ through informal but politically binding IIAs hoping that, once established, its new rights will be later codified at IGCs. Thus, IIAs pre-define future treaty reforms. Indeed, MEPs themselves acknowledge that they conclude IIAs in the hope that they will „sow the seeds for future treaty reforms“.³ Hummer, in an attempt to understand the legal nature of IIAs, argues that - despite varying strongly in denomination, form, content and impact -, IIAs nevertheless have one common feature: they grant the European Parliament decision-making competencies, which were not contained in the founding treaties.⁴ Viewed this way, the analysis of the role of IIAs in treaty reform could help to explain one of the key features of the EU’s constitutionalisation process and a still under-researched puzzle in European integration theory,⁵ namely the incremental parliamentarisation of the institutional system of the EU - i.e. the increased delegation of supervisory, budgetary and (co-) legislative powers to the European Parliament - over the last two decades. This article thus adds to the (as yet) sparse literature on the role of supranational actors in treaty reform in general and the process of parliamentarisation in particular.

We begin the article by setting out theoretical background and basic assumptions. The following parts look at three areas in which IIAs figure prominently: we track the evolution of the EP’s participation in legislative planning and comitology, as well as the informal rules governing its relations with the Commission. The last part summarizes our analysis and checks our empirical findings against the theoretical assumptions.

1. Treaty reform and institutional change in the EU

For those students of European integration who support a liberal intergovernmentalist approach, the EU is a means for national governments to retain influence *vis à vis* other countries. Accordingly, the institutional balance favours the Member States and, increasingly, the European Council. The European institutions perform an important agent-role but, without support from strong states, exercise limited influence. In the federalist camp, meanwhile, there is no agreement about the role of IGC’s and institutional reform in the EU’s institutional set-up. Some predict that inter-state bargaining will increasingly be seen as a state-centric relic of the days before the establishment of a supranational order. For neo-functionalists, integration is fuelled and legitimated by the breakdown of policy areas into functional problems, which are efficiently dealt with by committees of

² Article 48 TEU only obliges the Council to consult the European Parliament before delivering an opinion in favour of calling an IGC on treaty reform.

³ MEP Metten in OJ 1993 Debates, Annex No. 3-429-252, EP Sitting of 11.3.1993, p. 251.

⁴ Hummer, ‘Interinstitutionelle Vereinbarungen’, note 2 above, 116.

⁵ For articles dealing with single aspects of parliamentarisation see cf. S. Hix, ‘Constitutional Agenda-Setting through Discretion in Rule Interpretation: Why the European the EP Won at Amsterdam’, (2002) 2 British Journal of Political Science, 259-280; A. Maurer, ‘The Legislative Powers and impact of the European Parliament’, (2003) JCMS 41, 227-248, B. Rittberger, ‘The Creation and Empowerment of the European the EP’, (2003) JCMS 41, 203-226.

technical experts. This depoliticisation of policy-making will render interstate bargaining and interinstitutional framing of rules and procedures increasingly superfluous.

Recent research on treaty reform has levelled criticism at widely cited intergovernmentalist explanations of institutional change.⁶ The latter are based on two major claims: firstly, that institutional change takes place through „big bargain decisions”⁷ at IGC summits, and secondly, that Member States’ governments are the dominant actors at IGCs, making all the decisions based on their prefixed and homogenous national interests.⁸ This leaves supranational actors, which have no formal say at IGCs, with next to no role in institutional change.

Both claims have been put into perspective by an emerging body of literature which is either explicitly or implicitly rooted in neo-institutionalist approaches and assumptions concerning institutional change.⁹ According to what might be broadly termed a ‘neo-institutionalist approach’, supranational actors do indeed have an impact on treaty reform, above all due to the fact that institutional change is influenced by developments and decisions that precisely do not take place *at* but rather *between* IGCs. This body of literature shares the view that treaty reform is a long-term process not limited to the actual IGCs. It argues that existing treaty provisions or *formal and informal* rules, procedures, norms or ideas established in the course of treaty implementation predefine and constrain the choices of all actors at future IGCs.¹⁰

We seek to lend weight to this approach, and to address a lacuna in this growing body of literature, by explaining an important aspect of the EP’s role in treaty reform, namely its frequent recourse to IIAs. For this we specifically turn to a sub-stream of the neo-institutionalist approach - namely to historical institutionalist explanations of institutional change in the EU. Regarding institutional change in the EU, historical institutionalism shares many of the key assumptions of neo-institutionalism, challenging the view expounded by intergovernmentalists that Member States’ governments are the key actors determining the constitutional development of the EU. It acknowledges the role of autonomously acting supranational institutions that pursue their own reform agendas, as well as that of a dense cluster of governmental and non-governmental actors at all levels of the EU. At the core of all neo-institutionalist approaches in general is the claim that institutions matter. Institutions are defined as informal and formal sets of rules, procedures and/or norms and ideas that structure social interaction. These institutions in which the policy-making process is embedded are believed to define the scope for action of all actors, in this case the scope

⁶ T. Christiansen, G. Falkner and K.E. Jørgensen, ‘Theorizing EU Treaty Reform: beyond diplomacy and bargaining in ‘EU Treaty Reform as a Three-Level Process: Historical Institutional Perspectives’, (2002) 1 JEPP Special Issue 9, 12-33; T. Christiansen and K.E. Jørgensen, ‘The Amsterdam Process: A Structurationist Perspective on EU Reform’ (1999) 1 EIOP (<http://eiop.or.at>).

⁷ A. Moravcsik, ‘Preferences and Power in the European Community, A Liberal Intergovernmentalist Approach’ 31 JCMS (1993), 473.

⁸ A. Moravcsik ‘Liberal Intergovernmentalism and Integration: A Rejoinder’, (1995) JCMS 33, 611-628; A. Hurrell and A. Menon, ‘Politics Like Any Other? Comparative Politics, International Relations and the Study of the EU’, (1996) West European Politics 19, 386-402.

⁹ cf. S. Hix, ‘Constitutional Agenda-Setting’, n 6 above; H. Farrell and A. Héritier, ‘Formal and Informal Institutions Under Codecision: Continuous Constitution-Building in Europe’, (2003) 4 *Governance* 16.

¹⁰ For a larger critique on the state of the art of research on treaty reform not limited to constraints/opportunities deriving from previous decisions in between IGCs treated in this article, but in addition emphasising political and time constraints during the different phases of IGCs (issue-framing, agenda-setting etc.) see Christiansen et al, ‘Theorising Treaty Reform’, n 7 above.

for action in Treaty reform. Actors thus operate in an environment which is highly structured by these institutions which can both enable and constrain them in the pursuit of their interests.¹¹ Most significantly, historical institutionalist analyses treat institutional change as a process unfolding over time. According to Pierson,¹² any analysis of the institutional change of the EU which restricts itself to IGCs will yield a snapshot of constitutional development which is at best unrepresentative of the overall process. It is argued that the EU's constitutional development has to be seen as an *unceasing process of incremental change* rather than one limited to a staccato series of IGCs. The model of 'path-dependency' of policy preferences, institutions and procedures, policy-outcomes and policy-instruments suggests that in such a heavily institutionalised arrangement like the EC/EU, „past lines of policy [will] condition subsequent policy by encouraging societal forces to organise along some lines rather than others, to adapt particular identities or to develop interests in policies that are costly to shift“. ¹³ Thus, once policy decisions have been made or institutions introduced, they will be difficult to reverse at a later point. This is due to the institutional barriers to reform, the resistance of actors that were favoured by the institution, and the high costs of change once actors start to adapt to the new policies/institutions in the period between two IGCs.

In sum, awareness of incremental change suggests that treaty reform is subject to a wide range of actors. Member states are but single players in a cluster of actors, each of which has an impact on the constitutional process and which are constrained by previous decisions and developments, and a myriad other factors including their political hinterland.¹⁴ Actors do not simply have fixed sets of demands; rather, their preferences are shaped or 'shift' during this process of treaty implementation and treaty reform. IGCs can thus be seen as the highlights of treaty reform; they are very reactive in that these 'summits' of treaty reform often „merely codify“ key institutional features „which have already occurred [...] away from the 'intergovernmental' negotiating table, in the depths of the valleys in between“ such as the gradual „empowerment of the European Parliament“. ¹⁵ It is in this light that we propose to analyse the effect of IIAs upon treaty reform.

2. IIAs in treaty reform: pre-defining future treaty amendments

IIAs can be regarded as an element that predetermines reform options *in the valleys between IGCs and the final endgame summits of the heads of state and government*. Indeed, many treaty provisions refer to procedures formerly decided upon in IIAs.¹⁶ Despite their informal nature, arrangements like IIAs institutionalise, and are able to modify, the real institutional balance without formally changing the Treaties.¹⁷ Even if IIAs cannot amend the Treaties,¹⁸ we set out to show that

¹¹ P. Pierson, 'The Path to European Integration: A Historical-Institutionalist Analysis' in W. Sandholtz and A. Stone Sweet (eds), *European Integration and Supranational Governance* (Oxford UP, 1998), 27-58.

¹² P. Pierson, 'The Path', n 12 above.

¹³ P. Hall and R. Taylor, 'Political Science and the Thee New Institutionalisms', (1996) 44, 936-954, 941.

¹⁴ U. Sverdrup, 'Precedents and Present Events in the European Union: An Institutional Perspective on Treaty Reform' in K.-H. Neunreither and A. Wiener (eds), *European Integration after Amsterdam* (Oxford UP, 2000), 241-265.

¹⁵ T. Christiansen and K.E. Jørgensen, n 7 above, 17.

¹⁶ For an overview see table 6 in A. Maurer and W. Wessels, *Das Europäische Parlament nach Amsterdam und Nizza: Akteur, Arena oder Alibi?* (Nomos, 2003), 171.

¹⁷ Cf. J.A. Stacey, 'Constitutional Re-engineering in the European Union: The Impact of Informal Interinstitutional Dynamics', Paper presented at ECSA Seventh Biennial International Conference, 2 June 2001, Madison, Wisconsin.

in practice they can go far beyond what has been agreed under the Treaties. In line with MEPs' aspirations, IIAs have the capacity to induce Treaty reforms. Based on the assumption of path-dependency, we argue that IIAs can be seen as rules or procedures that, once introduced, shape the realm for further developments by narrowing the scope for possible change and by indirectly obliging Member States to think only of the incremental revision of existing arrangements. In other words, IIAs can create facts thanks to which member state governments subsequently have limited options other than their formalisation.

We seek to show that the EP has consciously used IIAs as instruments to effect changes to its institutional position in decision-making procedures.¹⁹ Since the EP has no formal decision-making power at IGCs, we argue it has strategically and deliberately used IIAs to create irreversible facts, informally increase its power and precondition future Treaty reforms at IGCs. Numerous parliamentary reports and statements made by MEPs show that parliamentary actors see IIAs as instruments to strengthen the EP's role in the EU's institutional set-up²⁰ and link the conclusion of IIAs to the unfinished process of constitutionalisation.²¹ In line with the theoretical arguments set out above, we argue that IIAs can be seen as temporary solutions which should at a later point result in alterations of the Treaty provisions.

Given the way that the EP has gained from the Agreements, a crucial question is why the Council and the Commission have entered IIAs with the EP. We suggest that the EP exploited the rather favourable terrain of the valleys to effect institutional changes. It made strategic use of its original bargaining powers vis à vis Member State governments that referred to IIAs at consecutive IGCs without - in Pierson's terms - anticipating the possible consequences. The EP used these powers (its right to oust and appoint the Commission; its extensive budgetary rights including the right to reject the budget and most recently the possibility to delay and even reject legislation in the framework of the co-decision procedure) in order to cajole both institutions into the Agreements. Once agreed upon, the procedures established by the IIA will be difficult to reverse because of the strong resistance of the EP and the high costs of interinstitutional conflict-negotiation necessitated by a breach of the IIA. Every subsequent IIA or treaty revision is likely to build on and go beyond the provisions of the existing IIA. The degree to which other actors comply with IIAs has also increased with growth of the EP's broader powers.

Two qualifications should be made at this stage: firstly, we do not claim that every IIA codifies rights for the EP, or that the EP is always primarily motivated by such aims. There are numerous examples of IIAs which do not affect the balance of power between the Council, Commission and EP. Secondly, we see the EP's recourse to IIAs as just one aspect of the parliamentarisation process. This article is by no means an attempt to fully explain this process in which many factors play a role. For the sake of completeness, we should mention here that - as Hix and Kreppel have

¹⁸ J. Monar, 'Interinstitutional Agreements', n 2 above, 719.

¹⁹ For an early argument in this direction Waelbroeck, and Waelbroeck, 'Les „Déclarations communes” en tant qu'instrument d'un accroissement des compétences du Parlement Européen', in J.-L. Victor and D. Waelbroeck (eds), *Le Parlement européen dans l'évolution institutionnelle* (Editions de l'Université de Bruxelles, 1988), 85.

²⁰ Hummer, 'Interinstitutionelle Vereinbarungen', n 2 above.

²¹ For a clear expression of this finalité politique aspect see EP Doc. PE A4-0028/1994 (Willcox Report), Report on the Incorporation of the Common foreign and security policy CFSP in the EC budget (1994).

shown - the second major informal instrument used by the EP to create facts at the informal level in order to achieve later treaty change are its internal Rules of Procedure.²² The provisions in its Rules of Procedure and those in the IIAs often complement each other; however the analysis of these dynamics would make for an article in its own right and are not the focus of this paper.

We set out to find evidence for our assumptions looking at three areas which link procedural rules of the EU with the larger issue of balancing institutional powers between the EP, the Council and the Commission: (a.) comitology (b.) legislative planning, and (c.) the introduction of precise rules that render the Commission accountable to the EP. We chose these areas because first, according to the treaties the EP has no say in them but always had strong aspirations, and second the Council, Commission and the EP have concluded a large number of IIAs in these areas. According to our assumptions we expect first the EP, having no say in formal treaty reform, to make recourse to its above-mentioned bargaining-chips to convince the Council and the Commission to enter informal IIAs and second to push for the formalisation of the rights gained in these IIAs.²³

3. Formal Powers as bargaining potential

In its efforts to expand its role in decision-making, the EP disposes of three major bargaining chips: firstly, a say on the substance of the budget including the ultimate threat of rejecting the budget as a whole (a power transferred to it in the 1970s by the Member States); secondly, a vote of no-confidence towards the Commission as foreseen in the founding treaties, and - coupled with this - a right to appoint the Commission, as introduced at Maastricht and extended at Amsterdam; and thirdly, with the introduction of the co-decision procedure at Maastricht, also the possibility to delay, amend and even block legislation. We argue that the EP has strategically used these bargaining chips to wrest competencies from the Council and Commission in areas such as comitology where the founding treaties did not envisage any role for it, but which are linked to its ability to act as a fully fledged player in the decision-making process. Having no formal say at IGCs, the EP took recourse to informal IIAs which would confer rights not foreseen in the treaties - thus *inducing institutional change at the sub-constitutional level* - in the hope that these would create facts that future treaty amendments would incorporate and build upon. When analysing how and if the EP used these bargaining chips, the structural bargaining advantages of the EP over the Council in particular should be kept in mind.²⁴ The EP has a much longer time-horizon regarding the adoption (or in this case delay) of measures than governments in the Council: whereas national governments are under pressure to come up with results because of the relatively strong structural link with the electorate, MEPs enjoy more latitude in this regard.

²² S. Hix, 'Constitutional Agenda-Setting', n 6 above; A. Kreppel (2003), 'Necessary but not Sufficient: Understanding the Impact of Treaty Reform on the Internal Development of the European Parliament', *Journal of European Public Policy*, Vol. 10, No. 6, pp. 884-911.

²³ The authors have made a similar argument previously, using the example of EP competencies in CFSP, see A. Maurer, D. Kietz and Chr. Völkel, 'Interinstitutional Agreements in the CFSP: Parliamentarisation through the Back Door?', (2005) 2 *European Foreign Affairs Review* 10.

²⁴ H. Farrell and A. Héritier, 'Formal and Informal Institutions', n 10 above; S. Hix, 'Constitutional Agenda-Setting', n 6 above.

3.1. The EP's budgetary rights

The annual budget, as well as the multi-annual financial perspectives, must be approved by the EP and Council together. The EP has the last say regarding non-compulsory expenditure, a category which comprises almost everything but agriculture; the Council maintains a substantial say as regards obligatory expenditure. The budgetary rights are the EP's most powerful bargaining chip: the EP not only can, but also frequently *has* influenced the substance of policies by allocating means to them or not; it has also blocked or delayed the allocation of means in order to push through its demands in policy areas, which are not necessarily linked to the blocked allocations. Furthermore it has tended to put money into so-called reserves for which the Council or Commission need the approval of the EP for every single allocation instead of disposing of an annual lump sum for e.g. the policy field. The EP has also made use of threat of the worst-case instruments- the rejection of the annual budget.

3.2. Creating Accountability: Ousting and Appointing the Commission

The founding Treaties foresaw the right of the EP to censure the Commission, thereby making the Commission accountable to it. However, the EP had no say over the appointment of the Commission. With the first direct elections of the EP in 1979 the EP informally held a debate and organised a vote of confidence on every incoming Commission based on provisions it introduced to its Rules of Procedure. Over time this procedure was implicitly accepted by the Member States and every Commission waited for the vote before officially taking office. Since then the formalisation of the right to appoint the Commission has always figured as a major demand of the EP. From the EP's perspective, it was the only logical complement to the EP's right to hold a vote of no-confidence. The Maastricht Treaty formalised this practice and aligned the Commission's and the EP's terms of office. It granted the EP the right to be consulted on the Member States governments' choice of the President of the European Commission, and to approve the European Commission. From this point on, the EP talked of the Commission's „double legitimacy“. While before then the Commission had formally been appointed by the Member States governments alone, it now gained its legitimacy also from the approval of the EP. Appointments reflect a dynamic system of checks and balances or, in the language of the European Court of Justice, a system of loyal co-operation as envisioned by Article 10 TEC. Given the EU's hybrid structure of indirect interest representation through its institutions, appointments create a relationship of accountability and responsiveness between the appointing and the appointed institution. Consequently, the right of approval was not only perceived as a formal but highly political act: in combination with the aligned mandates of both institutions the EP perceived its vote on the Commission as the establishment of a genuine legislative agreement²⁵ between the two institutions. This contract was based on the Commission's work programme for the legislative period which the designated candidate for the office for President of the Commission was to present before the EP held its vote. The EP made clear that it would not approve a Commission without a programme: „pas de programme, pas de vote! [...] Ce

²⁵ EP Doc. PE 208.503/A (Rapport Froment-Meurice), Proposition de Resolution sur l'investiture de la Commission (1994), Partie A, 3.

programme doit être un véritable contrat de législature“ which largely increases the Commission’s accountability to the EP.²⁶

Strengthened by these formal rights of appointment and thus armed with a major bargaining chip, the EP again at the informal level complemented its new powers by introducing a provision into its Rules of Procedure which obliges the individual nominees for the College of the Commission to appear before parliamentary committees for hearings prior to the EP’s vote on the Commission.²⁷ Fearing postponement of the EP’s vote and therefore deadlock in the appointment process or, in the worst case, rejection of the entire Commission, the Commissioners followed the procedure. Thus, the new formal and informal mechanisms became a very important element for the strengthening of the Commission’s formal legitimacy and its accountability to the EP. The Amsterdam Treaty built on these developments: both the Commission President and the College as a body were now subject to a parliamentary vote of approval.

3.3. Delaying and rejecting legislation: introduction and re-interpretation of co-decision

Already under the co-operation procedure introduced by the Single European Act (SEA), the EP had the possibility to delay legislation as there were no time limits for deliberation in the first reading. It was in the EP’s strategy to cooperate with the Commission since if the latter supported the EP’s amendments after the second reading, the Council could only change them unanimously which was difficult. The EP only needed to convince one single member state of its proposal to see the draft law adopted with its amendments. The EP even fixed a provision in its Rules of Procedure according to which the Commission was asked to announce its opinion on the EP’s amendments before the final vote in plenary in order to find a position acceptable to both. According to Tsebelis, this made the EP a ‘conditional agenda setter’.²⁸ And indeed there is evidence for the strategic partnership of Commission and EP under the cooperation procedure. If the EP vetoed the legislation after the second reading the Council similarly would need a unanimous vote to adopt it. The introduction of the co-decision procedure by the Treaty of Maastricht, and its adjustment and enhancement by the Treaties of Amsterdam and Nice established the EP as an equal co-legislator alongside the Council. Acts adopted under this procedure need the assent of both legislative chambers, thus providing the EP with a major bargaining chip - the possibility to delay and even reject legislation.²⁹ The EP immediately made extensive use of its rights and especially in the early days of co-decision engaged the Council in lengthy interinstitutional struggles which at times threatened to induce severe gridlock. The procedure introduced at Maastricht still recognised the possibility of the Council overriding a rejection of the EP in conciliation unless the EP finally rejected the draft with a qualified majority of its members. This provision was strongly opposed by

²⁶ EP Doc. PE 208.503/B, n 30 above, 8.

²⁷ S. Hix and C. Lord, ‘The Making of a President: The European the EP and the Confirmation of Jacques Santer as President of the Commission’, (1996) 1 *Government and Opposition* 31, 62-76.

²⁸ G. Tsebelis, ‘The Power of the EP as a Conditional Agenda Setter’, (1994) 1 *American Political Science Review* 88, 128-142.

²⁹ cf. G. Tsebelis and G. Garrett, ‘Agenda-setting, Vetoes and the European Union’s Co-decision Procedure’, (1997) 3 *Journal of Legislative Studies* 3, 74-92; G. Tsebelis and G. Garrett, ‘Legislative Politics in the European Union’, (2000) 1 *European Union Politics* 1, 9-36.

the EP. It indicated its non-acceptance by laying down in its Rules of Procedure a clause which foresaw that each time the Council made use of this provision the EP would bring the legislation down at no matter what political cost. The Council only took recourse to the provision once in the widely cited case of voice telephony. The EP turned this vote into an important precedent by, for the first time, killing a piece of legislation. The Amsterdam treaty in consequence abolished the provision.

4. The EP's role in comitology

Proponents of intergovernmentalism would argue that, according to Article 202 TEC, only the Council has the right to delegate implementation powers and scrutinize the Commission's implementing measures. They quite rightly pose the question - why should Member States give the EP any right in scrutinizing an implementation process which first and foremost aims at finding efficient regulations for legislation applied in Member States? They thus struggle to account for the existence of a large number of IIAs that extend the EP's rights of scrutiny, the revised Comitology Decision of 1999 which gives the EP basic participation rights in comitology and finally the change of Article 202 in the proposed Treaty establishing a Constitution for Europe which would place the EP on an equal footing with the Council in comitology.

Table 1: IIAs in Comitology

Agreement	Date	Bi/trilateral	Scope of application
Plumb-Delors	1988	Bilateral EP-COM	General
First Council Comitology Decision 1987			
Klepsch-Millan	1993	Bilateral EP-COM	Sectoral structural policies
Modus Vivendi	1994	Trilateral EP-COM-Council	General
Samland-Williamson	1996	Bilateral EP-COM	General
Gil Robes-Santer	1999	Bilateral EP-COM	Sectoral (structural policies)
Second Council Comitology Decision 1999			
IIA on implementing Council Decision 1999/468/EC	2000	Bilateral EP-COM	General
Lamfalussy Procedure	2001	Bilateral EP-COM	Sectoral (financial services)
Draft Constitutional Treaty			
Joint Statement concerning the draft for a Council Decision amending the 1999 Comitology Decision	2006	Trilateral EP-COM-Council	General
Third Council Comitology Decision 2006			

4.1 From Rome to Maastricht: the limited influence of the EP

The EP has been sceptical of the practice of comitology ever since the establishment of the first *ad hoc* comitology committees in the early 1960s.³⁰ The decision of the Council to delegate implementation powers to the Commission resulted from the need to quickly adopt and amend specific technical regulations regarding the management of the common market. The Council did not have the resources, expertise or the will to engage in such day-to-day management. However, in order to retain some degree of control over the implementing activities of the Commission, the Council set up committees (later to be denoted comitology committees) made up of national experts, which, to different extents, advised and controlled the Commission in the adoption of implementing measures. Until the mid-1980s there was no clear typology for the different kinds of

³⁰ P. Lintner and B. Vaccari, 'The European Parliament's Right of Scrutiny over Commission Implementing Acts: A Real Parliamentary Control?', (2005) 1 Eipascope, EIPA; G. Haibach, 'Council Decision 1999/468 – A New Comitology for the 21st Century?', (1999) 3 Eipascope, EIPA; W. Hummer, 'Die Reform der „Komitologie“ auf der Agenda der österreichischen EU Präsidentschaft', (1998) 2 Die Union 2/1998.

committees, no standard procedures had been established and the committees were convened on an *ad hoc* basis. The Treaty establishing the European Economic Community, allowed the Council to delegate implementing powers to the Commission; it did not mention of the practice of comitology (ex-Art. 145, later 202).

In order to allow the systematisation of comitology procedures, the Single European Act (SEA) introduced a provision to the Treaty making delegation the norm, rather than the exception, and encouraging the Council to lay down the modalities for systematic delegation. On this basis, the Council adopted a 1987 decision laying down the procedures for the exercise of implementing powers conferred to the Commission (Comitology Decision).³¹

The EP was only consulted on the Decision. The demands, spelled out in its opinion, were to become central long-term objectives of the EP in comitology. In a nutshell, the EP demanded:

- a simplified and more transparent comitology system,
- a clearer separation of executive and legislative tasks (while the legislative branch should set the framework for the delegation of implementing powers to the Commission and have a right to object to sensitive draft implementing measures, the Commission should have a high degree of independence in drawing up these measures and adopting measures of an administrative nature without interference),
- equality of Council and EP in comitology, i.e. equal information rights and scrutiny rights.

The EP was well aware that in comitology it was not only that technical details were adopted: highly sensitive issues with far reaching implications were also regulated. As early as 1983, the EP used its budgetary rights to freeze the funds for the comitology committees, releasing them only after the Commission finalised and reported to the EP on the rationalisation and fund management of the committee system, reducing the number of committees by 132.

Considering the Commission accountable to it, the EP demanded the same right of scrutiny over the Commission's comitology activities as the Council. It advocated a system in which the Commission would be as independent as possible in drawing up draft measures (with the advice of the national officials in the comitology committees). It called for clear criteria to categorize measures according to their 'sensitivity'. While EP and Council should have the right to object to measures of general scope that implement essential aspects of the basic legislation or adapt it (this is often referred to as 'delegated legislation'), the Commission would be free to adopt merely technical measures. In case of objection, the Commission should submit an amended draft or a new legislative proposal.

Consequently, over the years, the EP opposed comitology procedures which heavily restricted the Commission in exercising its implementing powers by giving the comitology committees and the Council strong influence, e.g. to block and revoke measures, while the EP had no influence at all. The EP's call for equality with Council became stronger over time. The more the EP's role in adopting legislation increased through the introduction of the cooperation and co-decision procedure, the stronger was its claim to have a say in scrutinizing the implementation of this legislation.

³¹ Council Decision of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission, 87/373/EEC.

Almost from the first, the Commission supported the EP on the first two of its aims - simplification of the comitology practise and more leeway to the Commission in the implementation of delegation - as both would enhance the Commission's position in comitology. However, only with time and with the growing influence of the EP over the Commission, did it come to support the EP in its third aim: namely its desire for the same scrutiny rights in comitology as the Council enjoyed. This aim partly ran counter to the Commission's own interest in fulfilling its powers of implementation with the least possible amount of supervision from the other actors. Hence, the Commission's position on increasing the EP's information rights (which would burden the Commission with even more obligations) and giving it the right to object to implementing measures (which would mean an additional actor to limit the Commission's implementing powers) was at best ambivalent.

The Council's 1987 Comitology Decision deviated strongly from the Commission's original proposal³² and the EP's resolution³³. Contrary to the aims of creating more transparency, fewer and simpler procedures and an increased role for the EP, the Council decision foresaw three comitology procedures, advisory (subsequently referred to by the numeral I), management (II), regulatory (III), the latter two having sub-variants each. In the advisory and the first management procedure the Commission had to take account of the committee opinion but could nevertheless go ahead with the measure even where the committee opinion was negative. In these procedures, there was no means for the Council to revoke a draft measure for decision thus they were the least restrictive procedures as regards to the Commission's leeway in the exercise of its implementing powers. Subsequently, these were the only procedures acceptable to the EP which was absolutely opposed to the restrictive regulatory committees which gave the Council the strongest degree of control over the Commission. No information or participation rights were foreseen for the EP. The EP, deeply angered about the Council's rejection of all its demands, even challenged the Decision before the ECJ, without success.³⁴

Still without formal rights under the new Comitology Decision, the EP took recourse to informal mechanisms to receive information and monitor the activities in the comitology committees. It entered a bilateral interinstitutional agreement with the Commission. The so-called Plumb-Delors-Agreement of 1988³⁵ set up a procedure whereby the Commission was to supply the EP with draft implementing measures at the same time as it sent them to the relevant comitology committees. The EP was also given the opportunity to respond to matters where it had concerns. The question arises why the Commission agreed to this IIA. The Single European Act had increased the EP's decision making rights with the introduction of the cooperation procedure. Under this procedure, the Commission relied on the EP's cooperation (see section 3.3.); it lent the EP leverage over the Commission for the conclusion of this IIA. However, in view of the failure of the Commission to fully stick to its commitments under the IIA and the ongoing struggle with the Council under the

³² COM (86) 35 final, OJ 86/C 70/6.

³³ OJ 86/C 297/94.

³⁴ For details see W. Hummer, 'Die Reform', n 31 above.

³⁵ SG (88) D/03026; EP-Dok.123.217, in European Parliament, Conference of Committee Chairmen: The Application of the modus vivendi on Comitology: Practical Guidelines for the EP's Committees, 7 July 1995.

new cooperation procedure over which comitology procedure to apply,³⁶ the EP continued to voice its demands³⁷ in the run up to the Maastricht IGC.

The EP's failure to make the Member States meet these demands at the Maastricht IGC can be largely explained by the fact that the EP did not enjoy the bargaining chips of blocking legislation and holding the Commission accountable that it today has recourse to. Since the EP did not have the means to engage in a serious interinstitutional struggle and thereby put pressure on the Council, the latter would not give the EP any substantial say in comitology nor would the Commission fully stick to its commitment under the Plumb-Delors IIA. It was the introduction of the co-decision procedure (and thereby the possibility to delay and fully reject legislation) and the formalisation of the appointment (and thus the possibility of rejecting the Commission which strengthened its accountability towards the EP) at Maastricht that made the EP a fully-fledged player in the EU decision making process.

4.2 From Maastricht to Amsterdam – the period of interinstitutional clashes

4.2.1. The link: Institutional containment through co-legislation and co-delegation

The introduction of the co-decision procedure fundamentally changed the institutional set up of the EU. For the EP, this increase in influence through co-decision was strongly linked to the question of an increased influence in comitology. As the EP now delegated the implementation together with the Council to the Commission, it also claimed the same scrutiny rights as the Council over the implementation process. Here, the EP had a well grounded argument since Article 202 of the Treaty reads „the Council shall [...] confer on the Commission, *in the acts which the Council adopts*, powers for the implementation of the rules“. Legislation adopted under co-decision was now formally adopted by the *Council and the EP together*. It had become unacceptable for the EP that the Council only continued to have the exclusive control over, and a right to revoke implementing measures stemming from legislative acts adopted together with the EP. As a matter of principle, the EP demanded that the implementation of acts that the Council and the EP adopted and delegated *together* should be monitored and if necessary revoked *together*. Yet, these principled arguments were tempered by more practical concerns. The EP simply feared that, in the absence of any parliamentary monitoring, the Council or the Commission could, in the comitology committees, change and undermine provisions which the EP had bargained for in the legislative act during the course of its adoption.

However, the Council claimed that comitology and co-decision were two separate issues.³⁸ Hence, the strengthening of the EP in decision-making in the Maastricht Treaty was not accompanied by an increase in its role in comitology either through the Maastricht Treaty itself or through a change of the 1987 decision or an IIA (as proposed by the Commission but rejected by the Council). On several occasions the EP repeated its claim that „pursuant to Article 145 of the EC Treaty, the

³⁶ EP resolution OJ 1991 C19/273. It criticised the Council for frequently using the restrictive regulatory procedure.

³⁷ EP resolution OJ 1990 C231/97. It wanted to be able to object to implementation measures within two months and demand the submission of the measure to the normal legislative procedure.

³⁸ R. Corbett et al, *The European Parliament* (John Harper, 2006), 289; Council Doc. SN 1821/95, Report on the functioning of the Treaty on European Union, 14 March 1995.

provisions of the Decision of 13 July 1987 apply solely to acts of the Council and do not apply to acts of the Council and Parliament, in particular decision taken pursuant to Article 189b“.³⁹ In the absence of a Treaty change it requested the Commission and the Council to come up with both a new Comitology Decision and an IIA. In both cases the institutions refused to meet the EP’s demands.⁴⁰ The emerging ‘structural problem’ led to what Hummer calls the „eruption of severe interinstitutional conflict”.⁴¹

4.2.2. The breakthrough: the Modus Vivendi

Using its increased bargaining potential from its role as a co-legislator, and against the backdrop of different understandings of the EP’s role in comitology, the EP unleashed major interinstitutional clashes and long delays in the adoption of legislation under the co-decision procedure. Comitology issues were at the heart of most conflicts in the conciliation committee which stood at the end of the co-decision procedure: since the EP had no right to monitor decision-making on implementing measures in the comitology committees, it tried to limit the Council’s influence in comitology by laying down in each piece of draft legislation that only the advisory or first management procedure (I and IIa) should be applied. MEPs negotiating for the EP side were sent into the conciliation committee with the order to at all costs avoid the second management and regulatory procedures (IIb, IIIa, b). Its determination to avoid the application of the regulatory procedure was shown in mid-1994 when it rejected for the first time a piece of legislation after long interinstitutional struggle which was substantially about differing views on the comitology procedure to be included in the legislation.⁴²

Having successfully demonstrated its willingness to resort to the ‘worst case’ instrument of rejecting legislation, the EP linked the difficult negotiations over the adoption of the Socrates programme at the end of 1994 to the conclusion⁴³ of an IIA, the so-called *Modus Vivendi*.⁴⁴ Facing permanent and severe legislative gridlock and further stalemate, all actors involved realised the need for a settlement of the issue and thus decided to enter the agreement.⁴⁵ This agreement was supposed to call a „temporary truce”⁴⁶ and put a revision of the comitology procedures onto the agenda of the Amsterdam IGC. It gave the EP the right to:

- receive all draft implementing measures and timetables from the Commission,
- give its opinion, which had to be taken into consideration by the Commission and be informed to what extent it was taken into account,

³⁹ EP resolution on questions of comitology relating to the entry into force of the TEU, OJ 1994 C 20/176.

⁴⁰ Parliament however achieved the sectoral Klepsch-Millan-Agreement agreement in 1993, which obliged the Commission to keep the EP informed about the implementation measures in the field of the structural policies, OJC 255, 1993, 19.

⁴¹ Hummer, ‘Die Reform’, n 31 above, 83.

⁴² Corbett et al, ‘The European Parliament’, n 39 above; EP Doc. PE 230.998, Activity Report of the Parliament Delegations to the Conciliation Committee from 1 November 1993 to 30 April 1999; Com Doc. SEC (1995) 731, Report on the Operation of the Treaty of the European Union, 10.4. 1995.

⁴³ EP Doc. PE 230.998, n 43 above.

⁴⁴ OJ 1996 C 102/1.

⁴⁵ COM Doc. SEC (1995) 731, n 43 above.

⁴⁶ Corbett et al, The European Parliament, n 39 above, 289.

- be briefed by the Commission in cases where an implementing measure was referred back to the Council, and to give its opinion on the matter to the Council who then would *try* to find an appropriate solution.

These provisions were a major break with the established dominance of the Council in comitology. They considerably enhanced the EP's information rights and to a lesser extent also its participation in the control of the Commission.⁴⁷ This agreement clearly shows how the EP used the bargaining potential which it gained from the introduction of the co-decision procedure by threatening to bring down legislation if its demands for a minimum of influence on comitology were not met at all. The *Modus Vivendi* was not only the most far-reaching IIA on comitology, but also the first trilateral one, and therefore a step towards institutionalising the EP's say in comitology. Furthermore, the *provision in the IIA to review comitology issues at the upcoming IGC* was a major success for the EP which further supports our theoretical assumptions on the *strategic use of IIAs to indirectly set the agenda for future treaty reform*. It has to be borne in mind that the IIA only applied to acts adopted under the co-decision procedure and that it was still a long way from placing the EP on an equal footing with the Council. Struggles were bound to -and indeed did- continue where the Council wanted to apply the IIb and IIIa,b comitology procedures. In addition, the Commission did not always fulfil its information obligations under the agreement. The EP in all its following resolutions underlined how the *Modus Vivendi* was a provisional agreement upon which to build, and that a „definitive and fully democratic solution to these problems must be found at the 1996 IGC“.⁴⁸

4.3. The Amsterdam IGC: postponing comitology

In its resolutions in the lead up to the IGC the EP repeated all its long-standing demands already voiced a decade ago. It asked the Council to simplify the comitology procedures, to abolish all but the advisory committees and to finally put the EP on an equal footing with the Council by changing the wording of Article 202 of the Treaty and amend the 1987 Comitology Decision accordingly. It sought to fix the right of both institutions to delegate implementation powers to the Commission, keep both institutions equally informed and give both of them the right to revoke and object to draft measures.⁴⁹

The Commission took up the EP's proposals for a change of the Treaty according to which both EP and Council would formally have the right to delegate implementation powers for acts adopted, albeit only for acts adopted under co-decision. Furthermore it proposed to limit the kinds of comitology committees to three- one of each procedure. Council and EP would share the right to object to measures.⁵⁰

The Reflection Group, mostly made up of representatives of the foreign ministries of Member States, came up with several different proposals reflecting strongly diverging positions of Member States.⁵¹ There was a strong consensus among most Member States

⁴⁷ G. Haibach, 'Council Decision 1999/468', n 31 above.

⁴⁸ EP doc. A4-003/95, Report on the Modus Vivendi (1995).

⁴⁹ EP Doc., IGC Briefing No. 21 on Comitology, first update 17th March 1997.

⁵⁰ Amsterdam IGC Doc. CONF/3900/97 'Reinforcing the Political Union and Preparing for Enlargement'.

⁵¹ EP Doc., IGC Briefing, n 50 above; G. Haibach, 'Council Decision 1999/468', n 31 above.

that the overly complex and opaque comitology system had to be simplified but reluctance to deal with the issue at the IGC as a change of secondary law would suffice. Thus, a declaration was annexed to the final act of the Amsterdam Treaty which calls on the Commission to propose a revision of the 1987 Comitology decision latest at the end of 1998.

4.4. The 1999 Comitology decision

4.4.1. The EP's demands

The EP made proposals on the modification of the Comitology Decision as early as 1997; soon after it became clear the IGC would postpone the matter and before the Commission had even come up with a draft proposal.⁵² Disappointed with the non-action of the IGC it was determined to see its position realised at least in the new Comitology Decision. It threatened the Council and Commission outright, stating that it „will consider the appropriateness of placing comitology funding in reserve in the 1999 budget if the modifications of the Council decision fails to take due account of parliament's positions“.

It reiterated all its demands:

- more transparency through clear Rules of Procedure for all committees
- more leeway for the Commission through the simplification of procedures and a reduction of the number of committees,
- the elimination of the regulatory procedure,
- information rights for the EP irrespective of its involvement in the drawing up of the legislation,
- a clear distinction between substantive legislation and implementing measures as there have been cases substantive legislation was adopted as an implementing measure in order to avoid the full legislative procedure,
- the power to scrutinize and object to implementing measures based on an *abuse either of delegated power or of the content* of the measure in case of co-decision legislation,

The next treaty reform should finally authorise both EP and Council to delegate implementation powers through the reformulation of Article 202.

4.4.2 The Commission's proposal⁵³ and the EP's reaction

The Commission, as in its position at the IGC, proposed to reduce the number of committee procedures to three. It also proposed criteria for what should be dealt with in which committees in order to limit the Council's recourse to the regulatory procedure. It fell short of the EP's demands in that it fixed information rights for the EP only for measures stemming from co-decision acts. The Council kept its call-back right in the new management procedure. The proposal did not envisage this right for the EP. What is more, it foresaw a general call-back right neither for the Council nor the EP in the new regulatory procedure. Rather, the Commission would submit a

⁵² EP Doc. PE 225.917a/fin, (Aglietta I report), Report on the modification of the Council Decision of 13 July 1987 (1997).

⁵³ OJ 1998 C 279/5.

wholly new legislative proposal if there was no qualified majority for the implementing measure in the comitology committee. Parliamentary scrutiny thus „was subject to the views of the national civil servants”⁵⁴ – something which the EP rejected outright.⁵⁵

The EP, which formally had to be consulted on the proposal, finally proposed a general ‘right for scrutiny’ according to which the Council and the EP in case of co-decision acts, and the Council alone for other acts, could object to a measure by challenging its legality, i.e. if the Commission formally exceeded its implementing powers. The Commission would subsequently submit a new proposal, or amend or withdraw the measure. The EP defined a breach of the implementation powers to include cases where the Commission modified, updated or supplemented *essential* aspects of the basic act. Thus both legislative branches could formally contest the Commission for exceeding its implementing powers, but not if they simply disliked the substance of the measure. It deleted the Council’s call-back right in the management procedure.

4.4.3. The Council’s Decision

This Act is the current basis of comitology practice.⁵⁶ It reduces the number of committees to one of each type and establishes the criteria for application of committee types as proposed by the Commission and the EP. However, the decision fails to place the EP on an equal footing with the Council. Not only was the regulatory procedure not abolished but the Council keeps the right to object to and revoke measures in the regulatory and the management procedure for any reason. The EP’s role remains restricted to the right for scrutiny of the legality of a measure, i.e. if the Commission formally breaches its implementation powers, which the EP had originally proposed for both Council and EP. The EP’s information rights are limited to measures stemming from co-decision acts.

The EP accepted this decision as it puts into place at least a basic form of parliamentary scrutiny for the implementation of co-decision acts, confirms most information rights laid down in the IIAs and at the same time renders procedures more transparent and reduces the influence of the Council.⁵⁷ The new criteria in itself are a success for the EP and Commission because the Council now has to base its choice of committee procedure on clear guidelines and can be – and indeed was already challenged – by the Commission before the ECJ. These criteria ease the traditional struggle between the EP and Council as there is less leeway in the choice of procedure. Also, this decision is a secondary law act which thus formalises the so far informal procedures laid down in the IIAs and makes the EP’s rights enforceable before the ECJ. As the negotiators from the EP’s side put it: The final Decision did not yet meet the EP’s aspirations of being on an equal footing with the Council, but was the best result that could be obtained in the negotiations and it constituted a real step forward compared to the First Comitology Decision of 1987.⁵⁸

⁵⁴ G. Haibach, ‘Council Decision 1999/468’, n 31 above, 13.

⁵⁵ EP Doc. PE 229.449/fin (Aglietta II Report), Draft legislative Resolution embodying Parliament’s opinion [...] (1998).

⁵⁶ Council Decision of 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ 1999 L 184/23.

⁵⁷ EP Doc., Resolution on the agreement between the European the EP and the Commission on procedures for implementing Council Decision 1999/468/EC, OJ 2000 C339/279.

⁵⁸ Interview with MEP Richard Corbett on 31.05.2006.

Despite the drawbacks, the Council based the act to a larger extent on the Commission's and the EP's opinion than it had in 1987. We have already shown that the Council, in order to end or at least ease the institutional struggle with the EP during the adoption of legislation under the co-decision procedure, agreed to the *Modus Vivendi* which already gives the EP a non-binding consultation right and extensive information rights. It was clear that this was a „temporary truce”, not designed as a long term solution because it wouldn't end the key problem: namely that the EP pressed to be equal with the Council in delegating and scrutinizing implementation. Thus the Council in this Comitology Decision could not totally ignore the EP's position or fall much behind of what had been agreed in previous IIAs. Ignoring the EP would have led to major interinstitutional clashes, which were the very reason why this Decision was amended in the first place.

The practical application of the EP's right of scrutiny arising from the Council Decision, was laid down in another bi-lateral IIA between the EP and the Commission.⁵⁹ It goes a step further than the Decision in extending the EP's information rights. Whereas the Decision limits the draft implementing measures to be forwarded to those stemming from acts adopted under co-decision, the IIA envisages a forwarding of other implementing measures if the EP asks for it. What is more, the parliamentary resolution to which the IIA is annexed, refers to the EP's amended Rules of Procedure (rule 81) in which the EP claims the right to challenge implementing measures not only if the Commission formally exceeds its implementing powers but also – and most significantly – if the EP does not agree with the content (!) of measures.

4.5. The Constitutional Treaty: Culmination of the EP's pursuit of scrutiny rights in comitology

Looking back at the slow but gradual increase in power of the EP in comitology and taking into consideration the gradual extension of co-decision to more and more policy fields, it is clear that the 1999 decision would not be the end of the story. In 2002, the Commission put forward a proposal for an amendment of the 1999 Council decision⁶⁰ as one measure proposed in its 2001 White Paper on European Governance. The White Paper aimed at establishing more democratic forms of governance in the EU and forwarded a set of proposals focussing *inter alia* on comitology reform.

The proposal was not meant to replace the existing Decision but to introduce provisions applying only to the implementation of co-decision legislation. The reasoning of the Commission was twofold. Firstly, the Commission argued for the first time clearly and openly that the EP and the Council should be equal in delegating and scrutinizing the implementation of legislation. Secondly, it introduced the concept of 'delegated legislation'. If the draft measures concerned less important, administrative aspects, the advisory procedure would apply and neither Council nor EP could object to the measures. If, however, draft measures were of general scope, implementing essential aspects of the legislation, they could be scrutinized and objected to by both Council and EP under a revised regulatory procedure. If objected to, the Commission would either have to withdraw the

⁵⁹ OJ 2000 C 339/269.

⁶⁰ COM Doc. (2002) 719, Bulletin /2002/12/ 1.1.13.

measure, present a new legislative proposal, or could adopt it without changes.⁶¹ The EP welcomed the clear distinction of implementation measures and the fact that for the first time it could object to measures based on their content. However, it did not agree with the fact, that despite opposition of the Council of the EP, the Commission could go ahead adopting a measure. Getting the ‘the last word’ on implementing measures might help to explain why the Commission, so shortly after the last Comitology Decision, was so keen to come up with a new proposal. The Council, which was opposed to the proposal, failed to act.

However, there were a number of legislative acts where comitology became very contentious again and in the absence of an agreement, the EP started to insert clauses that limited the delegation of implementing power to the Commission for a certain period of time. This in turn made laborious renewal procedures necessary. As a result, the three institutions took up negotiations again at the end of 2005. These finally led to an interinstitutional agreement in the form of a joint declaration of the Council, Commission and EP in June 2006. In this declaration they agreed on an amendment to the 1999 Comitology Decision.⁶² The amendment will introduce one new comitology procedure, the so called ‘regulatory procedure with scrutiny’. It is based on the regulatory procedure proposed in 2002 by the Commission and will apply to ‘quasi-legislative’ implementation measures of general scope as stemming from co-decision acts.⁶³ An important fact is that these criteria are legally binding and enforceable before the ECJ. Under this procedure the EP and the Council can object to the measures based on arguments of content and legality. If objected to, the Commission either has to present an amended draft or a new legislative procedure. The proposed provision that the Commission could go ahead with the measure despite objections by the legislative institutions was abandoned. Thus, the Commission’s attempt to get the ‘last word’ on implementing measures failed. In addition to its new scrutiny rights, the Decision afforded the EP an upgraded information system on comitology procedures and obliged the Commission to provide documents in all of the EP’s official languages. Also, the amended Comitology Decision will retroactively apply to legislation already in force. In return for this increase in power, the EP agreed to refrain from taking recourse to time limits for the delegation of implementation powers and from the practise of blocking comitology funds. The funds for comitology committees had been frozen throughout the negotiations to increase pressure on the Council and the Commission and to achieve an agreement.⁶⁴

With the new agreement, for the first time, the EP is allowed to object formally to a large number of significant implementing measures based on their content. This is a large step forward in terms of the democratic accountability of such measures. However, there are also a number of drawbacks. The existing three comitology procedures - including the exclusive rights of the Council - will continue to exist. The new procedure applies only to measures stemming from co-decision acts and

⁶¹ OJ 2004 C 76E/82, COM (2004) 324 final.

⁶² At the time of writing, the draft amended Council Decision had been agreed upon by all three institutions in the Joint Statement, formal adoption by the Council was expected for autumn 2006.

⁶³ The provision that all other ‘administrative’ measures fall under the advisory procedures, foreseen in the 2002 proposal, has not been taken up.

⁶⁴ Letter from the EP negotiators Joseph Daul and Richard Corbett to the President of the European Parliament, Josep Borrell from 17.05.2006.

only to measures of general scope. It also envisages a number of very cumbersome provisions regarding the procedural details of comitology, for example those relating to cases where the comitology committee does not agree with the Commission's draft, or with regard to the large range of legal and substantial grounds on which the EP and Council can object to measures.⁶⁵ The agreement certainly is not an example of 'better lawmaking' in the EU. The final agreement left the path of the Commission's original proposal which would significantly simplified comitology procedures.

This agreement is seen as a temporary one until the Constitutional Treaty comes into force. The Draft Constitutional Treaty (DCT), too, takes up the distinction of delegated legislation and administrative measures. It distinguishes between „delegated regulations” (Art. I-36) and „implementing acts” (Art. I-37) stemming from European Laws and Framework Laws adopted under co-decision. But above all, the DCT puts the EP and the Council on an equal footing by substantially amending Article 202 TEC. Article I-37 of the DCT would abandon the old working, and clarifies that future European Framework Laws and Laws, which are adopted by both legislative branches together, can delegate the implementation of legislation to the Commission. In sum, the example of comitology supports our original assumptions in many ways: we have shown that the process of increasing parliamentary participation in comitology was incremental. As expected from our theoretical assumption, every IIA in comitology built on the one preceding it, always taking parliamentary involvement one step further. Each IIA thereby established facts or 'paths' of institutional change, which are difficult to reverse; these eventually lead to a formalisation of the EP's rights. We have shown how the EP strategically included provisions in IIAs, which would foresee a revision of formal comitology procedures at a later point as in the case of the *Modus Vivendi*. Looking at the changes foreseen by the DCT, IIAs were clearly instrumental in bringing about treaty reform in the case of comitology.

We also found evidence for our assumption about how these path dependencies come into existence; we showed that the EP extensively used its formal bargaining chips in order to cajole the institutions into the IIAs. Co-decision made it a co-legislator equal with the Council. The interinstitutional conflict arising from the bargaining about which comitology procedure to include in legislation adopted under co-decision and the resulting legislative stalemate were the main reasons why the Council provided the EP with more and more scrutiny powers over comitology - first through IIAs which were then taken up in amendments to the Council Comitology Decisions. The EP's growing influence in comitology is a clear function of its growing influence in decision-making. In addition, the EP frequently used its power to freeze the funds for comitology committees to put extra pressure on Council and Commission. The 1999 Comitology Decision and also the DCT can be seen as the result of the adaptation of interinstitutional relations after the balance between the three major institutions was fundamentally changed with the introduction of the co-decision procedure.

⁶⁵ EP doc. A6-0237/2006 (Corbett III Report), Report on the conclusion of an interinstitutional agreement (2006), 8.

However, the above analysis of the first (1987) and the second (1999) Comitology Decisions, and the changes envisaged by the DCT has also shown that the European Parliament was not the only winner in this game: the European Commission found a number of its own fundamental demands implemented with this Decision. The Commission's leeway *vis-à-vis* the Council is strengthened in particular by the establishment of clear criteria laying down the comitology procedure to be applied in each case as well as by the general reduction of the number of procedures. The gradual move towards a clearer separation of executive and legislative tasks in implementing legislation also boosts the position of the Commission: whilst the legislative branch sets the framework for the delegation of implementing powers to the Commission and has a right to object to sensitive draft implementing measures, the Commission has a high degree of independence in drawing up and adopting measures of an administrative nature. The Commission alone did not have the means to assert its demands *vis-à-vis* the Council. It was the European Parliament which supported the Commission's objectives, and which enjoyed the leverage to win concessions from the Council. Yet Parliament's intervention has not uniformly favoured the Commission. As noted above, Parliament's demands have been twofold: it has sought to expand the Commission's scope for manoeuvre; however it has also pushed for an extension of parliamentary control. Insofar as the Parliament has been successful in rendering the Commission more accountable, the latter can be seen to have lost out.

5. The EP in legislative planning

The EP's role in legislative planning is a double-edged sword. On the one hand the right of initiative is a traditional right of fully fledged parliaments which the EP - as the only directly legitimised institution in the EU - has always wanted to become. On the other hand the EP knew that if it was granted this right, the Council as the other branch of the legislature would demand it, too, which would interfere with the Commission's hybrid role as the sole initiator of EC legislation (Art. 211 TEC) within the EU's system and severely strengthen the intergovernmental character of the Union. Thus the EP never demanded the right. However, the EP's growing involvement in decision making after the introduction of the cooperation procedure through the SEA and co-decision at Maastricht increased the need to efficiently plan its legislative activities in coordination with the Council and Commission and to rationalise intra-parliamentary proceedings. Thus we would expect it to try and gain at least informally some influence in legislative planning without questioning the formal right of initiative of the Commission.

In practice, the EP has since 1988 been informally involved in setting the legislative agenda by establishing an annual legislative programme - on which all the legislative proposals of the upcoming year are based - together with the Commission. The legislative programme as such is not mentioned in the Treaties. Due to the increased involvement the EP in decision making and its need

to plan its workload, Commission and the EP agreed on the introduction of an annual procedure for the adoption of a legislative programme.⁶⁶

The details of the procedure to draw up the legislative programme were regulated in the EP's Rules of Procedure.⁶⁷ In consultation with the EP, the Commission was to draw up a rough timetable for legislation to be initiated in the following year and which the EP approved and considered on a quarterly basis. It gave the EP the opportunity to press for the inclusion or exclusion of items and agree with the Commission on annual priorities. There were several adjustments over the years as result of the EP's increased workload and the need for coordination under co-decision. In 1993, for example, directly after the introduction of co-decision and in light of the EP's criticism of the Commission's slowness in drawing up the programme, both institutions agreed on an interinstitutional declaration, a *de facto* IIA, which among other things committed the Commission to streamline legislative planning procedures and come up with the programme in a more speedy fashion i.e. in October every year. According to Rule 57 of the EP's Rules of Procedure, the President of the Commission presented the annual programme for the following year to the parliamentary plenary in October, which then adopted a resolution approving or rejecting it before the end of the year.

This process was tightly linked to the schedule of adopting the annual budget which is naturally tied to the annual legislative priorities. With the further progress of parliamentarisation through the Maastricht Treaty, the EP even tried to turn the legislative programme into a device for the joint scrutiny of the EU's legislative activity through the national parliaments and itself, by giving parliaments the possibility to comment on the Commission draft version submitted to the EP and through the discussion of the programme and its implementation at the biannual COSAC meetings (Conference of the national EU committees).⁶⁸ This was never put into place due to the reluctance of many national parliaments to deal with detailed EU legislation. However, in some areas, especially those covered by the EP's budget committee and the committee on civil liberties, justice and home affairs, there is still a tendency to scrutinise Commission proposals at a very early stage based on the legislative programme. This is carried out in joint meetings with national parliamentary committees.⁶⁹

Yet, in general, the procedure between the EP and the Commission had major shortcomings. According to the EP the timetable did not provide for intense discussion among the institutions on upcoming political priorities. It was „a rather dull exercise. There are no distinctions between long term political priorities and the technical adjustments. Strategic objectives are mixed with annual revisions and updating”.⁷⁰ The programmes presented to the EP for 2001 and 2002 have had major deficiencies. The 2001 programme lacked justifications and details for 500 (!) proposed legal and non-legal acts. Not even half of the overly ambitious programme was implemented in 2001, whilst many acts initiated in that year were not part of the programme at all. The 2002 programme was

⁶⁶ EP Doc A5-0046/2002 fin., Report on the Commissions Legislative and Work Programme (2002).

⁶⁷ Corbett et al, The European Parliament, n 39 above.

⁶⁸ EP Doc. 218548, Durchführungsbilanz des Cravinho Berichts vom 24.09. 1991.

⁶⁹ A. Maurer, Parlamentarische Demokratie in der Europäischen Union. Der Beitrag des Europäischen Parlaments und der nationalen Parlamente (Nomos, 2002).

⁷⁰ EP Doc. A5-0046/2002 fin, n 80 above, 10 (2002).

presented at a very late stage making parliamentary opinion-forming difficult. It also lacked concrete legislative proposals. These shortcomings cumulated in a resolution with the EP stating that it refuses to regard the submitted programme as a legislative programme.⁷¹ The reasoning presented in this resolution was clearly connected to the EP's interpretation of its powers in the legislative process: The introduction of the co-decision procedure and its application to more and more policy fields immensely increased the EP's involvement in decision-making and its interaction with the other institutions. It thereby intensified the need for efficient interparliamentary work management and legislative planning which is only possible on the basis of a realistic, implementable, detailed, and transparent work programme. Thus, in reaction to these problems, the EP and Commission negotiated a new procedure and timetable in an IIA which was annexed to the EP's Rules of Procedure.⁷² It is supposed to make a clearer distinction between strategies, legislation and policies. Amongst other things it provides for:

- a „State of the Union” debate between all three major institutions at the beginning of the preceding year based on the Commission's annual policy strategy which will also form the basis for the annual budget proposal,
- the involvement of the parliamentary committees, which shall engage in bilateral dialogue with relevant Commissioners on priorities in their respective fields,
- a stock-taking by the Committee chairmen and the Commission's vice president on envisaged proposals in each of the fields to be included in the programme later that year,
- the presentation to plenary of a comprehensive programme in November by the President of the Commission explaining political priorities and giving detailed lists of acts to be initiated the following indicating legal base, budgetary implications and the like. The programme has to be submitted at least ten days prior to this session in order to allow for debate in plenary. At the same time, the current programme is to be assessed,
- follow up procedures of the current programme including a final assessment at the same time of presentation of the new programme.

These procedures allow for sufficient and timely debate and parliamentary involvement right from the beginning of the elaboration of the programme. Especially the early and regular involvement of the EP's committees furthers a smooth legislative process.

This agreement came at a point where the Commission acted in a way which was far more accountable to the EP than when the procedure was first introduced in 1988 due to the establishment of the EP as a strong player in decision-making. The EP by then disposed of multiple ways to put pressure on the Commission such as the budget, the right to delay or reject legislation brought forward by the Commission and in the worst case also the right to censure the Commission. The EP had also proved in recent history that it, if forced to by the non-cooperation of the Commission, was determined to make use of all these. The right and the necessity of the EP to be considered in legislative planning were thus not put into question by the Commission. Notable is the fact that, again, the IIA was preceded by a high degree of interinstitutional conflict with the EP declaring that it would not regard the 2001 programme as a legislative programme. This supports our argument that the potential for conflict is a pre-condition for the conclusion of an

⁷¹ EP Doc PE 313.266, Resolution on the Commission's legislative programme (2002).

⁷² EP Doc. P5_TA(2002)0101, Resolution, Amendment of Rule 57 of the EP's Rules of Procedure (2002).

IIA as we have also seen in the case of the conclusion of the *Modus Vivendi* in comitology which was preceded by serious interinstitutional conflict and the ultimate rejection of legislation over comitology issues.

6. Politics of Accountability: Framework Agreements between the EP and Commission

The codes of conduct and the framework agreements on the relations between the European Parliament and the Commission are four consecutive, bilateral IIAs between the EP and Commission. They lay down the general framework for relations between the two institutions regarding all aspects of the decision-making process such as implementing measures, legislative planning, information management and much more. They all codify mostly information rights for the EP or, in other words, lay down the Commission's obligations towards the EP. They stress that these agreements are adopted „to strengthen the responsibility and legitimacy of the Commission”.⁷³

Table 2: IIAs governing EP-COM relations

Agreement	Date	Character
Code of Conduct	1990	Bilateral EP-COM
Code of Conduct	1995	Bilateral EP-COM
Framework Agreement	2000	Bilateral EP-COM
Framework Agreement	2005	Bilateral EP-COM

The first code of conduct (1990) established the initial interinstitutional contacts and was of a rather procedural nature. In contrast, the second code of conduct (1995)⁷⁴ and in particular the framework agreements (2000/2005) are of political nature and extend the EP's influence beyond treaty provisions. The evolution of these agreements over the period of 15 years mirrors the parliamentarisation process of the EU and depicts clearly the increased importance of the EP in the decision-making process.⁷⁵ In contrast to the 1990 code of conduct, the 1995 code shows how the EP's role has changed due to the introduction and implementation of the co-decision procedure. The code was a result of the increasing linkage between the EP and Commission due to co-decision. In order to take full advantage of its new co-decision rights and also to maximise its influence in areas not covered by co-decision, the EP needed a maximum of information and support from the Commission. Hence, the agreement, for example, obliges the Commission to „keep the EP informed on an absolute equal footing with the Council“ concerning consultation documents, legislative proposals, international agreements and much more. It furthermore obliges

⁷³ Framework Agreement on the Relations Between the Commission and the Parliament (2000), 1, OJ 2001 C 121.

⁷⁴ OJ 1995 C 089/69.

⁷⁵ Jacobs, 'A New Interinstitutional Balance? The European the EP's Relations with the Commission and the Council?', in A. Maurer and D. Nickel (eds), *Das Europäische Parlament: Supranationalität, Repräsentation und Legitimation* (Nomos 2005).

the Commission to function as an interlocutor between Council and the EP, e.g. reminding the Council not to take any decisions before the EP gave its opinion after its first reading and informing the EP about the decisions taken in the working bodies of the Council and the like. It also regulates the attendance of Commission representatives at committee meetings, the obligation to appear in the plenary as well as to answer parliamentary questions etc. The document establishes a clear line of argument according to which the Commission is obliged to provide the EP with all this information because the EP's approval of the Commission exemplifies the relationship of trust which should bind the two institutions throughout the parliamentary term. This is a certain result and a reflection of the EP's increased powers in the approval of the Commission since Maastricht. Like the two subsequent agreements, the Code of conduct was agreed upon with an incoming Commission. Negotiations began already during the investiture process and the EP thus profited from the Commission's 'dependent' position.

The 2000 framework agreement⁷⁶ builds on the code of conduct but takes the EP's rights further in many aspects. It explicitly tries to extend the Commission's accountability to the EP even further. It contains provisions concerning the extension of constructive dialogue and political cooperation, the improvement of the flow of information and the consultation rights the European the EP on Commission administrative reforms. The institutions also agree on a number of specific implementing measures (i) on the legislative process, (ii) on international agreements and enlargement, and (iii) on the transmission of confidential Commission documents and information. Thus the framework agreement does not only flesh out the relationship between the two institutions on a procedural level according to their powers laid out in the Treaty, but it also gives the EP powers which go beyond the Treaty provisions. Its section on 'political responsibility' is a good example of the political nature of the agreement. This was introduced in reaction to the most recent experience with the just-about impeached Santer Commission. The EP asks each Commissioner to take political responsibility for action in the field of which he or she is in charge. Furthermore, the EP reserves the right to express a lack of confidence in a Commissioner and subsequently to ask the President of the Commission to seriously consider whether he should request that Member to resign. Such a right of the EP has no basis in the Treaty. Although consecutive treaty amendments have seen the role of the EP in the appointment of the executive strengthened, this provision is by no means foreseen in the treaty. The overall assessment of this agreement is that it goes very far in strengthening the scrutiny of the EP over the Commission, in tying the Commission to the EP and rendering the Commission, its President and its individual members accountable to it.⁷⁷

The new framework agreement of 2005⁷⁸ goes even further and introduces a section concerning the possible conflicts of interest of Commissioners and a procedure to be followed if a Commissioner is replaced during the Commission's term in office. These new provisions can be seen as consequences of the EP's dissatisfaction with single Commissioners which emerged at the 2004 investiture hearings.⁷⁹

⁷⁶ OJ 2001 C 121.

⁷⁷ cf. Jacobs, *A New Institutional Balance?*, n 76 above.

⁷⁸ EP Doc, resolution P6_TA-PROV(2005)0194 based on Report A6-0147/2005.

⁷⁹ For an analysis of the 2004 investiture, cf. Nickel, *'Das Europäische Parlament als rekrutierendes Organ'*, n 89 above.

Again, the question is: Why did the Commission enter the agreements although they establish so many obligations towards the EP? The 2000 document has to be understood against the background of the increased accountability and responsiveness of the Commission to the EP. In general the EP's role in the appointment and thus its political control over the Commission had increased largely with the new formal and informal mechanisms introduced since Maastricht to hold the Commission accountable. In particular, however, the resignation of the Santer Commission in anticipation of a first successful impeachment procedure in the history of the EU left the EP strengthened in relation to the newly elected Prodi Commission. The EP used the window of opportunity to very quickly and successfully tie the weakened Prodi Commission down on the most controversial provisions of the agreement before it even settled properly in office. In 2005 the EP was in a similarly strong position after having successfully threatened not to approve the Barroso Commission. Barroso subsequently changed several designated Commissioners whom the EP did not consider appropriate for the post of Commissioner - another illustration of our argument that the EP used its bargaining chips to create interinstitutional conflict. In this case the link to the IIA is not as direct, since it was finalised a few months after the investiture. All the same, the negotiations on the IIA began earlier in view of the new legislative term. However, by forcing the Commission to back down and to push Member States to withdraw the rejected Commissioners-designate in what was one of the major power struggles between the two institutions in the history of the Union, the Commission's President admitted the EP's right to influence the individual composition of the Commission, which was then fixed in the new IIA.

7. Conclusions - IIAs as path-makers for institutional change

We can agree with Waldemar Hummer⁸⁰ that, in the fields under scrutiny in this paper, IIAs were instrumental in gradually strengthening the EP. The IIAs examined here do not simply implement Treaty provisions or lay down practical rules of cooperation. They provide the EP with powers not foreseen in the EU-Treaties. And in some cases they provide the basis for future Treaty reform. The analysis of the evolution of the EP's rights in comitology, legislative planning and in holding the Commission to account provides strong evidence for both our main assumptions. First, there is clear evidence that the EP uses its formal bargaining powers (stemming from the possibility to delay and reject legislation, appoint and censure the Commission and its budgetary rights) to wrest concessions from the other two main players in decision-making. In line with previous research⁸¹ we find that the common perception of interinstitutional conflict is the precondition for the conclusion of IIAs which provide the EP with additional powers not foreseen in the Treaties. In the case of comitology this was the result of situations of legislative gridlock under co-decision and was often reinforced by the freezing of comitology funds, for example in the case of *Modus Vivendi* or the most recent agreement on comitology. The slow but gradual increase in the EP's influence in comitology is a clear function of its increased power in decision-making. For the other

⁸⁰ Hummer, 'Interinstitutionelle Vereinbarungen', n 2 above.

⁸¹ Monar, 'Interinstitutional Agreements', n 2 above; Maurer, Kietz and Völkel, 'Interinstitutional Agreements in the CFSP' n 24 above.

two areas – legislative planning and IIAs governing the relationships between Commission and EP – the reason for conflict stemmed from the EP's increased power to hold the Commission accountable. In all three case studies the reason for the Council and the Commission to enter IIAs with the EP was the necessity to end or at least ease the situation of interinstitutional conflict. In general terms, the period between the first rejection of a legislative proposal under the co-decision procedure in 1994 and the demission of the Santer Commission in 1999 proved crucial in the strengthening of the EP's bargaining power. In the negotiations of the framework agreement in 2000 and 2005 or when the EP pressed for amendments to the Comitology Decision, the EP was in a completely different negotiation position than at the end of the 1980s - its bargaining potential had largely increased.

There is also evidence for our second argument: In line with historical institutionalist explanations of constitutional change in the EU which we set out in the first part of this paper, IIAs can be instrumental in Treaty reform. There is strong evidence for path dependency in IIAs, for example, all four consecutive IIAs governing the Commission-EP relations build up on each other and each takes the EP's competencies a step further. The case is even stronger for comitology, where IIAs and the reform of secondary law, i.e. of the Comitology Decisions, are strongly linked.

However, although all three cases show evidence for this informal and incremental institutional 'development'⁸² or 'sub-constitutional change', our assumption on the gradual formalisation of informal practises laid down in IIAs, i.e. their codification in secondary and primary law, only holds for the case of comitology. Only in comitology were the powers handed over to the EP in the informal arena through IIAs also codified in secondary law (and will lead to Treaty amendments if the DCT is adopted). One explanation is that – of the three areas considered in the case studies- comitology is arguably the most crucial for the EP. It is the only one of the three cases where the Treaties advantaged the Council over the EP by codifying the right to delegate and scrutinise the implementation of legislation which severely interfered with the EP's power to co-legislate. Thus, the EP pursued a very consistent long term strategy of being placed on equal footing with the Council in the delegation and scrutiny of the implementation of legislation.

On the other hand, the EP did not and in all probability will not push the Commission or the Council to legally codify its informal rights in legislative planning; further codification would come close to affording it a right of formal initiative to be shared with the Commission – something which, for reasons discussed above, the EP does not want. On the contrary, it is satisfied with the effective device that it has set up for planning and scrutinising the legislative planning activity in the Union.

⁸² P. Pierson, 'Not Just What, but When: Timing and Sequence in Political Processes', (2000) *Studies in American Political Development* 14, 72-92.