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CONTESTED DELEGATION:  
THE IMPACT OF CODECISION ON COMITOLOGY

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The Impact of Codecision on Comitology*

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## **Abstract**

In this article, we show that, for the area of environmental policy, the Commission and the Council have been more willing to rely on extensive delegation after the introduction of co-decision. We also show that the tendency of these two actors to delegate has followed the ratification of the Amsterdam Treaty – which indicates that the Council and Commission had anticipated their relative loss of power to the EP and rushed to delegate as much as possible before the effective introduction of co-decision. However, the Council was only willing to delegate more to the Commission on condition that it could exert as much control as possible over the procedure by using regulatory committees. These empirical findings confirm a distributive institutionalist argument according to which the Council and the Commission, seeking to maximize their institutional power, would try to circumvent the EP through delegation when the latter's competences in legislation increase. The expectation, also based on this argument, that the EP would react to this behaviour by opposing delegation altogether was not confirmed: the EP, rather than opposing delegation as such, has systematically tried to restrict its scope

## **Keywords**

European Union, Implementation, Comitology, Delegation, Council of Ministers, European Parliament, European Commission



## 1 Introduction<sup>1</sup>

The problem of delegation is at the heart of politics. The implications of delegation for democratic processes and political accountability have been of prime interest to political science since its very beginning. In particular, the decision to legislate in a legislative body or to delegate decision-making to a smaller executive and/or expert decision-making body constitutes a central problem for democratic political systems. With each issue on the agenda, decision-makers decide whether to base an item solely on legislation or to delegate the specification of legislation to smaller executive and/or expert decision-making bodies. While increasing efficiency, delegation also comes at a cost. Delegating the specification of legislative decisions to executive bodies and experts implies a loss of democratic control by legislators. The link to the legitimation by the electorate becomes an indirect one.

In this article, we focus on a specific aspect of delegation in the European Union: that of the Council of Ministers (henceforth the Council) assigning decision-making powers to the Commission when implementing Community legislation in comitology and the role of the European Parliament (EP) in comitology under the codecision procedure. It is the Council that – as a legislator – has delegated implementing powers to the Commission to flesh out the details of legislation, while at the same time guaranteeing that the Commission cooperates with member states in this formulation of decision-making in the comitology committees. The EP's role in comitology, despite some smaller changes, has for a long time remained very limited. Only with the introduction of codecision was the EP's role in comitology substantially transformed, since the EP in the areas of codecision received a veto right over whether to legislate or to delegate and the choice of comitology procedure. Each of the various comitology procedures entails a different distribution of competences between member states, the Commission and – most recently – the EP. Hence, shifts in the inter-institutional distribution of legislative power are likely to affect the willingness of all actors, i.e the Council, the Commission and the EP, both to delegate and to favour a particular type of intra-institutional procedure in comitology. In more abstract language, the change in the *inter*-institutional legislative rule from cooperation/consultation to codecision had an impact on the preferences of each European institutional actor – here assumed to be unitary actors - about using intra-institutional rules as regards comitology. In short, we analyze how a shift in inter-institutional relations leads to a shift in intra-institutional decision-making rules.

We have organized the article as follows: we first offer some background information on the Commission's implementing powers and the comitology system. We then develop a rational institutionalist argument based on Knight's (1992) distributive bargaining theory in order to explain why specific actors prefer legislation to delegation and argue that – from the viewpoint of a power shift in legislation - delegation should be expected to have increased after codecision was introduced. Once comitology has been decided upon, we analyze why which actor favours specific rules governing comitology and proceed to analyze how and why the EP's attitude towards comitology has changed in accordance with its increasing role in legislation and, indeed, in comitology. The hypotheses derived from the general argument are subject to an empirical test.

## 2. Setting the scene: European legislation and comitology

In the European Union many important policy decisions are taken on the basis of delegation to the Commission's implementing powers. This is because many legislative acts are rather loosely specified and give the Commission the power to formulate this legislation more specifically. The Single

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<sup>1</sup> We would like to thank two anonymous reviewers, Ase Gornitska, Bart Kerremans and Mark Pollack for helpful comments.

European Act clearly identifies the right to confer implementing powers as a prerogative of the Council. It also provides the latter with explicit authority to lay down the conditions under which the Commission exercises its delegated authority. These Treaty rules also state that the Commission has to cooperate with oversight procedures<sup>2</sup>.

These oversight procedures, or ‘comitology procedures’, consist of establishing committees of member states’ representatives, chaired by a member of the Commission. There are three types of committee that are decided upon by member states on the basis of a draft of the Commission. Firstly, there are advisory committees, whose vote is not binding on the Commission. Secondly, there are management committees. If the Commission adopts an implementing measure that a management committee (by qualified majority) disagrees with, the Commission must forward the measure to the Council, which may then (by qualified majority) modify or annul it. Thirdly, there are regulatory committees, which only pass the Commission’s draft decision if they approve it by qualified majority. Should the committee not approve it, or be unable to agree, the Commission must submit a proposal to the Council as if it were a legislative proposal<sup>3</sup>. If the Council, however, cannot reach a decision within a certain period of time, the Commission can proceed as it had originally planned.

A more restrictive variant of the regulatory and management committees (which was abolished in 1999) provided for a *contre-filet* (double safety net). Under this procedure, with a simple majority vote the Council could stop the Commission from acting, even after the expiry of the relevant period and even if the Council could not agree on an alternative measure<sup>4</sup>.

Regarding the competences of the EP in comitology, two important reforms have been adopted over time. Under the reform of 1999, the Second Comitology Decision, the EP obtained the right to be informed about planned implementing measures for legislation adopted under codecision. It was also given the right to pass a resolution opposing the measure if it considers that the Commission has exceeded its implementing power. However, the Commission is not bound by this resolution. Furthermore, if the regulatory committee delivers an unfavourable opinion or no opinion at all, the EP must be informed of the Commission’s proposal to the Council. If the EP opposes the proposal, it informs the Council of Ministers, which may, ‘where appropriate in view of any such position’, act on the Commission’s proposal. The EP was highly discontent with the outcome of the Second Comitology Decision in 1999 (Bergström 2005:249-285; Bergström et al. 2007; Bergström and Héritier 2007)<sup>5</sup>. Nevertheless it showed ‘a sudden willingness to reconsider the lifelong demand for the abolition of the regulatory procedure’ (Bergström 2005:302). This may be due to the fact that in return for accepting the regulatory committee procedure it obtained the removal of the *contre-filet* mechanism (Bergström 2005)<sup>6</sup>.

In 2004, the EU Constitutional Treaty incorporated important changes regarding comitology, but since it was not ratified, the Second Comitology Decision was revised in 2006. It created a new

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<sup>2</sup> In contrast to legislation, the Treaty does not specify the procedure that should be associated with a particular policy area. Secondly, it reserves a primary role for the Council in determining the procedures that should be applied in a given instance.

<sup>3</sup> In contrast to the procedure with a normal legislative proposal, the EP is not consulted.

<sup>4</sup> Decision 1999/468/EC

<sup>5</sup> This has been also acknowledged in an interview carried out in the EP: ‘Parliament under the old system (i.e. the 1999 decision) was very reluctant to delegate any power to the Commission, because once we delegate, that is gone for ever, we had no say. (...) we were not happy with the previous deal: we did get the information, we had a right to look at it and we could say what we think and we could object, but basically they would ignore us (Interview with an MEP, Constitutional Affairs Committee, 18 October 2006).

<sup>6</sup> In its final report on the Proposal for a Comitology Decision, the Committee on Institutional Affairs advised MEPs to amend the proposal so as to abolish the regulatory committee procedure completely. But after the debate in plenary this amendment was reformulated to insist on the abolition of the regulatory committee *unless* the *contre-filet* procedure was suppressed (Bergström 2005:300).

regulatory procedure ('regulatory procedure with scrutiny'), whereby the Commission has to submit its draft implementing measures to the regulatory committee and to both the Council and the EP, even if it receives a positive opinion from the committee. Both institutions have the ability to block the adoption of the proposed measure and thus send the proposal back to the committee. If it is rejected, the Commission has to present a new draft measure or a new proposal for legislation (Bergström 2005: 249-285; Bergström et al. 2007; Bergström and Héritier 2007)<sup>7</sup>. This decision satisfied the EP, which saw its competencies considerably increased<sup>8</sup>.

### 3. Theory and hypotheses

Two explanations may be offered for the choice of legislation or delegation to comitology and, in the case of the latter, for the choice of a specific comitology procedure. The first explanation is based on transaction cost saving principal-agent delegation theory. The second is based distributive bargaining theory in a given institutional context. Both explanations share similar assumptions of bounded rationality, transaction costs and incomplete contracts and predict similar results. However, the underlying causal mechanisms leading to the outcomes are different. The first argument proposes an increase in efficiency by choosing delegation over legislation; delegation saves transaction costs of bargaining over the details of legislation, the collection of detailed information, and having to engage in high side-payments to accommodate diverse interests and build a majority or a consensus (for a review see Pollack 2003). Adopting only framework legislation and delegating *ex post* rule-making and implementation powers facilitates agreement at the legislative stage (Epstein and O'Halloran 1994, 1999). Scholars using this transaction cost saving argument for delegation also submit that delegation is more likely when principals are divided over issues. In order to avoid a situation of gridlock, legislators will agree to delegate authority to agents (Epstein and O'Halloran 1999; Huber and Shipan 2002). Along a similar line of reasoning Franchino (2000) argues that conflicts make it more difficult for a decisive coalition of legislators to restrict the policy issues to be delegated to the agent. This is because "the exclusion of some issues may lead to the breakdown of the coalition. Controversial aspects about implementation are hence deferred [until] after the writing of the legislation and [the] agent's mandate remains rather large." (Franchino 2000:73). Following this argument, it could be argued that the introduction of codecision, which obliges the Council to negotiate with the EP as an equal partner in legislation, increases the transaction costs of reaching an agreement and hence will lead to increased delegation.

Once having delegated the principal(s) are not without control over how the agent discharges its task by giving him more or less discretion. McCubbins and Page (1987) argue that divided principals – after giving a broad mandate to the agent - have an incentive to control the agent's behaviour *ex post*. In a similar vein, Franchino (2000)<sup>9</sup>, finds that the level of conflict between the European Parliament and the Council (measured as the number of EP amendments rejected by the Council) correlates positively with the existence and stringency of *ex post* controls. Hence, principal agent theory using the concept of transaction costs – assuming diverging actors' preferences - would expect that codecision lead to principals/legislators using more stringent procedures.

Secondly, the increasing use of delegation and comitology rules favouring specific institutional actors may also be interpreted as a contest for power between institutional actors - here conceived as unified actors - who seek to maximize their influence over institutional competences and thereby their influence over policy outcomes. The introduction of co-decision involved a relative loss of legislative

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<sup>7</sup> Comitology Decision 2006/512/EC

<sup>8</sup> As one MEP declared: 'The EP is happy with the new deal, we approved it by a large majority (...) However, ... This deal maybe is not a peace treaty, it may only be a ceasefire, depending on how it works' (Interview with an MEP, 18 October 2006).

<sup>9</sup> Using a data base of 1.372 directives adopted between 1987 and 1998.

power for the Council. With a more important role for the EP in legislation, the Council may seek to use more delegation to comitology, in which the EP only played a marginal role until 2006. This would allow the Council to maximize the control it can exercise over decision-making and to eschew the relative loss of decision-making power under codecision. And it may motivate the Council to choose comitology committees that allow for the maximum influence of member state representatives. In this chapter we base our argument on this power-based distributive bargaining theory when explaining why delegation as opposed to legislation is chosen, and – within delegation – what type of comitology procedure is selected. We take issue with the principal-agent efficiency based explanation of the why of delegation to comitology elsewhere (Héritier, Moury, Bischoff and Bergström 2009). We focus on power-based distributional bargaining theory because it offers answers to why - with codecision - each actor opts for legislation or delegation, and – within delegation – for which specific comitology procedures.

### ***3.1 Distributive bargaining theory applied to comitology***

Institutions are defined as sets of man-made rules of behaviour facilitating and restricting social interaction (North 1990). They guide interaction in the accomplishment of joint tasks, such as legislation and delegation. The rules allow the actors involved to incorporate expectations of the actions of others into their own decision-making (Lake and Powell 1999). Actors assume that other actors will more or less abide by the rules and, in the case of non-compliance, be sanctioned. Institutional rules, therefore, constitute an important source of information in forming expectations as to how other actors are likely to behave. Multiple institutional rules that subsequently guide political interaction may be developed in order to deal with cooperation and coordination problems. Although institutional rules produce an increase in overall benefits by allowing cooperation, these benefits are not evenly distributed and are thus linked to conflicts of interest among actors (Knight 1992: 27); and, concomitantly, to actors having diverging preferences over them as a function of the outcomes they generate (Jupille 2004:223) The final form of an institutional rule is considered as a product of the conflict of interest among the relevant actors (Knight 1992: 27).

This raises the question of which actors systematically benefit from an institutional rule and how these actors obtain these benefits<sup>10</sup>. Rules being incomplete, actors engage in an implicit or explicit bargaining process over the specifics of their content (Lax and Sebenius 1986, Osborne and Rubinstein 1990:1). In explaining the outcome, power takes centre stage. A similar argument is made by Jupille when he argues that institutional macro rules frequently being ambiguous allow for several institutional alternatives (Jupille 2004: 223). In this article, we primarily focus on who benefits from and therefore favours specific rules, and only marginally look at how institutional rules change through redistributive power-based bargaining. We start from a set of empirical assumptions about actors' preferences, and seek to explain how these have changed over time in accordance with the valid institutional rules.

We assume that actors are competence-maximizers, that is, they will seek to ensure that policy will be enacted through procedures which maximize their own degree of control over the process of policy-making, and not through procedures where they have little or no control. In other words, actors' preferences over delegation will be determined by the degree to which they have effective influence over policy that is carried out through delegation as opposed to legislation. As a result, they will press

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<sup>10</sup> The (ex ante defined) power of an actor is reflected in his or her capacity to influence the feasible alternatives available to the other actors involved (Knight 1992:41/42). This in turn depends on the actors' credibility, risk aversion and time preferences (Bacharach and Lawler 1981, Raiffa 1982; Knight 1992: 131/132). Put differently, the more credible the restrictions stated by an actor, the lower his or her risk aversion, the less intense the time pressure on an actor and the better the fall-back position in the case of a bargaining failure, the more powerful will he or she be in negotiations and shaping the bargaining outcome (Elster 1989; Maynard-Smith 1982:153, Knight 1992:127).

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.

We argue that actors' preferences regarding delegation, *under given institutional rules*, will be a function of whether the actor has more ability to influence policy through delegation or through legislation, and that those preferences change as the attractiveness of pursuing legislation (or the lack of it) changes (Bergström et al. 2007). In the European Union, given the distribution of competences described in the previous section, we expect that the relevant institutional actors will have the following preferences regarding delegation.

The *Commission's meta-preferences* are assumed to be extensive delegation, without or with minimal control by member states. However, in view of the other actors' preferences and existing alternatives of action, this may often not be possible to realize. Its strategic preferences, therefore, will to some extent depend on the availability of alternative forms of policy making through legislation. In periods when the Commission has difficulty in proposing legislation that has good prospects of being adopted, it may be more amenable to extensive member state control in delegation than it would otherwise be. With the introduction of codecision, the Commission, moreover, has to take into account a second legislator that may or may not support its proposal. By comparison, under delegation, the Commission does not have to share decision-making powers with the EP. In addition, the Commission is much stronger in the comitology procedure than under codecision. This is obvious for the advisory and the management committees, but also – to some extent – for the regulatory committees. Here the Commission can set time limits by which the committee must deliver its opinion and – if the Council fails to adopt or annul a proposal (by QMV) – it sees it adopted by QMV within three months. Codecision, by contrast, is the legislative procedure in which the Commission is the weakest, because, in the conciliation committee, it allows the Council to amend the Commission's proposal with a qualified majority rather than the usual unanimity. It is also the longest procedure (see Rasmussen and Toshkov, this volume), and this can be a problem for proposals that the Commission would like to see adopted quickly. Accordingly, we assume that Commission prefers delegation over codecision, even in the light of the findings that – on average – the Commission's policy preferences are closer to those of the EP than to those of the Council (Napel and Widgren 2008)<sup>11</sup>, and we submit that:

*H 1: With increasing legislative competences of the EP under codecision, the Commission will be inclined to delegate more to comitology.*

With regard to the type of comitology procedure, the Commission is of two minds. On the one hand it has a (meta-) preference for a comitology procedure which implies the least control by the Council, i.e. the advisory or management procedures. On the other hand it is also plausible to assume that the Commission frequently strategically anticipates the likely opposition of the Council to the least constraining committees and its opting for more constraining committees (i.e. the regulatory committee). In order to secure the rapid adoption of legislation with as few amendments as possible (Pollack 2003: 132), the Commission, therefore, strategically may propose more restrictive comitology procedures.<sup>12</sup>

On the basis of these considerations, we present the following hypothesis: Either the Commission – with an increasing number of delegation proposals - true to its meta-preferences proposes the least constraining procedure. Or, the Commission strategically anticipate the Council's opposition to the

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<sup>11</sup> Napel and Widgren (2008) ascertained that Commission policies are, on average, more in accord with the aggregate position of the Parliament than that of the Council.

<sup>12</sup> Also, the measures adopted in the comitology committee which could have alternatively been adopted during the legislative procedure are likely to be large in scope<sup>12</sup>. Hence, the likely objection of the Council to the advisory and management committees may also be derived from the fact that the Council's Comitology Decision explicitly states that regulatory committees should be used in the case of 'measures of general scope designed to apply essential provisions of basic instruments' and to the updating or adaptation of 'certain non-essential provisions of the instrument'.

least constraining comitology procedures and proposes more restrictive for acts that could alternatively be adopted solely through legislation.

*H2.1 With an increasing number of delegation proposals the Commission will still propose the least constraining procedures, i.e. advisory and management committees*

*H2.2 With an increasing number of delegation proposals the Commission will propose the more restrictive comitology procedures, i.e. regulatory committees.*

We assume that the *Council* will prefer legislation with consultation to legislation on a codecision basis because this allows it to maximize its institutional power (meta-preferences). As argued above with the introduction of the codecision procedure, the member states in the Council have suffered a relative loss of influence in the legislative procedure, while their influence in implementing legislation has remained untouched. Under codecision it will therefore prefer delegation to the Commission along with extensive control by the member states. Given our assumptions, we therefore expect that, with the introduction of co-decision, in order to protect its own institutional power, the Council will be more inclined to delegate legislative powers to the Commission. In other words, actors who have to share decision-making power with a new actor seek to avoid sharing this power, and delegation offers such a possibility.

*H 3: With increasing EP legislative competences under codecision, the Council will be inclined to delegate more to comitology.*

To reiterate: Different types of comitology procedures imply different distributions of competences between member states and the Commission (and, more recently, the EP). The voting rule for only one of these procedures – the regulatory procedure – requires a qualified majority, as is the case for legislation presented in the Council. In the two other committees, the advisory and the management committees, the member states only give their advice or – alternatively – they need to obtain a qualified majority to *reject* the proposal. Hence, according to our assumptions, we would expect that, if the Council wishes to delegate more in order to circumvent the EP, it would want to link the increase in delegation to the use of the regulatory procedure.

*H 4: The increase in delegation accepted by the Council will be accompanied by an increase in the use of the regulatory committee.*

We expect that the increased willingness of the Commission and Council to delegate will start in the period following the signature of a treaty introducing co-decision and preceding its entrance into force, with the Commission and the Council anticipating the loss of power as a consequence of codecision but still being in a position to delegate without having to face an EP veto. While it is true that the Commission and Council might technically adopt detailed legislation on their own in this in-between period, they are also aware that detailed legislation would most likely need to be amended. Hence, both actors will have incentives to delegate as much as possible before the imminent coming into effect of codecision.

Finally, the *European Parliament* will prefer legislation over delegation (meta-preferences) since – until very recently – its competences in comitology were very limited. First, we expect that – with the introduction of codecision – the EP will insist on legislation and oppose delegation. However, once the EP has obtained more competences in comitology, the EP's opposition to delegation will decrease. More specifically, up to the coming into effect of the Council Decision of 2006, which substantially increased the EP's competences in comitology, the latter is expected to oppose delegation. After 2006 we expect that the resistance to delegation to comitology will diminish. We therefore submit that:

*H 5. With the introduction of codecision, the EP will seek to veto delegation and press for legislation only*

and

*H 6 With increasing competences in comitology the EP will be less opposed to delegation to comitology.*

## **4) Empirical results**

### **4.1) Databases**

To test our hypotheses, we built two different databases to empirically validate our hypotheses from two different perspectives. Our first database tracks the development of Commission proposals based on a given Treaty article (in one policy sector); the second focuses on the EP's amendments to Commission proposals (across all policy sectors). If the results drawn from the two different databases allow for the same conclusions, we will consider our hypotheses to be confirmed.

#### **A) Commission proposals based on Article 130s(1)**

The first database uses the EU's Eur-lex and Pre-lex on-line catalogues, which allow us to scrutinize the *full text* of all Commission proposals and parliamentary amendments that have been made since 1994, thus enabling us to investigate proposals over a period of fourteen years (up to 2008 inclusively). Eur-lex (formerly Celex) enables to select all Commission proposals in full text based on a given treaty article and to identify the resulting final legislation as adopted by the Council (and the EP in codecision). Pre-lex enables us to track all parliamentary reports (in full text) based on this proposal. Earlier work has convincingly argued that it makes sense to control for the change from the status quo by focusing only on non-amending legislation (Franchino 2000). We select non-amending proposals, based on a given Treaty article/policy sector to control for policy variation. Furthermore, we focus on binding legal acts of general application (directly or indirectly through member states), i.e. regulations and directives. This is not to say that decisions are not an important component of European law, but they are different in that their aim is *not* to produce law of general applicability.

Several studies have demonstrated that delegation varies both across issue areas and according to the voting rule in the Council (Pollack 2003, Franchino 2001, 2002, 2004). In order to study the possible impact of an increase in EP competences, we selected one article of the Treaty under which codecision was introduced during the period covered by our database while controlling for policy attributes and decision-making rule. We chose Article 130s(1) on environmental policy<sup>13</sup>. Legislation based on this article is subject to QMV for the entire period under investigation, but with the Amsterdam Treaty the legislative procedure shifted from the cooperation procedure to codecision. This article was chosen because it is the only Treaty article among those that changed from cooperation or consultation to co-decision in the Amsterdam Treaty<sup>14</sup> on which a sizable number of non-amending Commission proposals were based.

The choice of this specific policy field is – as described above plausible for methodological reasons, i.e. the need to control for other influences while allowing for a sufficient number of observations. On substantive grounds it is challenging because previous studies have not found an extensive degree of delegation/secondary legislation adopted before 1998 ((Pollack 2003; Franchino 2004). Hence in this particular policy area we should not expect to observe extensive delegation

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<sup>13</sup> Under the Amsterdam Treaty this became Article 175.

<sup>14</sup> The Eur-lex database does not allow us to analyze the changes introduced with the Maastricht Treaty.

independently of inter-institutional change. Moreover, environmental issues constitute an important area of European policy making both in scope and implications for member states and, therefore, a central body of legislation (Weale et al. 2000: 1). Additionally, environmental policy has been described as a policy field where the EP (and particularly the environment committee) is particularly pro-active (Burns 2005). Hence, the Commission and the Council might be particularly concerned with possible decision-making gridlocks resulting from the introduction of codecision in this policy area. However, the environmental policy field is not a 'most likely case' either because the treaty of Amsterdam replaced the *cooperation* procedure of article 130s by codecision. This – one may argue – generated less incentive for delegation than if *consultation* would have been replaced by codecision.

More specifically, in studying the legislative items based on Article 130s, we asked:

- i. Does the proposal include the delegation of legislative powers to the Commission? We identified all proposals including at least one provision enabling the Commission to adopt secondary legislation based on basic legislation in cooperation with comitology (delegation proposals). These provisions in general enable the Commission to amend legislation or even adopt annexes to it and to adopt decisions detailing the legislation<sup>15</sup>.
- ii. Is the delegation proposal supported by the Council (in its common position) and the EP (in its first reading)? In cases where the legislator(s) adopt(s) the proposal but remove(s) the delegating provision the delegating act was codified as not adopted. We also scrutinized whether the amendments by the legislator(s) provide for a change in the *scope* of the delegation proposal. In order to measure whether the legislator changes the substantive scope of delegation as originally envisaged in the Commission proposal, we count the number of amendments increasing/decreasing the extent of the substantive areas covered by delegation<sup>16</sup>.
- iii. Which committee was proposed by the Commission (in its proposal), the EP (in the first reading) and the Council (in the common position)? If two different committees were selected (which is seldom the case) the proposal was codified twice.

## B) All parliamentary reports

We complement this first database with a second one, based on the parliamentary online archives (Legislative Observatory - OEIL) that include all parliamentary reports from the same period (1994-2008). The main advantage of OEIL, in comparison to Celex and Pre-lex, is that it allows a search by means of keywords in the full texts of all parliamentary reports. We scrutinized all legislative reports deposited by the EP<sup>17</sup> during the codecision procedure that amended the Commission proposal, the Council Common Position and the joint text of conciliation. Applying a key word search we focussed on *all* issue areas in order to increase the number of cases<sup>18</sup>. We selected reports which introduced at least one amendment aiming at restricting the scope of implementing powers delegated to the Commission, and codified whether the EP proposed to change the committee(s) proposed by the Commission. We compared the number of reports including restricting amendments with the total number of reports commenting on *delegation* proposals. Our data collection started with the reports for 1994 when data became available from the EP internet site and extended to March 2008.

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<sup>15</sup> Given our focus on the choice between legislating and delegating, we opt for a narrower definition of delegation than the one used by Franchino (2001). He defines delegating provisions as 'any major provision that gives... the Commission authority to move the policy away from the status quo' (Franchino 2001: 31), which, for instance, also includes the management of resources and public procurements etc.

<sup>16</sup> E.g. if the EP or the Council introduce an amendment to specify delegation or eliminate delegating provisions.

<sup>17</sup> <http://www.europarl.europa.eu/activities/plenary/ta/search.do?language=EN>

<sup>18</sup> More specifically, we identified the reports based on *delegating* Commission proposals, by selecting reports registering key words such as 'comitology', 'commitology', 'Council decision', 'committee' and 'implementation'.

### 5) Empirical findings: Does codecision spur delegation and, if so, what type of delegation?

How does our first hypothesis *H1* With increasing legislative competences of the EP under codecision, the Commission will be inclined to delegate more to comitology. hold up to empirical evidence when we look at the development of the number of proposals based on Article 130s (environment, QMV) in the periods before and after the signing of the Amsterdam Treaty (1997)? Figure 1 shows the development of delegating Commission proposals (out of all proposals) and the development of the percentage of delegation proposals over the total of proposals from 1994 to 2008 (inclusively).

**Figure 1: Absolute numbers of delegating and non-delegating legislative proposals, and proportion of delegating legislation proposals (%), N = 102 proposals**

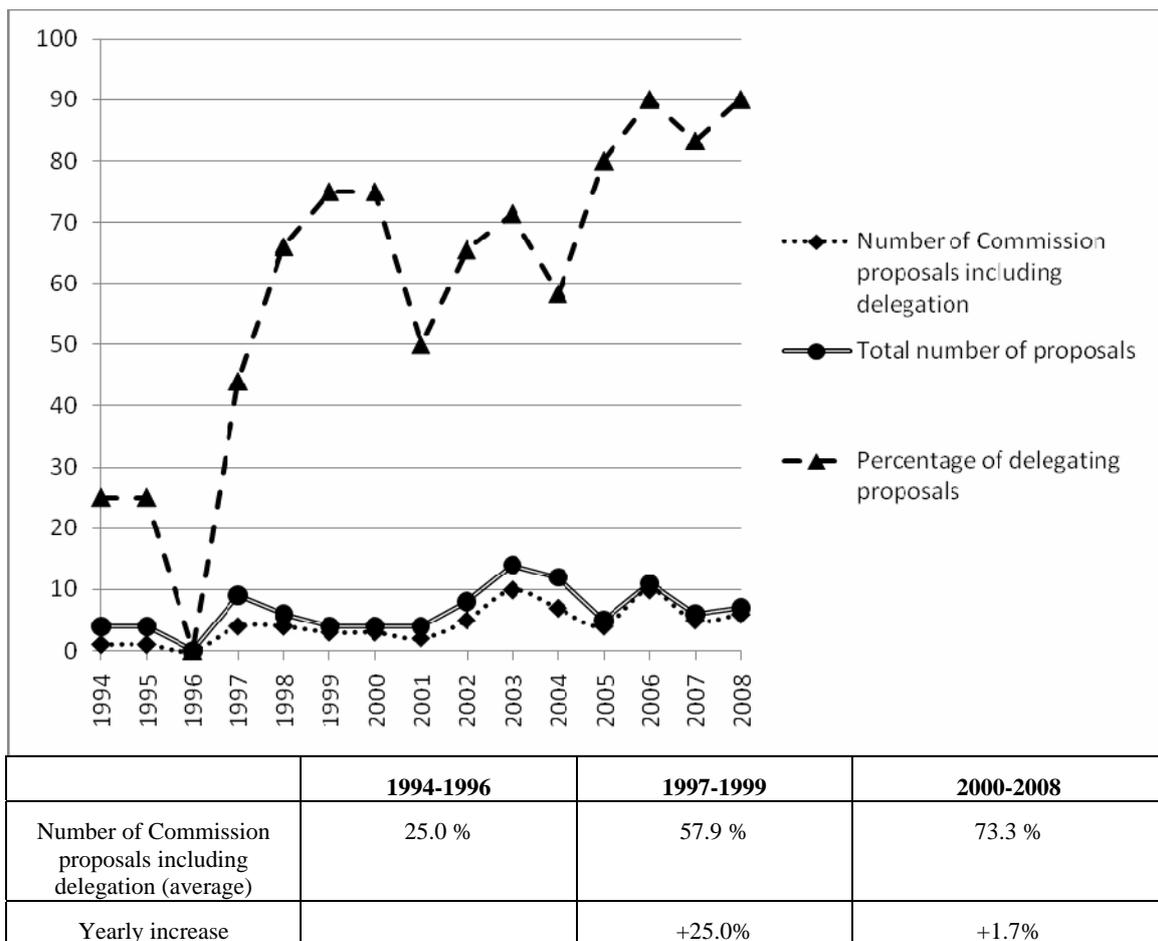


Figure 1 confirms our expectations. We observe a very strong increase in the percentage of delegation proposals in the two years following the signing of the Amsterdam Treaty, which is followed by a less important and more irregular, but nevertheless clear, increase after the introduction of the codecision procedure in 1999. What emerges from this figure is the willingness of the Commission to delegate as much as possible in the period following the signature of the Amsterdam Treaty and preceding its ratification. Clearly, the Commission seems to have anticipated its incoming loss of power derived from the introduction of codecision in the environmental area, and has rushed to counteract this loss before having to face the EP's veto in the decision to delegate. Also according to our expectations, the Commission's willingness to delegate remains high, and even slightly increases, in the period following the ratification of the Amsterdam Treaty.

At the bottom of Figure 1, we also show the average percentage of delegation proposals per year and the increase in delegation proposals, comparing a first period covering the time before the signing of the Amsterdam Treaty (1997), a second covering the two years between the signing and coming into force of the treaty, i.e. the period when the Commission knew that in the near future codecision would be introduced, and a third for the time when codecision was in force. What emerges is that the average proportion doubled from the first to the second period, rising from 25% to 53% (i.e. by an average yearly increase of 14%), and continued to increase from the second to the third period, although the yearly increase was much smaller (+2.7%). We obtained a positive phi coefficient<sup>19</sup> of 0.26, reflecting the correlation between the delegation proposed and the fact that this proposal was introduced after the Amsterdam Treaty. In view of these findings we consider H1 to be confirmed.

As regards the Commission's selection of a specific committee, we proposed (*H2*)

*H2.1. With an increasing number of delegation proposals the Commission will still propose the least constraining procedures, i.e. advisory and management committees;*

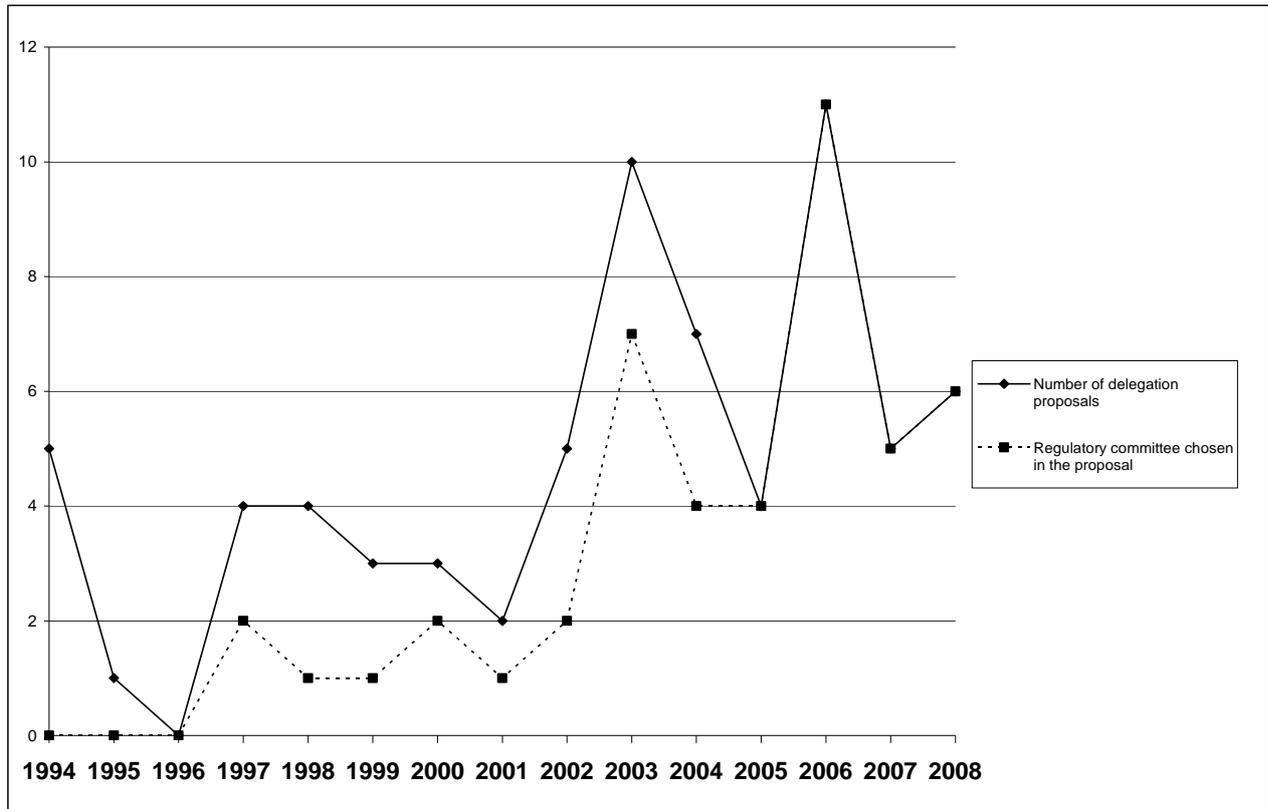
*H2.2 With an increasing number of delegation proposals the Commission will propose the more restrictive comitology procedures, i.e. regulatory committees.*

Our data's largely confirm the latter expectation. In Figure 2 we present the number of delegation proposals based on Article 130s/175 and the type of committee chosen. Our N is the total number of committees introduced in non-amending Commission proposals (regulations and directives) delegating to the Commission the power to adopt secondary legislation.

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<sup>19</sup> Since we are dealing with a population rather than a sample, the significance of this coefficient should not concern us.

**Figure 2:**  
**Number of delegation proposals and number of regulatory committees chosen, N=68 proposals**



We observe a strong relationship between the increase in delegation proposals and the use of the regulatory procedure, especially since the signature of the Amsterdam Treaty in 1997. As Figure 2 shows, the proportion of regulatory procedures proposed (out of the total number of procedures) rose from virtually 0% in 1994 to 50% in 1997 and to 100% after 2005. The correlation between the period before and after the ratification of the Amsterdam Treaty and the Commission proposing regulatory committees is positive and relatively important (.310).

This clearly indicates that the Commission – anticipating that member states would only be willing to delegate if maintaining control over the delegated matters - imposed greater procedural control on itself. These results confirm the fact that an actor might strategically accept to lose in one issue (i.e. a less constraining committee) and gain in another (delegation rather than codecision).

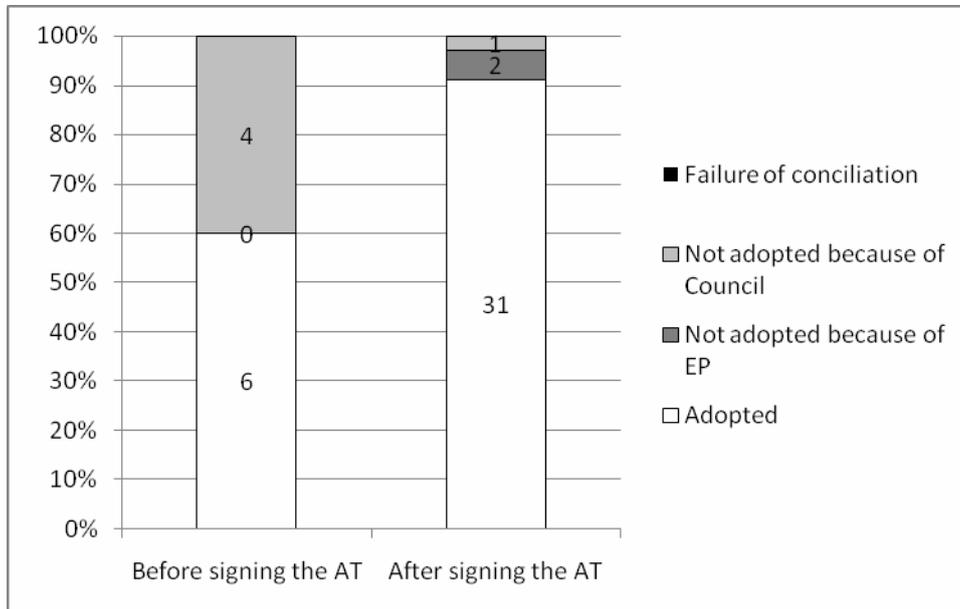
How did the Council react to codecision and to what extent did it accept the increase in delegation proposals by the Commission? In *H 3: With increasing EP legislative competences under codecision, the Council will be inclined to delegate more to comitology*

In order to test this argument, we first scrutinize whether the Commission’s proposals for delegation have been more frequently accepted by the Council since the signing of the Amsterdam Treaty than prior to it. In Figure 3, we only look at delegation proposals and classify the items according to whether the draft was passed by the Council<sup>20</sup> or whether, under codecision, it failed in the conciliation committee. Since, on average, it takes two years to adopt legislation, we only look at the proposals made before 2006. In Figure 3, we show what happened to the proposals adopted by the Commission before this date, according to the period when these proposals were passed *by the*

<sup>20</sup> When the Council failed to take a common position, the draft proposal was considered as rejected.

legislator (i.e. before or after the signing of the Amsterdam Treaty). Our N is the number of proposals adopted by the Commission before 2006.

**Figure 3: Proportion of adopted delegation proposals preceding and following the signing of the Amsterdam Treaty, N=44**

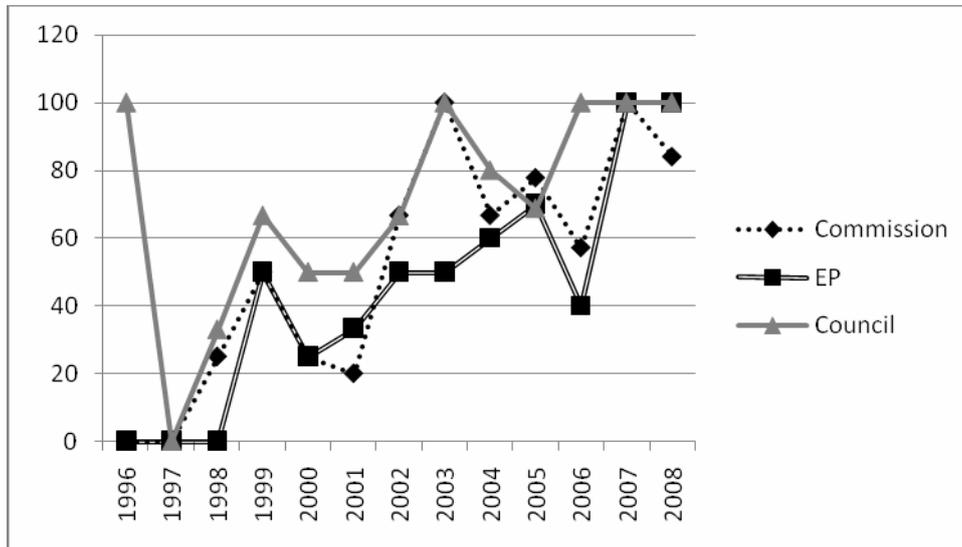


The number of observations is relatively small  $N$  (44), but it clearly emerges that the *delegation* proposals which reached the Council before the signing of the Amsterdam Treaty had a much lower chance of being adopted than the proposals which reached it in the following period. Before 1997 the Council rejected a delegation proposal in 4 out of the 11 cases, while after 1997 it did so in only one out of the 34 cases. Statistically, the phi coefficient of correlation between ‘delegation accepted by the Council’ and ‘after Amsterdam Treaty’, for the population of delegation proposals reaching the Council is positive and quite strong (+0.485). In short, after the introduction of codecision the Commission was much more successful in seeing delegation accepted by the Council.

To summarize, the Council as long it held the veto power over the outcome of the legislative procedure, more frequently refused to delegate to the Commission’s implementing powers. Once, the EP was established as a co-legislator under codecision the Council increasingly favoured delegation as opposed to legislation without delegation. Under the latter the Parliament (until 2006) only had limited rights. Our empirical findings confirm our hypothesis H3, and demonstrate that the inter-institutional change occurring with the introduction of codecision influenced the preferences of the institutional actors for the use of a specific intra-institutional rule.

In H4 we postulate that *H 4: The increase in delegation accepted by the Council will be accompanied by an increase in the use of the regulatory committee.*, i.e. that, with increasing delegation, the Council – in order to keep control over the Commission – will wish to delegate only to regulatory committees. Hence the increase in delegation following the ratification of the Treaty of Amsterdam should have led to an increase in the use of regulatory committee procedures. Figure 4 shows the percentage of cases when the regulatory committee was chosen by the Council, for every year.

**Figure 4: Percentage of occasions when regulatory committee was preferred, by legislator, N= 65**



We find a positive and very strong correlation (.690) between the introduction of codecision and the Council's preference for the regulatory committee. Unsurprisingly, the Council never turns down the Commission's proposal to use a regulatory procedure. Our results thus confirm H4 and also show that the strategy of the Commission to propose more delegation under the most constraining procedure has been a successful one. The Council, as the Commission anticipated, accepted most of the delegation proposals, since these proposals also provided for the regulatory procedure.

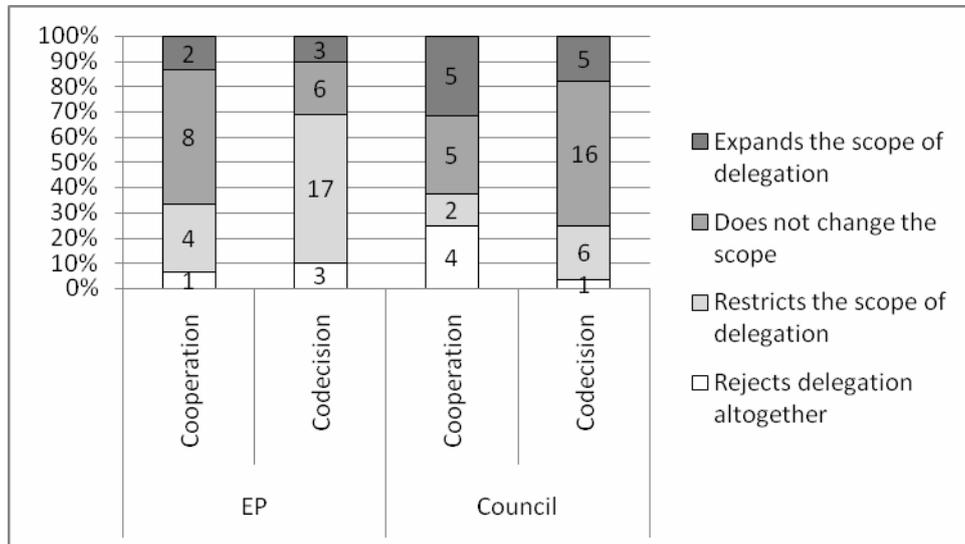
In our next analytical step we turn to the impact of codecision on the EP's attitude to delegation to comitology. In *H 5* we claimed that *With the introduction of codecision, the EP will seek to veto delegation and press for legislation only*

Surprisingly we find that, in the great majority of cases (93%)<sup>21</sup>, the EP does not oppose the adoption of delegating legislation under codecision. Only twice (out of 29 cases) did the EP (in its first reading) delete the provision allowing the Commission to adopt an implementing act under codecision, while it did so once (out of 15 cases) under cooperation. This finding contradicts our H5. The EP does not appear to be categorically opposed to delegation.

Figure 5 throws some light on this puzzling finding.

<sup>21</sup> This refers to the % of proposals going to Council under codecision.

**Figure 5: The EP and Council’s modification of the Commission’s delegation proposals, per type of procedure in use, N = 44**



It shows that the EP – while rarely entirely rejecting delegation – restricted its scope much more frequently under codecision than it did under cooperation. Under the cooperation procedure, in one third of the cases the EP either rejected delegation or reduced the substantive extent of delegation as proposed by the Commission. By contrast, it has done so in almost 70% of the cases under the codecision procedure. We observe a relatively strong phi coefficient of correlation (0.341) between the EP’s restriction of the scope of delegation and the procedure in use.

It appears, therefore, that the EP does not oppose delegation altogether, even if it technically could have done so under the codecision procedure, but rather opposes delegation of *large scope*. This finding obliges us to modify our argument to the effect that the EP, favouring a deeper integration, appears to be willing to accept the increase of delegated power to the Commission in order to speed up the process of European law-making<sup>22</sup>. However, the EP is only willing to support delegation under the condition of a limited. *scope* of delegation., a condition to be respected by the Commission.. It also shows that the EP – giving the trade-off between the conflicting goals of speedy integration and competence preserving legislation – is willing to compromise.

When additionally investigated the comitology committees that were favoured by the EP, Figure 4 (above) shows that the latter increasingly supported the regulatory procedure after 1999, even though the competences it obtained under the Second Comitology Decision of 1999 were marginal. Figure 4 also shows that that the EP has consistently opposed the use of the regulatory committee in 1996, 1997 and 1998; but did less so in the following period (only in 50% of the cases). This finding questions our assumption and the assumption made by Franchino (2000) that the EP preferences are closer to those of the Commission than to those of the Council, and therefore it will systematically favor less stringent procedures (see also Pollack 2003).. As observed by Pollack this may be accounted for by distinguishing between the EP’s meta preferences and strategic preferences (as we did in the case of the Commission). In the consultation and cooperation procedure the EP ‘enjoys the relative luxury of expressing its sincere preferences since its proposals enjoy no special status’. In the codecision procedure by contrast the EP’s proposals might ‘endanger a fragile majority in the Council’ (Pollack

<sup>22</sup> Such a finding is also well illustrated by Bergström in the case of the Lamfalussy process for making progress in the market for financial securities (Bergström 2005: 320-324).

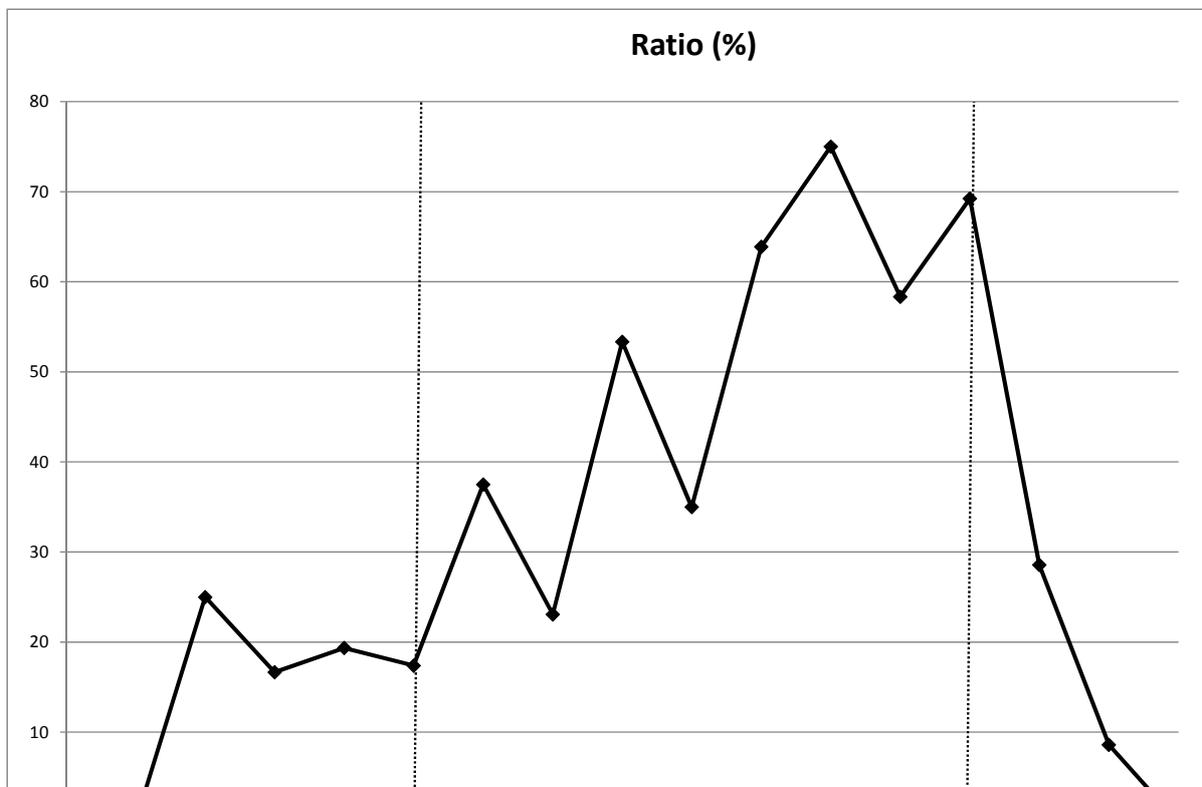
2003:132). In other words the EP, generally eager to adopt legislation expanding the EU competences, frequently refrains from opposing the use of the regulatory committee in order to see legislation passed by the Council.

Another explanation for this surprising finding may be that it reflects the outcome of a bargain between the EP and the Council. The EP obtained the suppression of the contre-filet mechanism and, in turn, made the concession to stop opposing the regulatory committee procedure (Bergström 2005). An additional explanation could be that between 1994 and 2006 the EP systematically restricted the scope of delegation instead of seeking a conflict about the choice of committee (see below).

In our last hypothesis we submit *H6: With increasing competences in comitology the EP will be less opposed to delegation to comitology.* The number of delegation proposals based on article 130s that reached the EP after July 2006 is too small (7) to allow systematic testing, but nonetheless shows a change of EP strategy.

First, according to our data the EP has never introduced, in these seven proposals, amendments aiming at reducing the scope of discretion left to the Commission. Second, as it emerges in the Figure 4 above, the EP's opposition to the use of delegation with the regulatory procedure (in all cases with scrutiny) is close to zero after this date. In order to analyze this preliminary finding from a different data angle, we used our second database (EP online archives of all parliamentary reports *across all policy areas*). Figure 6, drawn up from this second database, shows the percentage of legislative parliamentary reports as a percentage of *all* legislative reports on delegation proposals that include at least one amendment reducing the scope of discretion left to the Commission.

**Figure 6: Percentage of legislative reports restricting delegation as a % of all legislative reports regarding delegation proposals (N=315 reports)**



We observe a continuous increase in the percentage of reports including amendments proposing to reduce the scope of delegation, from our initial starting date (1994) until 2006. As expected, the 1999

reform did not reduce the willingness of the EP to limit the scope of delegation – rather the contrary. Given the very meagre increase in competences that the Council Decision of 1999 conferred on the EP, this is not surprising.

After 2006, the percentage of amendments reducing the scope of delegation drops drastically (from 70% in the first part of 2006 to 0% in 2008). As a result, we find a positive and important correlation between amendments restricting the scope of delegation in the parliamentary reports and the circumstance of their being adopted *before* the Council decision of 2006 (phi coefficient of .217). This confirms our hypothesis.

The graph above also illustrates the logic implicit in the bargaining strategy applied by the EP to widen its competences under comitology: in order to gain concessions in the negotiations over the revision of the Second Comitology Decision, it launched an offensive by systematically introducing amendments to restrict the scope of delegation (Bergström et al. 2007, Corbett 1998:258). The success of this strategy is documented in the fact that the EP – with the regulatory procedure with scrutiny – obtained important competences in 2006 (Bergström and Héritier 2007a; Bergström, Farrell and Héritier 2007b).

## 6 Conclusion

In this chapter we developed a distributive institutionalist argument of why, with the increasing legislative competences of the EP, the Council and Commission tend more frequently to delegate legislative powers to the Commission, which are then applied under the supervision of member states. On the assumption that actors seek to maximize their institutional power in order to increase their influence over policy outcomes, we argue that having to share legislative power with the EP motivates both the Council and the Commission to try to circumvent the EP through delegation, i.e. they prefer to adopt secondary legislation in comitology procedures. In consequence, we argue, the EP will react to these attempts by opposing the use of delegation or restricting its use.

We first show that, for the area of environmental policy, with the introduction of co-decision the Commission and the Council have indeed been more willing to rely on extensive delegation. The increase in delegation following the ratification of the Amsterdam Treaty indicates that the Council anticipated its relative loss of power to the EP, and rushed to delegate as much as possible to the Commission before the effective introduction of co-decision. However, the Council was only willing to delegate more to the Commission on condition that it could exert as much control as possible over the procedure by using regulatory committees.

We predicted that with the introduction of codecision the EP would oppose delegation altogether. This expectation was not confirmed. It emerges that the EP does not oppose delegation as such but, instead, systematically restricts its scope. Our data, based on all parliamentary reports adopted in codecision, show that the EP systematically introduced amendments to restrict the scope of comitology after the Second Comitology Decision of 1999. It also used this opposition as a bargaining chip in order to obtain more competences under the Revised Comitology Decision in 2006, at which point its opposition to comitology almost disappeared.

While we were able to empirically substantiate a number of our hypotheses, there are limits in what our data can tell us. One of these limits is that our results are mainly based on a single policy area, i.e. environmental policy. As pointed out, environmental policy, given its political importance and the proactive role of the EP in this area, may be considered on some aspects a ‘likely’ case for an increase of delegation associated with codecision, and for that reason cannot easily be generalized. A second caveat to bear in mind is that, while we do identify an increase of delegation following the signature of the Amsterdam Treaty, it would be premature to conclude that codecision only caused this increase in delegation. Further research would be necessary to increase the number of cases and control for a larger number of variables, such as the effect of the reform of the Comitology decision in 1999. Future research could for example include additional policy areas in which codecision was introduced in 1993 and compare them to policy areas where codecision was never introduced.

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