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Rule Application in EU and US Conciliation
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Abstract

Important rules regulating conciliation committees in the EU and the U.S. look similar but are applied very differently in practice. This article examines why rule application is different in the two systems. In accordance with insights from recent institutional literature, the results show that differences in rule application can be explained on the basis of variation in rule ambiguity between the two systems, and how much bargaining power the actors interested in strategically selecting between or modifying the rules have. They also add to the literature by underlining the fact that ambiguity in which rule to apply, or how to interpret a given rule, is not a necessary condition for these procedural choices. The results are thus not only relevant to scholars interested in bicameral bargaining, but also to scholars with a general interest in rule application.

Keywords

Conciliation committee, co-decision procedure, conference committee, legislative politics.

Rule Application in EU and US Conciliation Committees

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There is general agreement in the literature that although not a state, the EU increasingly resembles a domestic political system. The similarity between it and other bicameral systems becomes particularly evident on examining the co-decision legislative procedure. Several authors believe that it functions in a truly bicameral fashion, making the European Parliament (EP) a co-legislator with Member States in the Council of Ministers (Council) (Corbett, Jacobs and Shackleton 2003a; Crombez 2000; Tsebelis and Money 1997). This procedure enables the EP and Council to meet directly to resolve disagreements in a conciliation committee similar to those of national bicameral legislatures.

Interestingly, several authors have argued that even though the EU is similar to the structure of its member states, its construction more clearly resembles the U.S.-style separation of power (Corbett, Jacobs and Shackleton 2003b; Kreppel 2006; Pollack 2000). This also applies to the EU's conciliation committees, which, despite similarities with those of its member states, most clearly resemble the U.S. conciliation committees between the House of Representatives (House) and the Senate¹. Most importantly, whereas conciliation committees normally act as one body, the EU and U.S. committees are the only truly bicameral ones, since their compromises have to be adopted by both delegations individually. This affects the ability of the committees to influence the legislative outcomes. However, the apparent similarity in some of the important rules regulating the work of the conciliation committees should not lead us to believe that committees in these two systems function in a similar manner. Hence, the application of the conciliation rules varies significantly between the two systems.

¹ The U.S. conciliation committees are called conference committees and their members are referred to as conferees, but for simplicity's sake, this paper refers to both the EU and U.S. committees as conciliation committees, and their members as "conciliation delegates".

Actors in the U.S. often do not abide by the rules. As an example, rules on the scope of the conciliation negotiations are often ignored, or applied flexibly by the conciliation delegates. There is also a lot of procedural politics in this system, where actors strategically select the rules that give them the most influence on the policy outcomes. When for example scope rules are broken, it is often the case that actors strategically choose rules for adoption of conciliation reports that do not permit any points of order being raised against their content (Vogler 1977; Longley and Oleszek 1989; Oleszek 2001; Tiefer 1989; Light 1992; Congressional Quarterly Weekly 2003).

In contrast, the EU system is one where the rules are strict and generally respected, and where there is not much scope for actors to strategically select between different rules (Rasmussen 2005). The system has been described as one that has worked well and effectively (Garman and Hilditch 1998; Shackleton and Raunio 2003; Silvestro and Liberali 1997).

These differences in how the conciliation rules are applied between the EU and U.S. are important, as these committees affect who controls the legislative outputs of the two systems – outputs that affect the daily lives of millions of EU and U.S. citizens. We know from the U.S. literature that the type of legislation that ends up in conciliation there is usually the most controversial and significant (Krehbiel 1991; Longley and Oleszek 1989; Shepsle and Weingast 1987b; Steiner 1951). In addition, even if the committee is not used, actors can be expected to take into account what they could have obtained if the conciliation stage had been reached before concluding deals earlier on in the legislative process. In this way, EU practitioners have explained how conciliation “casts a shadow backwards” over the whole legislative process (Corbett, Jacobs and Shackleton 2007, 227; Shackleton 2000, 330).

The purpose of this article is to consider why rule application is more flexible in the U.S. than in the EU conciliation context. It specifically examines whether hypotheses derived from the recent literature on procedural politics (Jupille 2004; 2007) and institutional bargaining (Farrell and Héritier 2003; 2007) also hold in the conciliation area. The literature on procedural politics helps understand the conditions under which actors strategically choose between different rules, whereas the literature on institutional bargaining is interested in the conditions under which a given set of rules are modified or simply ignored. In line with the predictions of this literature, the results show that differences in rule application between the two conciliation systems can be explained on the basis of differences in ambiguity in which rule to apply, or how to interpret a given rule, and in how much bargaining power the actors interested in these choices have. However, they also add to recent work by showing how procedural politics and institutional bargaining may even occur in situations with only a marginal amount of rule ambiguity if the bargaining power of the actors with an interest in these choices is sufficiently strong.

The analysis firstly provides background, and reviews the existing literature about EU and U.S. conciliation committees. This is followed by a discussion of data, before the outlined differences in rule application are spelt out in more detail. Afterwards, hypotheses from the literature on EU procedural politics and institutional bargaining are derived to explain the differences in rule application, and the empirical analysis is performed.

EU and U.S. conciliation committees

An EU conciliation committee is convened to negotiate co-decision files when the Council does not have the required majority – normally a qualified majority if the European Commission (Commission) supports the amendments, otherwise unanimity – to adopt the EP's second reading amendments. In the U.S., conciliation is resorted to because of the requirement for all bills (not merely those relating to a specific legislative procedure as in the EU) to pass in identical form in both legislative houses. However, unlike the EU, there is no automatic route towards conciliation in the U.S. if the legislative bodies fail to adopt other measures to reach agreement. The chambers, instead, go to conciliation when, (usually) the second-acting chamber passes a bill, then insists on its amendment and also requests a conciliation committee with the first-acting chamber agreeing. U.S. conciliation committees can be resorted to at any time in the legislative process provided there is a formal statement that disagreement between the chambers exists, but, as in the EU, in practice they are reserved for the final legislative stage (Congressional Research Service 2003a, 13).

If a deal is reached in the U.S. conciliation committee, it goes to both houses for final approval just as a conciliation deal has to be approved by both the EP and the Council in the EU. In the U.S., the first-acting chamber may either accept or reject the conciliation report, or alternatively recommit it to conciliation. If, instead, the first-acting chamber accepts the conciliation report, the second-acting chamber may only choose between accepting and rejecting the deal. It is rare for the first-acting chamber to attempt to recommit a conciliation report, and when it does it is rarely successful. Of the 149 calls to conciliation during the 106th -108th Congresses, there were 21 attempts to recommit in the House, of which only two were successful, and no attempts to recommit in the Senate because it is usually the second-acting chamber on conciliation reports. Thus, in practice, U.S. conciliation reports are subject to an up and down vote just as EU ones are. If one of the U.S. chambers rejects the report, a new conciliation committee can be called, or amendments agreed between the houses can be resorted to in order to reconcile differences. This option, however, is very seldom used because failure to reconcile a deal in conciliation typically means that there is no political willingness to continue negotiations.

There are some interesting similarities between EU and U.S. conciliation committees. First of all, both are the only truly bicameral conciliation committees (Tsebelis and Money 1997, 110). In other words, their compromises have to be adopted by both delegations separately, not simply by the committee as a whole as is usually the case in conciliation committees and this has a profound effect on the types of compromises that can be reached. Correspondingly, formal studies have shown that bicameral conciliation committees can select from a wider range of solutions, and therefore have more leeway with their chambers than unicameral committees (Tsebelis and Money 1997, chapters three and four). Secondly, the EU and the U.S. have similar majority requirements (Tsebelis and Money 1997, 180) as in both systems one of the legislative bodies (the Council in the EU and the Senate in the U.S.) effectively requires a supermajority to adopt legislation, rather than the simple majority needed in the other body. In the Senate, a minority's power to filibuster legislation effectively raises the majority requirement, because three-fifths of the Senate is needed to invoke cloture (something that Tsebelis has referred to as a "qualified majority equivalent") (Tsebelis 2002, 151).

The literature on conciliation committees in the two systems is relatively sparse compared to, for example, the volume of studies devoted to parties and standing committees. Roughly speaking, it can be divided into three broad categories. Firstly, studies have been made of the development of the conciliation rules. Two examples are Ada McCown's impressive doctoral thesis (1927), which gives a thorough historical overview of the development of U.S. conciliation procedures up to the start of the 20th century, and Julie Garman and Louise Hilditch's (1998) study of how informal practices developed in the first years of EU conciliation committees. Moreover, a recent article looks at the institutional set-up of the EU committees and tests whether delegation in EU conciliation procedures fulfils the typical predictions of principal-agent theory, and concludes that the rules regulating the room for maneuver of the delegates are strict (Rasmussen 2005). Secondly, there is a large body of research in the U.S., and a couple of recent EU, studies on inter-chamber power, i.e. studies of the relative power of the two legislative bodies within the committee. Except for Steiner, U.S. studies draw the conclusion that the Senate tends to win (Fenno 1966; Ferejohn 1975; Kanter 1972; Manley 1970; Steiner 1951; Strom and Rundquist 1977; Vogler 1970), whereas the answer is less clear in EU research. Here, a theoretical study (Napel and Widgren 1993) finds that the Council holds the best bargaining position whereas an empirical study of "who wins" draws the opposite conclusion (König, Lindberg, Lechner and Pohlmeier 2007).

Thirdly, studies have investigated the effects conciliation committees have on intra-chamber power distribution. For example, U.S. studies have debated whether the existence of conciliation committees gives the standing committees an ex post veto to clear what might have happened on the floor after the bill left committee (Krehbiel 1987; Shepsle and Weingast 1987a and 1987b), or whether these committees are effectively controlled by the majority party leadership (Carson and Vander Wielen 2003; Ortega and McQuillan 1996). A recent EU study also examines intra-chamber power by looking at whether the conciliation delegates from the EP have policy positions in line with different potential principals, such as the EP party groups and standing committees (Rasmussen 2008). It shows these conciliation delegates have positions very close to their party groups, but that at the same time the delegation is typically composed in such a way as to be in line with the interests of the full body.

So far we do not have any comparative studies of the EU and U.S. conciliation committees. Only Tsebelis and Money's 1997 study of bicameralism includes information about these committees in both systems, but it does not test its formal models on EU and U.S. data as such.

Data

The argument here is not that the EU has all the characteristics of a state but that its special characteristics do not prevent it from being compared to a domestic political system either. As Caporaso perceptively observed, "the treatment of the EC as a special case has been driven mostly by disciplinary pressures, the increasing academic division of labor, and the growth in complexity of the EC itself, rather than by explicit philosophical argument" (Caporaso 1997, 1-2). To study the EU and U.S. conciliation rules and their application, similar time periods have been examined in the two systems, i.e. the 106th-108th Congress and the 5th term of the EP. This means that the EU system, which was invented with the Maastricht Treaty in 1993, is examined in a relatively early

stage of its development, whereas the U.S. system is a much older one dating back to the beginning of Congress in 1789. However, this is not a problem because there is no expectation that how flexibly rules are applied should be linked to how long they have been in existence, but rather to a range of other factors which will be discussed below.

To examine the formal rules regulating the work of conciliation committees in these two systems, the study relies on the Treaty of the European Union, the rules of procedure of the EP, and the rules and precedents of the two U.S. houses. Moreover, to examine their practical application, it includes news sources: official documents on the functioning of conciliation procedures from the EP and the U.S. Congressional Research Service, and 20 interviews. The respondents were staffers with a high knowledge of conciliation work due to their involvement in (e.g.) procedural advice and co-ordination in this phase of the legislative process. They were found by contacting the conciliation services of the EP, Council and Commission in the EU, and the Congressional Research Service, the Office of the Parliamentarian and leadership office in the two U.S. houses. Their inclusion ensures that assessments of how the procedures generally work are obtained, which would not necessarily be the case if the study had relied on evidence from staffers involved in specific policy cases.

Differences in rule application

The analysis starts by going into more detail on the outlined differences in rule application between the EU and U.S. These differences are clear if for example we examine the scope rules regulating what the conciliation delegates can negotiate about. In the EU, it was agreed in an inter-institutional agreement (and later in the Amsterdam Treaty) that the conciliation committee should address the common position on the basis of the EP's second reading amendments (Treaty of the European Union, Article 251(4); EP 1999, 4; EP 2003, 5). It is also reported that the delegates do so in practice (Rasmussen 2005). In the U.S., the House rules limit the conciliation delegates' authority to matters over which the two houses are in disagreement, meaning that matters that appear in both chamber bills cannot be discussed and new matters cannot be added (Congressional Research Service 2003a, 19-22; Congressional Research Service 2003b, 12). Moreover, the House rules explicitly limit the negotiations on matters of disagreement to the scope of the differences between the House and the Senate positions. In other words, if the Senate proposes a figure for a program of \$100 million and the House has proposed \$90 million, they must agree on a final figure within that range. These restrictions on the scope of behavior of the conciliation delegates may seem strict at first sight, but they have been administered much more flexibly than the EU rules. According to one Congressional staffer "There are rules, but we don't follow them" (Interview H-1). In the words of another Congressional staffer, there are instances in both chambers in which "a conference committee can result in outside materials even though the rules prohibit it from being considered" (Interview S-1). It is only when a point of order is raised against the conciliation report in the chamber that new matters can create problems, but this does not necessarily occur. Alternatively, different options can be used, such as adopting the report by a two thirds majority of the House under suspension of the rules in which points of order against the report are not allowed; or else the House Rules committee may suggest that the House approves a special rule waiving all points of order against the report. According to one

Congressional staffer, today “There is a tendency to give more lenient rules on things like some of the substantive issues on what can be in a bill” (Interview H-1).

The Senate also has a scope rule (Rule 28), but it is quite flexible. *Riddick’s Senate Procedure* states that “a conference report may not include any new ‘matter entirely irrelevant to the subject matter,’ not contained in the House- or Senate-passed versions of a measure” (Congressional Research Service 2003a, 22). Unlike the House, there is no motion to waive all points of order against conciliation reports containing new matter, or from which agreed matter has been deleted. Instead, there is only the option of suspending the rules with a two-thirds majority, but it is rarely used. This has not been necessary as the Senate has interpreted its own rules and precedents even more flexibly than the House, thereby permitting its conciliation delegates extensive room for maneuver (Congressional Research Service 2003c, 2). A Congressional staffer gives an example of such behavior: “The bill that the House and Senate did the other day included several portions that hadn’t passed at least in the Senate, and some hadn’t passed in the House” (Interview H-2). The risk of points of order being raised is therefore relatively low. *Congressional Quarterly Weekly* (2003, 2761) has written that “While conference reports often include language that was not in either the House or Senate version, lawmakers rarely challenge final bills by raising a point of order on scope [...] in the Senate, staff cannot recall any points of order being raised [author: concerning scope] since at least 2000”.

The U.S. chambers have another option which is not available to EU legislative bodies which limits the scope of behavior of the conciliation delegates, namely to instruct them, for instance, to insist on certain provisions from their own body, or to accept some of the other body’s provisions. Instructions are somewhat more common in the House than in the Senate, where there is a general lack of willingness to constrain the negotiating flexibility of the conciliation delegates (Congressional Research Service 2003d, 3). As Table one shows, during the period being examined there were 104 successful attempts to instruct conciliation delegates in the House and just six in the Senate.

Table 1. Motions to Instruct on the 149 calls to conference during the 106th-108th Congresses

	House		Senate	
	Attempts	Adopted motions	Attempts	Adopted motions
Total	166	104	6	6
106 th	52	39	6	6
107 th	34	28	0	0
108 th	80	37	0	0

Note: All attempts to instruct listed in <http://thomas.loc.gov/> which were put to the vote are counted.

Instructions are not necessarily a very effective tool for the chamber to constrain the conciliation delegation. Firstly, they are not binding in either chamber and may be ignored, especially those issued in the later stages of the process. A respondent explained: “It is all message politics. That’s what it amounts to. They choose the issue, offer repeated motions to instruct. They force it on record, that’s really what it amounts to” (Interview CRS-1).

A further limitation of the room for maneuver of the House conciliation delegates is that amendments have to be germane, i.e. there is a requirement that “no motion or proposition on a subject different from that under consideration shall be admitted under color of amendment” (Bach 1982, 341-57). In the Senate, amendments merely have to be germane when offered to general appropriations or budget measures, or when they are put forward after the full Senate has invoked cloture on a filibuster.² However, the stricter House requirement may potentially constrain the scope of action of conciliation delegates from both chambers. Thus, procedures were accordingly established in the House in the beginning of the 1970s which made it possible for House members to reject non-germane provisions of conciliation reports. If the House votes to reject the non-germane matter of a conciliation report after debate, it is considered to have been rejected. The House will then vote to amend the Senate amendment with a House amendment that consists of the rest of the conciliation report.

However, once again there are ways of getting round this that are somewhat similar to those for getting around the prohibition against putting new matter into conciliation reports. Firstly, to adopt the final report in the chambers a special rule that does not allow points of order to be raised against the conciliation report can be used here too. Secondly, if points of order are raised, the House may decide not to accept them and keep the non-germane matter that is contained in the conciliation report. Ultimately no action against non-germane matter may be taken in the House, typically because a majority of the House actually supports the insertion of the non-germane matter into the conciliation report, or the Senate’s acceptance is conditional on having the non-germane matter included (Congressional Research Service, 2003a, 35-36). According to one Congressional staffer, this option

is never used [...] Conference reports are a “take it or leave it” proposition. If the House exercises that rule and tries to take out something which would not have been germane, the effect is to kill the conference report [...] because the Senate then has to agree to whatever position the House has made, and why would it? [...] so you haven’t seen that rule used in years and years, because it just really doesn’t work (Interview S-2).

The EU does not have a germaneness rule in the Treaty text, but adheres to the principle in practice. This also follows from the opinion of the Advocate General before a recent Court ruling stating that “The joint text should have the same subject-matter as the original Commission proposal” (Case C-344/04, Paragraphs 86 and 98). In sum, even though it was noted initially that the two political systems display similarities in the rules that regulate the conciliation delegate’s room for maneuver, there are important differences regarding how these constraints are applied in practice. The EU system is one where the rules are generally respected, whereas the U.S. system shows examples of scope and germaneness rules being ignored, and where there is more than one way of doing something, of procedural politics where actors strategically select rules to maximize their influence. The study will now dig deeper into the question of why the application of the rules is different in the two systems.

² The Senate may also impose a germaneness requirement on itself as part of unanimous consent agreements used for consideration of individual measures, if there are no exceptions which allow non-germane amendments in such agreements (Congressional Research Service 2003a: 35). However, this is rarely done.

When would we expect institutional disobedience and procedural politics?

Recent work in institutional theory has looked at how actors try to influence the rules of the game either a) by modifying or simply ignoring the existing rules (here referred to as institutional disobedience) or b) by engaging in procedural politics and strategically selecting the rules that benefit them the most. Examples of the first type of work include Henry Farrell and Adrienne Héritier's analysis (2003) of how the EP has reinterpreted the rules of play in the co-decision legislative procedure to its own advantage, and of the second type Joseph Jupille's work (2004; 2007) on procedural politics when it comes to selecting the legal basis of the EU treaty under which a given legislative proposal should fall. In the EU, the different treaty articles attach specific procedures to specific policy areas, and the relative power of the EU legislative bodies varies between the different procedures. It is therefore important to them which treaty article, or legal basis, a given act falls under. Both types of work underline that the choices made in the EU legislative process are not just about the substance of the policy proposals, but also very much about the rules under which these policies are made.³ This is nothing new. Where this work distinguishes itself is by specifying the conditions under which we can expect such institutional disobedience and procedural politics to occur.

Firstly, both types of work stress the importance of institutional ambiguity. For Farrell and Héritier the institutional set-up is an incomplete contract. Rules do not spell out precisely what the obligations and competences of the involved actors are. They are an abstraction of reality, whereby they are by definition obligatorily incomplete. Otherwise they would not be rules (Caporaso 2007; Farrell and Héritier 2007). Actors cannot and may not have an interest in specifying all contingencies in advance when designing a given rule. This leaves scope for actors to exploit rule gaps and ambiguities by bargaining about if and how to apply them in everyday politics. Jupille's supply-side study of procedural politics also argues that the likelihood of procedural politics increases when there is jurisdictional ambiguity on which rule to apply. In his example, the treaties leave scope for which legal basis to apply to a legislative act. The same issue can often be phrased in different subject terms or addressed by different subjects. In sum, we can hypothesize that *the greater ambiguity about which rule to apply or how to interpret a given rule, the greater the level of procedural politics and institutional disobedience we would expect.*

Demand-side explanations are also central to this work. Jupille argues that we will not see a lot of procedural politics if actor influence when using different rules is more or less the same. However, the more actors can get out of using one rule as opposed to another, the more they will push for adopting that rule. Along the same lines, Farrell and Héritier's work is based on the assumption that actors exploit opportunities in incomplete contracts to expand the amount of their political influence. Hence, *the greater the possibility for the actor to gain by selecting a certain rule or modifying a given rule, the greater the level of procedural politics and institutional disobedience we would expect.*

³ The argument of this work is that these processes of institutional bargaining and procedural politics either constitute or may lead to institutional change. The ambition here is not to explain institutional change, but exclusively to make a cross-sectional comparison between the two systems within a limited time period.

Finally, inspired by Jack Knight (1992), Farrell and Héritier argue that to find out which actors will be successful in selecting or modifying a given rule, we need to take their relative bargaining strength into account. *Hence, the greater the bargaining power of the actors interested in procedural politics and institutional disobedience, the more likely these two types of behavior are.* Bargaining power can derive from many factors, such as competences that actors have in a given decision-making context, their time-horizon, and their sensitivity to failure of the measure in question. The idea is that actors can use these sources of power to force through the procedural choices for which they have a preference. As an example, if an actor is the only veto player in the policy process, has a lot of time to reach a deal compared to the other actors involved, and would not suffer any damage if the policy process fails, in contrast to the other actors he has more bargaining power in the negotiations to force through modifications of the formal rules. Here, bargaining power is primarily seen as being linked to two factors. First, it derives from procedural control over the legislative agenda. Actors interested in strategically selecting between the rules, or adopting conciliation reports which break scope rules, have more bargaining power if it does not require a high majority for them to make these choices. Second, heavy monitoring and sanctioning have the opposite effect, i.e. the bargaining power of actors to ignore rules is low if rule compliance is heavily monitored by for example procedural staff, or if such behavior can subsequently be sanctioned by third parties.

Because this article is only looking at two systems, it cannot perform an actual test of the three hypotheses. Instead, the ambition is much more modest: it will simply examine whether qualitative evidence suggests that there is a relationship between the three outlined conditions and the differences in the level of institutional disobedience and procedural politics in the U.S. compared with the EU conciliation context. If so, the causal relationships proposed by the hypotheses can subsequently be tested in a large n study.

Why is there more procedural politics in U.S. than EU conciliation committees?

Beginning with the EU, it is quite obvious why we see no procedural politics in the conciliation context. There is simply no supply. For example, conciliation delegates cannot bring conciliation reports to a vote under a special rule in the Council and the EP or suspend the rules of these bodies if they have broken scope rules. There are not multiple procedural alternatives for taking these decisions in this political system.

The analysis given above, by contrast, shows how procedural politics are possible in the U.S. context regarding the decision on how to adopt conciliation reports. The chambers rarely decide to suspend the standard rules by adopting the reports with a two-thirds majority so that points of order against reports are not allowed, but the House does use the option to adopt the report under a special rule that automatically waives all points of order. However, this choice cannot be seen as a result of ambiguity. Hence, which rule to apply is not ambiguous in the way that ambiguity may exist about which legal basis is the right one for a legislative act. There are simply multiple alternatives for adopting conciliation reports, with no single one most appropriate in a given circumstance. This also means that there is no option of sanctioning actors for having selected one rule as opposed to another. What matters is that there is sufficient demand to do things in a certain way and sufficient bargaining power behind these demands. Special rules were selected in the House by actors who saw it as a way for them to

maximize their influence on the policy outcomes. Numerous instances were reported of the leadership using a rule that waived all points of order against a conciliation report that contained new matter in order to prevent any points of order being raised against it, so as to protect its own preferences. Moreover, the fact that it had sufficient bargaining power played a role in its success. Hence, the House majority party is very powerful because its majority of seats gives it a unique opportunity to influence not only policy outcomes, but also the rules of the game. It controls the so-called rules committee of the House, which determines the House rules and procedures for completing its business, for example the extent of the debate and the degree to which a proposed bill can be amended. It is one of the most powerful committees of the House and may be regarded as an “arm of the majority leadership” (Davidson and Oleszek 2002, 240-45).

Why were there no procedural politics in the Senate when, even though special rules could not be adopted, there was always the option of suspending them? Both the demand-side and bargaining power hypotheses can help explain this. Firstly, there was little incentive for Senators to demand such a suspension of the rules to protect conciliation reports. As explained, these scope rules are interpreted in a very liberal manner, and in any case points of order against reports that break them are highly unlikely. Moreover, even if some Senators or even the Senate majority party showed interest in suspending the rules, it is unlikely that they would have sufficient bargaining power to implement this procedural option. The majority party in the Senate does not have the same level of procedural control as it does in the House. Moreover, as previously explained, the only option than existed here was to suspend the rules altogether, which requires a two-thirds majority, not merely a simple one.

So, all in all, the factors outlined in the hypotheses as being important for whether procedural politics is likely to occur have helped explain the differences between the EU and the U.S., as well as between the two U.S. chambers. Procedural politics occurred in the House because there were procedural alternatives and there were actors who would benefit from adopting a certain rule instead of another, with sufficient procedural control of the agenda to make such choices, and who could not be sanctioned for such behavior. The situation was different in the Senate even though there were procedural alternatives. Here, actors did not have sufficient incentive or bargaining power to use them. Finally, in the EU there were simply no institutional alternatives. The only qualification to the framework is that the supply of procedural politics did not require procedural ambiguity. It is not that one rule for adopting conference reports might be more correct than another in the way that it may be more accurate to let a given EU legislative act fall under one legal basis in the Treaty as opposed to another. Instead, there are simply several available procedural alternatives for adopting conference reports in the U.S.

Why is there more institutional disobedience in U.S. than EU conciliation committees?

After having explained selection between the different rules, the study now proceeds to examine how well the three hypotheses perform in accounting for whether actors comply with a given rule, i.e. why the EU scope rules are generally respected whereas the U.S. scope and germaneness rules are interpreted somewhat flexibly. In the EU system, it can of course not be ruled out that there may be a demand for interpreting the scope rule strategically. Hix, for example, explains how the long-standing chair of the

Environment committee, Ken Collins, tried to take advantage of the situation to introduce new amendments at the conciliation stage “to use as bargaining chips or to change the dimensionality of negotiations” (Hix 2002, 276).

At the same time, we know from a recent study of the EU conciliation committee that the conciliation delegates rarely have an incentive to deviate from the opinion of their parent bodies, as their level of representativeness is very high (Rasmussen 2008). There is also not much rule ambiguity in the EU context. In the beginning of EU co-decision there was some ambiguity about the application of the scope rules. It was argued (but viewed as being a matter of controversy) that the committee could negotiate on the entirety of the common position and not merely about those parts amended by the EP (Boyron 1994, 298; EP 1995, 38). However, this ambiguity has subsequently been reduced when the rule requiring that the conciliation committee address the common position on the basis of the second reading amendments of the EP was later written into an interinstitutional agreement and subsequently incorporated into the Amsterdam treaty, which served as the legal basis in the period under examination. A study by Fernandez and Casanueva published by the EP commented, “It appears logical that the work of the committee should henceforth focus exclusively on the amendments proposed by the Parliament and adopted by plenary at second reading” (EP 1997, 26). It should be noted though that a recent ruling by the European Court of Justice, delivered on 10 January 2006, concerning the so-called Denied Boarding Directive (COD 2001 305) questions this narrow interpretation (Case C-344/04). Here, representatives from the airline industry tried to challenge the validity of certain provisions of a directive which the Council and the EP had changed during conciliation, but which had not been amended by the EP at second reading. However, the Court decided that the conciliation delegates had not exceeded their competence in the case in question but were allowed to change provisions not amended by the EP in the spirit of reaching agreement. At the same time, this decision should by no means be seen as arguing that “anything goes” in conciliation. The Advocate General, who prepared the court decision, said: “It is clear, too, that the scope of the power of the Conciliation Committee is not unlimited. First, the logical starting point for seeking amendment is the outstanding disagreement between the Council and the European Parliament. Second, the scope of the measure proposed may not be fundamentally altered” (Opinion of Advocate General on Case C-344/04, paragraph 86). Moreover, in this case something was removed from an article that had not been amended by the EP at second reading, but a parallel article *had* been amended at second reading. When Council agreed to this EP amendment, there was a need to also change the unamended article to ensure consistency between the two articles. Thus even if there may be an element of ambiguity about the application of the scope rules in the EU, it is limited. A respondent explained that “In conciliation, everybody knows what the starting point is: the amendments of the Parliament and the common position of the Council, and it’s written down”, and that “In conciliation, though we can be very creative, in practice the scope is significantly smaller” (Interview EP-1).

In any case, it is unlikely that the few actors in this system who might be interested in modifying the rules would have sufficient bargaining power to force changes through. In the EP, no party group has a sufficient number of votes to push through its agenda but, instead, must coordinate with others. Even if it were possible, the Council would have to agree to such behavior for the act to become law, which might not be easy. A respondent explained, “Both sides watch the others like hawks to make sure that

these rules are respected [...] There are controls inside the delegations but also between the delegations” (Interview EP-1). Moreover, the Commission, which participates in the work of the conciliation committee as an honest broker between the co-legislators, might protest against such behavior (Treaty of the European Union, Article 251(4)). There is also procedural staff in all three EU institutions who play a very important role during the conciliation negotiations, enforcing the scope rules by participating in the negotiations and helping to manage the agenda. Finally, actors might refrain from breaking the rules because of the risk that the act might subsequently be taken to the European Court of Justice either by another institution or by external parties disadvantaged by it. Hence, because the EU scope rules are part of the EU treaty, they are subject to third party enforcement, which significantly decreases the bargaining power of actors interested in breaking them.

If we now compare this to the U.S., there are both differences and similarities. In accordance with the demand-side hypothesis, the empirical analysis demonstrates very clearly that actors engage in such institutional disobedience because of the policy gains they can obtain from interpreting the rules in their own way. Even though a recent study of U.S. conciliation committees shows that they are not generally biased towards their parent bodies, it is pointed out that such a discrepancy between the preferences of their conference delegates and their parent bodies has not been uncommon either (Rybacki, Smith and Vander Wielen 2003). Furthermore, the respondents in the present study indicate that there is often a demand for institutional disobedience. One explained, “Often you’ll see conferees push the line [...] Conferees, yes, should represent the body and likely will, but you know they will try to move things or massage items to better suit their interests” (Interview S-3). Another respondent explains how, especially in recent years, there has been “greater willingness on the part of the Senate to not insist on conferees staying between the scope of the differences committed to conference” (Interview H-2). Even in cases where it is obvious that some matter is new, it may be added to a bill which it is considered important to pass. A respondent stated that “Anybody could raise a point of order against this conference report, but nobody did because they liked what was in the report. So these rules are not self-enforcing [...] That’s sort of the downside of conferences” (Interview CRS-1).

If we look at rule ambiguity, the practical application of the scope rules may prove difficult. Take, for example, the House rule that matters in disagreement must remain within the scope of the previous differences. The judgments become especially hazy when the differences are qualitative. Moreover, when one chamber does not amend the other chamber’s bill through a series of individual amendments, but makes a single large amendment to the other chamber’s bill in the form of a substitute (as is usually the case), the scope of the disagreement becomes very broad. As the Congressional Research Service (2003a, 20) has argued, “Second house substitutes make it much harder, if not impractical, to specifically identify each matter in disagreement and the scope of the differences over that matter [...] Technically, the House and Senate are in disagreement over the entire text of the measure; substantively, the policy disagreements may be almost as profound”.

The House *does* however have a special clause concerning the scope for action in the case of such substitutes, meaning that some of the same principles apply even in this situation. Nevertheless, in practice it is still quite difficult to determine whether such conciliation deals include “new matter”. Moreover, with regard to substitutes, Riddick’s *Senate Procedure* says (p. 463) that “In such cases, they [the conciliation delegates]

have the entire subject before them with little limitation placed on their discretion...” (Congressional Research Service 2003a, 22).

However, it is also clear that the rules are not just ignored because there is ambiguity about how they should be interpreted. In many cases, the actors are aware that they break the scope rules. A staffer engaged in giving procedural advice in the Senate explained,

People come to us all the time and say: Is this in scope, is this in scope? And, you know, sometimes they will act accordingly, and then other times, it is just admitted in advance, like the appropriations bill we just had [...] They took the foreign aid appropriations bill in conciliation and they added eight other appropriations bills and a whole bunch of other stuff. It is obviously out of scope (Interview S-2).

The bargaining power of the actors pushing for rule breaks plays a role in explaining why they are successful in exploiting ambiguity to their own advantage. Respondents underlined how those pushing for breaks to the scope rules can often be quite powerful if they manage to add their amendments to ‘must pass’ bills. One explained how, during the negotiations on the 2000 appropriations bill, Senator Byrd “walked in with a piece of legislation that no one had seen and insisted that it be added to the measure without any consideration by any committee [...] That’s one of the tricks of the process that Senator Byrd knows that appropriations bills don’t get voted down very often. Everybody has to get that money” (Interview COM-1). In Farrell and Héritier’s wording, if sensitivity to failure is high (here because of ‘must pass’ financial bills), the conciliation delegates have additional bargaining leverage. Likewise, the bargaining power of actors pressing for institutional disobedience is not constrained by the same factors as in the EU. The U.S. chambers have procedural staff (for example the Office of the Parliamentarian in the two houses, and the Congressional Research Service) that can be consulted, but they play no role in enforcing the rules as staff typically do in the EU. The staff simply give advice to the Congress members but, as mentioned, conference delegates will not necessarily act accordingly. Moreover, the President’s staff plays a quite different role to that of the Commission. They may try to influence conciliation negotiations on an informal basis, but such work is more motivated by an attempt to forward the President’s agenda than to make sure that the internal rules of the two houses are respected. Precisely the fact that these rules are internal rules of procedure in the two houses also means that there is no threat that laws could subsequently be taken to court for breaking the scope rules. These are all factors that add to the bargaining powers of U.S. actors interested in breaking the scope rules.

Conclusion

It is now less puzzling why rule application in the EU and U.S. conciliation committees is so different. Whereas the few EU rules that exist to constrain the work of the conciliation delegates are generally applied very effectively, this is not necessarily the case in the U.S. Here, the actors can often choose between rules in such a way as to increase the conciliation delegates’ room for maneuver, or where there are no procedural alternatives they may not abide by the rules at all. Recent institutional literature on procedural politics and institutional bargaining can help account for this. Some of the factors which this literature draws our attention to as being important for procedural politics and institutional disobedience vary between the two political

systems. Procedural politics does not take place in EU conciliation committees due to lack of procedural alternatives; in contrast in the U.S. conciliation reports can be adopted under different rules. Moreover, we see more procedural politics in the House than the Senate because it is less necessary for actors in the Senate to demand rules protecting conciliation reports as the Senate scope rules are interpreted very flexibly anyway, and because, even if some actors did, their bargaining power would be low; a large number of Senators are needed to adopt such a decision.

Institutional disobedience is higher in the U.S. than the EU partly because of the ambiguity over not amending the other chamber's bill with individual amendments, as happens in the EU, but with one big substitute, which – even if there are scope rules – can make their interpretation tricky. It has also been pointed out that, whereas a recent study has shown that EU conciliation committees are composed in such a way that preference bias is marginal, bias in the US context has not been uncommon over the years. In addition, EU actors interested in breaking the rules are unlikely to have enough bargaining power to do so for a number of reasons. They are heavily monitored by procedural staff, the co-legislators monitor each act carefully, and there is always the threat that an act breaking the scope rule could be subsequently challenged constitutionally because of the treaty status of this rule. In short, the supply, demand, and bargaining power explanations of procedural politics and institutional disobedience all perform well.

However, there is also a new lesson for the literature. Despite the prominence often given to rule ambiguity as a starting point for either procedural politics or institutional disobedience, we saw examples of both processes occurring even where there is marginal or no ambiguity. In the U.S., procedural politics does not exist in bicameral bargaining because of lack of clarity over which rule to apply in a given situation. All alternatives for adopting conciliation reports are valid choices. Where the choice falls depends on the incentives and bargaining power of the actors. Moreover, institutional disobedience does not only occur when it is unclear whether something is in scope or not, but also very often when it is known by all relevant actors that it is not, but when they have sufficient bargaining power and incentive to demand it.

We previously knew that rule ambiguity was not a sufficient condition for procedural politics and institutional disobedience. This study adds to the existing literature by underlining that it is not a necessary one either. This is of course not to say that rule ambiguity is not a factor that creates scope for conflict, or that actors should not strive to draft rules that are as unambiguous as possible. Instead, the point is simply that no matter whether one succeeds in creating relatively unambiguous rules or not, there may still be bargaining about their application. So, even if actors wanting to ensure rule compliance could specify all contingencies and make complete contracts, they might also have to focus on some of the other factors discussed here as being of importance to whether procedural politics and institutional disobedience occur.

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