

Working Paper

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The European Parliament in Treaty Reform

Predefining IGCs through Interinstitutional
Agreements

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Abstract

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

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

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

We begin the article by setting out theoretical background and basic assumptions. The following parts look at three areas in which IIAs figure prominently: we track the evolution of the EP's participation in legislative planning and comitology, as well as the informal rules

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

² Article 48 TEU only obliges the Council to consult the European Parliament before delivering an opinion in favour of calling an IGC on treaty reform. As regards the roles played by the EP during the last IGC's cf. A. Maurer, 'Democratic Governance in the European Union: the institutional terrain after Amsterdam', in J. Monar and W. Wessels (eds.), *The European Union after the Treaty of Amsterdam* (Continuum 2001), pp. 96-124; A. Maurer, 'The European Parliament: Win-Sets of a Less Invited Guest', in F. Laursen (ed.), *The Amsterdam Treaty. National Preference Formation, Interstate Bargaining and Outcome* (Odense University Press 2002), pp. 405-452; C. Neuhold, 'The European Parliament and the European Commission: You can't always get what you want', in F. Laursen (ed.), *The Treaty of Nice. Actor Preferences, Bargaining and Institutional Change* (Martinus Nijhoff Publishers 2006), pp. 351-368.

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

⁴ Hummer, 'Interinstitutionelle Vereinbarungen', note 1 above, 116.

⁵ For articles dealing with single aspects of parliamentarisation see cf. S. Hix, 'Constitutional Agenda-Setting through Discretion in Rule Interpretation: Why the European the EP Won at Amsterdam', (2002) 2 *British Journal of Political Science*, 259-280; A. Maurer, 'The Legislative Powers and impact of the European Parliament', (2003) *JCMS* 41, 227-248; B. Rittberger, 'The Creation and Empowerment of the European the EP', (2003) *JCMS* 41, 203-226; A. Rasmussen 'Institutional Games Rational Actors Play: The Empowering of the European Parliament', (2000) 4 *EIOP*, (<http://eiop.or.at>).

governing its relations with the Commission. The last part summarizes our analysis and checks our empirical findings against the theoretical assumptions.

1. Treaty reform and institutional change in the EU

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

Recent research on treaty reform has levelled criticism⁶ at widely cited intergovernmentalist explanations of institutional change. The latter are based on two major claims: firstly, that institutional change takes place through „big bargain decisions”⁷ at IGC summits, and secondly, that Member States' governments are the dominant actors at IGCs, making all the decisions based on their prefixed and homogenous national interests.⁸ This leaves supranational actors, which have no formal say at IGCs, with next to no role in institutional change.

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

We seek to lend weight to this approach, and to address a lacuna in this growing body literature, by explaining an important aspect of the EP's role in treaty reform, namely its frequent recourse to IIAs. For this we specifically turn to a sub-stream of the neo-institutionalist approach - namely to historical institutionalist explanations of institutional

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

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

⁸ A. Moravcsik 'Liberal Intergovernmentalism and Integration: A Rejoinder', (1995) JCMS 33, 611-628; A. Hurrell and A. Menon, 'Politics Like Any Other? Comparative Politics, International Relations and the Study of the EU', (1996) West European Politics 19, 386-402; A. Moravcsik and K. Nicolaidis, 'Explaining the Treaty of Amsterdam: Interest, Influence, Institutions', (1999) JCMS 37, 59-85.

⁹ cf. S. Hix, 'Constitutional Agenda-Setting', n 4 above; A. Rasmussen, 'Institutional Games', n 5 above; H. Farrell and A. Héritier, 'Formal and Informal Institutions Under Codecision: Continuous Constitution-Building in Europe', (2003) 4 *Governance* 16.

¹⁰ For a larger critique on the state of the art of research on treaty reform not limited to constraints/opportunities deriving from previous decisions in between IGCs treated in this article, but in addition emphasising political and time constraints during the different phases of IGCs (issue-framing, agenda-setting etc.) see Christiansen et al, 'Theorising Treaty Reform', n 6 above.

change in the EU. Regarding institutional change in the EU, historical institutionalism shares many of the key assumptions of neo-institutionalism, challenging the view expounded by intergovernmentalists that Member States' governments are the key actors determining the constitutional development of the EU. It acknowledges the role of autonomously acting supranational institutions that pursue their own reform agendas, as well as that of a dense cluster of governmental and non-governmental actors at all levels of the EU. At the core of all neo-institutionalist approaches in general is the claim that institutions matter. Institutions are defined as informal and formal sets of rules, procedures and/or norms and ideas that structure social interaction.¹¹ These institutions in which the policy-making process is embedded¹² are believed to define the scope for action of all actors, in this case the scope for action in Treaty reform. Actors thus operate in an environment which is highly structured by these institutions which can both enable and constrain them in the pursuit of their interests.

Most significantly, historical institutionalist analyses treat institutional change as a process unfolding over time. According to Pierson,¹³ any analysis of the institutional change of the EU which restricts itself to IGCs will yield a snapshot of constitutional development which is at best unrepresentative of the overall process. It is argued that the EU's constitutional development has to be seen as an *unceasing process of incremental change* rather than one limited to a staccato series of IGCs. The model of 'path-dependency' of policy preferences, institutions and procedures, policy-outcomes and policy-instruments suggests that in such a heavily institutionalised arrangement like the EC/EU, „past lines of policy [will] condition subsequent policy by encouraging societal forces to organise along some lines rather than others, to adapt particular identities or to develop interests in policies that are costly to shift“.¹⁴ Thus, once policy decisions have been made or institutions introduced, they will be difficult to reverse at a later point. This is due to the institutional barriers to reform, the resistance of actors that were favoured by the institution, and the high costs of change once actors start to adapt to the new policies/institutions in the period between two IGCs.

In sum, awareness of incremental change suggests that treaty reform is subject to a wide range of actors. Member states are but single players in a cluster of actors, each of which has an impact on the constitutional process and which are constrained by previous decisions and developments, and a myriad other factors including their political hinterland.¹⁵ Actors do not simply have fixed sets of demands; rather, their preferences are shaped or 'shift' during this process of treaty implementation and treaty reform. IGCs can thus be seen as the highlights of treaty reform; they are very reactive in that these 'summits' of treaty reform often „merely codify“ key institutional features „which have already occurred [...] away from the 'intergovernmental' negotiating table, in the depths of the valleys in between“ such as the gradual „empowerment of the European Parliament“.¹⁶ It is in this light that we propose to analyse the effect of IIAs upon treaty reform.

2. IIAs in Treaty Reform: Pre-defining future Treaty amendments

IIAs can be regarded as an element that predetermines reform options *in the valleys between IGCs*. Indeed, many treaty provisions refer to procedures formerly decided upon in IIAs.¹⁷ Despite their informal nature, arrangements like IIAs institutionalise, and are able to modify,

¹¹ cf. P. Hall and R. Taylor, 'Political Science and the Three New Institutionalisms', (1996) 44, 936-954.

¹² P. Pierson, 'The Path to European Integration: A Historical-Institutionalist Analysis' in W. Sandholtz and A. Stone Sweet (eds), *European Integration and Supranational Governance* (Oxford UP, 1998), 27-58.

¹³ P. Pierson, 'The Path', n 12 above.

¹⁴ P. Hall and R. Taylor, 'Political Science', n 11, 941.

¹⁵ U. Sverdrup, 'Precedents and Present Events in the European Union: An Institutional Perspective on Treaty Reform' in K.-H. Neunreither and A. Wiener (eds), *European Integration after Amsterdam* (Oxford UP, 2000), 241-265.

¹⁶ T. Christiansen and K.E. Jørgensen, n 6 above, 17.

¹⁷ For an overview see table 6 in A. Maurer and W. Wessels, *Das Europäische Parlament nach Amsterdam und Nizza: Akteur, Arena oder Alibi?* (Nomos, 2003), 171.

the real institutional balance without formally changing the Treaties.¹⁸ Even if IIAs cannot amend the Treaties,¹⁹ we set out to show that in practice they can go far beyond what has been agreed under the Treaties. In line with MEPs' aspirations, IIAs have the capacity to induce Treaty reforms.²⁰ Based on the assumption of path-dependency, we argue that IIAs can be seen as rules or procedures that, once introduced, shape the realm for further developments by narrowing the scope for possible change and by indirectly obliging Member States to think only of the incremental revision of existing arrangements. In other words, IIAs can create facts thanks to which member state governments subsequently have limited options other than their formalisation.

We seek to show that the EP has consciously used IIAs as instruments to strengthen its own position in the EU decision-making process.²¹ Since the EP has no formal decision-making power at IGCs, we argue it has strategically and deliberately used IIAs to create irreversible facts, informally increase its power and precondition future Treaty reforms at IGCs. Numerous parliamentary reports and statements made by MEPs show that parliamentary actors see IIAs as instruments to strengthen the EP's role in the EU's institutional set-up²² and link the conclusion of IIAs to the unfinished process of constitutionalisation.²³ In line with the theoretical arguments set out above, we argue that IIAs can be seen as temporary solutions which should at a later point result in alterations of the Treaty provisions.

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

Two qualifications should be made at this stage: firstly, we do not claim that every IIA codifies rights for the EP, or that the EP is always primarily motivated by such aims. There are numerous examples of IIAs which do not affect the balance of power between the Council, Commission and EP. Secondly, we see the EP's recourse to IIAs as just one aspect of the parliamentarisation process. This article is by no means an attempt to fully explain this process in which many factors play a role. For the sake of completeness we should mention here that as Hix and Kreppel have shown the second major informal instrument used by the EP to create facts at the informal level in order to achieve later treaty change are its RoP.²⁴

¹⁸ Cf. J.A. Stacey, 'Constitutional Re-engineering in the European Union: The Impact of Informal Interinstitutional Dynamics', Paper presented at ECSA Seventh Biennial International Conference, 2 June 2001, Madison, Wisconsin.

¹⁹ J. Monar, 'Interinstitutional Agreements', n 1 above, 719.

²⁰ MEP Metten, n 3 above.

²¹ For an early argument in this direction Waelbroeck, and Waelbroeck, 'Les „Déclarations communes” en tant qu'instrument d'un accroissement des compétences du Parlement Européen', in J.-L. Victor and D. Waelbroeck (eds), *Le Parlement européen dans l'évolution institutionnelle* (Editions de l'Université de Bruxelles, 1988), 85.

²² Hummer, 'Interinstitutionelle Vereinbarungen', n 1 above.

²³ For a clear expression of this finalité politique aspect see EP Doc. PE A4-0028/1994 (Willcox Report), Report on the Incorporation of the Common foreign and security policy CFSP in the EC budget (1994).

²⁴ S. Hix, 'Constitutional Agenda-Setting', n 5 above; A. Kreppel (2003), 'Necessary but not Sufficient: Understanding the Impact of Treaty Reform on the Internal Development of the European Parliament', *Journal of European Public Policy*, Vol. 10, No. 6, pp. 884-911.

RoP and IIAs often complement each other, however the analysis of these dynamics would make for an article in its own right and are not the focus of this paper.

We set out to find evidence for our assumptions looking at three areas: (a.) the introduction of precise rules that render the Commission accountable to the EP, (b.) legislative planning, and (c.) comitology. We chose these areas because first, according to the treaties the EP has no say in them but always had strong aspirations, and second the Council, Commission and the EP have concluded a large number of IIAs in these areas. According to our assumptions we expect first the EP, having no say in formal treaty reform, to make recourse to its above-mentioned bargaining-chips to convince the Council and the Commission to enter informal IIAs and second to push for the formalisation of the rights gained in IIAs.²⁵

3. Formal Powers as bargaining potential

In its efforts to expand its role in decision-making, the EP disposes of three major bargaining chips: firstly, a say on the substance of the budget and the ultimate threat to reject the budget as a whole transferred to it in the 1970s by the Member States; secondly, a vote of no-confidence towards the Commission as foreseen in the founding treaties, and - coupled with this - a right to appoint the Commission introduced at Maastricht and extended at Amsterdam; thirdly, with the introduction of the co-decision procedure at Maastricht also the possibility to delay, amend and even block legislation. We argue that the EP strategically used these bargaining chips to wrest competencies from the Council and Commission in areas such as comitology where the founding treaties did not envisage a role for it, but which are linked to its ability to act as a fully fledged player in the decision-making process. Having no formal say at IGCs it took recourse to informal IIAs which would confer rights not foreseen in the treaties - thus inducing institutional change at the sub-constitutional level - in the hope that these would create facts that future treaty amendments would incorporate and build upon.

The general normative justification brought up by the EP why it should have any decision-making and control competencies in the first place is the fact that the EP is the only directly elected institution that can deliver democratic input and legitimacy for EU-decision making in a way national parliaments, governments and NGOs cannot. However, we do not see this argument as having a direct influence on the negotiations of IIAs in the sense of a bargaining chip.

3.1. Delaying and rejecting legislation: Introduction and Re-interpretation of Co-decision

Already under the cooperation procedure introduced by the Single European Act (SEA), the EP had the possibility to delay legislation as there were no time limits for deliberation in the first reading. This provision was very useful in its arguments with the Commission over the choice of legal bases. The EP in certain cases felt circumvented by the Commission which chose a legal base not allowing for the application of the co-operation procedure. However, it was rather in the EP's strategy to cooperate with the Commission since if the latter supported the EP's amendments after the second reading, the Council could only change them unanimously which was difficult. The EP only needed to convince one single member state of its proposal to see the draft law adopted with its amendments. The EP even fixed a provision in its RoP according to which the Commission was asked to announce its opinion on the EP's amendments before the final vote in plenary in order to find a position acceptable to both. According to Tsebelis, this made the EP a 'conditional agenda setter'.²⁶ And indeed there is evidence for the strategic partnership of Commission and EP under the cooperation

²⁵ The authors have made a similar argument previously, using the example of EP competencies in CFSP, see A.Maurer, D.Kietz and Chr. Völkel, 'Interinstitutional Agreements in the CFSP: Parliamentarisation through the Back Door?', (2005) 2 *European Foreign Affairs Review* 10; cf. Hummer, 'Interinstitutionelle Vereinbarungen', n 1 above.

²⁶ G. Tsebelis, 'The Power of the EP as a Conditional Agenda Setter', (1994) 1 *American Political Science Review* 88, 128-142.

procedure.²⁷ If the EP vetoed the legislation after the second reading the Council similarly would need a unanimous vote to adopt it.

The introduction of the co-decision procedure by the Treaty of Maastricht, and its adjustment and expansion by the Treaties of Amsterdam and Nice established the EP as an equal co-legislator alongside the Council. Acts adopted under this procedure for the first time need the assent of both legislative chambers, thus providing the EP with a major bargaining chip - the possibility to delay and even reject legislation.²⁸ The EP immediately made extensive use of its rights and especially in the early days of codecision engaged the Council in lengthy interinstitutional struggles which at times threatened to induce severe gridlock. The procedure introduced at Maastricht still recognised the possibility of the Council overriding a rejection of the EP in conciliation unless the EP finally rejected the draft with a qualified majority of its members. This provision was strongly opposed by the EP. It indicated its non-acceptance by laying down in its rules of procedure a clause which foresaw that each time the Council made use of this provision the EP would bring the legislation down at no matter what political cost. The Council only took recourse to the provision once in the widely cited case of voice telephony. The EP turned this vote into an important precedent by, for the first time, killing a piece of legislation. The Amsterdam treaty in consequence abolished the provision.

3.2. The budgetary rights

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

3.3. Creating Accountability: Ousting and Appointing the Commission

The founding treaties foresaw the right of the EP to censure the Commission, thereby making the Commission accountable to it. However, until the fall of the Santer Commission there have been no serious attempts at using this right which was thus regarded as hardly applicable in practise. The EP had no say over the appointment of the Commission, which, in terms of a separation of powers would be the logical complement of the right of censure. With the first direct elections of the EP in 1979 - and from its own perspective largely strengthened in its legitimacy - the EP informally held a debate and organised a vote of confidence on every incoming Commission based on provisions it introduced to its rules of procedure (RoP). Over time this procedure was accepted by the Member States and every Commission waited for the vote before officially taking office.²⁹ Since then the formalisation of the right to appoint the Commission has always figured as a major demand of the EP. From the EP's perspective; it was the only logical complement to the EP's right to hold a vote of no-confidence. The Maastricht Treaty formalised this practise and aligned the

²⁷ A. Rasmussen, 'Institutional Games', n 4 above.

²⁸ cf. G. Tsebelis and G. Garrett, 'Agenda-setting, Vetoes and the European Union's Co-decision Procedure', (1997) 3 Journal of Legislative Studies 3, 74-92; G. Tsebelis and G. Garrett, 'Legislative Politics in the European Union', (2000) 1 European Union Politics 1, 9-36.

²⁹ This is an example for the 'idea' of democratic legitimacy of the EP and accountability of the Commission to the EP can be seen as an independent variable in explaining why the procedure was accepted, on the role of ideas in treaty reform see T. Christiansen et al, 'Theorizing Treaty Reform', n 6 above.

Commission's and the EP's mandate. It granted the EP the right to be consulted on the Member States' choice of the President of the European Commission, and to approve the European Commission.

From this point on the EP talked of a „double legitimacy“ of the Commission. While before then the Commission was formally only appointed by the Member States, it now gained its legitimacy also from the approval of the EP. Appointments reflect a dynamic system of checks and balances or, in the language of the European Court of Justice, a system of loyal co-operation as envisioned by Article 10 TEC. Given the EU's hybrid structure of indirect interest representation through its institutions, appointments create a relationship of accountability and responsiveness between the appointing and the appointed institution. Consequently, the right of approval was not only perceived as a formal but highly political act: in combination with the aligned mandates of both institutions the EP perceived its vote on the Commission as the establishment of a genuine legislative agreement³⁰ between the two institutions. This contract was based on the Commission's work programme for the legislative period which the designated candidate for the office for President of the Commission was to present before the EP holds its vote. The EP made clear that it would not approve a Commission without programme: „pas de programme, pas de vote! [...] Ce programme doit être un véritable contrat de législature“ which largely increases the Commission's accountability to the EP.³¹

Strengthened with these formal rights of appointment and thus a major bargaining chip, the EP again at the informal level complemented its new powers by introducing a provision into its RoP which obliges the individual nominated Commissioners to appear before parliamentary committees for hearings prior to the EP's vote on the Commission.³² Fearing postponement of the EP's vote and therefore deadlock in the appointment process or, in the worst case, rejection of the entire Commission – at this point the Commission already disposed of the bargaining chip of appointment rights -, the Commissioners followed the procedure. Thus, the new formal and informal mechanisms became a very important element for the strengthening of the Commission's formal legitimacy and its accountability to the EP. The Amsterdam Treaty built on these developments. Not only was the Commission as a collegiate body, but also the President of the European Commission now subject to a parliamentary vote of approval.

When analysing how and if the EP used these bargaining chips the structural bargaining advantages of the EP especially over the Council should be kept in mind.³³ The EP e.g. has a much longer time horizon regarding the adoption (or delay for this purpose) than governments in the Council that have to come up with results, the structural link between MEPs and the electorate is much weaker than in the case of Member States that have to defend their decisions. These and other factors work in the EP's favour.

Did the EP use these formal bargaining chips to cajole Council and Commission into IIAs which refer to it rights not foreseen in the founding treaties? And is there evidence for path dependency in IIAs eventually leading to a formalisation of the rights laid down in IIAs? This is what we will seek to answer in the following three parts, tracing the establishment of IIAs in the introduction of precise rules that render the Commission accountable to the EP, legislative planning and comitology.

³⁰ EP Doc. PE 208.503/A (Rapport Froment-Meurice), Proposition de Résolution sur l'investiture de la Commission (1994), Partie A, 3.

³¹ EP Doc. PE 208.503/B, n 30 above, 8.

³² S. Hix and C. Lord, 'The Making of a President: The European the EP and the Confirmation of Jacques Santer as President of the Commission', (1996) *Government and Opposition* 31, 62-76.

³³ H. Farrell and A. Héritier, 'Formal and Informal Institutions', n 9 above; S. Hix, 'Constitutional Agenda-Setting', n 5 above.

4. The EP's role in comitology

Proponents of intergovernmentalism would argue that, according to Article 202 TEC, only the Council has the right to delegate implementation powers and scrutinize the Commission's implementing measures. They quite rightly pose the question - why should Member States give the EP any right in scrutinizing the implementation process which first and foremost aims at finding efficient regulations for legislation applied in Member States? Yet their arguments struggle to account for the existence of a large number of IIAs and the revised Comitology Decision of 1999 which give the EP basic participation rights in comitology and finally the change of Article 202 in the proposed Treaty establishing a Constitution for Europe which would place the EP and Council on an equal footing in comitology. How can this be explained? Did the EP use its formal bargaining chips to cajole Council and Commission into IIAs? Can we find evidence for path dependency in those IIAs? Were they instrumental in treaty reform?

Table 1: IIAs in Comitology

Agreement	Date	Bi/trilateral	Scope of application
Plumb-Delors	1988	Bilateral EP-COM	General
First Council Comitology Decision 1987			
Klepsch-Millan	1993	Bilateral EP-COM	Sectoral structural policies
Modus Vivendi	1994	Trilateral EP-COM-Council	General
Samland-Williamson	1996	Bilateral EP-COM	(General) transparency in management/ regulatory committees
Gil Robes-Santer	1999	Bilateral EP-COM	Sectoral structural policies
Second Council Comitology Decision 1999			
Agreement on implementing Council Decision 1999/468/EC	2000	Bilateral EP-COM	General
Lamfalussy Procedure	2001	Bilateral EP-COM	Sectoral financial services

4.1 From Rome to Maastricht: limited influence of the EP

The EP has been sceptical of the practice of comitology ever since the establishment of the first *ad hoc* comitology committees in the early 1960s.³⁴ The pragmatic decision of the Council to delegate implementation powers to the Commission resulted from the need to quickly adopt and amend specific technical regulations regarding the management of the common market. The Council did not have the resources, expertise or the will to engage in such day-to-day management. However, in order to retain some degree of control over the implementing activities of the Commission, the Council set up committees (later to be

³⁴ P. Lintner and B. Vaccari, 'The European the EP's Right of Scrutiny over Commission Implementing Acts: A Real the EPary Control?', (2005) 1 Eipascope, EIPA; G. Haibach, 'Council Decision 1999/468 – A New Comitology for the 21st Century?', (1999) 3 Eipascope, EIPA; W. Hummer, 'Die Reform der „Komitologie“ auf der Agenda der österreichischen EU Präsidentschaft', (1998) 2 Die Union 2/1998.

denoted comitology committees) made up of national experts.³⁵ Until the mid-1980s there was no clear typology for the different kinds of committees, no standard procedures had been established and the committees were convened on an *ad hoc* basis. Although the Treaty establishing the European Economic Community, (ex-Art. 145, later 202) allowed the Council to delegate implementing powers to the Commission it did not mention of the practice of comitology.³⁶

The EP did not in general oppose the practice of comitology. However, it was concerned about the lack of transparency and democratic supervision of these processes, especially since they could involve decisions of high political sensitivity. With the number and size of committees considerably increasing over time, the EP voiced concerns about the secretive decision-making process in these committees and the growing difficulties for the Commission to supervise their activities. The EP eventually *used its budgetary rights* and froze the funds for the committees in 1983, releasing them only after the Commission finalised and reported to the EP on the rationalisation and fund management of the committee system, bringing down their number by 132 committees.³⁷ Also, the EP vividly rejected and still today rejects the system of management and regulatory committees in which the Commission could only adopt implementing measures after these committees (and thus member state representatives over whom the EP had no control, as compared to the Commission which it could hold to account) gave their consent. Indeed in regulatory committees the Council even enjoyed a right to call back draft measures for decision, unlike in simple advisory committees.

In order to allow the systematisation of comitology procedures, the Single European Act (SEA) introduced a provision to the Treaty making delegation the norm, rather than the exception, and encouraging the Council to lay down the modalities for systematic delegation.

Thus the Council adopted a 1987 decision laying down the procedures for the exercise of implementing powers conferred to the Commission (Comitology Decision).³⁸ This decision did not take into consideration the demands of the EP and the Commission to simplify the comitology system, render it more transparent, give the Commission more leeway *vis à vis* the comitology committees and reduce the situations in which the Council itself would have the last say on an implementing measure. The Council decision foresaw three Comitology procedures – advisory (I), management (II), regulatory (III), the latter two having two sub-variants each. In the advisory and the first management procedure did the Commission have to take account of the committee opinion but could nevertheless go ahead with the measure even where the committee opinion was negative. In these procedures, there was no means for the Council to call back a draft measure for decision. Subsequently, these were the only procedures acceptable to the EP which was absolutely opposed to the regulatory committees which gave the Council the strongest degree of control over the Commission. The EP even challenged the Council decision before the ECJ without success.³⁹

Being on the one hand deprived of formal participation rights, and on the other hand having an increased need for information to fulfil its legislative role in the passing of acts under the procedure of cooperation which was introduced by the SEA, the EP took recourse to informal mechanisms to receive information and ultimately monitor the activities in the comitology

³⁵ J. Neyer, 'Administrative Supranationalität in der Verwaltung des Binnenmarktes: Zur Legitimität der Komitologie', (1997) 1 Integration 20.

³⁶ W. Hummer, 'Die Reform', n 33 above.

³⁷ G. Haibach, 'Council Decision 1999/468', n 33 above.

³⁸ Council Decision of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission, 87/373/EEC.

³⁹ For details see W. Hummer, 'Die Reform', n 33 above.

committees. It entered a general bilateral interinstitutional agreement with the Commission.⁴⁰ The Plumb-Delors-Agreement in 1988⁴¹ set up a procedure whereby the Commission was to supply the EP with draft implementing measures at the same time as it sent them to the relevant comitology committees. The EP was also given the opportunity to respond to matters where it had concerns. It succeeded in persuading the Commission to enter the IIA arguing it was accountable to the EP and the threat of blocking funds for comitology committees as it had done previously. The procedure however did not work well in practice⁴² prompting the EP to voice the demand for more far-reaching participation rights in several resolutions.⁴³ It also shows that the agreements were not very binding. The EP's lack of influence can be explained by the fact that the bargaining chips of blocking legislation and the accountability of the Commission weren't yet fully available to the EP. The EP tried to argue that the Commission was accountable to it, but the degree to which this argument would bind the Commission was rather low.⁴⁴ Unless the EP didn't have the means to create serious interinstitutional struggle and thereby put pressure on the Council and the Commission, IIAs would not give the EP any substantial rights or make the institutions stick to their commitments. This was to change with the introduction of the co-decision procedure and the formalisation of the appointment of the Commission at Maastricht which made the EP a fully-fledged player in the EU system.

4.2 From Maastricht to Amsterdam – The Modus Vivendi

The introduction of the co-decision procedure fundamentally changed the institutional set up of the EU. It established the EP – at least in its own interpretation – as an equal co-legislator alongside the Council.⁴⁵ Increasingly tightly linked to its increase in influence in co-decision was the question of an increased influence in comitology. The EP now interpreted its own role in those areas covered by co-decision as one of a real co-legislator. As a result, it claimed to be on an equal footing with the Council in the authorisation of comitology procedures, at least in those fields where the co-decision procedure applied. It had become unacceptable for the EP that the Council, which was now only one part of the legislative branch, had the exclusive control over, and a right to call back, implementing measures that it disagreed with stemming from legislative acts that it adopted together with the EP under the co-decision procedure. The EP demanded that the implementation of acts that the Council and the EP adopted and delegated *together* should be monitored and if necessary called back *together*. It feared that the Council would, in the comitology committees, reverse provisions which the EP had bargained for in the legislative act in the course of its adoption. However, the Council did claim that comitology and co-decision as two separate issues.⁴⁶ The strengthening of the EP in decision-making in the Maastricht Treaty was thus not accompanied by an increase in this role in comitology either through the Maastricht Treaty itself or through a change of the 1987 decision or an IIA as proposed by the Commission but rejected by the Council. The emerging 'structural problem' led to what Hummer calls the „eruption of severe interinstitutional conflict”.⁴⁷

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

⁴¹ SG (88) D/03026; EP-Dok.123.217, in European Parliament, Conference of Committee Chairmen: The Application of the modus vivendi on Comitology: Practical Guidelines for the EP's Committees, 7 July 1995.

⁴² Hummer, 'Die Beteiligung des Europäischen Parlaments an der „Komitologie"', in G. Hafner, G. Loibl, A. Rest L.-R. Sucharipa-Behrmann, and K. Zemanek (eds), Liber Amicorum Professor Ignaz Seidl-Hohenveldern - in Honour of his 80th Birthday, (Kluwer Law International, 1998).

⁴³ R. Corbett, F. Jacobs and M. Shackleton, The European Parliament, (John Harper, 2005), 288.

⁴⁴ EP Doc. A3-310/90, Resolution on the executive powers of the Commission (comitology) and the role of the Commission in the Community's external relations (1990).

⁴⁵ Hummer, 'Die Reform', n 33 above, 83.

⁴⁶ Corbett et al, 'The European Parliament', n 42 above, 289; Council Doc. SN 1821/95, Report on the functioning of the Treaty on European Union, 14 March 1995.

⁴⁷ Hummer, 'Die Reform', n 33 above, 83.

Using its increased bargaining potential from its role as a co-legislator, and against the backdrop of different understandings of the EP's role in comitology, the Parliament unleashed major interinstitutional clashes and long delays in the adoption of legislation under the co-decision procedure. Comitology issues were at the heart of most conflicts in the conciliation committee which stood at the end of the co-decision procedure: Since the EP had no right to monitor decision-making on implementing measures in the comitology committees, it tried to limit the Council's influence in comitology by laying down in each piece of draft legislation that only the advisory or management procedure (I and IIa) should be applied. These procedures gave the Commission – over which the EP had much stronger general scrutiny powers – the largest leeway vis à vis the Council in Comitology. Its determination to avoid at all costs the application of the regulatory procedure was shown in mid-1994 when it rejected for the first time a piece of legislation after long interinstitutional struggle which was substantially.⁴⁸

Having successfully demonstrated its willingness to resort to the worst case instrument of rejecting legislation and threatening to do it again, the EP linked the difficult negotiations over the adoption of the Socrates programme at the end of 1994 to the conclusion⁴⁹ of an IIA on increasing its own rights in monitoring comitology, the so-called *Modus Vivendi*.⁵⁰ Threatening the Council to again reject the legislation, the EP linked the success of the negotiations Facing permanent and severe legislative gridlock, and in order to avoid further stalemate, all actors involved realised the need for a settlement of the issue and thus decided to enter the agreement.⁵¹ This agreement was supposed to call a „temporary truce”⁵² and put a revision of the comitology procedures onto the agenda of the Amsterdam IGC. It gave the EP the right to:

- receive all draft implementing measures and timetables from the Commission,
- give its opinion, which had to be taken into consideration by the Commission,
- be informed by the Commission to what extent its opinion was taken into account,
- be briefed by the Commission in cases where an implementing measure was referred back to the Council, and to give its opinion on the matter to the Council which then had to find an appropriate solution.

These provisions are at least in theory a major break with the established dominance of the Council in comitology. It considerably enhanced the EP's information rights and to a lesser extent also its participation in the control of the Commission.⁵³ In sum, this agreement clearly shows how the EP used the bargaining potential which it gained from the introduction of the co-decision procedure to create major interinstitutional conflict by threatening to bring down legislation if its demands for a minimum of influence on comitology weren't met at all. The *Modus Vivendi* is also not only the most far-reaching IIA in comitology, but also the first trilateral one, and therefore a step towards institutionalising the EP's say in comitology. Furthermore, the provision in the IIA to review comitology issues at the upcoming IGC was a major success for the EP which further supports our theoretical assumptions on the strategic use of IIAs to indirectly set the agenda for future treaty reform. In this regard, it has to be borne in mind that the IIA only applied to acts adopted under the co-decision procedure and that it was still a long way from placing the EP on an equal footing with the Council.

⁴⁸ Corbett et al, 'The European Parliament, n 42 above; EP Doc. PE 230.998, Activity Report of the Parliament Delegations to the Conciliation Committee from 1 November 1993 to 30 April 1999; Com Doc. SEC (1995) 731, Report on the Operation of the Treaty of the European Union, 10.4. 1995.

⁴⁹ EP Doc. PE 230.998, n 47 above.

⁵⁰ OJ 1996 C 102/1.

⁵¹ Com Doc. SEC (1995) 731, n 46 above; Corbett et al, The European Parliament, n 41above.

⁵² Corbett et al, The European Parliament, n 42 above, 289.

⁵³ G. Haibach, 'Council Decision 1999/468', n 33 above.

Struggles were bound to, and indeed did, continue where the Council wanted to apply the IIB and IIIa,b comitology procedures.⁵⁴ In addition, the Commission did not always fulfil its information obligations under the agreement. The EP thus in all its following resolutions underlined how the *Modus Vivendi* was a „pragmatic and provisional means“ to deal with the interinstitutional struggles and that a „definitive and fully democratic solution to these problems must be found at the 1996 IGC“.

Shortly after the *Modus Vivendi*, the EP „kept up the pressure“⁵⁵ and entered yet another, quite far-reaching IIA with the Commission in 1996, the so called Samland-Williamson-Agreement⁵⁶ which contributes an example of how the EP bargained the Commission into an IIA through the use of its budgetary rights. It blocked half of the funds foreseen for the comitology committees in the 1996 budget because the Commission refused to render committee agendas, voting results and membership lists public to the EP.⁵⁷ The agreement, which was even published as part of the budget, gave all these information rights to the EP.

4.3. The institutions' positions at the Amsterdam IGC

In its resolutions in the lead up to the IGC the EP asked to simplify the comitology procedures and underlined its longstanding demands to abolish all but the advisory committees and to finally put the EP on equal footing with the Council by changing Article 202 of the Treaty. It sought to fix the right of both institutions to delegate implementation powers to the Commission, keep both institutions equally informed on *all* implementing measures (not just those adopted under co-decision) and give both of them the right to call back and reject measures of the Commission (which would then draw up new measures or initiate new legislation).⁵⁸

Later in 1997 after the EP had urged the Commission and Member States in several resolutions to tackle the subject,⁵⁹ the Commission took up the EP's proposals for a change of the treaty according to which both EP and Council would formally have the right to delegate implementation powers for acts adopted but only for acts adopted under co-decision. In other procedures only the Council would have this power. The EP also wanted to amend the 1987 Comitology Decision accordingly. Furthermore it proposed to limit the kinds of Comitology committees to three- one of each procedure-, although it had severe reservations concerning type III procedures. Council and EP should share the call-back right.⁶⁰

The Reflection Group, mostly made up of representatives of the foreign ministries of Member States, came up with several different proposals reflecting the fact that opinions amongst the Member States diverged.⁶¹ There was a strong consensus among most Member States that the overly complex and opaque comitology system had to be simplified.⁶² Already at this point it was underlined it might be sufficient to make changes below the level of treaty revision. In particular, the fact that member state opinions diverged on the matter resulted in reluctance on their part to deal with the issue at the IGC. A change of secondary law would suffice. Thus, a declaration was annexed to the final act of the Amsterdam Treaty which calls on the Commission to propose a revision of the 1987 Comitology decision latest at the end of 1998. The EP not surprisingly criticised this decision, which meant that its strategy to formally codify in the treaties its rights in comitology had not (yet) been met.

⁵⁴ Corbett et al, The European Parliament, n 42 above.

⁵⁵ G. Haibach, 'Council Decision 1999/468', n 33 above.

⁵⁶ OJ 1996 C 347/134.

⁵⁷ Corbett et al, The European Parliament, n 42 above.

⁵⁸ EP Doc., IGC Briefing No. 21 on Comitology, first update 17th March 1997.

⁵⁹ EP Doc. A 4-0003/95 (Bourlanges/De Giovanni Report), Report of the Committee on Institutional Affairs on a *Modus Vivendi*.

⁶⁰ Amsterdam IGC Doc. CONF/3900/97 'Reinforcing the Political Union and Preparing for Enlargement'.

⁶¹ EP Doc., IGC Briefing, n 57 above; G. Haibach, 'Council Decision 1999/468', n 33 above.

⁶² EP Doc., IGC Briefing, n 57 above.

4.4. The 1999 Comitology decision

4.4.1. *The Commission's proposal⁶³ and the EP's reaction*

The EP made proposals on the modification of the first Comitology Decision in a report as early as 1997; soon after it became clear the IGC would postpone the matter and before the Commission had even come up with a draft proposal.⁶⁴ Disappointed with the non-action of the IGC it was determined to see its position realised at least in the new Comitology Decision. It threatened the Council and Commission outright, stating that it „will consider the appropriateness of placing comitology funding in reserve in the 1999 budget if the modifications of the Council decision fails to take due account of parliament's positions“ and also repeated its claim that the next treaty reform should authorise both EP and Council to delegate implementation powers through the reformulation of Article 202. Until this was the case the EP wanted the wording of the new Comitology Decision at least to spell out clearly that the EP has comitology rights due to its participation in co-decision.

Furthermore, it traditionally requested extensive information rights not limited to co-decision, the abolishment of at least the regulatory and the second management procedures, as well as a 'right for scrutiny' according to which the Council and Parliament in case of co-decision acts, and the Council alone for other acts, could object when the Commission was deemed to have abused its implementation powers. The Commission would subsequently submit a new proposal, or amend or withdraw the measure. The EP defined a breach of the implementation powers if the Commission with modified, updated or supplemented essential aspects of the basic act. The EP and the Council could thus formally contest the Commission for exceeding its implementing powers, but not if they simply disliked the substance of the measure.

This provision of a simple scrutiny right is largely based on the notion of separation of powers and would have fundamentally strengthened the Commission. This is in line with the EP's calls since the early days of comitology to clearly define in the framework of implementation measures in the basic act and then give the Commission in its role as the Executive as much leeway as possible and only reserve a simple scrutiny right for the legislative. This is in clear opposition to the Council's demand of extensive call-back rights and scrutiny of the Commission in regulatory committees.

The Commission, similar to its position at the IGC, proposed to reduce the number of committee procedures to three. It also proposed criteria for what should be dealt with in which committees in order to limit the Council's recourse to the regulatory procedure. Taking up the EP's proposal, the Commission's version, the Council and EP did not get a general call-back right for type III committees. Rather, the Commission would submit a wholly new legislative proposal if there was no qualified majority for the implementing measure in the committee. Parliamentary scrutiny „was subject to the views of the national civil servants“⁶⁵ - something which the EP rejected outright.⁶⁶

4.4.2. *The Council's Decision*

In comparison to 1987, the Council based the act to a large extent on the Commission's and the EP's opinion.⁶⁷ Why did it do so? We have shown the Council, in order to end or at least ease the institutional struggle with the EP during the adoption of legislation under

⁶³ OJ 1998 C 279/5.

⁶⁴ EP Doc. PE 225.917a/fin, (Aglietta I report), Report on the modification of the Council Decision of 13 July 1987 (1997).

⁶⁵ G. Haibach, 'Council Decision 1999/468', n 33 above, 13.

⁶⁶ EP Doc. PE 229.449/fin (Aglietta II Report), Draft legislative Resolution embodying Parliament's opinion [...] (1998).

⁶⁷ Council Decision of 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ 1999 L 184/23.

comitology, agreed to the Modus Vivendi which already gives the EP a non-binding consultation right and extensive information rights. It was clear that this was a temporary measure not designed as a long term solution because it wouldn't end the key problem: namely that the EP pressed to be equal with the Council in delegating and scrutinizing implementation. Thus the Council in this Comitology Decision could not ignore the EP's position or fall behind of what had been agreed in previous IIAs if it wanted to settle the matter. In sum, the bargaining weight (stemming from co-decision) of the two institutions Council and EP had shifted largely between the last Comitology Decision and the new Decision. Ignoring the EP would have led to a major interinstitutional clash that all institutions wanted to prevent. The very reason why this Decision was amended in the first place was the interinstitutional struggle. Again, the Council itself was perfectly happy with the old Decision which gave it much more power over the Commission. Thus, in the larger picture, the second Comitology Decision can be seen as one result of the adaptation of interinstitutional relations after the balance between the three major institutions was fundamentally changed with the introduction of the co-decision procedure. That this adaptation process to a new balance of power does not take place immediately but incremental and with time delays only once again proves a major assumption of historical institutionalist explanations of institutional change. The act reduced the number of committees to one of each type and established the criteria for application of committee types proposed by the Commission in its draft. The major change concerned the regulatory procedure, where the Council is no longer able to reject an implementing measure by simple majority. This provision strengthens the Commission over the Council. If the latter rejects a draft implementing measure by qualified majority, the Commission can resubmit the measure, submit an amended version or submit a new piece of legislation. Under the same procedure the EP now has the right to monitor the Commission and ask it to review the draft measures in cases where it exceeds its implementation powers set out in the basic legal instrument. If a measure is referred back to the Council, the EP may also give its opinion on it. Furthermore, the EP will receive committee agendas, draft measures for acts adopted under co-decision, voting results, provisional summary records of meetings, participant lists and draft measures that are referred back to the Council.

4.4.3. Analysis

The decision does not place the EP on an equal footing with the Council. The Council keeps a call back right in the regulatory procedure which the EP wanted to abolish in the first place while the EP's role is restricted to the right for scrutiny it proposed. However, the EP accepted this decision as it puts into place a basic form of parliamentary scrutiny in the implementation of co-decision acts, confirms most information rights laid down in the IIAs and at the same time renders procedures more transparent and reduces the influence of the Council.⁶⁸ It thus builds on the existing IIAs and takes the EP's powers even a bit further. Also, the new criteria in itself is a success for the EP and Commission because the Council now has to base its choice of committee procedure on clear guidelines and can be –and indeed was already challenged- by the Commission before the ECJ. These criteria ease the traditional struggle between the EP and Council as there is less leeway in the choice of procedure. Also, this decision is a secondary law act which thus formalises the so far informal procedures laid down in the IIAs and makes the EP's rights enforceable before the ECJ.

The practical application of the EP's right of intervention and information rights arising from the Council decision were laid down in another bi-lateral IIA between the EP and the Commission.⁶⁹ It replaces most other IIAs in comitology.⁷⁰ Yet, the IIA goes further than the

⁶⁸ EP Doc., Resolution on the agreement between the European the EP and the Commission on procedures for implementing Council Decision 1999/468/EC, OJ 2000 C339/279.

⁶⁹ OJ 2000 C 339/269.

Council Decision in extending the EP's rights. Whereas the Council Decision limits the draft implementing measures to be forwarded to the EP to those stemming from basic instruments adopted under co-decision, the IIA envisages a forwarding of other implementing measures if the EP asks for it. What is more, the parliamentary resolution to which the IIA is annexed, refers to the EP's amended rules of procedure (rule 81) in which the EP claims the right to challenge implementing measures not only if the Commission formally exceeds its implementing powers but also –and most significantly- if the EP does not agree with the content of measures. This is a good example of how IIAs and RoP, both informal, complement each other in the pursuit of more influence for the EP. This resolution is not formally part of the IIA, and therefore does not entail any obligation for the Commission; neither do the provisions in the rules of procedure.

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

In 2002 the Commission put forward a legislative proposal for an amendment of the Second Council decision⁷¹ as one measure proposed in its 2001 White Paper on European Governance. The White Paper aimed at establishing more democratic forms of governance in the EU and forwarded a set of proposals focussing *inter alia* on the role of the EU institutions and including comitology reform. Besides the overhaul of the Decision, the Commission once again stipulated a change of Article 202 of the Treaties in order to authorise both EP and Council to delegate implementation powers. As the proposals explicitly were to complement the phase of institutional reform launched by the Laeken Declaration of December, 2001 leading the Convention on the Future of the European Union, and culminating in the 2004 IGC, these proposals had a large impact in setting the agenda for the Convention and IGC. The proposal also took into account many of the proposals the EP had brought forward in the Convention. It basically took up those points that Commission and Parliament still found unsatisfactory after the last reform in 1999. Among other changes the draft finally envisages only two committee procedures, distinguishing between measures of general scope and administrative measures: Administrative or procedural measures would be only subject to the advisory procedure and measures of general scope would be subject to a revised regulatory procedure. For acts adopted under codecision, the Council *and* the EP could oppose the draft which the Commission would withdraw or modify, present a new legislative proposal, or adopt it without changes accompanied with a statement.⁷² The Commission's resistance to the concerns of the EP and the Council concerning its capacity to go ahead with a draft without amendments underlines its longstanding position that it finally „must be able to apply its executive responsibility autonomously and therefore cannot be bound by the legislature's position”.

The Constitutional Treaty (CT) which was drafted in parallel to the negotiations on this proposal takes up the distinction of measures and the upgrading of the EP. It distinguishes between „delegated regulations” (Art. I-36) and „implementing acts” (Art. I-37) stemming from European Laws and Framework Laws which are adopted under co-decision, which in turn becomes the ordinary legislative procedure. However in contrast to the Commission proposal on the amendment of the 1999 Council Decision, the CT envisages a right of the Council and the EP to object to measures under delegated regulations and revoke the delegation to the Commission at any time. The mechanisms for implementing acts would be laid down in a separate law.

⁷⁰ Only the sectoral Klepsch-Millian-Agreement and its successor agreement, the Gil Robles-Santer Agreement (OJ 1999 C 279/ 488) remain in force.

⁷¹ COM Doc. (2002) 719, Bulletin /2002/12/ 1.1.13.

⁷² OJ 2004 C 76E/82, COM (2004) 324 final, 22.04.2004.

Both the provisions envisaged by the CT and the Commission proposal would eventually put the EP on equal footing with the Council and thus settle the long lasting struggle over comitology for good. The distinction between scrutiny based on content and on legality is abolished in both documents. The major difference between the Treaty and the Commission proposal is that the latter would give the Commission the last say on implementing measures. The only means to control the Commission in cases where it would override objections of Council and the EP would then be judicial in nature. This would shift the institutional balance significantly to the disadvantage of Council and the EP. Apart from this issue, the Commission proposal would significantly simplify the Comitology procedures and render it much more efficient. If adopted, it would add a great deal to the transparency, efficiency and - if the legislature retains the last say - also to the aspect of accountability in comitology procedures.

In sum, the example of comitology supports our original assumptions in many ways: The process of increasing parliamentary participation was incremental. While the EP, in the first Comitology Decision, was neither mentioned nor its opinion taken into consideration at all, the 1999 Decision gave it much larger role and the amendments under way are finally a perfect illustration of the demands the EP's had already made more than a decade ago: Equal footing with the Council in delegating and scrutinising measures stemming from co-decision, abolishment of those types of committee that strongly restrict the Commission's authority in implementing measures, extensive information rights beyond co-decision based implementing measures and more transparent procedures. We have shown that every IIA in comitology built on the one preceding it, always taking parliamentary involvement one step further. Each IIA thereby established irreversible facts or 'paths' of institutional change, eventually leading to a formalisation of the EP's rights. The EP used IIAs to build up its information and participation rights in consecutive agreements with the Commission and Council until the point where the second Comitology Decision formalised the long-existing political practice and took the EP's rights even further. The CT, if ratified, would be the culmination of the EP's quest for scrutiny rights in this field: It would finally put the EP on an equal footing with the Council in comitology and settle the interinstitutional conflict for good. We also found evidence for our hypothesis about how these path dependencies come into existence; we showed that the EP in order to cajole the institutions into the IIAs extensively used its bargaining chips of budgetary rights and delaying or even rejecting legislation under the co-decision procedure. While the budgetary pressure was directed mostly at the Commission to gain information rights, the possibility to delay legislation or reject it was of a more central role as it was the more suitable means to put pressure on the Council. In the end it is the Council that makes the Comitology Decisions and, similarly, it is the Member States that take the final decision at IGCs to codify or not the EP's rights in comitology in the Treaties. With the increasing participation of the EP in decision-making under the cooperation and then co-decision procedure, the EP was not only given normative justification to demand more scrutiny rights in comitology but also the means to create major interinstitutional struggle which it used to make the Council.

5. The EP in legislative planning

The EP's role in legislative planning is a double edged sword. On the one hand the right of initiative is a traditional right of fully fledged parliaments which the EP - as the only directly legitimised institution in the EU - always wanted to become. On the other hand the EP knew that if it was granted this right, the Council as the other branch of the legislature would demand it, too, which would interfere into the Commission's hybrid role within the EU's system and severely strengthen the intergovernmental character of the Union. Thus the EP never demanded the right. However, the EP's growing involvement in decision making after the introduction of the cooperation procedure through the SEA and co-decision at Maastricht

increased the need to efficiently plan its legislative activities in coordination with Council and Commission and to rationalise intra-parliamentary proceedings. Thus we would expect it to try and gain at least informally some influence in legislative planning without questioning the formal right of initiative of the Commission. Did the EP take recourse to its bargaining power (see section 2) to cajole the Commission into IIAs which codify a gain in the EP's influence in legislative planning?

In practise, the EP since 1988 has been informally involved in setting the legislative agenda⁷³ by establishing an annual legislative programme - on which all legislative proposals of the upcoming year are based - together with the Commission. The legislative programme as such is not mentioned in the treaties. Due to the increased involvement the EP in decision making and its need to plan its workload, Commission and the EP agreed on the introduction of an annual procedure for the adoption of a legislative programme.⁷⁴ The EP used its bargaining power in that it made a link between the establishment of the programme and the ability to delay and de facto kill legislation that the Commission submitted under cooperation procedure (see section 2).

The details of the procedure to draw up the legislative programme were regulated in the EP's RoP.⁷⁵ In consultation with the EP the Commission was to draw up a rough timetable for legislation to be initiated in the following year and which the EP approved and considered on a quarterly basis. It gave the EP the opportunity to press for the inclusion or exclusion of items and agree with the Commission on annual priorities. There were several adjustments over the years in consequence of the EP's increased workload and the need for coordination under co-decision. In 1993, for example, thus directly after the introduction of co-decision and criticism of the Commission's slowness in drawing up the programme from the EP's part, both institutions agreed on an interinstitutional declaration, a de facto IIA, which among other things committed to Commission streamline legislative planning procedures and come up with the programme in a more speedy fashion i.e. in October every year. According to rule 57 of the EP's RoP, the President of the Commission presented the annual programme for the following year to the parliamentary plenary in October, which then adopted a resolution approving it or not on it before the end of the year.

This process was tightly linked to the schedule of adopting the annual budget which is naturally linked to the annual legislative priorities. With the push of parliamentarisation of the Maastricht Treaty, the EP even tried to turn the legislative programme into a device for the joint scrutiny of the EU legislative activity through the national parliaments and itself by giving parliaments the possibility to comment on the Commission draft version submitted to the EP and through the discussion of the programme and its implementation at the biannual COSAC meetings (Conference of the national EU committees).⁷⁶ This was never put into place given to the reluctance of many national parliaments to deal with detailed EU legislation. However, in some areas, especially those covered by the EP's budget committee and the Committee on civil liberties, justice and home affairs, there is a tendency to scrutinise Commission proposals at a very early stage based on the legislative programme in joint meetings with national committees.⁷⁷

However, in general the procedure between EP and Commission had major shortcomings. According to the EP the timetable did not provide for intense discussion among the

⁷³ In a broader sense, the EP has an influence on the agenda through various instruments, amongst other things through own initiative reports or parliamentary resolutions.

⁷⁴ EP Doc A5-0046/2002 fin., Report on the Commissions Legislative and Work Programme (2002).

⁷⁵ Corbett et al, *The European Parliament*, n 42 above.

⁷⁶ EP Doc. 218548, Durchführungsbilanz des Cravinho Berichts vom 24.09. 1991.

⁷⁷ A. Maurer, *Parlamentarische Demokratie in der Europäischen Union. Der Beitrag des Europäischen Parlaments und der nationalen Parlamente* (Nomos, 2002).

institutions on upcoming political priorities. It was „a rather dull exercise. There are no distinctions between long term political priorities and the technical adjustments. Strategic objectives are mixed with annual revisions and updating”.⁷⁸ The programmes presented to the EP for 2001 and 2002 have had major deficiencies. The 2001 programme lacked justifications and details for 500 (!) proposed legal and non-legal acts. Not even half of the overly ambitious programme was implemented in 2001 and many acts initiated in that year weren't part of the programme at all. The 2002 programme was presented at a very late stage making parliamentary opinion forming difficult. It also lacked concrete legislative proposals. These shortcomings cumulated in a resolution with the EP stating that it refuses to regard the submitted programme as a legislative programme.⁷⁹ The reasoning presented in this resolution was clearly connected to the EP's interpretation of its powers in the legislative process: The introduction of the co-decision procedure and its application to more and more policy fields immensely increased the EP's involvement in decision making and its interaction with the other institutions and thereby the need for efficient interparliamentary work management and legislative planning which is only possible on the basis of a realistic, implementable, detailed, and transparent work programme. Thus, in reaction to these problems, the EP and Commission negotiated a new procedure and timetable in an IIA which was annexed to the EP's RoP.⁸⁰ It is supposed to make a clearer distinction between strategies, legislation and policies. Amongst other things it provides for

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

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

This agreement came at a point where the Commission acted in a way which was far more accountable to the EP than when the procedure was first introduced in 1988 due to the establishment of the EP as a strong player in decision-making. The EP by then disposed of multiple ways to put pressure on the Commission such as the budget, the right to delay or reject legislation brought forward by the Commission and in the worst case also the right to censure the Commission. The EP also had proved in recent history that it, if forced to by the non-cooperation of the Commission, was determined to make use of all these. The right and the necessity of the EP to be considered in legislative planning were thus not put into

⁷⁸ EP Doc. A5-0046/2002 fin, n 73 above, 10 (2002).

⁷⁹ EP Doc PE 313.266, Resolution on the Commission's legislative programme, (2002).

⁸⁰ EP Doc. P5_TA(2002)0101, Resolution, Amendment of Rule 57 of the EP's Rules of Procedure (2002).

question by the Commission. Notable is the fact that, again, the IIA was preceded by a high degree of interinstitutional conflict with the EP declaring not to regard the 2001 programme as a legislative programme. This supports our argument that not only the potential for conflict but also the actual outbreak of it is a pre-condition for the conclusion of an IIA as we have also seen in the case of the conclusion of the Modus Vivendi in comitology which was preceded by serious interinstitutional conflict and the ultimate rejection of legislation over comitology issues (see section 3). As the EP does not want to gain a genuine right of initiative (see above) but rather aimed at setting up an effective device for planning and scrutinising the legislative activity in the Union it is not surprising that there is no evidence for the EP pushing for these IIAs to be codified in the Treaties. Rather, the last IIA on legislative planning has been attached to the 2005 Framework Agreement on the Relations Between the Commission and the Parliament. This is an IIA lay down the rules of cooperation of the two institutions throughout the entire legislative process which functions and which gives the EP more influence on the Commission than spelled out in the Treaties, without however aiming at codifying these in the Treaties.

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

The codes of conduct and the framework agreements on the relations between the European Parliament and the Commission are four consecutive, bilateral IIAs between the EP and Commission. They lay down the general framework for relations between the two institutions regarding all aspects of the decision making process such as implementing measures, legislative planning, information management and much more. They all codify mostly information rights for the EP or, in other words, lay down obligations of the Commission towards the EP. They stress that these agreements are adopted „to strengthen the responsibility and legitimacy of the Commission“.⁸¹

Table 2: IIAs governing EP-COM relations

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

The first code of conduct (1990) established the first interinstitutional contacts and was of a rather procedural nature. In contrast, the second code of conduct (1995)⁸² and in particular the framework agreements (2000/2005) are of political nature and enlarge the EP's influence beyond treaty provisions. The evolution of these agreements over the period of 15 years mirrors the parliamentarisation process of the EU and depicts clearly the increased importance of the EP in decision making process.⁸³ In contrast to the 1990 code of conduct, the 1995 code shows how the EP's role has changed due to the introduction and implementation of the co-decision procedure. The code was a result of the increasing linkage between the EP and Commission due to co-decision. In order to take full advantage of its new co-decision rights and also to maximise its influence in areas not covered by co-decision, the EP needed a maximum of information and support from the Commission. Hence, the agreement, for example, obliges the Commission to „keep the EP informed on an absolute equal footing with the Council“ concerning consultation documents, legislative proposals,

⁸¹ Framework Agreement on the Relations Between the Commission and the Parliament (2000), 1, OJC 121, 24.4. 2001.

⁸² OJC 089, 10.04.1995, p. 69.

⁸³ Jacobs, 'A New Interinstitutional Balance? The European the EP's Relations with the Commission and the Council?', in A. Maurer and D. Nickel (eds), *Das Europäische Parlament: Supranationalität, Repräsentation und Legitimation* (Nomos 2005).

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

The 2000 framework agreement⁸⁴ builds on the code of conduct but takes the EP's rights further in many aspects. It explicitly tries to extend the Commission's accountability to the EP even further. It contains provisions concerning the extension of constructive dialogue and political cooperation, the improvement of the flow of information and the consultation rights the European the EP on Commission administrative reforms. The institutions also agree on a number of specific implementing measures (i) on the legislative process, (ii) on international agreements and enlargement, and (iii) on the transmission of confidential Commission documents and information. The framework agreement thus does not only flesh out the relationship between the two institutions on a procedural level according to their powers laid out in the treaty but also it gives the EP powers which go beyond the Treaty provisions. Its section on 'political responsibility' is good example of this political nature of the agreement. This was introduced in reaction to the most recent experience with the just-about impeached Santer Commission. The EP asks each Commissioner to take political responsibility for action in the field of which he or she is in charge. Furthermore, the EP reserves the right to express a lack of confidence in a Commissioner and subsequently to ask the President of the Commission to seriously consider whether he should request that Member to resign. Such a right of the EP has no basis in the treaty. Although consecutive treaty amendments have seen the role of the EP in the executive appointment strengthened, this provision is by no means foreseen in the treaty. The overall assessment of this agreement is that it goes very far in strengthening the scrutiny of the EP over the Commission, in tying the Commission to the EP and rendering the Commission, its President and its individual members accountable to it.⁸⁵

The new framework agreement of 2005⁸⁶ goes even further and introduces a section concerning the possible conflicts of interest of Commissioners and a procedure to be followed if a Commissioner is replaced during the term in office of the Commission. These new provisions can be seen as consequences of the EP's dissatisfaction with single Commissioners which emerged at the 2004 investiture hearings.⁸⁷

Again, the question is: Why did the Commission enter the agreements although they establish so many obligations towards the EP? The 2000 document has to be understood against the background of the increased accountability and responsiveness of the Commission to the EP. In general the EP's role in the appointment and thus its political control over the Commission had increased largely with the new formal and informal mechanisms introduced since

⁸⁴ OJC 121, 24.4. 2001.

⁸⁵ cf. Jacobs, *A New Institutional Balance?*, n 82 above; R. Corbett et al, *The European Parliament*, n 42 above.

⁸⁶ EP Doc, resolution P6_TA-PROV(2005)0194 based on Report A6-0147/2005.

⁸⁷ For an in-depth analysis of the 2004 investiture, see Nickel, 'Das Europäische Parlament als rekrutierendes Organ – unter besonderer Berücksichtigung der Einsetzung der Kommission', in A. Maurer and D. Nickel (eds), *Das Europäische Parlament*, n 82 above.

Maastricht to hold the Commission accountable. In particular, however the resignation of the Santer Commission in anticipation of a first successful impeachment procedure in the history of the EU left the EP strengthened in relation to the newly elected Prodi Commission. The EP used the window of opportunity to very quickly and successfully tie the weakened Prodi Commission down on the most controversial provisions of the agreement before it even settled properly in office. In 2005 the EP was in a similarly strong position after having successfully threatened not to approve the Barroso Commission before Barroso changed several designated Commissioners who the EP did not consider appropriate for post of Commissioner - another illustration of our argument that the EP used its bargaining chips to create interinstitutional conflict. In this case the link to the IIA is not as direct, since it was finalised a few months after the investiture. However, the negotiations on the IIA began earlier in view of the new legislative term. However, by backing down and pushing Member States to withdraw the rejected designated Commissioners in what was one of the major power struggles between the two institutions in the history of the Union, the EP admitted the EP's right to influence the individual composition of the Commission, which was then fixed in the new IIA.

In large parts, the framework agreements simply lay down how the institutions work in practice together. We have shown, however, how some provisions go well beyond the EP's rights set out in the Treaties, especially regarding the Commission's direct accountability to the EP. To get the Commission to agree to these politically sensitive aspects, the EP – took used its increased powers in the investiture and censure of the Commission. However, as is the case with the IIA in legislative planning, we do not find evidence for a formalization process, i.e. the EP does not push for these rights to be codified in the Treaties.

7. Conclusions - Path Dependency in IIAs

The analysis of the evolution of the EP's rights in comitology, legislative planning and the in holding the Commission accountable provides strong evidence for our main assumptions. First, the EP uses its formal bargaining powers stemming from the possibility to delay and reject legislation, appoint and censure the Commission and its budgetary rights to wrest concessions the other two main players in decision-making. We can observe an established pattern: the EP builds up a situation of major interinstitutional struggle e.g. by creating legislative gridlock and links the termination of this conflict to the conclusion of IIAs as we have seen e.g. in the case of the Modus Vivendi, the 2000 Framework Agreement, the 2001 IIA on legislative planning. The period between the rejection of the Council confirmed common position in the case of the voice telephony directive 1994 and the impeachment of the Santer Commission proved crucial in the strengthening of the EP's bargaining power. In the negotiations of the framework agreement in 2000 and 2005 or when the EP pressed for the formalisation of the Comitology IIAs, the EP was in a completely different negotiation position than at the end of the 1980s - its threatening potential had largely increased. In line with previous research we find that interinstitutional conflict seems to be a precondition for the conclusion of IIAs - at least in cases of IIA that provide the EP with additional powers not foreseen in the Treaties.⁸⁸ Indeed, we can agree with Hummer⁸⁹ that in those fields under scrutiny in this paper, the EP was the driving force behind the conclusion of each IIA and benefited most from the new provisions. The IIAs under scrutiny do not simply implement Treaty provisions or lay down practical rules of cooperation. At least in parts they go well beyond and thus *amend* Treaty provisions, as in the case of comitology where e.g. the Modus Vivendi clearly shifts the interinstitutional balance in favour of the EP. This is not to say that the EP all of a sudden becomes more powerful than the Council, but that it is given

⁸⁸ Monar, 'Interinstitutional Agreements: The Phenomenon and its new dynamics after Maastricht', (1994) 4 CMLRev 31; Maurer, Kietz and Völkel, 'Interinstitutional Agreements in the CFSP' n 25 above.

⁸⁹ Hummer, 'Interinstitutionelle Vereinbarungen', n 1 above.

competencies not provided for in the Treaties. From a legal perspective this is not compatible with the principle of Community institutional balance according to which each institution has to act in accordance with the powers conferred on it by the Treaties.⁹⁰ In fact, it was developed by the ECJ to proscribe any encroachment by one institution on the powers conferred on another.

The article also makes a strong case for historical institutionalist explanations of constitutional change in the EU which we set out in the first part of this paper. There is strong evidence for path dependency in IIAs, e.g. all four consecutive IIA governing the Commission-EP relations build up on each other and each takes the EP's competencies a step further. However, although all three cases show evidence of informal and incremental institutional 'development',⁹¹ our assumption on the gradual formalisation of informal practises laid down in IIAs, i.e. their codification in secondary and primary law, only holds for the case of Comitology. One explanation springing to mind is that comitology is arguably the most crucial area of the three for the EP - here it had most to lose. It is the only of the three cases where the Treaties advantaged the Council over the EP by codifying the right to delegate and scrutinise the implementation of legislation which severely interfered with the EP's power to co-legislate. Thus, the EP pursued a very consistent long term strategy of being placed on equal footing with the Council in the delegation and scrutiny of the implementation of legislation - and is about to succeed.

⁹⁰ For details on this argument cf. Hummer, 'Interinstitutionelle Vereinbarungen', n 1 above; F.v. Alemann, 'Die Handlungsform', n 1 above.

⁹¹ P. Pierson, 'Not Just What, but When: Timing and Sequence in Political Processes', (2000) *Studies in American Political Development* 14, 72-92.