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Thomas König

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Why do member states empower the European Parliament?

Thomas König

ABSTRACT This is the first study which provides a strategic view on the empowering of the EP by the member states. Compared to the consultation procedure, in which the Council adopts Commission proposals, the EP has become a co-legislator in the codecision procedure, in which it usually promotes an integrationist position favouring policy change. According to this supranational scenario, most scholars conclude that member states intend to increase the legitimacy of the EU rather than their benefits from legislative outcomes. For some authors the empowering of the EP is even a significant example of the limits and deficits of rational choice theory.

From a strategic perspective, however, this study clarifies that member states can benefit from introducing the codecision procedure in the supranational scenario. When the parliament can hardly figure out the complex configuration in the Council, member states can strategically misrepresent their pivotal member's 'true' position and present a minority proposal in the conciliation bargains that is more closely located to the status quo. Under these conditions, the introduction of the codecision procedure has several advantages for the member states; in particular it improves the benefits of member states *vis-à-vis* solutions under the consultation procedure, in which a better informed Commission makes a proposal that must find the support only of a qualified majority of member states.

KEY WORDS Codecision procedure; democratic deficit; European Parliament; strategic bargaining.

THE PUZZLE: WHY DO MEMBER STATES DECREASE THEIR POWER BY EMPOWERING THE EP?

In recent years, a rich literature on the empowering of the European Parliament (EP) has demonstrated that the member states of the European Council increased parliamentary legislative power in the course of treaty reforms, notably by the introduction of the co-operation procedure with the Single European Act (1987), the codecision I procedure with the Maastricht Treaty (1993) and the codecision II procedure with the Amsterdam Treaty (1999). Ever since, the EP has become an increasingly powerful co-legislator in EU legislative decision-making

(Crombez 1996; Scully 1997; Tsebelis and Garrett 1997, 2000; Tsebelis 2002). At the same time, a number of empirical studies found that the EP usually promotes an integrationist position on Commission initiatives, which is furthest from the status quo (König and Pöter 2001; Tsebelis 2002; Selck 2004). In the most recent Decision-making in the European Union (DEU) group study by Thomson *et al.* (2006), this supranational scenario characterizes the profile of almost half of all Commission proposals.¹

By empowering the EP this scenario suggests more integrationist policy change in EU legislative outcomes: the higher the parliamentary power and the more supranational the EP position, the more policy change towards European integration should occur. In the literature, this supranational bias has generated a discussion about the reasons for member states' treaty choices to increase the legislative power of the EP (i.e. Vaubel 1993; Majone 1998; Scharpf 1999; Bräuninger *et al.* 2001; Moravcsik 2002, 2004). For the Amsterdam Treaty, Hix (2002) – assuming no redistribution of power and efficiency gains through more transparency – argues that member states only institutionalized *de jure* what had already been in practice under the Maastricht codecision procedure I. For most scholars, the empowering of the EP is not a matter of member state (expected) benefits from legislative outcomes but they intend rather to increase the legitimacy of the EU (i.e. Jachtenfuchs *et al.* 1998; Wagner 2002; Farrell and Héritier 2004; Held 2004). Some authors even claim that the empowering of the EP is a significant example of the limits and deficits of rational choice theory (Rittberger 2005; Rittberger and Schimmelfennig 2005).

This study provides a novel explanation for the empowering of the EP, which distinguishes between a complete and an incomplete informational level in conciliation bargains. While we should find more integrationist policy change in the complete information game *vis-à-vis* the consultation procedure, the member states may have a strategic informational advantage under codecision procedure II when the Commission does not share the parliamentary position.² This does not mean that member states necessarily base their treaty decision on this strategic informational advantage, but the argument is that member states have established a complex decision-making situation in the Council, which makes it difficult for the EP alone to figure out the positions of individual Council members.³ When this information is not provided to the parliament, Council members are able to strategically misrepresent their pivotal member's 'true' position in the conciliation committee and to present a (strategic) minority proposal in conciliation bargaining that is more closely located to the status quo. Under these conditions, this sophisticated move allows member states to bring the solution closer to their majority position because they can expect the EP to hold a supranational position, which usually favours policy change towards more European integration.

In this incomplete informational model, the introduction of the codecision procedure has several advantages for the member states; in particular it would improve their benefits *vis-à-vis* solutions under the consultation procedure, in which the Commission makes a proposal that usually needs only find the

support of a qualified majority of member states. Under the consultation procedure, in which conciliation bargains do not exist, member states play against the Commission which always participates in the Council negotiations and has the right to withdraw its proposal. This suggests that the Commission has a similar information level to the member states, knows their individual positions and can make a credible threat to withdraw a proposal in order to reveal their positions. Member states are therefore not able to act sophisticatedly under the consultation procedure, while the Commission can only mediate between the Council and the EP in the conciliation bargains, in which these two institutional actors share the power exclusively (König *et al.* 2007).⁴ Hence, when the Commission shares the parliamentary position, there should be no informational advantage for the Council; otherwise, the member states can present a (strategic) minority proposal in the conciliation bargaining that is more closely located to the status quo. Another advantage is that the majority of member states may claim to have promoted and defended the minority position of member states against parliament. In addition to higher benefits, this should also increase the legitimacy of Council decision-making and member states' willingness to comply with legislative outcomes.

The analysis relates to the discussion on the democratic or parliamentary deficit in EU legislative politics which has attracted much scholarly attention in recent years. The overviews of Siedentop (2000) and Hix (2005) reveal that the findings on the democratic deficit (in)directly refer to the role of the EP by pointing to the increased power of the executive; respectively, the decreased power of the domestic legislatures (Andersen and Burns 1996; Raunio 1999), the weakness of the EP (Williams 1991; Lodge 1994; Crombez 2003), the second order character of European elections (Franklin *et al.* 1996; Hix 1999; Marks *et al.* 2002), the too distant policy-making (Wallace and Smith 1995; Magnette 2001; Crombez 2003) or the policy drift (Streeck and Schmitter 1991; Scharpf 1997, 1999).

All these studies have in common that they explain the democratic deficit by low parliamentary powers or they conclude that strengthening parliamentary rights can solve the current deficit.⁵ There is also consensus among scholars that the EP has increasingly gained power in EU legislative politics, and scholars also agree that the EP has benefited from establishing the codecision procedure. Briefly summarized, when explaining member states' choice for the empowering of the EP, common wisdom points to these more general, normative aspects, such as the democratic deficit in EU legislative politics, the normative value of parliamentarism in Europe and the functioning of EP political parties (i.e. Tsebelis 2002; Rittberger 2005; Rittberger and Schimmelfennig 2005).

The following study does not intend to reject these normative accounts on the empowering of the EP, but it provides an additional answer to the reasons for member states to increase parliamentary power. In my view, the empirical answer will remain open because there is very little evidence as to whether the treaty decision of the member states followed normative rather than rational guidelines, and perhaps member states cannot, or are

even unwilling to, project legislative solutions to their choices on the rules of the game (Bräuninger *et al.* 2001). The main insight from the following study is therefore to show that sophisticated member states can benefit from the introduction of the codecision procedure when comparing the solutions with those under other procedures. Keeping in line with rational choice theory under the conditions of the supranational puzzle, the simple explanation for the growing usage of the codecision procedure is that member states prefer outcomes which are closer to them.⁶ This also holds true if we do not observe sophisticated behaviour in the legislative process and in the conciliation committee because actors will anticipate these strategies and already include the outcome in the proposal. On closer inspection, however, we find that the level of parliamentary information is also determined by other actors' preferences supporting the EP when they share the parliamentary position.

THE CONVENTIONAL VIEW: SINCERE COUNCIL VOTING UNDER PARTICIPATION OF THE EP

A major strand in the literature on the EU's democratic deficit starts from a normative evaluation of the EU's legitimacy, discussing the pros and cons of democratic legitimation, especially regarding the role of the EP (Moravcsik 2004; Follesdal and Hix 2005; Schmitter 2002; Rittberger 2003; Tsebelis 2002). From a more general viewpoint, we are reminded that democratic legitimation only describes the institutional process of collective decision-making, and even though democracy can hardly be reduced to a specific institutional arrangement or a particular institutional interaction, the collective decisions of national governments conventionally achieve democratic legitimation through parliament in the member states. These parliamentary systems offer governmental control and change according to precisely defined electoral procedures, which are repeated at substantially predictable times, aimed at achieving desired objectives and whose results are respected by the people. Because other democracies, in particular presidential systems, have established slightly different institutional arrangements without generating a discussion on their democratic nature, it seems that the debate on the EU's democratic deficit is primarily motivated by a more skeptical general attitude to the legitimacy of the EU – in terms of a supranational superstate, governance without demos, etc. This suggests that it remains an empirical rather than a normative question whether the empowering of the EP does increase or decrease EU legitimacy. In fact, ever since the EP gained power in EU legislative decision-making, we do not find greater public support for European integration over time (Luetgert 2007).

Perhaps Moravcsik's (1998) intergovernmental approach most explicitly claims that member states' treaty choices of the institutional framework reflect their expected benefits from EU legislative politics. Unfortunately, the question on the specific procedural empowering of the EP is answered in a

very broad and perhaps too simplified manner by intergovernmentalists when they conclude that governments choose those procedures that will best serve their intergovernmental policy goals (see, for this criticism, Tsebelis and Garrett 2001). Another perspective is provided by Rittberger and Schimmelfennig (2005) who introduce the argument on a community environment that has the potential for modifying outcomes different from the constellation of member state preferences. They predict that the EP receives more powers in norm-related policy domains, such as human rights, but their area-specific approach can hardly explain a general application of the codecision procedure – as proposed by the current reform proposal.

Tsebelis and Garrett's analysis (2001) claims to present a unified model of institutional choice based on the interaction between the members states in the Council, the EP, the Commission and the Court of Justice. They divide European integration history into three epochs which relate to the voting rule in the Council and the powers of the other institutions that finally led to a bicameral system with coequal powers of the Council and the EP (Tsebelis and Garrett 2001: 359). Empirically, Bräuninger *et al.* (2001) analyse how the power consequences of the Amsterdam Treaty affect the interactions among the major EU institutions. They demonstrate a rationale of member states to introduce Council qualified majority voting (QMV), but they cannot find similar evidence for the empowering of the EP. Similarly, Schulz and König (2000: 665) show that parliamentary participation slows down EU legislative activities, suggesting that parliamentary empowering is considered as solving the much lamented democratic deficit.

A typical feature of these approaches is that they conceive of the EP as an additional institutional veto player in EU legislative politics, which will change the outcomes in conciliation bargains under the codecision procedure. However, although the conciliation committee solves most bicameral conflicts, there is much theoretical debate on the bicameral power distribution between Council and EP in the conciliation process (Napel and Widgren 2003; Tsebelis 2002; Tsebelis and Garrett 2000; Garrett 1995; Crombez 1997, 2000). In spite of their different interpretations of the conciliation bargains, these authors share the assumption that the two institutional actors negotiate the outcomes sincerely: the EP and the Council, it is assumed, present their 'true' position when submitting proposals to the conciliation committee, in which the Council is usually broken down into member states with different positions on Commission initiatives. Figure 1 illustrates the conventional game in which member state 1 favours a lower regulatory standard of 10 per cent, member state 3 prefers 38 per cent and member state 7 is in favour of 46 per cent, while – for simplicity – it is assumed that the EP and the Commission have a more integrationist standard of 75 and 90 per cent respectively.

Under the consultation procedure and Council unanimity, the Commission should consider that member state 1 does not veto the proposal. Accordingly, it

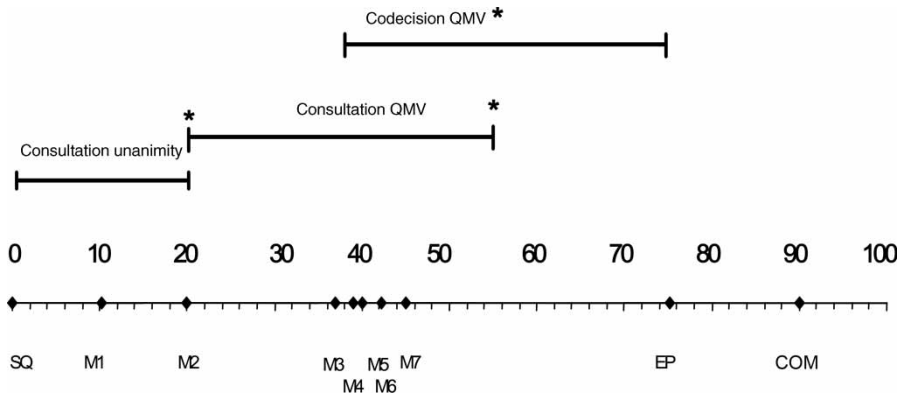


Figure 1 The conventional game of parliamentary empowering

Notes: M1–M7: member states 1–7; EP: European Parliament; Com: Commission; SQ: status quo; *: outcome.

will propose an initiative that makes member state 1 (at least) indifferent to the status quo. In the case of the symmetric utility function, the conventional model predicts an outcome at about 20 per cent – a value which should guarantee the indifference of member state 1 with a distance of 10 per cent against the status quo and the proposal. Under Council QMV, which is reached with five out of seven member states in this example, the Commission should similarly take into account member state 3, but there is a lengthy discussion as to how the Council's unanimous amendment right affects the indifference of member state 3. Crombez (1996) argues that member state 3 considers the Pareto set and the distance to the status quo predicting an outcome at value 46 per cent where the most distant member state 7 is located. Considering the unanimous amendment right of the member states, according to which member state 3 is only indifferent to the unanimous counterproposal, the prediction would be 56 per cent (Tsebelis 1994, 2002).

Under the codecision procedure, authors commonly assume that the outcome is negotiated between the EP and the position of member state 3, while the Commission is not part of the bicameral game in which the two institutional actors negotiate the final text (Tsebelis 2002; Napel and Widgren 2003). Assuming equally powerful institutional actors without loss of generality, the result of the conciliation process should thus be located in the mid-distance between the EP and member state 3 at value 56.5 per cent. Compared to the 'best rational choice'-prediction (56 per cent) under the consultation procedure, all member states have indeed a larger distance to the outcome under the codecision procedure, generating the question, why have member states accepted losses when empowering the EP in legislative decision-making?

THE MODEL: A SOPHISTICATED PERSPECTIVE ON CONCILIATION BARGAINS

The conventional game assumes that information is symmetrically distributed among the member states, the Commission and the EP. In the consultation procedure, there are several arguments about why the Commission has the same or a similar informational level that the member states have: (i) the Commission usually prepares its initiatives in white and green papers in which member states indicate their preferences; (ii) the Commission always participates in Council deliberations – whether these take place at working group, Committee of Permanent Representatives (COREPER) or ministerial level; (iii) the Commission has the right to withdraw its proposal when the Council attempts to modify the proposal's substance by amendment. While these provisions provide the Commission with informational resources in the consultation procedure, the question is whether these are similarly shared between the EP and the member states in the codecision procedure.

When the Commission shares the position of the EP, it has good reason to provide the parliament with the necessary informational resources. The Commission knows the configuration of the member states and has an incentive that the outcome will be located close to its own position. In this case, the EP and the Council can be considered to be bargaining on an equal footing. But when the Commission does not share the parliamentary position, the collective nature of the Council and member states' simultaneous knowledge about the EP's position would suggest that information is asymmetrically distributed between the two institutional actors to the advantage of the member states. Because the EP is most distant to the status quo in the supranational scenario, it always has an incentive (positive pay-off) to bargain.

The plausibility of this situation is evidenced by the two most recent studies on EU legislative decision-making: according to the conciliation data of König *et al.* (2007), the collective preference heterogeneity of the Council is far more complex than that of the EP. This result is confirmed by the DEU data of Thomson *et al.* (2006), revealing that the ordering of member states often changes across the issues of Commission proposals, which means that a member state sometimes supports an issue-specific initiative for policy change, while the same country may prefer the maintenance of the status quo in other matters of the proposal. Like the study of König and Pöter (2001) on the co-operation procedure, these data also reveal a supranational location of the EP, with a parliamentary median position at 100 on a scale from 0 to 100 (the latter indicating the most integrationist position). Thus, the probability of a supranational location of the parliamentary position is very high, but it is difficult for the EP to determine the pivotal actor in the Council. A major reason for this informational deficit is that the EP alone – unlike the Commission – neither prepares the initiatives nor participates in the Council's deliberations which take place at various Council levels.

Another reason for the Council's advantage is that the QMV rule, which is usually applied under the codecision procedure, hardly allows for identifying an equilibrium solution in the Council, where there are two pivotal actors for coalition-building: a decisive actor close to the status quo, and another more close to policy change. Napel and Widgren (2003) conclude that the Council pivotal actor should be the one closest to the status quo, meaning that this actor is more credible in conciliation bargains. This offers the Council a chance to submit a (credible) strategic proposal to the conciliation committee which moves the outcome towards the preferences of the member states. In other words, if the qualified majority of the member states and the Commission do not share the parliamentary position, the Council can profit from sophisticated behaviour and submit a less integrationist position. In the extreme, member states propose the position of their status quo minority which may help them to bargain an outcome located at their majority position.

Compared to the conventional game, an informational advantage offers the Council an opportunity to introduce its second or third best alternative in the conciliation bargains, which may, however, increase the benefits of the member states against the submission of the first 'true' position. Theoretically, such sophisticated behaviour is particularly likely in the lengthy process of EU legislative decision-making, in which the limited number of procedural moves is known to the actors involved. For example, if member states first decide about either adopting a common position or maintaining the status quo, and subsequently about the winner of this decision against a parliamentary amendment, sophisticated member states will anticipate the outcome of the second round when making their first choice. From a normative view, we are reminded that sophisticated voting has the advantage of limiting the power of an agenda-setter, who can manipulate the outcome by deciding about the order of the sequencing (Shepsle and Weingast 1984: 58).

From a general point of view, an important precondition for a successful bargaining strategy is knowledge and distribution of information about the positions and strategies of the other actors involved. In my opinion, a major incentive for bargaining is the attempt to gather such information, which promises an optimization of own bargaining strategy, and thus more benefits. For example, if only one of the two actors knows the reference point for an outcome in case of non-decision, the more informed actor may have a bargaining advantage by providing credible information about the location of the rejection point. Note that this argument has sometimes been put forward about the Commission which has been considered capable of manipulating the Council's default condition or changing the preferences of some member states (Schmidt 2000). Such an (informational) advantage for the Commission under the consultation procedure would even strengthen the argument on the member states' rationale for introducing the codecision procedure, in which the member states can hide their position owing to the Council's internal complexity. They know the parliamentary position at value 75 per cent, but the EP can hardly determine whether member state 2 or 3 is decisive for Council majority building without Commission support.

To simulate the difference between the complete and incomplete model in respect of parliamentary uncertainty, Figure 2 shows the outcome predictions for the consultation and codecision procedure, assuming that the EP bargains with the Council pivot for the outcome, with both having the same bargaining power. When the EP has complete information about the positions of the member states, the bargaining outcome should be located exactly in the centre of all outcomes which both institutional actors prefer to the status quo in the codecision procedure (solid line).⁷ In the consultation procedure, the win-set is more restricted because the Commission has to improve the Council pivot against any unanimous amendment by the member states (dashed line). In this model, the EP benefits from the introduction of the codecision procedure when it has complete information.

With incomplete information, the EP knows neither the location of the Council pivot nor the outcome to which the pivot would agree – which provides the Council pivot with a bargaining advantage, moving the outcome further away from the EP. In Figure 2, the uncertainty of the EP is represented by a normal distribution peaking at the ‘true’ ideal point of the member states. The level of uncertainty is represented by the standard deviation s of the

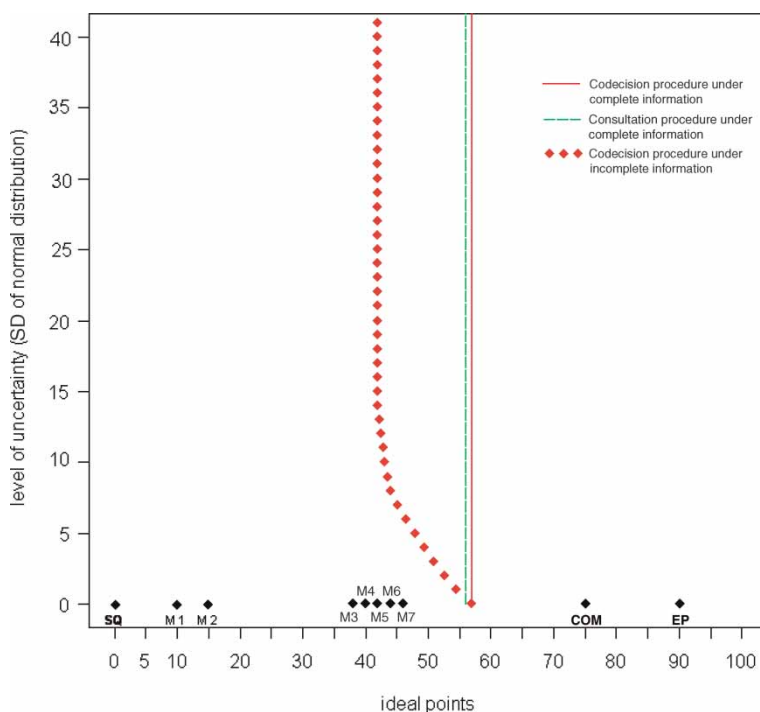


Figure 2 Outcome predictions for the codecision procedure for different levels of uncertainty by the EP about the member state ideal points

Note: Abbreviations as for Figure 1.

distribution, which is denoted on the y-axis. Two effects of uncertainty on the bargaining outcome are apparent: (i) when the uncertainty of the EP increases, the bargaining outcome moves towards the centre of the Council majority (up to a certain point). The reason is that the rejection costs of the final proposal are much higher for the EP than any bargaining concession. When the EP increasingly fears rejection, parliamentary strategy is dominated by maximizing the probability of acceptance – which peaks in the centre of the Council majority; (ii) if the uncertainty of the EP on the positions of member states further increases, the probability of acceptance becomes the same for all proposals. Under these conditions, maximizing acceptance is decreasingly relevant and distance to the parliamentary position increasingly important for the EP. For this reason, the outcome moves closer to the EP in the event of a very high level of uncertainty.

When an (integrationist) outcome under the consultation procedure is located outside the core of member states – as represented by the vertical line in Figure 2 – all countries could benefit from using the codecision procedure when they have an informational advantage *vis-à-vis* the EP. Hence, the codecision procedure not only limits the power of the agenda-setter, but it may also allow member states to submit the less integrationist minority position in the conciliation bargains – a sophisticated move that could also increase the internal legitimacy of the EU and the willingness of member states to comply with EU legislation.⁸

ANALYSIS: TWO CASES OF SOPHISTICATED CONCILIATION BARGAINING

Owing to the large number of actors involved and the secrecy of Council negotiations, empirical evaluation of EU legislative decision-making is a difficult task, and it is almost impossible to evaluate the sophisticated behaviour of the Council. Fortunately, there are two recent important empirical contributions to the study of EU legislative decision-making and conciliation bargains which can be used for the analysis of member states' sophisticated action. The first source of information is the DEU dataset which contains estimators on the positions of each member state, the Commission and the EP, the status quo and outcome location for 66 Commission initiatives. These data were gathered by experts who were primarily affiliated to the Council Secretariat and cover more than 120 issues at stake in the period from May 1999 to December 2000 (Thomson *et al.* 2006). On closer inspection of the DEU units of analysis, 25 of the 66 Commission proposals reflect the supranational scenario, in which the status quo is located at the less integrationist, and the EP at the opposite integrationist, side.⁹ Note that the supranational scenario is found at the level of Commission proposals, while several analyses attempting to aggregate the issue-level estimators failed to identify a common European space (i.e. Thomson *et al.* 2006; Selck 2004).

The second dataset provides estimators for 73 conciliation issues and contains the collective positions of the Council and the EP as well as the location of the

status quo and the outcome. These issues cover all controversial conciliation cases in the period from May 1999 to July 2003, which deals with the period between the coming into force of the Amsterdam Treaty and eastern enlargement. In this period, 25 per cent of legislation decided under codecision had been settled at the first reading; most Commission proposals were decided at the second reading, and about 24 per cent or 69 proposals were negotiated, and 57 decided in the conciliation process (some proposals contain several controversial issues with different positions of the Council and the EP). The information on their positions was also gathered by experts who were affiliated to the EP (König *et al.* 2007). Five proposals of the DEU dataset were negotiated in the conciliation committee, and thus also provide the respective positional estimators. Because such expert judgements always raise concerns about biased data regarding the set of selected issues, the location of actors' positions and distances to the status quo and outcome, the estimators for these five proposals were cross-validated.¹⁰

Besides the institutional affiliation of the experts, a main difference between the two datasets is that the DEU researchers asked for the issue-specific positions of the member states before the Council formulated its common position, while the conciliation data refer to the Council's collective issue-position during the conciliation process.¹¹ Using the DEU data for checking the issues negotiated in the conciliation committee, there is a surprisingly high similarity regarding the point locations of the EP, the Commission, the status quo, the outcome and the Council pivot, which has been calculated in order to compare it with the collective Council position. More precisely, on a scale from 0 to 100 the point location of 15 positions is the same (deviation of 0–5), 13 positions are almost identical (deviation of 6–25), four positions are not comparable owing to missing values, and only three measures indicate a large deviation (50, 50 and 70). In sum, five of the DEU proposals were negotiated in the conciliation process, and most of the positions – including the Council, the EP, the Commission, the outcome and the status quo – reveal identical measures which were indicated by experts from different institutional affiliations.

On closer inspection of the three deviating cases, two list a scant Council qualified majority position, while the minority position is almost identical with the Council estimate.¹² A simple explanation would be a measurement error, but these cases also suggest that the Council may have introduced the minority position in the bargains of the conciliation process. The two deviating cases involve the directive on the resale right for the benefit of the author of an original work of art (*'droit de suite'*) and the tobacco directive which intended to harmonize laws, regulations and administrative provisions of the member states concerning the manufacture, presentation and sale of tobacco products. Process tracing of these cases might provide additional insights into the actors' behavior and strategies in the conciliation process.

The *droit de suite* directive

The *droit de suite* directive was initiated by Commissioner Mario Monti in March 1996, and it attempted to establish a right for the author of an original

work of art, to be defined as an inalienable right which cannot be waived, to receive a royalty based on the sale price obtained for any resale of the work. The key issues of the final legislative act were a minimum threshold for the resale price, the specification of the digressive rates ranging from 4 per cent to 0.25 per cent decreasing with the sale price, a maximum amount of royalties of 12,500 euros and the transposition deadline of 1 January 2010. The resale rights are part of the Berne Convention and copyright provisions which have been recognized by 11 member states with considerable legislative variation. Austria, the Netherlands, Ireland and the UK had no provision, and the two most relevant lobby groups, the European Visual Artists and the Groupement Européen des Sociétés d'Auteurs et Compositeurs (GESAC), issued a declaration before the first reading of the EP. They generally welcomed the initiative but were against a minimum threshold exceeding 500 euros and reluctant to accept a tapering scale of rates. Since there already was a single rate in Germany and France, the proposal threatened their income. Strong protests came from large salerooms such as Sotheby's and Christie's which hold about 70 per cent of the European art market; they feared that sales would be relocated in the US and Switzerland.

Unsurprisingly, the UK was strongly opposed to the proposal, supported by the Netherlands. In spite of qualified majority rule, the German presidency sought a consensus solution in February 1999, but neither the German nor the Finnish presidency could reach such a solution. By contrast, in the meantime a blocking minority of Austria, Denmark, Ireland, Luxembourg, the Netherlands and the UK was formed despite multiple modifications. London believed that these concessions were insufficient, while other countries considered them to be maximum changes. In order to avoid a vote, the UK threatened to block a decision by vetoing it in accordance with the Luxembourg compromise (European Daily Bulletin (EDB), No.7583/1999; 7608/1999), and Prime Minister Tony Blair intervened personally, hinting at the importance of the art market for the UK. Commissioner Bolkestein's spokesman commented that 'the British concerns are not sufficiently justified. Should the United Kingdom invoke a vital national interest and veto the directive [by virtue of the Luxembourg compromise, see EUROPE of 9 December, page 9], the Commission would be extremely disappointed. This would set a precedent and could obstruct many future decisions relating to the internal market. Fears that application of the resale right would lead to a relocation of sales and the loss of jobs are exaggerated. The last time a very powerful lobby used this type of argument, it proved not to be grounded', he added, referring to duty-free sales (EDB, No. 7615/1999). This view was shared by the French Collective Administration Organization for the Rights of Authors in the Visual Arts (ADAGP), which estimated that the share of resale rights to be paid will only be between 0.0002 per cent and 0.15 per cent of the global turnover in Europe.

At the first meeting of the Internal Market Council under the Portuguese presidency it was decided that a compromise had to be accepted unanimously, particularly because of the demand for a long transition period.

Commissioner Bolkestein was very much against the long transition period of 15 years and the concessions achieved by the British 'waving the banner of national interest' (EDB, No. 7678/2000). With abstentions from Belgium and Austria, a compromise with many amendments to the original proposal was adopted by consensus on 20 June 2000. The GESAC was opposed to the compromise, claiming that it 'empties the resale right of its substance in many respects'. In support of the Commission's view, their main points of criticism referred to the maximum amount and the long transition period. Throughout the legislative process the position of the EP was quite close to that of the GESAC. The following conciliation process was described as difficult with a long series of meetings and lunches. The conciliation committee reached an agreement on 31 May 2001, thereby accepting a compromise text from the chair of the parliamentary delegation, Ingo Friedrich (Christian Social Union – CSU, Germany). The two points of the compromise concerned the minimum threshold (compromise outcome: 3,000 euros, EP position: 1,000 euros, Council position: 4,500 euros) and the deadline for transposition (compromise outcome: 4 years/6 years (for countries which do not currently apply resale rights), EP position: 2 years/2 years, Council position: 5 years/10 years). The Council did not agree on the abolition of a maximum ceiling, and the maximum deadline would be ten years considering transition periods (EDB, No. 7978/2001). The EP adopted the legislation with a majority of 405 votes in favour, 101 against and 32 abstentions (EDB, No. 7999/2001). The GESAC regretted the shortcomings of the directive, namely the excessive transition period, lower rates than those applied in some countries, the ceiling and the high threshold (EDB, No. 8014/2001). The Commission adopted a declaration stating that such a long transition period must remain an exception.

The DEU data list the UK as very close to the status quo (1 on a scale between 0 and 100), four countries with a position at 9 and the qualified majority of ten countries at a position with a value of 82. The EP is located at the most integrationist position with a value between 90 and 100, which is mostly shared by the Commission, while the outcome is located at a value of about 70. According to the conventional model, we would expect an outcome between the pivot of the Council qualified majority (82) position and the EP (between 100 and 90) which is even shared by the Commission. However, the conciliation data indicate a Council bargaining position at a value of 10, which corresponds to the minority position of Austria, the Netherlands, Luxembourg and Ireland. This suggests that the Council indeed submitted this minority position into the conciliation bargains, pointing to the consensus requirement and the British veto threat. While the Commission could have determined the outcome under the consultation procedure, the compromise is located between the more and less integrationist member states. However, the close views of the Commission and the EP might have helped to negotiate an outcome which is located closer to their views than to the middle position of the two institutional actors.

The tobacco directive

The second case involving sophisticated conciliation bargains is the tobacco directive which raised concerns about the export of tobacco products, the strength of health warnings, the disclosure of product information, the updating of the directive and the ban on product descriptions. The aim of this directive was to approximate the laws, regulations and administrative provisions of the member states concerning the maximum tar, nicotine and carbon monoxide yields of cigarettes and the warnings regarding health and other information to appear on unit packets of tobacco products, together with certain measures concerning the ingredients and the descriptions of tobacco products, taking as a basis a high level of health protection. Only a few days after the proposal had been presented by the Commission, the Health Council under the Finnish presidency was briefed by Commissioner David Byrne on the content. The proposal consolidated and amended existing legislation, namely directives 89/622/EEC and 91/41/EEC on labelling and directive 90/329/EEC on the maximum tar content of cigarettes. At a public round table concerning this topic, all participants expressed their unanimous support of the Commission's proposal especially in light of the international work carried out by the World Health Organization (WHO). During the debate the delegations mentioned various ideas on how the consumption of tobacco, especially among young people, could be reduced (EDB, No. 7596/1999). Commissioner Byrne also asked for the support of the EP and mentioned that the directive was based on article 95 of earlier directives even though this was challenged before the European Court of Justice (ECJ) (EDB, No. 7597/1999).

The proposal had been examined in two EP committees: the Environment, Public Health and Consumer Policy Committee and the Agriculture Committee. The report of the Environment Committee was in favour of more strict provisions for a ban on ammonium, size of warning, type of message (more precise), laboratories, traceability and requirements for the producers to invest in research on addiction, while the Agriculture Committee failed to agree on an opinion about this report (EDB, No. 7732/2000). The EP adopted the report of the Environment Committee, thereby making several amendments to the Commission's proposal. The amendment that tobacco products exported to third countries should meet the same standards as those sold to European consumers provoked much protest from the tobacco industry and trade unions. The EP rejected amendments aimed at introducing a gradual reduction of Community aids for tobacco production and requiring a minimum contribution from the tobacco industry for research. But parliament was split and the plenary debate over amendments aimed at ending subsidies and the very detailed nature of 'warnings' was highly controversial. Another conflict concerned the priority of either public health or employment. Some representatives expressed the view that even the Commission's proposal went too far. In addition, the Legal Committee indicated that the proposal should be based on the internal market and not health. This committee made an amendment rejecting the proposal and

awaiting the decision of the ECJ on the directive concerning tobacco advertisements.

The Commission indicated that it would accept some, but not all, amendments proposed by parliament. For example, it mentioned that scientific knowledge about the dangers of tobacco lacked a positive list (EDB, No. 7737/2000). During the Council meeting under the Portuguese presidency on 28 June 2000, several member states expressed reservations about maximum content (Finland and the UK) and the enforcement of these standards on exported cigarettes (Germany, Greece, Austria). However, the Council quickly reached an agreement on a common position. It was adopted with QMV with Germany voting against, and Austria, Spain and Luxembourg abstaining with regard to the legal basis of article 95 of the directive. Spain abstained because it opposed applying the maximum levels to brown tobacco from 2003 onwards. Only a few months later, the ECJ cancelled the tobacco directive on advertisements on the grounds that the legal basis of article 95 was not suitable. Following this, the EP adopted a report on 13 December 2000, which proposed amendments for supplementing the legal basis with article 133 (trade), the list of ingredients to be adopted through a directive, the reintroduction of a complete list of warnings, a longer transposition time for export and warnings covering 30 per cent of packet surface (already applied in Poland). Finally, it wanted to allow terms such as 'light' in the case of registered brand names. Except for the last point, the Commission agreed with almost all the amendments. The Council concluded one day later that ten of the 32 parliamentary amendments were not admissible. The Conciliation Committee reached an agreement at the first meeting at 2.30 in the morning. Many of the EP's amendments became part of the text and only a few, such as the printing of a warning on vending machines, were dropped. All actors were very pleased with the compromise outcome, and the rapporteur even felt that the text was better than previous versions. Commissioner Byrne said that this demonstrated the extent to which the European law-making machine could be effective. The procedure had at this point lasted less than 15 months (EDB, No. 7913/2001), and the text was adopted without debate in the EP in May 2001 and by the Council one month later (EDB, No. 7965/2001).

Regarding the health warnings of the tobacco directive, the DEU and the conciliation data indicate that the EP had the most integrationist position at a value of 100, while the Commission held an intermediate position around 50. Eleven member states shared this intermediate position with the Commission, three were in favour of the status quo, and one country was close to the status quo. Both datasets suggest an outcome close to the parliamentary position, but the conciliation data again indicate that the Council submitted the minority status quo position. With respect to a second issue relating to the conciliation bargains of this directive on descriptions, the EP again favoured the most integrationist position (100), and the Commission took an intermediate one at a value of 50, which was shared by four member states. Four member states preferred a more status quo oriented solution at a value

of 25, but seven countries supported the parliamentary view. However, the Council again submitted its minority position. Although the different views of the Commission and the EP should favour the sophisticated move of the member states, the outcome for both issues was closer to the parliamentary position (90 and 80), suggesting that the Council could not credibly submit the minority position, in particular because of the large number of member states supporting the parliamentary view on the second issue. Instead of forming a coalition with the Commission, the EP could have received the necessary information about the Council from those member states which shared the parliamentary position (Hix 2002: 688).

CONCLUSION: THEY SOMETIMES LOSE, BUT THEY CAN ALSO WIN

In an evaluation of the empowering of the EP by the codecision procedure, this study proposes a distinction between conciliation bargains under complete and incomplete information. When the EP has information deficits, it is argued that the member states may have incentives to empower the EP because they can benefit from sophisticated behaviour in the codecision procedure. The simulation confirmed the sophisticated view and predicted member state benefits *vis-à-vis* the consultation procedure under the conditions of a supranational scenario, in which the EP is poorly informed when promoting policy change. Process tracing provided additional insights into actors' strategies in the conciliation process, in particular the relevance of information on other actors' positions and of third actors to deliver it.

This finding is provocative for those scholars who have either excluded the Commission from their analysis of the codecision procedure or emphasized the irrationality of member states when introducing the codecision procedure. The empirical analysis combined the information of two datasets, cross-validated both sources of information, and identified five conciliation bargaining proposals with few deviations showing a supranational scenario. For these cases, the theoretical expectation is that the Council submitted the minority position in the conciliation bargains, which can improve the benefits of all member states against outcomes under the consultation procedure. One reason for this Pareto improvement would be that the codecision procedure limits the power of the Commission. Another reason is that the member states can profit from an informational advantage when they know the most integrationist parliamentary position, and the EP can hardly determine the decisive Council actor. Accordingly, the success of the two institutional actors is also determined by the Commission's position in conciliation bargains.

On closer inspection, the two cases of the *droit de suite* and tobacco directives are evidence of Council sophisticated behaviour and reveal further patterns of EU legislative decision-making, in particular with regard to the interaction between Commission, EP and Council in the codecision procedure. Obviously, by process tracing of a few cases, we can hardly provide a satisfactory empirical

answer in terms of testing competing views on the treaty choice of member states for the empowering of the EP. But the results:

- confirm previous empirical findings on the prevalence of the supranational scenario in which the EP holds an extreme integrationist position, always preferring most policy change;
- are evidence that the Council is the more complex collective actor in EU legislative decision-making; member state coalitions vary sometimes from issue to issue, which promotes trading and thus a consensus solution in the Council;
- show that – compared to the EP – the Commission sometimes performs a more moderate role but it always favours policy change against the status quo;
- indicate that the Council indeed introduces the minority position in the conciliation bargains;
- show that member states do not always win when they behave strategically.

On closer inspection of the final results, the outcome of the tobacco directive reveals that the EP can also benefit from divided member states. A similar example can be found in the bargains of the Socrates directive, in which the Council was also split in the budgetary conflict and submitted the status quo biased minority position. Member states claimed to favour a zero growth of the Socrates and Leonardo programmes at 1.55 billion euros, while the EP called for a substantial increase in the allocated resources to 2.5 billion euros.

But when the member states are located on one side of the scale and the EP on the other, as in the *droit de suite* directive, the strategic advantage of the member states is one way to explain their support of parliamentary empowerment by the codecision procedure. This does not mean that member states necessarily follow this approach in intergovernmental negotiations. Other cases might call this strategic perspective into question and reveal other patterns in the interaction between the Council, the EP and the Commission. For example, in the case of the takeover directive, the two datasets show that the EP could determine the outcome against the Commission and 13 member states, while only two of them supported the parliamentary position. Furthermore, the motor insurance directive was characterized by member state consensus against the EP with a moderate position of the Commission, with a final outcome of 1.85 billion euros. This suggests that the EP is most successful when it shares the position with the Commission or some member states, while the member states can more easily behave sophisticatedly when they are in opposition to the EP and the Commission is on their side. In my view, this draws attention to the information level of actors in the analysis of EU decision-making, which seems to play a crucial role in the determination of outcomes.

Today, the Council has become even more complex with the accession of 12 member states. In the case of a more complex Council, member states might continue to profit from an informational advantage under the codecision procedure, and a simple model would predict an expansion of the codecision

procedure to more fields of application. However, the simulation revealed that this advantage does not increase steadily. The EP is only disadvantaged when it is concerned with the acceptance of the bargaining solution by the Council at low levels of uncertainty. But when uncertainty is generally high, the difference between the acceptance probability for proposals decreases and their distance to the EP becomes more important for the EP's willingness to make concessions. Another move could be indicated by the recent events concerning the service directive in which the EP changed its supranational attitude and became a more strategic 'public' actor. All these developments need more research on the preference profiles, the bargaining tactics and the informational level of the actors involved in order to understand EU decision-making at the legislative and treaty level.

Biographical note: Thomas König is Professor of Political Science at the University of Mannheim, Germany.

Address for correspondence: Thomas König, Universität Mannheim, Postfach 103462, D-68131 Mannheim, Germany. email: koenig@uni-mannheim.de

NOTES

- 1 This scenario is found as the unit of analysis on the proposal level for 25 of the 66 proposals (Junge and König 2007). On a scale ranging from 0 to 100 per issue, the status quo is located on the less integrationist side ($SQ \leq 25$) in 37 of the 66 Commission proposals, for which the EP or the Commission promotes the most integrationist position (>75). Using the issues as the unit of analysis, the supranational scenario is revealed in 79 of the 122 issues (with EP or Commission >75 and $SQ \leq 25$).
- 2 Rittberger and Schimmelfennig (2005) also use the term strategic action for explaining parliamentary empowerment but they relate it to the particular environment of the EU. In other words, they add a second value-oriented dimension to the preference dimension of actors (König and Finke 2006).
- 3 In the study of König *et al.* (2007) on bicameral conflict resolution, the Council had maximum heterogeneity in five cases, major differences in preferences in 18 cases and moderate differences in 17 cases, while the EP never had maximum heterogeneity, in only five cases major and in two cases moderate differences in preferences.
- 4 The DEU data also show that the Commission only has similar positions to the EP in five of the 24 cases in which the supranational scenario exists.
- 5 Only Majone and Moravcsik dispute this view when they conceive of the EU as a 'regulatory state' (Majone 1996, 1998, 2000, 2002a, 2002b). Such a state does not engage in redistributive or value-allocative policies which receive democratic legitimization by national governments with directly accountable politicians (Moravcsik 2002, 2003, 2004).
- 6 While the puzzle can be solved if the EP changes its supranational attitude, this study attempts to hold most conditions constant and to find an alternative explanation for the empowering of the EP, given the supranational parliamentary location.

- 7 Not necessarily in the centre between the EP and Council pivot, but in the centre of their shared win-set. The shared win-set defines the bargaining space because no actor would agree on outcomes which would make them worse off against the status quo.
- 8 For simplicity, it is assumed that the EP and the Commission share the position, while a more complex characterization would show that the Commission has an incentive to hide (part of the) information when it is more distant to the EP. For example, if the Commission were located on the left side of the dotted line, it would not inform the EP, while it would provide some information if it were located between the dotted and the straight lines.
- 9 For 37 of the 66 proposals, the Commission or the EP is located in the quartile of the most integrationist actors, providing evidence for the supranational scenario at the level of the unit of analysis. Furthermore, the Commission and the EP only have identical positions in less than half of the cases.
- 10 For validation of the conciliation data, König *et al.* (2007) first cross-checked the selected set of issues with official documents revealing that all issues identified by the interviewed experts were either mentioned in the Activity Reports of the EP Conciliation Secretariat or the Legislative Observatory. Upon closer inspection, these documents also provided information about the estimates of 11 cases dealing with budgetary affairs. Standardizing the budgetary figures on a scale from 0 to 100, where 100 indicates the highest and 0 the lowest budgetary demand in terms of euros, the point locations of the EP, Council, Commission, status quo and legislative outcome were confirmed exactly (15 per cent of all 73 cases).
- 11 Arregui *et al.* (2004) found that Council members change their position over time.
- 12 The third concerns the outcome of the review clause issue of the Socrates II proposal. The conciliation indicator suggests a split-the-difference compromise between the Council and the EP, while the DEU estimate indicates the total success of the EP. Unfortunately, neither the Legislative Observatory, nor the Activity Reports provide any further information about the outcome of the Socrates II proposal. However, since the split-the-difference estimate of the EP's bargaining success is more conservative than the DEU assessment by a Council expert, there is no evidence for a possible parliamentary bias by interviewing the rapporteurs in favour of the EP.

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