

# Contested Delegation: The Impact of Co-decision on Comitology

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

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

In this article, we focus on a specific aspect of delegation in the European Union: that of the Council of Ministers (henceforth the Council) assigning

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

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

### **Setting the Scene: European Legislation and Comitology**

85 In the European Union the Commission is delegated the power to  
 implement many important policy decisions. This is because many  
 legislative acts are rather loosely specified and give the Commission the  
 power to formulate the details of the legislation. The Single European Act  
 clearly identifies the right to confer implementing powers as a prerogative of  
 the Council. It also provides the latter with explicit authority to lay down

the conditions under which the Commission exercises its delegated authority. These Treaty rules also state which role the Commission plays in the oversight procedures.<sup>1</sup>

During the oversight procedures, so-called 'comitology committees' consist of member states' representatives, chaired by a member of the Commission. There are three types of committees that are decided upon by member states on the basis of a draft of the Commission. Firstly, there are advisory committees, whose vote is not binding on the Commission. Secondly, there are management committees. If the Commission adopts an implementing measure that a management committee disagrees with (by qualified majority), the Commission must forward the measure to the Council, which may then (by qualified majority) modify or annul it. Thirdly, there are regulatory committees, which only pass the Commission's draft decision if they approve it by qualified majority. Should the committee not approve it, or be unable to agree, the Commission must submit a proposal to the Council as if it were a legislative proposal.<sup>2</sup> If the Council, however, cannot reach a decision within a certain period of time, the Commission can proceed as it had originally planned.

A more restrictive variant of the regulatory and management committees (which was abolished in 1999) provided for a *contre-filet* (double safety net). Under this procedure, the Council could stop the Commission from acting with a simple majority vote, even after the expiry of the relevant period and even if the Council could not agree on an alternative measure.<sup>3</sup>

The competences of the EP in comitology have been changed in two important reforms. Under the reform of 1999, the Second Comitology Decision, the EP obtained the right to be informed about planned implementing measures for legislation adopted under co-decision. It was also given the right to pass a resolution opposing the measure if it considers that the Commission has exceeded its implementing power. However, the Commission is not bound by this resolution. Furthermore, if the regulatory committee delivers an unfavourable opinion or no opinion at all, the EP must be informed of the Commission's proposal to the Council. If the EP opposes the proposal, it informs the Council of Ministers, which may, 'where appropriate in view of any such position', act on the Commission's proposal. The EP was highly discontented with the outcome of the Second Comitology Decision in 1999 (Bergström 2005: 249–85; Bergström and Héritier 2007; Bergström *et al.* 2007).<sup>4</sup> Nevertheless it showed 'a sudden willingness to reconsider the lifelong demand for the abolition of the regulatory procedure' (Bergström 2005: 302). This may be due to the fact that in return for accepting the regulatory committee procedure it obtained the removal of the *contre-filet* mechanism (Bergström 2005).<sup>5</sup>

In 2004, the EU Constitutional Treaty incorporated important changes regarding comitology, but since it was not ratified, the Second Comitology Decision was revised in 2006. It created a new regulatory procedure ('regulatory procedure with scrutiny'), whereby the Commission has to

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135 submit its draft implementing measures to the regulatory committee and to  
 both the Council and the EP, even if it receives a positive opinion from the  
 committee. Both institutions have the ability to block the adoption of the  
 proposed measure and thus send the proposal back to the committee. If it is  
 140 rejected, the Commission has to present a new draft measure or a new  
 proposal for legislation (Bergström 2005: 249–85; Bergström and Héritier  
 2007; Bergström *et al.* 2007).<sup>6</sup> This decision satisfied the EP, which witnessed  
 a considerable increase of its competencies.<sup>7</sup>

### 145 Theory and Hypotheses

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

After having delegated, the principal(s) are not without control over how  
 the agent discharges its task by giving him more or less discretion.

② McCubbins and Page (1987) argue that divided principals – after giving a  
 broad mandate to the agent – have an incentive to control the agent’s

behaviour *ex post*. In a similar vein, Franchino (2000),<sup>8</sup> finds that the level of conflict between the European Parliament and the Council (measured as the number of EP amendments rejected by the Council) correlates positively with the existence and stringency of *ex post* controls. Hence, principal-agent theory using the concept of transaction costs and assuming diverging actors' preferences would expect that co-decision leads principals/legislators to use more stringent procedures. 180 185

Secondly, the increasing use of delegation and comitology rules favouring specific institutional actors may also be interpreted as a contest for power between institutional actors – here conceived as unified actors – who seek to maximise their influence over institutional competences and thereby their influence over policy outcomes. The introduction of co-decision involved a relative loss of legislative power for the Council. With a more important role for the EP in legislation, the Council may seek to use more delegation to comitology, in which the EP only played a marginal role until 2006. This would allow the Council to maximise the control it can exercise over decision-making and to eschew the relative loss of decision-making power under co-decision. And it may motivate the Council to choose comitology committees that allow for the maximum influence of member state representatives. In this article we base our argument on this power-based distributive bargaining theory when explaining why delegation as opposed to legislation is chosen, and – within delegation – what type of comitology procedure is selected. We take issue with the principal-agent efficiency based explanation of the why of delegation to comitology elsewhere (Héritier *et al.* 2009). Here, we focus on power-based distributional bargaining theory because it offers answers to why actors opt for legislation or delegation, and how they choose between specific comitology procedures. 190 195 200 205

#### *Distributive Bargaining Theory Applied to Comitology*

Institutions are defined as sets of man-made rules of behaviour facilitating and restricting social interaction (North 1990). They guide interaction in the accomplishment of joint tasks, such as legislation and delegation. The rules allow the actors involved to incorporate expectations of the actions of others into their own decision-making (Lake and Powell 1999). Actors assume that other actors will more or less abide by the rules and, in the case of non-compliance, be sanctioned. Institutional rules, therefore, constitute an important source of information in forming expectations as to how other actors are likely to behave. Multiple institutional rules that subsequently guide political interaction may be developed in order to deal with cooperation and coordination problems. Although institutional rules produce an increase in overall benefits by allowing cooperation, these benefits are not evenly distributed and are thus linked to conflicts of interest among actors (Knight 1992: 27); and, concomitantly, to actors having diverging preferences over them as a function of the outcomes they generate 210 215 220

225 (Jupille 2004: 223). The final form of an institutional rule is considered as a product of the conflict of interest among the relevant actors (Knight 1992: 27).

230 This raises the question of which actors systematically benefit from an institutional rule and how these actors obtain these benefits.<sup>9</sup> Rules being incomplete, actors engage in an implicit or explicit bargaining process over the specifics of their content (Lax and Sebenius 1986; Osborne and Rubinstein 1990: 1). In explaining the outcome, power takes centre stage. A similar argument is made by Jupille (2004: 223) when he argues that institutional macro rules frequently being ambiguous allow for several  
235 institutional alternatives. In this article, we primarily focus on who benefits from and therefore favours specific rules, and only marginally look at how institutional rules change through redistributive power-based bargaining. We start from a set of empirical assumptions about actors' preferences, and seek to explain how these have changed over time in accordance with the valid institutional rules.

240 We assume that actors are competence-maximisers, that is, they will seek to ensure that policy will be enacted through procedures which maximise their own degree of control over the process of policy-making, and not through procedures where they have little or no control. In other words, actors' preferences over delegation will be determined by the degree to which they have effective influence over policy that is carried out through delegation as opposed to legislation. As a result, they will press for the widespread use of procedures that favour their own interests and for less frequent use (and, where possible, the alteration or abandonment) of those  
245 procedures that do not.

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

260 The Commission's meta-preferences are assumed to be extensive delegation, without or with minimal control by member states. However, in view of the other actors' preferences and existing alternatives of action, this may often not be possible to realise. Its strategic preferences, therefore, will to some extent depend on the availability of alternative forms of policy-making through legislation. In periods when the Commission has difficulty  
265 in proposing legislation that has good prospects of being adopted, it may be more amenable to extensive member state control in delegation than it would otherwise be. With the introduction of co-decision, the Commission, moreover, has to take into account a second legislator that may or may not support its proposal. By comparison, under delegation, the Commission



does not have to share decision-making powers with the EP. In addition, the Commission is much stronger in the comitology procedure than under co-decision. This is obvious for the advisory and the management committees, but also – to some extent – for the regulatory committees. Here the Commission can set time limits by which the committee must deliver its opinion and – if the Council fails to adopt or annul a proposal (by QMV) – it sees it adopted by QMV within three months. Co-decision, by contrast, is the legislative procedure in which the Commission is the weakest, because, in the conciliation committee, it allows the Council to amend the Commission’s proposal with a qualified majority rather than the usual unanimity. It is also the longest procedure (see Rasmussen and Toshkov 2011), and this can be a problem for proposals that the Commission would like to see adopted quickly. Accordingly, we assume that Commission prefers delegation over co-decision, even in the light of the findings that – on average – the Commission’s policy preferences are closer to those of the EP than to those of the Council (Napel and Widgren 2008),<sup>10</sup> and we submit that:

*H1: With increasing legislative competences of the EP under co-decision, the Commission will be inclined to delegate more to comitology.*

With regard to the type of comitology procedure, the Commission is of two minds. On the one hand it has a (meta-)preference for a comitology procedure which implies the least control by the Council, i.e. the advisory or management procedures. On the other hand it is also plausible to assume that the Commission frequently strategically anticipates the likely opposition of the Council to the least constraining committees and is opting for more constraining committees (i.e. the regulatory committee). In order to secure the rapid adoption of legislation with as few amendments as possible (Pollack 2003: 132), the Commission may strategically propose more restrictive comitology procedures.<sup>11</sup>

On the basis of these considerations, we present the following hypothesis: Either the Commission – with an increasing number of delegation proposals – true to its meta-preferences proposes the least constraining procedure. Or the Commission strategically anticipates the Council’s opposition to the least constraining comitology procedures and proposes more restrictive for acts that could alternatively be adopted solely through legislation.

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

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

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

330 *H3: With increasing EP legislative competences under co-decision, the  
 Council will be inclined to delegate more to comitology.*

According to our assumptions, we would also expect that, if the Council  
 wishes to delegate more in order to circumvent the EP, it would want to link  
 the increase in delegation to the use of the regulatory procedure.

335 *H4: The increase in delegation accepted by the Council will be accompanied  
 by an increase in the use of the regulatory committee.*

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

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



*H5: With the introduction of co-decision, the EP will seek to veto delegation and press for legislation only, and*

*H6: With increasing competences in comitology the EP will be less opposed to delegation to comitology.*

## **Empirical Results**

### *Databases*

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

*Commission proposals based on Article 130s(1).* The first database uses the EU's Eur-lex and Pre-lex online catalogues, which allow us to scrutinise the full text of all Commission proposals and parliamentary amendments that have been made since 1994, thus enabling us to investigate proposals over a period of 14 years (up to 2008 inclusively). Eur-lex (formerly Celex) enables us to select all Commission proposals in full text based on a given treaty article and to identify the resulting final legislation as adopted by the Council (and the EP in co-decision). Pre-lex enables us to track all parliamentary reports (in full text) based on this proposal.

Earlier work has convincingly argued that it makes sense to control for the change from the status quo by focusing only on non-amending legislation (Franchino 2000). We select non-amending proposals only. Furthermore, we focus on binding legal acts of general application (directly or indirectly through member states), i.e. regulations and directives. This is not to say that decisions are not an important component of European law, but they are different in that their aim is *not* to produce law of general applicability.

Several studies have demonstrated that delegation varies both across issue areas and according to the voting rule in the Council (Franchino 2001, 2002, 2004; Pollack 2003). In order to study the possible impact of an increase in EP competences, we selected one article of the Treaty under which co-decision was introduced during the period covered by our database while controlling for policy attributes and decision-making rule. We chose Article 130s(1) on environmental policy.<sup>12</sup> Legislation based on this article is subject to QMV for the entire period under investigation, but with the Amsterdam Treaty the legislative procedure shifted from the cooperation procedure to co-decision. This article was chosen because it is the only Treaty article among those that changed from cooperation or consultation to co-decision in the Amsterdam Treaty<sup>13</sup> on which a sizeable number of non-amending Commission proposals were based.

405 Focusing on one policy area enables us to control for the influence of the  
 policy sector. However, we may still face the problem that the environ-  
 mental policy area is not necessarily representative of EU policy in general.  
 We know that environmental issues constitute an important area of  
 410 European policy-making in both scope and implications for member states  
 and, therefore, a central body of legislation (Weale *et al.* 2000: 1).  
 Additionally, environmental policy has been described as a policy field  
 where the EP (and particularly the environment committee) is particularly  
 pro-active (Burns 2005). Hence, the Commission and the Council might be  
 particularly concerned with possible decision-making gridlocks resulting  
 415 from the introduction of co-decision in this policy area. However, the  
 environmental policy field is not a ‘most likely case’ either. It should be  
 remembered that Amsterdam replaced cooperation (and not consultation)  
 with co-decision in this policy area, which may have generated smaller  
 changes in the frequency of delegation than if consultation had been  
 420 replaced by co-decision.

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

- 425 (i) Does the proposal include the delegation of legislative powers to the  
 Commission? We identified all proposals including at least one  
 provision enabling the Commission to adopt secondary legislation  
 based on basic legislation in cooperation with comitology (delegation  
 proposals). These provisions in general enable the Commission to  
 430 amend legislation or even adopt annexes to it and to adopt decisions  
 detailing the legislation.<sup>14</sup>
- (ii) Is the delegation proposal supported by the Council (in its common  
 position) and the EP (in its first reading)? In cases where the  
 legislator(s) adopt(s) the proposal but remove(s) the delegating  
 provision the delegating act was codified as not adopted. We also  
 435 scrutinised whether the amendments by the legislator(s) provide for a  
 change in the *scope* of the delegation proposal. In order to measure  
 whether the legislator changes the substantive scope of delegation as  
 originally envisaged in the Commission proposal, we count the  
 number of amendments increasing/decreasing the extent of the  
 440 substantive areas covered by delegation.<sup>15</sup>
- (iii) Which committee was proposed by the Commission (in its proposal),  
 the EP (in the first reading) and the Council (in the common position)?  
 If two different committees were selected (which is seldom the case) the  
 445 proposal was codified twice.

*All parliamentary reports.* We complement this first database with a  
 second one, based on the parliamentary online archives (Legislative  
 Observatory – OEIL) that include all parliamentary reports from the same

period (1994–2008). The main advantage of OEIL, in comparison to Celex and Pre-lex, is that it allows a search by means of keywords in the full texts of all parliamentary reports. We scrutinised all legislative reports deposited by the EP<sup>16</sup> during the co-decision procedure that amended the Commission proposal, the Council Common Position and the joint text of conciliation. Applying a key word search we focused on *all* issue areas in order to increase the number of cases.<sup>17</sup> We selected reports which introduced at least one amendment aiming at restricting the scope of implementing powers delegated to the Commission, and codified whether the EP proposed to change the committee(s) proposed by the Commission. We compared the number of reports including restricting amendments with the total number of reports commenting on delegation proposals. Our data collection started with the reports for 1994 when data became available from the EP internet site and extended to March 2008.

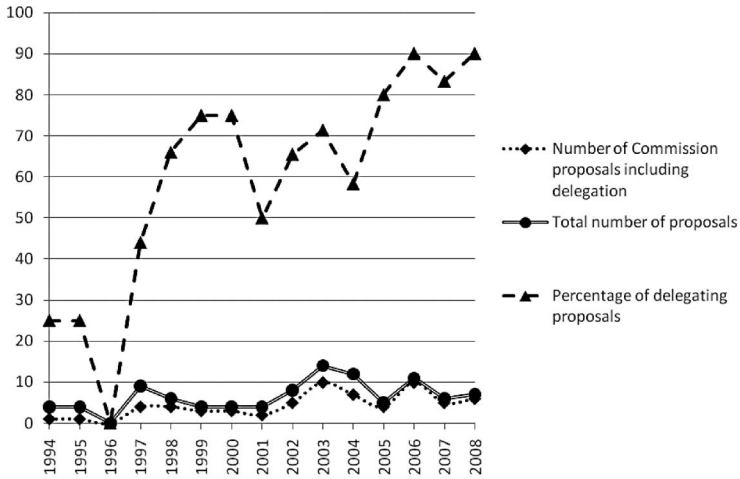
### **Empirical Findings: Does Co-decision spur Delegation and, if so, What Type of Delegation?**

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

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

At the bottom of Figure 1, we also show the average percentage of delegation proposals per year and the increase in delegation proposals, comparing a first period covering the time before the signing of the Amsterdam Treaty (1997), a second covering the two years between the signing and coming into force of the treaty, i.e. the period when the

FIGURE 1  
 ABSOLUTE NUMBERS OF DELEGATING AND NON-DELEGATING LEGISLATIVE PROPOSALS, AND PROPORTION OF DELEGATING LEGISLATION PROPOSALS (%) (N = 102 PROPOSALS)



	1994–96	1997–99	2000–08
Number of Commission proposals including delegation (average)	25.0%	57.9%	73.3%
Yearly increase		+25.0%	+1.7%

Commission knew that in the near future co-decision would be introduced, and a third for the time when co-decision was in force. What emerges is that the average proportion doubled from the first to the second period, rising from 25 per cent to 53 per cent (i.e. by an average yearly increase of 14 per cent), and continued to increase from the second to the third period, although the yearly increase was much smaller (+2.7 per cent). We obtained a positive phi coefficient<sup>18</sup> of 0.26, reflecting the correlation between the delegation proposed and the fact that this proposal was introduced after the Amsterdam Treaty. In view of these findings we consider H1 to be confirmed.

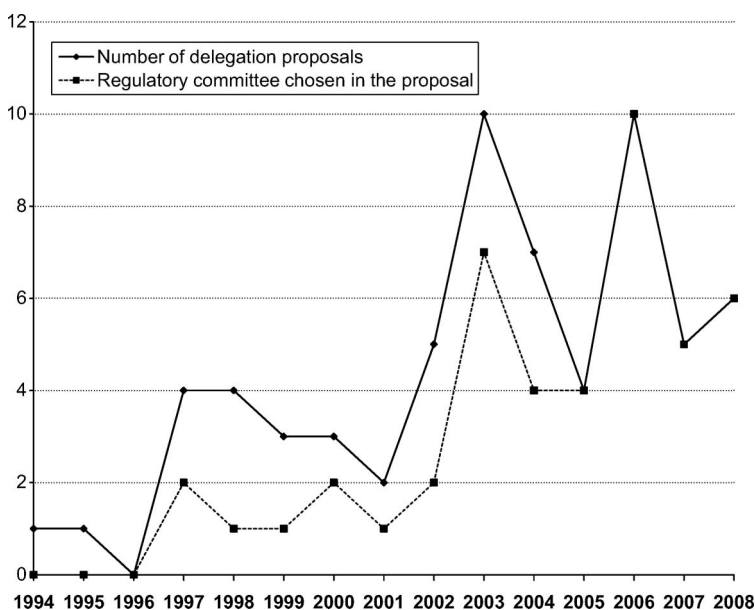
As regards the Commission's selection of a specific committee, we proposed that 'With an increasing number of delegation proposals the Commission will still propose the least constraining procedures, i.e. advisory and management committees' (H2.1) and that 'With an increasing number of delegation proposals the Commission will propose the more restrictive comitology procedures, i.e. regulatory committees' (H2.2).

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

We observe a strong relationship between the increase in delegation proposals and the use of the regulatory procedure, especially since the signature of the Amsterdam Treaty in 1997. As Figure 2 shows, the proportion of regulatory procedures proposed (out of the total number of procedures) rose from virtually 0 per cent in 1994 to 50 per cent in 1997 and to 100 per cent after 2005. The correlation between the period before and after the ratification of the Amsterdam Treaty and the Commission proposing regulatory committees is positive and relatively important (0.310).

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

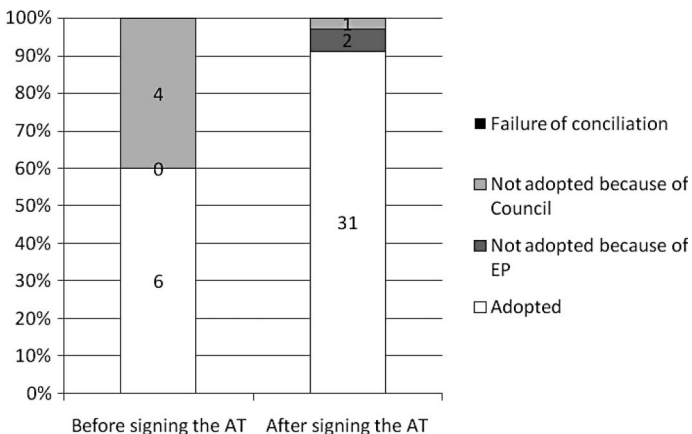
FIGURE 2  
NUMBER OF DELEGATION PROPOSALS AND NUMBER OF REGULATORY COMMITTEES CHOSEN ( $N=68$  PROPOSALS)



585 How did the Council react to co-decision and to what extent did it accept  
 the increase in delegation proposals by the Commission? We hypothesised  
 that ‘*With increasing EP legislative competences under co-decision, the*  
*Council will be inclined to delegate more to comitology*’ (H3). In order to test  
 590 this argument, we first scrutinise whether the Commission’s proposals for  
 delegation have been more frequently accepted by the Council since the  
 signing of the Amsterdam Treaty than prior to it. In Figure 3, we only look  
 at delegation proposals and classify the items according to whether the draft  
 was passed by the Council<sup>19</sup> or whether, under co-decision, it failed in the  
 conciliation committee. Since, on average, it takes two years to adopt  
 595 legislation, we only look at rate of the proposals made before 2006. In  
 Figure 3, we show what happened to the proposals adopted by the  
 Commission before this date, according to the period when these proposals  
 were passed by the legislator (i.e. before or after the signing of the  
 Amsterdam Treaty). Our *N* is the number of proposals adopted by the  
 Commission before 2006.

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

615 **FIGURE 3**  
 PROPORTION OF ADOPTED DELEGATION PROPOSALS PRECEDING AND  
 FOLLOWING THE SIGNING OF THE AMSTERDAM TREATY (*N*=44)





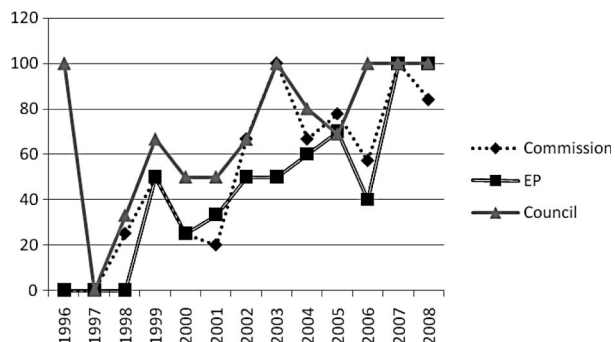
introduction of co-decision the Commission was much more successful in seeing delegation accepted by the Council.

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

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

We find a positive and very strong correlation (0.690) between the introduction of co-decision and the Council's preference for the regulatory committee. Unsurprisingly, the Council never turns down the Commission's proposal to use a regulatory procedure. Our results thus confirm H4 and also show that the strategy of the Commission to propose more delegation under the most constraining procedure has been a successful one. The Council accepted most of the delegation proposals as the Commission anticipated, since these proposals also provided for the regulatory procedure.

FIGURE 4  
PERCENTAGE OF OCCASIONS WHEN REGULATORY COMMITTEE WAS PREFERRED, BY LEGISLATOR (N = 65)

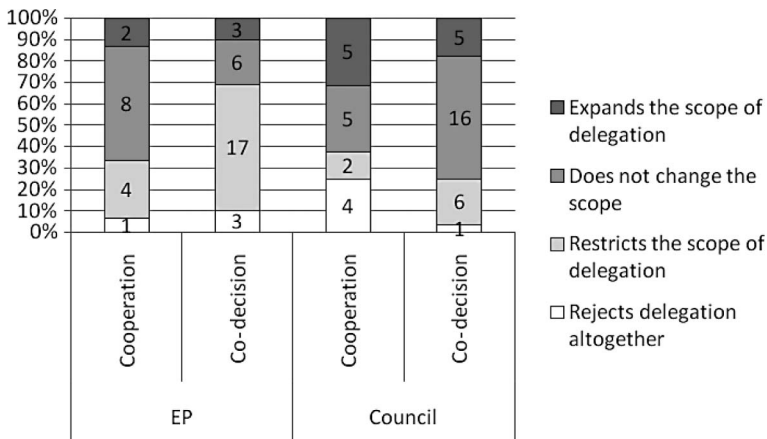


In our next analytical step we turn to the impact of co-decision on the EP's attitude to delegation to comitology. We claimed that 'With the introduction of co-decision, the EP will seek to veto delegation and press for legislation only' (H2). Surprisingly we find that, in the great majority of cases (93 per cent),<sup>20</sup> the EP does not oppose the adoption of delegating legislation under co-decision. Only twice (out of 29 cases) did the EP (in its first reading) delete the provision allowing the Commission to adopt an implementing act under co-decision, while it did so once (out of 15 cases) under cooperation. This finding contradicts our H5. The EP does not appear to be categorically opposed to delegation. Figure 5 throws some light on this puzzling finding.

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

It appears, therefore, that the EP does not oppose delegation altogether, even if it technically could have done so under the co-decision procedure, but rather opposes delegation of large scope. This finding obliges us to modify our previous argument, as we actually see that the EP appears to be willing to accept the increase of delegated power to the Commission in order to speed up the process of European law-making.<sup>21</sup> However, we also see that the EP is only willing to support delegation under the condition of a

FIGURE 5  
THE EP AND COUNCIL'S MODIFICATION OF THE COMMISSION'S DELEGATION PROPOSALS, PER TYPE OF PROCEDURE IN USE (N = 44)



limited scope of delegation, a condition to be respected by the Commission. It also shows that the EP – giving the trade-off between the conflicting goals of speedy integration and competence preserving legislation – is willing to compromise.

If we dig deeper into which type of comitology committees that were favoured by the EP, Figure 4 shows that the EP increasingly supported the regulatory procedure after 1999, even though the competences it obtained under the Second Comitology Decision of 1999 were marginal. Figure 4 also shows that that the EP has consistently opposed the use of the regulatory committee in 1996, 1997 and 1998, but did so to a lesser extent in the following period (only in 50 per cent of the cases). This finding questions our assumption and those made by Franchino (2000) that the EP preferences are closer to those of the Commission than to those of the Council, and therefore it will systematically favour less constringent procedures (see also Pollack 2003). As observed by Pollack this may be accounted for by distinguishing between the EP's meta preferences and strategic preferences (as we did in the case of the Commission). In the consultation and cooperation procedure the EP 'enjoys the relative luxury of expressing its sincere preferences since its proposals enjoy no special status'. In the co-decision procedure by contrast the EP's proposals might 'endanger a fragile majority in the Council' (Pollack 2003: 132). In other words the EP, generally eager to adopt legislation expanding the EU competences, frequently refrains from opposing the use of the regulatory committee in order to see legislation passed by the Council.

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

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

First, according to our data the EP has never introduced, in these seven proposals, amendments aiming at reducing the scope of discretion left to the Commission. Second, as emerged in Figure 4, the EP's opposition to the use of delegation with the regulatory procedure (in all cases with scrutiny) is close to zero after this date. In order to analyse this preliminary finding from a different data angle, we used our second database (EP online archives of all parliamentary reports across all policy areas).

Figure 6, drawn up from this second database, shows legislative parliamentary reports as a percentage of all legislative reports on delegation

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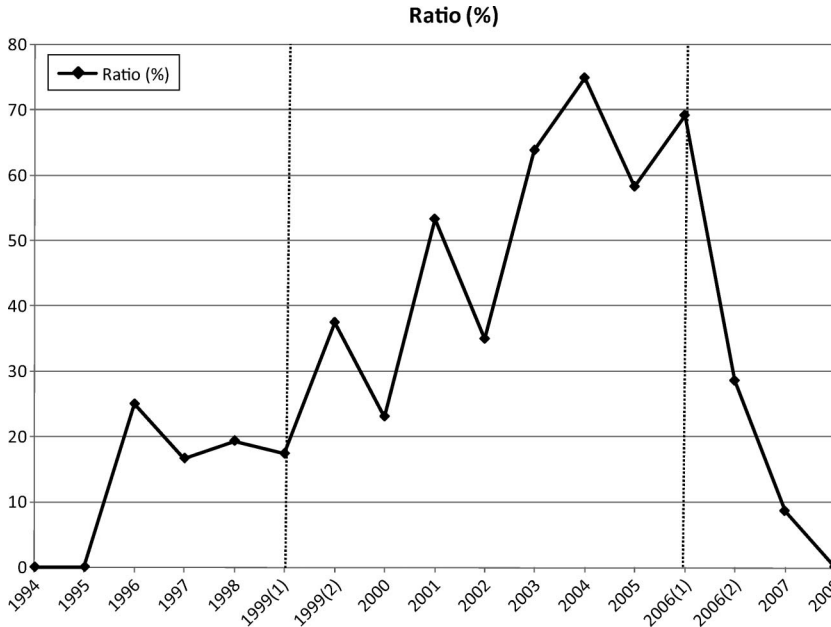
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FIGURE 6  
 PERCENTAGE OF LEGISLATIVE REPORTS RESTRICTING DELEGATION AS A  
 PERCENTAGE OF ALL LEGISLATIVE REPORTS REGARDING DELEGATION  
 PROPOSALS ( $N = 315$  REPORTS)



proposals that include at least one amendment reducing the scope of discretion left to the Commission. We observe a continuous increase in the percentage of reports including amendments proposing to reduce the scope of delegation, from our initial starting date (1994) until 2006. As expected, the 1999 reform did not reduce the willingness of the EP to limit the scope of delegation – rather the contrary. Given the very meagre increase in competences that the Council Decision of 1999 conferred on the EP, this is not surprising.

After 2006, the percentage of amendments reducing the scope of delegation drops drastically (from 70 per cent in the first part of 2006 to 0 per cent in 2008). As a result, we find a positive and important correlation between amendments restricting the scope of delegation in the parliamentary reports and the circumstance of their being adopted before the Council decision of 2006 (phi coefficient of 0.217). This confirms our hypothesis.

Figure 6 also illustrates the logic implicit in the bargaining strategy applied by the EP to widen its competences under comitology: in order to gain concessions in the negotiations over the revision of the Second Comitology Decision it launched an offensive by systematically introducing amendments to restrict the scope of delegation (Bergström *et al.* 2007;

Corbett 1998: 258). The success of this strategy is documented in the fact that the EP – with the regulatory procedure with scrutiny – obtained important competences in 2006 (Bergstöm and Héritier 2007; Bergström *et al.* 2007).

## **Conclusion**

In this article, we developed a distributive institutionalist argument of why the Council and Commission tend to delegate implementing powers to the Commission more frequently as the legislative competences of the EP increase. On the assumption that actors seek to maximise their institutional power in order to increase their influence over policy outcomes, we argue that having to share legislative power with the EP motivates both the Council and the Commission to try to circumvent the EP through delegation, i.e. they prefer to adopt secondary legislation in comitology procedures. In consequence, we expect that the EP will react to these attempts by opposing the use of delegation or restricting its use. In this way, we show how changes in the inter-institutional distribution of power between the EU bodies affect their intra-institutional preferences to either legislate on a given matter or delegate the issue to comitology.

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

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

While we were able to empirically substantiate a number of our hypotheses, there are limits to what our data can tell us. One of these limits is that our results are mainly based on a single policy area, i.e. environmental policy. As pointed out, environmental policy, given its political importance and the pro-active role of the EP in this area, may be considered on some aspects a ‘likely’ case for an increase of delegation associated with co-decision, and for that reason cannot easily be generalised.

855 A second caveat to bear in mind is that, while we do identify an increase of  
delegation following the signature of the Amsterdam Treaty, it would be  
premature to conclude that co-decision is the only cause of this increase in  
delegation. Further research would be necessary to increase the number of  
860 cases and control for a larger number of variables, such as the effect of the  
reform of the Comitology decision in 1999. Future research could for  
example include additional policy areas in which co-decision was introduced  
in 1993 and compare them to policy areas where co-decision was never  
introduced.

### 865 **Acknowledgements**

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### 870 **Notes**

1. In contrast to legislation, the Treaty does not specify the procedure that should be associated with a particular policy area. Secondly, it reserves a primary role for the Council in determining the procedures that should be applied in a given instance.
2. In contrast to the procedure with a normal legislative proposal, the EP is not consulted.
3. Decision 1999/468/EC.
4. This has been also acknowledged in an interview carried out in the EP: 'Parliament under the old system (i.e. the 1999 decision) was very reluctant to delegate any power to the Commission, because once we delegate, that is gone for ever, we had no say [...] we were not happy with the previous deal: we did get the information, we had a right to look at it and we could say what we think and we could object, but basically they would ignore us' (Interview with an MEP, Constitutional Affairs Committee, 18 October 2006).
5. In its final report on the Proposal for a Comitology Decision, the Committee on Institutional Affairs advised MEPs to amend the proposal so as to abolish the regulatory committee procedure completely. But after the debate in plenary this amendment was reformulated to insist on the abolition of the regulatory committee unless the *contre-filet* procedure was suppressed (Bergström 2005: 300).
6. Comitology Decision 2006/512/EC.
7. As one MEP declared: 'The EP is happy with the new deal, we approved it by a large majority [...] However, ... This deal maybe is not a peace treaty, it may only be a ceasefire, depending on how it works' (Interview with an MEP, 18 October 2006).
8. Using a database of 1,372 directives adopted between 1987 and 1998.
9. The (*ex ante* defined) power of an actor is reflected in his or her capacity to influence the feasible alternatives available to the other actors involved (Knight 1992: 41–2). This in turn depends on the actors' credibility, risk aversion and time preferences (Bacharach and Lawler 1981; Raiffa 1982; Knight 1992: 131–2). Put differently, the more credible the restrictions stated by an actor, the lower his or her risk aversion, the less intense the time pressure on an actor and the better the fall-back position in the case of a bargaining failure, the more powerful will he or she be in negotiations and shaping the bargaining outcome (Elster 1989; Maynard-Smith 1982: 153; Knight 1992: 127).
10. Napel and Widgren (2008) ascertained that Commission policies are, on average, more in accord with the aggregate position of the Parliament than that of the Council.
11. Also, the measures adopted in the comitology committee which could have alternatively been adopted during the legislative procedure are likely to be large in scope. Hence, the likely objection of the Council to the advisory and management committees may also be



- derived from the fact that the Council's Comitology Decision explicitly states that regulatory committees should be used in the case of 'measures of general scope designed to apply essential provisions of basic instruments' and to the updating or adaptation of 'certain non-essential provisions of the instrument'. 900
12. Under the Amsterdam Treaty this became Article 175.
  13. The Eur-lex database does not allow us to analyse the changes introduced with the Maastricht Treaty. 905
  14. Given our focus on the choice between legislating and delegating, we opt for a narrower definition of delegation than the one used by Franchino (2001). He defines delegating provisions as 'any major provision that gives ... the Commission authority to move the policy away from the status quo' (Franchino 2001: 31), which, for instance, also includes the management of resources and public procurements etc. ①
  15. E.g. if the EP or the Council introduce an amendment to specify delegation or eliminate delegating provisions. 910
  16. <http://www.europarl.europa.eu/activities/plenary/ta/search.do?language=EN>
  17. More specifically, we identified the reports based on delegating Commission proposals, by selecting reports registering key words such as 'comitology', 'commitology', 'Council decision', 'committee' and 'implementation'.
  18. Since we are dealing with a population rather than a sample, the significance of this coefficient should not concern us. 915
  19. When the Council failed to take a common position, the draft proposal was considered as rejected.
  20. This refers to the percentage of proposals going to Council under co-decision.
  21. Such a finding is also well illustrated by Bergström in the case of the Lamfalussy process for making progress in the market for financial securities (Bergström 2005: 320–24). 920

## References

- Bacharach, S.B., and E.J. Lawler (1981). *Bargaining: Power, Tactics, and Outcomes*. San Francisco, CA: Jossey-Bass. 925
- Bergström, C.F. (2005). *Comitology. Delegation of Powers in the European Union and the Committee System*. New York: Oxford University Press.
- Bergström, C.F., and A. Héritier (2007). 'Institutional Rule Five: Controlling the Implementation Powers of the Commission (Comitology)', in A. Héritier (ed.), *Explaining Institutional Choice in Europe*. Cambridge: Cambridge University Press.
- Bergström, C.F., H. Farrell, and A. Héritier (2007). 'Legislate or Delegate? Bargaining over Implementation and Legislative Authority in the European Union', *West European Politics*, 30:2, 338–66. 930
- Burns, C. (2005). 'The European Parliament: The EU's Environmental Champion?', in A. Jordan (ed.), *Environmental Policy in the European Union*. London: Earthscan.
- Corbett, R. (1998). *The European Parliament's Role in Closer EU Integration*. London: Macmillan Press Ltd. 935
- Elster, J. (1989). *The Cement of Society*. Cambridge: Cambridge University Press.
- Epstein, D., and S. O'Halloran (1999). 'Administrative Procedures, Information, and Agency Discretion', *American Journal of Political Science*, 38, 697–722.
- Epstein, D., and S. O'Halloran (1999). *Delegating Powers: A Transaction Cost Politics Approach to Policy Making under Separate Powers*. Cambridge: Cambridge University Press.
- Franchino, F. (2000). 'Control of the Commission' Executive Functions: Uncertainty, Conflict and Decision Rules', *European Union Politics*, 1, 63–92. 940
- Franchino, F. (2001). 'Delegation and Constraints in the National Execution of the EC Policies: A Longitudinal and Qualitative Analysis', *West European Politics*, 24:4, 169–92.
- Franchino, F. (2002). 'Efficiency or Credibility? Testing the Two Logics of Delegation to the European Commission', *Journal of European Public Policy*, 9:5, 1–18.

- 945 Franchino, F. (2004). 'Delegating Powers in the European Community', *British Journal of Political Science*, 34, 449–76.
- Héritier, A., C. Moury, C. Bischoff, and C.F. Bergström (2009). 'Legislate or Delegate: European Parliament and Comitology', unpublished manuscript.
- Huber, J.D., and C.R. Shipan (2002). *Deliberate Discretion? The Institutional Foundations of Bureaucratic Control*. New York: Cambridge University Press.
- 950 Jupille, J. (2004). *Procedural Politics: Issues, Influence and Institutional Choice in the European Union*. New York: Cambridge University Press.
- Knight, J. (1992). *Institutions and Social Conflict*. Cambridge: Cambridge University Press.
- Lake, D.A., and R. Powell (1999). 'International Relations: A Strategic-choice Approach', in D.A. Lake and R. Powell (ed.), *Strategic Choice and International Relations*. Princeton: Princeton University Press.
- 955 Lax, D.A., and J.K. Sebenius (1986). *The Manager as Negotiator: Bargaining for Cooperation and Competitive Gain*. New York: Free Press.
- Maynard Smith, J. (1982). *Evolution and the Theory of Games*. Cambridge: Cambridge University Press.
- Napel, S., and M. Widgrén (2008). 'The European Commission – Appointment, Preferences, and Institutional Relations', *Public Choice*, 137:1, 21–41.
- 960 North, D. (1990). *Institutions, Institutional Change and Economic Performance*. Cambridge: Cambridge University Press.
- Osborne, M.J., and A. Rubinstein (1990). *Bargaining and Markets*. San Diego: Academic.
- Pollack, M. (2003). *The Engines of European Integration: Delegation, Agency and Agenda Setting in the European Union*. New York: Oxford University Press.
- Raiffa, H. (1982). *Art and Science of Negotiation*. Cambridge, MA: Harvard University Press.
- 965 Rasmussen, A., and D. Toshkov (2011). 'The Inter-institutional Division of Power and Time Allocation in the European Parliament', *West European Politics*, 34:1, 1475–1500
- Weale, A., G. Pridham, M. Cini, D. Konstadakopoulos, M. Porter, and B. Flynn (2000). *Environmental Governance in Europe*. Oxford: Oxford University Press.

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