COMITOLOGY CHOICES IN THE EU LEGISLATIVE PROCESS: CONTESTED OR CONSENSUAL DECISIONS?

JENS BLOM-HANSEN

Studies show that the EU institutions have strong preferences with regard to the design of the EU comitology system which, consequently, is the result of intense inter-institutional negotiations. However, the exact choice of comitology procedure to install in a given legislative proposal has received much less scholarly attention. Based on a behavioural logic of control maximization, this article investigates the comitology preferences of the Commission, the Council, and the European Parliament in the legislative process. The findings from an analysis of all new directives and regulations in the years 1999–2006, a total of 686 acts, show that the Council seeks strict comitology control while the Commission and the Parliament both seek permissive control. This holds even though the legislative process is characterized by a high degree of agreement on comitology. The analysis indicates that this is because the actors strategically anticipate each other’s preferences, not because there is a true alignment of preferences.

INTRODUCTION

In quantitative terms, the Commission is the most important rule-maker in the EU system. Approximately two-thirds of all directives, regulations, and decisions in force today have been made by the Commission, and only about one-third have been made by the Council of Ministers and the European Parliament. When making rules, the Commission acts on powers delegated from the Council and the Parliament. However, delegation is seldom unlimited. Procedural controls are often introduced in the form of member state committees that the Commission must consult. This committee system is known as the EU comitology system. It consists of 2–300 committees that operate in all policy fields (Bergström 2005; Christiansen et al. 2009; Blom-Hansen 2011).

The committees are strategically installed by the member states to monitor the Commission’s rule-making. Counts show that approximately two-thirds of all Commission rules are controlled by the member states in this way (Brandsma 2010, p. 33). Delegation from the legislature to the executive to implement, update, specify, clarify, or flesh out legislation by administrative orders is well known from national systems (Epstein and O’Halloran 1999; Strøm et al. 2006). It can be considered an aspect of normal governance. However, controlling delegated powers by a comitology committee is unique to the EU, and this committee system represents one of the least known parts of the EU system.

The general rules of the comitology system are specified in framework rules. Before the Lisbon Treaty they were known as ‘comitology decisions’ because they were adopted as decisions by the Council of Ministers (1987, 1999, 2006). Since the Lisbon Treaty they have been regulations adopted under the codecision procedure¹ (European Parliament and Council 2011). From studies of reforms of these framework rules we know that they are the object of intense inter-institutional battles (Haibach 1999; Bergström 2005, pp. 189–95, 249–64; Christiansen and Vaccari 2006; Schusterschitz and Kotz 2007; Bradley 2008; Blom-Hansen 2011, pp. 72–93; Brandsma and Blom-Hansen 2012). However, the exact choice of comitology committee to install in a given delegation situation is part of the legislators’ decision on the relevant legislative proposal. In other words, installing

Jens Blom-Hansen is in the Department of Political Science, Aarhus University, Denmark.
comitology committees and specifying their procedures is a case-by-case decision, and the framework rules only provide rough guidelines. But while inter-institutional negotiations on the framework rules are well known, we know hardly anything about how comitology enters negotiations on legislative proposals that delegate powers to the Commission.

The purpose of the article is to analyse this stage in the decision on comitology control in the EU. Which types of comitology committees do the legislators prefer? Is comitology contested at this stage? Is it as controversial here as when framework rules are made? Based on a behavioural logic of control maximization (McCubbins et al. 1987; Moe 1990), my argument is that the Commission, the Parliament, and the Council of Ministers pursue positions of institutional control when inserting comitology provisions into legislative proposals.

It is not straightforward to put this argument to a rigorous empirical test since the comitology framework rules have been subject to several changes in recent years. The framework rules were introduced in 1987 and remained intact until 1999 when they were reformed. This reform lasted until 2006 when the regulatory procedure with scrutiny was introduced. But in 2009 the Lisbon Treaty introduced a distinction between delegated and implementation acts and thus changed the rules of the game again. Then in 2011 a new comitology regulation introduced new framework rules once more. It is difficult to compare comitology choices across these changes since the list of comitology procedures to choose from varies considerably.

To conduct a rigorous test I therefore focus on the framework rules introduced in 1999. They were in force for seven years, and enough cases were decided under their rule to make a sound quantitative analysis possible. The Parliament and the Council adopted a total of 686 new directives and regulations in this period. They have all been coded to allow an investigation of legislative comitology choices.

The contribution of this article is twofold. First, it presents an argument on the EU institutions’ preferences over comitology in the legislative process. This is done on the basis of existing literature that is applied to this empirical domain. Second, it provides a quantitative analysis of these preferences. This is done on pre-Lisbon data in order to have enough cases for a quantitative analysis. The lessons for the post-Lisbon situation are teased out in the conclusion.

The article is structured as follows. After a brief introduction to the comitology system I present my theoretical argument. I then deal with two questions that make a study of legislative acts a rigorous test for my hypothesis: the guidelines in the comitology framework rules, and anticipated reactions in the legislative process. I then turn to questions of data and methods before presenting the results of the empirical analysis. In the concluding section I discuss the implications of the analysis for understanding the politics of delegated rule-making after the Lisbon Treaty.

THE COMITOLGY SYSTEM

The comitology system was introduced in the early 1960s when the common agricultural policy was decided upon and implemented. With the growth of EU legislation, the practice of establishing comitology committees also grew. It proved to be a practical solution for the member states to the problem of delegating powers to the Commission without losing control (Docksey and Williams 1994; Bergström 2005, pp. 78–110; Blom-Hansen 2011, pp. 53–71).

The system did not achieve solid treaty foundation until the Single European Act in 1987. From then on the Treaty recognized that the Council might impose procedural
controls on the Commission when delegating implementing powers (Haibach 2000). Following this change in the Treaty, the Council adopted its first framework rules in 1987, the first so-called comitology decision. This act, formally a Council decision, provided a list of committee types and procedures from which the Council and the Parliament could choose when inserting comitology provisions in legislative proposals. The 1987 comitology decision specified seven different decision procedures for the committees (Council of Ministers 1987). In 1999, the number of committee procedures was reduced to four and in 2006 increased to five (Council of Ministers 1999, 2006). In 2011, following the entry into force of the Lisbon Treaty, new framework rules were adopted, this time by a regulation adopted by the Parliament and the Council acting under the codecision procedure (European Parliament and Council 2011). The number of procedures was formally reduced to two, but in reality the number is higher since the new procedures come in several variants (Brandsma and Blom-Hansen 2012).

Studies of the reforms of the framework rules show that the EU institutions take a keen interest in their exact specification (Haibach 1999; Bergström 2005, pp. 189–95, 249–64; Christiansen and Vaccari 2006; Schusterschitz and Kotz 2007; Bradley 2008; Blom-Hansen 2011, pp. 72–93; Brandsma and Blom-Hansen 2012). While the framework rules have been studied intensively, their practical application in the legislative process has received much less scholarly attention. The next section provides a theoretical approach to this question and reviews the limited existing empirical evidence.

ON THE PURSUIT OF INSTITUTIONAL CONTROL POSITIONS: THEORIZING COMITOLOGY PREFERENCES IN THE LEGISLATIVE PROCESS

To understand the actors’ preferences over the exact choice of comitology procedure to install in a legislative proposal I rely on rational choice institutionalism. This means that actors are assumed to be self-interested, guided by an instrumental logic, and sufficiently informed to assess the implications of different options. Although there is agreement on these basic behavioural starting points, rational explanations of institutional choices can, broadly speaking, be divided into functionalist and distributive bargaining variants (Campbell 2010). Functionalist explanations view institutions as solutions to collective action problems, whereas distributive bargaining explanations view institutions as outcomes of power-oriented bargaining processes. Both variants of rational choice institutional explanations have gained ground in EU studies in the past 10–20 years (Aspinwall and Schneider 2000; Peterson 2001; Pollack 2006).

I contend that comitology preferences are best understood from the rational distributive bargaining perspective. No one in the EU system knows for certain how powers delegated to the Commission will be used, but everybody knows that there will be policy decisions to make down the line. When specifying the details of the various comitology procedures, EU legislators cannot specify the contents of these decisions, but they can make sure that they will be in a position to influence them. In this sense, administrative procedures are political weapons. Actors therefore pursue control positions in future decision-making situations. This approach to the choice of administrative procedures is referred to as the politics of structural choice (Moe 1990) or deck stacking (McCubbins et al. 1987). Since actors are more motivated by a wish to secure control positions in future decision-making situations than by considerations of technically rational procedures, the resulting administrative arrangement is likely to be complex. Cumbersome, even bizarre, administrative arrangements should be no surprise.
If the making of comitology rules is an example of the politics of structural choice, or deck stacking, the individual EU legislators seek to use these rules to increase their own control over delegated decision-making. They will press for comitology rules that ensure efficient institutional control positions for themselves and inefficient control positions for their opponents. This again means that the legislators will have different preferences regarding comitology rules.

The member states in the Council acknowledge the need to delegate decision-making power to the Commission, but they are wary of the Commission and want to be in a position to monitor it and intervene in individual cases. The comitology system is a convenient control instrument since it is staffed by their own stand-ins. Therefore the member states accept delegation, but are likely to impose strict comitology control.

The European Parliament is in a very different position. The comitology system is a threat to its position in the EU system. From the Parliament’s perspective, comitology interferes with its fundamental right to exercise political supervision over the Commission and to participate in the legislative process. If seeking to protect its control, the Parliament’s interest is to leave as much real decision-making as possible in the legislative arena, to keep executive decision-making to purely technical matters, and to achieve real supervisory powers over the Commission by either gaining access to the comitology system or by replacing the comitology system with other monitoring devices. But as long as the comitology system is in place, the Parliament is likely to resist restrictive comitology control, because it gives its legislative competitor, the Council, more control than itself.

The Commission is also likely to be sceptical about the comitology system, but for different reasons. It survives by being above national interests and acting like a neutral arbiter and entrepreneur on behalf of all member states. In this sense interference from the member states in its daily affairs is dangerous. Furthermore, it does not want to be bogged down by complex administrative procedures that drag decisions out for years. The Commission’s interest is to protect its autonomy, and in this respect the comitology system represents a threat.

In sum, if the EU institutions use the comitology system to pursue control positions, they are likely to hold the following preferences in legislative proposals that delegate powers to the Commission:

**Hypothesis:** The Council favours stricter comitology procedures than the Commission and the European Parliament.

Note that my argument is not that the Council always wants to impose strict comitology control. Since control of delegated powers is costly, the incentive to install it varies with its benefits. For example, controlling delegated powers is more beneficial to legislators the more the preferences of the executive differ from those of the legislators (Epstein and O’Halloran 1999, pp. 77–9; Franchino 2007, p. 56). My hypothesis only specifies the average ordering of preferences that is likely to hold in any given delegation situation.

Note further that my argument treats the EU institutions as unitary actors. This is an analytical assumption that is not meant to be descriptively accurate in every case. There are many examples of intra-institutional disagreements on comitology choices. My hypothesis only presupposes that the EU institutions possess some strategic capacity vis-à-vis each other and only specifies the average pattern that results from these strategic interactions.

Only a few studies provide evidence on comitology preferences in the legislative process. First, Dogan (1997; see also 2000) investigated the use of comitology in EU...
legislation in the period 1987–95, the first eight years under the Council’s first comitology decision. In this early period he found that the Commission and the Parliament favoured more permissive comitology procedures than the Council. Second, Franchino (2007, pp. 282–5) investigated the Parliament’s comitology preferences relative to the Commission’s under the codecision procedure. In legislative acts negotiated under this procedure he found that the Parliament favoured a more permissive comitology procedure than the Commission. Third, Heritier and Moury (2011) investigated the preferences for the regulatory comitology procedure in legislative acts from 1994 to 2008. Relying mainly on evidence from the environmental area, they found that the Commission and the Council increasingly agreed on delegation combined with the regulatory comitology procedure. Finally, Pollack’s (2003, pp. 140–4) case study of the creation of the securities committee showed that the negotiating actors were driven by a wish to control future financial regulation.

In sum, previous research has to some extent investigated comitology preferences in the legislative process and obtained results that are broadly in accordance with the empirical pattern specified in my hypothesis. However, while important, the insights from previous research remain partial since they rely on studies of selected policy areas (Pollack 2003; Heritier and Moury 2011) or selected institutional actors (Franchino 2007; Heritier and Moury 2011), or are restricted in time to the first years after the first framework rules were introduced (Dogan 1997, 2000). The following analysis covers all legislative actors: the Commission, the Council, and the Parliament. Further, it covers all policy areas, including areas with no involvement of the Parliament and areas under the consultation procedure, which have received no attention in the literature since Dogan’s (1997, 2000) analysis of the 1987–95 period. Finally, in contrast to Dogan’s study it focuses on a period where all actors had gained considerable experience with the framework rules. In sum, the following analysis is based on more comprehensive data than existing research. But before turning to the analysis I discuss questions of research design.

**LEGISLATIVE ACTS: A HARD CASE FOR IDENTIFYING INSTITUTIONAL COMITOLOGY PREFERENCES**

As noted in the introduction, several studies have analysed reforms of the framework rules on the comitology system. These studies show that the Council has a maximalist approach to comitology control while the Commission and the Parliament exhibit a minimalist approach. There is thus already evidence to support my hypothesis. However, this evidential support should not be exaggerated because reforms of the framework rules arguably represent a most-likely case for this hypothesis. In this empirical setting the basic rules of the comitology system are up for grabs. It represents an obvious opportunity for all actors to improve their control positions. If the EU institutions have the slightest institutional preferences on the comitology system, they should matter in this setting.

In contrast, for two reasons the legislative process represents a least-likely case for institutional comitology preferences to matter. The first is that there are guidelines for choosing comitology procedures in legislative proposals. If they were binding, it would make no sense to use legislative proposals to study comitology preferences since there would be no scope for disagreement. If the legislative process is to function as an empirical testing ground, it presupposes that the EU actors have some freedom to choose comitology procedures. However, the 1999 comitology decision introduced guidelines (Council of Ministers 1999). The decision’s Article 2 states that the management procedure ‘should’ be
used within the areas of the common agricultural and fisheries policies and in relation to programmes with substantial budgetary implications. The regulatory procedure ‘should’ be used in relation to measures of general scope within the areas of health or safety of humans, animals, or plants. The advisory procedure is to be used ‘in any case in which it is considered to be the most appropriate’.

However, as the wording signals, these guidelines are informal. This is even stressed in the fifth consideration of the 1999 decision which explicitly states that they are of a ‘non-binding nature’. The establishment of non-binding criteria was a compromise in the negotiations leading to the 1999 decision. The Commission and the Parliament wanted binding guidelines in order to increase transparency, but the Council insisted on some freedom of manoeuvrability in the legislative process (Bergström 2005, pp. 272–4). The non-binding nature of the guidelines has been upheld by the European Court of Justice, which nevertheless has found that their existence means that the legislators must explicitly state their reasons if they decide not to follow them (Türk 2009, pp. 80–1). In 2010, when the framework rules were renegotiated following the Lisbon Treaty, the Commission again tried to introduce more binding guidelines, but again the Council objected and insisted on flexible guidelines (Brandsma and Blom-Hansen 2012).

In sum, although the framework rules include guidelines for the choice of comitology procedures in legislative proposals, they still leave the legislators considerable freedom to decide this question on a case-by-case basis. The guidelines probably constrain the choice to some degree and thus make it less straightforward for the actors to pursue their comitology preferences. In this sense the guidelines make legislative acts a hard case for studying comitology preferences.

The second reason why the legislative process is a least-likely case is that anticipated reactions make a high degree of open conflict over the choice of comitology procedures unlikely. Several observers have noted that the Commission, in particular, is strategic in its choice of comitology procedure in legislative proposals. Rather than following its true preference, it proposes a procedure that is acceptable to the Council (Pollack 2003, p. 133; Hix 2005, p. 57; Heritier and Moury 2011). This tricky problem of anticipated reactions is well known from studies of the EU legislative process.

The general insight is that under complete information there will be no open conflict. All objections from the Parliament and the Council that are likely to succeed will be anticipated by the Commission. If they are acceptable to the Commission, they will be incorporated into its first proposal. If they are not acceptable, they will never surface because the Commission will use its right of initiative and not make a proposal. Objections that are not likely to succeed will never be raised by the Parliament or the Council since they realize the futility of doing so. Consequently, under complete information there will be no amendments, successful or unsuccessful, to the Commission’s proposals. All actors will accept the Commission’s initial proposal, and the legislative process will be quick and uneventful.

This is the logic of backwards induction, and it has been confirmed by a number of complete information models of the EU legislative process (Steunenberg 1994; Crombez 1996; Moser 1997). Tsebelis has aptly summed up the core prediction of complete information models:

If all the actors knew each other’s preferences and payoffs … this way of thinking would lead to an immediate end of the legislative game: the Commission would propose a bill that would be accepted by all other actors. Indeed, the Commission would never make a proposal that would be ultimately rejected, and
the other players would not raise objections if they knew they would not win in a confrontation. (Tsebelis 2002, p. 259)

As a prediction of the real-world EU legislative process this scenario is, of course, far from the mark since the process abounds with amendments. Complete information theorists have offered a number of reasons (e.g. Moser 1997), but the most likely reason is – as repeatedly emphasized by Tsebelis (1996, 2002, pp. 259–60) – that information is not complete at the beginning of the process, but only later when the actors have exchanged information. In the early stages of the process the actors may not precisely know each other’s preferences.

Although persuasive, Tsebelis’ arguments reduce, rather than eliminate, the problem of anticipated reactions. Even if information is incomplete, it is not absent. Many objections may still not reach the surface as amendments either because they are anticipated and incorporated into the Commission’s proposal or because the Council and the Parliament realize the futility of raising them. The actual number of amendments is therefore likely to be lower than if actors used amendments to express their genuine preferences. Consequently, a high degree of apparent agreement may be misleading. It may be due to genuine agreement, but it may also cover a state of affairs where actors accept the futility of airing disagreement. There is thus a problem of observational equivalence: agreement may indicate either genuine consensus or strategic behaviour.

However, if there is open disagreement – that is, amendments exist – this is likely to reveal true preferences. No matter whether amendments are due to incomplete information or symbolic politics, there is no reason to expect actors to systematically propose amendments that contradict their interests. Disagreement cases are thus much more useful as data than cases of agreement.

In sum, legislative acts represent a hard case for uncovering institutional comitology preferences. The guidelines in the framework rules for the choice of comitology procedure as well as the problem of anticipated reactions make it difficult for genuine preferences to shine through.

METHODS AND DATA

To have sufficient cases for a quantitative study I focus on legislative practice in the pre-Lisbon period where legislation took place under three comitology framework rules – the Council’s 1987, 1999, and 2006 comitology decisions. Although these decisions use the same labels for the various comitology procedures – advisory, management, regulatory, safeguard – the procedures vary considerably across decisions. To keep a firm grip on the dependent variable, the choice of comitology procedure, I therefore focus on legislation under a single comitology decision, namely the 1999 decision, which was effective for seven years (from 18 July 1999 until 23 July 2006).

In this period the Council (acting alone) and the Council and the Parliament (acting together) enacted a total of 686 new directives and regulations. These acts have all been followed through the legislative process to map comitology preferences. All information to code the acts stems from the EU’s two official online legislative databases, Eurlex and Prelex. Please refer to the Appendix for further information on this dataset.

The 1999 comitology decision specified four procedures that committees could follow when controlling Commission proposals: an advisory, management, regulatory, and safeguard procedure. The advisory procedure is purely consultative, and the Commission is not obliged to follow the committee’s opinion. When the management procedure is
used, a qualified majority in the committee can block the Commission’s proposal and refer it to the Council of Ministers. When the regulatory procedure is used, a qualified majority in the committee needs to be in favour of the Commission’s proposal; otherwise it is referred to the Council. Under the safeguard procedure any member state can refer the Commission’s proposal to the Council.

Obviously, the four procedures constrain the Commission to various degrees. The advisory procedure is the least constraining, while the safeguard procedure is the most constraining since each member state may veto the Commission’s proposals. Among the two intermediary procedures, the regulatory procedure constrains the Commission more than the management procedure. According to the latter procedure the Commission’s proposal can only be referred to the Council if a qualified majority can be mustered in the committee while the former procedure only requires a blocking minority. Formal game theoretical analyses confirm this rank order of the comitology procedures (Steunenberg et al. 1996).

The actual use of the four comitology procedures is highly uneven. As table 1 shows, EU legislators preferred only two procedures in practice, namely the management and regulatory procedures. It was rare that the advisory and safeguard procedures were used or that several comitology procedures were inserted into a legislative act.

I map the EU institutions’ comitology preferences by their statements in the legislative process. Tsebelis’ argument that information is less complete in the early stages of the legislative process implies that preferences expressed at this stage are more likely to be sincere and less likely to be strategic anticipations of other actors’ preferences. I therefore use early statements in the legislative process to the extent possible.

The Commission makes the first formal proposal, may withdraw it and present an amended proposal and, under the consultation and codecision procedures, states its opinion on the Parliament’s amendments. Among these formal statements the first proposal is likely to most precisely reveal the Commission’s true preference. Later in the process the Commission is more informed on the other actors’ preferences and may anticipate them to a higher degree. Hence, the Commission’s first proposal is used to measure its comitology preference.

The Council also makes formal statements during the legislative process, although most of its deliberations are secret. However, the formal statements vary across the different types of legislative process. Under codecision the Council adopts a common position and a final decision. Under consultation and when acting alone its only formal statement is

<table>
<thead>
<tr>
<th>TABLE 1</th>
<th>Comitology procedures in final legislative acts under the 1999 comitology decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number</td>
<td>Per cent</td>
</tr>
<tr>
<td>No comitology procedure</td>
<td>400</td>
</tr>
<tr>
<td>Advisory procedure</td>
<td>15</td>
</tr>
<tr>
<td>Management procedure</td>
<td>120</td>
</tr>
<tr>
<td>Regulatory procedure</td>
<td>116</td>
</tr>
<tr>
<td>Safeguard procedure</td>
<td>1</td>
</tr>
<tr>
<td>Several procedures</td>
<td>34</td>
</tr>
<tr>
<td>Total</td>
<td>686</td>
</tr>
</tbody>
</table>

Note: The table contains all new directives and regulations proposed and enacted under the seven-year reign of the 1999 comitology decision (1999–2006).
Source: Dataset compiled by author (see Appendix).
the final decision. To measure consistently across cases I use the final decision to tap the 
Council’s preference. Under the codecision procedure this is an imperfect measure since 
the final decision may have been influenced by the legislative powers of the Parliament. 
To check the robustness of results I report codecision cases separately.

Finally, the Parliament is involved in the legislative process if the cases are decided 
under the consultation and codecision procedures. Under the consultation procedure 
the Parliament has one reading and, consequently, one round of amendments. Under 
the codecision procedure the Parliament may make amendments during its first and 
second readings. Formally, first reading amendments are to the Commission’s proposal, 
while second reading amendments are to the Council’s common position. Thus, first 
reading amendments therefore reveal parliamentary conflicts vis-à-vis the Commission, 
while second reading amendments reveal conflicts vis-à-vis the Council. In reality, as 
argued by Franchino (2007, p. 275), first reading amendments are a manifestation of 
Parliament–Council conflicts if the Parliament anticipates the preferences of the Council 
and incorporates them into its amendments. The degree of anticipation is difficult to 
measure, but is likely to be of greater relevance after the Amsterdam Treaty, which made 
it possible to terminate the codecision process after the Parliament’s first reading.

Be that as it may, second reading amendments are likely to be less revealing about 
the Parliament’s true preferences because they are made at a later stage in the legislative 
process where the Parliament is better informed of the Council’s position. Hence, second 
reading amendments may anticipate the reactions of the Council to a higher degree 
and thus mask the true preferences of Parliament. I therefore use first reading amend-
ments to measure the Parliament’s comitology preferences. If the Parliament makes no 
amendment on comitology procedures it is coded as agreeing with the Commission’s 
proposal.

To compare the EU institutions’ comitology preferences, I measure their preference for 
the most constraining procedure in actual use, the regulatory procedure. If my hypothesis 
is true the Council prefers this procedure to a greater extent than the Commission and the 
Parliament. If my hypothesis is false, the reverse is true, or there is no particular pattern 
in the data.

**EMPIRICAL ANALYSIS**

Table 2 shows the extent to which the three EU institutions prefer the most constraining 
comitology procedure, the regulatory procedure, in legislative proposals under the 1999 
comitology decision. The first column contains all acts. Note that the number of cases 
(N) is lower than the 686 cases included in table 1. This is because the 34 acts that 
contain several procedures (cf. table 1) are excluded since they are difficult to compare 
systematically to acts that contain only one procedure. Second, the number of cases varies 
across institutions. The number of acts is lower for the Commission than for the Council 
because, first, the dataset contains thirteen member state initiatives (i.e. the Commission 
did not make the first proposal), and second, because a few cases have missing values due 
to data missing in the Prelex or Eurlex databases. The number of acts for the Parliament is 
lower than for both the Commission and the Council. This is because the dataset contains 
all directives and regulations, as well as also acts enacted without the involvement of the 
Parliament.

The first column shows that the Commission proposed the regulatory comitology 
procedure in 16 per cent of the cases, the Council preferred it in 18 per cent, and the
Parliament preferred it in 29 per cent of the number of cases in which it was involved. However, this is just a first glimpse at the data, and these numbers should be interpreted with caution. It would be misleading to conclude that the Parliament is the actor most in favour of the regulatory procedure since it is involved in only about half of the cases.

The next three columns show the actors’ comitology preferences divided according to legislative procedure. Cases that do not involve the Parliament – i.e. the Council acts alone – are mostly acts under the common commercial policy. In this area neither the Commission nor the Council has any preference for strict comitology procedures. Moving to cases enacted under the consultation procedure – the area of the common agricultural and fisheries policies – the three EU institutions all prefer strict comitology procedures in about 10 per cent of the cases. Finally, in acts enacted under the codecision procedure – the policy areas of transportation, the internal market, environmental issues, health and consumer safety – the three EU institutions all prefer strict comitology procedures in about half of the cases.

Across the three legislative procedures the most striking result is how consensual the choice of comitology appears to be. However, due to the problem of anticipated reactions discussed above, a high degree of apparent agreement may be misleading. It may be due to genuine agreement, but it may also cover a state of affairs where actors accept the futility of airing disagreement. There is thus a problem of observational equivalence: agreement may indicate either genuine consensus or strategic behaviour.

For this reason, cases with open disagreement on the choice of comitology procedure are much more useful as data for investigating true preferences. The final column of table 2 only includes disagreement cases. Note the dramatic drop in the number of cases. It means that agreement on the choice of comitology procedures in the legislative process is the rule. But, again, this finding is inconclusive as to my hypothesis. Table 2 shows that, among the disagreement cases, the Council prefers the strict regulatory procedure in 40 per cent of the cases. This is about twice as often as the Commission and the Parliament. This is evidence in favour of my hypothesis.

A more systematic analysis is presented in table 3, which reports the results of a t-test for difference in proportions of strict comitology in Commission proposals, parliamentary amendments and final acts. Again, the first column contains all acts. Even though there is no disagreement in the vast majority of cases analysed in this column, the difference in proportions is still statistically significant and has the expected sign. The Council

<table>
<thead>
<tr>
<th>Legislative procedure</th>
<th>All cases</th>
<th>Cases without EP involvement</th>
<th>Cases under consultation procedure</th>
<th>Cases under codecision procedure</th>
<th>Cases of disagreement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commission</td>
<td>0.16 (N = 628)</td>
<td>0.01 (N = 293)</td>
<td>0.09 (N = 176)</td>
<td>0.52 (N = 157)</td>
<td>0.20 (N = 45)</td>
</tr>
<tr>
<td>Council</td>
<td>0.18 (N = 652)</td>
<td>0.01 (N = 300)</td>
<td>0.11 (N = 194)</td>
<td>0.58 (N = 156)</td>
<td>0.40 (N = 43)</td>
</tr>
<tr>
<td>European Parliament</td>
<td>0.29 (N = 352)</td>
<td>–</td>
<td>0.10 (N = 177)</td>
<td>0.50 (N = 157)</td>
<td>0.16 (N = 38)</td>
</tr>
</tbody>
</table>

Notes: The table shows the preference for the regulatory comitology procedure in all new directives and regulations proposed and enacted under the seven-year reign of the 1999 comitology decision (1999–2006). The cell entries indicate the share of Commission proposals, final acts, and parliamentary amendments containing the regulatory comitology procedure.

Source: Dataset compiled by author (see Appendix).
TABLE 3  t-test for difference in proportions of preference for strict comitology under the 1999 comitology decision

<table>
<thead>
<tr>
<th>Legislative procedure</th>
<th>Expected sign</th>
<th>All cases</th>
<th>Cases without EP involvement</th>
<th>Cases under consultation procedure</th>
<th>Cases under codecision procedure</th>
<th>Cases of disagreement</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Council–Commission:</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Difference in proportions</td>
<td>+</td>
<td>0.01</td>
<td>0.00</td>
<td>0.01</td>
<td>0.04</td>
<td>0.19</td>
</tr>
<tr>
<td>t-test</td>
<td>2.14**</td>
<td>1.00</td>
<td>1.00</td>
<td>1.74*</td>
<td>2.24**</td>
<td></td>
</tr>
<tr>
<td>N</td>
<td>618</td>
<td>292</td>
<td>174</td>
<td>150</td>
<td>43</td>
<td></td>
</tr>
<tr>
<td><strong>Commission–EP:</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Difference in proportions</td>
<td>?</td>
<td>0.01</td>
<td>–</td>
<td>–a</td>
<td>0.01</td>
<td>0.05</td>
</tr>
<tr>
<td>t-test</td>
<td>0.58</td>
<td>–</td>
<td>–a</td>
<td>–a</td>
<td>0.58</td>
<td>0.57</td>
</tr>
<tr>
<td>N</td>
<td>329</td>
<td>–</td>
<td>–a</td>
<td>–a</td>
<td>155</td>
<td>38</td>
</tr>
<tr>
<td><strong>Council–EP:</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Difference in proportions</td>
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<td>0.03</td>
<td>–</td>
<td>0.01</td>
<td>0.05</td>
<td>0.25</td>
</tr>
<tr>
<td>t-test</td>
<td>2.74***</td>
<td>–</td>
<td>1.00</td>
<td>2.58**</td>
<td>3.00***</td>
<td></td>
</tr>
<tr>
<td>N</td>
<td>322</td>
<td>–</td>
<td>174</td>
<td>148</td>
<td>36</td>
<td></td>
</tr>
</tbody>
</table>

*p < 0.1; **p < 0.05; ***p < 0.01.

The test cannot be made because the difference in proportions is zero.

Notes: The table shows the difference in preferences for the regulatory comitology procedure in all new directives and regulations proposed and enacted under the seven-year reign of the 1999 comitology decision (1999–2006). The cell entries show the results of a t-test for the difference in proportions of Commission proposals, final acts and parliamentary amendments containing the regulatory comitology procedure.

Source: Dataset compiled by author (see Appendix).

systematically prefers stricter comitology than the Commission and the Parliament, while there is no statistically significant difference between the Commission and the Parliament. The substantial size of the difference in proportions is very small, but this should be interpreted with caution because of the large number of cases of agreement.

The next three columns in table 3 again divide the cases according to legislative procedure. In cases enacted without involving the Parliament or under the consultation procedure, there is no statistically significant difference in the actors’ comitology preferences. The reason is that the actors do not disagree on the choice of comitology in these areas. This is perhaps not very surprising. Cases in these areas are mostly from the common commercial policy and the common agricultural policy, two of the oldest EU policy areas where the actors have more than 50 years’ experience with each other’s preferences. Routinization and rational anticipation of preferences are likely to play a large role here.

In contrast, cases enacted under codecision are mostly from relatively new EU policy areas where routinization is less likely. In these areas we see more disagreement, and it has the expected pattern. The Council prefers stricter comitology than the Commission and the Parliament. Again, the substantial size of the difference in proportions is small, but this should be interpreted with caution because there is a large number of cases of agreement even under the codecision procedure.

Finally, the last column in table 3 only includes the relatively few disagreement cases which are the most revealing as to true comitology preferences. Here there are much more marked differences among the actors. Again, the results show that the Council prefers stricter comitology than the Commission and the Parliament. The difference
TABLE 4  Examples of legislative proposals where the EU institutions disagree on the choice of comitology control

<table>
<thead>
<tr>
<th>Legislative act</th>
<th>Delegation provision</th>
<th>Preferred comitology procedure to control delegation</th>
</tr>
</thead>
</table>
| Directive 122/2003 on radioactive sources | Art. 5,6: ‘The Commission may ... update the required information set out in Annex II.’ | Commission: No comitology control  
European Parliament: No comitology control  
Council: Advisory procedure |
| Regulation 1382/2003 on the freight transport system | Art. 11,1: ‘Submitted actions shall be evaluated by the Commission. The Commission shall decide whether to grant financial assistance under this Regulation.’ | Commission: Advisory procedure  
European Parliament: Advisory procedure  
Council: Management procedure |
| Regulation 806/2004 on gender equality | Art. 13,1: ‘The Commission shall be responsible for appraising, deciding on and administering operations covered by this Regulation.’ | Commission: Management procedure  
European Parliament: Advisory procedure  
Council: Management procedure |
| Regulation 2006/2004 on consumer protection laws | Art. 6,4: ‘The measures necessary for the implementation of this Article shall be adopted [by the Commission].’ | Commission: Advisory procedure  
European Parliament: No comitology control  
Council: Regulatory procedure |
| Regulation 1177/2003 on Community statistics | Art. 15,1: ‘The measures necessary for the implementation of this Regulation ... shall be taken [by the Commission] at least 12 months before the beginning of the year of the survey.’ | Commission: Management procedure  
European Parliament: Management procedure  
Council: Regulatory procedure |

Source: Dataset compiled by author (see Appendix).

in proportions is not only statistically significant with the expected sign, it also has a substantial magnitude. The difference in proportions between, on the one hand, the Council and, on the other hand, the Commission and the Parliament is between 0.19 and 0.25 – that is, about 20 per cent of the full potential range. This is strong evidence in favour of my hypothesis.

To provide some substance to these numbers, table 4 shows five examples of the cases of disagreement analysed in the last column of tables 2 and 3. These examples are representative of the cases of disagreement in three senses. First, they confirm that the Council does not always prefer the regulatory procedure. Recall that my hypothesis was not that the Council always wants to impose strict comitology control, only that the Council, on average, prefers stricter comitology control than the Commission and the Parliament. Second, the examples show that disagreement is seldom fundamental in the sense that all actors disagree with each other. Rather, the normal pattern is that one actor disagrees with the other two. Third, the examples indicate that the average ordering of preferences is as expected by my hypothesis, which stated that the Council, on average, prefers stricter comitology control than the Commission and the Parliament.3

CONCLUSION AND LESSONS FOR THE POST-LISBON PERIOD

This article has contributed to our understanding of one of the least known areas of the EU system: how powers delegated to the Commission are controlled by the comitology system.
The exact choice of comitology procedure to control delegated powers is made when the legislative proposal introducing delegation is debated. However, very few studies focus on this stage in the process. Previous comitology studies overwhelmingly focus either on the preceding stage – that is, on reforms of the comitology framework rules which specify the list of control procedures to choose from in the legislative process (Haibach 1999; Bergström 2005, pp. 189–95, 249–64; Christiansen and Vaccari 2006; Schusterschitz and Kotz 2007; Bradley 2008; Blom-Hansen 2011, pp. 72–93; Brandsma and Blom-Hansen 2012) – or on the succeeding stage – that is, on the operation of comitology committees in practice (Joerges and Neyer 1997; Daemen and van Schendelen 1998; Niemann 2006, pp. 67–112; Gatt 2009; Blom-Hansen 2011, pp. 143–76).

The article’s analysis shows that comitology is seldom openly contested in the legislative process. This state of affairs may be due to genuine agreement, but it may also cover a state of affairs where actors accept the futility of airing disagreement. If actors are familiar with each other’s preferences, they do not spend scarce resources fighting battles they have no chance of winning. Consequently, objections to the Commission’s preferences do not reach the surface either because they are anticipated and incorporated into the Commission’s formal proposal or because the Parliament and the Council realize the futility of raising them later in the legislative process.

In short, agreement may indicate either genuine consensus or strategic behaviour. However, based on rational choice institutionalism I argue that the latter explanation is more likely. But since cases of agreement cannot empirically discriminate between the two explanations, this article has put more emphasis on cases where the choice of comitology is openly contested. These cases show the pattern expected by rational choice institutionalism: the Council systematically prefers stricter comitology than the Commission and the Parliament.

The findings complement existing studies on comitology preferences in the legislative process that were reviewed earlier in the article (Dogan 1997, 2000; Franchino 2007; Heritier and Moury 2011). First, the findings confirm the pattern of preferences identified in Dogan’s (1997, 2000) study of the 1987–95 period. The extent of agreement is much higher in the period investigated in this article, most likely because the early period studied by Dogan comprised the first years of framework rules on comitology choices in the legislative process, and the actors had no experience with standardized comitology procedures. By the turn of the millennium the actors’ comitology preferences were common knowledge to a higher degree. It is therefore plausible that routinization and rational anticipation play a larger role in the period that I study.

Second, on the broad range of cases studied here I have not been able to find the difference in comitology preferences between the Commission and the Parliament identified by Franchino (2007, pp. 282–85) in codecision cases or the growing consensus between the Commission and the Council identified by Heritier and Moury (2011) in the environmental area. When comitology preferences are analysed in a large dataset, there seems to be only one clear result: a division line between, on the one hand, the Commission and the Parliament, and, on the other hand, the Council. This is the substantive lesson of the present study.

Since the article investigates the pre-Lisbon period, a relevant question is what lessons it provides for inter-institutional negotiations over the control of delegated rule-making in the post-Lisbon period. The Lisbon Treaty has important implications for the comitology system. The new treaty introduces a new hierarchy of legal acts (Hofmann 2009). Legislative acts are adopted by the Council and the Parliament, while executive acts are
adopted by the Commission, or in some instances by the Council, as delegated acts and implementing acts. Delegated acts are controlled by the Council and the Parliament by new rights of revocation and opposition, while implementing acts are controlled by the member states in a reformed comitology system.

Based on the findings in this article, the post-Lisbon system is likely to be characterized by three types of institutional conflict over the control of delegated rule-making. First, although the comitology system was reformed in 2011, the new system is closely modelled on the pre-Lisbon system (Brandsma and Blom-Hansen 2012). A plausible expectation is therefore that institutional conflicts over comitology choices in the legislative process live on in the new system.

Second, the new delegated acts are, according to the Lisbon Treaty, to be controlled by new rights of revocation and opposition. Since the Council and Parliament have different preferences regarding control of delegated decision-making, a reasonable expectation is that institutional conflicts will arise over the proper use of these new control mechanisms.

Third, since the distinction between implementing acts and delegation acts is not clearly stipulated by the Lisbon Treaty, and since the two types of acts leave the Council and the Parliament with different powers of control, a reasonable expectation is that institutional conflicts will arise over which type of act to entrust to the Commission when powers are to be delegated in legislative acts.

In sum, the politics of delegated rule-making in the EU system have become more complex after the Lisbon Treaty. But investigations of institutional preferences in the pre-Lisbon period provide guidelines for understanding it.

NOTES

1 The Lisbon Treaty renamed the codecision procedure the ‘ordinary legislative procedure’. But since this article deals with the period both before and after the Lisbon Treaty I use the term ‘codecision procedure’ throughout the article.


3 A closer inspection of all the cases of disagreement shows that the Council’s preferences were as follows: Compared to the Commission, the Council preferred a stricter procedure in twenty-three cases, a more permissive procedure in seven cases, and there was agreement in fifteen cases. Compared to the European Parliament, the Council preferred a stricter procedure in sixteen cases, a more permissive procedure in two cases, and there was agreement in twenty cases. In sum, when there is disagreement, the Council almost always prefers a stricter procedure than the Commission and the Parliament.

REFERENCES


APPENDIX

DATASET ON COMITOLOGY IN EU REGULATIONS AND DIRECTIVES 1999–2006

The dataset contains the following EU acts:

- Directives and regulations (not decisions)
- Authors: Council or Council and European Parliament (not Commission, not ECB or other EU institutions)
- New acts, i.e. non-amending or partially amending acts (not amending or repealing acts, not recasts, codifications, or corrigenda)
- Period: The whole decision-making process of the acts must fall under the 1999 comitology decision (i.e. the first Commission proposal – COM document – must be made after 17 July 1999; the final act must be enacted before 24 July 2006)

In total the dataset contains 686 coded EU regulations and directives.

All cases have been identified by reading the page of contents of all the daily issues of the L-series of the Official Journal of the EU in the period of investigation (online edition at http://eur-lex.europa.eu/JOIndex.do?ihmlang=en).

All information in the dataset stems from the EU’s two official online legislative databases, Eurlex and Prelex.

The EU acts in the dataset have been coded by the author (304 cases) and three research assistants (382 cases). To ensure intercoder reliability fifteen cases were coded and discussed by all coders before the final dataset was compiled.

For more information on the dataset, see Blom-Hansen (2010).