Forum section

The EU Legislative Process

Academics vs. Practitioners – Round 2

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1 Understanding better the EU legislative process
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In the October 2000 issue of *ELUP* a forum debated our article ‘Legislative Politics in the European Union’ published in the inaugural issue of this journal (Tsebelis and Garrett, 2000). The commentators were two academics (Christophe Crombez and Bernard Steunenberg) and one Member of the European Parliament (Richard Corbett). Our article analyzed the whole legislative history of the European Union (EU) from the Luxembourg compromise period to the Amsterdam revision of the codecision procedure. We also speculated about the future using a series of plausible scenarios about the evolution of EU politics.

Nonetheless, all three responses devote the bulk of their critical attention to one particular claim we made: that the European Parliament (EP) had more influence over legislation under the cooperation procedure than it had under the original (i.e. Maastricht) version of codecision (codecision I). No one takes issue with our broader characterizations of the evolution of the EU’s legislative regime. Nor do our critics disagree with our analysis of the reformed (Amsterdam) codecision procedure (codecision II).

Thus, we concentrate in this rejoinder on the cooperation vs. codecision
I comparison. Here is what we said in our article (Tsebelis and Garrett, 2000: 14–15):

[W]e argue that the Parliament’s role as a ‘conditional agenda setter’ under cooperation (Tsebelis, 1994) has been of considerable legislative effect. The second element of the conventional wisdom holds that the power of the Parliament was significantly increased by the first version of codecision agreed to at Maastricht (Corbett et al., 1995; Crombez, 1997; Scully, 1997). This view concentrates on Parliament’s ability unconditionally to veto proposals after the Conciliation Committee, which is considered to make it a far more influential legislator than under cooperation. Our analysis is different. Several of the EP’s powers certainly were increased at Maastricht. For example, it was empowered to vote the Commission out of office. The treaty’s effects on the Parliament’s legislative powers, however, were more complicated and ambiguous than the conventional wisdom assumes. The transition from cooperation to codecision entailed the Parliament’s exchanging its conditional agenda setting power for unconditional veto power. The impact of the exchange of conditional agenda setting (cooperation) for unconditional veto (codecision I) varies with the relationship between the Parliament’s preferences and those of members of the Commission and the Council. Under the supranational scenario [that is, where the Commission and Parliament are pro-integration players] (and so long as the members of the Council have different preferences themselves) the swap of the conditional agenda setting under cooperation for the unconditional veto of codecision I was a bad deal for the Parliament – and for the pro-integration agenda.

The first article to propose the concept of conditional agenda setting described in more detail the conditions under which the EP has such power under the cooperation procedure (Tsebelis, 1994: 131; emphasis in the original):

This procedure may enable the EP to offer a proposal that makes a qualified majority of the Council better off than any unanimous decision. If such a proposal exists, if the EP is able to make it (the reader is reminded that an absolute majority of MEPs is needed) and if the Commission adopts it, then the EP has agenda setting powers.

Our critics take issue with these statements. We focus mainly on the practitioner’s arguments for three reasons. First, we have exchanged arguments with the academics in the past and we do not want to repeat ourselves. Second, Richard Corbett (RC) introduces some new elements in the debate. Third, some readers may share RC’s assertion that ‘a large amount of academic work is based on a lack of knowledge of the realities of decision taking’ (Corbett, 2000: 378).

Our article has three parts. First, we quickly respond to some of the points raised by our two academic critics. Second, we address issues of fact raised by RC in the hope that this will lead not only to better understanding of
theories but also to better data collection and analysis. Finally, we focus on what RC calls his ‘psychological’ reason (Corbett, 2000: 376) for objecting to our arguments, because this is likely to reflect the general reaction of many practitioners to academic work on the EU.

Academic critics

Christophe Crombez (CC) reintroduces what we called in our article the conventional wisdom: the notion that the unconditional veto power the EP received with codecision I was more important than its conditional agenda-setting power under cooperation. CC makes the curious claim that the two versions of codecision are in essence identical. If this were true, why (as we documented in our article) would the Parliament have objected to the first version of codecision, introduced Rule 78, and insisted on the Amsterdam modification? (See the discussion below.) CC also criticizes our cooperation procedure model because it focuses on only the last stage of the legislative procedure. In his view, '[p]olitical economists can play an important role in assessing the implications of potential reforms by presenting parsimonious formal models, which yield clear, testable conclusions' (Crombez, 2000: 368). We agree with this statement. Indeed, the reason we have tried to generate testable conclusions is to allow us to refute some predictions and to corroborate others. This is why we do not present a complete information model of legislative procedures in the EU, because it strongly predicts no disagreements among the relevant actors (in particular, no EP amendments of legislative proposals or, if any amendments were made, such amendments would be rejected by the Commission and Council).

CC made the following categorical statement (Proposition 3) in an earlier article: ‘Under the cooperation procedure the Parliament’s opportunity to amend the Council’s common position does not affect the equilibrium policy’ (Crombez, 1996: 218). We disagree with this conclusion because it is far from the empirical reality we observe. Instead, our model accommodates reality. As we said in our article: ‘we calculate subgame perfect equilibria for the final subgames of the various legislative games. The overall subgame perfect equilibrium strategies for all stages of the games must include these moves.’

The critical empirical point, which we have stressed time and again, is that the Parliament has amended the Council’s common position literally thousands of times under cooperation and that many of these amendments have been accepted by the Commission, and ultimately by the Council. On this point, Bernard Steunenberg (BS) enters the fray. He claims that:

Although Kreppel (1999), Tsebelis et al. (1999) and Tsebelis and Kalandrakis (1999) have performed some testing [with respect to cooperation vs. codecision], they
chose as their dependent variable the rate of successful amendments by the European Parliament. However, these success rates are a procedural aspect of the decision-making process, which do not say much about the outcome of decision making in terms of policy. The formal models should be tested by comparing the outcomes they predict with the actual policies that result from the interaction between the Commission, the Council and the Parliament. (Steunenberg, 2000: 369–70)

It is not clear to us why BS thinks acceptance rates of amendments are irrelevant to actual policies. The policies are determined by the content of legislation, that is, at least in part by which amendments are accepted, partially accepted, or rejected. If BS’s point is that these amendments should be evaluated for their significance so that we know if they make trivial or significant modifications to the initial text, we agree. However, given that Tsebelis and Kalandrakis (1999) make extensive efforts to evaluate the policy significance of different amendments and to assess whether or not importance has an effect on adoption rates (the answer from their limited sample is negative), we suspect that BS must have something different in mind. If additional data become available we will be very interested in analyzing them. Nonetheless, we do agree that there are significant limitations to most of the existing data. This brings us to our second part.

‘A practitioner’s puzzled reaction’

This is RC’s own subtitle. May we return the complaint? We are puzzled by his reaction to our article. Let us elaborate.

RC first argues that the EP had de facto achieved the powers it received at Amsterdam with respect to the reforms of the codecision procedure because of Rule 78 – which essentially eliminated the power of the Council to make a take it or leave it offer to the EP in the codecision endgame: ‘Council treated Parliament as if the Amsterdam Treaty . . . was . . . already in place’ (Corbett, 2000: 374). So, in his eyes, our analysis is based on a literal interpretation of the Maastricht Treaty ‘that took no account of how the institutions sought to interpret or use the Treaty’. It is true that our analysis is based on the Maastricht Treaty. We believe that the Treaties are actually the basis of all actors’ behavior.

The fact that the EP had been able successfully to use Rule 78 once and it had not been challenged again does not mean that all possible challenges had been eliminated forever, or that the EP and the Council believed such a thing with any confidence. This uncertainty would have affected the behavior not only of the Council but also of the EP during legislation. In particular, the EP might have hesitated to lead a joint committee to failure even if the Council
had not accepted several of its amendments. This also explains why the EP insisted on eliminating the last stages of codecision in Amsterdam, and why there was resistance in the intergovernmental conference (IGC) negotiations. (For accounts of these events and different interpretations see Moravcsik and Nicolaïdis, 1999, and Hix, forthcoming). We consider Rule 78 an astute bargaining device by the Parliament, but it was by no means a substitute for a Treaty revision. Indeed, had left parties not won elections in Britain and France during the IGC, Amsterdam might have preserved the Maastricht rules and RC’s argument would have been unsustainable.

RC’s second claim is that we argue that the EP has the power to make ‘take it or leave it’ offers under cooperation. He spends several paragraphs explaining why EP amendments have to be taken up by the Commission and, even if they are, ‘they do not necessarily amount to a “take it or leave it” offer to the Council’ (Corbett, 2000: 375). However, nowhere in the article do we make the point that the EP has the power to make ‘take it or leave it offers’.¹ In fact, we claim that the EP has conditional agenda-setting powers under the cooperation procedure.² The very title of the article that introduced the concept (Tsebelis, 1994) was ‘The Power of the European Parliament as a Conditional Agenda-Setter’.

What are the conditions for such agenda-setting powers? The reader is invited to compare the conditions specified by Tsebelis (1994) (the second quotation at the beginning of this article) with the following quotation from RC: ‘Parliament’s powers ... to formulate a “take it or leave it” position ... will not apply if the Commission is unwilling to accept Parliament’s amendments. It is unlikely to apply if Council was unanimous ... It will not apply if it goes beyond the range of what is acceptable to a five-sevenths majority within the Council’ (Corbett, 2000: 376).

Notwithstanding the fact that Tsebelis’ statement is in a conditional mode whereas RC’s is in the negative, the only difference between the two is that Tsebelis (1994) adds one more condition: that the EP has an absolute majority in favor of such a proposal. Whether stated one way or the other, these are the conditions for conditional agenda setting. If they do not exist, conditional agenda setting does not exist. This is clearly stated in our article.

Thus, RC’s objections to our analysis are really about the frequency and effect of conditional agenda setting, not about the terms under which Parliament can act as a conditional agenda setter under cooperation. Here is his empirical assessment: ‘Parliament’s powers under the cooperation procedure to formulate a “take it or leave it” position towards Council depend on so many conditions that, in practice, it does not usually apply’ (Corbett, 2000: 376). So, this should put an end to the discussion. Why do we persist ‘several years after [the argument was first introduced]?’ (Corbett, 2000: 373).
When we made the argument comparing cooperation and codecision I for the first time (Garrett and Tsebelis, 1996), several practitioners in the EU did not believe us. Later, some researchers said that our game theoretic arguments were wrong (see Scully, 1997, and our rejoinder in Tsebelis and Garrett, 1997). Now RC’s objection is not about theory, but about the empirical frequency with which the conditions for conditional agenda setting are realized. From our point of view this is collective progress, so let us now move on to the empirical issues.

RC’s argument that the conditions for conditional agenda setting do ‘not usually apply’ seems at least an exaggeration. After all, there have been thousands of amendments under cooperation, and approximately half of them have ultimately been incorporated into law. Here is what the Commission reports: ‘Since the Single European Act came into force on July 1 1987, over 50 percent of Parliament’s amendments have been accepted by the Commission and carried by the Council. No national Parliament has a comparable success rate in bending the executive to its will’ (Commission Press release 15 December 1994, quoted in Earnshaw and Judge, 1996: 96).

What can be said about the relative legislative influence of the Parliament under cooperation when one prerequisite for conditional agenda setting – acceptance by the Commission – is satisfied compared with the Maastricht version of the codecision procedure (where Parliament ceded conditional agenda setting to the Council in return for an absolute veto)?

Recent empirical literature has started statistically examining rejection rates of parliamentary amendments under different procedures. Tsebelis et al. (forthcoming) study rejection rates by the Council of Parliament’s amendments under both cooperation and Maastricht codecision for 230 pieces of legislation involving 5000 amendments. Let us begin by controlling for acceptance by the Commission under the cooperation procedure (since it is a condition for conditional agenda setting) but not under codecision (since nobody has claimed that the Parliament needs the Commission’s support under this procedure). Tsebelis et al. find that the rejection rate by the Council of Parliament’s amendments that have been accepted by the Commission under cooperation is 20 points lower than for all parliamentary amendments under codecision.

However, one can argue that this is an unfair test, since EP proposals are treated differently in the two procedures. After all, in the aggregate without any controls, the results are in the opposite direction: there is a 10-point higher rejection rate of EP amendments under cooperation relative to Maastricht codecision (data from the EP published in Corbett et al., 1995). Here is the relevant equation from Tsebelis et al. (forthcoming) estimating the impact of rejection by the Commission on final rejection by the Council, under both the cooperation and Maastricht codecision procedures:
Rejection = .2708 − .0938SYN + .3987REJECTCOM + .3193SYN * REJECTCOM

(6.46) (−1.71) (4.11) (2.66)

Here, SYN is a dummy with the value 1 for cooperation and 0 for codecision
I, REJECTCOM is rejection by the Commission, and SYN*REJECTCOM is the
interaction between the two variables (t-statistics in parentheses).

What does this equation imply? First, rejection by the Commission has
deleterious consequences for the survival of an EP amendment, and this is
true for both cooperation and codecision (the coefficient is substantively large
and highly significant). Second, the Commission rejected more EP amend-
ments under cooperation than under the Maastricht version of codecision (the
coefficient of the interaction term is also positive and almost as large and sta-
tistically significant). Third, controlling for these two factors, the coefficient
for amendments made under the cooperation procedure is negative – this
means that there were fewer rejections by the Council of Parliament’s amend-
ments under cooperation than under codecision. This is a smaller coefficient,
and is not as significant as the others (significance at the .05 level using a one-
tailed test), so we do not want to make a big issue out of it.

However, this analysis does show that RC’s assessment is mistaken. It is
not the case that the terms for conditional agenda setting are so stringent
that they almost never apply (and can be ignored by practitioners – and
by theorists such as CC). If just one of the required conditions held, the
probability that an EP amendment would be incorporated into final legis-
lation was higher under cooperation than under codecision by 20 percentage
points. Controlling for Commission rejection in both procedures indicates that
Parliament’s amendments fared better under cooperation than under the
initial version of codecision.4

But, according to RC, ‘academic work . . . has gone off at a tangent’
(Corbett, 2000: 378). We certainly do not consider the building of models and
the accretion of empirical evidence testing them to be a tangent.

Psychological arguments

RC also presents what he calls a psychological objection to our analysis: ‘It is
the simple fact that, under codecision, Parliament’s approval is necessary for
legislation. This gives Parliament a simple-to-explain and easily understood
role. Parliament is seen to matter. Under cooperation it arguably mattered,
but in such a roundabout way that few members of the public, journalists or
even ministers were aware of it’ (Corbett, 2000: 376). We take this statement
as RC’s observation about how others interested in the EU think, not as his
own beliefs. It is not even clear if he ascribes this view to other MEPs – who
were not included in the group with the public, journalists, and ministers in the above quotation.

Why is conditional agenda setting so difficult to understand? Tsebelis (1995a) made the argument that, in parliamentary systems, cabinet governments control the agenda, whereas in presidential ones parliaments control the agenda (at least on the basis of the constitutional rules). In parliamentary systems, the parliament selects the government, but it then delegates powers (including the formulation of bills) to the cabinet. Of course, the parliament can throw out its government in cases of serious disagreement. However, it is the government that controls the legislative agenda as long as it is in place.

In many European countries MPs complain that parliaments do not have enough power over their governments. Countries such as the UK or Ireland are considered to have weak parliaments, whereas parliaments are stronger in Italy and the Netherlands. Lijphart (1999) created an index of ‘executive dominance’ covering some 36 countries. He calculated this index mainly on the basis of the stability of the different governments. Doering (1995), on the other hand, calculated an index of the agenda-setting powers of different governments in 18 West European countries. What is interesting to note is that Doering’s index of agenda setting is significantly correlated with Lijphart’s index of executive dominance (see Tsebelis, forthcoming). This is to provide some empirical evidence that agenda setting matters.

On the other hand, several researchers of EU institutions have made the argument that these are quite similar to the American presidential system (Golub, 1999; Kreppel, 2000). In particular, they stress the absence of stable majorities generated by strong parties and the substantial role the EP plays in legislation. Nonetheless, even though the EU shares several characteristics with the American presidential system (including a powerful legislative branch), the individual actors involved in European institutions – whether MEPs, Ministers in the Council, or bureaucrats – are more familiar with the workings of (national) parliamentary systems. That is, they know all about political systems where the parliament does not have legislative agenda-setting powers but rather relies on the power to veto (legislation or the government itself in confidence motions). One would think that this would be sufficient for them to see that the EU is different.

Against this background, RC wants to convince us that conditional agenda setting is so roundabout and convoluted that even actors intimately connected with the legislative process think it is irrelevant to policy making. But such parliamentary system blinders apparently have not hindered his MEP colleagues from understanding the importance of agenda setting (their manifest behavior under cooperation), nor have they stopped him from
understanding differences between the two versions of the codecision procedure. But this is strange. Since, regardless of Rule 78, the Parliament’s agreement is necessary for legislation to be adopted under both versions of codecision, RC’s psychological argument would seem to imply that both iterations of the procedure should lead to the same outcome. Yet, RC himself thinks that Rule 78 was necessary for Parliament to become powerful under codecision.

In our argument the difference is clear: although veto powers were identical in both codecision procedures, it is agenda-setting rules that changed between codecision I and codecision II. In the codecision I endgame, the Council could in effect influence the agenda to which Parliament had to react. This agenda-setting power was removed by the reforms to codecision written into the Amsterdam Treaty. This is the thrust of our comparison between the two versions of the procedure.

To conclude, we share Crombez’s aim to make simple and clear models that lead to specific predictions. We just want in addition that these models accord with reality. We share Steunenberg’s aim to study policy implementation and we support his quest to find more and better empirical data and to test arguments rigorously. The tendency in EU studies has been to go, we believe, in the opposite direction: too much reliance on case studies and the views of informed insiders, which then become the conventional wisdom. Although familiarity on the ground with specific issues can be very useful in identifying processes worthy of further scrutiny, it can also lead to inaccurate conclusions based on inappropriate extrapolations. Finally, we have agreed all along with all the conditions that Corbett imposes on conditional agenda setting. We just disagree with his empirical analysis and we hope that he might now revise his claims on the basis of the new empirical evidence we have presented.

2 A response to a reply to a reaction (I hope someone is still interested!)

Richard Corbett MEP

In Volume 1, Issue 3 of this journal, I wrote of my ‘practitioner’s puzzled reaction’ to the academic modelling of the codecision procedure carried out by Tsebelis and Garrett. I took issue with their conclusion that the Parliament enjoyed greater influence under the cooperation procedure than under the codecision procedure, at least in the original (Maastricht) version of this procedure. Since Tsebelis and Garrett were kind enough to respond in this issue, I in turn would like to comment on their response.
Perhaps our dialogue has served to clarify some of the issues. In certain circumstances – when the Commission supports Parliament’s amendments, when at least one member state is willing to support Parliament’s position to the extent of preventing the unanimity needed to overturn it (usually when Council was not unanimous in approving its first reading common position), and when Parliament’s amendments remain within the realm of what is acceptable to a qualified majority – Parliament could indeed be in a powerful position under the cooperation procedure. But, as Tsebelis and Garrett themselves admit, it is only under these conditions that Parliament has an ‘agenda-setting power’ – i.e. the power to force Council into a take it or leave it position.

I stated that these conditions do ‘not usually apply’. Tsebelis and Garrett claim that they apply frequently enough. Whatever. The position in any case falls short of the position under codecision where a majority of Parliament can always force Council to negotiate, even when the Commission is not on Parliament’s side, and even when Council is unanimous in taking a different position from Parliament, and even when Parliament has no initial ally inside Council. In other words, it applies to all legislation under that procedure and not just to select instances when the right circumstances are assembled.

Tsebelis and Garrett make much of the fact that the original codecision procedure (codecision I) under the Maastricht Treaty left Parliament in a formally weaker position than did the subsequent Amsterdam codecision procedure (codecision II). This is because, in the absence of an agreement, Council could reconfirm its own position in the third reading, which Parliament could then reject only by an absolute majority of its members within six weeks. Council could thus refuse to bargain and leave Parliament in the position of having to take it or leave it (with leaving it requiring a more difficult majority). This escape route for Council disappeared under the Amsterdam Treaty, according to which agreement in (or before) conciliation by both sides is the only way to adopt legislation.

I pointed out that Parliament had in practice already anticipated the Amsterdam procedure by means of Rule 78 of its Rules of Procedure, which required Parliament always to vote on a rejection motion if Council tried this particular escape route (and implied that Parliament always would reject). Tsebelis and Garrett deny the significance of this, claiming that only ‘the Treaties are actually the basis of all actors’ behavior’. This seems to me to be remarkably rigid. Do they deny that actors attempt to interpret, manipulate or take advantage of the various treaty provisions? It strikes me as highly significant that Parliament specifically amended its Rules of Procedure on this point (which Tsebelis and Garrett admit was ‘an astute bargaining device by the Parliament’) and that the only time Council tried it, Parliament
Indeed rejected Council’s reconfirmed position, and Council never ever tried it again.

Even if they are right that the failure of Council to challenge Rule 78 again ‘does not mean that all possible challenges had been eliminated forever’, the fact that it was never challenged again means that there was sufficient uncertainty in Council’s mind to prefer bargaining to the risk of rejection.

Of course, Parliament wanted this recognized in the Amsterdam Treaty, thereby eliminating any remaining doubt, as well as clarifying for public opinion that Parliament’s approval is necessary for the adoption of legislation. But even if the treaty had remained unchanged, Rule 78 would have still applied. For Tsebelis and Garrett to claim that, had the Maastricht rules been preserved, all would have been radically different and my ‘argument would have been unsustainable’ seems somewhat exaggerated. All the more so because they themselves claim that the Amsterdam Treaty changed the balance in Parliament’s favour precisely on the point that was achieved, de facto, by Rule 78. Indeed, in their original article they say this change made Parliament ‘a co-equal legislator with Council, now unambiguously more powerful than under cooperation’.

Tsebelis and Garrett also fail to respond to my arguments about the significance of the conciliation committee. Face-to-face negotiations take place between Council and Parliament in the conciliation committee under the codecision procedure, but were lacking under the cooperation procedure. Do they really think that this is insignificant, that the participants remain entrenched behind the positions adopted prior to the meeting and that there is no give and take whatsoever? They similarly do not address my analysis of the ‘relative impatience’ of each institution. It is the institution that, for one or more of several possible reasons, is more impatient that is likely to make the most concessions in negotiations.

As to the statistical evidence on the take-up rate for parliamentary amendments: it is hazardous to compare the take-up rate for amendments under different procedures. The procedural significance of the amendments differs and therefore the reasons for Parliament adopting or not adopting amendments will, ipso facto, also differ. Under the cooperation procedure, the significance of an amendment will depend crucially on whether or not the Commission has indicated that it will accept it, and this will have a bearing on the vote. It will also increase the likelihood of private negotiation with the Commission prior to the vote. Under codecision, however, the Commission’s position is less crucial and a different dynamic applies. Rather than focusing on the Commission, Parliament will often be focusing on the Council. Some amendments will be adopted for tactical reasons ahead of a negotiation. And so on. Several such reasons make comparisons of a statistical nature unlikely
to reveal much in terms of the ‘success’ of Parliament (and this without even bringing in the matter of the differing substance of proposals on different subjects or at different times).

All things considered, I stick to my guns!

Notes

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1 We do make this argument about the Council in codecision I.
2 We plead guilty for even more convoluted academic jargon.
3 Acceptance by the Commission is the only condition that RC acknowledges we impose in our theoretical argument: ‘For a start (and Tsebelis and Garrett concede this), it depends on the Commission taking over Parliament’s amendments – without that, Parliament is nowhere’ (Corbett, 2000: 375).
4 Tsebelis et al. (forthcoming) also demonstrate that there was a significant reduction of Commission powers from cooperation to codecision I (as many people, including ourselves, predicted) and speculate that the Commission rejected more EP amendments on single market votes (which were subject to the cooperation procedure before Maastricht).
5 It can be argued that, given the specialized agencies controlled by presidents, presidents control de facto the agenda in presidential regimes (see Londregan, 2001).
6 See also Huber (1996) and Tsebelis (1995b) for additional theoretical arguments having to do with the issue of confidence.
7 I did not say ‘almost never apply’, as Tsebelis and Garrett suggest.

References

Earnshaw, David and David Judge (1996) ‘From Co-operation to Co-decision: The
Tsebelis, George, Christian B. Jensen, Anastassios Kalandrakis and Amie Kreppel

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