More on the Co-Decision Endgame

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Our recent *JLS* paper\(^1\) pointed out that Roger Scully\(^2\) in some places does not understand and in others distorts our recent article in *International Organization*.\(^3\) Scully’s latest critique of our work compounds his earlier behaviour.\(^4\) He now uses humour to shrug off his mistakes (‘I thank Tsebelis and Garrett for identifying this inconsistency in their own work’ (p.95)) and belittles points he does not understand, most importantly backwards induction (which he calls ‘simplistic to the point of true banality’ (p.98)). What is worse, he distorts our arguments. Not content to claim that our published work is inconsistent, he contends that we have revised our argument (concerning the co-operation procedure) to move closer to his position. He writes: ‘I accept Tsebelis and Garrett’s wish to alter predictions made elsewhere. They must acknowledge, however, that they have diminished the force of their own argument.’ (p.95). Nothing could be further from the truth.

The outcomes of our models remain consistent throughout. The models concerning the co-operation procedure were introduced several years ago,\(^5\) and the statements included in our *International Organization* article were derived from these models under some simplifying assumptions presented on page 280. One of these is that ‘the status quo ... reflects the preferences of the least integrationist government’. The logic of the argument has remained unchanged since 1994 (in fact, since 1992 when Tsebelis first presented his analysis in the APSA meetings). Scully appears not to have understood our analysis.

In the interest of readers who may be confused after all these arguments about the Council’s agenda-setting powers under co-decision, we focus here exclusively on the co-decision endgame – that is, what happens in the event the conciliation committee breaks down.

Figure 1 depicts the interaction between the Council and the Parliament in the last stage of the co-decision procedure. It looks like Figure 1 of our

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FIGURE 1
A SIMPLIFIED MODEL OF THE DIFFERENCE BETWEEN CO-OPERATION AND CO-DECISION PROCEDURES

Notes:  
CP: common Council position
X: proposal under cooperation
CP, X: the Council can choose (QMV) any point or one among over a thousand points (if the Commission has included ten EP amendments in its report) for final proposal under co-decision.

earlier JLS article (the location of the ideal points of the members of the Council and the Commission and EP are identical), but there is one important difference. Instead of speaking about an abstract status quo, we now depict the common position of the Council (CP), generated earlier in the procedure. We expect that most of the time CP will be located to the left of government 3 (the qualified majority voting pivot), because if it were to the right the EP would not make any amendments in the last round (knowing that it cannot modify any CP in the interval 3–7), or if it made amendments (by mistake, or for pure position taking) all these amendments would be rejected since there would be no QMV to support them. In this case, co-decision’s conciliation committee would fail and the Council would confirm its previous common position. According to Gary Miller, up to the middle of 1995 there was only one case where this sequence of events occurred under co-decision. In the Liberalisation of Voice Telephony Bill, the conciliation committee failed, and the Council adopted its previous common position without accepting any of EP’s amendments. The appropriate analytic conclusion to draw from these data is that in all other bills considered under co-decision the Council’s CP was to the left of 3. Let us now compare co-operation and co-decision.

Under co-operation, the EP would make a proposal (X) that makes the pivotal member of the Council (3) indifferent between the Council’s common position and X. Let us assume that the Commission incorporates ten EP amendments. Tsebelis argues that such a Commission proposal is equivalent with a set of $1024 (=2^{10})$ proposals of the form $0101001000$, where 0 stand for amendments rejected and 1 for amendments accepted by the Council (in the above example, the Council accepted amendments 2, 4 and 7). Out of all these (over 1,000) proposals, there is one and only one
that can be adopted by qualified majority by the Council: \(1111111111\). All others require a unanimous vote in the Council. This is what Tsebelis called ‘conditional agenda setting’ powers of the EP.\(^8\)

Let us now examine what happens in the last stages of co-decision. According to article 189b(6) of the Maastricht Treaty, if the conciliation committee does not agree to a joint text, the Council may reintroduce the position ‘to which it agreed before the conciliation procedure was initiated, possibly with amendments proposed by the EP’. The meaning of the highlighted text is crucial and controversial. The real issue is whether the Council must include those EP amendments it accepts exactly the way they were proposed, or if the Council can modify them in any way. Our interpretation is that the Council can incorporate portions of individual amendments (that is, amend them), as well as using entire amendments as the EP wrote them.\(^9\) The reason is that since the Council is given by the Maastricht Treaty the power to make the worse proposal (from the point of view of the EP) of rejecting all amendments and reaffirming its common position, it must also have been offered the power to make a better offer (for the EP): modify some amendments in order to incorporate them. Other scholars have claimed that the Council has to adopt EP amendments as they were proposed.\(^10\) So far, however, there are not data to test these two readings of 189b(6).

What is the difference in results of these two interpretations? In our view, the Council can select among an infinite set of possible proposals (any modification of its earlier common position that contains any element of any of Parliament’s amendments). In Figure 1, it could select any point between CP and X. On the more restrictive view, the set of feasible outcomes is \(2^n\), where \(n\) is the number of EP amendments incorporated by the Commission in its report. Let us play out this more restrictive scenario. Since we have assumed that the Commission incorporated ten EP amendments, the Council could select among any of the \(1024 (=2^{10})\) possible combinations of them in making its final QMV proposal under co-decision. In Figure 1, one would have to identify 1,024 points between CP and X for the Council to choose among by QMV.

To recapitulate the above example: under co-operation, the only proposal that the Council could adopt by QMV was X; under the restrictive interpretation of co-decision, the Council could select among 1,024 points located between CP and X; under our interpretation, it could select any point among CP and X by QMV. If one incorporates the reports in the literature about the Council’s adoption frequently of a least common denominator position, the outcome under co-decision is going to be either exactly 3, or a point very close to it.\(^11\) Thus, regardless of the specific interpretation of article 189b(6), the Council has agenda-setting power under co-decision.\(^12\)
One implication of our argument is either that the Parliament will make more restricted amendments under co-decision, or, if it does not and the last stages of the procedure are reached, that the Council should hold a stronger bargaining position in the conciliation committee than does the Parliament (this is an appropriate inference using backwards induction). Is there any evidence of that? Here is what Miller (of the Conciliations Secretariat of the European Parliament) reports:

The attitude of the Council often seems to be that its common position represents the starting point of the whole procedure and the reference point for any compromise. Since its quality as a legal text is taken to be self-evident, given the time and energy the Council has invested in arriving at a compromise, Council members behave as if they are the ones who have to be convinced and as if they have no need to persuade the Parliament that its amendments are not acceptable. Thus, if the Council has accepted any of the amendments, this is presented as a great concession on its part. Parliament can in other words 'take it or leave it', there is no point in discussing the other amendments and if Parliament is so foolhardy as to persevere with them, it will be up to Parliament to carry the responsibility for the failure of the procedure and ultimately to reject the act outright. The members of the Council thus permit themselves the luxury of leaving the search for a compromise to others (their Presidency and the Members of the European Parliament). The compromise must be sufficiently attractive to persuade them to change their minds.13

Our conclusion is simple and consistent with all of our earlier work: the agenda-setting powers of the Council in the last stage of co-decision procedure are real. Backwards induction instructs us that rational actors do not need to arrive at that stage in order to modify their actions accordingly in previous rounds, and this is why it is such an important analytic issue (otherwise, big mistakes of interpretation are likely). In fact, the major use of formal models is to unveil this kind of reasoning of which sophisticated actors are capable; they improve our understanding of complicated procedures such as those adopted by the EU for the passage of legislation.

NOTES

3. G. Garrett and G. Tsebelis, 'An Institutional Critique of Intergovernmentalism',


10. The use of a unidimensional model seriously simplifies the process, and our only excuse is that in order to present an accurate picture of the options generated for the Council by seven amendments we would need a seven-dimensional space, which makes the exercise very difficult!

11. For more discussion of this issue see Tsebelis, 'Maastricht and the "Democratic Deficit"'.