

## POST-MAASTRICHT LEGISLATIVE PROCEDURES: IS THE COUNCIL "INSTITUTIONALLY CHALLENGED" ?

summary of a paper presented  
by  
Gary Miller  
(European Parliament Secretariat)

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With the Maastricht Treaty now almost two years in operation the institutional system is changing and explanations of how the system works will have to change as well.

The Treaty gave rise to a number of fundamental challenges to the Council as an institution. The paper will focus in particular on the "codecision" procedure laid down in Article 189b of the EC Treaty, but sets the operation of this new decision-making procedure in the context of a whole series of challenges for the Council which arose from the Maastricht Treaty and its difficult process of ratification.

It shows how this procedure built on the existing cooperation procedure, giving the Parliament the power to reject legislation and obliging the Council to negotiate with it in a "Conciliation Committee" which recalls similar institutions in bicameral legislatures in certain federal systems. The paper will describe how the procedure has operated since its inception by using case studies and statistics. It explains how the institutions have tried to adapt to the new demands placed on them by the procedure.

To conclude, the paper gives an overview of the shortcomings of the procedure and summarises proposals for reform which are circulating in view of the Inter-governmental Conference to be convened in 1996. It will try to relate the proposals to the experiences of the different institutions with the operation of the procedure and look at ways in which it could be simplified.

The extremely tentative conclusions of the author are that, if codecision survives 1996 intact or if it is modestly improved and extended, it will have an increasing impact on the institutional system and particularly on the balance between Council and Parliament and on the role of the Commission. But its biggest impact is likely to be on Council for its decision-making practices and culture are going to have to evolve yet more if codecision is going to improve.

The interplay between the institutions involved in this new legislative procedure and the new powers of the Parliament also have implications for the academic study of the EC. In future more attention will have to be played to the Parliament as it plays an increasingly direct role in legislation, and the EC will have to be understood as a complex system which involves a number of almost equal institutional players.

The federalist school of thought remained a normative one. Very broadly speaking, different shades of opinion on a spectrum between realism and functionalism competed to give the most accurate picture of what was going on in the European Community institutions. The question at the centre of debate was always to what extent the institutions could be described as "supranational", that is going beyond the conventions of international relations.

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## IS THE COUNCIL "INSTITUTIONALLY CHALLENGED" ?

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Gary Miller \*

Conciliations Secretariat,  
European Parliament

Brussels

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### 1 THE CODECISION PROCEDURE<sup>1</sup>

Parliament has generally not been seen by commentators as having major impact on decision-making in the European Community. Although the reforms contained in the 1987 Single Act had introduced a new decision-making mechanism called the cooperation procedure which considerably improved the ability of Parliament to amend legislation, it was some time before the full impact of this could be assessed. With the new procedure of codecision introduced by Maastricht Treaty now in operation since the end of 1993, the impact of Parliament on decision-making will need further re-evaluation. Codecision has particular implications for the Council and its relations with Parliament, for it reflects the spectrum of challenges on transparency, democracy and efficiency which Council has faced since the ratification of the Maastricht Treaty.

#### 1.1 Antecedents: the cooperation procedure

The normal procedure for Community legislative acts under the original treaties, before the Single Act, was as follows: The Commission makes a proposal to Council; the Council consults Parliament, which gives its opinion on the proposal (usually proposing amendments); the Council then adopts the act on the basis of the Commission proposal (usually after it has amended it and possibly after it has incorporated some of Parliament's amendments). Although Council had to wait for Parliament's opinion before it could reach a decision, it was under no obligation to accept Parliament's amendments. This consultation procedure still applies to a significant number of EC decisions (for figures, see below).

The 1987 Single European Act introduced a new procedure which modified the basic legislative process in the case of single market measures by adding a second reading. In this new second stage Parliament could put forward amendments to the initial Council position on the proposal in question. If these amendments found the support of the Commission, it would incorporate them in its revised proposal for submission to Council and Council could then change the revised proposal only by unanimous vote. Parliament therefore only needed one member-state to support an amendment to make it impossible for Council to remove it from the text. In addition, Council could adopt the revised proposal by a qualified majority.

In practice a substantial proportion of Parliament's amendments were incorporated into the final text of the legislative acts adopted under the cooperation procedure. However the principal

disadvantage of the procedure was that it implied that Parliament had to rely on the Commission for support. Moreover, at the end of the day, the Council could still in theory proceed to adopt a legislative act even if Parliament had rejected all or most of its provisions. Parliament remained at a disadvantage compared to the Council. Where it was not transformed into the co-decision procedure (see next section) the cooperation procedure has been retained in the Treaty for many legislative decisions, and its provisions are today contained in Article 189c of the EC Treaty.

#### 1.2 Codecision: sources, scope, principal features

Building on the cooperation procedure, the Maastricht Treaty provided for a new procedure which improved the ability of Parliament to have its amendments incorporated into a legislative proposal. The Treaty on European Union which came into force on 1 November 1993 introduced the new procedure in Article 189b of the EC Treaty, and it has commonly been referred to as "codecision" although the treaty nowhere uses the term. Official Council documents generally refer to it as "the so-called codecision" procedure reflecting the conception of a number of member-states that it is really a procedure of "negative assent". Other relevant parts of EC Treaty are Articles 189, 189a, 189c, 190 and 191 - and these are important, for the Treaty on Union effectively creates a new category of legislative act called "acts of Parliament and the Council" (Article 191), to be adopted in accordance with Article 189b. Apart from the treaty the main sources for the rules governing codecision and conciliation are as follows:

- Parliament's Rules of Procedure (and those of Council and Commission) which set out details of the procedure to be carried out as far as each institution is concerned. 2
- The Inter-institutional Agreement of 25 October 1993 lays down the detailed arrangements for the work of the Conciliation Committee. 3
- An Aide-mémoire on the practical organization of the work of the committee has also been worked out between the Parliament and Council Secretariats. 4

Codecision applies to the single market:

- the free movement of workers (Article 49);
- the right of establishment for the self-employed (Article 54);
- coordination of laws for the special treatment for foreign nationals (Article 56);
- mutual recognition of professional diplomas (Article 57(1));
- conditions of access and right to exercise a profession (Article 57(2));
- freedom to provide services (Article 66);
- harmonization of national law relating to the internal market (Article 100a);

and to the following policy areas:

- promotion and support of cooperation in education (Article 126(4));
- promotion and support of cooperation in culture (Article 128(5));
- promotion of action and support of cooperation in public health (Article 129(4));
- EC action on consumer protection (Article 129a(2));
- establishment of policy guidelines for trans-European networks (Article 129d);
- framework programme and finance for research and development (Article 130(i));
- general environmental action programmes (Article 130(s)).

An idea of the range of subjects covered may be obtained from the list of completed legislation in Annex 2.

Under codecision, the Commission makes its proposal not to the Council, which then consults Parliament, but simultaneously to Parliament and the Council, as twin branches of the legislative authority. Ostensibly the procedure continues as for cooperation, with the Parliament delivering an

opinion on the Commission proposal before the Council establishes its common position. After this first reading stage however, there are two major differences in the new procedure:

- First, there is now the possibility of convening a Conciliation Committee between Parliament and Council if Parliament intends to reject the Council's common position on a proposed act. More importantly, at second reading the Council is obliged to convene the Conciliation committee if it cannot approve all of Parliament's amendments. The task of the Committee, for which Parliament forms a special delegation every time, is to reach a compromise agreement between the two institutions on the legislative act in question.
- The second major innovation is that at the end of the procedure, a new third reading stage is added. If there has been no agreement in conciliation, the Council can still proceed to adopt the act by confirming its common position, but Parliament then has the possibility of definitively rejecting such an act. It is this possibility which gives the procedure a fundamentally different character. Council no longer has the final say on how the text is to be amended. It is obliged to take Parliament's position move seriously and to enter into real negotiations with MEPs about the content of the legislation in question. A summary of the procedure is provided in the flow-chart in Figure 1 below. \*

## 2 THE CONCILIATION COMMITTEE

### 2.1 Procedure for convening the committee

As already mentioned, the committee may be convened during the second reading if Parliament decides, by an absolute majority, that it intends to reject the Council's common position. If the committee reaches agreement, Parliament's delegation submits the agreement to the plenary in the form of second reading amendments to the common position. These require the support of an absolute majority of members in order to be adopted. The Council then endorses the outcome of the conciliation exercise by adopting the same amendments in its second reading. Alternatively, if the Conciliation Committee does not reach agreement, Parliament may decide to reject the common position, upon the recommendation of its delegation, by an absolute majority. To date this provision has only been used once. It is only likely to be used in future in the case of extremely controversial legislation. The main conciliation activity has in practice taken place after second reading. After Parliament's second reading, the Council has three months to complete its second reading. If the Council does not accept all Parliament's amendments, its President must forthwith, in agreement with the President of Parliament, convene the Conciliation Committee.

### 2.2 Composition of the Committee

Parliament forms a delegation to the Conciliation Committee for each legislative act under consideration.<sup>5</sup> The political groups are responsible for appointing its members. The treaty states that the Committee shall be composed of the members of Council (currently 15) and an equal number of representatives of Parliament. Three members are chosen from among Parliament's Vice-Presidents to serve as permanent members of all delegations for a period of 12 months. The chairman and rapporteur of the parliamentary committee responsible for the legislation are ex officio members of the delegation. The ten remaining members are appointed from among the members of the parliamentary committees concerned with the legislation.

[Figure 1; Not converted]

Besides this functional composition of the membership, appointments must respect an overall political balance which is fixed in order to reflect the composition of Parliament by political groups. Currently there are six places for the PES (socialist), five for the EPP (christian-democrat), one for the ELDR group (Liberal), one for the smaller parties of the left (GUE (communist), Greens and Alliance Radicale), one for the smaller parties of the right (RDE (gaullist), Forza Europa and Europe Des Nations) and one remaining place alternating between the last two groupings. The political groups may also appoint substitute members and political groups not represented on the delegation may send observers to preparatory meetings. The delegation is led by the President of Parliament (in addition to

the 15 members) and he can delegate this function to one of the parliamentary Vice-Presidents who are permanent members.

### 2.3 Proceedings in the Committee

The 15-member delegation of Parliament sits opposite 15 members from the Council, including the President-in-office.\* One or more members of the Commission participate, depending on who is responsible for the legislation under consideration. The role of the Commission, according to the treaty, is "to take all the necessary initiatives with a view to reconciling the positions" of the Parliament and Council. The Committee meets in camera. Its purpose is, within six weeks, to draw up a "joint text" representing a compromise version of the legislation over which Parliament and Council have disagreed. In the search for a compromise, the Committee is not restricted by earlier proceedings. It may make any amendments it wishes to the common position. The Committee may, therefore, legitimately discuss compromise proposals in respect of parts of the text which were not amended by Parliament. The Council's own legal service has accepted this interpretation,<sup>6</sup> although at the political level Council was frequently opposed. Clearly, in political terms, both parliamentary and Council delegations are limited to the official position adopted previously by their institutions. It is up to the delegations to judge if they can justify a departure from those positions when they come to recommend the adoption of the joint text to their respective institutions.

Within the Conciliation Committee, Parliament's delegation decides on the compromise in a roll-call vote by the majority of its Members: currently eight members voting in favour are required. With two exceptions \* the Council's delegation decides by a qualified majority (currently 62 votes out of 87);<sup>7</sup>

### 2.4 Role of the co-chairmen of the Committee

The inter-institutional agreement on procedural arrangements lays down that the chairmanship of the Committee shall be exercised jointly by the chairmen of the Council and Parliament delegations, that is by the President-in-office of Council and by the President of Parliament or the Vice-President who replaces him at the head of the delegation. According to the same agreement, they are responsible for approving the texts which emerge from the Committee once they have undergone finalisation by lawyer-linguists. They forward the final joint text to Parliament and the Council in all the official languages together with a covering letter which also sets out, where necessary, in a second annex the declarations that may have been entered in the Conciliation Committee's minutes as part of the compromise\*. The co-Chairmen also inform the two institutions if the Committee has not been able to agree on a joint text, and it is they who will recommend if necessary the extension of the six-week deadline imposed on the work of the Committee by the Treaty.

### 2.5 Third reading by Parliament and Council

Following successful conciliation, the joint text is submitted without any possibility of amendment to the approval of Parliament and the Council. They must both approve it within six weeks. Parliament's delegation approves a report beforehand which recommends that the house adopt the joint text. The report is submitted to the plenary along with the joint text and the covering letter sent by the Committee. If the covering letter includes declarations "entered in the minutes" of the Committee these are available to the plenary and are therefore made public.

The plenary decides by a simple majority, in a single vote and without the possibility of amendment.<sup>8</sup> The Council must decide by a qualified majority within the same six-week period. If the joint text is not approved by either Parliament or Council, the act is deemed not to have been adopted\*.

A joint text which is adopted is signed by the Presidents of Parliament and the Council and is published under their joint authority in the Official Journal. At the first signing, on 23 March 1993, it was agreed to designate such legislative texts "Lex". (A list of Lex legislation so far published is included in Annex 2.)

Following unsuccessful conciliation, when the committee has not reached agreement, the Council may, within a six-week period and acting by qualified majority, confirm its initial common position

"possibly with amendments proposed by the European Parliament". 9 The Council is free to select which amendments to include but must adopt them as they stand without amending them.

However, another possibility for resolving the problem is offered by the provision that the President of Parliament "shall invite the Commission to withdraw its proposal, and invite the Council not to adopt under any circumstances a position".10 In the absence of a text confirmed by the Council, the legislative act is then deemed not to have been adopted. Up until now, neither the Commission nor the Council have indicated that they were prepared to accept such an invitation. In the only case which has occurred,\* the Commission urged the Council to confirm the text and the Council confirmed its initial common position without adopting Parliament's amendments.

If Council confirms a text, Parliament may reject it within a further period of six weeks. The house decides in a single vote and by an absolute majority of its Members11. If this majority is attained, the legislative act is deemed not to have been adopted. Otherwise, if Parliament fails to vote on time or fails to achieve the requisite majority, the act is deemed to have been definitively adopted in the form in which it was confirmed by the Council.12

If for any of the above reasons an act is not adopted successfully, it is for the Commission alone, on the basis of its right of initiative, to decide whether or not to submit a new proposal which would make it possible to re-start the codecision procedure from scratch - unless either Parliament or the Council, on the basis of Articles 138b and 152 of the EC Treaty respectively, ask it to do so.

FIGURE 2: SUMMARY OF THE MAJORITIES REQUIRED FOR EP DECISIONS  
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- \*Consultation procedure  
simple majority
  
- \*\*I Cooperation procedure (first reading)  
simple majority
  
- \*\*II Cooperation procedure (second reading)  
simple majority to approve the common position  
absolute majority of Parliament's component Members to reject or amend  
the common position
  
- \*\*\* Assent procedure  
absolute majority of Parliament's component Members to give assent  
but simple majority in cases covered by Articles 8a, 105, 106, 130d and  
228 EC
  
- \*\*\*I Codecision procedure (first reading)  
simple majority
  
- \*\*\*II Codecision procedure (second reading)  
simple majority to approve the common position  
absolute majority of Parliament's component Members to adopt a

declaration of intended rejection of the common position and amend the common position or confirm its rejection

\*\*\*III Codecision procedure (third reading)  
simple majority to approve the joint text\*  
absolute majority of Parliament's component Members  
to reject a Council's confirmed common position

FIGURE 3: SUMMARY OF THE TIME-LIMITS IN CODECISION ACCORDING TO ARTICLE 189b EC TREATY

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1. Second reading by Parliament

Three months dated from the announcement by the President in plenary session of receipt of the Council's common position. The three months can be extended by common accord of Parliament and Council by one month.

2. Intention to reject leading to conciliation during second reading

The vote indicating Parliament's intention to reject the common position must take place with in the time-limit allotted to second reading. If the vote succeeds (majority of component members of Parliament required) second reading is automatically extended by two months whether or not the Conciliation Committee is convened and whatever the results of its deliberations.

3. Vote following up conciliation during second reading

If conciliation is successful, Parliament votes to approve the common position subject to the amendments agreed in conciliation as its second reading. If conciliation fails, Parliament votes to confirm its rejection of the common position. These votes must take place within five months following the receipt of the common position (or six months if the original time limit of three months was extended to four months).

4. Second reading by Council

Three months dated from the receipt by the Council of Parliament's amended text. (In practice the receipt by Council of the Commission's opinion on these amendments has little significance for the calculation of this deadline.) This three-month time-limit may also be extended by one month by common accord between the Parliament and the Council.

5. Conciliation after second reading by Parliament

Six weeks from the date on which the Conciliation Committee was convened. Notwithstanding

ding initial disagreement on this point, the date on which the Committee is convened is deemed to be the date on which it first meets, an arrangement which maximises the time available for conciliation.

6. Approval of the Conciliation Committee's joint text

Parliament and Council have six weeks from the date on which the co-chairmen of the Conciliation Committee transmit the joint text to their respective Presidents in which to adopt the act in question.

7. Decision of Council to confirm its common position after failure of conciliation

Council has six weeks from the date on which the Conciliation Committee formally establishes the impossibility of reaching agreement on a joint text in order to confirm its common position. Otherwise the act is deemed not to have been adopted. If there is no such formal decision by the Conciliation Committee, the Council has 12 weeks from the date on which the Committee was first convened (the normal six weeks plus a consecutive six weeks).

8. Rejection by Parliament of a common position confirmed by Council after conciliation

Parliament has six weeks from its confirmation by Council in order to vote to reject the common position. The time-limit runs from the date on which the Parliament is officially informed of the Council decision and receives the text of the common position that Council has amended and/or confirmed.

3 THE OPERATION OF ARTICLE 189B TO DATE: GENERAL OVERVIEW

3.1 Facts and figures

Codecision already accounts for a substantial proportion of legislative activity. Since the entry into force of the TEU, 136 proposals for codecision acts have been forwarded to Parliament.\* In the case of 30 proposals the procedure has been terminated. At present codecision covers approximately 25% of the legislative activity of the Community. \*

The overall total of 385 procedures pending at 8 May 1995 breaks down as follows:

FIGURE 4:  
DISTRIBUTION OF PARLIAMENT'S LEGISLATIVE WORKLOAD BY PROCEDURE

Simple consultation	<sup>3</sup> Cooperation	<sup>3</sup> Assent	<sup>3</sup> Codecision	
214	319	104	- including at the following stages:	
3	3	3	EP first reading:	29
3	3	3	Council first reading:	66
3	3	3	EP second reading:	5
3	3	3	conciliation pending:	1



3 3 3 awaiting third reading: 2  
 3 3 3

Parliament has received 33 common positions which it has dealt with as follows:

- in 32 cases, agreement has been reached between the two institutions:
  - 18 without convening the Conciliation Committee (either there were no amendments to the common position, or the amendments were adopted by the Council);
  - 13 following approval of a joint text by the Conciliation Committee; in one of these cases, Parliament had adopted, at an earlier stage of the procedure, a declaration of intended rejection\*; in one case plenary did not follow the delegation's recommendations and therefore did not adopt the joint text\*;
  - in 1 case, the Conciliation Committee was unable to agree on a joint text and the Council nevertheless confirmed its common position, which was subsequently rejected by Parliament\*;
- in 1 case, at the time of writing, Conciliation is still in progress.

FIGURE 5:  
 BREAKDOWN OF CODECISION PROCEDURES BY PARLIAMENTARY COMMITTEE

Committees	Total	<sup>3</sup> Without <sup>3</sup> conciliation	<sup>3</sup> With conciliation <sup>3</sup> during 2nd reading	<sup>3</sup> With conciliation after 2nd reading	<sup>3</sup> Awaiting <sup>3</sup> conciliation
Economic	7	3	(1)	4	3
Legal	4	3		3	3
Environment	16	3	12	3	4
Research	2	3		1	3
Transport	1	3			3
REX (trade)	1	3	1	3	
Culture	2	3		2	3
TOTAL	33	3	18	(1)	14

The Committee on Research, Technological Development and Energy was the first to test the conciliation procedure, starting in March 1994 with the framework programme on research. Conciliation procedures were subsequently completed by the Committee on Economic and Monetary Affairs and Industrial Policy (3) and the Committee on Legal Affairs and Citizens' Rights (1). Following the European Parliament elections, the Committee on the Environment, Public Health and Consumer Protection completed four procedures, the Committee on Culture, Youth, Education and the Media two, the Committee on Economic and Monetary Affairs and Industrial Policy another one and the Committee on Legal Affairs and Citizens' Rights another two.

Four conciliations were successfully completed under the previous legislature. Eleven conciliation procedures were continued or begun in the second half of 1994 under the new legislature. One of these ended with the rejection of an act by Parliament.

Since the February plenary session in 1994 18 texts have been accepted under codecision without any necessity for a meeting of the Conciliation Committee. Eleven procedures were completed in the first half of 1994, and a further seven since the elections in June 1994. In all but four of these cases

Parliament largely followed the recommendations of its competent committee when voting at the various stages of the procedure. In four cases the Council approved all of Parliament's amendments.

In seven cases, Parliament was able to approve the common position without amendment. (In four of these seven, Parliament had not made any amendment at first reading and since the Council made no substantial modification to the text, Parliament was able to approve the common position at second reading as it stood. In the other three cases, Parliament adopted amendments at first reading which were sufficiently taken into account by the Council's common position for Parliament to be able to accept it without further amendment.) In seven other cases, further intervention was necessary, such as informal contacts between Parliament and Council to clarify various points before Parliament took its final decision. In one example this involved attempts to forge compromise amendments between Council and Parliament.<sup>13</sup>

### 3.2 The operation of Article 189b to date: Four examples

3.2.1 Engine power of two- or three-wheel motor vehicles (Committee on Economic Affairs) voted in third reading on 25 January 1995 on the basis of the Barton report.

The possibility of holding a conciliation during the second reading was tested in early 1994 among the very first application of the new procedure. This is the only example so far. The legislation involved was designed to complete the internal market in respect of motorcycles. This particular procedure was also a good example of how Parliament can articulate the interests of groups that have been excluded from Council's decision - in this case the consumers of this particular product, the bikers. Unsatisfied with Council's response, Parliament proceeded to confirm its rejection of the common position, but failed to obtain the necessary majority. But it could then still adopt amendments to the Council's common position which gave rise to a conciliation after the second reading.

A compromise was reached in the Conciliation Committee on 18 October 1994, comprising amendments to two articles of the directive and three declarations by the Commission. Parliament obtained the removal of the core provision of the original proposal which sought to lay down a limit on motor-cycle engine power, so that on this point the content of the directive was reduced to a study on the possible links between engine power and safety, instead of a material regulation of the issue.

However disagreement on the question of commitology delayed final approval of the joint text until 13 December and necessitated an extension by two weeks of the six weeks given to the committee. The delay was occasioned because the delegation wished to wait for the result of the parallel negotiations between the institutions on a general "horizontal" commitology agreement which had since commenced.\* Noteworthy also was the fact that the final agreement was effected by an exchange of letters between delegations without the need for a formal meeting of the Conciliation Committee. In the subsequent third reading Parliament's delegation also used the written procedure for approving its report to plenary. The importance of such flexibility is discussed below.

3.2.2 Liberalisation of Voice telephony (Committee on Economic Affairs) rejected at third reading on 19 July 1994 on the basis of the Read report.

This was a directive initiating a programme of liberalisation in telephone services with a view to creating an internal market. Considerable political importance was attached to it by the Commission and several member-states. While accepting the broad principle of liberalisation (open network provision), Parliament was particularly concerned to protect consumers and disadvantaged social groups. After two meetings of the Committee on 29 March and 26 April, Parliament's delegation was still not satisfied with the text, particularly as regards consumer protection and commitology. In spite of Parliament's invitation not to do so, the Council confirmed its common position

The Council agreed not to make its decision formal until the end of June in order to give Parliament the possibility of taking a position on it at its July plenary session. The new Parliament, at its constituent plenary session, stressed the need for an urgent solution to the commitology problem

and rejected the Council text on 19 July, by 379 votes to 45 with 13 abstentions. The absolute majority of Members needed for rejection was at that time 284 votes. Reacting to the rejection and replying to an oral question from the committee responsible, the Commissioner, Mr Bangemann, indicated that the Commission intended to re-introduce a legislative proposal on this subject. The proposal that Parliament has since received incorporates all of the changes it had sought during the previous attempt to agree on the legislation.\*

3.2.3 Packaging and packaging waste (Committee on the Environment) voted on 14 December on the basis of the Jensen report.

The directive involved was a high profile piece of environmental legislation which attempted to establish common European targets for the re-cycling of packaging and packaging waste. Given the highly divergent standards and practices of the member-states, it proved to be highly controversial in Council. The European packaging industry followed the progress of the legislation very closely. The procedure was characterized by an important innovation: at the insistence of the members of the Environment Committee involved in the EP delegation, it was the first occasion on which the Council indicated in writing which amendments it could not accept, information which until then was usually only communicated orally to Parliament in the conciliation meeting.

The conciliation required three successive meetings of the committee, on 20 September, 19 October and 8 November 1994 and, for the first time, an extension by two weeks of the six-week deadline before agreement could be reached, reflecting the difficulty of the negotiations. Parliament had adopted 19 amendments at second reading of which the Council accepted 18. MEPs remarked at the time that this was not a very sensible position for Council to take at the outset of a negotiation. Indeed this encouraged Parliament to request that the Committee consider an additional five amendments which were proposed at its second reading but not adopted by plenary, in the event of the Council insisting that Parliament should abandon its one outstanding amendment. The outstanding amendment concerned the use of "economic instruments" (i.e. "eco-taxes") to promote the objectives of the directive. In the end it proved unnecessary to consider other amendments as agreement was reached on a text containing the substance of the Parliament's amendment, that is to say the directive now allows the Community to adopt fiscal measures to promote the objectives of the legislation.

The problem of comitology in this directive was solved by a declaration by the Commission containing a stronger undertaking to keep Parliament informed than under existing arrangements at that time 14 and by the Council taking note of Parliament's declaration that this ad hoc solution was in no way to be considered as a precedent for other conciliations or for the general agreement between the institutions by that time under negotiation.

An additional problem was caused by provisions of the directive purporting to delegate powers to adopt implementing decisions to the Council alone whereas Parliament insisted that under codecision, such powers should be reserved to both institutions jointly. What the Council was proposing would have allowed it to return to the directive at a later date and amend it without reference to Parliament. A way round this was found partly by amending the articles concerned and partly by a Commission declaration saying that it was the objective content of proposed measures which determined their legal basis and thus the decision-making procedure to be followed. Parliament was assured that implementing measures changing the directive would have the same legal basis and thus be based on Article 189b.

This procedure witnessed a difference of interpretation about the Treaty time-limit. Once the Conciliation Committee reached agreement on a joint text, the Council maintained that the deadline of six weeks given to the two institutions to adopt the act is calculated from the date of that agreement. Parliament insisted that this deadline is calculated from the date on which the joint text is formally transmitted to the institutions by the delegation chairmen. This was in accordance with the interinstitutional agreement, which lays down that the joint text can only be approved once it has been finalized in all the official languages. This more flexible approach allows the procedure to be used in such a way as to maximise the chances of success.

Members involved in the negotiations on the general agreement or "modus vivendi" on committee asked for the vote on this dossier to be postponed in order to put pressure on the Council. In the end Council was the cause of delay since the final texts were in fact delivered by the Council only two days before the vote in Parliament.

3.2.4 Legal protection of biotechnological inventions (Committee on Legal Affairs) vote on 1 March 1995 on the basis of the Rothley report.

This directive attempted to create common standards for the legal protection of biotechnological inventions through patents. Because of the ethical implications of certain aspects of biotechnology, this was a proposal on which elected representatives had a particular moral authority to speak. By a procedural accident, Parliament was only able to adopt 3 amendments to the recitals of the directive in May 1994, although the committee responsible had approved 15 for presentation to plenary. (The vote was tabled right after the dramatic vote of assent to the accession of the new member-states and in the ensuing mêlée, although more than enough members were present, not enough took part in the vote.) Since the three months given to Parliament, with a one-month extension, expired before the next plenary session was held in July (no plenary was held in June because of the elections) Parliament was not able to complete its second reading as planned. Significantly, the Council for the first time had to request a one-month extension of the three-month time-limit in order to finish its second reading - revealing that it, too, had difficulty in arriving at a position.

Conciliation was nevertheless necessary, with three meetings of the committee being held before agreement was found on 23 January on the very last day of the deadline imposed by the Treaty. The Council was able to accept two of the three amendments relatively easily while the third amendment (concerning the non-patentability of the human body or parts of the human body) raised questions of fundamental ethical and legal importance on which both sides differed and had to compromise. The problem for Parliament was how and whether it could introduce any of the other amendments which it had not been able to adopt at second reading. In addition to a satisfactory compromise on its three "official" amendments, Parliament successfully obtained changes to two other recitals and one other article (concerning germ line therapy and animal protection). The ability of the Conciliation Committee to change the text in the interests of a politically-acceptable compromise was thus confirmed.

The compromise was accompanied by interpretative declarations, on one hand by all three institutions and on the other by Council and Parliament separately. In the interests of transparency, Parliament insisted that the most important of the joint declarations be published in the Official Journal alongside the directive, and the committee agreed in principle to do the same for a declaration by three members of Council. The publication of both these kinds of declaration in the Official Journal represented a precedent and seemed to create a "stronger" type of declaration which the committee will find useful to have at its disposal in future. At the time a member of Parliament's delegation raised the legitimate question of whether unilateral declarations by individual MEPs could not also be published.

Parliament's delegation made its recommendation to plenary as regards the joint text conditional on a commitment by the Commission to present a legislative proposal to guarantee a derogation for farmers allowing them to breed their own animals without having to pay licence fees for animal patents. The Commission made a declaration on 1 March 1995 at the start of the debate in plenary on the joint text. Several contributors to this debate found the declaration inadequate. But by that time MEPs had come under extensive lobbying by outside organisations and many became concerned by the ethical implications of the directive. Plenary later voted by 240 to 188 against the recommendation of Parliament's delegation and the act was thus deemed not to have been adopted.

## 4 PROBLEMS WITH CODECISION AND ITS IMPACT ON THE INSTITUTIONS

### 4.1 Conciliation: The impact on the Commission

An examination of the role of the Commission gives an immediate impression of how codecision has radically changed decision-making. Previously, under the cooperation procedure, the Commission

was the intermediary between Council and Parliament, and the latter was to some extent dependent on the Commission's support for getting its amendments through Council. In addition, the Commission alone had the power to propose compromise versions of legislation and the equally important ability to withdraw proposals. Now the Parliament negotiates directly with the Council. Although the treaty states, as we noted above, that the Commission "shall take all the necessary initiatives with a view to reconciling the positions of the European Parliament and the Council", during the conciliation exercise the Commission is de facto no longer able to withdraw its proposal and its legal right to do so is the subject of dispute. Moreover, any amendments which it might propose do not affect the majorities required in the Committee.<sup>15</sup> In practice, in the majority of cases, compromise proposals have originated in either the Council or Parliament delegations.

While it is going too far to say that the Commission has been sidelined, its role is of less importance for the success of the legislative process than it was under cooperation. Often its function is reduced to that of being the "conscience" of the two legislators, by reminding them of the original motivation for the legislation and of the interest of European industry in having common rules, and by pointing out how close the two sides are to compromise. The involvement of the Commission has been more useful when very technical legislation is under consideration, but even here the expertise of the Commission official concerned is matched by Parliament's rapporteur, who has normally been following the subject closely for a period of up to two years and more. Where the Commission contribution has been interesting is in the making of commitments to take related action in parallel fields to the legislation under consideration, often by means of declarations or statements before the Parliament's plenary. However, the Commissioner involved is usually wary of making commitments which the college may not accept and which might be seen as undermining the Commission's independent power of initiative.

The Commission could in theory be much more active as an "honest broker" and Parliament and Council would probably welcome it if it did, but in practice the Commission has had some difficulty in re-defining its role. It has, generally speaking, been represented by a Commissioner and the two exceptions which occurred in the first half of 1994 when it was represented by senior officials have not been repeated, for legislative institutions would seem to appreciate the presence a Commissioner in the Conciliation Committee. Moreover, to begin with, whenever there were breaks in the proceedings to allow each side time for consultation the Commission continued its practice of attending meetings of the Council. On occasion, the Commission's access to the Council has undoubtedly treated with suspicion by MEPs. Increasingly therefore the Commission has been invited to attend the separate meetings of Parliament's delegation and such equidistance will be a sine qua non if the Commission wishes to develop a role as "honest broker".

#### 4.2 Council and PARliament: The need for flexibility

Both institutions have shown the pragmatism required to make an overly-complex procedure work. As we have seen in the examples described above, it has suited both institutions on occasion to agree on a flexible application of the deadlines imposed by the treaty or to agree on the interpretation which maximises the chance of a successful conciliation. For example, the six-week period allowed for the proceedings of the Conciliation Committee do not start until it has actually met for the first time, and not when the Council sends the request to Parliament. The Treaty indicates that the Committee must be convened by the President of the Council "forthwith". But the agreement of the President of Parliament is needed as regards the date on which the Committee is to be convened. With one or two exceptions, the fixing of the date has not been used as a bargaining tool in the first stage of informal negotiations. Generally speaking, the expression "forthwith" has been interpreted as meaning within a period of a few weeks. Longer delays, however, were agreed during the summer of 1994 in order to compensate for the period of the European elections and at the beginning of 1995 so that the texts under consideration could be translated into the official languages of the new member-states. Given the interruption in parliamentary activities between July and September every year, such flexibility will continue to be necessary when dealing with a system of six-week deadlines.

According to the Treaty, the next phase, in which both institutions must adopt the legislative act, runs from the approval of the joint text by the Conciliation Committee. This is not the date on which political agreement is reached on the amendments to be made to the basic text, but the date on which the co-chairmen have established that there is agreement on the full text in all its language versions. This allows for the necessary time to draw up the final texts. It follows logically from the Treaty that this second date must be within the six week period allowed for the Committee's proceedings. The legal consequences if the joint text is forwarded late have not been clarified. In this connection, the preparation of the final texts is often the cause of disputes, for Council's services have been used for so long to having sole responsibility for legislative texts whereas now this responsibility is shared for codecision.

In order to save time and avoid the unnecessary proliferation of meetings, Parliament has on four occasions authorized use of written procedure to ascertain member's votes. This method is particularly appropriate in cases where the delegation has adopted a position by a very substantial majority in the Committee or when the issue is relatively uncontroversial. A written procedure has also been used to cement an agreement between the two institutions without having a full meeting of the Conciliation Committee. According to Parliament's Rules, it is predominantly members of the committee responsible for the legislation concerned who form the delegation to the Conciliation Committee. Recently however, where a compromise on a legislative proposal was found during informal meetings, the Environment Committee, as committee responsible, permitted a delegation from another committee (Legal Affairs) to seal the formal approval of the compromise in a Conciliation Committee on an entirely different piece of legislation. Following the parallel practice in Parliament and Council, the environmental legislation passed without debate as an "A-point" item. In another example involving legislation required to implement the GATT Uruguay Round, Parliament cooperated with the Council to complete both first and second readings in the same week in order to guarantee the ratification of this agreement by the end of 1994.

#### 4.3 Composition of the Conciliation Committee and its capacity for negotiation

Despite a certain amount of pragmatic agreement about the interpretation and application of the basic rules, the greatest divergence in the approach between the two institutions can be noticed in the actual operation of the Conciliation Committee. For Parliament, the Conciliation Committee is an inter-institutional body laid down in the Treaty, with considerable autonomy to organize its own work as it sees fit and to make its own decisions. Council does not share this view, and questions must be raised about the future effectiveness of conciliation as a result.

To begin with the difference of opinion can be seen in the approach taken by each institution to the composition of its delegation to the Committee. The relative composition of the Committee is a major determinant of its effectiveness in negotiating compromises. A list of meetings is included in the table in Annex 1, which indicates the evolution in attendance at conciliation.

On Parliament's side, conciliation has created quite a considerable extra workload for the members involved, who of necessity are usually among the most active members of the parliamentary committee responsible for the legislation. It has been a particular extra burden, alongside their other parliamentary duties, for the Vice-Presidents who are permanent members and who are therefore expected to participate in all the work of the delegations. Although conciliation meetings are open-ended and therefore very disruptive of tightly-planned timetables, attendance at meetings has been good. For understandable reasons it declined slightly immediately prior to the elections in 1994, and it has since returned to the average recorded during the initial conciliation procedures (and during budgetary conciliation procedures which predated codecision). There has never been any problem for Parliament in obtaining the necessary majority for decisions within its delegations. Furthermore, Parliament changed its Rules of Procedure in anticipation of the entry into force of the Maastricht Treaty to arrive at the composition of its delegations which was described above. In general the way the delegation is put together has proven to be effective. The presence of the chairman of the parliamentary committee responsible and its rapporteur ensures that the committee is fully involved in the compromise. The overall political balance in the delegation means that when it arrives at a majority position, it can speak with the authority of the political groups behind it. The presence of a core of permanent members

provides leadership based on past experience and has allowed a certain "institutional memory" to develop which means that each parliamentary delegation, even if they are from different committees, adopts the same approach to procedural problems and general institutional questions.

The Council evidently does not share this view of the Committee's autonomy. This can be seen in the typical composition of its delegations, which in turn influences the negotiating style it adopts in Committee meetings. According to the treaty, the Conciliation Committee "shall be composed of the members of the Council or their representatives and an equal number of representatives of the European Parliament" (Article 189b(4)). Moreover, the Council considers that Article 7 of its Rules of Procedure,<sup>17</sup> according to which "the presence of eight members of the Council is required to enable the Council to vote", does not apply to the Conciliation Committee. The result, as demonstrated by the table in Annex 2, is that the composition of Council's delegation varies considerably. The President-in-office is always a minister, but usually the other national delegations are represented by COREPER I (deputy permanent representatives, for example, in cases relating to the internal market) or II (permanent representatives, for example, on legal issues). Only in two cases were at least half the members of the Council represented by ministers. After the first meetings of the Conciliation Committee in 1994 (on the framework research programme), there was a marked decline in the interest of ministers. Interest revived in connection with the conciliation procedure on the Socrates and Youth for Europe programmes, in which the Presidency was represented by two ministers.

This situation is far from satisfactory. Ministers are more capable of delivering compromises. Members of Parliament, as elected representatives, often find it a frustrating experience to try and negotiate with unelected diplomats who may be operating under an extremely limited mandate from their governments. On occasion some governments will send an emphatic signal about their position by sending even more lowly officials than the deputy-permanent representatives. What annoys MEPs about this is that whereas they can take personal political responsibility for the dossier and the negotiations, the Council side often cannot take decisions of the same order without referring to their experts and national authorities for guidance, which in practical terms cannot take place until after the meeting. Given the friction this has caused, Parliament's delegations have insisted that the Presidency at the very least is represented by a minister, by refusing on two occasions to convene the Committee because the Council Presidency could not guarantee a minister's presence.

#### 4.4 Proceedings in the Conciliation Committee

Each institution has brought to conciliation the working methods to which they are accustomed when acting alone. The Council comes to conciliation with an in-built tendency to continue its consensual style of decision-making. Its position on the legislation in question is therefore usually based on the lowest common denominator, and no members of the Council are interested in going back on the positions they adopted previously which had allowed the Council to reach a compromise in the first place, for this could cause the whole carefully constructed compromise to unravel. Parliament's starting position in negotiations will be its second reading amendments that Council has not been able to accept. These too may represent a compromise between the political groups, but even if they have been arrived at by majority vote the members of the delegation will normally seek to defend and to maximise the position of the institution as a whole. As one former Council official predicted, "Article 189b will see in the field a Parliamentary delegation united in determination to have its way, and buttressed by hardline resolutions voted in plenary".<sup>18</sup>

Thus, at the start of the Committee meeting, the co-chairmen begin by outlining the respective position of their institutions. (In Parliament's case, the rapporteur will normally take the lead, supported by the committee chairman.) Other members only intervene to clarify a particular point. Members of Parliament's delegation will add to the arguments made by the rapporteur and will intervene generally to support one another. The national delegations on Council's side, however, have a tendency to entrench themselves behind the Presidency and leave the latter to speak for them. However, this situation is evolving and it has for example become the practice for any member of the Council who has not voted in favour of the Council's initial common position to explain the reasons why. (Likewise, if there is a strong minority position within the parliamentary delegation this will increasingly make itself known.) Apart from stressing national positions, Council members otherwise

only speak in support of the Presidency on the most sensitive points, where the latter's authority might have been placed in doubt, but no independent contributions aimed at bringing points of view closer together have yet been made on their part.

Whenever possible compromises are explored this means that, as soon as they develop the concrete form of a proposed text, Council always has to ask for the proceedings to be suspended to allow its delegations to consult, the Presidency being unable to speak on their behalf in respect of the new text and unwilling for Council to be seen deliberating or even voting on the proposal in front of the MEPs. When the meeting resumes, the co-chairmen inform it of the outcome of the separate deliberations and, if appropriate, note that agreement has been reached. In a few cases, it has been possible to conclude the proceedings without suspending the meeting, but frequently a large number of interruptions are needed before a compromise is reached. It is above all for this reason it is hard to predict the length of the meeting or when it will end. In the majority of cases the conciliation has had to be resumed at a later date. This makes for an inefficient use of negotiating time and an unnecessary proliferation of meetings.

Parliament takes a different approach which reflects the view that the Conciliation Committee needs a large measure of autonomy to be effective, and this means that the representatives involved should no longer act primarily as members of their respective institutions but as members of the Conciliation Committee. Thus, MEPs are more ready than their Council counterparts to engage the other side in direct questioning and individual criticism while at the same time being open, flexible and active in the search for a compromise.

The attitude of 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 Council thus permit themselves the luxury of leaving the search for a compromise to others (their Presidency and the MEPs). The compromise must be sufficiently attractive to persuade them to change their minds.

Normally, votes by the parliamentary and Council delegations take place in separate meetings of the delegations, before the Committee meets if preparatory contacts have resulted in specific proposals, or during the breaks in the Committee proceedings. In some cases, the vote has taken place during the Committee meeting, which seems more in line with the spirit of the Treaty.

#### 4.5 The need for preparation and informal contacts

Given the factors outlined above - the cumbersome procedure, the inflexible deadlines imposed by the treaty and the difficulty the Council has with negotiating in the formal setting of the Conciliation Committee - both sides obviously have an interest in informal negotiating mechanisms and in an optimal preparation of their respective positions before the formal process begins.

Even if the Council delegation came to the Conciliation Committee more prepared to enter into on-the-spot negotiation, it must be remembered that the actual size of the meetings militates to a large extent against the prospect of genuine and dynamic negotiation. As indicated above, the 15-member delegation of Parliament sits opposite 15 members from the Council. But attendance at the Committee does not stop there. Each Council representative may be accompanied by up to five assistants; the President of the Council, in addition to his national officials, will be assisted by five or more Council officials. The members of Parliament, together with the President of Parliament -if he is leading the delegation himself - are assisted by up to 10 officials from the secretariat.<sup>19</sup> On top of all this, the one of more members of the Commission will be assisted by advisers from their private office and at least



three officials. Meetings may therefore involve a total of almost 300 people, not counting the interpreters for 11 official languages.

This robs the proceedings of spontaneity and flexibility. Just as is the case with internal Council meetings, it also means *inter alia* that the rule of confidentiality is observed more in the breach. The two administrations have attempted to impose mutually agreed limits on the number of participants in the Aide-mémoire, but in practice these are difficult to enforce. In this respect Council's secretariat seems to have more difficulty in imposing discipline on the national delegations. Parliament's leadership has for example prohibited members' personal assistants from attending but only against the opposition of the members concerned.

The forced formality of such large meetings means that prior informal contacts between representatives of both sides have taken on crucial importance. The Treaty lays down a cumbersome procedure with anything up to four readings. However, there is no obligation to implement all the stages of the procedure: on the contrary, in Parliament's view the aim should be to seek agreement in the initial stages. Common responsibility for the final text begins with submission of the proposal by the Commission (or even prior to that if the Commission has chosen to issue green or white papers or other consultative documents in advance of legislative proposals).

Such an approach increases the importance of the first reading, in which Parliament should be in a position to take up a position, in full knowledge of the situation in Council, which it will then defend, with an appropriate negotiating strategy, until the end of the procedure. This implies a more disciplined and selective choice of amendments, but also much closer contacts with the other institutions from the beginning. Under forms of decision-making which preceded codecision, the object of these informal contacts was to get the Commission to incorporate Parliament's views in its draft legislation before it was sent to Council. While the Commission's support is still useful under codecision, now the object should be for Council and Parliament to sound each other out as early as possible in order to focus the later stages of the procedure on the outstanding points of genuine disagreement. To date, therefore, some of Parliament's committees have not only consulted with the Commission at this stage in the legislative process, but also with the officials presiding the relevant Council working group.

"Co-responsibility" in the interests of efficient decision-making requires not just close cooperation but also openness on both sides. Parliament, as a legislature, is an open institution *par excellence*, whereas Council still has far to go in this respect, publishing neither its official agendas or minutes. As a result of the inter-institutional agreement of 1993 on transparency (which was adopted at the same time as that on codecision) the Council undertook to publish its common positions and to publicise the results of its votes by press releases. The traditional secrecy of Council is perceived by many MEPs to give it an unfair advantage during conciliation. Since Parliament publishes its draft agendas in advance, its intentions are always transparent, whereas it sometimes has difficulty in reading the Council's intentions particularly at critical points in conciliation negotiations. Often Parliament has to rely on studying Council's press releases and unofficial sources such as Agence Europe to inform itself of events in Council and Coreper, just like everybody else.

For example, at the time of writing, the procedures whereby the Council communicates the outcome of its second reading have still not been standardized. Frequently, the Council fails to inform Parliament when it has accepted all the amendments. If it does not accept all the amendments, it often simply makes a formal communication without specifying the amendments concerned or the reasons for its refusal. It also fails to mention the date on which it reached its decision - which makes it impossible to verify whether Council has kept to the three-month treaty deadline for its second reading. This obviously makes it harder for Parliament to prepare its initial negotiating position - and leaves Council greater flexibility in its approach to the negotiations. As we have seen in the example of the packaging directive above, this lack of official communication has sometimes been made an issue by Parliament in the negotiations.

In the early conciliations, the first Committee meeting was often wastefully taken up by the Council Presidency merely explaining which amendments Council could or could not accept and why.

This was another reason why informal prior meetings became important. Now, after the outcome of the Council's second reading has been received, the President of Parliament convenes the delegation for a preparatory meeting in order to agree on priorities and strategy for the negotiations. It is now usual for the delegation to mandate the chairman and rapporteur of the committee responsible to make informal contact with the Council presidency in order to explore possible compromises, or if necessary, to find out what the Council position actually is. Generally speaking, these contacts take the form of a dialogue attended by the chairman and rapporteur of the committee responsible, the chairman of Coreper and the Commissioner responsible. At this meeting, the chairman of Coreper explains why the Council has not adopted Parliament's amendments. Parliament's representatives explain why Parliament confirmed its amendments at second reading. If these exploratory contacts open up the possibility of an agreement, a date is agreed for the committee's first meeting.

In some cases, it has not been possible to clarify the situation on the basis of a single dialogue meeting and others have followed after Parliament's delegation and Coreper have re-considered the situation. In other cases, it was thought desirable to convene the committee immediately without a preliminary dialogue meeting. The growing practice of organising these informal meetings has meant that formal Conciliation meetings can run rather more smoothly and efficiently.

Generally speaking, just before the committee meeting, Parliament's delegation meets again to hear the report by the chairman and rapporteur on the results of the preparatory work and to determine its definitive position. The 15 meetings of the committee were each immediately preceded by a preparatory meeting of Parliament's delegation. The delegations also met on 19 other occasions to prepare conciliation procedures. The delegations have presented 14 reports to plenary, which normally require approval by a post-conciliation meeting of the delegation.

As indicated above, the burden of these frequent meetings have sometimes been relieved by the application of a written procedure. Parliament has accepted such flexibility in a spirit of goodwill and cooperation. But the substitution of such informal arrangements for the strict procedures laid down by the treaty has clear limits. Given the frequently unco-operative attitude shown by Council, the only way the Parliament may be able to force the Council to negotiate is by insisting on formal set-piece meetings and on a strict application of the procedure.

#### 4.6 The use of "declarations in the minutes"

Of the many practices typical of its own decision-making which Council has carried over into conciliation, "declarations in the minutes" have been one of the most useful but also one of the most controversial. When it has not been possible to reach a compromise on the basis of the amended text of the legislative act alone, the Committee has had frequent recourse to declarations to be entered in the minutes, as we have seen in the examples discussed above. These declarations may be common to the three institutions or may be made unilaterally by a single institution. In one case, the Committee has also permitted a declaration from Council minority delegations. In a number of cases, it has also agreed to publish a declaration in the Official Journal along with the legislative text.

The legal status of these declarations is still unclear. Parliament's Legal Service has analysed the case law of the Court of Justice on declarations entered in the Council's minutes.<sup>20</sup> It emphasizes that, in order to have legal effect in respect of third parties, declarations must be published in the Official Journal, must be made by the legislator itself and must be in conformity with the legislative provisions to which they refer. If they consist of declarations published in the minutes of the Conciliation Committee or in the Official Journal, they differ from declarations entered in the internal secret minutes of the Council and approximate to the concept of an inter-institutional agreement. (The Legal Service considers that in certain circumstances inter-institutional agreements may have legal force and may have restrictive implications for the signatories as well as for third parties.)<sup>21</sup>

#### 4.7 Linkage of conciliation and constitutional issues

Council has had to accept the Parliament's using codecision to raise questions of a fundamental constitutional nature. Because of this, the conciliation process has had a tendency to become involved in institutional questions of a more fundamental nature than the legislation under consideration. This

has led to acts of general application which resolve an issue of institutional conflict being adopted on the back of a codecision procedure. Conciliation has thus to some extent become a forum in which the two legislative institutions confront each other over their constitutional differences, with normal legislation sometimes the hostage of wider concerns. Playing a negotiating strategy of constructive linkage, the Parliament can exploit the strict deadline of six weeks and the overriding interest of both sides in compromising and having successful legislation to extract concessions on institutional questions. During its first year of implementation, the codecision procedure has led the institutions to conclude two inter-institutional agreements of general application: on "commitology" and budgetary "amounts deemed necessary" (or "ADNs"). These are described below.

Because of the tendency of conciliation to give rise to institutional questions, the President of Parliament recently asked the Committee on Rules of Procedure to consider the possibility of systematically including a representative of the Committee on Budgets and a representative of the Committee on Institutional Affairs in each delegation to the Conciliation Committee.

#### 4.7.1 The "Modus vivendi" on commitology

Since the 1960s Parliament has opposed the method whereby the Council subordinates the Commission's executive powers, exercised either by virtue of the Treaty (e.g. Article 205 of the EC Treaty) or by delegation in a Council decision, to committees made up of national civil servants. In Community jargon the issue has been given the unfortunate name "commitology". Despite a joint declaration annexed to the Single Act requiring it to make the delegation of powers more flexible, the conflict worsened in 1987 when the Council adopted a general decision which provided for numerous types of committee, most of which were deemed inappropriate or even unacceptable by Parliament and the Commission.<sup>22</sup>

The situation became untenable following the entry into force of the codecision procedure provided for by the Maastricht Treaty: the implication was that Parliament, as co-legislator, supported this practice and at the same time restricted its own powers regarding the implementation of its legislative acts. Parliament subsequently established its position on this issue in the De Giovanni resolution of 16 December 1993. The Council, which wished to postpone the question until the Intergovernmental Conference in 1996, refused to enter a debate on the matter for several months. It is now clear that Parliament's consistent opposition to the commitology arrangements in codecision acts, which culminated in its rejection of the Council text on voice telephony (described above) and meant that a laborious search for ad hoc compromise formulae was needed in other cases, is what led the Council to change its stance.

Under the auspices of Jean-Louis Bourlanges and Biagio De Giovanni, who were appointed by the Committee on Institutional Affairs to explore possible compromises, the institutions finally agreed a "Modus vivendi", which was signed on 20 December 1994 and will run only until 1996.<sup>23</sup> This agreement makes no revolutionary changes to the situation in place since 1987 but, pending the review of the Treaty in 1996, enables Parliament more easily to monitor measures for implementing legislation jointly adopted with Council and enables it to be involved in the final decision in the event of disputes between committees and the Commission. The period between now the end of the IGC to be convened in 1996 will show whether the institutions manage to achieve harmonious implementation of the commitments that they have made.

#### 4.7.2 The incorporation of financial provisions into legislative acts

The joint declaration of the institutions 6 March 1995 which resolved this issue eliminates institutional differences concerning the scope of the financial provisions contained in a legislative act without the agreement of the budgetary authority.<sup>24</sup> As Parliament gradually acquired more budgetary powers, the Council increasingly resorted to setting maximum amounts of expenditure in its legislative acts. Despite the undertaking made in the 1982 joint declaration, under which the fixing of maximum amounts by regulation had to be avoided, it continued its previous practice by fixing maximum "amounts deemed necessary". It subsequently "legalized" this practice, at least as far as the framework research programme was concerned, by including it in the Single Act and the Maastricht Treaty.

When the Interinstitutional Budgetary Agreement was signed in 1993 the institutions realized that they needed to improve the working of the 1982 agreement. In July 1994 the Commission therefore presented a communication which analyzed the situation and proposed possible solutions. However, it was only under the pressure of the time-limits set by the conciliation procedure on the Socrates and Youth for Europe programmes that the institutions started genuine negotiations and subsequently established an agreement in the form of a new joint declaration. in January 1995. With regard to acts adopted under the codecision procedure, the declaration accepts the inclusion of a financial framework in multi-annual programmes, but at the same time spells out the conditions under which the budgetary authority may depart that framework. For other acts, the declaration reaffirms the 1982 principle whereby the inclusion of financial provisions must be avoided. If the Council nonetheless includes a financial reference, this amount does not affect the powers of the budgetary authority.

Parliament and its Committee on Budgets have thus achieved institutional objectives that they have pursued for more than 20 years, namely recognition of the primacy of the budgetary authority, as against the legislator, with regard to allocating the resources available, and an improvement in the tools at its disposal to assess the need for appropriations. In the run-up to the 1996 Intergovernmental Conference, this agreement clearly puts the codecision procedure on a special footing, and can be seen to introduce the logic of the codecision procedure into the budgetary conciliation procedure (see the next section below).

## 5 EXCURSUS: CODECISION AND OTHER DECISION-MAKING PROCEDURES

Other decision-making procedures continue to provide for the direct involvement of the Parliament in decision-making with Council. In addition, an older form of conciliation between the two institutions which arose in the context of budgetary decision-making can still be applied to legislative proposals. The Treaties of 1970 and 1975 which introduced the system of the Community's "own resources", also granted Parliament budgetary powers as one half of a new "budgetary authority" together with Council, so-called in order to distinguish the budget from legislation, for which different procedures applied. In the "legislative authority" at that time it was the Council which predominated whereas for the budget, a form of codecision had been introduced. The framers of the Treaties, aware of the risk of conflict, attached a resolution requiring the Council, in the legislative procedure, "to maintain the closest cooperation with the Assembly in the examination of such acts and to explain to it such reasons as may have led it to depart from the Assembly's opinion". This resolution gave rise to the budgetary conciliation procedure, which was instituted by the Joint Declaration by the European Parliament, the Council and the Commission of 4 March 1975. (To distinguish it from the procedure under codecision, in French the term "concertation" is still used to refer to this older form of conciliation).

These forms of conciliation continue to be important. They are particularly significant given the development of other legislative decision-making procedures, namely cooperation and assent. Parliament's delegation for budgetary conciliation is formed in the same way as for legislative conciliation. (Rule 63) According to the declaration, "the aim of the procedure shall be to seek an agreement between the European Parliament and the Council". It applies to "acts of general application which have appreciable financial implications", and also to financial regulations adopted on the basis of Article 209 of the EC Treaty. Thus, although it was signed at a time where there was only a procedure for simple consultation of Parliament, the joint declaration has general scope and may be applied to other procedures. As far as the cooperation and codecision procedures are concerned, this conciliation procedure may be replaced by a dialogue between the two readings by Parliament.<sup>25</sup>

Most interesting is the way conciliation can be applied to the assent procedure. Since the Single Act, assent has applied to acts of accession and association (Articles 237 and 238 of the EC Treaty). Since the entry into force of the Maastricht Treaty, it has also extended to most international agreements (Article 228(3)), as well as to certain legislative matters (Articles 8a, 105(6), 106(5), 138(3) and 130(d) of the EC Treaty). The importance of assent was demonstrated by its application to the

arrangements for the European Economic Area (EEA), to the accession of Austria, Finland and Sweden (in May 1994) and to the GATT agreements (in December 1994). The financial implications of an international agreement are evident and the 1975 joint declaration therefore applies. If an international agreement has "appreciable financial implications" the assent procedure must be used instead of the simple consultation procedure (Article 228(3)). The Council hesitated for a long time before seeking Parliament's assent to the GATT agreements, but it finally followed the Court of Justice's opinion of 15 November 1994. Despite the delayed submission of the documents, close cooperation between the committee responsible, the Council Presidency and the Commission enabled Parliament to deliver its opinion at the December plenary session and for consideration to be completed within the specified time-limit, without it being necessary formally to open a budgetary conciliation procedure.

As regards assent to legislative acts, Rule 80 of the Rules of Procedure states that budgetary conciliation shall apply when Parliament approves "recommendations for modification or implementation of the proposal". Parliament applied the procedure in the case of the regulation setting up the Cohesion Fund.

The creative application of conciliation to the assent procedure compensates for the weakness of Parliament's position when it is simply called upon to express a "yes" or "no" opinion, by giving it greater influence over the content of measures submitted to it and obliging the other institutions to take its views into account when framing the measures. In advance of treaty negotiations in which the Community is involved, for example, Parliament can set out its views beforehand in non-legislative resolutions and expect more attention to be paid to its views when the Council establishes the EC negotiating position.

Conciliation also continues to be used in the context of budgetary decision-making. In 1994 it was initiated on around ten acts concerning own resources and the financial regulation. These related to the practical implementation of the conclusions of the Edinburgh European Council concerning the financing of the Community until 1999. Agreement was reached for example, on aspects of the decision to increase own resources (a decision which required ratification by each member-state), a decision on budgetary discipline, the regulation setting up a loan guarantee fund, and on the implications of these changes for the basic financial regulations governing the budget and own resources system.

## 6 CONCLUSIONS

### 6.1 Assessments by Council and reform proposals

The Treaty on European Union provided for the inter-governmental conference to be held in 1996 *inter alia* to review the codecision procedure and in particular to consider widening its scope.<sup>26</sup> The Corfu European Council of June 1994 established a "reflection group" to prepare for the IGC, (in which 2 representatives of the European Parliament shall participate) and invited the institutions to submit reports on the functioning of the Treaty. Council adopted its report on 20 April,<sup>27</sup> and the Commission shall adopt its report soon. Parliament's Institutional Affairs Committee approved a draft report to plenary on 2 May drawn up by MEPs David Martin and Jean-Louis Bourlanges, on the basis of which a resolution is to be adopted at the May plenary session. The European Council was also called upon by Article D of Maastricht Treaty to submit an annual report to the Parliament on the progress achieved by the "Union", and in preparation of the Cannes summit next June, the Council has approved a draft.<sup>28</sup>

Council has not discussed concrete proposals with regard to codecision (that will be left to the representatives of the member-states in the Reflection Group and later in the IGC) but has limited itself to a description of how the procedure has functioned to date. Council would seem to agree that the early procedures in 1994 were characterised by administrative teething problems and that the complexity of the procedure has made its application more difficult. Although it has been acknowledged that fears were expressed within Council in the beginning about its capacity to adapt, the consensus appears to be that its machinery has coped adequately with the requirements of the new

procedure. The important thing for Council is the way it claims to have been able to preserve the balance that it achieved when it adopted the common position throughout the conciliation procedure. For Council, codecision requires both institutions to act in a consistent manner if the procedure is to work well, the sub-text being that the Council does not seem to think that the Parliament has always acted in this way. Questions have thus been raised about the way Parliament has linked codecision with other issues and has expanded negotiations to take up amendments which did not obtain the necessary majority in plenary. Undoubtedly also the failure of the biotechnology directive has led to questions being raised in Council about the "contractual capacity" of Parliament's delegation to the Conciliation Committee in its relation to the plenary.

Parliament's proposals for the IGC contained in the draft Martin/Bourlanges report proposes that codecision should be generalised and simplified, and the other decision-making procedures rationalised. Thus, it proposes that the cooperation procedure should be abandoned, consultation should be retained only for decisions in foreign and security policy (where Council has so far failed to apply it systematically) and assent should apply to decisions which require ratification by the member-states (amendments to the treaties, international agreements, accession and own resources). Codecision should apply to everything else<sup>29</sup>, but the procedure should be changed to allow it to be terminated when there is agreement at first reading. In addition, the phase of "intention to reject" should be abolished and a simpler form of conciliation procedure introduced at this point, but retaining the possibility for Parliament to reject the common position if it does not obtain satisfaction in the conciliation.

As regards the third reading the idea of harmonising the majorities required for rejection, (whether conciliation succeeds or not) found favour with the committee. Now only a simple majority is required to approve a joint text from a successful conciliation, and by definition therefore a simple majority is all that is needed to reject it, as was the case for the biotechnology directive. It remains to be seen if this idea will be supported by the plenary. It is certainly an idea that has found a resonance in Council.

Another proposal which was floated in the Institutional Affairs Committee was to abolish the third reading stage and to end the procedure with conciliation.<sup>30</sup> This would mean an unambiguous shift from a system of "negative assent" as at present (an act can only be adopted if it is not rejected by Parliament) to a more positive system of codecision in which an act requires the express agreement of both Council and Parliament to be adopted. Such an arrangement would also increase the significance of the Conciliation Committee as an autonomous institution, and probably require a thorough transformation of the Council in the longer term.

## 6.2 The impact of procedure from the point of view of Parliament

The general conclusion must be that the codecision procedure is fundamentally different in nature from the cooperation procedure: it involves a common act of the Council and Parliament. Throughout the procedure leading to the adoption of the act, the two institutions are on an equal footing. Parliament no longer has to give an "opinion" which the Council, deciding on its own, may or may not take into account. It participates fully in legislative decisions. So radical are the differences between codecision and existing decision-making that it is legitimate to say that Article 189b has created a new kind of legislative act, where the quality of the act is determined by the process which led to its adoption: in this case, a more democratic process that has hitherto been the case. Codecision acts now seem to occupy a superior position in a new hierarchy of norms which to some extent supersedes previous categorisations, such as the classification of acts into regulations, directives and other instruments.

Given that the procedure involves Parliament and Council in a new and challenging kind of interaction with one another, by and large the procedure has worked surprisingly well and so far has not been a major source of institutional conflict. Its efficiency can be judged by the fact that the Committee had to meet only 16 times on 12 common positions (once during Parliament's second reading and 15 times after Parliament's second reading). In the case of five of these texts (the framework programme for research, liberalisation of voice telephony, regulation of motorcycle engine

power, and the Youth for Europe and Socrates educational programmes) the committee had to meet twice. Only the three directives on packaging, VOC emissions and biotechnology patents required three meetings of the Committee before agreement was reached. (Note that the Committee can deal with more than one legislative proposal at a time.)

As far as the European Parliament is concerned, it has made every effort to ensure that the procedure works smoothly. It should be recalled that Parliament did not have a hand in shaping the treaty rules concerning codecision and has had to accept working practices which go against its own democratic standards, like the fact that the Conciliation Committee meets behind closed doors, and the fact that the plenary has to place its confidence in a restricted delegation of members to negotiate on its behalf. Given the hiccups that could quite easily have occurred on Parliament's side, the fact that they have remained the exception reflects the discipline provided within Parliament by its leadership bodies and by its party groups. As was the case for the cooperation procedure, Parliament has been a reliable co-legislator and generally has had no major problems in operating the strict deadlines and other rules laid down by the treaty, apart from the few exceptions noted above.

From Parliament's perspective it is far from clear that Council has fully come to terms with the implications of the new procedure. At a practical level, the Council's willingness to make the procedure work was reflected in its readiness to negotiate the inter-institutional agreement on procedural arrangements. But this provided only the bare minimum of clarification for a treaty text which left much scope for disagreement about procedure. Much was left to be worked out during the first applications of the procedure in 1994. The Aide mémoire which has been the subject of discussions between the secretariats of Parliament and Council provides much more comprehensive guidance as to how codecision and conciliation should be operated. It is hoped that it will receive a more official status in the near future. In general conciliation has imposed on the Parliament a certain number of the working practices typical of the Council. In so far as these practices are not entirely suited to negotiation and joint decision-making between two equal branches of a legislature, the question is how far the Council can evolve in order to make the procedure more efficient. That in turn will depend to a large extent on how the problems in Council with efficiency and transparency are resolved, particularly in view of the forthcoming enlargements which are likely to exacerbate the situation unless reforms are undertaken. In the perspective of enlargement, what it will take to ensure the continued effectiveness of codecision and conciliation will be a Council that can amalgamate the national interests of its members more efficiently by increased majority voting using a different system of weighting to take account of relative population. A development of the leadership and coordination roles of the Presidency would also help. It remains to be seen if the prospect for such developments will be opened up by the 1996 IGC or not.

Gary Miller, Brussels, May 1995

This paper would not have been possible without the cooperation of my colleagues in the Conciliations Secretariat, and in particular Roger Vanhaeren, Emilio De Capitani and Clara Albani-Liberali. A large part of this paper relies on our joint efforts.

NOTES

ANNEX 1: List of meetings of Conciliation Committee

ANNEX 2: List of LEX legislation  
 NOTES AND REFERENCES

ANNEX 1: MEETINGS OF THE CONCILIATION COMMITTEE (ARTICLE 189b)

Date	<sup>3</sup> Council: Subject <sup>3</sup> Ministers	<sup>3</sup> EP: Coreper <sup>3</sup> Pres.	Vice- pres.	Comm. pres.	Others resp.
4.3.94	FP research <sup>3</sup> 9 <sub>3</sub>	3	<sup>3</sup>	3	6 2
21.3.94*	FP research <sup>3</sup> 10 <sub>3</sub>	2	<sup>3</sup> 1	2	4 3
22.3.94	Engine power <sup>3</sup> 2 <sub>3</sub>	10	<sup>3</sup> 1	3	6
29.3.94*	Voice telephony <sup>3</sup> 1 <sub>3</sub>	11	<sup>3</sup> 1	2	4
12.4.94*	Deposit <sup>3</sup> 1 guarantees <sub>3</sub>	11	<sup>3</sup> 1 3	1	6 1
26.4.94	Recreational <sup>3</sup> 1 craft <sub>3</sub>	11	<sup>3</sup> 1	2	4
	Mechanical <sup>3</sup> couplings <sub>3</sub>		<sup>3</sup> 3		
	Voice telephony <sup>3</sup> <sub>3</sub>		<sup>3</sup> 3		
20.9.94*	VOC, packaging <sup>3</sup> 1 Time-share <sub>3</sub>	11	<sup>3</sup> 1 3	2	9 1
18.10.94	Engine power** <sup>3</sup> 1 <sub>3</sub>	11	<sup>3</sup>	1	6
19.10.94*	VOC, packaging <sup>3</sup> 1 <sub>3</sub>	11	<sup>3</sup>	3	9
8.11.94	VOC, packaging <sup>3</sup> 1 <sub>3</sub>	11	<sup>3</sup>	2	10
28.11.94	Biotechnology <sup>3</sup> 1 <sub>3</sub>	11	<sup>3</sup>	2	5 2
5.12.94*	Youth, Socrates <sup>3</sup> 7*** <sub>3</sub>	6	<sup>3</sup>	2	6 1
13.12.94	Engine power <sup>3</sup> Written <sub>3</sub> proc. <sup>3</sup>				
12.1.95*	Biotechnology <sup>3</sup> 1	14	<sup>3</sup>	1	8 3



		3		3				
		3		3				
23.1.95	Biotechnology	31	14	3	2	8	4	
		3		3				
		3		3				
25.1.95	Youth, Socrates	32***	14	3	3	7	3	
		3		3				

- \* On EP premises; the other meetings were held on the Council's premises.
- \*\* A meeting on biotechnology was scheduled for the same day, but had to be cancelled.
- \*\*\* The Presidency was represented by two ministers.

Covers meetings only until end of January 1995  
ANNEX 2: LIST OF LEX LEGISLATION

LEX N°	SUBJECT	PROCEDURE	DATE OF	TEXT
3	3N°	3SIGNATURE	3CORRESPONDS TO	
3	3	3	3	
AA				
AA				
1	3Directive 94/9/EC of the European Parliament and the Council on the approximation of the laws of the Member States concerning equipment and protective systems intended for use in potentially explosive atmospheres (OJ L 100, 19.4.94)	3COD0375	323.3.94	3Common position
		3	3	3
		3	3	3
		3	3	3
		3	3	3
AA				
AA				
2	3Directive 94/10/EC of the European Parliament and the Council materially amending for the second time Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations (OJ L 100, 19.4.94)	3COD0445	323.3.94	3EP second reading
		3	3	3
		3	3	3
		3	3	3
		3	3	3
AA				
AA				
3	3Directive 94/11/EC of European Parliament and Council on the approximation of the laws, regulations and administrative provisions of the Member States relating to labelling of the materials used in the main components of footwear for sale to the consumer (OJ L 100, 19.4.94)	3COD0378	323.3.94	3Common position
		3	3	3
		3	3	3
		3	3	3
		3	3	3
		3	3	3
AA				
AA				
4	3Directive 94/12/EC of the European Parliament and the Council relating to measures to be taken against air pollution by emissions from motor vehicles and amending Directive 70/220/EEC (OJ	3COD0448	323.3.94	3Common position
		3	3	3
		3	3	3
		3	3	3
		3	3	3
		3	3	3







