Informal Governance in the European Union

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There will never be a decision against a government that faces strong problems selling or implementing it at home. In these cases, we always try to find a compromise.

—Interview with a Council official, January 2008

After the Commission has officially submitted its proposal for a legislative act, the Council of Ministers and today also the European Parliament have to decide whether they want to adopt or change it. In a sense, this procedure is not very different from the decision-making procedures in other international organizations. In the United Nations, for example, the members of the Security Council take votes on official proposals for a resolution.

But there are also some notable differences with the way other international organizations typically work. The first is that the voting rules in the Council strongly privilege the adoption of the Commission’s legislative proposal over its amendment, since it is easier for the ministers to find a majority who endorses it than to agree unanimously on changes. As Mark Pollack (2003b, 85) notes, these rules provide greater protection for the agenda setter’s proposal than in most U.S. congressional legislation.

The second, more recent difference is the involvement of the European Parliament in the legislative process. To be sure, there are other international parliaments such as NATO’s Parliamentary Assembly or the United Nation’s General Assembly. The European Parliament, however, is now far stronger than these assemblies and, at least officially, on a par with the Council of Ministers.

Why did the member states cede their national vetoes and make it so difficult for themselves to alter the Commission’s legislative proposals? The reason is that surrendering the right to veto individual decisions constitutes a strong commitment to cooperation, since the member states accept that economic integration
might necessitate that they be overruled on individual decisions. The rules, in other words, allow them to demonstrate their determination to attain this objective even against the myopic interests of one or the other governments under domestic pressure for protection. Although the European Parliament’s empowerment does not undermine the commitment function of the voting rules, it cannot be explained in these terms and is probably better understood as an attempt to attenuate the European Union’s perceived “democratic deficit.”

Initial studies of Council decision making and the European Parliament were mostly descriptive and remarkably knowledgeable in nature. The past two decades, however, have witnessed an explosion of formal and quantitative analyses. Facilitated by the off-the-shelf availability of models of legislative bargaining, changes to the EU’s legislative procedures, and an increasing availability of decision-making data, more and more scholars have approached everyday EU politics similar to the way scholars study decision making in the U.S. Congress.

A first line of research sought to explore the ability of individual governments to influence Council decisions. Several scholars (see, e.g., Hosli 1993) computed power indexes, which represented the proportion of all possible winning coalitions to which an individual government is pivotal. Interested in the efficiency of the legislative process, scholars such as Jonathan Golub (1999) and Thomas König (2007) have investigated the determinants of decision-making speed in the Council. Christophe Crombez (1996) and Bernard Steunenberg (1996), among others, have pioneered formal models to investigate the effect of legislative procedures, information, and power on the substance of legislative bargaining between the Council and the Parliament. Although tests of these formal models are highly intricate, a group of scholars sought to meet the challenge and evaluated the models’ empirical implications with a newly collected data set of various Council decisions. Although the results still have to be taken with a grain of salt (Bueno de Mesquita 2004), this project found that so-called procedural models that emphasize the power of formal rules fare worse than models that give more weight to informal bargaining among the member states (Achen 2006b). Corroborating this book’s argument, Chris Achen concludes, “However decision-making is carried out, it does not seem well described solely by the formal rules. Informal norms and procedures appear to play a more central role.” (Achen 2006a, 295)

A formidable challenge that empirical tests of theoretical models of decision making face is that we know little about what the member states and other legislative actors want. More recently, studies have therefore turned to the analysis of preferences and cleavages within the Council and the European Parliament. Simon Hix and colleagues (2007) show that Left-Right cleavages have become increasingly noticeable in the European Parliament. Analyzing speeches, Sven-Oliver Proksch and Jonathan Slapin (2010) contend that national divisions and party positions
toward deeper EU integration are the most important dimensions of parliamentary speeches. Depending on data and time period, students of the Council find all kinds of cleavages or coalitions along redistributive dimensions (Zimmer, Schneider, and Dobbins 2005), between regions (Mattila 2009), or about regulatory solutions (Thomson 2009; Thomson, Boerefijn, and Stokman 2004).

Interestingly, and again corroborating this book’s argument, the most consistent finding of these studies seems to be that states’ preferences are quite difficult to predict (Thomson 2011, 134). In contrast to the existing literature, which continues to search the data for stable preference patterns, this chapter takes the contingency of preferences as its starting point. It argues that precisely because domestic preferences are difficult to predict, governments frequently need to mitigate the rules’ effects when a decision threatens to stir up strong distributive conflict at the domestic level. To be sure, this argument does not imply that voting rules and the rules governing decision making between Council and Parliament are not effective. It is precisely because they are so effective that they also harbor the potential of imposing excessive adjustment costs onto an individual group. To prevent governments from defying the implementation of EU law in these situations, the member states use informal governance in order to relieve these governments of excessive domestic pressure. Specifically, the governments refrain from voting against a cooperating partner under intense domestic pressure. Instead, they seek to find a consensus that accommodates this troubled government. At the same time, they seek to implicate the Parliament in these practices.

Liberal Regime Theory predicts that these practices of informal governance emerge especially in issue areas where the formation of domestic pressure is difficult to predict, while formal governance should be more noticeable in issue areas such as agriculture where domestic pressure is easier to predict. Given that the member states agree on the necessity of informal governance, its emergence and use is expected to generate conflicts between the governments and supranational institutions, rather than among the governments themselves. Let us now take a look beyond the treaty rules at actual decision-making practices.

**The Council of Ministers— the Consensus Machine**

The voting rules in the Council facilitate economic integration even against the myopic interests of one or more member states, since it is easier to adopt the Commission’s legislative proposal by a majority vote than to attain a consensus for its amendment. The flip side of these rules is that it is also easy to impose a legal act on one or more governments in the minority even if this act threatens
to create strong domestic conflicts in these countries. To prevent these situations, governments need to refrain from voting and attain the consensus that is necessary to collectively accommodate the government in difficulty. In the following, we therefore focus on the member states’ voting practices in order to investigate to what extent and why majorities in the Council restrain themselves from overruling other governments.

Before we proceed, however, a few caveats are in order regarding the data. Since there are no official voting records available for the time between 1958 and 1990, a large part of the analysis draws on semiofficial data from Council or national archives. However, these reports often code votes differently. In some data sets, for example, an abstention counts as a disagreement with the majority, whereas in other data sets a disagreement is an explicit negative vote. Where possible, this information is therefore complemented with qualitative data such as contemporary personal reports by ambassadors and other officials.


Shortly after the Treaty of Rome had come into force, the Council of Ministers made a habit of referring the Commission’s legislative proposals immediately to their experts for further study, instead of dealing with them officially. This practice permitted control over the timing of a decision, and it also allowed government experts to prepare the Council meetings in such a way that the ministers could concentrate their discussion on the proposal’s most important aspects.

The Council therefore recommended in 1960 that the ministries at home give their experts much more flexible instructions for the preparatory meetings (Conseil de la CEE 1960b; Rat der EWG 1960a).² It subsequently developed a large intergovernmental substructure throughout the 1960s with the ministers at the top, an ambassadorial Comité des Représentants Permanents (COREPER, or Committee of Permanent Representatives) in-between, and permanent and ad hoc working groups of government experts at the bottom. The working groups typically comprised the very same experts who had already advised the Commission in the preparation of its legislative proposal (Lindberg 1963, 53–65; Houben 1964, 97–100; Noël 1963; Alting von Geusau 1966, 235–40).

The various layers in the Council substructure sought to prepare decisions on legislative proposals in a way that the next higher level was willing to accept a number of preliminary decisions without further discussion (COREPER 1962; van der Meulen 1966). The permanent representatives hardly ever discussed items on which the working groups had reached a consensual decision (“Roman I-Points”), while they dealt in depth with items that had not been resolved by
the government experts (“Roman II-Points”) (Virally, Gerbet, and Salmon 1971, 651–53, 702–4). Similarly, all decisions on which the COREPER reached a consensus appeared as one single item (“A-Points”) on the Council’s agenda. The Council of Ministers then typically adopted all A-Points en bloc without any further debate. Issues that the permanent representatives had not been able to resolve (“B-Points”) were discussed in the Council of Ministers and then usually referred back to COREPER or the working groups with further instructions (Noël 1967b, 248).

The fact that the Council substructure served as a kind of “consensus machinery” is evidenced by the fact that the proportion of consensual A-Points relative to contentious B-points in the Council climbed dramatically when the number of working group sessions increased threefold over the course of the 1960s. As Emile Noël, the Commission’s first executive secretary, describes it: “True, the Commission proposal will always remain in the Council’s files and the Commission will be able to uphold it before the Ministers, but this prerogative can be rather theoretical if an agreement on quite different lines has already emerged before the Council session” (Noël 1967b, 244).

Because this decision-making practice supposedly ran counter to the spirit of the treaty and the Community Method, the Commission eyed the development of the Council substructure with great suspicion. Walter Hallstein, the Commission’s first president, was particularly critical of the involvement of government experts and the Permanent Representatives in decision making:

> The first danger is that the responsibilities, which the Treaty unequivocally confers to the Ministers, slip to functionaries to whom they do not belong…. The second danger is that… there is a reallocation of powers to the detriment of the supranational element. As a result of a newly developing habitude we run the risk that an administration develops within COREPER that assumes tasks that—according to the Treaty—belong to the supranational organ, that is, to the Commission. (quoted in Virally, Gerbet, and Salmon 1971, 712)

Other commissioners joined in these complaints, saying that Council of Ministers had shifted their responsibilities to an unaccountable Areopagus (council of senior public officials) of government experts that rivaled the staff of the Commission (Lemaignen 1964, 85). The Commission, therefore, initially refused to send its own senior officials to meetings within the Council substructure (Rat der EWG 1962). But when the Commission realized that this strategy did not prevent the Council substructure from making decisions, it gradually established contacts with COREPER (Noël and Étienne 1971, 433; Houben 1964, 104–7).
As the Council decentralized its powers to the substructure, it also became more differentiated horizontally. In addition to meeting in different ministerial formations, the ministers of agriculture decided to sideline the Council substructure by establishing their own Special Committee for Agriculture that reported directly to them, thus bypassing COREPER (Rat der EWG 1960b). The practices of this Special Committee and agricultural working groups differed substantially from other issue areas. The government experts responsible for agricultural matters did not adopt the “Roman-I-Point” procedure, and the representatives in the Special Committee agreed on far fewer consensual A-Points than their counterparts in COREPER. As a result, most legislative proposals on agricultural matters ascended quickly through the Council substructure to be discussed and decided by the ministers themselves. Thus, just as the Directorate General for Agriculture developed into a self-contained “Agricultural Empire” within the Commission, those government experts responsible for agricultural matters also secluded themselves from the rest of the Council substructure.

The Council substructure was conducive to consensus decision making. Not only were the government experts not authorized to vote but the informality of the discussions allowed governments to be more flexible. As Joseph van der Meulen, Belgium’s permanent representative in the 1960s, explained:

The advantages of COREPER become most apparent when tensions arise in the Council of Ministers.... These conversations [among the Permanent Representatives] would at a higher level give the impression that one is not pressing hard enough and not willing to succeed. (van der Meulen 1966, 25)

As a result, the Council virtually never made use of majority voting, despite the fact that, by the year 1965, eighty-eight treaty provisions were subject to this voting rule (Bundesministerium für Landwirtschaft 1965; Ophüls 1966, 193; Torrelli 1969, 94–96). As the German Ministry for the Economy noted,

More often than not you can hear the global assertion that the Council of Ministers decides by unanimity, and that majority voting is only going to be introduced in 1966. This is incorrect. There are plenty of decisions that are already subject to majority voting. (Bundesministerium für Wirtschaft 1965)

However, despite the fact that majority voting was permitted in a number of cases, in the Community’s first eight years the Council adopted only four to ten decisions, out of more than five hundred, against a minority (Vertretung der BRD bei der EWG 1965a). Observers of the Council spoke accordingly of a *horror majoritatis* (horror of majority) governing decision making in the Council in the first half of the decade (Houben 1964, 112–15).
Given that consensus decision making had always been the norm in the Council, the member states were taken by surprise when in 1965 a Commission proposal suddenly brought about a principled debate about majority voting. The debate was triggered when Commission president Hallstein violated an informal norm by announcing that he had placed a legislative proposal on agricultural finances before the European Parliament without consulting the governments in advance. This proposal sought to play off the member states’ interests by linking agricultural matters with budgetary matters as well as with a proposal to empower the European Parliament. The French president, Charles De Gaulle, was furious about this obvious ruse on the part of the Commission and decided to escalate the conflict by demanding the reintroduction of national vetoes when a country considered its “very important interests” to be at stake. To demonstrate his resolve, De Gaulle boycotted decision making by withdrawing all senior French representatives from the Council.

The other member states were baffled. In secret deliberations after the French withdrew, they considered De Gaulle’s public onslaught on majority voting as a pseudo debate on an abstract problem (“plus théorique que réel”) (Représentation Permanente de la Belgique 1966b). In an internal debate that ultimately led to the resolution of the conflict, the German Foreign Ministry notes with bemusement:

The rule has always been in practice that decisions are unanimous even in cases where the treaty provides for majority voting. We simply usually negotiate until we have reached consensus. (Auswärtiges Amt 1965, 2; see also Alting von Geusau 1964, 190; Pryce 1962, 35)

Importantly, all governments were, in principle, in complete agreement that majority voting should never be used against a country’s important interests. The main points of controversy concerned the codification of this informal norm and the definition of very important interests. France insisted that the authority to determine whether important interests were at stake lay with the respective government. The other member states resisted this proposal on the grounds that it was simply impossible to define this term in advance. As the German Foreign Ministry put it:

The term “vital interests” of a member state cannot be put in legal terms. Nor is it possible to list a number of situations in which the vital interests of a state can be considered in jeopardy. [A mere declaration of government] without any vindication or acknowledgement by the other council members would in fact lead to the abdication of the principle of majority voting. (Auswärtiges Amt 1965, 4)

France’s partners therefore argued that the decision to determine whether very important interests were at stake had to be a collective one (Représentation Permanente de la Belgique 1966a). The Dutch foreign minister, Joseph Luns,
also strongly cautioned against the demand to codify the French proposal, because he believed it would encourage even stronger domestic demands to defy the rules:

[The] French formula places governments in a thorny position at the domestic level. We will consequently face strong difficulties resisting all kinds of pressure, which will not fail to demand a veto on this and that national interest, no matter how unimportant. (quoted in Représentation Permanente de la Belgique 1966a)

The member states ultimately agreed to disagree. The Luxembourg Compromise, which concluded this “empty-chair crisis,” consequently produced a very ambiguous extralegal declaration, which states that while France insisted that the Council decide by unanimity in the event that a member state claimed that its vital interests were at stake, the other member states declared that they were prepared to search for a consensus only within a reasonable time period. The document acknowledges this contradiction by stating that the “six delegations note that there is a divergence of views on what should be done in the event of a failure to reach complete agreement” (European Communities 1966).

Given that consensus decision making had been the norm all along, the Luxembourg Compromise did not trigger any change in existing practices. Even so, a number of contemporary sources suggest that voting always remained an option after the Luxembourg Compromise. The Commission’s director general at the time, Christoph Sasse, remarked: “It is entirely wrong to think that the Luxembourg compromise had ousted the possibility of majority voting from the delegations’ minds. They are fully aware of the legal provisions” (Sasse 1975, 143).

In fact, other contemporary sources suggest that some majority votes still took place in practice. Emile Noël (1968) remarked that majority voting continued on questions of “average importance,” and considered it imprudent to vote on matters that aroused public interest (Noël 1973, 133–34; see also Amphoux et al. 1979, 123). These sources also agree that the votes that did occur were predominantly taken on agricultural and related budgetary matters (Streinz 1984, 52–73; Lahr 1983, 229; Sasse 1975, 136; Noël 1976a, 41; Ungerer 1989, 98).


The conclusion of the Luxembourg Compromise in 1966 coincided with a dramatic leap in the Council’s legislative activity in the second half of the 1960s. As figure 3 shows, the number of adopted legal acts increased fourfold between 1965 and 1970, and almost doubled over the course of the 1970s. The result of this sudden growth was a bottleneck in decision making.
This bottleneck, in combination with the upcoming accession of Great Britain and Denmark to the European Community in 1973, raised concerns about an imminent blockage of decision making (European Communities 1972a). In early 1970, the Commission president, Jean Rey, called on the member states to renounce the Luxembourg Compromise and apply the official voting rules more rigorously (Conseil des CE 1970, 3).

However, his plea met with a cool reception from the member states (Auswärtiges Amt 1970, 2). The German foreign minister, Walter Scheel, agreed in principle with Rey on the importance of majority voting. However, he also emphasized the necessity of the norm of consensus decision making in parallel to formal voting rules. For Scheel, it was not the compromise per se, but rather its ambiguity that allowed the member states to provide an optimal level of situational flexibility in every situation:

Still, we found a felicitous solution in 1966 [the Luxembourg Compromise], a formula that is just vague enough as to enable the Community to make important progress. This delicate equilibrium would not have been reached by a simple Council decision. We therefore need to continue to strive for solutions that are acceptable to all of us. (Conseil des CE 1970, 7)

When complaints about the increasing legislative backlog grew louder and louder (Bieber and Palmer 1975, 311), the member states began to look for ways to make the decision-making process more efficient (European

They also called on the national administrations to give government experts more flexible instructions to make even more preliminary decisions in the Council substructure (Rat der EG 1974b, 1974a; Council of the EC 1974). As figure 4 shows, the involvement of government experts consequently rose steeply in the late 1960s and early 1970s.

At the same time as the Council substructure sought to increase its efficiency, we can also observe a gradual change in the ministers’ voting behavior. First, individual governments increasingly abstained from decisions in order to enable the remaining member states to attain a unanimous agreement on amendments to the Commission’s legislative proposal (Henig 1973, 133; Rat der EG 1973; Noël 1976a, 41). Second, the member states increasingly had explicit recourse to majority decisions toward the end of the decade. In 1976, the Commission noted that a number of decisions were taken by majority vote in the Council that year, either because some Member States did not insist on pressing their views or because the Council formally recorded a majority vote (European Commission 1977, 34; European Communities 1977, 10; 1978).

A year later, the Commission observed that majority voting had become “standard practice” (European Commission 1978, 23). Several contemporary practitioners saw an even greater acceptance of majority decisions again from the early 1980s on (Noël 1985). Jean-Louis Dewost, the Council’s juris consult (official legal adviser), states: “We have moved from a few isolated votes each year...

The use of majority voting is most notable in the Agricultural Council. On one occasion in the early 1980s where prices for several agricultural goods were being determined, the member states openly overruled the British delegation despite its demand to be spared (Campbell 1986, 937–8; Teasdale 1993, 571; Swinbank 1989, 310). In fact, the available data show that votes in general were largely confined to agricultural matters.8

Channeling the Momentum (1987–1993)

In the 1970s and early 1980s, Council decision making was cranked up through a reinforcement of the Council substructure and a greater use of abstentions and majority voting. The lubricated machinery gained full momentum with the entering into force of the Single European Act in 1987, which extended majority voting to measures concerning the achievement of the Internal Market, most importantly to Article 100a on the approximation of domestic laws, regulations, and other national provisions.9

Contrary to the conventional wisdom that the Single European Act instigated a more frequent use of majority voting (Garrett and Tsebelis 1996, 281–83), the data show that voting peaked in 1987 and subsequently declined for the rest of the decade to early 1980s levels. Whereas in 1987 15 percent of all decisions were adopted by majority voting, the ratio fell to 12 percent and 9 percent in 1988 and 1989, respectively.10 In other words, the search for consensus remained a strong norm among governments despite the more frequent use of voting. The director general for competition at the time, Claus-Dieter Ehlermann (1990, 1104; Dashwood 1992, 79), confirms that the Single European Act did not result in a spectacular increase in the number of majority votes. Jean-Louis Dewost explains why:

It is the governments to which citizens and affected firms turn, and it is the governments that will have to face their reactions—politically or, in extreme cases, to maintain the public order. This explains why it is implicitly acknowledged by all actors of the Community game that it is necessary to strive for a reasonable consensus on sensitive issues. (Dewost 1987, 174, italics in the original)

New Rules, New Players, Same Game (1994–Present)

Although they extended the scope of majority voting and provided for more transparency in decision making, neither the 1993 Treaty on European Union, nor the 1997 Treaty of Amsterdam, nor the 2001 Nice Treaty, nor the accession
of new member states changed the fact that consensus decision making remained a very strong norm in the Council. According to data collected by Dorothee Heisenberg (2005, 72), the governments used majority voting in only 19 percent of the cases where they could have called a vote between 1994 and 2001. Data collected by Mikko Mattila (2009, 844) and a study by Robert Thomson (2011) suggest that this pattern has not changed since. In the postenlargement period from 2004 until the end of 2006, the governments overruled a minority in only about 10 percent of all cases. When this happens, the minority usually consists of isolated governments or quite small coalitions (Mattila and Lane 2001, 44).11

The few data that differentiate among issue areas suggest that majority voting is still largely confined to agricultural matters where approximately every third legal act is taken against explicit dissent.12 Hayes-Renshaw and colleagues conclude that some 25 percent of the decisions agreed under majority voting in 1994 were explicitly contested through negative votes and abstentions. “Of these, almost half were on agriculture and fisheries, with a further quarter on internal market issues, and the remainder thinly spread across other areas” (Hayes-Renshaw, Van Aken, and Wallace 2006, 165). They find the same pattern for the period between 1998 and 2004 (Hayes-Renshaw, Van Aken, and Wallace 2006, 171). Similarly, Mattila and Lane (2001, 42) find for the period 1995–98 that negative voting (explicit voting against a legal act) is most routinized on agricultural issues (28 percent), followed by 21 percent in the internal market, 18 percent in transport, with the rest, again, thinly spread across other areas.

This formal governance practice in the Common Agricultural Policy is reflected in considerably less decentralization within the Council. Whereas most ministers rely on government experts to prepare their decisions,13 the ministers for agriculture still make far less use of the Council substructure than their colleagues. Since the agricultural working groups have little discretion and the next highest level, the Special Committee for Agriculture, rarely reaches consensual agreements (Culley 2004, 204), most legislative proposals swiftly ascend to the level of the Council of Ministers, who are quick to take a vote (interview with a member of the German Permanent Representation, the term for the national embassies to the EU, Brussels, February 2008). Similarly, a Council official responsible for agriculture notes that “characteristically, the [government representatives] don’t get flexibility in the interest of getting something settled before Council; this is a big difference with my colleagues in COREPER” (quoted in Lewis 1998, 134).

The treaty rules make it much easier for governments to adopt a Commission proposal with a majority than to change it unanimously. A closer look at actual
voting practices reveals, however, that governments rarely ever vote at all. In fact, some variation over time notwithstanding, consensus decision making has always been a strong norm in the Council in almost all issue areas except for agriculture.

For the most part, the search for consensus agreements to change the Commission’s proposals takes place in the Council substructure, which consists of thousands of government experts with specific knowledge about the sensitivities at home. A former permanent representative underscores the importance of domestic sensitivities in a private conversation:

> Usually, there are only two or three delegations left that have difficulties with a proposal. They worry that a decision will lead some of their people to believe that “Europe isn’t that great after all.” We therefore always try to take the edges off a proposal. (interview in Brussels, February 2008)

Although the member states sometimes disagree about the norm’s interpretation in specific cases, there is little indication that any of them contests its raison d’être in principle.

The European Parliament—an Unlikely Accomplice

Initially, the Treaty of Rome merely required the Council to consult the European Parliament on a few rather minor issues. Over time, however, the Parliament massively gained in power in response to a combination of its informal twisting of the arms of the Council, the European Court of Justice’s very favorable interpretation of the rules, and the deliberate extension of Parliament’s influence on the part of the member states. Today, it acts as a co-legislator on formally equal footing with the Council, and the legislative procedure provides the Parliament with ample opportunities to challenge its counterpart in public.

The flip side of its empowerment, however, is that Parliament’s incentive to demonstrate its significance may jeopardize the accommodation of another government by bringing it to the attention of domestic opponents. Liberal Regime Theory therefore expects the governments to eschew public debates of sensitive issues in the Parliament where possible. This section therefore focuses on the actual use of parliamentary debates in order to show how the governments implicate the European Parliament into their practices of informal governance.
Benign Neglect (1958–1969)

The Treaty of Rome granted very little legislative power to the European Parliament; the member states were supposed to consult it on a few decisions, but they were under no obligation to heed its demands. However, the Council gradually gave in to parliamentary pressure to extend consultation to "very important" problems even if the treaty did not oblige it to do so. Toward the end of the 1960s, it also committed itself to consult Parliament on nonlegislative texts and to give reasons for departing from the Parliament’s opinions (Jacobs, Corbett, and Shackleton 1992, 179; European Parliament 2009b, 162–63).

Still, the European Parliament’s consultative function was largely a charade in that it did not precipitate much open deliberation, due to the Council’s influence on the Commission and the norm of consensus decision making. Thus, whenever the European Parliament was given the opportunity to voice its opinion, it was confronted with laborious consensus decisions that the governments were not going to open up anyway. Frustrated, it therefore demanded a clearer distinction between the stages of agenda setting and decision making in order to provide it real opportunities for a public contestation of the Council. A member of the European Parliament complained in 1964 that

the Council has tried to create a back and forth with the Commission, thereby suggesting modifications to the text [the legislative proposal] even before Parliament has had the chance to deliberate on it. [This exercise of influence] is illicit and undue, since decisions are made despite the fact that the Treaty prescribes prior consultation of the opinion of another institution [the European Parliament]. (quoted in Alting von Geusau 1964, 138–39)


In 1970, after a lengthy campaign by the Parliament, the member states decided to give it a greater say on budgetary matters. Specifically, they granted it the right to modify “noncompulsory” expenditures up to a certain limit. Although noncompulsory expenditures did not include agricultural spending and made up only a small fraction of the budget (Fitzmaurice 1978, 217; Westlake 1994a, 121–34, 264), the member states soon recognized that Parliament could use its new powers to extract concessions on other issues. To avert such situations, they decided to extend parliamentary consultation even into areas where the treaty did not specifically make provisions for it. Three years after extending Parliament’s budgetary rights, the Council therefore promised to consult Parliament within one week of receiving the Commission proposal, while the Commission,

In 1975, a “conciliation procedure” was set up as a forum to iron out controversies with the European Parliament on matters with “appreciable financial implications” (European Communities 1975). Thus, Parliament was gradually given more and more opportunities to make its voice heard. However, there was not much it could do in the event that the Council decided not to listen to it. Its consultation was still largely symbolic.

The European Court of Justice’s *Isoglucose* ruling in 1980 that legally obliged the Council to consult the European Parliament changed the situation dramatically by turning what seemed to be a mere complaisance into a real obligation. The Court argued that the European Parliament was supposed to serve as a transmission belt between the European Community and its citizens:

> Although limited, [parliamentary participation in decision making] reflects at Community level the fundamental democratic principle that the people should take part in the exercise of power through the intermediary of a representative assembly. (European Court of Justice 1980)

However, the European Parliament’s newly gained power to veto Council decisions by indefinitely withholding its opinion did not create more opportunities for public contestation. On the contrary, the Council’s positions on which it consulted Parliament became ever more vague so as not to give it anything to contest and, thus, any pretext to postpone the delivery of its opinion. The European Parliament was furious about the Council’s ruse, which it regarded as a “breach in spirit and probably of the letter of the *Isoglucose* principle” (Westlake 1994a, 136–37; Jacobs, Corbett, and Shackleton 1992, 182).

The situation changed only slightly with the first direct elections to the European Parliament in 1979. Whereas the members of the European Parliament had previously been mere delegates from the various national parliaments, they were now full-time members chosen in Europe-wide elections. Although the number of public hearings and question times leaped due to its increased presence, the Parliament remained largely unnoticed. Richard Corbett, a member of the European Parliament, observes:

> In terms of public visibility, Parliament remained stranded in a perceived secondary role. Even where its influence may have been great, it was Council that adopted the legislation and it was within Council (or the European Council) that the major political deals were made. Not surprisingly, media coverage of the Parliament declined. (Corbett 1998, 123, 124–25)
Nudged into Informality (1987–1993)

The Single European Act introduced a new two-stage legislative procedure, the cooperation procedure, which supplemented consultation in the important area of the Internal Market (Earnshaw and Judge 1995). The second reading now allowed the European Parliament to reject the Council’s position, and the member states could override this veto only when they were able to attain a consensus.

Although this procedure provided another opportunity for the Parliament to make its voice heard in public, it actually resulted in even greater informality. Why? Since Parliament’s threat to veto a legislative act was hardly viable—it usually preferred any kind of integration to the less integrated status quo (Jacobs, Corbett, and Shackleton 1992, 185)—a more promising way for it to influence decisions was through informal contacts with the Commission. Parliament then used these contacts in order to persuade the Commission to include its amendments in the legislative proposal, from which they could only be scrapped by a unanimous Council decision (Westlake 1994b, 38; Fitzmaurice 1988, 391). The Council, however, remained largely unreceptive to Parliament’s attempts to establish informal contacts (Jacobs, Corbett, and Shackleton 1992, 190).

Instead of leading to greater public contestation, the introduction of the cooperation procedure consequently led to an intensification of informal contacts between the Commission and Parliament prior to the submission of the legislative proposal (Westlake 1994a, 141–43). A member of the European Parliament explains:

> The theoretical model, which says that the Commission proposes and Parliament discusses and amends, seems to me to be absolutely defective—because a lot of parliamentary influence is actually exercised before the Commission proposal appears. (European Parliament 1995, 12)

It simply made more sense for the European Parliament to concentrate its efforts on persuading the Commission to its views during the drafting stage, which itself encouraged contacts between Commission officials and parliamentarians during the preparation of its proposal (Corbett 1998, 270). Thus, although the second reading provided another opportunity to gain visibility through public contestation, the European Parliament clearly focused its attention on the first reading as well as the “preformal stage” before the official submission of the proposal (Earnshaw and Judge 1997, 549–52).

Skipping Steps (1994–Present)

The Treaty of Maastricht in 1992 introduced a new legislative procedure, the “co-decision 1” procedure, which was supposed to strengthen Parliament’s
bargaining power vis-à-vis the Council. As three well-known experts on the European Parliament note, simplicity is not the essence of this procedure (Jacobs, Corbett, and Shackleton 1992, 192). For our purposes, it suffices to note two alterations to the cooperation procedure. First, co-decision endowed Parliament with a final veto over Council decisions, and it set up a conciliation committee in the event that both institutions failed to reach an agreement in the previous readings (Shackleton 2000, 326). Second, the co-decision procedure deprived the Commission of its right to withdraw the legislative proposal in the event that the Council and the Parliament entered conciliation.

There is considerable academic discussion about whether these changes enhanced or decreased the European Parliament’s bargaining power (Tsebelis 1994, 1996; Moser 1996; Crombez, Steunenberg, and Corbett 2000). There is general agreement, however, that they substantially weakened the Commission’s agenda-setting power, since the Parliament and the Council can agree on a joint text regardless of the Commission’s approval (Crombez 1997, 113).

How did these changes affect publicity about the EU’s decision making? On the one hand, they intensified informal contacts between the Commission and the European Parliament in the preformal stage, since the Commission was now more susceptible to parliamentary requests to include amendments to the legislative proposal. On the other hand, the European Parliament used its newly gained power to contest the Council in public when the Council remained reluctant to establish direct contacts with the European Parliament. Between 1993 and 1999, around 40 percent of all legislative proposals subject to the co-decision 1 procedure went through all of the readings to end up in the conciliation committee. Since there was no official option to conclude the procedure after the first reading, all acts were openly discussed in at least two readings (European Parliament 1999a).

None of the legislative actors was particularly happy with the co-decision 1 procedure, since it was complex, lengthy, and required a high degree of coordination between and within the institutions (European Parliament 1996a).

In addition, although the European Parliament’s veto power formally placed it on par with the Council, its threat to use it to reject new legislation was largely deemed unviable (Jacobs, Corbett, and Shackleton 1992, 191). Aware of this weakness, the European Parliament therefore changed its internal rules in order to commit itself to using the veto even if it preferred the piece of legislation under discussion to no legislation at all (Nicoll 1994, 410). The credibility of its veto threat consequently increased substantially when the Parliament in fact exercised it in 1994 (Hix 2002, 274).

Acknowledging this new situation, the member states, in the 1999 Treaty of Amsterdam, replaced the legislative procedure with “co-decision 2,” which simplified the existing rules and allowed for an early conclusion of the procedure.
As soon as the Council realized that the Parliament had to be taken more seriously, it established informal contacts among a reduced number of participants, joined by the Commission, early on in the legislative process prior to the start of official negotiations (European Parliament 1999b, 333–36; Shackleton 2000). The vast majority of these contacts developed between Parliament and the chairmen of Council Working Groups or the Deputy Permanent Representative (Farrell and Héritier 2004, 1198). These informal meetings, which would become known as *trilogues*, serve a similar function as the Council substructure in that they facilitate preliminary agreements between both institutions that can then be officially adopted without further discussion (Shackleton and Raunio 2003, 177).

Thus, just as the Working Groups and COREPER reduce conflicts in the Council of Ministers by assisting it in its search for consensual decisions, the trilogues enable Council and Parliament to reach agreements without going through all stages of public contestation. As a consequence, the number of early agreements, which are concluded after extensive informal consultations between the legislative actors, increased steadily. In 1999, when the modified co-decision procedure entered into force, only 13 percent of all legislative acts were concluded early in the first reading (see figure 5). By the end of the legislative period in 2004, the ratio was already 41 percent. In 2009, the final year of Parliament’s sixth legislature, 80 percent of all legislative acts subject to co-decision were concluded early in the first reading (European Parliament 2009a).

**FIGURE 5** Percentage of early agreements. European Parliament 2009b, 10.
As more and more legal acts were adopted during the early stages of the procedure, trilogues became a “major factor in the equation” (Council of the EU 2000). Despite this dramatic shift toward early conclusion, the average total length of co-decision procedures decreased only very modestly from an average of 22 months between 1999 and 2004 to 20.7 months in the following five-year term (European Parliament 2009a, 13).

By its own assessment, the more notable effect of Parliament’s implication in the Council’s informal governance has not been higher efficiency but its lower public visibility. Members of small party groups in the Parliament, in particular, have criticized the trilogue system for undermining the European Parliament’s function as a transmission belt between the public and politicians. A report on the co-decision 2 procedure demands that “there must be scope for the wider public to follow the legislative procedure” (European Parliament 2004).

A 2008 internal report is even more explicit:

[Serious] concerns have been expressed, within Parliament and beyond, about the potential lack of transparency and democratic legitimacy inherent in the informal first reading negotiations....[This practice goes] at the expense of an open political debate within and between the Institutions, with the involvement of the public....[This] certainly does not increase Parliament’s visibility in the public and the media, who are looking for political confrontation along clear political lines and not for a flat, “technocratic” debate where the representatives of the three Institutions congratulate each other on the “good work” done. (European Parliament 2008, 26)

The Council, however, defends this informal practice on grounds of its flexibility. In the words of a Council official (quoted in Farrell and Héritier 2004, 1199), “[informal trilogues] make it possible to speak more frankly and to explain what the underlying reasons are. You also can say: here is a real problem—we cannot go further on this, please recognize this.”

Summary

The official legislative procedures provide ample opportunities for the European Parliament to contest Council decisions in public. In reality, however, the members of the European Parliament rarely make use of this opportunity. As soon as the Parliament gained influence, it became implicated in the Council’s practices of informal governance.

Just as the Council substructure reduces the need for discussion at the level of the ministers, the informal trilogue system facilitates early agreements that can be adopted without having to go through all the steps of the legislative procedure. This practice seems to have increased the efficiency of decision making within
the Parliament and, to a lesser extent, between the Council and the Parliament. But it also makes the European Parliament forgo opportunities to contest the Council in public. This is why this practice has met with much criticism from smaller party groups in the Parliament that are quite often shut out of the trialogue system, whereas the member states approve of its efficiency and flexibility.


The voting rules in the Council permit a majority of countries to impose a decision on one or more recalcitrant governments. And because it is easier to scrape together a majority than to change a legislative proposal unanimously, the same rules also strongly boost the Commission’s agenda-setting power. Together, these rules represent a very strong commitment on the part of the member states to economic integration. A closer look beyond the treaty rules reveals, however, that governments rarely make use of these rules. The decision-making stage is once again littered with practices of informal governance that seem to run contrary to the rules’ actual purpose.

First, despite their increasing recourse to majority voting over time, it has always been the norm among the governments to refrain from voting and collectively accommodate a government that would otherwise face strong conflict at home and succumb to domestic pressure to defy the law in question. This consensus norm led to the development of a large Council substructure of preparatory groups, which consisted of government experts with specific knowledge about sensitivities on the ground. Second, as soon as the European Parliament was promoted to a more serious legislative actor, it was implicated in informal governance even despite its members’ incentives to contest the Council in public. As with the practices in agenda setting, the table below shows that informal governance does not occur at random. The cells depict observations of the prevalence of either formal or informal governance. Since it was for a long time excluded from decision making, some observations regarding the European Parliament are excluded from the analysis. In line with the predictions of Liberal Regime Theory, the table shows that governments made consistently more use of informal governance in issue areas where domestic pressure is, in fact, difficult to predict, while they had far more recourse to majority voting on the Common Agricultural Policy, where farmers’ pressure is easier to anticipate and manage within the formal institutional framework. The theory is further corroborated by the fact that all governments were in principle in full agreement over the need for a norm of consensus in the Council, whereas the Commission viewed this practice with far more suspicion.
The European Parliament’s practices of informal governance are more difficult to interpret. Given that its empowerment does not necessarily constitute a commitment to economic integration, its exclusion from decision making in the early years and on agricultural matters neither confirms nor disconfirms any theory. The fact that it used its opportunity to publicly contest the Council in the early 1990s even contradicts Liberal Regime Theory, since this contestation can potentially thwart the accommodation of a government under pressure.

As soon as the Parliament gained in power, the member states adopted a number of practices that limited its opportunity to contest Council decisions in public. The *trilogue* system, in particular, implicates the European Parliament in the informal norms and practices that apply in the Council and its substructure. To some extent, this development seems to be due to the need to increase the efficiency of decision making. Yet its informal character also provides for more flexibility and limits publicity about decision making. Accordingly, and in line with Liberal Regime Theory, the development and use of the system generates more conflict within the European Parliament and between Parliament and the Council than among the member states.

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