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THE EP'S RULES OF PROCEDURE AND THEIR
IMPLICATIONS FOR THE EU INSTITUTIONAL
BALANCE

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ABSTRACT

The paper discusses the EP's use of its Rules of Procedure (RoP) as part of the institution's general strategy for extending its Treaty-given powers. The analysis of the "creative" application of the EP's RoP to the consultation procedure, the legislative planning of the EU, the cooperation procedure, the co-decision procedure I, the Commission investiture procedure, as well as the EP's right of scrutiny over Commission's exercise of implementing powers shows that the EP's RoP do not merely refer to the Council and the Commission, but also burden them with a number of obligations corresponding to its own reading of the formal rules, which usually stray significantly from the Treaties' provisions. The text also considers in detail the legal and the political aspects of the principle of the institutional balance and argues that if the described kind of behavior on the part of the EP is taken to be a natural result of the evolvement of the institutional balance from a political point of view, it cannot but be taken to be in conflict with the institutional balance in its capacity of a static constitutional principle, according to which each institution is required to remain within the bounds of the powers that have been given to it by the Treaties.

Keywords: European Parliament, EU institutions, EP's RoP, strategic use, formal and informal rules, EU institutional balance

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1. INTRODUCTION

What gives us a reason to speak of the strategic deployment of the European Parliament (EP)'s Rules of Procedure (RoP) by the EP as a means to influence EU interinstitutional relations is the specificity of the Union's constitutional development. The EU constitutional development has been a lengthy process, in which Intergovernmental Conferences (IGC) have been of key importance though they cannot be said to exist independently but have been directly conditioned by preceding developments, a fact that clearly shows why the analysis of the EU constitutional change cannot be solely restricted to IGCs: "the process of European integration is more than negotiated "grand bargains", "supersystematic" or "history-making decisions". Integration needs to be conceived over the *longue durée*. Accordingly, it is insufficient to try to capture the dynamics of integration through snap-shot analyses of episodes of treaty reform" (Maurer 2011: 5). Hence, governments can be regarded as only one among the numerous participants in the complex and protracted process of the EU constitutional development influenced as it has been by preceding developments and tendencies. It is this perspective on the procedural character of the EU institutional development that allows us to place our understanding of Member States' role within reasonable bounds and to give the other participants their due in influencing the process. Thus, according to Pierson (1996) and Pollack (1997), as a result of the incomplete information and the short time horizons Member States have at their disposal, the provisions made by the latter have the character of incomplete contracts that can lead to "unintended consequences". Due to the limited information available at the time of laying down the formal rules, governments cannot foresee all the possible circumstances in their practical application.

As Ferrell and Héritier (2007) suggest, the institutional change in the period between the Treaty revisions is a product of the strategic interaction among the Council, the Parliament and the Commission (EC), whose success is determined by the current institutional rules and the participants' negotiation powers. Since governments possess limited information concerning the way institutions will try to interpret the formal Treaty rules, institutional actors have a certain discretion, which will allow them to impose such an application that may be closer to their preferences but can considerably differ from the "Masters of the Treaties" initial intentions. In their capacity of rational actors who strive to maximize their powers, institutions will take advantage of the freedom they have been given to achieve a result that increases their role in the EU "institutional triangle". Thus, for example, the EP will interpret the Treaty provisions in a way which corresponds to its own interests but which is unintended and even unwanted by the Member States. In the

periods between the Treaty revisions the Parliament will try to apply the vague formal rules related to its powers in a manner that will improve its own institutional position. By unilaterally introducing strategic amendments in its procedural rules, the institution never misses an opportunity to exert pressure on the Council and the Commission to make the latter take on new obligations towards it. The EP's strategy, called by Stacey „shooting for the moon” (Stacey 2010: 88), as involving „nothing less than steady bombardment of demands on its organizational rivals” (Stacey 2010: 89), pressures the other institutional actors to accept at least part of its ambitious demands. In so far as the EP does not possess formal power to participate in decision-taking in IGCs, the creative use of the Rules of Procedure allows it to give such an interpretation of the Treaty provisions that will maximize its prerogatives and determine the agenda of the forthcoming reform. In accord with the EP's overall strategy to extract the maximum of its prerogatives, procedural rules produce precedents in the application of the Treaties, shaping the possibilities for future developments. Hence, the EU's evolution and the shift in the existing institutional balance has been a result of a complex process of incremental change, spanning both the historical IGCs and the interim periods, in which supranational institutions have been key participants.

2. NATURE OF THE EP'S RULES OF PROCEDURE

The importance of the EP's RoP stems from the fact that they are something similar to a basic law (constitution) that determines the set-up, the principles of organization and functioning as well as the procedures of the institution. Created on a consensual basis, the EP's RoP constitute a systematized set of rules, enjoying an extremely high status in the eyes of the Parliament. For the institution it represents a statement of the highest order of the fundamental values and basic principles of exercising power in the Parliament. As Amie Kreppel (2003: 893) puts it, the rules of procedure „effectively structure the internal organization of the EP, the relationship between individual members, the various party groups and increasingly the relationship and interactions between the EP and the other institutions of the EU both formally and informally.” By regulating all the activities of the Parliament, including its participation in the process of EU policy-making, they increase its efficacy and operativity. The adoption of the RoP reflects the principle of institutional autonomy according to which, within the framework of their Treaty-defined powers, institutions are free to organize their work in a way that is deemed to be the most appropriate one for the adequate realization of their assigned mission. Though the Treaty asks each of the institutions to adopt its own Rules of Procedure, it does not elaborate on their form and content. An important modification,

however, is that the principle of institutional autonomy whose main manifestations are the procedural rules of the EU institutions is subject to two substantial restrictions: the right can be exercised within the limits as laid down by the Treaty; and in consideration of the analogous right of the other institutions.

Article 232 TFEU states that “The EP shall adopt its Rules of Procedure, acting by a majority of its Members.” Unlike the constitutions that describe the mechanism of their adoption and amendment, rules 211 and 212 of the EP’s RoP provide regulation only for the questions related to their application and amendment leaving out the adoption procedure. According to Annex VII, XVII (Powers and responsibilities of standing committees), point 8 the Committee on Constitutional Affairs is the one responsible for “the interpretation and application of the Rules of Procedure and proposals for amendments thereto.” Rule 211 stipulates that should doubt arise over the application or interpretation of these Rules of Procedure, the President may refer the matter to the Committee on Constitutional Affairs. Committee Chairs may also do so when such a doubt arises in the course of the committee's work. The committee shall decide whether it is necessary to propose an amendment to the Rules of Procedure. Should it decide that an interpretation of the existing Rules is sufficient, it shall forward its interpretation to the President who shall inform Parliament at its next part-session. Should a political group or at least 40 Members contest the committee's interpretation, the matter shall be put to the vote in Parliament. Adoption of the text shall be by a majority of the votes cast, provided that at least one third of Parliament's component Members are present. In the event of rejection, the matter shall be referred back to the committee.

Although the EP’s RoP are a “stable act”, they should reflect the state of the Parliament and the Union as a whole, which requires that when the state in question has changed, the Rules of Procedures of the institution should be appropriately amended. Thus, rule 212, states that any Member of the EP may propose amendments to these Rules and to their annexes accompanied, where appropriate, by short justifications. Such proposed amendments shall be referred to the Committee on Constitutional Affairs, which shall examine them and decide whether to submit them to Parliament. Having in mind the importance of the RoP, conditioned by its role “in governing both activities within the EP and to a lesser extent the relationship between the EP and the other institutions” (Kreppel 2003: 894) it is hardly a surprise that “[a]mendments to these Rules shall be adopted only if they secure the votes of a majority of the component Members of Parliament“ (rule 212 (2)).

3. HISTORY OF THE EP'S ROP

According to the data provided by the CARDOC¹, RoP of the then Common Assembly date as early as 1953 and were subsequently adopted by the EP in 1958. Though in the 1953 – 1983 period no numbers of the RoP's editions were specified, we can safely assume that the first edition is the one of 1979, the year of the introduction of the first direct elections for the EP. So, between 1979 and 2009 there were 17 editions of the document and since 2009, though no edition number is mentioned, the reference being only to the "RoP, 7th Parliamentary term", we can take it to be the last, 19th edition. While the first RoP, laid down by an assembly with decorative functions, were extremely modest, the subsequent increase of the powers of the institution has led to a parallel increase in the RoP's complexity and ambitiousness too (Costa, Brack and Dri 2010: 5). Thus, while the RoP of November 1979 contain merely 54 articles, 2 annexes and 53 pages, the one of June 1999 – 186 articles, 10 annexes and 152 pages, and the one of December 2009 – 216 articles, 20 annexes and 200 pages, the RoP of February 2014 include no less than 216 articles, 22 annexes and 264 pages.

Every revision of the Treaties has been usually accompanied by a revision of the EP's RoP, where the amendments have improved the Parliament's efficacy of functioning and internal organization: "EP's trajectory was significantly influenced by its rules of procedure, which have allowed the assembly to optimize its competences and internalize reforms established by the treaties" (Costa, Brack and Dri 2010: 1). As Kreppel (2003: 910) reminds us, the only major revision of the procedural rules that is not connected with the Treaty reform is the one of 1981 – imposed by the introduction of the direct elections for the EP and the increase in the number of its members. In most of the cases the amendments have been dictated by the necessity to take into consideration the changes both of the Parliament's role and prerogatives and of those of the Union as a whole. At the same time, however, next to this type of amendments more ambitious changes got sneaked in, through which the Parliament interprets, extends the meaning of and even modifies the Treaty-based formal rules: „[s]ignificantly the EP did more than just modify its Rules to deal narrowly with the new realities created by treaty reform, it also consistently attempted to make the most of the new situation" (Kreppel 2003: 904).

¹ The information was kindly presented by the Direction de la Bibliothèque et de la Gestion Documentaire, Centre archivistique et documentaire (CARDOC).

4. THE STRATEGIC USE OF THE RoP FOR IMPOSING OBLIGATIONS ON OTHER INSTITUTIONS

As part of its strategy of using informal mechanisms for “wringing out” powers and influencing institutional balance, the EP „frequently employs the tactic of including an advantageous procedural mechanism in its Rules as a means of putting pressure on the others to cede some legislative power” (Stacey 2010: 88). Unlike the Council and the Commission, which seem to a greater extent to comply with the spirit of the Treaties in placing the focus of their RoP on internal activities, the EP has subjected the document to its general tactic of extending its newly acquired powers. From a formal point of view, the EP’s RoP can solely express its position with respect to inter-institutional relations, without imposing any obligations on other institutions. Consequently, the Council and the Commission are not bound by the rules drawn in the Parliament’s document. On the other hand, regardless of the attitude of the Council and the Commission, in so far as the RoP have the task to regulate the Parliament’s relations with the two institutions within the framework of the EU “institutional triangle”, the rules inevitably affect them as well. In this connection, Stacey (2010: 87) correctly observes that “[a]s much as the Council in particular likes to claim that the Parliament’s Rules have no legal base - or “absolutely no basis in reason” - both actors have at various times given direct credence to a quasi - binding quality they possess.” The reason for the strategic use of the RoP as a political instrument, for Kreppel, stems from the fact that though the Treaties have systematically increased the EP’s powers, the latter “has often not been satisfied with the pace of reform and as a result has attempted to restructure these relationships unilaterally via revisions to its own Rules of Procedure” (Kreppel 2003: 894). Thus, apart from regulating the relations among the individuals/groups within the EP, the RoP also affect those between the EP and other institutions. It is this characteristic of the rules that makes, as Kreppel (2003: 894) notes, RoP’s reforms not only functional (“intended only to meet these new challenges”), but strategic as well (providing “a significant opportunity for strategic action by those with the ability to manipulate outcomes”). Kreppel discerns in the RoP two different methods of “stretching” the Treaties: the first “has been externally oriented, focused on unilaterally asserting its own powers and rights or by placing new obligations on the other EU institutions/organizations by incorporating them into the RoP”, while the second „has been to focus internally and “streamline” its procedures and organizational structures to maximize efficiency [...], often through the centralization of many powers and activities” (Kreppel 2003: 904-905). The presence of an externally oriented method for “stretching” parliamentary powers is also reflected in the types of reforms the EP introduces to its RoP – among the eight kinds of amendments identified by Kreppel

(2003: 895) is precisely the one that seeks “to increase the power of the EP without an official legal grounding.”² Hence, in addition to establishing certain internal guidelines, the RoP constitute a statement of the EP’s intent concerning its application of the Treaty’s provisions on interinstitutional relations. The EP deliberately resorts to its RoP for creating precedents in the application of the formal rules which unilaterally increase its powers at the expense of other institutions. In its RoP the EP gives a liberal reading of the prerogatives it has been granted by the Member States, an interpretation it consequently tries to impose on the other institutional actors. In a clear act of opposition to the institutional balance (as a legal principle), the EP’s RoP not merely refer to the Council and the Commission, but also burden them with a number of obligations corresponding to its own reading of the formal rules. The obligations in question not only often fail to completely reflect the Treaties’ provisions but usually stray significantly from the latter, a fact that has provided authors such as Stacey (2010: 93) with a reason to compare the RoP to a “trial and error” measure which tests the response of the other institutions: if the Council and the European Commission do not explicitly reject the obligations the EP unilaterally tries to impose upon them, the absence of a negative response is taken to mean that the obligations can be considered accepted. In a number of cases we will discuss later in which the EP has been in a better position, the weaker institutional actors have complied with the RoP listed views of the Parliament. Thus, by strategically using the negotiation power the “Masters of the Treaties”, having failed to envisage the possible consequences, have granted it, the Parliament has managed to force the Council and the Commission to follow the rules it has established. However, as we will see, in exerting such a significant influence on the distribution of institutional powers determined by the Treaty, the Parliament ignores the principle of the EU institutional balance, according to which each institution should act within the limits of its given powers without encroaching on the powers of other institutional actors.

5. THE CONCEPTION OF THE EU INSTITUTIONAL BALANCE

There are several “constitutional principles” regulating the activities of the EU institutions that are not to be found in the first version of the Treaties, which at the time did not have the character of a “constitutional charter”. And it is this fact that necessitates their formulation and endorsement

² The other 7 categories of amendments, identified by Amie Kreppel, are those that: 1. Increase Efficiency; 2. (De)Centralize Power; 3. Increase Political Group Power; 4. Increase Large Political Group Power; 5. Increase Small Political Group/NA Power; 6. Address Treaty Revisions; or are 7. Technical.

by the practice of the Court of Justice of the EU (CJEU) (Жake 2009: 245). Thus, today, one of the main characteristics of the EU institutional system (along with the principles of institutional autonomy, loyal cooperation and transparency) as reflecting the specificity of the Union and its ambitions is the principle of institutional balance. Though the name can be to a certain extent misleading, the principle does not imply that all of the EU institutions carry equal weight, but rather specifies the place of each one of these in the realization of the missions of the Union. According to prof. Jacqué (2004: 383) the principle can be seen from two perspectives: from a *legal* point of view the institutional balance is a “constitutional principle which must be respected by the institutions and the Member States”; while from a *political* one, it is a “means of describing the way the relationship between the institutions is organized.” In its capacity of a *legal* (static) principle the institutional balance reflects the rule that every institution should act within the bounds of the powers that have been given to it by the Treaties without unilaterally extending them at the expense of other institutions. I. e., as K. Lenaerts and A. Verhoeven (2002: 44) point out, it poses two requirements: a) a positive one – that the EU institutions take the political responsibility assigned to them by the Founding Treaties; and b) a negative one – that they abstain from abuse of power by appropriating the powers of other institutions. The essence of the principle of the institutional balance can be summarized as follows: it concerns the distribution of powers among the EU institutions, guaranteeing that the latter would not overstep their bounds as provisioned by the Treaties, with the control over this obligation being exercised by the CJEU.

For a rather long time the principle was not explicitly formulated in the Treaties, its first mention dates from the Protocol on the application of the principles of subsidiarity and proportionality of the Amsterdam Treaty without being additionally defined. On the other hand, the Court used the term for the first time in the Meroni case, seeing in “... the balance of powers which is characteristic of the institutional structure of the Community a fundamental guarantee granted by the Treaty in particular to the undertakings and associations of undertakings to which it applies.”³ Hence, one can be left with the impression that whereas it seems unthinkable to speak of the application the classical doctrine of the separation of powers in the EU, it is precisely the principle of the institutional balance that much like the doctrine in question prevents a disproportionate concentration of power in the hands of any one single institution. The cited case is actually the one that establishes the so-called “Meroni doctrine” which excludes the delegation of discretionary powers to structures different from the ones provisioned by the Founding Treaties with the explanation that any such practice would disrupt the balance of powers among the EU institutions in

³ See case 9/56, *Meroni v High Authority*, [1957-1958] ECR 152.

its capacity of a “fundamental guarantee”. At the same time, however, the Court did not elaborate on what this guarantee consisted of and why it carried such an importance. Elucidations to this effect can be found years later in the Chernobyl case, where the Court points that the institutional balance is based on: “... a system for distributing powers among the different Community institutions, assigning to each institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community.”⁴ And further adds: “[o]bservance of the institutional balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions. It also requires that it should be possible to penalize any breach of that rule which may occur.”⁵ It is this judgement of the Court that most clearly reveals the link between the institutional balance and Article 7 EC Treaty, now Article 13 (2) TEU, which states that “[e]ach institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them ...” I. e. the principle of the institutional balance concerns the balance among the EU institutions, that have been given certain powers by the Treaties and means that each institution should duly exercise its prerogatives while at the same time respects the prerogatives of other institutions. In addition, the Court judgement implies that the control over the observance of the institutional balance is one of the Court’s major tasks and that any violation of the principle will be legally sanctioned by the Court. The conclusions that, according to S. Prechal (1998: 279-280), can be drawn from the CJEU practice with respect to the principle are the following: a) institutions should be regarded as equal; b) the goal is to preserve the autonomy of each institution through the obligation to respect the powers given to other institutions; c) those powers are subject to reconsideration by the Court.

As for the political aspect of the principle, there is no statics, no single institutional balance and no fixed structure of interinstitutional relations: “[a]lthough the Court of Justice takes the institutional balance into account under a static aspect – that is to say, as it results from the treaties – it is evident that the balance established by the treaties has developed radically throughout the history of the Community” (Jacqué 2004: 387). The initial balance, established at the dawn of the European integration, has undergone a significant change and its evolution hardly consists of a linear process. On the contrary, it has been influenced by the divergent, even incompatible, visions of the different participants regarding the character and the future of the Union and their own role in it. As a result of those changes, if we take the relations in the “institutional triangle” for instance, one cannot fail to notice the progressive increase of the powers of the EP at the expense of those of the Council and mostly of the Commission. Strictly speaking, every amendment to the Treaties, entails a new

⁴ See case C-70/88 *European Parliament v Council [Chernobyl]*, [1990], ECR I-2072, para. 21.

⁵ *Ibid.*, para. 22.

institutional balance. On the other hand, however, the everyday application of the formal rules drawn by the primary legislation gives rise to informal rules, which also alter the relative “weight” carried by a given institution. Thus, for example, the EP systematically revises its procedural rules in accordance with its vision of its role in the relations with other institutions with the subsequent deployment of the former as *faits accomplis*. If this is taken to be a natural result of the evolvement of the inter-institutional balance from a political point of view, the question arises of as to whether such a behavior remains within the bounds of the Treaty and whether it is not in conflict with the institutional balance in its capacity of a static constitutional principle, binding the institutions of the Union.

6. THE USE OF THE EP’S “EXTERNAL STRATEGY” IN THE ROP REVISION FOLLOWING THE FIRST DIRECT ELECTION FOR THE EP

As already mentioned, the only one of the major revisions of the RoP that is not directly related to the Treaty reform, having been dictated by the introduction of direct elections for the EP, is the revision of 1981. The main factor for the resultant strategy, fixed by the RoP of the period is the democratic legitimacy, which was acquired as a result of the direct elections and which made any disregard for the institution increasingly difficult. MEPs, who since 1979 have been completely devoted to their European mandate, have been motivated to encourage the institutional change that will help improve the EP’s position in the EU interinstitutional relations. Additionally, the Parliament, which prior to the first direct elections of 1979 had been a hesitant plaintiff – neither entering nor initiating lawsuits in the CJEU - has gradually come to find in the Court’s jurisprudence an effective means for defending its interests in its relations with the Council. An indicative example of the use of the so-called “external strategy” in the RoP of the period is the attempt to extend the EP’s formal powers in the framework of the consultation procedure.

6.1 The consultation procedure

Consultation, being the oldest and the only legislative procedure prior to the Single European Act, gives the EP the opportunity to present opinions on the Commission’s proposals that are not binding on the Council. The procedure unfolds as follows: the Commission prepares a legislative proposal and sends it to the Council, which in its turn forwards it to the Assembly requesting a consultation opinion. In so far as the consultation is to be effective, the Council cannot express its opinion without having firstly had the EP’s position on the matter. Which means that

although formally the EP enjoys limited powers in the consultation procedure, the possibility it has to delay can informally increase its role in forging EU legislation. Thence, authors such as Scully (1997: 235) can even claim that the absence of a deadline within which the EP should present its opinion, gives the Parliament “indefinite power of delay”. Thus, regardless of its modest role, the EP is determined to extract the maximum from the formal power it has been granted: a goal it tries to achieve by resorting to the Court’s jurisprudence. In the *Isoglucose* case, where although the European Parliament had begun negotiations on the dossier, but had eventually decided to postpone the final debate and refer the matter back to committee, the Court proclaimed that the Council could not pass legislative acts before it has received the EP’s opinion as required by the Treaties.⁶ It determined that the consultation procedure “is the means which allows the Parliament to play an actual part in the legislative process of the Community. Such power represents an essential factor in the institutional balance intended by the Treaty. Although limited, it reflects at Community level the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly. Due consultation of the Parliament in the cases provided for by the Treaty therefore constitutes an essential formality disregard of which means that the measure concerned is void.”⁷ Therefore, the Court deemed that it cannot be claimed that by simply having asked for the EP’s opinion, the Council has met the requirement for consulting the Parliament. In other words, though the Court’s decision acknowledged that the consultation procedure presented limited opportunities to the EP for influencing the outcome of the legislative process, it still granted it a right of postponement. This CJEU granted right allowed the EP to bring more edge to the otherwise “modest” consultation procedure. On the basis of the Court’s decision, the EP “formalized” its right of delay, introducing an important amendment to its procedural rules, seen by Stacey (2010: 206) as “an action that amounted to something of an informal rule legitimized by the ECJ’s ruling.” Thus, the RoP of December 1981 contain rule 36 (1), according to which the EP could decide to postpone the final vote on the Commission’s proposal until the Commission had taken a position on its amendments. What is more significant, however, is that “[w]here the Commission announces that it does not intend to adopt Parliament’s amendments, Parliament may decide, on a proposal from the chairman or rapporteur of the committee responsible, to postpone the vote on the motion for a resolution. The matter shall be deemed to be

⁶ The legal justification of the regulation in question is the then operative Article 43 TEU, which states that the Council acts on the basis of the Commission’s proposal after it has consulted the EP. In this case the Treaty requires that the Council has received the EP’s opinion before acting on the Commission’s proposal. What is more, the Treaty does not determine time limits, within which the opinion must be presented. Nevertheless, the Parliament usually points out that it has made everything possible to present its opinion within reasonable time.

⁷ See the “*Isoglucose*” judgments, decided on 29 October 1980, Case 138/79 *Roquette Frères v Council* [1980] ECR 3360, para. 33, and Case 139/79 *Maizena v Council* [1980], ECR 3424, para. 34.

referred back to the committee responsible for consideration. In this case, the committee shall report back to Parliament within one month or, in exceptional case, any shorter period decided by Parliament” (rule 36 (2)). The importance of the rule is determined by the fact that the Commission’s acceptance of Parliament’s amendments automatically leads to their incorporation into a revised proposal, which the Council can change only by unanimity. This right of delay, which is still present in Rule 57 of the current RoP has increased the bargaining power of the Parliament with regard to the two other institutions, allowing the former, by threatening to postpone the vote on a draft legislative resolution and thence to delay the entire legislative process, to insist that the Commission and the Council comply with its demands. The established informal rules, regulating the exercise of the consultation procedure, strengthen the role of the weaker institutional actor in it, the EP, giving it the opportunity to exert a pressure that the Commission and the Council find it difficult to withstand. Apparently, the effect of using the rule is determined by the urgency of the issue and the desire of the two other institutions to avoid a possible protraction. By the amendment in question “not only did the Parliament basically grant itself a de facto power of delay, which was not provided for in the Treaty, but it further discovered in its Rules of Procedure a tool it could use to make institutional adjustments and bring pressure to bear on the other organizational actors” (Stacey 2010: 207).

7. THE USE OF THE EP’S “EXTERNAL STRATEGY” IN THE ROP REVISION AFTER THE SINGLE EUROPEAN ACT (SEA)

7.1 The legislative planning of the EU

As D. Kietz and A. Maurer (2006: 17) maintain, for the EP the legislative planning is a “double-edged sword”: on the one hand, the ambitious institution is tempted by the opportunity to have this traditionally granted to every legitimate parliament prerogative at its disposal, while on the other hand, it clearly understands that if it gets it, the Council will ask for the same – something that would entirely change the established institutional balance in the EU. Thus, besides the fact that after the Maastricht Treaty, by Article 225 TFEU, the EP can formally ask the Commission to exercise its right of legislative initiative, it also resorts to other far more informal means for influencing the determination of the legislative agenda of the Union, without at the same time challenging the EC’s formal right of legislative initiative. The cooperation between the two institutions “allow[s] for sufficient and timely debate and parliamentary involvement right from the beginning of the elaboration of the programme” (Kietz and Maurer 2006: 19). Kietz and Maurer

(2006: 19) remind that the EP's engagement in establishing the EU legislative agenda had its informal beginning in March, 1988, when "[the] Commission and the Parliament agreed on the introduction of an annual procedure for the adoption of a legislative programme." The establishment of this practice was immediately registered in the EP's RoP, 4th edition, June 1987, where rule 29 (4) reads that "[a]fter the presentation of the Annual Programme by the Commission and the debate thereon in Parliament, the enlarged Bureau and the Commission shall agree on an annual legislative programme and a timetable for the submission by the Commission and the examination by the Parliament of proposals which the Commission intends to remit to the Council." In addition, rule 72 elucidates that "[t]he annual legislative programme referred to in Rule 29 (4) shall be annexed to the draft agenda of the March part-session." Hence, though there are no formal rules obligating the Commission, it does take into consideration the Parliament's demands, as it knows that the latter has at its disposal an arsenal of political means, be as they are in other areas, for putting considerable pressure on the college. Such are, for instance, its right to dismiss the EC and discharge it from the responsibility to execute the budget, the possibility it has to delay the EC's legislative proposals together with its increasing participation in the appointment of the members of the college. So, although rule 29 (4) has not been unilaterally imposed by the EP, but is rather a consequence of the EC's willingness to cooperate, it sets an important precedent for the EP's participation in preparing the legislative agenda of the EU. At the same time, the conception of the so-called "path dependency" makes it possible to suggest that every new agreement between the two institutions is based on the rules formulated by the EP and additionally extends the obligations specified by them. Thus, in a series of subsequent interinstitutional and framework agreements the Commission not only allows the intervention of the institution in the formulation of the annual legislative programme, but also takes on a number of further commitments itself: the EC takes upon itself "not only to keep the Parliament well informed on a specifically timely basis but also take "utmost account" of the Parliament's own guidelines for the Commission's program" (Stacey 2010: 196). This tendency is preserved in the Framework Agreement on the relations between the European Parliament and the European Commission of 2010, annexed to the RoP, which along with the provision that "[t]he Commission shall take into account the priorities expressed by Parliament."⁸, the EC's accountability has been increased as well in the form of the following two obligations: firstly, that the EC "shall explain when it cannot deliver individual proposals in its Work Programme for the year in question or when it departs from it"; and secondly, that "[t]he

⁸ Framework Agreement on relations between the European Parliament and the European Commission, OJ L 304, 20.11.2010, p. 47, IV. Cooperation as regards legislative procedures and planning, i) Work programme of the Commission and the EU planning, Article 35, par. 2.

Vice-President of the Commission responsible for inter-institutional relations undertakes to report to the Conference of Committee Chairs regularly, outlining the political implementation of the Commission Work Programme for the year in question.⁹ In this way, though the EP does not strive to obtain an actual right of legislative initiative, it manages, via its RoP and a series of interinstitutional agreements, to impose its view on the legislative planning of the Union. As a result, the annual legislative programme presents the EP with the possibility „ ... to press for the inclusion of new items (e.g. following up parliamentary initiative reports) or even the exclusion of items” (Corbett 1998: 270). Again, in the wake of the SEA, the EP introduced amendments to its procedural rules that raised the threshold of votes required in plenary to approve motions for making requests to the European Commission for a legislative proposal submitted. As a consequence, though the EP finds it harder to secure a larger number of MEPs voting in favor of such motions than the one fixed at the time, EC finds it equally harder to disregard a demand that enjoys such a wide support.

7.2 The cooperation procedure

Doubtless, the procedure is much more modest than the co-decision provisioned as early as the Draft Treaty on the EU (1984). Though it has been given to the Member States rather as an eye-wash for the increasingly ambitious Parliament than an attempt to radically change the established legislative status-quo, gradually it has turned out that cooperation is „a major constitutional innovation in the Community system“(Westlake 1994: 37). And the reason for that is that by introducing a third player - the EP – in the legislative game, the procedure has altered the model “the Commission proposes, the Council disposes”, which the legislative process has been following so far. Yet, the main factor in turning the procedure into an “constitutional innovation” are the EP’s systematic efforts to make cooperation much more than it has been in reality. Thus, it has managed to transform its legislative powers from “a weak and essentially unconstructive power of delay to a stronger and potentially constructive role in the drafting of legislation” (Westlake 1994: 39). The procedure undergoes two readings: on the first one the Council consults the EP, after which, acting by qualified majority, adopts a “common position” that is presented to the EP for a second reading. At this point, the options available to the EP are as follows: a) to approve or withhold its opinion on the Council’s common position, which leads to the adoption of the text by the Council; b) to try to impose a veto that the Council can overrule only by unanimity; or c) to suggest amendments, which, if supported by the EC, become part of its revised proposal. In this case it can be passed by the

⁹ Article 36.

Council by a qualified majority and amended only by unanimity. Due to that peculiarity of the procedure, when the EC and the EP act together, they bear a certain advantage over the Council. That is the reason why, within the third hypothesis, the Parliament tries to exert a serious pressure on the Commission to accept the amendments it has introduced, threatening otherwise to reject the legislative act. In order to maximize its influence over the EC, the EP includes in its RoP the demand that the Commission should state its position before the final vote on the EP's amendments has been set, so that in case it is unsatisfied, the EP may have the opportunity to reject the legislative act. So, rule 51 (4) of the RoP, 4th edition, June 1987 reads that “[i]f one or more of the amendments are adopted, the rapporteur of the committee responsible or, failing him, the chairman of that committee shall ask the Commission whether it proposes to include such amendments in its re-examined proposal”, while according to rule 50 (2) “[a]fter voting on the amendments and hearing a statement from the Commission...”, “Parliament may ... consider a further proposal for rejection.” Along with that, the EP increased the threshold of plenary votes required to table amendments under the cooperation procedure, a move that puts a pressure on the EC to adopt the amendments enjoying widest support. Another important amendment to EP's RoP, consequential on the cooperation procedure, is the one concerning the control over the choice of the appropriate legal base on the part of the EC. As long as it determines the procedure used and conditions the role of different institutions in the legislative process, in rule 36 (3) of the RoP of June, 1987, the EP states “[t]he committee responsible shall examine the validity and appropriateness of the chosen legal base for any draft measure on which Parliament is consulted...” In this way, the EP can easily call in question the need for accepting the measure through a consultation procedure, when it deems that it will be much more advantageous for it to be used the cooperation procedure as the latter allows a more substantial participation of the Parliament. In the long run, the pro-integration disposed Commission, which always prefers seeing its legislative proposal passed to preserving the status-quo, is usually inclined to yield and accept a considerable part of the EP's demands. As Westlake (1994) notices, due to their identical predilections for integration, the EP and the Commission are partners rather than rivals in the process of EU policy-making.

8. THE USE OF THE EP'S "EXTERNAL STRATEGY" IN THE ROP REVISION AFTER THE TREATY OF MAASTRICHT

Today the Treaty of Maastricht is considered one of the most important revisions of the Treaties introducing as it did significant changes both to the Union as a whole and to the EP in particular. In Kreppel's opinion (2003: 905), as a consequence of the improved position of the EP "there was no discussion about dissatisfaction with the achievements of the Maastricht Treaty itself and, as a result, there were fewer attempts to unilaterally increase the EP's powers". Thus, according to her calculations, the percentage of the RoP amendments aiming at extending the EP's powers falls from 24 to 11 (Kreppel 2003: 900). As the EP was "at least partially satisfied" with its newly-acquired prerogatives, "the character of the internal reforms shifted toward "improving" internal organization to make the most of these new powers rather than attempting to artificially or unilaterally extend them" (Kreppel 2003: 901). In this shift Kreppel sees the rise of a new tendency, which undergoes further development in the subsequent revisions, of centralized control and the increase of the significance of the two largest groups in the EP. Nevertheless, it is this revision that has been associated with two of the most familiar examples of attempts at "stretching" the EP's powers by means of its RoP.

8.1 The co-decision procedure

The introduction of the co-decision procedure I by the Treaty of Maastricht transforms the forging of the European legislation from "a simple Council-dominated process into a complex balancing act between Council, Parliament and Commission" (Gary Marks et al. 1996: 364). What is characteristic of it is that the passing of a legislative act requires the support of both the Council and the EP. Which gives the reason for Corbett et al. (2007: 214) to maintain that it is one of the most significant constitutional changes, since by placing the Council in "a complex relationship of cooperation and contestation with the two other institutions" (Gary Marks et al. 1996: 365) it creates conditions for dialogue and for the intensification of their mutual contacts. The procedure is connected with a substantial increase of the legislative powers of the EP, with the latter being given, in addition to its right to postpone, an unconditional right of veto¹⁰, that cannot be overridden by the Council even by unanimity. At the same time, in so far as that in case the Conciliation Committee

¹⁰ Chalmers et al. even speak of the EP's "double veto" in this procedure, the reason being that besides the right to reject the Council's common position at the second reading, they also call a "veto" the third reading approval by which the EP should support the common text it has agreed on with the Council during the reconciliation procedure.

fails, there exists the option for the Council to reaffirm its common position, unless the EP rejects it by absolute majority, the variant of the Maastricht procedure (co-decision I) does not put the two institutions on an equal footing after all. The Council's competence to set the agenda in the co-decision procedure I is manifested in the option it has at its disposal to give the EP a "take it or leave it" offer, which leads to a serious inequality of the two institutions. Thence, as the EP is expected to support an act that although fails to reflect its demands, is better than the status-quo, the best winning strategy of the Council would be "to allow the Conciliation Committee to break down, and then reaffirm its common position" (Hix 2002: 274).

Nevertheless, the vagueness and ambiguity of the Treaty of Maastricht's provisions as regards the co-decision procedure allows the EP to try to impose its own interpretation of the procedure. In order to make up for the asymmetry in the role of the institutions, generated by the procedure, the EP starts to strategically apply its given powers. To that end it introduces significant amendments to its RoP, 8th edition, October 1993, which "read" the co-decision procedure I in a way considerably differing from the governments' views. Firstly, the RoP remove the need for a second vote by the EP, that, following the explanations presented by the Council during the Conciliation Committee, is to confirm the EP's "intention to reject" the Council's common position. Secondly, if consequent to a Conciliation Committee failure, the Council after all makes an attempt to act unilaterally, by reaffirming its common position, the EP can automatically vote on a motion to reject the Council text, regardless of its attitude to the given legislative proposal. Thirdly, in case of failure of the conciliation procedure the President of the EP invites the EC to withdraw its proposal, and if that is not possible – to invite the Council to not act unilaterally. So, rule 78 of the RoP of October, 1993 states the following:

“ 1. Where no agreement is reached on a joint text within the Conciliation Committee, the President shall invite the Commission to withdraw its proposal, and invite the Council not to adopt under any circumstances a position pursuant to Article 189b (6) of the EC Treaty. Should the Council nonetheless confirm its common position, the President of the Council shall be invited to justify its decision before Parliament in plenary sitting. The matter shall automatically be placed on the agenda of the last part-session to fall within six or, if extended, eight weeks of the confirmation by the Council unless the matter has been dealt with at an earlier part-session.

2. Parliament shall discuss the Council text on the basis of a report from its delegation to the Conciliation Committee.
3. No amendments may be tabled to the Council text.
4. The Council text as a whole shall be the subject of a single vote. Parliament shall vote on a motion to reject the Council text. If this motion receives the votes of a majority of the

component Members of Parliament, the President shall declare the proposed act not adopted.”

Hence, when faced with a “take it or leave it” offer the EP leadership prefers to impose a veto on the draft bill as a decision of principle, even if the Council’s proposal has been closer to its preferences than the status-quo. The EP undertakes this strategy since it clearly realizes that the victory in the long-term war is more important than winning a single battle. The EP uses its right of veto at the third reading of the co-decision procedure I for the first time in 1994 in connection with the draft directive on open network provision in voice telephony (ONP). After the EP and the Council had failed to reach an agreement during the conciliation procedure, the Council reaffirmed its common position, which the Parliament in its turn rejected by absolute majority. The actions of the Parliament prove that rule 78 is a completely real threat and not just empty posturing. When forced to choose between the status-quo and a legislative act that does not take into consideration its demands the EP chooses the status-quo. Therefore, by unambiguously stating that for it the co-decision procedure ends with the Conciliation Committee the EP blocks any attempt for unilateral action on the part of the Council and imposes the necessity for seeking its voluntary cooperation. As long as after the ONP draft directive failure the Council has no longer afforded itself to reaffirm its common position following a conciliation procedure failure, it seems that the goal the EP has set in this respect has been successfully realized. As can be expected, in the subsequent negotiations on the Treaty revision, the EP proposes the institutionalization of the informal rule it has established. Thus, as Farrell and Héritier (2007: 298) predict, “[a]n actor which gains from an informal rule, but does not have a formal role in Treaty revisions, can exert pressure on others to formalise this rule by using its veto power in other, linked, arenas in which it plays a role.” By linking the results of the negotiations on the Treaty revision with the results in the legislative sphere, the EP has managed to impose its position on the future development of the co-decision procedure in an area, in which it is not formally engaged (Farrell and Héritier 2007: 287, 292, 298). According to Hix, the factors in favour of the future formalization are two: the first one is the absence of redistribution consequences for the institutional balance between the Council and the EP, in so far as the Council has used its power to reaffirm its common position only in one case and unsuccessfully at that; while the second factor is the provision of the collective benefits of efficacy as a result of the institutionalization of the already established informal rules, because of the simplified and more transparent character of the procedure (Hix 2002: 272). In the end, the Amsterdam Treaty eliminates the Council’s right to act unilaterally, which up until then had restricted the EP’s actions to the option of either accepting or rejecting the act. The abolition of the Council’s right to reaffirm

its common position makes the powers of the two branches of the legislature equal and the latter, as Maurer puts it, now come to “share the responsibility for the adoption as well as for the failure of a proposed legislative act.” (Maurer 2003: 230). It is because of this amendment of the procedure, introduced by the Treaty of Amsterdam, the power to set the agenda, which the Council has been guaranteed by the possibility to make the aforementioned offer to the EP, has been abolished by the Amsterdam treaty.

8.2 The Commission investiture procedure (case I)

Though the Treaties of Rome provided the EP with the power to dismiss the Commission, they did not envision the institution’s participation in the appointment of the Commission. Yet, the Parliament has managed to gain a proper place in it by laying down various informal rules in its RoP, some of which have even turned into an object of future formalization. Prior to Maastricht, the Commission President was appointed from among its members for a two-year term by common accord of the governments of the member states. In practice, however, he/she was automatically reappointed to serve a total of four years with the rest of the Commissioners, who were also appointed by common accord of the governments of the member states. In the context of its increased legitimacy endowed to it by the first direct elections, the EP decided to resort to its procedural rules “to create” a plenary session debate and vote of confidence for incoming Commissions on the occasion of the presentation of their legislative work programs to the Parliament for the first time. This practice became routine procedure via its status as an informal institution, which the Council acknowledged in the Stuttgart Solemn Declaration...” (Stacey 2010: 198-199) The procedure was applied for the first time to the Thorn Commission (1981) and the Delors Commissions (1985; 1989), with the latter showing their respect to the procedure by having waited for the EP’s approval before taking an oath of office in front of the ECJ. The behavior of the colleges bears special significance as it “sets an important precedent to the effect that the Commission would be unable to take office without the Parliament’s vote of confidence” (Stacey 2010: 199). Another significant change, fixed by the Stuttgart Solemn Declaration is the Council’s obligation, that it has observed since 1984, to consult the Parliament’s Enlarged Bureau with regard to the election of the EC’s President. So, the introduction of the set of informal rules, fixed by the Stuttgart Solemn Declaration, to the Treaty of Maastricht, simply formalizes already existing practices. As regards the Commission President Article 158 (2) TEC states that “The governments of the Member States shall nominate by common accord, after *consulting* the European Parliament, the person they intend to appoint as President of the Commission”, which in fact means that the EP

is expected to present an opinion that is not binding on the governments. This is the reason why in introducing the provision, the Member States could not suppose that the EP would recognize its newly gained power as a right to veto the governments' nominee. As for the college as a whole, the Treaty of Maastricht stipulates that after the governments of the Member States in consultation with the nominee for President nominate the other persons whom they intend to appoint as members of the Commission, the President and the other members of the Commission thus nominated to be subject as a body to a *vote of approval* by the European Parliament. After the approval, the President and the other members of the Commission are appointed by common accord of the governments of the Member States. Immediately after the appearance of the new Commission investiture procedure, the EP introduces key amendments to its RoP. Firstly, rule 32 (Nomination of the President of the Commission) in the RoP, 8th edition, October, 1993, adds the following broad reading of the acquired powers:

“1. When the governments of the Member States have agreed on a proposal for the nomination of the President of the Commission, the President shall request the candidate to make a statement to Parliament...

2. Parliament shall approve or reject the proposed nomination by a majority of the votes cast...

...

4. If the result of the vote in Parliament on the proposed nomination for President of the Commission is negative, the president shall request the governments of the Member States to withdraw their proposal and present a new proposal to Parliament.”

Therefore, “although the EP only had a *de jure* right to be “consulted”, the EP’s interpretation of the procedure ... meant that under the Treaty of Maastricht the EP had *de facto* veto over the proposed EU chief executive” (Hix 2002: 277). Along with that, as Moury (2007: 376) reminds us, in order to strengthen the credibility of the text in its RoP, the EP threatens that in case of a negative vote for the EC presidential nominee, it has not been taken in consideration, the Parliament will not invest the Commission. In the face of the thus given ultimatum, threatening to block the entire procedure, both the EC presidential candidate and the President-in-Office of the Council yielded. Consequently, Jacques Santer promised to withdraw his candidacy if such a hypothetical scenario should obtain and Klaus Kinkel – to find a new candidate.

With respect to the individual investiture of Commissioners rule 33 of the RoP of the EP, 8th edition, October 1993 establishes a procedure for conducting the so-called confirmation hearings, involving the appearance of the candidates nominated before the appropriate committees according to their prospective fields of responsibility. According to rule 33 (2) “[t]he committee may invite

the nominated candidate to make a statement and answer questions...” Only after the commissioner candidates have been interviewed, the programme of the nominated Commission by the nominee for President has been presented and a debate has been held, “Parliament shall vote its approval of the Commission by a majority of the votes cast...” (rule 33 (5)). Similarly to the case of the consultation of the EP on the nomination of the President of the Commission, in this one the EP defends its broad reading in the RoP by means of a series of acts of practical character. Firstly, with regard to the EC Santer the EP threatened that if the college did not comply with the unilaterally imposed demand, the Parliament would simply not table a vote on the new Commission. Secondly, in 1999 the EP managed to coerce the EC President Romano Prodi to agree to sack any commissioner who no longer enjoys the support of the EP. And thirdly, in 2004 the EP threatened that it would not approve the EC if the EC presidential candidate, Jose Manuel Barroso did not replace the Italian Rocco Buttiglione as the Justice Commissioner. The same scenario was played out in 2010 in the case of Rumiana Jeleva, Bulgaria’s nominee for European Commissioner for International Cooperation, Humanitarian Aid and Crisis Response, whose candidacy was also withdrawn after her less than convincing performance at the confirmation hearing before the EP, when she failed to answer questions regarding allegations over her financial interests and didn’t demonstrate sufficient competence in the area concerned. Ultimately, the interpretation of the EP’s powers granted by the Treaty of Maastricht, that the Parliament advances in its RoP, provides two additional options for the institution: 1) to approve the Commission president; and 2) to hold confirmation hearings of the individual Commissioners.

In the Treaty of Amsterdam negotiations the EP insists on the institutionalization on the informally established investiture procedure (only in the part concerning the EC President). According to S. Hix’s theory of securing the agreement of the governments, again the following two consequences of the change have played a crucial role: firstly, the increase in the transparency of the procedure and the possibility for the governments to demand a reduced democratic deficit; and secondly, the absence of any shifts in the established balance between the Council and the EP, due to the formalization of the actual operation of the procedure (Hix 2002: 278). As a result, in Article 214 (2) TEU the Treaty of Amsterdam lays down that “[t]he governments of the Member States shall nominate by common accord the person they intend to appoint as President of the Commission; the nomination shall be *approved* by the European Parliament.” Therefrom, from a formal point of view, the necessity of “consulting” the EP (The Treaty of Maastricht) grows into one of “approval” of the nominee (The Amsterdam Treaty). Another significant characteristic is that while the Treaty of Maastricht’s provisions require that the consultation of the EP be undertaken before the nomination by the governments of the Member States, the Amsterdam amendments seem to imply

that the EP's approval should be given after that. An important clarification is that in accordance with Article 17 (6) TEU „[a] member of the Commission shall resign if the President so requests. The High Representative of the Union for Foreign Affairs and Security Policy shall resign, in accordance with the procedure set out in Article 18 (1), if the President so requests.” Furthermore, as a manifestation of the political responsibility of the European Commission to the Parliament, in the 2010 Framework Agreement, annexed to the EP's RoP, the EC assumes the obligation that “[i]f Parliament asks the President of the Commission to withdraw confidence in an individual Member of the Commission, he/she will seriously consider whether to request that Member to resign, in accordance with Article 17(6) TEU. The President shall either require the resignation of that Member or explain his/her refusal to do so before Parliament in the following part-session.”¹¹

9. THE USE OF THE EP'S "EXTERNAL STRATEGY" IN THE ROP REVISION AFTER THE TREATY OF AMSTERDAM

In the rules reform following the Treaty of Amsterdam the “external method” of increasing the EP's powers gives way to the need for improving the efficiency of the Parliament's functioning, again with “... discussion focused on how Parliament could make the most of those changes accomplished through the rationalization of its internal organizations and procedures” (Kreppel 2003: 901). Expressing what appears to be a common opinion, Kreppel (2003: 902) points to the then current disapproval of the EP's attempts to overstep the strictly determined limits of the Treaties: “thus, the temptation to attempt to add to the accomplishments of the Treaty through EP fiat resurfaced, but with less universal support and to a lesser degree than had been the case during the SEA Rules revisions.” Irrespective of the limited support for the “stretching” of the EP's powers beyond the formal Treaty lines, there is hardly any shortage of examples of the EP's use of the “external strategy”.

9.1 The Commission investiture procedure (case II)

In the years after the Treaty of Amsterdam the EP made another important amendment to its RoP. Thus, in rule 32 (3) of the RoP, 14th edition, June 1999 the expression “election” of the EC President almost surreptitiously sneaked in: “[i]f the nominee is elected, the President shall inform

¹¹ II. Political responsibility, Article 5.

the President of the European Council and the governments of the Member States accordingly, requesting them and the President-elect of the Commission to propose by common accord the nominees for the various posts of Commissioners.” It comes as no surprise that this “negligible” terminological modification, though it does not introduce any change to the procedure, is loaded with significant symbolic meaning and can also be encountered after the Lisbon revisions in Article 17 (7) TEU. According to the procedure as specified there, the European Council, taking into account the elections to the EP, proposes to the EP a candidate for President of the Commission, who shall be *elected* by the EP by a majority of its component members. If he fails to obtain the required majority, within one month the European Council proposes another candidate to the EP. Hence, taking advantage of the incompleteness of the Treaty provisions, the EP lays down a set of rules imposing unprovisioned obligations on the college. In Moury’s opinion (2007: 388), „the possibility of the Parliament to delay or block, combined with a lower vulnerability and the longer time horizon, has been a sufficient condition for the creation of interstitial institutional change.” Threatening to refuse to vote/vote against the new Commission, the EP manages to obligate the Commission to stick to its interpretation of the formal provisions. The Commissioners, impatient as they are to take office, have limited time horizons at their disposal and quickly yield to the demands of the ambitious Parliament. On the other hand, as Moury correctly notes (2007: 388-389), a substantial role in this case has also been played by the collaboration on the part of the Commission, which itself, in striving to obtain certain “democratic legitimacy”, has willingly agreed to concede the EP prerogatives that the latter would not have acquired by its own efforts.

9.2 The EP’s right of scrutiny over the Commission’s exercise of implementing powers

The RoP of June 1999 contain another significant amendment concerning the so-called “implementing provisions”. Though the delegation of powers is not mentioned in the original Treaty of Rome provisions, as a result of the increasing necessity to delegate powers to the Commission to implement European legislation measures, the first comitology committee started to operate as early as 1961. In so far as comitology (the system of committees, composed of government experts that control the Commission in the execution of delegated powers) has always been characterized by inter-institutional tension, such an amendment of the RoP does not seem particularly surprising. As Lintner and Vaccari (2005: 16) put it, "from the beginning the Parliament demanded that the committee procedures should not endanger the institutional balance of the Community, and should have a mere advisory role." Thus, if in the beginning the EP’s concerns were related to the absence of transparency and the limited control over the committees’ activity, with the introduction of the co-decision procedure and the transformation of the Parliament into a

full co-legislator on an equal footing with the Council in the adoption of the empowering provisions in the basic acts for the Commission's implementing tasks, the EP focused its efforts on the acquisition of powers equal to those of the Council.

In the period between 1999 and 2006, in response to the systematic claims made by the institution in connection with its involvement in the delegation of powers to the Commission, the EP obtained the following basic types of powers in the area: firstly, the right of information, provided by Article 7 (3)¹² of the Council Decision 1999/468/EC¹³; secondly, under Article 5 of the 1999 Comitology Decision, the EP has an "ultra vires Council information right", which consists of the option that if it considers that "a proposal submitted by the Commission pursuant to a basic instrument adopted in accordance with the procedure laid down in Art. 251 of the Treaty exceeds the implementing powers provided for in the basic instrument", "to inform the Council of its position"; thirdly, the right of scrutiny (being the right to pass a non-binding resolution if it considers that the Commission has exceeded its implementing powers provided for in a basic instrument adopted by codecision), established by Article 8 of the Council Decision 1999/468/EC¹⁴. The resolution based on Article 8 is not legally binding for the Commission, which means that the Commission can continue with the procedure as if the Parliament had not expressed its opinion; and fourthly, the right of ex post veto on implementing measures of general scope that amend a legal act adopted under co-decision procedure. The last newly-acquired right is connected with the introduction, in Article 5 a of the Comitology Decision in 2006¹⁵, of an additional procedure, which, increasing the EP's democratic

¹² Under it "The European Parliament shall be informed by the Commission of committee proceedings on a regular basis. To that end, it shall receive agendas for committee meetings, draft measures submitted to the committees for the implementation of instruments adopted by the procedure provided for by Article 251 of the Treaty, and the results of voting and summary records of the meetings and lists of the authorities and organisations to which the persons designated by the Member States to represent them belong. The European Parliament shall also be kept informed whenever the Commission transmits to the Council measures or proposals for measures to be taken."

¹³ Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (1999/468/EC, OJ L 184, 17.7.1999, p. 23).

¹⁴ Article 8 provides that "If the European Parliament indicates, in a Resolution setting out the grounds on which it is based, that draft implementing measures, the adoption of which is contemplated and which have been submitted to a committee pursuant to a basic instrument adopted under Article 251 of the Treaty, would exceed the implementing powers provided for in the basic instrument, the Commission shall re-examine the draft measures. Taking the Resolution into account and within the time-limits of the procedure under way, the Commission may submit new draft measures to the committee, continue with the procedure or submit a proposal to the European Parliament and the Council on the basis of the Treaty.

The Commission shall inform the European Parliament and the committee of the action which it intends to take on the Resolution of the European Parliament and of its reasons for doing so."

¹⁵ Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (1999/468/EC, OJ L 184, 17.7.1999, p. 23) amended by Council Decision of 17 July 2006 (2006/512/EC, OJ L 200, 22.7.2006, p. 11).

control over the implementation of the laws it had helped to draw up, reflects much more adequately the strengthened legislative positions of the institution.¹⁶

As the practice has so far shown, it should not come as a surprise that in this area too the EP has tried to interpret the prerogatives under the comitology decisions as widely as possible in order to be able to act when it opposes a draft measure. Thus, the adoption of the Comitology Decision in 1999 automatically leads to the amendment of rule 81 in the new 14th edition of the EP's RoP from June 1999. The new rule states that:

"1. When the Commission forwards a draft implementing measure to Parliament, the President shall refer the document in question to the committee responsible for the act from which the implementing provisions derive.

2. The chairmen or another designated member of the committee responsible may enter into a dialogue with the Commission. The committee responsible may propose to Parliament that it object to the measure. If Parliament objects to the measure the President shall request the Commission to withdraw or amend the measure or submit a proposal under the appropriate legislative procedure.

3. Where such a measure is referred to the Council and therefore to Parliament, the latter shall deal with it in accordance with Rule 112 (2)."

What strikes one here is that unlike the provision of Article 8 of the Council Decision 1999/468/EC, rule 81 gives a substantially more liberal reading to the power granted to the EP by including an objection to draft implementing measures on grounds other than the Commission's exceeding its implementing powers. In this sense it is also worth mentioning Lintner and Vaccari's (2005: 17) observation, that till May 2004 the institution's RoP do not specify in any way the aspects of the European Commission's executive powers to which the EP could object. The cited authors (2005: 17) find the explanation for this fact in the Parliament's aspiration "to be free to object on any

¹⁶ From the EP's perspective the introduction of the regulatory procedure with scrutiny (RPS) is a logical step stemming from the equal power that it shared with the Council in the co-decision. The procedure is applied when the following two conditions are met: (i) the basic act is adopted by co-decision; and (ii) the measure is of general scope and can be defined as "quasi-legislative". Unlike the hitherto existing comitology procedures, under the RPS which concerns sensitive areas, the Commission has the power not only to implement the basic act, but to amend it as well. Due to the great sensitivity of the measures it concerns, the EP's actions are controlled firstly through committee voting, and then by the option to exercise the veto right on the part of the Council and the EP. In case of a positive opinion in the committee a draft measure can only be blocked when the Parliament or Council considers that a) the measure exceeds the implementing powers in the basic act; b) the measure is not compatible with the aim or content of the legislation; c) the measure does not respect the principles of subsidiarity or proportionality. In case of a negative opinion/the absence of an opinion the Council could oppose the proposed measure by QMV or envisage adopting the proposed measure. If the Council opposes the proposed measure, the measure shall not be adopted and the Commission may submit to the Council an amended proposal or present a legislative proposal on the basis of the Treaty. We should note here that although as a whole the RPS improves the EP's institutional position in this sphere, in the envisioned scenario the Council has clear dominance, while no role has been provided for the EP.

grounds and for any reasons whatever, formally as well as substantially." It is only in the 15th ed. of the EP's RoP from May 2004 that a specification appears in rule 88, stating that the EP "may...adopt a resolution objecting to the draft measure, in particular if it exceeds the implementing powers provided for in the basic instrument." The aspiration in question is also reflected in the resolution¹⁷, annexed to the inter-institutional agreement on procedures for implementing Council Decision 1999/469/EC of June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission. In the resolution the Parliament unequivocally points out that the ultra vires right will not prevent the EP from objecting to the Commission's draft implementing measure based on rule 88: "this agreement is without prejudice to its right to adopt any resolution on any subject, notably when it objects to the contents of a draft implementing measure; this agreement is also without prejudice to its right to object to implementing measures referred to the Council following an unsuccessful committee procedure (pursuant to rule 88 of the Parliament's Rules of Procedure). In Lintner and Vaccari's comment (2005: 17), these rules, based only on Parliament's RoP represent "a simple political statement requesting the Commission to react in a certain way but without having any legally binding effect whatsoever. Conversely, this does ... not prevent the Commission from actually sharing Parliament's opinion."

10. THE INSTITUTIONALIZATION OF THE EP-DEvised RULES

The crucial mark of the legitimacy of the EP-generated rules, is indisputably the question as to what extent, after they have been created by the EP in the informal sphere, they will be incorporated in the Treaties. In reality, as we have seen, in some of the aforementioned cases, by granting new powers to the EP, the Treaty revisions have merely formalized a factual situation that the EP has unilaterally imposed through its RoP. These temporal decisions by which the EP has tried to bind the other institutions and to influence the distribution of powers amongst them, have initially given rise to changes at the sub-constitutional level that can easily turn into objects of future institutionalization. And so, "[w]hat has been perceived as a giant leap [taken by the "Masters of the Treaties"]", was in reality only a small step [made by the institutional actors]" (Hix 2002: 279). For, though they are not strong participants in the decision-making during IGCs, the institutions play a considerable part in determining their agenda. Contrary to the common view that

¹⁷ Annex XII to the EP's Rules of Procedure, 16th edition, 2006. Extract from the European Parliament resolution on the agreement between the European Parliament and the Commission on procedures for implementing Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission.

revision Treaties codify the Member States' will, the germ of most of the changes stems from the way in which the institutions have interpreted the less than clear formal rules in the periods between IGCs. So, the IGCs can be said to represent only the culmination of a protracted process of constitutional development, which simply "seals" informally existing practices. In Stacey's words (2010: 90), "rather than create new rules out of the thin air, during IGCs Member State negotiators frequently pluck the fruits of viable informal institutions", among which we can also count the EP's RoP. This seems a good reason to consider them as a form that, once established within the frames of the interinstitutional interaction, subsequently guides and even determines the possibilities for reform during the IGCs. As Maurer reminds us, in the context of the conception of the path-dependence, "once policy decisions have been made or institutions introduced, they will be difficult to reverse at a later point. This is due to the institutional barriers to reform, the resistance of actors that were favored by the institution, and the high costs of change once actors start to adapt to the new policies/institutions in the period between two IGCs" (Kietz and Maurer 2006: 4). The formalization has not altered the content of the rules established in the EP's RoP. After they have been entered in the Treaties, however, the rules in question acquire legal basis, which significantly enhances their status and increases their democratic legitimacy. Thus, the rules that at their first appearance have been proclaimed by the Council and the Commission to rest on no legal basis and to violate the constitutional principle of institutional balance, now draw their legitimacy directly from the Treaty provisions. Therefore, the creative use of its RoP by the EP comprises a crucial part in the Parliament's tactics "Strategic 'Power Grab'" (Benedetto and Hix 2007: 119), which can decisively contribute to our understanding of „the incremental parliamentarisation of the institutional system of the EU [...] over the last two decades" (Kietz and Maurer 2006: 2).

11. CONCLUSION

Although, *prima facie*, it seems that the EP's RoP carry so little significance for the interinstitutional relations that they cannot possibly substantially contribute to the accumulation of influence by one institution at the expense of another, the cases we presented show that such a view is completely wrong. Some of the EP's RoP are not only the institution's interpretation of the Treaty provisions on the inter-institutional cooperation. More often than not, by imposing new obligations on the Council and the Commission and securing unintended prerogatives for the EP, they can also shift the established (political) institutional balance. And so, "[w]hile the Council and Commission tend to lie back, the Parliament stakes out territory, readies its strategy, and draws the

battle lines for any ensuing negotiations” (Stacey 2010: 91). By agreeing to the EP’s interpretation of the vague Treaty provisions in the RoP, the Council and the Commission give indirectly their consent for the EP’s strategy of using its RoP as a political instrument for improving its position. The outcome of the informal institutional dynamics, fuelled, among other factors, by the ingenious use of the RoP by the EP is the so-called “institutional displacement”, which though short of leading to a “major transfer of power” from the Council/Commission to the EP, “ha[s] resulted in tilting the institutional balance slightly toward the Parliament and ha[s] re-engineered the ‘constitution’ of the EU – entirely by informal means” (Stacey 1997: 35). So, the EP’s RoP have considerably contributed “to make the Commission and the Council more accountable to the Parliament and to place the Parliament and the Council on slightly more equal terms” (Stacey 1997: 32). At the same time, doubts remain as to whether the use of the so-called “external method” for extending the Parliament’s powers is compatible with the institutional balance as a legal principle according to which each institution should act within the limits of the powers granted to it by the Treaties without unilaterally striving to extend them at the expense of the powers of other institutions.

12. ADDENDUM

The gradual increase of the EP’s powers under the Treaties as well as the redirection of the institution’s efforts towards the full employment of the acquired prerogatives predictably leads to changing the approach used in its Rules of procedure from an external to an internal one: “...the EP has consistently (since the early days as the Common Assembly) attempted to increase its own powers *vis-à-vis* the other institutions/organizations through the creation of informal institutions via its RoP. The earnestness with which this was pursued was understandably much greater when the power of the EP was much smaller. As its power has increased the EP has shifted its attention to ensuring that it can fully exploit its new powers...” (Kreppel 2003: 906). As a result, ever since the RoP’s revision following the TA, one can notice certain refocusing of the institution’s attention towards improving the efficacy and taking the most out of the powers it already has at its disposal. At the same time, it can hardly be expected that the Parliament would give up completely the strategy it has followed hitherto. It is quite possible, for instance, for the institution to go back to its “old habits” in the sphere of delegated rule-making, where its more significant powers date back from 2006. After the 2006 Comitology Decision and especially the introduction of the so-called regulatory procedure with scrutiny (RPS) the EP has once again adapted its procedures in order to

take full advantage of the newly acquired powers. The new procedure entitles the Parliament and the Council to scrutinize quasi-legislative measures, implementing an instrument adopted by co-decision and to reject such measures. Compliance with three conditions determines whether the new procedure will be used: firstly, the act is adopted in co-decision; secondly, the measure is of general scope; and thirdly, only quasi-legislative non-essential elements of the basic act are concerned. The RPS does not replace, but it is added to the existing advisory, management and regulatory procedure. Therefore the rule 88 (later 81) "did not need to be replaced by a new single Rule but to be supplemented by provisions taking account of the specific features of the new procedure."¹⁸ An important characteristic of the amendments in rule 81 (2), entered into force on 1 January 2007, is also the fact that although the institution has only a veto right on the whole draft measure, but not a right of amendment, a provision is made that the motion for a resolution opposing the adoption of the draft measures "may also indicate the changes that ought to be made to the draft of measures." The purpose of such a provision is, according to Kaeding and Hardacre (2011: 15 - 16), in case of adoption, to "give an indication to the Commission and Member States in which direction they should "amend" the draft measure in order to satisfy the Parliament. This is interesting because RPS as such did not explicitly foresee any formal right of amendment." The authors (2011: 22) even tend to explain the increased influence of the EP in the RPS through "the emergence of a number of informal powers", including the established "*de facto* parliamentary right of amendment". The Lisbon Treaty represents the next serious step with the following important implications for comitology. Firstly, the Treaty transforms the co-decision procedure into an ordinary legislative procedure, which is to be used in all cases with the exception of those, where the use of the special legislative procedure is required. Secondly, the EC is recognized as the main executive body; as for the Council, the latter can adopt Implementing acts only in "duly justified specific cases", but not Delegated acts. Thirdly and related to the second point, a distinction is introduced between standard

¹⁸ 2006/2211(REG) - 14/12/2006 Text adopted by Parliament, single reading, <http://www.europarl.europa.eu/oeil/popups/summary.do?id=979810&t=d&l=en> Hence, new paragraph 4 states that if the implementing measures envisaged by the Commission fall under the RPS, paragraph 81(3) shall not apply and paragraphs 1 and 2 shall be supplemented as follows: a) the time for scrutiny starts to run when the draft of measures has been submitted to Parliament in all official languages; b) Parliament may oppose the adoption of the draft of measures, justifying its opposition by indicating that the draft of measures exceeds the implementing powers provided for in the basic instrument, is not compatible with the aim or the content of the basic instrument or does not respect the principles of subsidiarity or proportionality; c) if the draft of measures is based on paragraph 5 or 6 of Article 5a of Decision 1999/468/EC, which provides for curtailed time-limits for the opposition of Parliament, a motion for resolution opposing the adoption of the draft of measures may be tabled by the chairman of the committee responsible if the committee has not been able to meet in the time available. Other changes concern the synchronization of the rule terminology with that of the 2006 Comitology decision. A provision is also made as to the employment of a second committee when enhanced cooperation between committees has taken place with regard to the basic act from which the implementing measure derives. The chairman of the committee responsible shall set a deadline for Members to object to the draft of measures, with the additional option, where the committee considers it to be appropriate, to appoint a rapporteur, who could draft a Resolution opposing the draft measure.

Implementing acts, on the one hand, and Delegated acts, on the other one, with Article 290 TFEU specifying the legal base of Delegated acts, while Article 291 TFEU – the one of Implementing acts. Under Article 290 TFEU a legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act. Thus, since the legislators give the extra power to supplement/amend the basic act to the Commission, at least prima facie Delegated acts seem rather similar to the RPS. EIPA Essential Guide (2013: 13-14), however, reminds that a closer comparison can reveal the following four significant differences. Firstly, with regard to Delegated acts there is no requirement to adopt any binding instrument of secondary legislation to ensure the implementation. So, the objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts case by case. Secondly, Delegated acts comprise a whole separate category, exempt from comitology control at the expense of the increased control exerted on the part of the legislators. Thirdly, the right of objection that the EP and the Council have is not subject to any substantive criteria and is not bound by the compliance with one of the three legal conditions, specified under RPS. Fourthly, with respect to Delegated acts, the Treaty not only emphasizes, in Article 290 (2), that "the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within the period set by the legislative act"¹⁹, but also provides the EP with the right of revocation: "the European Parliament or the Council may decide to revoke the delegation". With respect to the practical consequences of the introduction of the Article 290 TFEU in EIPA Essential Guide (2013: 20) it is pointed out that „the existing RPS procedures will not be automatically aligned to Delegated acts – so the RPS will continue to be used in committees until the basic act is revised – a process which should be finalized by the end of 2014.”

On the other hand, the provisions of Implementing acts, which in principle are accepted by the Commission, and, in specific circumstances, by the Council as well, are contained in Article 291 TFEU. Unlike Delegated acts, with this type of acts the familiar comitology system is preserved. The implementation of Article 291 TFEU requires a regulation, which is to lay out the new comitology procedures. As a result, the Regulation 182/2011 co-decided by the Council and the Parliament entered into force on 1 March 2011.²⁰ The Regulation keeps the advisory procedure (Article 4), which as has been the usual practice, will continue to be used for uncontroversial acts. Management and regulatory procedures are now replaced by the new examination procedure (Article 5). The EP, and now the Council have the right of scrutiny (Article 11), which consists of

¹⁹ The so-called "tacit approval"

²⁰ Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, OJ L 55, 28.2.2011, p. 13.

the option they are given to pass at any time a non-binding resolution if they consider that a draft implementing act exceeds the implementing powers provided for in the basic act. In addition, the referral to the Council is replaced by the referral to the Appeal Committee, which can vote changes to the text, to adopt or reject the text. The latter change is not as fundamental as it may seem, since, as the EIPA Essential Guide (2013: 20) rightly points out, the Appeal committee, in its capacity of the political body for exercising control over controversial and sensitive acts, “is Council in everything but name.”

Thus, if the revision of the rules of procedure of January, 2007 is needed by the institution in order to provide the latter with a framework to deal with the RPS measures, the same need arises in the case of Delegated acts. Due to that need, the RoP of July 2010 specify two separate rules for Implementing and Delegated acts. Rule 88, which is identical with the previous rule 81, concerns Implementing measures, including Implementing measures which fall under the regulatory procedure with scrutiny. On the other hand, the new Rule 87a is devoted exclusively to Delegated acts, giving the parliamentary committee responsible the power to examine any draft Delegated act, as well as to submit to Parliament, in a motion for a resolution, any appropriate proposal. Till the EP decision of May 10, 2012, on the amendment of Rules 87a and 88 of Parliament's Rules of Procedure (2009/2195(REG)), rapporteur Carlo Cassini, there have been no additional elucidations in Rule 87a. In the Explanatory statement of the Report²¹ on the amendment in question (2012: 15) the main motivation for the amendment is unequivocally stated, namely: addressing "the changes stemming from the entry into force of the Lisbon Treaty", as well as the need for "a procedure which sets out more clearly the arrangements for the rapid approval of a delegated act or implementing act." While the new Rule 87a and Rule 88 fix the standard procedures that involve consideration of the proposed Delegated act or Implementing act by the committee responsible without associated committees/committees jointly responsible, the new Rule 88a specifies the applicable procedure in cases involving such a type of committees. Of special significance, with regard to interinstitutional relations, is the provision of Rule 87a (6), which establishes the procedure whereby Parliament declares, prior to the expiry of the deadline set in the basic legislative act, that it does not intend to raise objections to the Delegated act, as provided for in point 11 of the common understanding²². As the Explanatory statement (2012: 16) states, this procedure "needed to be formalised, in particular in order to enhance the legal certainty of any such decision." At the same time, the RoP emphasize that the decision not to raise objections renders

²¹ Report on the amendment of Rules 87 a and 88 of Parliament' s Rules of Procedure (2009/2195(REG)), A7 - 0072/2012. Committee on Constitutional Affairs. Rapporteur: Carlo Cassini.

²² Common understanding on practical arrangements for the use of delegated acts (Article 290 TFEU).

inadmissible any subsequent proposal objecting to the Delegated act. Analogously, with respect to Implementing acts, Rule 88 4d specifies that if the committee responsible recommends, by means of a letter to the Chair of the Conference of Committee Chairs that Parliament should declare that it has no objections to the proposed measure prior to the expiry of the normal time limit, the procedure provided for Rule 87 a (6) applies.

One should bear in mind, however, that although the new rules on comitology determine the use and range of different procedures, the choice between Implementing and Delegated acts in the basic legislative act is not that easy to make in practice. As Bergström and Rotkirch (2003: 54) rightly note, the main difference does not consist in any qualitative differentiation, but rather in the different means for exercising the political supervision over these acts. Regardless of the immediate reason, the result is the formation of a grey area between Delegated and Implementing acts. A further aggravating circumstance in this case is related to the usual interinstitutional tensions, that characterize the area in question. The fact that the EP enjoys substantial powers under Delegated acts pre-determines the institution's preference for precisely this category. Here the right of objection on any grounds, no longer only the three legal criteria will facilitate the scrutiny of measures by the EP and will exempt the institution from the need to monitor the compliance with the three criteria. In any case, the intervention of the CJEU can help with finding a solution to the problem of the expanding grey area between Delegated and Implementing Acts. We are yet to see, for example, what position the Court will adopt with respect to case C-65/13²³ which is still in progress. In support of its action for annulment the Parliament claims that the Commission has misused the powers conferred upon it by the legislature. According to the Parliament, the Commission has infringed Article 38 of Regulation (EU) No 492/2011²⁴, which confers only implementing powers on the Commission. At the same time, the EP's stance is that the act adopted by the Commission, being an Implementing act, also supplements certain non-essential elements of the Regulation. For that reason, the EP deems that "if it is necessary to supplement non-essential elements of Regulation (EU) No 492/2011, the Commission, in the absence of powers to adopt delegated acts within the meaning of Article 290 TFEU, ought to have made a proposal to the legislature supplementing or amending the basic act." Having in mind the current practice of the Court, however, considerable doubts remain as to the willingness of the Court to issue an unequivocal ruling that would affect legislative powers of the EU institutions. But whereas for the

²³ Action brought on 7 February 2013 - European Parliament v European Commission, OJ 108, 13.4.2013, p.17.

²⁴ Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (codification), OJ L 141, 27.5.2011, p.1.

Court such a will, which will clearly have repercussions for the powers within the framework of the institutional triangle, is uncharacteristic, the same can hardly be claimed for the EP.

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