

THE CO-DECISION PROCEDURE (ART. 251 TEU)
ANALYSIS AND STATISTICS OF THE 2004-2009 LEGISLATURE
(Status: August 2009)

Summary

This analysis reviews the evolution of the co-decision procedure over the period of from June 2004 to July 2009, the 6th legislature of the European Parliament. The analysis is carried out in two parts, a qualitative and a quantitative one and, where possible, comparisons to the 5th legislature (1999-2004) have been made. Overall, the findings may be summarised as follows:

- a productive period, with a total of 477 pieces of legislation concluded;
- improved procedures and growing mutual trust between the institutions;
- a significant increase in the relative number of 1st reading deals – from 33% to 72%;
- an important drop in the relative number of conciliations – from 21% to 5 %;
- an increase in the length of time to reach agreement at each stage;
- an impact on output as a result of enlargement is not detected, however, some delays (e.g. because of linguistic checks and translations) or longer negotiations times may be, to some extent, attributed also to the two enlargements of the EU in 2004 and 2007;
- more emphasis on "better regulation" files (e.g. codification);
- negotiation of a new approach to comitology to meet EP concerns (regulatory procedure with scrutiny);
- increased use of the "package" approach;
- growing "coreperisation" and "presidentialisation" of Council's working methods;
- increased tendency to agree by consensus in Council;
- greater involvement of Coreper II;
- EP continues to assert and enhance its role in the procedure;
- consistent fulfilment of the Commission's role of "*animatrice et médiatrice*";
- a very small number of failures (Patenting of Computer Inventions, Port Services, Working Time).

In effect the approach to the co-decision procedure, as set out in the Communication to the Commission on the Implementation of the Amsterdam Treaty of 2 July 1999 (SEC(99) 1083) has stood the test of time well. Significant further extension of co-decision to most legislation under the Lisbon Treaty will present the occasion to revisit and redefine the role of the institutions in the procedure.

1. QUALITATIVE DEVELOPMENTS

This legislature has seen a number of important changes in the area of codecision, not only in the way the three institutions work together but also within each institution.

The most important change has been further improvement in the working relationship between the three institutions. With the passing of time the three institutions have developed a relationship based on trust and pragmatism, where agreement could be reached earlier and earlier in the procedure, reducing drastically the number of conciliations and provoking an explosion of 1st reading agreements¹. This change has led to a revision of the Joint Declaration on Codecision in 2007², which put down in writing the good practice that had developed between the three institutions as regards reaching 1st and 2nd reading deals. The new Declaration 'institutionalised' existing new practices, such as Negotiated Common Positions or the exchange of letters after an agreement, and introduced new ones, such as the organisation, as far as possible, of the signing of important adopted texts at a joint ceremony in the presence of the media or the agreement on the procedures for the finalisation of texts (including legal-linguistic verification).

The Joint Declaration was the first document to acknowledge the importance of trilogue meetings as the basis for reaching agreements. The last legislature saw an increasing number of these meetings, which any institution was free to convoke, at any stage of the procedure and at any level of representation, technical or political. Trilogues became the means of negotiating and coming to an agreement on a specific file, but they also came to have a much deeper institutional impact. Through frequent meetings of the same individuals sharing a common interest in a specific EU policy, positive working environments were created. Successful cooperation on one dossier thus helped the successful conclusion of the next negotiation.

Other factors behind the increase in 1st reading agreements included a high number of uncontroversial or technical proposals from the Commission as well as perceived political urgency of proposals. Council presidencies are also keen on 1st reading agreements, as each Presidency hopes to be seen as the one concluding a maximum number of files. Accordingly, each Presidency is very active in trying to secure a 1st reading deal on a number of files which it considers as priorities, since the arrangements for a 1st reading agreement are much more flexible than for the later stages of the procedure.

Within the EP, some of the new tendencies, and especially the increase of 1st reading agreements, have provoked strong criticisms however³. As a consequence, new internal rules were adopted in the framework of the new 'Code of Conduct for in the context of the ordinary legislative procedure' in the interest of transparency and accountability, especially at an early stage of the procedure. This Code of Conduct was also annexed to EP's new Rules of Procedure as Rule 70 (Inter-institutional negotiations in legislative

¹ See pages 6 & 7

² 2007/C 145/02

³ See The EP Activity Report of the delegations to the Conciliation Committee, presented by the three Vice-Presidents responsible for Conciliation: Mrs Kratsa-Tsagaropoulou, Mrs Roth-Behrendt and Mr Vidal-Quadras 1 May 2004-13 July 2009 (6th parliamentary term) PE427.162v01-00: see http://www.europarl.europa.eu/code/information/activity_reports/activity_report_2004_2009_en.pdf. The findings of this Activity Report have also provided inspiration for other parts of this Analysis and are gratefully acknowledged.

procedures)⁴. The Code of Conduct insists that decisions to pursue 1st reading agreements should be taken on a case-by-case basis and with the agreement of the entire Committee and, most importantly, that the amendments adopted in committee or in plenary should form the basis for the mandate of the EP negotiating team. Under the new rules, after each trilogue, the EP negotiating team will be required to report back to the Committee or at least organise a meeting of shadow rapporteurs. All documents distributed during the trilogue will have to be made available to Committee members. The committee should consider any agreement reached or update the mandate of the negotiating team in the case that further negotiations are required.

The **lower number of conciliations** during the 6th legislative term can be explained by several factors. Firstly, the very special circumstances of 2004 led to enormous efforts to conclude procedures before enlargement. This explains why during the 1st year of the 6th legislative term no conciliation took place. Circumstances at the beginning of the previous legislature in 1999 were very different, leading to 17 conciliations in the 1st year of the 5th legislature.

A second reason is that the agreement on the financial perspectives 2007-2013 led to agreements on the budget of the various multiannual programmes (such as the Cohesion Fund, the 7th Research Framework Programme, Culture 2007 or the European Neighbourhood and Partnership Instrument). When in 2006 the Commission presented legislative proposals revising 26 existing programmes and proposing 5 new ones, there was enormous time pressure to adopt them in time for the start, of most of them, in 2007. During the 5th legislature, in comparison, 10 conciliation procedures dealt with financial programmes and in particular their budgets.⁵ During the 6th legislature only one financial programme (Life+) was discussed in conciliation.

Third, the general trend towards 1st reading agreements also explains the lower number of conciliations⁶.

The ruling of the European Court of Justice in the IATA case (which confirmed that, in order to enable an agreement to be reached on a joint text, the conciliation committee could agree on changes to parts of the common position which were not amended by the Parliament at second reading)⁷ had an impact on conciliations. Negotiators during 3rd reading felt reassured when speaking about parts of the common position not amended by Parliament in second reading or about completely new elements introduced with the aim of finding a compromise. In that sense the ruling certainly was an important argument when, for example, the Parliament delegation requested the use of the regulatory procedure with scrutiny in the Civil Aviation security conciliation or a fixed date of application in the case of the conciliation on the Athens Convention.

Inter-institutionally, there is the question of transparency and in particular access to the documents used by the conciliation committee. Point 37 of the joint declaration provides for the 4-column working documents (outlining the common position, Parliament's 2nd reading position and the current positions of Parliament and Council) used during

⁴ <http://www.europarl.europa.eu/sides/getLastRules.do?language=EN&reference=TOC>

⁵ Socrates II, Save II, Altener II, Culture 2000, Youth, Life III, environmental dimension of development, tropical forests, social exclusion, public health programme (for details see Annex 3a and 3b of the EP Activity Report 1999-2004).

⁶ EP Activity Report , p.20-21

⁷ C-344/04

conciliation to be made public once the procedure has ended. Following the ruling of the European Court of Justice in the *Turco* case⁸, this practice needs to be reassessed in cooperation with the Council.

Since the beginning of co-decision, comitology (the rules according to which implementing decisions are taken) has been an issue in many negotiations between the institutions. Often this question played an important role in conciliation procedures. During this legislative term the new Comitology Decision of 2006⁹ which introduced the regulatory procedure with scrutiny (RPS or PRAC), was adopted. This new decision met a longstanding request by Parliament to improve its rights to monitor the implementation of legislative acts adopted under the codecision procedure. For the first time, Parliament gained an effective right to reject implementing measures in cases where it does not agree with the substance of these measures.

The new Comitology Decision generated further legislative activity, as the entire existing *acquis* needed to be aligned to the new decision, i.e. it had to be decided which of the "classical" comitology procedures was to be replaced by RPS. In addition, the choice of the comitology procedure remained a contentious issue between the institutions when negotiating codecision dossiers.

The alignment exercise started with 27 so-called priority acts¹⁰ which the institutions identified as in need of alignment "as a matter of urgency". In a further communication (COM(2007)740), the Commission identified a further total of 225 legislative acts, which were aligned by 27 further co-decision procedures.¹¹

In total, this alignment exercise has led so far to 54 concluded co-decision procedures, including 206 legislative acts. Following a request from Parliament, the Commission presented a further omnibus proposal to align the existing *acquis*. This proposal will be dealt with in the new parliamentary term.¹²

2. QUANTITATIVE ASPECTS

2.1. Agreement on co-decision files

The delivery of the co-legislator increased slightly with 477 co-decision files agreed¹³ in the 2004-2009 legislature (excluding 4 files¹⁴ in second reading which are likely to go to conciliation) compared to the 1999-2004 legislature, when the co-legislator was able to

⁸ The European Court of Justice (ECJ) ruled that the refusal by the Council in 2002 to give access to former MEP Maurizio Turco to an opinion of its Legal Service was in breach of the provisions of Regulation No 1049/2001 on public access to European Parliament, Council and Commission documents (C-39/05 P and C-52/05 P).

⁹ Council Decision 2006/512/EC of 17 July 2006 amending Decision 1999/468/EC; OJ L 200, 22.7.2006, p. 11. Consolidated version of Decision 1999/468/EC in OJ C 255, 21.10.2006, p. 4.

¹⁰ The institutions agreed on a priority list of legislative acts to be aligned "as a matter of urgency" (See point 5 of the joint statement in OJ C 255, 21.10.2006, p. 1. See also COM(2006)900).

¹¹ COM(2007)0740 contained 4 so-called omnibus proposals for 156 legislative acts where only the comitology provisions required modification and proposals for instruments undergoing codification and recasting (23 legislative acts in 23 codecision procedures).

¹² COM(2009)142

¹³ 428 out of 477 were signed during this period, 301 after first reading, 104 after second reading and 23 after conciliation.

¹⁴ 3 files of the telecoms package and the pesticides statistics

adopt 422 co-decision files by Parliament and sign 403 files. This rings the total number of successfully agreed co-decision files to 899.

The number of **Commission proposals** subject to co-decision increased from 432 to 486 files in this legislature. One reason is certainly the increase in scope of co-decision in the areas of justice, liberty and security following the transitional period in the Nice Treaty. Other reasons are the increased focus on better regulation which increased the number of codification¹⁵ proposals significantly and the resolution of the long-standing inter-institutional debate on comitology which required the alignment of a large part of the *acquis*¹⁶.

Another element to point out is the slightly increased number of "amending proposals"¹⁷, pointing to an increased focus on deepening and modernising the existing *acquis*. This may be another effect resulting from the better regulation agenda.

Other trends were, in particular:

- Recasts: the number of co-decision proposals by the Commission presented with the recasting technique is increasing.
- Packages: an increase in presentation of policy initiatives in the form of packages including several legislative proposals.

Out of the 486 proposals presented by the Commission during the 6th legislature, approximately 400 (82%) were agreed until June 2009. Most of the others are pending for the new legislature or, in a few cases, have been withdrawn.

2.2. Stage of agreement

Co-decision allows the agreement on a file between the co-legislator at every stage of the process, first reading, second reading or conciliation. Increasingly, the possibility for an agreement through a negotiated Common Position is being applied. In procedural terms, this requires a second reading by the Parliament without amendments ("early second reading agreement"). The analysis looks at the four options¹⁸ without being able to establish, however, whether an early second reading (plenary vote without amendments to the Common Position) was achieved because of dedicated negotiations or the fact that the Parliament was satisfied with the Common Position of the Council.

¹⁵ 48 codification proposals in the legislature 2004-2009 in comparison to 14 for the period 1999-2004.

¹⁶ 54 co-decision files (including five omnibus proposals) were presented since 2006 to align the powers of the Commission with the new Decision on comitology (Council Decision 2006/512/EC amending Decision 1999/468/EC).

¹⁷ 192 of 480 co-decision proposals include the word "amending" in the title in comparison to 175 files out of 427 in the previous legislature.

¹⁸ Agreement at first reading, early second reading (negotiated common position), second reading and conciliation.

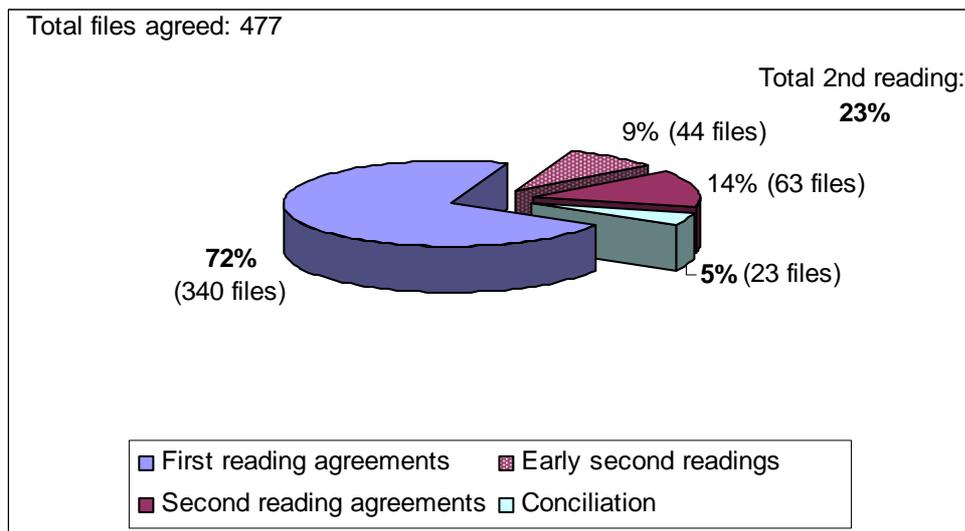


Figure 1: Distribution of stages of agreement based on all co-decision files agreed during the legislature 2004-2009

Overall, the trend towards first reading agreements is clearly visible with an increase from approximately 33% from 1999 -2004 to 72% from 2004-2009 compared over the whole legislature (see figures 1 and 2). The trend was even more pronounced for the year 2008 with a total of 84% of files agreed in first reading. This is not surprising since the rate of first reading agreements rose also at the end of the previous legislature, due to the pressure to conclude an agreement before the parliamentary recess.

Regarding conciliations, a significant reduction could be observed from 20% to 5%. Over the last two years one or two conciliations per year became the norm in comparison to annual 17-19 in the years 2001, 2002 and 2003.

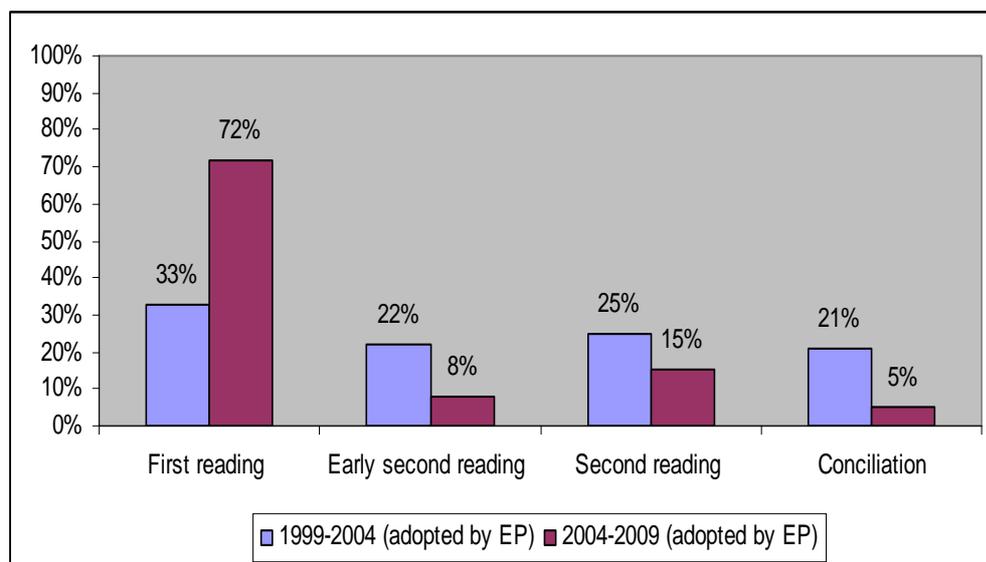


Figure 2: Comparison of stages of agreement between legislatures of 1999-2004 and 2004-2009.

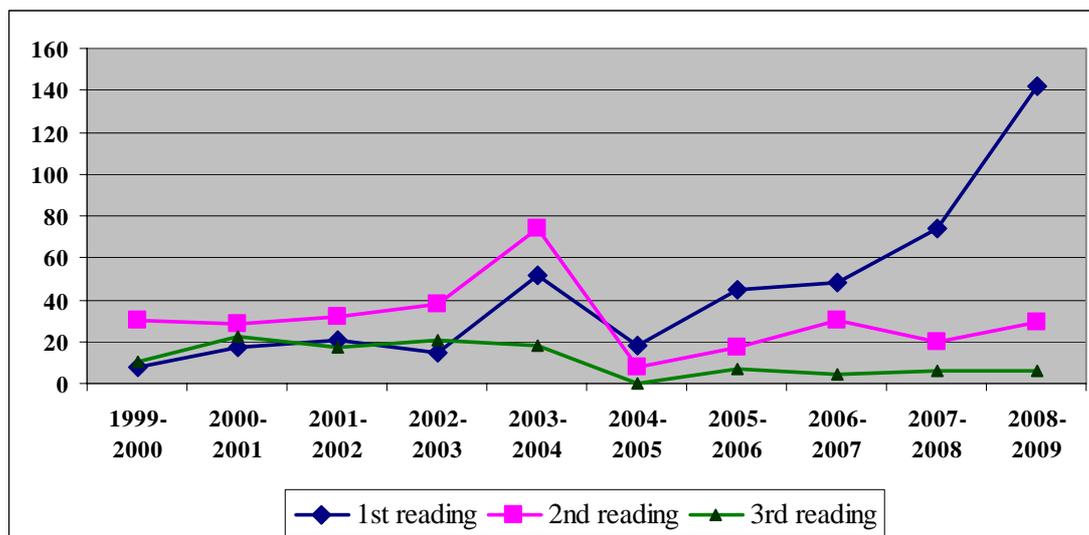


Figure 3: Evolution of the stage of conclusion 1999-2009 (Files adopted between 01.05. and 30.04. each cycle, except for 2008-2009 - all files included) (EP 2009: Activity Report 2004-2009¹⁹)

2.3. Duration of the co-decision procedure

The duration of negotiations and its changes is a useful indicator for the effectiveness of the procedure and the institutions. Some initial analysis is given below.

Table 1: Average duration in months of the procedure from Commission proposal until signature following adoption (including only files signed up to 13/05/2009)

Agreement in	Legislature 1999-2004	Legislature 2004-2009	Shortest and longest procedure (2004-2009)
First reading	13,8	15,2	1,8 / 47,9
Second reading	25,1	31,3	11,9 / 108,1
Conciliation	31,9	43,7	28,8 / 159,4

The time span for reaching agreement increased significantly in the last legislature. The increase grew as from agreements reached in first reading (1,4 months increase/+6%) to second reading (6,2 months increase/+20%) and conciliation (11,8 months/+25%).

The increase in duration of first reading agreements can be mostly allocated to the increase in time elapsing between the adoption of the proposal by the Commission and the first reading in the Parliament. The Council managed, actually, to reduce the time needed to finalise and adopt a first reading agreement.

Similar trends can be observed for files agreed in second reading where the time until the first reading in the EP increased by 3,4 months whereas in Council only an increase of

¹⁹ European Parliament - Activity Report 1 May 2004-13 July 2009 (6th parliamentary term) of the delegations to the Conciliation Committee, PE427.162v01-00: see http://www.europarl.europa.eu/code/information/activity_reports/activity_report_2004_2009_en.pdf

1,5 months was noted between the first reading in the EP and the transmission of the Common Position.

In files being agreed at the conciliation stage, the situation is reversed. The Council took 6,2 months longer between the first reading and the transmission of the Common Position whereas the increase in duration in the early stages of negotiations in the EP is similar to that for the second reading, namely an increase of 4 months between Commission proposal and 1st reading.

Table 2: Average duration in months of 1st reading where the file went to second reading or conciliation

Agreements in Duration of stage	Legislature 1999-2004		Legislature 2004-2009	
	Second reading	Conciliation	Second reading	Conciliation
From adoption of Commission proposal to EP first reading	9,7	9,6	13,1	13,7
From EP first reading to Council transmission of CP	10,1	10,6	11,7	17,7

2.4. Signature and publication

Following the adoption of a co-decision file by the co-legislator, two technical, procedural steps need to be completed in order to allow the legislation to enter into force, namely the signature and the publication in the Official Journal.

On average (over the some 900 co-decision files since 1999), the **signature** took place 1,4 months after the adoption in Council (first reading agreements and conciliations) and adoption of the 2nd reading in plenary for second reading agreements²⁰. In several cases it was possible to organise the signature on the same day as the adoption. The longest delays of several months (up to 10 months) were observed in second reading agreements.

The **OJ publication** takes place on average 0,6 month (17 days) after signature²¹. In individual cases, the publication was delayed up to 3,5 months. No significant difference was observed between the stages of agreement or the legislatures.

There has not been a significant increase in these last procedural steps following enlargement, except for second reading agreements where the average time until signature increased from 0,95 to 2,7 months.

2.5. Packages in the co-decision procedure

Recently, the negotiations on packages have gained increased attention because the Commission presented a number of important political and legislative initiatives in this form. In total, 17 packages (including 54 individual co-decision files) have been

²⁰ Note: for second reading agreements, the vote in plenary had to be taken as a reference point, since early second reading agreements do not require adoption by Council thereafter.

²¹ Note: these figures are based on a subset of 312 files, the remaining data were not compiled in the database

negotiated and agreed during the 2004-2009 legislature. By comparison, only 4 packages (comprising 11 files) were agreed from 1999-2004.

It is also remarkable that a large number of packages (7 packages comprising 21 files) were agreed in first reading and another 8 packages (24 files) were agreed in second reading during the 2004-2009 legislature. In the previous legislature, no package was agreed in first reading and 3 out of four packages were agreed in second reading. Finally, two packages (including 9 files) went to conciliation by comparison with one package (3 files) in the previous legislature .

In most cases, the packages were kept together during the legislative negotiations. Only the economic recovery, financial services and pesticide packages were adopted at different times. However, the individual files were also presented by the Commission at different dates and sometimes the treatment in packages was agreed after the proposals were presented. The only package which got really disconnected during the negotiations in Council was the 3rd Maritime Safety package. It was actually due to the Parliament's efforts that the whole package was finally agreed and adopted at the same time.

Concerning the duration of negotiations, it is remarkable that packages have a lower time-length than the average over all files. The shortest negotiations towards first reading agreements took place for the financial services and the economic recovery packages. The duration of the negotiations for the climate/energy package were, with 15 months, above average.

The shortest package which was agreed in second reading was the 3rd internal energy market package (with approx. 21 months up to signature in July 2009). This was well below the average second reading agreement which took approximately 31 months in this legislature.