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How strong is deliberation in EU intergovernmental decision making? Deliberation in the field of Justice and Home Affairs

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ABSTRACT

The argument that intergovernmental decision making in the EU is not marked by bargaining alone and that occurrences of deliberation play an important role is gaining increasing recognition in the literature. In this article, we critically evaluate that claim by developing a notion of deliberation along Habermasian lines, in which deliberation is understood as a process that induces negotiating partners to change positions through argumentation. Based on this conceptualization, we explore to what extent and under which conditions deliberation is likely to occur in intergovernmental settings. To that end, we analyse decision-making on the proposal to give law enforcement authorities access to the Visa Information System. We conclude that a ‘thicker’ conceptualization yields relatively few instances of deliberation. Moreover, we identify a number of specific conditions, and interrelationships between them, that are conducive to this kind of deliberation.

KEYWORDS

Constructivism; deliberation; Intergovernmentalism; European Union; Justice and Home Affairs (JHA); Visa Information System (VIS)

1 Introduction

A key question in the study of EU decision-making has been what is the dominant process through which member state governments come to agreements in the Council of Ministers. Some conceive of intergovernmental decision-making as essentially an interest-driven bargaining process, in which member state governments look for an outcome in the potential zone of agreements determined by pre-conceived preferences (see e.g. Moravcsik 1998; Thomson 2011). Others claim that intergovernmental decision-making evolves in a more deliberative way, in which member state governments try to convince each other and preferences are formed and redefined during the decision-making process (see e.g. Lewis 2010; Risse and Kleine 2010). This ties in with broader debates in international relations theory that pit ‘rational choice’ and ‘constructivist’ accounts against each other (Risse 2000; Wendt 1992).

In the context of the EU, this debate has gained new prominence with the increased emphasis on intergovernmental decision-making, which has been highlighted by the literature on ‘new intergovernmentalism’ (Bickerton, Hodson, and Puetter 2015; Puetter 2012, 2014). This literature identifies a growing use of intergovernmental modes of policy

coordination, in particular in the areas of economic governance, foreign and security policy and social and employment policy. This policy coordination is characterized by practices of deliberative and consensual decision-making. In this way, the notions of 'deliberation' and 'consensus building', which before were thought of as the 'behavioural hallmarks of supranationalism', were introduced into intergovernmentalist thinking (Bickerton, Hodson, and Puetter 2015, 704).

The idea that the occurrence of deliberation is not exclusively linked to supranational institutions or processes is appealing. Also, it is certainly a move forward in leaving the idea that the bargaining mode of discussion – the opposite of deliberation – is the sole characteristic of intergovernmental relations and decision making. As several empirical studies have shown, instances of deliberation can be found in the working structures of the Council of Ministers, the pre-eminent site of intergovernmental decision making in the EU (Kaniok 2016; Naurin 2010; Niemann 2004; Lewis 2005; Puetter 2003; Blom-Hansen and Brandsma 2009; Joerges and Neyer 1997).

Still, the argument that deliberation may also occur under intergovernmental circumstances, uncoupled from any supranational involvement or community logic, raises several questions. A key question in this regard is what is meant by 'deliberation' in this context. In this paper, we explore the implications of applying a notion of 'deliberation' that stays close to the Habermasian conception. This conception sees deliberation as a truthful and open-minded exchange of arguments where discussants are induced to change positions in light of the better argument (Habermas 1984; Checkel 1998; Risse 2000). This represents a relatively 'thick' or demanding conception of deliberation, which goes beyond the exchange of arguments and processes of arguing.

Based on this conception, this paper seeks to identify the scope and conditions of deliberative processes and position change in a field which is considered a key sector of intergovernmental policy making: justice cooperation and criminal law. Within this field, the discussions preceding the adoption of the Visa Information System (VIS) under the old third pillar are analysed.

The paper makes three contributions to the literature. First, the paper adds an important element to the current debate by specifying the less readily apprehensible attributes of deliberative exchange and concomitant position change, which are central to a Habermasian conception of deliberation. Second, the paper contributes to the further development of deliberative analysis by specifying the conditions under which deliberative decision-making in an 'intergovernmental' context takes place. Third, through a detailed analysis across a variety of configurations of institutional and social conditions in the EU, this study attempts to contribute to a more fine-grained, differentiated model of deliberation and the situational context in which it takes place.

The paper is structured as follows. In the next section, a theoretical framework is presented for specifying the attributes of deliberation and the conditions under which it may occur in the institutional setting of the EU. Then, an account is provided of the choice for the decision-making case, as well as the methods and sources used to examine it. Subsequently, a detailed analysis of decision-making is presented on the VIS process. Finally, a number of conclusions are drawn and the implications of the findings for the literature are discussed.

2 Theoretical framework

2.1 Identifying deliberation

One of the key elements that distinguishes deliberation from the rational choice conception of bargaining is that discussants are involved in a process where arguments are exchanged in a truthful and open-minded manner and in doing so they are receptive to argument and reason and prepared to reconsider their positions in light of the better argument (Habermas 1984; Risse 2000). In strategic bargaining, interests or positions are generally assumed to be (exogenously) given. By contrast, in interactions marked by deliberation or argumentation, positions are taken to be malleable in view of the willingness to be convinced by 'the force of better argument' (see for example Schmidt 2008).

One of the greatest challenges in constructivism – of which 'deliberation' has traditionally been considered the behavioural hallmark – is to ascertain whether justification or the use of argument is actually driven by truth-seeking motivation (and not by strategic calculation). This problem is aggravated by the fact that in most decision-making processes both types of decision-making occur alongside each other (Holzinger 2004; Schimmelfennig 2001). To circumvent this problem, most constructivists have opted for investigating the institutional scope conditions that facilitate deliberation (Risse and Kleine 2010, 710–711; Ulbert, T., and Müller 2004).

By bypassing the problem of identifying truth-seeking behaviour and focusing only on its facilitating conditions, such an approach misses out on the elements that distinguish deliberation from the rational-choice conception of bargaining. For instance, it has been claimed that deliberation can be found even at the highest level of intergovernmental negotiations in the EU (i.e. the European Council), arguing that member states felt the need to 'routinize and intensify their efforts to find acceptable solutions among them' (Puetter 2014, 59). However, as Moravcsik once argued (in a paper against the deliberative turn in constructivist thinking), this is merely an argument for a "transmission belt" role for ideas and other sources of spurious correlation' (2001, 231). By contrast, if one can show that there was an exchange of informed ideas and arguments and mutual receptiveness, which shifted positions and interests towards collective policy outcomes, this would be a claim for an independent role for deliberation.

If one intends to demonstrate that deliberation matters, it is necessary to open the black box of preference formation and position change in decision-making processes (Checkel 1998, 326). This requires a willingness 'to move beyond readily apprehensible ("obvious") motivations such as self-interests' (Gerring 2007, 70). In this paper, in order to identify the multifaceted and transformative nature of deliberation, we use a conceptual framework developed by scholars in the field of communication science (Dahlberg 2004; Graham 2009; Janssen and Kies 2004).

Two concepts are central to this framework. The first is reciprocity, which indicates the 'mutual exchange, a giving and taking of perspectives and knowledge' (Graham and Witschge 2003, 178). It is the pre-stage where incentives are provided for discussants to be receptive to the other's argument (Graham 2009). Reciprocity implies justification. It is assumed that in a mutual exchange of arguments and reasoned views, discussants support their allegations, assertions and claims with valid explanations and references to evidence, facts or values that are well-known or accessible to all (Janssen and Kies 2004, 13–14;

Graham 2009, 26; Ulbert, Risse, and Müller 2004). The second concept is reflexivity. It stands for 'an internal process of reflecting another's position against one's own' (Graham 2009, 18) or, stated differently, 'the critical examination of one's values, assumptions, and interests in the light of all other relevant claims and reasons' (Dahlberg 2004, 7–8). Together, these two concepts offer an operationalization of 'deliberation' by dissecting the transformative nature of deliberation in observable terms. We will therefore use them to identify instances of deliberation in the VIS case.

2.2 Conditions for deliberation in the EU

Having specified the two key elements needed to identify (instances of) deliberation, we now move to the conditions that facilitate the occurrence of deliberation. It has become increasingly common to consider the EU as an environment that favours deliberative practice. In the constructivist literature, there is a widely shared view that the EU provides abundant opportunities for deliberative decision-making, (Checkel 1999, 554; 2001; Joerges and Neyer 1997, 287; Risse 2000, 10; Risse-Kappen 1996, 71; Schmidt 2008, 313; Ulbert and Risse 2005, 363). The EU, with its multitude of venues and levels of everyday 'Brussels' decision-making, has repeatedly been identified as an institutionally dense environment. In constructivist circles, this has led many to hypothesize that there are substantial levels of deliberation, especially in daily decision making (Checkel 1999, 554; Lewis 2010; Risse-Kappen 1996, 70–71).

Building further on the constructivist literature, this paper focuses on three conditions that are likely to facilitate deliberation. To begin with, deliberative decision-making is more likely to occur if negotiating parties are able to build up stable interactions and mutual trust. This allows these parties to engage in intensive debate and to develop a shared understanding of issues, which are prerequisites for deliberation. Two specific conditions can be identified that facilitate stable interactions and mutual trust.

The first condition is systematic interaction, which refers to both the frequency and duration of interaction. Various studies have found that deliberation prevailed when a group of participants meets regularly – formally and/or informally – over a considerable period of time (Checkel 2005; Gheciu 2005; Lewis 2005; Risse 2000, 31). A link has been found between continuous, enduring and frequent interaction and the formation of common conceptual categories and 'behavioural dispositions' among negotiating parties (Gheciu 2005, 983).

The second specific condition that has been seen to promote deliberation is insulation from outside (political) pressure or influence. When participants work in a detached environment, insulated from outside pressure and exposure, they are more likely to engage in an open and highly interactive exchange of reasoned views (Checkel 1999; Haas 1992; Lewis 2005, 945–948, 2010, 652–654).

In addition, as a third condition, the representation of non-national interests in the negotiations is likely to foster deliberation. This may take place through the involvement of either supranational actors or non-governmental actors such as lobby groups and civil society organizations. In settings where non-state actors are assigned tasks to provide policy-makers with information, they make 'their claims and arguments persuasive almost by definition' (Ulbert and Risse 2005, 356). Even in formally intergovernmental processes, the inclusion of non-national interests may influence the style of negotiating. Decision-

making may move beyond the exchange of initial preferences of the national governments (Jordan, Brouwer, and Noble 1999, 392–395). This is particularly likely if the interests pursued by a non-national actor transcend the interests furthered by member state governments (Lemp and AltenSchmidt 2008; Risse and Kleine 2010) and if the formal attributes of the institutional context allow such actors to provide authoritative knowledge in the discussions.

In sum, we expect deliberative decision-making in the EU to be more likely if (1) there is continuous, enduring and frequent interaction between participants in the decision-making process, (2) these participants are insulated from (political) pressure or influence from outside, and (3) supranational and non-governmental actors have access to the discussions.

3 Research design

3.1 Case selection

An analysis of decision making in the field of justice and criminal law provides an opportunity to examine and test theoretical expectations about communication patterns and their conditions in a policy-making context where the paradigms of national statehood and sovereignty are well-established. Within this field, we focus on the process that led to the adoption of Council Decision 2008/633/JHA, regulating access by police and judicial authorities to the Visa Information System ('VIS'). This IT-system had originally been set up in the context of the EU's common visa policy. The Council Decision sought to use this system for law enforcement purposes as well.

The Council Decision was a peculiar decision-making process because a rare combination of institutional factors was at play. Formally, the process took place in the so-called 'third pillar' of the then-existing EU pillar structure, where only member state delegations took part in the negotiations on JHA matters. Informally, however, the European Parliament enjoyed significant influence over the drafting of the 'VIS' instrument by linking the adoption of the Council Decision to a concurrent decision-making process going on in the first pillar.

As a result, the VIS presents a unique possibility to examine whether and to what extent deliberation and position change occur in an intergovernmental setting with unusual, supranational involvement. This enabled us to examine to what extent deliberative discourse affected the discussions when, on the one hand, the locus formally was in the Council's intergovernmental working structures, while, on the other hand, a supranational actor (the European Parliament) was involved.

In addition, the process within the 'Council pillar' of EU decision-making took place in a range of bodies, ranging from a working group with member state experts to the ministers themselves, with three levels in between. Since these levels vary in terms of the conditions outlined above, they offer the opportunity to see how different contexts work out in terms of deliberation on one and the same decision file.

3.2 Methods and sources

Above, we conceptualized deliberation in terms of truth-seeking behaviour. Capturing instances of such behaviour in the real world is a methodological challenge. Scholars who

have been concerned with rendering the internal aspects of deliberation more tangible for empirical testing, have addressed this issue by approaching internalized attributes as objects of social interaction. Their argument is that such attributes only become conceptually and empirically relevant factors when they are perceived by others during the process. Whether it is ‘empathy’ (Graham 2009, 30), ‘reflexivity’ (Dahlberg 2004, 33) or ‘truthfulness’ (Steiner 2012, 161), these attributes only acquire importance if they are perceived by others and therefore made (socially) explicit (Janssen and Kies 2004, 19).

Our case-study design allows the analysis ‘to move beyond readily apprehensible (“obvious”) motivations such as self-interests’ (Gerring 2007, 70). The analysis was conducted by staying close to the subjective aspects of social reality through carefully understanding the viewpoints of the respondents and the meaning that they gave to their social environment. This was done by looking for internalized attributes of deliberative discourse that were made socially explicit (Janssen and Kies 2004, 19).

Two sources were used to do this. First, a total of 104 policy documents, drafts, agendas, minutes, and reports were examined for the purpose of reconstructing sequences, patterns of events and critical junctures in the decision-making process and for identifying the issues at stake, the positions of the interested parties, and the composition, size, format, frequency and/or duration of meetings. A process-tracing approach was used for analysing the data. Significant steps in the sequence of events leading to the final outcome of the decision-making process were identified and addressed. This tracing of the chain of events – hence: of the shaping of the outcome – has been done through providing detailed narratives of key decision points (George and Bennett 2005, 210–211).

Second, the nature of communications in the VIS process was analysed through the coding of transcripts obtained from fourteen in-depth interviews held between 2009 and 2012. They were conducted with field experts across European institutions, national delegations and permanent representations who participated directly in the discussions. A qualitative content analysis (Mayring 2000) was used to code and analyse the interview transcripts, which entailed that in addition to theoretically coding categories, subcategories were formulated in an inductive way. Through feedback loops the subcategories/field codes were revised or fine-tuned.

Critical junctures and changes in position were identified through document analysis. The nature of communications related to these critical events was then examined on the basis of an analysis of interview transcripts. The analysis centred on references made by the respondents to instances where fellow participants were perceived as responsive and/or reflexive (or not) to claims and arguments. References to instances of reciprocity and reflexivity (or the lack thereof) were gathered by means of ‘self-reporting’: without being asked or elicited, respondents talked about such instances out of their own initiative (Janssen and Kies 2004, 21).

4. Empirical analysis: the VIS process

4.1 The VIS process: background and rationale

The VIS decision was formally adopted by the Council – and informally authorized by the European Parliament (EP) – on 23 June 2008. The Council Decision regulated access to the Visa Information System (VIS) by law enforcement authorities for the purposes of the

prevention, detection and investigation of terrorist offences and other serious criminal offences (Council 2008). The VIS database was to be the first large-scale European IT-system that would store, process, and retrieve biometric data. The database was principally intended for the purpose of facilitating a common visa policy in the EU. It was at the invitation of the JHA Council (i.e. the national interior and justice ministers) that the Commission started also to draft a proposal for facilitating access to the database for national law enforcement agencies.

Strictly speaking, the decision on law enforcement access was taken under the EU's then third pillar, which at the time was the institutional framework for decision making in the field of justice and police cooperation in criminal matters. In this framework the EP would only be consulted, which in practice meant that its views could easily be disregarded by the Council. However, the decision making process was influenced by elements that were typical of the EU's first pillar procedure. This relates to the fact that, in addition to third-pillar modalities of law enforcement access, the decision also involved one important first-pillar item: the VIS database itself, which was primarily meant to facilitate one of the EU's first-pillar policies, the common visa policy.

When the Commission tabled a proposal for the third-pillar VIS Decision, a proposal for a Regulation that would provide for the legal framework of the VIS database was already under discussion in the first pillar. In the course of these discussions, the EP introduced a so-called 'bridging clause' as one of the many amendments to the proposed Regulation. In the bridging clause the EP set forth conditions and procedures that were to limit access for national law enforcement agencies to the strictest minimum possible and were to be included in the third-pillar Decision. The bottom line was that 'access shall be an exception granted on a case-by-case basis' (European Parliament 2005, 8). Access was not allowed to become routine. With the inclusion of the bridging clause in the VIS Regulation the EP ensured that the proceedings on the Regulation in the first pillar could only come to a successful end if it was heard on its amendments to the third-pillar VIS Decision. In this way, the EP forced the Council to negotiate with it on a third pillar instrument. Many of the conditions set in the bridging clause were adopted by the Commission in drafting the proposal for the third-pillar VIS Decision. This proposal was tabled on 24 November 2005.

Discussions on the proposal lasted from January 2006 until June 2007. They covered 42 officially reported meetings and three successive EU Presidencies (Austrian, Finnish and German, respectively). The negotiations focused mainly on a total of seven issues that ranged from specific conditions on access (e.g. whether access is necessary in a specific case in relation to serious crime or terrorism) and procedures for submitting requests for access (e.g. only duly reasoned requests sent to a 'central access point' are to be considered) to the transfer of data to third countries.

In the next section, we assess the level of deliberation in discussions on the proposed Council Decision within the Council, using the notions of reciprocity and reflexivity. The three subsequent sections then explore the factors that in the theoretical framework were hypothesized to affect the occurrence of deliberation.

4.2 The VIS process and occurrences of deliberation in the council

The discussions in the Council were first held at the working party level,¹ where officials from national ministries convened to discuss mainly technical details. Internal Council

discussions were also held in the high-level CATS committee, where senior officials from the national justice departments convened to discuss the politically more challenging issues of JHA files. Discussions were also held at the levels of JHA Counsellors² and the ambassadors in Coreper. This happened in the final stage of the VIS process, when the (German) Presidency had to brief the national delegations in the Council on the progress and completion of the interinstitutional negotiations with the EP. The national ministers responsible for JHA matters were mainly active in the concluding stage as well.

Instances of deliberation were barely present in the discussions at both the working party and the CATS level. At the working party level, reciprocity, let alone reflexivity, was barely reported in the VIS discussions. Interaction hardly took place in a group of 27 delegations as discussants had to wait for their turn if they wished to engage in an exchange of arguments with another discussant. The slow pace of this 'tour-de-table' style of discussion (examination of the draft proceeded 'article by article') and the holding on to the so-called 'red lines' (points beyond which a delegation was not prepared to negotiate) prevented negotiating parties from an interactive giving and taking of perspectives. Instances of reciprocity were reported, although rarely, in relation to the more vivid exchanges during so-called 'side meetings' (temporary suspensions of a plenary sitting). At the CATS level, reciprocity did not go further than a 'tour-de-table' style of discussion.

Nevertheless, since all national delegations had an interest in having access to the VIS for purposes of law enforcement, it did not take long for the national delegations at these levels to reach agreement. Four to five meetings at the working party level and two at the CATS level were enough to come to an understanding on almost all issues. The main challenge for the participants at both these levels was the tackling of the issues that divided the Council and the EP (which pursued a policy of restrictive rules on access to the VIS).

In the exchanges of views on these issues, reciprocity was constrained in so far as arguments during discussion lacked the persuasiveness of concreteness and example, because the VIS was not yet operative and there was no experience or expertise thus far with a large-scale European IT-system with biometric data.³ Instead, there was a reiteration of claims which all came down to a downright rejection of the EP's demands. The EP's call for strict access rules and procedures for the benefit of personal data protection was repeatedly dismissed with the argument that they would only create a 'bureaucratic hurdle without added value' and 'a waste of resources'.⁴ This lack of exchange of substantiated arguments made it difficult for the Presidency delegation to make a convincing case for the Council in the negotiations with the EP.⁵

Discussions on these issues took a different turn in the first months of 2007 when the locus of discussions shifted from the working party and CATS levels to the JHA Counsellors and of Coreper levels. During that stage, exchanges – which started to expand at a rapid pace – were primarily mediated through the Brussels-based JHA Counsellors, who acted as go-between between the Council Presidency, the Coreper ambassadors, and the national ministries.⁶ Also, it was the period when Germany took over the Presidency. As one of the few countries having experience with a large-scale biometric database, it was able to promote an exchange of views with facts and examples.

Occurrences of both reciprocity and reflexivity were identified among the JHA Counsellors, to the extent that there was mutual willingness to consider alternative perspectives and new insights. At this stage, reflexivity induced delegations even to change position. Most national delegations shifted towards acceptance of the EP's argument that

the protection of personal data would be better served if authorisation came from another, separate, unit having direct access to VIS data than the unit needing the access for criminal investigation. Building further on an open exchange of views, the national delegations were also able to develop a shared opinion on some of the issues related to the access procedure – except the Spanish and French ones.⁷ It enabled the Council to convincingly argue, in the negotiations with the EP, that the requirement of an independent unit having direct access and the power to authorize was acceptable as long as member states were allowed to have more than one such unit.⁸ The possibility of more units, as was argued on the Council side, would accommodate the national particularities of member states that have law enforcement and intelligence services in separate organizations. The EP first demanded that there should be one per member state.

At the Coreper level, reciprocity was constrained, while reflexivity was not reported. Even though there was more exchange than at the working party and CATS levels, it was not necessarily one of informed views on the specifics of the subject matter at hand. Occurrences of deliberation were not found at the ministerial level in the JHA Council. For the sake of (public) appearances so-called ‘false B-points’ were ‘discussed’: although agreement had already been reached at subsidiary levels, the ministers still wished to talk about it. This urge to discuss for the sake of public appearances did not play out quite well at the final ministerial meeting. Instead of building further on the agreements reached at the lower levels in the Council, the ministers ran the risk of getting bogged down in a debate over linguistic nuances.⁹

4.3 Systematic interaction

Discussions at the working party and CATS level in the Council were not conducted under the best of circumstances. The participants at both levels, who only met once a month or every two months, had to cope with large-sized interpreter-mediated meetings (then: of 27 delegations) and strict rules of ‘tour de table’ procedure. For the senior officials of the CATS there was the additional problem that they had to discuss the VIS dossier as one of several JHA files during their monthly meetings. In that regard, the delegates at the working party level were better off. They were able to dedicate one full day and sometimes two full days to the examination of the VIS dossier. The VIS file appeared eight times on the agenda of the working party and five times at the CATS level. The ministers only convened once every three months. Final discussion of the file at ministerial level was one of the well over fifty agenda items of a two-day ministerial meeting.¹⁰ The VIS file was discussed twice at that level.

More helpful were the conditions at the levels of JHA Counsellors and the ambassadors in Coreper. Reference was recurrently made to the high frequency of formal and informal contacts and the ease of arranging meetings at these levels. They regularly held meetings (without the use of interpreters) to discuss various sorts of files, at least on a weekly basis, if not more. Moreover, as Brussels-based diplomats, the participants at these levels were in frequent contact with each other also outside formal sessions. In addition, they were familiar with the practices of developing and maintaining ‘standing contact’ with the people working in the other EU institutions.¹¹ These conditions enabled them to find many more occasions to discuss legislative files more extensively than in official meetings. It was mainly for these reasons that their involvement was needed in the later stages of the process, when

the Presidency had to report back on the progress of the discussions between the Council and the EP. Officially the VIS file appeared once to twice at both these levels.

This was true in particular of the JHA Counsellors, who discussed the VIS file on many more occasions than in one official meeting. Many (if not all) of them not only took constantly part in the discussions on the VIS file at the working party level, they also assisted the Coreper ambassadors and the ministers in their meetings, when the VIS file was on the agenda. Moreover, unlike the ambassadors, the JHA Counsellors had the expertise and the time to discuss the VIS file in more detail. At the Coreper level, the VIS file appeared as one of the about five JHA agenda items which in their turn were part of as many as 30 to 70 items on Coreper's weekly agenda. These items ranged across a variety of different policy fields. As Brussels-based JHA experts, the JHA Counsellors could dedicate an entire meeting to one file only.

4.4 Effects of insulation

In all bodies, the conditions of insulation were quite weak. For various reasons it was hard for the delegates at various levels in the Council to work in a detached environment. As regards the working party level, respondents reported how national instructions and the 'red lines' (i.e. serious reservations) from the home capitals tied down the national experts in the discussions. It deprived them of a 'marge de manoeuvre' that would otherwise have enabled them to exchange more freely.¹²

The situation at the CATS level was not very different. Even though national instructions were not reported as a constraint on the discussions, evidence shows that the senior officials of the CATS were well aware of the implications of what was discussed and usually restricted themselves to discussing 'minor technical issues and perhaps one orientation on issues of principle'.¹³

JHA Counsellors and Coreper were relatively less constrained by red lines and therefore enjoyed a greater degree of insulation. This changed in the final stage of the process, when a final understanding was starting to take shape and the participants in these meetings were faced with mounting political pressure to reach a final political settlement. Although the type of outside pressure was different (pressure to conclude an agreement rather than red lines), the effect was the same, as it hindered participants in considering openly and freely various views and alternatives.

The ministers were confronted with the same difficult choice. Although indications of insulation (or its absence) at the ministerial level were not found, it is safe to assume that it is highly unlikely that insulation would be at work at this level considering that discussions between ministers cannot be kept hidden from outside scrutiny.

4.5 Representation of non-national interests

Contrary to the usual routine, the Council had to negotiate with the EP on the VIS Decision, even though it was a third-pillar instrument. So-called 'trilogues' – meetings that usually were held between Parliament, Council and Commission in the context of first pillar procedure – were used for this occasion. Early on in the process, throughout 2006 (when first Austria and later Finland held the Council Presidency), there was barely an indication of contact between the Council and the EP. In that year, the Rapporteur of the EP expressed

her serious concern at the Council discussions on the VIS file, which were held 'behind closed doors'.¹⁴ Contacts with the EP, and regard for interinstitutional issues, started to grow only in the later stages of the process.

Despite the EP's institutionally weaker role in the field of justice and police cooperation, the EP appeared to be a worthy opponent for the Council. In the negotiations with the Council the EP delegation could rely more readily on the expertise on data protection law it had already developed in the years before, in previous experiences with setting up other databases (such as the Schengen Information System). A former Parliament delegate observed in that regard that the VIS discussions were 'an excellent opportunity' to show that the Parliament was able to engage in an informed discussion with the Council.¹⁵

The nature of the interinstitutional discussions changed when Germany took over the Council presidency in the first half of 2007. During that period a shift took place from a debate between two institutions that were at first unwilling to fully integrate one another in the discussion to a more open-minded debate where they considered each other as valid interlocutors. Availing of its experience as one of the few member states having a large-scale data system with biometric data, the German Presidency was able to feed interinstitutional discussion with evidence and fact on the feasibility of law enforcement access in light of data protection rules.

The interinstitutional negotiations took place at two levels: the technical expert level and the political 'trilogue' level. At the technical level, deliberation took shape as the German Presidency stepped up efforts to maintain continuous contact with the EP delegation. Before Germany took over the Council Presidency, the frequency of these preparatory 'technical' exchanges (among experts) ranged from twice to three times a month. During the German Presidency, interinstitutional discussions at the technical level intensified considerably. Three to four arranged meetings were held monthly, while informal exchange went up to three to four times a week. The high frequency of these secluded small-group meetings and the focus on the substance without time restrictions or intervention from interpreters allowed the experts at this level to work on alternative wordings for proposed amendments suggested by the other delegation and to be receptive to 'what the other thinks'.¹⁶ Under these circumstances, positions were redefined, in particular on issues related to the procedure of access.

The progress made at the technical level prepared the ground for the discussions at the political level (involving national ministers and MEPs) as the exploration by the experts of alternative texts on the more controversial issues laid the groundwork for an informed discussion at the political 'trilogue' level.¹⁷ The political trilogues eventually set forth a legal framework consisting of clear, distinct rules and conditions on law enforcement access acceptable to all parties concerned because, as the head of the EDPS explained, 'it suited the argued need' for both data access and data protection.¹⁸ Although only three political trilogues were held during the German Presidency, the small size of these meetings and their focus on outstanding issues of the file made up for the low incidence of contact. It allowed the participants during the meetings to interact on a more personal basis which facilitated a sense of mutual receptiveness.¹⁹

After an interinstitutional agreement was reached between the Council and the EP, the Presidency took a more forceful stance in the Council. In that light, it was noted that the Presidency confronted the national delegations with a 'take-it-or-leave-it' proposition when it reported back the outcome of the interinstitutional negotiations.

Apart from the ramifications the involvement of the EP had on the VIS process, discussions were also affected by the input of two other supranational players: the Commission and the European Data Protection Supervisor (EDPS). The Commission's delegation facilitated an informed dialogue between the two legislative institutions, the EP and the Council, by feeding it with 'the necessary expertise, skill and arguments'.²⁰ The Commission for instance brought to the discussions its informed view on safeguarding high standards of data protection. Also, it challenged national delegations in the Council discussions to come up with valid arguments for more relaxed rules on law enforcement access.²¹

In the same vein, the EDPS – which at the time took on its newly ascribed role of monitoring and advising EU institutions in the field of personal data and privacy protection – was quite active in providing the interinstitutional debate with knowledge, substance and fact about data protection law. Its contribution was reported mainly in the initial stages of the VIS process, when the Commission was working on its proposal and, later, when the EP was preparing itself for negotiations with the Council.

5. Conclusion

5.1 Main findings

In the (single) case of the Visa Information System, one can observe different levels of deliberation, depending on the decision-making body one looks at. The level of deliberation, as measured by the degrees of reciprocity and reflexivity, was lowest in the Council of Ministers and highest among JHA Counsellors, with Coreper, CATS and the Working Party in between (but tending towards the low side).

Table 1 shows these different degrees of deliberation for the five bodies, together with their scores on systematic interaction, insulation and the inclusion of non-national interests. The body with the greatest extent of deliberation (the JHA Counsellors) indeed showed the highest level of systematic interaction, while deliberation was limited in the bodies in which systematic interaction was lowest. Coreper fits less well into this pattern, as systematic interaction was high but deliberation remained limited. Perhaps this has to do with the fact that Coreper had to deal with many and highly varied issues at the same time, which prevented intensive discussion on this specific file.

In terms of insulation from outside pressures, insulation among JHA Counsellors during most of the process helped them engage in deliberation. This was the same in Coreper but, similar to the effect of systematic interaction, this did not prove to be a sufficient condition for deliberation. In the Working Party and CATS, 'red lines' from national capitals guided the input from participants, restricting the room for deliberation. In the final stage of the process, Coreper and JHA Counsellors were also under pressure from their political principals, but this focused more on the wish to hammer out an agreement than on specific national red lines. Although it took a different form, the effect was the same, as it diminished the room for deliberation.

The effects of the inclusion of non-national interests were more complex. On the one hand, the involvement of non-national interests may have led to more deliberation, in that non-state actors provided the discussions with authoritative knowledge which challenged national delegations both to reflect on their positions and to more persuasively argue for

more lenient conditions of access. However, this depended on the extent to which interactions between actors from member states and representatives of those supranational bodies showed high levels of systematic interaction and took place in relative insulation from outside pressure. As was apparent, the input of non-state views was mainly mediated through the active involvement of the JHA Counsellors and the vigorous engagement of the (German) Presidency. On the other hand, the inclusion of supranational actors and their positions in the discussions may also have reinforced systematic interaction and insulation within the Council, by forcing member state representatives to engage more frequently with other actors (systematic interaction) and loosening the control of their political superiors (insulation).

5.2 Implications

An important implication of our findings is that a demanding reading of the notion of deliberation led to the identification of relatively few instances of deliberation, even when supranational actors were involved. An analysis of deliberation in different terms, for instance as a 'routinized procedure' of consensus seeking (Puetter 2012, 2014; Bickerton, Hodson, and Puetter 2015), would have led to a wider identification of instances of deliberation. These findings call for a careful consideration of claims about the nature of intergovernmental decision-making, and its notions such as 'deliberative intergovernmentalism' (Puetter 2012). Although intergovernmental decision-making in the EU certainly can be deliberative in the weaker sense of being a routinized system for finding consensus, this does not imply it also conforms to a 'thicker' notion of deliberation along Habermasian lines.

Also, our analysis contributes to an understanding of the conditions that facilitate deliberation at various levels of the Council hierarchy. Although, overall, instances of deliberation were limited, the specific level of deliberation showed considerable variation between these levels. Our analysis identified a number of facilitating conditions that could (at least partially) account for those differences. In addition to the conditions we derived from the literature, the number of items on the agenda of a Council body proved to be crucial: only when a body was able to devote a substantial amount of time to the VIS file, could deliberation come to fruition.

Moreover, the VIS case showed important links between the facilitating conditions themselves. To begin with, the level of systematic interaction and insulation in the interactions between non-national and Council actors crucially mediated the effect of the representation of non-national actors in the process. Furthermore, the inclusion of the EP in the process indirectly affected deliberation in the Council by increasing the level of systematic interaction and insulation within the Council.

This analysis adds to studies of the division of labour within the Council pillar, which show that higher-level bodies tend to focus on salient political issues while lower-level bodies sort out technical issues (Häge 2007, 2008). This division of labour may also affect the likelihood of deliberation, since a focus on technical issues and a relatively limited agenda facilitate deliberation. At the same time, our analysis adds a number of conditions that may occur (and vary) at all levels of decision-making. As a result, deliberation is not fully determined by the level at which a body operates but also depends on the context within which the body works.

This, then, leads to a more fine-grained and nuanced understanding of both the conception of deliberation in the context of intergovernmental EU decision-making and the conditions that facilitate such deliberation. Together, this may help us better to understand the specific dynamics in intergovernmental decision-making and the prospects for and limits to deliberation in EU decision-making more generally.

Notes

1. Discussions at the working party level on law enforcement access to the VIS were mainly held in the Police Cooperation Working Party. A few aspects were discussed in the Visa Working Party.
2. JHA Counsellors were added to the staff of the Permanent Representations in Brussels. Their main task was to brief their respective 'bosses', the Permanent Representatives, as legal experts on the legal subjects in the JHA field.
3. Interview with a former Principal Administrator, Directorate-General for Justice, Freedom and Security, European Commission, Brussels, 27 March 2009.
4. See for instance Council Document st14196-re02 of 22/12/2006.
5. Interview with a former Principal Administrator, Directorate-General for Justice, Freedom and Security, European Commission, Brussels, 27 March 2009.
6. Interview with Policy Officer, Directorate Police and customs cooperation, Directorate-General 'Justice and Home Affairs', General Secretariat of the Council of the European Union, Brussels, 26 May 2011.
7. Interview with former member of the Presidency delegation, Berlin, 16 July 2012.
8. Attaché at a member state's permanent representation to the EU, Section Federal Ministry of the Interior, Brussels, 3 June 2011. See also Council document st08185.en07 of 12/4/2007.
9. Interview with a former Principal Administrator, Directorate-General for Justice, Freedom and Security, European Commission, Brussels, 27 March 2009.
10. Press Release 10,267/07 of 12–13 June 2007.
11. Interview with an Attaché at a member state's permanent representation to the EU, Section Federal Ministry of the Interior, Brussels, 3 June 2011.
12. Ibid.
13. Interview with Head of Criminal Justice Unit, Directorate-General for Justice, Freedom and Security, European Commission, Brussels, 9 May 2011.
14. Council Document st9130 of 8/5/2006.
15. Interview with former assistant to a MEP, Brussels, 4 June 2012.
16. Interview with former member of the Presidency delegation, Berlin, 16 July 2012.
17. Interview with Policy Officer, Directorate Police and customs cooperation, Directorate-General 'Justice and Home Affairs', General Secretariat of the Council of the European Union, Brussels, 26 May 2011.
18. Interview with the European Data Protection Supervisor, Brussels, 20 May 2011.
19. Interview with Policy Officer, Directorate Police and customs cooperation, Directorate-General 'Justice and Home Affairs', General Secretariat of the Council of the European Union, Brussels, 26 May 2011 and interview with former member of the Presidency delegation, Berlin, 16 July 2012.
20. Ibid.
21. Interview with a former Principal Administrator, Directorate-General for Justice, Freedom and Security, European Commission, Brussels, 27 March 2009.

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