

THE DEVIL IS IN THE PROCESS: AN ANALYSIS OF THE IMPACT OF NEGOTIATION PROCESSES IN TRILOGUES ON EU LEGISLATION

**Het venijn zit in het proces: een analyse van de
invloed van onderhandelingsprocessen in trilogen
op EU-wetgeving**

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op EU-wetgeving**

(met een samenvatting in het Nederlands)

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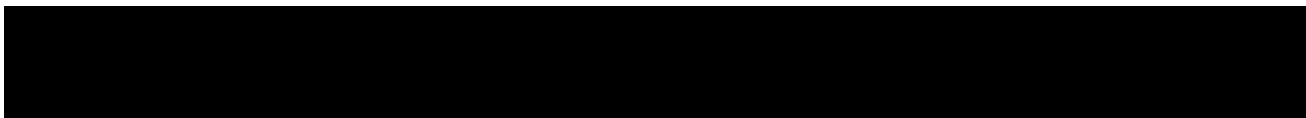
List of Abbreviations

AA	Association Agreement
AGRI	Committee on Agriculture and Rural Development
ALDE	Alliance of Liberals and Democrats
ATM	Autonomous Trade Measure
COM	European Commission
COREPER	Committee of Permanent Representatives
Council	Council of the European Union
CR	Conflict Resolution
DCFTA	Deep and Comprehensive Free Trade Area
DG	Directorate General
EA	Early Agreement
ECJ	European Court of Justice
ECR	European Conservatives and Reformists
EFDD	Europe of Freedom and Direct Democracy
EMIS	Committee on the inquiry into emission measurements in the automotive sector
EMPL	Committee of Employment and Social Affairs
ENF	Europe of Nations and Freedom
ENVI	Committee of Environment, Public Health and Food Safety
EP	European Parliament
EPP	European Peoples Party
EPSCO	Employment, Social Policy, Health and Consumer Affairs Council
EU	European Union
EUCO	European Council
FCD	Four column document
GA	General Approach
GUE	Confederal Group of the European United Left/Nordic Green Left
IMCO	Committee for Internal Market and Consumer Protection
INTA	Committee for International Trade
IR	International Relations
ITRE	Committee for Industry, Research and Energy
JURI	Committee for Legal Affairs
MEP	Member of the European Parliament
NECP	National Energy and Climate Plan
OLP	Ordinary Legislative Procedure
S&D	Socialists and Democrats
SME	Small- and medium sized enterprises
TFEU	Treaty on the Functioning of the European Union
TRAN	Committee for Transport and Tourism
UK	United Kingdom
US	United States of America
VW	Volkswagen

CHAPTER 1



Introduction



The European Union (EU) is often referred to as a regulatory state and the regulation of markets has been its main *raison d'être* from the first coordination between European States in the European Coal and Steel Community in the 1950s (Carpentras, 1996; Majone, 1994; 2002). While nowadays highly political issues such as Brexit, migration policy and economic crises dominate media coverage and public debates in and about the EU, regulation through law-making is 90% of what the Union does, thereby deeply impacting the lives of citizens all over the EU. In most policy fields, legislation is agreed between the Council of the European Union (Council) and the European Parliament (EP) in the ordinary legislative procedure (OLP). Yet, in the last decade this highly institutionalized procedure has been replaced by trilogues: An informal institutional setting in which the legislative institutions agree on legislation behind closed doors. While probably a majority of EU citizens is unaware of the existence of trilogues, this trend actually depicts a legislative revolution: In the eighth parliamentary term (2014-19), 99% of laws were concluded in so-called 'early agreements' (European Parliament, 2019). Whenever conflict between the legislative institutions is resolved in early agreements, we know the law was negotiated in trilogues.

Hence, one of the most central activities of the EU is conducted, to 99%, in trilogues. Given this essential role, we would expect detailed knowledge to exist on exactly what happens in trilogues and how they influence the legislation that increasingly governs our daily lives. Yet, despite growing public and academic interest in trilogues, they are still often referred to as black boxes, as a nebulous institution which translates divergent positions into EU legislation, hidden to the public eye (Reh, 2014; Laloux, 2019; Roederer-Rynning and Greenwood, 2020). How, we ask ourselves, is this possible? Trilogues take place behind closed doors, which makes it difficult to analyze them. While different studies have analyzed specific aspects of these negotiations, elaborate investigations of what exactly happens from the beginning of trilogue negotiations to the final agreement are still lacking. This study sets out to provide exactly this: A comprehensive analysis of the negotiation process in trilogues from beginning to end, exposing how these negotiations shape EU legislation.

In its activity report for the ordinary legislative procedure in the eight parliamentary term, the European Parliament states that "proportionately, there were more first readings than ever; and, for the first time over the course of a full term, there were no conciliations" in the OLP (European Parliament, 2019, p. 1). The OLP was basically a re-branding of the legislative procedure which finally had given actual legislative powers to the European Parliament. In the co-decision procedure, the EU had developed a complicated institutional setup of three consecutive readings in each institution, the EP and the Council, to decide on legislative proposals of the Commission together – as equal co-legislators. 'Ordinary' was meant to signal that this procedure would become the 'new normal'. However, when the Lisbon Treaty introduced the new wording, trilogues had already been introduced for resolving inter-institutional conflict.

Early Agreements were made possible in the Treaty of Amsterdam (Farrell & Heritier, 2003). They refer to the shortening of the legislative procedure and finding agreement between the institutions earlier, that is in first or early second reading. Increasing the policy fields in which the EP should have a legislative say, the architects of the Treaties feared full co-decision procedures would slow down the legislative process and allowed for concluding legislation early in some cases (Shackleton & Raunio, 2003a). Early agreement was made possible through an informal adaptation of the institutional setting surrounding legislative negotiations. The Co-decision procedure foresaw a so-called conciliation procedure. Representatives of the single institutions should come together before the third and last reading of the co-decision procedure in order to prevent the institutions from not finding a compromise and hence the legislative proposal from failure. In response to Amsterdam, what effectively happened was that conciliation shifted from the end of the procedure to earlier stages, allowing the institutions to discuss legislation in small circles of a few representatives: Trilogues (Shackleton & Raunio, 2003).

In the subsequent years after Amsterdam, the EP has constantly managed to expand its legislative power to more and more policy fields and early agreements have expanded dramatically. In the literature, there is no uniform definition of early agreement (Laloux, 2019). In this study, all cases of first and early second-reading agreements will count as early agreements, as the OLP is considerably shortened in both cases. In the 8th parliamentary term (2014-19), 401 legislative acts were adopted in total. Out of this, only 4 were not agreed in first or early second reading (European Parliament, 2019). Figure 1 depicts the steep increase of early agreements since 1999:

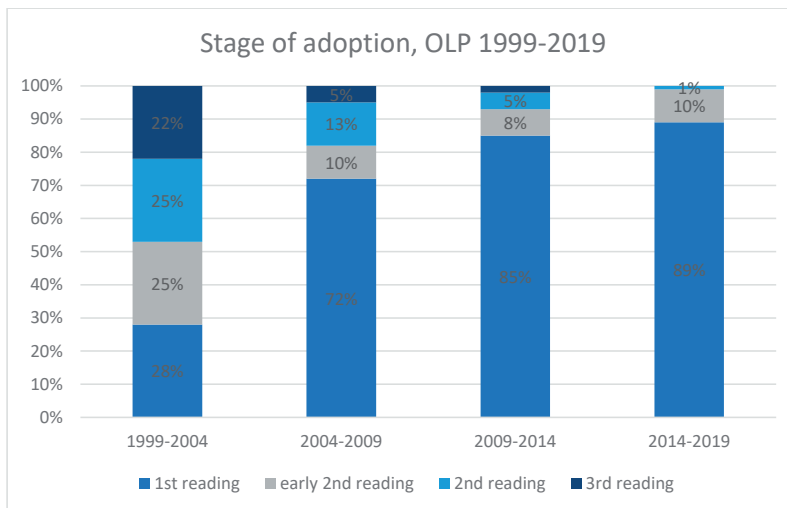


Figure 1: Stage of adoption legislative acts.

In parallel with early agreements, the number of trilogues skyrocketed in the last two decades. In the last legislative term, a new (relative) record amount of 1.185 trilogues took place, on the 346 legislative proposals that actually needed negotiations between the institutions (European Parliament, 2019, p. 8). On average, a file needs just under four trilogues to be agreed between the institutions. After a few representatives have agreed a compromise in trilogues, the agreement needs to be approved by the respective institutions. Often, this happens without much public scrutiny and some argue it is a mere rubber-stamping by the institutional actors, who often don't even know about and understand the details of the piece of legislation (Rasmussen & Reh, 2013). Only in exceptional salient cases, such as the Copyright Directive in 2018, can trilogue agreements trigger public debate (Frosio, 2018).

As trilogues are to date not a part of the Treaties, they are normally referred to as informal. Informal institutions can be defined "as socially shared rules, usually unwritten, that are created, communicated and enforced outside the officially sanctioned channel" (Levitsky, 2004; cited in: Christiansen & Neuhold, 2013, p. 1197). While on the one hand trilogues fit this definition, on the other a considerable institutionalization has taken place. By now, the institutions have developed (written) rules as to who can and should attend trilogues, regulating reporting back to the institutions as well as mandating rules (Brandsma, 2015; European Parliament, 2014; Roederer-Rynning & Greenwood, 2015a). Yet, both the academic and the public discussions around trilogues are foremostly skeptical (Brandsma, 2015; Bressanelli, Koop, & Reh, 2016; H. Cooper, 2016; Lord, 2013; Reh, 2014; Teffer, 2018). Trilogues, in the end, assemble very few representatives of the institutions behind closed doors, who after months, sometimes years of negotiations come with a fully-fledged agreement, the non-acceptance of which comes with high costs to the institutions (Bressanelli et al., 2014). It is more than understandable that doubts are prevalent on whether these procedures are compatible with the EU's understanding of democracy.

With the rise of trilogues, slowly attention towards its democratic credentials rose first within and later beyond the institutions. Academics probing the democratic quality of trilogues, especially concerning transparency, accountability and representativeness, are often pessimistic in their assessment (Brandsma, 2018; Curtin & Leino, 2017; Lord, 2013; Reh, 2014; Shackleton & Raunio, 2003a). The European Ombudsman has started an investigation into the transparency of trilogues, which comes to the conclusion that the current practice is in-transparent and urges the institutions to make further steps, especially in pro-actively publishing important documents to understand and follow the negotiations (European Ombudsman, 2015).

In contrast to these critical voices, proponents of trilogues, often enough found within the institutions themselves, praise the efficiency of the procedure, allowing agreement between two institutions which themselves already assemble manifold different interests. Indeed, many claim that without trilogues, effective law-making in a European Union

of 28 Member States would not be possible. These mostly normative discussions aside, trilogues are an empirical reality of still growing importance, and our knowledge about them is too limited. For the first time, this study sets out to investigate the negotiation process of trilogues and analyze whether and in how far it has an effect on the legislation resulting from trilogue negotiations.

1.1 What is a trilogue?

Having developed relatively ad-hoc out of institutional necessities, trilogues have witnessed an impressive institutional career in the last two decades. But with a higher frequency of use came an increase of critical voices as to their functioning and, in consequence, a considerable institutionalization. Yet, and this is important to stress, trilogues as an institutional framework have not yet made it into the Treaties, which is why it is correct to speak of ‘informal trilogues’, as many in and beyond Brussels do, including the European institutions (Official Journal of the European Union, 2007). Despite this lack of formal recognition, there is a set of rules surrounding trilogues by now, which allow us to draw a picture of the ‘ideal’ trilogue process.

As stated above, trilogues are informal meetings between the two legislative institutions. They include only a few representatives, who negotiate on the basis of negotiation mandates they receive from their institution. The Council is represented by the respective rotating presidency, which as one of the main tasks in their six months in office has coordination and negotiation with the European Parliament. Before the negotiations start, internally the Council agrees on a so-called General Approach, which represents the negotiation mandate of the Council and can or must be updated after every round of trilogue negotiations (Häge & Naurin, 2013; Thomson, 2008). The European Parliament chooses one or, in exceptional cases, several rapporteurs to represent it in the negotiations. Rapporteurs negotiate on the basis of committee reports, which are negotiated in the single EP committees and subsequently agreed to in plenary (European Parliament, 2014; Hurka & Kaeding, 2012; Kaeding, 2005). With the growing importance and in light of debates about inappropriate empowerment of single actors within the institutions, the EP has gradually enlarged its negotiation team, including shadow rapporteurs from all party groups (European Parliament, 2014). The European Commission is represented in these negotiations by the respective Commissioner or a high-ranking administrator from the respective DG (Roederer-Rynning & Greenwood, 2015).

Once the co-legislators have agreed on a mandate, trilogue negotiations can start. The representatives mandated by the institutions meet behind closed doors to negotiate and try to find an agreement on the issues on which positions diverge. On average, a file needs four political trilogue meetings, although in single cases the number of trilogues needed is considerably higher (Brandsma, 2015). Next to political trilogues, there are technical trilogues and ‘informal’, often bilateral meetings between the chief negotiators, rapporteur and presidency. These latter meetings are differentiated as informal, as despite the lack of mention

in the treaties, political trilogue meetings have undergone a far-reaching formalization through the rules agreed within and between the institutions (European Parliament, 2014; Laloux, 2019; Roederer-Rynning & Greenwood, 2015). Further, during the process chief negotiators have to report the current status of negotiations back to their constituent institutions (Brandsma, 2018). Once the representatives in trilogues have agreed on a draft legislative text, this has to be approved by the respective institutions. After this approval, the piece of legislation takes legal effect with publication in the official journal of the European Union.

While initially, ‘trilogue’ was the name of the actual meeting, by now it normally refers to the whole process. Accordingly, the definition of trilogue negotiations in this study is broad in that it not only includes the proceedings in actual trilogue meetings, but rather *the whole negotiation process from the moment the institutions officially enter informal negotiations between a few representatives of each institution (by officially agreeing on a negotiation mandate), to the final agreement of a legislative outcome* (Brandsma, 2015; Laloux, 2019; Roederer-Rynning & Greenwood, 2015a).

1.2 What do we know about trilogues?

Trilogues are the institutional embodiment of a paradoxical relationship between the Council and the EP, especially with the advent of co-decision (Mühlböck & Rittberger, 2015). On the one hand, they are legislative opponents. Both have a say in what EU legislation entails, and both have a high interest in seeing their, most of the times divergent, policy positions realized in the legislative outcome. On the other hand, both institutions are responsible for producing legislation in the first place, seen by most as the foremost activity of the European Union as a whole. Indeed, especially the EP is said to have adapted very quickly to a responsible engagement in the co-decision procedure, to the detriment, some say, of parts of its powers to shape policy and stand up to the Council (Pollak & Slominski, 2015). The need to accommodate divergent policy position in an efficient way has shaped the way trilogues function. Some of the first studies conducted on trilogues – or rather on the overall phenomenon of co-decision, of which trilogues started to become an aspect – reflect this paradox and the empirical necessities that stand behind the emergence of trilogues. Instead of trying to understand the institutional functioning of trilogues as a whole, specific aspects of trilogues – such as efficiency, transparency and inclusiveness – were at the core of research interest (Farrell & Héritier, 2003; Farrell & Héritier, 2007; Shackleton & Raunio, 2003a). While these questions are important, early on these analyses did not actually focus on trilogues, but rather viewed it as a byproduct of co-decision. Moreover, hardly any of these studies were actually based on a comprehensive understanding of the whole negotiation process – also because back then, the institutionalization was minimal, and one could hardly speak of a uniform process across all trilogue negotiations.

Other scholars were occupied with why legislators decide to agree legislation early – in a time, that is, where there was still variance in whether files would be negotiated in

trilogues – and what the consequences for the political system and the inter-institutional balance of power would be (Burns, Rasmussen, & Reh, 2013; de Ruiter & Neuhold, 2012; Huber & Shackleton, 2013; Rasmussen, 2011; Selck & Rhinard, 2005). Relatedly, the question how the institutions cope with this new negotiation environment (of early agreement), the possible empowerment of single actors, etc. was investigated (Bressanelli, Heritier, Koop, & Reh, 2014; Bressanelli et al., 2016; Burns et al., 2013; Delreux & Laloux, 2018; Farrell & Heritier, 2004; Häge & Kaeding, 2007; Häge & Naurin, 2013; Judge & Earnshaw, 2011; Laloux & Delreux, 2018; Reh & Heritier, 2012; Reh, Héritier, Bressanelli, & Koop, 2013a). Often, these authors have focused on the internal power balance of the institutions, on who wins in respect to other institutional actors, and on how institutions (should) react in order to re-establish a fair and equal balance of power and ‘fence in’ those representatives taking central roles in the negotiations.

Yet again, scholars did not focus on trilogues for the sake of this institutional arrangement *per se*. With their growing empirical relevance over time trilogues featured more prominently in these studies, however most did not engage in comprehensive procedural analyses. If they did, mostly with a focus on very specific aspects such as the role of single actors. To be fair, a focus on narrow aspects of trilogue negotiations was sufficient to answer the questions scholars were after. Yet, these focused studies were not able to shed light on the black box of trilogues, they merely illuminated a few dark corners. Additionally, some questions are still disputed, such as the potential empowerment of central actors in trilogues.

Recently, first scholars have started to target trilogues as a whole and proper research focus, investigating what actually happens in this institutional setting. Not focusing on single actors, or specific qualities such as transparency and effectiveness, they analyse trilogues as a comprehensive institutional framework or a holistic process (Brandsma, 2015; Ripoll Servent, 2011; Roederer-Rynning & Greenwood, 2015a, 2017). While this research goes to the very core of what trilogues are, it is at the same time inherently difficult to execute. Informal proceedings, in fact informal institutions are less public than their formal counterparts and analyses require thorough, time-consuming and in part frustrating digging into inaccessible data in order to produce fruitful outcomes. Thanks to the efforts of the analyses above we already have first, often descriptive insights into how trilogues as a whole work. We know that by now a relatively stable three-layered structure with different meetings has developed (Roederer-Rynning & Greenwood, 2015a), we know what determines the length and number of trilogues necessary for finding a compromise (Brandsma, 2015), and how a compromise can develop and change during the negotiations (Ripoll Servent, 2011). In other words, first steps into understanding the process of negotiations in trilogues have been made. Yet, while single aspects have been analyzed thoroughly and first investigations of trilogues as a complex institutional environment provide a cursory understanding of the negotiation process, comprehensive

and systematic analyses of the negotiation process in and impact of trilogues are lacking. This study intends to take the following step.

With the notable exception of the studies mentioned just now and some other to be fully reflected on in later chapters, many studies on the OLP and trilogues have treated the negotiation process as a 'black box'. Scholars were interested in balances of power, deviation from mandates, formal institutional adaptations, but hardly into the nitty-gritty details of what happens once a file enters the mystical world of trilogues. First findings show that (1) the negotiation processes in trilogues on different files seem to differ (Laloux, 2019; Roederer-Rynning & Greenwood, 2017) and that (2) these differences in the process, and the general design and functioning of the negotiations, can matter for the outcomes (Ripoll Servent, 2011). These findings deem a thorough investigation of the negotiation process more than worthwhile, in fact necessary, to get a full grasp of trilogue negotiations. An in-depth analysis of the negotiation process will allow us to detect a further question neglected so far: "Whether the way in which trilogues are conducted [...] impacts the final results, in other words, how the variation that we observe regarding negotiations matters with respect to the laws adopted thereby" (Laloux, 2019). Indeed, the influence of trilogue negotiations on the legislative files they produce has hardly been a focus. While scholars investigated the influence of trilogues on intra- and inter-institutional power relations, the democratic quality of the law-making process, or the speed of the legislative procedure, very few studies investigated whether, and how, the empowerment of the EP and its role in trilogue negotiations has an influence on the policy content of the files (Ripoll Servent, 2011). This is surprising, as arguably the effect trilogue negotiations have on the legislation the EU produces is one of the most important questions to be answered in order to assess what determines the laws produced by the EU.

Given the centrality of trilogues in the law-making process, this institutional setting should no longer be neglected in researching EU legislation. This dissertation investigates in detail the negotiation process in trilogues in order to determine how the legislative outcome resulting from trilogue negotiations is affected by the way the negotiation process functions. The main research question therefore reads:

How does the negotiation process in trilogue negotiations affect legislative outcomes in the Ordinary Legislative Procedure?

On the way to answering this question, different sub-questions concerning the functioning of trilogue negotiations which have so far received no or insufficient research interest will be shed light upon. First, this involves the social interaction of the actors during the negotiation process. While we know who the actors are, not much is known about their actual social interaction once trilogue negotiations have started. While single case studies have traced negotiator interaction in order to explain outcomes or differentiated actor empowerment, no systematic investigation of social interaction in trilogues has been

undertaken so far. Who interacts with whom and under what conditions, in what frequency and with which goals? Process- and interaction approaches to negotiations inform us that interaction can take different shapes and thereby influence the negotiation process. Investigating the interaction between actors in trilogues will enhance our understanding of the negotiation process.

One of the recent innovations in trilogue research, based on studies focusing on trilogues as such, is that they are more than merely informal negotiation, but a complex institutional structure in their own right. Indeed, they offer different institutional venues for negotiations involving partly varying sets of actors. Despite knowledge about the existence of these different institutional settings, so far the conditions and reasons for the use of these venues is unclear. A third interesting aspect in negotiation processes concerns the character of interaction between negotiators. The character of interaction in negotiations in the EU and beyond has long been a focus of academic studies (Elgström & Jönsson, 2000; Hopmann, 1995; Warntjen, 2010a). Theoretically, the form of the institutional environment of trilogues would have us expect negotiators approach the negotiations very constructively. This study will investigate whether this is the case, and which factors determine the negotiation mode in trilogues. The three main sub-questions this study will answer to understand the negotiation process in trilogues are therefore:

- 1) *How do negotiators interact in trilogues?*
- 2) *Which institutional venues are used in trilogue negotiations and why?*
- 3) *Which negotiation approach(es) can we witness in trilogues, and how are they determined?*

Answering these questions will allow us to start filling an important gap in the research on trilogues. In the end, the very rationale behind trilogues is producing legislation – it is hence overdue to start investigating what the negotiation process does to legislative outcomes. Systematically investigating and understanding the negotiation process in trilogues will furthermore contribute to our knowledge of trilogues and single aspects of the negotiations investigated earlier. In-depth investigations will automatically deliver insights on the empowerment of single actors, power-relations between the institutions and the inclusiveness of trilogue negotiations. In practical terms, the findings of this study will allow us to estimate which impact changes in the practical, institutional arrangements will have on the negotiation process and thereby also on the legislation produced in the OLP.

1.3 Outline of the book

To answer the questions outlined above, this book entails three different parts. The first part introduces the state of the art of research on trilogues, conceptualizes trilogue negotiations and other concepts crucial for the analysis and introduces the methodology. To start off, chapter 2 embeds this study into the current body of knowledge that

developed around trilogues in the last twenty years. From their evolution, over questions of institutional proceedings, via concerns around democratic quality to, finally the process of negotiations, six research streams are introduced and questions to be tackled distilled from the overview. Chapter 3 introduces the theoretical framework for the following analysis. Trilogue negotiations are conceptualized using process-, structural- and institutional approaches to negotiations. The negotiation process itself, which is the focus of this study, will be conceptualized in detail. Nine hypotheses will be developed to investigate (1) how the negotiation process functions and (2) how it affects the legislative outcome. Concluding this first part, a methodological chapter introduces the analytical approach this study follows. Process tracing is a tool developed for in-depth qualitative analysis of single cases in order to detect causal relationships linking causes and outcomes. Moreover, the data used in the analysis is explained. For one, this consists of official and non-official, public and non-public negotiation documents. Second, it consists of 43 interviews – conducted from May 2018 to March 2019 – with participants in trilogues on four different legislative files. Both, the case choice is presented and justified, as well as the approach towards interviews, discussing potential pitfalls of this method and the measures taken to prevent them.

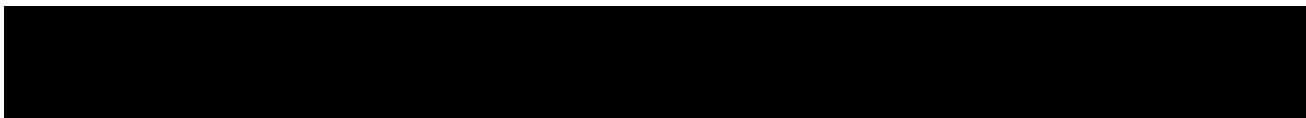
The second part of the book consists of the empirical analysis of the four empirical cases. All four cases represent legislation concluded between 2016 and 2018. Given a detailed knowledge of the cases is not only of importance for the researcher applying process tracing but also for the reader understanding it, detailed accounts of the negotiations in the four cases are given in a separate chapter each. These chapters entail a short sketch of the political background of the files, the development of the proposal and the process of negotiating a mandate in the single institutions, before it delves into the trilogue negotiations and depicts the outcome of said negotiations. Additionally, each chapter entails a first analysis of these negotiations in light of the conceptualization of the negotiation process and the theoretical expectations formulated in chapter 3.

In the last part of the book, an analytical chapter brings the findings of the four empirical chapters together, analyses the hypotheses developed and answers the research question. Detailed summaries of the findings concerning the outcome, the process, the impact of structural factors and the institutional framework allow us to find conclusive answers on whether the hypotheses are confirmed, hence whether and how the process of negotiations has an independent impact on the legislative outcome. A last chapter concludes the study, interpreting the results in light of the broader literature on trilogues and negotiations in the European Union in general.

CHAPTER 2



The state of the art and what is left
to be discovered



As a relatively young empirical phenomenon, trilogues have accordingly only become a research focus in the last two decades. This section will introduce the research so far conducted, its findings and gaps in our knowledge of trilogues. Whereas the political phenomenon of trilogues has existed for almost two decades, only in the preceding ten years it has developed into the pivotal part of EU legislative decision-making it is today. In accordance with their rising empirical significance, also the academic literature on trilogues has steadily increased within the last decade, reaching its peak around 2013 (figure 2) (Laloux, 2019).

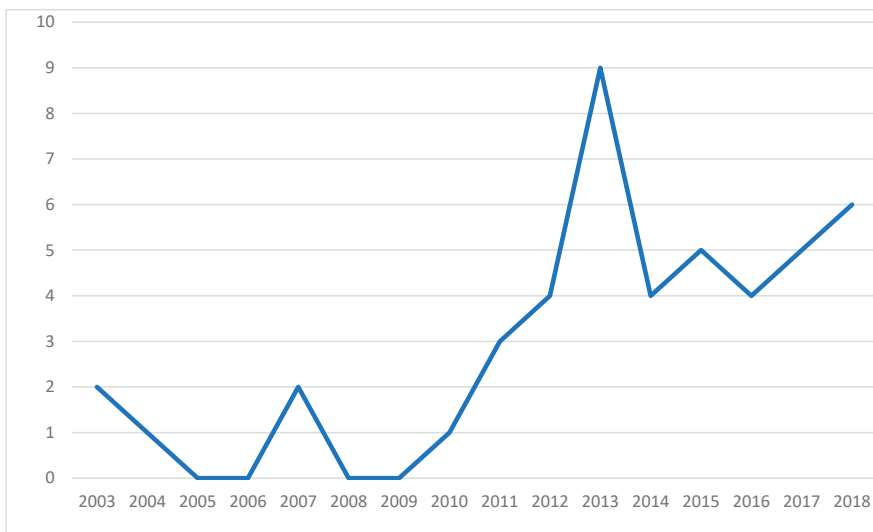


Figure 2: Number of trilogue studies, 2003-2018.

Especially in the years after this new form of inter-institutional decision-making has entered EU negotiation processes, research on trilogues remained a side-product in the general stream of research on co-decision as a developing institutional arrangement for deciding on EU legislation. Only incrementally, it developed into a research topic for its own sake, generating its own set of analytical puzzles and research questions.

In the following overview, research on trilogues will be divided into six different streams. Instead of a chronological order, these streams will be based on the respective different analytical foci, a more useful way of arranging and presenting existing knowledge on trilogues.

While the analytical focus of a stream of research might coincide with a close temporal proximity in some cases, the main ordering principle is the common focus of analysis or, in parts, of the findings. These streams partly overlap with the “research topics” identified by Laloux (2019) in his recent, excellent systematic literature review on the trilogue literature,

with which this following overview disagrees in but a few, though important, aspects. The review of existent research on trilogues serves two main purposes: First, it gives the reader an understanding of the existing knowledge of trilogues, on many aspects of which this study builds in the subsequent chapters. While, relatively speaking, research on trilogues is relatively young, it has developed manifold insights. A systematic investigation of trilogues cannot be complete without doing justice to the excellent work conducted so far in this field. Second, and importantly, the overview, especially through the coherent presentation in different research streams, allows us to understand which aspects of trilogues have not been shed light upon sufficiently, thereby justifying the questions asked and focus chosen in this study.

2.1 Six streams of research on trilogues

The first stream of research raises the question of how trilogues came into existence in the first place. What were the institutional conditions out of which trilogues developed and how did they slowly but steadily acquire the form they have today? The second stream of research focuses on a related question, namely why legislators decide to make use of trilogues. A third stream focuses on the question of how the use of trilogues affects the EU political system as a whole. While the fourth stream is related to this in that it also researches institutional consequences of trilogues, it is advanced enough to represent a research stream in its own right. It is occupied with the intra-institutional changes and adaptations brought about by trilogues. How, in short, have the single institutions – and particularly the European Parliament – adapted in order to cope with and gain the maximum benefit from trilogues?

The fifth research stream takes a more normative stance and examines the democratic credentials of trilogues and their impact on the EU's democratic quality from various perspectives. It is this stream that arguably ties in the most with current public debates about trilogues which often exclusively focus on questions of legitimacy. While there are only few contributions that fully concentrate on this dimension, these questions have featured more or less strong also in projects that initially had a different focus, the findings of which will also be accounted for in this stream. Lastly, and considering focus and structure of this research project most importantly, a hitherto rather limited stream of research has come to focus on different procedural aspects of trilogue negotiations and the actors therein: What exactly happens during trilogue meetings? How are they conducted? What are formal rules and which informal conventions do trilogues follow? Which actors are involved, and which roles do they occupy? Again, while some research focuses solely on this aspect, especially case studies with initially other research questions have contributed to our knowledge on the negotiation process and will be mentioned where appropriate. Concluding this chapter, current gaps in the research on trilogues will be identified, showing how this study will be able to begin filling some of them.

2.1.1 First Stream: The Evolution of Trilogues

With the introduction of the co-decision procedure, the Maastricht Treaty formally elevated the hitherto rather weak EP at least in some policy fields on a level-playing field with the Council, and thereby laid the basis for the legislative procedure we know today. Since then, the co-decision procedure has been what Shackleton and Raunio coined “a laboratory for institutional innovation and change” (Shackleton & Raunio, 2003, p. 171). It was the Treaty of Amsterdam which, by allowing for agreement after the first reading, has shaped the legislative procedure substantially and can therefore be seen as the cradle of trilogues. Based on the conciliation procedure, which “obliged [the two institutions] to meet to resolve their differences” (ibid) before the third and last reading in the co-decision procedure, trilogues were invented and slowly but steadily shifted to earlier phases in the legislative procedure. Already back then, the authors observed that this development “touches on central issues of the identity of the two bodies, the character of law-making at European level and the nature of democracy in the Union” (Shackleton & Raunio, 2003, p. 186).

It was the interplay of formal (co-decision) and informal (trilogues) institutions that caught academic interest in the following. In what they call “continuous constitution building” (Farrell & Héritier, 2003, p. 1), Farrell and Héritier argue that the exact informal practices and institutions within the co-decision procedure in the early years developed into a constant bargain between the co-legislators. The arrangements were not agreed upon, however, in singular bargaining processes detached from one another but within the continuous process of agreeing on single pieces of legislation:

“Parliament and Council did not treat each piece of legislation as a one-shot game, as many current accounts suggest. Instead, individual items of legislation were linked together through a protracted bargaining phase in which both Parliament and Council struggled over the general terms under which they would interact in the legislative process” (Farrell & Héritier, 2003, p. 14).

The treaty provisions, in other words, left enough space for the institutions to design the actual process themselves (Farrell & Héritier, 2007). Obviously, this came with diverging expectations as to the influence each institution should have. Interestingly, they find that it was the formally weaker Parliament that succeeded. More precisely, the EP’s successful strategy was to informally gain competences first and only later formalize them in treaty provisions.

Notwithstanding questions on the institutional evolution of trilogues as a bargain between the institutions for power, there is agreement on the fact that its very origin was a functional pressure to come to agreements in the new environment of the mutual power to forestall EU legislation (Huber & Shackleton, 2013; Mühlböck & Rittberger, 2015; Shackleton & Raunio, 2003a). With the advent of co-decision and “to overcome

such stalemates that the institutions could collectively not afford, they slowly came to realize that they needed some practical arrangements to enable them to work together” (Huber & Shackleton, 2013, p. 1043). It is this mix between functional pressure and a mutual wish for efficient legislative decision-making in both institutions and at the same time a continuous strive to strengthen their own institutional power which needs to be considered to grasp the current, some argue opaque, design of the negotiation process (Mühlböck & Rittberger, 2015). Hence, already this early research stream was highly occupied with explaining the form negotiation processes in trilogues can take, based on the assumption that they would be highly influential, as for example on the power relation between the two institutions. Yet, the research stream falls short of a systematic investigation of the process, in part because trilogue processes might have lacked the institutional underpinning to be considered a single, identifiable process.

Additionally, the evolution of trilogues falls into a period marking a general increase in the informalization of politics, of which “the increasing deployment of trilogues and the subsequent conclusion of first-reading agreements – the so-called ‘fast-track procedure’ in the EU legislative process – is another facet” (Christiansen & Neuhold, 2013, p. 1200). Functional pressures, power struggles and a general trend for informalization were hence the breeding ground for trilogues in the EU. Interestingly, until very recently trilogues have been classified as one, informal institutional setting of negotiations. Here lies an important potential for further investigation: As will be shown below, this understanding of trilogues might well be obsolete.

2.1.2 Second Stream: Why negotiate Legislation in Trilogues?

Certainly, none of the early accounts could have predicted the triumph trilogues as the quasi-institutional solution to these challenges would experience in the years to come. When it crystallized that they were not only here to stay, but that consecutively more and more EU legislation would have to pass trilogues, new questions entered the academic discussion. One prominent strand of research came to scrutinize why legislators would choose early agreements and trilogues over more formal procedures.

Once trilogues had been an established means to conclude early scholars began to wonder why legislators prefer to “go informal” and negotiate legislation in trilogues. In an environment where the actual impact of early agreement – aside improved efficiency – had not yet been established, this question was far from trivial. Especially, as it quickly turned out that not merely technical and non-salient files are negotiated in trilogues. Potentially, taking decisions in trilogues downgraded all actors that did not take part in the negotiations to mere observers, excluded civil society and general interest representation and harmed the transparency and legitimacy of the process.

Anne Rasmussen (2011) was one of the first scholars to investigate why legislators favour early agreement over going through all three possible readings of the legislative procedure. She starts from the assumption that actors in trilogues might have

inappropriately big impact on legislation, and hence analyses whether the proximity of the EP rapporteur to the median MEP has an influence on said rapporteur's choice to go informal, assuming those rapporteurs with preferences contrary to their institution might use informalization to bypass parliamentary positions. She finds that this is not the case, but that "conclusion at the first-reading stage in EU co-decisions can first and foremost be seen as resulting from factors linked to the character of the bargaining context" (Rasmussen, 2011, p. 61). That is, the proximity of the background of chief negotiators, e.g. nationality, plays a role as well as what she calls 'impatience', the strive to bring negotiations to a successful conclusion. Urgent files and a high workload in general increase the chances of early agreement. While closer proximity of the rapporteur to the median EP actually increases the chances of EAs, she also indicates that in contrast to what was generally expected, file characteristics play no role (Rasmussen, 2011).

Dividing formal from informal arenas of decision-making, Reh et al. find a dramatic increase of informalization since 1999 (Reh et al., 2013). Analysing a comprehensive dataset of 797 co-decision files, they find that "informalization is systematically related to EU enlargement [of 2004], legislative workload, complexity, and the time fast-track legislation has been in use" (Reh et al., 2013, p. 1136). Especially the last finding points at the fact that next to functional arguments, there seems to be an aspect of socialization into the new realities of trilogues, a trend that has certainly been confirmed in the last two legislative terms.

On the basis of intra- and interinstitutional rules, de Ruiter and Neuhold identify three theoretically possible reasons for concluding early: "the technical or uncontroversial nature of a legislative file, an urgent situation, and the political priorities of the EP and the Council" (de Ruiter & Neuhold, 2012, p. 552). Based on two case studies, they find that it is the priorities of the presidency and especially their proximity to the rapporteur's preferences, as well as perceived or actual urgency of a file that explains early conclusion. In addition, Bresanelli and colleagues find that there is a strong variation of EAs across different policy fields, but that file salience seems to not make a difference, again opposing the assumption that it is mainly technical, non-political files that are fast-tracked (Bressanelli et al., 2014). Interestingly, hence, file characteristics, especially the political importance of a file, do not seem to determine whether the file is negotiated in informal settings, contradicting the narrative that it was mainly invented for dealing with long, technical files.

In a study of post-Lisbon legislative files, Brandsma (2015) provides quantitative analyses of trilogues, underlining especially their major empirical relevance. His dataset, including all legislative files decided under OLP in the 7th EP, reveals that 93% of the acts were adopted in first reading. While around 25% did not require trilogues, the majority of other files required one to four trilogues, with a small group of files considerably more. He also investigates reasons for this divergence and finds that functionalist considerations are an important determinant for the number of trilogues necessary: In short, the longer

the file, the more trilogues used. However, he also finds that the preference proximity of the rapporteur towards the whole plenary matters, as does politicization in the Council and the experience of the specific committees with trilogues (Brandsma, 2015).

While it was highly important to assess potential reasons for choosing trilogues over the formal procedure when this choice was still of empirical relevance, the recent virtually exclusive use of trilogues, for which ever reasons, on first sight seems to have made this stream of research obsolete. Yet on the contrary, the findings are highly interesting when considering trilogues as a more complex institutional framework, itself offering different degrees of formal and informal venues. It is in this understanding of trilogues that this study will not only be able to build on the findings of this research stream, but potentially expand them by adding reasons for trilogue-internal informalization tendencies.

2.1.3 Third Stream: Consequences of Trilogues on the legislative System

Before introducing the specific research stream that is occupied with the effects of trilogues on the legislative institutions internally, some studies have considered the effect of trilogues on the wider system of the EU. Findings on the implications of trilogues on the EU's legislative system appear to diverge. One question of interest was what informalization does to the time devoted to negotiations. Toshkov and Rasmussen, maybe surprisingly, conclude that "even if early agreements lead to overall efficiency gains, they do allow more time for negotiation and deliberation when salient legislation is on the bargaining table and there is a level of political disagreement between the co-legislators" (Toshkov & Rasmussen, 2012, p. 17). Yet, even though these files are agreed after first reading, these first reading procedures take longer than if these files had gone through all three readings. This difference increases with the level of disagreement. The authors interpret this as a positive sign for the democratic and deliberative quality of the procedure. This first investigation delivers the important insight that the deliberative quality might not always suffer from concluding early, and that negotiation processes apparently differ and possibly there are systematic reasons underlying this differentiation. All the more interesting it should become to investigate when and how negotiation processes differ, and what this means for our broader understanding of trilogues.

Another aspect researched is the shifts in power relations between the institutions. We have already seen that the whole evolution of co-decision can be understood as a power bargain, but did actual policy influence also change with the advent of trilogues? Using the DEUII dataset covering 112 legislative files, Costello and Thomson have analysed the power distribution among the institutions under co-decision and found that "it is not realistic to place either the EP or the Commission on a par with the Council as a whole in terms of its power" (Costello & Thomson, 2013, p. 1036). However, specifically focusing on trilogues, Häge and Kaeding find that EAs actually advantage the EP in contrast to full-length legislative procedures (Häge & Kaeding, 2007). Hence, while the EP seems to have gained power – through co-decision in general and through trilogues

in particular – the overall assessment on power balance is clear: The Council remains the more powerful institution and the distributional consequences of the new procedures are smaller than hitherto expected (Burns et al., 2013; Delreux & Laloux, 2018; Kreppel, 2018; O’Keeffe, Salines, & Wieczorek, 2016). However, it was not the distribution of power or inter-institutional developments which attracted most scholars’ interest but mainly the repercussions the advent of trilogues had on the intra-institutional organization of the co-legislators.

2.1.4 Fourth Stream: Intra-institutional Adaptation to Trilogues

Farrell and Heritier were the first to conceptualize trilogues as having specific impact on the power distribution within the single institutions and also expected it to lead to intra-institutional adaptations by the two co-legislators. In 2004, they presented the ‘relais actor thesis’, according to which certain relais actors, especially rapporteurs from big party groups, gain disproportionate influence in trilogues, while committee chairs lose (Farrell & Heritier, 2004, p. 1208). In a convincing theoretical argument, they hold that due to the seclusion and the essential double-role of relais actors as coordinating the negotiations both within their institutions as well as with the other institution they will have an advantage towards their ‘principals’, namely the respective legislative institution as a whole. In turn, the authors predict that “organizations will respond to these shifts in the power balance among the individual actors that constitute them” (Farrell & Héritier, 2004, p. 1208). Due to its institutional structure, they argue, the EP will struggle more than the Council to react to these power shifts and control their relais actors.

This relais actor thesis has provoked multiple follow-up studies which tried to prove the initial assumption, namely that relais actors have an (inappropriate) impact on legislation concluded in trilogues. Reh and Heritier find that indeed, when an increase in the number of trilogues and a possible shift in power became apparent, the procedure became contested but that the ‘winners’ of the procedure opposed change. This corresponds to the broader picture that in the beginning, the institutions struggled in their attempt to give the informal procedure formalized rules (Reh & Heritier, 2012). However, the EP eventually succeeded in adapting the rules, and an important step was the introduction of a negotiation team to conduct the negotiations. While the rapporteur still occupies an important position in trilogues, Judge and Earnshaw argue that the definition of relais actors needs to be broadened to include the negotiation team. Again, this seems to support the second stipulation of the relais actor thesis, as indeed those that lost from the new procedure tried to adapt the rules of conduct according to their needs (Judge & Earnshaw, 2011).

However, there are several studies that struggled to identify any relais actor effect on the power of single actors. Rasmussen and Reh (2013), for instance, contest the thesis by showing that several factors restrict the relais actors’ freedom. Firstly, salient files attract closer scrutiny by MEPs in general. Secondly, the selection of rapporteurs is already based

on their initial preferences, which can therefore be expected to be relatively close to those of a majority in the EP. Thirdly, consensus in Parliament is still necessary to conclude early and fourthly, the participation of shadow rapporteurs and committee chairs in trilogues further restricts the rapporteur (Häge & Naurin, 2013; Rasmussen & Reh, 2013). Accordingly, the empirical relevance of the relais actor thesis remains disputed (Laloux, 2019). Yet, the centrality of especially rapporteurs in the new legislative procedure has triggered further investigations into the underlying logic of their appointment (Häge & Ringe, 2019; Hurka & Kaeding, 2012; Kaeding, 2005; Obholzer, Hurka, & Kaeding, 2019).

Also, apart from the direct relais actor effect, intra-institutional adaptations and ways of coping with trilogues have played an important role. Brandsma (2018) has investigated how the EP deals with reporting on trilogues in committee meetings. His findings show that there is a severe difference on the level of information conveyed in committee meetings – ranging from very informative and detailed reports, over short and un-informative reporting to no reporting at all or in camera respectively – with important implications on the inclusiveness of trilogue negotiations (Brandsma, 2018). Applying the principal-agent model to trilogue negotiations, Delreux and Laloux (2018) show that relais actors are able to overcome constraints that might hamper finding an agreement by applying a threefold strategy:

“(1) creating a situation in which his hands are tied by the principals, yet in such a way that it reflects his own preferences; (2) affecting coalition formation between the principals by bringing in allies from the other institution; and (3) actively searching for signals from his principals and his fellow agent on the zone of possible agreement” (Delreux & Laloux, 2018, p. 203).

They thereby also draw a bridge between intra- and inter-institutional developments and argue that both have to be taken into account in order to fully grasp the negotiation process in trilogues and the relais actors’ role. Bressanelli et al. have further investigated in how far trilogues, or EAs in general, affect the voting cohesion in Parliament. Assuming that non-agreement to compromises negotiated in trilogues is connected to considerable costs, they expect trilogues to increase voting cohesion in parliamentary party groups. They test their hypothesis with a dataset of close to 500 roll-call votes and find that “informalization does not affect all political groups equally”, but that in centrist parties, namely EPP, ALDE and PES, voting cohesion indeed increased through trilogues (Bressanelli, Koop, & Reh, 2016, p. 108).

Hence, the advent of trilogues has had important effects both inter- as well as intra-institutionally (research streams three and four respectively). The insights developed by this stream of research allow us to draw a clear picture of single actors’ roles and institutional adaptations which will refine the conceptualizations to be developed in the proceeding chapter. What stands out in both research streams which investigated the impact trilogues

have, is that they neglected so far what these negotiations do to legislative outcomes. This neglect is based on the implicit assumption that while trilogues might change power-relations between and in the institutions, thereby possibly empowering some positions over others, the negotiation process itself does not affect how these preferences are translated into outcomes. It is this very assumption which is challenged in the following analysis.

2.1.5 Fifth Stream: Democratic Credentials

An aspect of trilogues which has increasingly triggered debates both within as well as beyond the institutions is the procedure's democratic quality. Especially three aspects have been considered here: Inclusiveness, representativeness and transparency. First of all, it is important to note that many of the studies referred to above have something to say on the democratic credentials of trilogues. The impact of trilogues on the EU's democratic quality seems too important as to simply neglect the issue. Already Shackleton and Raunio (2003) underlined the potential of the new procedure to keep decision-making effective after including the EP as an influential actor, while they voiced concerns on the democratic quality of decision-making if trilogues became the standard negotiation forum. The EP, they assumed, could be imposed diplomatic negotiation styles of the Council, which in turn would undermine the surge for more democratic legitimacy (Shackleton & Raunio, 2003).

Lord (2013) asserts that especially within the institutions, the status of the informal procedures developed within the co-decision procedure is relatively uncontested. Accordingly, he wonders whether this can be considered appropriate from a democratic point of view. He therefore evaluates in "how far co-decision secures (a) public control with (b) political equality and (c) public justification" (Lord, 2013, p. 1056). He asserts that legislators in trilogues are neither publicly controlled, nor are decisions sufficiently justified to the public subsequently. Moreover, "there are political inequalities in the distribution of decision-powers within co-decision that affect the impartiality between different outcomes, opinions and values" (Lord, 2013, p. 1069). This partly refers back to power shifts and imbalances identified in the work on the inter- and intra-institutional effects of trilogues. He asks, "for a more public form of co-decision, and not one that disappears from public view in order to achieve 'early agreement' between institutions" (Lord, 2013, p. 1070).

Applying a selection model of representation to trilogues, Reh (2014) investigates the conditions under which informal politics is democratically problematic or tenable. She argues that "representation with a strong 'selection core' and a weak 'sanction periphery' is one condition for making the informal politics of co-decision normatively tenable" (Reh, 2014, p. 837). That is, in the environment of trilogues it is more feasible for the principals to invest in good selection procedures than to have too strict control mechanisms, as this impairs their negotiation position and is therefore less likely to be fully applied to

restrict the negotiator. It would restrict the agent's room to manoeuvre and, accordingly, bargaining success. She argues that while the current procedure did improve in some democratic respects, the procedure's legitimacy is especially hampered by the fact that the selection of rapporteurs takes place behind closed doors.

Some studies have concentrated on the transparency of the procedure and most of them paint a considerably negative picture. Curtin and Leino assert that "the creation of secluded spaces for entire, decisive procedural parts such as trilogues [...] is taking the logic of secrecy too far" (Curtin & Leino, 2017, p. 1711). Brandsma (2018), who analysed transparency through the respective post-trilogue reporting procedures in EP committees, comes to similarly negative conclusions. While the EP has the strongest rules committing itself to transparency, Brandsma finds that "this rule does not deliver on its promise. For over half of the trilogues that took place during the time period investigated, no public feedback was given whatsoever" (Brandsma, 2018, p. 15). It is especially on transparency, then that the evaluations of trilogues are negative. This is in line with the public picture of, and growing debate on, trilogues.

Scholars have hence analysed trilogues from different perspectives: their emergence and outcomes, inter- and intra-institutional impacts and democratic credentials. A last stream of research has started investigating procedural aspects of trilogues, often with a focus on specific aspects or actors within the process, while only a few studies so far have started forming a comprehensive understanding of the negotiation process in trilogues.

2.1.6 Sixth Stream: Procedural Aspects of Trilogue Negotiations

It is this last stream on the actual negotiation process which is the major discrepancy between this outline of trilogue research and that of Laloux (2019). Mainly, Laloux identifies most contributions, 21 of 46 studies investigating trilogues in total, to be investigating the process of trilogues. However, many of these studies only focused on very specific aspects or parts of the process, hence should, or at least can be assigned to one of the streams above. Some examples are studies focusing on transparency (Brandsma, 2018; Curtin & Leino, 2017); Delegation and principal-agent relationships (Delreux & Laloux, 2018); or negotiation position, strategies and success of the institutions (Delreux & Laloux, 2018; O'Keeffe, Salines, & Wieczorek, 2016). Only a few of the studies identified by Laloux as having the process of trilogues as a research focus therefore actually focus on the whole negotiation process in trilogues. Following the comprehensive understanding of the negotiation process applied in this study, analyses with an explicit process focus will be considered as the core of this research stream. It is accordingly also this stream to which the study at hand contributes the most. Yet, before it will be discussed, also research which can foremostly be classified in other streams have delivered valuable insights into the negotiation process of trilogues.

An important feature of the research on procedural aspects of trilogues entails case studies conducted for the sake of answering specific questions but which nevertheless

grant insights into the negotiation process, often because they traced the development of single files from beginning to end. Judge and Earnshaw, for example, testing the *relais actor* thesis found the important role shadows play in the process (Judge & Earnshaw, 2011). Ripoll Servent, in trying to explain policy-preference change of the EP in a case study of the returns directive, delivers important insights into the process of compromise-finding and the central role the rapporteur can play in this process (Ripoll Servent, 2011).

Most studies conducted so far on the actual process of trilogue negotiations seem to imply that the negotiation process has an impact on the negotiation outcome. Yet, to date this has not been systematically analysed. What is more, first in-depth investigations reveal substantial distinctions between negotiation processes of different legislative files, especially across policy fields (Roederer-Rynning & Greenwood, 2017). One reason for this is that the rules accompanying trilogue negotiations are still comparatively loose and leave the necessary leeway for differences. Some of the most important insights on the process of trilogue negotiations were delivered by the work of Roederer-Rynning and Greenwood since 2015. As two of only a few scholars they focused on a comprehensive understanding of how the process of negotiations in trilogues is structured and proceeds. In 2015, they delivered a first description of some general trends and structures in trilogues.

Trilogues do not simply entail one or a series of meetings of the official delegates to discuss compromises on legislative files. Rather, they constitute “an onion-like construct encompassing three main layers of practices” (Roederer-Rynning and Greenwood, 2015, p.1153). On top of this hierarchical structure are so-called full or political trilogues, which assemble all institutional negotiators to discuss and decide upon the draft file to be presented to their institutions for agreement. Below, layer II entails technical trilogues, which imitate political trilogues in structure but are attended by technical staff of all institutions only. The administrators engage in finding compromise on all issues that are not highly political, and also write out the preliminary compromises agreed upon in political trilogues. Lastly, layer III consists of informal, often bilateral meetings between administrative staff of the EP and the Council, but also possibly involving highest political actors (*ibid*). The frequency of meetings decreases with the level of hierarchy increasing, so that the main bulk of trilogue compromises is actually shaped in technical meetings by administrators of the institutions involved.

While often mainly descriptive, these first findings of in-depth investigations of negotiation processes in trilogues contribute significantly to the knowledge-base this study builds upon. It sheds light on the complex institutional arrangements trilogues offer nowadays and renders a thorough investigations on how negotiation processes unfold in this environment ever more important, because we can expect them to not be unitary, and not follow pre-determined routes. Only very recently have first studies begun to investigate this multi-layered process. In a study focusing on the institutional development of the European Parliament, Roederer-Rynning and Greenwood deliver a number of additional interesting perspectives on trilogues, which they see as “a critical

moment of the institutionalization of the EP-as-a-legislature" (Roederer-Rynning & Greenwood, 2017, p. 736). They posit that in the different committees of the EP different styles of approaching trilogue negotiations have developed: The gladiatorial, the problem-solving and the arm's length approaches (ibid, p.746). The gladiatorial approach entails an "adversarial style", with a "dramaturgic format of trilogues" and "insistence on high-level Council representation" (ibid). The second, problem-solving approach represents a rather accommodating and less confrontative approach, while the third, arm's length approach, which involves an important role of the committee chair as a main actor in negotiations and in 'playing' with his absence or presence in trilogue meetings sending important signals on the EP's ambition (ibid). All three of these generic approaches to trilogues, which are accompanied by several variants, include two central aspects: An increased role of the chair in relation to the formerly all-powerful rapporteur, and "a sharp division of labour between technical and political trilogues" (ibid, p.745).

The studies conducted on the process of trilogue negotiations hence allow a first conceptualization of trilogues for this study. Trilogues are understood not only as the single meetings, but the whole process from the issuance of a negotiation mandate by the EP and the Council until an agreement has been found to be confirmed by the respective institutions. Therefore, trilogues provide a comprehensive institutional framework for finding legislative compromise. Having been established as an institutional frame for finding compromise in early agreements, trilogues, although not officially part of the treaties, have been formalized and subjected to certain rules by the engaged institutions (Roederer-Rynning and Greenwood, 2017). Some of these rules have been codified, as for example in the EP rules of procedure, some manifested by repetition, and some are still disputed (lately most prominently these routines connected to questions of transparency). Trilogues as an institution constrict negotiators' options of behaviour and might open up new avenues for conflict resolution. This has an impact on the process of negotiations themselves. Trilogues can be expected to determine the range of acceptable behaviour of negotiators, the variety of bargaining tactics, and strategies of conflict resolution. Hence, trilogues influence how negotiations are conducted. While this process-focus on trilogues so far only motivated very few studies, especially in comparison to some of the other foci, it is still considered a stream on its own. First, it has a new focus, clearly distinguishable from earlier research. Second, it is this stream the following analysis is situated in.

The above has shown that research on trilogues both in their own right and as by-product of co-decision in general is far advanced and has yielded many important insights. Still, investigations on how the actual process of trilogues work, opening up what has so far often been dealt with as a black-box, are lacking. Research so far (1) has shown that the negotiation process in different trilogue negotiations differ, and (2) implies that procedural aspects might have an impact on the legislative outcome. There are good reasons why, so far, the extent of in-depth investigations with a comprehensive focus on

the functioning of trilogue negotiations is limited: A secluded setting is not only difficult to follow for the public, it is also difficult to research for scholars.

2.2 Taking the negotiation process seriously

In many existing studies on EU negotiations, the relationship between the preferences of the actors and the outcome are assumed to be direct, i.e. the distribution of actors' initial positions directly determines what the final outcome will look like (Costello & Thomson, 2013; Laloux & Delreux, 2018; Thomson, 2008). However, as different actors in negotiations have different initial positions at the beginning, their final compromise must be accounted for. (Implicitly) looking at the preferences mainly, many existing studies on trilogues have considered file- and negotiator specific factors, prominently power relations, to account for the relative success of the single actors. In short, the outcome of a political negotiation has been described as a function of the preferences of and the power distributions (determined by actors' characteristics) between the negotiating parties. While the influence of trilogues on both has been a topic of study, the influence the negotiation process in trilogues has on outcomes has been neglected. What has been measured so far can be summarized as the relative success of institutions in trilogue negotiations, as well as the principal-agent relationships between institutions and negotiators (Burns, Rasmussen, & Reh, 2013; Costello & Thomson, 2013; Delreux & Laloux, 2018). Not only does this blank out the negotiation process per se. It also assigns limited analytical value to the actual process. There is good reason to assume that also in EU negotiations, the process matters, just as it has been shown to matter in negotiations in other settings (Irmer & Druckman, 2009; Monheim, 2016; Odell, 2000; Park, 2016).

It is for this reason that this analysis will focus on the negotiation process in trilogues, because it promises to deliver new, important insights into what determines EU legislation and, as has been shown above, constitutes the main gap in the research on trilogues. Not only will it advance our empirical and theoretical understanding of trilogues, it will be pivotal for grasping the impact potential changes to the institutional setting of trilogues will have on the legislative outcome of the Union, and which aspects of these negotiations contribute to good, or bad, policy-making.

A deep and comprehensive understanding of the process of trilogue negotiations, while important, is not the only aim of this study and will advance our understanding of trilogues in manifold ways. The most important question to consider here is of course that between the link of negotiation processes with outcomes. An aspect of trilogue negotiations that has so far mostly been neglected is the influence these negotiations have on the legislative outcome they produce. It is necessary, in other words, "to go beyond the politics of trilogues and to link it with the policy outcomes that result therefrom" (Laloux, 2019). Producing policies is the main reason for trilogues in the first place, and yet we know surprisingly little about what the specific conduct of inter-institutional negotiations does to the legislation. As trilogue negotiations have shown to not be uniform, it is specifically

interesting to gain more knowledge on which aspect of the negotiation process has which impact on the final outcome. Put differently, this study satisfies the need to “investigate whether the way in which trilogues are conducted – e.g. who the main actors are or the level of involvement of the technical staff – impacts the final results, in other words, how the variation that we observe regarding negotiations matters with respect to the laws adopted thereby” (Laloux, 2019).

The isolation of trilogue negotiations from outside influence does not only allow the actors to negotiate in a protected setting, it also makes researching the process difficult. As an investigation of the logics governing trilogue negotiations demands a detailed understanding and reproduction of negotiation processes in trilogues, this isolation poses a considerable obstacle for researchers. This, however, does not mean that these detailed investigations are not important to further our understanding of the inside of trilogue negotiations. As Laloux stipulates, “thus far, scholars have observed that trilogue negotiations encompass different layers of negotiations involving different actors. Yet, there is still a need to investigate how different levels of informal contact and the actors involved interact with each other” (Laloux, 2019). The social interaction between actors is another important question this investigation will shed light on.

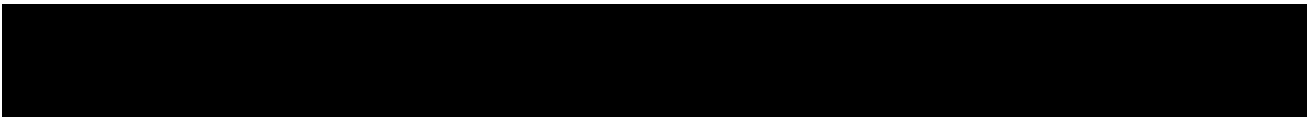
Second, while the identification of different layers of decision-making (Roederer-Rynning & Greenwood, 2015) was a crucial first step to understanding trilogues, in a next step we need further insights regarding the use of these different layers. Do all trilogue negotiations entail all three layers, what determines their use and which decisions are taken at which level? We have seen that the assumption that only technical issues are delegated to the technical level might be wrong. A further gap this study addresses therefore concerns what will be referred to as the venue of decision making: Who takes decisions at which layer of trilogue negotiations?

Third, the character of interaction between the institutions is another important aspect of trilogue negotiations so far under-studied, mainly because of the not sufficiently complex understanding of trilogues as a uniform institutional setting. Roederer-Rynning and Greenwood have shown that at least concerning the EP, approaches towards the negotiations differ. Given the expected institutional diversity within trilogues, the question how negotiators approach each other is another question to be answered along the way. Last and as an addition to these central questions in the following analyses, an in-depth and systematic investigation of four different trilogue negotiations will also deliver further insights into many of the topics raised by the six streams as outlined above. Given trilogues have become the close to exclusive setting of EU legislative negotiations, it is overdue to understand this particular process of negotiations, which research has shown to be both potentially influential as well as utterly complex.

3

CHAPTER 3

Theoretical Framework: Conceptualizing Trilogues as a Negotiation Process



The preceding chapter has delineated existing research and findings on trilogue negotiations. As one of the important remaining questions, the impact of negotiation processes on the outcome of trilogue negotiations has been carved out as the focus of this study. In order to fill this gap in the research, it will first be necessary to arrive at a precise conceptual understanding of trilogue negotiations. This chapter will provide this conceptualization. First, the negotiation outcome, the explanandum of this study, needs to be conceptualized for us to be able to trace the potential impact of negotiation processes. Afterwards, trilogues themselves will be conceptualized, building on three theoretical approaches towards negotiations. *Structural approaches*, which emphasize preferences and positions, power relations and issue characteristics as determinants of negotiations and their outcomes. Many of the existing studies on trilogues outlined above have been informed by a structural understanding of negotiations and shown that these factors matter. *Procedural or process approaches* to negotiations will provide the necessary insights into how the process itself can be conceptualized and assumed to impact on negotiation outcomes. Building on existing studies from this approach, three main elements of the negotiation process – interaction intensity, negotiation venue and negotiation mode – constitute the analytical focus of this study. Third, *institutional approaches*, which highlight the important impact of institutional environments on actors in and outcomes of negotiations are the second source of inspiration. Not only but especially in the EU, these institutional approaches are prominently used in explaining how negotiations unfold and the outcomes they produce. By now, trilogues are considerably institutionalized. Despite their ‘informality’, manifold rules and conventions have developed that guide the negotiations. The result of combining these approaches is a theoretical model of the interrelations of the negotiation process, structural factors, the institutional environment and the outcome of trilogue negotiations. On the basis of this model, hypotheses will be developed which render a thorough investigation of process influence in trilogue negotiations possible.

3.1 The negotiation outcome: Comprehensiveness

A first step in developing a theoretical model of procedural impact on negotiation outcomes is conceptualizing said outcomes. The outcomes of trilogue negotiations are legislative texts, i.e. drafts of EU legislation. In studies on the EU and beyond, there are different measures for variety in the outcome of negotiations. In many studies of international negotiations, the dichotomy in measuring the success of negotiations is the mere existence, or not, of a final agreement (Ghosn, 2010). In the case of trilogue negotiations however, a non-outcome is relatively unlikely. This is due to the fact that many files in which no compromise is expected do not get to the stage of negotiations in the first place (de Ruiter & Neuhold, 2012). Hence, a simple outcome/no outcome dichotomy to measure the negotiation outcomes cannot be applied in this case.

In many studies on EU negotiations, the outcome is measured in terms of which side won, i.e. which side has managed to accommodate most of its preferences in the negotiated outcome (Costello & Thomson, 2013; Dür & Mateo, 2010a; Kreppel, 2018; Selck & Rhinard, 2005), thereby reflecting on the impact of institutional arrangements on the inter-institutional power balance. Power (in-)balances between the legislative institutions of the EU, however, are not the focus of this study and have been investigated elsewhere. Hence, a different conceptualization of the outcome will be utilized: Comprehensiveness. This conceptualization allows the researcher to identify whether an outcome is comprehensive (rather than partial) “in the sense that all issues were resolved” (Druckman, 1997, p. 402). Comprehensiveness of an outcome therefore depicts in how far two (or more) divergent initial positions are resolved in an agreement that includes all parties’ demands and gives effect to their policy positions. Accordingly it will be conceptualized along four different indicators which measure on a political scale whether demands are met and the actors involved are satisfied with the agreement found in negotiations, as well as whether the agreed formulations will ensure that institutional demands will actually have an effect and whether the piece of legislation satisfies the legal requirements to be likely to solve the policy problem it was intended to. The four indicators are (1) the inclusion of initial positions, (2) the satisfaction of the actors involved, (3) the legal effect of initial positions and (4) the overall legal soundness of the agreement.

The first indicator, the inclusion of initial positions, is a common strategy of conceptualizing legislative outcomes also in those studies which measure institutional success in trilogues (Häge & Kaeding, 2007; Mariotto & Franchino, 2011). The initial positions of the institutions (as found in the negotiation mandates) are compared to the legislative outcome to see how many of the politically important issues of these positions can be found. However, this study is not interested in who wins, but rather in how far initial positions are to be found back in the outcome overall, i.e. in how far the present outcome can be considered to have fully, or only partially, resolved the conflict of the institutions through compromises respecting both institutions’ initial positions (Druckman, 1997). Thus, whenever an initial position can be traced in the legislative outcome, it will be considered present. Note, that this will be independent of the respective legal effects, which will be captured in an indicator in its own right.

A second indicator for comprehensiveness is the satisfaction with the file of all parties involved in the negotiations. If, hypothetically, all parties to a negotiation see themselves as negotiation winners, or more precisely, not as losers, the final output can be considered more comprehensive. If, however, a decisive share of actors feels disappointed with the final text, the outcome must be considered less comprehensive.

Third, the legal effect of positions determines the comprehensiveness of the outcome (Druckman, 1997). Politically important issues can be included in EU legislation with different degrees of legal effect. Indeed, one way of settling political conflict is by allowing opposing positions to feature in the outcome, but without legal effect. Another way of

resolving issues is to use different legal forms: Articles, recitals, statements. Articles are “the enacting terms, which constitute the normative part of the act” (European Union, 2015, p. 24). Articles are the main body of legislative texts and are to be applied legally in implementing the legislation, therefore they are the type of legal text of highest impact. Recitals, to be found in the beginning of the respective text of the legislation, “set out the reasons for the contents of the enacting terms (i.e. the articles) of an act” (European Union, 2015, p. 25). In other words, they define the reasons for and the spirit in which this law is to be read and implemented but are not necessarily binding in character and often refer to rather vague principles, so that they can hardly be of actual legal significance (Klimas & Vaiciukaite, 2008). Commission statements or comments are the weakest form of text to be included in a legislative act, adding to the law a principle declaration of intention that is of no legal consequence and mostly serves as providing the respective institution with the ability of stating, publicly, that their position has made it into the legislative text (normally concealing the limited legal impact). The legal form is a first and strong indicator of the legal effect of positions. However, also within articles positions can be included without having an actual (or likely) legal effect, i.e. foremostly being of symbolic value. The analysis will hence not only rely on the formal form of a position but also on its actual likely legal impact.

Fourth and last, the legal soundness of the provisions as well as the detail to which technical provisions are negotiated is an indicator for comprehensiveness. EU legislation is written in complex legal language, in which single words can have an important impact in the final application of the law. Ambiguous formulations, discretion left to the implementers as well as the sparring out of detailed instructions on complex issues leaves considerable leeway in the application of the law and might hence weaken the piece’s impact on the real world (Steunenberg & Toshkov, 2009). Accordingly, legal soundness will be regarded as low in those cases of low legal security of the provisions, ambiguous complex legal and technical issues and a lack of consistency and concision (Fluckiger, 2010). A qualitative approach allows us to pick up these legal details and include them into the analysis, a task many quantitative measurements struggle with.

Four indicators are hence used to measure the comprehensiveness of the legislative outcomes: (1) Inclusion of initial positions; (2) satisfaction of the actors; (3) legal effect; (4) legal soundness. These four indicators can be divided into the political quality (inclusion of positions and satisfaction of the actors) and the legal quality (legal effect and soundness) of an outcome. Table 1 summarizes the conceptualization of the outcome as applied in this study.

Table 1: Comprehensiveness of the outcome

Number	Political quality	Legal quality
I	The number of initial positions (as expressed in the negotiation mandates) reflected in the final legislation.	The legal effect of position inclusion
II	The satisfaction with the result of all parties involved	Legal soundness

3.2 Three Elements of Trilogue Negotiations: Process, Structure and Institutional Framework

Having conceptualized the outcome of trilogue negotiations, the question this analysis seeks to answer is what influences variation in the comprehensiveness of legislative outcomes, and especially which role the negotiation process plays in explaining variation. In order to develop hypotheses and answer this question, a holistic conceptualisation of trilogue negotiations is necessary. As will be shown below, three elements are central in trilogue negotiations: The negotiation process, structural factors and the institutional framework. While all three elements have the potential to influence the outcome and are moreover causally interrelated, the goal of this conceptualization is the development of hypotheses to test the autonomous influence of the negotiation process. Before, process, structural factors and the institutional environment will be delineated, building on four main strands of existing research: Conflict resolution (CR) and International Relations (IR) approaches to negotiations, as well as the literature on institutional environments of negotiations in general and in the EU in particular.

3.2.1 The negotiation process: Negotiation Mode, Negotiation Venue and Interaction Intensity

The negotiation process is the central element in studies approaching negotiations and outcomes from the CR perspective (Cutcher-Gershenfeld & Kochan, 2015; Deutsch, 1983; Druckman, 1997; Irmer & Druckman, 2009; L. L. Thompson, Wang, & Gunia, 2010; Leight Thompson, 1990; Zartman, 1988). Scholars in this tradition argue that in contrast (or addition) to structural and institutional aspects, it is the negotiation process that needs to be taken into account in order to explain the outcome: “Negotiation is a process of combining conflicting positions into a common position [...]. The essential element of the process is important because it posits a determining dynamic, not just an assortment of scattered actions or tactics. The challenge then becomes one of finding the nature of that dynamic and its parameters” (Zartman, 1988, p. 242).

Following this perspective, the aim of this study is to test in how far “outcomes result from the way the process unfolds” (Irmer & Druckman, 2009, p. 227). The conceptualization of the negotiation process and the development of testable hypotheses will be based on the insights gathered on the relationship between the process and outcome of

negotiations, especially concerning the four indicators of comprehensiveness as outlined above. In the identification of aspects which are central in negotiation processes and in linking processes to outcomes, the present analysis relies on the above CR perspective on negotiations on the one hand, as well as on research on negotiation processes in the European Union on the other. Which aspects of the negotiation process have been used to explain (the comprehensiveness of) outcomes?

The Negotiation Mode

Both, CR and EU scholars studying negotiation processes have put great emphasis on the negotiation mode when accounting for negotiation outcomes, especially for the inclusion of initial positions in the outcome (Cutcher-Gershenfeld & Kochan, 2015; Dür & Mateo, 2010b; Elgström & Jönsson, 2000; Greenhalgh & Chapman, 1998; Hopmann, 1995; L. L. Thompson et al., 2010; Warntjen, 2010a). As Donohue argues, “integrative and distributive motives clearly dominate our frame for thinking about how to make sense out of negotiations [and] [t]his frame has been very useful since it has been demonstrated as a very powerful predictor of negotiation outcomes” (Donohue, 2003, p. 172). The study of the negotiation mode, i.e. the way negotiators approach the issues under negotiation and the respective counterpart, rests on the assumption that “parties have both competitive and cooperative options available” (Hopmann, 1995, p. 25) and that the choice between these two options, or a range of in-betweens, determines the outcome (Elgström & Jönsson, 2000; Hopmann, 1995; Wøien Hansen, 2014).

In the last decades, “several typologies have been put forward to capture the range of decision-making modes” (Warntjen, 2010): Distributive/tough/hard bargaining, deliberation, deliberative/integrative bargaining, competitive negotiations, cooperative negotiations, problem solving, to name but few (Cutcher-Gershenfeld & Kochan, 2015; Greenhalgh & Chapman, 1998; Irmer & Druckman, 2009; Ocran, 1984; L. Thompson, 1990; L. L. Thompson et al., 2010). While these different accounts diverge in their focus and terminology, they do share a common denominator, namely situating specific negotiations, or approaches to negotiations by the negotiators, on a range between two different modes (Elgström & Jönsson, 2000): On one end confrontative (also distributive) bargaining, when the negotiators aim at securing the maximum gain for themselves, while trying to minimize the gain for the respective other side. At the other end integrative or problem-solving approaches, in which the absolute, rather than the relative, gains are what drives the negotiation (Figure 3).

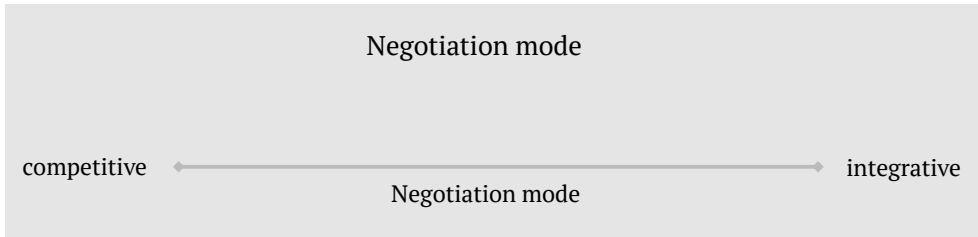


Figure 3: Negotiation Mode.

For the comprehensiveness of the outcome, the negotiation mode has proven to be one of the most decisive determinants of the negotiation process (Druckman, 1997; Hopmann, 1995; Irmer & Druckman, 2009; L. Thompson, 1990). The more cooperative the negotiations, the more comprehensive the outcome tends to be, as negotiators are more open towards including the opponents' demands and positions. The negotiation mode will therefore be considered one of the three decisive determinants of process-influence on negotiation outcomes in this study.

The Negotiation Venue

What can explain variation of negotiation modes in trilogue negotiations? The second and third aspects of the negotiation process to be conceptualized have both featured highly in approaches explaining the negotiation mode, but also have been theorized to have an impact on negotiation outcomes in their own respect. First, especially negotiations in the European Union do not take place in an institutional vacuum but are highly institutionalized (Hosli, Kreppel, Plechanovová, & Verdun, 2013). The second aspect of the negotiation process builds on the institutional framework surrounding trilogue negotiations and the different venues it offers. Venue choices during the negotiation process have been shown to influence both, the negotiation mode and also possibly the outcome directly (Checkel, 2005; Conceição-Heldt, 2006; Elgström & Jönsson, 2000; Lewis, 2010).

Especially legislative decision-making demands very specific and often technical knowledge of the issues under discussion in order to take informed decisions. Therefore, often different hierarchical, political and administrative levels are involved in taking decisions, drafting compromise texts and evaluating possible agreements towards their real-world consequences. For Ocran, the "level of the negotiations (i.e. the setting) – whether at the highest political level, at the level of middle-level technocrats, etc." is one of the most influential factors determining a negotiator's behaviour (Ocran, 1984, p. 428). Moreover, the level of decision-making has been a focus in overall research on EU negotiations, linking negotiation venues to negotiation modes (Lewis, 2010; Naurin, 2010; Neyer, 2004).

The venue of negotiations can and must be regarded as an aspect of the negotiation process, as a change of venue through delegation and informalization does not follow

pre-established rules, also and especially in trilogue negotiations (Christiansen & Neuhold, 2013a; de Ruiter & Neuhold, 2012; Roederer-Rynning & Greenwood, 2015). It is not merely the 'technicality' of an issue that explains the hierarchical level negotiations are held and decisions taken at. Also, the venue does not only refer to different hierarchical levels, but also to the degree of informalization of negotiations. Informal settings of negotiations are those in which "participation in the decision-making process is not yet or cannot be codified and publicly enforced" (Follesdal, Christiansen, & Piattoni, 2004, p. 6). As has been shown above, trilogue negotiations nowadays exhibit clear institutional rules and conventions. The three-partite institutional structure of political trilogues, technical trilogues and informal negotiations has been identified as one of the most decisive characteristics of trilogue negotiations (Laloux & Delreux, 2018; Roederer-Rynning & Greenwood, 2015, 2017). Yet, the negotiation venue is not fully predetermined by either the institutional framework of trilogues, nor the file- and issue characteristics of the legislation under negotiation. As the negotiation venue is central to explaining negotiation modes and outcomes, it will be the second important determinant within the negotiation process this study focuses on. Figure 4 summarizes the venues available in trilogues. Assuming on the basis of the existing literature of trilogues that negotiations can shift along two axes, level of formality of the negotiation and the hierarchical level, the figure shows where along these axes the three venues are situated.

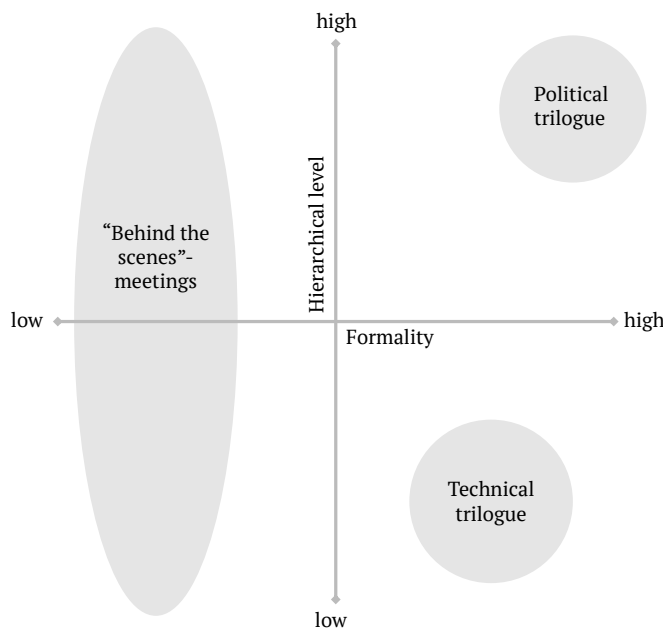


Figure 4: Negotiation Venue.

The Interaction Intensity

Given the existence of different venues for negotiations and assuming this choice is not predetermined by the character of the file and issue under negotiation, we need to account for the choices negotiators make concerning the negotiation venue. Again, both CR and EU scholars have shown that a promising area to turn to when explaining both, venue choice and negotiation mode, is the interaction between negotiators.

Following a process-oriented approach towards negotiations, this study will investigate whether negotiation mode and venue are determined, or at least influenced, by a third aspect of negotiation processes: The interaction intensity. Negotiation processes can be defined as “interdependent interactions with the aim of reaching agreement between two or more parties” (Cheng, Huang, & Su, 2017, p. 295), or “the interaction that occurs between the parties before the outcome” (Leight Thompson, 1990, p. 516). A negotiation is thus first of all an interaction between two or more actors, and it is the course of this interaction that will be shed light upon in this analysis. Social interaction is a central element in many conceptualizations of negotiation processes (Druckman, 1997; Greenhalgh & Chapman, 1998; Irmer & Druckman, 2009; Ocran, 1984; L. L. Thompson et al., 2010; Leight Thompson, 1990). Interaction, in that sense, is more than a mere empirical necessity and can take different shapes along a negotiation process. William Donohue identifies different “interaction-based approaches to negotiation”, which “seek to describe features of human communication” (Donohue, 2003, p. 168). Interaction approaches to negotiation can “link interaction structure to outcomes” and thereby establish “process theories that explain how social orders are created and how they influence outcomes” (Donohue, 2003, p. 169).

Interaction is seen as one of the constituent influences on the relationship between negotiators, which in itself can have an important impact on the outcome of negotiations. Negotiation research “highlights the role of both social perception and communication in shaping negotiation processes and outcomes” (Olekals, 2002, p. 42). In that sense, interaction between the negotiators constitutes a social aspect of negotiations. Research on the EU and beyond has further identified the intensity as the influential aspect of interaction: The degree to which two negotiators interact impacts manifold different relational and procedural aspects between the negotiators (Lewis, 2005, 2010; Taylor, 2002). Different EU scholars have also identified a process of socialization in EU institutional settings (Beyers, 2005; Checkel, 2003, 2005; Lewis, 2010; Quaglia, Francesco, & Radaelli, 2008). They differentiate two types of socialization. Type I describes a ‘lighter’ form of socialization, in which actors learn and adapt to a specific institutional role they fulfil and therefore start to follow a logic of appropriateness. Contrary, type II socialization might lead agents to “accept community or organizational norms as the right thing to do” (Checkel, 2005, p. 804). Such strong forms of socialization might be unlikely in interactions that normally do not span a timeframe of more than two years. However, also ‘weaker’ socialization of type I might change the way negotiators approach the representatives of

the opposite institution and therefore influence the other two aspects of the negotiation process (Beyers, 2005; Checkel, 2003; Lewis, 2005; Quaglia et al., 2008).

Irmer and Druckman (2009) find a relationship between complex interaction and the negotiation mode, which has also been linked by scholars studying EU negotiations and finding a socialization effect, showing that through high interaction intensity the likelihood of deliberative negotiations increases (Beyers, 2005; Checkel, 2003; Irmer & Druckman, 2009). In addition and importantly, higher degrees of interaction intensity encourage the development of a trustful relationship between negotiators, which in turn has been found to influence both, venue change and negotiation mode in the ongoing negotiations (Deutsch, 1983). The intensity of social interaction between the negotiators will be regarded the third aspect of the negotiation process to be of influence on the outcome, if only indirectly through changing the venue and mode of negotiations.

In summary, the following analysis focuses on three central aspects of the negotiation process, following both established research in conflict resolution and EU negotiations: the negotiation mode, the negotiation venue and interaction intensity. While the above has delineated established findings on their importance and introduced first possible causal relationships, nine hypotheses will be formulated to study the link between these three aspects in detail. Yet, the negotiation process does not take place in perfect isolation, and should accordingly not be studied as such (Monheim, 2016; Odell, 2002, 2000). Both, the structure surrounding a negotiation process, as well as the institutional framework trilogue negotiations take place in needs to be considered, to ensure the analysis does not turn a blind eye to significant determinants of negotiation outcomes. The following section introduces both, structural factors and the institutional framework surrounding negotiation processes in trilogues.

3.2.2 Preferences, Power, Salience and Issue Characteristics: Structural Factors in Trilogue Negotiations

In contrast to conflict resolution studies of negotiations, structural approaches to negotiation put another element of negotiations into the focus of analysis. They focus on different characteristics of single negotiations to explain outcomes (Zartman, 1988). This study considers four structural factors: The preferences of the negotiators, power relations, file salience and issue characteristics (Druckman, 1997; Monheim, 2016; Odell, 2002, 2000).

The preferences of negotiators constitute an essential determinant for both negotiation outcomes and processes (Druckman, 1997; Dür & Mateo, 2010b; Greenhalgh & Chapman, 1998; Hausken, 1997; Irmer & Druckman, 2009; Monheim, 2016; Moravcsik, 1997; Ocran, 1984). Accordingly, disregarding actors' preferences would render any conceptualization of a negotiation incomplete. According to Conceição-Heldt, "referring to an actor having a certain preference means that an actor prefers one alternative to another and in consequence tries to maximize his/her utility, when s/he tries to achieve outcomes that

are as close as possible to his/her preferred negotiating position" (Conceição-Heldt, 2006, p. 281).

Hence, actors hold preferences on the content of the specific files under negotiation. These policy preferences are what actors strive to achieve in the negotiations. Accordingly, they will be an important driver of their actions (Costello & Thomson, 2013; Druckman, 1997; Dür & Mateo, 2010b; Odell, 2002; Putnam, 1988). Existing studies on trilogue negotiations demonstrate that initial policy preferences of the actors can have an impact on how different actors within and in between institutions relate to each other during the negotiations (Delreux & Laloux, 2018), especially concerning coalition formation. Indeed, the coalition formation will be the main hypothesized cause of preference impact on trilogue negotiations.

However, policy preferences are not the only kind of preferences actors hold. Dür and Mattheo posit that preferences affect actors' negotiation behaviour "through at least two channels" (Dür & Mateo, 2010b). Next to the preference for or against a certain policy aspect of a legislative file, actors also position towards the whole file and whether or not they want it to be agreed in the first place, respectively how quickly they strive for file conclusion (de Ruiter & Neuhold, 2012; Rasmussen, 2011). The happier actors are with the status quo, the less enthusiastic they will be for changing it through finding a new agreement in negotiations. As we will see later, the institutional positions of different actors also prescribe different levels of eagerness for an agreement in trilogue negotiations. The preference for or against file conclusion will be termed procedural preferences, as they concern the speed with which negotiations are finalized successfully. Actors are hence conceptualized to hold both, policy and procedural preferences.

Actors' power positions, and the overall power relations in a negotiation process, are a common factor considered when accounting for interaction within and the outcome of negotiations both in the EU and beyond (Burns et al., 2013; Irmer & Druckman, 2009; L. Thompson, 1990; L. L. Thompson et al., 2010). The power relations in trilogue negotiations could especially impact the interaction intensity. The more powerful an actor is, the less reliant she is on support by, or coalitions with other actors in the negotiation process (Costello & Thomson, 2013; Dür & Mateo, 2010b, 2010a). On the contrary, less powerful actors might have to rely all the more on strong coalitions both within and beyond the own institution. We can therefore assume less powerful actors to interact more frequently and with more actors than powerful actors (Häge & Ringe, 2019). In general, each negotiator is aware that certain actors hold the power to forestall an agreement should the negotiation process diverge too far from what they would want it to be (Judge & Earnshaw, 2011). In addition, trilogues might give leeway to specific actors in designing the negotiation process. More influential actors in terms of procedural power, i.e. the ability to steer the negotiation process into preferred directions, might also play a role in the choice of venues the negotiations take place in.

A third structural factor in trilogue negotiations is salience, i.e. the political importance of, and public interest in a file. More salient legislative files are naturally more prestigious for negotiators and constituents, and the degree of file salience has long been established as a decisive fact in legislative negotiations (Brandsma, 2015; Burns et al., 2013; Costello & Thomson, 2013; Rasmussen & Reh, 2013). While salience is often conceptualized on a file-basis, in accordance with Thompson (2008), this study assumes that also single issues are prioritized by negotiators, and there is a conceptual difference between the salience of a legislative file as a whole and the salience of single issues within one file (Thomson, 2008, p. 234). Negotiators hold policy positions on single issues of a file and prioritize these positions in accordance with the salience they attach to the issues. While the negotiation mandate of each institution prescribes a negotiation position, the conceptualization above suggests that personal negotiator-positions will at least in part diverge from their mandates. Next to the issue-specific salience, whole legislative files hold a degree of salience, as well. As high salience often increases the prestige coming with the files but also public interest, delegation and informalization could be influenced by the salience of the file. With increased interest, both actors in the negotiation process, as well as in the legislative institutions or even the public could demand negotiations to be as open and transparent as possible, in the case of trilogues to take place in political trilogues exclusively.

Lastly, the different issue characteristics of a legislative file are important structural factors in negotiations (Monheim, 2016). The nature of the file and the single issues of it have a causal relationship with the negotiation venue, especially as concerns the hierarchical level. It is convention, not only in trilogues but in different decision-making settings of the Union, to delegate 'technical' question to lower hierarchical levels, while 'political' issues are negotiated and decided by the highest political level (Brandsma, 2015; de Ruiter & Neuhold, 2012; Roederer-Rynning & Greenwood, 2017). The fact that both academic literature as well as institutional convention differentiate between political and technical trilogues is telling in this regard. Hence, the nature of the issue could have an impact on the hierarchical level at which it is dealt with. Again, the preferences of the actors will play its part, as well. Controversial issues, as technical as they might be, will probably not be delegated to lower staff levels.

3.2.3 Trilogues as an Institutional Framework

Trilogue negotiations are embedded into a specific institutional framework which affects the individuals acting within it in a specific way. This institutional framework does not only entail trilogues itself and the rules developed around it in the last two decades, but also EU legislative politics and co-decision in general. Accordingly, next to the process of negotiations and the preferences of the actors involved, the institutional framework of trilogues is considered a third important element in this study. Following a historical institutionalist approach, institutions are defined as "the formal or informal procedures,

routines, norms and conventions embedded in the organizational structure of the polity or political economy" (Hall & Taylor, 1996, p. 938).

To be able to conceptualize the institutional effect in trilogue negotiations it is necessary to focus on the actors, as "it is through the actions of individuals that institutions have an effect on political outcomes" (Hall & Taylor, 1996, p. 939). Trilogues affect the actors by inflicting upon them specific roles. Two conflicting overall paradigms confront the co-legislators and their individual delegates in trilogues. On the one hand, the co-decision procedure posits the EP and the Council as opponents in a battle for policy influence. On the other hand, the EU in general is based on a norm of consensus and of compromise necessary in a political environment of a high and growing number of different divergent interests. The implicit expectation of finding a common solution is reinforced in trilogues, because a general perception on the possibility of finding a solution precedes trilogue negotiations and not reaching an agreement is generally considered a failure (de Ruiter & Neuhold, 2012). It is this combination of two different paradigms – the EP as having developed into an opponent on a par with the Council and the corresponding need to find agreement – that was the basis of trilogue negotiations and that governs the institutional development to this day.

Consequently, the institutional actors within trilogues are inflicted partly conflictive roles, which entail the necessity to forge compromise both within the own institution as well as with the co-legislator and to represent the own policy preferences. The actions of individuals during trilogue negotiations will be determined by the roles they are prescribed in the institutional framework and will affect their powers and their preferences. Analysing trilogues therefore requires specific attention to the conceptualization of the actors involved. This study will differentiate between (1) chief negotiators, (2) members of the negotiation team, and (3) constituents (Table 2). On all of these actors involved in trilogue negotiations the institutional framework will have an effect.

First, the chief negotiators constitute the central actors in trilogue negotiations, leading the negotiation on behalf of their respective institutions. On the Council side, this actor will be the Member State currently holding the presidency. For the EP, the rapporteur constitutes the chief negotiator. The hierarchical level at which the Member State is represented in trilogues will differ across presidencies, different legislative files as well as during single negotiations. While the hierarchical level has an important impact on the analysis, as an actor in trilogues the presidency will still conceptually be referred to as unitary, while in the single case studies the respective actual representatives will be referred to. The same is true for the rapporteur. There is detailed literature on the appointment, character and tasks of rapporteurs (Häge & Kaeding, 2007; Hurka & Kaeding, 2012; Hurka, Kaeding, & Obholzer, 2015; Kaeding, 2005; Roederer-Rynning & Greenwood, 2015, 2017). Rapporteurs, appointed based on a system allocating points to political parties according to their size in the current legislative term, lead the negotiation team of the EP. In most cases they are responsible for leading the negotiations during

official and informal trilogue meetings, partly shared with the chair and the secretariat of the respective committee (Roederer-Rynning & Greenwood, 2015, 2017). Lastly, the Commission will be represented by an official from the respective DG.

The institutional roles of the chief negotiators are situated at the very centre of the institutional conflict-compromise nexus in trilogue negotiations. They are to represent their institutions' positions in trilogue negotiations but are at the same time responsible for enabling inter-institutional compromise. They have to forge intra-institutional compromises, but at the same time represent a Member State or political party with own policy preferences to be represented. The weight these actors give to their respective different roles and responsibilities is vital for arriving at a legislative compromise.

Second, the negotiation teams of the institutions surround the chief negotiators and are always present at all political and technical trilogue meetings. Concerning the Council, this includes support staff of the presidency as well as the general secretariat of the respective Council formation responsible for the file in question. The EP negotiation team comprises different actors. First, the chair of the committee responsible for the file. The role of committee chairs has been considerably updated with the new EP rules of procedure in 2012, not only having become an official member of the EP negotiating team, but also responsible for chairing trilogues in case they take place in the premises of the EP (Costello & Thomson, 2013; Roederer-Rynning & Greenwood, 2017). Consequently, chairs have received increased research interest, which has led to two main findings: On the one hand, their role has indeed increased in importance and can even be used strategically to strengthen the EP's negotiation position. On the other hand, they are still inferior to the rapporteur when it comes to their role in the negotiation process, especially because their role is restricted to the official trilogue meetings. It is therefore justified to merely regard them members of the negotiation team, not chief negotiators. Second, the shadow rapporteurs, nominated by the other party groups to control the conduct of negotiations and represent the own policy positions are part of the EP negotiation team (Hurka et al., 2015). All members of the EP negotiation team face a similar challenge as the chief negotiators, as they must represent party preferences and at the same time should not risk the EP team to appear divided in trilogue negotiations, as this has negative consequences for their negotiation position.

A third group of actors, even though not present in trilogues but still to be considered, are the respective institutions (constituents) which need to ratify the agreement in the end, i.e. the European Parliament, the Council and the Commission as institutions.

Table 2: Relevant actors in trilogue negotiations

Actor	Task	Institution		
Constituents	Formal agreement	EP	Council	COM
Chief negotiator	Leading negotiation for institution			
	Present at formal and informal meetings	Rapporteur; assisted by committee chair	Member State holding presidency	Commissioner/ high level representative
Negotiation team	Supporting chief negotiators			
	Present at formal meeting	Committee chair; shadow rapporteurs	Presidency supporting staff; general secretariat	-

The institutional framework of trilogues has an important impact on how a negotiation proceeds and affects the legislative outcome. First, it can influence different social interactions. Intra-institutionally, there are rules and customs that can be expected throughout all trilogue negotiations. The institutional rules developed around trilogue negotiations prescribe reporting from the negotiator to her constituency. This involves mainly reporting back from both formal trilogue meetings as well as informal gatherings (while only the former is institutionalized to a degree which lets us reasonably expect to see recurring patterns). Second, within the negotiation teams, especially on the side of the EP there is constant coordination interaction, as in the institutionalized shadows' meetings before each trilogue in which the team's position is coordinated and possible disagreements tackled. The Council presidency has to gather a new mandate before each round of trilogue from the other 27 member states (Roederer-Rynning & Greenwood, 2017).

In between institutions, social interactions (outside formal trilogue meetings) are less institutionalized by rules. However, the institutional framework prescribes certain roles to the chief negotiators which might have an impact on the respective interactions (Bressanelli, Koop, & Reh, 2016; Delreux & Laloux, 2018; Farrell & Héritier, 2004; Reh, Héritier, Bressanelli, & Koop, 2013; Roederer-Rynning & Greenwood, 2015, 2017). Concluding the negotiations comes with prestige for the chief negotiators. Both the Council negotiator, working under the considerable time pressure of the six-month presidency, and the EP rapporteur therefore can be expected to hold a preference to conclude the file. They can be expected to coordinate the negotiations beforehand, exchanging positions and agreeing on a general schedule as to how to proceed with the negotiations. All institutionalized social interactions can be expected to be convention in all negotiations, and it would be their absence, rather than their presence, that would be out of the ordinary.

Trilogues offer three different venues for negotiations (political trilogues, technical trilogues, and informal negotiations). The mere existence of these different and widely accepted venues enables the participants to use them, while it does not necessarily prescribe their use. However, delegation to technical levels as well as occasional informalization can still be regarded 'standard operating procedures' in trilogues. According to Roederer-Rynning and Greenwood, technical trilogues are part of "a rather coherent, well delineated and ritualized sequence of meetings" and "each political trilogue is followed by a new round of technical meetings" (Roederer-Rynning & Greenwood, 2015, p. 1153). It is therefore reasonable to expect that delegation of decision-making is a recurrent pattern within trilogues as an institutional framework. Still, there is no institutional necessity for using all venues offered in the setup. It is only in combination with other procedural aspects that the venue of negotiations is determined.

Lastly, the institutional framework can also impact on the negotiation mode. A main reason for the 'invention' and excessive use of trilogues for legislative negotiations is the fact that it insulates negotiators from public attention. Already the formal negotiations take place in camera, and every further informalization or retreat to lower hierarchical levels further insulates decision-makers. The literature on negotiations has long drawn a connection between insulated decision-making and an increased readiness to compromise (Elgström & Jönsson, 2000; Hopman, 1995). While compromise can also be a (necessary) element of bargaining, the absence of public pressure to firmly stand one's ground does increase the potential for more integrative, or at least less confrontative, modes of negotiations.

In the following, hypotheses will be developed on how the negotiation process in trilogues influences the legislative outcome. As has been argued above, the process does not evolve in a vacuum: Both, structural factors as well as the institutional environment can have an impact on how the process develops concerning interaction intensity, the venue of negotiations and the negotiation mode. Figure 5 depicts the conceptualization of trilogue negotiations, with the red arrows indicating the relationships investigated in this study: The main relationship is the one between process and outcome, while the impact of structural factors and the institutional framework on the process will form part of the conceptualization and the analysis. In the following, the hypothesis theorizing the causal links will be developed.

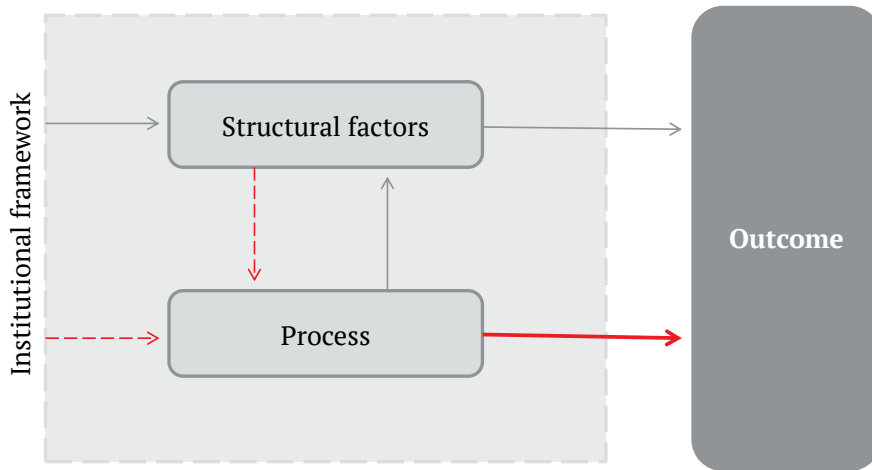


Figure 5: Theoretical Model.

3.3 Zooming in: The Impact of the Negotiation Process on the Outcome

In order to be able to test whether and in how far structural factors, the institutional framework and the negotiation process affect negotiation outcome in trilogues, and especially which role the latter plays, testable hypotheses need to be developed. Nine different hypotheses will be tested. The analysis will investigate both, how the different aspects of the negotiation process, interaction intensity, negotiation venue and mode relate to each other, as well as to the outcome of negotiations. In accordance with the expected causal relationships, first hypotheses on the interaction intensity will be developed, followed by the venue and the mode. Both institutional and structural aspects of negotiations will inform the hypothesis formulation where sensible.

The interaction intensity in trilogue negotiations covers all interaction between the actors taking part, from the very beginning of the negotiation process to the end. This interaction is of course not limited to a negotiator and her institution but can in principle occur between all actors. A central interaction relationship is that between the two chief negotiators. All interactions, both formal and informal, that include at least two negotiators are at the very core of social interaction in trilogue negotiations, given the central role played by chief negotiators (Farrell & Heritier, 2004; Judge & Earnshaw, 2011). Indeed, whether negotiators interact closely or whether they perceive themselves as opponents and interaction intensity is low can decisively alter the negotiation process. As will be shown below, the intensity of chief negotiator-interaction can be considered essential in determining the negotiation process. It is them that, despite the growing institutionalization of trilogues, have a considerable impact on all aspects of the negotiation process (Brandsma, 2015; Farrell & Heritier, 2004; Roederer-Rynning & Greenwood, 2017). Lastly, non-participating actors themselves can interact with their counterparts from other institutions in order to receive information or change the dynamics of the negotiations.

Interaction intensity therefore covers all interaction that can possibly occur in trilogues, both within as well as across levels.

Interaction intensity does not only capture the quantity of interaction. Next to frequency, social interaction is conceptualized as qualitatively differing on a scale from administrative/organizational exchange, such as agreeing on agendas, sending back and forth documents of pure informational value (i.e. the own position), to actual cooperation and coordination of positions between two (or more) participants to the negotiations outside of the formal arenas, factually forming stable coalitions. Coalition-building as a driver of interaction activity already hints at the fact that it is not merely process-inherent factors which can determine the interaction intensity in trilogues. Indeed, the preferences of negotiators can have an important influence on the interaction intensity, also and especially as concerns the chief negotiators.

While often, policy preferences are conceptualized on a file-by-file basis, EU legislative negotiations are structured along an issue-by-issue basis (Ripoll Servent, 2011). Accordingly, negotiators cannot be expected to hold a consistent position on a legislative file as a whole but rather separate positions on all (or most) single issues constituting the legislative proposal. Additionally, these distinctive issues are of diverging importance to the negotiators. In the beginning of each negotiation process, negotiators will try to form coalitions either within or across institutions that promise to best deliver on their most salient policy preferences. Note that the basis of these coalitions does not have to be agreement over which issues are salient and which are not (although empirically, common perceptions of issue salience are probable). For the sake of this study, only pro-active coalitions will be considered coalitions. They form at the beginning of a negotiation process, in order to coordinate the own positions and actively shift the negotiations towards the desired output. In contrast to that, ad-hoc cooperation at a certain, often late point in the negotiations due to spontaneous preference-alignment, i.e. to outvote a mutually considered less attractive position, will not have a genuine impact on the social interaction during the process, and yet still impact the outcome.

Pro-active coalitions imply closer cooperation between two parties and hence also increased interaction intensity between the parties. This intensity is directly influenced by the choice of coalitions. Interaction with actors identified as allies will in character be different from that with actors rather identified as opponents in the negotiations.

Research that focuses on the interaction intensity between negotiating parties often highlights the relationship between interaction intensity and trust between negotiators. "Trust is a critical element throughout a negotiation, both enhancing and facilitating the negotiation process, and as the binding element that often holds deals together" (Lewicki & Polin, 2013, p. 29). Donohue (1998) argues that "our psychological sense of relationship (how much we trust, like [...] each other) is a judgement we derive from our interactions with others" (Donohue, 2003). According to Kramer (1999), strong "interaction histories give decision-makers information that is useful in assessing others' dispositions,

intentions, and motives" (Kramer, 1999, p. 575). Accordingly, "trust between two or more interdependent actors thickens or thins as a function of their cumulative interaction" (ibid). This is due to the fact that personal interaction "leads people to identify with each other over time as they internalise each other's preferences" (Lu, Kong, Ferrin, & Dirks, 2017, p. 29). High interaction intensity and the corresponding trust can even lead towards a shift of loyalties, when negotiators experience "a shift of relational anchors from their principals to their agent partners [in the negotiation]" (Cheng et al., 2017).

An increase in interaction intensity should hence lead to higher degrees of trust between the negotiators. What should be the expected effect of trust in the further negotiation process, i.e. with regard to the venue and the negotiation mode in trilogue negotiations? Trust has been shown to have an impact on several behavioural aspects of negotiators. Deutsch (1983), developing a theory on competition and cooperation, has posited several effects of trustful relationships within negotiating groups. Negotiators will communicate more openly and effectively. Moreover, "members will be more satisfied with the group and more favourably impressed by the contributions of other group members" (Deutsch, 1983, p. 435). Another effect is an increase in the "coordination of effort, division of labour, orientation to task achievement" (ibid). Similarly, Greenhalgh and Chapman find that a trustful (in their words cohesive) relationship increases the willingness to share information with the respective counterpart (Greenhalgh & Chapman, 1998). "Trust allows negotiators to exchange the information necessary for integrative agreements" (L. L. Thompson et al., 2010, p. 501). Interaction intensity is hence one of the factors which "deepen the mutual trust and introspection that engenders more co-operative styles of negotiation to take hold and become routinized" (Lewis, 2010, p. 658)

Transferring these effects to trilogue negotiations, several hypotheses on the effects of interaction intensity on the other aspects of the negotiation process can be formulated. Firstly, higher levels of trust in the overall group of participants to negotiations should, as formulated by Deutsch, lead to higher propensity to sharing work. Trusting negotiators will be more inclined to delegate work, to which the higher orientation towards goal achievement will contribute (Deutsch, 1983). Delegation to lower hierarchical levels is more likely in trustful negotiation environments (Christiansen & Neuhold, 2013). Hence, an increase of interaction intensity should result in an increase in delegation to lower hierarchical levels:

Hypothesis 1: *High interaction intensity in the negotiation process increases delegation to lower hierarchical levels.*

The second hypothesis concerns the chief negotiators. As has been established above, they form an integral part of the negotiations and have important leeway in structuring the negotiation process (Farrell & Heritier, 2004; Judge & Earnshaw, 2011; Roederer-Rynning & Greenwood, 2015). Hence, their negotiation relationship should have a specifically

high impact on the negotiation process. As increased trust leads to increased sharing of information, honesty and coordination of positions, we can reasonably expect chief negotiators to increasingly informalize negotiations, the higher their interaction intensity. This informalization will, in consequence, exclude some of the other actors officially entitled a seat at the negotiation table, especially if the increase in interaction intensity is based on common policy preferences, as then chief negotiators will use the potential of informalization to insulate the negotiations from the influence of positions that do not correspond with their own (Christiansen & Neuhold, 2013; Curtin & Leino, 2017).

Hypothesis 2: *High interaction intensity through coalition building between the chief negotiators increases the informalization of negotiations.*

Third, the interaction intensity cannot only be expected to impact the venue of negotiations in the way stipulated above. Increased trust between negotiators has been found to also change their approach towards the negotiations and hence the negotiation mode (Cheng et al., 2017; Cutcher-Gershenfeld & Kochan, 2015; Deutsch, 1983; Greenhalgh & Chapman, 1998; Ocran, 1984; L. L. Thompson et al., 2010). A trustful relationship will enhance “the defining of conflicting interests as a mutual problem to be solved by collaborative effort” (Deutsch, 1983, p. 436). It will also lead negotiators to “not need coercive tactics because of their cooperative stance” (Greenhalgh & Chapman, 1998, p. 472). High interaction intensity is also linked to more integrative approaches towards negotiations in other EU institutional settings (Lewis, 2010). Hence, an increase in interaction intensity will lead to more integrative negotiations:

Hypothesis 3: *High interaction intensity in the negotiations leads to more integrative negotiation modes in the overall negotiation.*

As the second main aspect of negotiations, the venue of negotiations refers to the hierarchical level and the arena (formal vs. informal) decisions are taken at. Hierarchy and formality are not similar, although they might be related. While technical meetings are often considered less formal than political trilogues and as well assemble participants of a lower hierarchical level, informal negotiations can also be held by highest level politicians in informal meetings in order to exclude parts of the participants of formal trilogues. It is the character of the issues under discussion that can, next to the interaction intensity, determine the venue of negotiations.

The nature of the file and the single issues of it have a causal relationship to the venue of decision-making, especially as concerns the hierarchical level. It is convention, not only in trilogues but in different decision-making settings of the Union, to delegate ‘technical’ question to lower hierarchical levels, while ‘political’ issues are negotiated and decided by the highest political level (Brandsma, 2015; de Ruiter & Neuhold, 2012;

Roederer-Rynning & Greenwood, 2017). The fact that both academic literature as well as institutional convention differentiate between political and technical trilogues is telling in this regard. Hence, when choosing a venue for negotiation, negotiators will not disregard the character of the issue under discussion. Yet, the individual decision on how to deal with a single issue is hypothesized to depend on the negotiation process, and it differs from negotiation to negotiation. There are no objective criteria for allocating an issue to either the technical or political realm (Fouilleux, Maillard, & Smith, 2005; Roederer-Rynning & Greenwood, 2015a). Again, the preferences of the actors will play its part, as well. Controversial issues, as technical as they might be, will probably not be delegated to lower staff levels.

Lastly, next to the issue-specific salience, whole legislative files hold a degree of salience, as well. More salient legislative files are naturally more prestigious for negotiators and constituents, and the degree of file salience has long been established a decisive factor in legislative negotiations (Brandsma, 2015; Burns, Rasmussen, & Reh, 2013; Costello & Thomson, 2013; Rasmussen & Reh, 2013). As high salience often increases the prestige coming with the files but also public interest, delegation to lower hierarchical levels could become more difficult with the increase of file salience. Further, as actors should be less inclined to lose control over the negotiations in case a file is salient, the same goes for informalization.

The venue choice is hypothesized to impact both, the negotiation mode as well as the comprehensiveness of the outcome of negotiations directly. What are the causal consequences of different venues of decision-making? First of all, delegation and informalization further insulates negotiators from public scrutiny (or even scrutiny from their respective institutions). While political trilogues also take place in camera and are hence protected from direct public scrutiny, they can still be regarded less insulated than technical trilogues or informal consultations. Especially in technical trilogues, participants negotiate without any interference from the public. This insulation can “facilitate co-operative styles of negotiation because [it] enable[s] speaking frankly and explaining problems” (Lewis, 2010). But also, if higher level negotiators are involved and the issues highly political, the informality has an effect on the negotiation mode applied. As Lewis puts it for the Council setting, “There is growing evidence that co-operative styles of negotiation are prevalent at the level of informal ministers’ meetings” (ibid, p.653).

Existing research on negotiations in the EU and beyond has shown that insulation and informalization both contribute to more integrative negotiations (Christiansen & Neuhold, 2013; Elgström & Jönsson, 2000; Lewis, 2003; Tallberg, 2010). Second, the controversial issues are dealt with at high hierarchical levels, and any controversy developing in technical staff meetings can also be expected to be (re-)moved to higher levels. Less controversy in the issues under discussion lets us expect less confrontative bargaining (Elgström & Jönsson, 2000; Warntjen, 2010). Hence, delegation to lower hierarchical levels

and informalization of decision-making should lead to more integrative negotiation modes:

Hypothesis 4: *Delegation to lower hierarchical levels leads to more integrative negotiation modes.*

Hypothesis 5: *Informalization of the negotiations leads to more integrative negotiation modes.*

The technical staff supporting the negotiators is normally constituted by experts on the issue in question. They are able to devote more time and resources on understanding the issues, while their political superiors often have to be generalists, keeping an overview over many different legislative files and political issues (Busby, 2013; Egeberg, Gornitzka, Trondal, & Johannessen, 2013). Delegation to lower hierarchical levels should therefore increase the legal quality of the piece of legislation.

Hypothesis 6: *Delegation to lower hierarchical levels leads to an increase in legal soundness.*

Another consequence of informalization is restricting the range of actors involved in decision-making. As shown above, in the process of institutionalization of trilogues, rules developed as to which actors are allowed access to the negotiations in political trilogues. As soon as negotiations are informalized, these rules no longer apply to the new venue of decision-making. It is a common finding in studies on informalization of politics that while it might come with positive consequences, i.e. more open deliberation and higher goal-orientation, it also has clear negative consequences (Christiansen & Neuhold, 2013a; Farrell & Heritier, 2003; Follesdal et al., 2004; Reh et al., 2013). Reducing the range of actors involved in the informal consultations means that decisions taken at these venues create outsiders, whose satisfaction with the outcome might be negatively affected.

Hypothesis 7: *Informalization of negotiations decreases the satisfaction with the outcome.*

The last aspect of the negotiation process is the negotiation mode. In general, research on EU negotiations has shown that negotiations on a single file can have different characteristics in different venues and on different issues (Elgström & Jönsson, 2000; Hopmann, 1995; Warntjen, 2010). Accordingly, scholars call for a dynamic approach to analysing EU negotiations and accounting for the existence of both, bargaining and problem solving in different negotiations (Elgström & Jönsson, 2000). For single negotiation processes, it is still possible to position them rather towards one or the other

side on a scale between hard bargaining and problem-solving, i.e. identifying a dominant mode of negotiation. The negotiation mode is influenced by both, social interaction and the venue of the negotiations.

How does the negotiation mode affect the outcome? The more integrative the negotiations, the more of the initial positions can we expect to be included in general. Behavioural traits linked to problem-solving approaches, such as a willingness to accommodate the opponent's positions, information sharing, less coercive tactics, and softness are linked to more comprehensive negotiation outcomes (Greenhalgh & Chapman, 1998; Irmer & Druckman, 2009; Ocran, 1984; Zartman, 1988). While in hard bargains own preferences are pursued to the detriment of the respective counterpart, integrative negotiators will try to find ways of feeding as many positions as possible into the outcome, as it will be important to allow all institutions to be able to present themselves as having won something in the negotiations. Successful negotiations for one institution are not dependent on the loss of the other. As said above, through both informalization and delegation we expect the negotiation mode to shift towards problem-solving in comparison with formal trilogues. Yet, in terms of the outcome, the effects can be expected to be of a different character. This is due to the fact that both venues serve different goals. Informalization normally involves high level political actors, and the issues to be resolved can be expected to be of similarly high political level. The use of informal coordination is often finding an overall compromise both parties can live with (Laloux, 2019; Ripoll Servent, 2011; Roederer-Rynning & Greenwood, 2015, 2017). Hence, here the focus will be on position inclusion in general and possibly for reasons of window-dressing, allowing both institutions to present themselves as having won something from the negotiation. This is not only because of the high political salience of many issues discussed in informal settings. With the range of actors restricted, even chief negotiators alone cannot deviate too far from their given mandates and grant the opposite institution too much. In general, therefore, the legal effect will be of second-order importance only:

Hypothesis 8: *Integrative negotiation modes in informal loci will increase the inclusion of initial positions in the outcome.*

Integrative negotiations at technical level and including all actors entitled a seat at the negotiation table will also see to the demands being met thoroughly, not only by non-binding stipulations as they "jointly enlarge the benefits available to both, so that both may gain from creating a larger amount of value to be shared by them" (Hopmann, 1995, p. 27). Not only will hence the institutions allow the respective other institution to find their position back in the outcome, they can also be expected to enable both to gain from finding common ground that leaves everybody better off, with accordingly everybody winning from positions entering the file with high legal effect. Yet, given that the detailed stipulations to enter the outcome are agreed at lower hierarchical levels, this will especially

be true in case of delegation to technical levels (Ripoll Servent, 2011; Roederer-Rynning & Greenwood, 2015).

Hypothesis 9: *Integrative negotiation modes at lower hierarchical levels will increase the legal effect of initial positions included.*

In total, nine hypotheses have been developed above. Figure 6 gives an overview on how the different elements of the negotiation process relate to each other and the legislative outcome.

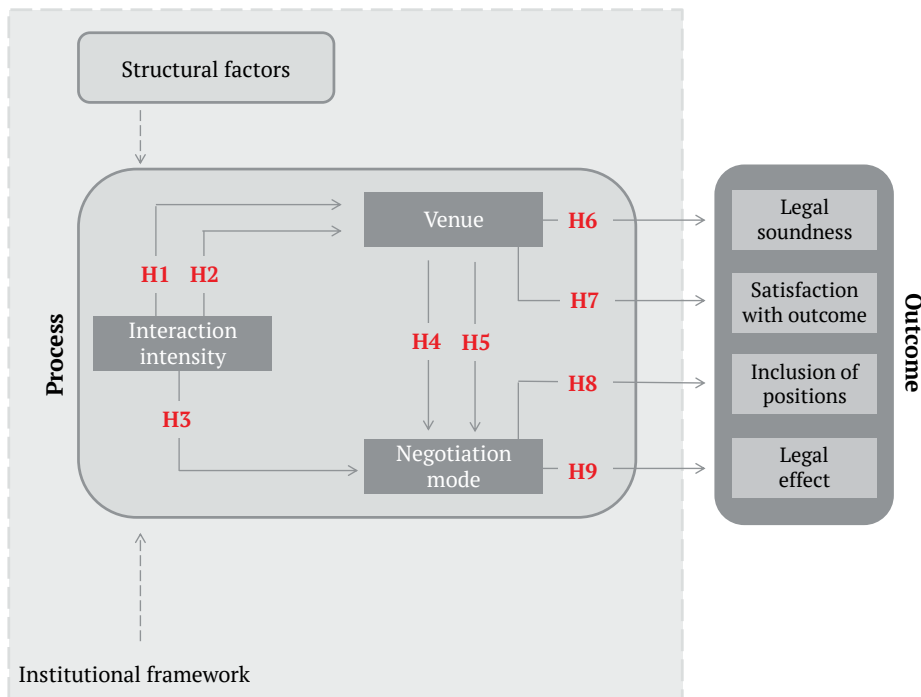


Figure 6: Hypotheses.

3.4 Summary

In the above, the central aspects of the process of trilogue negotiations have been presented in order to theorize how this process influences the legislative outcome of the negotiations. The negotiation process in itself is affected by structural factors and the institutional framework surrounding it. Structural factors as developed above are (1) the policy and procedural preferences of the actors (2) the power relations, (3) salience and (4) the nature of the issues, i.e. technical or political. The negotiation process and its impact on the outcome of negotiations are theorized in nine different hypotheses.

Table 3 summarizes the hypotheses developed and shows how they causally interlink the analytically important aspect of trilogue negotiations.

Table 3: Hypotheses

Number	Cause in	Hypothesis	Outcome in
1	Interaction intensity	High interaction intensity in the negotiation process increases delegation to lower hierarchical levels.	Venue of negotiations
2	Interaction Intensity	High interaction intensity through coalition building between the chief negotiators increases the informalization of negotiations, excluding other actors from the negotiations.	Venue of negotiations
3	Interaction Intensity	High interaction intensity in the negotiations leads to more integrative negotiation modes.	Negotiation mode
4	Venue of negotiations	Delegation to lower hierarchical levels leads to more integrative negotiation modes.	Negotiation mode
5	Venue of negotiations	Informalization of the negotiations leads to more integrative negotiation modes.	Negotiation mode
6	Venue of negotiations	Delegation to lower hierarchical levels leads to higher legal soundness.	Legal soundness
7	Venue of negotiations	Informalization of negotiations decreases the satisfaction with the outcome.	Satisfaction with the outcome
8	Negotiation mode	Integrative negotiation modes in informal loci will increase the inclusion of initial positions in the outcome.	Inclusion of positions
9	Negotiation mode	Integrative negotiation modes at lower hierarchical levels will increase the legal effect of initial positions included.	Legal effect

The next chapter will explain the methodology applied in analysing these hypotheses, as well as introduce the data collection and case choice of the four empirical cases to be analysed subsequently, before we will be able to draw conclusions as to the existence of the causal links conceptualized above.

CHAPTER 4



Data and Methods



After having developed the theoretical expectations and hypotheses to guide this analysis, the methodological approach needs be clarified. First, this chapter will introduce process tracing as an analytical approach, before the case choice and data collection process for this study will be explained and justified.

4.1 Process tracing as analytical approach

To answer the question posed in this study, process tracing is chosen as the most appropriate analytical approach. In recent years, process tracing has evolved as a leading method of case-based research in political sciences. Process tracing allows the researcher to “answer the ‘why’ and ‘how’ questions because it focuses on the causal condition, configurations and mechanisms which make a specific outcome possible” (Blatter & Haverland, 2014, p. 59). As an analytical tool in political sciences, process tracing has first been proposed by Alexander George (Trampusch & Palier, 2016, p. 437). Since then, a steadily growing fascination with and interest in the method as well as a developing methodological literature have both, de- and refined process tracing, as well as broadened the application of the term even towards the development of different sub-categories and different understandings of process tracing (Beach, 2016; Blatter & Haverland, 2014; Checkel, 2006; Collier, 2011; George & Bennett, 2005; Hall, 2008; Mahoney, 2015; Trampusch & Palier, 2016).

Along the way, process tracing has developed from a broadly defined research approach to a clearly outlined and precise analytical tool, adhering to clear rules, approaches and restrictions depending on the specific version of process tracing in mind: “The emerging methodological debate has been characterized by the fact that all scholars have emphasized some characteristic elements [of process tracing] and downplayed others” (Blatter & Haverland, 2014, p. 64). The plethora of different understandings has also led to partly unprecise applications of process tracing or, to put it blunt: “Frequently [process tracing] is neither adequately understood nor rigorously applied” (Collier, 2011, p. 823). Trampusch and Palier (2016), based on an overview of the literature on process tracing, develop best practices researchers should adhere to when conducting process tracing. First, the researcher should be explicit “whether his/her epistemological interest is inductive or deductive” (Trampusch & Palier, 2016, p. 449). Even though they, along with other authors, note that in reality process tracing is a constant back and forth between empirics and theory, researchers need to specify whether “the study’s objective [is] to generate or specify a hypothesis about a causal effect or causal mechanism, or does it seek a plausibility probe about a causal effect or mechanisms that has already been theorized?” (ibid, p.449). Beach and Pedersen on that note differentiate theory-testing and theory-building process tracing analyses, which follow partly different logics (Beach & Pedersen, 2013) of which the current analysis falls into theory-testing process tracing as will be further clarified below.

A next criterion is theoretical in nature: Researchers applying process tracing need to have developed a good theoretical framework which allows for target-oriented search for causal mechanisms and tells them “which actors to study and interview and what historical sequences of events to analyze” (Trampusch & Palier, 2016, p. 450). Here, not only the actors, but especially the context in which they have acted is of specific importance, and temporal and spatial contiguity can and should play an important role in assessing evidence (Blatter & Haverland, 2014, p. 68).

Next, good and justified case selection is important for the quality of process tracing analyses, as well as a good and detailed knowledge of the facts in these individual cases. Achieving this includes reliance on a multitude of sources, including interviews, and the triangulation of the information received in these (Trampusch & Palier, 2016, p. 450). Not only the author should possess deep knowledge of the cases. According to Crasnow (2017), a detailed description of the cases also needs to be provided to the reader in order to give the necessary context to be able to understand the mechanisms as well as the specificities of the case. This ‘narrative’ will greatly enhance the credibility of the analysis (Crasnow, 2017, p. 10).

A further important stipulation is that “we should carefully investigate when the processes we analyze have started and when they end” (Trampusch & Palier, 2016, p. 450). It is important to demarcate the process under analysis correctly because only then the researcher can convincingly claim to not have omitted causal mechanisms that led to the outcome. In general, and this issue touches upon most of the above: Transparency is an important standard guiding the research process, which adheres to everything from case choice to data collected and analytical inferences made. Again, the more the reader knows of the analysis in question, the more trustworthy the results will be. Other authors have developed additional and different quality standards for process tracing, a few of which will be touched upon in the following. However, the list above is valuable because it is rather general, i.e. it does hardly include best practices that adhere to one specific understanding of process tracing or the other. In the following, the understanding of and approach towards process tracing followed in this analysis will be elaborated, before case choice, methods and data collection will be explained and presented.

According to Blatter and Haverland process tracing is outcome-centered, “which means that the researcher is interested in the many and complex causes of a specific outcome and not so much in the effects of a specific cause” (Blatter and Haverland, 2014, p.59). Adhering to Beach’s and Pedersen’s distinction, this analysis firmly falls into the realm of theory-testing process tracing, which is “a deductive research method, testing whether a hypothesized causal [relationship] exists in a single case. At the core of theory-testing process tracing is a “structured empirical test of whether there is evidence” for a causal relationship theorized before to exist in the cases under investigation (Beach & Pedersen, 2013, p. 11). Several analytical steps are necessary to pursue this analysis, the first of which entails the conceptualization of a causal relationship between a cause and

an outcome (ibid). The preceding chapter did exactly this, by developing from existing research hypotheses on causal relationships in trilogue negotiations.

Blatter and Haverland identify three different types of observations that researchers should be after in their empirical analyses. First, they put an emphasis on a 'comprehensive storyline' (Blatter and Haverland, 2014, p.67) the researcher should provide, which allows the reader to follow the sequence of events and possibly critical moments. This can be complemented by Crasnow (2017), who identifies an added value for the analysis in understanding single cases as narratives and not simply a sequence of single, isolated causal elements which refute or confirm a hypothesis. Rather, only "the narrative does the cognitive work through making the causally salient elements of the case coherent", as "what appears to be context in an inferential reading of process tracing becomes content when we understand the case as a narrative" (Crasnow, 2017, p. 12).

Second, Blatter and Haverland identify what has been coined in process tracing literature as 'smoking gun' evidence, highly convincing evidence of causal relationships to occur and have caused the outcome on question. What the researcher is after is "a dense net of observations that show the temporal and spatial proximity of causes and effects" (Blatter & Haverland, 2014, p. 67). The third type of observation is what they refer to as 'confessions', i.e. interview data from important actors in the process in order to capture their perceptions and motivations for their actions. In combination, these three types of observations allow the researcher to draw meaningful conclusions on the processes at hand and (the absence of) causal effects on the outcome.

4.2 Case selection

According to Yin (2009), "a case study is an empirical inquiry that (1) investigates a contemporary phenomenon in depth and within its real-life context, especially when (2) the boundaries between phenomenon and context are not clearly evident." (p.18). Hence, and in contrast to other research methods, the phenomenon and its contextual characteristics are not disconnected, such as for example in many experimental designs, as it is precisely their conjunction that is theorized to be influential for the outcome. In more specificity, Vennesson (2008) defines case studies as "a research strategy based on the in-depth empirical investigation of one, or a small number, of phenomena in order to explore the configuration of each case, and to elucidate features of a larger class of similar phenomena, by developing or evaluating theoretical explanations" (p.226). The phenomenon under study in this analysis is, of course, trilogue negotiations. Case delineation therefore does not pose a peculiar problem. In line with the definition of trilogue negotiations given earlier, one 'negotiation' is not merely a single trilogue meeting, but the whole negotiation on a specific legislative file. One case, therefore, is the negotiation process on one legislative file. As to the requirement of delineating clearly the process to be traced and giving a clear starting and end-point, there is more leeway. One logical starting point would be the beginning of the inter-institutional negotiations,

i.e. after the institutions have officially given a mandate to their delegates. However, this will not be the starting point applied in this analysis. For one, the mandating process within the institutions does deliver highly important and possibly influential information on internal preference distribution and interaction-patterns, which might affect later inter-institutional negotiations. Second, even though inter-institutional negotiations officially only start once the mandates are officially agreed, there might be inter-institutional contacts before. These would be vital for parts of the questions asked in this study. Therefore, the process to be traced in the single cases starts with formulation and negotiation, intra-institutionally, of the single negotiation mandates and ends once there is preliminary agreement in trilogues.

The cases to be investigated must be chosen from the population of all trilogue negotiations that were conducted under similar institutional conditions. Therefore, in theory the population of all cases stretches from the coming into force of the Lisbon Treaty in 2009, the latest EU Treaty determining the broad institutional framework trilogues are embedded in, to the end of 2018. While trilogues are in a process of constant institutional evolution, the broad treaty provisions on the ordinary legislative procedure remained unchanged since 2009. However, except for the broad institutional conditions of inter-institutional decision-making, especially when applying process-tracing techniques, there are further conditions to be taken into consideration. As process tracing demands a rich array of data for reliable and valid results to be detected, “accessibility concerns are also important” (Beach & Pedersen, 2013, p. 22).

Data richness concerning trilogues refers to (1) the availability of official documents, (2) the availability of non-public working documents and importantly (3) the availability of the actors involved in the negotiations for interviews. Official documents on all legislative files negotiated in trilogues are accessible via the EU’s legislative databases, which is why this criterion can be considered fulfilled for all cases in the population. The availability of working documents, as they are not public, depends on the participants’ willingness to grant the researcher access, as well as on sheer availability since non-official documents are not stored centrally. This mainly concerns four-column-documents, which can be a rich data source in order to reconstruct temporal sequences and instances of position change. Lastly, the availability of the negotiating actors is an important criterion. Especially administrators in the institutions frequently change jobs, and a significant share of MEPs is replaced every 5 years in elections. Both, the availability of working documents and interview partners is essential for the good conduct of this study, which is why the sample of cases to choose from is restricted to all legislative files agreed upon between the second half of 2016, the starting point of this research project, and 2018, the end point of data collection.

In total, during the eight Parliamentary term 2014-19, 401 legislative negotiations were concluded and 179 legislative negotiations between 2016 and 2018. While some initiatives date back as far as 2012, the majority of files was proposed by the Commission

in 2016. In order to determine the criteria for case choice, we need to identify conditions deemed influential for the current analysis theoretically and possible to pre-determine in a broad range of cases. Case choice should therefore be based on including some variation on important contextual factors which could have an impact on the trilogue negotiations, as identified by earlier literature. As procedural aspects can only be established after in-depth analysis and are to be explained by the analysis, the cases will be chosen based on important structural factors identified in the literature which possibly change the negotiation process. In line with the theoretical considerations above, these are (1) actors' preferences and positions, (2) power relations, (3) file salience, and (4) issue characteristics. All four have been theorized to possibly impact on the negotiation process and outcome in trilogues. Neither the actors' positions on single issues, nor the nature of these issues can be determined beforehand for a large range of cases, as this identification demands in-depth research. This practically leaves us with two different case characteristics based on which to choose the cases for investigation: Power relations and file salience.

The power relations in trilogues could especially impact the interaction intensity of the negotiations. As stipulated above, the more powerful the actors in charge, i.e. the chief negotiators, the less they should have to rely on other actors to pursue their policy goals and hence the less they should have to interact with these other actors. In contrast, less powerful actors should be expected to heavily rely on interaction both intra- and inter-institutionally. File salience, in turn, should especially change the readiness and leeway of actors to shift to lower and more informal venues. Higher interest of actors external to the specific trilogue negotiations, i.e. single member states or MEPs, might increase the pressure on negotiators to stay in the most formal settings. Moreover, the negotiators themselves might refrain from informalization and delegation in highly salient files, as this might increase the chances of them losing control over (parts of) the process. Both these structural factors can therefore be expected to change negotiation processes and cases chosen along these two structural factors can be expected to vary in light of their specific process characteristics, allowing us to produce results on the different hypotheses developed earlier.

The power relation will be measured according to which party group holds the rapporteurship. In the Council, only small Member States held the presidency in the respective time period under investigation, so that the rapporteur position offers the only variance in this dimension. The rapporteur can either be a member of a big party group (EPP/S&D) or a small party group (all others). Salience will be operationalized on a high/low dichotomy. The possibly changing dynamics in different policy fields (Roederer-Rynning & Greenwood, 2017) are reflected by the fact that the four cases fall in different fields. Considering these criteria, the following four cases have been chosen from the population of all 179 cases:

Table 4: Case Selection

Case	Power Relation	Salience
Regulation on Autonomous Trade Measures for Ukraine	Rapporteur from EPP	low
Directive on Posting of Workers	Rapporteurs from EPP and S&D	high
Regulation on Type Approval and Market Surveillance of Vehicles	Rapporteur from ECR	high
Regulation on Governance	Rapporteurs from Greens	low

With this case choice, all possible scenarios concerning the two conditions for case choice are covered. The first case depicts a rapporteur from a big party group, hence with comparatively high power, and a file of low salience. In the posting case, again the rapporteurs stem from the two big party groups, but the posting directive can be considered one of the most salient files of this legislative term. The type approval case offers a rapporteur from a small party group who is responsible for a file which, through the Dieselgate scandal, gained considerable salience while the Governance Regulation is a low-salience file with rapporteurs from another small party group, the Greens. The cases will be analyzed in the order presented above. The analysis will rest on three main sources of information to be specified below: Official EU documents, working documents of the institutions and interviews with participants of the trilogues.

4.3 Data collection

Two different types of data will be utilized in the following analysis: documents and interviews. Before delving into interview approaches and the actors who participated in this study, first the kind and nature of the documents analyzed will be explained.

4.3.1 Different Types of Documents

One can differentiate two different kinds of documents accompanying EU legislative negotiations. The first type, official documents around the legislative procedure, are uniform and accompany every single legislative procedure under OLP. These are (1) the legislative proposal of the Commission, (2) the General Approach of the Council, (3) Presidency reports issued by the presidency of the Council, (4) The Draft Report of the Rapporteur, (5) the amendments tabled by other MEPs, (6) the EP report. All of these documents have been part of the analysis in all four of the cases. They are publicly available on the different databases of the legislative institutions, many of them are also collected centrally in the legislative observatory of the European Union.

A second type of documents is not simply available in one of the institutions' databases and in part not publicly available at all. This refers to so-called four-column documents (FCD). These documents are central in structuring the negotiations in trilogues (Curtin & Leino, 2017; Roederer-Rynning & Greenwood, 2015). The first three columns of these

documents entail the respective positions of the institutions, while the fourth column normally entails possible compromises. Every single amendment has its own row. Apart from the four columns which all these documents entail, their use is far from uniform in single negotiations and differs according to traditions in different policy fields or secretariats. Some secretariats use a color scheme of green, yellow and red to mark the degree of resolution of single issues between the institutions. As these documents are working documents, different versions exist which are, however, not necessarily stored and especially, there is no arrangement of storing FCDs centrally. In order to access these documents, one must file an official request for documents and, possibly, wait a considerable time before the administrators have located and collected all documents for a specific file.

For this study, all FCDs in the four cases have been obtained and therefore are also a central part of the analysis. In addition, some internal working documents of the different institutions, different party groups or committees have been obtained that will occasionally be included in the analysis. Next to documents, interviews are the central source of data for the analysis.

4.3.2 Interviews: Approach, Technique and Interviewees

In the social sciences, there is a persistent perception that “interviewing involves a good deal of learning by doing” (Mosley, 2013, p. 1). While this is certainly true as concerns especially techniques and strategies of approaching interviewees and steering the conversation to achieve the best possible results, there are naturally many structural questions to be considered before starting the interview process. Many of them have to do with what Mosley identifies as the four core challenges that come with interviews as a research method: sampling, validity and reliability, and ethics. I will shortly touch upon each of them to discuss whether they apply to this research project and, if so, how they have been targeted.

The first challenge linked to interview research is correct sampling of participants (Mosley, 2013, p. 18). Sampling is not to be confused with case choice, but concerns sampling the range of interview partners within the single cases researched. In the literature on interviewing especially in political sciences, sampling is one of the most discussed aspects in preparation of the research. “Sampling involves selecting a subset of elements (e.g. individuals, households, firms, episodes of decision-making) from the universe or population of all such relevant elements” for the research in question (Lynch, 2013, p. 38). Different approaches to sampling are possible: Random sampling, i.e. choosing these “elements” randomly out of a given population, which is the preferred technique of sampling in larger-n quantitative studies; Purposive sampling describes “sampling that involves selecting elements of a population according to specific characteristics deemed relevant to the analysis – for example, firms of various sizes, individuals of various social classes, or legislators from various parties in the political system” (ibid, p.41); Convenience

sampling is choosing any individuals that are connected to the respective important elements identified in the study; Lastly, snowball sampling relies on initial interview partners to point towards further interviews, either simply by providing personal contacts, or on the basis of, e.g. relevance of further actors for the questions asked (ibid). All of these sampling strategies have advantages and disadvantages which will not be discussed in detail here, especially because sampling in the case trilogue research is different and, somewhat, simpler than in other cases.

For the sake of answering the questions posed in this study, only actors who took part in trilogues can be considered as interviewees. The design of this study therefore entailed a “natural” sampling criterion. The population of possible interview partners was simply all actors involved in the negotiations on the single files chosen as cases in the study. As has been outlined in existing research, while some trilogues merely assemble some twenty participants, with observers, institutional services of different sizes the number of participants can easily accelerate to more than 50 or even 100, deeming it impossible, in the range of this study, to interview all participants of the trilogues in the four cases chosen. Therefore, a purposive sampling strategy has been applied to identify the interviewees to be approached. Centrally, the initial sample for every case included the chief negotiators, their personal teams, the members of the negotiation teams, and the secretariat of the EP and the Council.

In total, 43 respondents were interviewed in the four cases of this study. The following overview balances the needs of the reader, in being able to understand the range of interviews conducted, and the respondents, who were promised confidentiality and anonymity.

Table 5: List of interviewees

Institutional Position	Quantity
Administrator, European Commission	3
Head of Unit, European Commission	2
Member of the European Parliament	6
Parliamentary Assistant/Political Advisor, European Parliament	13
Attaché, national Permanent Representation	7
General Secretariat, European Parliament	4
General Secretariat, Council	4
Co-decision Unit, European Parliament	4

The second challenge in interview research is validity, or “the extent to which one’s measuring instrument (in this case, interview) actually gauges the properties it is supposed to measure” (Mosley, 2013, p. 20). Qualitative methods in general and interview research in particular is prone to criticism on issues of validity and reliability of the data. Validity mainly depends on “whether the researcher is asking the right questions, or

asking questions in the right way, as well as whether the interview participant is offering truthful answers (and, if she is not, whether the researcher is able to detect this)" (Mosley, 2013, p. 21).

In order to ask the right questions, it is paramount to know the issue at hand sufficiently well – both in terms of institutional proceedings, as well as concerning the policy issue at hand. There are different perspectives in the literature on interviewing on how knowledgeable the researcher should present herself towards the interviewee; there is also agreement, that although faking ignorance could be a valid strategy, significant knowledge is necessary (Leech, 2002). In order to gain knowledge on the trilogue process in general, a round of initial interviews with trilogue insiders was conducted at the beginning of the research project in the autumn of 2016, including with the horizontal unit in the European Parliament responsible for trilogues, MEPs, assistants and political advisors. Second, in the single cases a thorough desk-research phase preceded the interview phases, during which the researcher familiarized himself with the policy issues at hand both concerning the general policy environment as well as the specific policy proposal negotiated, including proposal, initial institutional positions and the final legislative outcome.

Another important aspect of the validity of interview data is the truthfulness of the answers. Interviewees might be tempted, possibly unconsciously, to reproduce a negotiation process that is not fully accurate. Either because that puts them in a better light, they are not comfortable admitting own mistakes or losses, they generally do not feel comfortable with the interview situation (see for creating a comfortable environment Leech, 2002), or they simply do not remember the exact details and reproduce them incorrectly. In order to assure validity, interviews were triangulated with other data collected, especially official negotiation documents as well as internal, non-public documents, as well as through checking with the data gathered in other interviews. In order to assure validity even in the event of the inevitable rejections of interview requests, it was made sure that the interviews conducted represented a good political distribution. First, in all of the cases actors of each of the three institutions were interviewed in order to prevent biased accounts against a specific institution. Second, within single institutions, the different political directions and administrative positions have been taken account of as good as possible. In the Commission, interview requests were often dealt with centrally, i.e. the coordination of interviews went via central secretariats instead of the actual actors to be interviewed. Often, this meant that only one actor in a specific case would be ready to meet for an interview, and in case of several interviews the accounts did not differ substantially. This was different in the other institutions. That is why in the Council, the presidency as well as a secretariat source have always been interviewed and in the EP great effort was put into reaching as many different political groups as possible, next to actors within the secretariat as well as the horizontal co-decision unit. Whereas not all

political groups accepted interview requests, there is a wide enough range in each case for convincingly eliminating extensive bias in the data.

Next, reliability represents a fourth challenge when conducting interviews. A first way of diminishing the risk of unreliable interview data is ensuring the data are stored securely. During this research project, interviews were, whenever allowed by the interviewee, recorded. Out of 43 interviews, merely 6 interviewees did not agree to recording the interview. In these cases, notes were taken during the interviews and an interview protocol made immediately after the interview. Recorded interviews were transcribed at the earliest convenience in order to ensure the interview was still fresh in the researcher's mind when transcribing and transcripts were stored carefully. A second means to ensure reliability proposed in the literature is interviewing the respondents again after some time has passed in order to check whether their answers are still consistent with those they had given in the earlier interview (Mosley, 2013). Unfortunately, this was not feasible within this research project. However, with transcribed records, triangulation through additional data and a broad number of interviews, the degree of validity and reliability of the data collected should be sufficiently high.

Lastly, in social science research in general as well as in interview research, ethical concerns have gained increased attention over the last decade. In the case of this study, the confidentiality of information posed the main ethical concern during the interview process. Other than confidentiality, no ethical considerations were identified during the research process. Different measures have been taken to assure the information shared in interviews will not have negative repercussions for participants: For one, the interview data reported is anonymized to a high degree. In the reporting, the author has made sure that information which would reveal the identity of participants is not quoted. Recordings of the interviews, where allowed, as well as transcripts or interview reports are safely stored. Lastly, full interviews will not be disclosed. Especially among participants of a specific negotiation process, reading a full interview entails a high risk of being able to identify the respective interviewee.

For the sake of this study, semi-structured interviews were the most suitable interview strategy. Different types of interviews can range from closed questions only, very much resembling a survey, possibly even giving a possible range of answers the respondents need to choose from. The other extreme are fully unstructured interviews, "with even the topic of conversation subject to change as the interview progresses" (Leech, 2002, p. 665). Different strategies have different advantages and disadvantages. While closed questions offer the greatest ability to compare between interviews and make sure all the necessary information is asked for, it bears the risk of omitting important aspects in case they are not known to the researcher beforehand and, therefore, not asked for. Unstructured interviews allow the respondent to simply talk about what she deems important but entail the risk of being drawn away from the actual information necessary for answering the research question.

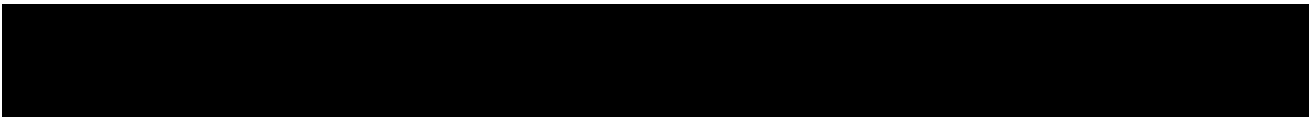
A prominent way to diminish both risks is conducting semi-structured interviews. That is, a template was produced entailing the issues and questions that each interview needed to entail. The questions, however, were mostly open-ended, and each interview allowed respondents the “latitude to articulate fully their responses” (Aberbach & Rockman, 2002, p. 674) and to elaborate and point out important aspects themselves in case they had not prior been asked for. This strategy is most useful in cases where some prior knowledge exists, as was the case concerning the policy issues as well as the general institutional setup, but where at the same time not everything is known to the researcher in advance, an inevitable fact when researching negotiations taking place behind closed doors. Indeed, this strategy turned out to be fruitful, as it delivered the necessary information to answer the research question, but also opened interesting new perspectives, such as the gender aspect in one of the cases, which certainly would not have been considered should the interviews only have entailed closed questions. Interviews normally lasted between 45 and 75 minutes. Respondents were contacted via email followed by, if necessary, further emails and phone calls. All interviews were conducted in the respondents’ offices, in the institutional buildings or in cafés in Brussels. In one single case, the interview was not conducted by the researcher himself. One respondent had shortly before given an interview on the same case and with a related research focus and proposed the colleague who did this interview shares the transcript, which he kindly did. All other interviews were conducted by the researcher himself, all of them face-to-face in Brussels.

In the above, the research methods as well as the analytical tool of process tracing have been introduced, case and methodological choices justified, and the data sources introduced and explained. In the remainder of this study, the four cases introduced above will each be analyzed, before an analytical chapter brings together the findings and evaluates them in light of the theoretical expectations. A concluding chapter summarizes the findings of this study.

CHAPTER 5

5

Case 1: Autonomous Trade Measures for Ukraine



5.1 The regulation

Despite the existence of an 'Association Agreement' (AA) and partial application of a 'Deep and Comprehensive Free Trade Agreement' (DCFTA) between the Union and Ukraine since January 2016, the political and economic situation in Ukraine remained difficult in the years to follow. Against this background, the Commission proposed in September 2016 a regulation "on the introduction of temporary autonomous trade measures for Ukraine supplementing the trade concessions available under the Association Agreement" (2016/0308(COD)), now Regulation ((EU) 2017/1566). The aim of this measure was to "increase the existing trade flows concerning the import of certain agricultural products from Ukraine into the Union, and to foster bilateral trade and economic cooperation with the Union" (European Commission, 2016d, p. 1). While the file was relatively simple in terms of length and complexity of the provisions, there has still been considerable discussion as Member States as well as the EP were divided especially concerning the Ukrainian products to be granted preferential access to the EU market. In the following, the political circumstances, content of and different positions on the file will be presented, before we turn to the actual proceedings of the negotiations and their analysis.

In the last decade, close cooperation has mostly characterized the relationship between the EU and its eastern neighbour Ukraine. The AA as well as the DCFTA are the most prominent institutional expressions of this close cooperation. However, especially after the beginning of ongoing diplomatic and military disputes with Russia, support for Ukraine from Brussels has intensified. One expression of this support is the existence of informal "friends of Ukraine" groups in all institutions, most prominent in the European Parliament (Ukrainian Ministry of Foreign Affairs, 2014). These groups of MEPs or Member State representatives respectively are committed to supporting Ukraine in its endeavour to stabilize its economic and political situation.

The relations between Ukraine and the EU are closest concerning economic and trade cooperation. The Union is Ukraine's biggest trading partner, accounting for more than 40% of its trade volume in 2016 (European Commission, n.d.), with the volume having increased by 23% in the first half of 2017 only. Ukraine mainly exports "base metals and articles thereof, vegetable products, mineral products, electric machinery and appliances, vegetable fats and oils" to the Union (ibid). Further, the EU offers ambitious financial support of €12.8 billion in a multi-annual plan to support investments, civil society, local governance and the fight against still problematic corruption amongst Ukrainian elites. In addition, the EU has established civil society dialogues as well as humanitarian aid in the war-torn east of the country (ibid).

Despite of these already considerable efforts, the Commission saw the necessity of proposing the autonomous trade measures (ATMs). "In order to support the development of closer economic relations, the measure aims at increasing the trade flows concerning the import of certain agricultural products and to grant concessions in the form of autonomous trade measures" (European Commission, 2016d, p. 4). The proposal, in short,

aims at offering zero tariff-rate quotas (TRQs) for specific annual amounts of different products, as well as preferential tariffs for another group of products, among which the most controversial a rate of 3% for the fertilizer Urea (European Commission, 2016c, Annex 1-3). As an internal briefing of the Commission stipulates, the rationale for this was that “the EU concessions in the DCFTA related to the imports of agricultural products from Ukraine are less ambitious”, and for some of the products the limit had already been reached. In its proposal, the Commission introduced light conditionality requirements concerning the rule of origin, abstention of Ukraine to introduce tariffs as well as general provisions on democracy, human rights and fundamental freedoms (European Commission, 2016c, p. 2). The regulation was to have effect immediately after publication in the official journal and for a duration of three years. Table 6 summarizes the Commission positions on the quantity of the products to be granted reduced tariffs.

Table 6: Case 1 - COM Proposal

Product	COM Proposal*
Honey	3000
Preserved tomatoes	5000
Wheat	100.000
Maize	650.000 (tons)
Barley	350.000
Urea	3,5 % duties

*(tons p.a., unless indicated differently)

The proposal encountered a special and, if you wish, contradictory political environment in Council and European Parliament. On the one hand, a vast majority of actors in the Union is generally keen to support Ukraine in the current difficult political situation and granting access to the EU market has traditionally been one of the main mechanisms to do so. On the other hand, some of the proposed products were very sensible to the agricultural sector in several Member States, a sector that generally feels “trade people sell them off to get advantages in other sectors” (R[espondent] 2). This conflict between supporters of free trade and granting market access on one side and agricultural interest on the other therefore played a major role in both legislative institutions and throughout all phases of the negotiations. Before delving into the interinstitutional negotiations, the development of the negotiation mandate in both legislative institutions will be outlined.

5.2 The Council general approach

While the Commission proposed the file during the Slovak presidency of the second half of 2016 and the file was officially adopted under the Estonian presidency of the second half of 2017, it was under the Maltese Council presidency of the first half of 2017 that the file was negotiated and concluded both within the Council, as well as between Council

and EP. Given the limited complexity of the file, the relatively short time necessary to get to a General Approach in Council and to agreement with the EP seems not surprising. However, the file has not been considered an easy file in the Council (R 2, 3, 4). The main reason for this was a mingling of opposed interest in some Member States. "Some of the Member States that want to help Ukraine the most had a problem with the products. Because the products were sensitive for their own agriculture" (R 2). The allocation of the file in itself was indisputable: "For this file, autonomous trade measures, that is straight forward trade committee" (R 7). However, as one of the traditionally most important and most contentious policy fields, agricultural political interest often manages to get its way into files originally from other policy fields.

Accordingly, while "everyone wanted to help Ukraine because of reasons you are well aware of"¹ (R 2), the reaction of many Member States towards this proposal was a mere 'yes, but'. With strong national agricultural interest, organized in strong Unions and a major concern of important voter groups, "some Member States were really schizophrenic about this" (R 2). This only counts for the products and respective quantities to allow Ukraine to import tariff-free, which was settled in the Annexes of the proposal. In terms of the articles, the Council was remarkably united in not taking specific interest in it, or at least not showing any opposition to the articles proposed by the Commission, leading to no single proposed amendment on the textual part of the proposal issued by the Council. In that sense, "it was a very simple situation because nobody in trade committee had trouble with the textual amendments proposed by the EP, while there were a number of them that had troubles with specific products" (R 7).

As to the products, different Member States lost sight of the international trade perspective, from which free trade in general and helping Ukraine with autonomous trade measures in particular is generally welcomed by a vast majority. "At the end of the day, their position was in line with the interest of agriculture rather than foreign policy" (R 2). Accordingly, positions neatly reflect market-shares of the respective Member States for the different products and thus do not come as a considerable surprise. Italy wanted to cut Ukrainian access to the market for preserved tomatoes, while Bulgaria wanted to protect its honey (R 4, 5, 6). The main issues in terms of products, however, also due to the considerable amounts of Ukrainian imports proposed by the Commission to be tariff-free, were maize and wheat. The latter was of special salience for the Polish, who accordingly fought hard to delete wheat from the proposal. However, there was also a concern in many Member States that with too rigorous a deletion of products, the file in the end would not be of more than symbolic meaning, not effectively helping small- and medium-sized enterprises (SMEs) in Ukraine recover economically.

Despite this rather difficult situation, the presidency managed to arrive at a General Approach mandating it for the upcoming trilogue negotiations relatively quickly.

¹ This comment refers to the military conflict with Russia Ukraine was involved in in relation to the Russian annexation of Crimea in 2014

According to our interviewees, one of the main reasons for this was the absolute policy neutrality of Malta as a Member State. They “had no stake whatsoever, no agenda. So that helped” (R 2). This helped building trust with the other Member States, a vital ingredient for getting to a common approach (R 2, 7). The presidency even took a little more time than necessary in order to convince more Member States of the General Approach and achieve more stable support for the negotiation mandate (R 2, 4, 7).

The final General Approach sought to amend the list of products and respective volumes in five different ways. First, the amount of honey to be imported without tariff quotas was to be reduced from 3000 tons to 2500 tons. Second, Tomatoes were to be reduced from 5000 to 4800 tons. Wheat, the most salient issue triggering stark opposition from Poland, was to be reduced from 100.000 to 90.000 tons and maize by 25.000 tons. Similarly, Barley was to be reduced by the same amount to 325.000 tons per year. While these changes might appear cosmetic at first sight, they were sufficient to convince a broad majority of Member States to support the presidency’s General Approach and enabled the Maltese to start negotiations with the European Parliament. Table 7 summarizes the Council position on the different products.

Table 7: Case 1 - Council Position

Product	Council Position *
Honey	2500
Preserved tomatoes	4800
Wheat	90.000
Maize	625.000
Barley	325.000
Urea	3,5 % duties

*(tons p.a., unless indicated differently)

5.3 Negotiations in the European parliament

While institutionally, Member State interest has its place to be fought for in the Council, it is not unusual for it to also figure in the European Parliament. Of this, the file on ATMs for Ukraine is a shining example. The high significance of national interest and what it did to the intra-parliamentary negotiations would be a very interesting case for studying negotiation dynamics in its own right.

The responsible committee in the European Parliament was the Committee for International Trade (INTA). It was chaired by the German social democrat Bernd Lange (S&D), who took a comparatively prominent position during the trilogue negotiations. Jaroslaw Walesa was the EP’s rapporteur for this file. The Pole is a member of his national party ‘Civic platform’ and EPP in the European Parliament. As pointed out above, there were several main interests that played a role in this file, partly forcing the traditional party-political interest into the background. In parliament, especially agricultural policy

interest and, linked to that, national interest governed the intra-institutional negotiations, which had severe repercussions for the trilogue negotiations that followed.

Before turning to the salient product lists it is important to note that, in contrast to the Council, the EP had a strong interest in amending the Commission proposal also concerning the text provisions: “Maybe [the products] was the most difficult part, but for some parts of the political spectrum these democratic elements which were put in the text, it was their request. [...] They insisted on that. The S&D and the Greens, they would really insist that there is some conditionality to be included” (R1). First, members wanted the rules of origin and other conditions producers must guarantee to be strengthened, not merely for the agricultural products as proposed by the Commission but for all products. Second, the fight against still flourishing corruption was to be included in the conditionality provisions, as well as the social provisions (European Parliament, 2017f).

A second important aspect has been the social impact of the proposed measures: “Because in this whole proposal and in our trade relations to Ukraine it’s always the question *qui bono*” (R5). In other words, who are the persons and companies profiting from the trade measures in Ukraine, are they actually the SMEs that are targeted with the measure, or it is oligarchs that profit from market access. Therefore, the Commission “shall monitor the economic and social impact of this Regulation in Ukraine and the Union. That monitoring shall extend to regional and sectorial level and identify those actors profiting from trade preferences” (European Parliament, 2017a, amendment 36).

On the other side of the spectrum, several members wanted to block the complete proposal and, should that not be possible, water it down as much as possible. Ignoring, for reasons of their non-impact on the negotiations, those anti-EU interest that wanted to block the proposal, we can focus on the more substantial changes demanded. Firstly, the safeguard clause to withdraw preferential treatment should be enhanced by deleting the necessity of qualified majority in the Council to decide on a reintroduction of common duties in case of difficulties to Union producers (European Parliament, 2016e, amendment 13). Second, the right to request a safeguard procedure should be extended from Member State governments to industry. So, in general these amendments aimed at strengthening the Member States and domestic producers considering possible disadvantages and deteriorating effects of the measure for the internal market and the Union’s producers.

Despite the comparatively high importance of text amendments, also in Parliament the products to be granted non-tariff access were the most salient issue in the negotiations in the INTA committee and, notably, beyond. Next to party political interest it was especially national interest that came to the fore, aside an episode of severe AGRI (Committee of Agricultural policy) protest. Before delving deeper into national sensitivities, it is worth mentioning that there has been one product that was rejected for party-political reasons, notably by S&D. Urea, a fertilizer that was supposed to gain preferential custom duties of 3%. Next to the negative consequences some members expected these preferential duties to have on the market due to already heavy market share of Ukraine when it

came to Urea (European Parliament, 2017b, amendments 64-65) , there was a strong suspicion that this would not serve Ukrainian SMEs. “With Urea it was totally clear that this was oligarch interest” (R5), which is why preferential custom duties for Urea have been strongly opposed. Other than that, the story of how the EP positioned itself in terms of the products in the proposal is as national a story as it gets.

The first noteworthy element of this file’s intra-institutional negotiations is the outspoken negative, though not surprising, opinion of the AGRI committee. While often written in a spirit of cooperation and diplomatic balance of positions, this opinion is clear on its stance toward the proposal throughout, stating that “the AGRI Committee does not accept this kind of headlong rush to tariff liberalization in agriculture by our trade policy makers and negotiators” (European Parliament, 2017f, p. 21). The committee queries that the measures proposed are targeting some highly sensitive sectors of EU agriculture recently hit by serious crises [...] and they could not possibly come at a worse time” (ibid). The legitimacy and justification of the proposal is lamented, given that Ukraine already enjoys, and has made full use of, extensive trade liberalization measures under the AA, and that “no impact assessment whatsoever has been carried out simply because in view of the difficult economic situation in Ukraine, it is important for the regulation to enter into force as soon as possible” (ibid). Hence, clearly the committee is strictly opposing the proposed measure, consequently asking INTA to “leave out the proposed TRQs for wheat, maize and tomatoes” (ibid). In total, concerning both the products and the text, AGRI proposed 13 amendments. It is further interesting to look at the results of the vote, showing that this strong position was not consensual. While 19 MEPs voted in favor, 9 voted against and 16 abstained, under which the majority of the S&D delegation as well as the Greens and GUE (European Parliament, 2017f, p. 31). We will later come back to how the voting results in all committees came about and what they meant for the further development of this file.

It was exactly these products that were of highest interest to national delegations within the EP, as well. With national interest mirroring those present in the Council as outlined above, the fact that with Walesa a polish national obtained the rapporteurship played an important role for the report issued by INTA. Walesa, just as the EPP delegation to INTA in general, is commonly known as both, a friend of Ukraine and free trade: “Normally, Walesa has been a supporter of Ukraine, tried to open the market to help them, but in this file, we saw a switch. He had a lot of pressure from Poland” (R 6). It was this pressure that led Walesa to draft a report that, had it made its way into the final legislation, would have degraded the proposal to mere symbolism. However, his initial support of measures supporting Ukraine’s economic and political development figures in the explanatory statement of the draft report, acknowledging that “additional preferences to Ukraine may support its economic recovery efforts and the reorientation of its markets to the EU” (European Parliament, 2016e, p. 15) . Further, he “welcomes the prolongation of EU restrictive measures against the Russian federation” and even admits that it is “justified to

consider further EU support to Ukraine in form of additional trade preferences” (ibid, p.16). However, “they should not be offered to producers whose export capacity has already proven substantial” (ibid).

Trade relations to Ukraine are already asymmetric he concedes and criticizes the lack of impact assessments concerning the economic consequences of the proposal for both the Ukrainian and the EU market and producers. Hence, while he chooses a much more compromising tone than did the AGRI committee in his explanatory statement, it becomes clear that he does oppose certain aspects of the proposal. In the following amendments, he proposes to delete both, maize as well as wheat from the list of products. He justifies the deletion of these products claiming that first, Ukraine already heavily exports these products and they are competitive on the EU market. Second, the EU sector has suffered multiple serious crises leading to low harvest, which in combination with trade liberalization for and record harvests in other parts of the world lead to an “extremely worrying [situation] in several Member States” (European Parliament, 2016e, p. 17).

Walesa’s position was by no means the undisputed position of his whole party group, the EPP. Rather, “they have a big group in the EPP that is really open towards market opening, so there was a big group that did not support Walesa’s position” (R 6). In addition, neither S&D, nor the Greens, GUE or ALDE were in favor of deleting all these products. Still, the final report agreed upon and voted in favor of by the EP entailed the deletion of wheat, maize, tomatoes, as well as the preferential duties for Urea. How, given the apparent majority against this position, did it get voted in favor of?

First, it is surprising that the EPP delegation to INTA with one accord supported Walesa’s amendments, even though the group was anything but consensual on the issue (R2,5,6,8). This can, however, be explained by the custom within the INTA committee (and probably many others), of supporting own rapporteurs in their report: “In Committee, normally people stand behind what the rapporteur is doing. So, for example, you have the EPP as rapporteur, then normally the party members would support the position of Walesa” (R6). While it is probable that the groups would not allow rapporteurs to depart from the party line extensively, apparently Walesa indeed had the backing of his party group for deleting the products.

Second, having a look at the voting results in committee reveals that apart from ENF, in an act of general EU opposition, GUE and the Greens, who both abstained in the final vote, all party groups voted in favor of the report as adopted, which included the deletion of wheat, maize, tomatoes and Urea (European Parliament, 2017f, p. 31) . A deletion of all these from the product lists would have diminished the impact of the proposal towards what many felt was factually insignificant, something opposed by all pro-European party groups in Parliament. The votes in favor of ECR and EFDD therefore make sense, given that watering down Commission proposals in general is one of their main aims. Why, however, did ALDE, GUE and S&D vote in favor of the report?

What can be witnessed in the committee vote is a clearly strategic approach. Many members of INTA faced a difficult dilemma: On the one hand, they were in favor of the Commission proposal and of granting new ATMs to Ukraine, supporting its economy. On the other hand, they rejected the amendments tabled by Walesa. However, voting against this report could have led to the rejection of the proposal in general, leading to no ATMs at all. “Because if you then vote against, and there would have been a majority, then there would not have been trilogues. Then you kill the whole thing” (R5). In principle, this applies to all party groups, although it is certainly most severe for the big two, EPP and S&D. Therefore, S&D members voted in favor of a report that was against their preferences, also because they had the freedom to do so given that their AGRI-colleagues had abstained in the vote on the opinion as adopted, meaning that INTA members were not bound by the AGRI opinion in their voting behavior (R5). The Greens managed to include all the amendments tabled by them into the final report, but decided to abstain, mainly because of the deletion of the products (R2).

The final report adopted by committee and later plenary, not without being discussed there but without changes resulting from that, entailed 21 amendments. As outlined above, the text amendments mainly aimed at increasing assessment and oversight by the Commission, enabling the measures to be suspended more easily and the deletion of the products mentioned. In the final vote in committee, 30 members voted in favor, with 4 against and 3 abstentions. Thereby, the EP officially had a negotiation mandate for starting inter-institutional negotiations with the Council. The fact that parliament was essentially divided about which position it should have in the first place, is to play an important role in the following negotiations. Table 8 lists the starting position of the EP in terms of the most important issue, the products to be granted TRQs.

Table 8: Case 1 - EP Position

Product	EP Position
Honey	Support COM proposal
Preserved tomatoes	Deleted
Wheat	Deleted
Maize	Deleted
Barley	Support COM proposal
Urea	Deleted

5.4 Inter-institutional negotiations

With both institutions equipped with a mandate, the inter-institutional negotiations could officially start. However, the negotiators did not neglect the respective other institutions and the developments therein already during the mandating phase. Inter-institutional contacts, on an informal level, are institutionalized not only in the negotiations in specific files but across files and policy fields. “Very often, [future] presidencies come and knock

on [your] door. And then you have a coffee and establish informal contacts. These are then of course used during a presidency" (R5). Also, in the negotiations on this file, inter-institutional interaction began before the mandate was officially given. The first dimension is simply staying informed about the positions, proceedings and divisions within the opposite institution. "It's not just a matter of [getting] to a [mandate] and then we start thinking what the [opposite institution] wants" (R2). On the contrary, all actors acknowledged that knowing the positions of the counterpart plays a pivotal role in forming the mandate.

It belongs to a chief negotiators task to, while working on the institutional mandate, "follow what's going on in the [other institution], follow debates, read reports, opinions" (R2) and consider these when formulating the own negotiation position. While this job is comparatively easy for Council negotiators, as the discussion on the mandate in the EP are relatively transparent, for EP negotiators it is considerably more difficult, given that most Council negotiations are not accessible from the outside. Therefore, next to good relations with the presidency it is vital for EP negotiators to "have informal contacts to other Council delegations, as well" (R5).

Next to gathering information, informal personal meetings also occurred before the mandates were fixed. Our interviewees confirmed that there was at least one meeting between the rapporteur in person, his team, as well as political advisors from S&D in order to exchange information on the respective positions (R1, 2, 7). "We had at least one meeting with the rapporteur of the EP. And he was quite open, he was basically explaining, it was just before he drafted the report, so he was explaining what his intentions are, very open discussion, it was totally informal, the rapporteur, the presidency, some of the political groups present as well" (R7). In this meeting, negotiators mainly exchanged positions and possible directions the negotiations could take: "It's more like a coordination, and the rapporteur can say 'yes, I will try to achieve this, but I cannot guarantee, and this is my position, and so on'" (R1). While this exchange of information seems to be very common and relatively uncontested, interviewees stressed that this should not be regarded informal negotiations already before the mandate was given: "I would definitely encourage following what is going on in the [other institution]. But what I would definitely discourage is [...] negotiating things before you have a mandate." (R2). There is hence a clear perceptual difference between informal information exchange and what has been coined by one interviewee as "conspirational meetings at the hotel bar" (R5). While the first did happen, the second seemingly has not been an element of the negotiations in this file.

In contrast to the average legislative file, which needs around four trilogues to be concluded (Brandsma, 2015), the negotiations on ATMs for Ukraine were settled in only one trilogue, for which there are two main reasons. First, the already mentioned relatively low complexity of the file contributed to this. Second, there was a considerable time pressure felt by the negotiators. A Ukraine summit was scheduled to take place in July

2017, at which EU leaders were keen to present preliminary results of the negotiations. This is the main reason for the Council and the Commission to push for an agreement, but also the EP was sensible to the timeframe of the negotiations: “There was time pressure. They really wanted to do it before the summit, and the second thing with Ukraine there is also a kind of time pressure because you are sending a political signal if you are giving support to a country when there is a war situation” (R1). All actors in the negotiation were aware that the EU sends an important signal with supporting Ukraine, also to the population in the country itself, and that non-agreement or even agreeing on limited support would have negative consequences in the still on-going struggle between friends and foes of the EU in Ukraine (R1, 5).

The positions the two institutions entered the negotiations with have been described in detail above. There are three main factors that were to shape what happened in the trilogue. The Council, generally uninterested in the text of the legislation, in its mandate followed the Commission and did not demand any amendments in the text. Second, the mandates were quite far apart as concerns the volumes of the salient products to be imported free of tariffs. Third, and importantly, the EP position was not backed by a stable majority.

A first specificity of the trilogue meeting was the presence of Commissioner Malmstroem herself, a sign for the eagerness of the Commission to come to an agreement in this first trilogue: “They normally only take part if there is a chance to conclude the file” (R5). Hence, everybody in the trilogue knew this was not only supposed to be a venue of exchanging positions, as often is the case with first trilogues. Negotiations began on the text amendments, and it comes as no surprise given the preference constellation, that the Council accepted every single text amendment tabled by the EP. Already the four-column document preceding the negotiations showed that agreement to the EP amendments was probable, given that the fourth column, normally entailing a compromise, entailed the exact EP amendments, only sometimes with insignificant linguistic adaptations. The Council negotiators of course expected the EP to compromise on the numbers in turn. “That clearly was strategic by the Council and the Commission” (R5). “Basically, they came with the position ‘we are taking these texts, but then you give us something as regards the numbers’” (R1).

It was another specificity of this file that the main debate was on products and volumes, so basically numbers, which accordingly structured the further course of the negotiations. “Basically, you just go along product by product. [...] Then we started dancing with the numbers, I give you more maize, you give me this and honey, which was quite random I think” (R6). Hence, there was an atmosphere of real negotiations in the trilogue. The rapporteur was set on defending, as much as possible, the mandate which he had pushed through intra-institutionally. Already the preparatory meeting of the whole EP negotiation team to develop a common position indicated that Walesa was set to defend his position: “He tried to enforce his view on how to do everything. [That]

we needed to be though, it was not a real dialogue, so there was no room for doubts" (R6). As the Council negotiators were similarly set on gaining their ground on the numbers in exchange of what they had granted in the text, negotiators were on the verge of failure: "At one point there was the risk that it would probably be stopped, and we would need one more trilogue" (R1).

It was probably the length of the trilogue, in combination with the generally unwelcomed prospect of prolonging the negotiations to a second trilogue, which contributed to internal divisions in the EP to become apparent. This came as a surprise to both the Commission as well as the Council. "Well, this was definitely a surprising case, because I am sure they have their internal differences, but they do not necessarily expose them in such an obvious way as in this case" (R7). Even though, next to the rapporteur and the chair none of the members of the EP delegation can speak, this division was hence obvious to everybody in the room, because "the principle to not speak does not mean that you don't communicate. [...] Communication does still take place. Of course, that has to be discrete" (R5). Apparently, the EP delegation did not (want) to manage to hide its division from the other delegations in this trilogue. In order to solve this situation, INTA committee chair Bernd Lange intervened with calling a break and asking for a new vote within the EP team on a proposed package by the Council. This intervention has been very controversial in the aftermath of the trilogue, with the rapporteur officially complaining in the following committee debate on the file, arguing that the chair has overstepped his mandate. In contrast to this assessment, most other participants supported the role Lange took towards the end of the negotiations (R1, 2, 5, 6, 7). It was clear to everybody that Walesa was defending the position of part of his national electorate, rather than that of the EP, and the intervention from Lange was mainly for that reason highly welcomed: "The division was completely along national lines. [...] I think he really, really fulfilled his role" (R1). There seems to be agreement below most negotiators that this intervention was necessary to prevent failure: "Had Lange not been there, we might not have arrived at a conclusion" (R2).

When the proposal by the Council was on the table, and the EP negotiation team withdrew to discuss it, the division still figured prominently. The rapporteur tried to defend the original parliamentary position, claiming that this is the mandate of the EP and too strong a deviation would be an embarrassing loss for the institution (R6). However, a sufficient majority of shadow rapporteurs supported the Council proposal. Due to the intervention of the committee chair, the EP majorities shifted during the trilogue, leaving the rapporteur out of the final compromise by simply outvoting him and his position. How did this new EP majority come about?

First of all, there was no strong majority backing the mandate, as described above. However, the majority position which developed during the trilogue did not exist from the very beginning; it was conditional on the acceptance of the EP text amendments earlier by the Council. "In the shadows meeting [...] we pushed something through against the will

of the rapporteur. But based on a majority of party groups [...] that were there. And we would not have come to this majority if not people, to whom these textual amendments were very important, had said ‘good, in light of what we got in the text I can live with this, because I want to get to a conclusion’” (R5). Therefore, the apparently relatively unimportant text amendments indeed played a huge role in the final conclusion of the file, and the Council strategy of using them as a bargaining chip to achieve EP concession on the products worked. The trilogue ended in agreement between the institutions.

5.5 Discussion

After having described the trilogue negotiations on this file in detail, the following part will zoom into the analytical elements of the negotiation process developed earlier. Starting with the outcome, subsequently the interaction intensity, venue and negotiation mode of the negotiations will be depicted.

5.5.1 The Outcome

As to the final agreement, the compromise offered gains for both institutions. The EP was successful in achieving to include provisions on conditionality of the measures (Art.2), impact assessments (Art.6) and a reference to human rights and worker protection (Art.2), all of which in form of articles added to the text of the regulation (European Parliament & European Council, 2017). In exchange, the Council could retain most of its positions in the numbers game, even though on most products they had to further compromise. The following analysis will further explain how the legislative output can be classified. Table 9 shows, what the final volumes of products to be imported are:

Table 9: Case 1 - Summary of Positions and Outcome

Product	COM Proposal	EP Position *	Council Position	Final Agreement
Honey	3000	3000l	2500	2500
Preserved tomatoes	5000	Deleted	4800	3000
Wheat	100.000	Deleted	90.000	65.000
Maize	650.000	Deleted	625.000	625.000
Barley	350.000	350.000	325.000	325.000
Urea	3.5% duties	Deleted	3.5% duties	Deleted

*(tons p.a., unless indicated differently)

How can the outcome of the negotiations in this file be classified? First, the occurrence of initial positions in the final agreement as well as actor satisfaction must be taken into consideration. Concerning the text amendments, the assessment is clear: The EP managed to get all its text amendments into the final legislation. As the EP amendments have mostly been accepted as they were, there is clearly no compromise struck and the initial positions of the Commission and the Council are not considered. It is important to

keep in mind, though, that especially the Council did not put high priority on the articles in the regulation. When it comes to the products, the picture is different. Here, the Council managed to secure most of its positions. Out of six different import quotas, three exactly depict the Council positions, while one is the EP's position and only on two, out of six, we see a compromise. Even considering the compromises, both more or less meeting in the middle, as at least partly reflecting both initial positions, we still need to assert that, overall, initial positions are reflected in the outcome to a very small degree.

Concerning the satisfaction of participants, we see a division. A majority of participants was satisfied enough to support the final regulation in a vote. That, however, will be a finding true for every file that was agreed and, therefore, is not surprising. What stands out is the fierce dissatisfaction of one of the chief negotiators, the rapporteur in the EP, and his party group. Certainly, sidelining the rapporteur in the trilogue is not the ordinary, especially not if he comes from the biggest party group. This is also reflected in the rapporteur's public statement of dissatisfaction on the proceedings in trilogue, to which we will return later. With one mayor player in the European Parliament being fiercely (and explicitly publicly) unhappy, the overall satisfaction must be regarded low.

Concerning the legal aspects, the file offers a different picture. All conflicts have been resolved on an article-basis, there are no symbolic concessions to accommodate initial positions without giving them actual, legal weight. Further, there is no technical or legal ambiguity, all provisions in the regulation are sufficiently spelt out and no legal uncertainty, nor inconsistent or unconcise legislation can be found in the regulation. Both, the legal effect of included positions as well as the legal soundness of the overall provisions is very high.

5.5.2 Interaction Intensity

The first thing to say about social interaction in this file is: It was, comparatively, scarce. Given the file was short and not very complex, especially the degree of inter-institutional interaction was low. The institutional framework that has established around trilogues offers a multitude of possibilities of interaction for negotiators, of which they have made only little use in the negotiations on this file. When regarding the reasons for this, two stand out. Let us first regard the coalition formation.

Theoretically, preference convergence between participants to the negotiations would be expected to lead to coalitions forming, which should then have an impact on the interaction intensity. First regarding intra-institutional coalition-building in Parliament, early in the process it showed that the rapporteur was relatively isolated with his strong stance on reducing the products on the list. Still, if one only was to consider the voting results in committee accepting the mandate of the EP, a coalition between S&D and EPP seems to have developed, with S&D backing the rapporteur. Regarding the initial preferences, this coalition would be a rather surprising finding. Indeed, a closer look at the data reveals that this was not an actual coalition formation but rather strategic backing

of the report by S&D to obtain their preferences. In that sense, the rapporteur was not involved in any coalition within the EP following the definition of coalitions applied in this study.

The data shows, however, that the interaction intensity within institutions during trilogues is generally high. All interviewees confirm that inter-party contacts are regular and frequent, independent of the file or party positions in question. An important reason is the close working relationship of the actors involved even beyond single files: "This naturally offers the opportunity of approaching a colleague 'listen, file X, what do you think about it?'" (R5, but also 4,6). Not only do party representatives meet those of other parties at their level frequently, they also know them well enough to have a good idea of their (parties') positions on specific files.

Turning to the inter-institutional interaction, the coalition expectation still holds. The coalition formation dynamics have several dimensions worth inspecting. The most important potential coalition for the negotiation process is the one between the two chief negotiators, i.e. the rapporteur on the side of the EP and the presidency on the side of the Council. The depiction of the negotiation process above has shown that these two actors did not form a coalition. The theoretical expectations are in line with this finding, as they did not share positions on their most salient issues, indeed they rather had opposing views. The rapporteur had very restrictive positions as concerns the products to be imported, while the presidency, in the absence of own national positions, supported the Council General Approach, which envisaged generous import quotas. Therefore, a coalition between the two would not have been beneficial for either of them and its absence makes perfect sense. In addition to opposing policy preferences, even their procedural preferences did not align; the Polish rapporteur had no interest in concluding the file quickly, or at all. In fact, delaying adoption was one of his strategies.

In line with that, merely one meeting between the presidency, the rapporteur and a representative of S&D took place. The nature of this get-together in the preparatory phase of the mandates in both institutions will be regarded later, but the fact that this apparently was the only meeting in person between the chief negotiators stands out. Further, the fact that this normally differs was referred to as well, as "normally you always have informal contacts to the [other institution] before the whole thing starts" (R5). The pattern of interaction confirms the expectations, as it was relatively scarce and perceived as more or less superficial exchange of information. Given the lack of issue convergence of negotiator-positions, and therefore the non-formation of inter-institutional coalitions, it would indeed have been surprising to see high interaction intensity between rapporteur and presidency.

Next to the chief negotiators, social interaction could span institutions also in between shadow rapporteurs and the presidency or certain national delegations. Again, we would expect actors with similar preferences to exhibit high interaction intensity. However, even though several shadow rapporteurs and their parties had convergent preferences

with many Council delegations, also this kind of social interaction did not exist in this file: “Normally, we also meet a lot with the Perm Reps, but in this case we didn’t” (R6).

What explains the absence of interaction between actors that shared a common interest? First, the personal views of the actors involved seem to run against side-lining the official negotiators (R1,2,4,6). Second, again the short duration of the file plays a role here. Had negotiations taken longer, this might have changed: “If we have trilogues for more than a year, then cracks start to appear, and these things start to happen” (R2). Compared to other cases dealt with during this research as well as findings from other analyses, the social interaction in this case can indeed be described as specifically scarce regarding most of the potential channels of interaction.

What is the impact for this low level of interaction intensity for the negotiations? Mainly, it prevents negotiators building a trustful relationship. This is not trivial: Developing trust is a main driver for the hypotheses as described theoretically (Lu et al., 2017). The less direct contact there is, the less well negotiators know each other, the less they can understand the underlying reasons for the respective positions of their counterpart and develop what could be called a close working relationship. While the initial coalition formation does not yet have a big impact on how parties to a negotiation see their counterparts, recurring personal meetings between them (and their team around them) are a necessary ingredient to develop a mutual understanding that goes beyond the generally good working relationship that exists between the two institutions. Therefore, analytically this is the main consequence of interaction intensity: While the relationship between the negotiators was described as good, it was not the trustful relationship developing through constant and repeated interaction.

Next to preventing a trustful working relationship between the two chief negotiators, the lack of strong coalitions with high interaction intensity also lets us expect these negotiations to not feature outsiders. Given the low social interaction, negotiations should be expected to take place in formal venues, rather than informally involving only a few privileged actors. Investigating the venue of negotiations will tell us more about whether these expectations hold.

5.5.3 The Negotiation Venue

Trilogue negotiations offer two dimensions along which the venue of negotiations can shift. Either, they can take place at different hierarchical levels, or they can shift from formal level negotiations to more informal levels. While both can go hand in hand, that does not necessarily have to be the case. What was the situation in these negotiations?

Firstly, it is very clear that negotiators did not use ‘technical trilogues’. All interviewees confirmed that “[h]ere we didn’t have technical trilogues” (R6), and while they did “[n]ot [happen] in this case, they are normal otherwise” (R7). The reason for this is simple: The file was very short and comparatively simple. The lack of complexity simply made technical trilogue meetings unnecessary (R1,2,4,5,6,7). Technical trilogues are the main

venue of hierarchical delegation during the negotiations. Their absence is a first hint that negotiation took place at high hierarchical levels only, and that is confirmed by interviewees: “Normally it’s back and forth between working and political levels, it’s a process that goes through different channels and levels. That wasn’t the case here” (R5). The second option of shift is informalization of the negotiations.

The data gathered in interviews shows that there has been one meeting, at least, that can be regarded and was described as “totally informal” (R7). This meeting took place between the presidency, the Council secretariat, the rapporteur and representatives of S&D and it happened in the mandate-finding phase, i.e. before inter-institutional negotiations had officially started. What allegedly happened in this meeting was “more like a coordination” (R1). Accordingly, the rapporteur was “explaining what his intentions are”, it was a “very open discussion” (R7). Hence, participants of this meeting consider it a mere exchange of information and getting to know each other and the respective other’s intentions.

This confronts us with the difficult question on the nature of these informal inter-institutional meetings. Theoretically, there is a range with two extremes on which such a meeting can be placed. One pole of this range is exclusive exchange of positions. This would entail each party communicating its official position to their counterparts and in return receiving theirs. The other extreme would be fully-fledged pre-negotiation, in that the negotiators meet in order to negotiate deals and factually take decisions, which they then have confirmed in formal trilogues, degrading the latter to mere theatre performances; i.e. actual decision-making would take place in the informal venue. According to most interviewees, the meeting described here served the purpose of getting familiar with each other and information exchange only. Several aspects support this interpretation. First, with both EPP and S&D present, two parliamentary groups that had opposing positions were at the table, making it difficult for them to negotiate based on a common position. Second, if we look at the outcome and the rapporteur’s stance toward it, it would be counter-factual to suppose that he negotiated an agreement with the presidency. In any case, should that have happened, this agreement did not hold up until the end of the negotiations. It is therefore highly unlikely that what happened in this meeting can be considered actual negotiation.

Notwithstanding this, the information exchange at least went beyond information that was publicly available. At least (actual) red lines and what can be achieved seem to have been an issue of discussion: “the rapporteur [said] yes, I will try to achieve this, but I cannot guarantee, and this is my positions, and so on” (R1) and “he was basically explaining what his intentions are” (R7). This kind of preparatory meetings are trilogue routine: “Time is a very precious resource. So, it would be very bad to call a trilogue and not having done the preparation, people usually get very upset when that happens” (R2).

In general, while the meeting went slightly beyond mere exchange of information, it is difficult to imagine that participants negotiated a compromise they took to

trilogue negotiations to have it formally accepted. Therefore, neither delegation to low hierarchical venues, nor an informalization of negotiations took place in the case of Ukraine ATM negotiations. It follows logically that the negotiation took place at highest hierarchical level in formal trilogues. Indeed, all interviewees confirm that in this case “it was all done in the trilogue” (R6, but also R1,2,3,4,5,7). Another hint to the fact that there were no pre-agreed compromises is that “at some point there was the risk that it would probably be stopped, and we would need one more trilogue” (R1). In this trilogue, the Maltese presidency was represented by the deputy-minister and the EP naturally by MEPs, also Commissioner Malmstroem was present (R1,3,5), so that we can rightfully speak of highest-level hierarchy negotiations.

The negotiation on Ukraine ATMs took place at highest hierarchical level and in the formal trilogue exclusively. Was this to be expected theoretically? While the institutional environment of trilogues offers different venues for negotiations, this case shows that there is no automatism of these being used. The first reason for this can directly be pinned down in the content of the file. The file was simply not of the (usual) complexity and did not need delegation to the technical level to agree on technical details not to be dealt with in political trilogues. It is therefore ‘the nature of the issue’ that was one reason for the lack of delegation.

Second, the interaction intensity of the negotiations would have us expect little delegation, as well. Neither did strong social interaction create the trustful environment enabling delegation, nor did we witness cross-institutional coalition-building, which would have increased the probability of informalization. This should have repercussions on the negotiation mode. High-level formal negotiations should, given our theoretical assumptions, lead to distributive bargaining rather than problem-solving approaches. Second, it should prevent the creation of outsiders and might in addition be harmful to the depth of technical provisions in the outcome, given that these did not get the necessary focus in technical level negotiations.

5.5.4 The Negotiation Mode

Trilogues as an institutional environment can have an impact on the negotiation mode. Their isolation from external pressure is designed, in many ways, to take the pressure of negotiators and enable more integrative, problem-solving negotiation. However, only if the negotiation process goes along a certain trajectory can we theoretically expect the chances for integrative negotiation styles to be high. What does the data tell us about the negotiations in this case?

It is a quote that neatly summarizes what all data hints these negotiations to have been like: “It was a bit like a bazar. An Arabic bazar” (R2). Indeed, from the very beginning of the negotiations everything looked like this would be a proper bargain (R1,2,3,4,6,7,8). First, in preparing the negotiation mandate, tactics of being able to secure as much of the own position as possible, with no regard for the sensitivities for the respective other (R2,5).

Second, and in contrast to many other trilogues, the knowledge about the exact positions within the other institutions was relatively scarce. While the Council side was roughly aware of a split in the EP, but not exactly about the dividing lines this split went along, many EP representatives also only had a rudimentary idea about the exact preferences of the Council and the delegations therein (R2,5,7). That is another fact to be attributed to the low level of social interaction during and in preparation of the negotiations.

Second, the preparation of the EP team was all but consensual. In the shadows meeting, which happens right before trilogues to agree on an approach for the following trilogues, the rapporteur clearly stuck to his own line: "The rapporteur tried to impose his own view on how to do everything, 'we need to be tough'. It was not a real dialogue" (R6). Already in this informal forum, which should align all members of the EP negotiation team behind their mandate, the atmosphere was hence were confrontational, the opposite of an integrative, consensus-seeking approach.

In the trilogue that followed, all interviewees agreed that "there was a real negotiation in the trilogues." (R1). And they confirm that these negotiations were a hard bargain. The market metaphor used above recurred in other interviews: "It was a bit like a market, when you go buy fish and want a good price" (R6). While the Council gave in to the EP in terms of the text amendments, chief negotiators overall were anything but accommodating, especially, again, the EP rapporteur: "He was trying to really push for his position the whole time" (R6).

In the course of the negotiations, when it became clear that 'his position' was no longer shared by a majority of the EP delegation and committee chair Lange called for the decisive break, again the atmosphere was confrontative within the EP delegation. The rapporteur was fiercely opposed to taking the offer on the table, as it would be too far a deviation from the EP mandate. Consequently, it was a vote that finally decided on the (new) EP position: "In the meeting during the trilogue, we pushed that through against the will of the rapporteur" (R5). Hence, until the very last act of these negotiations, the swing within the EP team, the relation was marked by fierce bargains rather than an atmosphere of accommodating everybody's preferences.

How does this negotiation mode fit in the theoretical expectations? The negotiation mode in this trilogue is not a surprising finding considering the hypotheses. The fact that there were no strong cross-institutional coalitions and low interaction intensity lets us expect a hard bargain in the negotiations, as participants have not built up the trust and encompassing problem-solving attitude necessary for negotiations to become integrative. Second, due to the lack of prior coordination, there was no pre-agreed range of compromise that the negotiators could have expected the other side to agree to, nor were the institutions aware of the respective red lines. If the coordinative social interaction had been of higher frequency, there would probably have been an understanding as to how far each negotiator would be able to go given the preference dynamics in the respective institution. Similarly, there have not been any pre-drafted compromise proposals that

could have stirred the negotiations. While the Council did accept all EP amendments on the articles, parliamentary representatives were aware of this being a strategic move – a further indicator of a bargaining mode.

However, there were other factors that contributed. As has already been mentioned, the general process was marked by the short and non-complex character of the file. Second, the fact that a main part of the negotiations focused on numbers was another reason “why there was a power game” (R6).

5.6 Conclusion

The negotiations process of the legislative file on autonomous trade measures for Ukraine shows very specific characteristics that had a direct impact on the outcome of the negotiations. The interaction intensity was comparatively low, especially in between the institutions, with only a single personal meeting between the negotiators. This low intensity prevented trustful relationships between the negotiators. As neither intra- nor inter-institutionally we could trace coalitions, the scarce interaction does follow our expectations. In a first step, the preference constellation led to a situation in which no stable coalitions developed. While during the process, at several points one could witness the building of ad hoc, or reactive, coalitions, there was no stable alliance between different parties that coordinated in order to pursue their preferences during the negotiations. Following from that, social interaction was little and stayed, relatively, superficial. While information was exchanged and first possible compromise directions seem to have been discussed, there were no real pre-negotiations in which deals were carved out or compromises agreed.

This leads us directly to the negotiation venue. Negotiations took place exclusively in formal venues and including senior representatives of all institutions. Negotiators kept everything close to themselves at a high hierarchical level. This fact, paired with the lack of any pre-agreed compromises or at least corridors of possible agreement lead to all parties following a clear distributive approach to these negotiations and a complete lack of integrative, accommodating behaviour.

Is this negotiation process reflected in the final legislation? When only considering the inclusion of initial positions and the satisfaction of the actors, the final legislation reflects these negotiation dynamics neatly. The extent to which initial positions are reflected is low, as is the overall satisfaction with the file, given that a mayor part of the EP was left fully unsatisfied. Both, the EP negotiation mandate and more importantly, the preferences of the chief negotiator of the EP are, to a considerable degree, not reflected in the regulation. Therefore, the process of negotiations indeed seems to have had the expected causal effect. The negotiation process to a considerable degree reflected the hypotheses, and it finally had an impact on the outcome: The process led to a situation in which negotiators accepted the exclusion, indeed the outvoting of an important participant to the negotiations. We need to account for the fact, however, that negotiations can also

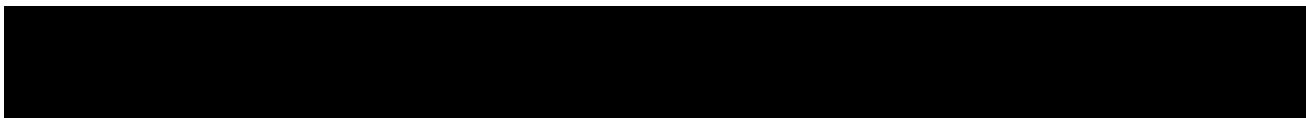
produce outsiders without the, theoretically assumed, development of strong coalitions. That shows us that different paths can lead to the same outcome in trilogue negotiations.

The legal quality leaves us puzzled concerning the theoretical expectations: The high legal solidity was not to be expected from the way the negotiation process developed. With no technical delegation and confrontative negotiations, we would have expected both aspects, the legal effect and the legal solidity to be low. A search for different explanatory factors is due, and it delivers: The nature of the file, short and not complex, contributed to this character of the outcome, by not posing technical difficulties in the first place. That is the exclusive impression of the respondents. It shows that the process is thus not the only relevant explanatory factor, which of course does not come as a surprise.

6

CHAPTER 6

Case 2: Posting of workers



The revision of the posting of workers directive from 1996 has been considered one of the most important files in the social and employment sector of the 2014-19 legislative turn. High hopes as well as strict opposition and fears accompanied the revision targeted by the Commission. Before delving into the negotiations on this file, the following will shortly sketch the historical development of posting within the EU single market and legislative action governing it which led to the revision proposed in 2016, as well as detail the substantive content of this revision.

6.1 The directive

Posted workers, albeit accounting for a very small percentage of the EU workforce, have triggered controversial debates around social justice, wage dumping and the overall consequences of single market-policies and globalization in general, felt differently in different (groups of) EU Member States. Posting has become “a typical and almost caricatural illustration of the East/West split in social matters” (Picard & Pochet, 2018), even though posting spreads across all Member States and sectors (Fromage & Kreilinger, 2017). In order to fully understand the negotiations around this file, a short sketch of the controversial history of posting, and the legislative developments therein, is necessary.

Posting of workers does not refer to mere labour migration, i.e. EU citizens moving from a Member State to the other to find employment. Rather, posted workers have “a genuine employment relationship with the employer in the country of origin/sending country [and are posted for] the temporary provision of a service within the territory of the receiving country” (Voss, 2016). One can hence speak of posting when a Swedish company sends their employees for a limited time to France to provide a specific service, such as building a bridge. In terms of labour legislation, these postings raise a plethora of questions: Which provisions count for the posted worker, those of the sending or the receiving country, who pays social security provisions and according to which standard, etc. Hence posting, while central to the philosophy of a single market, has always been a legislative challenge, not least because of the sectoral differences in experiencing posting.

One of the traditionally most affected sectors has been the construction sector. Ironically, “one highly prominent example of this was the reconstruction in the 1990s of a unified Berlin and the extensive works carried out to that end, drawing on the labour of many foreign workers under their posted worker status” (Picard & Pochet, 2018). It was at this time that – with a growth in actual posting and a prospect of further growth of the Union and increasing inequalities in the EU market – the first directive on posting of workers was negotiated and adopted in 1996.

Without going into legal detail, it suffices to say that the original directive was far from comprehensive in governing the posting of workers in a Union ultimately growing to 28 Member States. With the 2004 enlargement and thereafter, the number of posted workers escalated tremendously, with a 44% increase just from 2010 to 2014 (Voss, 2016). While the biggest share of workers moves westwards from the Central- and Eastern European

Member States, it is important to keep in mind that posted workers represent less than 1% of the total EU workforce. In the course of the last decade, many loopholes in the directive became apparent and were used by criminals, at the cost of both posted workers that are withheld their adequate remuneration, as well as domestic workers that must face unfair competition by cheaper workforce from abroad. Whereas most infringements of the directive probably remain undiscovered, some have triggered public debate, as the infamous case of Flamanville. When building a nuclear power plant in France, posted workers had to endure terrible working conditions, were not provided social security and had signed contracts in languages they did not understand. When after a fatal accident some of these workers managed to report said abuses, the systematic infringement of EU law became apparent.

Already under Barroso, the Commission saw the need for action. However, the general willingness to open the Directive for discussion was low. Even the left forces in Parliament, while seeing the most potential for correction, feared that re-opening the directive might lead to a worse situation than before (R7). Therefore, the Commission merely proposed an enforcement Directive in order to “reconcile the exercise of this freedom to provide cross-border services under Article 56 TFEU with appropriate protection of the rights of workers temporarily posted abroad for that purpose” (European Commission, 2016b). The enforcement Directive improved different aspects that should have helped enforcing the provisions of the 1996-directive. It set up clearer guidelines to identify genuine posting, supported information sharing between different authorities and Member States, increased the possibilities of control, inspection and complaint and introduced a first step towards enforcing subcontractor liabilities (Voss, 2016).

However, the enforcement directive could not solve the substantive problems of the original 96-directive that many especially in the left of the political spectrum had identified. Therefore, the Commission “announced in its Political guidelines and confirmed in its Work Program 2016 a targeted revision of the Posting of Workers Directive to address unfair practices and promote the principle that the same work at the same place should be remunerated in the same manner” (European Commission, 2016b, p. 2). On 8 March 2016 the Juncker Commission submitted a proposal on revising the posting of workers directive to the European Parliament and the Council (European Commission, 2016b).

The controversy around this file figured prominently for the first time when 11 national parliamentary chambers used the opportunity to issue a reasoned opinion, opposing the proposal and thereby reaching the threshold to submit a so-called “yellow card”. Under the Lisbon Treaty, Member States’ legislative chambers can submit a reasoned opinion that forces the Commission to react and reconsider its proposal if a certain threshold of chambers is reached, constituting a so-called yellow card. While originally intended solely for doubts concerning the subsidiarity principle, the few occasions in which yellow cards were issued often involved opposition to the content of the file, as was the case for the posting of workers directive. Chambers from Bulgaria, Croatia, the Czech Republic,

Denmark, Estonia, Hungary, Latvia, Lithuania, Poland and Romania submitted reasoned opinions (I. Cooper, 2015).

National Parliaments disapproved that the Commission had not sufficiently justified its action beyond stating that “an amendment to an existing Directive can only be achieved by adopting a new Directive” (European Commission, 2016b, p. 4). Flawless as this logic might be at first sight, it has been rightfully criticized by parliaments (Fromage & Kreilinger, 2017). Next to subsidiarity concerns, political opposition to parts of the proposal already figured in the reasoned opinion but will be depicted later in this chapter. Despite all objections, the Commission stuck with the text of its proposal. The yellow card has been an early confirmation of what was generally expected: fierce opposition from various Member States against the Commission proposal.

In the proposal published on 8 March 2016, the Commission set out to change different aspects of the original 96-Directive. A main objective was to make sure that companies would be prevented from using “posting as a means for unfair competition” (Voss, 2016, p.45), which had become possible because of the wage differences within the single market. Therefore, one of the most important changes suggested that the provision securing minimum rates of pay for posted workers was transformed into demanding the same standards of remuneration, effectively putting them on equal footing as domestic workers as concerns workforce costs (European Commission, 2016b, Art.1.2a). Thereby, wage and employee cost differences between posted and domestic workers were to be minimized. Further, these standards should become applicable in all sectors of employment instead of merely the construction sector, which used to be the case.

A second change concerned the timeframe of the directive’s application to a worker (and not, as often wrongly represented in the media and by politicians, the maximum length of a posting). It lays down that in case a posting exceeds 24 months, “the Member State to whose territory a worker is posted shall be deemed to be the country in which his or her work is habitually carried out (ibid. Art.1.1). This does not set a limit as to how long a posted worker can stay in the receiving country. It simply lays down the point in time the posted worker, legally speaking, becomes part of the domestic workforce. The Commission also made sure to target an apparent loophole of the existing directive, i.e. subcontracting: Companies are obliged to make sure their sub-contracted partners respect the directive and new rules on equal remuneration standards (ibid, Article 3.1a). A further important issue concerns the general applicability of collective agreements negotiated in one country to workers posted to the respective country (ibid, Art. 3.1). While the Commission mainly envisaged change in these just mentioned aspects, summarized in table 10, some other issues figured prominently later, brought in by the Council and Parliament in the course of the negotiations. We will now first turn to the mandating process in the Council.

Table 10: Case 2 - COM Proposal

Issue	COM Proposal
Collective agreements	Allowing for the applicability of regional and sectoral agreements universally
Subcontracting	Nothing
Long-term posting	24 months

6.2 The council general approach

Given the file was very controversial from the beginning, the negotiations leading to a General Approach in the Council took considerable time. Different national positions paired with high public salience of the issue pushed the debate out of diplomats' backrooms and into the sphere of high politics. Accordingly, it took the ministers in the Employment, Social Policy, Health and Consumer Affairs configuration (EPSCO) one and a half years to finally agree on a General Approach by 23 October 2017 (Council of the European Union, 2017j, p. 17). When the Commission proposal was published, the Netherlands held the Council presidency and chaired the first five discussions in the Council (Council of the European Union, 2016). The progress report issued at the end of the NL-presidency identified six main controversial issues.

6.2.1 Much to Discuss: The Divisive Issues

The legal basis of the proposal presented the first source of controversy. The Commission did not consider changing the legal basis of the directive, which is within the chapter on the Rights of Establishment of Free Movement of Persons, Services and Capital. Some Member States considered "it was desirable to add a legal basis under the Social Policy Chapter" if it was to include rules on working conditions and protection of workers (Council of the European Union, 2016, p.5). Second, the rules around long-term posting were considered to partly contradict with other regulations. Third, subcontracting has been identified as a possible controversial issue both in the Council as well as with the EP. Fourth, the question of who was able to define remuneration was crucial, as there is no pan-European definition applicable and many Member States were keen on keeping it this way. In general, questions were raised as to whether "the concept of remuneration was sufficiently clear" (ibid, p.6). Fifth, collective agreements were another issue of discussion, mainly as to whether fundamental rights are guaranteed under the Commission proposal and how information on existing collective agreements can be made available. Obtaining up-to-date information was a concern as well when it came to sub-contracting. Lastly, the provisions on temporary workers again raised doubts as to the compatibility with other EU law. Overall, the presidency concluded that more in-depth discussions were needed on all issues and that agreement on a General Approach was not close (ibid, p.9).

After individual consultations with different delegations, the Slovak presidency presented alternative options for what they considered the five main issues under

discussions, as apparently the legal basis did not cause further discussions and was accepted as proposed by the Commission (Council of the European Union, 2016). As to collective agreements, the presidency proposed sticking to the Commission proposal and did not see high potential of conflict in this question (ibid, p.7). The question of subcontracting had been narrowed down to two alternative proposals that both found support by a group of Member States. However, the question was directly linked to “the outcome of other discussions on the other two open issues, and in particular the remuneration issue” (ibid, p.8). Beyond the substantial connection between the two issues, first possibilities of packaging and then agreeing on multiple controversial questions are implied here. In contrast to these unresolved questions, the last meeting under the Slovaks saw agreement, in principle, on temporary agency workers. Accordingly, in its conclusions, the presidency identifies “a need for further technical work and discussions on the issues of long-term posting, remuneration and subcontracting” (ibid, p.9), but at the same time sees its work as a good basis for further discussions.

The next presidency to take over was Malta. According to the interviews they came close to a General Approach, had it not been for the Commission to publish a proposal inappropriately timed: The Mobility Package (R1,3,4,6,7,9). If unaware of the developments outside the Council, it could catch the observer by surprise that the Maltese progress report towards the end of their presidency opens with the remark that “the discussions centred around the main topics already identified by previous presidencies, as well as on transport and on the possibility of deferred application of the Directive” (Council of the European Union, 2017b, p. 3). This was because on 31 May 2017, the Commission published legislative proposals within the Mobility Package, which was to have lasting impact on the negotiations of the posting directive.

More precisely, this series of legislative proposals was to regulate road transport, including amongst other aspects the protection of workers and fair working conditions. In terms of posting, the road transport sector is of course peculiar, as frequent border-crossing is an integral part of it. Some Member States, mostly from Central and Eastern Europe but also Portugal and Spain, argued that “given the specificities of the sector and the high mobility of these workers, international road transport should be explicitly excluded from the scope of the Posting Directive and dealt with through sector-specific legislation” (ibid, p.8). It was in light of the publication of the Commission proposals on the road transport sector that these demands came to the fore and developed into one of the main points of contention in the negotiations on posting. It was also the main reason preventing a General Approach during the Maltese presidency.

However, there were other issues yet unsolved. On remuneration, slight progress had been made, but controversy remained. The presidency proposed to keep the Commission proposal but add that remuneration is defined according to national law and practice. In addition, they proposed recitals to clarify “the relation between remuneration and the current concept of minimum rates of pay [...] and simplifying the recital referring

to Member State competence in setting rules on remuneration" (ibid, p.3). On long-term posting, further compromises could have been reached and a solution seemed closer, even though some legal and definitional issues remained. However, also here external events had a complicating impact. Macron decided to make posted workers and the social dumping they allegedly cause one of his major issues in the campaign against Marine Le Pen. As part of his campaign, he stated that posting should not last longer than 12 months, referring to the question of long-term posting. Once out, the French could not deviate from these 12 months and hence added a new dimension to the negotiations.

The controversy around collective agreements was partly solved with minor objections. On subcontracting, the Maltese came close to a solution by simply proposing the deletion of the provision on subcontracting, leaving the old rules in place (ibid). Lastly, another issue added was the application of the directive, with the Council being split between two years as proposed amongst others by France, three years as in the Commission proposal, or five years as proposed by some Eastern Member States (Sansom, 2017). Application here refers to the date from which the legal measures adopted by the Member States in order to implement the new directive should enter into force. Despite the existing and partly new controversies, the conclusion of the Maltese presidency still considered agreement within reach, which turned out to be a realistic assumption (ibid, p.24).

6.2.2 The General Approach

Estonia took over as presidency from Malta in the second half of 2017 and indeed managed to reach a Council General Approach. In order to do so, several of the pressing issues had to be resolved. When submitting its compromise proposal, in form of a draft General Approach, to the EPSCO "with a view to reaching agreement" (Council of the European Union, 2017i, p. 4), the presidency identified several open questions of discussion. First, Macron's 12 months was one of the major issues to be dealt with in the final EPSCO session. Second, on the period between coming into force of the Directive and application in the Member States, there were still "differing views on how long this period should be, with proposals ranging from 2 to 5 years" (ibid, p.3). Third, the question if to exclude road transport from the directive was still open, as many Member States remained unwilling to accept its inclusion. It was thus with a bag full of controversies that the EPSCO entered what the presidency hoped would be the last session to finding a General Approach on posting.

In a session that allegedly lasted full 11 hours (Barbière, 2017), ministers were indeed able to find a compromise and hence present a General Approach to start negotiations with the European Parliament. Macron won on the issue of long-time posting. According to the General Approach, in cases where "the effective duration of a posting exceeds 12 months, Member States shall ensure to [...] guarantee workers posted in their territory [...] all the applicable terms and conditions of employment which are laid down, in the Member State where the work is carried out" (Council of the European Union, 2017j, p. 5).

While in exceptional cases, the time limit can be extended to 18 months, France indeed managed to get the 12 months deadline into the Council's position. However, concessions were necessary in exchange. First, Spain, Portugal and some Eastern members managed to exclude the transport sector. With a specific clause, the General Approach envisages the new posting directive to only "apply to the road transport sector from the date of entry into force of a legislative act amending Directive 2006/22/EC" (ibid, p.16). This clause refers to what is called *lex specialis* in the institutions, which is to regulate how posting provisions can be applied to road transport workers. Second, the date of application of the directive in the Member States was set to four years, which was a compromise by those who, such as France and Germany, favored two or three years respectively. The Estonian presidency put a big emphasis on the preferences of the Eastern members, as the whole directive was perceived as against their interest (R8, 10). Due to these compromises struck, the Council was able to agree on a General Approach on 24 October 2017. In order to start negotiations, only the EP needed to agree on its negotiation mandate. Table 11 summarizes the now extended list of contentious issues and the Council positions thereon.

Table 11: Case 2 - Council Position

Issue	Council Position
Dual legal basis	Art. 53(1) & 62 TFEU
Collective agreements	Nothing
Subcontracting	Nothing
Long-term posting	12+6 months
Allowances	Nothing
Road transport	Exclusion
Transportation and application	Application after four years

6.3 Negotiations in the European parliament

Negotiations in Parliament unsurprisingly focused on similar controversies. A first extraordinary feature of the EP handling of this file can only be explained considering its political salience. With a file of this degree of political importance, we would expect neither of the big parties to pass the rapporteurship, and indeed neither of them did. It was a strategic decision taken at the highest political level to include both EPP and S&D. In a meeting assembling the Commission President, the chairs of both parties as well as the EP President, the decision was taken to establish a so-called *co-rapporteurship* (Respondents, 1,2,4,7,12): Agnes Jongerius, Dutch S&D member and Elisabeth Morin-Chartier, French and EPP, shared the responsibility of bringing the negotiations of this file to a good end, starting with establishing a strong negotiation mandate for the EP. As can be expected, not everybody was happy with this choice. First, many from the two big parties themselves, including the rapporteurs, were skeptical concerning the co-rapporteurship. Second, especially from the point of view of the smaller parties, the co-

rapporteurship was seen highly critical as it institutionalizes a grand coalition that could simply outvote all other parties.

Yet, most of the initial opposition ebbed away rather quickly, for different reasons. First, the choice of persons. Agnes Jongerius has an established background and holds considerable expertise in legislation related to protection of workers, as former chair of a Dutch trade union federation. Elisabeth Morin-Chartier is a very experienced member of the EPP and social-conservative in her political views, “a kind of grand old lady” (R12), and from France, a very strong player in the whole posting discussion with utmost interest in the revision. This was a choice both big parties could live with and that was necessary for both to agree to the co-rapporteurship (R 1,2,7,12). Second, both rapporteurs were keen on not simply using the own party’s majority but keep everybody on board. On the one hand, to secure a strong mandate; On the other, to prevent single parties to claim that the big parties “never listen” (R12). This strategy was attempted especially in the beginning by the ENF shadow, but due to the efforts of the co-rapporteurs quickly rendered useless. Most of the party groups felt very well-integrated from an early stage of the negotiations.

The co-rapporteurs applied a certain division of labor, with Jongerius trying to keep the Greens and the Left in the loop, while Morin-Chartier worked on the more conservative forces as well as on ALDE (with, as we shall see, limited success). Therefore, a construction that potentially could have raised suspicion was relatively quickly accepted by most actors in Parliament and was to play a decisive role in the ongoing negotiations.

The shadow rapporteurs for the different parties were Terry Reintke for the Greens, Anthea McIntyre for the ECR, Rina Ronja Kari for GUE, Martina Dlabajová for ALDE, Laura Agea for the EFDD and Martin Dominique for the ENF. This rapporteur structure holds two specific characteristics. Firstly, with Martina Dlabajová only one of the rapporteurs was from an Eastern Member State, a group with vital interest in the file. Indeed, the enforcement directive of 2014 was dealt with by a Polish rapporteur on behalf of the EPP, who allegedly also had high interest in dealing with the posting file. However, during the negotiations on the enforcement directive, the shadows “twisted the mandate in her mouth” (R7), i.e. a majority had turned against the rapporteur and effectively changed the mandate, which is one of the reasons the EPP chose Morin-Chartier. Second, except for ENF rapporteur Dominique, who played a marginal role only, all (shadow-) rapporteurs were women.

The co-rapporteurship changed negotiation dynamics from the beginning: “Normally, as rapporteur you draft a report, bring it to the committee, do amendments and then negotiations start” (R2). In this case, the teams of the co-rapporteurs had to prepare negotiations amongst themselves for a draft report, which took up to ten meetings between MEPs, staff and advisors (R2,12). It was hence only by December 2016, nine months after the initial proposal by the Commission, that the co-rapporteurs presented the draft report to the EMPL committee.

6.3.1 The Draft Report

What, then, were the main topics for the EP in this file? An issue that was more important in parliament than it was in the Council was the Directive's *legal basis*. All progressive forces, S&D, GUE and Greens, wanted to establish a dual legal basis, i.e. adding a social legal base to the existing free movement legal basis. The reason for this was that the rather employer-friendly jurisdiction of the Court in relation to posting was solely blamed on the legal basis of the old directive (R1,2,3,8,9). The conservative groups in contrast mostly opposed adding a second legal basis, as this would have "created confusion in the European Court" (R4). They were backed in this judgement by the EP judicial service, which also advised against a dual legal basis due to legal uncertainty in case of judicial conflicts. Second, the question of *collective agreements* was of importance to the negotiating actors within the EP. Again, the groups left of the political spectrum in general preferred collective agreements to fully apply to all posted workers, while parts of the conservative/liberal camp had doubts.

Also, *remuneration* was intensively discussed in the EP. It was of specific interest for the left forces to change the stipulations on minimum rates of pay towards remuneration. Why so? So far, one of the only strong commitments for employers about posted workers was that they had to apply minimum rates of pay. By exchanging "mere" minimum rates of pay with full remuneration, this would change towards real equality for workers; as regards allowances, actual salary, board and lodging, etc. The exact scope, however, depends on the definition of remuneration, which is the critical point. The vagueness of the concept has been criticized by some, including that remuneration is not really "defined in any Member State, only in France" (R4).

Subcontracting was of special importance as it was one of the most concrete possibilities to stop abuse. By introducing general liability of contractors, one of the biggest legal loopholes in the old directive was to be filled. A last issue of importance was *extending the scope of hardcore rights* in Article 3.1 of the new directive. If this was to be achieved, the *time frame of posting* was considered to be of less importance, as workers would be on equal footing from day one (R2,3,5,7,8,9,10). Parallel to the Council, the *transport issue* figured only later when it became clear that some Member States pushed for an exclusion and the same fight was picked up in the EP.

What were the main dividing lines in the EP? Views on this differ, but there is a clear implication that the fault line ran between East and West, just as it did in the Council (R2,3,4,7,9,12,13). However, some sensed another division to run along employer/employee lines: "also the Eastern European Trade Unions clearly stated they were on the side of employees across the EU [...] same rights for same work at the same place" (R1). Still, even if parts of the Eastern European civil society were concerned with worker protection, in general there was a tendency of "Central-Eastern and Southeast Europeans siding with market-liberal viewpoints and Western European taking the employee's stance" (R1). Thus,

EP-internal negotiations did not fall short of the Council in complexity and controversy before a first draft report was presented to Committee. It entailed 23 amendments.

In the course of the next months, other political groups had the opportunity to table amendments. The frequency of their making use of this opportunity neatly reflects the controversy around this file: More than 500 amendments were table in committee and hence to be negotiated between the (shadow-) rapporteurs. Mind that the initial Commission proposal consisted of merely 5 pages, this equals an average of around 100 amendments per page. Accordingly, it took the rapporteurs nearly a year to finally table the report for vote in committee on 19 October 2017 (European Parliament, 2017c).

6.3.2 The Final Report

The report tabled for vote on a mandate vitally shows how controversial the file has been discussed, both in its substance as well as in the final voting in the committee responsible and those giving an opinion. The report now featured 38 amendments, with opinions of both the IMCO and JURI committees themselves featuring 39 and 29 amendments respectively. For the sake of this study, the latter two will only be of marginal importance. In addition, the final report enclosed minority opinions both by the rapporteur of ALDE, Djabalová, as well as ENF and an additional opinion of JURI on the question of the legal basis. This has been considered necessary as the EP report's first substantial amendment proposes to add Article 153 TFEU, the social chapter, and thereby creates a *dual legal basis* (European Parliament, 2017c, p. 5). After a row of amendments on the recitals of the directive, the substantive articles are overall amended favorably for employees. The *core rights* posted workers are granted are extended, including, amongst others, "the conditions of workers accommodations; allowance rates to cover travel, board and lodging" (ibid, p.18). General liability is added and the conditions of *liability in subcontracting* in general enforced to overcome fraud. The applicability of *collective agreements* is widened. Provision on *monitoring, control and enforcement* of the directive are strengthened (ibid, p.26) and possibilities of sanctions and criminal prosecution strengthened. In line with these amendments, the explanatory statement of the rapporteurs is very pro-employee in nature, stressing next to the importance of cross-border provision of services the "sound social protection of posted workers" (ibid, p.28).

This character of the report led the ALDE rapporteur Djabalová to write a minority opinion, stating she voted against the report as she does not see "the balance between the free movement of services and the protection of workers [...] achieved" (ibid, p.31). She complains that some provisions are simply not practicable and criticizes the dual legal basis as creating legal uncertainty. The ENF in its opinion furthermore stresses an argument which was very popular among critics of the new Directive, namely that it is premature given it came before the enforcement directive was applied and could hence be evaluated (ibid, p.32).

Controversy also figured prominently in the voting results to the report. While the rapporteurs worked hard to get all shadows behind their line, the votes show that not only across but also within party groups there was a clear dividing line in the positions on posting. Of 53 votes in the EMPL committee in total, 32 MEPs voted in favor and 8 against the report, with 13 abstentions. Still, this result was generally considered a success for the rapporteurs.

In order to understand the positive vote on a politically relatively far left report, different factors need be considered. First, “EMPL is a progressive committee and [...] one can win with left majorities” (R7). In contrast to other committees, the composition of EMPL allows for relative employee-friendly policy in general. Second, indeed the efforts by the rapporteurs were partly successful, for example through achieving that EFDD abstained, instead of voting against the report (European Parliament, 2017c, p. 87). Third, within EPP there were strong concerns on this file, but with Morin-Chartier and the German longest serving MEP Elmar Brok the group has a strong representation of employees’ interests, which is why relatively few voted against, also due to a very active role of trade unions across Europe. All these reasons added to EMPL entering the negotiations with a very employee-friendly mandate. Critics of the mandate would still have been able to prevent it by challenging it in plenary. Reaching a threshold of MEPs, the mandate could have been opened again and discussed in plenary. Two reasons seem to have prevented this: (1) the chances of success would have been relatively low and (2) apparently the rapporteurs and some of the critics had an agreement to not bring the mandate to plenary, connected to promises about another file within the Mobility Package (R1,4,7). The EP mandate did not foresee an exclusion of the road transport sector, which was asked for by parts of the EP. On 19 October 2017 the mandate was agreed in committee and on 23 October, without debate, in plenary. By then, both institutions were ready to enter inter-institutional negotiations. Table 12 summarizes the contentious issues and the EP’s positions thereon.

Table 12: Case 2 - EP Position

Issue	EP Position
Dual legal basis	Art. 53(1) & 62 and Art. 153(1&2) TFEU
Collective agreements	Allowing for the applicability of regional and sectoral agreements universally
Subcontracting	Ensuring that subcontracting only possible to subcontractors respecting the directive
Long-term posting	24 months
Allowances	Allowances are to be seen separately from remuneration and not deductible from salaries
Road transport	Inclusion
Transportation and application	Application after two years

6.4 Inter-institutional negotiations

The inter-institutional negotiations officially began with the first trilogue on 14 November 2017, under the Estonian Council presidency. Negotiations spread over eight trilogues in total, concluding under the Bulgarian presidency on 19 March 2018. A specificity of the negotiations on posting was a very early decision within the EMPL committee to fully renounce technical trilogues. This decision was based on the impression that on this file, every aspect was political and should hence be discussed at highest political level only (R1,2,3,4,7,8,10,12,13). This decision, however, did not go unchallenged, both within the EP as in the other institutions: “We tried several times still under the Estonian presidency last year to do at least the preparatory steps which is normal for any negotiation round, you have to prepare it. But that was refused, they said there is no discussion anywhere else expect in that political forum of trilogues” (R10, but also 4,6,8). Obviously, while it prevented negotiations at this technical yet institutionalized level, this does not mean that there was no interaction outside trilogues: “Of course, especially towards the end you had informal meetings with [chief negotiators] where we discussed how we can get the file negotiated. Positions were exchanged concerning 12+6 months and transport and that these were fixed. We said ok, but then we want to get something here and there. That happened, but not normal technical meetings” (R2). Still, this early decision had a decisive impact on how the negotiations developed.

As in all trilogue negotiations, also in this case negotiators relied on four-column documents to structure the negotiations. A word on how they were utilized in this file: For most of the single trilogue meetings, there were new documents before and after each meeting, and sometimes even in between two trilogues there were two new versions of the document. To give an example, there was one document before trilogue seven, one after trilogue seven, then a new one before trilogue eight, entailing changes that happened in between trilogues seven and eight. This allows us to not only trace change reached in each trilogue meeting, but also what happens after one trilogue and before the next. All four column documents were obtained for the analysis.

6.4.1 First Trilogues: Long Way Ahead

The first trilogue effectively did not see any negotiations. Its rather an official start of the negotiations, with all parties presenting their positions and normally disapproving of the other parties' positions (R3,13). The nature of the first trilogue seems to come down to “a theater game: The EP asks for the moon, because it represents the citizens. The Council asks for nothing, because it represents governments” (R11). It does therefore not come as a surprise that the fourth column of the FCDs entered the second trilogue as blank as it was prior to the first. Only after the second trilogue, the first fields of the in total 107 lines of the fourth column began to fill. Afterwards, there was steady process over the trilogues to come. When the end of the year approached, the Estonian presidency tried to convince the EP it would be beneficial for them to agree a deal before the start of the Bulgarian

presidency, as Bulgaria might have more of an own interest than did the Estonians (R 1,2,7,12). However, from the start of the trilogue negotiations hardly anybody deemed it realistic that negotiations would be concluded within 2017 (R5,8,10).

After four trilogues having taken place in 2017, the fifth trilogue on 22 January 2018 was the first to be led by the Bulgarian presidency. Just as was the case with Estonia, Bulgaria had also been one of the countries from which the Parliament had issued a reasoned opinion and hence contributed to the yellow card the initial Commission proposal received (Fromage & Kreilinger, 2017, p. 126). It was in part due to that yellow card that participants to the negotiations had mixed feelings as to what to expect from the Bulgarian presidency. However, potential worries were ill-founded: "The Bulgarians, that really positively surprised me, they were very constructive. I didn't expect that in the beginning, also because it was not clear which position they would take due to the yellow card, but they tried to advance the file" (R2). Similar assessments from all involved institutions support this impression (R1,4,6,8,9,11,12).

Nevertheless, negotiations came to a halt in the beginning of 2018. Views on the reasons for that halt differ according to the institution they come from, with interviewees generally blaming the opposite institution for being the root cause. In general, assessments of the progress along the trilogue negotiations differed. Some participants considered it to be a constant up and down, with good and bad meetings alternating. "You have a good meeting where they agree, then you have a very crappy meeting where they don't agree to anything and the next meeting you talk about that again, you explain a bit, the Commission brings some information, so at the second meeting you talk about it again and they agree, then you have a good meeting" (R8). In order to reach agreements on as many issues as possible, two different strategies seem to have been applied. In general, an easy start was to soften the mood in trilogues in order to prepare everybody for the tough bits: "The easy issues, where we could easily find a solution, were dealt with at the beginning, the more difficult ones towards the end" (R1). In addition, "We saw to it that some of the more difficult issues were bundled up with easier ones" (R2).

In contrast to constant up and down, other participants experienced a clear bottom within the negotiation process: "It was definitely locked at some point. There was a stage where it was in my opinion completely locked, particularly in the beginning of the Bulgarian presidency, up until it suddenly started moving very fast." (R3) The strategies of the negotiators allow us to draw conclusions on the general negotiation dynamics. The negotiations on posting were far from reaching a consensual result. "It was really that giving and taking all the time, so there were very few issues where we could have both sides agree" (R8). Already when negotiating the mandates, the institutions had to very carefully build a compromise that everybody could just agree to, which meant that "everything was so important, you couldn't have this kind of leeway" (R8) which often allows for satisfying compromises to be struck in trilogues. On the contrary, "You were so aware constantly that you were giving and taking from others" (R8).

Apparently, negotiators had only minimal leeway for concession making, were they not to risk losing the tight majorities within their institutions. In order to defend the own position, well-known negotiation strategies were employed: “It is always a bit difficult to explain that [...]. If we draft legislative text, [...] you need to aim higher in order to get what you want. We know that when we enter with 100%, we won’t go out with 100%, but with 45% or 30%. But in order to get this 30%, we might have to enter with 150%” (R2). It is a common strategy that was applied in this negotiation as well: The institutions “went into some sessions with three draft texts. If the first proposal is refused, we coincidentally had a second with us and as fallback a third that we maybe did not need anymore because they bought the second one” (R2). In this sense, the negotiations were very much give and take: “That’s also a part of it: You get this, but then we get this” (R12). The high public salience of the file added another difficult dimension to the negotiations, as “due to [that], there were too many cooks involved in the negotiations” (R5)

Knowing the nature and technicality of EU legislative documents, it is easy to imagine that these negotiations were far from easy and exciting. Indeed, “It was tough. Long, long trilogues, in terms of duration and way of thinking, deciding, it was long” (R4). It is not uncommon for trilogues to take up whole working days or more, as was the case in this file, as well. “But that’s how it is: Hours over hours are extremely boring and annoying. And then, when it really matters, you really have to sit with a pen in your hand and know what is important” (R7). This points to a specific aspect of trilogue negotiations, i.e. the way negotiations go along in practice. According to interviewees, “During the negotiations itself its pre-historic” (R3), in that no modern technology is used. Often, no screens or technical devices are used, and pieces of paper are circulated and changed along the way “just like this. Paper, pen.” (R7). It was within this general setup that at times tough negotiations were held: “[The EP] for example wanted the dual legal basis. Not viable. Ok, can they then get a recital, can they get an article. How strong was the fight for a recital, you start thinking what the hell is this about?” (R12). It is telling for the importance of negotiation dynamics that this specific issue was resolved by a mistake: “In case of the dual legal basis, the Commission spokesperson made a mistake in one speech act, offering an article where there should only have been a declaration. This, of course, cannot be turned back then” (R5).

Mistakes are the exception in this environment of very experienced negotiators. The question arises how negotiators managed to break the impasse and advance the negotiations. In the end, at one point “It went very fast all of a sudden” (R3). This can certainly be attributed to the contacts between the negotiators outside of trilogues referred to above. In order to understand the final compromise struck, trilogues seven and eight, held on 28 February and 19 March respectively, are key.

6.4.2 Acceleration towards the End

After weeks of little movement on the side of the institutions, a common understanding was reached in trilogue seven. This also clearly shows in the four column documents,

as between these two trilogues substantial change can be witnessed, especially on the most contentious issues: The legal base, the duration of posting, the timeframe for application of the directive and the road transport issue (FCD10). Several factors enabled this compromise to be struck. “Towards the end there were [text pre-agreed between the chief negotiators]. When it really gets to finalizing, in order to make progress, you start screening it before, would that be something for you, or here we will make this proposal later in the trilogue sessions, you can already have a look at it and form an opinion, just to save some time” (R2). While these talks remain highly informal and normally hidden to all other participants to the negotiation, they are by no means a well-kept secret: “I think a lot took place behind closed doors, in the sense that the rapporteurs met with the respective presidency and the Commission, that’s quite clear that there were agreements. You also noticed that in talks and in the dynamics, where it got stuck and where it went smoothly” (R1). It was because of these pre-negotiations that in trilogue seven a common understanding was reached, which however was endangered right afterwards through what has been referred to as “an incident, if I may say so, on the media involvement” (R10). What had happened was that “there was an agreement in Dutch between Thyssen [Commissioner responsible for the negotiations] and Jongerius, and she went out with a tweet. That is highly problematic. If one side goes to the press after a trilogue while the other side has no mandate yet, that is highly dangerous” (R9). This public intervention indeed caused quite some upheaval, as the presidency did not have a chance to ‘sell’ the agreement to the national delegations before, which caused considerable confusion. “The EP media service had to intervene, tidy up, calm everything down and there was quite some disconcertment.” (R9).

Still, the common understanding worked, and it was for the last trilogue to decide on the detailed provisions and, importantly, the most difficult issue left to the very end: road transport. However, according to some “the last trilogue was 100% choreographed. From the presidency, the offices of Morin-Chartier and Jongerius and Commissioner Thyssen. There was a pre-agreed choreography how the final agreement must look like. With one open question, and that was [road transport]. We entered a theatre performance, where more or less all elements were pre-agreed, in a very small circle of about six actors” (R7, but also 2, 4). This view indeed is again supported looking at the four column documents. And indeed, the document changed considerably, with every outstanding issue now being furnished with a compromise proposal. Accordingly, many shared the impression that “a lot has indeed been done by the rapporteurs and the presidencies already” (R1), even though “if you didn’t know that, it looked like a real trilogue, the usual give and take” (R7).

Apparently, these pre-negotiations worked. Trilogue eight indeed brought the final compromise afterwards confirmed in all institutions. The dual legal basis was laid to rest in exchange for an addition to Article 1 of the directive that it “Shall ensure the protection of posted workers [...] by laying down mandatory provisions regarding working conditions and the protection of workers’ health and safety that must be respected” (European

Parliament & Council of the European Union, 2018a, p. 20). A provision highly symbolic to all institutions and especially the EP, while the actual legal consequence of this Article is disputed. Full applicability of collective agreements was granted to the EP (ibid, p.22). The duration was changed to 12 months in general with the possibility of further six months in exceptional circumstances (ibid, p.23). Sub-contracting liabilities were strengthened. Road transport has been excluded from the revised directive and shall fall under the old directive until “the date of application of a legislative act amending Directive 2006/22/EC as regards [...] posting drivers in the road transport sector” (p.24), a so-called *lex specialis* that is to regulate posting in road transport and is highly controversial. The EP, to which this was the most hurtful concession, in return managed the inclusion of a review clause, making sure the Commission reviews, after two years, the directive with special focus on whether subcontracting liabilities work as well as the situation of road transport workers (ibid, p.24).

Afterwards, all actors involved were keen to get the agreement through the institutions as soon as possible and ideally before the mobility package unfolds its controversial potential. This went as far as to skipping, on the side of the EP, the two months period normally used by lawyer linguists to work on the final compromise and ensure legal consistency and translation. Participants saw the risk that with the vote on a mandate for the mobility package in TRAN “emotions would come to the boil and the posting directive held hostage” (R2). So, the negotiated compromise was brought to plenary immediately, with a short corrigendum in the sitting afterwards, after lawyers had finished working on the file. Despite some displeasure, this trick helped adopting the directive, as an involvement with the mobility package “could have really backfired” (R2). The revision of directive 96/71/EC was published in the official journal of the European Union on 9 July 2018.

6.5 Discussion

In the following, the outcome of the negotiation on posting will be classified concerning its comprehensiveness. Afterwards, the negotiations will be analyzed along its interaction intensity, negotiation venue and mode.

6.5.1 The Outcome

The first step in the analysis of the trilogue negotiations on posting will be the evaluation of the outcome. A couple of issues stood out in the negotiations as the most important. Even though the revision entailed more issues, concentration on the important few is not only appropriate, but valuable for judging the comprehensiveness of the outcome. Focusing will help establishing a concise judgement. The issues are in the following not ranked by importance but following the structure of the file.

The first issue of importance has been the *legal base*. The Commission proposed to keep the directive based on Articles 53(1) and 62 TFEU and thereby in the chapter of free

provision of services, and so did the Council. The EP, however, wanted to add Article 153, hence the social chapter, as a legal basis. The outcome is a political compromise without actual legal repercussions: The legal basis stayed untouched, but a provision was added to Article 1 stating that the directive “shall ensure protection of posted workers [...] by laying down mandatory provisions regarding working conditions and the protection of workers’ health and safety that must be respected”. While symbolically valuable for the EP, the legal consequence of this addition is minimal, as the court will still always have to base potential judgements on the chapter of free provisions of services (R4,7,8).

The second contentious issue was the possibility of inclusion, or not, of regional and sectoral *collective agreements*. The Commission foresaw a provision on the general applicability of regional and sectoral collective agreements in addition to the already binding universally applicable agreements across all sectors and geographic areas beyond the construction sector (which was already mentioned in the old directive). The EP pushed for the same, while the Council did not want any changes to the provisions on collective agreements. The EP secured new Article 1(8) laying down the applicability of regional and sectoral collective agreements if the Member State in question wishes so for all sectors; one of its priorities.

On *subcontracting*, the third crucial issue, the EP asked for a clause allowing subcontracting only to those undertakings that apply to the remuneration provisions as laid down in the directive. With the opposition of the Commission and the Council, this provision did not make it into the final legislative act. However, the review clause (see below) asks for a specific focus on the issue of subcontracting, next to transport.

An issue that became very salient during the negotiations of the mandates, mainly pushed by Emanuel Macron, was the question of *long-term posting*. Again, this is not about limiting the time a posted worker can spend in the receiving country (as it has often been depicted in public), but about the time from which the posted worker, in terms of labor rights, counts as an ordinary domestic worker. The Commission envisaged this time to be 24 months. The Parliament in its report followed the Commission and even introduced a provision that exceptional circumstances might allow for prolonging the posting under the provisions of the directive without a time limit. The Council opted for 12 months with the possibility of extensions to 18 months. It was this provision, generally referred to as 12+6, that entered the final legislation in Art. 1.1a.

As concerns *allowances*, the EP wanted the directive to be specific on those not being part of remuneration in general and not being deductible from the workers’ salaries. While neither the Commission nor the Council had foreseen a provision on allowances, the EP gained it in the negotiations.

The inclusion, or not, of *road transport* workers has become a decisive issue and the one most difficult to solve. The Commission had not envisaged any exemption of road transport workers, and neither had the EP, most of which’s members felt quite strongly about this creating ‘second class workers’ in the road transport sector. The Council wanted

road transport workers excluded until the adoption of a so-called *lex specialis* that would regulate road transfer provisions, due to the complexity connected to workers often crossing several borders daily. The Council did not let go and accomplished the exception, not however without admitting the EP a review clause. This clause states that after five years, not the initial eight years the Council wanted, the Commission is to review the impact of the directive with specific attention to the situation of road transport workers.

Lastly, the institutions had different views on the *timeframe of application* of the measures implementing the directive in the Member States. The Commission as well as the EP wanted the directive to take full effect two years after its entry into force (twenty days after publication), while the Council opted for four years. While also a contentious issue, the Council gave in, which means the directive is to be fully adopted and running in all Member States by 2020. Table 13 summarizes the outcome in light of the single institutional positions.

Table 13: Case 2 - Summary of Positions and Outcome

Issue	COM Proposal	EP Position	Council Position	Outcome
Dual legal basis	Art. 53(1) & 62 TFEU	Art. 53(1) & 62 and Art. 153(1&2) TFEU	Art. 53(1) & 62 TFEU	Art. 53(1) & 62 and Art. 1.1a
Collective agreements	Allowing for the applicability of regional and sectoral agreements universally	Allowing for the applicability of regional and sectoral agreements universally	Nothing	Art. 1(8), allowing for the applicability of regional and sectoral collective agreements universally
Subcontracting	Nothing	Ensuring that subcontracting only possible to subcontractors respecting the directive	Nothing	Review clause entails specific focus on subcontracting
Long-term posting	24 months	24 months	12+6 months	12+6 months
Allowances	Nothing	Allowances are to be seen separately from remuneration and not deductible from salaries	Nothing	Art. 3.1.7, allowances are separate from remuneration and not deductible from salaries
Road transport	Nothing (inclusion)	Inclusion	Exclusion	Exclusion until lex specialis is agreed; Specific focus of review by Commission
Transportation and application	Application after two years	Application after two years	Application after four years	Art. 3, application after two years

6.5.2 Inclusion of Initial Positions and Actor Satisfaction

In terms of positions included, the new directive does certainly go some way to have some initial positions taken account of, but not in all issues. The solution of the legal basis dispute considers both positions, just as the solution on subcontracting and road transport, with the review clause paying specific attention to these two questions. On the issues of application, allowances, duration and collective agreements at least one of the initial positions is not considered. Accordingly, only for less than half of the contentious issues have negotiators found a compromise solution, while for the others either one of the institutions was able to stand its ground and push the own preferred position into the final legislative act.

The satisfaction of the actors in the negotiations was overwhelmingly very positive as concerns the political compromise (R1,2,3,7,12). It is important to consider that “it could have gone completely wrong, meaning not getting an agreement. That was always in the air” (R10). This might seem self-explanatory, since in the end any negotiation might not be concluded. However, it is not ordinary that the possibility of no-agreement is constantly present in trilogue negotiations. In this case, there was a considerable reluctance by all institutions to review the directive in the first place and the perceived risk to even worsen the situation of workers: “When the Commission tabled its proposal [...] my first reaction [...] was: we won’t manage to do more than that. [...] One and a half years afterwards I have to state we did” (R9). Hence, for most actors, the result goes beyond what could have been expected in the beginning of the negotiations. Especially from a worker’s rights perspective, many actors are indeed very satisfied with the result, including trade union associations: “I think on paper it is certainly better than what is already there. [...] From a social protection point of view, it’s better” (R3). Participants also appreciated that this was not an easy negotiation: “I think it was the compromise which went to the limits in order to get an agreement” (R10).

However, there are shortcomings to consider. Firstly, the road transport issue was very divisive and left many actors with a considerable headache: “That was quite a blow for us, because now we have a two-class directive” (R1), even though it was acknowledged that this “was the only possibility, [...], to not lose the whole file” (R2). Second, of course there was disagreement. In the final vote in the EP, 70% of the plenary voted in favour, with 22% against and 8% abstentions. Even in the Council, Poland and Hungary voted against the directive and the UK abstained - but this is regarded the new normal after the Brexit referendum. Hence, there was fierce opposition, summarized well by ALDE MEP and shadow rapporteur Martina Djabalova in the debate before the vote in Parliament: “As shadow rapporteur, my goal was to achieve the necessary balance between maintaining free movement and protection of workers. Unfortunately, this has not happened, for these reasons personally I cannot vote in favour. To vote in favour means voting against one of the fundamental values of this Union”. Accordingly, there is a split within both institutions concerning the overall satisfaction with the file, with a majority being overwhelmingly satisfied and a minority very dissatisfied.

6.5.3 Legal Quality

In order to evaluate the legal quality, the character of inclusion of the initial positions must be regarded first. At first sight, all positions that have made their way into the outcome seem to be reflected in articles, i.e. the format of highest legal authority. In some cases, a second look might be in order though. Take the issue of the dual legal basis: The EP wanted to add a legal basis to allow the ECJ to base their judgements on the social chapter, as well, and not only on the chapter regarding free provision of services. While they were denied this demand, they got (allegedly by mistake) an article (Article 1) on the importance of social rights in this directive. However, “the change in Article 1 is of sheer symbolical character and will in my view not have any repercussions on ECJ interpretations” (R9, but also 3,5,7).

Equally, the inclusion of both the transport sector, as well as the issue of subcontracting in the review clause is largely of symbolic value, even though it can be found in an article. It merely obliges the Commission to pay attention to these two issues in its review. Any review, if comprehensive, would have entailed them anyway. Furthermore, it does not mean much more than possibly bringing the issues back on the table, and nothing within this clause assures that the Commission or any other institution will act even should the situation in five years not be satisfactory. In that sense, most of the compromises that made their way into the legislative text are of a relatively symbolic nature.

When it comes to the legal soundness of the legislation, evaluations couldn't be more negative: “I think at the end of the day, the text that you have after all the trilogues, you shouldn't use the term ‘legally speaking’ anymore” (R8). The involvement of the legal services of both institutions was relatively high in this case, and very often protesting the solution found, protest that have often been ignored (R1,7,8). Hence, “if you are from the [...] legal service, it is very difficult to see [the file] favorably” (R9). This is also caused by the compromises struck: “If you find some kind of solution [...] they tend to agree. But that some kind of solution is usually legally very bad” (R6). Additionally, some of the core concepts around which the compromises are struck, such as remuneration, are only imprecisely or not at all defined in many Member States. It does hence not come as a surprise that “Poland and Hungary already filed a complaint in the Court of Justice” (R10) and many of the negotiators are unsure about the actual real life impact the directive will have (R1,3,4,10).

In summary, the legal effect of initial positions included and the legal soundness of this piece of legislation must be regarded as low, while politically we see a mixed picture: Some but not all positions have been included in compromises, and a majority is very satisfied while a minority of actors in both institutions highly opposes the file.

6.5.4 Interaction Intensity

As stated above, the co-rapporteurship was an early decision taken at the highest political level, and one that was certainly to shape the interaction intensity of the negotiations.

Mind that with the rapporteurs coming from EPP and S&D, not only the two biggest party groups and a majority within the EP are represented. Also, those actors that are often considered political antidotes; leaving aside for a moment utter Eurosceptics. This specific rapporteur structure meant that “the grand coalition is already established from the beginning, not only during the negotiations” (R7). However, simply entitling two rapporteurs does of course not change the fact that the party groups hold different positions. It will be interesting to trace the evolution of this relationship.

Not all actors involved were happy with this solution from the beginning, also within EPP and S&D (R12). For the negotiations in Parliament it entailed a whole new aspect of social interaction: “Normally, the rapporteur drafts a report, tables it in committee, and then negotiations start. In a co-rapporteurship you need to negotiate before with the co-rapporteur. There were certainly eight, nine, ten meetings in advance. Staff, with and without MEPs, with the Commission secretariat, legal service, to draft the report” (R2). That means that Morin-Chartier, Jongerius and their teams had very close social interaction from the very beginning of the negotiation process beyond what is within the ordinary exchange between (shadow-) rapporteurs.

The further negotiations in Parliament entailed high interaction intensity between all (shadow-) rapporteurs and their teams. As the divide on this file did not (only) span political parties, we must keep in mind inter-party fractions when looking for changes in social interaction. Allegedly, and that is supported by the results of the votes, the intra-party divide in the EPP was the strongest and often revealed in the interaction intensity. While Morin-Chartier was a French social conservative, and thereby part of the western-European alliance in favor of a more social approach to the file, her EPP advisor was “from the neoliberal camp” (R7,1,2). Therefore, cooperation and trust between the rapporteur and her political advisor was minimal (R1,2,3,7). The co-rapporteurs, even though potentially already representing a majority in Parliament, made some effort to include other party groups in the compromise. In a division of labor, the EPP tried to keep ALDE, EFDD and ECR happy, while the S&D kept an eye on the Green’s and GUE’s preferences, which explains the voting results on the EP mandate, with nearly all party groups supporting or at least not openly opposing the proposal. This seems to support the assumption that it is preferences that dictate interaction intensity to a large extent.

When trilogue negotiations with the Council began, the rapporteurs could have been expected to make use of their privileged position in the negotiation process. The social interaction between the institutions in general was very frequent and high, not only between rapporteurs and presidency but between all parties involved (R1,2,3,4,6,8,9,12,13). Not only did this involve regular contact between the chief negotiators, but also between shadows, the presidency and other national delegations: “Yes, yes, we talked to them. During trilogues, we made a lot of exchanges” (R4). Inter-institutional contact had several motivations. Participants wanted to be on top of what happens in the opposite institution: “It is useful to know which Member State has problems, is it only one, a big or small one,

or are there ten, if so which. It helps to have that kind of background knowledge" (R2). And indeed, while much of the information is restricted to the public, participants to the negotiations always seemed to be fully informed on the state of affairs in the other institutions: "[Sometimes] it goes via five corners, in the end you get the information" (R1), normally via informal 'personal contacts' (R2,4). "Of course, we try to get as much information as possible. So, for example, we have to prepare the defensive points, so if [they] come with this, you could say this, you could come up with these arguments" (R10). Often, these exchanges happen in between trilogue negotiations, but that is not necessarily the case: "For example, during the trilogues I was on my mobile phone with different people sitting on the other side of the table" (R4). Next to informational reasons, this interaction also has strategic use, as in signaling to like-minded groups in the opposite institutions that the compromise in the own institution "was not so easy as [the chief negotiator] makes it appear" (R4).

A central interaction in trilogue negotiations is between chief negotiators outside the formal, institutionalized negotiations in trilogues. Informal coordination between the respective presidencies and the rapporteur featured prominently in the negotiations on posting: Interviewees agree that there was a "very good relationship between the negotiators" (R5). Not only the presidencies and rapporteur coordinated frequently in between trilogues, but "there were direct contacts between them (rapporteurs, presidency and Commission) where we were not part of" (R10). While the exact character of their interaction will be shed light upon later in this chapter, it is interesting to note here that beyond a general awareness of these meetings, the content was not fully clear to all other participants to the negotiations: "When things happen like that you are also exposed to a lot of rumor, so in the moment you don't know whether what you get is rumor or not" (R3).

The high intensity of these interactions as a common feature within the negotiations was acknowledged, forming part of "a four-step approach. First the single office, then the rapporteurs, then with the presidency, then trilogue" (R12). The co-rapporteurship seemingly also made a difference to negotiation dynamics. "That, let's say, made the negotiations more focused, of course the other political groups were part of the negotiation team but as everyone knew that the two have a majority, they were less depended on the support of the shadow rapporteurs of the other groups" (R10). Not all participants were happy with this dynamic and tried to use this in their advantage: "we would obviously play that card constantly, you are keeping us out, you can't do that" (R3).

Concerning the theoretical expectations, the first finding is that we witness a pattern of high interaction intensity on the basis of policy preferences throughout the negotiations within the EP. Especially the Greens, which were close to both rapporteurs' positions on most issues, had privileged access to the rapporteurs within and outside of trilogues (R1,2,7,12). This was strengthened by the fact that within the EPP's team, different policy preferences between the EPP rapporteur and her adviser caused the rapporteur to trust advisers from other groups more than her own (R2,7). The fact that issue preferences

differed within parties as much as they did in between parties was also reflected by the social interaction: "I have talked about this with [another MEP] from ALDE because we had a shadow from ALDE [...] that I couldn't deal with" (R12). It hence clearly shows that issue preferences were a driver of intra-institutional interaction. This also figured in the level of information obtained, with the Greens feeling the most informed throughout the negotiations (R1,3,4,7,9).

Across the institutions, policy preference played a role in social interaction as well. While all participants tried to stay in contact with and get information from as many actors as possible, interaction with those sharing the same preferences seems more frequent. Also, it has strategic use at times, for example if insights from the own institution are signaled in order to change the negotiation strategies or dynamics in the opposite institutions (R2,3,4,12).

The interaction between chief negotiators - rapporteurs, presidency and Commission representatives - however, does not exhibit any impact of policy preferences. The interaction was of very high intensity from the beginning of the negotiations and increased in the course of it. Towards the end, actual negotiations were conducted informally within a small circle of actors. The high interaction intensity can mainly be explained by common procedural preferences: Chief negotiators had a very strong wish to conclude this file (R1,2,4,5,7,8,12). Indeed, the strong interaction between the chief negotiators also served the sole purpose of agreeing on possible compromises, before political trilogues, to bring the file to a good end. As one of the most important files of the legislative turn, it entailed high prestige for the chief negotiators. Allegedly, the fact that none of the negotiators was very keen on carrying this file further through to the Austrian presidency was a factor, as well: "It was very clear that there were some people that were in a rush to close as fast as possible, before the next presidency. And then the deal was struck between the rapporteur and the presidency" (R3). There is a further aspect specific to this file that had impact, as well: The personalities of the negotiators. "The main aspects were negotiated by four women between 45 and 60. [...] Just like with the Juncker-Schulz effect, you had it in this situation. That like-minded characters were sitting at the table" (R9). This gender aspect was stressed by several respondents and is believed to have made a real difference in the interaction between the negotiators, who "very much appreciated that they were women" (R8). Not only did this change their relationship, due to a perceived like-mindedness stemming from same gender and age group. Within this group of negotiators, "there was not any glimpse of showing off. I mean, I don't mention the cases, but we sometimes must deal with machos to an extent where it is impossible to negotiate. So, this focus on negotiating and finding a compromise was really throughout this process very, very clear" (R10). These perceptions insinuate a connection between gender and social behavior that of course cannot be tested here, but at least all involved appreciated the fact mostly women were involved, which happens rarely enough: "In this case it was only women. Very extraordinary, but cool" (R1).

In sum, the interaction intensity exhibits many of the expected causal relationships. The intensity of interaction was driven by both, policy and procedural preferences of the actors involved. Especially within the EP, coalitions were built that shaped the interaction throughout the negotiations and created outsiders. We clearly see that some participants had privileged access to the rapporteurs and consequently better information about the proceedings in the negotiations. However, also outsiders found ways of obtaining information in case they have been withheld by the chief negotiators. Intra-institutionally, shared policy preferences played a lesser role and there are no footprints of any stable coalitions having developed. The interaction between the chief negotiators was intense due to the strong procedural preference for conclusion.

In theory, these patterns of interaction intensity should have two main effects. Given the high intensity of interaction, especially between the chief negotiators, we would expect a growing relationship of trust. Indeed, interviewees confirmed that the relationship between the rapporteurs and the respective presidencies were very good and trustful (R1,2,8,10,12). Additionally, there was a marked evolution in the negotiators' relationship, especially within the EP team: "During the negotiations. I saw the two co-rapporteurs, which were in the beginning quite distant, politically, mentally, two different people, ladies, politicians. They were getting closer and closer" (R4). The close and frequent interaction indeed seemed to have built trust between the negotiators.

The next steps within our analysis will show in how far this has impacted the further development of the negotiation process, whether the high intensity interaction led to a change of venue towards lower hierarchies and less informal loci.

6.5.5 The Negotiation Venue

When analysing the venues of the negotiations, one decision stands out. From the very beginning, the EP delegation agreed to not hold technical trilogues. That means that one venue of negotiations we ordinarily see at trilogues was not available in these negotiations. This added some complication to the negotiations, as many felt that while "this is a very political file, [...] it's also technically a very complex file. To explain in the trilogue technical issues is impossible" (R8).

In political trilogues, many different, often politically very senior actors come together. Meetings must be well prepared and the issues under debate very clearly spelt out because time is constantly pressing. It would indeed be very difficult to imagine negotiators to listen to lengthy detailed reports on the technicalities of a specific issue. The earlier finding that parts of the participants to the negotiation were reluctant or fully refused to listen to advice by the legal services fits this picture of negotiators overstating the political and partly ignoring technical and legal necessities in the negotiations.

The fact that no delegation to the technical level took place implies that negotiations were exclusively held at higher political levels. This is one of the extraordinary features of this file. Whereas the EP negotiation team logically consisted of MEPs, both Commission

and Council are more flexible in deciding who will be present in trilogues and which hierarchical level they represent. This is an issue of importance and the choice can have strategic, not only practical reasons. MEPs can “feel a little bit neglected when they are confronted with the chairs of the working party [comparatively low hierarchical level actors in Council] when negotiating” (R10). However, normally a ministerial level representative is not foreseen by the Council, as these only enter when a file goes into third reading, which of course very rarely happens under the current trilogue regime. In the case of posting, this was different: “During the Bulgarian presidency, they have sent the deputy minister. It was then in a way at the equal level with the Commissioner, which was well received” (R10).

Indeed, the MEP and the deputy minister were joined, in every trilogue, by Commissioner Thyssen personally, another feature worth noting: “What should not be underestimated was that Commissioner Thyssen was part of the negotiations from the beginning and I believe present in all trilogues. In a normal file, you don’t see a Commissioner, with difficult files they maybe show up for the last session to allow for an agreement, but she was there from the very beginning” (R2). Not only was Thyssen present in all trilogues, complementing the highest-level round of negotiators, she was also personally active during the negotiations. During the trilogues she took over an active role, much to the distress of her office: In one of the last trilogues, Thyssen took the stage with a pen in her hand and “she personally redrafted, her cabinet became nervous, they did not really appreciate because they had no access on what she tables” (R7). But also, in the informal interaction in between trilogues, Thyssen was personally involved.

Next to the senior participants of the actual trilogues, the overall involvement of high-level politicians in this file stands out and had a specific impact on the outcome. In a first step, Commission President Juncker declared the posting file a political priority for the Commission term: “If the president promises this in plenary, ‘we revise the posting directive,’ then this is clocked from the top to the bottom and I think there are a lot of brakes in the Commission but in such a case they have a less easy job than in other fields where there is less of an interest” (R2). Informally, it was clear that “Juncker backed Thyssen for a strong revision of posting” (R7). In the Commission, the file was handled with high priority and everybody was aware of this (R5,6).

Also, national governments were exceptionally involved. The question of posting and interrelated social dumping is one of the few high-publicity EU topics, heavily debated in national media. In the outline of the negotiation process above there are manifold examples of national leaders having direct impact on the file, as for example Macron in his campaigning. The German cabinet was involved as well: “During trilogues, there were attempts of the German government to stop [certain issues]” (R9). In this light, the decision of the rapporteurs to not delegate to the technical level might appear the logical reaction to high level involvement in all institutions. However, it is still questionable why they, in doing so, seemingly ignored the need for technical negotiations and discussions. Some

of the respondents have a clear view on this question: "In posting, it was clear that the rapporteurs wanted to keep everything under control. That was a political decision to do it like that" (R10). This assumption is supported by the alleged divide within parliament that alienated parties and sometimes even cut through the single parties' negotiation teams.

Having established that the negotiations on posting took part at the highest hierarchical level, the second aspect to consider is the formal level of negotiations. The evidence suggests that in the eight trilogues that took place, indeed proper negotiations were conducted, and decisions taken. Many respondents report of on-the spot drafting, counsel within smaller groups on proposals from the opponent, provisional agreement, etc. (R1,2,3,4,6,7,9,12). In addition, the four-column documents are a very good indicator for the negotiation venue in this file as they indicate change in the negotiations even in between trilogue sessions. Also, the interviews are revealing. Negotiators "met bilaterally with Thyssen and said 'if we say this...' Just to see if we could make people satisfied" (R12). And there was broad awareness of these meetings taking place, even though their informal character prevented comprehensive sharing of information on what happened.

Respondents admitted that bilateral contact between rapporteurs, presidency and Commission occur regularly in trilogue negotiations and appeared in these negotiations, as well: "Of course, I assumed that there were such talks and we also got reports that there were such talks" (R3). Especially towards the end, the rapporteurs increasingly engaged in bilateral negotiations, both testing the ground as to what is possible as well as agreeing on possible trajectories to take. "What of course happened, especially towards the end, were informal contacts with [Rapporteurs, Commission, Presidency] where they looked at how they can get that thing agreed. There, positions were exchanged again concerning 12+6 months and transport, that these are absolute no-goes. They said ok, but then we want to have something here and here. That happened" (R2). This is proof that actual negotiation took place in between trilogues in informal venues, by far not involving everybody entitled to. The data seems to imply that not all, but an important part of the actual negotiation happened in a highly informal setting between the chief negotiators: Thyssen, Morin-Chartier, Jongerius and Deputy minister of Bulgaria, Zournitsa Roussinova.

As regards the venue of decision-making, two findings therefore stand out: The negotiations on the revision of posting continuously involved highest-level politicians, and took place in part behind the scenes, in private, informal settings involving the chief negotiators and parts of their staff.

The venues of these negotiations were determined by a mix of all, the institutional environment, the preferences and the interaction intensity of the negotiations. It is striking that not all venues that are conventionally at the actors' disposal have been used. The decision to refrain from using technical trilogues cannot only be accounted to the fact that there are files that are comparatively way more complex technically. It was mainly the rapporteurs that represented this standpoint and successfully prevented technical trilogues. This is an interesting factor. There seem to be no institutional settings as to how

to handle disagreement concerning the use of technical trilogues, and the refusal of one party to engage in these forecloses it. It is thus to be ascribed to the preferences and political weight single parties attach to the file, whether technical trilogues take place.

In general, a factor that clearly caused negotiations to take place at highest political level was the file salience. All participants were aware of the incredible political importance of the file, which goes a long way to explain the hierarchical level it has been dealt with. This importance has caused the Commission and the Council to be represented by high(est) level politicians, national leaders to get involved and the rapporteurs to not want to lose control by delegating to the technical level. Some suspected they feared to lose in technical meetings, as “their reports are like swiss cheese, full of holes”, and “the Council tends to get all the technical little things” (R8). Another aspect that likely prevented delegation was the missing trust of some rapporteurs towards their staff, which is supported by the argument that they wanted to keep everything under control.

While hence hierarchical delegation was not a factor determining the venue in these negotiations, that does not mean that all negotiations took place in political trilogues. In contrast, some of the decisive breakthroughs in the negotiations were agreed behind even thicker doors: Informally between the chief negotiators. It was in the constructive atmosphere between all women that some of the toughest issues have been agreed, with no involvement and only sparsely informing the shadow rapporteurs. Given the allegedly very good relationship between the chief negotiators, this shift in venue towards informal arenas is not surprising. In contrast, it neatly confirms the hypothesized relationship between interaction intensity and the venue of negotiations. Surprisingly, while everybody seems to have been aware of these pre-negotiations having taken place, most actors also acknowledged their necessity and hence their level of satisfaction with the negotiations was not impacted greatly by this conduct of the chief negotiators, even though it did create outsiders, as theoretically expected.

6.5.6 The Negotiation Mode

In order to get an idea of the mode in these negotiations, we need to trace the negotiation approach taken by participants. Theoretically, we expect one driver of the negotiation mode to be the venue of negotiations, especially the hierarchical level. The hierarchical level was continuously very high, both at trilogue level and through the indirect involvement of many senior national level representatives. We would expect that to cause distributive bargaining during the trilogue negotiations.

From the very beginning the negotiations on this file have been described as exceptionally tough. The early yellow car was a first indicator that revising the posting directive might be a difficult bargain, and it was exactly that. Already reaching the negotiation mandates in the single institutions was difficult and by no means a consensual decision, with in both institutions considerable parts diverging from the positions in the mandates. Within the institutions, negotiations were “extraordinarily complicated” (R11). One of the

reasons for this was that “the file was very emotional, and everybody had to say something about it” (R8). That also meant that the mandates were very well-balanced compromises and negotiators always had to “give and take. I have never seen that with other proposals that you were so aware constantly that you are giving or taking from someone” (R8).

When zooming into the negotiation process spreading over eight trilogues, we see differences but not necessarily a constant trajectory. The first trilogue, a theatrical performance of disagreement as described by one participant, was followed by two trilogues which made considerable progress. But at one point, coinciding but not causally connected by respondents with the advent of the Bulgarian presidency, the process came to a halt, with little to no real progress in the negotiations until, at one point, it accelerated, and agreement was made possible. The process is constantly described as ‘up and down’, with some meetings showing success while others being “bad meetings where they agreed to nothing” (R10).

The strategies of the negotiators also hint at the fact that the negotiations included some real bargaining. Positions were prepared hiding the actual red lines, several proposals for the same text brought to one meeting in order to test the borders of the respective counterpart. Where negotiators might have expected the other institutions to be able to move, to be able to accommodate more of the own position, it was partly not possible due to the tight majorities in the own institution. The public, again, plays a role here, as well. As for example concerning the ‘duration’ publicly referred to by Macron, “12 was out there so it was very, very difficult to get to any other solution” (R8). Here, the involvement, publicly, of senior national representatives did more harm to the flexibility of the negotiators than it did well.

During the negotiations, very clearly there was a constant atmosphere of give and take, testing the limits and trying to get the other institution to agree on something acceptable to the own. “If [one institution] wanted something the others didn’t, we first offered a declaration or statement. If they did not accept, we offer a recital, if they don’t accept, we offer an article” (R6). All evidence points towards the fact that in trilogues, while the atmosphere was friendly, the negotiations were a real bargain.

The further informalized negotiations became, the more difficult it becomes to be meaningfully able to trace the negotiation mode, and evidence becomes scarce. On the one hand, description of behind the scene negotiations above point to a consensual atmosphere and honest attempts to reach a viable common solution. On the other hand, that does not necessarily mean a change in negotiation mode, as a constructive atmosphere does not prevent bargaining approaches. It seems that in backstage negotiations, negotiators were more willing to compromise. But in terms of the compromises they seem to have struck, it seems to be very much compromising own positions in exchange for others, not encompassing the problem with finding solutions that add value for both. The atmosphere was constructive, but positions were set and all parties (had to) fight for their own priorities. Yet, these backroom negotiations did indeed make a change as

participants were more engaging and finally able, also by giving up what seemingly were high priorities for the own institutions, to strike a compromise.

While there is a clear element of high interaction intensity and a shift of venues visible in the negotiations on posting, the negotiation mode in political trilogues was considerably stable. Due to the close majorities in the mandating phase and the high salience of the file, all compromises were a bargain exchanging one position for the other and defending the own position. Beyond the clear will to accommodate enough of the opponent's position to arrive at an agreement, there is no evidence for very engaging approaches in either institution. Only in the informal negotiations behind the scenes did negotiators seem to have engaged in more honest, problem-solving approaches towards these negotiations, which explains why in the end, a compromise was found.

What is striking in the negotiations on this file is that, while trilogues were of course conducted behind closed doors, these doors had considerable holes. Trade unions seem to have been almost a fourth party to these negotiations, they were on top of everything that happened. For one, they had standing lines to several participants to the negotiations during trilogues, being asked whether single issues, texts and formulations are acceptable (R1,2,3,7). Second, they were used to exert pressure: "If we raise an issue it could easily be marginalized, whereas with trade unions it's a different story. Also, they are bigger than us" (R3). Accordingly, their level of information was extraordinary. At times, actors from the negotiations used unions to get the latest state of play in the negotiations, not the other way around (R1,3).

Second, the media, due to the political importance, was more informed than usual on the proceedings in trilogues. On the one hand, the participants wanted publicity themselves, as the infamous twitter accident shows. On the other hand, there were considerable leaks. "Europe Agence, the Brussels-based news agency which writes about European issues, after every [meeting] they produced an overview of what was discussed. [...] So, someone was leaking" (R8). Actors not officially part of the negotiations played an important part.

Third, the negotiations were held at highest level, with the occasional involvement even of heads of state and government. It is not surprising, then that the overall negotiations were a tough bargain, with no side easily giving in and compromises being the absolute limits everybody could accept. It was only in the informal settings among the chief negotiator that they could have agreed on a compromise at all. Highest level hierarchical involvement as well as a high salience of the file and a considerable distance of positions seems to have prevented any effect the high interaction intensity could have had on the negotiation mode in political trilogues. An expectation that was confirmed is that informalization led to a more integrative negotiation mode.

6.6 Conclusion

The negotiations on the posting file were characterized by high interaction intensity, due to the convergence of policy preferences as well as, importantly, procedural preferences.

Intra-institutionally, as well as inter-institutionally aside from the chief negotiators, it was mainly substantial preferences that determined interaction. Concerning the chief negotiators, however, procedural preferences have shown to be the most influential factor. The decisions taken informally also support the finding that chief negotiator interaction was driven by procedural preferences. In fact, the EP negotiators compromised on some of their most important issues in these backroom negotiations.

Despite the conscious decision against delegation to technical trilogues, we still traced a relationship between the interaction intensity and the venue of negotiations: The high interaction intensity led to the informalization of decision-making. This, in turn, had an impact on the negotiation mode, albeit only limited: It was restricted to the informal venue and did not spread to the political trilogue. In consequence, the impact on the outcome was limited, as well.

When it comes to the initial positions reflected in the outcome, some, but less than half of the initial positions could be found back in the final agreement. While on some very salient points the parties managed to have both positions somehow reflected, for many issues this is not the case. Especially when inspecting compromises in more detail it shows that those issues in which the initial positions of both parties were reflected, were those that were allegedly at least in part negotiated informally between the chief negotiators. This supports the expectation that the range of initial positions reflected in the outcome is determined by the negotiation mode: The more negotiators engaged in tough bargaining modes, the less initial positions will be found back in the outcome, because the less actors were ready to diverge from their positions (leaving no space for those of the counterpart).

The satisfaction of participants was hardly impacted by the negotiation process. Yes, we witnessed early-on coalition building which led to some actors having privileged access to the internal circle of chief negotiators. While there are certainly actors that are not happy with the result, at least our interview evidence shows that it was the simple fact that a directive was adopted and its content, rather than the process, that created frustration. Most actors were aware of backroom meetings between the chief negotiators, most agreed that these were necessary, and while they did not feel fully informed about what happened, nobody seemed to be really frustrated about this.

When it comes to legal quality, the assessment above was overwhelmingly negative. Does that reflect the expectation we had concerning the negotiation process? When it comes to the legal effect of positions included it showed that especially the EP had not much more than a symbolic value to present (which it happily did). Again, these conflicts were not resolved, but rather one or the other institution gave in, partly with mere symbolic compensation. This fits the picture of bargaining rather than problem-solving approaches by the negotiators.

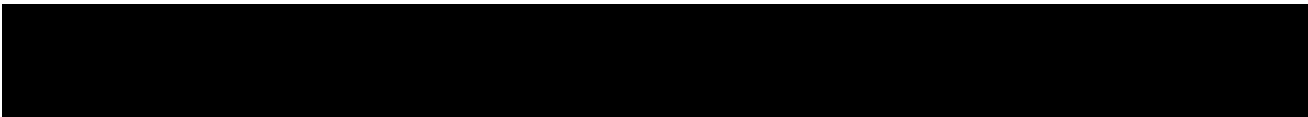
The legal soundness of the provisions in general cannot but be judged negatively. Again, that does not come as a surprise considering the process. Negotiations were highly politicized and very much centered around political statements such as “equal pay for

equal work". Legal services were at times neglected out of political considerations and delegation to technical level negotiations prohibited. We clearly see an impact of the negotiation process on the outcome in this regard, in that it is a (somewhat) satisfying political compromise, but legally speaking, it is very much a 'swiss cheese' and the complete lack of technical level negotiations figures in the premature nature of parts of the revision.

7

CHAPTER 7

Case 3: Type approval and Market Surveillance of Motorvehicles



New legislation on the type approval and market surveillance of vehicles sold in the EU single market had been planned by the Commission already for some time but given the highly technical and non-salient nature of the issue, apparently it did not have highest priority. This changed dramatically when the Dieselgate scandal broke in the US, elevating this piece of legislation to one of the more important ones in the legislative term. The Commission proposal, the single institutions' positions and the negotiations will be depicted in the following.

7.1 The directive

Until the year 2015, type-approval requirements were regulated in Directive 2007/46/EC, the so-called framework directive. The focus of this directive was not so much the tight control of type-approval, but rather the harmonization of procedures across the EU in order to "facilitate the free movement of vehicles and trailers in the internal market by laying down harmonized requirements" (European Commission, 2016e, p. 2). Within the so-called CARS2020 Action Plan, set up to foster the European automotive industry and make it more sustainable, the framework directive had "been the subject of a comprehensive fitness check in 2013" (European Commission, 2016e, p. 2). While according to the Commission the general value of the directive for achieving harmonization was confirmed in this review, several shortcomings were identified.

The main problem identified was that quite obviously there were "differences in the interpretation and strictness in application of the requirements across Member States" (ibid). While an approval that was issued in any EU Member State was valid in all of them, and producers were free to choose where they would have their cars approved, not all approval authorities approached the tests with the same degree of rigidity. What the Commission proposal describes as "reducing the effectiveness of the framework" (ibid) was perceived by some as a proper breach of single market principles (R1).

The review detected need for improvement along several different aspects. First, a major problem within the EU market was that once type-approval had been granted, there were no mechanisms in place for market surveillance in order to detect if the sold vehicles adhere to the same standards as the samples tested during type-approval. Relatedly, the recall- and safeguard procedures needed an update, along with the timespan approvals are granted for and a possible prolongation of these. Second, and of major importance, aid harmonization of the procedures for issuing type-approval across different Member States and the respective technical services. Third, "the role of economic operators in the supply chain" had to be clarified, which relates to the independence between technical services, national authorities and the car manufacturers within the type-approval system. Lastly, the flexibility towards alternative approval schemes and SMEs needed to be enhanced, "without however distorting the level playing field" (European Commission, 2016e, p. 2).

7.1.1 Dieselgate as Fuel for Revision

While there was therefore a clear need for action and the original review clause in the 2007 directive asked for an update of the framework by 2015 the latest, the Commission did not manage to publish a proposal for revision in 2015 even though working on said proposal since late 2013. In addition, neither the Council nor the EP exerted the necessary pressure on the Commission to do so. Chances are that there would not be a new type approval framework to write about, had it not been for a scandal in 2015 that shook the European car manufacturing industry to its core.

It had been American, not EU authorities that dismantled one of the biggest industrial scandals of the last decades. They detected that Volkswagen (VW) cars in the US did not conform with the emission limits based on which these cars were tested on when being issued type-approval. This triggered what was called the ‘carbon dioxide emissions problem’ in the beginning but soon came to be known as the ‘Dieselgate scandal’; which for its memorability and frequent use by EU officials and the public alike will be the term used here as well.

In September US authorities, specifically the Environmental Protection Agency, publicly announced that specific VW models had higher emissions in actual use than they had had in the original test for market approval. The investigations showed that VW cars were equipped with a software that could detect whether a car was in actual use or whether it was being tested, and would change the settings accordingly, reducing the car’s performance and hence emission during tests. In real-life use the engine is put back to normal power, which meant that the cars used on the streets had an emission that was up to 40 times as high as the US law permitted (Hotten, 2015). While the usual reflex of claiming ignorance of the software set in at VW headquarters immediately after the publication, it soon became known that it was a wide-spread systematic fraud and not the work of a few employees. Many senior managers, including VW chief executive Martin Winterkorn, had to resign, and single VW employees faced legal prosecution.

Dieselgate caused upheaval especially in US and European markets, with fraud accuses quickly spreading to other cars and brands and an enormous loss of trust in car manufacturers on the side of the consumers. In Brussels, it also evoked a painful insight: Under the current legislation, the necessary market surveillance mechanisms to detect this type of systematic fraud was not existent. Indeed, Sweden was the only Member State with a market surveillance system in place. Not surprisingly, the fraudulent practices were condemned by all institutions. The EP even established a “Committee of Inquiry into Emission Measurements in the Automotive Sector, its Powers, Numerical Strength and Term of Office” (EMIS) to further investigate failures made by both the Commission and the Member States in allowing for fraudulent practices to go unnoticed in the EU. Evidently, also the revision of the 2007 directive could not be delayed any further: “Within a week of the outbreak of the scandal, the Commission announced that it would reinforce the type-approval system” (European Commission, 2016e, p. 3). Working on full speed,

the Commission services on 27 January 2016 presented the proposal for a Regulation “on the approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles”.

As the first legislative proposal directly related to Dieselgate, which also figured in the explanatory text accompanying the proposal, the file received extraordinary attention. That does however not change the fact that type approval and the surrounding procedures are a highly technical issue. This is reflected in the length of the regulation of 98 Articles and seventeen annexes. The technical complexity is indeed overwhelming; had there not been “any Dieselgate scandal, [...] the type approval regulation debates would have been very uninteresting” (R1). A detailed discussion of all technical details to be regulated is impossible, which is why the focus will be on the most important issues.

7.1.2 The Proposal

The main goal of the new regulation was to ensure “adequate supervisory mechanisms to ensure a correct and harmonized application of the type-approval procedures” (ibid). In contrast to the 2007 Directive and as a direct response to Dieselgate, not only the proper functioning of the internal market but additionally the “safety and health of citizens and the protection of the environment” became a high priority for the new regulation. The choice of legislative instrument was “considered to be appropriate in that it provides the required assurance for direct and harmonized application and enforcement while not requiring transposition into Member States’ legislation” (ibid, p.6).

While many elements of the 2007 directive were maintained, the proposal introduced substantive change in different areas. In general, the new regulation was to enforce a more transparent exchange of information, both cross-border as well as from Member States towards the Commission and, importantly, towards costumers. Second, the obligations of all parties involved but specifically manufacturers are detailed. First, Member States are required to organize authorities for both, type-approval and market surveillance. The test for type-approval and market surveillance are to be conducted by separate authorities. Article 6.4. stipulates that Member States “shall organize and carry out market surveillance”. The specific “obligations of market surveillance authorities” are spelled out in Art. 8 of the proposal. They are to regularly perform checks on vehicles already approved for the market in order to ensure they comply with the new regulation. These test “shall be performed on an adequate scale, by means of documentary checks and real-drive and laboratory tests on the basis of statistically relevant samples” (Art. 8.1). Further, market surveillance authorities shall work independently and be subject to regular checks by the respective Member State. An important reform concerns the power of the Commission to perform, or have performed by mandated agents, own inspections of vehicles. Art. 9 lays down that “the Commission shall organize and carry out [...] tests and inspections of vehicles [...] with a view to verifying that those vehicles [...] conform to the type-approvals and to applicable legislation (Art. 9.1). To improve EU-wide coordination of type-approval and market surveillance measures, the

Commission proposes a “Forum for exchange of Information and Enforcement” which shall function as a forum for information exchange and have advisory power on coordination of measures and, in case necessary, sanctions (Art. 10).

The financing of type-approval and market surveillance mechanisms is subject to change, as well. Financing shall be ensured by Member States through “a national fee structure to cover the costs for their type-approvals and market surveillance activities” (Art. 30.1). These fees are to be paid by manufacturers in order to get their vehicles approved. Not only national type-approval activities, but also those conducted by the Commission are to be financed through these fees. In order to ensure minimal regularity in type-approval mechanisms, the Commission proposes to limit the validity of type-approvals to, depending on the vehicle category, seven to ten years, after which a new market approval license would have to be acquired by the manufacturer (Art. 33).

Another measure to strengthen harmonization of procedures as well as the pressure to comply for Member State authorities was a peer-review mechanism of the type-approval authorities, especially in carrying out the approval (Art.71). This carrying-out is in general delegated by the national authorities to technical services, which in turn must be thoroughly assessed before being granted a license to carry out type-approvals. In the process of designating technical services, the respective Member State authority shall be assisted by an assessment team, consisting of “representatives of the type-approval authorities of at least two other Member States [and] a representative of the Commission” (Art.77.1). These teams are entitled to on-site assessments at the respective technical service. A license granted based on the report of this assessment team is to be valid for five years, after which a new assessment is necessary.

As an instrument to ensure compliance by the economic operator (read: car manufacturer), the Commission proposal plans fines to be imposed by the Commission upon the operator (Art. 90). These fines “shall be proportionate to the number of non-compliant vehicles registered in the Union market” and “not exceed EUR 30.000 per non-compliant vehicle” (Art. 90.1). Note that only in 2015, in the direct aftermath of the public upheaval, Volkswagen recalled 8.9 million ‘non-compliant’ cars in Europe (Hotten, 2015). Lastly, the regulation “shall apply from 1 January 201X” (Art.98), i.e. on first January of the year following publication.

Triggered by Dieselgate or not, the new proposal indeed set out to refine, detail and strengthen obligations of testing, transparent communication of information, market surveillance and enforcement mechanisms. Table 14 summarizes the Commission proposal on the most contentious issues. It entailed a clear shift of power from Member State level to the Commission, giving it far-reaching powers as to get involved in national-level testing and supervision tasks. Given that, as well as the agitated political environment around Dieselgate, it does not come as a surprise that the proposal was intensely debated in both, the Council and the European Parliament. The following will outline in detail the course of these debates and the negotiation mandates they resulted in.

Table 14: Case 3 – COM Proposal

Issue	COM Proposal
I) Member State obligation (Art.6)	Set up authorities
II) Surveillance obligation (Art.8)	No minimum
III) Compliance verification by the Commission (Art.9)	Strong role, obliged own test
IV) Forum (Art.10)	Advisory body for information exchange
V) Financing of type-approval activities (Art.30)	Obligatory fee structure
VI) Termination of validity (Art. 33)	After five years
VII) Peer review of type approval authorities (Art. 71)	Peer-review mechanisms
VIII) Access to repair and maintenance information (Art. 65)	Moderate access

7.2 Negotiations in the Council

When examining the negotiations leading to a General Approach in the Council, there are two aspects of the file that should be kept in mind. One, of course, the Dieseltgate and its political implication. Care manufacturing is a central industry for several Member States, which is why re-establishing consumer trust in this industry was paramount for many governments. Second, the proposal envisaged a considerable shift of competences to the Commission – competences that thus far were held by Member States. Political tension was thus inevitable. Indeed, while the “general need for legislative action in light of Dieseltgate was clear to all delegations, Member States were afraid of the shift of powers to the Commission” (R9).

In February 2016 did the “Working Party on Technical Harmonization (Motor Vehicles)” begin its work on the Commission proposal (Council of the European Union, 2017b). Back then, the Dutch held the presidency in the Council, followed by the Slovaks. The Dutch hardly took any action on the file, and for the Slovak presidency the file “was not a priority” either (R10). The technical complexity of the file of course also meant that the Council delegations needed considerably more time to process the file. In the first phase of the process, therefore, delegations merely spent time on examining the impact assessment that preceded the proposal, “especially focusing on aspects to which delegations requested further clarifications” (Council of the European Union, 2017b, p. 3). This phase was hence used to carve out first aspects to which further discussions were deemed necessary. The first technical discussion is mentioned to have happened after the Competitive Council of 28 November 2016, where the (then already Slovak) presidency had presented an information note on the current state of play, which however did not really go beyond summarizing the Commission proposal and signaling first issues of possible disagreement between the Member States.

7.2.1 Heated Negotiations

Things started to take off under the following presidency. “The Maltese were very active and ambitious” (R10). The progress reports shows that by mid-February 2017, already 16

meetings of the working group on this proposal had taken place, in which several issues had been discussed and, partly, agreed: “After having reached an informal agreement on the technical provisions, the Council preparatory bodies have now been addressing the main political issues included in the Commission proposal” (Council of the European Union, 2017d, p. 4). As to agreement already found, “a number of technical provisions” had been clarified and complemented. Second, and this concerns the first substantial political issue, delegation had agreed that the financing of the type-approval, i.e. the proposed national fee system, needed change. While the “Member States shall ensure that sufficient resources are available to cover for costs for market surveillance activities” and “may levy administrative fees to technical services” (Council of the European Union, 2017f, p. 84), the general instruments of financing should be left to the discretion of the respective Member State and not prescribed by the Commission. Lastly, the Council had already agreed on turning many delegated acts into implementing acts. Agreement among Council delegations on this is of course not surprising.

Next to that, the progress report entails a long list of thus far unresolved issues. While “most Member States acknowledge the need to modify the current legal framework” (note that not even on this basic point all Member States agree), there are many political issues yet to be resolved. The first controversial issue was the competences and role of the Commission in verifying compliance. While the Commission assigned itself the competence of own checks, “a significant number of delegations continue[d] to express serious doubts on the added-value of these provisions” (Council of the European Union, 2017d, p. 4). While these Member States wanted the Commission to merely coordinate exchange of information and know-how between the Member States, there were others which believed a strong role of the Commission would help ensure harmonized procedures.

Concerning the forum proposed by the Commission, there was disagreement as to its character among Council delegations. While a group wanted it to merely facilitate information exchange, other Member States wanted to see an enforcement mechanism for non-compliant governments and technical services. The presidency acknowledged that what is further needed is specification of “the list of tasks to be carried out by the Forum, in particular with a view to avoiding diverging interpretations of the requirements among Member States” (ibid). The possible expiration of type-approval certificates was another point of contention, again with two groups of Member States; those that wanted approval, once issued, to be valid forever, and those that deemed a time limit necessary. The presidency proposed to find a compromise between the two groups, avoiding an excessive administrative burden (ibid, p.5)

One of the Commission’s innovations in the new regulation was the mechanism of peer review of national type-approval authorities. Here, “Member States [were] divided between those that see it as a contribution to an increased uniform enforcement of the rules and those that reject[ed] it on the grounds that it would create unjustified

administrative burden" (ibid). Concerning a related issue, the involvement of other national authorities in the assessment and designation of the technical services to carry out type-approval tests was another contested issue, with the presidency planning to outline possible ways forward. Given these outstanding issues, the presidency proposed as a way forward to come up with a new compromise proposal "with a view to reaching an agreement on the remaining outstanding issues" (ibid, p.6). However, the progress report also clearly expresses the ambition to have a General Approach agreed still during the Maltese presidency.

Unlike often witnessed in the Council, the above-mentioned divide did not run across geographical lines on this file but were determined by economic interest. Basically, it often came down to a division between those states with large automotive industries and those without, even though some delegations' preferences did not fully result from that. One of the most influential delegations, Germany, had a specifically different situation. On the one hand, its very own manufacturers were in the focus of Dieselgate. On the other, Germany has a reputation of protective policy for its industry. Indeed, on this file Germany was divided internally, and hence "very often could not express a clear position" (R9). The German attaché often did not get clear instructions from Berlin and "until the very last COREPER meeting, nobody knew how Germany would vote" (R10). This internal division hampered Germany from taking real influence on this file.

7.2.2 The General Approach

Despite the divisions between Member States, the next report issued by the Maltese presidency to the Competitive Council on 19 May could announce agreement. No less than another nine meetings of the working group were necessary after the progress report, adding up to a total of 25 meetings in order to agree on a General Approach. The explanatory statement accompanying the proposal for a General Approach states that by then "all delegations agree that it is necessary to improve the harmonized implementation of the rules across the EU" and that the overall objectives of the regulation have general support (Council of the European Union, 2017b, p. 4). The document also already foresees contention in the negotiations with the EP, of which amendments only several "may be acceptable as such or in spirit" (ibid). As a majority in the preceding COREPER meeting had accepted the presidency compromise, the presidency asks the Council to agree on a General Approach based on the presidency compromise submitted.

What does this General Approach entail on the important issues? On market surveillance, the approach "strikes a balance between a strengthening of market surveillance rules [and] the preservation of sufficient flexibility for smaller Member States" (ibid, p.5). It does this by introducing a minimum number of cars each Member State has to check annually, namely one "in every 50.000 new vehicles registered in the Member State in the preceding year" (Council of the European Union, 2017f, p. 42). However, Member States can agree that one authority takes over part of the testing of another

if appropriate. It might come as a surprise that the Council would introduce stricter provisions than did the Commission proposal. Indeed, the latter was very much pushing for a minimum number during the Council negotiations. Apparently, the time restriction due to Dieselgate did not allow the Commission internally to agree on a minimum, which is why they wanted to insert one ‘through the backdoor’ of the Council General Approach. It helped that the Maltese presidency backed this proposal from the very beginning, as did important Member States such as France (R4,9,10).

The Council grants the Commission the right to conduct its own tests, but with the seemingly small change from ‘the Commission shall’ to “the Commission ‘may’ conduct additional own tests” (Council of the European Union, 2017f). While on first sight this still allows the Commission to conduct its tests, the considerable implications of this change will be discussed later in this chapter.

The forum’s powers are clearly restricted in the Council position, with several changes in the text laying down clearer that it has merely advisory functions. In addition, instead of Member State representatives, it should be composed of representatives of the type-approval and market surveillance authorities (*ibid*, p.49). As mentioned earlier, there was further early agreement between the delegations that the fee-structure for financing type-approval activities should be replaced, allowing for Member States’ flexibility in the choice of financing solutions.

Concerning Article 33, the “Termination of validity”, the group of Member States opposing this provision prevailed. The Council General Approach does not foresee a time limit after which the validity of type-approvals automatically expires, so that the expiration of validity only occurs in case of substantive reasons (*ibid*, p.90).

The peer review mechanisms were a contentious issue in the Council until the very end, so that the presidency needed to “strike a delicate balance” (Council of the European Union, 2017b, p. 7). This compromise entails that “type-approval authorities shall not be subject to peer-evaluation when they designate all their technical services on the basis of accreditation of internationally recognized standards” (*ibid*). In the designation of technical services peer-review can be circumvented if a national accreditation body other than the type-approval authority is involved (Council of the European Union, 2017f, p. 166).

The General Approach also changes the provisions in Article 90 on the administrative fines. Through its changes, the Council stipulates that these fines cannot be applied should the Member State in question already have sanctioned the economic operator in breach of the regulation, and generally tightens the conditions under which these fines may be imposed by the Commission. Lastly, concerning the date of application the Council proposes application from 36 months after the regulation entered into force.

In summary, the General Approach would lighten some of the burdens for Member States that had been envisioned by the Commission and give some control over the procedures back to single Member States. Table 15 summarizes the Council positions. With

some delicate compromises struck, the Competitiveness Council agreed on the General Approach in its meeting on 29 May 2017, and the Council was ready to start negotiations with the Parliament.

Table 15: Case 3 - Council Position

Issue	Council Position *
I) Member State obligation (Art.6)	Have both done by the same organization
II) Surveillance obligation (Art.8)	1 out of 50.000 newly registered vehicles
III) Compliance verification by the Commission (Art.9)	Moderate role, no obligation
IV) Forum (Art.10)	Stress advisory character, not lay down clear tasks
V) Financing of type-approval activities (Art.30)	Obligation to ensure sufficient resources
VI) Termination of validity (Art. 33)	No
VII) Peer review of type approval authorities (Art. 71)	No
VIII) Access to repair and maintenance information (Art. 65)	Moderate access, reactive
IX) Date of Application (Art.98)	36 months after entry into force

7.3 Negotiations in Parliament

In the European Parliament, the Committee responsible was Internal Market and Consumer Protection (IMCO), with ENVI (Environment, Public Health and Food Safety) and TRAN (Transport and Tourism) being granted the right to issue an opinion. The rapporteurship in IMCO was obtained by the European Conservatives and Reformists (ECR), which in turn installed Daniel Dalton, a British Tory MEP, as rapporteur. A specificity of this file was that it interfered with the proceedings of the special Committee set up in reply to Dieselgate. It is peculiar that the reports on the file itself and the report by the EMIS Committee were issued one day after another and discussed during the same EP plenary on 4th of April 2017.

7.3.1 A Radical Draft Report

The first step in the EP negotiations was for Dalton to issue his draft report. In it he proposed 208 amendments, and the report was considered “much more a political statement from the ECR than [...] a constructive draft report” (R1). Consequently, the draft report envisaged much of the innovation from the original Commission report deleted and keeping as much of the status quo as possible.

Dalton did not include any minimum as to the number of cars to be controlled each year (European Parliament, 2016c, p. 17). The report does not envisage any possibility for the Commission to conduct its own test and thereby ensure market compliance of vehicles already approved. The corresponding article 9 is simply deleted. Concerning the

forum, Dalton does not introduce major changes to the Commission proposal, other than emphasizing the forum should merely be assigned an advisory role (*ibid*, p.23). When it comes to financing the necessary type-approval, the draft report very neatly repeats Member State positions. The fee structure is turned into one possibility of financing, but not, as in the Commission proposal, mandatory. The only obligation is for Member States to make sure the financing is guaranteed (*ibid*, p.87).

The expiry date for type-approvals is set to seven and ten years respectively, depending on the type of vehicle in question. For type-approvals for systems, components and separate technical units, approval should in principle be issued without a time limit (*ibid*, p.92). The report does not introduce substantial changes to the peer review mechanisms as established in Articles 71 and 77 of the Commission proposal. Lastly, on the administrative fines the draft report again neatly mirrors the Member States' demands that the Commission may only award a penalty in case this has not already been done by the Member State in question.

Not surprisingly, as radical a report as the one issued was not received very positively by many other party groups. Consequently, no less than 934 additional amendments were tabled, increasing the total amount of amendments to the Commission proposal from EP to 1142 to decide on in Committee. The shadow rapporteurs as well as many other MEPs tabled amendments that both considerably scaled up the proposal and aimed at making type approval a genuine European affair while others aimed at reducing EU competences to a minimum.

A list of very meaningful amendments for the following negotiations was tabled by a conglomerate of MEPs featuring S&D and the Greens (European Parliament, 2016a, p. 95). Seeing the main failure allowing Dieselgate to happen at the Member State level, these parties wanted to introduce a European agency, "in the style of the food safety agency" (R5), that should conduct type-approval and market surveillance instead of having 27 or more different systems dealing with type-approval in the future. The agency should be responsible for "all aspects of the type-approval process of a vehicle, system, component or separate technical unit" (European Parliament, 2016a, p. 95). It should designate national approval authorities, and itself carry out market surveillance for the whole internal market. Hence market surveillance would have been taken out of the hands of the Member States completely, while type-approval would still be issued by national authorities. Yet, these were to be designated and assessed solely by the agency.

The agency would of course also have made other parts of the proposal obsolete, as for example the forum proposed by the Commission; its tasks would have naturally been taken over by the agency. In fact, many of the subsequent amendments can be explained by this substantial change to the proposal from S&D and the Greens: After all, this affects nearly all aspects of the legislation in terms of responsibilities and the allocation of competences. It was Green MEPs that already included a name for the agency in the amendments: European Vehicle Surveillance and Enforcement Agency (EVSEA). It would,

however, not be appropriate to speak of a project of the political left: GUE was not in favor of establishing a new agency. In fact, they “did not actually feel positive about reinforcing Commission competences” and were general of marginal importance in the negotiations on that file (R4,6,9).

Different MEPs proposed different minimum numbers of vehicles to be checked. Amendment 363 envisages the agency to check on “20% of all type-approved vehicles placed on the European market” (European Parliament, 2016a, p. 95). On the other extreme, amendment 418 asks for “0.5 samples per 1000% vehicles type-approved (ibid, p.128). For the forum, EPP MEPs demand that representatives of the European Parliament should be members of the forum as well, instead only representatives of Commission and Member States.

Another important issue proposed by S&D and the Greens is that data in a car should be available to independent operators. Checking, as well as analyzing problems and repairing a car, in modern cars is not a fully analogue business any more. It is necessary to be able to access and read in-vehicle data. Big car manufacturers often make this data available only to their own or contracted operators, thereby forcing customers to use these, often more expensive, services. Amendment 927 aims at changing this (European Parliament, 2016b, p. 59). The peer review mechanisms are not only upheld in the amendments tabled, they are enforced by an audit type-approval authority should be subject to every three years. Lastly, as concerns the administrative fines, there are different proposals. From a full deletion of the fines, over European fines being possible next to national fines already issued on manufacturers.

7.3.2 Agreeing on a Draft Report

Both, the political importance added to the file through Dieselgate as well as the rather rigorous report from the ECR rapporteur would have an intense political fight be expected in the course towards finding an EP mandate. However, the draft report and the rapporteur’s behavior in the negotiations afterwards are two different issues, and indeed in this case they have been remarkably different: “He was extremely cautious and very much aware of the fact that he would need a majority in order to get his report past” (R1). Indeed, all parties were relatively happy and surprised by the very open approach of the rapporteur. Even though there was a potential coalition between ECR, EPP and in parts ALDE, the rapporteur went out of his way to have S&D on board (R1, 2, 4, 5, 6).

However, there was one dividing issue that was discussed very controversially and on which neither side was able to give in. The agency was discussed heatedly with Greens and S&D facing opposition from ECR, ALDE and EPP who all three did not see the necessity of a new EU agency, in part to circumvent a new bureaucratic structure, in part out of general refusal of new European structures or central control of industries. And the center-right coalition, the formation of which already showed at the very beginning of the negotiations, was able to stand its ground: The agency did not become part of the EP

negotiation mandate because in the vote on amendments a majority both in Committee as well as in plenary voted against it. Hence, the final EP mandate represents a mix of many amendments that represent a compromise, or a concession by the rapporteur representing the center-right majority to S&D and the Greens in order to secure broad backing for the mandate, an issue of highest importance to the rapporteur (R1,6).

Evidently, during the process of negotiating the mandate, the initial draft report tabled by the rapporteur underwent substantive change. First, a minimum of cars to be controlled entered the draft legislation in Article 8.1., reading “at least 20% of the number of types placed on the market in that Member State in the previous year” (European Parliament, 2017d, p. 42). Also, the strict separation between the tasks of type-approval and market surveillance is laid down in this Article, as is the obligation for market surveillance authorities to submit programs to be approved by the Commission (multi-) annually. Article 9 foresees the Commission’s duty, much more than simple ability, to carry out its own market surveillance controls. Also considering the forum, the EP report levels up the Commission proposal. It is to be called the “Forum for Enforcement”, and all references to its advisory character are deleted (ibid, p.56-58). In addition, the EP wants to establish an “online type-approval database” in order to ensure the secure and transparent exchange of type-approval related data between the Member States and the Commission.

When it comes to the financing of type-approval and market surveillance, the EP report does, just as did the Council, not uphold the mandatory fee-structure as the basis for financing, but leaves it to the Member States to decide on how to finance the services, as long as they “ensure that the costs for their type-approval and market-surveillance activities are covered” (ibid, p.87). On the limited validity of type-approvals, the EP maintains limits less rigorous than the five-year Commission limits. Depending on the type of vehicle under question, approvals shall expire after between seven and ten years (ibid, p.91).

The report is closer to the Council mandate than it is to the Commission proposal when it comes to the peer-review for type-approval authorities, which is deleted completely (ibid, p.127). Only when it comes to the designating technical services does the report envisage cooperation of the designating Member State with both, the Commission and independent auditors. Lastly, the administrative fines to be imposed by the Commission shall not be in addition to fines already issued by the Member State in question for the same infringement, while fines for the same economic operator fined by a Member State is still possible.

The mandate by the EP represents a compromise that was accepted by all parties both in the vote in Committee as well as a vote in plenary, as summarized in table 16. The rapporteur decided, knowing that a challenge to the mandate was probable anyways, to take the mandate to plenary and have votes on the amendments there. This was first to again get backing on the deletion of any proposed amendments on the issue of the agency, as well as overall broad support for the mandate (R1,4,6). This strategic move by the rapporteur was seen to strengthen the EP’s mandate, ensure alignment of all big

parties and an important signal of the unity of the EP towards the Council in order to enter inter-institutional negotiations with the Council. The specifically contentious issue of a possible agency was also open to a vote and, with the rapporteur relying on the center-right coalition, voted down by 351 to 309 votes in plenary. The plenary finally voted in favor of the report on 4 April 2017, mandating the rapporteur Dalton and his team to start negotiations with the Council.

Table 16: Case 3 - EP Position

Issue	EP Position *
I) Member State obligation (Art.6)	Ensure separation of tasks between type-approval and market surveillance
II) Surveillance obligation (Art.8)	20% of new types approved
III) Compliance verification by the Commission (Art.9)	Strong role, obliged own tests
IV) Forum (Art.10)	+ EP representatives as observers, + online database
V) Financing of type-approval activities (Art.30)	Obligation to ensure sufficient resources
VI) Termination of validity (Art. 33)	After seven to ten years
VII) Peer review of type approval authorities (Art. 71)	No
VIII) Access to repair and maintenance information (Art. 65)	Strong access, pro-active
IX) Date of Application (Art.98)	1 January 2020

7.4 Inter-institutional Negotiations

With both institutions having agreed on a negotiation mandate, interinstitutional negotiations were set to start. With the actual negotiations starting only after the summer break (except for some first technical meetings), the Estonian presidency was responsible for negotiating the file on the side of the Council. In total, four political trilogues took place in the negotiations on this file, accompanied by a multitude of technical meetings. In fact, participants “had technical trilogues every Friday from the beginning of July, or end of June until the end of December” (R4). These technical meetings took between three and five hours and were a decisive characteristic of the negotiations on this file (R1, 2, 3, 4, 5, 6, 7, 8, 9,10).

7.4.1 Technical Preparations and the first Trilogue

Already before the first political trilogue, which took place on 6 September 2017, first technical trilogues took place. “Those meetings were very, very technical. It was about defining what a trailer is. I have a definition hanging on my wall just to remind me what it was. What is a trailer, what is a tracking vehicle? All this really just technical stuff” (R4). In these technical meetings, the composition of trilogues is mirrored, but then at a lower

hierarchical level. This means that all rapporteurs are represented by mostly one assistant and one political advisor of their party group. Attachés from the presidencies' Permanent Representation represent the Council, and low-level Commission administrators the Commission. In addition, both the Council and the EP Committee's secretariats were present in all technical trilogues (R1,9,10). They would be led by the team of the rapporteur, with support of the IMCO secretariat (R5).

The first political trilogue took place on 6 September 2017 (Council of the European Union, 2017h, p. 3). According to the data, no real negotiations took place in this first meeting, which was much more of organizational character: "There is no negotiation in the first trilogue, and that was very much the case here, as well" (R4). As the meeting "still took three hours" (R4), the question arises what is discussed in this first high-level meeting. First, the positions were exchanged between the institutions. Those did not come as a surprise to any of the participants, as they were known beforehand due to the official documents (R3,4,5). Second, "an agreement was reached on the overall framework for the coming negotiations, including the four-column document as a basis for the negotiations [...] as well as the timeline for negotiations" (Council of the European Union, 2017h, p. 4). The four-column document in this file follows the conventional design with one addition, namely that rows are assigned a color. Depending on the degree to which the issues in the rows are solved, the compromise column states green, yellow or red. Possibly followed by some explanations or draft text (Council of the European Union, 2017g).

Further, participants to the first political trilogue agreed on a "list of political and technical issues [and] the delegation to the technical level of a large number of pending issues" (Council of the European Union, 2017h, p. p.3). This shows that the issues to be discussed on the technical level are agreed and delegated from political trilogues a priori, which is in line with what our respondents said: "Normally, technical trilogues would have mandates from the political level trilogues to deal with certain issues" (R3). While there was a broad political decision in the beginning as to what is to be considered political and what technical, "at all the political trilogues they sort of delegated some of the minor issues to the technical level and we would follow up on them at the next political trilogue" (R4). So, while there was principle agreement in the beginning, the actual delegation of issues to the technical level was constantly updated in political trilogues.

7.4.2 Political Negotiations Begin

Even though no substantial political negotiations took place in this first trilogue, the presidency asked for a revised mandate in preparation for the second political trilogue, which was to take place on 10 October. It did so based on "positions taken by delegations [in working group meetings] on 13 and 26 September and taking also into account the outcome of the last tri-partite technical meetings" (Council of the European Union, 2017h, p.3). In this, the presidency asks Member States to consider several compromises. Firstly, the EP's demand to "ensure that type-approval authorities and market surveillance authorities

adhere to a strict separation of roles and responsibilities and function independently from each other” (ibid). Further, the Council presidency urges the Member States to approximate the EP’s position on the Commission’s role as compliance verifier, in exchange of which the presidency wants to convince the EP to “clarify that the Commission is not given any power over national type-approval authorities” (ibid, p.4). As to Article 77, the presidency proposes to follow the EP by strengthening the role of the joint assessment team (ibid, p.5). Also, a first attempt to “seeking some flexibility from the Council side concerning the principle of a time limitation of the validity of the designation of technical services” was made by the Maltese (ibid, p.6).

Based on an updated General Approach given to the Maltese Presidency, which the Member States approved on 4 October, the second trilogue was used for actual political negotiations, and some preliminary agreements were reached in this trilogue. One of the big issues this trilogue revolved around was the Commission power of ensuring compliance and carry out its own test. Concretely, much of the discussions revolved around a single word. The Commission proposal, as well as the EP position, on Article 9(1) envisaged that “The Commission **shall** organize and carry out [...] tests and inspections” (Council of the European Union, 2017g, p. 58). The Council, in its position, wanted ‘shall’ to be replaced with ‘may’, arguing that this would still allow, but not oblige, the Commission to conduct its own tests. Arguably, “it seems to outsiders really weird that we were fighting for hours over one word, which was may or shall” (R4). However, this word was important as only in the case of ‘shall’ being used would the EU budget allocate funds to this task. Given that the Member States also wanted the clause “at its own expense” (Council of the European Union, 2017g, p. 58), the budget allocation was in the end the winning argument that also convinced the Council presidency (R4).

Accordingly, the new bid for a revised General Approach by the Maltese presidency for the third trilogue on 23 November includes the question of may and shall. On the independence between type-approval and market surveillance authorities, the presidency proposes to give in to the strict EP separation but make clear that they can still be in one organization “provided that their activities are managed autonomously as part of separate structures” (Council of the European Union, 2017e, p. 4). A new issue on which negotiations started to become more concrete is the obligations of market surveillance authorities in view of the numbers of cars to be tested. The presidency proposes to introduce a “lowest threshold of 5 to 10 tests for Member States with a low number of new vehicle registration (Council of the European Union, 2017g, p. 48) and, possibly, by increasing the number of tests in general through the requirement to carry out one test for every 30.000 to 50.000 new motor vehicles registered (ibid). The presidency, however, does propose to stay strict in refusing the EP’s demand for Member States to develop and have approved by the Commission specific surveillance plans. Further, the Council has moved towards the EP in terms of the forum and the connected database.

Another highly controversial issue that was picked up was the automatic termination of validity of type-approvals. The presidency asks for flexibility on this point, proposing a verification that the conditions under which type-approval was granted do still apply every five years and, as a fallback option, to accept the EP proposal, as “the presidency believes that a compromise on this will be necessary to reach the overall agreement” (Council of the European Union, 2017e, p. 6). On the issue of fees, the presidency proposes to not change the General Approach, as also the EP “has indicated flexibility on the issue [...], if the Council could be more flexible on the issue of termination of validity” (ibid). Lastly, the issue of making data available to independent operators has come on the agenda, with the presidency proposing to move towards the EP position.

7.4.3 Towards an Agreement

Trilogue 3 of 23 November could have been the last one already, had it not been for the rapporteur to have an obligation which meant “that he couldn’t commit to an open-ended trilogue and we had to finish around 11:30hrs.” (R5). This completely changed the expectations of participants towards the trilogue. “With a politically tricky file like this it is quite common that each side will only commit to the final result once they know this is really the final trilogue” (R4). As the rapporteur “had a plane to catch” (R1), the third trilogue was not conclusive. Still, many controversial issues had been debated, for example “the issue of how many checks the MS had to do was one of the very last things that was solved during the 3th political trilogue” (R4). In general, “during the meeting the EP demonstrated significant flexibility and consequently proposed compromises on most of the important political issues on which an agreement could be reached” (Council of the European Union, 2017c, p. 3).

Accordingly, on the issues of validity of type-approvals, the numbers of vehicles to be tested annually, data availability for independent operators and the Commission’s oversight role compromises were close. After the third trilogue, the presidency asked the Member States for a last revision of the mandate “with a view to reach agreement at the next trilogue” (ibid). On the issue of obligations for market surveillance authorities, the Council is to confirm the results of the last trilogue, including amongst others a minimum of five annual test, one test for every 40.000 cars and “20% of the minimum number of tests [being] full emission related tests equivalent to type approval tests” (ibid, p.4). Further, the Council shall give further rights to the Commission in oversight of type-approval authorities.

Not all issues had been resolved in the third trilogue. One question of contention was the application date of the Regulation (R9). Instead of application from 1 January of the following year, as envisaged by the Commission and the EP, the Council demanded it be applicable only 36 months after its coming into force, with the presidency asking for flexibility in case necessary and a fallback of 30 months before the last trilogue.

With this new Council mandate the fourth and final trilogue took place on 7 December. The outstanding issues were heatedly debated, such as said date of application. Otherwise, the fourth trilogue served to smooth the remaining unclarities: “The last one was a few minor outstanding issues” (R4), which had been left on the table simply because there was no time to discuss them in the third trilogue. These issues were resolved and “in the end we were quite satisfied and shook hands” (R4). After approval in the respective institutions, the final legislative text was published in the official journal of the European Union on 14th of June 2018, being the first official legislative response of the EU to the Dieselgate scandal.

7.5 Discussion

The Regulation was both, highly technical as well as very salient and controversial within and between the institutions. Below, the outcome will be presented and analyzed, before we dive into the single aspects of the negotiation process on this file.

7.5.1 The Outcome

In total, nine specific issues stood out in this file as politically controversial and shaping the negotiations. The first was the issue of Member State obligations, or the question what Member States are obliged to ensure regarding type-approval and market surveillance. The controversial question was the degree of separation, or not, between the two tasks. Should, that is, the two tasks be conducted by the same organization or not? While the Commission proposal as well as the Council did not foresee any obligation except for “establish[ing] or appoint[ing] the approval authorities and the market authorities” (European Commission, 2016e, Art.6.1), the EP wanted Member States to “ensure that type-approval authorities and market surveillance authorities adhere to a strict separation of roles and responsibilities and function independent from each other” (European Parliament, 2017d, Amendment 62) so basically the two tasks be conducted by different entities. The result is a compromise par excellence: While the EP demand for ensuring the separation of tasks can be found in the final legislation, the stipulation that “[t]hose authorities may be within the same organization provided that their activities are managed autonomously” is also found in the final regulation (European Parliament & European Council, 2018, Art. 6.1)

Secondly, one of the most heated debates evolved around the question of numbers of vehicles to be checked annually by market surveillance authorities. Starting positions were widely apart, with the Commission not foreseeing any minimum, the EP demanding 20% of the number of all newly approved types on the market, and the Council opting for “1 in every 50.000 new vehicles”. Again, the final solution represents a compromise. Firstly, the Council’s approach to measuring the number is maintained, but increased to 1 in every 40.000 vehicles. Second, the EP managed to insert a minimum number of five annual tests in cases where there are less than 40.000 new registrations. Third, 20% of the tests

shall be carried out “in the form of emission-related tests comparable to type-approval tests” (European Parliament & European Council, 2018, Art. 8.3), another concession to the Parliament.

The role of the Commission in verifying compliance is laid down in Article 9. Debates evolved around whether the Commission shall be obliged or merely allowed to carry out its own tests, and in general on the role of the Commission in especially market surveillance. Here, the EP got its way by insisting on the obligation, albeit the Council added the Commission tests shall be carried out at its own expense, while the EP also demanded the Commission to audit the type approval authorities, something strictly opposed by the Council. These audits were accordingly toned down to “assessments” the Commission shall carry out that should “aim to assist the approval authorities that grant EU type-approvals to ensure the uniform application of this Regulation” (European Parliament & European Council, 2018, Art. 10).

Related to the question of oversight, a Forum was to be established to ensure exchange of information and, possibly, powers of enforcement, something the Council was opposed to. Here again, the outcome clearly represents a compromise. The EP was granted the right to be invited, as observer, to meetings when appropriate. On the other hand, the Council ensured clear stipulations as to the advisory and facilitating character of the Forum. The EP demanded annual reports by the Commission on the Forum’s activities, while the Council did not foresee such reports. In the end, the Commission is obliged to make a “summary report of market surveillance activities publicly available on a two-annually basis” (*ibid*, Art. 11.3). Again, this can be interpreted as a rather balanced compromise.

The Financing of type-approval activities is a whole different issue. Here, the EP and the Council had similar positions of deleting the obligatory fee structure. Indeed, the final provision simply states that “Member States shall ensure that sufficient resources are available” and that, in case there is a fee structure in place, these fees “shall be levied on the manufacturers who have applied for EU type-approval” (*ibid*, Art.32.1). While this issue was hence of limited controversy, the following was not: The termination of validity of type approvals was in the beginning heavily opposed by Member States. As a reminder, the Commission did foresee a limit of five years, the EP of seven to ten years and the Council none. The final regulation stipulates that after seven to ten years, depending on the vehicle type, “the approval authority shall verify that the type of vehicle complies with all regulatory acts that are relevant on that type” (*ibid*, Art.35.1). Further, conditions of approvals becoming invalid are laid down, as well as the manufacturers duties of reporting to the authorities. While hence there is no direct and explicit termination of validity, type approval factually needs be renewed every seven to ten years.

The access of repair and maintenance information for independent operators was another priority for the EP, and one that was granted by the Council. The debate revolved essentially around (1) which information shall be available and (2) whether they need be made available pro-actively or upon request. Again, we see a compromise, in that the EP

managed to have all necessary data made available, while the Council maintained that parts of this data need only be made available upon request by the operator (ibid, Art.61).

Regarding the assessment of technical services, whether a peer-review mechanism shall be installed was debated, with both the EP and the Council opposing a strict mechanism. Accordingly, the regulation does not entail a strong mechanism but merely the possibility of peer evaluation in specific cases and without any direct enforcement power. Furthermore, the peer evaluations shall not on a regular basis be (co-) conducted by Commission representatives.

The two last issues concerned administrative fines to be issued by the Commission and, lastly, the date of application. The Member States were very strict on the issue of fines and hence the final regulation very much resembles the General Approach, also because the EP mandate did not substantively differ from the General Approach on this issue. Lastly, the question of when this regulation shall apply was approached differently. While the EP foresaw entry into application for 1st January 2020, the Council demanded it to enter into application only 36 months after entry into force. The last trilogue was needed to strike a compromise on the issue, with the regulation entering application now on 1st September 2020, so approximately 26 months after entry into force.

As becomes clear in the account above, the comprehensiveness of the outcome scores high on the dimension of initial positions entailed. On issue I the negotiators were able to fully accommodate both positions, allowing for a single organization in case tasks are clearly separated. Issue II also represents a compromise. While the Council method of measurement is adopted, through an increase in the number of cars originally foreseen by the Council and other smaller concessions, again both positions can be regarded present in the final output. Concerning Article 9, the EP secured its core preference, obligation for the Commission to conduct own tests, but again granted concessions to the Council.

On issues IV and V, both positions are represented, on the former by adding a new article on online-data exchange (new Art.11). On the termination of validity, even though the Council has agreed to factual limits on the validity, the final provisions can still be regarded as a compromise position. While the peer-review mechanisms have been disapproved by both institutions, issue VIII again represents a clear compromise considering both positions, by allowing independent operators access to the manufacturer's information, but making it dependent on operators actively demanding it. The date of application again represents a clear middle-ground. Hence, in all politically contentious issues we find both positions of the legislators reflected in the final output. While not all these compromises might be fully balanced and represent "meeting in the middle", the institutions have not stuck to their positions without compromising – their approach was not to increase the own gain at the expense of the other.

Table 17: Case 3 - Summary of Positions and Outcome

Issue	Proposal	EP	Council	Outcome
I) Member State obligation (Art.6)	Set up authorities	Ensure separation of tasks between type-approval and market surveillance	Have both done by the same organization	Strict separation of tasks, but possibly by same organization
II) Surveillance obligation (Art.8)	No minimum	20% of new types approved	1 out of 50.000 newly registered vehicles	1 out of 40.000 and additional concessions to EP
III) Compliance verification by the Commission (Art.9)	Strong role, obliged own test	Strong role, obliged own tests	Moderate role, no obligation	Obligated own test, but role toned down in general
IV) Forum (Art.10)	Advisory body for information exchange	+ EP representatives as observers, + online database	Stress advisory character, not lay down clear tasks	+ observers, advisory character stressed, no clear tasks. Online data exchange regulated in own article.
V) Financing of type-approval activities (Art.30)	Obligatory fee structure	Obligation to ensure sufficient resources	Obligation to ensure sufficient resources	Obligation to ensure enough resources
VI) Termination of validity (Art. 33)	After five years	After seven to ten years	No	After seven to ten years, but toned down
VII) Peer review of type approval authorities (Art. 71)	Peer-review mechanisms	No	No	Peer evaluation mechanism in specific cases
VIII) Access to repair and maintenance information (Art. 65)	Moderate access	Strong access, pro-active	Moderate access, reactive	Strong access, reactive
IX) Date of Application (Art.98)	1 January 2020	1 January 2020	36 months after entry into force	26 months after entry into force

When it comes to the negotiators satisfaction with the result, it is a gain very high. Except for very few minor critical remarks, for example criticizing a few “issues which we gave up too easily” (R4), the overall satisfaction was very high (R1,2,3,4,5,6,7,8, 9, 10). This is also reflected in the result of the EP final vote on the regulation, with a very clear majority of 547 members voting in favor and only 83 against, and merely four abstentions and no vote against the regulation in the Council (R2,5,8).

Politically speaking, the comprehensiveness of the agreement is therefore high. The assessment is similar for both, legal effect and the legal soundness of the agreement. While the institutions did certainly work with recitals to facilitate compromise finding, positions of both legislators are also reflected in the articles in most of the cases and overall, most positions that are integrated in the final compromise have considerable legal effect. Further, the assessment of the legal soundness is decidedly positive: “In terms of the legislative quality, it’s a file of high quality. I have rarely seen both legal services as satisfied as in this case” (R5, but also 2,3,6,8,9,10).

7.5.2 Interaction Intensity

During the more than two years that lay between the Commission proposal for a new type-approval Regulation and the agreement in trilogues, social interaction in this file has been constant and spanning all theoretically possible tracks of interaction. In order to get an overview, let us revisit one-by-one the different forms social interaction can take.

Firstly, the chief negotiators of the Council and the EP can and will interact socially in trilogues. In this case of negotiations, the interaction intensity was indeed particularly high: “I know that there was very close cooperation between the rapporteur and his assistant and the policy advisor who were leading the technical negotiations and there was a very close cooperation between them and the Council working party, or the Estonian presidency” (R4). The contact between the two negotiators started early in the negotiations, when the rapporteur himself apparently met “on a few occasions with the deputy Permanent Representative” (R6). Further, there was a constant email- and phone exchange and especially the rapporteur’s office coordinated heavily with the Estonian presidency: “quite a lot of that was done between them” (R6, R1).

The interaction intensity was hence high, but it showed that the interaction between the chief negotiators was not fully transparent to all those participating in the negotiations. For many, “it is difficult [...] to say how much informal cooperation there was between the rapporteur’s team and the presidency, presumably a lot” (R5). Nevertheless, everybody was aware that at least some interaction has been taking place and that “the [rapporteur’s office] was coordinating with the presidency” (R5, but also R3,4,7). In this coordination, the secretariats of the institutions had a partial, but no fixed role. They only took part in the interaction when actively invited by the chief negotiators. One of the reasons to not, always, invite them, is that all the knowledge obtained by the secretariats was shared with everybody who has a stake in the negotiations (R8). Often, the chief negotiators’ teams

would hence by themselves meet “face-to-face”. And you could see a lot of confidence developing between the rapporteur and the presidency” (R9).

While there is ample evidence of very close cooperation, it is yet another question whether the chief negotiators have formed a coalition. Certainly, it can be ruled out that Dalton and the Estonian presidency grouped together to push through their own agenda in terms of the content of the regulation. The simple reason for this is that the Estonian presidency was known as “honest and neutral brokers” as they “didn’t have a stake in the matter whatsoever” (R5). The only preference followed by the Estonians was obviously finding agreement with the EP. On the other hand, they were bound by a mandate, and that mandate in return was closer to the rapporteur’s preferences than were the positions of the progressive center-left groups of the EP. In that sense, it could have been a strategy for the rapporteur to build a coalition with the presidency and push through his own agenda. However, our data does not offer any trace of an active coalition to defend any policy preferences against the interference of their respective institutions. It can therefore be assumed that it was the procedural preference for conclusion only that led the two sides to interact intensively.

The second form of social interaction is within the EP negotiation team. Within the EP, the case exhibits clear potential coalition choices. The policy preference, especially on most of the political issues discussed above as well as on the central issue of a potential agency, neatly aligned ECR, EPP and ALDE. Consequently, during the EP negotiations “there was a stable coalition between EPP, ECR and ALDE” (R2). This coalition, or at least its potential, did not only become apparent during the negotiations on type-approval, but rather “it was clear from the EMIS committee and with this file that yes, as starting positions you have a clear [...] progressive block. S&D, the Greens” (R5). Hence, initial preferences would have us expect coalition building along the left/right-division and indeed this seems to have been the case. However, the rapporteur put exceptional effort in trying to bridge these coalitions and especially bring S&D in and get their support for the negotiation mandate. “He was very much attentive to the S&D. At some point [EPP and ALDE] were even telling him this might be too much” (R1). Still, the rapporteur “relied on [the center-right coalition] to get through the Committee and Plenary vote” without including an agency (R6).

However, next to trying to accommodate S&D and Green preferences (apart from the agency) during the EP-internal negotiations, also during the following trilogue negotiations the rapporteur stayed attentive to the left block within the EP. Once the controversial agency-issue had been settled by a vote, the internal EP-division seems to have diminished, as well: “After the mandate the EP I think was quite united” (R4). All participants described the interaction within the EP team during the negotiation process as good, mainly due to the work of the rapporteur. “The rapporteur on this file did a very good job trying to bridge the positions between the different blocks” (R5). He kept everybody informed about the current state of affairs, usually in a timely and open manner,

as he seemed convinced that full openness promises the most successful negotiations (R6,8). Yet some participants felt that occasionally, coalition dynamics did re-enter the trilogue phase and “there were some points when we would get some information on what they were wanting to give up just an hour in advance, where we thought this is not good for our cooperation” (R4). From our interviews it seems that these felt differences were perceived along the dividing lines between the coalitions (R2,4,5,6,7,8). However, it must be stressed that they were the absolute exception and that in general, all parties felt that “He made sure to keep everybody informed” (R2).

A second aspect furthering interaction was the IMCO secretariat, which was seen as a good addition to the rapporteur by the rest of the negotiation team. Its involvement increased the openness of the negotiations: “And we knew also that the IMCO secretariat sort of had to be neutral, so usually what they suggested to us was also quite reasonable” (R4). In general, the social interaction within the EP negotiation team was overwhelmingly perceived as frequent and good, also across political dividing lines. “The rapporteur on this file did a very good job trying to bridge the positions between the different blocks” (R5).

The next aspect of social interaction is cross-institutional contacts beyond the presidency and the rapporteur and indeed, also this form of interaction was of high intensity within this file and, in parts, follows the coalition logic. Most EP actors indicate their frequent contact to Council delegations: “I was in touch with a large number of Member States during the entire process” (R1). These interactions followed two patterns. On the one hand, the own national delegations seem a logical point of departure for obtaining information from within the Council (R1,3,4,5). Second, again policy preferences are an important driver of contact. This interaction serves two main goals. Firstly, everybody “want[s] to have information” (R1): “It’s quite important sometimes to get your own information, at least that you can verify the assessment of the situation” (R5). Even if the internal circulation of information seems good and everybody feels comfortable with the information received, it is important to use as many sources as possible to be able to judge for oneself what exactly is the state of play. Second, and in the case of overlapping policy preferences, indeed political coalitions are formed. Especially one delegation seems to have maintained close contacts to the EP: “The French Perm Rep was really active, and we had good cooperation with them. [They] would tell us ‘well, we know the Estonians have to present this offer to you, but if you just push them, then they can get back to the Council and say the EP was really against this issue and get a broader negotiation mandate” (R4). To several party groups the French reached out “on points where they sort of formed a coalition” (R5).

The inspection of the interaction intensity in this file features different interesting analytical aspects. Firstly, the expectation that coalition-building follows policy preference is confirmed. All coalitions that could be traced were formed based on preference convergence. However, these coalitions did only to a limited extend predetermine the

interaction intensity, especially during the trilogue negotiations. The rapporteur did seemingly intentionally not follow the coalition dynamics in determining his social interaction especially within the EP team. This diminished the creation of outsiders from coalition-building, as the coalition dynamics did not fully vanish, but at least were remarkably reduced in the second phase of negotiations between the EP and the Council. Only sporadic did interviewees confirm that their interaction was driven by coalition dynamics (R4,7). Overall, we would expect the high intensity of social interaction to have created a trusting environment both within the institutions as well as across, especially between the chief negotiators. The following inspection of the venues and negotiations mode will show us whether this had the expected impact on the negotiations.

7.5.3 The Negotiation Venue

The data shows that all three venues of decision making were effectively used in the negotiations on type-approval. At political trilogue level, four meetings took place in total, out of which three witnessed actual negotiations (R1,3,4,5,6). The exception was the first trilogue, which was merely used to exchange positions, agree on an agenda and decide which issues could be delegated to the technical level: "They took a decision saying 'these articles which were of minor political relevance we delegate to the technical level, see if you can find a solution to these points and return to us at the next political trilogues'" (R4). Participants did not only confirm the absence of negotiations in trilogue one, but moreover stated this to be the case in most negotiations. There is clear proof for actual negotiation taking place in trilogues two, three and four however: "In this file there were real negotiations" (R5).

The second trilogue was mostly dedicated to finding a solution on the issue of compliance verification by the Commission, and the data gives a neat insight into how these negotiations play out. The decisive issue here was a single word, determining whether the Commission 'shall' or 'may' conduct its own test. Of course, the choice for the one or the other had important financial implications. It seems that it was in the political trilogue meeting that arguments were exchanged and the issue finally, at least provisionally, agreed upon. Trilogue three saw important progress, as well, with many of the outstanding issues having been resolved in this meeting. It is highly likely, however, that many of these compromises were at least prepared, if not pre-agreed, at the technical and informal levels, given that it involves a broad range and the third trilogue was conducted under considerable time pressure due to the rapporteur needing to leave after three hours (R5). In trilogue four, the remaining issues have been agreed, with the only yet unsolved issue being the date of application. This issue however was fiercely debated, with "an actual bargain, month by month" (R9).

The second venue of negotiations is the technical level trilogues. The sum of technical meetings adds up to at least 20, which lasted "between three and five hours" (R4). Indeed, participants "spent a huge amount of time on the technical level discussing this file" (R1)

Every party to the political trilogues had the right to attend technical level meetings. Therefore, these meetings assembled Parliamentary assistants, political advisors, attachés from the Permanent Representations, administrators from the Commission as well as the Council and EP Committee secretariats. “The ECR advisor was leading the technical trilogues” (R3) supported by the EP committee secretariat (R5).

Technical trilogues already started before the first political trilogue, when participants mainly clarified and agreed on a common understanding of technical definitions and other minor issues without, however, already engaging in negotiating different positions (R4,5,6). Except for these first meetings, the technical level was normally mandated to discuss specific issues from the political trilogues: “Normally, technical trilogues would have mandates from the political level trilogues to deal with certain issues” (R3). Nevertheless, in effect “all issues had been discussed, at least touched upon, in technical trilogues” (R10).

Delegation to the technical level therefore is a conscious act, and there is no automatism of specific issues being discussed at the technical level regardless of the positions of the institutions simply because they are ‘technical’ in nature. Still, there is broad agreement that in general there are a lot of ‘technical’ issues and that it is useful, if not necessary, to delegate them: “With a 100 article-long file, a complexity level like this one you really need to make a lot of work on the technical level” (R4). In the character, and here especially the length of the file, seems to lie one reason for the necessity to delegate.

Issues that have been delegated once did not vanish in the world of advisors and assistants. Rather, the delegation between political and technical level was a two-way street. First, everything that was pre-agreed at technical level needed final approval in political trilogues. Second, participants to the technical level were not demanded to take a decision, but rather invited to engage in the search for one. If any party felt that an issue was too politically important, it was always possible to step in (R10). In case an actor felt it impossible to agree to a compromise at technical level, they would still explain “what [their] rationale is behind it and how you see that interplay with other pieces of legislation” (R4). The technical level meeting hence offered a forum of debate and pre-discussion even if no agreement could be struck there.

This also means that hardly any issue was not at all discussed in technical trilogues, even if it was clear from the beginning that they would need political-level negotiations. The issue of the minimum number of cars neatly exemplifies this logic. Even though it was one of the most controversial issue, it was nevertheless delegated to the technical level for some pre-negotiation in the sense that participants “discussed different options at technical level but that’s pretty much all we could do” (R4). Discussion went beyond merely presenting different options, but can clearly be labelled proper negotiation, as compromises were certainly struck at the technical level, as one participant describes:

“What we discussed in the technical meeting is that both the Council and the EP had inserted a minimum number of vehicles to be checked, which wasn’t there in the

Commission proposal. [...] But the way in which it had been drafted, and the whole way of measuring that, was completely different in the EP than in the Council proposals. So, basically what we did at the technical level was kind of discuss whether we could agree at least which way we should set the targets. And then we can start talking about what the targets should be. [...] The concrete number was decided by the political level" (R5)

A single issue is therefore clearly not either technical nor political but entails aspects of both and is treated accordingly in trilogue negotiations. This example neatly clarifies the value of technical meetings, where participants "may be able to have these long discussions to find out where the route is. Then the participants go back to the institutions and say we think that might be a part where they might give in, that's what their technical level said. And then we work a bit more at political level before it is finally agreed in trilogues" (R6).

Across all participants there is agreement that the issues are negotiated and decided at the right level according to their 'nature', i.e. whether they are technical or political. Problematically, there is of course no neat and clear standard which would allow objective division of issues into the one or the other, even though there seemed to be a general intuitive agreement on it between the negotiating partners. In case of any disagreement on this, participants at the technical level were always able to disagree and send the issue back to the political level. In general, the controversy around an issue seems to have played an important role concerning their delegation, or not, to technical level (R1,3,4,7).

Technical level trilogues did not only prepare the issues to be agreed at the political trilogue, it also worked the other way around. Often, political level trilogues would find agreement in principle on an issue, but this political forum is often not well equipped to take the time to formulate legislative text. Therefore, the technical level was also used "in order to implement the political decisions into actual text" (R4), putting agreement in principle into legislative texts that can be implemented by the Member States. Hence, the technical level was involved in all issues and at all stages of decision-finding. However, trilogues, whether technical or political, were not the only two venue of negotiations.

An important rationale for defending informal meetings between the chief negotiators from within the institution is that "just the [trilogue] meetings, especially on the political level won't help actually to solve the entire issue" (R1). This implies that negotiators need a 'safe space' or a 'space to think' that is even more restricted than are political trilogues. There was a general awareness among interviewees that "the [ECR] policy advisor and the rapporteur's office were very much in touch with the presidency. At the point to actually try to discuss over difficult issues" (R1). It is of course a recurring difficulty to determine the nature of the meetings and discussions but there is evidence that these meetings served to negotiate. The chief negotiators "met on a few occasions [...]. Just when there were political problems [...] to see if [they could find] a path to solving between themselves. [...] quite a lot of that was done between them" (R6).

Not only were participants aware of this happening, it was encouraged. For example, in “the technical meetings we have between the three institutions or the political trilogues, we even invite the rapporteur and the presidency to come together and try to find a solution” (R1). One could therefore speak of delegation to these behind-the-scenes negotiations in which the chief negotiators are demanded to consult and find possible paths for compromise, even though this delegation is of course not official and will not be traceable in, say, official documents or agendas. While in principal the Commission could be involved in these talks as well, “in this it was mostly about the discussions between the presidency and the rapporteur” (R1).

While these negotiations only included an exclusive circle of actors, interviewees generally felt quite informed about what had been going on behind the scenes. Again, the rapporteur seems to have followed an approach of openly informing his counterparts. Before every technical and political trilogue meeting, the shadows or their teams came together and would be informed by the rapporteur that they “had exchanges with the Council presidency and [...] believe that they would be willing or able to move in our direction on this, or it would make sense if we gave them that” (R4). This information policy was generally approved by the EP and “it never happened that the rapporteur would come back and say I had these negotiations with the presidency, we end up with this result, and that the entire EP would say ok, we are not behind this” (R1). Additionally, this underscores again that the informal discussion was perceived as actual negotiations.

Given this, it is not surprising that support of what had been agreed informally was not always universal: “There were some points when we felt the rapporteur and his team had been moving in such a direction that the only logical outcome would be to give up on certain points where it would be difficult to step in and say we cannot accept this now” (R4). Not only does this imply that on some issues the EP team would not support the compromises struck in full, but that they further did not have the feeling that what had been agreed could effectively been turned around again, as “when you have been building towards a certain goal some time it becomes difficult to turn around” (R4). Therefore, even though everybody was generally well informed about what the rapporteur had done, not all parties did agree in full.

Still, in most of the cases the EP team “sort of nodded along, saying ‘okay, we think this line is fair’” (R4). It is regarded “even helpful for the progress of the file to have at some point meetings like this when they actually think they can come up with a compromise they can both sell to their institutions” (R1). Especially as, either through formal channels of information, or informally, all parties to the negotiation would know about what has been discussed: “You wouldn’t genuinely get to a trilogue where you don’t know where all the negotiations have come to [...]. And most of the times you would [get to] know behind the scenes if an agreement was done quietly behind the scenes” (R6).

The data clearly shows that all three available venues have been used to negotiate in this case. First, this can be linked to the nature of the file. The actors agreed that with

a file of this length, restricting negotiations to political trilogues would not have been feasible. Not only technical and non-controversial issues have been delegated in full. As the example of a minimum number of cars shows, even highly controversial issues have been at least pre-discussed at the technical level in order to agree as many aspects as possible on this level.

Secondly, we witnessed a case of high interaction intensity, both intra- and inter-institutionally, and data confirms that this has led to high levels of trust. Both, the rapporteur as well as the presidency have been attested trust by their respective institutions and by the respective opposite negotiator. It is therefore not surprising that both, a high degree of delegation to the technical level as well as behind the scenes negotiation between the chief negotiators did not only took place but was seemingly encouraged by all participants for the sake of finding solutions for the politically most difficult issues.

One can therefore witness a pattern of delegation, ignoring for now that what happens behind the scenes is not officially delegated: The least political contentious issues are (pre-) negotiated at the technical level, while the most contentious issues need pre-negotiation behind the scenes, in a safe environment where parties can present their positions and possible ability to compromise more honestly than is, apparently, possible in actual trilogue meetings. While also at technical level as many issues as possible are negotiated, high political contestation presents a limit to these negotiations, which is contrary in the informal venue.

The dynamics around the negotiation venue in part correspond well with the findings on the outcome: Legal effect and legal soundness of this file indeed were exceptionally high, and our data shows that indeed the expected relationship was at work. Through the increase in time and expertise gained through the delegation to technical level, the legal solidity of the file increase. However, other expectations were not met. The high degree of informalization did not lead to considerable dissatisfaction, even though the very moderate dissatisfaction witnessed in this file can be linked back to the informalization. Concerning negotiation mode, the patterns in the venue choice would have us expect a more integrative approach to the negotiations.

7.5.4 The Negotiation Mode

If one was to describe the negotiation mode in this file, one could not but use 'diverse'. Our data shows that there is no clear, single approach followed by the negotiators, but that in contrast, the atmosphere and approach by negotiators changed depending on the institutional venue negotiated in. In general, the assessment was that "it was not an easy negotiation at all. Especially because of the length, and how large the file is" (R1). It is therefore useful to not regard this whole negotiation as one but differentiate different venues and issues in order to understand which negotiation mode was applied by the participants.

In political trilogues, interviewees are relatively clear that this mostly was “a tough, hard bargain” (R6). Except for trilogue one, of course, where no real negotiations took place, the institutions did not engage in problem solving during these highest-level meeting and mostly tried to defend their red lines. The examples of in-trilogue negotiations offered by interviewees, such as an hour-long discussion on the issue of compliance verification, i.e. ultimately around one word, supports this view. This bargaining approach is notwithstanding the fact that most issues had been pre-discussed in other venues: “Most of it is stuff that has already been tested either at technical level, between [the chief negotiators] talking. But not all. Actually, in these trilogues we did maybe more negotiation than sometimes in others” (R6).

Second, also the negotiation strategies of entering trilogues with several proposals that could, if necessary, be used as a fall back option as implied in the updated Council mandates confirms that the institutions were set to defend as long as possible their positions and did not approach the opponent with compromise proposals from the start of the negotiations. Especially “the last two political trilogues were very difficult. It was a lot about different sides taking breaks and trying to consult key players” (R1). In order to find solutions, the institutions would also package different issues together and exchange concessions: “You sort of take a lot of different political issues and batch them together into one deal” (R4). Overall, political trilogues were “quite a hard bargain and I think we forced the [opposite institution] to move a little bit from where they really wanted to be” (R6).

However, the approach towards negotiations taken in the highest level, formal venue does not necessarily overshadow the whole negotiation: “I think there’s two different atmospheres. During the technical trilogues, there was a very constructive approach. [...] We had a really good working relationship with both the Council and the Commission. [...] During the political, the atmosphere was a bit more tense, but that also varied from trilogue to trilogue” (R4). Again, even variation within different trilogue meetings is implied, but especially in between different venues of negotiations. Delegation to the technical level had the expected causal effect, as “on the side of the technical team we had a good atmosphere” (R5).

Everybody approached the negotiations at technical level with an open mind (R6) and there was a “constructive, cooperative relationship in the EP as well as across institutions” (R2). Negotiations at this level are also less formal than is the case at political trilogue level. For example, representatives of shadow-rapporteurs would also speak at this level, which is not allowed in political trilogues. Two different factors explain this. First, the delegation factored out political tension. At contentious points technical level participants would normally decide to re-delegate the delicate issues to the political level. Second, the sheer duration of the negotiation and quantity of technical meetings does, as suspected, make a difference. Participants get to know each other and the respective other’s positions and rationales behind them. Interaction intensity matters: “I think it does. If you spend every

Friday with a certain group of people, you get to know the presidency, the Commission and the atmosphere becomes a bit more informal" (R5). In the technical meetings, both within the EP negotiation team as well as across institutions, there was "not a lot of tension. Not at all." (R3).

Behind the scenes, the informal exchange between the chief negotiators was also coined by a very open and integrative approach by both negotiators. All evidence points to the fact that problem-solving was the actual use of these meetings. In principle, these negotiations served to approach the opposite institution in a safe environment and inquire for different possible solutions "whether they would in principle be open" (R6). If this was the case, the negotiators would go back to their institutions and propose the viable solution to see whether they could get support for it. Here, the high-level political level was able to involve in a more consensus-seeking approach, which arguably was not possible in the "formal" forum of political trilogues.

Two important conclusions can be drawn from the analysis of the negotiation mode of these negotiations. First, the theoretical expectations are in principle correct: High interaction intensity led to more problem-solving approaches both, at technical level as well as between the chief negotiators behind the scenes. In addition, there is clear evidence that delegation to lower hierarchical levels impacts on the negotiation mode. However, and as a second conclusion, this does not necessarily show in formal political trilogues. The mode of negotiations differs by venue, and, in contrast to what was expected theoretically, does not necessarily 'travel' across these. In contrast, the design of delegation seems to increase different negotiations modes depending on which venue the negotiation takes place in.

7.6 Conclusion

The Regulation on type-approval and market surveillance of vehicles was a highly technical and complex piece of legislation. In the trilogue negotiations on the file, one could neatly witness all aspects of inter-institutional negotiations playing out in full: High interaction intensity between all actors in different compositions, delegation of negotiations to different venues and a mix of different approaches towards the negotiations in terms of negotiation mode. Analytically, the case offers different interesting insights.

Firstly, the interaction intensity did follow coalition dynamics, but only in part. Coalitions did form, as expected, around policy preference: Especially the question of the agency during the European Parliament mandating negotiations, but also the interaction between single Member States, the Commission and single EP actors during the trilogue negotiations confirms this. In part, the coalition formation also determined the interaction, especially concerning these issues in which positions were divided. However, the file also clearly shows the power of central figures, i.e. the rapporteur in this case, to overcome social interaction based on coalitions and involve strongly also these actors with which

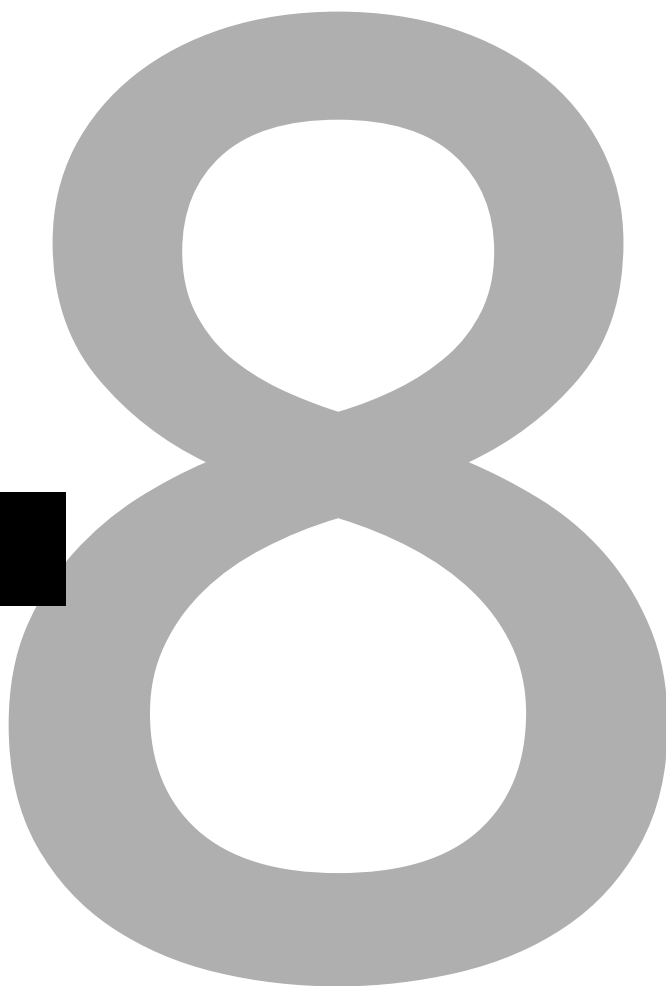
he would not share most policy preferences. In case an actor decides to do so, this has an impact on the theoretical expectations.

The interaction intensity indeed has had one expected impact: It increased levels of trust between the participants. Both, at technical level as well as between the chief negotiators trust increased during the process due to high interaction intensity. This also had an impact on the venues of negotiation, just as we would have expected: As much as possible was delegated either to the technical level or to informal negotiations behind the scenes. While this would have us expect the creation of outsiders, this effect was minimal. There was only very scarce evidence for the creation of inside-outside dynamics. However, those actors who are slightly less happy with parts of the outcome are those that felt slightly left out in some parts of the negotiations.

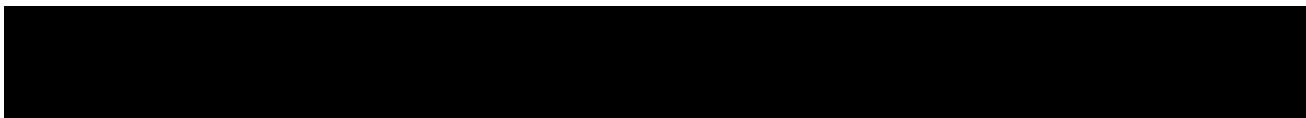
The negotiation mode is an interesting aspect of this negotiation, as well. While everything said above would have us expect a very integrative approach, this is only true, again, for the negotiations at technical level and behind the scenes. It is a surprising finding that in political trilogues, the negotiation mode was very much distributive from beginning to end. This shows that apparently, different negotiation modes do not 'travel' different levels, and that the interaction intensity at technical level does not have an impact on the political level. By design, political trilogues seem to be made for bargaining, and what happens around these meetings seems of limited impact only to what happens within them.

Finally, considering the outcome, many expectations are supported. Delegation and problem-solving approaches in two of the three venues lead to a high quality both politically and legally. It is interesting to see that again, the bargaining approach in political trilogues is of limited impact only, if through delegation the issues can be resolved elsewhere. One possible explanation is that being discussed in technical trilogues and behind the scenes beforehand, issues enter the heated trilogue negotiations only when a range of outcomes has already been agreed that all already present a compromise. In political trilogues, it is only within this close range of compromise agreements that the institutions bargain on a slight shift towards the one or the other's policy preference.

CHAPTER 8



Case 4: Governance of the energy union



Energy policy was one of the priorities identified by the Juncker Commission, with the inauguration of an Energy Union as the main goal. For that sake, the Commission proposed a legislative package, the Energy Package, of which the Governance Regulation was the own to lay the overall structures governing EU and national Energy policy and coordination. As the last of four cases, the following will outline the negotiations of the Regulation in the known manner.

8.1 the regulation

The Energy Union is supposed to be a “major vector for and contribution to a global and comprehensive transition towards a low carbon economy (European Commission, 2016a, p. 2). Due to different crises especially east of the Union, public perceptions of energy security had suffered in the second decade of the 21st century, and national disputes over energy supply and trade entered ever more prominently into the EU. Against this background the Commission came up with its ambitious Energy Union plan.

As EU energy policy had already been before, the Energy Union is directed to three basic objectives: First, energy security, i.e. making sure there is always sufficient supply in energy across the whole Union and at all times; second, sustainability in the Union's Energy policy; and third, economic competitiveness with third countries (ibid).

It was within the framework of the Energy Union that the Commission presented the “Clean Energy for Europe” package, a package of in total eight legislative initiatives to update, improve and streamline EU energy policy “that will facilitate the clean energy transition and make it fit for the 21st century” and allow the Union to reach its 2030 climate and energy target (European Commission, 2016a). The package entailed eight different legislative proposals, one of which was the “Regulation of the European Parliament and of the Council on the Governance of the Energy Union”.

8.1.1 The Commission Proposal

The Governance regulation had as its goal to streamline and summarize different elements of governance, including mostly reporting requirements, which had so far been spread across manifold sectoral legislation on energy: “Current planning and reporting requirements (for both the Commission and Member States) [...] are found in a wide range of separate pieces of legislation adopted at different points in time, which has led to certain redundancy, incoherence and overlaps and lacking integration between energy and climate areas” (European Commission, 2016c, p. 2). Therefore, the new regulation was to “integrate, streamline or repeal more than 50 existing individual planning, reporting and monitoring obligations of the energy and climate acquis” (ibid).

The proposal was therefore set to decrease the administrative burden that comes with reporting in manifold fields of energy policy and allow for an easier comparability between Member States. The latter was of concern due to a recent change in the setup of the Union's energy and climate policy. In its summit in October 2014, hence before

the launch of the Energy Union, the European Council laid down in its conclusions EU-wide targets “of at least 27% [...] for the share of renewable energy consumed [...] and] for improving energy efficiency in 2030” (European Council, 2014, p. 5). More important than these minimum targets however, was the fact that they are to be applied to the EU level and not to be “translated into nationally binding targets. Individual Member States are free to set their own higher national targets” (ibid). This marks an important shift from national binding targets that the EU policy was based on before, a shift that also increases the coordination necessary at EU level to ensure that the EU-wide targets can be accomplished. In the absence of a possibility to set nationally binding targets, comprehensive planning and coordination of Member States plans is required, which is exactly what the Governance Regulation was set out to enable the Commission to do.

The eight initiatives were not all proposed by the Commission in parallel, but as smaller packages. The Governance Regulation was tabled in conjunction with the Directives on renewable energy and energy efficiency. While part of the same wider package, and with certain linkages in the negotiations, the three files were nevertheless negotiated independently from one another and the following discussion will only occasionally refer to the latter two. The Commission proposal was tabled in November 2016. With a length of 89 pages, containing in total 52 Articles and detailed annexes the proposal in general entailed a high level of technicality and, naturally, a plethora of different issues, of which the discussion here will focus on the most important and politically controversial ones.

The Governance regulation set out “to establish the regulatory framework for the Governance of the Energy Union with two main pillars: First, the streamlining and integration of existing planning, reporting and monitoring obligations in the energy and climate field in order to reflect Better Regulation principles. Second, the definition of a robust political process between Member States and the Commission with close involvement of other EU institutions in view of the achievement of the Energy Union objectives, in particular its 2030 targets for energy and climate” (European Commission, 2016c, p. 5). The substantial part of the regulation consists of nine chapters. Chapter one merely gives the necessary definitions. Chapter two introduces the regulation’s main ingredient, namely the so-called “*national integrated energy and climate plans*” (NECPs) (ibid, Art. 3), which should include a detailed set-up of the Member States’ plans for the period 2012-30, to be submitted by Member States “by 1 January 2019 and every ten years thereafter” (ibid, Art.3(1)). Art. 4 stipulates the targets for renewables and energy efficiency of at least 27% (as laid down in the EUCO conclusions) and, importantly, the necessity for Member States, in their NECPs, to lay down a *trajectory for reaching the renewables target* from 2021 onwards. *Draft reports*, on the basis of which the Commission will issue recommendations to the single Member States in case improvement of the plans in the face of the overall EU target is necessary, are to be submitted by 1st January 2018 (ibid, Art.9).

Both, the Commission as well as other Member States shall assess the draft NECPs and issue recommendations as to their sufficiency considering the EU-wide targets (ibid, Art. 12), and by 2024 (and every ten years thereafter) the Member States shall, if necessary, send an updated plan, still referring to reaching the target within the current ten-year framework (ibid, Art. 13).

Chapter 3 establishes the duty for Member States to submit, in addition, “*long-term low emission strategies with a 50-years perspective*” (ibid, Art. 14), to fulfil the Union’s commitment to different climate treaties and keeping the overall global warming below 2°C, or 1,5°C respectively. Chapter 4 introduces reporting duties. Member States are to report biennially the progress made in light of their NECPs and their measures combating climate change in general. The reports shall also include progress made concerning the trajectory on renewables referred to above (ibid, Art.18). Further, the Chapter includes some annual reporting obligations on greenhouse gas. Article 24 introduces an *e-reporting platform* which is to “facilitate communication between the Commission and Member States and promote cooperation among Member States” (ibid, Art.24).

Chapter 5 regulates the important aspect of “*assessment and monitoring of progress and policy response to ensure Union target achievement*”. Should the Commission detect insufficiencies in the Member States’ action, it “shall issue recommendations to a Member State” for it to scale up its action. In case the Commission detects insufficient ambition in one or more national plans, “it shall take measures at Union level in order to ensure the collective achievement of those objectives and targets” (ibid, Art.27). Art.27(4) lays down the so-called *gap-filler mechanism*. In case the Commission worries the Union might not reach its 2030 targets, Member States must make sure the gap is closed in the following years by *either of the following measures*:

- a) adjusting the share of renewable energy in the heating and cooling sector
- b) adjusting the share of renewable energy in the transport sector
- c) making a financial contribution to a financing platform set up at Union level, contributing to renewable energy projects and managed directly or indirectly by the Commission;
- d) other measures to increase deployment of renewable energy.

Further, single Member States for which the Commission has identified a possible gap shall individually contribute to *the financing platform*, the size of their contribution depending on the size of the gap between the target and what they achieved (ibid, Art.27 (5-6). The recommendations by the Commission must be reacted to appropriately by Member States and taken regard of in their following progress reports, where they are to lay out measures taken or planned to confront the problems identified (ibid, Art.28). Chapter 6 entails the duty for establishing inventory systems for “removals by sink of greenhouse gases” (Art.30). Sinks, here refers to a reservoir that can store CO².

Chapter 7 entails further stipulations as to the cooperation of Member States, while chapter 8 establishes the power to adopt delegated acts for the Commission (ibid, Art.8(1)). The “final provisions” in Chapter 9 propose an “*Energy Union Committee*” (ibid, Art.37). This committee shall assist the Commission and replace a committee established earlier which had the task to monitor CO² emission in the Union as well as different aspects of climate change (ibid, Art.37(2)). Subsequently, the ten annexes present detailed templates of the NECPs to be submitted by the Member States, the inventory systems and reporting obligations. Table 18 summarizes the contentious issues and the Commission proposals thereon.

Table 18: Case 4 - COM Proposal

Issue	COM Proposal
Early efforts	Allowing for the applicability of regional and sectoral agreements universally
Energy efficiency first	Nothing
Submission dates for plans and drafts	24 months
Trajectories on renewable	Linear trajectory
Trajectories on energy efficiency	None
Multilevel Climate and Energy Dialogue Platform	None
Long term climate and energy strategies	Every ten years to be prepared by Member States
Provisions on energy poverty	None
Provisions on methane	None
Commission competence in gap fillers	COM shall take measures at EU level to ensure collective achievement of targets
Energy Union Committee	Single Committee

8.2 Negotiations in the council

One of the special characteristics of this file is that it featured both, issues of Energy- as well as Climate policy. In the Commission, this meant that both DG ENER and DG CLIMA were “leading the file from the Commission side” (R4). The first decision to be taken in the Council was hence which configuration would be responsible for negotiating the file. “In such cases, COREPER can decide to create an ad-hoc committee” (R3), which would include both, all representatives from both the Climate and the Energy sector. However, “there is a disadvantage in ad-hoc groups, [...] it is a new group, it has no group dynamics, you miss certain things” (R4). Therefore, the Council decided to have the file dealt with in the Energy configuration, and climate attaches merely joining. “Because the climate aspect in this file is relatively small, really relatively small, 10, 15%” (R4), this was deemed appropriate and also was accepted by everybody as the climate attaches “were fully responsible for the climate part” (R4).

8.2.1 Finding a General Approach: Quality over Speed

After this first administrative question had been decided, the content of the file was to be discussed to arrive at a General Approach. When the proposal was published in November 2016, it was clear that the then Slovak presidency would not start engaging with the file and leave it to the next presidency. In January 2017 the working group on Energy started earnest work on the file. However, for the then Maltese presidency the file had not really been a priority, either. Therefore, only “in February 2017 an exchange of views on the package was held” (Council of the European Union, 2017l, p. 2). In this, “the need for quality over speed” was underlined, effectively already deciding that it would not be the Maltese presidency leading the file to a General Approach. Its work on the file however produced a progress report in June 2017.

Already in its first paragraph, the report states what would become two of the main issues for the Council delegations and in the subsequent negotiations. Firstly, a main concern was the “proportionality of the administrative burden” (Council of the European Union, 2017a, p. 7). A classic Member State concern in EU politics is of course to keep the own administrative burden resulting from EU policies as low as possible. In this case, that target was also explicitly expressed in the rationale of the whole proposal, which should bind and reduce the reporting need and therefore administrative burden for the Member States’ administrations.

However, “the Commission being the Commission, here and there reporting obligations that really were unnecessary were deleted, but other new things appeared” (R3). Especially these ‘other new things’ met resistance in the Council. Secondly, “notably the appropriateness of the proposed *linear trajectories for national shares of renewable energy and energy efficiency*” was heavily doubted by the delegations (Council of the European Union, 2017a, p. 7). Moreover, the *deadlines for submitting reports* had been considered not realistic, and in general the need for flexibility in the light of specific national circumstances been stressed. The *gap-filling mechanisms* were criticized, and delegations called for clearer provisions on the consequences of underperformance. The fact that the NECPs could only be modified to include stronger, not less ambitious targets was criticized (ibid, p.8). An issue that first appeared in the progress report was the definition of so-called ‘*early efforts*’. According to the Commission proposal, early efforts by Member States to reach the overall EU-2030 targets should be considered by the Commission when issuing recommendations, but what these early efforts entail is not defined in the proposal.

Another issue to gain some prominence in the negotiations is the issue of *electricity interconnection targets* (ibid). This refers to connections of electricity systems across borders, which is necessary to trade and transfer electricity from one Member State to another. Further issues raised were the *financial platform* and respectively Member States’ contribution to it, and lastly the *Committee question*, with delegations raising

concerns against the plan to replace “the current Climate Change Committee with a new Energy Union Committee” (ibid, p.9).

On the basis of this progress report, the Estonian presidency took off and was ambitious to lead the file towards a General Approach by the end of its presidency (R11).

8.2.2 The General Approach

Already early in the presidency the Estonians marked “the 18 December meeting of the TTE (Energy) Council” as the occasion for finally agreeing the General Approach (Council of the European Union, 2017l). The file was consequently discussed at several occasions in the following months, both at working party as well as at COREPER level in order to find compromises and the right formulations for the open and contested issues. In general, the negotiations towards a General Approach were not overly conflictive. Many of the issues mentioned unified Member States: All of them have a high interest in a decrease in administrative burden, even though arguably the smaller and less well-resourced members’ interest in this was higher (R4). When it comes to the powers of the Commission of sanctioning underperforming states, the Council was relatively united in its refusal of strong powers. Only a few Member States, notably France, was often pushing for more ambition than its counterparts (R1). A few issues sparked some disputes, as for example electricity interconnection. The Iberian Member States are interconnected themselves, “but they are having a very hard time going through France, because France doesn’t want to compete with Portuguese and Spanish renewables, because they have nuclear energy and they don’t want the prices to fluctuate” (R6). Naturally, on these issues some conflicts would arise. Other than that, the process was lengthy, because the file under consideration was long and rather complex, but not very conflictual.

In its meeting of 24 November 2017 COREPER for the first time faced a complete draft of the General Approach, while until then meetings normally focused on a few outstanding issues. This full version over the course of nearly a month developed into what was submitted to the Energy Council on 12 December 2017 for approving a General Approach on the Governance file. All the main issues had been addressed and resolved to the satisfaction of all delegations at working party- and COREPER level and now needed to be approved by ministers. A definition of early efforts was added in Art. 2(19), “defined as a Member State overshooting its 2020 or 2030 target” (Council of the European Union, 2017l, p. 3), including the period since 2005.

As was to be expected, the *dates of submission* for the first national action plans were deemed unrealistic by the Council, which is reasonable given the lengthy negotiations the file needed and the fact that, by the time the Council General Approach was to be agreed, the first draft NECPs were already due according to the Commission proposal. Therefore, the date for submission of the initial report was set for 31 December 2019 (ibid, Art.3(1)), while the draft reports should be due by 31 December 2018 (ibid, Art.9(1)). For the next ten-year periods, the Commission deadlines were kept. The Council refused a

linear trajectory and therefore set an indicative trajectory with two reference points, in 2023 and 2025, “with some Member States arguing for lower and higher percentages” (ibid, p.2). Art.4(2) lays down a trajectory of 22.5% in 2023, and 40% reached in 2025, so after half of the time and of the total target (100%) of having 27% renewable energy in 2030 (Council of the European Union, 2017k, p. 35). Ministers themselves in the Energy Council session of 18 December added a third reference point of 60% to be reached 2027 as a concession to those Member States that wanted more ambitious targets.

As concerns the long-term strategy on emission, the Member States reduced the perspective from 50 to 30 years (Art.14(1)). In general, the reporting requirements in terms of issues covered and detail to be provided are toned down in the General Approach, as compared to the Commission proposal. One dimension added to the assessment of the Commission, however, was that it “shall assess the progress made towards the level of electricity interconnectivity that the Member State aims for in 2030” (Art.25(3bis)). On this issue, indeed strong opposition between Member States is apparent. The Commission had proposed a 15% target for interconnection, which was deemed highly important by some Member States. “However, this was strongly opposed by some other Member States, which requested deletion or significant amendment of this provision as proposed by the Commission. As a result, the Presidency has seen no other balanced compromise option than maintaining the text of the Commission proposal” (Council of the European Union, 2017l, p. 2).

Consequences for insufficient action by Member States were of high concern in the negotiations. The issue was now coined “ambition and performance gaps” (ibid), referring to both too little ambition in the initial plans and not reaching the targets set in the plans by Member States. As a “response to insufficient ambition of integrated national energy and climate plans” (Council of the European Union, 2017k), the Commission may “issue non-quantitative recommendations [to] Member States whose contributions it deems insufficient” (ibid, Art.27(1)). In general, both concerning insufficient ambition and performance, “EU measures shall be taken only if the national measures [...] are not sufficient to achieve the EU renewable energy targets” (ibid, Art.27(3)). Moreover, the financial contributions to the financing mechanism shall merely be voluntary and not to be forced upon Member States (ibid, Art.27(4)) and the Council detailed the working of the financing mechanisms as well as its own ability to “decide whether, and if so under which conditions, they allow installations located on their territory to receive support from the financing mechanism” (ibid). Further, the Council demanded more information and, in parts, cooperation from the Commission in the overall monitoring of the governance system and the single Member States’ NECPs.

Another important issue was that of the committee. The Commission aimed for replacing an existing Climate Change Committee with a new Energy Union Committee. The Council opposed this replacement and stipulated that “the Commission shall be assisted by (a) the Energy Union Committee and (b) the Climate Change Committee

[which] reinstates" the Committee already in existence (ibid, Art.29(1-2)). The ministers agreed on the General Approach, which mandated the incoming Bulgarian presidency to start inter-institutional negotiations from January 2018. Table 19 summarizes the Council positions on the contentious issues.

Table 19: Case 4 - Council Position

Issue	Council GA
Early efforts	MS achievement in or before 2021 (since 2005)
Energy efficiency first	Not included
Date of Submission of plans and drafts	31 December 2019 and 31 December 2018
Trajectories on renewables	Indicative and backloading trajectory
Trajectories on energy efficiency	none
Multilevel Climate and Energy Dialogue Platform	None
Long-term climate and energy strategies	MS to prepare every ten years
Provisions on Energy poverty	None
Provisions on Methane	None
Commission competence in gap-fillers	COM "may issue non-quantitative recommendations"
Energy Union Committee	Two separate committees

8.3 Negotiations in parliament

When the proposal was published, the EP, just as the Council, had to decide which committee was to deal with the file. While the process in the Council was a deliberative one, in which it was especially the secretariats of the respective Council constellations that agreed in the end (R3), the European Parliament followed its current Rules of Procedure to decide committee responsibility. According to Rule 55, the Conference of Presidents may decide on a joint committee procedure when "the matter falls indissociably within the competences of several committees" (European Parliament, 2014, p. 41). As this was the case for this regulation, the negotiations were led by both, the ITRE and the ENVI Committees in the EP. This entailed a rapporteur from each of the committees, who together draw up a single report to be voted on by both committees together. In addition, also the secretariats of the two closely coordinated, officially building a single ad-hoc secretariat, mailing lists, etc. It does not come as a surprise that "if you have joint committee it complicates a lot in the logistics of the process. Everything is much bigger" (R7).

Not only does a joint committee increase the administrative effort, it also potentially adds another line of conflict. Many proposals are evaluated differently depending on the policy angle actors come from. However, in this case the cooperation was unproblematic: "It actually worked well. There is the perception that ENVI and ITRE are often at war with each other, and it's true that there are turf wars. But in this case, it actually went kind of

smooth" (R1). A main reason for this was that also internally, most parties very closely coordinated their positions between the two committees, with very close cooperation between the two (shadow-) rapporteurs and their teams (R1,2,5,6,7,8). Second, and importantly, the two rapporteurs from the respective committees were both from the Greens. Their cooperation was excellent, so that practically it was as if there was only one rapporteur (R7).

8.3.1 The Draft Report

Given their party affiliation, it is not surprising the rapporteurs aimed at scaling up the Commission proposal considerably when it comes to sustainability and environmental friendliness. Accordingly, "when Greens take the role of rapporteur, its typical, [...] they of course take very ambitious positions. They also presented their first proposals for compromises coming from a very ambitious position" (R8). Given they are from a small party group, the rapporteurs were aware, however, that compromises would need to be struck to get a majority for a negotiation mandate, so that they followed a very pragmatic approach towards finding said majority.

Indeed, the negotiations in parliament were not easy: "The file needed a lot of coordination and confrontation in committee" (R10). Early in the negotiations a division became apparent dividing the EP neatly along the left-right dimension. The Greens, S&D, GUE, "the Cinque Stelle-part of EFDD" (R9) and in large parts ALDE formed "what we call a progressive alliance" (R9), while ECR and EPP opposed most of the position of this alliance. The progressives wanted to increase the reporting duties and level of detail to be reported, while ECR and EPP wanted a "simple regulation, no administrative burden, cut the red tape" (R1). Especially for the EPP, "the Commission proposal was actually very good" (R8).

The reason why ALDE, politically situated somewhere between these two alliances, sided with the progressive camp, lies in the choice of rapporteur: "We had two very progressive and green-minded MEPs, Gerbrandy for ENVI and Ms. Punset for ITRE" (R1), so that "ALDE was very much on the rapporteurs' side throughout the whole process I would say" (R7).

Before being able to build alliances, the party groups themselves of course had to find their own positions. With the division between committees not having played a big role, the second traditional dividing line is national: MEP's nationality often plays a pivotal part in building their positions. However, in this file no large intra-party divides along national lines have featured, "except for one thing, the interconnections. Then it was very clear that national affiliation prevailed over political affiliation" (R1). Again, here the most prominent fault line was between the Iberian countries and France.

Many different issues were debated within the EP in finding a negotiation mandate: "how comprehensive, which reporting obligations, there were very different approaches on the EP" (R8). The rapporteurs' draft report contained 199 partly far-reaching amendments. They introduce a "*proper carbon budget*" for the EU, in order to "allow us living in a world

where climate change is limited to 1.5°C by the end of the century” (European Parliament, 2016d, p. 89). Another important inclusion is that of *methane*, the “‘poor relation’ of climate policy” (ibid.). As methane is seen as highly harmful to the environment, the Commission is to “analyze the implications for policies and measures of adopting a 20-year time horizon for methane” (ibid.). They further introduce macro-regions for cross-border cooperation to not only limit cooperation to two Member States and “deliver cost-optimized deployment of smart grids, renewables and energy efficiency” (ibid, p. 102).

The divide in the EP, the length and technicality of the proposal as well as the fact that two committees were involved explain that no less than 1296 additional amendments were tabled, raising the number of total EP amendments tabled to 1495 in July 2017. What followed were tough negotiations to find a common approach. The greens relied on their progressive alliance mostly. Even though they tried everything to get EPP on board, “they had a [too] extreme position to be able to join” (R9). Especially EPP ITRE shadow Gunnar Hogmark wanted a more liberal approach to the governance regulation” (R5) and was not to be convinced by the rapporteurs’ line of argument. On many issues, the ‘progressives’ “had a big fight with the EPP shadow from ITRE, Hogmark” (R9) on which road to take. It therefore became evident that EPP would not back the rapporteurs’ report and reliance on a progressive alliance became inevitable for the Greens.

The most difficulty in this exercise was posed by ALDE. Not clearly situated in either of the camps, they would find themselves “on some questions more with the left and the Greens, and in other questions clearly to the right” (R2). However, especially the choice of rapporteurs guaranteed that broadly speaking they backed the progressive positions, with an important exception detailed below.

After lengthy internal debates the rapporteurs were confident to table a report that would get majority support. In finding compromises, the rapporteurs employed a specific strategy: “The approach of the rapporteurs was a bit to take everything on board as much as they felt they could accept without filtering, or editing, or things like that” (R1). Therefore, 285 amendments made it into the final report to be voted on in plenary at 17 January 2018.

8.3.2 The Final Report

The first important amendment in the final report is number 53, where the EP gives its own definition of *early efforts*. Remarkably, it only includes “early progress of a Member State made from 2021 onwards” (European Parliament, 2017e, p. 35). Another important new definition that is to guide the regulation is “*energy efficiency first*”, referring to “the prioritization, in all energy planning, policy and investment decisions, of measures to make energy demand and energy supply more efficient” (ibid). Member States should also be obliged, dependent on the domestic situation, to include in their plans strategies against *energy poverty* (ibid, p.37). One of the main controversies was introduced in amendment 65; *A linear trajectory for Member States on the use of renewables* from 2021 onwards with

biennial interim targets (ibid, p.43). These national linear trajectories should lead to an EU binding linear trajectory, as well (ibid, p.44). Linear trajectories should moreover not only count for renewables, but just as well for energy efficiency (ibid, p.45). For both, the EP proposes a *gap-filler mechanism* in case the Member State does not deliver and hence there is a gap between what has been promised and what delivered (ibid, p.95).

Throughout the proposal, the EP “replaces ‘regional level’ with ‘macro-regional and regional’” (5683/18, p.2), to oblige Member States to cooperate across whole regions (such as the Mediterranean, the Nordic Sea, South-East Europe). Another requirement is to add investment strategies as a central element of the NECPs (ibid, p.82). Further, the Commission need ensure that the strategies of the single Member States are consistent with their overall plans on energy efficiency and renewables. The Commission should also assess “any planned major infrastructure project” (ibid, p.96). In order to include local stakeholders and the civil society in the process, Member States shall establish a “*Multilevel Climate and Energy Dialogue Platform*” (ibid, p.86).

Amendment 122 asks the Commission to determine a carbon budget necessary to keep the temperature rise “well below 2 C”. On the general long-term plans, the EP, just as the Council, refrains from asking for 50-year plans and instead asks for a *30-years perspective*, however including a provision to decrease the Unions greenhouse gas (GHG) emissions (ibid, p.70). Further, these plans should include national targets for carbon removals from sinks. These plans should be consistent with the goal to “achieve a net-zero greenhouse gas emissions within the Union by 2050 and go into negative emissions soon thereafter” (ibid).

The 20-year *methane strategy* for Member States, which was an important demand especially also from S&D, is settled in Amendment 175. The *new committee* proposed by the Commission was not seen favorably by the EP either, as “the Energy Committee was something we didn’t particularly like. Because we were afraid that the logic and the prevailing atmosphere would be that of the Energy people and not the ENVI people” (R9).

Another important issue that had been in the report did not make it through the vote in plenary. Amendment 119 introduced a “Just Transition Initiative for workers and communities”, especially demanded by S&D. This should secure that regions that are particularly hit by the transition to low carbon economy, as for example those relying heavily on coal mining for their economic wellbeing, would be compensated. These communities and workers therein should be supported inter alia by “a board of representatives coming from the Member States’ national authorities, the Commission, local and regional representatives as well as the social partners” (ibid, p.67). While the ALDE rapporteurs in the committee vote supported it, they were not able to convince their party of the necessity of said initiative, which is why ALDE demanded a separate vote on the amendment at plenary and it was voted down there, leaving stipulations on just transition merely as a recital. Members of the progressive alliance partly “felt very betrayed

with that because they had supported it in the [committee] vote, you would think it's the same in plenary. No, they asked for a separate vote on just transition" (R6).

In general, the vote was everything but consensual in the EP. Already at committee stage, the vote was in favor merely with 61 votes to 46, which appears even closer when considering that nine votes were abstentions (European Parliament, 2017e, p. 173). Accordingly, the vote shows a neat left-right division, with however half of the ECR delegates abstaining, thereby letting the result appear relatively comfortable in favor of the progressive block. In the vote in plenary, most of the amendments accordingly made it into the final report, apart from the just mentioned provisions on just transition due to ALDE intervention. Hence, at 17 January 2018 also the EP had its report adopted and inter-institutional negotiations were set to start. Table 20 summarizes the EP positions on the contentious issues.

Table 20: Case 4 - EP Position

Issue	EP Position
Early efforts	Progress made by MS from 2021
Energy efficiency first	Include provision and make it infrastructure priority
Date of Submission of plans and drafts	1 January 2019 and 1 June 2018
Trajectories on renewables	progressive trajectory
Trajectories on energy efficiency	Linear trajectory
Multilevel Climate and Energy Dialogue Platform	MS shall establish platforms
Long-term climate and energy strategies	MS to prepare every five years
Provisions on Energy poverty	Included in the plans
Provisions on Methane	Add a provision on methane in view of developing a 20-year time horizon for methane
Commission competence in gap-fillers	COM "may request MS to increase their ambition"
Energy Union Committee	Two separate Committees

8.4 Inter-institutional negotiations

The negotiations on the Governance Regulation happened in parallel to the negotiations on two other files: Those on energy efficiency and renewable energy sources. Before starting the negotiations, the institutions agreed to negotiate the latter two before the Governance regulation. The main reason for this was that the actual targets to be reached in renewables and energy efficiency were to be negotiated in the sectoral files and, as it was the Umbrella legislation summarizing all reporting mechanisms, would have to be integrated into the Governance Regulation (R7). While especially the Greens, understandably, would have preferred to have Governance negotiated first and determine the targets, the other parties as well as Commission and Council prevented this, so that in the end the "EP and Council agreed on the fact that the three files should progress in

parallel, as a mini-package. You agree on the objective and then on the mechanics, the gap-fillers and that" (R1).

8.4.1 Early Scepticism in the Council

The first trilogue of four took place on 21 February 2018. By then, the EP report had been thoroughly examined by the Council working party in two meetings (Council of the European Union, 2018b, p. 3). In these meetings and in direct response to the EP position, "several delegations stated that this Regulation should not attempt to go beyond the Union's existing commitments under the Paris Agreement or beyond already agreed sectoral Union legislation" (ibid). As most EP positions were met with skepticism, the presidency "proposes to maintain for most amendments, and in particular as regards all major political issues, the Council General Approach" (ibid, p.4). Still, to show the will to compromise and keep negotiations going, the presidency proposed to accept some EP amendments of minor importance already in trilogue one.

This, however could not prevent the EP team from feeling the Council was not very compromising in the beginning of the negotiations process, even if the first trilogue was mostly concerned with procedural issues: "The first trilogue was merely formality, nothing is really exchanged, you don't really enter details" (R5). One important issue to be discussed is the delegation to the technical level, next to the general positions of the respective institutions one of the few things that happened in this first trilogue. Still, the negotiations could have been off to a better start, also concerning the performance of the chief negotiator of the Council in this trilogue, the deputy minister of Bulgaria: "The first trilogue was quite awful, he was very nervous" (R7). Both, in the political as well as in technical trilogues the Bulgarian Presidency first needed to adapt to its new role, as also the representative of the Council in technical meetings was not well received. However, "After a while, they sent somebody from the capital, he was very good" (R7).

After the first trilogue had kicked off negotiations, it took until 26 April when the second trilogue, which originally had been scheduled to 21 March but then postponed mainly due to the developments in the other files, took place. Accordingly, the Institutions had ample time, in between, to discuss many issues at technical level. In its preparatory note to COREPER, the presidency first points out the urge for good progress in the second trilogue if the overall goal of concluding during the Bulgarian presidency is to be kept. First stating that the institutions agreed it would probably take four trilogues, they add that "substantial progress should be achieved at the upcoming second trilogue meeting" and accordingly "urges the delegations to show some flexibility and to focus interventions on the main issues" (Council of the European Union, 2018c, p. 2) during the preparatory COREPER meeting.

In addition, and "thanks to a constructive attitude from all sides, during the technical meetings held with the representatives of the three institutions provisional agreement could be reached" on different issues (ibid). First, some of the reporting requirements on

climate issues had been dropped or equipped with less strict timelines. However, except for one amendment which was to delete a four-annual implementation assessment of the Commission, on none of these issues the EP had an own position, so that it mostly concerned agreeing to changes to the proposal asked for by the Council. Second, the degree of future investments to be included in the NECPs was another issue compromise was reached in, with a view to “avoid an excessive level of detail” (ibid, p.3). Further, the institutions agreed to add to the E-platform for reporting by the Member States a public dimension.

In addition to these relatively low-profile issues, some compromises were agreed at technical level that reach closer to the core political issues. One important issue were the long-term climate and energy strategies. The EP is granted the obligation for the Commission to come up with a Union long-term strategy in addition to the single national strategies and the language with regard to the Paris targets is reinforced (ibid, p.121f). There is also a compromise agreement concerning the EP demand to enter into this Article a stipulation to achieve net-zero greenhouse gas emissions by 2050, which is not accepted in full but in an extenuated version. Further, the publication of information and transparency are increased.

Also concerning the Energy-leaning issues, some progress was made in the second trilogue. On the investment strategies to be included in the reports, the institutions agreed on including stipulations on investments but to weaken the language: “The compromise would introduce the ‘general overview of the investments needed’ instead of an ‘investment strategy’” (ibid, p.5). First progress was also achieved on the question of reference points for the trajectories on renewables, “where the presidency proposes to move the first reference point forward by one year” accommodating the EP’s demand (ibid). Further, first technical meetings were held on the multilevel climate and energy dialogue platforms demanded by the EP as well as on the political monitoring of the governance by the Council, both however non-conclusive. Hence, while the second trilogue indeed advanced the negotiations, a lot of the main issues were still undealt with. An exception to this was the issue of the new Committee proposed by the Commission. The co-legislators managed to convince the Commission of keeping two different committees instead of one, something not easy for the Commission to swallow (R5): “On the Committees in Article 37, good progress was made on a compromise text that foresees two committees (as agreed in the second trilogue)” (Council of the European Union, 2018d, p. 2).

In contrast to the long break between the first two trilogues, the third followed merely a month after the second. Still, building on the progress achieved in trilogue 2, some further issues were resolved. First, the issue of including methane in the proposal was discussed for the first time and the institutions began to move towards each other without, however, fully agreeing on a compromise. “Some progress was made” also in the issue of the dates of submission (ibid). The Council wanted to postpone both, the submission of the draft as well as final NECPs to the Commission. In the technical meetings before trilogue 3 the

EP agreed on debating a later date at least for the draft plans. Also, the provisions on the multilevel platforms were finally resolved in the third trilogue. Instead of obliging the setup of such platforms, Member States are “to consider establishing such a permanent Dialogue platform” (ibid, p.5). Another article under discussion was Art.27, dealing with the possible sanctions in case of Member States not reaching the own ambition as laid down in the NECPs, as well as on energy poverty. Both, however, inconclusive. In general, the third trilogue did not find agreement on many issues, even though the institutions moved towards each other. This meant that many of the most important issues were yet to be discussed, and agreed in the fourth trilogue, which was supposed to be the last.

8.4.2 Much to be discussed: The last Trilogue and a Final Compromise

Given the many outstanding issues as well as problems in the other files, the Council was reluctant to have the fourth trilogue scheduled in mid-June as was agreed early in the process. However, time pressure suddenly evolved from two sides. Not only was the Bulgarian presidency eager to conclude the file during its mandate. Also, one of the rapporteurs of the EP, Claude Turmes, who was the actual leading negotiator for the EP, was appointed minister in his home country Luxembourg, which meant he had to leave the EP by 19 June 2018 only. Not only was he eager to conclude the file; An actual change of rapporteurs would also have meant that conclusion would become virtually impossible during the Bulgarian presidency (R1,3,7). Therefore, all sides agreed to have Tuesday, 19 June as the date of the last trilogue for Governance. The other two files had been agreed on the same day, so that the trilogue could only start at 20.30 hrs. and lasted until 04.30 in the morning (R1,5,6,7).

This already is an indicator for the manifold issues still to be agreed upon. On most of the politically salient issues the institutions had not yet agreed, on some talks even only started before the fourth trilogue. Certainly, the most contentious issue of many were the trajectories, on which so far, no real progress had been achieved. Second, despite principle agreement on the committee issues, discussions were still outstanding on “the exact division of competences between the two Committees and the need to avoid overlap” (Council of the European Union, 2018a, p. 5).

Another issue hardly touched upon in the first three trilogue meetings was early efforts. While the institutions agreed that the Commission shall take these early efforts into account when assessing the Member States’ progress according to their plans, the definition was disputed. The Council wanted early efforts to include any action taken from 2005 onwards, the EP envisaged 2021. Also, the dates of the submission of plans was still to be discussed.

Another important issue, the gap-filler mechanisms, was still to be decided upon. Gap-fillers refers to actions to be taken in case the plans do not add up on renewables as well as energy efficiency. The EP also had not yet agreed to political monitoring of the governance mechanisms by the Council. Lastly, several aspects in the long-term emission

strategies were still not agreed despite lengthy discussions in earlier trilogues. Especially the relation to the Paris agreements, gashouse emissions and the carbon budget were still unresolved (Council of the European Union, 2018a).

Given the pressure to conclude from both sides it is not surprising that the negotiators did not give in and end the trilogue after many hours with no result. Both the fact that it lasted eight hours, until 4:30 in the morning, and even more the interesting detail that no food was provided during this whole eight hours (R2,4,5,6) shows the dedication of negotiators to wrap up the file. This also included at some point “negotiations becoming heated” (R2) because some participants missed compromising by their counterparts. However, and to everybody’s delight, the trilogue saw agreement on all outstanding issues. After agreement in the Council and the affirmative vote in the EP plenary on 13 November 2018, the Regulation on the Governance of the Energy Union was published in the Official Journal of the Union on 21 December 2018.

8.5 Discussion

The negotiations on the highly complex Governance file were difficult and culminated in an all-night trilogue session to discuss the last outstanding issues. The following will show what the outcome looked like – as well as the role the negotiation process played in determining it.

8.5.1 The Outcome

The highly complex and technical file on Governance can be broken down to 11 politically important issues. Given the length of the proposal, not all actors and their subjective priorities can be paid full justice. The analysis of both negotiation documents and interviews however allowed for the focus on the issues summarized below.

The first issue was that of ‘early efforts’ which the Commission shall consider when assessing the national plans. The Council wanted these early efforts to possibly reach back until 2005, while the EP envisioned them to start from 2021 onwards. While the definition of early efforts is split into two parts, effectively the Council got its way on this issue. When it comes to “the assessment of a potential gap between the Union’s 2030 target for energy from renewable sources and the collective contributions of Member States” (European Parliament & Council of the European Union, 2018b Art.2), the efforts of Member States in reaching their 2020 targets are to be considered, hence from before 2020. When it comes to assessing the Member States’ achievements considering the new NECPs in the future, only the early contribution considering said plan can be considered.

A compromise can be found on the principle of energy efficiency first: While a definition of the principle is included in the Regulation as asked for by the EP, it is not included in the articles as a binding principle guiding the Member States’ conduct. Rather, it is referred to in a recital as a guiding, but not binding, principle. A clear win for the Council can be traced when it comes to the dates of submission of both, the draft and the

actual NECPs by the Member States. In both the Council got what it aimed for, with the plans to be submitted on 31 December 2018 and 2019 respectively for the first plans, and only in ten years the originally envisaged dates by the Commission are applied.

Arguably the most controversial issue, and one of the most complex, is that of the trajectories. That is, while the overall target to be reached by 2030 was to be agreed upon in the sectoral legislation for both the share of renewables in energy supply as well as energy efficiency, the Governance Regulation was to determine whether, and if so which, intermediary steps Member States and the Union would need to reach on the way to the 2030 target. On renewables the EP, supported by the Commission, demanded a linear trajectory towards 2030, with three intermediary steps: 20% of the final target to be reached by 2022, 50% by 2025 and 70% by 2027. The Council, arguing that renewable sources would become considerably cheaper towards 2030, asked for an indicative, backloading trajectory: 24% by 2023, 40% by 2025 and 60% by 2027. The outcome is not linear, but the two institutions approached each other. The Regulation determines that on renewables, the Member States shall have reached 18% of their targets by 2022, 43% by 2025 and 65% by 2027. On energy efficiency, the Commission itself did not demand a trajectory, which the Council naturally followed. The EP asked for a linear trajectory also in this sector. However, the Council managed to maintain its position and prevent a trajectory for energy efficiency.

The next controversial issue was that of Multilevel Climate and Energy Platforms, newly introduced in the EP report while neither the Commission nor the Council envisioned any measures to enhance the multilevel dialogue on issues of climate and energy. Again, the Institutions found a compromise in that the final Regulation entails multilevel climate and energy dialogues which Member States shall establish to engage diverse stakeholders at different levels in the overall policy discussion. The NECPs may, but not necessarily have to, be discussed in these dialogues (*ibid*, Art.11).

While all institutions agreed on the need for Member States to submit long-term strategies for their energy and climate policies, with a view to fulfilling long-term targets partly agreed in external treaties, the question of the regularity of submissions of these strategies was disputed. The Commission and the Council aimed for every ten, while the EP demanded every five years. In the end, Council and Commission retained the upper hand, even though a clause was added that “Member States should, where necessary, update these strategies every five years” (*ibid*, Art.15.1).

With the two aspects of methane and energy poverty, the EP aimed at introducing two aspects to the regulation the Commission had not envisaged and the Council had originally opposed. And it succeeded in both. On methane, the new Article 16 was introduced urging the Commission to “analyze the implications for implementing policies and measures for the purpose of reducing the short- and middle-term impact of methane emissions” (Art.16). With Art. 24, a new provision was added obliging the Member States to account for strategies of reducing energy poverty if necessary, based on an assessment

of the number of households in energy poverty as indicated in their NECPs, in the biennial progress reports to the Commission (ibid, Art.3, Art.24).

A clear compromise was struck concerning the Commission competences when it detects a gap between the overall EU 2030-target and the cumulative efforts by the Member States. The Council wanted the Commission to merely issue non-quantitative recommendations, while the EP and the Commission wanted stronger rights. The compromise gave the Commission stronger rights, but only and explicitly for renewables (ibid, Art.27.1). Lastly an important issue for both co-legislators was that the proposed Committee for the Energy Union be split into two committees, one on climate and one on energy each, which accordingly is established in Article 44 of the new regulation. Table 21 gives an overview of positions and outcome.

Comprehensiveness of the outcome

Regarding the comprehensiveness of the outcome, it shows that out of eleven issues, on a majority compromises were found. On five issues one can identify a clear 'winning side', namely the question of the dates, early efforts, the trajectory on energy efficiency, as well as on the provisions on methane and energy poverty. Therefore, in terms of position inclusion, the comprehensiveness of the legislation cannot be regarded more than medium, given there are many issues the institutions did not find a compromise on. In terms of satisfaction, the picture is relatively clear. Most actors were highly satisfied with the result of the negotiations, which also explains why in the Council, all Member States voted in favor and in the EP the Regulation was approved with 475 votes in favor and only 33 against.

Concerning legal effect, firstly most of the compromises had been included in the operative part of the Regulation, albeit some recitals were used to help, for example on the issue of energy efficiency first. Still, overall the resolution was of a high quality and most initial positions that can be traced back in the final Regulation are included with high legal effect. The overall legal soundness of the legislation is high: "It's a good piece of legislation, unlike others which are sometimes in need of S.O.S. from the legal services. [...] In the end I think this file is legally sound" (R5, but also 1,2,4,6,9). Overall, the legal quality of the Governance Regulation can hence be regarded high.

Table 21: Case 4 - Summary of Positions and Outcome

Issue	COM Proposal	EP Position	Council Position	Outcome
Early efforts	Not included	MS achievement in or before 2021 (since 2005)	Progress made by MS from 2021	Achievement of 2020 targets pre-2020 (Art.2)
Energy efficiency first	Not included	Not included	Include provision and make it infrastructure priority	Included as definition. Priority only in recitals (64)
Date of Submission of plans and drafts	1 January 2019 and 1 January 2018	31 December 2019 and 31 December 2018	1 January 2019 and 1 June 2018	31 December 2019 and 31 December 2018
Trajectories on renewables	Linear trajectory	Indicative and backloading trajectory	progressive trajectory	Indicative trajectory (Art.4)
Trajectories on energy efficiency	none	none	Linear trajectory	None
Multilevel Climate and Energy Dialogue Platform	None	None	MS shall establish platforms	MS shall establish multilevel climate dialogue
Long-term climate and energy strategies	MS to prepare every ten years	MS to prepare every ten years	MS to prepare every five years	Every ten years, but "should update, where necessary, every five years" (Art.15)
Provisions on Energy poverty	None	None	Included in the plans	Included in the plans
Provisions on Methane	None	None	Add a provision on methane in view of developing a 20-year time horizon for methane	Article on Methane added (Art 16).
Commission competence in gap-fillers	COM shall take measures at EU level to ensure collective achievement of targets	COM "may issue non-quantitative recommendations"	COM "shall request MS to increase their ambition"	COM "shall (for renewables) and may (for other parts of Energy Union) issue recommendations to MS to increase ambitions"
Energy Union Committee	Single committee	Two committees	Two committees	Two committees

8.5.2 The Interaction Intensity

It took exactly two years for the Regulation to develop from the proposal in November 2016 to being agreed by a majority in Parliament in its final form in November 2018, and these two years of intensive negotiation opened opportunities for manifold social interaction. Especially between the chief negotiators, interaction intensity was high.

An important aspect of the social interaction was that it started considerably before the actual negotiations. It is not uncommon that presidencies, when planning their six-month terms and which files they want to prioritize, start building relationships with their institutional counterparts. In this case, the Bulgarian presidency approached the rapporteurs' offices early on and they "met ahead of the presidency" (R1). This early interaction was especially important as "the Bulgarian presidency was a bit peculiar because it was a capital-driven presidency [...], the lead negotiator was an expert based in Sofia. [...] So, it was a little bit different from a Brussels-based presidency, where you already know the attaches, the Perm Reps" (R1).

Hence, early contact mainly served for getting to know the counterparts in the opposite institutions, as well as getting a feeling for their agendas and plans with the files. This is important as often a file will not be closed during a presidency if not both chief negotiators commit to doing so. Early interaction helps "to have a sense of the timing and their intentions to close" (R1). Therefore, and logically as the mandates were not (fully) in place at the time of the first interaction, it was not exchange on the content of the file, but rather on how to approach and organize the negotiations in the coming six months. "Are you on the same page, do you think it is feasible in the six months, how should we work?" (R3) are the kind of questions to be discussed in pre-negotiation interaction between the two chief negotiators and while they therefore do not advance the negotiations in terms of policy content, they are indispensable for a smooth progress. Especially in this case, where the Governance file could not only be considered in isolation: "EP and Council also agreed on the fact that the three files should progress in parallel, as a mini-package" (R1).

Next to issues of agenda and planning, the early interaction also lays the groundwork for any later, and more substantive cooperation: "You meet very regularly. But it takes time to build personal relationships" (R1). Indeed, interviewees confirm that the interaction between the chief negotiators was of high intensity all through the negotiations (R1,2,3,5,6,7,8,9). According to some the personal side of negotiations is the decisive aspect:

"It heavily depends on interpersonal relationships. You need to build trust, to start knowing each other, and then you discover that you have a common goal of closing. So that you are really allies rather than opponents. Presidencies also have their Member States, deal with them, go to COREPER, get the mandate, come here, talk, report back. We have the interests in Parliament, of course. It takes a few weeks or months before really it matures to a level of interpersonal relationship where you feel confident enough to be very informal" (R1)

An important aspect of the interaction lies in the personalities of the chief negotiators. It stands out that especially on the side of the EP, even though officially there were two rapporteurs, the negotiations were indeed led mainly by ITRE rapporteur Turmes (R2,3,5,6,8,9). Not only had Rivasi been absent during parts “for private reasons” (R8). Turmes had furthermore “been at the forefront of this debate [on EU Energy and Climate policy] from the very beginning” (R6). Turmes was described as a very strong personality throughout, with deep involvement and profound knowledge on issues of Energy and Climate policy as well as a very active actor when it comes to social interaction in general. And this also featured in the social interaction within the EP negotiation team.

Interaction in the EP team is institutionalized in that all shadow rapporteurs are involved in working towards a report. However, we theorized that coalitions could be build based on policy preferences, which clearly was the case in the early negotiations on this file, the core of which were the Greens and S&D. Was that to be expected concerning the traditions in the committees? While in the ENVI committee, center-left majorities are nothing unusual, “in ITRE they have much more of a grand coalition thing, where more often EPP and S&D agree on something and the Greens are less often part of it” (R9). In the case of this file however, from the very beginning “many [S&D] amendments mirrored what [the rapporteurs] had proposed” (R5). The same applied to GUE and in parts EFDD (R1,4,5,9). This did not provide the rapporteurs with a majority for their proposals yet and ALDE traditionally lies between the ‘progressive’ group and the political right of EPP and ECR. However, concerning “the most important issues” (R1), ALDE “saw things very similarly” to the left coalition (R2), which is why they often aligned with the rapporteurs. Only on some issues did they disagree, prominently on the issue of just transition, which they voted down in plenary when voting on the report.

The coalition formation had clear implications on the interaction intensity, as the parties on the left clearly “pre-negotiated things with [the] coalition partner. [...] You try to secure your majority before you put it to the consideration of all shadow rapporteurs in the shadow’s meetings, at least on the main elements. [...] At staff and MEP level” (R1). This also entailed being “very careful with ‘Ccs’. Because there were definitely certain [...] information that we didn’t want to share with the other parties, absolutely” (R6). Despite these clear coalition dynamics, the overall process was generally described as “quite open throughout the EP process” (R2). Especially after the mandate was decided upon, the coalitions dynamics also stopped having strong implications for the social interaction. In general, the “cooperation between rapporteurs and shadows and on a working level during trilogues, especially given the strong personalities at the table, was very good” (R8, but also 1,2,5,6,7,9).

In terms of both, coalition formation as well as interaction intensity, interviewees stress that “everything is dependent on who is appointed rapporteur and shadow” (R1, but also 2,5,6,7,8,9). Again, the personalities as well as political orientation of the actors is key: “If we had a more conservative-minded ALDE shadow, it could have been

a different majority" (R1). But not only the ALDE choice of rapporteurs influenced the social interaction in the EP team, also S&D shadow "Griffin is somebody who is also quite environmentally conscious. So, she also worked well on a personal level with Turmes" (R9). It clearly shows that the choice of rapporteurs did affect the interaction intensity through both, agreement on the content of the file as well as good interpersonal relations.

Concerning the interaction spanning institutions beyond the chief negotiators, we see a scattered picture. While some shadows and, again especially rapporteur Turmes were very active in engaging with Member State delegations, some mostly refrained from this (R1,2,3,5,6,7,8,9,10). The activity of Claude Turmes stood out: "He always knew what was on the table and he had very good minutes from their meetings, where all the Member States were on the different issues" (R7). However, also other shadows entertained contacts to single delegations, while others "didn't have any contact with the presidency" (R8) and hardly any to single delegations (R2,8). As can be regarded a general pattern, those that had contacts used them for two purposes mainly. First, for information purposes, especially on the side of the Member States. "When it comes to trilogues, its more of informative nature. Because trilogues are closed. Its more to know what happened in the trilogue, rather than try and force a decision" (R5). But also, for the EP actors its important "to just have information, for us to know what is going on [...]. The Council is very closed, you really don't know what is going on" (R2).

Secondly, and on a more structural level, there also was cooperation between the EP negotiation team and some delegations, especially the French. Single delegations were approached urging them "to put maximum pressure on the presidency to make them agree with the Parliament. [...] A concrete example: we were very close with the French government on the trajectory for renewables [...]. So once, when the Bulgarian presidency was extremely pushy, we would be in contact with the French. So that the French would then come to the Bulgarians, say no, some Member States support the EP approach, you need to be constructive" (R1). Hence, "If there is a coalition in the Council which is more prone to the EP position, which happens, then there can be more systematic contact" (R2). It clearly showed that also across institutions, coalitions formed based on common positions on single issues, which tried to cooperate to push the compromise towards their preferred outcome. Also, the presidency sought cooperation with single shadows, as for example "Stankov [Council negotiator] came to us in the first trilogue and said I will deliver on Energy poverty, I will" (R6), even though there was a strong group within the Council opposing a provision on energy poverty entering the regulation.

Overall, it shows that there was interaction intensity along the negotiations on this file, and both within as well as across institutions clear coalitions developed, which had a clear impact on the interaction with coalition partners interacting more closely than others.

In terms of interaction intensity between the chief negotiators, again the question occurs whether they built a coalition or not. Yes, in that there is a common interest that

all chief negotiators share, namely closing the negotiations and arriving at a compromise, i.e. their procedural preferences. No, in that there is no evidence that rapporteurs and presidency shared common policy preferences. What we can see is that the interaction was intense, and the relationship developed into a trustful cooperation, the degree of which will be subject to investigation below. There is no evidence of coalition-building to push specific policy positions, but the common interest of closing the file was clearly present and intensified towards the end of the negotiation. What should the implication be for the venue and negotiation mode? First, we would expect delegation to lower hierarchical levels, as well as an informalization of the negotiations due to the high interaction intensity in general and especially between the chief negotiators. Lastly, we would also expect the negotiation mode to shift towards integrative negotiation modes.

8.5.3 The Negotiation Venue

All three possible venues of negotiation, political trilogues, technical meetings and behind-the-scenes bi- and multilaterals have been used in the negotiation process of this file. Firstly, in total four political trilogues have taken place, spreading from February to June 2018. As has often been the case, the first trilogue did not really see actual negotiation: "In the first one, you can call it theatre" (R7). As seems to be custom, this "theatre" consists of different acts. First, the trilogue decides which issues are to be dealt with at technical level (R6,9). Second, on a very superficial level, positions are stated "but nothing is really exchanged" (R5) and, as also shown in the preparatory Council documents for the first trilogue, institutions are not prepared to give in to their counterparts just yet. Trilogue one can be seen as an official start of the process without actually engaging in negotiations, hence more of ceremonial and partly administrative character. Accordingly, "that was the one that was done in one hour" (R5) and in which no real progress was made.

In contrast, interviewees agree that all three trilogues that followed actual witnessed real negotiation. All three "started with saying we all agree to what was decided at technical level" (R9), which was a considerable part of the legislation. Afterwards, the institutions engaged in negotiating the outstanding political issues not to be solved in technical meetings. The second trilogue brought "progress and clear guidance" due to a "constructive attitude from all sides" (Council of the European Union, 2018d, p. 2). Hence, again this shows actual negotiations have taken place, as the Council preparatory documents also differentiate between 'progress made' in either political trilogues or technical meetings. However, "it's the final trilogue, that is actually where you culminate the whole process, in the last trilogue" (R9). And this case was no exception to this rule, the last trilogue witnessed negotiations on the most important political issues.

It becomes very clear from the preparatory document that many different aspects, as for example the trajectories, early efforts, dates of submission and multilevel platforms had not been resolved before the last meeting. Therefore, in the last political trilogue these issues were "absolutely negotiated, that is for sure" (R7). Probably it is for this reason

that the last trilogue especially sticks in the minds of the interviewees. Reportedly, it lasted over seven hours, until “three or four, in the morning. With no food whatsoever” (R6), posing a considerable physical challenge to the negotiators. Not all of these seven hours had been negotiated between all persons present: “sometimes they took place not in the full format but bilateral. The rapporteur will go meet with the Permanent Representative and the Commissioner or whomever is there, during the trilogues we break off and they go, and they kind of negotiate standing somewhere” (R9).

Overall it becomes clear that actual negotiation took place in political trilogues also in this file. Indeed, it seems the degree to which issues were resolved in the highest formal and political forum was above average: “relatively, maybe that sounds a bit odd, but I believe the main negotiation took place in political trilogues. That’s how it should be” (R8).

The second venue, technical trilogues, has also been made excessive use of in the negotiations on the Governance Regulation. Technical meetings were a regular part of the agenda of all involved throughout the negotiations process. Interviewees “remember at one point only doing this. Because we would book hours of technical negotiations on Mondays, Wednesdays and Fridays” (R5). Of course, and as is common, technical trilogues were attended by staff level representatives only and chaired, normally, by the rapporteurs’ assistants or political advisors (R3,8). The meetings lasted between “two, three, four or five hours per day” (R9) and mainly revolved around “the nitty gritty technical details on dates, where a comma should go” (R5). In effect “you try to find solutions for everything at the technical level” (R3), and “the technical level looks at everything, but we don’t necessarily work on specific texts” (R9). Hence, there was virtually no issue that was not at least discussed at technical level and often “different texts were drafted as to how a solution could look like” (R10), leaving the final decision as to which solution to take to the political level.

The importance of these technical level negotiations cannot be underestimated, also in terms of negotiators’ ability to position their own solutions: “What matters, that’s the technical meetings. And in those situations, it’s about being active, being able to see the situation, being able to come with proposals of the kind that can, of course are in line with your position but also can become a compromise” (R2). The ability of administrative and political staff of the rapporteurs and parties is therefore decisive for the respective party’s success in the negotiations. At the same time, there is a perception that “technical meetings are there for building trust. Not for political gains” (R10). Even though decisions are taken, most of which are accepted at political level without any further discussion, the technical level meetings serve another purpose, as well. That again underlines their centrality to the negotiation process.

The third venue, alternatively referred to as behind-the-scenes, informal bilateral, or behind-closed-doors negotiations, was also made use of. As already hinted to above, informal exchange did not only take place between, but also within the institutions. First, within the EP and facilitated by the coalition dynamics, often (shadow) rapporteurs

“pre-negotiated things with their coalition partners” (R1), before they would engage in discussions with the whole institutional negotiation team. But also in between institutions, “a lot of negotiation was done behind closed doors and via E-Mail. A lot” (R6). Naturally, these negotiations normally only involve a fraction of the negotiating partners. Especially the rapporteurs, and here Turmes, had been very active in this regard: “As far as I remember and am aware, he had bilateral meetings. Not only with the presidency, I think he was meeting every single Member State in the Council” (R9).

While there is of course no document evidence on these meetings, all interviewees were aware of behind-the-scenes negotiations having taken place (R1,2,3,4,5,6,7,8,9,10,11). And even though many of them were left out, most “didn’t have the feeling that there was something going on behind the scenes that was inappropriate” (R2). Just what inappropriate would entail seems to be very difficult to pin down, but in general the activity in this case was seen as “part of the political game” (R8). This is even more surprising as, while everybody seems to be aware of negotiations taking place, in terms of reporting back there is “nothing. They don’t communicate these meetings to other members or staff of the EP, they don’t debrief them” (R1). Still, all parties, including shadow rapporteurs as well as Member State delegations, seemed confident that what happened “was all within normal limits” (R8), because any possible deal anyways must be agreed by everyone.

Mostly it has not been actual detailed text that was pre-agreed. Rather, and in a process of mutual trust building, chief negotiators start to

“share information, and to pre-cook some deals. Not in the details, but at least have a common understanding on the landing zones. Bringing it to the formal trilogue to really decide but knowing that the final landing zone would be between here and there. And then, depending on the packaging, it can be landing a bit here, a bit there, but within this very well-defined zone” (R1).

This landing zone had been agreed on several issues in these negotiations, including the highly controversial trajectories issue (R3,6,7).

As the analysis show, all three possible venues of decision-making have been made use of in the negotiations on the Governance Regulation. How can the spread of negotiations across the three levels be accounted for? Firstly, technical level negotiations seem to have been inevitable. Again, the size and technicality of the file played a role here: “It would have been impossible to say that everything was political, because some issues are just technical” (R5). Second, and as alluded to above, early on regular meetings at staff level also served to build trust and get to know each other and the different positions. The high interaction intensity certainly has built the trust essential for delegation to both, lower levels as well as more informal venues. Interviewees made clear that it took time to build the relationships necessary for this kind of change of venues, especially concerning the informalization of negotiations.

Given the circumstances, it is surprising that relatively speaking a large part of the negotiations took part in political trilogues. Again, the personality of the rapporteur is one

explanatory factor: “Mr. Turmes in that case is not the type of person who likes delegating. ‘Okay do your deal, I will just be here to sign and take a picture’. He likes being involved personally. He wants to be able to personally negotiate something with his counterparts in trilogues” (R1). Second, another possible explanation might be that while this file was regarded rather unimportant, through its interlinkages with the other two files it did gain a certain prominence for the negotiating partners.

8.5.4 The Negotiation Mode

During the negotiation process in this case we witness diversity in the negotiation mode applied in different venues of the negotiations, which are accordingly described by participants as both, “constructive and friendly” (R1) as well as “more heated compared to other trilogues” (R9). A differentiation between different loci and stages in the negotiations will bring more clarity.

Delegation to lower levels had the theoretically expected effect. First, negotiations were “much less formal at the technical level” (R7). Whoever wanted could speak, ask and answer questions, clarify the own position and raise concerns in case they had problems with deciding specific issues at this level (R2,6,8). Secondly, because the persons involved in the course of time “see each other often, of course the atmosphere is changing” (R7). There is evidence that this indeed changes the way participants view each other: “At the end it’s like, you have seen these people so many times, it is actually strange that you won’t see them anymore” (R7). This change, in combination with the character of the issues discussed at technical level, by nature less controversial than those at political level, made participants engage in a very problem-solving approach during technical meetings. Again, “technical meetings are there for building trust. Not for political gains” (R10). All technical meetings therefore “had a nice atmosphere” (R3) and were perceived as “quite constructive” (R2).

Behind the scenes, with an important temporal dimension of getting to know each other and relations improving (R1,3,7), there was a very integrative approach, as well. Especially towards the end, chief negotiators notice to be “allies rather than opponents” (R1), together engaging in finding a way to overcome institutional diversity and arrive at a compromise both can sell to their constituencies. It is in this venue that our theoretical expectations on both the interaction intensity and venue seem to translate the clearest into an effect in the negotiation mode, where good relations over time and delegation clearly had an impact on the approach followed by negotiators, shifting it towards a more integrative mode.

It could have been expected that the same applies for negotiations in political trilogue. However, it again shows that the negotiations in this highest venue follow own dynamics. Firstly, while also here participants get to know each other over time, “the more you go from trilogue to trilogue, the pressure increases” (R1). While the first trilogue is merely an exchange of positions, also documents show that from trilogue to trilogue negotiators

engage with ever more difficult and politically important issues (Council of the European Union, 2018a). Additionally, the interpersonal relationship had less of an effect on the approach in political trilogues. While the “atmosphere was good, still, you stand your ground, you don’t make concessions” (R1). It is much more of a bargain when it comes to political trilogues, which shows in this case. These negotiations also experienced “a standstill. I seem to recall that we had situations like this, in this trilogue” (R2). One reason for this is the meeting structure, which can clearly be differentiated from more informal settings: “There was a clear difference between political discussion and technical. Political is much more orchestrated” (R9). Second, also the Council and Commission negotiators were on a very high political level, even though this is less institutionalized compared to the EP: “we nearly always negotiated with the Commissioner or Director General, that doesn’t normally happen” (R8). Third, again the personality of the negotiators plays a role. Green rapporteur Claude Turmes had an important impact on how negotiations went: “Turmes is certainly a powerful person, so we had arguments in the trilogues were things were heating up” (R2).

Lastly, focusing on the last and most controversial trilogue, the overall circumstances play an important role, as well. The approach became, in parts, really confrontative, especially in “the last one. Because of political circumstances, the fact that Turmes was going to leave to be minister and he really wanted to wrap up this file. And so, after a few hours of them not advancing, he stepped up and started being less diplomatic. It was also three in the morning and people were hungry and tired” (R5).

Different negotiation modes prevailed in the different institutional venues of decision-making in these negotiations. While the negotiations in other venues very much depend on the dynamics of the overall negotiation process, political trilogue meetings had their own dynamics and, in general, are an institutionalization of the opposition between the co-legislators. Negotiation modes in technical and behind-the-scenes meetings were integrative, while the political level trilogues mostly saw a hard bargain. The institutional framework moderated the relationship hypothesized between the interaction intensity and venue in political trilogues, as we would have expected integrative negotiations to also feature in this highest setting. Again, personality matters: “Some people like to raise their voice or get upset as a negotiating tactic, as well” (R2), which seems to make most sense during political trilogues. In other venues, a different strategy seems to be more promising, as the atmosphere as well as single negotiator’s success also depends on “the kind of amiability you bring to your relationships. It’s much easier when you are nice. You catch more flies with honey. It definitely comes down to that” (R6).

8.6 Conclusion

The negotiations on the Governance Regulation are yet another interesting case of trilogue negotiations with important theoretical implications. In large parts, we see the relationships as hypothesized at work. First, coalitions built based on common policy

preferences and determined the interaction intensity both in the early, intra-institutional phase as well as in the later, inter-institutional negotiations. Second, the interaction intensity had a clear impact on the negotiation mode in both technical meetings as well as bilateral, informal negotiations and, in the latter case, also on the venue of negotiations. The informal negotiations between chief negotiators was made possible only through high intensity of social interaction before.

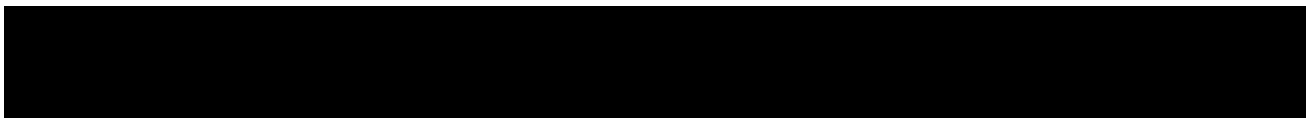
On the other hand, theoretically we encounter some puzzles, as well. Again, we witness that in parts, political trilogues do not follow the hypothesized structure, as they seem to be a lot more institutionalized on the one hand and depending on the personalities of the negotiating actors on the other. The negotiation mode partly contradicts the theoretical expectations, which would have predicted a more integrative negotiation also in this highest political forum.

In terms of the outcome, the tense atmosphere in political trilogues shows in that half of the important issues were not resolved in compromises but leaned heavily towards the preferences of one of the institutions, supporting the perception that negotiators “stand their ground” (R1) in political trilogues. The high interaction intensity as well as delegation to lower venues and extensive time spent at the technical level meanwhile explains the high legal quality.

CHAPTER 9



Analysis



After having analyzed four cases in depth, this chapter brings together the analytical findings gathered in the empirical chapters. To begin with, the findings on the legislative outcome will be summarized, showing that there is variety across the four cases concerning the comprehensiveness of the final pieces of legislation. Second, the three central aspects identified in the process dimension of negotiations – interaction intensity, negotiation venue and negotiation mode – will each be re-visited, and the single-case findings will be summarized to extract general patterns. In the following part, the impact of the preferences of the actors, the power relations, the file salience and issue characteristics, and the institutional framework on the negotiation process will be analyzed. Lastly, the relationship between the negotiation process and the outcome will be clarified and linked back to the theoretical expectations, to see whether the hypotheses formulated in the beginning hold and to be able to draw comprehensive conclusions on the real-world functioning and impact of trilogue negotiations.

9.1 The legislative outcome

In the previous chapters, four empirical cases have been analyzed to investigate the impact of the negotiation process in trilogues on the legislative outcome. These in-depth investigations have delivered interesting insights into how trilogue negotiations develop, which factors are shaping negotiations concerning the three process aspects and how the process indeed makes a difference. The comprehensiveness of a legislative file was operationalized with four indicators. The legislative files in the four cases investigated offer variation on all four of these indicators, which we will shortly revisit in the following.

The first indicator was the *degree of inclusion of initial positions* in the final legislative outcome. In this regard, the “Regulation on autonomous trade measures for Ukraine” (Ukraine) scored low. Hardly any of the important issues considered in this analysis did feature a compromise agreement. Rather, the overall negotiation was an overwhelming win for the Council. The “Posting of workers Directive” (Posting) scored better, but not good, on the degree of position inclusion. At least parts of the contentious issues have been resolved into compromises during the negotiations, while there are other important preferences of both institutions which did not find their way into the final agreement. The case of the “Regulation on type approval and market surveillance” (Type Approval) offers a completely different picture, featuring the initial positions to a high degree in the final agreement. Almost all of the important conflicts have been resolved in compromises reflecting both initial positions. Lastly, the “Governance Regulation” (Governance) offers a more ambiguous picture, as only just more than half of the issues were resolved in a compromise, leaving half of the initial positions out of the final legislation. Hence, the inclusion of initial elements varies widely, from close to exclusive inclusion of all initial positions to a very narrow range of positions included.

The second indicator was the *degree of satisfaction* of the co-legislators, i.e. the EP and the Council, as well as the single actors involved in the negotiations. Again, the four cases

score differently. From a low score in Ukraine to a very high score in the Type Approval case, the satisfaction of the actors shows a similar pattern as did the first indicator. In Posting and Governance, the satisfaction of the actors outpaces position-inclusion. While these cases show that the two indicators do not need to be similar, in general the results hint at a relation between the two.

The third indicator examined the *legal effect* of included positions and reveals considerable variation between the four cases. In Ukraine, Type Approval and Governance, the positions included are of high legal effect. Most of them can be found in articles, the strongest legal category in legislative files. Posting stands out in this regard, as many of the initial positions included are of little actual effect, even when they have been laid down in an article. This shows that inclusion in an article does not per se guarantee that the positions will have an actual, real life impact. The general *legal solidity*, which depicts the legal certainty and the depth and clarity with which the issues are resolved during the negotiations, reveals a similar distribution. Posting scores exceptionally low, while the other three files are legally solid and technical provisions have been negotiated to a high degree of detail. Note, however, that because of its incompleteness, Ukraine cannot fully be compared to the other cases in this study.

All four indicators of the comprehensiveness of an outcome were expected to be impacted by different aspects of the process dimension of trilogue negotiations. Both, the inclusion of positions as well as the legal effect should be shaped by the negotiation mode: Whether negotiators compete or cooperate was expected to matter, not only concerning the inclusion of positions, but also on how sincerely the different parties allow opposite positions to gain legal weight (Hypotheses 8&9). In contrast, the satisfaction of the parties involved, as well as the legal solidity of a file were to be determined by the negotiation venue (Hypotheses 6&7). The venue was expected to have an impact on the overall satisfaction with the result, as well as the legal solidity of the file. In the following, we will analyze the findings regarding all three aspects, to conclude whether the direct impact holds as expected.

9.2 The interaction intensity

Theoretically, the expectation was that the policy preferences of the actors in trilogues would be the main determinant of interaction intensity. More precisely, it was expected that negotiators' policy preferences would determine their coalition choices which would, in turn, lead to more, or less intense social interaction. The analysis indicated that some of the social interactions were indeed determined by the negotiators' policy preferences. However, the four cases clearly reveal that it is the actors' procedural preferences that have by far the most important impact on the interaction intensity of the chief negotiators. Their preference for file conclusion – the desire to bring the negotiations to an agreement, relatively independent of what this final agreement entails – plays the most significant role in shaping the social interaction.

The investigation of the negotiations on trade measures for *Ukraine* did not exhibit coalition building dynamics within the parliamentary team. In the EP, even the majorities shifted from the vote on the mandate, with S&D voting with the EPP rapporteur and later assembling with the other party groups to outvote the rapporteur and his very national view on the file during trilogues. This switch in the S&D behavior already hints at the fact that no stable coalitions were built in the EP. And while a majority of the EP in the one trilogue on this file voted with the Council position and against the own rapporteur and mandate, nothing in the data lets us conclude that the parties had agreed on a common line with the presidency or single Member States beforehand. This case has not exhibited a positive effect of common policy preferences increasing the social interaction.

Instead, the interaction intensity between the presidency and the rapporteur was coined by their diverging preferences. Not only did the rapporteur's policy position oppose that of the presidency. Also, the presidency's procedural preference to conclude the file was not shared by the rapporteur. While the Maltese presidency clearly wanted to conclude the file, the rapporteur actively opposed a quick conclusion in order to showcase his stance to his home constituency. Consequently, the chief negotiators discussed their general approaches to the file in merely one meeting and the overall social interaction, especially inter-institutionally, was exceptionally scarce. Besides the fact that the file was short and not very complex, and thus needed comparatively less coordination than longer files anyway, the absence of both common policy- and procedural preferences coincided with an exceptionally low interaction intensity between the chief negotiators.

Posting featured the specificity of an institutionalized coalition within the EP, due to the co-rapporteurship. Beyond that we saw that both policy- and procedural preferences clearly influenced the interaction intensity both intra- and inter-institutionally. Concerning the policy preferences, the institutions were internally extremely divided which was also reflected in the level of social interaction. In the EP, the internal division was even visible within party groups, leading some MEPs to neglect the own party's advisors and instead to collaborate very closely with advisors from other parties. This underlines the impact of policy preferences on interaction intensity.

Also, inter-institutionally, we saw a high intensity of interaction. Shadow rapporteurs and single Member States maintained regular interaction, for two reasons. First, all parties tried to stay informed about what happens in the opposite institution. Second, single actors tried to push their positions by forming coalitions with actors in the opposite institution, emphasizing that policy preferences played a particularly important role in this case. For example, by signaling to like-minded groups internal institutional divisions, or urging actors in the opposite institution to push for a certain position, these coalitions tried to shape the final agreement. Here, social interaction largely took place outside of official institutional venues.

However, while inter-institutional interaction beyond the chief negotiators might have an important impact on the content of the final agreement, its impact on the other

aspects of the negotiation process, venues and negotiation mode are exceptionally low – running contrary to the formulated expectations. In determining the negotiation process, the interaction between the chief negotiators is much more influential, and again it was not driven by policy preferences. The analysis showed the interaction between chief negotiators to be of exceptionally high intensity. The relationship was described throughout as extraordinarily close and good. Clearly, the interaction intensity was not based on common policy positions on the content of the file mainly, but simply by the strong common preference for concluding the file: their interaction was driven by their procedural preferences.

Type Approval exhibited potential coalition dynamics in the EP team. The ECR rapporteur's policy preferences neatly aligned with those of the EPP and, partly, ALDE. However, it was due to the rapporteur's effort to keep all parties satisfied that this coalition did not have a strong impact on the social interaction, even though the vote on a mandate partly reflected the coalition. Preference alignment had minor impact on the interaction intensity during the intra-EP negotiations and, even less so, after the mandate was agreed and negotiations with the Council began. On an inter-institutional dimension, the data shows very strong interaction between the chief negotiators, in this case the Estonian presidency and the rapporteur. Just as in the second case, we were able to rule out policy position alignment as the reason for this close interaction. What is left explaining the interaction pattern is the procedural preference which both chief negotiators strongly stated as driving their conduct. The very few signs of frustration with the interaction in the negotiations stem from the fact that the close interaction between the chief negotiators left some of the other actors puzzled as to the exact nature and result of their consultations.

On the contrary, further cross-institutional interaction did neatly follow the coalition logic according to policy preference alignment. Again, obtaining information was a main reason for contact across institutions, as had been the case in the negotiations on posting. Often, relationships that are not intrinsic to the specific negotiations were used, such as the same national or party-political background. Yet, beyond that, political coalitions based on policy preferences were formed in these negotiations. The interaction mainly served signaling divides in the own institution and trying to coordinate pressure to be put on the own negotiator. A specificity of the negotiations was the behavior of the Commission engaging in cross-institutional coalition building and urging EP actors to push for their own agenda.

The intra-institutional interaction intensity in the EP on Governance most clearly exhibits coalition-forming due to policy preference-alignment between the so-called progressive alliance. The green rapporteurs, S&D, GUE, as well as parts of EFDD and ALDE coalesced due to the alignment of preferences on the most important issues, and this was clearly reflected in the high interaction intensity between them. Information was shared with only a group of shadow rapporteurs and outsiders were actively withheld

information on what has been discussed and agreed by the coalition. It is interesting to see though that in the plenary vote on the mandate, the coalition did not entirely hold. ALDE decided to reject one of the amendments it had favored in the committee. Yet again, once the mandate was decided upon, the coalition dynamics faded in their impact on the social interaction within the EP team.

The interaction between the chief negotiators follows the dynamics already known from Posting and Type Approval. Interaction was of high intensity throughout the whole negotiation and went beyond mere exchange of positions. The rapporteur is described as extraordinarily active in the interaction with the presidency. What is more, this case provides additional proof that it is the common preference for concluding the file that shape the interaction rather than policy preferences. While all participants to the negotiations were aware of the close cooperation, the nature and content of the interaction was only known to the small circle including the chief negotiators and their teams.

The picture is less clear concerning the inter-institutional interaction beyond chief negotiators. Again, the rapporteur was extraordinarily active in maintaining close contacts with single delegations. However, beyond that the contact was sporadic only, with some parliamentary actors not seeking any contact to single Member State delegations and vice versa, leaving everything to the chief negotiators. In its character, the interaction mirrors the two motives known from the other cases: Obtaining information and, again, coalescing with actors across institutions to put maximum pressure on the respective chief negotiators to support the one or the other position. The Council presidency moreover used the contact with single shadow rapporteurs to try and achieve certain preferences on single issues.

9.3 The negotiation venue

The next conceptual aspect of the negotiation process is the venue, focusing on the hierarchical and formal forum of the negotiations. The institutional framework confronts negotiators with three main venues – political trilogues, technical trilogues and informal negotiations behind the scenes – without, it was assumed, dictating the use of all three to negotiators. Determinants of the venue of decision-making were assumed to be found in the interaction intensity: The higher the degree of interaction intensity, the more trust develops between the negotiators. In a more trustful relationship, more delegation to either lower hierarchical levels or an increased informalization of the negotiations was expected. Again, the four cases produced evidence supporting some of our expectations, while others did not work as expected.

When it comes to the venue of negotiations, the negotiations on Ukraine can be referred to as one-dimensional. Not a single technical meeting took place in the negotiations and only one informal meeting between the chief negotiators, without any trace of decisions having been taken in this meeting. Accordingly, all negotiations took place in the one trilogue on this file. The reason for this can mostly be found in the nature

of the file, as well as the positions of the single institutions. First, the complexity of the file was exceptionally low. Second, as the Council was ready to grant the EP all the changes to the text it demanded, the actual negotiations only had to consider the import quotas.

The Posting case mirrors the first case in that also here, no technical meetings took place. Two main reasons have been given for this. While the file was more complex than that on trade measures, it was still, relatively speaking, less complex than many other legislative files in the ordinary legislative procedure. This means that the character of the file did not make technical meetings inevitable, at least in the perception of some actors. Still, not having technical meetings was controversial, with both the Council and parts of the EP perceiving technical negotiations necessary. The second, and main reason for the absence of such meetings was the active decision of the rapporteurs to do without them. Since the case was so political in nature, the rationale was that technical meetings would in any case not be the appropriate setting to negotiate the file.

This leaves two further venue for negotiations: The formal political trilogue setting as well as behind the scenes negotiations. The data clearly shows that actual negotiations took place both in trilogue meetings and behind the scenes, where some of the most contentious points had been pre-negotiated. These informal negotiations were a key to the successful conclusion of the file after a long negotiation process. It also clearly shows that with time proceeding, behind-the-scenes negotiations increased, to a degree that the last trilogue meetings were largely described as theatre performances of pre-agreed negotiations. However, single issues, and among these the most controversial, were still negotiated in political trilogues. We therefore see two of the three institutionally default venues of decision-making used in the negotiations on Posting: Political trilogues (high level, formal and inclusive) and behind-the-scenes negotiations (high level, informal and exclusive).

As the first case in this study, Type Approval showcases negotiations in all institutionally possible venues for decision-making in trilogues. First, delegation to the technical level was central to the negotiations in this file. Indeed, the technical meetings outpace political trilogues as well as behind the scenes negotiations by far in terms of time spent in negotiations and the share of the file that was negotiated at the different venues. On a weekly basis did technical meetings take place for multiple hours over more than half a year. In contrast, only four political trilogue meetings took place within the same period. Manifold decisions have been taken in these technical meetings and merely rubber-stamped in political trilogues afterwards. Similarly, behind the scenes negotiations between the chief negotiators are also evidenced by the data assembled. Not only did chief negotiators retreat to negotiations behind the scenes, they were actively encouraged by their negotiation teams to do so to solve politically difficult issues.

This did not mean, however, that formal political trilogues did not witness actual negotiations. Except for the first trilogue, in which traditionally negotiations rarely take place, in all political trilogues the participants negotiated. In short, the negotiations on

Type Approval were as diverse as possible when it comes to the venue of decision-making, including high and low hierarchical levels as well as informal and formal negotiations on the path to the final agreement.

Also, in the negotiations on Governance all three possible venues of negotiation were used. It was in technical meetings that the bulk of the file was negotiated, again with one or even two weekly meetings lasting several hours over the course of half a year. Not only did they take most of the negotiation time. The data also shows that these meetings brought about decisions which were of major importance to the file, which were only afterwards formalized in political trilogue meetings.

The data on this case also provides proof of behind the scenes negotiations. Whereas negotiators did not use behind the scenes meetings to agree on the actual legal texts, the venue had been used to agree on a so-called “landing zone”, which drew the boundaries for the final legislative agreement. The actual details of the text, however, were negotiated in more inclusive venues, depending on the policy issue, either in technical meetings or political trilogues. Political trilogues saw actual negotiations in this file, even despite the preparatory work prepared in the two other venues. Interviewees stressed the fact that comparatively speaking, the extent to which issues were negotiated in political trilogues was higher than in other files.

9.4 The negotiation mode

The last element of the negotiation process is the negotiation mode on a range between competitive and integrative approaches. The findings on this aspect are the most diverse, providing both confirming and disproving evidence regarding the theoretical expectations. Across as well as within single cases, different negotiation modes prevail. However, they are clearly governed by different factors. The institutional environment plays an important role in the negotiation mode, as well.

The negotiations on Ukraine clearly represent a competitive approach followed by the negotiators. All data shows that the institutions and their representatives aimed at increasing their own benefit at the cost of the other institution. It was encouraged by the fact that it was mainly numbers to be negotiated, implying a ‘give-and-take’ negotiation. This is very much what happened in the one trilogue on this file, neatly depicted by the bazar- or market metaphors employed by many interviewees. The case depicts the clearest example of a bargaining approach out of all four of our cases. Contributing to this, of course, is the fact that in general the negotiations were short and covered comparatively few dimensions a negotiation process in theory could.

The negotiations on Posting were influenced by a high political salience. Accordingly, the negotiations taking place in trilogues have been described as exceptionally tough and competitive. While during eight trilogues, the atmosphere obviously changed in between single meetings, the overall dominating mode was described as competitive. The fact that the atmosphere was much more cooperative in behind-the-scenes exchanges and negotiations

between the chief negotiators shows that different negotiation modes within single cases of a negotiation process can exist in different venues of the negotiations. Overall, the mode in this negotiation is therefore best described as competitive bargaining with a shift towards more cooperative approaches whenever negotiators withdrew behind the scenes.

‘Diverse’ was the term that stood out to best describe the negotiation mode in Type Approval. Both across different venues and different issues the mode changed. While the high level political trilogues saw competitive bargains, both lower level technical meetings as well as behind-the-scenes negotiations were marked by a very constructive approach. Naturally, that implies that single issues had been approached differently. Often, we see a pattern of constructive pre-negotiations on specific issues, which in their finalization during trilogues saw bargains on the final details of the agreement. It again shows that negotiation modes do not necessarily travel across institutional borders and that, contrary to our expectations, the approach that chief negotiators take in their interaction with each other does not preclude other parts of the negotiations witnessing different modes.

Also, the trilogue negotiations on Governance were characterized by a high-level diversity within the negotiation mode. Technical meetings have been described as very constructive with a view to finding common solutions to the questions under negotiations, while political trilogues witnessed partly heated bargains. The case also neatly shows a change of approaches between the chief negotiators behind the scenes, with a more and more integrative approach and the realization of having a common goal developing over time. However, it indicates again that political trilogues seem to be somewhat immune towards infiltration of more constructive approaches having developed at lower levels of hierarchy or informality.

Table 22 below summarizes the findings of the four case studies, both in terms of the negotiation process as well as the impact on the legislative outcome.

Table 22: Summary of findings

Characteristics	Ukraine Case	Posting Case	Type Approval Case	Governance Case
Inclusion of positions	Low	Medium/Low	High	High/Medium
Satisfaction	Low	High	High	High
Legal effect of positions	High	Low	High	Medium
Legal solidity	High	Low	High	High
Interaction Intensity	Low	High	High	High
Negotiation Venue	High level; formal	High level; formal and informal	All Venues	All Venues
Negotiation Mode	Competitive	Competitive	Variation; mostly cooperative	Variation; mostly cooperative but with heated political trilogues

9.6 The impact of structural factors and the institutional framework on the negotiation process

Before delving into the process of trilogue negotiations and analyzing in how far the hypotheses developed above hold, the analysis of the four cases also demonstrated that outside factors have an important impact on the process of negotiations. In the following, the role of preferences, power, salience and issue characteristics, as well as the institutional framework will be elaborated upon, starting with the former.

9.6.1 Actors' Preferences

The first assumption was that negotiators' preferences, both concerning the issues under investigation (*policy preference*) as well as file conclusion (*procedural preference*), impact on the interaction intensity. First considering internal interaction within the EP team, the cases deliver a scattered picture as concerns policy preferences. In Ukraine, the specific policy preferences of the rapporteur did correlate with comparatively low interaction intensity. Governance shows a causal impact of policy preferences on the social interaction within the EP team, as well. Similarly, the impact of policy preferences could be traced in Posting, where the policy preference-divide even impacted on party-internal cooperation. In Type Approval, however, EP interaction seems to have been relatively unaffected by the policy preferences of the chief negotiators. While the approach of the rapporteur has been singled out as extraordinary, it seems that policy preferences are not under all circumstances driving the rapporteur's social interaction within his negotiation team.

This picture changes completely in the inter-institutional interaction between chief negotiators. Indeed, the wish to come to an agreement is the main driver of high interaction intensity between chief negotiators. Contrary to our expectations, there is no proof that policy preferences played a role in chief negotiator interaction in any of the cases. The low interaction intensity in Ukraine, where the rapporteur had no strong preference for fast conclusion, already hinted at what the following three further underlined: the procedural preference is a strong driver for chief negotiator interaction.

When we look beyond the chief negotiators' policy preferences, however, we see a considerable impact on social interactions. Cross-institutional contacts are mainly determined by two factors. The first is common backgrounds, be it party-political or national. Especially when the goal of interaction is attaining information on the proceedings in the opposite institution or the trilogue negotiations themselves, patterns of interaction often follow pre-established contacts. Interaction intensity is hence highest within 'in-groups', usually sharing the same national background. When the interaction concerns building cross-institutional coalitions to influence the final legislation, the interaction is clearly and logically driven by policy preferences: In three out of four cases this interaction could be traced at some point in the negotiations. Overall, while not in all cases all expectations towards the impact of policy preferences have proven correct, there is a clear picture that both the procedural preferences of chief negotiators as well

as the overall policy preference structure impact the social interaction in the expected directions.

9.6.2 The Power Relationship

Second, we expected the *power relationship* within the EP team to have an impact on the social interaction. Here, the findings are ambiguous. It was expected that less powerful actors, i.e. smaller party rapporteurs, would more actively engage with their shadows, being aware that as smaller parties they would need more support from their counterparts. The only case in which this mechanism seems to be confirmed was in Type Approval, with an ECR rapporteur being very inclusive in his approach to social interaction despite clear and divisive preference structures. Interviews have confirmed that the fact he came from a small party group played a part in motivating this behavior. At first sight, also in the Ukraine case the EPP rapporteur seemed to act according to these expectations. Again, the interaction intensity within the EP team was comparatively low and voting behavior and clear dividing lines during trilogue negotiations within the EP team suggested that the coordination within the negotiation team was below average. However, there is no clear evidence proving that the cause for this lack of coordination was indeed caused by the rapporteur's comparatively big power or whether it was simply a result of a low level of complexity and no policy preference alignment with most other EP parties.

Contrary to the expectations, Governance, in which the Greens held the rapporteurship, exhibit the clearest coalition dynamics based on preference alignment, where the Green rapporteurs through their social interaction clearly left out the biggest party group, the EPP. Power positions of the rapporteurs themselves seem to have played no role in the interaction intensity in this case. Similarly, the institutionalized grand coalition in Posting also did not actively leave single parties out of the negotiations. This could have been expected, given they would already have secured a majority. However, their approach, especially in the negotiations towards the mandate was experienced as very open and attentive towards all party groups. In addition, inter-institutionally the power position of the rapporteurs in none of the four cases revealed any impact on the negotiation process. Hence, while many interviewees saw the potential of powerful rapporteurs neglecting especially smaller party groups, and less powerful negotiators, in return, being more open towards all shadows, this causal relationship did not feature strongly in the cases under investigation.

9.6.3 File Salience

A third condition we expected to affect the negotiation process was the *file salience*. Concerning the interaction intensity, surprisingly we could not find any evidence for the impact of salience on most dimensions of interaction. The only aspect in which the salience of the file really made a difference was the engagement of outsiders in the negotiations, both concerning interest group activity as well as the engagement of MEPs

and national delegations that were outsiders to the negotiations. However, concerning the social interaction of those involved in the negotiations, no impact of file salience could be traced. File salience does come back into the picture at a later stage however, in connection to the nature of the issues under negotiation.

9.6.4 The Nature of the Issues

We expected that the nature of the issues under negotiation would play a part in the choice of decision venues. And indeed, it has shown that this file characteristic has important impact on the venues of negotiation, especially concerning the hierarchical level. This connection showed very clearly in the cases on Type Approval and Governance: while the decision to delegate had to be actively taken by all negotiators in the first trilogue, implying there is no automatism, it was fully uncontested as there was unequivocal agreement that many issues were simply 'technical' and therefore had to be negotiated at the technical level. As there are no objective criteria for delineating the political from the technical, the division is a question to be agreed upon between the institutions. Here, especially the negotiations on the Posting Directive have shown that this is not always as uncontested as in the other cases. Some of the participants to the negotiations on posting defined the whole file as political and therefore decided against delegation to technical level, but not all actors agreed to this assessment. It is therefore no objectively assignable character of legislative files that determines the venue of negotiations: The decision what is seen as technical or political can be taken anew in every negotiation. This supports again the conceptualization of the negotiation venue being part of the negotiation process.

When delegation to lower hierarchical levels does happen, it has been shown that basically, all issues are at least touched upon in technical trilogues. Even though in the beginning of the negotiations specific issues were delegated, once technical level actors did come together, they tried to find agreement on as many issues as possible. The discretion as to the actual level of decision-making is left to the actors themselves, not discussing a specific issue at technical level because it is 'too political' is always an option. Technical level staff seems to have a degree of discretion on deciding upon that: As long as they can find compromises at technical level, they seem encouraged to do so. Regarding the overall system of delegation, it becomes clear that next to the character of the issue a second aspect is significant as expected in this study: The single actors' issue preferences, especially the preference distribution, i.e. how do the single preferences position towards each other.

Given that the technical character of an issue cannot be determined objectively, the preferences of the actors on different issues are important. Strong preferences on an issue by one or more negotiators will automatically deem that issue political. Similarly, compromises at technical level can only be struck if all parties agree and the issue is otherwise automatically re-delegated to the political trilogues (or to behind the scenes negotiations). It has hence been shown that both, the file characteristics, i.e. whether

issues are perceived political or technical, as well as the preferences of the actors involved on these issues have an impact upon which venue they are decided in. File salience furthermore affects both: In salient files, such as the posting of workers directive, issues are rather deemed political and positions tend to be further apart. Both hampers delegation to lower hierarchical levels.

In summary, the impact of file specific factors does not stop at determining the interaction intensity. Especially when it comes to the choice of venues, the content of the file, as well as the issue preferences of the actors and the overall file salience are important. Overall, the file specific factors identified in the theoretical expectations of this study are influential, apart from one: Power relations. While even interviewees, especially so in the case of Posting, expected power positions to make a difference in the negotiation process, it was shown that at least in the four cases under investigation here, it was a factor of marginal impact only.

9.6.5 The Institutional Environment

The institutional environment around trilogues impacts the interaction intensity by assigning specific roles to the different actors which are widely accepted by all participants to the negotiation. For one, this concerns the chief negotiators. As the relays actors of their institutions, they do not only lead the negotiation in political trilogue negotiations, but it is their main responsibility to enable successful conclusion of the file. Three of our four cases clearly show that chief negotiators accept and embrace this role, which impacts their self-perception and the social interaction they engage in. Moreover, their specific role is also accepted by the other participants to the negotiations and especially close interaction between the chief negotiators is even encouraged. However, in case of strong contrary policy and procedural preferences the chief negotiators can deviate from the assigned role, which again has an important impact on the interaction intensity during the negotiations. Still, there is a strong institutional pressure towards close cooperation between the chief negotiators and deviation from this role has been connected to considerable costs for the actor in the case of Ukraine.

In general, the institutional environment impacts the EP-internal interaction, by incentivizing close coordination and cooperation throughout the negotiations with the Council. In most cases, a clear pattern evolves, with a change in interaction from the internal negotiations of the mandate towards the inter-institutional negotiations. Again, this is caused by a shift in the shadow rapporteurs' role from defending their party interest against other EP parties in the mandating phase towards defending EP interest against the Council in the trilogue phase.

Chief negotiators are aware of a specific role expectation also as concerns their behavior beyond their social interaction. Especially the Council presidencies in all four cases mostly neglected any own policy preferences they might have had on the file. This became apparent in the case on Posting, where both presidencies leading the negotiations were

countries that had been involved in issuing a yellow card on the Commission proposal. For both countries, their political position on the file did not feature in the negotiations at all, even though many participants had feared a strong bias, especially for the Bulgarian presidency. For the EP side, rapporteurs clearly did not put their policy preferences last in their role as chief negotiator. However, also here institutional constraints on the behavior became apparent. In two out of four cases, the rapporteurs clearly felt an obligation to assemble as big a majority as possible behind the EP negotiation mandate and, especially in the actual trilogue phase, keep everybody in the loop and represent all positions equally, even though they might contradict their own issue preferences.

The highly important procedural preference for file conclusion by chief negotiators is also partly rooted in the institutional environment of trilogues and the legislative procedure in general. To chief negotiators, successful conclusion of a file comes with high prestige. Especially for the presidency, due to the bi-annual rotation, this entails a strong preference for concluding timely, amplifying their procedural preference for conclusion and consequently their incentives for high interaction intensity and informalization of the negotiations.

The negotiation mode is arguably the one most affected by the institutional framework. Especially the cases in which negotiations took place in all venues showed that it is the institutional environment that has a big impact on how negotiations are approached. Technical meetings are different from political trilogues in manifold ways. First, they assemble lower hierarchy staff, and all cases in which these meetings took place show that this indeed makes a difference in terms of the negotiation mode applied and the technical expertise of the actors involved. Second, and importantly, the procedural rules are different. Technical trilogues are less formal, which manifests itself in the fact that all participants can speak, making the negotiations more interactive and increasing the capacity of the negotiators to understand the respective opponent's position.

The findings manifest a clear institutional difference between technical and political trilogue meetings. The latter are perceived as very procedural and formal, with clear rules as to the roles of single participants, speaking rights, etc. It has become clear that political trilogues are very much perceived as the arena of political battle and therefore, unsurprisingly, overwhelmingly feature bargaining approaches, as both institutions perceive this the ground to fight for their policies. The process dimension, therefore, has shown to be of limited impact only on the negotiation mode in this formal locus of high-level political negotiations. Rather, it is the institutional framework of trilogues that prescribes the different modes in different loci and prevents negotiation modes to travel across different loci and dominate the overall negotiations, mainly because political trilogues have become the institutionalized arena of political conflict and, in parts, a political show.

9.7 Revisiting the hypotheses: How closely are the theoretical expectations related to the reality of trilogue negotiations?

The analysis of the four cases has shown in how far the structural factors as well as the institutional framework affect the negotiation process, as summarized above. The main aim of this study however was to analyze the negotiation process and its impact on the legislative outcome. For this sake, nine hypotheses had been developed, to be tested in the four cases. Below, the findings concerning all nine will be presented.

9.7.1 Hypotheses 1-3: The Impact of the Interaction Intensity

We expected the interaction intensity of negotiations to have an impact on the venue of decision-making in several ways:

Hypothesis 1: *High interaction intensity in the negotiation process increases delegation to lower hierarchical levels.*

Hypothesis 2: *High interaction intensity through coalition-building between the chief negotiators increases the informalization of negotiations, excluding other actors from the negotiation.*

Hypothesis 3: *High interaction intensity in the negotiations leads to more integrative negotiation modes.*

A first expected impact was that high interaction intensity and the resulting trustful relationships in the overall negotiations would lead to more delegation to lower hierarchical levels (hypothesis 1). However, the four cases under investigation did not support the existence of this relationship. In cases with high degrees of delegation to the technical level, clearly file characteristics in combination with preference distribution were the driving force. None of the respondents provided evidence that the overall relationship between the actors involved in the negotiations had an impact on the delegation of decision-making to lower hierarchical levels. Hypothesis 1, therefore, has not been supported by the empirical evidence collected for this analysis.

High interaction intensity between the chief negotiators seems to have the expected effect of informalization of negotiations (Hypothesis 2). In all three cases with strong interaction between the chief negotiators, parts of the negotiations have taken place behind the scenes with a restricted range of participants. Only in the case of Ukraine, where the social interaction was comparatively scarce, did we not see an informalization of the negotiations. While the mutual non-existence of both high interaction intensity and informalization does in itself support the existence of a positive relationship, the Ukraine case does not oppose the hypothesis and the other cases do provide evidence.

Through high interaction intensity the chief negotiators build up trust and a good negotiation relationship. Clearly, this has been described as a process which develops over time and needs frequent social interaction, which in part explains why in the case of negotiations on Ukraine one could not witness informalization: both time and hence the interaction intensity were considerably less than in the other negotiations. If there is a high degree of interaction intensity, chief negotiators indeed start to perceive themselves as a team with a common goal, namely file conclusion. Instead of 'coalescing' because of shared policy preferences and through informalization aiming to exclude other preferences from the negotiation table, chief negotiators cooperate in the common spirit to bring the negotiations to a successful end. Informalization has mostly not happened for the sake of excluding other actors, even though partly this was one of the side-effects. Largely, however, informalization is not only accepted, but often encouraged by those actors not part of informal negotiations, such as the EP shadow rapporteurs. Strong social interaction between the chief negotiators leads to a trustful relationship and, consequently, to the informalization of the negotiations. The cases support the existence of a positive relationship between the interaction intensity and the informalization of negotiations.

The interaction intensity was expected to have an impact on the negotiation mode, as well. Through high interaction intensity we expected the mode to shift towards problem-solving approaches (hypothesis 3). The conclusions to be drawn concerning this hypothesis are ambiguous. At first sight, it seems it does not hold. Relatively independent of the interaction intensity in the different cases, all cases exhibited competitive bargaining in the highest institutional setting, political trilogues. In none of the negotiations, the interviewees identified a single, integrative negotiation mode to prevail. Concerning the overall negotiation situation hypothesis 3 therefore has not been supported.

However, when looking beyond political trilogues, the hypothesis comes back into the picture. Both in technical trilogues and informal settings negotiations grew more integrative over time in the single cases and the interviewees partly attributed that to the relationship theorized in hypothesis 3. Technical meetings, in both cases in which we have witnessed them and in what was referred to as a general principle, take place more frequently than political trilogues. Participants to the negotiations clearly stated that it is in part increased interaction intensity that leads to a more integrative negotiation mode. When it comes to behind the scenes negotiations, which are considerably less institutionalized than technical meetings, again the impact of interaction intensity clearly comes to the fore. Only constant and frequent social interaction between the chief negotiators builds the trustful relationship that leads to informal negotiations in the first place and that allows them to engage with their counterparts in a very integrative way, honestly sharing information and collectively searching for a satisfactory outcome for everybody involved. Not only are high interaction intensity and constructive behind the scenes-negotiations associated in all the cases the latter occurs, the cases provided proof

for the causal connection between the two through the mechanisms of trust-building and the realization of sharing a common goal, rather than being opponents.

Therefore, the interaction intensity does have an impact on the negotiation mode in trilogue negotiations; Yet, contrary to our expectations it is limited by institutional borders. While we expected one overarching mode spreading all venues of negotiations, this is in clear contradiction to the findings in the four empirical cases. Hypothesis 3 therefore seems to have held in specific venues only. What also became clear, however, is that this hardly influences political trilogues. Overall, the analysis has shown that hypothesis 1 was not supported, hypothesis 2 was and hypothesis 3 holds in part, but with the important constraint of the institutional framework preventing it to spread to political trilogues.

9.7.2 Hypotheses 4-7: The Impact of the Negotiation Venue

Four hypotheses were developed to explain the impact of the negotiation venue on both the negotiation mode and the legislative outcome, which will in the following be revisited one by one:

Hypothesis 4: *Delegation to lower hierarchical levels leads to more integrative negotiation modes.*

Hypothesis 5: *Informalization of the negotiations leads to more integrative negotiation modes.*

Hypothesis 6: *Delegation to lower hierarchical levels leads to higher legal soundness.*

Hypothesis 7: *Informalization of negotiations decreases the satisfaction with the outcome.*

The first impact the negotiation venues were expected to have was on the negotiation mode: Through delegation to lower hierarchical levels (Hypothesis 4), as well as through informalization of negotiations (Hypothesis 5), the negotiation mode was expected to become more integrative. And indeed, in all cases in which changes of the venue of decision-making could be witnessed, these came with a clear change in the negotiation mode. Both in technical level-negotiations as well as in informal venues such as behind the scenes meetings, the participants experienced a noticeable shift from more competitive approaches in the political trilogues of all four cases towards more integrative negotiations. The technical level negotiations were experienced as very constructive in both cases they were utilized, and so were informal negotiation in all three cases we witnessed them. As explained above, in both venues this shift can be attributed to two main reasons. First, technical trilogues and informal negotiations are by design reserved for less distributive negotiations. Second, as both rely on frequent contact between negotiators, the high

interaction intensity supports the development of integrative negotiations. The conclusion for both hypotheses is positive: Hypotheses 4 and 5 were supported by all four cases, a shift in venue led to a shift in negotiation mode.

The venues were further expected to impact the legislative outcome in a twofold manner. Through the increased expertise at the negotiation table in technical meetings, the legal soundness of the agreement was said to improve (hypothesis 6): To which degree are technical details clearly regulated, how much leeway does the piece of legislation give for mis- or reinterpretations?

The analysis delivers a clear picture: Negotiations at low hierarchical levels strongly affect this quality of the outcome in question. The only exception is represented by the Ukraine case, which scores high on legal soundness without technical meetings having taken place. However, the evidence allows us to attribute this anomaly to the specific character of the file: Due to its comparative shortness and low complexity, legal soundness was never a problem for the file in the first place. All the other cases neatly support the theoretical expectation that low hierarchy meetings increase the legal soundness of a file. Not only does high legal soundness coincide with a lot of technical level negotiations and vice versa, the data also revealed that the two are causally related, as political trilogues and informal political negotiations simply cannot ensure that all technical details are properly negotiated, and the legislation is legally sound. Negotiations which rest solely on high political levels will therefore be highly unlikely to produce legally sound legislation, unless it is as short and simple as it has been in the Ukraine case. The cases investigated in this study support hypothesis 6.

Furthermore, we anticipated that sidelining parts of the negotiation team through shifting the negotiation to informal venues would affect the satisfaction of the actors with the outcome (hypothesis 7). Overall, it must be noted that this expectation does not hold. The case with the lowest score on the satisfaction dimension was the one where neither coalition dynamics, nor the informalization of negotiations could be witnessed. On the contrary, the two cases with most satisfaction were those where informalization featured highly in the negotiations. In general, the analysis suggests that the reason for this hypothesis to not find support lies in the character of and reasons for informalization. The hypothesis was based on the expectation that informalization is mainly sought by the chief negotiators with common policy preferences to actively exclude other actors. This kind of informalization was not as decisive a factor in the negotiations as expected. The impact of intra-institutional coalitions during the mandating phase diminished during trilogue negotiations, while inter-institutional coalitions between the chief negotiators were not based on policy preferences but on the procedural preference to conclude. Strong cooperation between the two chief negotiators was, moreover, encouraged in most cases and while other participants sometimes felt not fully informed about what was discussed behind the scenes, most considered that a normal part of the political game and it consequently did not have a strong impact on their overall satisfaction with the

file. Interestingly, the four cases still imply that there is a relation between the negotiation process and the satisfaction, as the interaction intensity and the satisfaction of the actors in all four cases seem to be related, with high interaction intensity coinciding with high satisfaction and vice-versa. This is an interesting aspect of this analysis. However, the analysis revealed that while a connection between the two might exist, it is not via the mechanism assumed in hypothesis 7. While there were few indications that the feeling of having been left out during the negotiations created a feeling of dissatisfaction, the overall reason rather relates to the own positions not being found or the bad legal quality of files. Accordingly, no evidence was found in support of mechanism 7.

9.7.3 Hypothesis 8-9: The Impact of the Negotiation Mode

Two different hypotheses were developed to explain the impact of the negotiation mode on the legislative outcome:

Hypothesis 8: *Integrative negotiation modes in informal loci will increase the inclusion of positions in the outcome.*

Hypothesis 9: *Integrative negotiation modes at lower hierarchical levels will increase the legal effect of initial positions included.*

The degree of initial positions reflected in the outcome was expected to be influenced by the negotiation mode of the negotiations, especially in informal venues of decision-making (hypothesis 8). The more integrative the negotiations, the more initial positions to be found in the outcome. The analysis of the cases has shown that these expectations hold. Arranging the four cases on a scale from high to low inclusion of initial preferences, the range of initial positions included in the legislative outcome roughly coincides with the existence of integrative negotiations in informal venues in the trilogue phase. The Ukraine case shows the lowest rate of inclusion, which can neatly be explained by the fact that everything was negotiated in the political trilogue. In Posting the inclusion was higher, and the interviews revealed that the considerable difference between the two can be explained by the fact that in the posting negotiations the chief negotiators did use informal venues for negotiations and many of the issues were resolved behind the scenes. Type Approval and Governance clearly lean towards more positions included. The latter two are also the cases where we saw a high number of negotiations taking place behind the scenes, which consequently led to more integrative negotiations.

Second, the negotiation mode was expected to have an impact on the legal effect of conflict resolution: Are initial positions meaningfully included in the outcome or of mere symbolic character? If negotiators followed integrative approaches, they would take the concerns of their counterparts seriously and, accordingly, try to include their positions in a meaningful way with high legal effect. In the negotiations on Posting, we see a clear

difference between the political overall inclusion of initial positions and the legal effect. When we consider the negotiation mode witnessed in these negotiations, it seems to support the expectation. With some integrative negotiations behind-the-scenes but the absence of technical trilogues, the posting process had a relatively strong component of competitive bargaining.

Other than that, the picture is again relatively clear: high legal effect in terms of conflict resolution occurs in those negotiations in which constructive approaches played an important role and especially a lot of technical level negotiations took place. While the files on Ukraine and Posting scored low concerning this dimension, the last two cases exhibited a high degree of meaningful inclusion of positions in the legislative file which coincides with large parts of the file being negotiated outside the conflictive political trilogue negotiations, hence in an integrative negotiation mode. The Posting case suggests that it is especially delegation to lower hierarchical levels which increases legal effect. Both hypotheses 8 and 9 have been supported by the four cases investigated in this study.

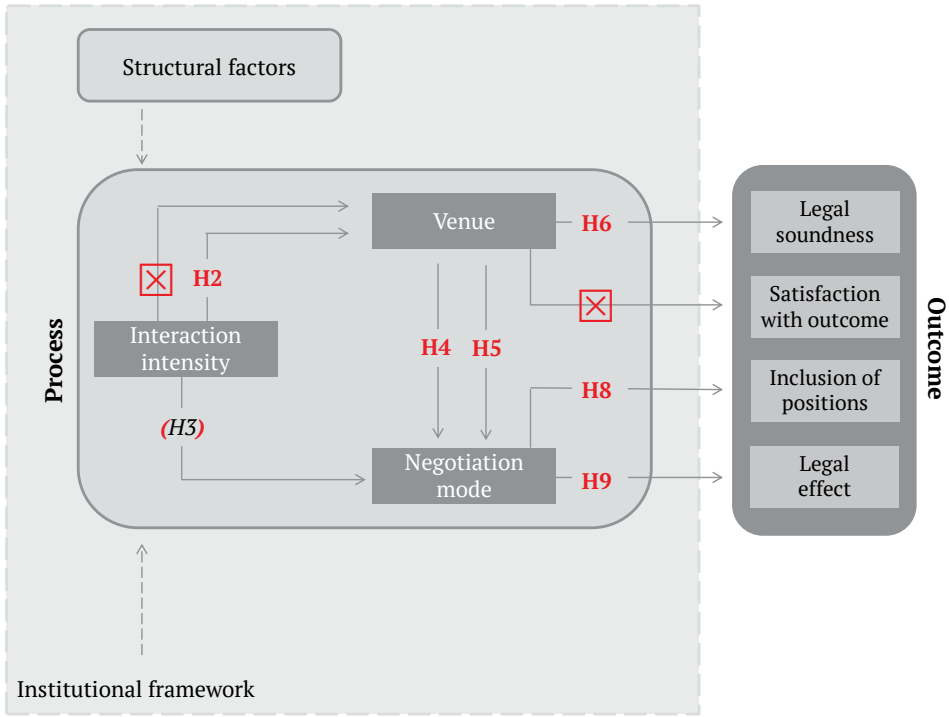


Figure 7: Results

9.8 Conclusion

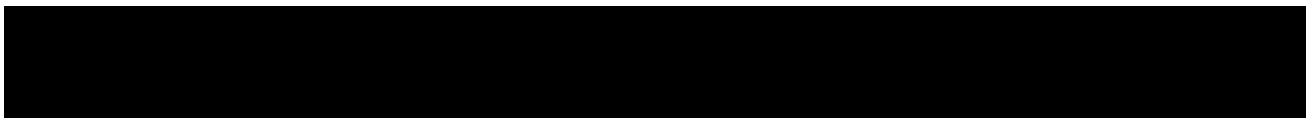
This chapter has analyzed the findings of the four empirical case studies. It showed that concerning the legislative outcome, there is a clear variance across the four cases and that the hypotheses developed go a long way towards explaining these differences. First, however, it showed that preferences, file-specific factors and the institutional framework have an important impact on the negotiation process, more precisely on all three process aspects analyzed in this study.

In total, the analysis has shown that some, but not all the hypotheses have been supported, and that furthermore some work with slight modifications. None of the cases exhibited a link between interaction intensity and delegation to lower hierarchical levels (hypothesis 1), while interaction intensity between the chief negotiators and informalization are clearly connected (hypothesis 2). Hypothesis 3, linking interaction intensity and the negotiation mode, does not work in the overall negotiation setting. It showed that within different venues, namely low and informal, it does come to the fore. Two of the strongest relationships revealed are those tested in hypotheses 4 and 5, linking the venue to the negotiation mode. Moreover, delegation to lower hierarchical levels also has a causal link to the legal soundness of the outcome (hypothesis 6). While hypothesis 7 was not supported by evidence, even though the cases do imply a connection between the interaction intensity and the satisfaction with the outcome, 8 and 9 were supported, as the negotiation mode has an impact on both initial position inclusion and the legal effect of these positions in the outcome. Figure 7 summarizes these findings. In the following, concluding chapter these findings will be brought together to answer the research question. Moreover, the implications of these findings for different research streams will be delineated.

CHAPTER 10

10

Conclusion



Trilogues have become the single most important forum for negotiating EU legislation in the last two decades. From a functional adaptation of the legislative process, they have developed into the exclusive arena of inter-institutional negotiations in the ordinary legislative procedure of the EU. The statistics of the last legislative term show that virtually all legislative files which need negotiations are negotiated trilogues (European Parliament, 2019). The question occupying EU scholars can therefore not be when trilogues are chosen as the institutional setting for inter-institutional negotiations – when it comes to the OLP, virtually always. Consequently, the internal functioning, logic and impact of trilogues on EU legislation need to be analyzed. The study at hand did exactly this. It was overdue to analyze how the negotiation process in this specific institutional environment affects the legislation it produces. This analysis set out, for the first time, to thoroughly investigate the negotiation process in trilogues in order to determine how it impacts on the legislative outcome of negotiations. To do so, the negotiations on four different legislative files were analyzed: Autonomous trade measure for Ukraine, posting of workers, type approval and governance of the Energy Union. Based on a finely tuned theoretical framework, three decisive aspects of trilogue negotiations were identified and analyzed, tracing how the negotiation process has an influence on the comprehensiveness of the legislative outcome, as measured along four different indicators of comprehensiveness: Initial position inclusion, satisfaction of the actors, legal effect and legal soundness.

The study showed that the negotiation process indeed has important implications for the resulting legislation: The process, structure and institutional framework of trilogues interact and determine the comprehensiveness of the final piece of legislation. In this conclusion, the key findings of this study will first be summarized, and the research question answered. Subsequently, the main theoretical contribution to different strands of research in EU politics will be elaborated. The study will be embedded into the existing research on trilogues, negotiations in the EU and informalization of politics. Subsequently, the normative and practical relevance for possible institutional adaptation will be pointed out, before avenues of future research will be proposed in the end.

10.1 The research question: How does the process of negotiations affect the outcome?

This research project set out to answer the following overarching research question:

How does the negotiation process in trilogue negotiations affect legislative outcomes in the Ordinary Legislative Procedure?

Having conceptually separated the process of trilogue negotiations and applied this analytical framework to four different trilogue negotiations on EU legislation, it was possible to carve out a process-inherent impact on the comprehensiveness of the file. Through distinguishing and conceptualizing the process of negotiations along

three decisive aspects, the analysis was able to show the underlying logic of procedural influence on decision outcomes.

The first aspect of the negotiation process identified as influential was the interaction intensity in the negotiation, i.e. how closely negotiators interact while finding an agreement. It showed that the interaction of chief negotiators is the most influential for determining the other aspects of the negotiation process, and that policy- and procedural preferences both explain interaction intensity, but that the latter is most decisive. The character of interaction does entail a specific pattern, as policy preference alignment not surprisingly led to actual coalition interaction, i.e. interaction aimed at directly influencing the negotiations towards the own preferences, while interaction based on procedural preferences mainly had as its aim furthering agreement. Interaction based on common earlier ties, nationality or party allegiance, often entailed mere information sharing.

Second, the negotiation venue was the second aspect of the process worth investigating. Trilogue negotiations offer three institutional venues for negotiations: Political trilogues, technical trilogues and informal negotiations. While in contrast to the expectations the interaction intensity had no traceable impact on the delegation of negotiations to lower hierarchical (technical) levels, the informalization of negotiation coincided with high interaction intensity between the chief negotiators. While, on first sight, it could have been assumed that political and technical trilogues are reserved for highly political or purely technical issues to be negotiated, the analysis has shown that the political/technical distinction is ambiguous and decided upon in every negotiation anew, depending mainly on the preferences of the actors involved.

Third and last, the negotiation mode was identified as the third crucial aspect of the negotiation process. On a range from bargaining to problem solving, or competitive to integrative negotiation, the negotiation mode is one of the central aspects of negotiations linked to the characteristics of negotiation outcomes in existing research. Supporting the theoretical expectations, the negotiation mode was influenced by both, the interaction intensity and especially the negotiation venue, with shifts in negotiation venues consistently being associated with shifts in the negotiation mode.

Four indicators were identified for the comprehensiveness of the outcome. The inclusion of initial positions of the institutions, the satisfaction of the actors, the legal effect with which the initial positions are included in the outcome and the overall legal soundness. The degree of inclusion of initial positions in the outcome can be traced back to the negotiation process through the following causal chain. It was shown that high interaction intensity between chief negotiators leads to the informalization of negotiations. The analysis revealed that it is the trustful relationship developing between chief negotiators over time that leads to the informalization, as negotiators increasingly share relevant information and honestly try to find a common denominator. The intentional exclusion of other actors due to their policy preferences was no significant factor in the informalization.

Informalization shifts the venue of negotiations towards behind-the-scenes negotiations, where negotiators apply a more integrative negotiation approach. In this atmosphere of cooperation, solutions are found which are then only in their very details still subject to change in political trilogues. The integrative negotiation mode leads to the inclusion of more initial positions in the legislative file (figure 8). An important initiator for this causal chain is the shared preference to conclude the file by the chief negotiators. In short, high interaction intensity leads to the informalization of negotiations, which in turn leads to cooperative negotiations and thereby more initial positions are included. This procedural impact featured in all cases in which informalization occurred.



Figure 8: Causal Chain I.

Second, the legal effect of initial positions included was influenced by the negotiation process. In contrast to the first causal chain, this impact is not reliant on high interaction intensity, due to the absence of an effect of interaction intensity on the delegation to lower hierarchical levels. However, once hierarchical delegation has been a factor in the cases, this change of venue has again come with an increase in integrative negotiation modes. This combination of low hierarchical venues and integrative negotiation modes was in turn related to an increase in the legal effect of positions in the outcome (figure 9). This hints at the fact that while in higher political, yet informal venues the main aim of negotiations is to find any compromise both institutions would accept, at technical levels the agreements are comprehensively negotiated to give the included positions appropriate legal effect.



Figure 9: Causal Chain II.

Third, the legal soundness of the final outcome was also in part determined by the negotiation process, especially the negotiation venue. It increases with the delegation to lower hierarchical levels, as with this delegation comes both, more time spent on the provisions as well as more technical expertise by the actual negotiators, as lower-level staff usually has more expertise especially on the technical and legal details of the file.

While this hypothesis was supported in the two cases in which the venue of negotiations was moved down the hierarchical ladder, the fact that one case exhibited high scores on this quality despite the lack of delegation shows that there might be other reasons for it, as in this case the low complexity of the file. Still, it was shown that the hypothesis on a positive relation between hierarchical delegation and legal soundness holds (Figure 10).

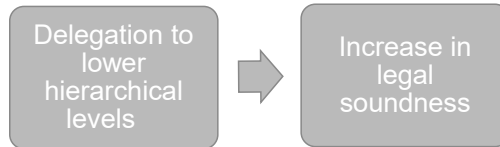


Figure 10: Causal Chain III.

In summary, it showed that especially a shift in the venue of negotiations is of vital importance. The interaction intensity between chief negotiators is an important determinant for the degree of informalization. Also, only in one of the three indicators of comprehensiveness described above is the impact of a venue shift direct – in the other cases, the shift of venue merely comes with more integrative negotiation modes, which in turn leads to the respective outcomes. The study still allows us to not only conclude that the negotiation process of trilogues impacts on the quality of a legislative file. It also disclosed three different direct causal relationships between the negotiation process and the outcome. In addition, the four cases granted a deeper understanding of the negotiation process in trilogues.

One of the four indicators of comprehensiveness was not linked to the negotiation process, despite contrary theoretical expectations: Apparently, at least in the four cases under investigation here, the satisfaction of the actors with the outcome is not related to the negotiation venue. The main reason for this is that informalization was not mainly aimed at excluding actors from the negotiation table and was neither experienced as such. While factually, especially shadow-rapporteurs negatively felt that informalization at times did exclude them, this was interpreted as a necessary evil and did not change these excluded actors' satisfaction, which is an interesting finding in its own right. Yet, the cases still imply that there might be a connection between the negotiation process and satisfaction, as interaction intensity and satisfaction seem to be related in all four cases. This study was not able to detect hints on the causal relationship between the two (should it exist). This question will be interesting to analyse in future studies.

Of course, some important limitations inherent in the design of this study need to be acknowledged. First, while the process tracing approach offers valuable in-depth insights into the four cases studied and allowed for identifying interesting causal relations between the main analytical elements identified, the potential for generalization to all trilogue negotiations is limited. While it can be safely concluded that all trilogue processes

potentially entail the mechanisms discovered in this study, we cannot assume that they will play out equally in all cases. Additionally, other cases might entail characteristics that change some of the procedures and lead to different outcomes.

Second, the conceptualization of the outcome for this study was innovative but might gain from further specification and more fine-tuned measurements. Some of the concepts borrowed from conflict resolution studies do not translate easily to legislative files – the difference in comprehensiveness between a temporary ceasefire and a sustainable peace agreement between two violent opponents is easier to establish than in cases of highly technical legislative agreements. Additionally, the focus on the politically most important issues, while sensible in light of this study, might not be sufficiently precise for a thorough categorization of comprehensiveness. Future studies investigating EU legislation in light of its quality could profit from more fine-grained conceptualization and measurement.

Nevertheless, the analysis conducted in this study allow for some clear conclusions regarding the most important questions. First, the negotiation process of trilogue negotiations has an impact on the outcome. Through analysing interaction intensity, negotiation venue and negotiation mode some underlying causal links between the process and the outcome were identified and systematically traced in the four cases. In the following, the relevance of these findings beyond the four cases will be elaborated on.

10.2 What do these findings tell us?

The findings of this study have repercussions also beyond the explicit research question, on different strands of research in EU politics and negotiation studies. The next section will suggest how the new knowledge gained in the four cases contributes to, supports or contradicts research on EU legislative negotiations and the informalization of politics. In the end, some normative and practical considerations for trilogues in the light of democratic legitimacy will be added.

10.2.1 The Close Relation between Negotiation Venues and Negotiation Mode

The findings of this study support existing research on the importance of negotiation venues in understanding negotiator behaviour and outcomes. Research on socialization in the European Union has for long identified the institutional environment as a decisive factor (Beyers, 2005; Checkel, 2003, 2005; Quaglia et al., 2008). Even though these studies often focus on institutional settings in which actors interact over longer timeframes, such as committees with fixed composition over several years, this study has shown that mechanisms of weak socialization also occur in trilogues. Yet, it went further in adding insights on the relation between the negotiation process and the institutional framework in negotiation settings which offer different institutional venues to the negotiators. In short, it revealed both the potential impact social interaction has on venue choice and shifts in negotiation modes, and at the same time the limits of the causal impact of the negotiation process set by the institutional framework.

Hierarchical venue choice has shown to not be fully determined by issue characteristics. While there is a perceived difference between political and technical issues, the cases have shown, as expected, that this choice is to a degree arbitrary and dependant on the actors' preferences and the political importance they attach to single issues. Despite the correct insight that hierarchical delegation is a common aspect of trilogue negotiations (Roederer-Rynning & Greenwood, 2015), this study could show that it is not self-evident. In contrast, the characterization of issues as technical or not and the resulting decision to delegate or not can be controversial. The cases have not offered systematic insights into which factors account for this choice, an investigation of which could increase our understanding of how trilogue negotiations work. Certainly, this study was able to show that it is a question worth further investigation, and that the technicality of an issue has limited explanatory power only.

When it comes to the informalization of negotiations, the second shift of venue away from political trilogues, it became clear that the negotiation process has important explanatory power. The interaction intensity in the negotiation process contributes to informalization. This finding adds to our understanding as to how venue shifts in the EU work: Within single negotiation processes, informalization is not only dependant on structural factors or the prior relationship between negotiators. This study therefore supports earlier findings that "intensity of contact [is] much more important than duration of contact" (Zürn & Checkel, 2005, p. 1056). This form of "ad-hoc informalization" is an important aspect of trilogue negotiations, and in the common approaches explaining informalization in EU politics it falls somewhere in between approaches of thick socialization on the one hand and informalization "which is induced by a calculation of costs and benefits" (Checkel, 2005, p. 805).

Once the venue of negotiation was decided, all four cases of this study supported the established connection drawn between specific institutional settings and negotiation modes. Clearly, the view that insulation, lower hierarchical levels and informalization contribute to more integrative negotiation modes (Cutcher-Gershenfeld & Kochan, 2015; Druckman, 1997; Hopmann, 1995; Warntjen, 2010b) has been supported. The debate about which negotiation modes are apparent in EU negotiations is ongoing, and the four cases offer valuable insights. A very clear finding is that a range of modes is present in the negotiations on a single file. This study hence supports the finding that "several modes of decision-making can be in effect at various stages or in different settings of the decision-making procedure" (Warntjen, 2010b, p. 675). This does apply to different settings of EU negotiations and decision-making (Blom-Hansen & Brandsma, 2009; Elgström & Jönsson, 2000). The question for researchers on EU negotiations should therefore not be whether bargaining or problem-solving is the main negotiation mode in specific settings, but rather which factors facilitate the occurrence of one or the other. This study has shown that both, interaction intensity and the venue are explanatory factors to be taken into account. The cases have offered a clear pattern as to the institutional venue: In political

trilogues, bargaining prevails, while more integrative modes are applied in informal and technical venues.

One of the most important findings of this study, then, is the importance of delving into single instances of negotiations to understand the different institutional venues single negotiation processes take place in. The identification of three different institutional venues of negotiations in the overall trilogue setting is only relatively recent (Roederer-Rynning & Greenwood, 2015). Before, scholars working on trilogues have conceptualized trilogues as one, informal venue of negotiations (Christiansen & Neuhold, 2013; de Ruiter & Neuhold, 2012; Rasmussen, 2011; Reh, Héritier, Bressanelli, & Koop, 2013b). While this might have corresponded to the realities in the early years of trilogue negotiations, this study clearly shows that this view is outdated. While the absence of trilogues in the treaties still allows for describing them as informal, political trilogues have formalized to a considerable degree and follow different institutional logics than the technical and the informal venue. The negotiation mode is only one aspect in which the old, one-dimensional understanding of trilogues is inaccurate for a thorough understanding of empirical realities. Understanding trilogue negotiations requires taking account of the more complex realities this institutional framework has developed into. Not only has this study shown that a clear distinction of the three venues is fruitful, but also in how far the negotiation process contributes to the choices of one venue over another by the negotiator. Both insights have repercussions on the research on trilogues, informalization and EU negotiations in general.

10.2.2 The Informalization of Politics: Complexity and Venue Choice

The research strand on informalization of politics, of which trilogues are but one, prominent example, can gain from a more complex understanding of institutional venues. It is appropriate to speak of different degrees of informalization within an institutional environment generally regarded as informal. Indeed, this analysis contributes through refining conceptualizations used as well as through informing the overall focus of informalization research. While having applied different names and conceptualizations, many studies on informalization identify as reasons the impatience of, or perceived urgency for the negotiators as well as position proximity (de Ruiter & Neuhold, 2012; Rasmussen, 2011; Reh et al., 2013b). This study has shown that what has been coined “procedural preference” of the negotiators indeed is a driving motivation for the processes leading to informalization. Yet, it is not simply the external urgency of the file (Rasmussen, 2011) or a specific political situation (de Ruiter & Neuhold, 2012). The institutional role of chief negotiators imposes a preference for conclusion relatively independent of external factors (unless this external factor is basic rejection of the file). The procedural preference of actors should hence be considered a factor in its own right and not be compounded in a single measure of preference proximity. It can and does exist independent of policy

preferences. This is an important insight which should be considered also in research specifically analysing chief negotiators (Obholzer et al., 2019; Thomson, 2008).

Additionally, and in accordance with other case-based investigations of informalization, this study adds evidence that file characteristics, i.e. the technical or political character of the issues under negotiation as well as file salience, seem to not impact choices and opportunities of going informal. Indeed, especially file salience has been tested as an indicator for the conduct of trilogues, the length and the venue, in multiple studies (e.g. Rasmussen, 2011; Reh et al., 2013b; Toshkov & Rasmussen, 2012; Wøien Hansen, 2014). Many of these studies have found little impact of salience, and this can be confirmed as concerns the negotiation process: While salience might increase the number of actors interested in the negotiations and the involvement of highest-level politicians, the actual negotiation patterns and processes are hardly affected.

A process perspective delivers a valuable addition to current research and knowledge on informalization. While in most accounts the choice by decision-makers to go informal has been attributed to structural factors, such as file salience and issue characteristics, impatience (procedural preferences), policy preference proximity, (perceived) urgency and so forth (Brandsma, 2015; de Ruiter & Neuhold, 2012; Rasmussen, 2011; Toshkov & Rasmussen, 2012), this study has shown that the negotiation process has explanatory potential, as well. Indeed, especially informalization at higher political levels seems to depend on procedural aspects, is in other words more likely in relationships characterized by high interaction intensity. This study has also shown that a common nationality or party affiliation (Reh et al., 2013b) is not necessarily needed to facilitate informalization if high interaction intensity and the effectual development of trust is present. The negotiation process, in other words, can substitute other factors that have been identified as facilitating informalization. Hence, if “the building blocks of a coherent research agenda on informal governance are beginning to come together” (Christiansen & Neuhold, 2013, p. 1203), processes of negotiation and decision-making should become one of these building blocks.

Lastly, the findings of this study have some repercussions on the debate between proponents of rationalist or constructivist approaches to analysing negotiations in the EU. Both, institutional role imposition and the procedural mechanism of trust development based on high interaction intensity propose that sociological institutionalist perspectives have explanatory value when accounting for informalization in trilogue negotiations (Hall & Taylor, 1996). The cases researched in this study indicate that to a degree, and especially as concerns procedural preferences, it is sensible to understand preferences “to be endogenous to the institutional environment and the interaction among actors” (Mühlböck & Rittberger, 2015, p. 10). The relation between interaction intensity, informalization and integrative negotiation modes indeed implies the mechanisms assumed in sociological institutionalist approaches to be at work. Additionally, the rational choice assumption that intense interaction between actors will develop mainly based

on common exogenous policy preferences does not fit three of the four cases. Policy preferences of the institutions differed in parts quite widely, yet processes of socialization, informalization and integrative negotiations unfolded. However, the Ukraine case shows that rational choice institutionalist assumptions on the centrality of external preferences can have strong explanatory value, given the behaviour of the rapporteur due to his refusal of the policy goals of the file. A combination of different approaches towards explaining EU negotiations seems to be the most fruitful perspective, which is in line with earlier studies applying these broad theoretical perspective to trilogue negotiations (Lewis, 2010; Odell, 2002; Ripoll Servent, 2011).

10.2.3 Single actors' Power and Behaviour: Process matters

An important research agenda has developed on the role, behaviour and impact of specific actors, importantly chief negotiators in inter-institutional negotiation (Costello & Thomson, 2013; Delreux & Laloux, 2018; Farrell & Heritier, 2004; Judge & Earnshaw, 2011; Reh & Heritier, 2012). This study has made a considerable contribution to this strand of research in showing how much the process really matters when investigating these roles. For example, the analysis entails important findings for scholars applying a principal-agent perspective on trilogues. Delreux and Laloux (2018) conceptualize three ways in which agents' (rapporteurs and the presidency, respectively) ability to foster an agreement centrally relies on the negotiation process. Yet, an explicit process focus is lacking in their theorization. Especially their second manner, affecting coalition formation and the third, "actively searching for signals from his principals and his fellow agent on the zone of possible agreement" (Delreux & Laloux, 2018, p. 301) are both contingent on the negotiation process. Only with a thorough understanding of the negotiation process can we understand whether and in how far chief negotiators can and will build inter-institutional coalitions to overcome internal resistance. This study shows that the character of the negotiation process can go a long way in explaining whether inter-institutional cooperation works to overcome intra-institutional opposition. Only in negotiation processes with high interaction intensity can we expect close enough relationships for this kind of strategic inter-institutional cooperation. It requires trusting chief negotiators to e.g. share the actual internal preference distribution in the own institution. Indeed, these exchanges are difficult to imagine should the negotiations not at least in part take place in informal venues.

Second, and more importantly, this study is an important addition to this specific PA-approach in that it sheds light on what they refer to as "searching for signals by the agents" (Delreux & Laloux, 2018, p. 302). It has shown that the process plays an integral part in determining how closely coordinated and hence successful the inter-institutional 'search for signals' is. Indeed, in high interaction processes with a high degree of informalization, the actual red lines of the opposite institutions as well as the preference distributions among the different sections are actively exchanged. In contrast, in negotiations

with low interaction intensity, it accordingly becomes a lot more difficult for agents to meaningfully collect signals for the preferences in the opposite institutions. Additionally, the analysis has shown that the chief negotiators are not the only signal-searching actors, and that others might well use inter-institutional coordination and cooperation to do both, forge coalitions and get information about preference distributions. It is therefore the negotiation process that significantly influences the ability of the agent to apply these two strategies.

Relatedly, Laloux argues that the EP as principal has a collective agent in trilogues, as negotiation teams “are composed of several members of the European Parliament who are collectively delegated the task to negotiate an agreement with their Council counterpart” (Laloux, 2017, p. 84). While considering the rules of procedure of the EP this is certainly an appropriate conceptualization, the investigation of the negotiation process has revealed that chief negotiators cannot be considered on a par with their shadow rapporteurs. Indeed, and again depending on how the negotiation process unravels, there can be stark differences. Especially in negotiations with high degrees of informalization, it can be more appropriate to talk of shadow rapporteurs being delegated the task of controlling the chief negotiator, rather than of negotiating with the Council. An additional important finding from the current analysis in this regard is that, depending on how the rapporteur interacts with the other members of her negotiation team, the shadows grant their chief negotiator considerable leeway, assuming that a degree of informality is necessary to get to an agreement. The differences witnessed in the four cases indicate one should be cautious to apply to strict a model or conceptualization on trilogue negotiations as one.

The interaction, relationship and power distribution in negotiation teams is highly contingent on how the negotiation process unfolds. This also accounts for some of the differences found in the conduct and role of other actors in trilogue negotiations (Roederer-Rynning & Greenwood, 2017). While certainly different committee- and policy-field related traditions help explain the role of different actors, also here the process is an important addition to our understanding of these roles. For example, in explaining the role of the secretariat and the chair of the committee – both mainly involved in formal, political trilogues and the preparation thereof – process developments need to be considered, especially as they have so far mostly been absent in studies investigating the different roles of different actors. The higher the interaction intensity in the negotiations, and the more informal venues are utilized, the less influential we can expect the secretariats of the respective institutions to be. This is not trivial, as studies have shown that the involvement of secretariats in EU negotiations can go beyond mere administrative facilitation (Dobbels & Neuhold, 2013; Pegan, 2017). Indeed, the cases showed that the roles of different actors varied considerably in the four cases. While the case on Ukraine featured very strong involvement of the committee chair, this was not a factor in any of the other negotiations. When studying principal-agent relationships in inter-institutional negotiations and the

roles of single actors in trilogues in general, this study has shown that it is highly valuable to take into account the impact of negotiation processes.

This also relates to another discussion that features highly in the study of trilogues: The policy impact of chief negotiators or 'relais actors'. The relais-actor thesis is disputed to this day, with different studies having produced different findings. While some argue that indeed relais actors do have the potential to shape outcomes according to their preferences, others have found no such effect (Laloux, 2019). This analysis offers another layer to this debate. Studies that have found no evidence for the relais-actor thesis are either based on a single case of trilogue negotiations and focused on the intra-institutional interaction (Judge & Earnshaw, 2011), or analysed a broad set of files comparing initial institutional positions and the outcome (e.g. Rasmussen & Reh, 2013). After having read the study at hand, it will not be difficult for the reader to identify what is missing in these analyses: The negotiation process. And this neglect is not trivial, as the analysis of the four cases has shown. Moreover, it can explain why, despite missing evidence on actual policy impact, there are recurrent calls "for a modest re-appraisal of the relais-actor thesis" (Brandsma, 2015, p. 18).

Taking the negotiation process seriously has revealed that trilogue negotiations certainly offer a potential for relais-actors to shape outcomes, for agent drift, or deviation from the mandate as it has been called in other studies. The process approach has shown that chief negotiators are central; the way they conduct negotiations is important, it can have a significant impact on the interaction intensity, venue and negotiation mode in the trilogue negotiations and thereby on the outcome of the negotiations. The negotiations on posting are an interesting example of rapporteur influence, as it was due to the decision of the rapporteurs that technical trilogues were not part of the negotiations. Rapporteurs can also determine which actors are informed about and involved in negotiations taking place outside of political and technical trilogues. This is not to dispute that there are limits to relais-actor influence, and that some of the safety mechanisms developed by the institutions in response to trilogue negotiations work (Costello & Thomson, 2013). Yet, the study has shown that within limits, they are able to define landing zones in which the agreement will fall, and they do so without full control through their shadows. This is only possible as they steer the negotiation process.

However, it has also become apparent that their influence has limits when it comes to 'pushing through' their preferences. The Ukraine case clearly showed that there are mechanisms in place to prevent rapporteur positions from entering the agreement should they diverge too far from that of the institution as a whole. The different focus of different studies, namely on the potential of chief negotiators to influence the outcome on the one hand, and the actual, empirically traceable policy influence on the other, can explain the divergent assessments. With regard to this, the analysis conducted here clearly shows that chief negotiators are still central to the negotiations and their position is privileged – it might hence be fruitful to investigate not whether, but under which

specific circumstances they (can) make use of this privileged position to advance their policy preferences. The advice is clear – the negotiation process might be a good starting point for such investigation.

10.3 Normative and practical implications in light of democratic legitimacy

The democratic quality of trilogue negotiations has been one of the most debated issues lately, with mostly negative assessments (Curtin & Leino, 2017; European Ombudsman, 2015; Häge & Naurin, 2013; Lord, 2013; Reh, 2014; Stie, 2013). Democratic concerns have not been the focus of this study, yet there are some important observations that can inform the normative and practical discussion on the democratic quality of the current legislative procedure.

First, and given the differences in the outcome detected along the four cases, it might be sensible to add a third dimension towards assessing inter-institutional decision-making. So far, there are two dimensions that are exclusively contrasted as the two values against which the legitimacy of the procedure needs to be evaluated: Transparency and efficiency (Häge & Naurin, 2013; Huber & Shackleton, 2013; Laloux, 2019; Shackleton & Raunio, 2003b). Given the results of this analysis showing that the process of negotiations – which will be affected by any of the proposals on democratizing trilogues – has an independent effect on the quality or comprehensiveness of the outcome, it might be advisable to consider outcome quality, as well.

This is especially the case as some of the findings of this study do not go easily with propositions towards full transparency in trilogues, which likely would include a call for less or no delegation and informalization of the negotiations. A shift in venues to lower hierarchical levels and informalization of the negotiations had a positive effect on the comprehensiveness of outcomes and has moreover often been described (in line with the 'space-to-think' narrative) as pivotal to arriving at an agreement at all. From a transparency perspective, any shift away from the official political trilogue meetings, as in-transparent as they might already be themselves, makes things worse. Yet for efficiency, and as this study indicates the comprehensiveness of the outcome, they are beneficial.

In general, this study suggests that in order to judge the legitimacy of trilogues, the negotiation process deserves a more prominent role in these assessments. Whether or not deliberation on important policy issues takes place and how many actors are involved are important factors in this regard, and they cannot merely be measured by the length of the procedure only (see also Toshkov & Rasmussen, 2012). Also judging every early agreement as in principle informal decision-making and thereby equally in-transparent is not appropriate. Recently, Brandsma has shown that in terms of reporting back to the EP committee there are considerable differences (Brandsma, 2018). The findings of this study suggest that there are differences not only in reporting back, but also in different procedural aspects of transparency. Analyses treating every file decided in trilogues as

a unique negotiation process will allow more nuanced assessments of the legitimacy of trilogues.

Importantly, it will allow us to develop sensible measures to adapt the procedures taking account of all three, transparency, efficiency and the quality of the outcome. To be clear, this is not to dismiss calls for more transparency in trilogue negotiations. In line with other recent studies on the subject (Brandsma, 2018; Curtin & Leino, 2017; Leino, 2017; Reh, 2014), the thorough analysis of four trilogue negotiations has shown that they are often in-transparent, and the rules designed to open them up are circumvented through informalization, both highly problematic as to their democratic legitimacy. Yet, in all calls for reform, the specificities of the process need be taken account of. This includes a shift from studies mainly focusing on the accessibility of documents to applying standards of democratic legitimacy to the negotiation process per se.

The study has shown that patterns of informalization are relatively accepted in trilogue negotiations. It can hence be expected that any increase in transparency which is rendered as obstructive to effective negotiations by some or all participants to trilogues will not actually enhance transparency. In contrast, it might lead to a further informalization of negotiations, which would not only leave the public, but also large fractions of the Council and the European Parliament worse off. This empirical reality, regardless its normative desirability, needs to be taken into account when debating the likely future re-design of inter-institutional negotiations.

10.4 Where to go from here? The future of trilogue research

While there is by now a well-established research programme on trilogues, this relatively new forum of inter-institutional negotiations is still in evolution and renders further investigations necessary.

This study has begun to systematically analyse the negotiation process of trilogues in-depth. It showed that such an analysis is warranted and has delivered first valuable insights. Yet it also showed that there is more to find out. We have seen that social interaction is a central aspect of the negotiation process. Future research could delve into this aspect and analyse it more systematically. For example, it could take into account the different hierarchical levels and in how far their interaction differs. So far, hierarchical delegation is mostly studied as an intra-institutional phenomenon, while the actors of lower hierarchical levels also interact inter-institutionally, presumably more so than their superiors. In many, especially complex files administrators do much of the work. First, we need to find out more on their interaction. How are interaction at highest political level and at lower hierarchical levels different from one another, and do they explain differences in different negotiation venues, or do we have to search for other determinants?

Furthermore, and relating to the different layers of negotiation and decision-making, this study has shown that decisions taken at various levels differ. Given the existing knowledge on why actors choose early agreement in general, and the insights generated

by this study especially concerning the informalization of negotiations, it would be highly interesting to take the next step and analyze systematically, why actors chose to make use of lower hierarchical levels. The interaction intensity seemingly has no decisive influence on delegation to lower hierarchical levels, which is why the search for determinants of delegation needs to continue. Additionally, also in light of concerns with legitimacy, the share of decisions taken in the different venues should be investigated further. While for example in Council decision-making, the system of indication of the level of decision-making in the agenda makes this task relatively easy, trilogues differ in this regard. There is no evident way of identifying who actually took the decisions and which share of the final agreement was simply rubberstamped in political trilogues. In terms of time spent in the single venues, especially the technical trilogues stand out in that they consume a lot more time than negotiations in other venues. This also changes the actors in charge of the bulk of negotiations, giving technical staff a highly prominent role in the negotiations. While this is only a first indication, systematic analyses could enlighten us in terms of the portion of legislative files which is actually negotiated by political actors, and how much of EU legislation agreed by their assistants, advisors and legal staff. In other words, “the distribution of work between the arenas” of decision-making deserves further attention (Laloux, 2019).

Second, this study has tried and made a first step in classifying a range of outcomes of legislative negotiations in the EU independent of their actual policy content. While questions of efficiency and power balance in the outcomes of EU decision-making are prominent, other qualities of these outcomes are under-researched. So far, if outcomes have been considered at all, they have either been measured as to which institution won (Costello & Thomson, 2013; Kreppel, 2018), or in single case studies investigating whether increased EP involvement led to more liberal or environmentally friendly legislation (Ripoll Servent, 2011). Yet, the quality of legislation is important for their real-world effect. Identifying determinants of legislative quality is therefore of highest empirical and political relevance. First, a more fine-grained conceptualization will help understanding legislative outcomes better and enable more wide-ranging comparisons of legislative agreements. Again, as already argued above, more profound knowledge on the determinants of variation in the quality of outcomes will also allow for more sensible adjustments of trilogue negotiations in the future, as changes can be more targeted to not only increase transparency, but also at least not decrease systematically the quality of EU legislation.

Another important aspect this study started to shed light upon, and which deserves further research is the impact of the personality of the respective negotiators. While not a central research theme, in nearly all cases interviewees stressed the importance of personalities of the central actors. First, apparently a proximity of personalities has a clear impact on the negotiation process and the approach towards one-another. Second, also the ‘political’ personalities of the actors matter. Both, the policy preferences as well as the procedural preferences of the chief negotiators were important determinants of

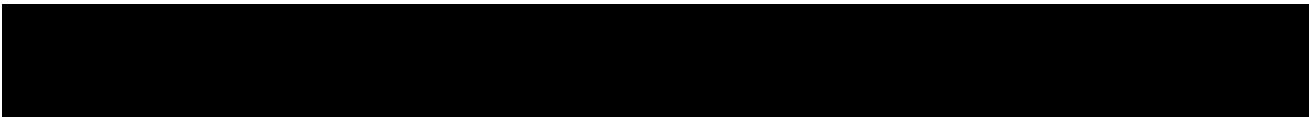
the negotiation process. The choice of (shadow-) rapporteurs gains a completely new dimension considering personality traits, and an important one. Also the procedural preferences of rapporteurs has so far not featured prominently in research on rapporteur-choice (Hurka & Kaeding, 2012; Hurka, Kaeding, & Obholzer, 2015; Kaeding, 2005).

In addition to personality traits of the negotiators in trilogues, another interesting aspect is the involvement of actors or factors originally external to trilogue negotiations. The four cases have exhibited considerable variance as to how open they were to third parties both in the institutions and beyond. Indeed, interest representatives and NGOs in part played crucial roles and were informed about the content and status of trilogue negotiations to a surprising degree, at times better than some of the shadow rapporteurs. In addition, media coverage has influenced the negotiation process and the relation between negotiators, and high-ranking national politicians also seemed to have a real effect on trilogue negotiations. It seems that possibly the doors to trilogue negotiations are less closed to the outside than they typically appear to be, especially for lobby- and civil society groups. Their strategies towards and influence on trilogue negotiations should be another research focus. Again, next to an inherently important understanding of trilogue negotiations as such, the possibly varying influence of different interests has important repercussions on debates on democratic legitimacy.

Trilogues as an institutional setting for law-making in the European Union seem to be here to stay. While criticism prevails, actors involved in trilogues keep stressing that they are virtually without alternative and that, would they not exist, efficient law-making in the Union would hardly be possible. All the more surprising was the lack of knowledge on the actual functioning and underlying logics of the negotiation process in trilogues. This first systematic study of four trilogue processes has yielded important insights and started to fill this gap in the literature. The way negotiation processes unfold does have the potential to change the quality of the legislation they produce. An investigation of four cases can by far not be conclusive, but it offered insights into which aspects of the negotiation process to concentrate on for investigating the underlying logics of trilogues further. Further research on trilogues is not only of value for the academic community through increasing our conceptual and empirical understanding of this pivotal legislative arena. It can also help decision-makers and the institutional architects in Brussels to take sensible decisions in reforming and possibly formalizing trilogues in the future. The message of this study is clear: Yes, the process matters. The black box of trilogues is not yet fully illuminated. Hopefully, this study was able to install some permanent lighting in the right spots, which will make it easier for scholars to navigate their way in future endeavors of analyzing trilogue negotiations.

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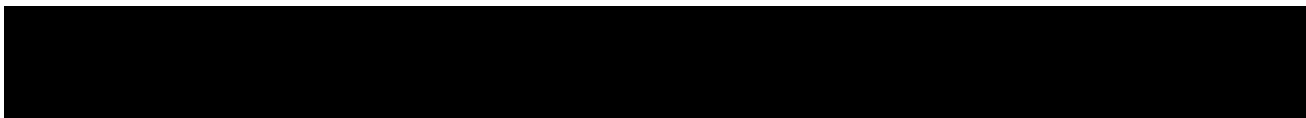
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SAMENVATTING

Nederlandse samenvatting



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Media-aandacht omtrent de Europese Unie (EU) gaat vooral naar grote, belangrijke kwesties zoals Brexit en de migratiecrisis van 2015. Dit is echter niet de kern van wat de EU doet. Ambtenaren en politici in Brussel houden zich vooral bezig met wetgeving. In de meeste gevallen wordt over deze wetten onderhandeld, binnen het kader van de gewone wetgevingsprocedure, tussen de Europese Commissie, het Europees Parlement (EP) en de Raad van de Europese Unie (Raad). Hoewel het Verdrag van Lissabon voor deze gewone procedure een ingewikkeld stelsel met drie lezingen in de instellingen voorschrijft, is deze procedure gedurende de laatste twee decennia (steeds vaker) vervangen door zogenaamde “trilogen”: een informeel institutioneel kader waarbinnen de betrokken instellingen achter gesloten deuren onderhandelen. Tussen 2014 en 2019 zijn 99% van de wetten binnen de gewone wetgevingsprocedure aangenomen via zogenaamde “early agreements” na de eerste of vroeg in de fase van tweede lezing. Daarmee zijn zij het resultaat van onderhandelingen in trilogen.

In eerste instantie beschrijft het begrip “triloog” de daadwerkelijke bijeenkomst tussen vertegenwoordigers van de instellingen. Echter, het omvat tegenwoordig, en dus ook in dit proefschrift, veelal het gehele onderhandelingsproces. Dit proces begint met het geven van een formeel mandaat door de instellingen en eindigt met een ontwerpakkoord, dat tot slot door het hele EP en de Raad moet worden goedgekeurd. Aangezien trilogen een centrale plek innemen in het dagelijks werk van ambtenaren en politici in de EU, is het verrassend dat de kennis over trilogen nog altijd erg beperkt is. Sterker nog, het fenomeen triloog staat vooral bekend als een “black box”: een ondoorzichtige, institutionele procedure die achter gesloten deuren plaatsvindt en waar niet-direct betrokkenen weinig tot geen grip op hebben (Reh, 2014; Laloux, 2019; Roederer-Rynning en Greenwood, 2020).

Het onderzoek naar trilogen in de afgelopen twee decennia leverde al belangrijke inzichten op, maar er bestaan nog altijd veel vragen over onderhandelingen in trilogen, met name wat betreft het onderhandelingsproces. Dit proefschrift levert een bijdrage aan het uit de schaduw halen van dergelijke onderhandelingsprocessen in trilogen en toont hoe deze onderhandelingsprocessen plaatsvinden en invloed hebben op de resulterende wetgeving.

Het boek bestaat uit 10 hoofdstukken die opgedeeld kunnen worden in drie delen. **Deel een** introduceert de onderzoeksvraag, het theoretische kader en de methodiek die gebruikt worden om een antwoord op de onderzoeksvraag te kunnen vinden. **Deel twee** omvat de empirische analyse, gepresenteerd in vier verschillende casestudies. **Deel drie** vat de bevindingen van het empirisch onderzoek samen, beantwoordt de hoofdvraag en toont welke implicaties het onderzoek heeft voor zowel andere, gerelateerde academische vragen als ook de politiek-bestuurlijke praktijk. Tot slot worden alle hoofdstukken kort samengevat en de belangrijkste inzichten uitgelegd.

Deel 1 – Introductie, Theorie en Methode

Dit proefschrift zoomt in op het onderhandelingsproces in trilogen en onderzoekt in hoeverre het uiteindelijke resultaat, namelijk Europese wetgeving, wordt beïnvloed door de manier waarop onderhandelingen zich voltrekken. De hoofdvraag van dit proefschrift luidt:

Hoe beïnvloedt het onderhandelingsproces in trilogen de uitkomsten van wetgevingsprocessen in de Gewone Wetgevingsprocedure?

Om tot een antwoord te komen op deze hoofdvraag, verkent dit proefschrift drie deelvragen waar bestaand onderzoek naar trilogen, tot nu toe, nauwelijks naar heeft gekeken. De eerste deelvraag betreft het verloop en de impact van de sociale interacties tussen actoren tijdens het onderhandelingsproces. Hoewel reeds bekend is wie de actoren zijn die in trilogen onderhandelen, weten we nog weinig over de processen van sociale interactie zodra het onderhandelingsproces in trilogen is begonnen. Proces- en interactie-benaderingen naar onderhandelingen tonen echter aan dat interacties kunnen verschillen, waardoor verschillende processen van onderhandelingen ontstaan.

Ten tweede weten we al langer uit onderzoek dat trilogen niet alleen informele onderhandelingen zijn. Door de jaren heen hebben trilogen zich ontwikkeld tot een complexe institutionele structuur. Zo zijn er verschillende routes ("institutional venues") ontstaan om te onderhandelen, waartussen de zeggenschap en de status van de onderhandelingspartners varieert. Een black box blijft echter het ontstaan en gebruik van deze verschillende institutionele structuren tijdens trilogen en de redenen voor variatie. Hier zoomt deelvraag twee op in.

Tot slot staat dit proefschrift, via deelvraag 3, stil bij het karakter van de interactie tijdens de onderhandelingen. De manier waarop onderhandelaars met elkaar interacteren is al lang een belangrijk onderzoeksthema, zowel binnen als buiten de EU (Elgström & Jönsson, 2000; Hopmann, 1995; Warntjen, 2010). Theoretisch gezien verwachten we dat onderhandelingen in trilogen een coöperatief karakter kennen, maar het is onbekend of dit in de praktijk zo is. Dit proefschrift onderzoekt in hoeverre dit het geval is en welke factoren het karakter van interacties in trilogen beïnvloeden.

De drie deelvragen die centraal staan in dit onderzoek zijn:

- 1) *Hoe interacteren onderhandelaars in trilogen?*
- 2) *Welke institutionele structuren/kaders worden gebruikt in triloogonderhandelingen en waarom?*
- 3) *Welke onderhandelingsaanpak/strategie observeren we in trilogen, en hoe wordt die bepaald?*

Hoofdstuk 1 introduceert deze deelvragen nader, waarna **hoofdstuk 2** inzoomt op het bestaande onderzoek naar trilogen, dat samengevat kan worden in zes verschillende stromen. *Stroom 1* omvat onderzoek naar het ontstaan van trilogen als gevolg van

de groeiende invloed van het EP in het wetgevingsproces, waar trilogieën vooral een experiment van institutionele innovatie waren. Onderzoek in *stroom 2* focust op de redenen voor betrokken instellingen om voor trilogieën te kiezen in plaats van de lange(re) wetgevingsprocedure. Dit blijkt niet alleen een kwestie van efficiëntie, ook de verhouding tussen de onderhandelaars en hun rol gedurende het proces zijn bepalende factoren in de keuze voor het wel of niet overgaan tot trilogieën. *Stromen 3 en 4* bevatten onderzoek dat zich richt op de gevolgen van trilogieën, zowel voor het gehele wetgevingssysteem als binnen de instellingen zelf, zoals het EP en de Raad. Dit soort onderzoek laat zien dat het EP heeft geprobeerd zijn eigen invloed te vergroten via trilogieën, terwijl er binnen de instellingen tevens een verschuiving van macht heeft plaatsgevonden. Vooral de vertegenwoordigers binnen trilogieën – dus het raadsvoorzitterschap voor de Raad en de rapporteur voor het EP – hebben hierdoor aan invloed gewonnen, ten koste van andere lidstaten en parlementsleden. Vragen over transparantie staan centraal in *stroom 5*, waarin onderzoek zich richt op de democratische kwaliteit van trilogieën. Ondanks het beperkte aantal studies in deze stroom, zijn het toch vooral deze vragen die in het publieke debat over trilogieën van groot belang zijn.

Tot slot bevat *stroom 6* onderzoek dat kijkt naar het onderhandelingsproces aan sich. Onderzoek met een expliciete focus op het onderhandelingsproces is pas in de afgelopen 10 jaar ontstaan en is tot nu toe vaak beschrijvend van aard gebleven. Zo toonden Roederer-Rynning en Greenwood (2015) dat trilogieën niet alleen maar een serie van bijeenkomsten zijn, maar een complexe structuur kennen met drie dominante niveaus. Van formeel naar informeel zijn dit: “Politieke trilogieën”, oftewel de formele triloo-gbijeenkomsten, “technische trilogieën”, waar politici het werk delegeren aan hun ambtenaren en medewerkers en waarin vaak over een groot deel van de wet wordt onderhandeld, en tot slot de “informele, (vaak) bilaterale bijeenkomsten” tussen de centrale actoren. Dit proefschrift stelt tevens het onderhandelingsproces centraal en situeert zich daarmee in stroom 6. Dit onderzoek bouwt voort op het bestaande, beschrijvende onderzoek, onder andere door bestaande theorieën over onderhandelingen toe te passen op trilogieën, te testen en aan te vullen met nieuwe praktijkinzichten.

Hoofdstuk 3 zet het theoretische kader voor dit onderzoek uiteen. Het presenteert een analysemodel voor de studie van trilogieën als zijnde onderhandelingen met vier aparte onderdelen: (1) het resultaat, (2) het proces, (3) de structurele factoren en (4) het institutionele kader.

Onderdeel 1, het resultaat, wordt in deze studie beoordeeld op basis van de volledigheid van het onderhandelingsresultaat, een concept dat vooral ontwikkeld is en gebruikt wordt in de literatuur over conflictbeslechting. De volledigheid van een resultaat wordt geconceptualiseerd op basis van een viervoudige indeling. De twee politieke factoren zijn (a) in hoeverre de oorspronkelijke posities van verschillende actoren terug zijn te vinden in het uiteindelijke resultaat en (b) de tevredenheid met het resultaat van de belangrijke actoren. Deze politieke factoren worden aangevuld met twee juridische

factoren: (c) wat is de rechtskracht van de verschillende oorspronkelijke posities die terug te vinden zijn in het resultaat en (d) wat is de juridische deugdelijkheid van de wet. Zo ontstaat een viervoudige indeling om de wetten uit de vier casestudies te beoordelen.

Om te kunnen analyseren in hoeverre het onderhandelingsproces, *onderdeel 2*, invloed heeft op het resultaat, deelt dit onderzoek trilogie conceptueel op in drie factoren: (1) het onderhandelingsproces zelf, (2) structurele factoren en (3) institutionele factoren. Deze indeling komt voort uit een combinatie van drie verschillende theoretische perspectieven op onderhandelingen: (a) proces- en interactiebenaderingen, (b) structurele benaderingen en (c) institutionele analyses.

Onderzoek vanuit (a) een procesbenadering laat zien dat de interactie tussen onderhandelaars belangrijk is voor het al dan niet creëren en voortduren van onderlinge relaties, die vervolgens van invloed zijn op het resultaat. Volgens bestaande literatuur blijken vooral de frequentie en intensiteit van de sociale interactie van belang. Een hoge “interaction intensity” (interactie-intensiteit) kan het vertrouwen tussen de onderhandelaars verhogen, met positieve gevolgen voor het verdere verloop en resultaat van het onderhandelingsproces.

Naast de intensiteit van sociale interacties vormen de onderhandelingsarena's, “de institutional venues”, een belangrijk tweede aspect van het onderhandelingsproces in trilogie. Bij trilogie zien we drie hiërarchisch georganiseerde niveaus, te weten: politieke trilogie, technische trilogie en informele, bilaterale onderhandelingen. Eerder onderzoek toont aan dat de arena-keuze een verandering in het onderhandelingsproces met zich meebrengt (Checkel, 2005; Conceição-Heldt, 2006; Elgström & Jönsson, 2000; Lewis, 2010). Het hiërarchisch niveau van onderhandelingen – en dus de arena – blijkt tevens een van de meest bepalende factoren voor het onderhandelingsgedrag (Ocran, 1984). Zo vinden onderhandelingen over Europese wetgeving vooral plaats in technische trilogie, aangezien zij vaak vragen om technische kennis over zeer specifieke onderwerpen, waarbij verschillende politieke, administratieve en hiërarchische niveaus meedoen. Een informele, bilaterale onderhandeling is, in dit geval, een minder geschikte en logische keuze.

De manier van onderhandelen, de “negotiation mode”, vormt het derde belangrijke aspect in een onderhandelingsproces. Bestaand onderzoek maakt gebruik van verschillende labels om het karakter van een onderhandeling te beschrijven. Deze labels laten zich rangschikken op een schaal tussen competitieve onderhandelingen aan de ene kant en coöperatieve onderhandelingen aan de andere kant, zoals confronterende, competitieve of harde onderhandelingen aan de ene kant, en herverdelende, integrerende en coöperatieve onderhandelingen aan de andere kant (Cutcher-Gershenfeld & Kochan, 2015; Greenhalgh & Chapman, 1998; Irmer & Druckman, 2009; Ocran, 1984; L. Thompson, 1990; Thompson et al., 2010). Voor de volledigheid van het resultaat is de manier van onderhandelen van enorm belang (Druckman, 1997; Hopmann, 1995; Irmer & Druckman, 2009; L. Thompson, 1990). Hoe coöperatiever een onderhandeling, hoe vollediger het

resultaat, omdat onderhandelaars de posities en wensen van hun tegenhanger serieus nemen en bereid zijn deze in een overeenkomst te integreren.

Naast het proces zijn in een analyse van onderhandelingen ook structurele factoren en de institutionele omgeving van belang. Structurele factoren omvatten de posities en macht van de actoren en de relevantie en het karakter van de vraagstukken in een onderhandeling. Zowel deze factoren als ook de institutionele omgeving zijn meegenomen in deze studie. Weliswaar ligt de focus van dit onderzoek op het onderhandelingsproces, maar een analyse van onderhandelingen in trilogieën zou niet volledig zijn als de andere factoren niet meegenomen worden. Voor een visueel overzicht van het analysemodel en de conceptualisatie van trilogieën in de EU-praktijk, zie figuur 5 in hoofdstuk 3.

Uit de zojuist geschetste conceptualisatie vloeien negen hypothesen voort om (1) de sociale interactie tussen de onderhandelaars, (2) de arena gebruikt voor de onderhandelingen, (3) de manier van onderhandelen en (4) het onderhandelingsresultaat te onderzoeken:

Hypothese 1: *Hoge intensiteit van sociale interactie leidt tot delegatie van onderhandelingen naar lagere hiërarchische niveaus.*

Hypothese 2: *Hoge intensiteit van sociale interactie door coalitievorming tussen onderhandelaars leidt tot informalisering van onderhandelingen.*

Hypothesis 3: *Hoge intensiteit van sociale interactie leidt tot coöperatieve vormen van onderhandeling.*

Hypothese 4: *Onderhandelingen op lagere hiërarchische niveaus leiden tot coöperatieve vormen van onderhandeling.*

Hypothesis 5: *Informalisering van onderhandelingen leidt tot coöperatieve vormen van onderhandeling.*

Hypothesis 6: *Onderhandelingen op lagere hiërarchische niveaus leiden tot een hogere juridische deugdelijkheid in het resultaat.*

Hypothesis 7: *Informalisering van onderhandelingen leidt tot lagere tevredenheid met het resultaat.*

Hypothesis 8: *Coöperatieve vormen van onderhandeling in informele arena's leiden tot een sterkere integratie van oorspronkelijke posities in het resultaat.*

Hypothesis 9: *Coöperatieve vormen van onderhandeling op lagere hiërarchische niveaus leiden tot een hogere mate aan rechtskracht.*

Hoofdstuk 4 introduceert de onderzoeksmethodiek en sluit daarmee deel één van het boek af. Om het onderhandelingsproces zorgvuldig te kunnen analyseren is gekozen voor de methodiek van “process tracing”. Process tracing maakt het mogelijk om zowel vragen over het ‘waarom’ als het ‘hoe’ te beantwoorden, omdat het de causale condities die een resultaat mogelijk maken blootlegt (Blatter & Haverland, 2014). Process tracing kan verschillende onderzoeksdoelen dienen, zoals het “testen” of “formuleren” van theorieën (Beach en Pedersen, 2013). Dit onderzoek heeft het eerste doel, het testen van een theorie, waarbij bestaande theorieën over trilogieën en onderhandelingen aan de hand van de hypothesen worden getoetst. Voor een zorgvuldige process tracing analyse is een brede en gecombineerde basis aan bronnen belangrijk, zodat bevindingen over het proces via verschillende vormen van observatie belicht en onderbouwd kunnen worden. Blatter en Haverland (2014) opperen hiervoor drie (opeenvolgende) vormen van observatie: (1) het presenteren van een volledig verhaal, dat wordt aangevuld met (2) “smoking-gun evidence” als zijnde overtuigende signalen dat de veronderstelde causale verhoudingen bestaan en dat wordt gestaafd met (3) bekentenissen uit interviews met betrokkenen.

Dit onderzoek voldoet aan deze voorwaarden door twee hoofdbronnen van data te combineren, namelijk (1) documenten omtrent het onderhandelingsproces en (2) 43 interviews met betrokkenen die toegang hadden tot het onderhandelingsproces, verspreid over alle drie de instellingen. De documenten omvatten wetgevingsvoorstellen, algemene aanpakken van de Raad, zogenoemde “presidency reports”, ontwerpverslagen en verslagen van rapporteurs alsmede voorgestelde wijzingen door andere parlementsleden. Daarnaast wordt er gebruik gemaakt van zogenoemde “four column documents”. Dit zijn onderhandelingsdocumenten die de instellingen gebruiken tijdens het onderhandelingsproces om veranderingen en vooruitgang bij te houden. Deze tussentijdse procesnotities zijn daardoor bijzonder geschikt en waardevol voor het begrijpen van het onderhandelingsproces.

Dit onderzoek spitst zich toe op vier casussen, die gekozen zijn op basis van twee verschillende factoren: (1) de machtsrelatie tussen de verschillende onderhandelaars en hun betreffende instellingen en (2) de relevantie van de wet waarover onderhandeld wordt.

De keuze viel op vier wetgevingsprocessen:

- a) *De verordening betreffende de invoering van tijdelijke autonome handelsmaatregelen voor Oekraïne,*
- b) *De richtlijn betreffende de detachering van werknemers,*
- c) *De verordening betreffende de goedkeuring van en het markttoezicht op motorvoertuigen, en*

d) De verordening inzake de governance van de energie-unie en de klimaatanpak.

Hoofdstuk 4 geeft gedetailleerd inzicht in zowel de keuze van casussen als de gebruikte data.

Deel 2 – Empirisch Onderzoek

Hoofdstukken 5 tot en met 8 omvatten elk een gedetailleerde analyse van een casus. Qua opbouw zijn de vier hoofdstukken gelijk: allereerst wordt het voorstel van de Europese Commissie toegelicht. Daarna volgt een overzicht van het totstandkomingsproces van het onderhandelingsmandaat, zowel in de Raad als in het EP. Dan volgt een uitgebreide beschrijving van het onderhandelingsproces aan de hand van de drie analyse-onderdelen, te weten: (1) intensiteit van sociale interactie, (2) gehanteerde onderhandelingsarena en (d) de manier(en) van onderhandelen. Hieronder volgt een korte toelichting van de hoofdzichten per casus.

Hoofdstuk 5 beschrijft de verordening over de invoering van handelsmaatregelen voor Oekraïne. Deze casus toont een lage intensiteit van sociale interactie, waardoor weinig tot geen vertrouwen tussen de onderhandelaars kon ontstaan. Dit heeft ook te maken met een gebrek aan coalitievorming. De instellingen gaven de voorkeur aan onderhandelingen via de politieke triloog, wat ook verklaart waarom we geen variatie zien in onderhandelingsarena. Als gevolg van de keuze voor de politieke triloog, valt de manier van onderhandelen voornamelijk te kenmerken als “confronterend” en zien we geen coöperatief gedrag bij de onderhandelaars. Wat betreft het onderhandelingsresultaat blijken de hypothesen slechts gedeeltelijk correct: terwijl we relatief weinig oorspronkelijke posities terugzien in het resultaat, en ook de tevredenheid laag is, blijkt de juridische kwaliteit hoog. Deze bevinding valt onder andere te verklaren door het feit dat de onderhandeling in kwestie relatief kort duurde en de verordening niet erg complex was.

Hoofdstuk 6 analyseert de vorming van een richtlijn betreffende de detachering van werknemers; één van de belangrijkste onderhandelingen de afgelopen jaren. De onderhandelingen kenmerken zich door een hoge mate aan intensiteit in de sociale interactie en ook door de beslissing bij de start om niet over te gaan tot technische trilogie. Ook toont de analyse een samenhang tussen de intensiteit van de sociale interactie en de arena-keuze: de hoge intensiteit van interactie zette aan tot informalisering. Daarnaast was een verandering in de manier van onderhandelen zichtbaar, alhoewel opviel dat de meer coöperatieve manier van onderhandelen in informele arena's niet werd overgedragen naar de politieke trilogie. Hierdoor bleef de invloed op het onderhandelingsresultaat beperkt: minder dan de helft van de oorspronkelijke posities zijn terug te vinden in het eindresultaat. De actoren bleken er echter wel tevreden mee. Deze casus laat daarmee zien dat het onderhandelingsproces de tevredenheid over het onderhandelingsresultaat niet op de manier beïnvloedt als verwacht. De juridische kwaliteit was wel laag, zoals verwacht gezien de veronderstelde causale relaties en het gebrek aan technisch trilogie.

Hoofdstuk 7 behandelt de verordening betreffende de goedkeuring van en het markttoezicht op motorvoertuigen. Voor het eerst hebben we hier te maken met een onderhandelingsproces dat alle mogelijke arena's omvat, waarbij onderhandelingen zowel in politieke trilogie, in technische trilogie als in informele bijeenkomsten plaatsvinden. Dit komt mede door de complexe en technische aard van de verordening. We zien in het onderhandelingsproces een hoge intensiteit van sociale interactie, evenals verschillende manieren van onderhandelen. De hoge intensiteit van interactie heeft het verwachte gevolg: het vergrootte het vertrouwen, zowel op technisch niveau als tussen de hoofdactoren. Ook heeft de interactie invloed op de arena-keuze, waarbij veel onderwerpen gedelegeerd werden naar het technische niveau en naar informele onderhandelingen. Ook wat betreft de manier van onderhandelen is er een opmerkelijke dynamiek te zien: in technische trilogie en informele bijeenkomsten is er voornamelijk coöperatief gedrag, terwijl in politieke trilogie de onderhandelaren hoofdzakelijk confronterend onderhandelden. Wat betreft het onderhandelingsresultaat zijn vele van de onderzoekshypothesen bevestigd. Zo leiden delegatie naar lagere hiërarchische niveaus en coöperatieve onderhandelingen tot hogere kwaliteit op zowel politiek als juridisch vlak. Daarentegen blijkt dat de confronterende manier van onderhandelen in politieke trilogie weinig invloed heeft op de kwaliteit van het onderhandelingsresultaat.

Hoofdstuk 8 analyseert het onderhandelingsproces voor de verordening inzake de governance van de energie-unie en de klimaataanpak. De analyse toont aan dat de causale relaties grotendeels werkten zoals verwacht. De intensiteit van interactie, ook hier voor een groot deel bepaald door onderliggende posities, heeft duidelijk invloed op de manier van onderhandelen, zowel in technische trilogie als in bilaterale, informele onderhandelingen. Verder blijkt dat de arena-keuze ook beïnvloed wordt door de sociale interactie: alleen door een hoge intensiteit van interactie werden informele, bilaterale onderhandelingen tussen de twee hoofdactoren mogelijk. Deze casus plaatst echter ook enkele vraagtekens bij de theoretische verwachtingen. Met name in politieke trilogie hadden we hier, ook op basis van de sociale interactie, een coöperatieve manier van onderhandelen verwacht. De praktijk laat echter een hoge mate aan institutionalisering van politieke trilogie zien. Wat betreft het onderhandelingsresultaat, is circa de helft van de belangrijke thema's niet is opgelost via een compromis, maar kon de ene of de andere kant duidelijk de eigen positie doorzetten. Daarnaast is het resultaat hoge juridische kwaliteit, wat te verklaren valt door zowel de hoge intensiteit van interactie als de grote hoeveelheid technische trilogie.

Deel 3 – Bevindingen

Na de behandeling van de vier empirische casussen volgt in **hoofdstukken 9 en 10** een samenvattende analyse en het antwoord op de onderzoeksvraag. De studie richtte zich op het beantwoorden van de vraag hoe het onderhandelingsproces in trilogie de Europese wetgeving beïnvloedt. Door allereerst het proces van onderhandelingen conceptueel te

scheiden van andere factoren en vervolgens vier verschillende triloogonderhandelingen te analyseren, was het mogelijk om de specifieke invloed van het proces te identificeren. De analyse laat zien dat wat betreft de eerste belangrijke factor, sociale interactie, de interactie tussen rapporteur en voorzitter van de Raad het belangrijkste is. Deze interactie wordt bepaald door zowel de posities van deze actoren als de voorkeuren wat betreft het proces, oftewel de “procedural preferences”.

Verder laat de analyse zien dat trilogieën, zoals verwacht, plaatsvinden in drie verschillende arena's voor onderhandelingen: politieke trilogieën, technische trilogieën en informele onderhandelingen, maar dat niet alle onderhandelingen er ook daadwerkelijk gebruik van maken. In tegenstelling tot de verwachtingen, heeft de intensiteit van sociale interactie geen invloed op het al dan niet overgaan tot onderhandelingen op lagere hiërarchische niveaus. Een hoge intensiteit van sociale interactie leidt wel tot meer informalisering. De analyse toont verder dat het onderscheid tussen politieke en technische thema's ambigu is, en dat de beslissing ‘welke vragen het beste in welk forum kunnen worden besproken’ in elke onderhandeling opnieuw moet worden genomen.

Een derde belangrijk aspect van het onderhandelingsproces vormt de manier van onderhandelen, oftewel de “negotiation mode”. De verwachtingen hierover worden bevestigd in de analyse: de manier van onderhandelen wordt beïnvloed door de sociale interactie alsmede de arena voor onderhandelingen.

Bij aanvang identificeerde dit onderzoek vier indicatoren voor de volledigheid van een wet: (1) de mate waarin oorspronkelijke posities terug te vinden zijn in het eindresultaat, (2) de tevredenheid met het resultaat, (3) de rechtskracht van posities en (4) de juridische deugdelijkheid. De analyse laat drie causale verbanden zien die het onderhandelingsresultaat en het onderhandelingsproces aan elkaar koppelen. Zo is de mate waarin oorspronkelijke posities in het resultaat terugkomen, gerelateerd aan de intensiteit van sociale interactie tussen de hoofdonderhandelaars. Ook zien we dat door een hoge mate van intensiteit in de sociale interactie de informalisering van onderhandelingen toeneemt. Dit komt doordat de vertrouwensrelatie tussen de actoren groeit, wat op zijn beurt aanzet tot informalisering. Omdat de onderhandelingen verschuiven richting een hiërarchisch lagere en meer informele arena, verandert ook de manier van onderhandelen: actoren tonen meer coöperatief gedrag. Daardoor neemt, zoals verwacht, het aantal oorspronkelijke posities dat terugkomt in het onderhandelingsresultaat tevens toe.

De analyse toont ten tweede een causaal verband tussen de rechtskracht van oorspronkelijke posities die zijn terug te vinden in de uiteindelijke wet en de delegatie van onderhandelingen richting hiërarchisch lagere niveaus. Terwijl het verwachte verband tussen sociale interactie en deze vorm van delegatie niet bevestigd is, had delegatie wel het verwachte effect. Door over te gaan tot onderhandelingen op lagere niveaus verandert de manier van onderhandelen namelijk ook: we zien meer coöperatief gedrag. De combinatie van coöperatief gedrag op hiërarchisch lagere niveaus leidt tot een hogere

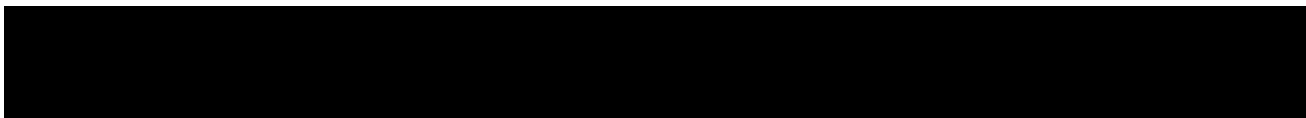
rechtskracht van posities in het onderhandelingsresultaat. Terwijl coöperatief gedrag op hoog politiek niveau vooral gericht is op het vinden van enige mate van compromis, toont de analyse dat er op lagere niveaus daadwerkelijk gewerkt wordt aan oplossingen die alle posities terug laten komen in de uiteindelijke wet.

Ten derde toont de analyse een verband tussen de juridische deugdelijkheid en de onderhandelingsarena's. Ook hier zien we dat delegatie van onderhandelingen naar lagere niveaus een positief effect heeft op de kwaliteit. Door de delegatie besteden actoren namelijk meer tijd aan het onderhandelen en hebben de actoren vaak meer technische kennis van het onderwerp.

Concluderend toont deze analyse dus aan dat het onderhandelingsproces inderdaad invloed heeft op het onderhandelingsresultaat. Vooral de delegatie van onderhandelingen naar zowel lagere als meer informele arena's blijkt buitengewoon belangrijk te zijn. De keuze voor delegatie wordt, op zijn beurt, beïnvloed door de (intensiteit van) sociale interactie. Het onderhandelingsproces in trilogieën heeft dus onmiskenbaar invloed op Europese wetgeving: het proces telt! Alhoewel de 'black box' rondom trilogieën nog niet helemaal weggenomen is, vervangt dit onderzoek een hoop onduidelijkheid door waardevolle inzichten die gestoeld zijn op de praktijk. Bovendien biedt deze studie voldoende aanknopingspunten voor het zetten van volgende stappen in het verkennen van onderhandelingen in trilogieën.

CV

CV



Curriculum Vitae

Alexander Hoppe (1987) studied European Studies at the University of Maastricht (2008-2011). During this Bachelor program, he studied one semester at the University of Málaga. After finishing his Bachelor program, he followed a two-year double degree programme at the Universities of Maastricht and Cologne (2011-2013, cum laude). During the last year of the Master program, Alexander worked as a student teaching assistant at the Chair for European Politics of Prof. Wolfgang Wessels. After finishing his Master studies, he started to work at this same chair as a research associate (2013-2016). Below others, he managed the ERASMUS academic network 'PADEMLIA'. In 2016, Alexander started his PhD trajectory within an NOW-funded research project on trilogues, to be defended on July 3rd, 2020. He was employed as a PhD researcher at the School of Governance at Utrecht University (USG) (2016-2019). Since December 2019 he is employed as assistant professor at USG.

Alexander has published in international journals (Journal of European Integration), in edited volumes (Jahrbuch der Europäischen Integration, Europa von A bis Z) and has appeared in the media (EU observer, Vrij Nederland). Further, he has presented his research at several national and international conferences (ECPR joint sessions, ECPR general conference, NIG, EPSA, Politicologenetmaal). Next to doing research, he was involved in teaching bachelor seminars and supervising bachelor- and master thesis students.

In 2012, Alexander received the student prize of the Faculty of Arts and Social Sciences of the University Maastricht and his Master thesis was shortlisted for the Daniel Heinsius prize for the best Master thesis of the Dutch and Belgian Political Science associations in 2013. Further, he received a scholarship of the DAAD (German academic exchange service) in 2011-12. He was a member of the NIG PhD Council from 2017-2019. Next to his professional live, Alexander was founding member and deputy chair of the voluntary association "Schülerpaten Köln e.V." an association organizing educational support for children with migratory background and refugees.