

**THE INFORMAL POLITICS OF LEGISLATION:
EXPLAINING SECLUDED DECISION-MAKING IN THE EUROPEAN UNION**

by

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Abstract

This paper investigates a widespread yet understudied trend in EU politics: the de facto shift of legislative decision-making from public inclusive to informal secluded arenas, and the subsequent adoption of legislation at first reading. Since its formal introduction in 1999, “fast-track legislation” has become ever more frequent, accounting for 72% of adopted codecision files in the last parliamentary term. Our paper analyses this puzzling trend and explains under what conditions informal decision-making is likely to occur. Competing and equifinal expectations are drawn from rational choice and sociological institutionalism. Based on institutionalist delegation theory and power-based distributive bargaining, we argue that informalisation saves the transaction costs of multi-party negotiation, and hinges on a legislative act’s issue-properties. By contrast, based on sociological institutionalism, we argue that informal decision-making results from the emulation of tested decision-rules, and from socialisation into habitual procedural choice and inter-organisational cooperation. We test our hypotheses on a data set of all 797 codecision files negotiated between mid-1999 and mid-2009. First, our analysis suggests that informalisation and seclusion are systematically related to an increase in participants, legislative workload and issue complexity. These findings back a functionalist argument, emphasising the transaction costs of intra-organisational coordination and information-gathering. Second, given that even redistributive and salient acts are regularly decided informally, we find little support for a rationalist argument, stressing the role of public interest in, and political opposition to, a legislative file. Finally, we find strong evidence for the impact of the time fast-track legislation has been in use. This finding confirms the sociological expectation that links informal and secluded decision-making to local positive feedback at the intra-organisational level, and to sustained cooperation at the inter-organisational level.

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Introduction¹

This paper investigates a widespread yet understudied phenomenon in European Union (EU) politics: the shift of legislative decision-making from public inclusive to restricted secluded arenas, and the resulting “informalisation” of the political process. Informalisation is a particularly prominent trend in the EU’s legislative procedure known as “codecision”—or, post-Lisbon, as “ordinary legislative procedure”—and it is puzzling to scholars and practitioners alike. Indeed, when analysing EU legislation over the last decade, it is striking how large a proportion of acts is adopted by the two co-legislators—the European Parliament (EP) and the Council of Ministers—at first reading under codecision. Since the possibility to conclude the procedure at first reading was introduced in 1999, such early conclusion has become ever more frequent, accounting for 72% of all acts passed in the 2004-2009 parliamentary term.

This increase in early conclusion has had two repercussions on EU legislation. First, to agree a file at first reading, Parliament and Council must negotiate a compromise prior to the EP’s first official reading of a legislative file. This compromise is negotiated informally by a restricted and secluded group of representatives from the EP, the Council and the European Commission. Second, early conclusion implies that codecision is abridged or “fast-tracked”, as decision-making is concluded after only one, rather than the three possible, readings. The dual trend towards informal decision-making and fast-tracked legislation is particularly puzzling when assessed against the backdrop of EU institutional reform. Indeed, over the last two decades, European governments have gradually promoted the EP to a genuine co-legislator, not least with a view to addressing Europe’s “democratic deficit” through a more open and inclusive legislative process. Yet, the transformation of codecision since 1999 seems to have refuted both the concerns and expectations raised when the procedure was introduced. Contrary to concerns about its complexity (Scharpf 1994), codecision has proved highly efficient in terms of legislative output; contrary to expectations of greater accountability, inclusiveness and transparency (Wallace 1996), the routine use of fast-track legislation has led to seclusion from the electorate and from rank-and-file parliamentarians (Farrell/Héritier 2004; Raunio/Shackleton 2003; Reh 2008).

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Our paper attempts to explain this puzzling trend in supranational politics and addresses a question that is relevant beyond the study of EU legislation: Under what conditions will decision-making be shifted from formal inclusive to informal secluded arenas?

This question is warranted for two reasons. First, in EU legislative politics, the sheer volume of fast-track legislation and the increase of first reading agreements from 22% of codecision acts adopted in 1999 to 86% of acts adopted in 2009, begs for empirical investigation, theoretical explanation and normative evaluation. At the same time, we know little about how fast-tracked legislation is agreed, under which conditions it occurs, and what its political and democratic consequences are. Indeed, there is an extensive scholarly debate about whether and how the formal rules of EU legislation affect the legislative influence of, and the distribution of power between, the EU's co-legislators (see a.o. Crombez et al. 2000; Kardasheva 2009; Kasack 2004; Kreppel 1999; Thomson/Hosli 2006; Tsebelis/Garrett 2000). Only two contributions have, however, linked the analysis of informal procedures with the study of legislative influence (Häge/Kaeding 2007; Kardasheva 2008). More generally, practitioners have long discussed fast-track legislation and its challenges (Bostock 2002; Raunio/Shackleton 2003; Shackleton 2000), but few academic studies have analysed how the change in formal rules—the introduction, reform and extension of codecision—has played out in the EU's legislative praxis. The systematic explanation of early conclusion under codecision from 1999 to 2004 by Rasmussen (2007) is the most notable exception; in addition, two pilot studies have investigated how informal legislative decision-making has impacted on intra-organisational relations and institutional reform in the Council and Parliament (Farrell/Héritier 2004; Héritier/Reh 2009). Our paper addresses this gap in the literature on EU legislative politics.

Second, the recourse to fast-track legislation can exemplify a more general trend towards secluded policy-making, national as well as supranational. Scholars have begun to investigate this trend, where the informalisation and seclusion of democratic decision-making is combined with new forms of openness and inclusion (Héritier/Mair 2007). Indeed, political decision-makers are, on the one hand, increasingly “sealed off” from their wider constituencies and the rank-and-file of elected representatives; on the other hand, multiple attempts are made to open up decision-making by way of direct democratic procedures, increased transparency and civil society involvement. While our paper's empirical focus is exclusively on EU legislative politics, our conceptual and

theoretical framework is developed so as to address this wider trend towards seclusion and to explain why decision-makers systematically choose informal arenas over the formal decision-process (see Häge/Kaeding 2007 for a similar question).

Our paper proceeds in the following steps. The first part conceptualises informal decision-making and identifies those features that delimit an informal political process from its formal variant. Part 2 introduces the informalisation and seclusion of EU legislation in more detail, and discusses both the scale of and the process behind the informal politics of codecision. Part 3 develops a theoretical framework to explain under what conditions informal decision-making is likely to occur. Competing and equifinal expectations will be drawn from rational choice and sociological institutionalism. Based on institutionalist delegation theory and power-based distributive bargaining, we argue a) that informal politics saves the transaction costs of conducting multi-party negotiation (process), and b) that a legislative act's issue-properties determine whether it can be agreed informally (outcome). By contrast, based on sociological institutionalism, we argue that the shift to informal decision-making is less a strategy to cope with the functional challenges of complex decision-making or to increase influence over policy-outcomes, but results from a) socialisation into established patterns of cooperation (process), and b) emulation of successfully tested decision-procedures (outcome). We test our hypotheses on a new data set, drawn from the full population of the 797 codecision files concluded between mid-1999 (when the possibility of fast-track legislation was introduced) and mid-2009 (when the last parliamentary term ended). Part 4 operationalises our dependent, explanatory and control variables, discusses challenges of measurement and introduces our data set. Part 5 submits our hypotheses to a statistical test. Our analysis suggests that the decision to "go informal" is systematically related to an increase of participants and workload in political negotiation, to the complexity of a file, to the inter-organisational bargaining context, and, most significantly, to the time informal rules have been in use. However, we found no link between the choice to negotiate informally and the nature of a legislative dossier as redistributive or salient. The paper concludes by discussing the wider implications of our findings for the study of EU legislative politics.

1. Formal and Informal Decision-Making

Let us start our conceptual definition with three caveats. First, our paper focuses on informal and secluded processes that are endogenous rather than exogenous to a system's formal institutional framework; informal decision-making as defined here is played out as a part of, rather than outside to, the formal political process. More specifically, we look at those instances where the formal rules of cooperation leave—or even rely on—informal spaces that decision-makers can—but need not—choose to fill. Similar to endogenous informal institutions, such spaces are created to “mitigate the effects of, substitute for, or enhance the efficiency of” the formal political process (Helmke/Levitsky 2004, FN 103). In spite of its interest in informalisation and seclusion, the paper is thus squarely placed within the study of “formal politics”, as “the Government and the process of governing narrowly conceived” (Hay 2002, 70).² Second, our analysis is confined to decision-making, defined as that stage in a political process during which actors, operating under set institutional constraints, choose binding outcomes or identify preferred options. Our definition of informal decision-making is, accordingly, too restricted to encompass mere consultation (e.g., of interest groups and networks prior to tabling a legislative proposal), or to include interaction that evolves entirely outside the framework set by formal institutions (e.g., corridor talks or practices of clientelism and corruption); it also falls outside the remit of informal governance as “the operation of networks of individual and collective, private and public actors pursuing common goals” (Christiansen et al. 2003, 7). Third, we do not claim that informal and secluded decision-making is novel, unusual or normatively problematic per se. Choosing to use the informal spaces left by formal institutions may not only be legitimate but expected from decision-makers, and it is difficult to imagine a system doing altogether without informal politics when applying its formal rules.

In this paper, we assume that decision-makers have a degree of choice over whether and to what extent they “go informal”, and we try to explain their choice of the informal over the formal arena. However, before doing so, we need to conceptually delimit the informal decision-arena from its formal variant. In the following, we suggest a distinction along four dimensions: 1) the nature and status of rules; 2) the boundaries of

² Our interest thus differs from a definition of informal institutions as competing “with the state’s claim to binding decisions, by striving to establish parallel areas of competence” (Lauth 2000, 25).

participation; 3) scope and possible outcomes; 4) public access.

First, the informal and the formal arena differ with regard to the *nature and status of rules*. Following the standard definition, we understand institutions as those man-made rules and procedures that enable and constrain human interaction so as to stabilise expectations and to “define and limit the choices of individuals” (North 1990, 4; 3ff.). Rules more specifically are “prescriptions commonly known and used by a set of participants to order repetitive, interdependent relationships” (Ostrom 1986, 5). They are designed to achieve “order and predictability” by specifying which actions are “requested, prohibited, or permitted” (Ostrom 1986, 5). Prescriptions in the informal arena differ from those in the formal arena with regard to comprehensiveness, codification and enforceability. Formal decision-arenas are structured by a configuration of codified rules that specify the positions, boundaries, scope, authority and aggregation of an “action situation” (Ostrom 1986, 19). Informal decision-arenas, by contrast, are structured by non-codified rules, and one or more dimensions of an action situation can be under-specified or not covered at all (Knight 1992; Helmke/Levitsky, 2004; Lauth 2000). Enforcement also works differently. Formal rules can be enforced by a third party through official, publicly known means; informal rules are “created, communicated and enforced outside the officially sanctioned channels” (Helmke/Levitsky 2004, 727f; see also Knight 1992; Farrell/Héritier 2004 and 2007; Lauth 2000). Given our initial definition of institutions, this means that the opportunities and constraints for action differ across arenas (Farrell/Héritier 2007). On the one hand, decision-makers in the informal arena face fewer codified and enforceable constraints on *how* they are required, prohibited or permitted to act. On the other hand, the constraints on what their action can *affect* (Ostrom 1986, 17) are tighter in the informal arena: enabling rules, too, will be non-codified and non-enforceable by a third party; and intermediate informal decisions require formalisation.

Second, the informal and the formal arena differ with regard to their *boundaries of participation*. These are distinguished by their degrees of inclusiveness or by the codification of restriction. Membership in the formal arena is either inclusive or formally restricted. The formal political process will include all legitimate decision-makers (or, at least, allow for inclusion even if actors choose not to partake), or it will involve a formally restricted sub-set of actors. Hence, no matter whether membership is inclusive or restricted, it is publicly known who participates (or is allowed to

participate) in formal decision-making. By contrast, participation in the informal arena is both restricted and non-codified; the process involves a limited group of actors, and the boundaries of membership are neither formally drawn nor publicly known. In sum, differences between the formal and informal arena pertain to the inclusiveness of participation, the codification of boundaries, and public knowledge about membership.

Third, the informal and the formal arena differ with regard to their *scope of action*, defined as “the set of outcomes that may be affected” (Ostrom 1986, 19). Outcomes can differ with regard to their form and their function, and it is the latter that clearly delimits the endogenous informal process from the formal one. Indeed, when acting in the informal arena, decision-makers can only produce intermediate rather than final outcomes, and they cannot legitimately conclude the political process. Thus, in functioning democracies—and contrary to dysfunctional political systems—the relationship between the two arenas is one of asymmetrical dependence. Final and binding decisions can emanate from the formal process only, and any agreement reached informally requires legitimation through formalisation. Yet, even under such conditions, the informal arena can go a long way in constraining the scope left to the formal process. It is in this respect that normative concerns can be raised—about how much is left to be decided (and justified) formally, and about how accountable the informal process can be. In sum, formal and informal decision-making is asymmetrically dependent: legislative decisions taken informally are intermediate and require formal legitimation to close the political process and to become legally binding.³

Fourth, the informal and the formal arena differ with regard to *public access*. On the one hand, such differences pertain to the actual physical or virtual access to deliberation and negotiation or their documentation; on the other hand, to whether access restrictions must be publicly justified. In the formal process, decision-makers will generally—though not always—meet in public; in the informal process, decision-makers will

³ Helmke and Levitsky distinguish the relationship between formal and informal institutions according to two dimensions: a) whether informal institutions are functional (or problem-solving) or dysfunctional (or problem-creating), and b) whether the outcomes reached when applying informal rules are convergent or divergent from outcomes reached under formal rules (2004, 727f.; see also Lauth 2000, 25f.). This leads to a four-field matrix of complementing, accommodating, substitutive and competing informal institutions (Helmke/Levitsky 2004, 728). Given our interest in endogenous rather than exogenous informal decision-making, our paper is restricted to the functional (or problem-solving) side of the matrix, where the informal space provides “solutions to problems of social interaction and coordination” and enhances “the efficiency or performance of formal institutions” (Helmke/Levitsky 2004, 727II).

generally—though not always—be sealed off. Yet, even where the formal arena is (partially) secluded, documentation about the decision-process will be available or, where this is not the case, the lack of physical or virtual access to deliberation, negotiation or documentation needs to be justified. By contrast, the informal decision-arena can be systematically secluded, and access can be denied without public justification. In sum, the two arenas differ with regard to accessibility, documentation and transparency.

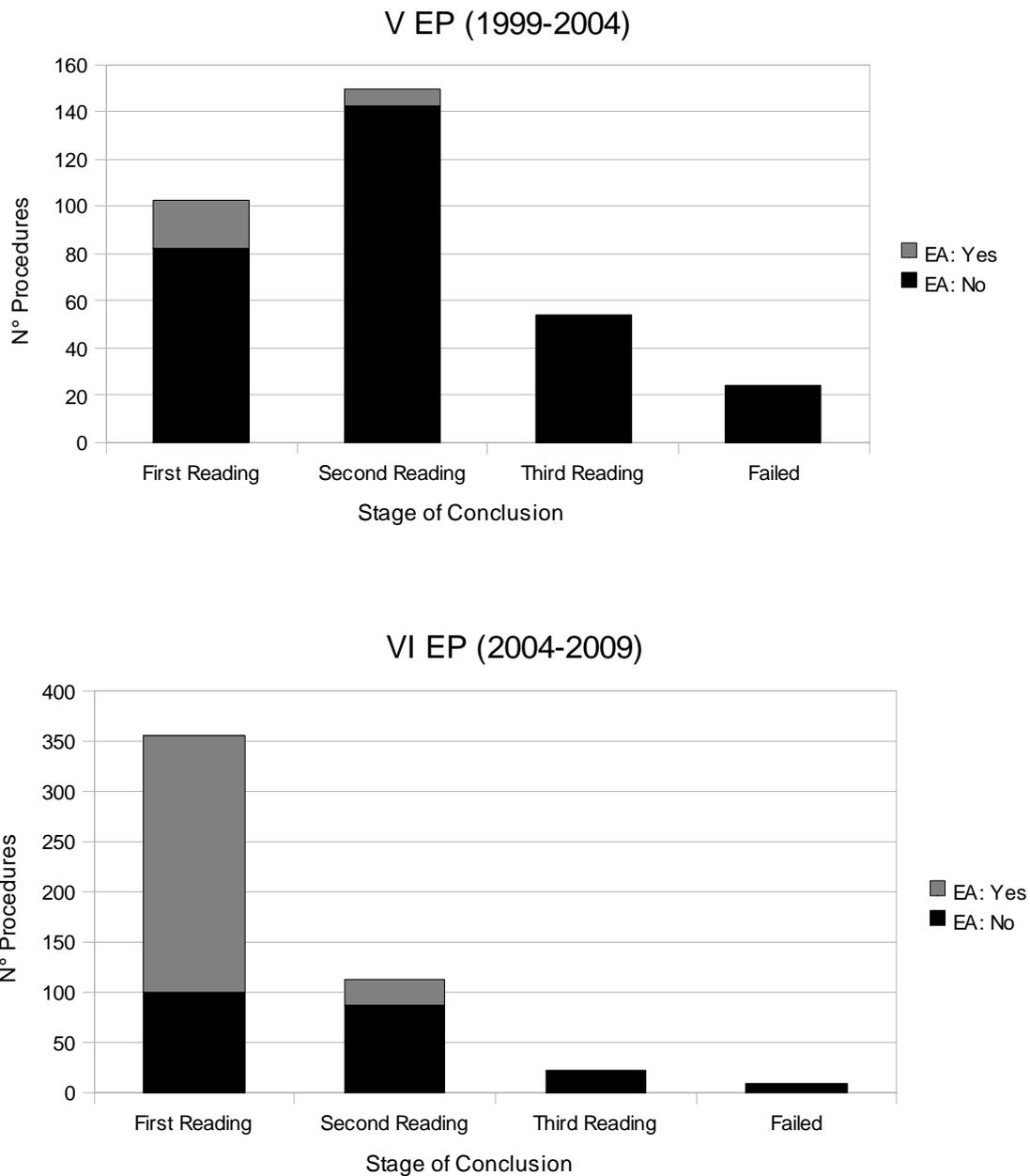
Figure 1: Formal and Informal Decision-Making

Decision-Making (choice of binding outcomes or selection of preferred options)	
Formal Arena	Informal Arena
<ul style="list-style-type: none"> ▪ formal rules (codified and enforced through official channels) ▪ inclusive participation or formally restricted boundaries ▪ outcome: binding decisions ▪ public access or justified seclusion 	<ul style="list-style-type: none"> ▪ informal rules (non-codified and enforced outside official channels) ▪ restricted participation and unofficially drawn boundaries ▪ outcome: requires formalisation ▪ seclusion
<p>← complementary/functional (where informal decision-making is endogenous) ———</p> <p>← substitutive/dysfunctional (where informal decision-making is exogenous) ———</p>	

2. The Informal Politics of Codecision

Understanding informal decision-making, and explaining why it occurs, has become imperative for anyone who studies the process and outcome of EU legislation. Under codecision, informalisation and seclusion are corollaries of the increasing trend to conclude the procedure at first or early second reading (European Parliament 2009a; Raunio/Shackleton 2003; Rasmussen 2007). Fast-track legislation was institutionalised in the 1999 Treaty of Amsterdam, and this formal rule change arguably “led to a shift from formal, sequential bargaining between Council and Parliament to a more informal, simultaneous, and diffuse set of relations” (Farrell/Héritier 2004, 1199). Figure 2 shows the dramatic increase of first and early second reading agreements since 1999.

Figure 2: Early Agreements and Early Conclusion (1999-2009)



In this paper, we aim to explain this striking trend by analysing a sub-set of the 797 legislative acts concluded under codecision between 1999 and 2009. To be included in our analysis, an act has to fulfil two conditions: 1) it has to be fast-tracked, i.e. concluded at either first or early second reading; 2) it has to be based on an informal compromise between the two co-legislators. Where both conditions are met, we refer to an act as an “early agreement” (EA). Figure 2 shows the proportion of early agreements in addition to the overall increase in first and early second reading deals.

Our analytical focus is justified for the following reasons. An act's stage of conclusion is a necessary but insufficient indicator of how the agreement was reached. It is necessary, because only acts concluded at first or early second reading hinge both upon rubberstamping (otherwise the procedure cannot be concluded early), and, in case of conflict between the EP and Council, upon a systematic shift of decision-making to the informal arena (otherwise a compromise cannot be pre-agreed). The mechanism behind an early agreement concluded at first reading is the following: after the Commission has tabled its legislative proposal, representatives of Parliament, Council and Commission enter into informal negotiations, known as "trilogues". These negotiations take place *before* the EP has issued its formal opinion and *before* the Council has adopted its common position, which are the first two steps in the formal procedure. If the Council and the Parliament can reach an informal compromise, the EP includes the Council's propositions in its own first reading amendments; it requires a simple majority to do so. Subsequently, the Council accepts the Commission proposal as amended by Parliament; it requires a qualified majority unless the Commission has expressed a negative opinion on the EP amendments. The procedure is closed and the act adopted accordingly. An early second reading agreement is possible when the EP, at its second reading of the file, adopts—rather than amends—the Council's common position, based on the prior incorporation of the EP's suggested amendments in the Council's common position. At this stage, the informal compromise must be reached *after* the EP holds its first reading and *before* the Council adopts its common position.

However, the stage of conclusion alone is an insufficient indicator of informalisation. Indeed, first and early second reading deals, by definition, require rubberstamping. Rubberstamping can be the result of an informally negotiated compromise, but it can also result from the absence of legislative conflict. Given our driving interest—the choice of informal decision-making rather than the stage of conclusion per se—we therefore focus only on those fast-tracked files that result from informal compromise on a contested file.⁴ These acts are ideally suited proxies for decision-makers' choice to "go informal" and examples of informal decision-making as conceptualised in section 1.

Under codecision, the shift into the informal arena is in line with—and in application of—Art. 251 TEC. Informal decision-making is thus endogenous rather than exogenous

⁴ See section 4 for a detailed discussion of the coding and data sources used to build our sample.

to the EU's formal legislative process, and it can be distinguished from the formal process along all four dimensions introduced above: a restricted, non-codified set of decision-makers operates in a secluded setting; social interaction is structured by informal and semi-formal rules rather than by codified and enforceable prescriptions; and any outcome reached informally must be legitimised through the formal process.

First, legislative compromise is reached in a so-called trilogue, where participation is both restricted and non-codified. In contrast to the parliamentary plenary and Council meetings, trilogues are limited; in contrast to EP committees, the boundaries of membership are not officially defined. When early agreements became a formal possibility—and trilogues a practical necessity—the inter-institutional agreements and intra-organisational guidelines merely talked about “appropriate contacts” between the institutions (European Parliament et al. 1999); stipulated that participation in trilogues is to be decided ad hoc by the coordinators in the respective committee (European Parliament 2004); and states that both the decision to attempt an early agreement and the composition of “the EP's negotiation team” is to be taken on a “case-by-case basis” (European Parliament 2009b). In sum, the process involves a limited set of participants, and the boundaries of membership are neither formally drawn nor publicly known.

Second, the rules structuring informal interaction are different in both nature and status from the rules of the formal process. Not all dimensions of the decision-situation are clearly defined; in trilogues, the set of positions held by participants and the set of participants in each position are under-specified and flexible, as are the channels of communication and the information available at each decision-node (Ostrom 1986, 17ff.). Furthermore, the “rules of engagement” (Shackleton 2000) in the informal arena have been created and enforced outside official channels. Where such rules are written, they are either of a very general nature—such as the inter-institutional *Joint Declaration on Practical Arrangements for the Codecision Procedure*, an agreement concluded in 1999 and amended in 2007—or they have had limited binding force—such as the EP's guidelines on how to reach intra-organisational consensus and negotiate with the other institutions. The EP's 2004 *Guidelines for First and Second Reading Agreements*, for instance, foresee that informal negotiations with the Council should usually wait until a committee has adopted its first reading amendments. Yet, whether the EP's *rapporteur* does act on such a basis seems to depend on the issue and committee in question (Bunyan 2007; European Commission 2007). This situation is, however, likely to

change in the Seventh European Parliament, since the *Code of Conduct for Negotiating Codecision Files* was adopted in May 2009 as part of the EP's codified and enforced Rules of Procedure (Héritier/Reh 2009). Prior to 2009, behavioural constraints mainly came through the need to reach intra-organisational consensus on informal agreement, and from the requirement to formalise any informal compromise in the EP's plenary.

Indeed, decision-makers in a trilogue can reach agreement, yet any such agreement is intermediate until it has been formalised by the EP's plenary and a Council of Ministers. At the same time, rubberstamping is a pre-condition for the procedure's early conclusion. Under codecision, the informal compromise therefore constrains formal decision-making to a significant extent. Formally, MEPs continue to have the right to table amendments to the informal compromise, both in committee and in plenary; de facto, however, they face considerable political pressure not to challenge a deal reached informally with the Council (Rasmussen/Shackleton 2005; Raunio/Shackleton 2003).

Finally, trilogues are not only informal but secluded. Access is highly restrictive—not only for members of the public but also for MEPs who are not party to the parliamentary negotiation team. Information on the decision-process is limited to feedback given by trilogue members to their respective committees, and documentation on the decision-process is not publicly available. Trilogues are thus both inaccessible and intransparent, and the high level of seclusion has neither been justified publicly nor decided formally (for a normative assessment see Bunyan 2007; Reh 2008).

The increase in early conclusion under codecision has been widely noticed in the Brussels policy-community—both by the co-legislators themselves (European Parliament 2007 and 2009a; Raunio/Shackleton 2003; Jacqué 2007) and by civil society organisations (Bunyan 2007). Fast-track legislation has, however, drawn little academic attention, and our paper contributes to filling this gap in the literature. In so doing, we build on, yet go beyond, three studies in particular: Farrell and Héritier's study of the link between fast-track legislation and intra-organisational power shifts (2004); Häge and Kaeding's analysis of the EP's legislative influence in trilogues (2007); and Rasmussen's explanation of first reading deals in the Fifth European Parliament (2007). Our paper contributes beyond these earlier works in the following ways. First, our period of study is more comprehensive; our data set runs from mid-1999 to mid-2009 and thus covers the two complete parliamentary terms during which fast-track

legislation has been in use. Second, our dependent variable is both wider and more specific; it comprises early second reading agreements (in addition to first reading deals), but it includes only those acts that have been negotiated informally (rather than all procedures that were concluded early). Third, by adopting this particular focus and by addressing the wider question of why decision-makers choose to “go informal”, we aim to contribute to the study of informalisation and seclusion beyond the confines of EU legislative politics.

To give readers a better sense of the scope and extent of informal politics under codecision, in what follows, we present a descriptive statistical overview of early agreements since 1999, accounting for their distribution across types of legislation, their duration and the spread across EP committees. Section 3 will follow up on this descriptive account by theorising the reasons for informal decision-making; section 4 will introduce our explanatory and operational variables as well as the data set; and section 5 will submit our hypotheses to a controlled statistical test.

Table 1 shows the number and percentage of early agreements per type of legislation. Early agreements are most common for procedures adapting legislation to the regulatory procedure with scrutiny⁵ (93 percent), and for procedures recasting legislation (64 percent). Early agreements are also used for procedures combining the introduction of new legislation with the repeal of existing legislation (42 percent), for new legislation (37 percent), and for procedures which change the content of existing legislation (38 percent). They are not typical where the term of operation of existing legislation is extended (15 percent), and they are not used at all for the repeal of existing legislation and for codification. The absence of early agreements for procedures which repeal legislation can be accounted for by lack of contestation⁶, while the absence of early agreements for codification can be explained by looking at the legislative trajectory for these procedures. Codification proposals replace a number of existing acts by a new act which does not introduce any substantive change.⁷ Before the EP and the

⁵ These procedures amend existing co-decision legislation by including the provision that the EP can block the (quasi-legislative) implementing measures of the Commission which are adopted to facilitate the implementation of the act in question (see Council Decision of 17 July 2006 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred to the Commission (2006/512/EC). OJ L 200/11, 22 July 2006).

⁶ Moreover, some of the acts had already been identified by the Commission in the *Better Regulation Strategy* as redundant acts.

⁷ Interinstitutional Agreement of 20 December 1994. Accelerated working method for official

Council decide upon a codification proposal, the so-called Consultative Working Party of the legal services of the EP, the Council and the Commission checks whether the proposal indeed leaves the content of the acts intact. Where this is the case, there is no need for informal negotiation.

Table 1: Early Agreements across Type of Legislation

	No EA		EA		Total
	Freq	%	Freq	%	
New legislation	182	62.8	108	37.2	290
Amendment of content	162	61.8	100	38.2	262
New with repealed legislation	44	57.9	32	42.1	76
Codification	55	100	0	0	55
Adaptation to Comitology	3	7.0	40	93.0	43
Recasted legislation	14	35.9	25	64.1	39
Extension in time	22	84.6	4	15.4	26
Repealed legislation	6	100	0	0	6
Total	488		309		79

We can also observe differences between the duration of procedures that conclude with an early agreement and procedures that follow the formal track. The average duration of the 797 codecision procedures concluded between 1999 and 2009—from the day of the Commission proposal to the day of the publication of the final legislative act—is almost 21 months. As Table 2 shows, the average duration of “formal procedures” is 23 and a half months, while the average duration of “informal procedures” is only slightly more than 16 months. At this point, we should note that the procedural time limits specified in Art. 251 TEC do not apply prior to the first reading stage.

Table 2: Early Agreements and the Duration of Codecision

	Average duration (months)	Total number
Procedure without early agreement	23.5	488
Procedure with early agreement	16.2	309
All procedures	20.7	797

Variation in early agreements can also be observed across EP committees. Table 3 lists the number and percentage of early agreements for those committees that have dealt with more than 25 codecision procedures.⁸ The EP committees differ considerably in

codification of legislative texts. OJ C 102, 4 April 1996.

⁸ The Committee on Legal Affairs and Internal Market—the predecessor of the Committee on

their use of early agreements. While the Committee on Civil Liberties, Justice and Home Affairs committee concluded 75 percent of its procedures by means of an early agreement, four other committees concluded about half of their procedures in this way: the Committee on Economic and Monetary Affairs (53 percent), the Committee on Employment and Social Affairs (50 percent), the Committee on Internal Market and Consumer Protection (50 percent), and the Committee on Culture and Education (49 percent). Early agreements are less common for the Committee on Environment, Public Health and Food Safety (43 percent) and the Committee on Legal Affairs (39 percent), and least common for the Committee on Industry, Research and Energy (36 percent) and the Committee on Transport and Tourism (31 percent).

Table 3: Early Agreements across EP Committees

	Non-early		Early		Total
	Freq	%	Freq	%	
Civil Liberties, Justice and Home Affairs (LIBE)	11	25.0	33	75.0	44
Economic and Monetary Affairs (ECON)	35	46.7	40	53.3	75
Employment and Social Affairs (EMPL)	17	50.0	17	50.0	34
Internal Market and Consumer Protection (IMCO)	18	50.0	18	50.0	36
Culture and Education (CULT)	20	51.3	19	48.7	39
Environment, Public Health and Food Safety (ENVI)	87	57.2	65	42.8	152
Legal Affairs (JURI)	48	61.5	30	38.5	78
Industry, Research and Energy (ITRE)	46	63.9	26	36.1	72
Transport and Tourism (TRAN)	65	69.2	29	30.9	94

3. Theorising the Use of Early Agreements

The theoretically derived response to our paper’s driving question—why do decision-makers choose to interact informally under the EU’s codecision procedure?—draws from the rationalist and sociological variants of neo-institutionalism.

Rational choice institutionalism provides us with two core arguments: first, a functionalist argument stressing the efficiency gains of informal decision-making; second, an argument about power-based distributive bargaining, emphasising the gains of institutional power—and, thus, influence over policy outputs—that the informal arena offers some actors. Both arguments are based on an assumption of boundedly

Legal Affairs and the Committee on Internal Market and Consumer Protection—has concluded more than 25 procedures, but has been excluded from the table because it was active only in the first years of the period under consideration.

rational actors who seek to maximise their utility in the context of specific institutional restrictions (Knight 1992 and 1995). Bounded rationality, in turn, implies transaction costs in decision-making, i.e. costs of collecting information, negotiating and monitoring implementation (Knight 1992 and 1995). Rational choice institutionalism further assumes that actors are restricted by the extant decision-making rules. We argue that the EU's co-legislators—the Council and EP—interact strategically when deciding whether to fast-track legislation or not, and that the two organisations are unified in their interaction with each other. However, when deciding whether or not to “go informal”, they have to consider their respective memberships and internal decision-making processes as well as the transaction costs of forming a common position.

We apply both, the efficiency and power-distributional argument, as “conceptual experiments” (Lake/Powell 1999) in a strategic interaction bargaining argument. Strategic interaction analysis distinguishes between two elements: actors and their environments. Strategic *environments* are composed, first, of the actions which are available to the actors. They summarize what could be the outcome of the interactions of actors, or the outcome of how decisions and events can unfold. The environment, secondly, is composed of an information structure that defines what the actors can know for sure and what they have to infer from the behaviour of others. Institutional rules play an eminent role here. On the *actor side*, strategic choice analysis distinguishes between actors' preferences, defined as how they rank the possible outcomes defined by the environment, and actors' prior beliefs about the preferences of others (Lake/Powell 1999, 9-11). Based on the analytic distinction of actors' attributes and the attributes of the environment we conduct two “conceptual experiments”. The first varies the properties of the actors, i.e. their preferences and beliefs, while holding the environment in which they interact constant, and derives conclusions, i.e. hypotheses, about the likely outcome. For instance, holding a specific decision-making rule constant and varying the number of players and their preferences would yield specific predictions regarding the outcome. The second conceptual experiment varies attributes of the environment while the actors' attributes are held constant and derives conclusions or hypotheses about the likely outcome of the interaction. For instance, holding the number of actors and their preferences constant and varying the valid decision-making rule, e.g. simple majority as opposed to qualified majority, would yield specific predictions regarding the decision-making outcome.

Another explanation, drawn from the sociological variants of neo-institutionalism and organisational theory, offers two arguments for the steep rise in early agreements since in 1999: first, an argument about rule diffusion, where the emulation of institutional templates is a response to uncertainty and organisational stress; second, an argument about local positive feedback through inter- and intra-organisational socialisation.

This theoretical account is based on two micro-level assumptions about the motivations behind decision-makers' choice. First, actors are equipped with too limited cognitive resources to constantly and systematically calculate the consequences of alternative courses of action, based on their expected utility. When confronted with novel opportunities to act, with uncertainty or with organisational stress, such actors are likely to draw on existing and well-known organisational or group rules as “simplifying shortcuts, cues, and buffers” (Checkel 2005, 810; see also DiMaggio/Powell 1991a). Over time, these procedural choices can turn into routines or taken-for-granted habits, discharging actors in both new and established choice situations—such as the decision whether to “go informal” in order to search for legislative agreement. Second, whereas rational choice institutionalism assumes decision-makers to be driven by consequentialist calculation, the sociological alternative considers decision-makers to be firmly anchored in a particular social and organisational context (Johnston 2001); it is this context with its specific rules of appropriate behaviour that defines an actor's available choice repertoire. In sum, in a complex inter-organisational negotiation such as the EU's codecision procedure, actors' procedural choices will be constrained both cognitively and contextually.⁹

On the basis of these theoretical arguments, we next derive concrete expectations about the likelihood of early agreements under the EU's codecision procedure. Rational choice institutionalism and sociological institutionalism offer us different causal arguments for each hypothesis; for some hypotheses these lead us to diverse, for others to equifinal expectations with regard to outcomes. In our paper, the two approaches thus enter a “theoretical dialogue” (Jupille et al. 2003, 19) which works at two levels: where

⁹ Two caveats are in order. First, when we refer to socialisation in the following, we are not interested in substantive preference change through persuasion (see e.g. Checkel 2001; Risse 2000) or in the constitutive power of international institutions (see e.g. Johnston 2001; Risse 2002). Preference convergence or a re-constitution of interests may result from repeated interaction in small-scale, insulated settings (Checkel 2001), but our argument pertains to procedural choice only. Second, when we talk about “appropriate” behaviour, we refer to actors' recourse to consensual contextual rules rather than to the highly reflective process through which they assess “similarities between current identities and choice dilemmas and more general concepts of self and situation” (March/Olsen 1998, 951).

hypotheses predict diverse outcomes, our design is competitive-controlled; the statistical tests show the effect of each explanatory variable while controlling for the alternative explanation (Jupille et al. 2003, 26-27). Where a hypothesis predicts an identical outcome and is confirmed in the statistical test, the prevalent causal mechanism can only be uncovered qualitatively through comparative process-tracing. Throughout the paper, we will clearly identify necessary qualitative follow-up research.

Starting with the functionalist argument of rational choice institutionalism, we formulate expectations of how the actors' varying preferences will affect the choice of early agreement, holding the institutional rules constant. The functionalist argument assumes that actors seek to save transaction costs, i.e. costs of gathering information and bargaining. For the EU's two co-legislators, transaction costs arise from the need to coordinate a position within their respective organisations. We argue that the level of these transaction costs determines the actors' preferences for "going informal", as early agreements offer both actors an opportunity to save costs of internal coordination. The Parliament can save transaction costs in particular at the first reading stage, where agreement is reached with simple majority. The Council is represented in informal negotiations by the Presidency, whom early agreements offer the possibility to see its agenda adopted more quickly and during its time as chair.

We argue that transaction costs—and, thus, the incentive to shift into the informal arena—are particularly high under two conditions: a) where the number of participants and the diversity of preferences within the respective organisation is high (given the additional time required to negotiate a common internal position); and b) where the workload for the respective organisation is high (given the additional pressure on resources required for information gathering). Under these conditions, a shift into the informal arena becomes particularly attractive to save transaction costs. We therefore assume that the incentives to agree early under codecision increases with enlargement, and with the number of legislative files under consideration.¹⁰

Sociological institutionalism expects the same outcome: early agreements are likely to increase with the number of participants in an organisation, and with an intensifying workload. This expectation, however, draws on a different causal argument.

¹⁰ See Rasmussen for a similar argument about workload impacts on early conclusion (2007, 4).

Both, the arrival of new members and the higher workload, raise the level of adaptational pressure in an organisation—because new members must be socialised into existing norm-sets to allow day-to-day functioning and to maintain “group stability” (Bailer et al. 2009, 166); because large-scale public settings are inconducive to socialisation; and because uncertainty over the appropriate course of action increases under conditions of novelty and competing pressures. When looking at the EU’s co-legislators under such conditions, the shift to the informal arena can be explained in two ways. First, when actors face organisational stress in an a priori densely institutionalised context, decision-makers are likely to turn to the well-tested templates of related organisational fields to structure their interaction and to save cognitive costs (DiMaggio/Powell 1991a and 1991b). When the Treaty of Amsterdam entered into force in 1999, offering the new yet procedurally under-specified opportunity to fast-track legislation, decision-makers in the European Parliament and the Council of Ministers had two such organisational templates to turn to: on the one hand, the rules governing the conciliation stage of codecision I (Shackleton 2000; Rasmussen/Shackleton 2005); on the other hand, the “norms of Community” (Lewis 1998 and 2000; Heisenberg 2005) governing negotiation in Council working groups and the Committee of Permanent Representatives (COREPER). The recourse to secluded and scaled-down settings is a defining feature of both. Second, given the restricted and secluded setting that is a trilogue, the conditions for socialisation are expected to improve in the informal arena.

Based on these two lines of argumentation, we submit

- H1 The likelihood of early agreement will increase if the overall number of participants in the negotiating organisations increases.
- H2 The likelihood of early agreement will increase if the overall number of legislative files under negotiation increases.

A second source of transaction costs is the need to collect information when dealing with complex, technical dossiers. Following the functionalist logic of rational choice institutionalism, given these costs, actors are likely to decide such issues in the informal arena. This is not because the small circle of actors in trilogues have more technical expertise than other actors in the EP or Council, but because complex, technical issues are less likely to raise pronounced public interest and political opposition and may,

therefore, be adopted more speedily as an early agreement. Given such a variation of actors' preferences as reflected in their attitudes towards technical issues, we submit

H3 An early agreement is more likely where the legislative issue is complex and regulatory-technical.

As a corollary, we expect the opposite where a legislative issue is likely to raise public interest and political opposition. We argue that such issues will not be decided informally, because respective memberships in the EP and Council will oppose the internal stifling of broad legislative debate. We expect public interest and political opposition to be particularly high where issues are salient or redistributive. Where issues are salient, interest and opposition may derive from an issue's relation to sovereignty or from its strong symbolic relevance; where issues are redistributive, interest and opposition will derive from the asymmetrical distribution of benefits across social groups.¹¹ We therefore propose

H4 An early agreement is less likely where a legislative issue is salient.

H5 An early agreement is less likely where a legislative issue is redistributive.

Sociological institutionalism expects a different outcome: the likelihood of early agreement will vary across time and context, and will do so independently of a legislative act's issue properties. This expectation is based on two arguments: one argument is related to intra-, the other to inter-organisational choice, and both are a function of the time and frequency with which informal rules have been used. First, where particular rules are used repeatedly and successfully, actors will become more competent at operating these rules, and, therefore, encourage their further use (March/Olsen 1998, 964). Through a process of local positive feedback decision-makers thus become locked into a default procedural choice (Arthur 1989; Levitt/March 1988; March/Olsen 1998). Second, in the complex repeated bicameral negotiation that is the EU's codecision procedure, actors are not only socialised into a particular set of intra-organisational rules; they are also socialised into a particular pattern of inter-organisational cooperation. In short, they become competent with a set of new

¹¹ See Rasmussen for similar expectations but different arguments about the impact of issue properties on early conclusion (2007, 5).

procedures and with one another.¹² Socialisation is here defined as the “process of inducting actors into the norms and rules of a given community” (Checkel 2005, 804; Johnston 2001, 494ff.), and it operates on two levels: a) by turning the procedural choice to “go informal” into a taken-for-granted habit; and b) by facilitating and sustaining inter-organisational cooperation. As argued above, repeated, time-demanding and long-lasting interaction in small-scale, secluded settings fosters a cooperative and constructive negotiation climate (Checkel 2001; Beyers 2005). Frequent informal contacts will “create habits of working together, friendships, group loyalties, and knowledge about others. They create convergence, mutual confidence, and positive trust spirals. They alter political competencies, augmenting skills at political compromise” (March/Olsen 1998, 960)—and, thus, work in the stead of broad legislative debate.

In sum, sociological institutionalism explains the informalisation of codecision through two causal processes: at the intra-organisational level, local positive feedback locks actors into habitual procedural choice; at the inter-organisational level, positive trust spirals sustain cooperative negotiation. Both arguments lead us to expect an increase of early agreements over time, independent of policy-area, issue-saliency and institutional preferences. We therefore suggest

H6 The likelihood of early agreements increases with the time codecision has been in use, independent of issue properties.

Our final hypothesis is derived from the power-based distributive bargaining argument of rational choice institutionalism, and varies attributes of the environment while holding actors’ attributes constant. The argument starts from the assumptions that actors seek to maximise their institutional power in order to have influence over policy outcomes (Héritier 2007). Institutional rules guide interaction in the accomplishment of joint tasks, such as legislation. Although institutional rules increase overall benefits by allowing for cooperation, these benefits are not evenly distributed and lead to conflicts of interest. The final form of an institutional rule is the outcome of an explicit or implicit bargaining process (Knight 1992, 27; Lax/Sebenius 1986; Osborne/Rubinstein 1990, 1). In explaining the outcome of this bargaining process, power takes centre stage. The (ex ante defined) power of an actor is reflected in an actor’s capacity to influence the feasible alternatives available to the other involved actors (Knight 1992,

¹² See Rasmussen for a similar argument about the impact of time on early conclusion (2007, 5).

41/42), or, put differently, the availability of fall-back options where bargaining fails. In line with this argument, specific actors have a strong interest in using early agreements because—under the extant institutional rule—it gives them stronger influence over policy-outcomes. Holding the Council Presidency is such an institutional rule. The six months stint offers a window of opportunity to shape policy decisions, and using fast-track legislation rather than the full formal procedure increases the chance of adopting the Presidency’s policy-agenda. The institutional rule thus allows the Presidency to strongly influence policy outcomes. This argument is observationally equivalent to the functionalist explanation, where the use of early agreement was also considered to increase the speed of adopting the Presidency agenda. In other words, two theoretical explanations can be offered for the same expected outcome. In terms of strategic interaction, we here hold actors’ preferences constant, and varying the conditions of the institutional environment we submit

H7 An early agreement is more likely where the legislative file is an ex ante defined priority of the Council Presidency.

4. Research Design

To test our hypotheses, we created a dataset of all codecision procedures concluded in the Fifth and Sixth European Parliament. As fast-track legislation became a formal possibility with the entry into force of the Amsterdam Treaty in 1999, we have taken this year as the starting point for our analysis. We have included all codecision procedures completed between July 20, 1999 and July 17, 2009, which has resulted in a list of 797 procedures¹³. To draw up the list, we used the online legislative database of the EP, referred to as Legislative Observatory.¹⁴

Our study seeks to explain why a codecision procedure is concluded by way of an early agreement. As detailed in section 2, to qualify as an early agreement, a legislative act has to fulfil two conditions: 1) it must be concluded at first or early second reading; 2) it must be the result of an informal compromise between the co-legislators. We have identified early agreements in the following way. First, since the Legislative

¹³ The list of completed codecision procedures in the Legislative Observatory is slightly longer and also includes a number of procedures concluded in the Seventh EP. We have removed all procedures which were agreed upon by the EP and the Council after July 17, 2009.

¹⁴ http://www.europarl.europa.eu/oeil/search_procstage_familyandtype.jsp

Observatory does not distinguish between early and “late” second reading, we initially focused on all dossiers which were concluded at first and second reading. Second, following Yordanova (2010, Chapter 6), we searched the procedural files of these dossiers in the Legislative Observatory to find evidence of informal compromise.¹⁵ Third, we assessed those dossiers on which an informal compromise was reached at second reading, and we selected those dossiers which were concluded early, i.e. those dossiers where the compromise was included in the common position of the Council. Informal decision-making prior to *first reading* is typically indicated by formulations like “[t]he amendments are the result of a compromise between Parliament and Council [...]”, “[i]n accordance with the compromise reached at first reading between the Parliament and the Council [...]”, or “[f]ollowing a first reading agreement with the European Parliament, the Council adopted this Regulation”. For informal decision-making before the EP’s *second reading*, typical formulations include “[t]he common position [...] reflects the compromise text agreed by all three institutions [...]” or “[t]he common position is the result of intense inter-institutional negotiations [...]”. Only where we found such evidence for files concluded at first or early second reading did we code positively for early agreement; this way we ensured that should we err, we would do so on the side of caution. Of the 797 procedures in our dataset, 309 procedures were concluded by way of an early agreement, with 275 agreements reached at first and 34 agreements at early second reading stage.

To test the hypotheses presented in section 3, our statistical models include the following sets of explanatory and operational variables.

To test H1—which links the likelihood of early agreement to the number of participants in the negotiation—we created the variable *enlargement*. This is a dichotomous variable which takes the value 0 if the codecision file was concluded before 1 May 2004, and the value 1 if the procedure ended after 1 May 2004 (see Best/Settembri 2008, 186 for a more detailed discussion).

To test H2—which links the likelihood of early agreement to the number of files under negotiation—we have created the proxy variable *workload presidency*, defined as the

¹⁵ We have studied all documents in the procedure files, but evidence of informal compromise was mainly found in the summary documents linked to the various stages of the procedure (under the heading “Stages”), and in the Commission’s communication documents (also under the heading “Stages”).

number of *ongoing* codecision procedures during each six-months Council Presidency. Our operationalization thus departs from Rasmussen's (2007, 7), who measures workload with the number of codecision files *concluded* during the Presidency.

To test H3—which links the likelihood of early agreement to the nature of the file as complex and regulatory-technical—we included three variables. A first set of two variables captures the complexity of a legislative dossier. First, *recitals* is a continuous variable which measures the number of recitals incorporated in the Commission's legislative proposal. Second, *committee opinion* measures the number of EP committees asked for their opinion on a certain codecision dossier.¹⁶ To capture the regulatory-technical files, we first identified the policy type of the procedures.¹⁷ Based on the Commission proposal, we classified each procedure in our data set according to six categories. First, if no funds are mentioned, but the procedure refers to requirements which burden everyone—or all Member States—to the same extent, or if the administrative burden for the whole private sector is reduced, the file is coded as “regulatory, distributive”. Second, if no funds are mentioned, but obligations affect a particular group, the file is coded as “regulatory, redistributive”. Third, if the file requires Members States to provide information, or if the file contains regulations which coordinate or harmonise legislation or make simple recommendations, it is coded as “regulatory, technical”. Fourth, if specific funds are mentioned for which everyone can apply, or if funds are transferred to third countries or are invested in the EU bureaucracy, the procedure is coded as “distributive”. Fifth, if specific funds are offered to a particular group, the file is coded as “redistributive”. Finally, if the file pertains to technical adjustments (for instance, adaptation to the regulatory procedure with scrutiny, or creation of an agency), the procedure is coded as “constituent”.¹⁸ We used a

¹⁶ In addition, we also coded for the “word length” of a legislative file. However, in order to avoid collinearity problems (the correlation between word length and recitals is 0.76), and because word length is used differently in the literature, we only kept recitals in the final analysis. Rasmussen uses word length as an indicator for “scope of conflict” (2007, 7) while Best and Settembri use it as a proxy for “a principal's effort to constrain the actions of an agent” (2008, 185). The opinion of EP committees is also used differently by Rasmussen (2007, 8) and Best/Settembri (2008, 185), where it serves as an indicator of political salience. By contrast, we consider that the number of EP committees consulted indicates particularly high transaction costs of information-gathering, and it is therefore used to code complexity.

¹⁷ Based on Lowi (1972), policy types are analytically distinguished according to whether they are of a distributive, redistributive, regulatory or constituent nature. The underlying idea is that the policy attributes give rise to political conflicts, e.g. between “haves” and “have-nots” in the case of redistributive policy, but do not trigger conflict in the case of distributive policy where all are treated equally.

¹⁸ Please note that we code codification procedures as “constituent” when the file states specifically that there are no changes in substance. Otherwise, we assess the specific content of the change, and subsequently code the procedure according to one of the above-mentioned categories.

dummy variable for the category *regulatory-technical* for the analysis. Finally, in order to test if complex *and* regulatory-technical files are more likely to be concluded as early agreements, we created two interaction variables between each of the measures for complexity (recitals or committee opinion) and the regulatory-technical policy type.¹⁹

In order to test H5—which links the likelihood of early agreement to the nature of the file as redistributive—an additional dummy variable was created for the category *redistributive*, including both the policy type categories “regulatory, redistributive” and “redistributive”.

The effect of H4—which links the likelihood of early agreement to the file’s salience—is tested with the variable *media*. This variable was created by using the search engine Lexis-Nexis Academic. Keywords for our search were the file’s official title, or, where available, its public “nickname” (for instance, “Bolkenstein” or “Services Directive”). We searched the English and the French speaking media,²⁰ covering the most important newspapers in Belgium, France, Ireland and the UK (see Table 4 for the list of newspapers). In order to capture the relevance of the EU legislation in the press, the average number of mentions in the selected newspapers was calculated.²¹

To test H6—which links the likelihood of early agreement with intra- and inter-organisational socialisation—we created the variable *time in use*. This is a continuous variable, ranging from 1 to 10 and indicating the number of years fast-track legislation has been formally possible. In so doing, we follow an operational definition suggested by Rasmussen (2007, 8).

Finally, we assess H7—which links the likelihood of early agreement to the policy-agenda of the Council Presidency—with the variable *preference Presidency*. This is a dummy variable which takes the value 1 where the legislative file falls within the remit of the Council Presidency’s programme, or, where such a document is unavailable,

¹⁹ The variables recitals and committee opinion have been recentered to reduce a problem of multicollinearity between the main effects and the interactions.

²⁰ We selected the English and French speaking newspapers because the Legislative Observatory only provides official titles of codecision files in English and French. Since the official title was the basis of our search, we could not use Lexis-Nexis without an official translation of the titles in other languages.

²¹ The time boundaries for the search operations were the date of the Commission proposal and the date of the conclusion of the final legislative act—in other words, the time-span of the legislative process in Brussels. References beyond these time limits—for instance, during implementation—were excluded.

where it is mentioned in the programmes of Joint Presidencies.²²

In addition to our explanatory variables, our models include three control variables: 1) *anticipation*; 2) *policy distance*; and 3) *EP committee*.

The first control, *anticipation*, was included in the light of the anticipation effect found in EU legislative politics prior to EU enlargement (Leuffen/Hertz 2010). We identified two moments of particular importance for the EP and the Council: the EP elections of 2004—after which parliament would not only be new but extended, given EU enlargement in May of that year—and the EP elections of 2009. As we expect the anticipation effect to set in well before the anticipated event, we took the average duration of a codecision procedure as our anticipation period.²³ This variable takes the value 1 for all procedures concluded in the 20.7 months before the EP elections of 2004 and 2009. Based on Leuffen and Hertz (2010, 67), we expect a particularly strong anticipation effect—and a particularly steep increase in early agreements—prior to the 2004 EP elections, which coincides with potential anticipation of EU enlargement.

The second control, *policy distance*, was introduced in the light of Rasmussen's study of first reading deals in the period 1999-2004. Rasmussen concludes that “there is a tendency for those from the same party family to be better able to reconcile issues early irrespective of whether there are differences in the policy positions of their national parties” (2007, 13). Our control is a proxy for the absolute distance between the policy position of the EP's *rapporteur* and the policy position of the party of the national minister responsible for the dossier in the Council. Like Rasmussen, we measure policy distance by using a recent expert survey (Benoit/Laver 2006), but our variable is slightly different: we take the position of the political party of the responsible minister, whereas Rasmussen looks at the largest party in the government of the Presidency (2007, 8). If party politics mattered, we would expect the likelihood of early agreement to decrease with the increase of policy distance between *rapporteur* and minister.

Finally, we constructed four binary variables for the *ECON*, *LIBE*, *ITRE* and *TRAN* committees. This specific variable was included in the light of the descriptive statistics

²² The Programmes of the Council Presidencies were unavailable for the early years (2000-2001). We used the Joint Programmes for the years 2004-2005-2006.

²³ We would like to thank Frank Häge for suggesting this measurement.

presented in section 2: according to Table 3, these four committees were “extreme” cases: the former two appear to fast-track files frequently, the latter two do so rarely. By including this control, we aim to gage a potential “committee effect”—by assessing whether the EP committee responsible for a dossier matters for the likelihood of early agreement, even when we hold all other explanatory factors constant.

Table 4: Operationalisation of Explanatory and Control Variables

Operational Variable	Description	Source
H1 = Enlargement	Was the procedure concluded before or after 1 May 2004? 0 = Before 1 = After	Legislative Observatory
H2 = Workload	Total number of ongoing codecision procedures within the six-month Presidency during which the legislative file was concluded	Legislative Observatory
H3		
Recitals	Number of recitals in the Commission proposal	Commission proposal
Committee opinion	Number of committees which are asked for an opinion on the proposal	Legislative Observatory
Regulatory-technical	Is the file regulatory-technical by nature? 0=No 1= Yes	Commission proposal
H4 = Media	Average number of newspaper articles referring to the codecision procedure in English speaking newspapers (UK: Daily Mail, Guardian, Independent, The Observer, The Sun, The Times; Ireland: The Irish Times) and in French speaking newspapers (France: L'Express, Le Figaro, Le Monde, Le Monde.fr, Liberation, L'Indépendent; Belgium: L'Echo)	LexisNexis Academic
H5 = Redistributive	Is the file redistributive or regulatory-redistributive by nature? 0=No 1= Yes	Commission proposal
H6 = Time in use	Number of years fast-track legislation has been possible at the time of conclusion	Legislative Observatory
H7 = Preference Presidency	Is the procedure mentioned in the programme with the priorities of the Presidency at the time of conclusion? 0 = No 1 = Yes	(Joint) Presidency Programmes
C1 = Anticipation	Has the procedure been concluded within 20.7 months (average duration of a procedure) before EP elections? 0=No 1=YEs	
C 2 = Policy distance	Absolute distance between the national political parties of the EP's <i>rapporteur</i> and the national minister at the time of the political agreement	Benoit/Laver 2006
C3 = Committee	Binary variables for ECON, LIBE, ITRE and Tran	Legislative Observatory

5. Statistical Analysis

As our dependent variable is dichotomous, we used binary logistic regression to test the hypotheses. Logistic regression is a regression technique which can be used for analyses with discrete dependent variables and categorical or continuous explanatory variables. Logistic regression models predict the probability of a certain outcome—in our case, the conclusion of codecision by early agreement—given the values of the explanatory variables. The regression coefficients, estimated by maximum-likelihood, indicate whether the explanatory variables increase or decrease the probability of the outcome. Because the relationship between the dependent and the independent variables is non-linear, the interpretation of the estimated coefficients is not as straightforward as it is in OLS regression. Therefore, we follow a standard practice in our models by reporting the odds ratios (e^{β}) besides the coefficients. The odds ratios provide a more intuitive interpretation of the effect of each regressor on the regressand: for a unit change in x_i , the odds of $y=1$ change by a factor of e^{β} , holding all other variables constant. Odds ratios with values between 0 and 1 point to a negative effect (i.e., the likelihood of early agreement decreases), whereas odds ratios greater than 1 indicate a positive effect (i.e., the likelihood of early agreement increases).²⁴

We estimated four models for the likelihood of early agreements. Hypotheses 1 to 7 are tested in Model 1. Model 2 adds two control variables (*policy distance* and *committee*). Model 3 is a reduced model including only those variables in Model 2 with a significant effect ($p < 0.15$).²⁵ Finally, Model 4 mainly serves as a robustness check. It excludes the variable *preference Presidency* so as to include a larger sample of observations.²⁶ Hence the model covers the full time period (1999-2009). In addition, Model 4 includes our third control, which captures the anticipation of EP elections and EU enlargement.²⁷

²⁴ For an accessible discussion about the interpretation of results in categorical dependent variables models, see Long/Freese 2006, 113-128 and Tabachnick/Fidell 2001, Chapter 21.

²⁵ We have used the p-value of 0.15 as a cut-off point instead of the conventional cut-off point of 0.10 since we wanted Model 3 to also include those variables which were very close to significance.

²⁶ It should be noted that the sample for Model4 is constituted by 777 observations (out of the 797 codecision dossiers included in the dataset) because we have some missing data for the variables *recitals* (we lack a document for the Commission proposal) and *policy distance* (in a few procedures, the rapporteur was not mentioned)

²⁷ This control variable could not be included in the previous models because they drop most procedures concluded before 2002, which leads to a lack of variance on the variable *anticipation* before 2004.

Table 5: The Likelihood of Early Agreement (1999-2009)

	Model 1		Model 2		Model 3		Model 4	
	β Coef. (S.E.)	e^{β}						
Enlargement	.88 (.41)**	2.41**					2.87 (.27)***	4.76***
Workload Presidency	.04 (.01)***	1.04***	.04 (.01)***	1.04***	.04 (.01)***	1.04***	.02 (.01)***	1.02***
Recitals	.00 (01)	1.00	-.00 (.01)	1.00			.01 (01)	1.01
Committee opinion	.87 (.11)***	2.39***	.84 (.11)***	2.33***	.83 (.10)***	2.28***	.87 (.11)***	2.39***
Regulatory-technical	.24 (.25)	1.26	.23 (.25)	1.26			-.08 (.24)	.93
Recitals*Reg-tech	.03 (.02)	1.03	.02 (.02)	1.02			.02 (.02)	1.02
Ctte*Reg-tech	-.06 (.23)	.95	-.01 (.23)	.99			-.22 (.21)	.80
Media salience	.01 (.01)	1.01	.01 (.01)	1.01			.01 (.01)	1.01
Redistributive	-.02 (.25)	.98	.04 (.26)	1.04			-.22 (.25)	.80
Time in use	.39 (.07)***	1.48***	.51 (.05)***	1.67***	.51 (.05)***	1.66***		
Preference Presidency	.30 (.21)	1.34	.38 (.22)*	1.46*	.44 (.21)**	1.56**		
Policy distance			-.08 (.04)**	.92**	-.08 (.03)**	.92**	-.05 (.03)	.95
Anticipation							1.02 (.20)***	2.78***
Committee ECON			.94 (.37)**	2.55**	.88 (.36)**	2.41**	.68 (.35)**	1.98**
Committee ITRE			.16 (.37)	1.18			.18 (.36)	1.21
Committee TRAN			.31 (.33)	1.36			.31 (.31)	1.36
Committee LIBE			.99 (.45)**	2.70**	1.00 (.43)**	2.72**	1.08 (.44)**	2.94**
Constant	-5.92 (.65)***		-6.12 (.65)***		-5.92 (.60)***		-4.10 (.50)***	
n	665		665		665		777	
McFadden Adj R ²	.28		.28		.30		.33	
Nagelkerke R ²	.46		.48		.47		.51	
LR chi ² (df)	281.21 (11)		292.85 (15)		287.16 (7)		370.72 (15)	

Note: ***p<.01; **p<.05; *p<.1

Table 5 reports the estimates for our models. In a nutshell, we find support for the impact of EU enlargement, legislative workload, the dossier's complexity measured by the number of consulted committees, and the time codecision has been in use. We also find some support for the impact of the Council Presidency's ex ante defined policy priority. Several control variables also affect our dependent variable. While only some support is found for the effect of policy distance, we have stronger evidence of anticipation and a "committee effect". Although it is more difficult—and less important—to interpret the measures of the explanatory power of logit models,²⁸ they are briefly discussed here. The McFadden adjusted R^2 statistics ranges between 0.28 and 0.33, whereas the Nagelkerke R^2 is higher, ranging between .46 and .50. The values of both can be considered satisfactory for logit models. The most efficient model is Model 3, which is a reduced model of Model 2: with only 7 explanatory variables, it has a McFadden adjusted R^2 of 0.30.

In what follows, we discuss our findings for each hypothesis in more detail.

H1 expected the likelihood of early agreement to increase if the overall number of participants in the negotiating organisations increases. As the EU's 2004 enlargement resulted in a particularly steep rise in membership, we tested this hypothesis with a dummy variable for the period after *enlargement*. The 2004 enlargement indeed has a positive and significant effect, and in the period after May 1, 2004, the likelihood of early agreements is higher by a factor of 2.41 (Model 1). In Model 4, which includes more observations from the period before 2004, the likelihood of early agreements after enlargement is even higher by a factor of 4.76. H1 is thus confirmed in the analysis.

H2 expected the likelihood of early agreement to increase with the overall number of legislative files under negotiation—and, thus, with an increase in workload for the Council and Parliament. The variable *workload*, operationalised in terms of number of procedures concluded during each Council Presidency, was used to test the hypothesis. In all four models, we found a positive and very significant effect of workload. More specifically, every extra procedure during a Presidency increases the likelihood of an early agreement with about a factor 1.04. H2 is thus confirmed in the analysis. Our

²⁸ When interpreting goodness-of-fit statistics, we have to remember that "in binary regressand models, goodness of fit is of secondary importance. What matters is the expected signs of the regression coefficients and their statistical or predicted significance" (Gujarati/Porter 2009, 563).

finding only partially confirms Rasmussen's analysis of first reading conclusion between 1999 and 2004; she finds a positive but insignificant relationship between workload and early conclusion (2007, 9). This difference may either stem from our operationalization of workload (the number of ongoing, rather than concluded, procedures), our particular dependent variable (early agreement as opposed to first reading conclusion), or from the longer time period captured by our analysis (1999-2009 as opposed to 1999-2004).

The predictions of H1 and H2 were made by both rational choice and sociological institutionalism, yet the underlying causal arguments differed: based on the former, we argued that transaction costs—and, with them, the incentive to “go informal”—increase with membership and workload; drawing from the latter, we argued that adaptational pressure and organisation stress—and with them, the incentive to emulate institutional templates—increase with (novel) membership and workload. Uncovering the mechanism that is causally prior for the confirmation of H1 and H2 must therefore be one next, qualitative step in our research.

H3 expected the likelihood of early agreement to increase where the legislative issue is complex and regulatory-technical. Based on two variables capturing the *complexity* of the files, and one dummy variable for *regulatory-technical* files, we created two interaction terms to test the hypotheses. Neither of the terms appeared to have a significant effect on the dependent variable. Hence H3 is not confirmed in the analysis. However, one of the two variables used to measure the complexity of the file—the number of committees offering their opinion on the Commission proposal—positively and significantly affects the dependent variable. That is, every additional EP committee consulted increases the likelihood of an early agreement with about a factor 2.35. Hence although the regulatory-technical nature of the file does not appear to matter much for the likelihood of early agreements, some support is found for the importance of complexity. This conclusion is in line with the relationship Rasmussen identified between committee opinion and early conclusion (2007, 9). However, in Rasmussen's study committee opinion measure political salience, and her finding therefore disconfirmed the related hypothesis.

H4 expected early agreements to be less likely where the legislative issue is salient. This hypothesis was tested by using a variable which captures the *media attention* for the codecision files in English and French speaking Member States. In the analysis, we have found no support for this hypothesis. It does not matter for the likelihood of early agreements whether a codecision file is salient: both salient and non-salient files are decided upon through early agreement. Given the limited number of EU Member States covered by our operational variable, we should, however, sound a note of caution about this particular finding, especially as the media of large countries—such as Germany, Italy, Poland or Spain—could not be included in the coding.

H5 expected early agreements to be less likely where the legislative issue is redistributive. To test this hypothesis, we used a dummy variable for those legislative files which contain an element of *redistribution*. However, our analysis does not confirm this hypothesis, as both redistributive and non-redistributive files are concluded as early agreements.

By contrast, H6, which expected the likelihood of early agreement to increase with time, and to do so independently of the nature of the file, is fully confirmed. The effect of the variable *time in use* is in the expected direction, strong, and robust to different model specification. In Model 1 the magnitude of the coefficient is smaller than in Models 2 and 3, because part of its effect is captured by the variable *enlargement*. Nevertheless, a unit change in *time*—i.e. each additional year during which the Amsterdam Treaty has been in force—brings an increase of a factor of 1.48 in the likelihood to conclude an early agreement ($p < .01$). In Model 2 and 3, when the variable *enlargement* is omitted, in order to account for a problem of collinearity²⁹, the odds ratios rise to 1.67. Controlling for policy type, issue-saliency and the Presidency's institutional preferences, *time in use* has a strong and significant effect on the likelihood to conclude early agreements. This result is fully in line with Rasmussen's findings for early conclusion during the period 1999-2004 (2007, 11).

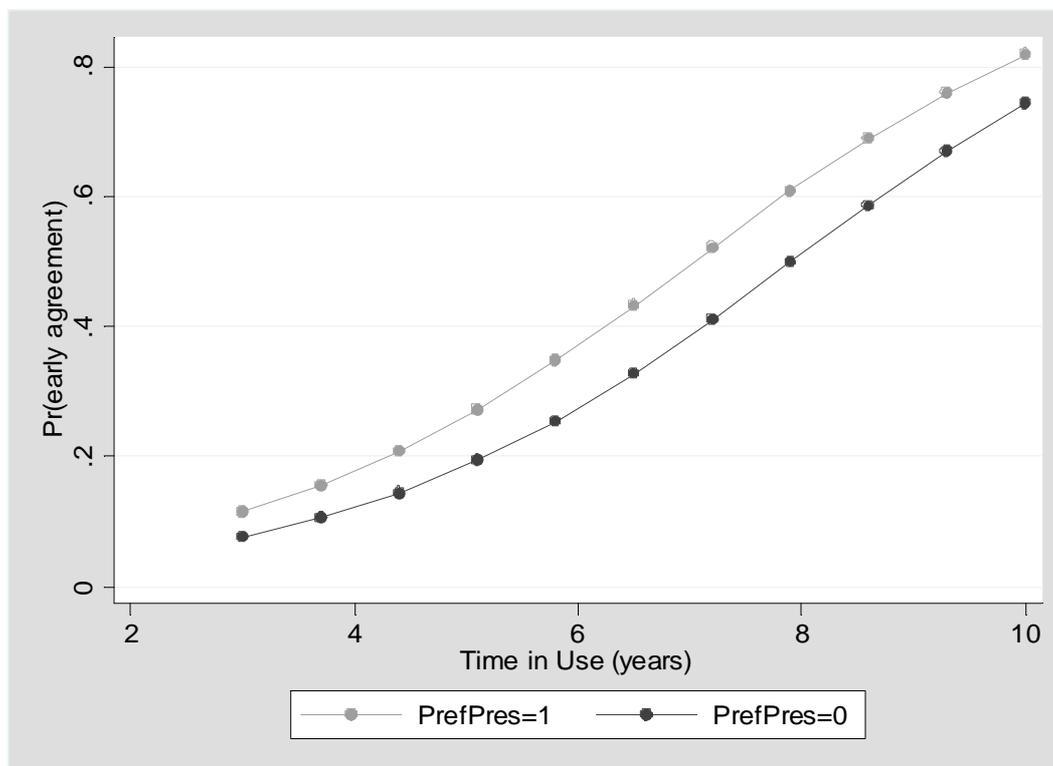
The tests of H3-H6 thus lend little support to the rationalist line of argumentation: the nature of the file matters less than the year during which the file was negotiated. Rational choice institutionalism links the incentive to “go informal”—and, thus, the

²⁹ *Time in Use* and *Enlargement* are correlated at .86. Nonetheless, the VIF and the Tolerance values of a formal test to detect multicollinearity do not reach critical levels.

likelihood of early agreement with expected costs of information-gathering as well as public interest and political opposition. While the costs of information-gathering seem to exercise some impact, no such effect can be discerned for the public interest in and political opposition to salient or redistributive files. By contrast, the sociological argument, which links an increase in early agreements to a spiral of local positive feedback as well as inter- and intra-organisational socialisation into informal rule-sets, has more explanatory power: informal decision-making seems to have become habitual, independent of the nature of the file, and actors in the Council and EP seem able to capitalise on increasingly cooperative rather than confrontative inter-organisational relations. Practitioners reach a similar conclusion (see in particular Jacqu  2007), but this result, first and foremost, identifies the need for follow-up qualitative process-tracing—to uncover whether the effect is pre-dominantly caused by intra-organisational lock-in or by inter-organisational socialisation, and to trace how precisely inter-organisational socialisation relates to the number of participants in a negotiation, to the organisation’s workload, and to the complexity of a legislative file.

H7 expected early agreement on those legislative files that are an *ex ante* defined agenda-priority of the Council Presidency. This hypothesis is based on a power-based distributive bargaining argument, and it is supported to a limited degree. As expected, *preference Presidency* has a positive and non-negligible effect on the dependent variable (Model 3), but the relationship becomes weaker and less significant when controlling for policy type and EP committee (Model 2), and it is no longer significant in Model 1. However, limitations in the availability of data—Presidency programmes are missing for 2000-2001—prevent us from testing for effects on the whole sample. This may, in turn, explain why the effect of *preference Presidency* disappears when we control for *enlargement*. Although the Council seems to make use of its institutional power to influence the legislative process, this finding does not hold across all model specifications. Figure 3 shows the effect of *time in use* and *preference Presidency* (based on Model 3).

Figure 3: Impact of Time and Preference Presidency on the Probability of Early Agreement



Our first control variable, *policy distance* between the EP’s *rapporteur* and the national minister in the Council has a modest effect on the likelihood of early agreement. The B coefficient is small, and the change in the odds of Y=1 is limited. Still, the coefficient is negative (and significant at 5% in Model 2 and 3): as the ideological distance between *rapporteur* and minister increases, the chances for agreement in trilogues decreases. Even if the magnitude of the effect is small, this finding brings grist to the mill of the argument that party politics matters in inter-organisational relations (Rasmussen 2007, 13). As the policy preferences of the two main actors of EU legislative politics get more similar, the chances to conclude a codecision dossier informally increase. Since this typically happens when *rapporteur* and minister belong to the same *famille spirituelle*, party relations seem to influence the outcome of informal negotiations positively.

As recent research has shown, “anticipation effects” play a role in EU legislative politics (Leuffen/Hertz 2010). This is captured by our variable *anticipation* (Model 4), which is expected to be positive and significant for the months preceding EP elections

(in 2004 and 2009) as well as the 2004 enlargement. Indeed, in the twenty months preceding the “expected ‘shock’” (Leuffen/Hertz 2010, 57) for the co-legislators, the likelihood to conclude early grows with a 2.78 factor ($p < .01$).

Finally, we find strong first evidence of a “committee effect” on the likelihood of an early agreement. *Ceteris paribus*, if a codecision dossier is dealt with by LIBE or ECON, early agreements are significantly ($p < .05$) more likely. In contrast, if a legislative file is assigned to TRAN or ITRE, no effect can be appreciated. This is an important finding, pointing to the need to systematically theorise why decision-makers in certain EP committees are more prone to choose the informal over the formal arena.

Conclusion

This study argued that informal decision-making has become a defining feature of EU legislative politics and set out to explain this puzzling and under-studied trend. The paper also introduced codecision in the Fifth and Sixth European Parliament as an ideal test case for scholars with a wider interest in the dynamics and causes of informalisation and seclusion. Indeed, fast-track legislation displays all defining characteristics of informal decision-making: a restricted, non-codified set of actors from Commission, Council and Parliament operates in a secluded setting; social interaction is structured by informal and semi-formal institutions rather than by codified, specific and enforceable rules; and any pre-agreed compromise must be legitimised through the formal process. This focus on an informal arena that is used as a part of the formal political process adds a new angle to the study of informal politics in the EU; it is distinct from the literature on informal governance with its emphasis on private actors or the Open Method of Coordination, and from the study of informal institutions that constitute “parallel societies” outside the formal political system.

By introducing the mechanism behind fast-track legislation as well as the scope and spread of early agreements across types of legislation, our discussion also responds to a pertinent question raised by EU scholars and policy-makers alike: are first and early second reading deals simply an up-shot of non-contestation and technicality, or do they imply conflict and bargaining for compromise in the informal arena? Even when applying our restricted definition of early agreement, which factors out non-contested first and early second reading deals, our figures demonstrate a dramatic shift of

decision-making into the informal arena since 1999. The relevance of informalisation and seclusion is underlined further by the confirmation and disconfirmation of our theoretical hypotheses. The regression analysis suggests that the decision to “go informal” is systematically related to EU enlargement, to legislative workload, to the complexity of a file, and, most significantly, to the time fast-track legislation has been in use. However, we found no link either between the choice of the informal arena and the nature of a legislative dossier as regulatory-technical, or between the choice of the formal arena and the nature of the legislative dossier as redistributive or salient. These findings support the functionalist argument of rational choice institutionalism that explains the decision to “go informal” with the transaction costs of internal coordination (where participants and workload increase) and information-gathering (where a file is complex). However, we cannot explain informalisation with the public interest in and political opposition to a legislative file: even salient and redistributive acts are regularly pre-agreed informally and concluded early. This could be for one of two reasons: either, actors from the EP and the Council do not encounter significant internal opposition where their decision to “go informal” undercuts broad legislative debate; or public interest and political opposition are de facto avoided by moving a file into the informal arena and by making it, accordingly, less widely known. Neither of these explanations is good news for the democratic credentials of fast-track legislation—the first explanation concludes that public legislative debate is systematically undercut, the second implies that informalisation occurs because rather than in spite of contestation.

Our statistical analysis finds particularly strong evidence for the sociological explanation that links the shift of decision-making to the availability of informal rule templates and to actors’ socialisation into informal behavioural patterns, within as well as across organisations. Yet, although the time codecision has been used and the likelihood of early agreement are strongly correlated, only follow-up qualitative process-tracing can uncover whether intra- or inter-organisational socialisation predominates, and trace the causal link with the number of participants in a negotiation, the organisation’s workload and the complexity of a legislative file. Such qualitative analysis could, in turn, lead to the generation of more targeted hypotheses about the conditions under which particular types of organisations will be more or less prone to informalisation and seclusion.

In sum, our paper makes an empirical, a theoretical and a normative contribution to the literature on EU legislative politics. Empirically, we analyse the informal spaces left by the formal rules of codecision and the mechanism of fast-track legislation; theoretically, we question the conventional wisdom of “formal” rational choice institutionalism with its analytical focus on conciliation as the last round of legislative bargaining; normatively, our systematic test of the type and context of legislation that leads to early conclusion even where a file is contested puts the democratic evaluation—and criticism—of fast-track legislation on firmer empirical ground.

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