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Hidden parliamentary power: Informal information-sharing between EU institutions from agenda-setting to execution

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Abstract

Over the past decades, transparency of European policy making has been high on the political agenda. Most attention is paid to public access to documents and other information, be it in terms of the scope of access to documents regulations or the degree to which transparency is a necessary prerequisite for the democratic functioning of the European institutions. Although transparency towards the general public has unquestionably increased since the entry into force of the Maastricht treaty, a parallel trend of increasing information-sharing between the European institutions has for the most part been overlooked. Compared to the number of public transparency requirements of the Commission, Council and Parliament, the number of inter-institutional information sharing requirements is vast. This article presents an overview of these rules, which for the most part are not mentioned in the Treaties but rather are hidden in the rules of procedure of the institutions, or in informal agreements between them. The analysis shows that there is a dense web of inter-institutional information-sharing rules that strongly affects European Union policy-making processes which benefit some institutions more than others, even to the degree of fundamentally altering the division of powers that is provided for in the Treaties.

Introduction

Since the entry into force of the Maastricht Treaty, transparency of European policy making has been high on the political agenda. Numerous EU policy documents have stressed the importance of public access to information and decision-making as one of the key solutions to its alleged lack of democracy (Curtin and Meijer 2006), and many scholars, too, propagate different forms of transparency as one of the solutions for increasing government legitimacy in general, and the EU's 'democratic deficit' in particular (e.g. Majone 2000, Corbett et al. 2000). In this regard, most attention is paid to the public at large as the 'addressee' of transparency. Within a relatively short time-span, the European institutions effectively built up a web of policies and voluntary commitments making large number of documents available to the general public.

Although transparency towards the general public has unquestionably taken a quantum leap since the entry into force of the Maastricht treaty, a parallel trend of increasing information sharing between the European institutions – which started a few years earlier – has to a great degree been overlooked. The European Parliament and the Council of Ministers, constituting the two branches of the European legislative authority, directly and indirectly represent the European citizens. The principle of representative democracy is explicitly referred to in the Treaty on European Union as the basic principle behind this division of powers (Article 10, TEU). Hence, the European Parliament as well as the Council of Ministers have every right to be kept fully informed in order to be able to fully represent their constituents' interests, perhaps even to a more fundamental degree than supplementary information policies targeted at citizens directly. The Treaties, although specifying the formal powers of each European institution, say remarkably little about the information regime that is required to effectively make use of those powers. It is in unilaterally imposed working rules as well as in bilateral or trilateral agreements between the institutions that more operational information agreements have been made, or have become the norm.

The process of the 'informal' building-up of this inter-institutional information sharing regime was kick-started with the entry into force of the Single European Act, with which the European Parliament was deeply disappointed. Through changes in its own Rules of Procedure, it increased its power base by imposing its desired political role on the other institutions, thereby forcing them to adapt to the EP's working style

that emerged outside the scope of the Treaty (Kreppel 2003). Many of the provisions in its Rules of Procedure that take further the Treaty provisions, also in further adaptations of these rules, concern information rights about the intentions and behaviour of the other institutions, mostly coupled with procedures on handling this information and with political instruments to act upon it.

Besides Rules of Procedure, there are also a number of agreements between the institutions that, among other things, specify information rights. Some of these are pieces of secondary legislation (i.e. the Council Decisions and the recent Codecision Regulation on comitology), while others do not have the status of legislation per se but have the form of bilateral or trilateral agreements between the institutions. The types and degrees of formality of these agreements differ, but at the very least they include political commitments that shape inter-institutional behaviour (Eiselt and Slominski 2006, Hummer 2007). These agreements, too, include numerous provisions on information sharing, often also linking these to specific political rights.

Although European inter-institutional agreements as such have been addressed explicitly or implicitly in a considerable amount of research, the evidence is only scattered. Mostly, research is limited to one type of agreement or to one domain of policy-making. This includes, for instance, an exclusive focus on inter-institutional aspects of comitology (e.g. Bergström 2005, Bradley 1992, Brandsma and Blom-Hansen 2011) or of the EP's rules of procedure and internal structure (e.g. Hix 2002, Farrell and Héritier 2004, Kreppel 2003). Typically, the institutions and most notably the European Parliament are modelled as competence maximisers wanting to 'cash in' informal power gains during the reform of legally stronger instruments such as Treaties or secondary legislation (Hix 2002, Kietz and Maurer 2007). The common denominator of this body of literature is that it unequivocally shows an increase in the power of the European Parliament, but it only gives a fragmented picture of the types of information that the institutions share amongst each other across the full spectrum of European policy making.

The aim of this paper is to establish what types of information are shared between which institutions, and for what purposes these institutions subsequently use this information during the policy-making process. In doing so it compares between obligations on inter-institutional information-sharing between those enshrined in the Treaties and in secondary legislation to the more operational set of obligations to which the institutions have committed themselves in inter-institutional agreements

and in their own rules of procedure. The paper starts off by discussing how information sharing can be arranged between the institutions, followed by a close analysis of the Treaties, inter-institutional agreements and the institutions' own rules of procedure currently in force. It shows that in every phase of the European policy-making process, the information regime coupled with specific political rights equip the institutions with powers and influence not provided for in the Treaties.

Inter-institutional information-sharing

Even though transparency is widely propagated in the literature as a desideratum due to its many alleged positive effects such as stimulating public trust and the integrity of public officials (Meijer et al. forthcoming), there is remarkably little agreement on the exact meaning of the term other than that it includes 'access to information' of some kind. From there, definitions diverge along several dimensions, also within the discourse on European governance. One dimension concerns the scope of the term, in which definitions range from narrow ones including access to documents (e.g. Öberg 1998), or their actual availability as an even narrower scope (e.g. Brandsma et al. 2008), to very broad definitions including information in a more general sense that reveals the thinking behind a decision or the way in which a decision is made (e.g. Stasavage 2004). Another dimension concerns the distinction between transparency as a normative right, and transparency as a means to other ends. As a normative right, transparency is seen as a principle, as a virtuous attribute of government as it were, whereas in its other meaning transparency derives its relevance from the effects it produces following an *act* of disclosing information (e.g. Curtin 2000, Heald 2006, Meijer et al. forthcoming). A step further down this path concerns distinguishing between access to information ('transparency') on the one hand and the use that a recipient physically makes of that information ('publicity') on the other (Naurin 2007, Hueller 2007).

The concept of transparency typically concerns the disclosure of information of organisations towards the public at large. The general public can then use this information for different purposes, including in its communication with its representatives or with the executive. But representative institutions are much more closely involved with decision-making than the general public is, in fact it is their very *raison d'être*. Through their legislative and scrutinizing functions they represent

the preferences of the public, be it directly or indirectly. This makes agreements, in whatever form, on inter-institutional information sharing vital in order to give maximum effect to exercising these public tasks.

Because of the strong connotation of transparency with the general public as its audience, this paper will use the more neutral term 'information sharing' for the sharing of information between institutions. It defines this broadly as the degree to which an institution is informed of the activities and intentions of other institutions, since the behaviour and intentions of institutions in a general sense are not necessarily captured in pre-defined information formats such as documents. It also treats information sharing as a functional device with respect to increasing popular grip, through its representative institutions, on European policy-making. Information sharing, thus, is taken as instrumental for other, political, purposes.

Information sharing through the backdoor

There are different modes by which the European institutions can become subjected to information obligations towards other institutions. The principles as well as the practical modalities on the exchange of information between the Commission and the two legislative institutions are mentioned in several categories of agreements that vary considerably in terms of legal and constitutional embedding, scope, and specificity. To begin with, several articles in both the Treaty on European Union and in the Treaty on the Functioning of the European Union specifically address this issue. For the most part this relatively small number of articles outlines principles to which further operationalisations by the respective institutions are subject.

Secondly, there is one piece of secondary legislation that creates inter-institutional information obligations, namely the Comitology Regulation that, in various forms since 1987, specifies the degree of control of the member states over the Commission through a set of 250 implementing committees that have voting power over executive measures drafted by the Commission. This Regulation also mentions which documents have to be transmitted to the other institutions for exercising their scrutiny rights over the decision-making that takes place in those committees.

But the relatively few provisions in the Treaties and the Comitology Regulation are massively outnumbered by additional obligations to which the

institutions have committed themselves in bilateral or trilateral agreements. Although those obligations tend to be more specific and even technical at times, concluding such agreements entails distributive bargaining between the institutions (Eiselt and Slominski 2006). The Parliament and the Commission, for instance, make 'framework agreements' in order to facilitate the cooperation between both institutions. These are made every five years pending the appointment of a new Commission. Furthermore, there are additional agreements that, among other things, govern the information exchange regime on specific domains, such as financial markets, the quality of the law-making process, or – again – comitology. Inter-institutional agreements come in various forms, such as joint declarations, statements, common understandings, exchanges of letters, or agreements that are literally named 'inter-institutional agreement'. The Treaty allows the institutions to adopt bilateral or trilateral agreements for their cooperation (Article 295, TFEU), but these agreements do not necessarily need to be binding. The institutions, thus, have a choice between making binding agreements, non-binding agreements or no agreements at all. The legal status of many inter-institutional agreements is not clear (Hummer 2007), but in any event they express a political commitment from the parties concerned.

Finally, the institutions also adopt their own respective rules of procedure, which are sometimes supplemented by codes of conduct. These, obviously, are not inter-institutional by nature, but still there are many instances where these contain specific procedures for handling and requesting information and requirements for interaction on this with other institutions, thereby informally still having inter-institutional effects.

The fact that inter-institutional agreements as well as internal rules of procedure matter a great deal for European Union policy-making, and may even create obligations beyond the Treaties, has been pointed out repeatedly (e.g. Hix 2002, Stacey 2003, Kreppel 2003, Puntscher Riekmann 2007). The European Parliament is seen as the main driving force behind the development of these. Where Treaty provisions were unclear or absent, it systematically attempted over the last decades to settle its demands through inter-institutional agreements, in order to have such – by then – common practices codified in later Treaty reforms (Hix 2002, Kietz and Maurer 2007). Rules of Procedure are used similarly. In specifying how an institution deals with its responsibilities, the Rules of Procedure for instance spell out internal decision rules including their timing and the sequencing of all stages of

internal decision-making. This creates standard practices that in turn can be codified in the next round of constitutional reform (Hix 2002, Kreppel 2003).

This existing body of research has gone some length in analyzing the content of specific agreements between institutions or, to a lesser extent, of internal rules of procedure, as well as the internal and inter-institutional power maximizing dynamics behind the establishment of these. But it is not exactly clear how much these agreements really help the Council and the European Parliament in getting information on each other's and the Commission's behaviour, be it as an operationalisation of Treaty provisions or as extra agreements on top of this. Many inter-institutional rules are in force that regulate information sharing related to legislative planning, policy preparation, law-making and executive control. The true 'bite' in these obligations lies in the coupling that is made with specific political rights that the receiving institutions enjoy. Sometimes these are referred to in the same agreement, but sometimes also in the Treaty articles that the inter-institutional rules are giving effect to, or in the rules of procedure of individual institutions. These, too, create inter-institutional information obligations by formulating compulsory internal decision rules that require certain pieces of information from other institutions.

Table 1 below shows an overview of Treaties, pieces of legislation, inter-institutional agreements and rules of procedure currently in force (March 3, 2011), each of which containing provisions on inter-institutional information-sharing. Other inter-institutional agreements concluded in the past (cf. Hummer 2007) have either been replaced by newer versions, or do not address information sharing. It stands out that the number of informally agreed rules greatly outnumbers the number of obligations stemming from primary and secondary law. To help readability, the names of these agreements are all abbreviated in the analysis to follow.

Table 1 Inter-institutional information-sharing rules and agreements

Source	Reference in text
Treaties and Secondary Law	
Treaty on European Union (consolidated version) (TEU), OJ 2010 C83/13	TEU
Treaty on the Functioning of the European Union (consolidated version) (TFEU), OJ 2010 C83/47	TFEU
Regulation (EU) No. 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by member states of the Commission's exercise of implementing powers, OJ 2011 L55/13	Regulation 182/2011/EU
Inter-institutional agreements	
Letter from commissioner Bolkestein to Mrs. Randzio-Plath, MEP, 2 Oct 2001	Commission 2001
Institutional Agreement (between the European Parliament, the Commission and the Council) on better law-making, OJ 2003 C321/1	Agreement on Better Law-making 2003
Joint Declaration on Practical Arrangements for the Codecision Procedure (by the European Parliament, Council and Commission), OJ 2007 C145/2	Joint Declaration 2007
Agreement between the European Parliament and the Commission on procedures for implementing Council Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, as amended by Decision 2006/512/EC, OJ 2008 C143/1	Comitology Agreement 2008
Framework Agreement on relations between the European Parliament and the European Commission, OJ 2010 L304/47	Framework Agreement 2010
Common Understanding on practical arrangements applicable to delegations of legislative power under Article 290 of the Treaty on the Functioning of the European Union, 3 March 2011	Common Understanding 2011
Internal rules of procedure and codes of conduct	
Code of Conduct for negotiating co-decision files, as approved by the EP Conference of Presidents on 18 September 2008	EP Code of Conduct 2008
Council Decision of 1 December 2009 adopting the Council's Rules of Procedure (2009/937/EU), OJ 2009 L325/35	Council RoP
Commission Decision of 24 February 2010 amending its Rules of Procedure, OJ 2010 L55/60	Commission RoP
European Parliament Rules of Procedure, 7th Parliamentary Term, November 2010, *	EP RoP
Horizontal Rules for Commission Expert Groups, Annex to Commission Communication of 10 November 2010 on the Framework for Commission expert groups: horizontal rules and public register	Expert Group Communication 2010

Document references are in the Official Journal of the European Union. This listing is limited to the agreements in force at the time of analysis (March 2011).

* Only amendments are published in the Official Journal – with a long delay. A complete and up-to-date version of the rules of procedure is available via the website of the European Parliament.

Each of these documents was analyzed for provisions on information-sharing and their coupling or instrumental value to formal or informal political rights. The analysis is structured along the main contours of the policy making process, beginning with the preparatory phase under the responsibility of the Commission, via the legislative phase where the European Parliament and the Council bear prime responsibility to the executive phase that again is primarily in the hands of the Commission. For each of these phases, provisions in the Treaty are compared to other more specific agreements made elsewhere. It turns out that in every phase of the policy-making process, the informal agreements do much more than just operationalising Treaty provisions alone.

Phase 1: Policy preparation

The key institution in the preparatory phase of European policy making has traditionally been the European Commission. Leaving aside a handful of exceptions, the Commission is the only institution allowed to prepare and formulate legislative proposals and hence it acts as a gatekeeper before the start of legislative procedures. Throughout the history of European integration, institutions other than the Commission have increasingly managed to influence its agenda-setting. To name just a few examples, the European Parliament and the Council can request the Commission to formulate a legislative proposal, and the European Council formulates major strategic issues requiring European Union action. The Commission, though, can still decide to steer its proposals in a given direction, or can decide not to submit a legislative proposal when requested by other institutions (Articles 225 and 241, TFEU). Its gatekeeper function is thus safeguarded at Treaty level.

There are two aspects with respect to the Commission's policy preparation in which information sharing with other institutions affects the balance of powers, namely in the decision whether or not to formulate a legislative initiative and the actual preparation of such an initiative. For both aspects, the Treaties only mention a small number of specific provisions, which are massively outnumbered by agreements between the institutions and provisions in the rules of procedure of the institutions themselves.

Agenda-setting and legislative planning

To begin with the selection of issues, the Treaty on European Union only mentions that the Commission "… shall initiate the Union's annual and multiannual programming with a view to achieving inter-institutional agreements." (Article 17(1), TEU). The procedure as to its operationalisation is hidden in a protocol attached to the Treaties, stating that "the Commission shall also forward the annual legislative programme as well as any other instrument of legislative planning or policy to national Parliaments, at the same time as to the European Parliament and the Council." (Article 1 in Protocol 1, TFEU).

At first sight these two provisions do not seem particularly restrictive to the Commission; their only effect seems to be not taking the other institutions by surprise when presenting legislative proposals, and to prevent issues from being stopped in either branch of the legislative power by communicating them in an early stage. However, numerous agreements between the institutions, and even their own rules of procedure, add further and more specific measures to the process of legislative planning. Most of them have a slight effect on the powers of the institutions concerned, some of which even to the extent of transferring part of the Commission's gatekeeper function to the European Parliament.

First of all, the Commission commits in its Framework Agreement with the European Parliament to report on the concrete follow-up of requests for legislative initiatives within three months, and to outline its reasons in detail if it does not submit a proposal (Point 16, Framework Agreement 2010). This clause aims to keep the Parliament informed, but it also closes a loophole left in Article 225 of the TFEU which does not specify a time limit for the Commission to decide whether or not to put together a legislative proposal. Theoretically, at least, the Treaty allows the Commission to postpone the Parliament's request for new legislation endlessly. For the Council variant of this Treaty article (Article 241 TFEU), no equivalent inter-institutional agreement was found. In sum, this point somewhat restricts the Commission.

Second, there are many specific procedures governing the process of creating the Union's annual and multiannual programming, which severely constrain the Commission and favour the European Parliament. The Commission's contribution to this programming, which in itself can be considered an act of inter-institutional

information sharing, comes in the form of its Commission Work Programme (Article 2, Commission RoP). The Commission has pledged to keep the Parliament informed of its intentions in the process of creating this document. The Framework Agreement states that the Commission "shall take into account the priorities expressed by Parliament" and "shall provide sufficient detail as to what is envisaged under each point in its working programme" (Points 33-35 and 53, Framework Agreement 2010). These provisions open the door for parliamentary involvement on the basis of information sent from the Commission to Parliament in choosing which issues require a legislative proposal and which do not. The lengthy timetable for this whole procedure includes several months of political dialogue between the institutions in the drawing up of this document (Point 11, Framework Agreement 2010; Annex 4, Framework Agreement 2010).

Although the words chosen in these particular provisions still leave the formal power of policy preparation with the Commission, the European Parliament's Rules of Procedure are more explicit as to where this power in practice lies. These stipulate that Parliament and the Commission "shall cooperate" in preparing the Commission's annual legislative and work programme, that Parliament is to adopt a resolution on this programme *after which* the Council is asked to express an opinion, and that "an institution" (i.e. the Commission) is only allowed to add measures to the annual work programme in urgent and unforeseen circumstances (Rule 35, EP RoP). Especially this last element severely limits the room for manoeuvre of the Commission in autonomously choosing which legislative proposals to draw up; it testifies to the fact that the Parliament has a strong say in selecting the issues the Commission takes up and that the Commission can only deviate from their preferences in extraordinary circumstances. The gate keeping role of selecting issues for legislative initiatives, thus, has informally become a joint responsibility of the Commission and the European Parliament under the guise of early information-sharing and cooperation between the institutions.

The Council, however, is left out of this cooptive arrangement. The Framework Agreement urges the Council to engage in discussions as soon as possible (Point 53, Framework Agreement 2010), whereas its own rules of procedure only stipulate that the Commission will "present" its annual work programme in the Council (Article 8(3), Council RoP).

Preparation of legislative initiatives

Preparing the content of a legislative initiative is supposed to be the exclusive realm of the Commission as well, but here, too, the other institutions – especially the European Parliament – have managed to get a foot in the door. Treaty-wise, there is only one very generic statement as to the way in which the Commission can perform its duties, stating that "within the limits and under the conditions laid down by the Council, (…) [the Commission may] collect any information and carry out any checks required for the performance of the tasks entrusted to it." (Article 337, TFEU).

Most of the provisions as to this relate to informing the European Parliament in the course of preparing a legislative initiative, so that it is prepared when the initiative finally is officially tabled. The Commission has agreed with the Parliament to send to it lists of its expert groups, and on request the chairs of the respective parliamentary committees can obtain more information on the activities and composition of such groups (Point 19, Framework Agreement 2010). Also, the Parliament may already appoint rapporteurs to monitor the Commission's preparation of an initiative as soon as its work programme is adopted (Point 41.3, Framework Agreement 2010; Rule 43.1, EP RoP).

In some cases members of Parliament may even sit in the Commission's expert group meetings themselves. This rule came about as a result of Treaty article 290 on delegated acts, which was meant to partially replace the comitology system (see below on 'executive measures'). Since delegated acts, as opposed to acts adopted under the old comitology regime, do not formally require the Commission to consult a committee of member state representatives, a gentleman's agreement was made between the Council and the Commission that it would continue to systematically consult all member states through 'expert groups' (Brandsma and Blom-Hansen 2011). This induced the Parliament to agree with the Commission that it would be informed of the same documentation as the national experts when it concerns meetings to which national experts from all member states are invited. Although having come about as a result of almost five decades of inter-institutional struggle over control over the European executive, this particular agreement was put in place for committees of national experts *generally*, also including those preparing new legislation or soft law. Upon request by Parliament, the Commission may even decide

to allow Parliament experts to attend those meetings (Rule 15 and Annex 1, Framework Agreement 2010; Rules 12 and 13, Expert Group Communication 2010).

All these measures equip the European Parliament with information on policy initiatives, so that it can work more efficiently during its legislative procedures. It can also use the information it receives to influence the Commission early on in the process. The necessary arrangements for that are already in place with rapporteurs appointed early, and also given that there is "a regular and direct flow of information between the member of the Commission and the chair of the relevant parliamentary committee" (Point 12, Framework Agreement 2010). Both institutions may use these arrangements to their advantage, but it is evident that these agreements equip the Commission with less capacity to shield off some of its activities from prying eyes, and favour the European Parliament which can formulate and negotiate its position earlier in the process.

Phase 2: Legislative procedures

The vast majority of European legislation is passed according to the co-decision procedure, or ordinary legislative procedure as it is formally named as from the Lisbon Treaty. Formally, this procedure starts off with a legislative proposal, nearly always prepared and submitted by the European Commission, which is sent simultaneously to the European Parliament and the Council of Ministers. The European Parliament, as the first branch of the EU legislative power, acts by voting in plenary on 'reports' including amendments that are drawn up by a designated MEP, the 'rapporteur' on a particular issue. Before such reports arrive in plenary, they have followed a route through one of 18 legislative parliamentary standing committees, where the bulk of the parliamentary work is done. Often one or more other standing committees are involved at this stage as well by giving additional comments.

The Council's formal role starts as soon as the European Parliament has adopted the aforementioned report and an accompanying legislative resolution in plenary, after which the Council considers the Commission's proposal together with Parliament's amendments (Article 294, TFEU). However, since the Council receives the Commission's proposal at the same time as the European Parliament does, the Council already starts seeking agreement among its 27 member states in parallel to the

European Parliament's consideration of the proposal. While the European Parliament mainly works in its currently 18 standing committees, the Council has delegated its preparatory work to COREPER and ultimately its 158 'Working Parties', which are mostly chaired by an attaché from the country holding the Council presidency (Council of Ministers 2011), after which the ministers give final approval. Depending on the level of agreement between the institutions following the Parliament's and Council's first reading on the matter, a second reading may be necessary or even conciliation if after a second reading no agreement has emerged.

Around this formal decision-making procedure within the two legislative institutions, a set of semi-formal working agreements have been adopted as well. These concern both a further specification on how the individual institutions deal with the co-decision procedure itself, as well as inter-institutional cooperation in the shadow of the formal co-decision procedure. Agreements on inter-institutional information sharing have been made for both these aspects, while some rules have even been imposed by single institutions on the other.

Information-sharing surrounding co-decision

Within the European Parliament, thus, the co-decision procedure provides for reports including amendments adopted in plenary. The Treaties themselves only include very few provisions on inter-institutional information-sharing. Article 230 TFEU stipulates that the European Commission may be (and thus is not required to be) present at the meetings of the European Parliament, and shall be heard at the Commission's request. The same Treaty article also mentions that the Council shall be heard by the European Parliament in accordance with the Council's rules of procedure.

Most of the spice, here, is hidden in the European Parliament's Rules of Procedure. During the EP standing committee's deliberations, the committee asks both the Council and the Commission to keep it informed of the progress in the Council and its working parties, especially with a view to detecting substantial amendments made by the Council, or a complete withdrawal, early on in the process (Rule 39.2, EP RoP). Having such information enables the European Parliament to anticipate developments in the Council already before its own proposed amendments are adopted at the committee stage, before plenary. But the interesting thing here is that through this rule, the European Parliament has made the Commission its

eavesdropper in the Council's deliberations - where according to the Council's Rules of Procedure it is usually present (Article 5.2, Council RoP). The fact that the European Parliament committees herewith receive information on Council decision-making from two sources may to some degree limit opportunities for strategic behaviour of the Council presidency towards the European Parliament.

Another aspect is the timing of formal statements by the other institutions to the European Parliament, most notably the Commission. Since the Commission, after submitting its initial proposal to the Council and the European Parliament, also needs to accept any amendments made by the other institutions, the co-decision procedure foresees several points where the Commission can formally state its views. These are at the end of the first reading, if the Council does not approve the European Parliament's position, and halfway the second reading if the European Parliament proposes amendments to the Council's first reading position (Article 294.6-7, TFEU). The Commission's viewpoint is important during the legislative phase since it influences to some degree the voting procedure to be used. Normally, the Council acts by qualified majority under co-decision, but it is to act unanimously on amendments on which the Commission has delivered a negative opinion (Article 294.9, TFEU).

Therefore, the European Parliament has an interest in already knowing the position of the Commission before formally proposing amendments. If in first reading an amendment is formally adopted by the Parliament, but the proposal including all amendments is not fully acceptable to the Council *and* the Commission objects to a single amendment, the entire bill risks being rejected if the Council in second reading does not unanimously overturn the Commission's negative opinion (or otherwise a third reading may be started). For this reason the Parliament's Rules of Procedure specify that both the Council and the Commission need to inform the parliamentary committee of their views on all proposed amendments before the parliamentary committee votes on a legislative report and forwards it to plenary. Whereas there are no sanctions if the Council does not comment, the committee may decide to postpone its vote on a legislative report when the Commission does not state it views or when it is not prepared to accept all proposed amendments (Rule 54, EP RoP). This gives the committee some room for manoeuvre to look for more acceptable wordings, if necessary, or at the very least it will inform them of the likelihood their amendments may be rejected at a later stage before the matter is debated and voted upon in plenary.

Information-sharing through informal trilogues

Apart from information arrangements that fit the formal decision-making process itself, more informal practices have emerged in the shadow of the formal procedure that relocate important parts of legislative decision-making to tripartite meetings of European Parliament, Commission and Council representatives called 'informal trilogue meetings'. Behind closed doors they work towards consensus over policies, in parallel to the normal legislative processes which does not include such tri-partite discussions. Once joint solutions have been found, these are entered into the legislative deliberations as a final compromise, after which concluding the legislative process is only a matter of formality. This informal procedure speeds up European policy-making as it allows for dialogue between the institutions beyond the more time-consuming legislative processes. Also, first reading agreements only require a simple majority in plenary in the European Parliament as opposed to an absolute majority of its constituent members required in second reading , making it is easier for the institutions to get a bill accepted in first reading (Judge and Earnshaw 2011). This perhaps also explains its tremendous popularity: nowadays 60 to 70 per cent of all new legislation takes the trilogue route (European Parliament 2009: 8).

It is widely accepted that the choice for taking the trilogue route results from a trade-off between input legitimacy, including popular input and transparency on the one hand, and output legitimacy including more efficiency on the other, in which the latter aspect is deemed more valuable. Although it is undeniably true that information on trilogues is not publicly available, trilogues do equip representatives of all three institutions with information on the viewpoints of all other institutions. The question, thus, is to what degree other members of the same institutions are aware of the proceedings in the trilogue meetings, and if they can use this information for exercising direct or indirect influence.

It appears that there are numerous provisions on this matter, both in the EP's Rules of Procedure as well as in a number of inter-institutional agreements. First of all, the decision to enter into a trilogue should be taken by the parliamentary committee including a mandate for negotiations (Rule 72.2, EP RoP), which normally also includes a decision on the composition of the negotiating team (Rule 3, EP Code of Conduct 2008). The committee, thus, chooses its own representatives. But then it appears that the committee does not only select representatives to negotiate its

position with the Council and the Commission, but also to keep tabs on political opponents from the same institution. This is specified in a number of rules stating that within the negotiating team 'political balance shall be respected' (Rule 3, EP Code of Conduct 2008), that on a proposal of the coordinators the shadow rapporteurs may be involved in the negotiations (Rule 192.2, EP RoP) and even that *all* political groups shall be represented at least at staff level (Rule 3, EP Code of Conduct 2008).

This means that, the EP may send no less than fourteen political negotiators or observers to the trilogue meetings; that is: not counting any administrators from the committees themselves, personal assistants or advisors from the legal service. Each of these flies on the wall can immediately inform non-participating members of parliament on the course of the negotiations, or even in advance of the meetings themselves since proposed compromise texts are to be distributed to all participants before the meeting (Point 9, Joint Declaration 2007, reiterated in Rule 5, EP Code of Conduct 2008). In fact, there are even further rules to guarantee a flow of information to non-participants. In principle, trilogue meetings are announced 'where practicable' (ibidem), and the negotiating team is to report back to the committee after each trilogue also making all distributed texts available to the committee (Point 6, EP Code of Conduct 2008). Finally, the committee has the final say, even in cases when trilogues lead to a political deal after the European Parliament's first reading (Points 14, 15, 18, 19, 21 and 23, Joint Declaration 2007).

At the side of the Council, there is only one vague commitment related to trilogue meetings. Its presidency is to 'carefully consider any requests it receives to provide information related to the Council position, as appropriate' (Point 10, Joint Declaration 2007), which fits well the general obligation of professional secrecy surrounding all Council preparatory activities (Article 6.1, Council RoP). Although public transparency is low for trilogue decision-making, the above shows that its internal and inter-institutional information regime is quite dense. In fact, with all these little rules it must be a real challenge to find only a single interested MEP who is not constantly kept up to date on the wheelings and dealings of the trilogue negotiators and the viewpoints of the other institutions.

The information rules related to the codecision procedure itself as well as to trilogues are the most detailed ones in the legislative phase of policy-making, but they are by no means the only ones. Some more general arrangements have been made as well,

such as cooperation through 'appropriate inter-institutional contacts' throughout the codecision procedure to monitor progress (Point 5, Joint Declaration 2007), the institutions keeping each other 'permanently informed about their work' (Point 6, Agreement on Better Lawmaking 2003), exchange of information on progress between institutions (Point 6, Joint Declaration 2007), and a synchronization of common dossiers between the preparatory bodies of the institutions (Point 5, Agreement on Better Lawmaking 2003). These arrangements do not match the degree of specificity of the previous ones by far, but at least this shows that the institutions, and most notably the European Parliament, have built a web of intra- and inter-institutional obligations on disseminating inter-institutional information which they can use to their advantage.

Phase 3: Executive measures

The legislation which the Council of Ministers and the European Parliament adopt cover the aims and principles of policy, but the vast majority of European decisions are of an executive nature. Throughout history, 60 to 90 percent of European directives, decisions and regulations have been executive acts adopted by the Commission (Brandsma 2010, Van Schendelen 2010). Those 'little rules' flesh out and apply European legislation, mostly in the form of further decisions, directives and regulations adopted by the Commission. It is for that reason that, as in any parliamentary democracy, the executive has been placed under control of the legislator in this. Information arrangements play a crucial part in making the according control systems work.

The system of controlling the Commission in its executive capacities rests on two pillars that were introduced in the Lisbon Treaty, which distinguishes between implementing acts (Article 291 TFEU) and delegated acts (Article 290 TFEU). The former is the descendant of the age-old 'comitology' system in which control is exercised through a system of committees of expert civil servants representing all member states. The delegated act system was introduced in the Lisbon Treaty and specifies control instruments for the Council and the European Parliament. Hitherto cases now falling under this regime also went through a comitology procedure, but the new Lisbon Treaty makes these committees redundant for delegated acts. Many inter-

institutional information obligations exist in the executive realm that apply to both implementing and delegated acts. These obligations result from a long-standing conflict between the institutions on the powers and the design of the control system.

Comitology

Traditionally, the design of the comitology system has been an exclusive matter for the Council, which designed it to include only staff from the Commission and the member states. However, the European Parliament – although a co-legislator since the Treaty of Maastricht – was not fully able to hold actors accountable for decisions that were in practice made in comitology meetings. By strategic use of its other prerogatives – such as holding up legislation, freezing budgets, et cetera – the European Parliament has to a great extent succeeded both in gaining some (specific) powers as from 1999, as well as in getting information on the wheelings and dealings of the committees to back up these powers through the conclusion of bilateral agreements with the Commission (Bradley 1992, Türk 2003).

Leaving aside the development of the inter-institutional agreements on comitology for the period up to the entry into force of the Lisbon Treaty (for that see Brandsma forthcoming; Kietz and Maurer 2007) and concentrating on the current state of affairs, it appears that for the current control system for implementing acts the according information agreements are specified in the latest Comitology Regulation adopted by the European Parliament and the Council (Regulation 182/2011/EU). More or less replicating earlier agreements, this regulation mentions that the Council and the European Parliament are to receive agendas for meetings, the results of voting, a list of authorities to which the member state representatives belong, summary records of the committees' discussions and draft and final draft implementing measures that were submitted to the committees at the same time as the committee members. This is coupled with the right of both institutions to challenge the legality of an adopted implementing act.

An earlier inter-institutional agreement on the pre-Lisbon comitology system, that still remains into force for the new system, specifies that the documents mentioned are to be sent to the European Parliament on the same terms and at the

same time as to the committee members, and that these documents are to be uploaded into a Commission-managed database to which the European Parliament's services have direct access, in which documents can be followed from early on up to the final stages in the comitology processes (Points 1-3, Comitology Agreement 2008). In addition the European Parliament may request access to the full minutes of the comitology committee meetings, as long as it respects confidentiality rules (Point 6, Comitology Agreement 2008).

Treaty Article 291 TFEU upon which the new comitology system is based only mentions control by member states and remains silent on possible control by European institutions such as the Council and the Parliament, let alone on inter-institutional information obligations supporting this. But since both legislative institutions were charged with designing the new post-Lisbon member state control system, this enabled the institutions to include such obligations in the eventual arrangement more or less in the same spirit as in the pre-Lisbon comitology arrangements. Including these obligations was mainly pushed by the European Parliament as opposed to the Council (Brandsma and Blom-Hansen 2011). The information arrangements supporting Parliamentary and Council control therewith effectively continue existing practices.

Delegated acts

Some executive measures are not simple, stand-alone measures, but rather amend or supplement 'non-essential elements' (i.e. annexes) of basic legislation. In the absence of any other control system before the entry into force of the Lisbon Treaty, such measures were subject to the comitology procedure, albeit with limited veto-power of the Council and the European Parliament from 2006 onwards. Effectively, this setup allowed the Commission and the member states to change annexes to co-decision legislation without involving Parliament. The Lisbon Treaty solved this matter by classifying such executive measures as 'delegated acts' (Article 290 TFEU), which allows the Commission to propose and adopt those acts unilaterally while equipping the Council and the European Parliament with extensive veto and revocation rights. In order to be able to scrutinize delegated acts effectively, the institutions agreed upon several procedures on exchange of information. These were agreed in multiple ways: by means of a trilateral common understanding, in the context of the Framework

Agreement between the Commission and the European Parliament, and in the form of a gentlemen's agreement between the Council and the Commission.

In order to be sure that the Commission would take into account seriously any input from the member states, the Council insisted on putting in place a system of national representatives committees similarly to comitology, only without voting power. After some inter-institutional debate a gentlemen's agreement was made that the Commission committed itself to systematically consult a system of special member state 'expert groups' before the adoption of every single delegated act (Brandsma and Blom-Hansen 2011). Although clearly meant to increase the influence of the member states on delegated acts, this special expert group system also serves as a signalling tool for the Council in order to decide at a later stage whether or not to use its veto right at the passing of a delegated act. The European Parliament, which had celebrated to have finally been relieved of comitology or anything similar, was not amused with the agreement. After warning the other institutions not to recreate comitology in this realm, it behind the scenes worked towards an agreement on information and participation rights balancing those of the member states. Through its multi-annual framework agreement with the Commission, it agreed that for all expert group meetings to which only representatives from all member states are invited, the European Parliament is sent the same documents as the participants. It may also request access to those meetings (Rule 15 and Annex 1, Framework Agreement 2010; Rules 12 and 13, Expert Group Communication 2010).

Besides this, the three institutions in parallel also concluded a tripartite common understanding on practical arrangements for the scrutiny of delegated acts. The information arrangements included in this common understanding are phrased vaguely. It, for instance, refers to the transmission of all 'relevant' documents on expert consultation into the Parliament's and Council's functional mailboxes, and to the establishment of 'appropriate contacts at administrative level' for a smooth exercise of delegated power (Common Understanding 2011). These two unspecific provisions basically continue existing practices of document handling that already existed in the comitology regime before Lisbon (Brandsma forthcoming), and also extend existing bipartite administrative contacts to tripartite ones.

The 'appropriate contacts at administrative level' date back to the period between 2001 and 2004, when extra information arrangements were made between the EP and the Commission for measures that relate to the financial services sector.

Through a letter from Commissioner Bolkestein, the Commission and the Parliament agreed to set up regular meetings between the two institutions: monthly meetings between the secretariat of the EP's committee on Economic Affairs and the Commission services in DG Internal Market, and regular meetings between the Commissioner and the coordinators and rapporteurs within the Economic Affairs committee (Commission 2001). Also, it was agreed that Commission officials would inform the EP of the discussions in comitology committees and that they would be obliged to answer any questions from the EP on such discussions, either orally or in writing. While these strong contacts will remain in force in the financial services sector (Point 17, Comitology Agreement 2008, Declaration 39, TFEU), the 2011 Common Understanding extends the practice of having regular contacts between the institutions to all policy domains.

Conclusion

The above shows that, in contrast to what one might expect when reading the Treaty provisions on information sharing, there in fact is a dense web of information arrangements between the institutions that, often coupled with existing or creatively interpreted political rights, equip the institutions with the necessary information and means to influence policy outcomes. These processes take place from the earliest to the final stages of the policy process. At the very beginning, before legislative initiatives are even presented to the Council and the Parliament, the Commission needs to make an annual legislative programme which is discussed and agreed upon inter-institutionally, and in which the European Parliament may even decide not to accept a legislative proposal that was not included in the original legislative programme. It has also arranged for it to be able to monitor, and at times even participate in, the Commission's preparatory expert groups in order to be both fully prepared when an initiative is finally presented, and to already influence the proposed bill before it is presented. In the legislative phase of the process, the Parliament has ensured that it is kept up to date of the developments in the Council also by charging the Commission with collecting information. It forces the Commission to communicate its opinion on Parliament's amendments before proceeding to its final vote in first reading, and it has put in place a dense system of informing MEP's of the

goings on in trilogue meetings. When executive measures are adopted, the European Parliament has secured scrutiny rights including information rights beyond the treaty provisions in comitology, and it can use the expert group system insisted upon by the Council to be informed of potentially veto-worthy cases in an early stage.

We thus see that major information arrangements have been set up, but that these mainly concern arrangements between the Commission and the European Parliament. The Council only has made more specific arrangements in the executive realm, including both comitology as well as the delegated act regime. In the preparatory and legislative stages, if at all, it has only made vague commitments to the European Parliament that are left unsanctioned if they are not abided by, and it has hardly put in place specific obligations on the Commission. This of course begs the question why it has chosen not to. The common explanation for the mushrooming of inter-institutional agreements with the European Parliament is that it threatens to use its political rights, such as budget approval and Commission appointment, in order to force the Commission to accept its demands (Stacey 2003). But the member states in the Council, in turn, have treaty change to their disposal as an instrument. On the other hand it is easier for the European Parliament to effectively use information from the Commission to make agreements with it already in the preparatory stages of policy making than it is for the Council, simply because the European Parliament is much less affected by shifting preferences as a result from government changes in the member states.

In sum, we thus observe that the information arrangements that have been put in place at least potentially equip mainly the European Parliament with stronger bargaining power, and even sub-constitutional changes to the balance of power in its own advantage in all phases of EU policy-making. The inter-institutional information regime benefits the European Parliament, which using inter-institutional agreements and rules of procedure as legal or semi-legal instruments makes the European Union parliamentarise by stealth. The question therefore is to what degree these provisions are put into practice on a day to day basis. Scattered previous research has shown a mixed picture for comitology and a more systematic use of information for delegated acts, as can be expected as an extrapolation of existing practices under the pre-Lisbon comitology system (Kaeding and Hardacre 2010, Brandsma forthcoming), and also a number of cases where the European Parliament has used its information rights

politically in the other phases of the European policy process. Its general conduct regarding trilogue negotiations remains the biggest question mark to date.

For a representative democratic system, in which popular control is mediated via the directly and indirectly elected legislative institutions, the number and density of inter-institutional information arrangements that was found is encouraging. From this perspective even trilogue decision-making, which is often said to lack transparency and accountability due to its secretive character, is open to input from non-participating members of parliament due to its many information disseminating systems. But balance between the institutions is far away in this. While, except for the executive phase, the Council stands by and watches, the European Parliament builds up a privileged position and the Commission is placed under strong obligations. On the basis of the inter-institutional information arrangements in place, in line with Jacqué (2004), one might even wonder whether especially the European Parliament pushes it too far. The dense system of inter-institutional information sharing equips it with powers that countervail those of the Commission. However, the formal and informal political rights to which this web is instrumental makes the legislative institutions closely interweave with the power they set out to control. The information regime in place, and mainly the parts that are coupled with specific informal political powers, shows once again that European Union policy-making works quite differently from its formal design.

Literature

Bergström, Carl Fredrik (2005), *Comitology: delegation of powers in the European Union and the committee system*, Oxford: Oxford University Press.

Bradley, Kieran (1992), "Comitology and the law: through a glass, darkly", *Common Market Law Review*, Vol. 29: 4, pp. 693-721.

Brandsma, Gijs Jan, Deirdre Curtin and Albert Meijer (2008), "How transparent are EU 'Comitology' committees in practice?", in: *European Law Journal*, Vol. 14: 6, pp. 819-838.

Brandsma, Gijs Jan (2010) *Backstage Europe: Comitology, accountability and democracy in the European Union*, Utrecht University: PhD Thesis.

Brandsma, Gijs Jan and Jens Blom-Hansen (2011), "The post-Lisbon battle over comitology: Another round of the politics of structural choice", working paper, available at www.uu.nl and www.ps.au.dk.

Brandsma, Gijs Jan (forthcoming), (title deleted), under review.

Corbett, Richard, Francis Jacobs and Michael Shackleton (2000), *The European Parliament,* 4th edition. London: John Harper.

Council of Ministers (2011), List of Council Preparatory Bodies, 1 February 2011, Ref. No. 5688/1/11 REV 1.

Curtin, Deirdre (2000), "'Citizens' fundamental right of access to EU information: An evolving digital passepartout?", *Common Market Law Review*, Vol. 37: 1, pp. 7-41.

Curtin, Deirdre and Albert Meijer (2006), "Does Transparency Strengthen Legitimacy? A Critical Analysis of European Union Policy Documents", in: *Information Polity*, Vol. 11: 2, pp. 109-122.

Eiselt, Isabella, and Peter Slominski (2006), "Sub-constitutional engineering: negotiation, content, and legal value of inter-institutional agreements in the EU", *European Law Journal*, Vol. 12: 2, pp. 209-225.

European Parliament (2009), Activity Report 1 May 2004 to 13 July 2009 (6th parliamentary term), PE 427.162.

Farrell, Henry and Adrienne Héritier (2004), "Interorganizational negotiation and intraorganizational power in shared decision making: early agreements under codecision and their impact on the European Parliament and Council", *Comparative Political Studies*, Vol. 37: 10, pp. 1184-1212.

Heald, David (2006), "Transparency as an instrumental value", in: Christopher Hood and David Heald (eds.), *Transparency. The key to better governance?*, New York: Oxford University Press, pp. 59 - 73.

Hix, Simon (2002), "Constitutional agenda-setting through discretion in rule interpretation: why the European Parliament won at Amsterdam", *British Journal of Political Science*, Vol. 32, pp. 259-280.

Hueller, Thorsten (2007), "Assessing EU strategies for publicity", in: *Journal of European Public Policy*, Vol. 14: 4, pp. 563-581.

Hummer, Waldemar (2007), "From 'Inter-institutional Agreements' to 'Inter-institutional agencies/offices'?", *European Law Journal*, Vol. 13: 1, pp. 47-74.

Jacqué, Jean-Paul (2004), "The principle of institutional balance", *Common Market Law Review*, Vol. 41, pp. 383-391.

Judge, David and David Earnshaw (2011), "'Relais actors' and co-decision first reading agreements in the European Parliament: the case of the advanced therapies regulation", *Journal of European Public Policy*, Vol. 18:1, pp. 53-71.

Kaeding, Michael and Alan Hardacre (2010), "The Execution of Delegated Powers after Lisbon. A timely analysis of the Regulatory Procedure with Scrutiny and its lessons for Delegated Acts", EUI Working Paper 2010/85, http://cadmus.eui.eu.

Kietz, Daniela, and Andreas Maurer (2007), "The European Parliament in Treaty reform: predefining IGCs through inter-institutional agreements", *European Law Journal*, Vol. 13: 1, pp. 20-46.

Kreppel, Amie (2003), "Necessary but not sufficient: understanding the impact of Treaty reform on the internal development of the European Parliament", *Journal of European Public Policy*, Vol. 10: 6, pp. 884-911.

Majone, Giandomenico (2000), "The credibility crisis of Community regulation", in: *Journal of Common Market Studies*, Vol. 38: 2, pp. 273-302.

Meijer, Albert, Deirdre Curtin and Maarten Hillebrandt (forthcoming), (title deleted), under review.

Naurin, Daniel (2007), *Deliberation behind Closed Doors: Transparency and Lobbying in the European Union*, Colchester: ECPR Press.

Öberg, Ulf (1998), "Public access to documents after the entry into force of the Amsterdam Treaty: much ado about nothing?", in: *European Union Online Papers*, Vol. 2: 8.

Puntscher Riekmann, Sonja (2007), "The cocoon of power: democratic implications of inter-institutional agreements", *European Law Journal*, Vol. 13: 1, pp. 4-19.

Stacey, Jeffrey (2003), "Displacement of the Council via informal dynamics? Comparing the Commission and Parliament", *Journal of European Public Policy*, Vol. 10: 6, pp. 936-955.

Stasavage, David (2004), "Open-door or closed-door? Transparency in domestic and international bargaining", in: *International Organization*, Vol. 58: 4, pp. 667-703.

Türk, Alexander (2003), "Transparency and comitology", in: C. Demmke and C. Engel (eds.), *Continuity and Change in the European Integration Process*, Maastricht: EIPA, pp. 175-198.

Van Schendelen, Rinus (2010), *More Machiavelli in Brussels*, Amsterdam: Amsterdam University Press.