

United or Divided We Stand? Perspectives on the EU's Challenges

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Measuring agents' discretion in trilogue negotiations

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— *this is a draft paper, please do not quote* —

1. Introduction

Trilogue negotiations have progressively become the major forum for legislative negotiation in the European Union. Trilogues are informal tripartite meetings between representatives of the co-legislators (the Council and the European Parliament) and the Commission. Their purpose is to reach an informal compromise that can be adopted as early as possible in the formal legislative procedure by the Council and the EP. Such 'early agreements' i.e. files concluded at either first or early second reading and based on an informal compromise negotiated between the co-legislators represent now the vast majority of the EU legislative procedure. In trilogue both the Council and the EP delegate the task to negotiate a compromise. For the Council, the representative is the rotating Presidency whereas a negotiation team led by the rapporteur represents the EP. Trilogue are secluded and restricted. Moreover both institutions are constrained in their action as the negotiated deal is presented on a take it or leave it basis to them. This puts the negotiators present in trilogue in a central position in the legislative procedure; raising the question of the discretion they enjoy vis-à-vis their institutions when negotiating compromise.

Trilogues can be seen as a double principal agent relationship where both institutions as principals delegate to the negotiators as agents the responsibility for informally resolving legislative disputes to allow an early adoption of the legislation. The issue

of discretion enjoyed by the agent when executing their task is central in the principal agent theory. A crucial point is that the discretion enjoyed by an agent depends on the control mechanism activated by the principals. As controlling the agent has a cost for the principal, the level of control activated by the principals is assumed to be based on a cost-benefit analysis. This cost-benefit analysis varies between acts of delegation, leading to different level of discretion for the agents. Hence the level of discretion enjoyed by the agents in trilogue may also vary between legislative files, as each trilogues negotiations represent a different act of delegation.

The aim of this paper is to develop and apply a tool to empirically measure the discretion enjoyed by the agents in trilogues vis-à-vis their institutions. Then this measure will allow explaining the level of this discretion by testing explanatory factors in a large-n statistical analysis. Discretion is defined here as “the range of potential independent action available to an agent after the principals have established mechanisms of control” (Hawkins, Lake et al. 2008). The measure of discretion consists in an index measuring the difference between the mandates from the Principal and the outcome negotiated by the agent. This index is designed to be use as dependent variable of the model explaining discretion while the independent variables will be the factors that are theoretically supposed to affect the cost-benefit analysis of the principal, on the basis on the principal agent theory and on a review of the literature on early agreements. The index is tested here on a sample of X recent trilogue procedures. The empirical data for the index comes from the official documents from the institutions.

This issue of agents’ discretion in trilogue is normatively relevant as it contributes to the debate on the democratic legitimacy of the European Union legislative decision-making. Indeed this legitimacy is, inter-alia, rooted in the public control of the procedure and the accountability of the legislators to their constituents (Lord 2013). However, this accountability link may be undermined when a handful of individuals take the final decision in secluded trilogue. This seclusion does not allow for public debates justifying the decision taken and reduce the range of opinion that can be heard within the institutions (Reh 2014, Jensen and Martinsen 2015). Therefore, studying discretion of the participants in trilogue vis-à-vis their whole institutions is important for a better assessment of this accountability link.

The paper is structured as follows. I will first present the principal agent modeling of the informal policy-making process and the theoretical factors explaining agency discretion. Section 3 provides an overview of the state of the art on early agreements and trilogues in EU legislative decision-making. It particularly focuses on the literature that deals with agency discretion in trilogues and on the limits of this literature. Section 5 discusses the existing methods to measure agent discretion. I then develop the 'discretion index' and how I construct it. Subsequently, section 6 applies the discretion index to a sample of recent early agreements. Section 7 introduces potential independent variables to be included in the model explaining the discretion of the agents. Eventually, Section 8 presents the conclusions.

2. Trilogue negotiations as double principal agent relationships

Trilogue negotiations can be understood as consisting of two parallel principal agent relationships. A principal agent relationship occur when "one (set of) actor(s) [the agent, here the negotiators in trilogues] is acting on behalf of another (set of) actor(s) [the principal, here the Council and the responsible Committee within the European Parliament]" (Delreux 2011). In the case of trilogue, both the Council and the responsible committee are 'collective principal' as they have a single contract with the agent but are "composed of more than one actor" (respectively the Member states and the MEPs) (Nielson and Tierney 2003). Principal agent model is useful to understand both the decision and the setting of the delegation (the politics of delegation) and the actual game played by principals and agents once the act of delegation has been established ('the politics of discretion') (Delreux and Adriaensen forthcoming). According to the principal agent model, principals decide to delegate a task to the agent because it generates functional benefits (Pollack 2003). In trilogue the negotiating agents are delegated the task reach a compromise with the other institution in order to reduce the transaction costs of bargaining between the two legislative bodies.

The discretion enjoyed by the trilogue negotiators is the result of delegation of negotiation authority by their institutions. Discretion is defined here as "the range of potential independent action available to an agent after the principals have established mechanisms of control" (Hawkins, Lake et al. 2008). In the principal agent model, the discretion enjoyed by an agent is a function of the level of control

activated by the principal (Delreux 2009) and of the agent behavior during the execution of the delegated act (Hawkins and Jacoby 2006, Delreux and Kerremans 2010). Indeed delegation does not only come with benefit for the principal but also with costs. Agency costs occur when agents pursue policy outputs that do not correspond to the principal's preferences. In front of these cost, principals are not helpless as they can establish control mechanisms to avoid a gap between what the principals want and what the agents do and thus maintain the benefit of delegation. However controlling the agent also has a cost for them as Principals have to invest resources to activate and employ control mechanisms. Hence, the level of control activated by the principals is assumed to be subject to a cost-benefit analysis. This cost-benefit analysis depends of conditions that are external and internal to the delegation relation. Furthermore, agent can also try to increase his autonomy by affecting the cost and thus the principal incentive to control (Delreux and Kerremans 2010).

When negotiating in trilogues, agents face several control mechanisms. Generally three kinds of control mechanisms are at the disposal of the principal: *ex ante*, *ad locum*, and *ex post* control. They respectively take place before, during and after that the agent executes the delegated task. In trilogue both agent face the same *ex-ante* control mechanism. To enter trilogues they need to be authorized to start informal negotiations by the COREPER and the competent committee. Moreover they are also given a mandate as basis for negotiation which takes the form of committee report for the EP and negotiation mandates from the COREPER for the Council. Mandates contain the principals' preferences concerning the Commission proposal. Regarding *ad locum* control, the design of both principal agent relationships differs. While the EP has developed such mechanism to scrutinize the work of the agent on the spot the Council has not. Indeed during trilogues meetings the rapporteur is accompanied by other MEP, including the Committee chair and the shadow rapporteurs. They form a negotiation team, collectively responsible for the negotiation. In the Council, the Presidency remains the sole negotiator, together with staff from the secretariat.

After agents have reached a compromise both Principal have yet to formally adopt it to close the procedure. Hence agent cannot take formal decision, principals keeping the final decision and thus a capacity of *ex-post* sanction by rejecting agents' agreement. This possibility is crucial. Because when the cost of non-agreement is

high for the agent, “the mere threat of this ex post sanctions creates ex ante incentives to cow [. . .] agents into submission” (Epstein and O'Halloran 1999). However the Principals choice toward a compromise is not unconstrained. He has to chose on a take it or leave it basis. Either he accepts the agent proposal either he refuses it but he cannot modify it. If one of the collective principal does not vote the compromise as its formal position, the agreement falls off and the procedure continues in the second reading. Such rejection is not costless for the Principal. It entails political and transaction costs and increases the uncertainty regarding the final output (Costa, Dehousse et al. 2011, Bressanelli, Koop et al. 2016). Hence whereas both institutions retain the formal possibility to reject or modify the compromise it is not necessarily a feasible strategy as the principals' decision regarding the agents agreement not only depends of to what extend it differs from its preferences but also of the cost to reject it.

3. Agents discretion in trilogue negotiations: What do we know so far?

The literature on trilogue negotiations soon identified the issue of the agent empowerment inside his institution, suggesting high levels of discretion. The relais actors thesis developed by Farrell and H eritier (2004) argued that the informalization of the legislative process had empowered the participating agents (the so-called relais actors), increasing their influence on the outcomes of negotiations. The restriction and the seclusion of trilogue allowing them “to control the flow of information from their own organization to the other and vice versa” (Farrell and H eritier 2004) and act as gatekeeper “using this brokerage position to their advantage by emphasizing [...] opposition to policy initiatives they would prefer to block, and by de-emphasizing [...] opposition to policy initiatives they would prefer to promote” (Costello and Thomson 2010). Studies on trilogue also emphasized that both institutions responded differently to theses shifts in the internal power balance (Naurin and Rasmussen 2011). While the Council has been able to mitigate the agency cost due to trilogue, this consequence of the informalization of the procedure was seen as much stronger within the EP. Especially EP rapporteurs were identified as the bigger winner of informalization (Benedetto 2005, Rasmussen and Shackleton 2005, Costello and Thomson 2010), facing little control in first reading and thus as having a “quite extraordinary latitude to set the agenda of negotiations” (Farrell and H eritier 2004).

More recently, the influence of the relais actors in the legislative process has been de-emphasized in the literature. Several studies did not find empirical evidences that early agreements are beneficial for the political group of the rapporteur nor the presidency (Judge and Earnshaw 2011, Häge and Naurin 2013, Rasmussen and Reh 2013). Moreover the spread of trilogues has generated a strong contestation within the EP leading to several reforms of the EP rules procedure with the aim of to increase the control of negotiation authority and information flow (Héritier and Reh 2012). These reforms have progressively decreased the discretion enjoyed by the rapporteur, including by broadening the EP negotiating team and by reinforcing the role of the responsible committee in trilogue negotiations (Reh 2014, Roederer-Rynning and Greenwood 2015). Yet literature still identified the EP rapporteur and the Council Presidency as the major actors in inter-institutional negotiations (Jensen and Winzen 2012, Finke and Han 2014, Smeets and Vennix 2014) as they remain the “central actors to reconcile difference between and within institutions” (Dyrhaug 2014). Moreover Kurzer and Cooper (2013) reaffirmed the importance of the rapporteur and their ability to influence legislative outcomes. Similarly Burns (2013) found that in case of conflict between associated committees, the final outcome was closer to the rapporteur position than to that defended by its committee. Eventually Brandsma (2015) re-underlined ‘the relevance attached to relais positions’ and their ‘potential to speed up or slow down legislative processes’.

In sum, the literature on early agreements provides a contradictory picture regarding the discretion enjoyed by the Presidency and the EU negotiating team in trilogues. Furthermore, existing studies present major shortcomings. Firstly, the existing literature mainly compares early agreements with legislation concluded either in second reading or in conciliation whereas the latter is increasingly becoming a rare event as in the 7th EP 84% of the EU legislative files are adopted through early agreement (European Parliament 2014). Secondly, existing literature analyzing agency discretion empirically in trilogue is biased toward the most salient and controversial files, as most of the works are limited to conflictual case studies, whereas the salience of the file for a principal is an explanative factor of discretion. An exception to the case studies is the article of Rasmussen and Reh (2013) which empirically test the relais actors thesis in a large-n design using the DEU dataset. However, this dataset includes again salient files only, with a very limited number of

files for the EP (13 legislative files). Moreover, the preference of the rapporteur is approximated by the preference of his political group whereas Costello and Thomson (2010) showed that “To the extent that rapporteurs influence the EP’s opinions, they appear to be motivated by national interests” . Similarly they use the presidency preference as proxy for the presidency success whereas several studies (Elgström 2006, Niemann and Mak 2010, Warntjen 2013) on presidency show that presidency success “is generally defined by the amount of progress it manages to achieve in those issue area(s) on which it chooses to focus its attention” (Smeets and Vennix 2014). Hence there is a lack of large-n comparison of discretion between trilogue negotiations which would allow to shed light on this contradictory picture by assessing the variation of and by identifying the conditions under which the agent enjoys a high or rather low level of discretion.

To fill this gap this paper develops a ‘discretion index’ measuring the discretion enjoyed by the agent to go beyond his mandate when negotiating a file. The index assesses the discretion by measuring the extent to which the agent, in the execution of his task, deviates from the initial instructions by the principals. This aims to allow carrying out a large-n comparison of discretion using the index as dependent variable. By doing so this project mitigates the saliency bias by comparatively studies all the legislative files negotiated through trilogues, including less salient files. Examining the entire population will not only allow me to identify the conditions under which a particular level of discretion is enjoyed by agents, but it will also give the findings a high level of external validity. It also allows opening the black box of trilogue by examining variation between trilogue negotiations rather than comparing with the formal procedure. Further, by developing a systematic measurement tool to quantify discretion, that can be used beyond trilogue negotiations, it will contribute to the principal agent literature in the EU field that are mostly limited to single case studies.

4. Existing measurements of agents’ discretion

To a large extent, principal agent studies assess agent discretion through qualitative case studies (e.g. Delreux (2009) Graham (2013) Da Conceição (2010)). Yet quantitative methods to measure discretion have also been developed to compare and explain the discretion enjoyed by agents in large-n designs. These methods have

mainly focused on explaining the discretion enjoyed by organizations (such as regulatory agencies, bureaucracies or international organizations) by measuring discretion by analyzing the delegation acts giving them authority. In this perspective, scholars have measured discretion by creating indexes weighting the authority delegated to an organizations by the constraints imposed during the execution of the delegated tasks (see for instance Epstein and O'Halloran (1999) and Franchino (2007)). Similarly, Huber and Shipan (2002) assessed discretion by the detail of the legislative act delegating power. On this basis, more complex empirical measures have been further developed, combining a large amount of parameters including the human and financial resources enjoyed by the organizations (e.g. Brown (2010), Hanretty and Koop (2012), Bauer and Ege (2016)).

These measures of discretion based on the delegation acts present however major shortcomings to assess agent discretion in the context of trilogue negotiations. Indeed as the delegation acts from the institutions are similar for every informal negotiation, analyzing them does not allow comparing agent discretion between trilogues. Moreover focusing on the discretion given ex-ante to the agents does not allow to assess the actual discretion enjoyed by the agents during the execution his task. As result of the cost-benefit analysis presented above, control mechanisms available for the principal in the delegation act may not be activated. Further, ex-ante assessment of agent discretion does not take into account the behavior of the agent as source of discretion whereas principal agent literature has shown that 'agents matter' in explaining the discretion they enjoy (Hawkins and Jacoby 2006, Delreux and Kerremans 2010).

5. Constructing the 'discretion Index'

I operationalize the discretion enjoyed by an agent for a large-n analysis by constructing a discretion index. This discretion index gives a discretion score for each agent in each legislative file negotiated through trilogue. To assess discretion the index measures the extent to which the agent, in the execution of his task, deviates from the initial instructions from his principals. In other words, the index makes a comparison between the mandate given by the principal and the final agreement negotiated by the agent and it calculates how much the latter deviates from the former. By doing so it measures discretion as the extent to which the agent is able to

carry out independent actions regarding the principal preference by going beyond the mandate when reaching an informal agreement. Here I make the assumption that the principal mandate represents his policy preference regarding the Commission Proposal. Thus the discretion score depends on the degree of difference between both texts: more the final outcome deviate from the mandate; more the agent is considered as having a large discretion and vice versa.

The discretion index is constructed through a three-stage process. First I structure the mandate into units of analysis. Second, I carefully compare both texts (mandate and negotiated compromise) to count all the mandate unit of analysis modified in the final compromise. Third, I divide the number of changes by the total number of units of analysis present in the text to have the discretion score enjoyed by the agent for this legislation. Hence the discretion score is measured with the following formula:

$$D_{ij} = \frac{NUm}{NU}$$

Where D_{ij} is the discretion (D) enjoyed by an agent i (either the EP or the Council agent) for a legislation j , NUm is the number of the mandate's units of analysis modified in the final compromise and NU is the total number of units of analysis in the mandate. Thus discretion scores may vary from 0, when the agent does not enjoy any discretion as he just followed the mandate, to 1 when the agent enjoy maximum discretion in executing his task as he modified all the principal mandate.

I use the paragraph present of the mandate as unit of analysis. Hence I count a change when a paragraph from the mandate is modified in the final compromise and I divide the number of changed paragraphs by the total number of paragraphs present in the mandate, following the formula above. I do not use the proposed amendment in the mandate nor the articles of the legislation as unit of analysis, unlike previous scholar (Tsebelis, Jensen et al. 2001, Häge and Kaeding 2007, Hurka 2013). Indeed articles can be very large and can include different issue, especially in file modifying existing legislations as all the modifications may be included in one article. Moreover institutions "often consider all changes to one article to be one amendment, although they might touch on very different subjects" (Kasack 2004). Hence by using these units of analysis, a minor modification in an article or

amendment while the majority remains unchanged would be considered as a change for the whole article/amendment, leading to an overestimation of the degree of discretion. Thus using the paragraph as unit of analysis offer a more nuanced measure of the differences between mandate and compromise.

An example of how file are divided in unit of analysis to construct the index is given by the amendment 30 of the EP mandate for the procedure 2013/0239(COD)¹ which states : *“2a. Member States shall establish plans for inspections aimed at checking compliance with this Regulation. The plans shall cover the entire geographical territory of the Member State concerned and shall apply to inspections carried out pursuant to paragraph 2. Those plans shall include the following:*

(a) strategy and objectives for waste shipment inspections referring to the necessary human, financial and other resources;

(b) a risk assessment covering specific waste streams and sources of illegal shipments, and, where relevant, taking into account intelligence-based data such as police investigations and analyses of criminal activities. Details of the risk assessment shall be presented in such a way as to avoid compromising the sources of intelligence-based data”. Indeed whereas it is counted as a sole amendment in the EP report, I distinguish between 3 units of analysis that can potentially be counted as changed: the introduction and the point (a) and (b).

Regarding the coding procedure of the first step, a unit of analysis is coded as modified when the compromise change the substantive content of the unit, including by removing or adding paragraph to the mandate. In other words, I do not code as change a modification in the wording of a paragraph if the content remain similar. The article 4.b(i) of the procedure 2014/0096(COD)² gives an example of change in the wording without substantive change. The EP mandate read *“(b) in the case of products marketed as mixtures: (i) the words ‘mixture of ...’ followed by the names of the **different products which make up the mixture, in decreasing order of weigh**”.* Which became in the final compromise: *“(b) in the case of products marketed as mixtures: (i) the words ‘mixture of ...’ followed by the names of the **different products of which the mixture***

¹ Commission proposal for a Regulation of the European Parliament and of the Council amending regulation (ec) no 1013/2006 on shipments of waste which states

² Commission proposal for a directive of the European Parliament and of the Council on the approximation of the laws of the member states relating to caseins and caseinates intended for human consumption and repealing Council Directive 83/417/EEC

is composed, in decreasing order of weight". While the sentence changed, the intention remained the same i.e. to consider the products composing the mixture.

On the contrary an example of substantive change is given by the procedure 2013/0239 (COD)³. The Council mandate states in the amendment 17 that: *"The Commission shall adopt delegated acts in accordance with Article 59 concerning technical and organizational requirements for the practical implementation of electronic data interchange for the submission of documents and information"* which became in the compromise *"With a view to facilitating the implementation of this paragraph, the Commission shall, where feasible, adopt implementing acts establishing the technical and organisational requirements for the practical implementation of electronic data interchange for the submission of documents and information.* The change of from 'delegated act' to 'implementing act' is counted as a substantive change, as it is change regarding the content in the mandate as it change the implication of the unit in the enforcement of the legislative act.

This binary way of coding (Substantive modification versus no modification OR modification in the wording) is chosen to simplify the interpretation and avoid as much as possible arbitrariness while coding. Of course it is arguable that either the importance or the degree of change of subdivisions vary. However such assessment would require a deep technical knowledge on the issue treated by the file and a clear method to class subdivision. In the absence of these conditions, as for quantitative data collection, any judgment would be highly subjective. Furthermore, the presence of a single coder does not allow comparing the coding results. Using a binary assessment and regarding all unit of analysis of the mandate as being of equal importance represent thus the second-best solution. While losing nuance, this method allows limiting the arbitrariness of the coding and thus minimizing the errors. Indeed it is relatively easy to determine roughly whether the content of a unit of analysis was modified or not and the dichotomous separation is rather unambiguous. Moreover, having in mind the second stage, from a mathematical point of view binary values are more validly summed to have the legislation score than ordinal ones where distances between values can be different.

³ Commission Proposal for a regulation of the European Parliament and of the Council amending regulation (ec) no 1013/2006 on shipments of waste

When the same change is repeated in several units of analysis, it is counted only as one change to not artificially increase the agent discretion score. The rationale behind this choice is that a repeated change represents only one independent action repeated several times. The repetitions are just adaptations of the text to be coherent with the first move beyond the mandate, but not further modification. Similarly, all modifications to make the text coherent following a first change are not counted if they do not bring further modifications. For instance in the negotiation regarding the 2014/0011 (COD)⁴ establishing a market stability reserve for the EU's emission trading scheme, the starting date of the reserve was changed regarding the Council mandate, moving from 2021 to 2019. So I count every citation of the new starting date as only one change. Also I do not count changes in other dates as changes if they are only adaptations to this first change, i.e. in the market stability reserve Decision when a change advances a date two years to adapt to the new starting year.

Moreover, a change in the location of the subdivision is considered as a wording change and hence not counted either, because this does not bring a substantive change in the content as defined above. This also holds true when a unit of analysis in the mandate is split into different points in the compromise but the content is kept. Hence, in doing the index it is necessary to look at the whole two texts to assess if a modification is substantive or if it is just a change in the location.

In the second stage, the total number of modified units of analysis is divided by the total number of units of analysis present in the mandate to obtain the discretion score enjoyed by the agent for this legislative file. Weighting the number of modified units of analysis for each file allows to compare between files of different sizes and thus to build the statistical model. I chose to divide by the total number of subdivisions rather than the number of amendments to the Commission Proposal because I deem the whole mandate as being the principal preference and not just the amendments brought to the Commission proposal. I consider here that if a principal does not modify a point in the Commission proposal that means that the point corresponds to his preference. Hence if the agent modifies it later he or she goes against his principal will. Limiting the count to the amendments would thus not take into consideration all this point, whereas they are also part of the mandate that the

⁴ Commission Proposal for a Decision of the European Parliament and of the Council concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading scheme and amending Directive 2003/87/EC

principal want to see realized. Moreover, the amendment voted in committee do not necessary represent all the point on what the relais actors have preferences as they can be in favor of outvoted proposed amendments.

In sum two types of databases are created. For each legislative file, a database is created containing as row all the modified units of analysis. For each row, the columns show the original text in the mandate; the text in the final compromise and the location of the subdivision in both documents. Moreover, to allow for the maximum of transparency, a column also gives the justification for all units counted as modified. In the justification I explain why I counted this unit of analysis as substantively modified by showing the difference between the mandate and the final agreement. By doing so, I ensure that my method and my choice can be controlled and can be consistently applied to the entire dataset. For instance, in the first change presented above the written justification to count it as a change is "*change from delegated act to implementing act*".

Afterward another database is created with legislative files as row and containing, for each files, columns with the discretion score for this file for both agents (i.e. the number of modification divided by the total number of subdivisions) as dependent variable and the values for all the independent variables which are presented in the next section. This second database will allow conducting a large-n analysis of discretion by building explanative statistical model testing the influence of the theoretically constructed independent variables on the discretion index measuring discretion.

Regarding data collection for the index, generally both mandates as well as the final compromise are publicly available. The EP mandate is the responsible committee reports (Art 74 of the rules of procedure). Reports are publicly available via the EP legislative observatory website Council mandate is the COREPER position for trilogue. They are mostly public and available via the public register of the Council. When they are not public, they can be obtained through access to documents procedures). Eventually, final agreements, as adopted in first reading, are also publicly available via the EP legislative observatory website. The data used to construct the index and the relationships between them are summarized in the table 1.

Table 1: Data used for the index

Concept	Data used
(1) EP Mandate	Responsible Committee report
(2) Council Mandate	COREPER position for trilogue
(3) Agent's compromise	EP first reading position
(4) EP agent discretion	Comparison (1) and (3)
(5) Council agent discretion	Comparison (2) and (3)

6. Application of the index

To give an illustration of the 'discretion index', I applied it to five recent early agreements. To assess that a file was negotiated through trilogue, I used two strategies: first I check on the procedural files in the Legislative Observatory if the EP takes the decision to open interinstitutional negotiation in first reading; second I check in the public register of the Council if the COREPER issued a mandate for trilogue negotiations. The sample of procedures was randomly selected. The five cases selected are the negotiation regarding the procedures 2014/0096 COD⁵; 2013/0133(COD)⁶; 2013/0239 COD)⁷; 2014/0011 (COD)⁸ and 2013/0150 (COD)⁹.

The table 2 below gives for all the selected procedure the number of units of analysis counted, the number of modified unit of analysis and the resulting discretion index score, computed following the formula above. Similarly the figure 1 shows visually the discretion scores of both agents for each case. Eventually the table 3 provides

⁵ Directive (EU) 2015/2203 of the European Parliament and of the Council of 25 November 2015 on the approximation of the laws of the Member States relating to caseins and caseinates intended for human consumption and repealing Council Directive 83/417/EEC

⁶ Regulation (EU) No 544/2014 of the European Parliament and of the Council of 15 May 2014 amending Council Regulation (EC) No 302/2009 concerning a multiannual recovery plan for Bluefin tuna in the eastern Atlantic and Mediterranean

⁷ Regulation (EU) No 660/2014 of the European Parliament and of the Council of 15 May 2014 amending Regulation (EC) No 1013/2006 on shipments of waste

⁸ Decision (EU) 2015/1814 of the European Parliament and of the Council of 6 October 2015 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading scheme and amending Directive 2003/87/EC (Text with EEA relevance)

⁹ Regulation (EU) No 334/2014 of the European Parliament and of the Council of 11 March 2014 amending Regulation (EU) No 528/2012 concerning the making available on the market and use of biocidal products, with regard to certain conditions for access to the market.

descriptive statistics of the results for these cases. The discretion score for the EP varies from to with a mean of. For the Council it varies from to with a mean of.

Table 2: Discretion score for the five cases

Procedure	EP agents			Council agents		
	Unit of analysis in the mandate	Modified unit of analysis	Discretion score	Unit of analysis in the mandate	Modified unit of analysis	Discretion score
2014/0096(COD) Caseins and caseinates intended for human consumption	45	22	0.489	41	4	0.097
2011/0144(COD): Fish stock conservation: multiannual recovery plan for bluefin tuna in the eastern Atlantic and Mediterranean	20	5	0.25	20	3	0.15
2013/0239(COD) Shipments of waste: legality of shipments	65	35	0.54	66	17	0.26
2014/0011(COD) Union greenhouse gas emission trading scheme: establishment and operation of a market stability reserve	31	13	0.42	25	10	0.4
2013/0150(COD) Making available on the market and use of biocidal products: conditions for access to the market	80	12	0.15	74	13	0.17

Figure 1: Discretion score for the five cases

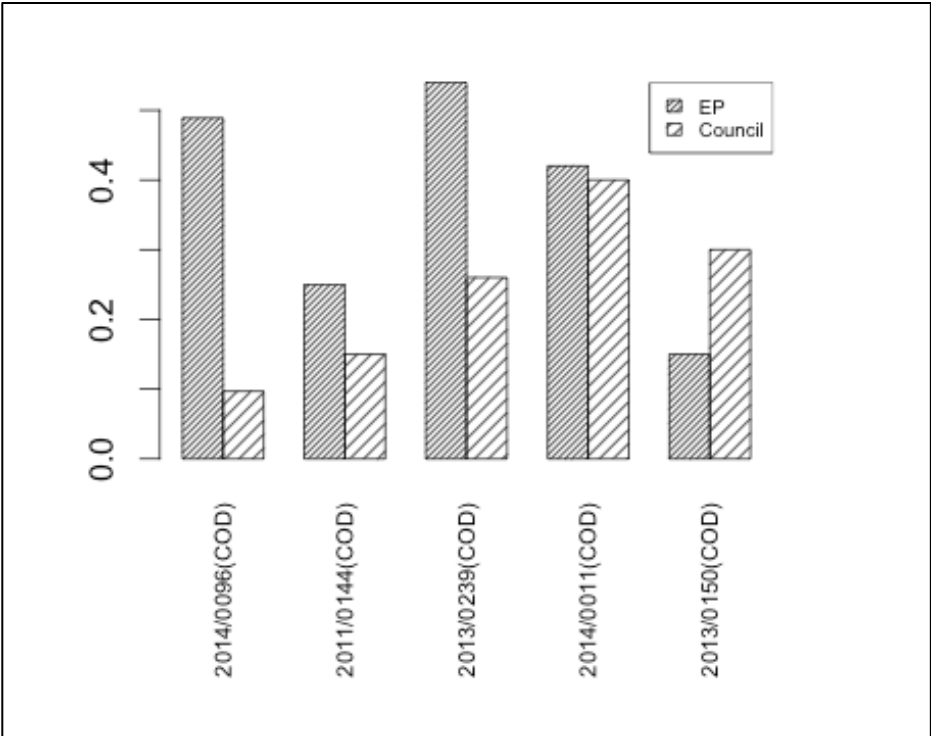


Table 3: descriptive statistics of the five cases

Variable	Maximum	Minimum	Mean	SD
EP agents				
Unit of analysis in the mandate	20	80	48.2	24.47
Modified unit of analysis	5	35	17.4	11.54
Discretion score	0.15	0.54	0.37	0.16
Council agents				
Unit of analysis in the mandate	20	74	45.2	24.09
Modified unit of analysis	3	17	9.4	5.94
Discretion score	0.097	0.4	0.216	0.12

7. Independent variables

In order to explain the discretion enjoyed by an agent while negotiating informally, sixth independent variables will be included in the research design. They are selected on the basis on the principal agent theory and on the review of the literature on early agreements. For all dependent variable I present first the theoretical underpinning, then the resulting hypothesis and eventually a proxy to measure it empirically. The empirical measurements are mostly based on the existing quantitative literature on the ordinary legislative procedure.

First there is a broad consensus in the principal agent literature that the level of preference homogeneity within a collective principal affects the direction enjoyed by an agent (Delreux 2011, da Conceição-Heldt 2013, Sobol 2015). Preference heterogeneity creates a collective action problem for the principal, hindering the activation of available control mechanisms (Nielson and Tierney 2003). Moreover when principal have to take majority decision, as for both institutions in the Ordinary legislative procedure, it may allow the agent to find the more favorable winning coalition to adopt compromise maximizing his preferences. Hence my first hypothesis is h1: *the more a principal is internally divided, the higher the discretion enjoyed by the agent*. For the EP “Homogeneity of preference” will be measured here by using the vote in committee to adopt the report as mandate before enter trilogue negotiations. A contested vote will be regarded as low preference homogeneity in the competent committee. For the Council, in the absence of ex-ante vote, this variable will be measured using the number of preparatory meetings before adopting the mandate. A high number of preparatory meetings will be considered as a low level of preference homogeneity.

Second, the preference homogeneity between principal and agent will be also considered. The impact of preference heterogeneity between principal and agent is a classic explanation of agent discretion in the principal agent theory (Miller 2005, Shapiro 2005). Different preferences between principal and agents give the latter incentive to increase its discretion in order to maximize his preferences. Yet, goal conflict may not always exist between principals and agents as they can share the same preferences (Waterman and Meier 1998, Delreux 2011). Consequently it is necessary to include goal conflict as a variable in the model, rather than a constant. Hence my second hypothesis is h1: *the more agent and principal have different preferences, the higher the discretion enjoyed by the agent*. For the EP, goal conflict between principal and agent will be measured by the number of proposed committee amendments modifying the rapporteur draft report, considered as representative of his preferences (Brandsma 2015). Similarly for the Council, this variable will be measured by the number of number of modifications to the first presidency compromise text.

Third, the political resources at the disposal of the agent also have an impact on discretion. More an agent has such resources more he can invest to increase his discretion, inter alia by increasing the information asymmetry between him and his principal. Information asymmetry in favor of the agent allows him to act as gatekeeper vis-à-vis his principal and thus increase his discretion (Miller 2005, Shapiro 2005, Delreux 2011). Furthermore early agreement as well as Council literature showed that rapporteur close to big political group (Farrell and Héritier 2004) as well as big member states (Rasmussen and Reh 2013) has more capacity to increase their discretions by securing favorable winning coalition. Hence my third hypothesis is h3: *the more the agent has political resources, the higher the discretion he enjoys*. Following Brandsma (2015), the political resource at the disposal of the EP agent will be measured by the number of seats of the rapporteur' political group. For the Council' agent, the political resource will be measured by the voting power of the Presidency (using power indices (cf. Pajala and Widgrèn (2004))).

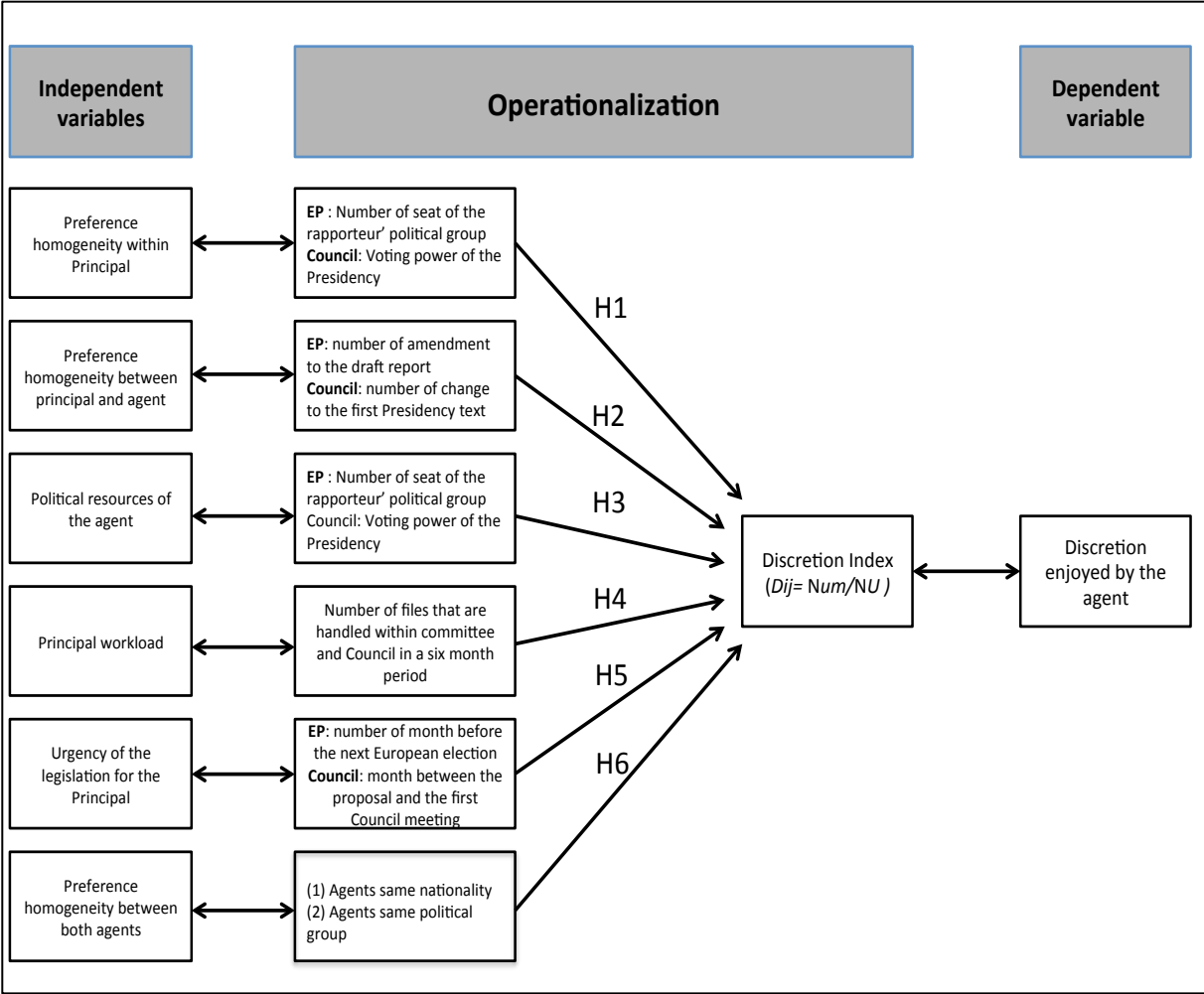
Fourth, the agent discretion can also depends on the principal workload during the negotiation. Because principal only has limited resources, when his workload increases he can devote less resources per delegation in activating control. Thus "A

high workload pushes the costs of information gathering up” (Reh, Héritier et al. 2013) increasing the discretion of the agent. Consequently my fourth hypothesis is *h4: the more a principal has workload, the higher the discretion enjoyed by the agent*. The workload of a principal will be measured by the number of files that are handled within committee and Council configuration in a six months period (i.e. during a presidency) (Rasmussen 2011, Reh, Héritier et al. 2013).

Fifth, principal may be more willing to give the agent more discretion if the file is urgent for him. Indeed the political cost of no-agreement increases for a principal when the file is urgent for him (Rasmussen 2011, Reh, Héritier et al. 2013). However with a larger discretion, the agent can more easily find a compromise deal with his counterpart by going beyond his mandate. Thus principals have to do a trade off between the speed of the process and the control on his agent. When a file is urgent this trade-off may lean toward the former. Hence my fifth hypothesis is *h5: the more a file is urgent for a principal, the higher the discretion enjoyed by the agent*. The urgency of a file for the EP will be measured by the number of months between the proposal and the next European election (Reh, Héritier et al. 2013). The urgency of a file for the Council will be measured by the months between the proposal and the first COREPER meeting.

Eventually the preference homogeneity between the two agents can also be determinant in the discretion they enjoy. The rationale behind this argument is that if the agents share similar preferences they can collude to maximize their common preferences at the expense of their respective principals. Literature on early agreement has emphasized the effect of the coherence of both agents’ preferences in the likelihood to conclude early in the process (Rasmussen 2011, Rasmussen and Reh 2013, Reh, Héritier et al. 2013, Dyrhaug 2014) as well as the risk of collusion that this coherence may entail (Farrell and Héritier 2004, Bressanelli, Koop et al. 2016). Hence my sixth hypothesis is *h6: If both agents have similar preference, they enjoy higher discretion*. Two kinds of possible preferences proximity are taken into account here, the political preferences and national preferences. Thus this hypothesis is operationalized by two measures: (1) if the rapporteur and the presidency have the same nationality or not and (2) if they belong to the same political group or not. Figure 1 summarizes the variables, their proposed operationalization and the hypothesis.

Figure 1: Dependent variables, independent variables, operationalization and hypothesis



8. Conclusion

The purpose of this paper was to develop an empirical tool to measure negotiator’s discretion in trilogue negotiations. This empirical tool will allow conducting a large-n comparison of trilogues in order to explain the discretion actually enjoyed. Discretion is understood here in a principal agent perspective as “the range of potential independent action available to an agent [here the negotiators] after the principals [here the institutions] have established mechanisms of control”. To empirically assess the discretion enjoyed by the agents in trilogue this paper constructed a discretion index which measures the extent to which agents deviate from the initial instructions by the principals. ‘This discretion index’ is based on a comparison between mandates given by the principals and final agreements negotiated by the agents. The paper then applied the ‘discretion index’ to five recent trilogue negotiations to obtain the ‘discretion score’ of both agents for these trilogue negotiations. Eventually this paper also presented six potential independent

variables as well as proposed measurement of these variables. They aim to be included, together with the discretion scores, in the statistical model to explain the discretion enjoyed by the agents in trilogue.

While this quantitative analysis allows explaining the actual level of discretion, it does not allow coming to a more nuanced understanding of the sources of discretion. To do that, a qualitative analysis is needed to refine and explain the statistical results. Hence the index developed here is aimed to be part of a larger general research strategy consisting of a mixed-methods sequential explanatory design (Creswell and Plano Clark 2011). This method consists in collecting and analyzing first quantitative and then qualitative data in two consecutive, but connected, phases within one study. The rationale of such a two-step approach is that the quantitative step is employed to detect empirical regularities and pattern on the cross-case level, while qualitative design allows to “discern the causal mechanisms that give rise to the political outcome of interest increasing the validity and allowing for a robust empirical underpinning of causal explanation” (Fearon and Laitin 2008). More specifically, in the second, qualitative, step I plan to use process tracing techniques to assess and deepen the quantitative results and thus to discover the causal mechanisms between the variables.

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