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Bending the rules: Arrangements for sharing technical and political information between the EU institutions

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Abstract: The European Union is typically modelled as a separation of powers system. Within this context, this article focuses on the exchange of technical and political information on policy-making between the EU institutions. Even though only very few formal rules are specified in the treaties and in legislation, the institutions, and mainly the European Parliament, have improved their institutional position through creative interpretation of these formal rules, resulting in a set of codified quasi-formal rules coupled with the institutions' political rights. This article presents a comprehensive overview of this and demonstrates that the quasi-formal rules give the European Parliament a privileged position across the policy process, which for the greater part is not matched by the Council. The political power of the inter-institutional information regime has made the European Union parliamentarise by stealth.

Keywords: Institutionalism; legislative procedure; constitutional change; political science; sociology.

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1. Introduction

The political system of the European Union (EU) is typically modelled as one of separation of powers (cf. Jacqué 2004, Kreppel 2011) but between the institutions, various practices have evolved that fuse rather than separate their powers (Curtin 2009: 281-283). Various procedures are in place which create interdependencies between the institutions within the policy-making process, and these are a source of power. One institution simply cannot proceed without anticipating which steps other institutions are inclined to take.

The degree to which institutions can exercise power in practice thus rests on their ability to acquire information and to utilize this when interacting with other institutions (Bendor et al. 1987: 796-798, Patty 2009: 385). Seemingly practical arrangements for sharing or distributing information are vital instruments for getting a foot in the door, by whatever means, in processes of decision-making. Numerous rules have been agreed upon by the legislature and the executive that relate to the executive's work processes, the resources spent on gathering information, and the types of information forwarded to the legislative. Also, several rules have been agreed upon by the legislative institutions in order to gain insight in to each other's positions. All of the rules

have in common that they mean to control acquisition and processing strategies and thereby constrain the ability of the institutions to utilize information strategically.

The main question this article seeks to answer concerns the relative benefit that the Commission, the Council and the European Parliament (EP) each enjoy from the information arrangements between the institutions. Whose position is most advantageous vis-à-vis the other institutions? To answer this question, a rational choice institutionalist perspective is used to analyse the rich body of Treaty provisions, secondary legislation, inter-institutional agreements and internal rules of procedure that include rules or procedures on inter-institutional information sharing. The analysis shows that, contrary to what one would expect, the EP has the most privileged position in obtaining information from other institutions.

This article is structured as follows. The first section further conceptualizes information in decision-making processes and introduces rational choice institutionalism as the analytical framework, including three hypotheses on the setup of the information sharing arrangements between the EU institutions. This first section is followed by a brief overview of Treaty provisions specifying general principles of information sharing, as well as secondary legislation and numerous inter-institutional agreements in which the institutions have created further and more specific obligations to this effect. The third section provides an analysis of this full set of provisions, showing the full breadth of instruments available to the institutions to act strategically on the basis of information acquired from other institutions. The conclusion of this article illuminates the lessons of using an informational approach to decision-making for understanding the balance of power between the EU institutions.

1.2. Information as an instrument of power

Information is of key importance in any process of decision-making. Having to choose between several possible alternatives in policy, decision-makers are faced with uncertainty over the consequences of those alternatives. Information reduces this uncertainty, and therefore it is essential in justifying the eventual choice (Stephenson 2011).

It is exactly because of this uncertainty over consequences that information is a political asset in itself rather than a neutral, objective form of expertise. Its acquisition may well be biased due to the preferences of the acquirer, or due to limited resources (Bendor et al. 1987, Patty 2009, Lupia and McCubbins 1994, Sabatier 1978). When acquired, information can be framed or utilized strategically so that it can be used as a discursive weapon, softly steering its recipients in a particular direction (Stone 2002, Sabatier 1978). This is what is variously referred to in the literature as the strategic acquisition of information (Stephenson 2011, Sabatier 1978), the strategic utilization of information (Sabatier 1978), or, in more generic terms, politics based on information (Blom and Vanhoonacker 2014).

1.3. Typology of information

Information can be classified into two types: technical information (or expertise) and political information (Sabatier 1978). The distinction does not relate to types of documents or pieces of information, but rather to the message being conveyed. Hence, it is quite possible that a single document includes technical as well as political information rather than either of the two.

Technical information concerns empirical knowledge that means to reduce the uncertainty of policy outcomes, to assess the magnitude of the problem, or to evaluate the impact of past decisions (Sabatier 1978, Stephenson 2011). This can be further divided into exogenous and endogenous expertise. Exogenous expertise is already available before an institution starts working on a certain policy (Gailmard 2002). This, for instance, refers to the prior education of administrators or to the knowledge possessed by experts who are recruited for giving advice. But given that many administrators are generalists rather than specialists, it seems implausible to assume that institutions exclusively possess this type of expertise. People also learn about issues on the job. This is referred to as endogenous expertise, which relates to the learning capacity of people within institutions (Gailmard 2002). In short, technical information focuses on content.

Political information, by contrast, refers to information about the preferences of other actors (Sabatier 1978). This concept should not be confused with the strategic utilization of information as described above, since political information refers to a type of information as such rather than to utilization strategies. Political information refers to positions of other players, the strength of their preferences and their fall-back positions. Given that the executive and the legislature are in a permanent state of negotiation about the contents of policies, information about true preferences is usually not available. However, the amount of resources spent by an institution on gathering information can be taken as a proxy for interest. When the executive proposes a controversial policy without having spent many resources justifying this policy, it may not appear a very credible option to the legislative. Conversely, significant amounts of resources spent indicate that the stakes are high (Stephenson 2011: 1455). Political information, thus, focuses on power and interests.

1.4. A rational choice institutionalist perspective on information arrangements

Rational choice institutionalism assumes that all institutions are rational power maximisers. Information arrangements are seen as one means by which institutions can exercise power, and most of the literature addresses the functioning of information arrangements in the context of legislative oversight over the executive. Perfect oversight is impossible in practice, because the legislative power has less expertise and fewer resources than the executive and is unable to fully verify the quality of the information sent by the executive (Lupia and McCubbins 1994). The legislative power, thus, has an interest in acquiring political information because this type of information reduces uncertainty about the strategic intentions of the executive (cf. Epstein and O'Halloran 1999).

The purpose of this information is to be able to assess the trustworthiness of the information submitted to it by the executive, for instance by gaining insight in the resources spent by the executive (Stephenson 2011: 1455). By using instruments of constitutional design, the legislative

power can "stack the deck" in order to obtain the information it needs (Stephenson 2011: 1484, Patty 2009, McCubbins et al. 1987). Instruments of constitutional design are especially relevant in the case of the EU. The non-partisanship of the Commission, and the fact that it is not based on a permanent parliamentary majority, means that institutional rules of engagement are more important in acquiring information inter-institutionally than in the system of party political networks that is common in western parliamentary democracies (Brandsma 2012, Saalfeld 2000).

On this basis, two things can be expected. First, one may expect that most inter-institutional information agreements concern political rather than technical information. For institutions, the most important thing to know in the process of creating new policies or controlling other institutions is the preferences of the other institutions so that the messages these convey can be politically assessed. Put slightly differently, technical information may lead to sound policies in the end, but it is less important for winning the argument. Second, because of the autonomy of the European Commission and the lack of party-political ties between the Commission on one side and the Council and the European Parliament on the other, one may expect the Council and the European Parliament to have put in place some form of control over the Commission through inter-institutional agreements. The first two hypotheses summarize these expectations:

H1: Most information arrangements concern political rather than technical information

H2: The information arrangements favour the Council and the EP over the Commission

Empirical research on the balance of power in the EU, however, shows that the two legislative branches in practice are not equally strong. Traditionally, the Council has been the EU's sole legislator and only gradually has it started sharing this power with the EP. This means that it has an incentive in maintaining its privileged position by informal means. Recent studies show that in policy areas subject to co-decision, the Council appears slightly more successful in achieving its preferences than the EP (e.g. Thomson and Hosli 2006). Having been the underdog in the EU's institutional landscape for many years, the EP has been quite vigilant in advancing its own position by sub-constitutional means, such as its own rules of procedure and inter-institutional agreements (e.g. Kreppel 2003; Hix 2002). Apparently, despite the relatively large number of inter-institutional agreements, the Council still remains the dominant legislative institution. Partially contrary to the second hypothesis, one may therefore expect that the inter-institutional fabric of exchanging technical and political information in fact mainly supports the Council in maintaining its relatively dominant position. This leads to the third and final hypothesis:

H3: The information arrangements are more beneficial to the Council than to the EP

1.5. Formal and informal agreements on information sharing

Most political institutions create operational rules on handling and exchanging information (Krehbiel 2004). Attention to the contents and political implications of their inter-institutional information sharing arrangements, however, is quite limited when it comes to the relationships between EU institutions. When addressed at all, only particular classes of arrangements are analysed, limited to specific policy instruments or to specific types of agreements as opposed to

the full breadth of arrangements on information sharing as such (e.g. Brandsma 2012, Kreppel 2003, Eiselt and Slominski 2006). This article goes beyond specific classes of agreements and establishes which inter-institutional arrangements on acquiring and processing information have been made, and how these arrangements impact the balance of powers between them.

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 status, scope, and specificity. To begin with, several articles in the Treaty on European Union (TEU) and in the Treaty on the Functioning of the European Union (TFEU) specifically address inter-institutional distribution of information. 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 member state control 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 decision-making that takes place in those committees (Council and European Parliament Regulation 182/2011/EU).

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'. Article 295 TFEU allows the institutions to adopt bilateral or trilateral agreements for their cooperation, 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 institutions concerned (Eiselt and Slominski 2006).

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 with other institutions, thereby informally still having inter-institutional effects. The recourse to this type of informal agreements was started by the EP, which chose to change its rules of procedure following the entry into force of the Single European Act in 1987 with which it was deeply disappointed. The changes increased its power since they internally regulated interactions with the other

institutions, thereby forcing them to adapt to the EP's working processes that emerged outside the scope of the Treaty (Kreppel 2003). Consequently, where Treaty provisions were unclear or absent, the EP systematically attempted to settle its demands through inter-institutional agreements or through changes to its Rules of Procedure, expecting to have such – by then – common practices codified in later Treaty reforms (e.g. Hix 2002, Kietz and Maurer 2007, Farrell and Héritier 2007).

The fact that inter-institutional agreements as well as internal rules of procedure matter a great deal for daily practices of EU policy-making, and may even create obligations beyond the Treaties, has been pointed out repeatedly (Curtin 2009, Hix 2002, Kreppel 2003, Jacqué 2004, Stacey 2003, Puntscher Riekmann 2007). Although European inter-institutional agreements as such have been addressed explicitly or implicitly in a considerable amount of research, the evidence with respect to their contents is quite fragmented. Most 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. Brandsma 2012), or of the EP's rules of procedure and its internal structure (e.g. Hix 2002, Kreppel 2003, Farrell and Héritier 2004). This literature, however, does not exactly make clear how much these agreements really help the Council and the EP in obtaining 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 these.

Table 1 shows an overview of the Treaties, pieces of legislation, inter-institutional agreements, and rules of procedure in force in 2012, each of which contains provisions on inter-institutional information sharing. Other inter-institutional agreements concluded in the past have either been replaced by new agreements (for a list see Hummer 2007), or do not address information sharing. What stands out from this table is 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. Each document was analyzed for provisions on information sharing as well as the function of this information in the decision-making process.

The analysis is structured along the main contours of the policy-making process, beginning with the phase of policy preparation via the legislative phase to the executive phase. In each of these phases, it turns out that the informal agreements do much more than just operationalise Treaty provisions alone. In fact, they bend the rules of the game to the extent that information agreements affect the balance of power between the EU institutions.

Table 1: Inter-institutional information sharing rules and agreements[1]

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	
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
Inter-Institutional Common Approach to Impact Assessment (IA), November 2005	IA Common Approach 2005
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
Co-Decision Guide, Council, http://ue.eu.int/uedocs/cmsUpload/code_EN.pdf, consulted 11 December 2012	Council Co-Decision Guide
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[2]	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

[1] Document references are in the Official Journal of the European Union. This list is limited to the agreements in force in 2012.

[2] 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.

2. Information sharing in policy preparation

The Commission has an exclusive right of initiative in most cases and hence acts as a gatekeeper at the start of legislative procedures. But institutions other than the Commission have increasingly managed to influence its agenda-setting. For instance, the EP and the Council can request the Commission to formulate a legislative proposal, and the European Council formulates major strategic issues requiring EU action. The Commission, though, is free to decide on the actual content of its proposal or it can decide not to submit a legislative proposal when requested by other institutions (Articles 225 and 241 TFEU). Its gatekeeping function is thus safeguarded at the Treaty level.

There are two aspects in this phase of the policy process for which there are arrangements for information sharing between the Commission and the other institutions, namely in the decision whether or not to formulate a legislative proposal and the actual preparation of such a proposal. For both aspects, the Treaties only mention a small number of provisions which are massively outnumbered by agreements between the institutions and provisions in the rules of procedure of the institutions themselves that slightly bend the rules.

2.1. Agenda-setting and legislative planning

The Treaty on European Union specifies 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 laid out 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, the only effects of these provisions seem to be not taking the other institutions by surprise when presenting legislative proposals and preventing issues from being stopped in either branch of the legislative by communicating them at 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, to the extent that some even transfer part of the Commission's gatekeeper function to the EP.

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 closes a loophole left in Article 225 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 agreement was found. In sum, this point somewhat restricts the Commission as it

forces the Commission to start considering whether or not to table an initiative, and it gives the EP some indication of the endogenous expertise built up by the Commission before the time limit elapses.

Second, there are many specific procedures governing the process of creating the Union's annual and multiannual programming, which constrain the Commission and favour the EP. 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 the 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, which in practice is part of the continuous interaction between the EP's Conference of Presidents or Committee Chairs and the President of the Commission or individual Commissioners. 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 EP's Rules of Procedure are more stringent. 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). The latter element essentially means to say that the EP may decide not to appoint a rapporteur, and hence not to debate a legislative proposal, if it is not consulted early on in the process. Examples of this, however, have not been found, which may well indicate that the institutions anticipate each other's behaviour.

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. By having created informal rules on information, the EP has therefore managed to slightly bend the Treaty rules on the right of initiative. The gatekeeping role of selecting issues for legislative initiatives has by informal means become a joint responsibility of the Commission and the EP under the guise of cooperation between the institutions and the early sharing of political information.

The Council, however, is left out of this 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).

2.2. 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 EP – 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). This article thus specifies the Commission's endogenous information acquisition capacity.

Most of the provisions as to preparing legislative initiatives relate to informing the EP early on so it is prepared when the initiative is officially tabled. The Parliament is free to 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), and in fact we do see that rapporteurs are often appointed well before Commission proposals are tabled.

Also, the Commission has agreed with the Parliament to send lists of its expert groups and upon 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). These agreements thus allow the EP to monitor the Commission's processes of learning by gaining insight into its efforts to gather exogenous information. The salience of the Parliament's interest in having information on the expert groups as well as controlling their composition is reflected by the Parliament's freezing of Commission expert group funds in November 2011, lifted one year later after further commitments were made to Parliament regarding more balanced composition of the expert groups as well as providing more public information on their proceedings (EUObserver 2012).

In some cases, members of Parliament may even sit in the Commission's expert group meetings themselves, giving them an even closer look into the information as gathered by the Commission. This rule came about as a result of Article 290 TFEU on delegated acts, which was meant to replace part of the comitology system (see below '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 gentlemen'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 2012). This induced the Parliament to agree with the Commission that it 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 also 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). It is not exactly clear whether this concerns the exchange of technical or of political information, even though it seems plausible that both are included at least to some degree.

Finally, the institutions have agreed on a set of agreements concerning impact assessments of new legislative proposals. The Inter-Institutional Common Approach to Impact Assessment addresses the institutions' responsibilities in acquiring technical information. It specifies that the Commission, as a general rule, is to carry out an assessment of potential impacts of its proposed legislation and is to make a comprehensive analysis of a range of legislative and non-legislative options which might meet the set objectives, including stakeholder consultation. The Council and the Parliament, in turn, are responsible for carrying out such assessments for their own substantive amendments, in which they take the Commission's impact assessment as a basis. In that respect the Commission also shares its data and methodology with the other institutions.

Ideally, impact assessments assist the institutions in making technically sound policies by putting a common framework of acquiring and assessing technical information into place. But interestingly, the 2005 IA Common Approach also explicitly warns against political capture of impact assessments. Impact assessments "must not lead to undue delays in the legislative process, nor be abused as an instrument for opposing undesired legislation or prejudice the legislator's capacity to propose amendments. The rigour, objectivity and comprehensive nature of the analysis should mean that the impact assessment is not a simple justification of the initiative or the substantive amendment" (IA Common Approach 2005). Arrangements to avoid this are not made in the Common Approach, other than perhaps by the stakeholders consulted by the Commission who may inform the Parliament or the Council of the Commission's behaviour during this consultation.

All the above measures equip the EP, and to a more limited degree also the Council, with information on policy initiatives so 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 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 EP. The latter can formulate and negotiate its position earlier in the process than is envisaged in the Treaties.

3. Information sharing in the legislative processes

The vast majority of European legislation is passed according to the co-decision procedure, or ordinary legislative procedure as it is formally called since the Lisbon Treaty. Around the formal decision-making procedure within and between the two legislative institutions, a set of semi-formal working agreements have been adopted. 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.

3.1. Information sharing surrounding co-decision

Within the EP, 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 EP, and shall be heard at the Commission's request. The same Treaty article also mentions that the Council shall be heard by the EP in accordance with the Council's rules of procedure.

Most of the spice here is hidden in the EP'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 political information enables the EP to anticipate developments in the Council before its own proposed amendments are adopted at the committee stage, before plenary. But the interesting thing here is that through this rule, the EP has made the Commission its eavesdropper in the Council's deliberations – a role which the Council acknowledges, also with respect to carrying information from the EP to the Council (Council Co-Decision Guide). The fact that the EP committees herewith receive political information on Council decision-making from two sources may to some degree limit opportunities for strategic behaviour by the Council presidency towards the EP.

Another aspect is the timing of formal statements by the other institutions to the EP, most notably the Commission. Since the Commission, after submitting its initial proposal to the Council and the EP, 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 EP's position, and halfway through the second reading if the EP 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 the voting procedure to be used to some degree. 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 EP has a strategic interest in already knowing the position of the Commission before formally proposing amendments. If in the 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 bend the rules by adding one: they specify that both the Council and the Commission need to supply the parliamentary committee with political information; that is, of their views on all proposed amendments before the 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 equip the committee with political information on the likelihood that their

amendments will be rejected at a later stage before the matter is debated and voted upon in plenary.

3.2. 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 EP, Commission, and Council representatives called 'informal trilogue meetings'. Behind closed doors they work towards consensus over policies, parallel to the normal legislative processes which do 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 (Farrell and Héritier 2003, 2004). 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 EP as opposed to an absolute majority of its constituent members required in the 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 80 per cent of all new legislation takes the trilogue route (European Parliament 2009).

Even though the literature on trilogue decision-making primarily addresses the empowerment of the individual representatives of the institutions, possibly at the expense of the institutions they represent (Farrell and Héritier 2003, 2004), trilogues are also venues in which the institution representatives learn about each others' points of view. It is widely accepted that the choice for having trilogues 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 (Farrell and Héritier 2004). Although it is undeniably true that most information on trilogue proceedings is not publicly available, trilogues do equip representatives of all three institutions with some political information on the viewpoints of the other institutions. The question is to what degree this political information is or can be complete, given the negotiative character of trilogues.

With respect to information provisions regarding trilogues, the rules specified by the EP only refer to participation rights and internal dissemination procedures rather than to strategies for acquiring technical or political information from other institutions (Héritier and Reh 2011). On 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 the general obligation of professional secrecy surrounding all Council preparatory activities well (Article 6.1, Council RoP).

Going beyond co-decision files exclusively, more general arrangements have been made as well, such as agreements on 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), cooperation through 'appropriate inter-institutional contacts' throughout the co-decision procedure to monitor progress (Point 5, 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 arrangements discussed before, but at least this shows that the institutions have engaged in building a web of intra- and inter-institutional obligations on disseminating mainly political information which they can use to their advantage. It is only in the information provisions related to the formal co-decision procedure that the EP seems to have managed to gain a strategic benefit.

4. Information sharing on executive measures

The legislation which the Council of Ministers and the EP adopt covers the aims and principles of policy, but the vast majority of European decisions are of an executive nature. Throughout history, about 80 per cent of European directives, decisions, and regulations have been executive acts adopted by the Commission (Van Schendelen 2010, Héritier et al. 2012, Brandsma 2013). 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 this reason that, as in any parliamentary democracy, the executive has been placed under control of the legislator. 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 refers to a system in which the Commission adopts stand-alone measures on the basis of existing legislation. Control is exercised through committees of member state civil servants equipped with voting rights. Delegated acts, by contrast, are not truly stand-alone measures: they are adopted by the Commission, but they amend or supplement annexes to legislation adopted by the legislator. Control of these measures is in the hands of the Council and the EP: they both enjoy veto rights. Before the Lisbon Treaty, cases falling under this regime also went through a committee with voting rights, but formally these committees have been made 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 design of the control system.

4.1. Implementing acts

Traditionally, the design of the implementing acts system has been an exclusive matter for the Council, which designed it to include only staff from the member states and the Commission. However, the EP – although a co-legislator since the Treaty of Maastricht – was not fully able to hold actors accountable for decisions that were made in committee meetings. By strategic use of its other prerogatives – such as holding up legislation, freezing budgets, etc – the EP has to a great extent succeeded both in gaining some (specific) powers from 1999, as well as in getting information on the wheeling and dealing of the committees to back up these powers through the conclusion of bilateral agreements with the Commission (Héritier et al. 2012, Brandsma 2013).

The current control system for implementing acts as well as its according information agreements are specified in the latest Comitology Regulation adopted by the EP and the Council (Regulation 182/2011). More or less replicating earlier agreements, this regulation mentions that the Council and the EP 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 linked to the right of both institutions to challenge the legality of an adopted implementing act.

An earlier inter-institutional agreement on the pre-Lisbon system, that still remains in force in the new system, specifies that the documents mentioned are to be sent to the EP 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 EP's services have direct access, in which documents can be followed from early on to the final stages in the comitology processes (Points 1-3, Comitology Agreement 2008). In addition, the EP may request access to the full minutes of the committee meetings, as long as it respects confidentiality rules (Point 6, Comitology Agreement 2008).

Article 291 TFEU, upon which the new committee 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 operationalising the new Lisbon Treaty provisions in the form of a Regulation, they managed to bend the Treaty provisions on control so as to include inter-institutional information obligations and legality checks more or less in the same spirit as in the pre-Lisbon arrangements. The inclusion of these obligations was mainly pushed by the EP as opposed to the Council (Brandsma and Blom-Hansen 2012). The information arrangements supporting Parliamentary and Council control therewith effectively continue existing practices.

4.2. 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 EP from 2006 onwards. Effectively, this setup allowed the Commission and the member states to change annexes to co-decision legislation, bypassing Parliament. Article 290 TFEU solved this matter by classifying such executive measures as 'delegated acts', which allows the Commission to propose and adopt those acts unilaterally while equipping the Council and the EP with extensive veto rights and revocation rights. The institutions agreed upon several procedures on exchange of information by means of a trilateral common understanding, in the context of the Framework Agreement between the Commission and the EP, and in the form of a gentlemen's agreement between the Council and the Commission.

To begin with the latter, 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 to bend the rules on autonomous Commission action slightly. The Commission committed itself to systematically consulting a system of special member state 'expert groups' before the adoption of every single delegated act (Brandsma and Blom-Hansen 2012). Although clearly meant to increase member state influence, this special expert group system also serves as a political information 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 EP was not amused with this as it was left out of this arrangement. Therefore it worked behind the scenes towards an agreement on information and participation rights balancing those of the member states. In 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 EP is to receive 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 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. For instance, it 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 occurred in the comitology regime before Lisbon (Brandsma 2012).

5. Conclusion

A dense web of information arrangements between the institutions is in place. Instrumental to existing or creatively interpreted political rights, these arrangements equip the institutions with technical as well as political information in order to influence policy outcomes. These processes take place from the earliest to the final stages of the policy process.

Table 2 summarizes the arrangements of transmitting technical as well as political information between the institutions. The findings strongly support hypothesis 1: most arrangements refer to political as opposed to technical information. They include information on the other institution's preferences either by directly engaging with other institutions and asking for stated preferences or by indirectly detecting possible biases in the preparation of legislative initiatives or executive acts. Arrangements that purely concern the distribution of technical information are quite rare indeed. The best example of this is the arrangement on impact assessments, which even literally warns against misuse of expertise for political purposes.

Table 2: Inter-institutional arrangements for sharing technical and political information

Arrangement	**Instrument**	**Purpose**	**Policy-making stage**
Technical Information			
Summaries of comitology meetings (EP + Council)	Inter-institutional Agreement + Comitology Regulation	Control of legality of implementing measure	Executive measures
Impact assessments (EP + Council)	IA Common Approach	Better law-making; but risk of political capture	Preparation
Political Information			
Follow-up on requests for legislative initiatives (EP)	Framework Agreement	Commission cannot keep postponing initiatives	Preparation
Interaction on legislative priorities with Commission in preparing Annual Work Programme (EP)	Framework Agreement, EP RoP, Commission RoP	EP may decide to appoint rapporteurs early, or not to appoint one at all	Preparation
List of, and information on, expert groups (EP)	Framework Agreement	Insight in exogenous information acquisition, detecting possible bias in legislative proposal	Preparation
Commission informs EP and Council of each other's preferences (EP + Council)	EP RoP	Anticipation; limiting strategic behaviour	Legislative processes
Commission and Council express their views on EP draft amendments before vote in plenary (EP)	EP RoP	Avoiding failure of bill in second reading	Legislative processes
Expressing red lines and preferences, and negotiation, in informal trialogues	Joint Declaration	Avoiding second reading	Legislative processes
Information on delegated act expert groups (EP)	Common Understanding	Preparing opposition	Executive measures
Member state participation in delegated act expert groups; informal information transmission (Council)	Common Understanding & Gentlemen's Agreement	Preparing opposition	Executive measures

The information arrangements that have been put in place at least potentially equip the EP with stronger bargaining power, even to the extent that the constitutional balance of powers as foreseen in the Treaties is somewhat tipped to its own favour by sub-constitutional means. The Council, by contrast, only made more specific arrangements in the executive realm, including both comitology as well as the delegated act regime. If at all, it has only made vague commitments to the EP in the preparatory and legislative stages that are left unsanctioned if they are not abided by, and it has hardly put in place any specific obligations to the Commission.

These findings are at odds with hypothesis 2, and directly contradict hypothesis 3. While the information regime does not benefit the Commission as hypothesised, the regime does not benefit both legislators equally: the arrangements structurally favour the EP. This of course begs the question why the Council has chosen not to conclude agreements on the sharing of information with the other institutions. The common explanation for the mushrooming of inter-institutional agreements with the EP is that this institution used to be the underdog compared to the Commission and the Council. Over the course of history, it has been quite successful in using the few powers it has, such as budget approval and Commission appointment, to force other institutions to accept its demands (e.g. Stacey 2003). But the member states in the Council, in turn, have treaty change at their disposal as an instrument. On the other hand, it is easier for the EP than for the Council to effectively use information from the Commission because it is much less affected by shifting preferences as a result of government changes in the member states.

By bending the formal rules by means of semi-formal agreements, the inter-institutional information regime creates a sub-constitutional structure that enhances the power of the EP in the EU system. The question therefore is to what degree the EP makes use of the inter-institutional information regime in order to be at the apex of power in policy-making, or if the conclusion of the agreements as such mattered more than the daily operations they govern. 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 (Brandsma 2012, Kaeding and Hardacre 2010). The actual functioning of the information agreements in the earlier phases of the policy process remains the biggest question mark.

The information regime in place, and mainly the parts that are instrumental to specific informal political powers, shows once again that EU policy-making may work quite differently in practice than its formal design. The dense web of inter-institutional information sharing rules equips the EP with powers that encroach upon those of the Commission. But while the Council stands by and watches in the preparatory and legislative phases, the EP builds up a privileged position in the structure of inter-institutional relationships. The number and density of inter-institutional information arrangements that were found show that the legislative institutions' informal powers interweave closely with the power they set out to control, somewhat fusing rather than separating them.

Since the entry into force of the Lisbon Treaty, the EP now has formally become more equal to the Council than ever before, and the informal agreements on information sharing have become stronger political weapons. As this article has demonstrated, the structure that allows it to obtain

strategically important information is there. Empirically, it is an open question to what degree the EP in practice tips the balance of power in its favour.

References

Bendor, J., Taylor, S. and Van Gaalen, R. (1987) 'Politicians, bureaucrats and asymmetric information', *American Journal of Political Science*, 31(4), 796-828.

Blom, T., and Vanhoonacker, S. (eds.) (2014) *The politics of informing the EU*, Houndmills: Palgrave MacMillan.

Blom-Hansen, J. (2011) *The comitology system in theory and practice: keeping an eye on the Commission?* Houndmills: Palgrave MacMillan.

Brandsma, G. J. (2012) 'The effect of information on oversight: the European Parliament's response to increasing information on comitology decision-making', *International Review of the Administrative Sciences*, 78(1), 74-92.

Brandsma, G. J. and Blom-Hansen, J. (2012) 'Negotiating the post-Lisbon comitology system: Institutional battles over delegated decision-making', *Journal of Common Market Studies*, 50(6), 939-957.

Brandsma, G. J. (2013) *Controlling comitology: Accountability in a multi-level system*, Houndmills: Palgrave MacMillan.

Curtin, D. M. (2009) *Executive power of the European Union: Law, practices and the living constitution*, Oxford: Oxford University Press.

Epstein, D. and O'Halloran, S. (1999) *Delegating powers: a transaction cost politics approach to policy making under separate powers*, Cambridge: Cambridge University Press.

Eiselt, I. and Slominski, P. (2006) 'Sub-constitutional engineering: Negotiation, content, and legal value of inter-institutional agreements in the EU', *European Law Journal* 12(2), 209-225.

EUObserver (2012), 'MEPs unblock funds for EU expert groups', 22 September 2012, http://euobserver.com/institutional/117633.

European Parliament (2009) 'Activity report 1 May 2004 to 13 July 2009', PE 427.162v01-00.

Farrell, H. and Héritier, A. (2003) 'Formal and informal institutions under codecision: continuous constitution-building in Europe', *Governance* 16(4) 577-600.

Farrell, H. and Héritier, A. (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* 37(10), 1184-1212.

Farrell, H. and Héritier, A. (2007) 'Codecision and institutional change', *West European Politics* 30(2), 285-300.

Gailmard, S. (2002) 'Expertise, subversion, and bureaucratic discretion', *Journal of Law, Economics, and Organization* 18(2), 536-555.

Héritier, A. and Reh, C. (2011) 'Codecision and its discontents: intra-organisational politics and institutional reform in the European Parliament', paper prepared for: EUSA biannual meeting, Boston, 3-5 March 2011.

Heritier, A., Moury, C., Bischoff, C. and Bergström, C. F. (2012) *Changing Rules of Delegation: A contest for power in Comitology*, Oxford: Oxford University Press.

Hix, S. (2002) 'Constitutional agenda-setting through discretion in rule interpretation: Why the European Parliament won at Amsterdam', *British Journal of Political Science* 32(2), 259-280.

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

Jacqué, J. P. (2004) 'The principle of institutional balance', *Common Market Law Review*, 41(2), 383-391.

Judge, D. and Earnshaw, D. (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* 18(1), 53-71.

Kaeding, M. and Hardacre, A. (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, available at http://cadmus.eui.eu/ bitstream/handle/1814/14956/RSCAS_2010_85.pdf (accessed 06/05/2013).

Kietz, D. and Maurer, A. (2007), 'The European Parliament in Treaty reform: Predefining IGCs through inter-institutional agreements', *European Law Journal* 13(1), 20-46.

Krehbiel, K. (2004) 'Legislative organization', *The Journal of Economic Perspectives* 18(1), 113-128.

Kreppel, A. (2003) 'Necessary but not sufficient: Understanding the impact of Treaty reform on the internal development of the European Parliament', *Journal of European Public Policy* 10 (6), 884-911.

Kreppel, A. (2011) 'Looking "up", "down" and "sideways": Understanding EU institutions in context', *West European Politics*, 34(1), 167-179.

Lupia, A. and McCubbins, M. C. (1994) 'Who controls? Information and the structure of legislative decision-making', *Legislative Studies Quarterly*, 19(3), 361-384.

McCubbins, M. C., Noll, R. and Weingast, B. (1987) 'Administrative procedures as instruments of political control', *Journal of Law, Economics and Organization* 3(2), 243-277.

Patty, J. W. (2009) 'The politics of biased information', *The Journal of Politics*, 71(2), 385-397.

Puntscher Riekmann, S. (2007) 'The cocoon of power: Democratic implications of inter-institutional agreements', *European Law Journal* 13(1), 4-19.

Saalfeld, T. (2000) 'Members of parliament and governments in Western Europe: agency relations and problems of oversight', *European Journal of Political Research* 37(3), 353-376.

Sabatier, P. (1978) 'The acquisition and utilization of technical information by administrative agencies', *Administrative Science Quarterly*, 23(3), 396-417.

Stephenson, M. C. (2011) 'Information acquisition and institutional design', *Harvard Law Review*, 124(6), 1422-1483.

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

Stone, D. (2002) *Policy paradox: the art of political decision-making*, 2nd edition, New York: W. W. Norton & Company.

Thomson, R. and Hosli, M. (2006) 'Who has power in the EU? The Commission, Council and Parliament in legislative decision-making', *Journal of Common Market Studies* 44(2), 391-417.

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