Black boxes and open secrets: trilogues as ‘politicised diplomacy’

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ABSTRACT
Why do EU actors promote secluded fora of decision making even as they have committed themselves to open and public lawmaking? How do they perceive and reconcile the ensuing tensions in practice? These questions, arising amidst growing public controversy, point to a blind spot in the scholarly agenda on EU lawmaking, which has overwhelmingly focused on the games institutions play. From an interpretivist perspective, we argue that rules are ‘made’ not by detached officials, but by practitioners puzzling out the meaning of their actions in their everyday experiences. Based on extensive interview material, the article captures trilogues as ‘politicised diplomacy’ and shows how they have become a ‘permeable institution’, shaped by dense flows of exchange between ‘insiders’ and ‘outsiders’. The article helps pinpoint to what extent and how trilogues challenge democratic norms; and it punctures the myth of trilogues as quiet politics dominated by producer interests.

KEYWORDS ordinary legislative procedure; trilogues; seclusion; interpretive research; politicised diplomacy

This article takes its point of departure in a puzzling contrast in the current EU legislative process. On the one hand, the successive treaties establishing the Ordinary Legislative Procedure (OLP) as the normal legislative process highlight the idea of open lawmaking at its core. On the other hand, a significant part of EU lawmaking in practice takes place in secluded arenas (Hillebrandt and Novak 2016; Novak and Hillebrandt 2019), with the so-called legislative trilogues at the pinnacle of the legislative process. Trilogues are in camera negotiations between representatives of the European Parliament (EP), Council, and Commission. While they have no reference in the treaties, trilogues are now the ‘new normal’ of EU lawmaking, used at all phases of the ordinary legislative procedures.
and across a very broad spectrum of issues as a way of reaching legislative compromises.

This contrast now forms the theme of a rapidly growing public conversation involving: (1) the European Ombudsman’s own inquiry into the transparency of trilogues, initiated in 2015 (European Ombudsman 2016); and (2) the March 2018 ruling of the Court of Justice of the EU on the De Capitani case (General Court of the European Union 2018) annulling a decision of the EP to refuse to grant Mr Emilio De Capitani, an EP administrator, full access to trilogue documents. The court ruling recognised trilogues as a decisive part of the EU legislative process, contrary to what Council had maintained. Both the Ombudsman and the Court pinpointed problematic features of the current trilogue process, specifically: (1) the lack of public information regarding the trilogue meetings, agendas, participants, documents, and decisions; and, underpinning this, (2) the EU institutions’ very restrictive interpretation of the principles of publicity and transparency in trilogues, amounting to a problematic ‘general presumption of non-disclosure’ (General Court of the European Union 2018). EU lawmaking institutions have yet to implement the Court’s ruling and the Ombudsman’s recommendations.

In this article, we examine why EU actors promote secluded and informal fora of decision making even as they have committed themselves to open and public lawmaking. While others have raised similar questions (Novak 2013), we ask: how do EU actors perceive the tension between the practice of EU lawmaking and the democratic values of their institution? And how do they cope with challenges and dilemmas arising from such a situation in practice?

In order to shed light on these questions, we turn to interpretivism, an approach still largely overlooked in the field of EU studies (Diez 2015; but see Heinelt and Münch 2018), which is a mystery given its relevance for the study of informal processes and governance (Finlayson 2004). Interpretivism’s appeal to us is twofold. First, interpretive reasoning, at least in some of its variants, is puzzle-led; it ‘begins with a puzzle, a surprise, or a tension’, which it then seeks to elucidate by asking: ‘what circumstances would render [this] event, … word, … relationship, or whatever else one is seeking to explain more “commonsensical” – less surprising, less puzzling’ (Schwartz-Shea and Yanow 2012: 27). This emphasis helps us maintain analytic attention on what is strange, and therefore in need of an explanation, in the process of EU lawmaking even as we become familiar with it. This is critically important not only for the scholarly community, and researchers’ duty to speak truth to power, but also for ordinary people, for whom EU politics and processes often do not make sense and need to be elucidated.
Second, in chasing these puzzles, interpretivists single themselves out by ascribing a considerable importance to meanings in individual and collective endeavours. Their central contribution is that ‘to understand actions, practices and institutions, we need to grasp the relevant meanings, beliefs and preferences of the people involved’ (Bevir and Rhodes 2004: 130). This emphasis is particularly useful to us given our interest in understanding actors’ perceptions and sense-making. Our contention is that paying more attention to meanings and beliefs helps us elucidate the puzzle of EU lawmaking.

Importantly, paying attention to beliefs does not mean that researchers are ‘simple conduits of research participants’ concepts’, or that they are ‘merely describing the social and political worlds’ (Schwartz-Shea and Yanow 2012: 39). What it does mean, instead, is that researchers engage in a ‘world-making’ activity, in which actor’s beliefs take the drivers’ seat. This makes their research a ‘scholarly, political act of persuasion that requires careful attention to the many elements it can (or should) contain which produce a trustworthy research study’ (Schwartz-Shea and Yanow 2012: 39).

Accordingly, our aim in this article is to produce a trustworthy interpretation of trilogue seclusion helping us elucidate the puzzle of EU lawmaking spelled out at the beginning of this introduction. We proceed in four steps. First, we take stock of the literature on trilogues with a view to developing an initial understanding of the issues connected to trilogue seclusion: this part highlights the democratic ambiguities of trilogues. Second, we spell out the conceptual underpinnings of our interpretive approach, emphasising the explanatory concepts of ‘tradition’, ‘dilemmas’, and ‘narratives’. Third, we provide key information about our methodology of ‘soaking and poking’. Finally, we develop our interpretation of EU lawmaking as politicised diplomacy.

The democratic ambiguities of trilogues

There is a growing literature on trilogues. This literature has contributed rich insights into the phenomenon of trilogues. Our initial understanding of trilogue seclusion is shaped by two main debates in this literature, both framed in a democratic perspective. The first debate focuses on the ‘efficiency–transparency trade-off’ (Héritier and Reh 2012; Novak and Hillebrandt 2019). It is embedded in a view of the lawmaking parties, particularly Council, as motivated by the goal of reducing transaction costs, following the legislative empowerment of the EP in the consecutive treaties of the 1990s, starting with the Maastricht Treaty. Trilogues are a form that suits the Council well because it can speed up the process, the
argument goes. At the heart of this debate is whether trilogues actually have paved the way for a more efficacious process, and whether this has taken place at the expense of transparency (Novak and Hillebrandt 2019; Settembri 2005; Stasavage 2004). Evidence shows some efficiency gains: in the lifetime of trilogues, the EU has not only legislated more on a broader range of issues, it has also increasingly used first-reading agreements or early second-reading agreements (Dionigi and Koop 2017; Reh et al. 2013) – all of this thanks to the flexible form of trilogues as an informal and secluded process. The literature also shows that trilogues have been a source of opacity in the EU legislative process, for reasons ranging from the characteristics of trilogue themselves (no or little public information on trilogue proceedings), to features of trilogue preparatory bodies in the respective lawmakers, through composition effects due to the superimposition of trilogues and first-reading agreements (see Table 1).

The second big debate focuses on how trilogue seclusion affects the accountability of EU lawmakers. Researchers have argued that, by empowering a narrow set of actors in the respective lawmaking institutions, trilogues give these actors incentives to develop opportunistic behaviour. This claim, known as the ‘relais actor empowerment’ thesis (Farrell and Hérétier 2004), has two implications: it implies a loss of accountability insofar as pivotal actors in the Council and the EP are able to manipulate information and eschew monitoring from their respective constituencies; it also implies a loss of inclusiveness since smaller parties in the EP are marginalised or even excluded from the political negotiations. This thesis, however, probably better reflects the early years of trilogues, when the advent of early agreements had ‘accelerated the informalization of relations between Council and Parliament’ (Farrell and Hérétier 2004: 1198), than recent practice. Trilogues have gone through a considerable institutionalisation, going from largely ad hoc negotiations, centred on critical bilateral contacts between the EP rapporteur and the Council presidency, to institutionalised negotiations, embedded in a de jure multilateral format at all stages of the negotiations in the EP, and following a more predictable script of EP–Council interactions (Roederer-Rynning and Greenwood 2015, 2017). There are also more extensive requirements for reporting back to institutional constituencies, if not always through public channels (Brandsma 2018). This reduces the risk of opportunistic behaviour, which is why it has been difficult to find evidence in support of the relais actor thesis (Costello and Thomson 2011; Brandsma 2015; Rasmussen and Reh 2013).

In sum, trilogues have become an important theme in the scholarly debate on the EU lawmaking process, and research shows that their
contribution to the EU’s democratic quality is ambiguous. In part, the assessment of the democratic contribution of trilogues is related to how one weighs the role of input and output in democratic legitimacy (Scharpf 2003; Schmidt 2013). Those highlighting output legitimacy find in the trilogue process a positive contribution since it has contributed to a more efficient lawmaking process. Conversely, those highlighting political participation find the trilogue process problematic given that it is secluded and it renders the EU lawmaking process invisible to the broader public. Looking into the organisation of the process itself (throughput legitimacy), the research findings are ambiguous, too, depending on what attribute of throughput legitimacy one focuses on (Schmidt 2013). If one focuses on transparency, there is no question that trilogues have been

Table 1. Four types of trilogue-related sources of opacity of the EU lawmaking process.

| Source of opacity          | Description of the effect                                                                                                                                 |
|---------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------|
| Design of trilogues       | There is no or little public information about the calendar of trilogues meetings, no official and publicly available minutes, and the famous four-column documents – i.e. the document that trilogue negotiators work on, where the first three columns identify the position of each three institutions, and a blank fourth column is filled out during the process to reflect the inter-institutional agreement reached in the trilogue meetings – remain for the most part unpublished (European Ombudsman 2016). |
| Preparatory bodies        | There is a lack of transparency around the work of the preparatory bodies of trilogues in the EP (Ripoll Servent 2017; Settembri 2005; Stie 2013), in the Council (Berthier 2016; Settembri 2005; Stasavage 2004), or in the Commission (Panning 2019). |
| Composition effect        | There is an unfortunate composition effect due to the superposition of trilogues and early agreements (first-reading agreements in particular). This combination allows EU legislators to eschew the core transparency obligations linked to public deliberations on first-reading positions in the EP and common positions in the Council (Berthier 2016). |
| Implementation of ‘access to documents’ | There is a regulatory gap on ‘access to documents’ at the EU level (Settembri 2005), particularly as it pertains to the trilogue process: the regulatory framework is outdated and does not take into account the reality of trilogue lawmaking; agreement on revising it has been long stalled due to diverging national views in the Council; in the absence of a reform, the regime has been left to the discretionary purview of EU institutions, which have adopted a minimalist interpretation of access in relation to trilogue proceedings (Curtin and Leino 2017; Leino 2017). |
detrimental to democracy. We have identified four ways in which they contribute to the opacity of EU lawmaking (see Table 1). If one focuses on accountability instead, we cannot draw such general and simple conclusion because the institutionalisation of trilogues, at least in the EP, has promoted a more inclusive and rule-like process – even though discrepancies between public commitments and practice exist (Brandsma 2018). We know very little on the Council’s side.

**Worldviews and world-making: an interpretive approach**

Discrepancies between formal rules and practices are not unique to the EU. In an insightful interpretation of the role of the World Trade Organization (WTO) in the global trading system, Wolfe (2005) argued that the WTO ‘may be “rule-based”, but officials do not “make” the rules; participants in the trading system make the rules’ (Wolfe 2005: 340). To understand the rule-based character of the WTO, the most important piece of information, he argued, is ‘not the WTO treaty or the decisions of the Appellate Body’ but ‘the way in which traders think about reciprocity and non-discrimination’ (Wolfe 2005: 340). Similarly, in the EU, where it is common to view Lisbon’s OLP as an integral part of ‘a rule-based logic’ of EU lawmaking, it would be naive to expect that the practice of EU lawmaking is identical to formal Treaty rules. The rule-based quality of EU lawmaking is to be probed in the daily life, from the way participants puzzle out the meaning of their actions and seek to find concrete solutions to concrete dilemmas. The interesting question to analyse is thus not whether there is a discrepancy between formal rules and practice, but rather how, in concrete dilemmas or ‘problem-situations’, EU lawmaking participants encounter ‘treaty rules’ and decide, more or less consciously and rationally, and by drawing on prior webs of beliefs, ‘that a certain amount of variance around the central limit is acceptable’ (Wolfe 2005: 348; drawing on Abram and Chayes 1995: 26–7).

What makes the EU different from other organisations (such as the WTO), however, is its hybrid and novel institutional character. Observers have drawn attention to this ‘fact’ since the 1980s (Wallace 1983). The novelty of the EU results from the merger of different, and to a great extent competing, paradigms of political order. This merger is a ‘living’ process combining accommodation and domination; and it often manifests itself in institutionalised contradictions. Our argument is that these institutionalised contradictions permeate the EU lawmaking process, just as they permeate individual EU institutions and organisations (see for example Christiansen 1997 on the European Commission; Lewis 2003 on the Council of Ministers; Christiansen and Neuhold 2013), and that the
search for answers to these contradictions gives rise to organisational dynamics that are unforeseen.

In the remainder of the article, we develop an interpretation (or ‘world-making’ reconstruction) of trilogues as politicised diplomacy in an actor-based interpretive analysis (Bevir and Rhodes 2015). Our approach is very much in line with recent calls within the institutionalist scholarship to bring the role of actors and agency back into constructivist or sociological accounts of EU institutions and processes (Jenson and Mérand 2010; Ripoll Servent and Busby 2013; Saurugger 2013, 2016). We borrow from Bevir and Rhodes (2015) to specify what this means, in terms of both the worldview underpinning our analysis and the explanatory tools of ‘world-making’.

Concerning the worldview underlying the analysis or the ontological premises of the analysis, our main assumption is that individuals are shaped by their context while also being able to transform them (situated agency). This is possible because, while never experiencing social reality from a ‘pure’ perspective free from prior beliefs, individuals develop their own interpretation of common beliefs and norms, and can change their beliefs and meanings through experience and their reflexive capacity. The corollary of this is the assumption that reasoning is always contextual – or ‘local’ – in the sense that reasoning ‘occurs in the context of agents’ existing webs of beliefs’ (local reasoning) (Bevir and Rhodes 2015: 15). Together, the assumptions of situated agency and local reasoning suggest that a lot of social activity can be expected to cluster in regular and stable patterns of actions, which are labelled ‘practices’. Practices are somewhere between institutions and actions. They are less constraining and more flexible than institutions, which are larger and more constraining structures; and they are more stable than actions, which are individual and blend beliefs together with individual motivations (Bevir and Rhodes 2015: 15).

As for explanatory concepts, we are engaging in a form of explanation, which relies on the crafting of ‘narratives’. Narratives are ‘a form of explanation appropriate to an interpretive theory of politics’, which ‘work[s] by relating actions to the beliefs and desires that produce them and by situating these beliefs and desires in particular historical contexts’ (Bevir and Rhodes 2015: 17). Narratives are concrete, historical, and realist in the sense that they are embedded in concrete situations, show the connections between beliefs and actions in time, and typically aim at producing a fine-grained picture of what is happening. A particularly interesting moment in interpretive narratives is the moment of change. From an actor-centred perspective, change can be interpreted as the result of a confrontation between ‘tradition’, i.e. the received set of beliefs, and
actors’ lived experience (filtered by these beliefs). This confrontation culminates in ‘dilemmas’, which actors can resolve by reassessing their beliefs and changing their strategies. Dilemmas are ‘any experience or idea that conflicts with someone’s beliefs and so forces them to alter the beliefs they inherit as a tradition’ (Bevir and Rhodes 2015: 17).

Soaking and poking: the ‘conversational interview’

Interpretive analysis requires a great deal of what Fenno (1977) once called ‘soaking and poking’. Ideally, we would have soaked and poked in the world of trilogues by participating and observing, but this is not possible given the in camera setting of the negotiations and our status as ‘outsiders’. Our access to sources is through interviews with trilogue participants: we use a form of interview, which is sometimes called ‘ethnographic’ (Spradley 1979) or ‘conversational’ (Rubow 2003). Unlike other types of interviews, such interviews are relatively long and aim at bringing the ‘implicit’ to the surface. Unlike ordinary life conversations, the ethnographic interview is a concentrated and focused conversation, and it is more asymmetric ‘because the interviewees’ story is at the center’ (Rubow 2003: 235). The interviewee is both a ‘native speaker’ and an ‘informant’, as we aim to become conversant in the language of trilogues as well as acquire specific pieces of information (Spradley 1979: 25; see also Rubow 2003: 239). For example, we use interviews to understand how much variation there is between the logic of public lawmaking and the practice of seclusion (interviewee as informant); but also how participants decide what deviation between formal rules and informal practice is acceptable (native speaker). Given the rather sensitive topic and the risk of manipulation, a high number of interviews is a definite advantage since its gives us a better sense of regularities and variation and more possibilities for cross-checking content. Our interviews typically started by identifying the position and experience with trilogue files, and then seeking to understand how actors keep track of the trilogue negotiations, and whether a surprise had ever been encountered. The interviews then looked in detail at trilogue mechanisms in each of the EU institutions, and how organised civil society actors engage with the process. Finally, we sought to understand why we have the system of trilogues, and to go through cases which illustrated aspects of the trilogue process.

Specifically, we carried out 86 in-depth interviews, of which 82 were conducted in Brussels and four in Strasbourg (see Table 2). Thirty-one interviews were conducted jointly, which gave us the possibility to exchange reflections, discuss themes and puzzling information, and formulate follow-up questions. All interviewees were guaranteed anonymity.
Table 2. Interviewees.

| Trilogue insiders | Trilogue outsiders |
|-------------------|--------------------|
| **Permanent**     | **Civil society organisations** |
| representations   | 38                 |
| Large countries   | NGOs 16 (15)       |
| Medium countries  | Trade unions 2 (1) |
| Small countries   | Producer associations 20 (19) |
| **European Parliament** | Other 7 |
| MEPs (5 parties, 7 committees) | Public affairs consultancies 3 |
| Party advisors (same affiliations as MEPs) | Speakers at trilogue conferences 2 |
| Assistants to MEPs | European Ombudsman’s office 1 |
| Secretariat       | Territorial governmental representative organisation 1 |
| **Total**         | 42                 |
| **Civil society organisations** |
| at EU level       |

In parentheses: number of civil society organisations at EU level.

Our interviewees fell into two groups: ‘insiders’, who attend trilogues and meetings of trilogue preparatory bodies; ‘outsiders’ or civil society actors in the broadest sense, who do not attend trilogues or meetings of the preparatory bodies, but we know from the extensive EU policy literature that they are a key part of the policy-making process and are often considered as a proxy for broader societal interests.

We did not audio-record the interviews. Given the sensitive nature of trilogue negotiations, audio-recording would have prevented open and detailed conversations on the topic. Audio-recording and verbatim transcriptions are also very time-consuming, and, given the number of interviews that we planned to conduct, this would have delayed the process of data analysis, and removed us unduly from the fieldwork.

In line with the qualitative method guidelines (Loubere 2017; Vogel and Funck 2017), however, we documented each interview with the help of detailed interview minutes, which we computer-typed during the interviews. Where we jointly interviewed, we thus had two sets of minutes on which to base our interpretations. The entire interview material (minutes) was then subject to a three-step process of data reduction and analysis, which we describe, together with interview selection and access. This process is critically important given the richness and complexity of the data material. For further methodological detail, please consult the Appendix at the end of this article.

**Trilogues as ‘politicised diplomacy’**

A consensus exists across Council and the EP in support of trilogues. In this section, we explore the beliefs upon which this consensus rests, the dilemmas it engenders, as well as the practices which have developed as a result of these contradictions. This explanatory narrative is encapsulated in
the concept of ‘politicised diplomacy’. Politicised diplomacy is poised between the diplomatic and parliamentary traditions of politics, and it is shaped in practice by a permanent flow of exchanges between ‘insiders’ and ‘outsiders’.

‘Space to think’: a tradition arises

Trilogues are underpinned by a merger between different traditions of politics and political conflict resolution, and therefore also rest upon different justifications. In the Council, seclusion is justified in light of three main beliefs: first, the belief that, without trilogues, the formal procedures would take too much time (efficiency); second, the belief that trilogues are a key device for neutralising EP politics (depoliticisation); and finally, the belief that, without trilogues, compromises could not be hammered out (space to think; Hillebrandt and Novak 2016). In the EP, likewise, seclusion is justified in light of two main beliefs: first, the belief that without trilogues the EP would wield less power over EU legislation (empowerment); and second, the belief that without trilogues it would be difficult to conduct real negotiations (space to think). These beliefs are spelled out in greater detail in Figure 1. Extensive interview referencing can be found in the figure in the numbers in parentheses at the end of each sentence.

There are two main insights to be derived from this list. First, a ‘tradition’ of seclusion has arisen across the EP and Council around the core belief of promoting a ‘space to think’ (Hillebrandt and Novak 2016). Both EP and Council actors refer to this belief extensively. Both describe this ‘space to think’ as an alternative to (1) grandstanding on the one hand and (2) the descent into informal politics on the other hand. ‘Space to think’ means that compromises are difficult to achieve when the cameras are on. Both legislators highlight the temporal dynamics of compromise-crafting: compromises develop over time, requiring different concessions from different actors. This is not a linear or symmetric process. While the overall result may be balanced, it builds on a series of partial touchstone agreements, which might seem unbalanced if they were publicised in real time. Public pressure would thus stiffen positions, making it very difficult to move forward towards a compromise. Both EP and Council actors highlight two different types of pressures arising from the ‘public gaze’. One pressure is clearly identifiable. It is related to the power of vested interests: more transparency gives powerful interests more influence especially if the political process is skewed in the first place, according to both EP and Council legislators. Another pressure is more diffuse and less clearly identifiable. It is the pressure of ‘public opinion’: more
Figure 1. Council and EP beliefs on trilogues.
Source: Own interviews. Numbers in parentheses refer to interview identification number.
transparency means more public messaging and public relations work (grandstanding, face-saving, and posturing) aimed at placating public opinion rather than solving specific problems.

Second, important differences exist below the surface. We note the importance of efficiency as a prominent value in the Council, as expressed in the belief that trilogues are a superior form of ‘conciliation’. EP actors may value efficiency, but they do not articulate it, which indicates a lesser prominence than in the Council. More importantly, we note the basic and fundamental contradiction between a Council viewing trilogues as a neutralising and depoliticising device and an EP intent to use trilogues to project its power and politicise EU legislation. There are several ways in which trilogues are believed to depoliticise negotiations: (1) by creating asymmetries of information: as a ‘discrete’ and ‘secretive’ Council can control an open, attention-craving, and talkative EP; (2) as a result, by enabling Council to fragment EP opposition by dividing and ruling strategies; and finally, (3) by enabling Council to exchange symbolic political points against mastery and domination through technical arrangements.

In the EP, by contrast, trilogues have very much become synonymous with empowerment. There are many aspects of empowerment. For the large EP parties, empowerment means sitting at the table with the big boys (Interview 35). For the smaller parties, empowerment means reducing the domination of larger EP groups. The alternative to trilogues is an informal politics of ‘deals’ between Council and the large groups. For the EP as a whole, trilogues as a process and a construction helps forge and designate Council as a collective opponent. EP actors clearly perceive and articulate this effect as a political advantage. This explains the sense of ownership that many MEPs have developed for a practice which could at first glance appear foreign to the political repertoire of parliamentary politics.

In sum, a consensus exists across Council and the EP in support of trilogues. This consensus is centred on the belief that trilogues afford lawmakers the ‘space to think’ which is necessary for crafting complex compromises in a political environment characterised by often polarised opinion and skewed political interests. This consensus institutionalises a basic contradiction, between an EP intent on politicising EU lawmaking at the heart of power, and Council viewing trilogues as a tool of conflict deflection and legislative efficiency. This consensus forms the ‘tradition’ within which trilogues are validated as an appropriate form of decision making.

**Seclusion dilemmas: the cost and limits of tradition**

The tradition of seclusion has not gone unchallenged. Pockets of opposition exist, which are nurtured by ideological opposition and ambiguous lessons
from MEPs’ lived experiences. In the EP, much of the contestation about trilogues has developed on ideological grounds. Trilogues were from the outset a controversial topic, and the fire is smouldering under the lid of EP empowerment. The radical left party GUE/NGL (Confederal Group of the European United Left/Nordic Green Left) has long expressed its opposition to a system that it deemed untransparent, and it continues to do today. For instance, at the time of writing, GUE/NGL MEPs on the ECON committee systematically opposed any committee decision to enter into trilogue negotiations on the ground of transparency and accountability (Interview 31). Given GUE/NGL’s confederal structure, this decision was not applied across all EP committees; it nonetheless suggests that EP reform of trilogues remains an unfinished business. From the Greens, an MEP raised the lack of transparency of the EP’s preparatory bodies as a problematic issue, referring to the untransparent role of the shadow meetings in the process of elaboration of the EP trilogue mandate (Interview 15). The rise of Eurosceptic parties adds yet new voices of discontent as these parties are often excluded from the trilogue process (Interview 26). Recent research shows that ‘only soft Eurosceptics are seen as legitimate partners in intra-institutional negotiations, while mainstream MEPs exclude hard Eurosceptics from trilogue negotiations in order not to give them a platform to propagate their views’ (Ripoll Servent and Panning 2019: 770–771).

In addition to ideological tensions, tradition is also challenged on the ground of EP empowerment. A sticking point for the EP is to maintain access to high-quality advice and expertise under the trilogue process. The EP has developed considerable in-house resources, with significant growth in staff for the European Parliament Research Service (EPRS), the Directorate General for Internal Policies (DGIPol), Secretariat staff of committees, and assistants for MEPs (Greenwood and Roederer-Rynning 2019). And at least one member state reported facing a technically superior EP team (Interview 12). However, a widespread experience is that Council exploits the EP’s relative technical weakness by shifting issues into ‘technical’ trilogues (Interview 15). One member state contrasted Council’s independence from external sources of technical input in trilogues, with EP dependence on external advice and expertise (from NGOs) (Interview 2). Some member states viewed the EP’s relative lack of expertise as leading it to concede many points of ‘technical’ details and reinforcing its eagerness to score ‘political’ points (Interviews 10, 11). Thus, in addition to ideological tensions and political exclusion, the lived experience of some lawmakers clashes with the belief of empowerment, bringing the tradition of trilogue seclusion under pressure.

The tradition of seclusion has faced its own dilemmas in the Council. One dilemma focuses on the trade-off between efficiency and Council
power. Some member states view the EP as the big winner of trilogues and threaten to go back to the Treaty framework if the EP becomes too difficult – this is clearly based on a belief that the formal rules of EU law-making would be advantageous to Council (Interview 1). Sometimes, member states also experience that Council makes too large concessions to the EP, or concessions they did not fully understand, in its eagerness to compromise (Interview 12). Finally, speed can also be detrimental to the quality of legislation (Interview 2). Sometimes, speed is just not that attractive.

An equally important dilemma revolves around the decreasing internal transparency that some experience in the Council. Member states regularly described the Presidency as the only ‘insider’ in trilogues, being the only member state participating in the trilogues. While presidencies are widely aware that their power depends to a large extent on the trust that member states place in them (Interviews 7, 29), many member states highlighted the difficulty of keeping track of the negotiations. The Presidency often keeps member states informed through oral debriefings of very short duration and uninformative nature. The presence of the Commission sometimes constrained the reporting (Interview 1). No minutes are circulated, although the secretariat keeps minutes (which it does not circulate) and some working groups might circulate ‘outcomes of proceedings’ (Interview 3). Sometimes papers with procedural content may be circulated, but they remain of little interest. It is therefore up to the member states to keep track of the process – a difficult task considering the need to monitor 27 positions and complex details. Compounding the difficulty is the fact that the traditional system of footnote annotations, by which member state positions are recorded in internal documents, is not used across the board in the Council (Interviews 3, 7, 10, 11, 12). This makes it even more difficult for member states to track one another’s positions in the negotiations. As a result, member states report having difficulty reading the political landscape and the thrust of coalition-building in the Council (Interview 3), and there is a certain sense of unease vis-à-vis the asymmetric position of the Presidency. One member state, for example, described the Presidency as not always reporting what really happened in trilogues and playing with votes behind the scenes (Interview 9). All member states acknowledge the need to rely on multiple sources of information to stitch together their understanding of the trilogue process and coalition opportunities.

**Trilogues as a permeable institution**

Institutionalised contradictions and dilemmas arising from ideological trade-offs and the lived experiences of EU lawmakers have fuelled a
constant flow of exchanges across the boundaries of trilogues. Trilogues are not sealed off; they are permeable. Permeability has two dimensions. A first dimension is inter-institutional: it brings institutional actors in contact at both EU and national levels. The Commission is regularly mentioned as a key source of information. EP and Council interviewees also provide ample evidence of ongoing contacts across the two institutions. Member states often consider MEPs from their countries as ‘their’ MEPs, though there might be national variation regarding the density of contacts between permanent representatives and national MEPs (contrast Interviews 5 and 6). In turn, MEPs are often dependent on their permanent representatives for accessing trilogue documents (Interview 26). National governments and parliaments play a role too, in this circulation of information (Interviews 2, 4, 5, 6).

A second layer of contacts spanned the institutional–extra-institutional domains. This layer of contacts involved all institutional actors. Some member states claimed relying only or mostly on inter-institutional contacts (Interviews 2 and 6). But they too were open to societal actors, stressing the gap between Council’s self-understanding as an institution which does not leak (Interview 2) and the entrenched practice of open-door policy and information exchange between permanent representatives and their societal environments. At least six patterns of disclosure, and their associated justifications, emerged:

1. **Expertise sharing** was about acquiring technical knowledge necessary for EU legislation. This deviation from seclusion was seen as appropriate when lawmakers did not have the relevant expertise in house to address the highly detailed and complex nature of legislation at the supranational level. Trilogues did not mark the end of the need for expertise; in fact, the acceleration of the negotiations during trilogues highlighted the need for insiders to get swift and reliable access to expertise, sometimes to be provided overnight (Interview 82). The EP was conventionally viewed as being more in need of external input on technical issues, although this assertion was occasionally disputed from outside observers (Interviews 5, 64). The ‘Noise at Work’ directive was a good example of this, where you needed input from outside organisations about what different decibel levels meant (Interview 15).

2. **Intelligence gathering** was about understanding the processual side of EU lawmaking, specifically how the ‘lay of the land’ evolved during trilogues, in an environment often very difficult to ‘read’. All types of CSOs could be involved. Consultancies were sometimes singled out as a good source of information (Interview 5, 27). Besides
monitoring the position of other actors, intelligence gathering during trilogues also involved shaping one’s own position. Occasionally, EP or Council actors had not worked out their strategy and used intelligence gathering to develop their last-minute game plan (Interview 44).

3. **Inter- and intra-institutional lobbying** was about building coalitions, usually across the EP and Council, and often (but not always) indirectly, i.e. with an outsider as an intermediary. Sometimes, the EP encouraged NGOs or producer associations to lobby the member states (Interviews 56, 60, 68, 74). Other times, some member states might do the same, to influence either the EP or other member states (Interview 1, 8, 66). For member states, this type of lobbying was appropriate when national interests were at stake. Most stressed the hold of the ‘no naming and shaming’ norm. Finally, sometimes it was the Commission which was trying to build support for its proposal with the lawmakers, using civil society organisations (Interviews 67, 76, 77).

4. **Politicisation** was about breaking trilogue negotiations out to the broader public, either directly through leaks, or indirectly through civil society organisations (typically NGOs) as an intermediary. For an EP interviewee, reaching out to NGOs to create public pressure was appropriate when other means of leverage were not available. If they could obtain information at the right time and in a way that would capture media attention, then an NGO could make a difference, and it would even be possible to embarrass the Presidency (Interview 35). *Politico* was repeatedly cited as an important source of leakage, perhaps a game-changer in this respect, creating a tremendous amount of frustration with some member states but welcomed by others (a contrast between Interviews 1 and 6, vs 4).

5. **Domestic provisions on parliamentary scrutiny**: Depending on the domestic procedures for parliamentary control of EU affairs, national parliaments were more or less well-informed of the ongoing trilogue negotiations, with the Dutch, German, and Danish parliaments better informed. Some information on trilogues was occasionally leaked out to the broader public via national parliaments. Other times, the information circulating between permanent representatives and their capital was considered legally subject to all transparency requirements in domestic law.

6. **Normative pressure**: On some files, it was simply not normatively defensible not to inform the broader public about the national positions. The ‘Trade Secrets’ file was one such file, on which member
states felt that they were morally compelled – due to the nature of the topic – to break out of the secrecy bubble of the trilogues.

As a result, both the industry and NGOs are very well-informed, sometimes better informed, than institutional actors (Interview 5). At least one NGO reported almost negotiating on behalf of the negotiators (Interview 50). The EP is regularly portrayed as a very open (the most open – but see Settembri 2005) institution. MEPs often have ‘their’ team of CSO advisors (Interview 15), who provide them with advice and expertise during the trilogue process (Interview 28). All EP interviewees claimed to have regular contacts with a broad and pluralistic set of societal and institutional interests during trilogues.

In sum, trilogues in practice take place in a very dense web of ongoing contacts between institutional actors and societal actors. These contacts take place through very different channels and methods; and they are initiated for a variety of reasons ranging from the need for expertise to references to the national interest through normative reasons.

Conclusion

The EU institutions have not yet responded to the European Ombudsman’s report, and a request for clarification of the ruling is now pending (Interview 79). Yet clearly the Ombudsman’s 2016 report and the Court’s 2018 ruling can change the trilogue process, paving the way for more systematic and public access to trilogue information. While concrete implications are currently being worked out in EU institutions, our study generates original and systematic insights into the reasons why EU lawmaking has taken the form of secluded decision making (trilogues), and how trilogue practices have evolved to a point where it makes better sense to talk about the permeability, rather than the seclusion, of trilogues.

We have argued the following. In line with the EU’s hybrid political nature, the EU lawmaking process can be interpreted as politicised diplomacy, i.e. a hybrid and unstable fusion between an intergovernmental paradigm of politics, emphasising negotiation between sovereign representatives and promoting the quiet and consensual method as a mechanism of conflict resolution; and a parliamentary paradigm, emphasising competition between elected representatives, and open and public debates as a mechanism of conflict resolution. The trilogue process, with seclusion as its defining feature, is a compromise between these traditions, and to some extent it reflects the crafting of a new, albeit unstable, tradition, forming together around the shared belief of the need to create a ‘space to think’. This new tradition has not gone unchallenged. Ongoing
ideological rumblings and the ambiguous lessons of lawmakers’ lived experiences have raised dilemmas in both the EP and Council. These dilemmas are the primary reason why a steady flow of exchanges exists between ‘insiders’ and ‘outsiders’ during trilogues, in spite of commitments from EP and Council actors to protect the ‘space to think’. We have thus come full circle: from treaty declarations of the EU lawmaking process as open and public, to trilogue seclusion and trilogue permeability, and now also to renewed, authoritative public calls for an open and public process.

Our contribution is threefold. First, regarding the trilogue literature, our study coins the concept of ‘politicised diplomacy’ to make sense of trilogues, as an institution unsteadily poised between the diplomatic and the parliamentary traditions, and evolving as a result of ongoing tensions between different sets of beliefs and real-world dilemmas encountered by EU policymakers. This is a distinctive contribution given the predominant interpretation of trilogues as a depoliticising device. We know that ‘when a policy decision point approaches, but clashes between rival advocacy coalitions cause impasse, the EU’s natural propensity is to depoliticize issues and “push” them back to the sub-systematic level for quiet resolution’ (Peterson 2001: 309). While Peterson had expert committees and professional networks in mind, trilogues also lend themselves perfectly well, in appearance, to defusing political conflict in a quiet and largely technical context. In this article, we argue that understanding trilogues as a depoliticising device, however, is too simple because this overlooks the intrinsic conflicts upon which trilogues are based and which keep flaring up. In essence, trilogues are based upon a clash between the diplomatic and parliamentary traditions; this clash remains a living fault line, fuelling tensions and contradictions. Where Council hoped to shape trilogues in conformity with its own working method, it has been faced with MEPs viewing trilogues as, in essence, a tool of bicameral conflict resolution – an opportunity to bring politics to the heart of the EU legislative process.

Second, in making this argument, we contribute to the emerging scholarly focus on the politicisation of the EU (De Wilde and Zürn 2012; De Wilde et al. 2016). While this literature has mainly focused on the citizen and intermediary spheres (Baglioni and Hurrelmann 2016), we show how insiders politicise trilogues by negotiating under the shadow of public opinion, and bringing salient issues for a broad range of societal interests to the very heart of legislative deals. Our contribution in this regard is to trace the dense and variegated pattern of exchanges between trilogue insiders and a very broad range of civil society organisations. This punctures the myth of trilogues as quiet politics dominated by producer interests.
Third, with regard to the interpretivist literature in EU studies, our work shows the relevance of interpretivism to explore EU informal governance and politicisation of the EU (Wiesner et al. 2017), and particularly the fruitfulness of explanatory concepts like ‘traditions’, ‘dilemmas’, and ‘narratives’. At the same time, our methodological approach to ‘soaking and poking’, based on the technique of ‘conversational interviews’, provides concrete solutions to classic problems that researchers face when dealing with informal processes and relying on (a large number of) qualitative interviews.

Looking ahead, we need to explore how civil society organisations engage with trilogues, and what implication this has on their identities, mobilisation strategies, organisational form and resource management. Furthermore, given the hybrid character of trilogues as politicised diplomacy, we need to pursue and deepen the normative reflection on trilogues (Reh 2014; Stie 2013) to assess the conditions under which we can accept lawmakers’ own justifications of (dis)closure, evidenced in this paper, as acceptable. Where do we draw the line between ‘making formal rules work in practice’ and ‘anything goes’?

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Interviews

All interviews conducted in Brussels unless otherwise indicated.

Interview 1 with the permanent representation of a large member state, 25 September 2017
Interview 2 with the permanent representation of a large member state, 10 January 2018
Interview 3 with the permanent representation of a medium-sized member state, 25 September 2017
Interview 4 with the permanent representation of a medium-sized member state, 26 September 2017
Interview 5 with the permanent representation of a medium-sized member state, 28 September 2017
Interview 6 with the permanent representation of a medium-sized member state, 28 September 2017
Interview 7 with the permanent representation of a medium-sized member state, 28 September 2017
Interview 8 with the permanent representation of a medium-sized member state, 29 September 2017
Interview 9 with the permanent representation of a medium-sized member state, 12 October 2017
Interview 10 with the permanent representation of a small member state, 26 September 2017
Interview 11 with the permanent representation of a medium-sized member state, 29 September 2017
Interview 12 with the permanent representation of a small member state, 29 September 2017
Interview 14 with an MEP from the EPP, Strasbourg, 14 September 2017
Interview 15 with an MEP from the Greens, 28 September 2017
Interview 16 with an MEP from ALDE, 10 October 2017
Interview 17 with an MEP from ALDE, 12 October 2017
Interview 18 with an MEP from S&D, 5.12.2017
Interview 21 with an MEP from ECR, 6.12.2017
Interview 22 with an MEP from GUE/NGL, 6.12.2017
Interview 24 with an MEP from ECR, 9.4.2018
Interview 26 with a policy advisor from the S&D, Strasbourg, 13 September 17
Interview 27 with a policy advisor from ALDE, Strasbourg, 13 September 2017
Interview 28 with a policy advisor from the ECR, 26 September 2017
Interview 29 with a party policy advisor, ALDE, 29 September 2017
Interview 31 with a party policy advisor, GUE/NGL, 12 October 2017
Interview 35 with a party policy advisor, Greens-EFA, 7 December 2017
Interview 44 with an NGO, 25 September 2017
Interview 50 with an NGO, 29 September 2017
Interview 56 with an NGO, 17 January 2018
Interview 60 with a national trade union confederation, 6 December 2017
Interview 64 with a business association, 27 February 2018
Interview 66 with a business association, 4 June 2018
Interview 67 with a business association, 4 June 2018
Interview 68 with a business association, 5 June 2018
Interview 74 with a business association, 7 June 2018
Interview 76 with a business association, 7 June 2018
Interview 77 with a business association, 7 June 2018
Interview 79 with a national business association, 8 June 2018
Interview 82 with a public affairs consultancy, 27 February 2018

Key to party acronyms

ALDE  Alliance of Liberals and Democrats for Europe
ECR  European Conservative and Reformists Group
EPP  European People’s Party
Greens-EFA  Greens – European Free Alliance
GUE/NGL  European United Left/Nordic Green Left
S&D  Progressive Alliance of Socialists and Democrats

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Methodological Appendix

Interviewee selection and access

A division was made between trilogue ‘insiders’ and ‘outsiders’. ‘Insiders were those who participated in trilogues, or who were involved in institutional preparation for trilogues, whereas outsiders were those who had no official access to the trilogue process. As Schwartz-Shea and Yanow (2012: 70) write, ‘the language of “case selection” [used by positivist researchers] implies considerable researcher control … but is not appropriate to interpretive research design’, which is why interpretivists prefer to speak of access rather than case selection. Of the outsiders, only two organisations refused to meet with us, or could not be reached. Of the insiders, almost half of the permanent representations responded positively to an invitation to interview, with only one outright refusal. Most of the remainder later responded positively to a subsequent research enquiry. This is notable, because traditionally permanent representations have been hard to reach in research enquiries. There was slightly less success in gaining interviews with MEPs, with many proving hard to reach. Nonetheless, there was a previous enquiry to draw upon where necessary.

Insiders

All the permanent representations were contacted, with the responses enabling interviews with a range of large, medium, and small countries. In the European Parliament, in selecting interviewees from amongst MEPs, the input of a spread
of parties and committees was sought where there was recent experience with tri-logues. Two assistants substituted where appointments with members had to be cancelled, but these were individuals with active experience of working on a recent trilogue file. Two members of the EP Secretariat were interviewed, who were well placed to comment on a case study of the trilogue process. A previous project, in which trilogues had formed one line of enquiry, had involved interviewing a much wider range of MEPs.

**Outsiders**

All organisations contributing to the European Ombudsman’s public consultations on trilogues were invited for interview. The remaining ‘outsider’ organisations were selected from the EU transparency register, so as to achieve a spread of perspectives from the range of civil society organisations present in Brussels, using the criteria of small, medium-sized and large organisations. A future study could include companies with offices based in Brussels, and national associations with offices in and outside of Brussels, in order to develop the line of enquiry that a Brussels base provides for access to information about the trilogue process. Nonetheless, we managed to interview three national organisations with a Brussels office: a producer association, a trade union, and an NGO.

**Process of data reduction and analysis**

The process of data reduction and analysis involved the following complementary steps: (a) writing up reports by category of interviewees in order to extract the most significant points, convergences as well as contradictions; these reports helped us identify relevant classification categories, to be used in a more systematic analysis of the data. Originally 27 codes were identified; (b) we then wrote up more detailed individual interview reports (called case reconstructions) citing for each category the key passage of the interview minutes; and (c) finally we created a searchable interview database in Excel, on the basis of these individual reports and finer coding dimensions, which enabled us to filter relevant parts of the interview material across analytical dimensions.

**Guide to individual interview detailed reporting (case reconstructions) developed by Niels Lachmann**

This document regroups all the individual case reconstructions, which have been uploaded individually to the folders on Sharepoint. In cases where there were two sets of notes, only one case reconstruction was done, with both sets used therein. Quotes from the notes, when relevant, have been entered under different coding dimensions. A guide to these dimensions can be provided on request. Interviewees, references to other interview subjects, specific – e.g. sectoral – organisations connected to the interview subject, opinions attributed to other persons, and so on, have been anonymised. Whenever an interview subject refers to another one in the notes, this is referenced by case reconstruction ID number and actor code. The acronyms used for the actor codes are noted subsequent to the coding dimensions.