

# Inside the black box of trilogues: introduction to the special issue.

BRANDSMA, G.J., GREENWOOD, J., RIPOLL SERVENT, A. and ROEDERER-RYNNING, C.

2021

*This is an Accepted Manuscript version of the following article, accepted for publication in Journal of European Public Policy. BRANDSMA, G.J., GREENWOOD, J., RIPOLL SERVENT, A. and ROEDERER-RYNNING, C. 2021. Inside the black box of trilogues: introduction to the special issue. Journal of European public policy [online], 28(1): inside the black box of trilogues, pages 1-9. Available from: <https://doi.org/10.1080/13501763.2020.1859600>. It is deposited under the terms of the Creative Commons Attribution-NonCommercial License (<http://creativecommons.org/licenses/by-nc/4.0/>), which permits non-commercial re-use, distribution, and reproduction in any medium, provided the original work is properly cited.*

## **Inside the black box of trilogues: Introduction to the special issue**

Gijs Jan Brandsma, Justin Greenwood, Ariadna Ripoll Servent and Christilla Roederer-Rynning

### **Abstract**

This special issue brings together seven original contributions on actors involved in trilogue negotiations whose role has largely been neglected: the Commission, the Council, the Court, the Ombudsman, national parliaments, organized interests and Eurosceptic groups. This introduction outlines the setup and work processes of trilogues, and highlights the key findings of the issue's contributions, namely how actors at the edge of the negotiations can shape power relations in trilogues and how micro-behaviour shapes macro-processes of inter-institutional bargaining. It also discusses the ongoing tension between transparency and efficiency, notably when it comes to institutional oversight mechanisms and the legitimacy of trilogues.

### **Key words**

European Parliament, Council of Ministers, European Commission, democracy, bicameralism

### **Introduction**

European Union (EU) decision-making has increasingly moved from publicly visible venues towards more informal settings (Farrell and Héritier 2004, Héritier and Reh 2012, Brandsma 2015). The Treaty of Amsterdam provided the main impetus for this development, foreseeing the possibility for first-reading agreements between the EU co-deciders and, thereby, giving rise to the use of informal means of conflict resolution. Presently, around 99% of new European laws are fast-tracked, with political compromises mostly found behind closed doors in so-called 'trilogue meetings' between representatives of the European Parliament (EP), Council, and Commission (European Parliament 2019). Trilogues have become the 'new normal' as a way of reaching legislative compromises.

The rise of trilogues has sparked some controversy, particularly because they are held *in camera*. This form of secluded decision-making offers a contrast to the logic of 'public control' touted in the EU treaties (Curtin and Leino 2017). Yet, the EU needs a means to resolve bicameral conflicts, which is exactly what trilogues deliver. This trade-off between seclusion and efficacy has raised various academic and political debates. First, transparency is the biggest touchstone of dissent. European decision-makers repeatedly underscore the necessity of a 'space to think' and deliberate, away from the pressures of a public gaze, so as to avoid grandstanding and posturing during negotiations (Hillebrandt and Novak 2016; Roederer-Rynning and Greenwood 2020). However, the lack of availability of trilogue documents prior to, or even after, trilogue meetings seems at odds with the general principle of political equality and open decision-making established in the Treaty (Curtin and Leino 2017; Rosén and Stie forthcoming).

Second, academic debates have evolved from an early focus on processes of informalisation (Farrell and Héritier 2004, Shackleton and Raunio 2003), via institutionalisation (cf. Héritier and Reh 2012, Roederer-Rynning and Greenwood 2015), back to informalisation (Brandsma and Hoppe 2020). The question today is perhaps less to what extent trilogues can continue to

be characterised as ‘informal’ or ‘formal’ institutions, but to conceptualise and explain the many shades of (in)formality over time and across institutions.

Third, while scholars have identified and underscored the relevance of trilogues since they first emerged in the early 2000s, we still know little about how this form of bicameral conflict resolution affects the intra- and inter-institutional distribution of power. Research has mostly focused on the EP, neglecting the Council and the Commission. We also lack research on the actors surrounding trilogues but greatly affected by them, such as civil society organisations and national parliaments, as well as on the participation of Eurosceptic groups in trilogues. These are the lacunae that this special issue seeks to fill.

### **Trilogues as an integral part of the ordinary legislative procedure**

During the eighth legislative term, 1,185 trilogues took place on 346 legislative files (European Parliament 2019: 8); on average 3-4 trilogues were needed to reach agreement (Brandsma 2015). This number only refers to trilogues at the political level, which are at the apex of a much larger set of non-formalised, yet institutionalised, practices of interinstitutional interaction.

Nowadays, the lead committee takes the initiative in preparing an EP negotiating position to open negotiations with the Council, taking account of the opinions of associated committees. As EP committee meetings are held in public, the Council can follow the development of the EP’s negotiating position and exploit the main points of internal disagreement. A new measure introduced into the Rules of Procedure in 2017 gives the plenary and political groups a brief moment to intervene in the decision to open negotiations and refer the case back to the committee for further discussion if deemed necessary (Rule 71). The trilogue meetings are scheduled as soon as mandates are agreed in the EP and the Council.

From this stage, the EP secretariat is supported by two specialist horizontal internal units, the Conciliation and Co-decision Unit (CODE), and the Co-ordination of legislation unit (CORDLEG) (Greenwood and Roederer-Rynning 2019). The EP committee secretariat then opens bilateral discussions with the Council secretariat. Together, they lead discussions into technical trilogues, which feature representatives of the Presidency on the Council side, and the Rapporteur or/and their assistant, the assistants of Shadow Rapporteurs, and the respective secretariats, on the EP side. The Commission is represented by the Head of Unit and an official from the unit responsible for the file, as well as an official from the Legal Services.

In political trilogues, the Council’s General Secretariat attends and assists the Presidency, which at the early stage usually means the Chair of the Council working group, and at a later stage the Chair of the Committee of Permanent Representatives (Coreper) and occasionally also ministers (Brandsma et al., this issue). From the EP, attendees include the Committee Chair (who chairs the trilogue meeting), the Rapporteur, and the Shadow Rapporteurs, although the usual protocol is for only the Rapporteur to speak. Observers usually include political group advisors, MEP assistants, and the Committee Secretariat. The Commission is represented by its Legal Service, its Co-Decision Unit, and either the Head of Unit responsible for the file or, increasingly, more senior levels going up to Director, Director General, and even the responsible Commissioner. The practice, thus far, has been for the Commissioner to attend the final trilogue meeting when a deal is in sight (see also the online Annex for a visual representation of a political trilogue).

In addition, one should not forget that there are bilateral interactions seeking to resolve conflicts ahead of trilogues, or even to agree on strategies to side-line opponents during trilogue meetings – turning hence political trilogue meetings into something of a rehearsed play (Brandsma and Hoppe 2020; Hoppe 2020). Although large-scale systematic research is lacking, several case studies show that process choices regarding the level of discussions and the involvement of administrative actors affect the outcome of the negotiations (Judge and Earnshaw 2011; Hoppe 2020).

### **At the edge - Trilogue boundaries and research frontiers**

The special issue shows the complexity of capturing trilogues with a unified approach. First, it underlines the importance of analysing trilogues as part of a broad political system. Past procedural and bargaining models often failed to account for the rapid emergence of informal bargaining mechanisms (e.g. Hagemann and Høyland 2010; Thomson 2011). Indeed, it has become increasingly difficult to disentangle the bargaining process and conceptualise influence and power when negotiations start even before formal procedures capture the positions of the different decision-making actors. This makes it particularly challenging to capture and model shifts in the balance of power (Laloux this issue; Brandsma et al. this issue; Brandsma and Hoppe 2020). Our contributors also show the necessity to broaden our understanding of power and politics in trilogues. Greenwood and Roederer-Rynning (this issue) integrate insights from classic comparative politics and public policy literature to conceptualise trilogues as an ‘informal majoritarian’ institution and underline the importance of societal actors outside of the negotiation room. Hillebrandt and Leino (this issue) and De Ruiter and Neuhold (this issue) show the importance of institutional actors outside of the negotiation room – courts and national parliaments, respectively – for shaping the long-term power relationship of decision-makers. Power relationships are not just given by formal and informal EU structures but can also be shaped by actors external to the negotiating arena. By participating at the edges, they shape the process and content of legislative procedures and raise questions about the secluded nature of trilogues (De Ruiter and Neuhold, this issue).

Second, the special issue also underlines the importance of linking macro-processes to micro-behaviour (see also Ruiter 2020, forthcoming). Panning (this issue) zooms into agent-based explanations to highlight the role of Commission staff in shaping institutional positions and preparing for trilogues. She shows the ability of certain actors in a specialist unit of the Secretariat General (the ‘Groupe de relations interinstitutionnelle’ or GRI) to act as gate-keepers and nodal points but also underlines the necessity to acquire a thicker understanding of the institutional contexts in which these actors operate. Despite their centrality, GRI actors are often limited by hierarchical procedures and the ultimate decision-making role of the College. Ripoll Servent and Panning (this issue) underline how an informal norm such as the *cordon sanitaire* has become institutionalised to the point of effectively excluding hard Eurosceptics groups from legislative work. They demonstrate how this norm is related to perceptions of undesirability rather than an actual evaluation of their ideology; indeed, mainstream MEPs often cooperate with radical right parties but legitimate these actions by pointing to their ‘soft’ Eurosceptic nature.

Finally, the special issue also shows how the methodological challenge of studying secluded negotiations can be alleviated. Laloux’s article (this issue) illustrates how new methods based on text mining can overcome some of these challenges. Ripoll and Panning (this issue) use EP

amendments to trace the survival rate for each political group. As in the case of Laloux, their methods cannot capture how successful the EP and the Council are, but they can tell us more about the conditions under which amendments survive trilogues and whether this is related to certain partisan or institutional factors. This shows, however, that we still miss ways to assess who wins and who loses (i.e. inter-institutional bargaining success) in trilogues.

The contributions of the special issue prove the importance of using a range of quantitative and qualitative methods to capture the informal nature of trilogues. Case-based methods complemented with process-tracing can help us draw patterns and better understand the conditions under which certain actors or institutional structures play a role in shaping processes (e.g. De Ruiter and Neuhold, Ripoll Servent and Panning, this issue). The informal and secluded nature of trilogues call for in-depth ethnographic methods, combining participant observation, elite interviews and qualitative surveys (see Panning, Greenwood and Roederer-Rynning, Brandsma et al, this issue; Ruiter 2020, forthcoming). These methods allow us to capture actors' perceptions and their own understanding of the shifting nature of trilogues over time.

### **Evolving control mechanisms in trilogues—From meta oversight to informal norms**

With the normalisation of trilogues, pressures for more transparency have been mounting and led to new forms of oversight – from meta oversight by the European Court of Justice and the European Ombudsman (see Hillebrandt and Leino, this issue), and horizontal legislation such as Access to Documents measures, through to procedural rules as described below in the Commission and Parliament, and to informal norms in the Council. Nonetheless, tensions between transparency, oversight and efficiency remain. A landmark ruling in 2018, the *De Capitani* case, found that trilogues were an integral part of the EU legislative procedure, and thus subject to public accountability (General Court of the European Union, 2018, Case T540/15). The European Ombudsman (2016), in her own-initiative report, sought to balance these requisites with the institutional 'space to think', and recommended retrospective transparency in the form of an inter-institutional public database of trilogue documents, including the famous 'four-column' documents that record the course of trilogue negotiations. The Ombudsman's report disappointed transparency activists, which Hillebrandt and Leino (this issue) attribute to the role of the EP in appointing the Ombudsman and the universal liking for trilogues amongst the EU institutions. The institutional argument is that further transparency measures would simply shift the venue of discussions into even more informal fora, losing what form of oversight already exists (European Ombudsman, 2016).

The issue of transparency has been particularly relevant for the entire range of civil society organisations (CSOs), which are frustrated at having to turn to informal networks to perform their advocacy. Greenwood and Roederer-Rynning, this issue, argue that trilogues' 'permeability' is a poor substitute for formal transparency mechanisms. In the Commission, trilogue participation is overseen by the i GRI (see Panning, this issue). In the Parliament, the plenary oversees the work of committees and the decision to open negotiations (Rule 71 in the Rules of Procedure) (*ex-ante* control) and has the power to intervene in the final package presented by the Committee responsible (the little used rule [59.3]) (*ex-post* control). In the latter case, the EP plenary can use its power of amendment to break down the package into parts; this rule aims to avoid that the outcome is presented as the 'best available deal' (i.e. a *fait accompli*) at the end of painstakingly detailed and delicate negotiations with the Council. There are also oversight arrangements exercised by the lead committee, which require the

negotiating team to report back after each political trilogue – although the extent to which this happens is highly variable (Brandsma, 2019).

In the Council, oversight practices have evolved in the form of norms, rather than through changes in formal internal rules. In this issue, Brandsma et al. consider the relationship between the Presidency and member states, analysing the latter's ability to exercise oversight through mandating, monitoring and sanctioning the Presidency. They note how member states have become less able to jointly exercise control over the Presidency by dropping the practice of inserting country-specific footnotes in working documents. Although all trilogues are reported back on in Coreper, presidencies rarely face repercussions for opportunistic behaviour. Typically, member states monitor the Presidency's behaviour through informal contacts with the EP and organized civil society.

Despite the presence of oversight mechanisms, there are key areas of weaknesses in the procedures and norms within and between the co-decision institutions, in particular. These refer to information asymmetries within the co-decision institutions as well as to considerable arenas that remain out of reach of intra-institutional oversight mechanisms. These include hidden venues, such as the Shadow Rapporteurs meetings within the European Parliament, contributions of the previously unexplored tier of political party advisors, the political co-ordinators in committees, and the committee secretariats ((Ripoll Servent and Panning 2019; Ruiter, 2020, forthcoming), and overall the persistence of a degree of informal 'pre-cooking' between the key representatives of the institutions, making some trilogues a 'theatre' following previously agreed scripts (see in particular Hoppe 2020, and Brandsma and Hoppe 2020).

Therefore, the trade-off between transparency and efficiency is still perceived by many insiders and outsiders as problematic. Our contributions show that these concerns have been dealt with very differently by each EU institution and that there is still a need for a common approach to transparency and oversight. Thus, while trilogues have become a highly institutionalised informal institution, they still raise questions that affect the input, throughput and output legitimacy of the EU's decision-making processes.

## **Acknowledgements**

The authors gratefully acknowledge the funding support provided by the DFG (RI 2536/3-1) (Germany), NWO (464-15-187) (the Netherlands), and the Economic and Social Research Council (ES/NO18761/1) (United Kingdom). The principal investigators (Brandsma, Greenwood and Ripoll Servent) and international collaborator (Roederer-Rynning) of these projects are all co-authors of this article.

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## Web appendix: A Trilogue in Process



Source: European Parliament (2017)