

Organized interests and trilogues in a post-regulatory era of EU policy-making.

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Abstract

Organized interests play a role in the everyday policy making of the EU. Trilogues are now part of the everyday policy-making of the EU. But little is known about the interaction between organized interests and trilogues. Can organized interests access this secluded and informal arena of EU decision making? If so, what implications does their degree of access have? Are there different patterns of interaction between different types of organized interests and the different co-decision making institutions? How do established controversies, such as the posited asymmetries between business interests and other types of civil society interests, manifest themselves when it comes to trilogues? As much as organized interests lobbying institutions, do we also find evidence of the reverse as a pathway seeking to influence trilogue negotiations? We answer these questions by conceptualising trilogues as informal institutions delivering political choices, distinguishing between different periods of trilogue informality, and flesh out an ideal-type of contemporary trilogues as 'complementary informal institutions' in a 'post-regulatory' state. We pinpoint valuable as well as enduringly problematic features of trilogue informality and permeability. Based on a substantial recent interview survey among 100 trilogue 'insiders' and 'outsiders', we provide fresh evidence of extensive and quasi-institutionalized ties between these players, their implications for the democratic quality of EU legislation. We develop further research questions surrounding the relationship between organized interests and trilogues.

Introduction

Organized interests play a systemic role in the European Union's (EU) political system. A teeming population of civil society organisations (CSOs) of all kinds – from producer groups to non-governmental organisations (NGOs) – act as a proxy for a civil society otherwise tenuously engaged with EU political institutions (Greenwood, 2017), and contribute to 'everyday EU policy-making' in formal and informal ways (Peterson, 2003). The literature on most of these roles of CSOs in the EU is well covered (for a review see Klüver et al, 2015), but little is known about CSO participation in a key feature of EU policy making, trilogues. We don't know whether established controversies, such as the posited asymmetries between business interests and other types of civil society interests, manifest themselves when it comes to trilogues. Recent research from the field of population ecology suggests that the EU ecosystem is well populated by a wide variety of advocacy groups, well capable of creating the simulation of a public 'marketplace of ideas' in a 'Brussels bubble' (Sorubaklsh, 2014). If there is a pluralization of interests with even and sufficient access to trilogues, then a range of civil society organisations might even produce democratic effects, such as oversight, checks and balances, a public debate (albeit in Brussels), and politicization.

Trilogues are theoretically and empirically interesting for the study of organized interests because they combine secluded decision-making and informality (Reh et al, 2013). Whilst we recognize that there is a debate as to whether trilogues can be characterized as formal or informal institutions, we see them as informal because they have no mention in the Treaties, and because the outcome of trilogues has to be approved by the political institutions. We recognize the extent to which trilogues have been codified over time. . The combination of informality and seclusion points to a problem in the literature on interest representation. First, there is a literature on interest representation in secluded decision-making, but this literature is exclusively focused on formal institutions (notably, EU agencies; Arras & Beyers, 2019; Arras & Braun, 2018; Durlan, 2018). We expect secluded decision-making venues to pose a series of issues for interest groups seeking to access EU policy-making which are different to that of regular channels, because of the lack of availability of formal information. The intensive need for different political allies also places some emphasis on 'reverse lobbying', i.e. political institutions lobbying interest groups to seek to influence other political institutions. And the fast pace of events towards the end of trilogue decision-making seems to carry implications for political access. Second, informal governance has only been applied to the EU political system as a whole (Christiansen and

Neuhold, 2013). Whilst the literature carries references to trilogues as features of informal governance (Christiansen and Neuhold, 2013; Reh et al, 2013), we still don't know how organized interests access trilogues.

We seek to advance the debate conceptually and empirically starting with a consideration of the way in which trilogues can be understood as a type of informal institution. Based on a diverse set of literatures, we claim that informality can be a fruitful conceptual anchor for analyzing the nature and effects of trilogues provided we distinguish between different types of informal institutions. We bring conceptual clarity by identifying the features that allow trilogues to be cast as informal institutions, and distinguishing between different periods of trilogue informality. We argue that the EU has entered a 'post-regulatory' era, where trends of redistribution and participatory democracy politicise a traditionally de-politicised and technical policy-making bent. On these premises, we expect trilogues to be embedded in continuously growing layers of social ties and interaction between insiders and outsiders, far from the image of trilogues as a political submarine that is ordinarily conveyed by their secluded nature. We also provide ample evidence of the social embeddedness of trilogues. It is consistent with narratives of institutionalization of the EU's legislative system and conceptualizations of trilogues as a 'permeable' institution, recently developed in the trilogue literature (Roederer-Rynning and Greenwood 2017 and 2020).

Our argument proceeds in the following way. We flesh out an ideal-type of contemporary trilogues as 'complementary informal institutions' in a 'post-regulatory' state. Next, we present a historical narrative of institutional evolution on the basis of typologies of informal institutions and we map out a rich landscape of quasi-institutionalized ties, reflecting the extensive and multi-faceted social embeddedness of trilogues. We then discuss our findings and pinpoint valuable as well as enduringly problematic features of trilogue informality and permeability. A key point driven by this article is that *permeability, as a property of informal institutions*, cannot substitute for transparency of decision-making, and that more systematic attention to the transparency of trilogues would be an effective way to further consolidate the nature of trilogues as 'complementary informal institutions'. Finally, we assess whether the activism and ingenuity of an EU-level civil society, combined with the increasing pressures for trilogue transparency, might provide a means of public oversight of the trilogue process.

Trilogues as a post-regulatory informal institution

As an integral (though informal) part of the EU's legislative process, trilogues can be conceived as an informal legislative institution delivering political choices. This conceptualization borrows freely from two intellectual fields of research. The first is related to Majone's work on regulatory policy-making in the EU and the 'rise of the European regulatory state' (Malone 1999). Majone made a compelling theoretical and historical case that European integration epitomized the rise of regulatory policies and regulatory policy-making, where public intervention predominantly takes the form of rule-making rather than (re)distributive intervention. He also argued that much of this policy-making activity at the EU level revolves around de-politicizing non-majoritarian institutions, that is, 'institutions which fulfil public functions but are not directly accountable to voters or to their elected representatives' (Majone 1999, 3), who draw their legitimacy from a logic of delegation. Majone concluded his examination of the EU regulatory state with a warning that is worth reproducing in length:

We cannot expect parliamentary democracy to flourish at European level as long as European voters support far-reaching economic integration but continue to see in the nation state the principal focus of their loyalty and the real arena of democratic politics. The separation of economic and political integration entails the de-politicisation of European policy making. Majone (1999, 21).

We argue that the EU today is in a post-regulatory moment where pushes for redistribution and for participatory democracy coexist and challenge the EU institutions' reflexive bent towards regulatory and de-politicising European policy making. There are several reasons why these pushes are not going to go away, for example: the secular constitutional trend towards the parliamentarization and democratization of EU policy-making; the politicization of EU policy-making in the wake of the Maastricht Treaty and the economic crises of the 2000s; and now the structural push towards financial transfers fuelled by the COVID-19 pandemic. The policy-making dynamics of EU legislative politics, and specifically the politics of trilogues, reflects this historical moment. As an integral part of the EU's legislative process, trilogues produce political choices – not institutionalize choices already made. The political playwright of trilogues is centered on crafting legislative compromises, not providing credible commitments.

While this makes trilogues a mechanism of bicameral conflict resolution analogous to those existing in other bicameral federal systems (Greenwood and Roederer-Rynning, 2019a), we should note that the character of trilogues remains contested. Given the deep-rooted elements sustaining regulatory policy-making (Majone 1999) and the stickiness of institutions, we might expect to see variations in the institutionalization of trilogues allowing for different combinations of regulatory and depoliticized policy-making and a more political form of 'post regulatory' politics.

The other intellectual field, to which we are indebted, is related to research on informal institutions. Our main point of reference here is Helmke and Levitsky's (2005) conceptual and empirical charting of informal institutions. The role of informal institutions has long been recognized by EU scholars (Middlemas 1995; Christiansen and Neuhold 2013), and to some extent by students of trilogues (Reh et al. 2013). Going beyond previous references, we use Helme and Levitsky's typology of informal institutions to define and calibrate the informal dimension of trilogues over time. This approach helps us pinpoint the evolving relationship of trilogues to formal institutions, and from there to conceptualise the present and potential place of organized interests.

Trilogues are an informal institution in the sense that they are 'rules of the game that structure political life ... [that are] created, communicated, and enforced outside of officially sanctioned channels' (Helmke and Levitsky 2005, 725). Indeed, as noted in the introduction to this article, trilogues are a pivotal element in the EU's legislative process despite having no bases in the EU treaties. Furthermore, for trilogue decisions to become binding, they have to be validated by the Council of Ministers and the EP. However, trilogues have evolved considerably since they first emerged in the 1990s (Shackleton and Raunio, 2003), and therefore, we need to develop a finer grained understanding of the informality of trilogues in order to understand access, roles, and impact of organised interests. Helmke and Levitsky's (2005, 728-30) typology is particularly useful in this respect. Where formal rules are effective, informal institutions may either be 'complementary' or 'accommodating'. 'Complementary informal institutions' basically arise to fill in gaps and enhance efficiency, while 'accommodating' informal institutions arise when actors often dislike the formal institutional arrangements, and seek to reconcile these institutions with their interests. Organised interests offer the potential to contribute to these gaps and efficiencies.

From accommodating to complementary informality: Implications for organized interests

The emergence of trilogues is mainly associated with the quantum leap in the EP's co-legislative powers at the 1997 Treaty of Amsterdam, entering into force in 1999, and a shared dislike of the cumbersome Conciliation Committee procedure. The Treaty introduced the possibility for a 'fast-track' procedure, allowing the legislative procedure to end after the First Reading (Stie, 2012). In turn, this led to what we know now as 'the trilogue'. These started out in an informal and unstructured guise, providing a venue for institutions to pursue their interests. It was only after the progressive codification of rules for participating in trilogues by the respective institutions that trilogues could better be described as a mechanism to enhance efficiency and to fill the gaps between the formal procedures for bicameral conflict resolution. The development of these procedures is described in the introduction to this special issue and in the articles on the Council and the European Parliament, and the development of these procedures provided a greater access space for organised interests. Trilogues developed into a sophisticated system of bifurcation between 'political' trilogues punctuated by 'technical trilogues' in order to nail down the complete issues at stake for bicameral resolution, and each populated by a different set of actors (Roederer-Rynning and Greenwood, 2015). As doubts began to emerge in the European Parliament, in particular, about the democratic implications of uncontrolled behind closed doors 'deal-making', and the stunted public debate caused by the dramatically increasing practice of first reading agreements, so the institutions began to develop a series of (formal: EP, and informal norms: Council) rules surrounding their participation. The EP has a visible set of rules, annexed as Rules of Procedure, last revisited in 2017 to give the plenary more powers of oversight of committees and to assert its authority, but in essence require Committee approval to enter into trilogue negotiations, a formal public negotiating position, and the requirement for negotiators to report back to committee after each (on average four – see Brandsma, 2015). Rapporteurs are no longer supposed to be unaccompanied into bi-lateral negotiations with the Presidency, but instead accompanied by a team of Shadow Rapporteurs, assistants and political party advisors. Council and Presidency norms, too, provided for an elaborate system of codified involvement (Brandsma et al, this issue). Together, these rules have assisted the institutions to fill the gaps between the co-decision powers of the EP and Council as a highly institutionalised mechanism of bi-cameral conflict resolution, and provide a means for organised interests to access information about the trilogue process.

We have conceptualized trilogues as an informal institution in a post-regulatory EU, producing political choices (legislative compromises) rather than simply institutionalising choices already made. We have traced their development from ‘accommodating informal institutions’ to ‘complementary informal institutions’ which fill in gaps and enhance efficiency, accompanied by codified rules and norms of procedure together with elaborate mechanisms and structures of both technical and political decision making. The development of these has assisted organized interests to enter the arena as a semi-participant, contributing to the formulation of positions of each institution, through established networks in the Brussels bubble. If our conceptualization of trilogues is fruitful, we should expect trilogues to be socially embedded in a broad, deep, and variegated web of organized interests. Indeed, the institutional evolution we have traced above means that trilogues should have become more hospitable for a wide variety of organized interests. The latter are in principle able to watch the emergence and finalization of the European Parliament’s positions through web-streams of committee meetings. The growing value of trilogues, as a ‘complementary informal institution’ should also translate into a growing ‘permeability’ of trilogues, as a result of the institutionalization of a dense web of ties enabling a wide range of outsiders to penetrate the shell of the ‘black box’. There is evidence that this has been happening, however, the evidence so far has centered on ‘insiders’ accounts’—not ‘outsiders’. In this paper, we move beyond the perspective of institutional (insider) actors.

In the following section we present an empirical account followed by an interpretation of what these findings mean for a ‘post-regulatory’ Europe informed by a drive for participatory mechanisms. Methodologically, we examine variations between NGOs and business organisations in terms of their access to trilogue information, the use of their expertise, their access to EU institutions during trilogues, the possibility for actors to influence the outcomes of trilogues through their expertise, the possibility or existence of CSO impact, and the use made by political institutions of CSOs as emissaries, i.e., to lobby one another during the trilogue process. From the EU institutions, we made contact with the many actors participating in, or observing, trilogue meetings, particularly from the EP side, and by contact with the permanent representations of member states who are briefed by the Presidency and who take an active part in the formulation of the positions of the Council. We draw on a rich dataset of 100 in-depth, semi-structured interviews with trilogue

'insiders' (participants and observers in trilogues and preparatory bodies from EU institutions) and 'outsiders' (mainly civil society organisations), during the period September 2017 to January 2019. In this article, we focus on trilogue outsiders, but in order to triangulate findings, we draw upon information from both trilogue outsiders and insiders to establish our empirical observations. The interviews typically lasted for an hour or more, and were mostly conducted in-person (96) rather than by telephone (4), in Brussels (96) and Strasbourg (4).

Insert table 1 here

The interviews therefore involved a combination of 'inside' and 'outside' organisations, and a database of 42 civil society organisations from which to draw. We selected our interviewees with civil society organisations based on those who had responded to the Ombudsman's own initiative enquiry as to the transparency of trilogues (2015-16; see the introduction to this special issue), as well as using the Transparency Register database of civil society organisations, and some 'snowballing' effect of recommendations of organisations and individuals known to be engaged on the topic, such as members of Commission Executive Vice-President Timmermans Better Regulation Task Force. The interview minutes were subject to a process of data reduction and analysis using case reconstructions, enabling us to identify qualitative insights from trilogue insiders and outsiders. The qualitative data were also reproduced in a quantitative form, based upon guiding categories, allowing us to examine variation between civil society organisations (and in particular between business organisations, NGOs, and trade unions). We recorded patterns such as the use of 'quiet' and 'noisy' politics (Keller, 2018) where possible, the use of CSOs as emissaries of EU political institutions and permanent representations, the access to information by CSOs, political access by CSOs, politicization of issues, and influence pathways. For access to information, we examined the role the three EU institutions appear to play for the civil society organisations, the degree of accessibility to EU institutions by civil society actors, and the extent to which information was obtained by CSOs. Whilst we do not equate access with influence, it is a necessary (though insufficient) pre-requisite. 'Influence' involved perceived impact, i.e., those occurrences where insiders were found by interviewees to have been permeable to some degree to civil society positions or actions during the legislative process, drawing on questions related to the possibility for actors to influence the outcomes of trilogues, with what impact, how, when, and how often.

'Emissaries' involved analysis of which institutions send which organisations where, how often, and under what circumstances. Observations were made based upon the statements made by interviewees.

The social embeddedness of trilogues: Evidence and interpretation

The literature on organized interests at EU level focuses our attention, for the purposes of this analysis of their relationship to trilogues, on a number of debates and realities. Here, we review key debates which focus our data collection, and present our results. There is the hotly contested question of whether there are asymmetries of access between different types of organized interests, with some accounts placing emphasis on the extent of possession of varying kinds of resources. Nonetheless, the presence or otherwise of a Brussels office would seem to be a cleavage, irrespective of the category of organized interests; lobbyists network to acquire information, and the number of potential points of contact with trilogue insiders increases the chance of information flows. A further ongoing debate in the literature on organized interests is whether the EP's position as the people's tribune makes it a particularly hospitable information access source for NGOs. We would expect this to be a two-way relationship, in which the EU institutions, and in particular the European Parliament, use NGOs to lobby the Council, and whether the Council, in turn, with its more concentrated focus on the impact of EU legislation upon domestic business, might use business interests as a conduit to lobby the EP. The more generally perceived strong relationship between the EP and NGOs is however nuanced by the findings of a study by Coen and Katsaitis, who find an overall greater presence of business in the EP than NGOs, and that the strength of the relationship is more limited to specific committee areas and activities (Coen & Katsaitis, 2015). Further, a key issue in the interest group literature involves access to information. The sheer size of the trilogue delegations from the EU institutions (see the introduction to this special issue), and those who participate in the preparation of institutional positions in trilogues means that there are lots of potential sources of leakage of information about the course of trilogue negotiations to outside organisations, such as CSOs. We examine access to information in the results presented below.

A surprise finding from *Table 2*, in contrast to the frame of 'secluded' trilogues characterizing public perceptions of trilogues, is that all the institutions were more likely to provide information about the trilogue decision making process than not. This follows the

development of trilogues into the formal end of the spectrum of informal institutions. According to one Permanent Representation official, 'information flows freely from insiders in trilogues' (Interview 89). The 'four-column documents' (as described in the introduction to this special issue) which are progressively built during the trilogue negotiations freely circulate to those with a network of contacts in Brussels. Public affairs consultancies appear to be very well informed about developments in the trilogue process (Interviews 5, 81 and 98, from 'outsider' and 'insider' organisations), particularly accessing information from smaller member states (interview 81). Nonetheless, overall, the European Parliament is most likely to be a source of trilogue information than other EU institutions. However, a stark difference lies between institutions in their proactivity, with information made more readily available to business actors than NGOs by the Council. A qualification is that information from the Council flows less freely than for other institutions. In the Parliament, however, information is much more readily available to NGOs and to trade unions relative to other EU institutions, albeit also readily available to business organisations. This reflects a pattern of trade union observations being a similar trend to that of NGOs, where trade unions can rely upon institutionalised contact with the Socialists and Democrats (S&D) Party, and with the Employment Committee (EMPL) of the European Parliament. It also contributes to the continuing debate about the extent to which the European Parliament is still a hospitable place for 'diffuse' interests (Greenwood & Roederer-Rynning, 2019b). The data suggests that the EP is a hospitable institution to business organisations, trade unions and to NGOs, albeit nuanced in different contexts (Dionigi, 2017). This conforms to the qualitative data from interviews, where we were told that even small NGOs can have access to information, provided that they themselves are giving something in return (Interview 44). For the larger NGOs, 'there are no surprises' (Interview 45). Rather than a cleavage between business and NGOs, or between large and small organisations, the main cleavage seems to be between those with, and without, a Brussels office as a means of accessing information.

Insert table 2 here

In turn, 'lobbyists are a good point of information transfer; you get the information from an Assistant, and pass this on to PERMREPS' (Interview 47). Whilst information mainly comes from informal sources, some business associations use professional monitoring/tracker services such as DODS (Interview 68). An MEP also told us how lobbyists watch the web stream of committee reporting back on trilogues, and from there they come

up with solutions to offer political actors as a means of seeking to influence the process (Interview 23). This MEP told us that ‘they always manage to get the documents, so there is hardly any file where they have no influence. There are lots from the Council secretariat and Commission who leak, and NGOs are manipulated by leaks’ (Interview 23). From the EP side, one Assistant to an MEP told us that ‘I have calls from all the lobbyists in all the hours following trilogues. They will call each political group advisor, assistant, etc., who has been there’ (Interview 37).

Table 3 examines the degree of accessibility to EU institutions by civil society actors, which helps to conceive of them as potentially democratising agents in the form of a teeming population of contesting interest groups offering checks and balances in the ‘post-regulatory’ form of the drive by EU institutions to develop different types of legitimacy and a participatory democracy. Confirming the pattern found in Table 2, there is relatively good access to the EU institutions, but in this case the pattern prevails throughout the EU institutions. Once again, it is the Parliament where there is most degree of contact, and where access is strongest for both business and NGOs. One NGO told us that ‘everyone working on trilogues gets to the Council last, probably because it is a black box, and because the Council works less with NGOs’ (Interview 53). Nonetheless, where a civil society organisation has sufficient expertise, so it is able to gain more formal access to the trilogue process. For one large producer association, representing a key industry in Europe, ‘three times in my eleven years I have been invited to joint meetings of the Council and the EP during the trilogue process to bring the position of my industry’ (Interview 74).

Insert table 3 here

For output legitimacy, organised interests provide expertise. The need in the Parliament for expertise is well recognized (Burns & Carter, 2010; Burns et al, 2013). One MEP gave us the example of the Noise at Work directive, where they needed outside organisations to tell them what different decibel levels mean (Interview 15). This MEP recalled that ‘I have a team of NGOs who I know have real expertise on this: so, I can test the argument with them, and test the Council’s argument’ (Interview 15). A trade union official recounted how ‘trilogues move fast on technical subjects, and advisors will often ring me up to see if something will work for us’ (Interview 59). Another MEP recalled how his assistants met with civil society organisations to get help with wording (Interview 24). This need for expertise is well recognized in the literature, but one interviewee from the Council provided a contrasting perspective: ‘If you are in INTA (International Trade Committee), then you are into the subject matter more deeply than the Presidency which has been there for 6 months, who is not necessarily an expert in trade’ (Interview 99). Similarly, interviewees in Broniecki pointed out that whilst the trilogue workload in the EP is evenly spread out, in the Council one Presidency handles all informal negotiations (Broniecki, 2019), placing the advantage with the EP.

A key issue for participatory governance or even a participatory democracy (Kohler Koch & Rittberger, 2007; Schmidt, 2013) based around organised interests involves the impact of different types of organised interests. *Table 4* denotes the possibility or existence of perceived impact by civil society actors, with variations provided below of strong through to weak and uncertain. Of interest is that perceived impact appears evenly between the Council and the European Parliament for business actors, NGOs, and trade unions. Nonetheless, a key variation in strength is evident in the European Parliament, where over half of all NGOs were deemed to have had a strong influence, whilst for business actors the corresponding figure is 13.6%. Once again, this demonstrates the enduring relationship between the European Parliament and NGOs. Interestingly, however, NGOs also had twice as much perceived strong impact in the Council than business organisations. The strong perceived impact of NGOs on Council may also indicate the professionalization of NGOs. One interviewee from a party group in the European Parliament told us that ‘if they can get information at the right time and framing the issue in a way which gets media attention, then yes NGOs can make a difference, especially if the agenda coincides with a member state’ (Interview 35). In echoes of ‘noisy’ politics, this interviewee continued that ‘and it

would be possible if you can embarrass the Presidency'. Confirming the role of CSOs as more than information gatherers, one Assistant to an MEP commented how 'CSOs are very active in trying to change positions during trilogue negotiations' (Interview 40).

Table 5 documents the use made by political institutions of lobby organisations (55 statements) of behavior of this type by the three EU decision making institutions, mostly by the European Parliament using NGOs to lobby the Council, once again providing strong evidence of the relationship between the EP, NGOs, and trade unions. This relationship receives little commentary in the literature on organised interests, so is worthy of investigation and analysis, and again helps to contribute to the debate about access to political institutions by organised interests (Pakull, Marshall & Bernhagen, 2020). As might be expected given the traditional role of the Council in protecting economic interests in their member states, there were more examples of Council actors using business interests to lobby the EP than any other category, although the numbers in each category were relatively small. Nonetheless, this finding overall provides evidence of the political role of civil society actors as carriers of messages between the EU institutions during the trilogue process. During the course of interviews, however, one NGO recalled that 'I got a call to go to Place Lux to have a beer with one national delegation. They didn't have a game plan, but they did want to shape our approach viz. the Parliament' (Interview 44). As regards the European Parliament, a telling quote from an NGO was that 'it happens all the time that we are political emissaries of the EP with the Council. I was almost negotiating for the negotiator in one case' (Interview 50). Another use of CSOs as emissaries is in a more subtle way; a party policy advisor in the EP told us that 'documents are leaked to put pressure on the member states – particularly from the Greens' (Interview 28). For this respondent, '4 column documents are leaked as a matter of routine'. Another subtle means of using NGOs was stressed by an MEP from a left party in the EP: 'we need NGOs to be critical of our stances, because we need them to put pressure on the Council' (Interview 22). Similarly, another MEP from the same group stressed that 'it is the task of the NGO to ask for the impossible, otherwise nothing will change' (Interview 23). From the other way round, one permanent representation told us that 'we do use companies, NGOs and other stakeholders to influence the position of the EP, including during the course of trilogues' (Interview 1). Another told us that 'we do use lobby groups as political communication with the EP'.

Insert table 5 here All types of civil society actors have been vocal in seeking reform of trilogues, aimed at further transparency, including business interests. The *De Capitani* ruling (see the introduction to this special issue, and in particular the article by Hillebrandt and Leino) seems to be a landmark in this respect, providing for release of the '4-column' documents during the course of the trilogue process. The accessibility of information we find provides the ability for civil society actors to engage in 'quiet' and 'noisy' politics, although the extent of variation between these remains a task for further research. Nonetheless, a key finding is that the incoming Presidency is heavily lobbied, mainly through quiet politics. An official from the General Secretariat of the Council, which assists the Presidency, commented that 'what helps for us if there are clear position papers from lobby groups, that there are sound arguments for and against something' (Interview 99). This provides further evidence of the permeability of the trilogue process to civil society organisations: where they can bring something useful to EU institutions, such as added value analysis and expertise, or political support for the positions of actors, so their access to trilogue information will be correspondingly increased. Meanwhile, an official from a country with recent experience of the Presidency commented that the Presidency sees lobbyists throughout the process, from mandating to conclusion (Interview 91). Nonetheless, towards the conclusion of a trilogue lobbyists are increasingly left out in the dark as the institutions search for agreement between themselves (Interview 14). We return to this point in the conclusions when mapping out a future research agenda.

Taken together, our findings provide some insight into the concept of trilogue development into the formal end of informal institutions, and the implications for the development of participatory governance or participatory democracy in a post-regulatory state. In sum, Tables 2-5 confirm that the institution with the strongest relationship to civil society actors during the trilogue process is the European Parliament, where access to information, the use of expertise, and the use of civil society actors as emissaries to other political institutions is strongest. Strongest of all is the relationship between the European Parliament and NGOs and trade unions in the trilogue process, challenging accounts which have identified a declining strength in this relationship (Burns & Carter, 2010; Burns et al, 2013). Nonetheless, the EP remains a hospitable institution to both business organizations and to NGOs, particularly to those organisations which have national networks as a means of shifting the position of member states within the Council (Interview 95). Perhaps unsurprisingly, information is made more readily available to business actors than to NGOs

in the Council. Nonetheless, the perceived influence exerted by civil society actors appears evenly between the Council and the EP for business actors, NGOs and trade unions. However, a key variation in strength of influence is evident in the European Parliament, where in over half of all occurrences on NGO influence, it was deemed to have been strong, whilst for business actors the corresponding figure is 13.6%. Environmental NGOs and trade unions were very active in the trilogue process (Interviews 97 & 98). Of surprise is that NGOs also had twice as much strong influence in the Council than business organisations. The data, however, suggests that the EP is more permeable to these actors than the Council.

Conclusions

Ours is the first study to look at the relationship between civil society organisations and EU institutions during the trilogue process. Our contribution is, first, to examine the implications of the historical evolution of trilogues for organized interests' access to trilogue decision-making; and third, to provide fresh and rich empirical evidence on outsiders' access *from the perspective of outsiders*. Our study helps pinpoint valuable as well as enduringly problematic features of trilogue informality and permeability. Our findings provide a fresh context because they cover the supposedly blacked out process of the trilogues, and the implications which informal and secluded decision making has for political access.

A valuable feature of the institutionalization of trilogues is the growing social embeddedness of this form of decision-making. A central finding from the analysis is that information about the trilogue decision making process is readily available to civil society organisations. While this finding challenges accounts which highlight the seclusion of the process (Reh et al, 2013), and its dominance by business organisations (Andlovic and Lehmann 2014), it confirms the conceptualization of trilogues as a permeable institution. There is a paradox between the openness of the trilogue process and public critiques, as well as between stakeholder perceptions of a 'black box' and empirical reality. Trilogues are where most legislative compromises are struck. Trilogues have become so large and institutionalized that it is virtually impossible, with such a large number of actors involved in these negotiations, to keep information restricted. The EP is by far the most open institution; and though it is receptive to *both* producer associations and NGOs, we do not find evidence that the EP no longer is the champion of diffuse interests. NGOs have clearly upped their game, combining litigation, quiet, and noisy politics to shape EU legislation in its least public phase. A key finding is the extent of use of organized interests as emissaries

between the EU institutions, particularly, though not exclusively, in the case of the European Parliament's relationship with NGOs.

However (and this is the more problematic feature of trilogue informality), *permeability, as a property of informal institutions*, cannot substitute for transparency of decision-making. The progressive codification of trilogues marks a shift from informal bilateralism, filling gaps between the formal procedures for bicameral conflict resolution. Our unique focus on organized interests in EU informal institutions identifies them as players in the trilogue scene, but a lack of transparency remains, and without this the potential even for a pluralized population of organized interests to assume political roles is limited. More systematic attention to the transparency of trilogues would be an effective way to further consolidate the nature of trilogues as 'complementary informal institutions'. The Ombudsman's report and the De Capitani case point us in this direction.

An important research agenda lies ahead of us, with several sets of issues in particular demanding more systematic analytic attention. First, we need to continue the painstaking mapping out of the involvement of CSOs in the trilogue process. Excluded from our analysis are two important actors: individual businesses—particularly large, multinational corporations; and national producer associations and NGOs. Further research must examine how these actors deal with the trilogues. Multinational corporations have a paramount interest in shaping EU legislation given their sensitivity to cross-border regulation. At the same time, they are better able to devote resources to shaping the trilogues through the mobilization of expertise, through their access to networks and through lobbying. And yet, the EU legislative system could hardly afford to serve particular interests, whether or not they are powerful, cross-border business operators. Unlike multinational corporations, national civil society organizations are outside of the Brussels bubble, and therefore lack an important precondition of access to trilogues. The key finding we make about the distinction between those with a Brussels office and otherwise, rather than types of interest groups (business, NGOs etc.), in terms of access to trilogues, makes this an important research agenda. Involving national organisations in the EU legislative process is an important step in making the EU system more robust and legitimate. to know more about the involvement of national CSOs in the trilogue process, too.

Second, we need to start inquiring systematically into the reasons for the (variegated) patterns and sometimes puzzling findings that we have found. Our analysis highlights

puzzling findings regarding the relationship between business interests and NGOs in the Council. Even though business interests have greater access with Council, NGOs are perceived to be more likely to have a strong influence with the Council. Why? This finding points to a different set of dynamics in venues where decision-making is informal and secluded, compared to regular stories of ‘insiders’ and ‘outsiders’. Here, the premium may be upon political allies, and the inter-institutional dynamics of EU institutions lobbying interest groups as a means to influence other political institutions. This may ultimately be the principal driver of information availability, rather than size of network or lobbying budget. The relatively greater cohesion of NGOs when compared to business ‘leaders’ and ‘laggards’ may give NGOs the edge as political allies, and provide them with information and political access throughout the trilogue process. Future research can usefully assess whether there are differences across types of interest groups in terms of political access at the different stages of trilogue negotiations, and draw upon established distinctions between ‘access’ and ‘influence’ (Stevens & De Bruycker, 2020). And there is a disquieting discrepancy between the observed openness of the trilogue process, and public critiques, as well as stakeholder perceptions, of a ‘black box’—what does it reflect? Also, the Commission remains largely in the background in our analysis, but this likely reflects our research interest in the role of the two co-legislators rather than the lack of an active role for the Commission.

Third, we recognize the scope for analysis by policy sector, and might expect different dynamics depending on configurations of competencies, EP Committees, Councils, and organisation of CSOs. This on its own would be a substantial task, and we leave it to a future project. Equally, there may be value in investigating any differences between whether the interest organisation is a federation (association of associations), or a single association.

Finally, we need to raise issues of a more normative character. Is this type of openness necessary and sufficient for a good democratic process to emerge in the EU, in a post-regulatory area? Can the activism and ingenuity of an EU-level civil society make up for a lack of broad public debate about EU legislation across the EU? If NGOs are successful in creating a shift from ‘quiet’ politics to ‘noisy’ politics (and to a certain extent business organisations can play this game when required – see Keller, 2018), we would expect organized civil society, acting as a proxy for an otherwise disengaged public, to be able to fill this gap. This would fit our characterization of the EU shifting gradually from a relatively de-

politicised, technical form of policy-making towards a 'post-regulatory' era, where trends of participatory democracy help to politicise EU policy making. We have characterized trilogues as informal legislative institutions, producing political choices rather than institutionlising choices already made, and centred on crafting legislative compromises. The extent of access to trilogue information by organized civil society has already helped to politicise trilogues further, but further transparency measures are required to consolidate this position.

Interviews

1. Interview 91 with an official from a Permanent Representation, Brussels, 20 January 2019.
2. Interview 44 with an NGO in Brussels, 25 September 2017.
3. Interview 45 with an NGO in Brussels, 25 September 2017.
4. Interview 50 with an NGO in Brussels, 29 September 2017.
5. Interview 93 with a Permanent Representation in Brussels, 10 January 2019
Interview 97 with a Council official in Brussels, 9 January 2019.
6. Interview 1 with a Permanent Representation official in Brussels, 25 September 2017.
7. Interview 89 with a Permanent Representative official in Brussels, 10 January 2019.
8. Interview 44 with an NGO in Brussels, 25 September 2017.
9. Interview 45 with an NGO in Brussels, 25 September 2017.
10. Interview 47 with an NGO in Brussels, 27 September 2017.
11. Interview 68 with a business association in Brussels, 5 June 2018.
12. Interview 23 with an MEP in Brussels, 27 February 2018.
13. Interview 37 with an Assistant to an MEP in Brussels, 10 October 2017.
14. Interview 53 with an NGO in Brussels, 5 December 2017.
15. Interview 74 with a producer association in Brussels, 7 June 2018.
16. Interview 44 with an NGO in Brussels, 25 September 2017.
17. Interview 59 with a Trade Union official by phone, 10 September 2017.
18. Interview 24 with an MEP in Brussels, 9 April 2018.
19. Interview 99 with a Council official in Brussels, 22 January 2019.
20. Interview 15 with an MEP in Brussels, 28 September 2017.
21. Interview 24 with an MEP in Brussels, 9 April 2018.
22. Interview 35 with a political party campaigner in the European Parliament, Brussels, 7 December 2017.
23. Interview 40 with an MEP assistant, Brussels, 13 February 2018.
24. Interview 15 with an MEP in Brussels, 28 September 2017.
25. Interview 44 with an NGO in Brussels, 25 September 2017.
26. Interview 50 with an NGO in Brussels, 29 September 2017.
27. Interview 28 with a party political advisor from the European Parliament, Brussels, 26 September 2017.
28. Interview 22 with an MEP in Brussels, 6 December 2017.

29. Interview 1 with an official from a Permanent Representation, Brussels, 25 September 2017.
30. Interview 23 with an MEP, Brussels, 22 February 2018.
31. Interview 5 with an official from a Permanent Representation, Brussels, 28 September 2017.
32. Interview 81 with a Public Affairs consultancy in Brussels, 14 February 2018.
33. Interview 98 with a Council official in Brussels, 22 January 2019.
34. Interview 98 with a Council official, Brussels, 22 January 2019.
35. Interview 99 with a Council official, Brussels, 22 January 2019.
36. Interview 91 with an official from a Permanent Representation, 29th January 2019.

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Table 1: Trilogue interviewees

Trilogue Insiders		Trilogue Outsiders	
Permanent Representations	22	Civil Society Organizations*	38
Big countries	4	NGOs	
Medium countries	11	Trade Unions	16 (15 EU)
Small countries	7	Producer Associations	2 (1 EU)
Council	3		20 (19 EU)
European Parliament:	30	Other	7
MEPs (5 parties, 7 committees)	13	Public Affairs Consultancies	3
Party Advisors (same affiliations as	11	European Ombudsman's	
MEPs)	4	office	2
Assistants to MEPs	2	Territorial governmental	
Secretariat		representative organisation	1
		Emilio De Capitani	
			1
Total	55		45

*Note: number of CSOs at EU level in parenthesis.

Table 2: Access to Information Pathways: Number of instances found of observations.

	COUNCIL actors			EUROPEAN COMMISSION			EP actors		
	F	Gk	R	F	Gk	R	F	Gk	R
CSOs	10	1	4	7		3	12	1	2
Business actors	39	8	21	17	7	11	44	12	13
NGOs	5	5	10	5	1	3	27	7	6
Trade Unions				1			8		

f= facilitator; gk = gate-keeper, r= restrainer

- *facilitator* means that EU institutions make information accessible without CSOs having to count on leaks to obtain what they are interested in.
- *gate-keeper* means that EU institutions are seen to filter information thoroughly.
- *restrainer* means that generally, EU institutions behave in a way that CSOs are unable to access the information they are interested in.

Table 3: Access-Contact pathways

	COUNCIL actors	EUROPEAN COMMISSION	EP actors
CSOs (56)	27 (14s, 8l, 3w, 2ns)	3 (3s)	26 (20s, 2l, 1w, 3ns)
Business actors (123)	38 (28s, 9l, 1ns)	21 (16s, 2l, 1w, 2ns)	64 (43s, 8l, 2w, 3u, 11ns)
NGOs (84)	31 (14s, 8l, 2w, 7ns)	8 (6s, 1l, 1ns)	45 (30s, 2l, 13ns)
Trade Unions (9)	3 (2s, 1w)		6 (6s)

Number of instances found of observations.

Categories denote possibility or the existence of CSO access to EU institutions.

Quality variables:

Strong (s) = denotes that the accessibility of EU institutions involved in trilogues is substantial in light of CSO expectations.

Limited (l) = denotes that the accessibility of EU institutions involved in trilogues exists but is more tenuous than what would respond to CSO interests.

Weak (w) = denotes that the accessibility of EU Institutions involved in trilogues exists but does not meet CSP expectations.

Not specified (ns) = denotes accessibility of EU institutions involved in trilogues where the quality of access cannot be assessed.

Table 4: **Perceived Influence pathways** Number of instances found of observations.

	COUNCIL actors	EUROPEAN COMMISSION	EP actors
CSOs (31)	14 (4s, 2l, 4w, 4ns)	4 (3s, 1ns)	13 (7s, 1l, 1p, 1w, 3ns)
Business actors (52)	22 (3s, 1l, 6p, 5w, 2u, 5ns)	8 (2s, 2l, 2p, 1w, 1ns)	22 (3s, 2l, 7p, 3w, 3u, 4ns)
NGOs (48)	22 (8s, 2l, 4w, 8ns)	3 (2p, 1w)	24 (13s, 2l, 2p, 4w, 3ns)
Trade Unions (6)	3 (3s)		3 (3s)

Categories denote possibility or the existence of CSO impact.

Strong (s) = denotes that the CSO is seen as having successfully put forward its interests and impacted the legislative process, whether through connections, expertise as an access good, politicisation, etc.

Limited (l) denotes that the CSO has been a player in the legislative process, but that it has not necessarily been successful in putting through its essential interests.

Possible (p) denotes that there is a possibility for a CSO to impact the legislative process, but that preconditions like connections to trilogue actors or recognition of expertise exist and that a CSO providing expertise might actually not be able to influence the process.

Weak (w) denotes that a CSO can be involved in the legislative process, but that its impact is minimal.

Uncertain (u) denotes that a CSO cannot be sure whether it can be able to impact the legislative process at all.

Not specified (ns) denotes potential CSO influence that might be real but is too vague to be qualified on the basis of the description.

Table 5: Emissaries pathways: Number of instances found of observations

63 observations, of which 55 on COUNCIL, EUROPEAN COMMISSION or EP

Sender	COUNCIL actors	EUROPEAN COMMISSION	EP actors
Target			
COUNCIL actors	Business actors (1)	Business actors (3) NGOs (1)	CSOs (1) Business actors (4) NGOs (20) Trade unions (4)
EUROPEAN COMMISSION		Business actors (1)	Business actors (1) NGOs (1)
EP actors	CSOs (4) NGOs (2) Business actors (5) Trade unions (1) Media (1)	NGOs (1)	Business actors (2) NGOs (1) Trade unions (1)
Total	14	6	35

