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Taming trilogues: the EU's law-making process in a comparative perspective.

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Taming Trilogues—

The EU's Law-making Process in a Comparative Perspective

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As the directly elected institution of representative democracy, the European Parliament (EP) is at the centre of debates about the nature of the EU polity.[1] The dramatic increase in its legislative powers since becoming a directly elected institution in 1979 makes it the central object of analysis about the development of the European Union. At the core of its powers is its role as a co-legislator with the Council of Ministers for the overwhelming majority of legislative files since the 2009 Treaty of Lisbon, making the mechanics of co-decision a key unit of analysis. The core question we address in this chapter [2]is whether the EP, the people's tribune in EU politics, has arrived at a stable set of arrangements in order to be able to assert itself in co-decision viz. other EU institutions. Trilogues present two potential risks for the EP as an organ of parliamentary representation: 1) depoliticizing conflict by delegating decision-making to technical experts; and 2) reducing the accountability and transparency of the decision-making process by making it more informal and ad hoc. The key for the EP to counter these risks is to

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[2] In O Costa (forthcoming) (ed.) *The European Parliament in Times of Crises: dynamics and transformations* (Basingstoke: Palgrave Macmillan)

develop a sense of common purpose as a parliamentary institution, and institutional autonomy to prevent being drawn into the Council's world of diplomacy. On these premises, we explore the extent to which the EP has been able to articulate procedures for internal conflict solving; and to what extent these rules have helped to ensure transparency of the legislative process and the accountability of elected representatives. We examine these factors through an examination of the internal mechanisms of the EP in preparing for co-decision, trilogues, as a critical moment of the institutionalisation of the EP as a legislature. We discuss these developments in a comparative perspective of EU and US institutions for bicameral conflict resolution.

Trilogues and EU Decision Making

The name *Tri-logues* denotes an informal but institutionalised mechanism for discussions between the three main EU decision making institutions, held in a secluded setting aimed at facilitating and securing legislative agreements. Although co-decision defines up to three readings between the Council of Ministers and EP, trilogues offer the means to achieve early legislative agreements. Their use has mushroomed since the 1999 Amsterdam Treaty made it possible for co-decision to be concluded at any stage in the legislative process, resulting in a search for informal ways of coming to inter-institutional agreements at an earlier stage than might otherwise be the case. Thus, trilogues were borne of expediency, in recognition of the way the logistics of EU decision making would need to be fundamentally changed when nine countries joined the EU in 2004, as well as the growing role of the Parliament in co-decision assigned by the

Treaties (Shackleton and Raunio, 2003; Kreppel, 2003 and Héritier, 2012, in Broniecki, 2017). The results have been startling. The point when half of all legislative files were concluded at first reading was reached during the course of the 6th term of the EP (2004-2009) (Héritier and Reh, 2012), rising to 97% of legislative files being concluded at first or early second reading[3] by the mid-way point of the 8th Parliamentary term (2014-2019) (European Parliament, 2017). Thus, trilogues have become the *modus operandi* of EU decision making.

Until 2007, trilogues went largely unregulated, typically involving secluded bargaining between a limited number of 'relais actors' (Farrell and Héritier, 2004), i.e. the EP Rapporteur, the Presidency and the respective institutional secretariats in a supporting role. The consequences of these small closed huddles for democratic decision making have involved the progressive development of regulation aimed at the authorisation to enter negotiations, a mandate to negotiate with, pluralisation of actors, oversight of them, and reporting back. The first regulation came in the form of an inter-institutional declaration on co-decision in 2007, and from there in the development of in-house rules, most notably in the EP in 2012 and 2016, reviewed later. The issue has long been the subject of contention in the EP, and was one of the factors informing the European Ombudsman to open her own initiative enquiry.

[3] Early second reading files typically reflect the inheritance of first reading positions adopted at the end of the preceding legislative term (European Parliament, 2017).Early second reading is where 'the agreement between the Council and Parliament is reflected in the Council's Common Position rather than the Parliament's first reading report. This may be because a compromise was reached between the two only after Parliament had adopted its first reading report' (House of Lords, n.d.)

The European Ombudsman pinpointed the democratic consequences of the trilogue process, drawing on both the EU's representative and participatory strands of democracy:

> *A representative democracy…implies that citizens are effectively empowered to hold their elected representatives* ***accountable*** *for the specific choices made by their representatives on their behalf. Second, citizens have* "the right to ***participate*** in the democratic life of the Union.*"* (European Ombudsman, 2015b)

> *If citizens are to scrutinise how their representatives performed, they need to be able to compare the outcome of the process with their representatives' initial position, so that, if necessary, they can ask why positions changed and be reassured that the process took all interests and considerations into account." (European Ombudsman, 2015b)*

The Ombudsman stressed the way in which Articles 1 and 10(3) of the Treaty on European Union ensure that 'decisions are taken as openly and as closely as possible to the citizen', and recalled requirements for the Parliament and Council to meet in public when considering and voting on a draft legislative act as set out in Articles 15(2) and (3) in the Treaty on the Functioning of the European Union. Nonetheless, in an overture to the need for inter-institutional space to negotiate, including elected representatives as participants, the Ombudsman recommended the publication of trilogue documents at the conclusion of the trilogue process.

Today, a negotiated legislative file[4] will typically involve between three to four trilogue summits (European Parliament, 2017; European Parliament, n.d.), but files with a high political content can involve considerably more.[5] The topics for agreement become progressively more difficult as the trilogue meetings on a legislative file evolve. In today's practice, a trilogue will involve a relatively large number of participants from each of the three EU institutions, which at the upper reaches can extend to as many as 100 (European Parliament, 2017).[6] Most attendees come from the Parliament, comprising the Committee Chair leading the delegation, sometimes replaced by a Vice-President (Ripoll Servent and Panning, 2017), the Rapporteur and Shadow Rapporteurs from the different parties, their assistants, political party functionaries, and a member of the Committee secretariat. From the Commission, Heads of Unit or Directors attend, supported by the Legal Service and the Co-Decision Unit, although sometimes Director-Generals or their Deputies attend from the outset, and often concluded by the appearance of a Commissioner. The Council is represented by the rotating Presidency, but the personnel varies, with different traditions in the Committee of Permanent Representatives (COREPER) COREPER I and COREPER II. In COREPER II it is usually the Working Party Chair, whereas in COREPER I the Chair themselves often leads the Council delegation in all trilogues. As legislative files are long, negotiations can be exhaustive, some

[4] Around one-third are not negotiated
[5] In EP8, the largest in the first half term involved 14, for the General Data Protection Regulation
[6] The European Fund for Strategic Investments (European Parliament, 2017).

involving all-night sessions. The negotiators work on a four column document, with the positions of each of the institutions identified respectively in the first three columns, and a blank fourth column waiting to be completed to reflect the inter-institutional agreement reached in the trilogue meetings.

Figure 1: A full trilogue meeting

A number of 'technical' preparatory meetings precede full 'political' trilogues as a means of coping with the legislative detail which typically accompanies regulatory policy making, as well as making logistical arrangements for trilogues, with different compositions of actors attending the different types of meetings. In the main, attendees of technical preparatory meetings come from the secretariat of the respective

institutions, rather than the political level. At the more logistical level of content, there are also bilateral meetings between the secretariat of the EP and Council (Ripoll Servent and Panning, 2017). Heads of Unit of the EP Committee Secretariat can be influential players throughout the layers of meetings (Roederer-Rynning and Greenwood, 2017). The layers beneath political trilogues contribute to the potential for the depoliticisation of inter-institutional decision making.

Trilogues and Democratic Norms

Whilst expedient, the informal and secluded nature of decision making which trilogues entail may place them at odds with standard norms of democratic practice. 'Trilogues are where deals are done', located somewhere in between 'the (institutional) space to negotiate' and norms of transparency (European Ombudsman, 2015a). Institutions like these are a means of expediting business, but their secluded nature and lack of record has made them targets for public anxiety (EU Observer, 2014; International New York Times, 2014).

From a scholarly perspective, it has been noted that, whilst expeditious in facilitating early agreements between EU decision makers, trilogues have been an opaque and unaccountable form of decision-making (Farrell and Héritier 2004; Héritier and Reh 2012; Rasmussen and Reh 2013; Reh 2014). This literature highlights a series of issues, which boil down to the following potential problems. First, there is a risk that trilogues privatise, or personalize, the decision-making process by removing it from the public gaze. It is important to note that this risk is *not* inherent in closed

decision-making processes, but perhaps is compounded by it. Privatization is bad for both democracy and for stability since it personalises decisions, making them both potentially erratic and arbitrary. Second, there is a risk that trilogues depoliticise the decision-making process by delegating undue decisional power to technical experts.

Our point here is that these risks have not quite similar consequences for the two branches of the legislative authority. The co-legislators undoubtedly both have an interest in creating a secure space for 'open and frank' negotiations. Furthermore, as co-legislating *institutions*, neither has an interest in privatising the decision-making process, which negates the very idea of an orderly process. This being said, the EP is more vulnerable to this risk than the Council. Given that the EP represents the EU citizenry, privatisation jeopardizes both the internal legitimacy and order of decision-making in the EP (as in the Council) and its external legitimacy (to the people) and arguably its very *raison d'être* in the institutional order of the EU. The Council, which is technically not an organ of popular representation (but governmental representation), is less directly affected by accusations of democratic deficit. Likewise, regarding the de-politicisation of the decision-making, the EP is arguably more affected by this risk than the Council, since articulating and aggregating political preferences through political compromises is arguably a test of its parliamentary pedigree. The Council, working in a quasi-diplomatic style, has been historically comfortable delegating decision-making to technical experts in working parties and COREPER, even though the share of decisions made by ministers has recently risen

(House of Commons, 2017). Based on these premises, we examine the response of the EP to the growing criticism of trilogues in the next section.

Trilogues and the European Parliament

When the Ombudsman opened her own-initiative enquiry in 2015 into the transparency of trilogues, the institutions collectively sought to place on record their concern that she was exceeding her powers, but nonetheless responded. The responses demonstrate a deep commitment to current trilogue practice. Council's response identified specific concerns about how disclosure of trilogue documents 'may seriously undermine the ongoing decision making process' (EDRi, 2015, p.7). On a less defensive but nonetheless devoted tone, the EP8 half-term Activity Report commits to further reflection on how trilogues can

> *'adequately deliver on citizens' legitimate information needs, without undermining the fruitful working environment and conditions that have enabled Parliament, the Council and the Commission to respectfully and responsibly legislate over the years' (European Parliament 2017, p.37)*

President Schulz sounded a similar line to the Council in warning the Ombudsman that

> *'undue formalisation of the trilogue process could lead to negotiations taking place outside the established process (without, for example, all political groups being present or the orderly*

exchange of text proposals) and could therefore lead to less transparency rather than more' (European Parliament 2017, p.25).

However, while advocating the trilogue system, the EP has also tried to grapple actively with the issues raised in the public and internal debate, showing its higher sensitivity and vulnerability to criticisms of democratic deficit. These efforts were not purely reactive. In fact, a process of reform had started well before the Ombudsman's own report. Over the last decade, the EP has developed the most extensive internal rules of procedure of the three institutions, notably in 2009 (Annex XX, Code of Conduct for negotiating in the context of the ordinary legislative procedure), and in 2012 (Rules 73 and 74, abolished and replaced with Rules 69c, d and f) in 2016/2017. These are comprehensive arrangements for pluralisation of actors in the trilogue process, authorisation, oversight and reporting back; the provision of a mandate; some degree of transparency of the process; and a limited degree of ability to amend trilogue agreements. In 2009, at the end of EP6, the 'Code of Conduct for Negotiating in the Context of Codecision Procedures' was introduced as an Annex to the Rules of Procedure (Héritier and Reh 2012), carrying, *inter alia*, a proviso that all political groups shall be represented, that the negotiating mandate be provided by the committee or plenary, that the negotiating team reports back after each trilogue on the outcomes of the negotiations and refreshes its mandate when negotiations changed the committee position, and that all texts be made available to the committee. The 2012 revisions made Annex XX binding, and introduced the requirement for the committee chair or nominated

Vice-Chair to lead the EP official delegation (and chair of the trilogue when held on EP premises), collectively referred to as part of the 'team'. Rule 73 comprised a comprehensive set of arrangements parallel to the provisions of the Code of Conduct, covering the composition of the negotiating team, the decision to open negotiations, the mandate on which to negotiate (for later consideration in plenary), a vote to approve the result of negotiations, and a report back after each Trilogue. The MEP political co-ordinators oversee the work of committee members in trilogue, assisted by advisors from the political parties. Together, these arrangements have progressively met a number of the core criticisms aimed at the EP's involvement in trilogues.

The most recent revisions to EP procedures for handling trilogues were agreed in December 2016 to extend the powers of the plenary relative to committees to authorise the commencement of inter-institutional negotiations. Thus, Rule 69c2 gives MEPs or political groups a brief time window to seek a plenary vote on a Committee's decision to enter into negotiations with the Council. A further innovation of the rules changes was to introduce the publication of documents reflecting the outcome of the concluding trilogue. A little noticed new rule introduction, Rule 59.3 gives plenary the opportunity to decide not to have a single vote on the provisional agreement, but to vote on amendments. This latter change addresses a long-standing criticism made by transparency NGOs of the EP's position being weakened by its continued *de facto* constraint in being unable to unpick agreements concluded in inter-institutional trilogue negotiations, and presented as a *fait accompli*. The extent of use of Rule

59.3 will help to address whether this criticism remains valid. A coalition of 18 NGOs spelt out the dangers of policy-making in a secluded setting, in a 2015 letter to the President of the Parliament and Commission, and Secretary General of the Council of Ministers, stressing how the secluded nature of trilogues privileges those with the resources and connections to be able to acquire information (Access Info Europe, 2015; European Digital Rights Initiative, 2015; Transparency International, 2015).

In its best interpretation, changes to the rules mean that the EP's participation in trilogues satisfy core democratic criteria. That is: the mandate to negotiate with the Council is public, and endorsed by plenary; all of the political groups are represented in the trilogues; the negotiating team from the European Parliament have the responsibility to stay within the mandate given by the Committee, and to then see that a majority in the Committee supports the provisional agreement; that the Chair and Rapporteur report back to Committee; that the provisional agreement is voted on by the committee (in a single vote); and that plenary can now decide to vote on amendments to the provisional agreement. Principles, however, need to be institutionalized in order to give democracy a substantive reality.

Institutionalization of trilogues: Contrasting paths in the EP and the Council

In the EP, the Constitutional Affairs Committee (AFCO) has led the process of institutional scrutiny and revision of the Trilogue process as they are in charge of the Rules of Procedure, with support for operational scrutiny

provided by two horizontal units, the Conciliations and Co-decision unit (CODE) and the Co-ordination of Legislation Unit, CORDLEG. The development of procedures in AFCO have been assisted by key committee chairs in different parliamentary terms, as well as from the leadership of the political groups. The Economic and Monetary Affairs Committee (ECON) was at the centre of co-decision in EP7, accounting for over one-fifth of all early legislative agreements in that term. Its Chair in EP6, Pervenche Berès, was a norm leader in driving for Committee Chairs to be a regular member of the EP trilogue delegation, a practice diffused through the Conference of Committee Chairs, and continued via her position as chair of the Employment and Social Affairs Committee in EP7. Her successor as Chair of ECON, Sharon Bowles, also took up the cause, dynamically placing herself at the centre of each trilogue negotiation with the Council as a means of oversight and enforcement of committee positions. At the other extreme in EP7 was the Chair of the Committee on Transport and Tourism (TRAN), who spared his appearances on the grounds of the psychology of negotiations, intending to give a signal of gravitas by his attendance at the final meetings (Roederer-Rynning and Greenwood, 2015). To a certain extent these approaches will vary between parliamentary terms as Committee chairs change, but the changes introduced have also become institutionalised (Roederer-Rynning and Greenwood, 2017). The permanent secretariat of committees, project teams for different legislative files, the EP Legal Service, and horizontal coordination units which service co-decision committees, have played a part in this process. Both of these have experienced substantial growth during the seventh term of the EP, as part of a wider process of

upgrading the capacity of the secretariat which also extends to the European Parliament Research Service (EPRS) (European Parliament, 2014a). And the number of assistants which Members can have has been increased to four. Few national parliaments, with the exception of US Congress, enjoy access to knowledge and expertise on the scale displayed by the EP (Roederer-Rynning and Greenwood, 2017). Thus, rules of pluralisation, delegation, and oversight have been institutionalized in the EP, ensuring that trilogues today are an essentially multilateralised exercise in the EP. This means that trilogues in the EP have come a long way from the private deals occasionally stigmatised in the national and global media titles.

While the institutionalization of trilogues in the EP means that internal accountability has been improved in the EP, the technical character of much EU legislation means that public scrutiny of co-decision files remains effectively performed by elite stakeholders and guardians of the public interest. Specialised EU press outlets, such as *Politico, EurActiv and EUObserver*, join with national and global titles, to contribute to such monitoring. Another part of the EU ecosystem of monitoring involves a teeming population of interest groups, with an extensive system of funding supporting the presence of EU NGOs, taking their place alongside producer organisations. The main NGOs active in the field of transparency advocacy are *Transparency International* (EU liaison office), and smaller EU specific NGOs including *Access Info Europe*, and the *European Digital Rights Initiative (EDRi)*. The UK based NGO *Statewatch* has also historically been an active commentator in the field.

These NGOs point to an enduring challenge for the democratization of trilogues: the institutionalization of transparency rules. The 2016 Interinstitutional Agreement (IIA) on Better Regulation promised no more than a joint legislative database and 'appropriate handling' of trilogue negotiations in the context of the transparency of the legislative process (EDRi, 2015). In more general terms, the IIA promised better communication to the public, and 'to facilitate traceability of the various steps in the legislative process' (EDRi, p.6), as a means of guarding against the possibility of corruption and potential negative externalities arising from lobbying. These promises have yet to be implemented. Until they are, the lack of traceability tools ensures that the public scrutiny of trilogues will continue to be difficult to perform in the foreseeable future.

Whilst trilogues have been well institutionalised in the EP through rules of procedure, established practice is the main driver of the behaviour of the Council in trilogue negotiations (European Economic and Social Committee, 2017). Working procedures are passed over from one Presidency to the next by training provided by the Council Secretariat, supplemented by various written guides. A first agreement on a 'General Approach' is made either at Council or COREPER level (in the latter case sometimes called a 'mandate'). There are significant differences within the Council as to the need for further transparency in trilogues, with a predictable cleavage between the Nordic countries, the Netherlands, and Slovenia on the one hand, and other countries who raise the traditional objection that further transparency would simply result in more rigid

positions and a less flexible approach. Throughout the Council, nonetheless, there is support for a 'diplomatic tradition' (EESC, p.76) of flexibility.

These points mean that a key difficulty for the Council viz. the EP is the ability of the latter to influence the negotiations by going public, whereas the Council's position may only be known at a late stage, and then in the form of a General Approach (Greenwood and Roederer-Rynning 2015). The EP's mandate, by contrast, is public from an early stage, whereas the diplomatic culture within the Council of internal deliberative confidentiality, and the less public position of the Council on legislative files, makes it vulnerable to the EP's dexterity in political communication.

The EU Process in Light of the US Experience

Interestingly, the politics of private deals within and between chambers has been at the core of recent political controversies in US politics, too. These controversies have crystallized with the repeated, and at the time of writing infructuous, efforts by President Trump and his Republican majority in the US Congress to pass flagship legislation on health care reform and tax reform. In the Senate, an institution designed for taking care of minorities and 'provid[ing] extraordinary leverage to individual Senators' (Heitshusen 2014, 2), the top Republican Mitch McConnell first kept the legislative process insulated in a small group of lawmakers (New York Times 8 May 2017)[7] and, when he failed to garner the required

[7] , https://www.nytimes.com/2017/05/08/us/politics/women-health-care-senate.html?mcubz=3

number of votes, prepared to use an arcane budgetary procedure (Reconciliation Procedure) to force a repeal bill of Obama's Affordable Health Care Act through Congress. Meanwhile, on the equally pivotal tax reform file, the Republicans were hoping to push through legislation from a core group of six officials from the House, Senate and the White House—the so-called 'Bix Six' (The Wall Street Journal 8-9 July 2017). Seasoned observers of the Congress and lawmakers alike have voiced their concerns against what they see as the de-facto transformation of the Senate into a majoritarian institution and an opaque process taking place outside the formal institutional arenas of deliberation and lawmaking and concentrating power in the hands of a few congressional lawmakers.

These developments are interesting because the US Congress and congressional politics have been a prime point of reference in the comparative literature on the EP (e.g., Kreppel 2002; Crombez and Hix 2015). Comparativists have long highlighted similarities between the US and European polities (see e.g., Sbragia 1992 and more recently Egan 2015). Both polities display a fragmented, multi-level political system, where the executive, legislative, and judiciary power are separated rather than fused, as in many European political systems. Within this overarching construction, the US Congress and the EU's legislative authority provide examples of some of the world's most powerful legislative assemblies. Article 1 of the US Constitution stipulates that 'all legislative Powers herein shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives'. Though the EP cannot take such pride of place in the Maastricht Treaty

establishing the European Union or even in the Lisbon Treaty (which, while elevating the EP to the status of co-legislator, still keeps a number of areas outside of legislative purview), it is widely recognized as a powerful, federal-like legislature, bringing a powerful system of specialized, standing committees and its impressive analytical capabilities to bear on EU legislation. Not only are both the US Congress and the EP influential actors in domestic politics; they have also established themselves as leading international diplomatic actors (Jancic 2015). Furthermore, with regards to the law-making process, both systems are characterized by the need for inter-chamber cooperation since passage of legislative act can only happen if the two chambers agree on the same legislative text. In the US, as in the EU, this constitutional requirement brings the heterogeneity of the two chambers. The US 'Congress' is in reality composed of two chambers with very different traditions, rules, political outlook, operating mode, and self-understanding. Moreover, 'each chamber is jealous of its powers and prerogatives and generally suspicious of the other body' (Olezsek 1974, 75). It has been said that the 'natural disinclination of the two bodies to work in tandem has limited joints committees to such housekeeping issues as government printing and overseeing the Library of Congress' (Ritchie 2016, 48). Likewise, the relationships between the two arms of the EU's 'legislative authority'—epitomized in the pivotal legislative trilogues—can aptly be described as one of 'comity and conflict', to use a phrase applied to Congress (Olezsek 1974). Bearing these similarities in mind, it is interesting to understand the background against which the recent US controversies take place, and

discuss what kind of insights can be learned from these developments in the context of the EU's own trilogue system.

Several points are worth noting. First, it is widely recognized that the contemporary US legislative process is rather unpredictable. As a Congressional expert puts it, 'the process by which a bill can become law is rarely predictable and can vary significantly from bill to bill. In fact, for many bills, the process will not follow the sequence of congressional stages that are often understood to make up the legislative process' (Heitshusen 2014, 1). The life of bills is erratic. 'Many will never be brought up on the floor' while 'it is also possible, although less common, for a bill to come directly to the floor without being reported' (Heitshusen 2014, 7). For Congressmen, this unpredictability can be a source of problem, as Members do not always understand the process very well (interview 1, Congressional Research Service, 4 April 2017). Second, a great number of bills are passed without the need for bicameral negotiations because both chambers agree on the text. Such consensual bills reportedly amount to 70% of all the legislative activity in Congress today. There can be a variety of reasons for bicameral consensus. Some bills may address rather trivial considerations, and thus generate little interest or conflict. Additionally, bills often materialize in a coordinated way. The two chambers are 'not throwing bills at each other; they are coordinating in advance. They try to iron things out in advance by Members and staff of both chambers talking with one another' (interview 2, Congressional Research Service, 23 June 2017). Finally, third, where there is a need for inter-chamber negotiation (because of bicameral

disagreement on a bill), the two chambers now tend to settle their differences through other ways than the formal conference committee, designed for this purpose (Olezsek et al. 2016). Over the last two decades, the number of reports adopted in conference committees has decreased from 53 under the 104th Congress (1994-1995) to 7 in the 114th Congress (2014-2015) (Bipartisan Policy Center 2017). Over the same period of time, the number of bills reported by committee in both chambers rose from 978 to 1271 (Bipartisan Policy Center 2017). A more informal method of 'exchange of amendments' between the chambers, known as the 'ping pong' procedure, has become the favourite mode of reconciling differences (Olezsek 2008; Karadasheva 2012). While this informal method was limited to technical bills, or bills to be adopted under time pressure, the ping pong procedure is now used in a broad range of situations. As one observer puts it, the conference committee has become the 'dodo bird'; the big driver of this trend has been the polarization of US politics, both outside of Congress and inside the chambers (interview 3, Congressional Research Service, 11 July 2017). Observers agree that it picked up pace in the mid-1990s, it has affected both chambers of Congress, and thereby also the legislative process including the politics of bicameral conflict resolution. The link between polarization and the growing development of informal legislative practices appears to be pivotal in the US. In both chambers, polarization means that the formal arenas for compromise-making have become gridlocked. This applies to the standing committees: as one observer puts it, 'the tradition of the committee as a safe place for negotiation has dwindled toward extinction since the 1990s' (Ronald Brownstein, National Journal,

11 May 2013). This applies equally to conference committees, which have been known to generate their own informal and secretive deal-making outside the formal conference venue. Over time, the very act of convening a conference committee to negotiate compromises between the two chambers has become very difficult because it requires overcoming several challenging procedural hurdles in the Senate, which minorities have blocked. The development of ping pong legislation is not the only indicator of the growing informality of the US legislative process. As mentioned in the beginning of this section, it is now not exceptional to see important legislation develop across the chambers in ad hoc, insulated groups of congressmen. This style of legislative politics is not limited to Congress under the Trump Presidency; Obama himself resorted to it to develop important legislative proposals on immigration and other topics. Informal alliances are now increasingly used to stave off the destructive effects of polarization.

These developments bring into relief the growing importance of informal politics in both the EU and the US polities over the last two decades. In both polities, informal politics has developed to bridge the tensions between fragmentation and integration in these federal legislatures, and eventually deliver policy. The comparison between the EU and the US polities also serves to highlight important differences in the nature of informal politics and the interaction between legislative institutions and their political context. Regarding informal politics itself, the EU and the US polities actually seem to illustrate diverging trends of *institutionalization* (EU) and *de-institutionalization* (US) of the legislative

process. While we can now consider trilogues as an informal *institution*, with a set of predictable rules and routines guaranteeing EP committees and political minorities in the EP a 'formal' role in the informal negotiations, there seems to be—as highlighted above—precious little predictability today in the US legislative process. While the ping pong process represents the most institutionalized part of US informal legislative politics, the 'gangmen style' of legislative politics as Brownstein puts it (National Journal, 11 May 2013) can arguably best be understood as a step towards de-institutionalization: we are in the realm of informal alliances rather than informal institutions. This is an inhospitable realm for democracy.

In all likelihood, bicameral compromises in the EU and in the US will continue to involve negotiations in insulated forum. It is key to realize that insulation need not be bad for democracy: there are in fact good reasons to believe that insulated arenas can promote persuasion—or the ability to convince others on the basis on reasoned arguments (Checkel 2005), whereas open arenas may promote little more than ideological messaging or 'strategic disagreement', when 'party to a potential deal "avoid the best agreement that can be gotten given the circumstances in order to seek political gain"' (Gilmour, cited in Binder and Lee 2016, 96). Even though the institutionalization of EU trilogues is a positive development for democracy, we would like to sound several cautionary notes. First, the institutionalization of trilogues is uneven across the co-legislators. Second, it is reversible in the EP where it still lacks formal means of enforcement. Third, the EU legislators operate now in a political

environment characterized by an increasing polarization of European publics regarding European integration. Not only is the trilogue system, with all its flaws and weaknesses, an easy target for Euroskeptical narratives based on idealized versions of democracy. This European form of radical polarization may put EU institutions of bicameral conflict resolution under the same strain as the US. For in the end, while ideological pluralism is the hallmark of democracy, democracy is inherently difficult to institutionalize in divided societies.

Conclusion

Trilogues have become the *modus operandi* of EU decision making. The EP being a directly elected institution, trilogues carry more risk for the legitimacy of the EP than for Council. Over time, the EP has developed a series of rules to tackle the range of issues around removing decision making from the public gaze, whilst at the same time defending the need for an institutional space to negotiate with the Council of Ministers *in camera*. In the most recent revision of rules, there is a mechanism for the political groups to bring a plenary vote on a Committee's decision to enter into negotiations with the Council on the basis of a particular mandate, meaning that the EP's position is both public and carries the endorsement of elected representatives from across the political spectrum. All of the political groups are represented in trilogues, and the Committee oversees changes to the mandate. At the end of the process there is an opportunity for plenary to vote on amendments, rather than simply the entire package negotiated with the Council of Ministers. The

EP has developed a system which is much more formalised than the Council, where trilogues have been absorbed into existing custom and practice of diplomatic tradition. Whilst NGOs provide a reminder that there is still work to be done in terms of the transparency of the process, in the EP, trilogues have come a long way from the early day caricature of private deal making. This gradual process of institutionalising informal politics stands in stark contrast to the United States, where the story is more one of de-institutionalisation, in which bicameral conflict resolution has been driven underground as a result of the polarisation of politics. Ultimately, the EU's informal institutions have greater democratic insulation than the informal alliances of US politics.

The seclusion of arenas in both polities provide for unpredictability, though even this has been eroded in the EU system by the investiture of new rights in the full European Parliament to unpick negotiated deals with the Council of Ministers. Time will tell how well the EP plenary uses these powers.

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