Policy Brief

Inter-institutional coordination in the EU: reassessing the legislative balance of power after Lisbon

INCOOP Dissemination Conference on Inter- and Intra-institutional Cooperation in the EU System of Multi-Level Governance

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1. Dynamics of Inter-institutional cooperation post Lisbon: persistence and innovations[1]

The treaty of Lisbon has profoundly affected the way European institutions relate to each other. It aimed to reinforce the efficiency of the legislative process, the coordination between European institutions and the legitimacy of the EU as a whole. For this purpose, Lisbon formally recognizes the role of the European Council in providing leadership and setting the directions of the Union. It also reinforces the continuity and coherence of its work through the creation of a new position of permanent President of the European Council. In addition, the formal powers of the European Parliament (EP) have been reinforced through the expansion of the 'ordinary legislative procedure' (formerly 'co-decision') to 40 new EU policy areas. The extension of the co-decision procedure has also reinforced the "constitutionalisation" of the EU by expanding the areas in which member governments are liable to the Court of Justice of the European Union (CJEU), notably in key fields such as the area of Freedom, Security and Justice.

We argue that the Lisbon Treaty reinforces four main trends that started before its entry into force. These trends affect inter-institutional cooperation in legislative policy making in various ways. First, the European Council tends to informally intervene in the legislative decision-making process, going beyond its formal role in providing other institutions with 'guidance' and 'impetus'. The reinforcement of the European Council after Lisbon has fuelled its inclination to enter the legislative domain, thereby creating difficulties for the Commission, Council and Parliament. Second, the increasing informalisation of the decision-making process between the Council and the Parliament has continued under the Treaty of Lisbon rules. Third, by giving the Parliament a greater role, Lisbon has raised the legislative stakes for this institution and brought the EP into a broader arena of potential conflicts with other legislative institutions. Last but not least, in recent years the Court has increasingly impacted on the decision making process through politically sensitive infringement cases, raising some concerns about inter-institutional coherence in the enforcement of EU law.[2] Its reinforcement in the Lisbon Treaty has thus increased the potential for difficulties with the legislative institutions of the Union.

Focusing mainly on co-decision before and after the Lisbon Treaty, this policy brief addresses the challenges that these dynamics raise in terms of balance of power between EU institutional actors. We substantiate and illustrate our argument based on original case studies from several policy areas – climate and energy, comitology regulation, food safety, and the budget – exploring different levels and aspects of inter-institutional cooperation. On the basis of this assessment, we conclude by formulating a number of institutional recommendations that can increase the transparency and efficiency of the decision-making process and address certain weaknesses of the institutional system.

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[1] This research was conducted within the framework of the INCOOP Research network. INCOOP is a multi-disciplinary network of seven Universities (Cambridge, Loughborough, Luxembourg, Maastricht (coordinator), Mannheim, Osnabrück, and Sciences Po Paris). Predominately focused on training PhD students (13 in total), the ITN is financed under the EU's 7th Research Framework Programme (http://www.in-coop.eu/). It involves three key research strands: intra-institutional cooperation, inter-institutional relations and the dynamics of relations between the European and national level.

[2] See Schmidt & Kelemen (eds) (2012) on this matter.

2. Institutional balance of power in the ordinary legislative procedure

Understanding the impact of formal and informal changes in the ordinary legislative procedure, is crucial, not only to get a better understanding of the EU's functioning but also, from a normative point of view, to assess the efficiency and democratic legitimacy of the European system of governance. It connects to a crucial question, which permeates almost all debates on inter-institutional relations: how have these dynamics affected the balance of power between European institutions?

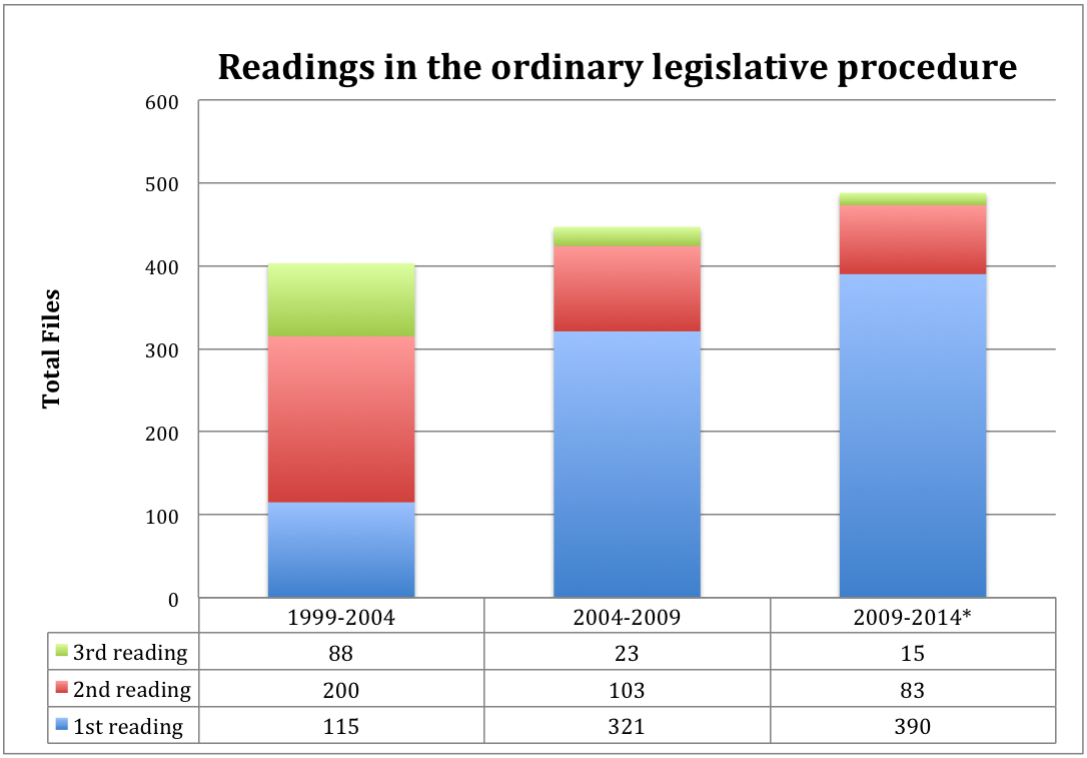
More than ever, the European Council has taken a central place in the decision-making process under the ordinary legislative procedure. This is apparent in its increasing interventionism in the policy-making process, often taking over the *right of initiative* of the Commission on sensitive political issues. For example, the European Council's impulse has been key to the development of certain policy areas such as energy and climate change (see case below). Yet the attention of the supreme EU institution has also been extremely volatile. In recent years its agenda has been practically absorbed by the on-going economic crisis. Crisis management is certainly one of its key functions, but its long-term involvement in setting and following up on sectoral and cross-sectoral strategies is also vital to the development of the Union's policies. Although the Commission's role in providing political guidance has been weakened, it remains in charge of drafting legislation. Its technical expertise and specialisation gives this institution considerable leverage in gathering support for its proposals from member governments and, in particular, from the European Council. Thus, in spite of occasional tensions, the European Council and the Commission remain in need of each other's resources and input.

The creation of a permanent European Council President, elected for 2.5 years has changed the relationship between the European Council and the Council. The rotating Council Presidency has lost an opportunity to be in the spotlight at European summits and has refocused on the management of the legislative agenda. In the new post-Lisbon setting, a Presidency is not assessed based on the outcome of its summits, but rather based on the number of co-decision files adopted or the progress achieved during its term in office. Overall, the relationship between the European Council and the Council (including its rotating Presidency) is still strong, thanks notably to the work of the General Secretariat of the Council and in particular the *cabinet* of the European Council President, which has ensured the linkage between both institutions (Bocquillon and Dobbels 2013). Looking more closely at the working dynamics of the Council and its presidency, a key consequence of the focus on legislation is the increasing bureaucratisation (or 'Coreperisation') of the decision-making process[3]. Debates in ministerial meetings have tended to become more superficial. They have been eroded both from above, through the rising involvement of the European Council, and from below, due to the central role of Coreper in delineating the Presidency's mandate for early agreements with the European Parliament.

Indeed the most remarkable change in the ordinary legislative procedure has been the increasing recourse to the informal practice of negotiating early agreements, in the first

[3] 'Coreperization' refers to the Council's distinct, discreet and compromise seeking-diplomatic culture.

reading of the legislative process. As Figure 1 shows, the number of early reading agreements has skyrocketed over the past 15 years. Consequently, behind-closed-doors bargaining in trialogue meetings has taken centre stage of the legislative process.[4] Trilogues have emerged as THE response to the rising number of files going through the ordinary legislative procedure and the EU's need to respond swiftly to urgent policy problems. On the one hand, the use of trialogues is far more common for technical issues that need to be resolved quickly. On the other hand, as suggested by the cases analysed below, politically sensitive and controversial issues are also discussed in the trialogues. As a result of these dynamics, a new inter-institutional culture has emerged which consists of intense contacts and informal negotiations. One of the consequences of the pervasive use of trialogues is that legislative deal making takes place between a limited number of representatives from the Council, EP and Commission, behind closed doors. The spread of early agreements prior to and post-Lisbon raises important questions in terms of accountability and legitimacy of the legislative process (Obholzer & Reh 2012). It also raises issues of balance of power between the institutions. The European Parliament in particular has found it especially difficult to adapt to the pace of the negotiations and to weight on their outcome (Garcia Pérez de Léon and Grossman 2013; Huber & Shackleton 2013).



	1999-2004	2004-2009	2009-2014*
3rd reading	88	23	15
2nd reading	200	103	83
1st reading	115	321	390

Figure 1: Readings in the ordinary legislative procedure (source: EP Conciliation & Co-Decision site)
**until 12 August 2013*

[4] Trialogues are meetings in which representatives of the three legislative institutions meet to find a compromise prior to formal voting.

Changing judicial politics has also affected the legislative sphere. The political activism of the Court of Justice has notably increased in recent years. The Lisbon Treaty modified the organisation of the Court and expanded its jurisdictional scope – notably to certain foreign policy measures such as sanctions as well to certain aspects of Freedom, Security and Justice. The Court renders a growing number of controversial judgments, which may either have an impact on the implementation of EU sectoral policies or result in the initiation of corrective legislation by the Commission. This poses new challenges of inter-institutional cooperation in order to avoid serious cases of incoherence across levels of governance.

3. Case Studies

This section presents a selection of cases with the aim to assess and illustrate the evolution of the inter-institutional balance of power. The limited scope of this paper prevents us from going into extensive details. Yet, the cases are explored in greater depth in the authors' doctoral and postdoctoral research. First, we look at the balance of power between the European Council, the Council and the Parliament in the case of energy and climate change policies. Second, we look at the capacity of the European Parliament to perform its functions in an inter-institutional context. Third, we look at the role of the CJEU in the case of internal energy market policies.

Energy and climate change policies: the European Council makes waves, the Council adapts, the Parliament loses out

- The European Council's involvement in energy and climate change was key to the development of this policy area in the second half of the 2000s:
    - adoption of the 20.20.20 targets;
    - direct involvement in the legislative negotiations on the energy and climate change package;
    - preparation of the European position for international conferences, including the Copenhagen climate conference.

  But its role has sharply decreased in the turmoil of the economic crisis. Yet, the newly elected President of the European Council has tried to keep the momentum through the organisation of energy summits and follow up discussions.

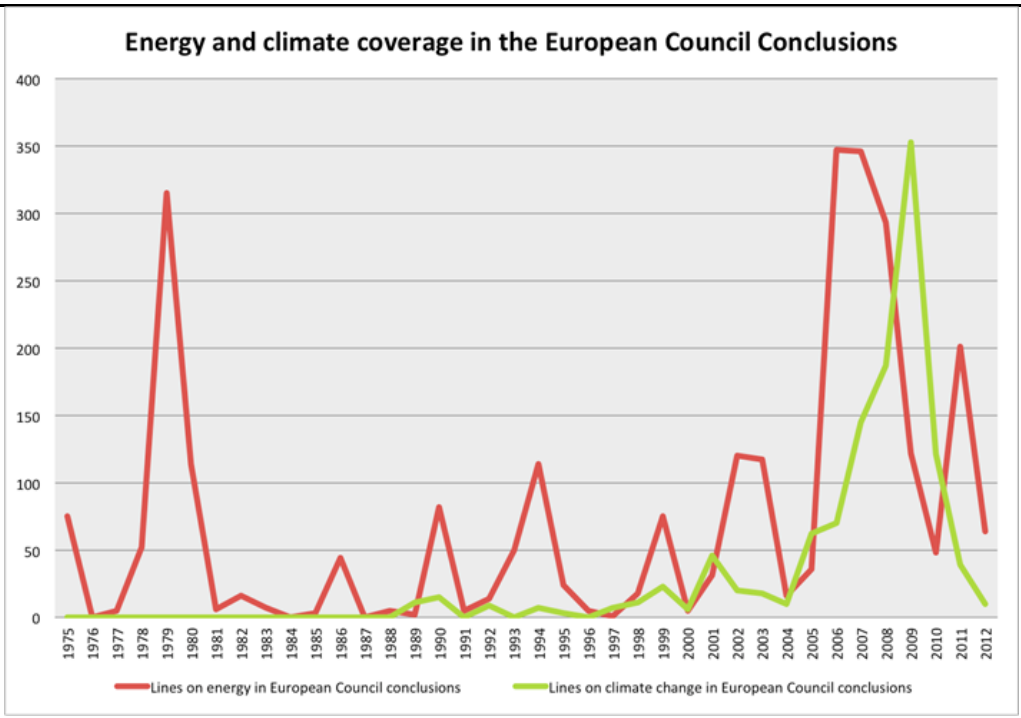


Figure 2: Energy and climate in European Council Conclusions (source: European Council Conclusions)

- The role of the Energy Council[5] has been undermined both by the rising involvement of the European Council (Figure 2) and by the preparations for trialogue negotiations at committee level (Coreper and working parties). Infrequent ministerial meetings do not enable them to follow up directly on rapid trialogue negotiations whose outcomes are only validated ex-post. By contrast, the Environment Council has kept a somewhat greater role in the decision-making, notably through discussions of the EU's mandate for international negotiations.

- In the negotiations on the energy and climate package (2008), the position of the Parliament was also weakened by the direct involvement of the European Council in the final stages of the legislative decision-making[6]. As a result, the Parliament was forced to accept a 'take-it-or-leave-it' offer from the Heads of state and government.

- In trialogue negotiations, the Council has often outweighed the European Parliament, notably because of the latter's lack expertise on highly complex issues but also because of the EP preference for an agreement over the status quo. In addition, open internal divisions and a lack of 'bargaining chips' to offer to the Council made the EP the underdog in the informal negotiations.

- An analysis of 40 trialogue meetings in three prominent areas of energy and climate

[5] Formally the Transport, Telecommunication and Energy Council (TTE), although the energy ministers usually hold separate meetings.

[6] More specifically, the French Presidency had arranged that the European Council had to agree unanimously before the package could be passed.

change policy—internal energy market, sustainable energy and security of supplies—shows that, despite some incidental triumphs for the EP, especially on renewable energy and Carbon Capture and Storage negotiations, the Council was most successful in realizing its policy preferences in the final legislative outcome (Braun, *forthcoming)*[7]. In the informal negotiations on the Third Internal Energy Market Package (2007-2009), the Council triumphed in the highly controversial area of ownership unbundling. The outcome of the informal negotiations on the Security of Gas Supply Regulation (2010) – the first energy legal instrument under the Treaty of Lisbon rules – secured the Council's text on the key issue of protected customers.

EP capacities in inter-institutional negotiations: struggling with lack of time, shortage of expertise and the considerable autonomy of rapporteurs

The cases considered in this comparative analysis are the novel foods regulation, the new comitology regulation and the 2011 budget.

- These cases show that *time* is a resource that the EP is struggling with. MEPs have very little time at their disposal and how they prioritise that time affects the EP's position in negotiations with the Council and the Commission. The cases showed that when a file is low on the priority list, less time is dedicated to it, thereby giving more freedom to the rapporteur to define the direction taken.

- Nevertheless, the budget case demonstrates that even when time is scarce, if an internal procedure is in place which forces all key players (rapporteurs, shadow rapporteurs, coordinators and members of other committees) to prioritise the substantive preparation of the EP's position, and gives an important role to a *bridging figure* such as the committee chair, a well-underpinned and broadly carried position can be formulated.

- The same conclusions can be made with regards to *information*. The cases show that it is neither access to information, nor the processing of large volumes of information that is a problem for the EP, but rather the handling of different sources of information. Both

[7] The trialogue meetings analysed are: the negotiations on the Third Internal Market Package (2007-2009); the Climate Change Package (2008); and the Security of Gas Supply Regulation (2009-2010).

the comitology and the novel foods case show how legal or scientific information that could have strengthened the EP's position in the negotiations was available but not used.

- Most staffers in the EP are generalists who build up their expertise on the job, rather than policy specialists recruited for certain positions. While they are often procedural experts, their capacity to provide substantive expertise is limited. This lack of expertise can be seen as a considerable weakness in the context of EU decision-making. Staffers very often have to rely on their own ability to build up knowledge and extract useful information from a plethora of sources.

- Linked to expertise, all three cases show that the EP has a fundamentally different approach to negotiations than the Council. The Parliament is much less sensitive to the specific and detailed effects and costs of implementing what is negotiated[8]. In contrast with the energy files analysed, the cases show that the potentially negative impact on the EP's ability to influence the outcome of negotiations arising from a lack of expertise is weaker when a file is politicised.

- Tapping expertise from members and fostering the development of expertise is crucial for a legislature in need of well-underpinned positions such as the EP. However, the analysis has shown that in-house expertise is limited and often concentrated, which may lead to certain asymmetries. Asymmetries in expertise between members and between committees have proven to affect the outcome of negotiations.

- Again, the budget case showed that asymmetries in expertise can be addressed by an extensive coordination system in which expertise and input of specialised committees is used, leading to a well-underpinned position. The ordinary legislative procedure however, is much less strict and formalised in terms of coordination. Especially in the case of first reading agreements, rapporteurs enjoy significant leeway. As a result, too much discretion in the hands of rapporteurs can potentially lead to one-sided positions where the EP is either missing out on certain elements in its position or adopts a very extreme position making it harder to show flexibility in negotiations with the other institutions.

[8] Part of the explanation is that the EP needs less technical expertise compared to the Commission or the Council's Member States as it is not responsible for implementation.

The CJEU, Slovakia and the Internal Energy Market: the Commission gets a shock

This case study analyses the case of *Commission v. Slovakia* and the implementation of internal energy market policies.

- In 2009, the European Commission brought Slovakia before the European Court of Justice for violating the EU *acquis* on the internal energy market. The Court was called to rule on the delicate interaction between the international investment protection obligations of a Member State (Slovakia) and its duties of compliance with the cornerstone of the internal energy market: non-discriminatory third-party access to the network.

- Considering the established case-law of the Court, the Commission was persuaded that the litigation would recognise the violation of the EU acquis by Slovakia. Contrary to the Commission's expectations, the judgement of the Court (*Commission v. Slovakia*, 15 September 2011) allows Slovakia to derogate from the obligation to provide non-discriminatory third-party access.

- Importantly, this judgement creates a precedent that could enable foreign investors like Gazprom to challenge the implementation of the internal energy market *acquis,* in particular in the new Member States of Central and Eastern Europe where Gazprom's presence is very important.

- Through its judgment, the Court has laid the basis for a regulatory chill that could compromise the completion of the internal energy market, highlighting serious issues of incoherence across levels of governance.[9]

4. Recommendations

- While the ***European Council*** should continue to provide political priorities, it should abstain from being directly involved in the legislative procedure. The Energy and Climate Package negotiations have shown that this undermines the formal equality of the Council and the EP. Nevertheless, coordination between the European Council and the EU's legislative institutions could be improved. We argue for the ***creation of a strategic unit composed of representatives of the Council, EP and Commission which assists the European Council President in preparing the discussions of the Heads of state and government on the long term priorities of the Union.*** This could help strengthen the link between the different institutions while ensuring the soundness and legitimacy of EU long-term strategies.

[9] See Boute and Carafa (2013) on this matter.

- As regards the ***EP's capability*** to fully exercise its powers in practice, certain weaknesses need to be addressed. One of the key issues is what balance to strike between efficiency on the one hand and inclusiveness and the ability to have better underpinned positions on the other. Under the rules of the ordinary legislative procedure, the EP's organising capacity is inadequate in the sense that much power lies in the hand of rapporteurs. This often leads to one-sided or weakly developed positions. As a result, the EP is weaker in informal negotiations and hence misses out on opportunities to influence the legislative outcome(s). It lies in the EP's own capacity to address this issue. Our analysis shows that great potential lies with so-called ***bridging figures***; members who represent broader interests than rapporteurs, in particular committee chairs or vice-presidents. Internal procedures could be adapted so that these have the adequate resources and possibility to play a more mediating and consensus-seeking role than is the case today. In that way, not only broad majorities can be forged, but well-underpinned positions can be assured. The 2012 reforms of the EP's Rules of Procedure, which partly formalise internal procedures on trialogue negotiations, show that the Parliament is conscious of these concerns. Future research will have to tell whether they have addressed them adequately.

- A second weakness in the EP's capabilities was identified to be ***expertise***. In early 2014, with the aim of increasing its internal expertise capacity, the EP will establish a Parliamentary Research Service (PRS) with the aim of providing MEPs with independent scientific research[10]. In order to underpin this initiative, we propose to ***streamline and govern the acquisition of external expertise better*** so that the resources available are used where they are most needed in the EP.

- The ***transparency*** of trialogue negotiations should be reinforced to increase both the accountability and legitimacy of this crucial phase of the decision-making process. This could be achieved through the systematic publication of reports on the debate. In this context, we recommend the ***extension of the EP's Legislative Observatory to include the Feedback Notes on Trialogues after the adoption of the legislation***[11].

- There is a need to reinforce the ***communication flow*** between the Commission's Services and the Court at the different (formal and informal) litigation stages. This could be achieved through a pilot project aimed at intensifying information exchange between the two institutions. It could provide a possibility for the Commission to crosscheck reasoned opinions, before even referring to the CJEU.[12] Without impacting upon the formal infringement procedure itself, such a pilot project could ensure that the Commission receives any missing information at the earliest stage possible. In this context, we argue that reinforcing

[10] The Parliamentary Research Service will be created on the basis of existing resources from the current EP Library and the DG for Impact Assessments plus extended with about 200 staff.
[11] Feedback Notes on Trialogues are documents that provide (in a politically neutral way) what has been discussed in the trialogue meetings. Currently, these documents are not made public.
[12] The Commission can build on its own experience with an EU pilot project launched in 2008, aimed at intensify its informal contacts with the Member States in order to provide a possibility to eliminate infringements of the EU law at the earliest stage possible.

communication between the Commission and the Court can help ***avoiding serious issues of incoherence across levels of governance***.

All of these recommendations can be implemented within the framework of the Lisbon Treaty. They will increase the transparency, efficiency and coherence of the decision-making system.

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