

A photograph of a brass scale of justice, a symbol of law and justice, resting on a polished wooden surface. The scale is ornate, with two pans hanging from a central beam. In the background, several wooden chairs are visible, suggesting a courtroom or a formal assembly. The lighting is warm and focused on the scale.

DELIBERATING JUSTICE POLICY IN THE EUROPEAN UNION

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A Discursive Perspective on day-to-day Decision-Making in EU's

Criminal Justice Cooperation

In the ten years before changes were introduced by the Lisbon Treaty, the European Union (EU) witnessed a gradual but significant expansion of legislative activities in the field of justice and police cooperation. Since the entering into force of the Treaty of Amsterdam of 1997, the entire legislative framework in this field has grown exponentially in terms of substance and number.

New notions and guiding principles, such as mutual recognition and new instruments, such as framework decisions, were translated and implemented as concrete policies in a policy area that was hitherto not covered by secondary legislation. Whereas only nine conventions (which also included asylum and immigration instruments) saw light in the period before Amsterdam, the legislation output of the period 1999-2005 yielded a list of well over forty-five binding decisions of various sorts in the field of justice cooperation (Den Boer & Wallace, 2000, p.510).¹

The developments in the ten years before Lisbon raises the question of policy changes and their origins in the daily practice of EU decision-making. While it is commonplace to relate changes in European integration and cooperation to those 'grand moments' of intergovernmental treaty making and institutional design, little attention has been paid to the gradual, sometimes unobtrusive, changes in policy that occur in the daily practice of decision-making. This is particularly true in relation to the area of justice cooperation, which has traditionally been viewed as the primary area of intergovernmental decision-making.

As will be discussed in the next section, this paper takes a different view from the traditional rational-choice perspective on EU decision-making, which almost exclusively focuses on the power politics or strategic bargaining elements of decision-making. This paper takes the view that under specific circumstances 'arguments may carry the day' in daily EU decision-making.

The assumption is based on the claim that in order to identify and explain changes in policy, one should complement the traditional strategic bargaining perspective on decision-making (based on rational choice premises) with a constructivist and discursive view, which also allows us to focus on discourse or language in daily usage as a source of change. The motive and importance of such a view is that we need to look for more potential sources of change in EU policy-making than those already demonstrated by rational choice approaches such as rational choice institutionalism or liberal intergovernmentalism.

Samenvatting

Dit artikel stelt dat beleidsverandering binnen de Europese Unie (EU) ook voortkomt uit besluitvorming op dagelijks niveau. Om veranderingen aan te kunnen wijzen en te verklaren dient de traditionele rationele keuzetheorie en de oriëntatie op instrumenteel-strategisch handelen te worden aangevuld met een constructivistische zienswijze op discours als bron van verandering. Met de inzichten van constructivisten en communicatiewetenschappers wordt in dit artikel gekeken naar de voorwaarden en het zich voordoen van deliberatie als discursief proces dat beleidsverandering op dagelijks niveau bevordert. In dat verband is onderzoek verricht naar een tweetal besluitvormingsprocessen op het gebied van EU-justitiesamenwerking. De ene betreft een *casestudie* omtrent de onderhandelingen over de totstandkoming van het Europees Bewijsverkrijgingsbevel van 2008. De ander gaat over de onderhandelingen over een Raadsbesluit betreffende de toegang van politie tot het Visa Informatie Systeem. Uit beide casestudies blijkt dat onder bepaalde omstandigheden deliberatie uitmondend in beleidsverandering zich feitelijk heeft voorgedaan.

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Theorists in the field of constructivism and communication sciences have formulated analytical tools that throw light on how discourse affects negotiations and their outcomes in multi-lateral settings. With the insights of both schools of thought, this study focuses in the second section on the identification of conditions and occurrences of deliberation as a source of policy change on a day-to-day basis.

In this light, two case studies will be presented in the third section. The first analysis is of the drafting process of the Framework Decision on the European Evidence Warrant of 2008. The findings of this analysis will be compared with findings of another case that concerns negotiations for a 2008 Council Decision on access by law enforcement authorities to the Visa Information System (VIS) for the purposes of the prevention, detection and investigation of crime and terrorism.

Theories of Discourse and Change

Theories based on rational choice ontology have proven their value in describing and explaining decision-making processes in the long course of European integration and cooperation. Basically, they have captured events where actors are caught up in a dynamic orientated to maximise or optimise their individual preferences and interests (Eilstrup-Sangiovanni, 2006, p.200). As such, rational choice logic may at best account for ‘snap shot’ changes resulting from ‘external constraints’ (Schmidt, 2010). Yet, temporal analysis is not one of the major strengths of the rational choice perspective.

Rather than (only) looking further for explanations of change that follow on from external constraints as they are formally and informally structured in the institutional setting at a certain point in time, this study will turn to approaches that focus on discursive practices by virtue of which discussants or negotiating partners are induced to change their minds and interests over time. In these approaches the focus is placed on subjective (or inter-subjective) ideas or beliefs and discourse or language as sources of change. Whether this sociological perspective is focused on language/discourse, on ideas or social norms, in all its variations this new perspective was introduced in the field of European Studies in the 1990s and has since then been referred to as social constructivism.

Scholars of the various strands of constructivism share the belief that reality can best be understood as a changing social reality that is continually constructed by virtue of human agreement, be it in terms of inter-subjective meanings, discourse, social learning, norms, institutions, deliberative processes, communicative action or identity formation (Christiansen, Jorgensen and Wiener, 2001, p.3). Illustrating the powerful role language plays in explaining change at the day-to-day level Diez explained that: ‘we all know that meaning is not eternally fixed: dictionaries provide us with contested meanings of a single word, and, once in a while, such entries have to be changed because the word is now used in a different or additional sense.’ (1999, p.607). Some scholars, who claim the middle ground of constructivism, build further on Habermas’ ideas on communicative action and look for conditions that enhance deliberation in the EU and cooperation in Europe. In these circles it has been argued that language generally is op-

erative in every aspect of European integration (Risse, 2000; Ulbert, Risse, & Müller, 2004). Intensive exchange of opinions and debate are features of what Checkel has considered in the context of the Council of Europe as ‘the transformative process’ of argumentation towards the adoption of norms and policies (2001).

Risse attaches great importance to actors’ motivation to seek the truth in negotiating situations, as a result of which they can be willing to discuss the validity claims of their beliefs (2000, p.12). Eriksen and Fossum believe ‘force of the better argument’ and legal reasoning to be the cornerstones of discursive processes driving institutional and normative change in European integration (2000). Burley and Mattli emphasise the relevance of language and communication by demonstrating that case law of the Court in Luxembourg gave profound meaning and direction to European integration (1993). More recent inquiries focus on the substantive content of discursive processes in their institutional context, referred to as discursive institutionalism (Schmidt, 2010).

In the broad range of different constructivist approaches it is therefore expedient to explore those approaches further where the transformative role of day-to-day discourse or debate are believed to be crucial in the adoption of common decisions and policies in the EU. Widely used notions in that context are ‘deliberation’ or ‘argumentative process’ that basically refer to the typically Habermasian situation where ‘participants in a discourse are open to being persuaded by the better argument and that relationships of power and social hierarchies recede in the background.’ (Risse, 2000, p.7).

Comparing insights of middle-ground constructivists with those of scholars operating in other fields, who also draw on Habermas’ ideas, reveals a richer conceptual framework of what may constitute an argumentative event. It is for this reason that approaches from other disciplines, notably communications science, are taken on board in this paper. There is extensive literature in the field of communications research, particularly in the field of discursive processes in the public sphere, that builds on Habermas’ theory (Bächtiger, Niemeyer, Neblo, Steiner, & Steenbergen, 2010).

Theorists in the field of communications science refer to almost the same observables as constructivists. Moreover, they use a broader range of more concrete notions and explicate methods more thoroughly. In their literature two key notions stand out that have proven to be valuable tools for qualifying a discursive event as an instance of deliberation: ‘reciprocity’ and ‘reflexivity’.

‘Reciprocity’ has been introduced to identify instances where discussants give arguments/reasoning for their claims and the other discussants actually listen to the arguments given (Graham, 2009). It indicates situations where discussants are ‘predisposed’ to listen and respond to each other’s arguments. There is ‘mutual exchange, a giving and taking of perspectives and knowledge’ (Graham and Witschge, 2003, p.178). Justification is implied. It is considered to be a basic feature of any deliberative process. Discussants, while justifying, try to avoid coming up with allegations, assertions or claims without due explanation or information that conforms with generally accepted facts or standards (Ulbert, Risse, & Müller, 2004). In further qualifying deliberation, one other stage has been identified in the communications discipline. As ‘reasoned’ discussion advances, discussants will start to rethink their positions

in light of the other's argument. The more the participant is willing to heed the evidence put forward in the claim of another, the greater will be the sensibility to the validity of the other's claim, and the more likely he will be to rethink his own position when his own justification proves to be flawed in relation to the claim of the other. This instance of deliberation, in a more advanced stage, has commonly been referred to by communications theorists as 'reflexivity' (Graham, 2009; Graham and Witschge, 2003).

Although highly important in analysis, reflexivity does not imply an instance of discursive change itself. Instances of change following a reasoned debate are referred to in this paper with the notion 'reorientation'. They indicate shifts in positions, accruals of majorities and agreements struck during a deliberative process geared towards a common understanding.

In EU decision-making, pure deliberation is just as rare as pure bargaining, and yet, deliberation is to a certain extent 'all pervasive' (Ulbert, Risse, & Müller, 2004). The exchange of valid or plausible arguments between negotiating parties only has significance in the entire policy-making system of the EU if it is assumed that instances of strategic bargaining can also be found. This assumption should even imply that instances of bargaining are necessarily part and parcel of the EU's entire policy-making process (Checkel, 2005).

This paper therefore attempts to find out under which circumstances 'arguments may carry the day' in decision-making processes in the EU. The implication of this middle-ground, perhaps even positivist, approach is that characteristics of a given setting favouring deliberation in the EU must be determined for a given setting.

In that regard, the middle-ground constructivists have extensively explored analytical tools that help to qualify conditions that trigger deliberation in a multilateral setting. Furthermore, they consider the EU to be an ideal place for argumentative processes, due to its being an 'institutionally dense environment', or a site of 'high density of mostly informal interactions' (Checkel, 2001; Risse, 2000, p. 15).

One set of conditions favouring deliberation in the EU was related to the access of non-state actors (such as European institutions, lobby groups and civil society organisations) to discussion. This concerns the formal and informal positions (and their implications) of the various actors attending the discussion. Specifically, the focus is on the ability of non-state discussants to have a share in the discussion that follows from their formal position.

While it is a straightforward matter that all national delegations in the EU have an unqualified share in the formal discussion, it is not a foregone conclusion that *all* delegations are involved in the *real* (informal) discussions on key issues or politically sensitive issues. On top of that, the position of European institutional actors, such as the European Commission or the European Parliament, varies according to the rules of the formal institutional context. This seems to have an effect on both their formal and informal involvement in the real discussion, i.e. the debates on the key (or politically sensitive) issues under discussion (Egeberg, 1999; Lempp & Altenschmidt, 2007).

On the discursive stature of non-state actors, constructivist scholars have indeed found evidence that, if these actors were taken seriously by the other discussants, their involvement

would affect the course of the discursive event. For example, one study revealed that, in the field of transport policy, 'national officials were indeed attentive to arguments advanced by supranational actors.' (Egeberg, 1999, p.468).

The relevance of access by non-state institutional discussants is only appreciable when in the context of an interest important to such discussants. Their participation in the discussion only makes sense if their interests facilitate deliberation.

Evidence has shown that as arenas characterised by high-interaction frequencies and long tenures of office, non-state institutions are very likely to be more oriented toward non-national interests (Egeberg, 1999, pp.465-6). The same has been said about the Presidency and the Council Secretariat. It was found that unrestrained involvement by these institutions in the discussion 'made decision making considerably easier.' (Lempp & Altenschmidt, 2007, pp.7-15)

Another set of conditions that has been demonstrated to have a facilitating effect on discussion, and more specifically on the occurrence of argumentation, is related to interaction patterns in a given setting (Quaglia, De Francesco, Radaelli, 2008, p.7). Two related notions stand out in the constructivist body of literature: 'insulation' from external pressure and 'intensity' (or 'high frequencies') of interaction.

'Insulation from outside political pressure' is considered as one of the key factors facilitating reasoned discourse in multilateral settings (Checkel, 2001; Lewis, 2005, p.947-48; Risse-Kappen, 1996, p.70-71). The common view in the constructivist body of literature is that an atmosphere of an open exchange of views is likely when a group of discussants works in a detached environment, insulated from direct political pressure and exposure. A similar view is also held by communications theorists (Graham, 2009). Insulation is expected to be high at policy level gatherings where 'Brussels-based' national delegations negotiate. 'Insulation' was identified as one of the principal conditions facilitating socialisation in the negotiations between the permanent representatives in Coreper (Lewis, 2005, p.945-948).

'Intensity' is a notion that is almost always present in the analysis of constructivist scholars. It refers to high frequencies and sustained duration of interaction. According to most scholars, argumentation is more likely when a group of discussants meets repeatedly over a considerable period. It is said that the dissemination of a set of common conceptual categories and 'behavioural dispositions' takes place if there is continuous, enduring frequent interaction (Gheciu, 2005, p.983). Here, too, 'intensity' is expected to be at work at gatherings where the discussants are 'Brussels-based' (Lewis, 2005).

Empirical Findings

For the identification of conditions and occurrences of deliberation in the EU's daily decision-making, a qualitative case study has been conducted comprising two cases. Each of the cases outlines a decision-making process resulting in a decision in the EU policy field of justice and police cooperation. The case studies concern decision-making events that took place in the pre-Lisbon period, in the EU's former third pillar.

One revolves around the process preceding the adoption of the Council Framework Decision on the European Evidence Warrant (hereinafter: 'EEW') in December 2008. The other is about the decision-making process leading up to the adoption of the Council Decision of June 2008 concerning access to the Visa Information System (hereinafter: 'VIS') for consultation purposes by designated national authorities active in the area of preventing, detecting and investigating crime and terrorism.

The formal attributes of the institutional setting of the two cases are similar. Both processes took place in the former third pillar setting, which was the predominant institutional setting for shaping policy in the field of criminal justice cooperation before Lisbon. Nevertheless, there is a significant difference between the cases. While there was, as will be shown, no participation of the European Parliament in the EEW process, it had plenty of *informal* power in the decision-making on the VIS decision.

The model on deliberation formulated in the previous section specifies a hypothetical causal path, or a 'causal mechanism', that links initial and intermediate causes to a perceived effect (George and Bennett, 2005). This model will be used for ordering, categorising and narrativising the discursive process in each of the two decision-making cases. Chronologies of each of the two decision-making events will be traced with the aim of establishing the conditions under which and to what extent deliberation affected the decision-making process.

As there were no verbatim accounts of the discussions available, an indirect approach was adopted with regard to data. It entailed the coding of instances where one or more key elements of deliberation – or indeed none – were the (often implicit) subject of conversation and report. In view of this, data collection relied mainly on two main sources of evidence: data retrieved from in-depth interviews (with field experts across European institutions and permanent representations) and from policy documents reporting the proceedings of meetings in the EU's various decision-making venues. A total of 161 documents were coded and analysed (87 for the 'VIS' case, 74 for the 'EEW' case). Twenty-four interview transcripts were examined (nine for the 'VIS' and 15 for the 'EEW' case).

The EEW Process

In November 2003, the Commission tabled the proposal for the Framework Decision concerning the EEW. The aim was to replace the slow and inefficient traditional mutual assistance procedure with an instrument that would facilitate speedier and simpler procedures for the transfer of evidence between member states in criminal proceedings. To this end, the Commission considerably reduced in the proposal the number of grounds on which requests for evidence could be refused. Also, it proposed a time limit to the procedures for issuing and executing a warrant. The proposed framework decision for an EEW was limited in scope in that it only provided for the transfer of objects, documents or data already obtained under various procedural powers, including seizure, production or search powers. Still, the draft text underwent significant modifications during the decision-making, in consequence of which the EEW framework decision became a mere shadow of what the Commission initially intended. While the Commission presented only two grounds for refusal in the proposal, the final text included as many as nine grounds for refusing an evidence warrant. The final outcome was heavily criticised for

being unworkable in practice.

The discussions lasted from June 2004 until June 2006. At least seventeen minor and major issues were discussed during that period. The Justice and Home Affairs Council (hereafter: 'JHA Council') formally adopted the EEW framework decision in December 2008. As the discussions on the EEW draft decision took place in the third pillar, the European Parliament did not have much influence on the drafting of the proposal. Although it issued two reports, there was no interaction between the Council and the European Parliament on the EEW file. Consequently, the discussions on the drafting were held exclusively within the Council.

In this exclusive communicative space, the Council discussions on the EEW proposal proceeded in a set of 51 official meetings between the national delegations at five levels: the working party level of national experts², the CATS³ level of senior national experts, the diplomatic levels of Coreper and the JHA Counsellors' group⁴ and, finally, at ministerial level, the JHA Council.

The EEW process underwent a marked shift from the initial stages, where the national experts of the working party and the senior officials of the CATS were the principal interlocutors, to the final stages where the JHA Counsellors and the ambassadors had an almost exclusive role in the discussions.

In the early period of the EEW decision-making process, when the 'capital-based' discussants of the working party and the CATS held sway, only one full agreement was reported. This period lasted from the very first working party meeting in June 2004 until November 2005, when other decision-making levels became increasingly involved. Other instances of 'reorientation' in the early stages were of little consequence to the progress of the negotiations.

Indicative of the generally features of the setting and discussions at the 'capital-based' levels that predominated in the early stages were the formal atmosphere, the low level of interaction, and national legal reasoning. Contacts at these levels almost always took place in an official setting. While the national experts of the working party met once or sometimes twice a month, the senior officials of the CATS met every two months.

Often the official meetings at working party and CATS levels were held over two long days. Whilst national experts had enough time to conduct in-depth discussions on the various details of the EEW file, the senior officials had to cope with time restraints. For the senior officials, the EEW file was but one of more than fifteen agenda items to be covered at an average CATS meeting.

The use of twenty formal languages, strict time limits on interventions, the presence of interpretation services and the rules of conduct of meetings had a constraining effect on the exchanges of views between the delegations. The physical aspects of the formal setting of the working party meetings were such that, as it was reported, even eye contact was difficult to establish.

The subjects discussed at these levels were principally of a detailed and legal-technical nature. Especially at the working party level, national experts seemed to be caught up in

national-legal reasoning where it was not always easy to convey the significance and relevant nuances of the details to the other delegations. Nor was there a general willingness to listen to or understand the position of the other delegation. An official of a permanent representation very aptly described the manner of reasoning at the working party level during the EEW negotiations as follows: “[the] mind-set is less focused on listening to the other and finding a compromise than on presenting their own position and trying to get their own wishes into the text.”

Still, discussions at working party level were considered crucial to the progress of the EEW decision-making process. The widely held view was that without working party discussions, the delegations in the other Council working structures would have nothing to discuss. As one respondent noted, it then only becomes possible for the other Council levels to discuss alternatives or solutions once the national experts have established the problems.

In the later stages, when the ‘Brussels-based’ delegates at JHA Counsellors’ and Coreper level gradually took over the discussions, as many as eleven agreements were struck of which three were partial agreements. Five shifts in position were detected that were important to the progress of the decision-making. Even though the EEW file had already earlier appeared on the agenda of the JHA Counsellors and the ambassadors of Coreper, their involvement in the discussion on the EEW draft decision became substantial only by the end of 2005, just half a year before the final agreement was reached in June 2006.

The setting in which the discussions at the ‘Brussels-based’ levels took place was entirely different from those at the ‘capital-based’ levels. The setting of ‘Brussels-based’ meetings was far less formal. The physical aspects of these meetings did not form a hurdle to communication. Interpretation services were absent and discussions were often conducted in one language, English, and sometimes also French and/or German.

As diplomats of the ‘Brussels-based’ permanent representations, both the JHA Counsellors and the ambassadors were able to meet frequently, sometimes even more than once a week. This happened particularly in the concluding stages of the EEW process, as the need for a political agreement became increasingly apparent. Ambassadors and JHA Counsellors usually also met outside office hours, at social and private events. It has even been noted by one JHA Counsellor that she saw her counterparts from the other permanent representations more frequently than her colleagues of her own permanent representation working in other policy fields.

At Coreper level, vivid exchanges of views on the EEW file have rarely been reported. An explanation for this was that for Coreper, just as it was for CATS, the discussion of the EEW instrument was one of the many items on a weekly agenda that comprised up to 25 policy fields. Time restrictions therefore had a constraining effect on the Coreper discussions. If the EEW file appeared at a Coreper meeting, it was one of around five JHA agenda items which, in turn, were items among a myriad of agenda items ranging across the various policy fields of the EU, from foreign policy and trade to financial and economic affairs.

At the JHA Counsellors’ level, it was reported that the discussants were seriously engaged in a long-lasting mutual exchange of perspectives on various issues of the EEW file. Instances

have been identified where there was a shared willingness of a group or even of all present to try to find a solution that would address the needs of all parties concerned.

Discursive commitment went at times further than reciprocal exchange. A reference was made to a dynamic aimed at trying to develop an understanding within the group. Also, instances have been reported where JHA Counsellors actually managed to change positions due to a relentless drive to argue, to explain and to find a solution. It was even reported that there was a group-wide commitment to understand the other discussant in order to find alternatives and solutions.

However, there is also evidence that some of the more ‘intense’ discussions between the JHA Counsellors turned into a debate where pressure was felt by individual discussants to maintain a reservation on a particular issue. It was reported that in a significantly socialised environment such as the JHA Counsellors’ group, the exercise of a veto or maintenance of a reservation is accompanied by the experience (or fear) of social rejection in the group. Instances of this sort of (bargaining pressure) dynamic occurred in debates on the very thorniest EEW issues in the concluding stages of the EEW process.

It was commonly reported that discussions at the ministerial level took the form of a ‘tour de table’. It is considered as rather rare for ministers to intervene more than once. Large delegations and big rooms, a formal atmosphere, busy agendas, the presence of interpreters and limited time seem to have just as much – if not more – of a constraining effect on discussions at this level as during the meetings at the working party and CATS level.

Yet, it was reported that during the ‘final’ discussions on the EEW file, in June 2006, a group of ministers engaged in a more interactive debate on the thorniest issues of the EEW agenda. The (Austrian) Presidency found it necessary to adjourn the meeting for an hour in order to discuss the issues bilaterally in a smaller group. No reference was made, however, to possible instances of reflexivity on that occasion.

The VIS Process

Before discussions started in 2005 on the establishment of a European Visa Information System (VIS), the European Council and the JHA Council took the view that the envisaged visa database would, alongside its main purpose of facilitating a common visa policy, also be an instrument that could contribute to the fight against serious crime and terrorism. It would do this by allowing law enforcement authorities to consult visa data for the prevention, detection and investigation of criminal offences. As the legal basis – a regulation – for the proposed first pillar instrument in the establishment of VIS did not allow access for such purposes, it was agreed that police access could only be regulated by a third-pillar decision.

For the European Parliament, which as co-legislator had a decisive say in the drafting of the first pillar VIS regulation, it would mean that the drafting of a third-pillar decision regulating such access to the first-pillar visa database would escape its control. To prevent this, the Parliament included in its amendments to the VIS regulation a so-called ‘bridging clause’ that contained ‘all the basic parameters on the availability of VIS data for law enforcement purposes’. The clause stipulated that access for law enforcement purposes could only be granted

in very exceptional circumstances. The Parliament justified its position with the argument that 'the VIS data is collected mainly to facilitate the visa policy'.

In the 'bridging clause', the Parliament set forth a number of conditions and procedures that were to limit police access to a strict minimum. It proposed that 'access shall be an exception granted on a case-by-case basis'. It may not be 'routine'. And access may only be requested in relation to an on-going investigation of a serious offence. The Parliament furthermore introduced a procedure whereby VIS data may only be consulted at 'a single national access point'.

With the inclusion of the bridging clause, the European Parliament ensured that the proceedings in the first pillar on the regulation could only come to a successful conclusion if it was heard on the amendments to the 'access' decision of the third pillar. Basically, it forced the Council to negotiate on a third-pillar instrument with the European Parliament.

As a result, the 'communicative space' for discussions on the third pillar 'access' decision went beyond the Council working structures. It also comprised discussions between Council and Parliament that were conducted in the so-called 'trialogue' settings⁵. More importantly, as the focal point of the discussions was on the scope of procedures and conditions regulating access to VIS data, the balance of the discussions moved from internal Council debate to the trialogues between Council and Parliament.

In the final outcome, it was agreed that access may be granted in a specific case if there are reasonable grounds to consider that consultation of VIS data will substantially contribute to the prevention of and fight against terrorism and serious crime. General agreement on the outcome was reached at triologue level in April 2007 and subsequently in the Parliament and later in the Council in June 2007.

The negotiations on the 'access' decision in the third pillar started in April 2006. They included 21 meetings in the Council working structures, ten meetings in the Parliament's LIBE Committee⁶, eight triologue meetings at political level and an indeterminate number of (sometimes weekly) triologue meetings at technical level. The negotiations in the Council on the 'access' decision were primarily held at working party⁷ and CATS levels. At the JHA Counsellors and Coreper level, the VIS the 'access' file was briefly discussed only on a few occasions in the month before the formal political agreement reached in the JHA Council in June 2007.

As the Council was not as familiar with the co-decision procedure in the area of judicial and police cooperation as it was in other policy areas, in the early decision-making stages it was not open to a serious exchange of views on a third-pillar instrument with the Parliament. It was even regularly reported that the Council showed reluctance to take seriously the Parliament's position on the restrictive conditions on access to VIS data.

Throughout 2006, under the Austrian and subsequently the Finnish presidency, national delegations were more focused on the discussions between themselves than on an exchange of views and thoughts with the European Parliament. There was widespread belief in the Council that discussion with the Parliament would only get politicised and principled beliefs of fundamental rights or the protection of privacy would prevail over views of substance. National

delegations believed that only the Council was able to decide on the issue of access.

The lack of regard for an informed inter-institutional debate worked in two ways. To the Parliament it seemed that the Council and the national delegations were unable to explain why national police and judicial authorities would need access to a European data system that is primarily meant for the purpose facilitating a common visa policy. An explanation often heard was that most member states had little experience with access for law enforcement purposes to large-scale systems containing personal data of people who are by definition presumed to be innocent.

The European Parliament was at the time acting rather as a block. In closing its ranks, the Parliament provided the Rapporteur of the LIBE Committee with a broad mandate to negotiate with the Council. Even right-wing political groups such as the EPP, which were in favour of less restrictive rules on access, supported the Rapporteur, who was a member of the liberal-centrist ALDE group.

Throughout 2006, the talks between the Council and the Parliament at political triologue level were hampered mainly by the failure of the institutions to express their commitment and to convincingly accept and acknowledge each other as valid and knowledgeable discussants. Instances of reciprocity were not demonstrated during that stage, let alone instances of reflexivity that would result in reorientation. Only two political trialogues were held in that period.

Still, movement following deliberation was not absent altogether in that period. Common understandings were developed at 'technical triologue' level on minor aspects of the draft decision such as standards on keeping VIS data in national files, security of data, liability rules and the training of authorised police officers. Meetings at that level were quite regular, often once a week. The high frequency of small-group meetings and the focus on the substance of the subject matter without time restrictions allowed the delegations in the technical trialogues level to overcome mutual distrust and to explore and find alternative texts.

Instances of deliberation at this level went well beyond occurrences of reciprocity. Often, the willingness to accept and work on alternative wordings for proposed amendments suggested by the other delegate resulted in shifts in position that helped agreement to be reached. It even proved to be important for the discussions at the political triologue level as the exploration of alternative texts with respect to the more controversial issues by the 'trialogue experts' laid the groundwork for discussions at political level that followed in the first half 2007.

The VIS process reached a turning point when Germany took over the presidency at the beginning of 2007. It pursued a policy of more vigorous engagement in the discussions with the Parliament. More meetings at technical triologue level were held. The Presidency's extra commitment was also apparent from the presence of a high-level politician in the person of the German Minister of the Interior, who was both willing and able to engage in an exchange of views with the Rapporteur of the Parliament on the most contentious issues. Equally important to progress were considered the interpersonal relationships at the political triologue level. It was observed that a setting of only three representations each consisting

of only a handful of delegates allowed the key discussants, the German Minister (Wolfgang Schäuble) and the Rapporteur of the Parliament (Sarah Ludford), to demonstrate good knowledge of the file and to establish a personal relationship on the basis of mutual respect.

Helpful was also the fact that the German presidency availed itself of the extensive practical and legal experience in the field data protection and law enforcement access that Germany (as one of the few member states) had already acquired at the time. This enabled the German delegation not only to make able use of practical examples and practices during the trialogues, it also helped the Presidency to demonstrate the fairness and usefulness of the outcome through referrals to practice and experience when it presented the compromise package of the trialogue discussions to the national delegations at all Council levels (including JHA Counsellors and Coreper level).

What happened in the first half of 2007 was a shift in discourse from a debate between two institutions which were unwilling to fully integrate one another in the discussion to a more open-minded debate between the two parties that considered their opposites as valid interlocutors. It was, in terms of discursive dynamics, a shift from a contestation over principled beliefs to an exchange of open-minded views that made informed debate, reorientation and compromise possible.

In general, the locus of negotiations on the VIS 'Access' Decision gravitated from an internal Council debate to trialogue discussions between the European Parliament and the Council. While discussions in the Council working structures virtually remained bogged down on the key question of whether and how to discuss the more contentious issues with the Parliament, it was mainly at trialogue level where the VIS 'Access' agenda was taken forward. However, discussion did not extend further than inter-institutional trialogues. No referral was made to direct discursive involvement of other possible stakeholders.

While there is enough evidence to support the view that reorientation, and therefore agreement, was facilitated by deliberation principally at trialogue level, general agreement in both the Council and the Parliament originated in a situation where bargaining pressure was not entirely excluded. In the case of the Council, it was rather due to the warning from the Presidency that there would be no access to VIS data at all if national delegations failed to reach consensus on the outcome of the trialogue discussions. For the Rapporteur of the Parliament, it was necessary not to lose sight of the declining support in the Parliament from the moment the Council started to consider the Parliament as a serious partner in the decision-making. It was in the concluding stages that the Rapporteur started to receive signals (mainly from right-wing political groups) to step back from the rigorous position on the rules on access.

Reorientation Through Deliberation

Relating the occurrences of reorientation and instances of deliberation found in both the EEW and VIS processes yields a mixed, yet telling picture. First, instances of reorientation were more likely to be the result of deliberation in the early stages of the process than in the later stages. In the early stages, the political pressure for success from outside the group of discus-

sants was less. Therefore, there was less incentive to bargain. More importantly, the focus was principally on content and detail. The key discussants who took the lead in that period, i.e. the national experts (either in working parties or in 'technical trialogues'), were far too entangled in technical detail to have regard for the wider political implications of the issues they discussed.

These conditions made it likely that, in the early stages, changed positions and agreements were the result of reciprocal exchanges of informed arguments on the technicalities of the instrument under discussion. It can be safely assumed that the focus then was mainly on technical detail and that the burden or exercise of pressure was less on the minds of the discussants. In other words, there was a significant degree of insulation from the overall (political) setting.

In later stages nearer the final outcome, political pressure for a final resolution was mounting. In such circumstances, it is difficult to perceive discursive dynamics as free and open exchanges based on reasoned, informed arguments that might result in reorientations due to instances of reflexivity. There was less insulation from the political context. In other words, pressure on the discussants made instances of bargaining more likely.

It is logical to assume that the more distant in time the moment of final, general agreement was, the greater the focus on the substance of the subject matter. And conversely, the nearer the deadline drew, the more likely it was that the discussants, also at JHA Counsellors and trialogue levels, got caught up in a dynamic of bargaining and pressure.

Yet, it was also demonstrated that reorientation in the EEW process at JHA Counsellors' level and in the VIS process at trialogue level was more likely to follow from deliberation in the concluding stages. Like national experts, the JHA Counsellors and the key interlocutors at political trialogue level were better equipped for delving into the subject matter. Appropriate expertise and full regard for the subject matter made deliberation more likely.

From an institutional point of view when comparing the EEW and VIS cases, it appeared that the locus of deliberation was remarkably different due to the level of participation of the Parliament in the discussions. Whilst the level of Parliament participation was low in the EEW process, and hence the locus of deliberation and ensuing shifts were identified exclusively in the Council working structures, in the VIS process it was at trialogue level where deliberation and ensuing progress mainly took place.

While a facilitating role of the Commission has been identified only in the VIS case, in both cases it was convincingly demonstrated that the Presidency played a crucial role in promoting progress towards a reasoned understanding of the final outcome.

Remarkably, the conditions of 'insulation', 'intensity' or 'access of non-state actors' only gave full shape to deliberative processes in a setting of a relatively small group of discussants. Whether it was the informal or even plenary consultations between the JHA Counsellors or the trialogues between the delegates from the three European institutions, it was in these relatively smaller settings where significant breakthroughs were made following occurrences

of deliberation.

Conclusion

This paper argues that, in addition to the practice of strategic bargaining, one may very well find in the day-to-day running of the EU decision-making instances where changes in policy outcome result from occurrences of deliberation. Occurrences have indeed been signalled in both the 'EEW' and 'VIS' cases where negotiating parties engaged in reasoned exchanges of views that resulted in position shifts and even agreements on certain issues.

Analysis of both cases demonstrates that in settings where the conditions of 'insulation', 'intensity' or 'access of non-state actors' were prominently present, deliberation and ensuing progress towards a more reasoned understanding of the issue concerned was more likely to occur. Furthermore, a certain detachment from technical detail, yet sufficient proximity to subject matter, absence of agenda constraints and small-group dynamics made it more likely that discussants were inclined to engage in more open-minded exchanges of views based on reason and argument.

On balance, clearly identifiable occurrences of deliberation-promoting progress in decision-making have been found in the institutionally quite diversified and multifaceted environment of the EU. They can certainly be regarded as representative of other decision-making processes operating under similar conditions, processes of which the institutionally dense EU is particularly rich.

In a way, the occurrences of deliberation identified constitute a path of progressive understanding that is bound to extend beyond the temporal boundaries of a specific decision-making procedure. Reasoned understandings on certain issues achieved in either the EEW or VIS process were likely to provide a fertile basis on which further reasoned discussion can evolve into other, future decision-making processes. As such the deliberative instances found in the EEW and the VIS cases are of all periods, including the post-Lisbon period, and should be examined as alternative sources of policy change in the EU, irrespective of the timeframe. ■

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(Endnotes)

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- ¹ Only decisions and framework decisions based on Title VI TEU were counted
- ² For the negotiations on the EEW it was the Council Working Party on Cooperation in Criminal Matters that discussed the file at working party level. This working group has commonly been referred to as 'Copen'
- ³ CATS (Comité d'Article Trente-Six) is a coordinating committee consisting of national high officials.
- ⁴ JHA Counsellors are experts in the fields of justice and home affairs seconded to the national permanent representations in Brussels from the national ministries of justice or home affairs.
- ⁵ Basically, a trialogue was (and still is) a three-sided meeting between representatives of the European Parliament, of the Council Presidency and of the Commission. The so-called 'technical trialogues' were meetings between experts of the three institutions, either at desk officer (working party) or senior official (CATS) level. Trialogues at political level were meetings between a Rapporteur of the Parliament, a national minister or high-ranking national official of the Council Presidency and a Commissioner of the Commission. At the time of the VIS process, trialogues were not part of the formal procedures of co-decision in the first pillar.
- ⁶ The LIBE Committee is the Parliament's standing committee on 'Civil Liberties, Justice and Home Affairs'
- ⁷ In the VIS process, on the 'access' decision, it was the 'Police Cooperation Working Party'.

Abstract

This article argues that changes in policies of the European Union (EU) also emanate from everyday decision making. In order to identify and explain changes in everyday decision making, one should complement the traditional strategic bargaining perspective on decision making with a constructivist view on discourse as a source of change. With the insights of both constructivists and communication theorists, this study focuses on the identification of conditions and occurrences of deliberation as a discursive process that promotes policy change on a day-to-day basis. In this light two case studies in the field of EU justice cooperation have been conducted. One concerns the negotiations on the Framework Decision on the European Evidence Warrant of 2008. The other concerns the negotiations on the Council Decision of 2008 regarding access to the Visa Information System by law enforcement authorities. Analysis of both cases learned that in certain circumstances instances of deliberation and ensuing change actually occurred.

