

The Informal Politics of EU Climate and Energy Policy

Explaining Legislative Decision-Making (2007-2010)

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Abstract / Zusammenfassung

This thesis explains the adoption of the Climate & Energy Package (2008), the Third Package (2009) and the Security of Gas Supply Regulation (2010). These three politically highly sensitive pieces of legislation are at the heart of the EU's first-generation climate and energy policy which was established between 2007 and 2010. The climate & energy legislative files were adopted as an early agreement (EA) meaning via an informal compromise between the EU's co-legislators (i.e. Council and Parliament) and after one rather than three possible readings. The adoption of these files under co-decision rules in such a short timeframe was remarkable as the bargaining process between the co-legislators was marked by collective action problems, disagreement over which set of rules to apply and had to be carried out under urgent circumstances caused by (inter)national events and/or regimes. This thesis applies a 'thick', rational choice institutionalism bargaining model in explaining the speed of the legislative decision-making process on the three pieces of legislation. Next to interests, this model incorporates 'ideas' meaning principles and norms found in EU primary and secondary legislation. In legislative decision-making, the EU puts a premium on the ability to provide convincing ideas or 'focal points' around which actors' interests can converge and which promote common action. The cumulative message of the research conducted on the three files is that ideas served as instrumental tools in sustaining cooperation and cementing an acceptable compromise solution among a set of players with divergent interests.

Diese Dissertation untersucht die Annahme des EU Klima- und Energiepaketes (2008), des dritten Energiebinnenmarktpaketes (2009) und der Gassicherheitsverordnung (2010). Diese drei politisch sensiblen Gesetzgebungsmaßnahmen sind ein wichtiger Bestandteil der zwischen 2007 und 2010 erstmalig etablierten europäischen Klima- und Energiepolitik. Diese Gesetzgebungen wurden mittels einer sog. „baldigen Einigung“ verabschiedet, d.h. mittels eines informellen Kompromisses zwischen Rat und Parlament und dies bereits nach einer Einigung in erster Lesung statt in bis zu drei Lesungen. Die rasche Einigung über die drei Gesetzgebungsmaßnahmen ist außergewöhnlich, da das Gesetzgebungsverfahren durch Probleme kollektiven Handelns und Streit über die anzuwendenden Regeln gekennzeichnet war und zudem unter dem starken Druck nationaler und internationaler Ereignisse und Regime stattfand. Diese Dissertation erklärt die Schnelligkeit des Verfahrens der drei Gesetzgebungsmaßnahmen mit Hilfe eines „dichten“ Rational Choice-Verhandlungsmodells. Neben Interessen inkorporiert dieses Modell „Ideen“, d.h. Prinzipien und Normen des europäischen Primär- und Sekundärrechts. Die Fähigkeit der EU-Institutionen überzeugende Ideen oder „Focal Points“ zu formulieren, die es Rat (d.h. den Mitgliedstaaten) und Parlament ermöglichen, ihre Interesse zusammenzuführen und dadurch gemeinsame Maßnahmen zu fördern, nimmt im legislativen Entscheidungsprozess einen hohen Stellenwert ein. Die zentrale Erkenntnis dieser Dissertation ist, dass während des Entscheidungsprozesses über die drei Klima- und Energiegesetzgebungsmaßnahmen Ideen als instrumentelle „Tools“ dienten und letztlich Zusammenarbeit und Kompromisslösungen zwischen verschiedenen Beteiligten mit gegensätzlichen Interessen ermöglichten.

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The Informal Politics of EU Climate and Energy Policy

Explaining Legislative Decision-Making (2007-2010)

Foreword

Human nature cannot be changed, but common rules and institutions, which bind and protect at the same time, can change behavior for the better.

-Jean Monnet¹

The research for this thesis was conducted in a research network on Inter-institutional Cooperation in the European Union (INCOOP)². INCOOP explored what impact formal and informal modes of decision-making have on policy-making as well as the on the distribution of power among the Union's main legislative actors (i.e. Council of the European Union, European Commission and European Parliament).

Critics often easily dismiss the EU as an origami palace of treaties and institutions and describe the legislative process and policy outcomes in terms of 'tit-for-tat' politics and lowest common denominator. A major part of what inspired me to write this thesis was to retort to critics by stating that it is too easy to dispose of the EU and its policies in these terms without providing a better understanding of the complex and often difficult circumstances under which legislative agreements are reached. At the very least, explaining legislative decision-making points out the remarkable efficiency with which proposals are 'pushed through' the Union's legislative machinery and allows the EU to respond swiftly to urgent policy problems, such as those central to this thesis.

Another part of the inspiration required for writing this thesis came from the desire to obtain a better understanding of the policy outcomes in this area. In praising or criticizing an outcome I argued that I needed to understand the process of policy-making. In-depth analysis of legislative decision-making in EU climate and energy policy provided me with a much better insight into how and why formal and informal institutions play a key role in reaching agreements between the co-legislators. These institutions truly serve as an indispensable ingredient in establishing 'an ever closer union among the peoples of Europe'.

Jan Frederik Braun

¹ Monnet in Grant (1994: 273).

² INCOOP was an EU-funded Training Network which brought together Universities and other professional organisations as well as high-level EU officials that all shared a long-term interest in a better understanding of the functioning of institutions in the European system of multi-level governance. For more information see: www.in-coop.eu.

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Any and all errors are my own.

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List of Abbreviations

ACER	Agency for the Cooperation of Energy Regulators
ALDE	Alliance of Liberal Democrats for Europe
CA	Competent Authority
CDM	Clean Development Mechanism
CEEC	Central and Eastern European Countries
COP	Conference of the Parties
COMP	Competition
COREPER	Committee of Permanent Representatives
DG	Directorate-General
EA	Early Agreement
EC	European Community
ECJ	European Court of Justice
ECR	European Conservatives and Reformists Group
EEC	European Economic Community
EEU	Effective and Efficient Unbundling
EFD	European of Freedom and Democracy
ENGO	Environmental non-governmental organisation
ENER	Energy
ENTSO	European Network of Transmission System Operators
EPE	Energy Policy for Europe
EPI	Environmental Policy Integration
EPP	European People's Party
EREG	European Regulators Group for Electricity and Gas
ETS	Emissions Trading Scheme
ENVI	Environment
EU	European Union
GHG	Greenhouse Gas
GUE/NGL	Group of the European United Left - Nordic Green Left
IGC	Intergovernmental Conference
IPCC	Intergovernmental Panel on Climate Change
ISO	Independent System Operator
ITO	Independent Transmission Operator
ITRE	Industry, Research and Energy
JI	Joint Implementation
LCD	Lowest Common Denominator
MEA	Multilateral Environmental Agreement
MEP	Member of European Parliament
MLG	Multi-level Governance
NAP	National Allocation Plan
NI	New Institutionalism
NRA	National Regulatory Authority
OEIL	European Parliament Legislative Observatory
OU	Ownership Unbundling

PAP	Preventive Action Plan
QMV	Qualified Majority Voting
RCI	Rational Choice Institutionalism
S&D	Group of the Progressive Alliance of Socialists & Democrats in the European Parliament
SEA	Single European Act
SEM	Single European Market
SI	Sociological Institutionalism
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TPA	Third Party Access
TREN	Transport & Energy
TSO	Transmission System Operator
TTE	Transport, Telecommunications and Energy
UCTE	Union for the Coordination of the Transmission of Electricity
UEN	Union for Europe of the Nations Group
UNFCCC	United Nations Framework Convention on Climate Change
VIU	Vertically Integrated Undertaking

Chapter 1: Introducing the Informal Politics of the EU Climate and Energy Policy (2007-2010)

1.1. Introduction

The European Union (EU) is increasingly adopting co-decision files ‘early’³. To qualify as an early agreement (EA), first, an act is based on an informal compromise between the Council of the European Union (henceforth: Council) and the European Parliament (henceforth: Parliament). Second, the procedure is fast-tracked, meaning that legislation is adopted after one rather than three possible readings. To elaborate further, fast-tracking here means that an agreement is concluded at either first or early second reading. In first reading, a legislative compromise is reached before Parliament issues its formal opinion and before Council adopts its common position, which are the first two steps in the formal decision-making process. In early second reading, an informal compromise is reached *after* Parliament holds its first reading and *before* the Council adopts its common position. First and early second reading deals are subsequently rubber-stamped by the Parliament’s plenary and a ministerial Council (Reh *et al.* 2011: 6, 8-9)⁴.

EAs are established via one or more trilogue meetings, i.e. informal meetings that consist of a number of participants from Council, Parliament and the European Commission (henceforth: Commission). For reasons of efficiency and promoting compromise, and since its introduction in 1999, informal decision-making in the ‘trilogues’ has become the standard way of ‘doing politics’ between these three actors (henceforth: The Three) under co-decision rules⁵. In other words, policy-making that used to be dealt with through formal and sequential negotiations is now dealt with through informal discussions among these actors.

³ The terms ‘European Union’, ‘European Community’ and ‘Community’ will be used interchangeably throughout this thesis. In addition, the term ‘Treaty’ shall refer to the Treaty establishing the European Economic Community as amended by the Single European Act to become the Treaty establishing the European Community (TEC). This in turn was further amended by the Treaty of Maastricht (1993), Treaty of Amsterdam (1997), the Nice Treaty (2001) and Lisbon Treaty (2009).

⁴ Formally, Members of the European Parliament (MEPs) continue to have the right to table amendments to the informal compromise, both in committee and plenary; de facto, however, they face considerable political pressure not to challenge an informal deal (Rasmussen & Shackleton, 2005 in Reh *et al.* 2011: 9).

⁵ In the Treaty of Lisbon (2009) the co-decision procedure was renamed the ‘ordinary legislative procedure’. The symbolic linguistic change under Lisbon naming the procedure the ‘ordinary legislative procedure’ underlines that co-decision is now the normal way of adopting EU laws (Huber & Shackleton 2008: 1040). For the sake of

More than 1000 pieces of legislation have been adopted under co-decision since 1999 and the average length of adopting a file has gone down from 22 to 19 months⁶. This informal way of legislative decision-making has allowed the EU to respond quickly to major political problems such as climate change and security of energy supply. After decades of hesitation, the EU established a first-generation climate and energy policy between 2007 and 2010 via the informal decision-making process as described above. This policy consisted of approaching energy and climate policy for the first time in an integrated manner for the sake of addressing Europe's three main energy challenges: to combat climate change and guarantee security of supply while ensuring the competitiveness of European industries (Behrens & Egenhofer 2008: 1).

The Climate & Energy Package (2008), the Third Internal Market Package (2009) and the Security of Gas Supply Regulation (2010) were key pillars of this first-generation policy and all three files were agreed upon as an EA. Despite the different interests of the Member States, their disagreement over which path to cooperation to choose and governments threatening gridlock and mutiny, these key dossiers were established with the average length of adoption being just over 13 months⁷. How did the EU manage to adopt these politically highly sensitive files so quickly? This thesis aims to explain the rapid adoption of this legislation by examining the informal decision-making process via a 'thick' rational choice institutionalism (RCI) bargaining model which will be elaborated upon below. According to this model, principles formulated as focal points and norms played a key role in facilitating the adoption of the EAs.

1.2. A puzzle in EU policy-making: The quick adoption of three major energy policy files (2007-2010)

From the mid-2000s to 2010 climate and energy policy constituted one of the biggest policy dossiers in European politics. Challenges such as sustained higher oil prices, security of supply difficulties and climate change forced the EU to come to terms with a new energy

continuity, co-decision' is used here to describe the policy-making process pre-Lisbon and post-Lisbon. This is because the main focus of this thesis is on the legislative process prior to the coming into force of the Lisbon Treaty.

⁶ Own calculations based on *Statistics on concluded Co-decision Procedures* for the 6th (2004-2009) and 7th (2009-2014) legislative terms of the Parliament. See 'Statistics on concluded co-decision procedures' on Conciliations and Co-decision Website of the Parliament.

⁷ Own calculations, see Chapter 5 to Chapter 7.

reality (e.g. Helm 2007, 2005a, 2005b; Van der Linde 2008, 2007). At an informal yet landmark summit at Hampton Court in October 2005, the European Council expanded the definition of EU energy policy to include climate action and energy security alongside the traditional objective of creating a competitive energy market (Barysch 2011: 2). This meeting laid the groundwork for the EU's first-ever political climate and energy plan and heralded a period in which the EU entered a new and crucial stage in the debate on establishing a common energy framework.

In January 2007 the Commission published a document entitled *An Energy Policy for Europe* which included a vast package of measures on energy and climate change and a proposal for an Action Plan (2007-2009). This Plan proposed a raft of objectives and priority actions with the aim of:

- *Establishing a real internal energy market;*
- *Moving towards a low carbon economy (including energy efficiency measures);*
- *Ensuring mechanisms for strengthening solidarity between Member States and security of supply for oil, gas and electricity (Commission 2007/1: 6-11).*

The heads of state and governments at the European Council meeting of 8 and 9 March 2007 broadly endorsed the Action Plan and invited the Commission to come forward with legislative proposals.

First, in September 2007, with the aim of improving the functioning of the internal market and to open it up to more competition, the Commission proposed a third legislative package for the internal market for electricity and gas known as the 'Third Package'. At the heart of the five proposals in the package lay the highly controversial issue of ownership unbundling (OU), i.e. the separation of production/supply activities from the transport activities of the energy operators in order to try to facilitate the emergence of new operators on European markets which were (and still are) dominated by vertically integrated companies (Commission 2007/841). After long and difficult negotiations, which were threatened by gridlock on multiple occasions, the co-legislators reached an EA on the package after two months of informal negotiations in the trilogues. In the context of severe Member State resistance to the Commission proposals, with the issue of OU causing deep rifts within and between Council and Parliament, it is all the more remarkable that these two

legislative actors reached an EA on the Third Package in less than a year-and-a-half after the Commission proposal⁸.

Second, in January 2008 the Commission published its proposals for a Climate & Energy Package, a set of ambitious legislative proposals to curb greenhouse gas emissions and develop low carbon technologies (Howarth 2009). The package comprised four pieces of complementary legislation which were intended to deliver on the '20-20-20 targets' set by the March 2007 European Council, namely

- *A reduction of at least 20% in greenhouse gases (GHG) by 2020 – rising to 30% if there is an international agreement committing other developed countries to "comparable emission reductions and economically more advanced developing countries to contributing adequately according to their responsibilities and respective capabilities".*
- *A 20% share of renewable energies in EU energy consumption by 2020 (Commission 2008/30).*

Far-reaching proposals in the package included an update of the EU Emissions Trading Scheme (ETS) and binding national targets for the reduction of GHG emissions outside the ETS up to 2020. Despite the general consensus on the need for policy-action in tackling climate change, the package was the topic of heated discussion between Member States. The package contained major pieces of legislation such as the revised ETS Directive or the Renewable Energy Directive that could have been negotiated individually for years. In addition several new Member States, i.e. Central and Eastern European Countries (CEECs), largely rely on coal and heavy industries and tend to give priority to economic growth over environmental concerns and the onset of the global financial crisis in the second half of 2008 threatened the adoption of the whole package (Bocquillon 2013: 3). So major obstacles in the decision-making process had to be overcome before an EA through an 'accelerated' first-reading procedure was established in less than 11 months.

⁸ The previous two packages (1996-98) and (2003-2004) and aimed to accelerate the creation of competitive Europe-wide electricity and gas markets. The First Package marked the first serious steps towards the liberalisation of electricity and gas markets. Nevertheless, taking four years before the electricity Directive was adopted, followed a year and a half later by gas, both Directives proved to be unsatisfactory in terms of stimulating market opening (Jones 2010). Thus was born the Second Package with the two 'acceleration Directives' for electricity and gas of 2003/2004. Still, there were doubts that the 2003 Directives would be sufficient for creating a fully-fledged, internal market. Thus the Commission decided to propose a Third Package in 2007 (see Chapter 2).

Third, in July 2009, in the context of growing import dependence and increased supply and transit risks from third countries the Commission tabled the Security of Gas Supply (SoS) Regulation. The proposal aimed to put in place effective mechanisms to ensure solidarity between the Member States in the event of an energy crisis. Part of this mechanism was to give a stronger role to the EU in coordinating Member States' responses to supply disruptions and declaring emergencies while requiring Member States to draw up preventive and emergency plans. The Regulation was established as an EA in June 2010 after wide-ranging disagreements between (and within) Council and Parliament on moving security of supply to the European level were settled during the informal negotiations.

In stark contrast with previous efforts in energy policy, which up until mid-2000 were characterised by piecemeal progress, the EU established a first-generation energy and climate policy in three years. The European Council and, to a lesser extent, the Council became the major driving forces in EU climate and energy policy and the policy area was considered to be an important tool in enhancing the legitimacy of the EU and the integration project in general. After the failure of the 2009 Copenhagen international climate conference and the onset of the global financial crisis (2008-onwards), the window of opportunity for climate and energy policy had effectively closed again by 2010. For example, the 2030 policy framework for climate and energy policy proposed by the Commission in early 2014 puts an end to binding national targets for renewable energy production which reflects a reduction in the level of the EU's commitment to climate and energy targets.

What happened during the 2007-2010 window of opportunity? A range of structural changes in energy markets, increasing public worry about climate change and upcoming global talks on this issue coupled with other events (e.g. power cuts in the early 2000s, the Russia-Ukraine gas crises between 2006 and 2009, the rejection of the Constitutional Treaty in 2005) forced the EU to reflect on the gains to be expected in setting up a European energy policy. Yet this fact tells us nothing about how the EU's legislative actors were able to reach a quick agreement on these three politically prestigious dossiers.

This thesis argues that these EAs would not have been possible in such a short period of time had they been based solely on the self-interested behaviour of the Member States⁹. Perhaps reaching an agreement would have taken years, perhaps reaching an agreement

⁹ See Section 1.4 below for further elaboration on this statement.

would not even have been possible at all. Huge differences between the Member States in terms of conflicting and expensive national subsidies, the availability of energy resources and choice of energy mix have for decades constituted an obstacle to establishing anything resembling a common energy framework. Member States were and are keen to remain sovereign in shaping their energy policies as they consider the energy sector to be of strategic geopolitical and economic importance and an essential public service. As a consequence governments have been reluctant to see the EU interfering in this area of national sovereignty and have repeatedly responded to crisis and challenges on their own terms (Andoura *et al.* 2010: 25-6).

Because the Member States had - and continue to have - divergent preferences over the potential ways to organise their interactions, the lack of a natural, unique path to cooperation has been a great barrier to the realization of a fully-fledged EU climate and energy policy. Despite structural changes in energy markets and the high political significance of energy and climate policy, the different national interests of the Member States constituted a major if not insuperable obstacle to the quick adoption of these major energy policy files. This thesis aims to explain the speed of the EAs and focuses on the 'informal politics' of the legislative decision-making process as a way of explaining how deep divisions between states were overcome.

1.3. The informal politics of co-decision and EU climate and energy policy

The informal politics of co-decision involves a restricted, non-codified set of decision makers from the Three operating in a secluded setting. Within this setting, social interaction is structured by informal rather than codified and enforceable rules and informal compromise is legitimised through the formal process (Reh *et al.* 2011: 8). An increasing number of general contributions to the EU-literature recognise the fact that informal politics is prevalent within the legislative process under co-decision rules (e.g. Huber & Shackleton 2013; De Ruiter & Neuhold 2012; Rasmussen 2011; Heisenberg 2011, 2005; Shackleton 2000). The main reason for the increasing interest in this issue is the fact that aiming for an EA in dossiers under co-decision rules, including on politically sensitive ones such as those central to this thesis, has become effectively a standard practice in the legislative process.

EAs serve the efficiency of the legislative process in terms of saving transaction costs of information-sharing and negotiating and have accelerated the informalization of relations between Council and Parliament. Policy-making that used to be dealt with through formal and sequential negotiations is nowadays dealt with through informal discussions among these actors. An important contribution to the literature describes this development in terms of the growth of a new legislative culture between Council and Parliament (Huber & Shackleton 2013: 1044). In contrast to viewing decision-making as a one-shot game, this culture is described as one in which the legislative actors are engaged in a permanent dialogue, i.e. permanent informal negotiations to deliver on EU legislation.

The cases analysed in this thesis are exemplary of this legislative culture of ‘informal politics’ as they were all ‘fast-tracked’ (i.e. concluded at either first or early second reading) and an agreement was reached via an informal compromise between Council and Parliament in trilogues (see Table 1.1 below).

Legislation	Trilogues (No & date)
<u>Climate & Energy Package</u> (Renewable energy - Directive 2009/28)	I (04.11.08), II (11.11.08), III (18.11.08), IV (26.11.08), V (03.12.08), VI (09.12.08)
(Emissions Trading - Directive 2009/29)	I (06.11.08), II (11.11.08), III (17.11.08), IV (25. 11. 08), V (04.12.08), VI (13.12.08)
(Carbon Capture Storage - Directive 2009/31)	I (11.11.08), II (25.11.08), III (01.12.08), IV (13.12.08)
(Effort sharing - Decision 406/2009)	I (06.11.08), II (17.11.08), III (25.11.08), IV (03.12.08), V (13.12.08)
<u>Third Internal Energy Market Package</u> (Directive 2009/72; Directive 2009/73; Regulation 2009/713; Regulation 2009/714; Regulation 2009/ 715)	I (27.01.09), II (03.02.09), III (18.02.09), IV (03.03.09), V (10.03.09), VI (18.03.09), VII (23.03.09)
<u>Security of Gas Supply Regulation</u> (Regulation 2010/994)	I (29.04.10), II (06.05.10), III (02.06.10), IV (22.06.10)
TOTAL:	31

Table 1.1: The trilogues in the three energy files.

Furthermore, two of the three energy files analysed in this thesis are so-called ‘package deals’. Nowhere is the need to understand informal politics greater than in the case

of package deals. Package deals are informal bargains agreed between representatives of the Council and Parliament and which allow the exchange of support ('logrolling') between the two co-legislators across different types of issues to which they attach different preference intensities. Logrolling allows some of the most controversial proposals that would otherwise face gridlock to be successfully negotiated and passed (Kardasheva 2009: 64). The use of package deals can be explained in terms of resolving conflict and reducing the costs of collective action.

Several contributions to the literature on the first-generation EU climate and energy policy recognise that policy-making in this area is embedded in a complex framework of both formal and informal rules (Eikeland 2011, 2008; Sauter 2010; Muengersdorff 2009; Mayer 2008; Eberlein 2004). These studies provide a valuable contribution to the literature in terms of indicating the complexities of decision-making in the EU's multi-level, multi-actor policy process. On the other hand, there are no studies that examine the informal decision-making process in the EU energy & climate policy. The aim of analysing the 'informal politics of co-decision' in this policy area is to explain why an agreement was reached so quickly in the three major policy files mentioned above. Second, due to the importance ascribed to the informal policy-making process under co-decision, it is considered important here to examine this process and explain the content and scope of the agreement reached between the Three on the three files.

1.4. Conceptual, theoretical and methodological assumptions

Explaining the informal politics of the EU climate and energy policy, this thesis takes several concepts and assumptions from the literature. First, separating the adjective 'informal' from its attachment to other terms, the focus here is on the identification of the process or procedure of EU legislative policy-making (Christiansen & Neuhold 2011). Informal politics, in this sense, is understood in this thesis as a coping strategy in the context of 'deficient' formal institutions.

Second, informal negotiations such as those taking place in trilogues are understood here as an informal accommodating institution (AII) (Helmke & Levitsky 2011). While placed within the study of formal politics, i.e. the government and the process of governing narrowly conceived, AII's at the EU-level 'fill in the gaps' by addressing contingencies not

dealt with in the formal rules, e.g. the Treaty and the individual Rules of Procedure of the Three (Reh *et al.* 2011; Stacey 2010)¹⁰. In accordance with this literature, this thesis defines informal institutions as socially shared rules usually unwritten and created, communicated and enforced outside officially sanctioned channels by the actors themselves (Reh *et al.* 2011: 4).

The theoretical approach applied here departs from the rational-choice assumption that informal decision-making is driven by actors' rational pursuit of fixed preferences. Due to an exclusive focus on the rational pursuit of preferences within formal institutions, 'thin' rational choice shows reluctance to accept and incorporate informal institutions in legislative decision-making. Therefore this form of rational choice is unsuitable for explaining the process of informal decision-making and the choices of policy actors in games with repeated play under circumstances of ambiguity and uncertainty such as in the three energy files under co-decision.

Making up for these flaws in thin rational choice, several contributions to the general literature on informal politics recognise that the EU puts a premium on the ability to provide convincing ideas in the legislative decision-making process around which actors' interests can converge (Eising & Kohler-Koch 1999; Garrett & Weingast 1993; Goldstein & Keohane 1993). Ideas, meaning principles and norms found in EU primary and secondary legislation, provide direction to the Union's dealings in complex subject matters. To be specific, principles serving as focal points and norms are instrumental in facilitating the informal bargaining process in case of collective action problems, incomplete contracting, disagreement over which set of rules to apply and under circumstance of urgency caused by events and/or international regimes. In light of these considerations and bridging the gap between the general literature and the literature on EU climate and energy policy, the central research question guiding this thesis is:

¹⁰ For the sake of clarifying the dividing line between the formal and informal frameworks, where bargaining *within* trilogues is conceived in this thesis as being part of the informal sphere of political decision-making, trilogue meetings are considered to be 'quasi-formal' institutions.

How did ideas (i.e. focal points and norms) facilitate the informal bargaining process between a set of legislative actors (i.e. the Three) with different preferences and make an EA possible in the three cases of EU climate and energy policy that are central to this thesis?

The negotiations on the three climate and energy policy files were hampered by factors such as severe political resistance, fears of uncertainty and entrenched economic interests so that no natural route to cooperation existed for establishing an EA. This thesis argues that the following principles and norms served as key facilitating mechanisms in the decision-making process on the climate & energy files:

- *Access principle (focal point);*
- *Flexibility principle (ibid.);*
- *Fairness principle (ibid.);*
- *Solidarity principle (ibid.);*
- *Subsidiarity (ibid.);*
- *Proportionality (ibid.);*
- *Consensus / reciprocity (norm).*

Expressing collective gains and operationalised via stipulations in EU law, these principles and norms smoothed out inter-institutional difficulties between the Three in the informal decision-making process and served as the mortar that made it possible to cement an EA in each of the three files. The Commission and the Council Presidency played an important role in proposing the principles and norms necessary for promoting cooperation in a policy field in which a cooperative equilibrium was difficult to obtain.

In the Third Package the Commission proposed a series of liberalization measures with the aim of making the energy network 'neutral', i.e. stimulating open access to the energy grid and consequently the creation of competition in the electricity and gas markets. This 'idea of access' was made tangible by the Commission by referring to two principles which support each other in EU energy law and are at the core of the liberalization process: Third Party Access (TPA) and unbundling. The TPA principle effectively means open access for all and the term 'third' is used to indicate additional individuals or companies beyond the original partners or participants in a project, network or transaction (Buchan 2009: xiii). Unbundling refers to the separation of supply and production activities on the one hand, and grid-related activities on the other hand and constitutes a complementary and necessary

measure to create open access to EU electricity and gas networks. Although the Commission's claim that OU provided the only way to create open network access and develop competition was certainly not shared by all actors in the negotiations, the TPA and unbundling principles did contribute to establishing a cooperative solution on the OU-issue and an EA on the package.

The Commission argued that the Climate & Energy Package proposals should be flexible enough to take account of Member States' different starting points and different circumstances in terms of projected GDP growth and changes in industry and energy sectors. In operationalizing the flexibility principle as a focal point the Commission proposed three kinds of mechanisms. These mechanisms included carry-forward and carry-over clauses which allowed Member States to borrow or carry over excess emission reductions to subsequent years as well as the use of international credits from project-based flexible mechanisms of the Kyoto Protocol.

The fairness principle proposed by the Commission in the Climate & Energy Package took into account Member States' different circumstances and the reality that differing levels of prosperity have an impact on Member States' capacity to invest in reducing their GHG emissions under the ETS scheme. Therefore the Commission suggested a mechanism through which 10% of the total auctioned ETS allowances would be redistributed from higher income to lower income Member States. Also the solidarity mechanism was introduced which foresaw that 90% of the total quantity of allowances to be auctioned would be distributed according to the relative share of Member States' 2005 emissions in the EU ETS.

Furthermore, during the decision-making process on the Climate Package, the French EU Presidency announced an unprecedented informal procedural move by announcing that all crucial decisions on the package would be taken via unanimity (not QMV) at the European Council level. Contrary to the general belief that unanimity merely provides the Member States with more leverage in pursuing their national interests, it is argued here that this measure served the norm of consensus-building and the strengthening of the collective commitment to reaching an 'accelerated' EA.

In the SoS proposal the Commission introduced subsidiarity, proportionality and solidarity as focal points which expressed gains for the further Europeanization of security of

gas supply. The Commission argued that the security of gas supply is a concern whose Community dimension is becoming more and more important, hence proposed new measures in accordance with the subsidiarity principle in the Treaty (Art. 5(3) TEU). Anticipating Member States' keenness on their energy sovereignty, the Commission argued that the SoS proposal complied with the proportionality principle in the Treaty (Art. 5(4) TEU). Member States would continue to be responsible for their security of supply and would enjoy considerable flexibility in the choice of arrangements and instruments to ensure security of supply, taking into account their national characteristics.

The operationalization of solidarity as a policy of supply security provided by the Member States to other Member States was proposed by the Commission via a range of mechanisms. These mechanisms included:

- *Defined security of supply standards;*
- *The obligation placed on the national competent authorities to consult each other and avoid inconsistencies in their plans and;*
- *The obligation on Member States to enable permanent capacity to transport gas in both directions on all interconnections (the so-called 'reverse flows').*

This thesis argues that these principles and norms defined and operationalised as focal points were instrumental in facilitating the bargaining process and therefore serve as 'the missing link' in the rational choice explanations of the speed, content and scope of the EAs in the three energy dossiers.

With the aim of explaining these EAs, ideas are incorporated in a 'thick' rational choice theoretical bargaining model. Next to recognizing the interests-based strategies of the actors in terms of logrolling, coalition-building and package deal-making, the bargaining model also assigns a prominent role to ideas in the informal decision-making process¹¹. In games with repeated play such as in legislative decision-making under co-decision rules, focal points and norms in the bargaining model embody, select and publicise particular paths by which actors are able to coordinate their bargaining and realise collective goals in a short time frame.

¹¹ Interest-based strategies are determined in the bargaining model by the impatience of the Three. This impatience is influenced by factors such as the end of the legislative term of the Commission and/or Parliament, the end of the six-month rotating EU Presidency and to whether or not existing legislation is considered inadequate in the face of new or increased political challenges.

The bargaining model also gives consideration to the interaction between an actor and its 'environment'. In terms of obligations under international regimes and (inter)national events, the environment of the EU's legislative actors determines the relevance of certain ideas. For example, global climate change talks surrounding the Climate & Energy Package negotiations and events such as the Russia-Ukraine gas crisis which preceded the SoS Regulation played a major role in strengthening the credibility of certain principles as focal points in the informal bargaining process. During the Third Package negotiations the Russia-Ukraine gas crisis strengthened the facilitating 'power' of the TPA and unbundling principles in finding an agreement on 'effective unbundling' as the anti-OU Member States argued that without vertically integrated companies, European consumers would continue to be exposed to security of supply problems caused by third-country oligopolies.

Concerning methodology, and with the aim of analysing and explaining the informal politics of EU climate and energy policy, this thesis applies two qualitative research methods:

- Process-tracing and;
- Case study research.

The distinctive need for case studies in this thesis arises out of the desire to explain how an agreement was reached so quickly and what the role of ideas was in the decision-making process. The cases themselves were selected according to two research objectives. The first research objective is to explain the speed of the decision-making process in the three EU legislative files adopted as an EA. Related to the depth of the agreement, the second aim is to generate as much information about the role and influence of ideas in the informal bargaining process as possible and to gain a better understanding of how these ideas facilitated legislative decision-making in the three energy cases.

Case-study research provides insight to the specifics and complexities of the decision-making process. This includes offering insight into the EU legislative process, the intentions and the reasoning capabilities of the actors involved and contextual factors affecting the decisions taken.

In carrying out case-study research, 'tracing the process' of the relevant events and actions of actors constitutes a fundamental research tool. Process-tracing is defined as the

systematic examination of diagnostic evidence selected and analysed in light of the research question mentioned above. Process tracing is recognised as detective work, multiple types of evidence are employed for the verification of a single inference – bits and pieces of evidence that embody different units of analysis which are drawn from unique populations. As such, process-tracing aims to identify the particular decision-making paths in the three case-studies and points out variables that were otherwise left out of the bargaining model.

1.5. Structure of the thesis

This thesis is divided into eight chapters. **Chapter 2** provides a background analysis of what happened before and during the window of opportunity (2007-2010) in EU climate and energy policy in terms of policy and institutional developments and the legal basis. Before 2007, the energy and environmental policy areas developed in piecemeal fashion and in relative isolation from one another and energy policy was merely seen as a by-product of the single market. The chapter explains that from 2007 onwards a range of structural changes and political crises forced the EU to quickly establish a first-generation European climate and energy policy with the European Council and the Council becoming major driving forces for the first time. The chapter introduces the three cases that are central to this thesis and points out that there is a gap in the existing EU climate and energy literature that cannot fully explain the rapid adoption of these important pillars.

Chapter 3 aims to explain the EAs of the three legislative files by providing the ‘tools’ relevant to explaining the informal processes of EU legislative decision-making. It introduces the new legislative culture between Council and Parliament under co-decision rules and proposes and explains a bargaining model of EU informal politics. The bargaining model incorporates ‘ideas’ as a key variable in order to explain the informal bargaining process on the climate & energy legislative files.

By further elaborating on the case-study research, process-tracing and data collection tools such as interviews and document research, **Chapter 4** discusses the research methodology that is applied in explaining the informal policy-making process in the three cases of EU climate and energy policy.

Chapter 5 to Chapter 7 examine the case studies that are central to this thesis:

- The Climate & Energy Package (**Chapter 5**);
- The Third Package (**Chapter 6**);
- The SoS Regulation (**Chapter 7**).

These chapters test the bargaining model formulated in Chapter 3 and elaborate on how and to what extent the above-mentioned focal points and norms facilitated the establishment of an EA as well as providing an in-depth explanation of the agreement reached. The cumulative message of the case-study research conducted in these chapters is that ideas served as instrumental tools in sustaining cooperation and cementing an acceptable compromise solution among a set of players with divergent interests. Focal points and norms cleared the path for defining a cooperative solution and played an instrumental role in the informal negotiations: they were conciliatory in meeting the interests of the Three (Chapter 5); they facilitated the logrolling process between Council and Parliament in terms of overcoming a stalemate and delay in the decision-making process (Chapter 6); and promoted cooperation in the precarious area of security of supply (Chapter 7).

Finally, **Chapter 8** offers concluding remarks and raises some broader questions. It reflects on the questions raised in this thesis on the rapid establishment of the EU energy policy and on how far these questions have been answered by the analysis offered in the three case studies. Second, the chapter considers broader questions that have not yet been answered in this thesis but are relevant for further research on explaining the speed, scope and content of informal policy-making under co-decision rules.

Chapter 2: A Window of Opportunity - Establishing the EU Climate and Energy Policy (2007-2010)

2.1. Introduction

The three legislative dossiers that are the main focus of this thesis are at the heart of the EU's first-generation climate and energy policy established between 2007 and 2010. With political blessing from the European Council, the integrated nature of energy and climate policy was acknowledged for the first time and a range of policy measures adopted in a spectacularly rapid fashion.

This chapter provides a background analysis of what happened before and during the 'big bang moment' in EU climate and energy policy. Prior to the window of opportunity between 2007 and 2010, EU energy and climate policy developed rather autonomously from one another. In terms of relevant policy and legal developments as well as the involved European actors, sections 2.2 and 2.3 describe the establishment of both policy areas before and after 2007. Section 2.4 describes the factors that created a window of opportunity that encouraged the Member States to accept the rapid establishment of a first-generation EU climate and energy policy between 2007 and 2010.

The aim of the analysis in sections 2.2-2.4 is to provide insight into how the previous efforts in energy policy stand in stark contrast with what happened during the 2007-2010 window of opportunity. Also, the chapter points out that there is a gap in the literature that cannot fully explain the rapid establishment of the EU's first generation energy policy. This gap concerns explaining the role and influence of the informal EU decision-making process on policy outcomes in the EU climate and energy policy. Finally, section 2.5 summarises the main findings of this chapter.

2.2. The EU internal energy market policy¹²

In general, energy policy is concerned with the coal, electricity, gas and oil industries, as well as newer technologies such as nuclear power, renewable energy and activities to enhance the efficiency of energy supply and consumption (McGowan 1996). EU energy policy is driven by the economic and political-strategic interests of different stakeholders across national borders and takes place within the constraints of formal law.

The historical *Sonderweg* of the EU energy policy is the subject of a rich amount of literature (e.g. Lyons 1998; Matlary 1997; McGowan 1996; El-Agraa & Su Hu 1984). These and other contributions underline some well-known facts. First, that with the enacting of the Coal and Steel Community (ECSC) (1951) and the Euratom treaty (1957), energy policy stood at the cradle of European integration. In fact, the Messina Declaration of 1955 established as a European priority putting more abundant energy at a cheaper price at the disposal of the European economies. Apart from this promising start in coal and nuclear, however, energy remained the 'odd-man out' in the EU's economic integration process for decades. Oil security had become a political issue by the time of the 1956 Suez Crisis. However, the negotiations on the EC and Euratom Treaties were so far advanced that incorporation of oil issues or the development of an integrated energy were unfeasible (De Jong 2008a: 96). In the decades that followed, the Member States took some intergovernmental measures, for example, in response to the oil crises of the 1970s. Yet this remained a far cry from an integrated EU energy policy. In an age of cheap and abundant energy, nothing resembling an EU energy policy was established. Hence the vertical delegation of policymaking powers from the EU Member States to the supranational level remained very limited.

In other words, the 'europeanization' of energy remained all but non-existent for a long time. Regarding the liberalization of national energy markets, a general strand in the literature points to Member State governments being keen to retain tight control over a sector that they considered to be of strategic geopolitical and economic importance and an essential public service (Eising & Kohler-Koch 1999; Padgett 1992). As Van der Linde (2007: 276) summarises: "*More often than not, energy is part of the political and strategic function of the state*".

¹² For the sake of clarity, this section neither aims to provide an exhaustive overview of all EU legislation in the field of energy and climate change policy nor review Member States' national policies.

Second, in contrast with sectors such as finance and telecommunications the public utility model of energy supply constitutes a policy area marked by the rigidity of national interests as well as being structured around a well-established organization model. In this earlier period, European electricity and gas supply industries were typically organised as regional or national monopolies in a closed national context. This model was relatively immune to change in terms of market competition and technological innovation (Eising & Jabko 2001: 743, 762). Last but not least, Glachant (2013: 34) reminds us that, for example, electricity is a very difficult product to trade as it requires hundreds of technical, legal and economic rules and standards to be agreed before it becomes tradable. Together with the specific yet demanding market arrangements for gas and the cheap and abundant availability of both in the 1980s and 1990s, this explains, in a nutshell, why energy was for decades considered to be a typical anti-market product that was best suited to monopolies and even cartels¹³.

It also explains why during these decades, several attempts by the Commission to extend the internal market into the gas and electricity industries – i.e. liberalizing them – proved to be a difficult task (Commission 1995; 1988). As a result, Padgett (1992) describes energy policy as constituting one of the Community's major failures, constituting the only sector where the Union, up until the early 1990s, had been moving from a high degree of integration (via the ECSC and Euratom Treaties) to a lower level not for a moment regaining the common vision and courage of its founding years¹⁴.

The provisions in the Treaty Establishing the European Community (TEC) underline the Community's limited foothold in the area of energy. The Maastricht Treaty (1992) mentions energy yet it is relegated to the same level of importance as measures in the spheres of civil protection and tourism. Moreover, contrary to other policy areas such as consumer protection and environment (see section 2.3), the TEC does not contain an enabling provision that lays down the specific objectives, commitments and procedures

¹³ Electricity and gas industries depend on networks that in turn can be considered natural monopolies. This in contrast to oil and coal, whose physical characteristics – storability, higher energy density and flexible transport – have allowed an international market in these commodities to flourish with relatively little government intervention.

¹⁴ The ECSC (which expired in 2002) and Euratom Treaties are unique in that they provide for specific energy policy tools. The authors of these Treaties felt that an energy policy should be a common policy based on exclusive supranational powers. This is particularly the case for the ECSC Treaty, which lays down a relatively detailed set of rules to be applied directly by a central High Authority and which left Member States little room for manoeuvre.

underlying Community action in the sphere of energy. At the same time, the modest place of energy policy in the list of action items did not preclude the possibility of developing and pursuing such a policy on the basis of the general provisions of the TEC. Thus, the provisions on the internal market, in particular Art. 95 EC on harmonisation measures and the rules on the coordination of economic policy have provided a legal basis (Andoura *et al.* 2010: 11). Other general provisions in the TEC relevant to energy policy-making concern Art. 100 (Economic & Monetary policy) and Art. 308 (General & Final provisions)¹⁵.

Yet the lack of a specific article on energy pointed to a more general difficulty. This difficulty consisted of trying to understand why a Community based on an internal market and the principles of a competitive, open-market economy, free from the distortions of restrictive agreements, the abuse of dominant positions or the granting of state aid by governments, was not able to implement a common market for energy (Egenhofer 1997: 6).

In the early 1990s, in response, the Commission Directorate-General (DG) for Transport & Energy (TREN) began to champion the inclusion of the energy sector within the overall framework of the EU internal market: Application of Community law, removal of territorial barriers, approximation of indirect taxation, etc. At the same time, the Commission began agitating against national legal monopolies (Buchan 2009). Generally held by state companies, these monopolies had played an important part in establishing security of supply in the national context. However, where they extended to a legal monopoly on the import and export of energy they were clearly incompatible with the single market.

As a solution to the problems caused by natural monopolies, the Commission began to push the idea of Third Party Access (TPA) to energy grids and pipelines. Meaning open access to all customers on a network, TPA constitutes the spearhead principle of liberalizing EU energy markets (Buchan 2009: 20-7).

The principles governing third-party access are rooted in EU competition law and more particularly in the essential facilities doctrine. This doctrine states that a company which has a dominant position with regard to the performance of an essential service that it uses itself (through a facility or infrastructure, without which competitors are not able to provide the service to their customers) and which refuses other companies access to that

¹⁵ Art. 308 allows action by the Community in order to achieve objectives enshrined in the EC Treaty yet in the absence of the necessary powers assigned.

facility without good reason, or allows access under less favourable conditions, is abusing its dominant economic position (De Rijke 2004)¹⁶.

Complementary to TPA is the principle of unbundling. Unbundling generally refers to the management of energy networks separately from the production and supply sides and constitutes a necessary requirement to create a real TPA (Francese 2009: 9; Zafirova 2007: 29).

Since the mid-1990s, and with reference to the TPA and unbundling principles, the Commission has issued several legislative measures under which the Member States must introduce a system of guaranteeing access by third parties to the gas and electricity transmission and distribution networks. Table 2.6 below makes a separation between account unbundling, legal unbundling and the strongest form of unbundling, i.e. ownership unbundling (OU).

Overview energy market packages	Unbundling of networks	Access to networks	Market opening	National regulation
1st Legislative Package (1996-98)	Separate management and accounts	Negotiated or regulated terms of access	Power: 35% open by 2003 Gas: 33% open by 2018	Mechanism for regulation
2nd Legislative Package (2003-04)	Legal unbundling	Regulated terms of access	Power and gas markets 100% open by July 2007	Specific regulator for energy
3rd Legislative Package (2007-09)	Ownership Unbundling	Regulated terms of access	Already achieved (see above)	Ungraded and harmonised power for national energy regulators

Table 2.1: The EU Internal Market Energy Packages. *Source: Author & Buchan (2009)*

The first electricity (96/92/EC) and gas (98/30/EC) Directives introduced a partial opening of national markets to competition, requiring Member States to liberalise certain segments of their respective markets (electricity generation and supply as well as gas supply) and to progressively enlarge the categories of customers eligible to choose their suppliers of electricity and gas. Nevertheless, it took four years before the electricity Directive was

¹⁶ The judgment of the European Court of Justice which is usually cited in this respect is the *Bronner* judgment (Case C 7/97, Jur 1998, pl-7791).

adopted, followed a year and a half later by gas. Both Directives proved to be unsatisfactory in terms of stimulating market opening (Jones 2010). In fact, these Directives mainly introduced the 'idea' of TPA and unbundling rather than guaranteeing it at EU-level.

In the Second Internal Energy Market Package (i.e. two Directives, together with a Regulation on cross-border trade in electricity), the weaker provision of legal unbundling (the organizational separation of production/supply and network activities) was adopted. This approach left control of grid operation and investments with the major energy groups.

At the time of the Second Package, the deeply controversial issue of OU received clear support from members across all political parties in the Parliament's Committee on Industry, Trade, Research and Energy (ITRE). The Parliament has traditionally voted in favour of consumer interests and backed the 2nd Package only after securing a range of amendments focusing on consumer protection (Eikeland 2008: 24). In the Transport, Telecommunications and Energy (TTE) configuration of the Council, in contrast, OU was not acceptable to all or even a qualified majority of the Member States. Nevertheless, the Second Package contained many of the key requirements for developing a competitive European market such as full market opening, the introduction of regulated third party access and the obligation to create a regulatory authority¹⁷. While leading to an improvement in TPA, however, legal unbundling does not suppress the conflict of interest that stems from vertical integration. According to the Commission, the risk here is that networks are seen as strategic assets serving the commercial interests of the integrated entity, not the overall interests of network customers (Commission 2007/841).

By the time the Commission proposed the Third Package in September 2007 substantial changes had taken place in terms of policy as well as regarding the involved actors. The new Commission appointed in 2005 under President Barroso had taken a new line on internal energy market policies. As part of his general plan to revitalise the Lisbon agenda, the 'Barroso I Commission' promised and delivered a more pro-active application of competition policy, including the screening of industrial sectors for barriers to competition (Commission 2005/24)¹⁸. Also different from the preparation of the first and second policy

¹⁷ The Second Package required gas and electricity markets to be liberalised by 1 July 2004 for large consumers and 1 July 2007 for all consumers.

¹⁸ The Lisbon agenda or 'strategy' was initiated by EU leaders in 2000 for enhancing growth and competitiveness in the Union.

packages, DG Competition assumed a more prominent role in pushing internal energy market policies next to DG TREN.

This more prominent role of DG Competition and doubts that the Second Package would be sufficient (or sufficiently implemented) led the Commission to make use of a new power it had been given to launch a competition sector inquiry: “*Into a whole sector of the European economy without having any specific suspicions or indications of infringements*” (Council Regulation 1/2003/EC). After retail banking and telecommunications, and due to a combination of economic importance and indicators suggesting a lack of competition in the sector, energy was up next. The resulting 328-page report by DG Competition released on 10 January 2007 contained a relentless critique on the state of the internal energy market, stating serious shortcomings in the energy liberalization process that hindered European energy users and consumers from reaping full benefits (Commission 2006/1724: 17). The chief characteristic revealed by the inquiry was the high degree of market concentration by incumbents (generally defined as the pre-liberalization monopolies or dominant companies) in their home states arising out of two factors. One is the so-called vertical foreclosure – the use by vertically integrated energy groups of their networks and long-term upstream gas contracts to shut rivals out. The other is lack of competition because of the European energy sector’s continued segmentation into national markets with too few interconnecting wires and pipes to link them.

In short, the key shortcomings mentioned in the inquiry included:

- *Too much market concentration in most national markets;*
- *A lack of liquidity, preventing successful new entry;*
- *Too little integration between Member States’ markets;*
- *An absence of transparently available market information, leading to distrust in the pricing mechanisms;*
- *An inadequate current level of unbundling between network and supply interests which had negative repercussions on market functioning and investment incentives;*
- *Customers being tied to suppliers through long-term downstream contracts.*

The sector inquiry served as the justification for proposing a third package of legislative proposals aiming to correct the still existing flaws in the design of the internal energy market. Based on the sector inquiry and other Commission documents, the 2007 March European Council invited the Commission to come forward with relevant proposals

to complete the internal market for gas and electricity¹⁹. More elaborate, the European Council invited the Commission to propose the following measures:

- *The effective separation of supply and production activities from network operation ['effective unbundling'];*
- *The further harmonization of the powers and enhanced independence of the national energy regulators;*
- *The establishment of an independent mechanism for cooperation among national regulators;*
- *The creation of a mechanism for transmission system operators to improve the coordination of networks operation and grid electricity, cross-border trade and grid operation;*
- *Greater transparency in energy market operations (Council 7224/1/2007: 16-17).*

Following this invitation from the European Council, the Commission proposed a third package of internal market measures on 19 September 2007 which consisted of proposals for two directives and three regulations.

Central to these legislative proposals and with the aim of creating a real internal energy market, the Third Package introduced the concept of ownership unbundling (OU), i.e. where network companies are wholly separate from the supply and generation companies in both electricity and gas. In the proposals, the Commission suggested that OU would end the inherent conflict of interest in joint ownership of monopoly networks and of competitive parts of the energy business. In other words, only fresh legislation on OU would suffice to create the necessary across-the-board structural change (Buchan 2009: 50-1). Second, OU would also redress a perceived dearth of investment in cross-border networks. The argumentation by the Commission is that vertically integrated networks lacked the incentive to invest in their networks since:

The more they increase network capacity, the greater the competition that exists on their home market and the lower the market price (Commission 2006/1724: 7).

It was on this point that most of the economic argument about OU turned.

The Third Package proposals received clear support from the Parliament with a majority of MEPs supporting mandatory OU of TSOs as well as other provisions proposed to

¹⁹ See Chapter 6 for more details on the legislative proposals.

improve the function of the internal market. Nothing indicates, however, stronger support from the Parliament than at the time of the Second Package (Eikeland 2008: 31). In fact, many MEPs opted for mandatory OU already at that point in time. The minority with reservations against more radical market-opening appeared as large in 2007 as it had been in 2003.

In the enlarged EU, which over the period 2003-2007 saw the inclusion of 12 new Member States, Germany and France took the lead of a new alliance against OU. This alliance included a minority group of older Member States as well as a group of new Member States such as the Czech Republic, the Baltic States, Slovakia and Hungary. This blocking minority in the Council made it clear during a TTE meeting in June 2007 that they opposed OU.

Despite the trouble ahead for agreeing on the Third Package, EU energy policy underwent structural changes in the period 2007-2010. Regarding legal provisions, Art. 4(2i) (TFEU) in the Lisbon Treaty in December 2009 established a shared competence between the Union and the Member States in the energy sector.

The aforementioned competence is described in more detail in the new chapter XXI entitled "Energy". Its sole Article 194 TFEU first lays out the central aims of the EU's energy policy in paragraph one, namely to:

- a) Ensure the functioning of the energy market;*
- b) ensure security of energy supply in the Union;*
- c) promote energy efficiency and energy saving and the development of new and renewable forms of energy;*
- d) promote the interconnection of energy networks.*

The objectives are flanked by statutory provisions according to which energy policy shall take place 'in a spirit of solidarity between the Member States', while moving 'in the context of the establishment and functioning of the internal market' and keeping in mind 'the need to preserve and improve the environment'. For these matters - and for the functioning of the (internal) energy market, co-decision or the ordinary legislative procedure (Art. 294 TFEU) applies under qualified majority rules in the Council.

At the same time, the second paragraph of Art. 194(2) TFEU stipulates that the measures formulated in the first paragraph shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different

energy sources and the general structure of its energy supply. Also, any fiscal measures under the new Energy Title still require a unanimous Council vote (the ‘special legislative procedure’). This requirement is explicitly provided for in Art. 194(3).

One also has to note the re-formulation of Art. 100 TEC, i.e. Art. 122 (1) TFEU. This new formulation does not change the scope of the article but is more precise in allowing the Council to decide:

In a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy (Belyi 2007: 412).

Besides the explicit reference to energy, the term ‘solidarity’ is introduced in a (more) general context by the Lisbon Treaty. What needs to be underlined here is the link between the enlargement process to the East and the emphasis on solidarity in the Treaty. Poland and the Baltic states made particular requests on strengthening solidarity between Member States in this area.

In line with the increasing formalization of energy policy under the Treaty of Lisbon rules (see Appendix 1), and the growing political importance attached to this area by the Member States, the Barroso II Commission (2010-2014) created a separate DG for energy with responsibility for managing all aspects of the internal and external dimensions of EU energy policy (Piris 2010)²⁰.

In sum, the slow progress in internal energy market policy prior to mid-2000 stands in stark contrast with the short period thereafter. This period from 2007 onwards is marked by:

- *A more abrasive approach of the Commission in strengthening integration in the internal energy markets;*
- *The formalization of energy policy in the Treaty;*
- *Political support for internal energy market reform in the European Council.*

Yet as the sections 2.3. to 2.4 will make clear, this is just part of the story of what separates the 2007-2010 window of opportunity from the preceding period. A range of structural

²⁰ DG Competition continues to play a pro-active role in applying competition policy in internal energy markets.

changes and political crises forced the EU from 2006 onwards to establish a first-generation European energy policy. As explained in section 2.4, the main pillar of this system consists of approaching energy and climate policy for the first time in an integrated manner.

2.3. The EU environment and climate change policy

In the Treaty of Rome, there was no legal basis for environmental policy, much less the specifics of climate change. Hence during the initial phase of environment policy, which runs from 1972 to 1987, policies followed primarily trade-related motivations and were legally based on the single market provisions (Lenschow 2010: 309). In other words, environmental policy emerged as a niche product of the single market. Furthermore, in accordance with some pioneering Member States the Commission used its monopoly on the right of policy initiative to promote tough environmental rules. These 'pioneering' Member States such as Germany and the Netherlands pushed for an increasing range of measures at a high level of environmental protection, 'uploading' national regulation to the Community level (Lenschow 2010: 313). Overall, though, the Council proved to be a laggard in environmental policy.

Other historical-legal institutional developments that strengthened the EU's prominence in environmental policy during this phase included decisions by the European Court of Justice (e.g. 1971 ERTA decision), Commission initiatives like the Environmental Action Programme (1973) and the creation of new institutional actors such the Commission DG for Environment (1981).

The first inclusion of environmental policy in the primary legislation of the EU came with the 1986 Single European Act (SEA). The SEA incorporated environmental policy into the EU's treaty structure, giving it an explicit legal basis from which to make policy (Damro *et al.* 2008: 182). More specifically, the SEA provided an explicit legal basis for environmental regulation, introduced qualified majority voting in the Council for some areas of environmental policy, and increased the powers of the Parliament in decision-making.

The Parliament is widely regarded as the most environmental of all of the EU's institutional actors. The Parliament's strong stance on environmental issues is explained in

several ways²¹. One is that in a multiparty system in which there is no permanent majority, smaller parties like the Greens can exploit their influence by securing key positions such as rapporteurs (Jordan & Schout 2006: 231). In addition, the Parliament is characterised by strong divisions in sectoral committees with the level of ambition of a committee being determined to a large extent by the personalities in the chair. The entrepreneurship of key individuals and the relative radicalism of the Committee on the Environment, Public Health and Food Safety (ENVI) Committee seem to have been critical in cementing the Parliament's reputation as an environmental leader (Burns & Carter 2011: 59). Between 1993 and 2006 the ENVI Committee was recognised as the largest customer of co-decision within the Parliament (ibid).

Nevertheless, the Parliament's environmental leadership role was initially symbolic in the subsequent phase of the EU environmental policy that began with the Maastricht (1993) and Amsterdam (1999) Treaties. While the Parliament gained co-decision powers and qualified majority voting was introduced for almost all aspects of environmental policy in the Council, it could only put forward amendments under co-decision on proposals brought forward under the single market provisions of the Treaty between 1993 and 1999 (Lenschow 2010: 309-10; Burns & Carter 2011). This limited the Parliament's scope to shape proposals falling under the environmental provisions of the Treaty. The scope of the Parliament's competence was widened with the revisions of the Amsterdam Treaty in 1999²². Apart from land use planning, water management and fiscal measures, 'Amsterdam' extended co-decision to most environmental policy. With the adoption of several key pieces of climate change legislation since 2001, originating from environment policy and all subject to co-decision, the Parliament had the opportunity to amend their content and thereby help to strengthen standards within the EU as well as to consolidate the EU's wider leadership role on the international stage²³.

²¹ Next to these more specific explanations, Lenschow (2010: 316) states that it is easier for MEPs to articulate more general programmatic ideas as they are some steps removed from the operational level (and demands of accountability) in the EU's multi-level governance system.

²² The environment provisions in the TEC provided a legal basis for policy measures in the field of renewable energies, climate protection, emissions trading policy as well as in enhancing energy efficiency and energy savings. According to Art. 175 (1) TEC decisions based on Art. 174 TEC are, in general, subject to the co-decision procedure under Art. 251 TEC.

²³ The Lisbon Treaty consolidates the provisions on energy and is composed in the same manner as the energy chapter mentioned above. Environment (Arts. 191-193 TFEU) also constitutes a shared competence (Art. 4(2) TFEU) between the Member States and the Union and falls under co-decision. The special legislative procedure

On the other hand, Member State politics within the Council largely prevented the EU from making sufficient progress on the development of EU climate policy. Climate policy remained sharply limited in scope during this phase with activities focused on the Environment Council, while most other Council formations successfully avoided the topic. As a result, progress in, for example, reducing GHG emissions in the EU-15 was very limited (Oberthuer & Dupont 2011: 76).

The track record of the Council improved substantially at the start of the new millennium. On the international level after 2000, the Council and the European Council led the EU to become the champion of the Kyoto Protocol (concluded in 1997) (Youngs 2009). For example, the EU adopted several policy measures in the context of the entry into force of the Kyoto Protocol in 2005²⁴. All in all, the EU increasingly played a proactive role in negotiating multilateral environmental agreements and became a prominent player in climate change policy negotiations (Lenschow & Sprungk 2010: 139)²⁵.

Linked to increasing external commitments, both the Environment and the Energy Councils constructively participated in the adoption of an increasing number of legislative acts aimed at mitigating GHG emissions, which the Commission on the basis of its European Climate Change Programme (ECCP) launched in 2000. The ECCP marked a reframing of EU climate policy in environmental and market terms (as opposed to the earlier focus on fiscal measures) and initiated an increasing integration of climate considerations in the activities of the Energy council. Climate policy came to be considered closely related to the internal market, serving general environmental objectives while leaving sufficient choices for Member States as regards their energy sources/supply (Oberthuer & Dupont 2011: 80-8).

The centrepiece of the EU's first serious efforts in effective climate policy was the EU Emissions Trading Directive (2003/87/EC)²⁶. The combined effect of these measures on EU greenhouse gas emissions, together with supplementary measures taken by Member States

applies in case of fiscal measures and measures affecting a Member State's choice between different energy sources and the general structure of its energy supply. According to Art. 218 (6a) TFEU, furthermore, the Parliament's consent is now required in international environmental and/or energy agreements.

²⁴ The measures include: Decision 280/2004/EC concerning a mechanism for monitoring Community greenhouse gas emissions and for implementing the Kyoto Protocol; Directive 2005/32/EC establishing a framework for the setting of eco-design requirements for energy-using products; and Directive 2006/32/EC on national programmes for energy end-use efficiency and energy services.

²⁵ The EU is signatory to more than 40 Multilateral Environmental Agreements (MEAs).

²⁶ In 2004, the ETS Directive was complemented with a Directive (2004/101/EC) linking the ETS to the Kyoto Protocol project mechanisms, namely, the Clean Development Mechanism (CDM) and Joint Implementation (JI).

individually, brought the EU closer to the Kyoto targets. Nevertheless, the Council did not become a major green force for effective climate protection. For example, one of the major weaknesses of the initial ETS, the free national allocation of allowances (instead of auctioning of emission rights) was the result of the general preference of the Member States (Skjøersth & Wettestad 2008). Also, the actual effect of the measures did not exploit their full emission reduction potential. Ubiquitous implementation deficits caused by the Member States raised doubts about the ability of the EU-15 to comply with their Kyoto targets (Oberthuer & Pallemmaerts 2010: 43). As a general rule, the Parliament and the Commission were greener forces in the legislative process than the Council (Oberthuer & Dupont 2011: 81).

At the same time, the 2004 enlargement had no immediate substantial negative effect on the development of EU climate policy. Stated differently, a distinct block of opposition of central and east European countries (CEECs) to strict environmental policy could not be identified generally hence did not significantly hamper the Council in following up on the legislative programme developed and proposed by the Commission under the ECCP in this period.

In sum, only when the Parliament had obtained the proper co-decision powers could it do justice to its far-reaching ambitions in the field of environment and climate policy. These ambitions, however, were seriously undermined by the Council's poor track-record in environmental and climate policy up until 2003-2004. The way in which the Member States 'defused' the ETS policy was illustrative of these lacklustre ambitions.

2.4. A window of opportunity: Establishing the EU climate and energy Policy (2007-2010)

This all radically changed during a window of opportunity that opened in 2005 and heralded a period of exceptional involvement of the Council and the European Council in climate and energy policy. As Figure 2.1 below shows, after the failure of the 2009 Copenhagen international climate conference and the onset of the global financial crisis (2008-onwards), the climate and energy policy window of opportunity had already closed again by 2010.

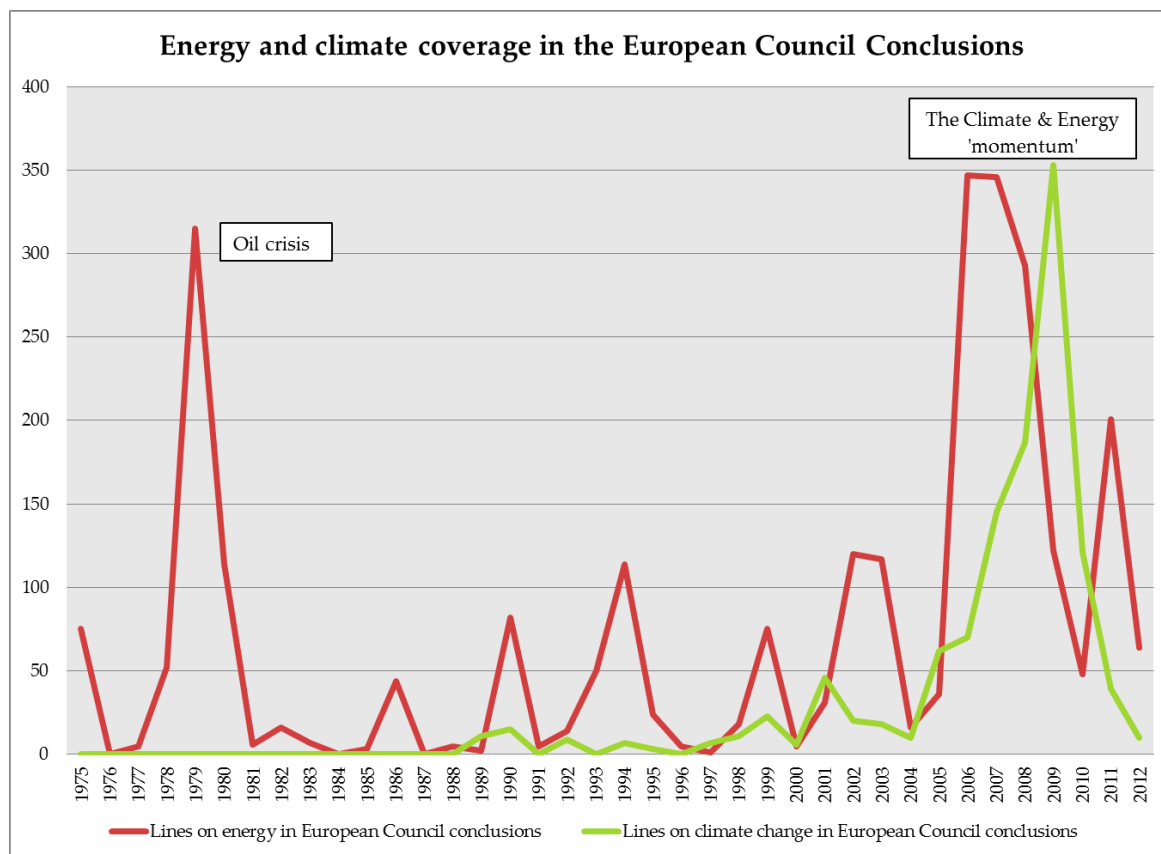


Figure 2.1: Energy and climate coverage in the European Council conclusions (Source: Bocquillon et al. 2013).

The debate on climate and energy policy at the highest, political level commenced with an informal European Council summit at Hampton Court in 2005 under the EU Presidency of the UK. The European Council's concern with energy must be understood in a larger framework of structural changes. Factors most mentioned in the literature are related to the issue of security of supply:

- Higher oil and gas prices (due to increasing global demand)²⁷;
- Urgent need for investment (ageing infrastructure, power stations, oil refineries)²⁸;
- Dwindling oil and gas reserves hence rising import dependency on a few external suppliers²⁹;

²⁷ Since gas continues to be priced in contracts that are indexed to the oil price, gas costs are also higher. In turn, electricity prices have risen to reflect gas costs.

²⁸ The Commission argues in several documents that in Europe alone, to meet expected energy demand and to replace ageing infrastructure, investments of around one trillion euros will be needed over the next twenty years.

²⁹ Eurostat data (Energy Production & Imports over 2010) shows that Russia is the main supplier of crude oil and natural gas as well as the leading supplier of hard coal. More than 81% of the EU27's imports of natural gas came from Russia (31.8%), Norway (28.2%), Algeria (14.4%) and Qatar (8.6%). A similar analysis shows that 64.4% of EU-27 crude oil imports came from Russia (34.5%), Norway (13.8%), Libya (10.2%) and Saudi Arabia (5.9%).

- *External dependency on gas (notably from Russia), and the reliance on pipelines through often politically difficult territory (e.g. Ukraine-Russia gas disputes between 2006-2009). (Source: Van der Linde 2007; Correljé & Van der Linde 2006; Helm 2005a; 2005b)³⁰.*

Although there is no easy definition of European security of supply, most commonly it means the availability of abundant energy sources to users at affordable prices (Commission 2008/769: 3). Concerning gas, a distinction needs to be made between long-term and short-term security of supplies as the risks, the ways to prevent supply problems and the possible mitigation tools are different (Commission 2008/769: 3). The focus in Chapters 5 and 7 is on securing the Union's long term security of supply. This mainly depends on:

- *Establishment and development of effective international frameworks and relations;*
- *The evolution of EU indigenous production, which given new technologies and high process, might be further explored or possibly promoted;*
- *Energy efficiency;*
- *The management of demand (pace of transition to a green economy, e.g. under the 20 20 by 2020 targets.*

The short term security of supply, which is the focus in Chapter 6, relates to a well-functioning market in which appropriate price signals trigger a matching of demand and supply and direct gas to where it is valued most highly. Having been an issue of high political salience in the wake of the oil crises in the 1970s, security of supply had sparked renewed political interest as a result of the cut-off of Russian gas supplies to the Ukraine in January 2006, with incidental effects in a number of Member States (Adelle *et al.* 2009: 14-15).

Like in 2006, the January 2009 gas supply disruption resulted from an unresolved commercial dispute between Naftogaz (Ukraine) and Gazprom (Russia). But in sharp contrast to 2006 – when one tenth of the Union's supplies were affected and the crisis lasted only 36 hours – in 2009 this was the starting point of a more serious conflict (Pirani *et al.* 2009: 19-25). In 2009, no Russian gas was delivered to Europe for almost two weeks. This affected up to 75% of gas supply in several Member States, most notably the CEECs (see

³⁰ The sense of urgency for a common energy policy for European policy-makers increased in early 2006 when Russia cut gas supplies to Ukraine in the midst of a dispute over pricing, causing a temporary 30 per cent decline in gas flows to the EU. History repeated itself with another price dispute between Russia and Belarus in January 2007 and – again – with Ukraine in January 2009.

Figure 2.2 below). The 2009 crisis had a considerable economic and social impact related mainly to involuntary restrictions of gas supplies to industry.

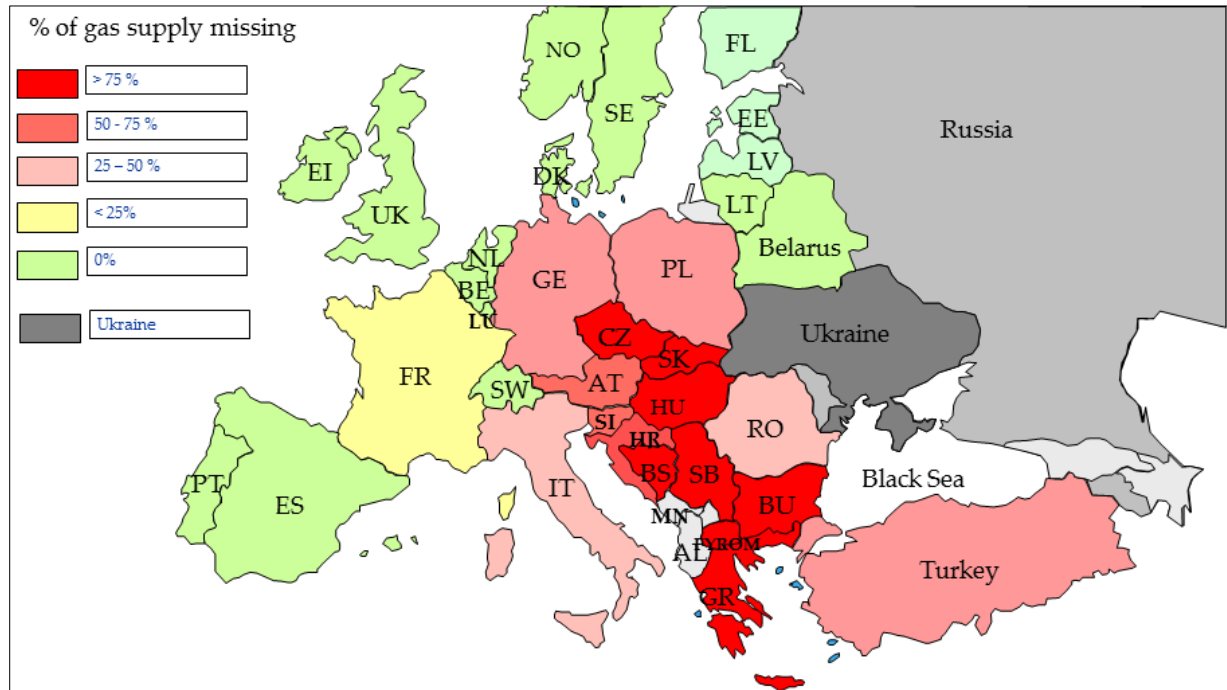


Figure 2.2: Impact of January 2009 gas crisis on the EU Member States.

(Source: Devlin 2010).

The 2009 gas crisis provided a practical demonstration of the European dimension of current gas supply disruptions, underlining that the security of gas supply is increasingly a matter of EU concern. The crisis demonstrated that gas supply crises are felt more quickly across large parts of the Union due to the growing importance of long-distance network flows of gas and the development of the internal gas market. Although the internal market responded to the disruption, with flows changing direction on several interconnectors, the incompleteness of the gas market was exposed in terms of inadequacies in transport, reverse flow capabilities and insufficient integration of gas networks in Central and South Eastern Europe. There were no solidarity actions between Member State governments and several emergency arrangements in Member States (e.g. Slovakia) prevented gas flows to the crisis area.

The [January 2009] crisis demonstrated that investments in infrastructures across Europe to prevent disruptions becoming crises are still needed (e.g. storage, reverse flows, some new interconnectors) and that further market integration would improve security of supply (Commission SEC 2009/979: 12).

The Russian-Ukrainian gas crisis underlined that security of gas supply was a concern whose Community-dimension was becoming more and more important. It proved to be the immediate cause for the March European Council meeting and for the Council to invite the Commission to speed up the revision of the 2004 Gas Directive, notably with respect to the definition of the major supply disruption indicator and the related Community and national mitigating measures in crisis situations (Council 5215/2009). On the basis of Art. 95 TEC (now Art. 194 (2) TFEU), the Commission submitted the legislative proposal for the SoS Regulation in July 2009 (see Chapter 7). The modest amount of literature available on the Regulation focuses on the outcome in terms of establishing a stronger role for the EU in coordinating Member States' responses to supply disruptions and declaring emergencies as well as to what extent the solidarity principle is reflected in the final text of the Regulation (e.g. Beyer 2012; Glachant & Ahner 2012; Vinois 2012; Behrens & Egenhofer 2011). This thesis contributes to a better understanding of the decision-making process on the Regulation.

Next to the high political significance of security of supply from 2005/06 onwards, the Council and the European Council increasingly realised that climate policy has the potential to enhance their legitimacy and reinvigorate European integration in general.

It is only in the political crisis following the rejection of the Constitutional Treaty in the referenda in France and the Netherlands in 2005 that energy policy again became an issue for high-level political debate, together with climate change as the EU prepared for the first UNFCCC Conference of the Parties following the entry into force of the Kyoto Protocol (Adelle et al. 2009: 57)³¹.

Public opinion polls showed strong support for European-level action regarding climate change. In combination with the overarching goal to enhance the EU's role as a global actor and to support multilateralism, the Council, with the Commission and the Parliament, grasped this window of opportunity by moving climate change into the centre of their agendas (Oberthuer & Roche Kelly 2008).

Figure 2.3 below provides an overview of the pressures caused by international regimes and events that led the to the skyrocketing of climate and energy issues on the

³¹ UNFCCC is an acronym for 'United Nations Framework Convention on Climate Change'.

European Council agenda which in turn led the way to policy initiation by the Commission.

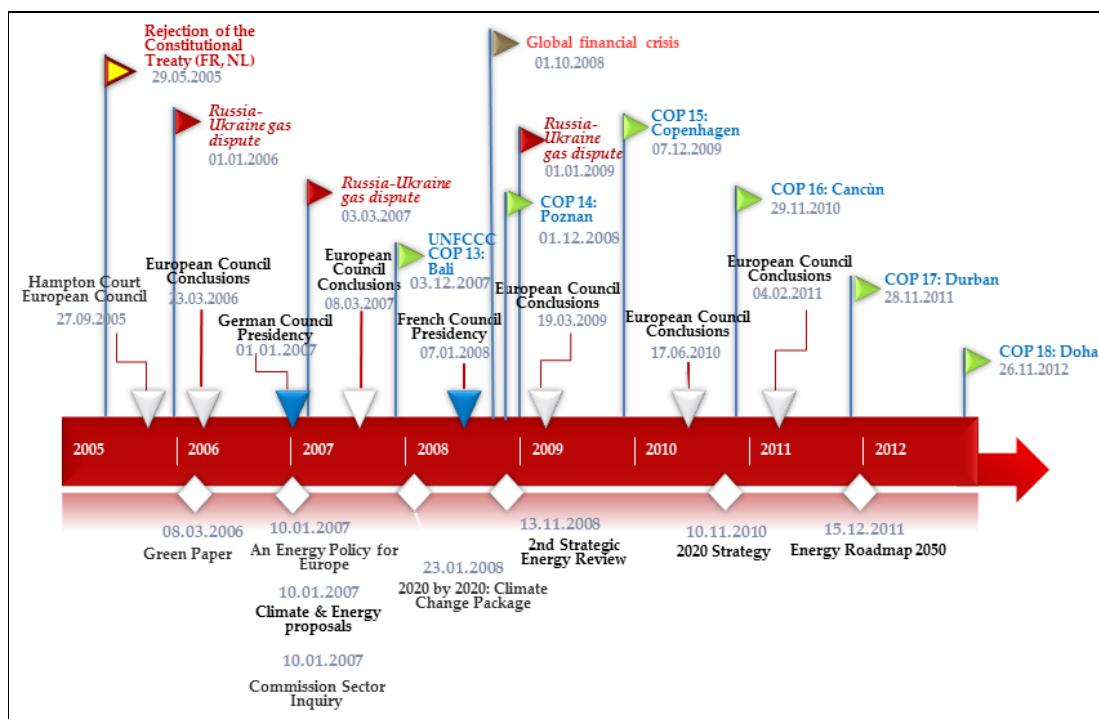


Figure 2.3: International pressures, political impetus and policy initiation in EU climate and energy policy (2005-onwards). (Source: Author).

Regarding policy initiation, and following the 2005 informal European Council at Hampton Court, the Commission's March 2006 Green Paper (2006/105) constituted a landmark in opening a wide-ranging debate on a future European climate and energy policy. As a follow-up to this Green Paper, the Commission tabled a voluminous energy package in January 2007 under the banner of *An Energy Policy for Europe* (EPE), including a *First Strategic Energy Review*. The EPE package outlines an action plan to advance energy policy in the EU between 2007 and 2009 as well as formulating the goals of mitigating climate change, security of supply and provision of competitive energy. Concerning the EPE action plan, this includes a binding target to raise the EU's share of renewables to 20 per cent by 2020; an obligation for each Member State to have 10 per cent biofuels in their transport and fuel mix by 2020, and a reaffirmation of the energy efficiency target to save 20 per cent of the EU's total primary energy consumption by 2020.

Furthermore, the package includes a climate change policy vision entitled “*Limiting Global Climate Change to 2 Degrees Celsius: The way ahead for 2020 and beyond*”. The proposal called for a range of actions to strengthen climate policy, headed by the proposal that the EU commit to an independent commitment of 20 per cent reduction in emissions by 2020. The 20 per cent reduction target would rise to 30 per cent if an international agreement under which third countries took comparable action was reached at the Copenhagen climate conference in December 2009.

As a point of departure, the EPE package argued for the need to establishing a comprehensive EU energy policy that consists of three, interdependent pillars:

- *Increasing security of supply;*
- *Ensuring the competitiveness of European economies and the availability of energy at affordable prices;*
- *Promoting environmental sustainability and combating climate change (Commission 2007/1: 3-4).*

For the first time in the EU’s history, the EPE package formally underlined the link between the internal energy market and climate change fields (Commission 2007/1). Building on important preparatory work of both the Environment Council and the Commission, the March 2007 European Council (under the German EU Presidency) endorsed what has subsequently been called the ‘20-20-20 by 2020’ Package. In particular, EU heads of state and government:

- *Made a firm commitment to achieve at least a 20 per cent reduction of GHG emissions in the EU from 1990 level by 2020;*
- *Agreed to increase the share of renewable energy sources in the EU energy supply to 20 per cent in 2020, including a binding minimum target of 10 per cent for the share of biofuels in transport by 2020; and*
- *Approved the objective of saving 20 per cent on the EU’s projected energy consumption for 2020. (Council 7224/1/2007).*

In order to implement the European Council’s decisions, through the Climate & Energy Package, the Council and Parliament agreed upon establishing a ‘new’, internal climate policy framework for the period 2013-2020.

Constituting a radical break from the period before 2007, the European Council and, to a lesser extent, the Council have become major driving forces in EU internal climate policy. This has helped to reduce further the aforementioned credibility gap in support of international EU leadership on climate change, especially through the Climate & Energy Package of 2008/2009 (Oberthuer & Dupont 2011: 82). The Commission published the Climate & Energy Package in January 2008. According to Howes (2010), the package:

Acknowledged the integrated nature of, and interrelationships between energy policy (energy efficiency, security of supply, renewable energy policy) and climate policy (revised ETS, GHG emission reduction targets for the sectors of the economy not included in the ETS, and a legal framework for carbon and capture storage) (Howes 2010: 125).

Henceforth, as displayed in Figure 2.4 below, the three dimensions of the EU's first-generation energy policy inextricably linked EU climate change and internal (energy) market measures.

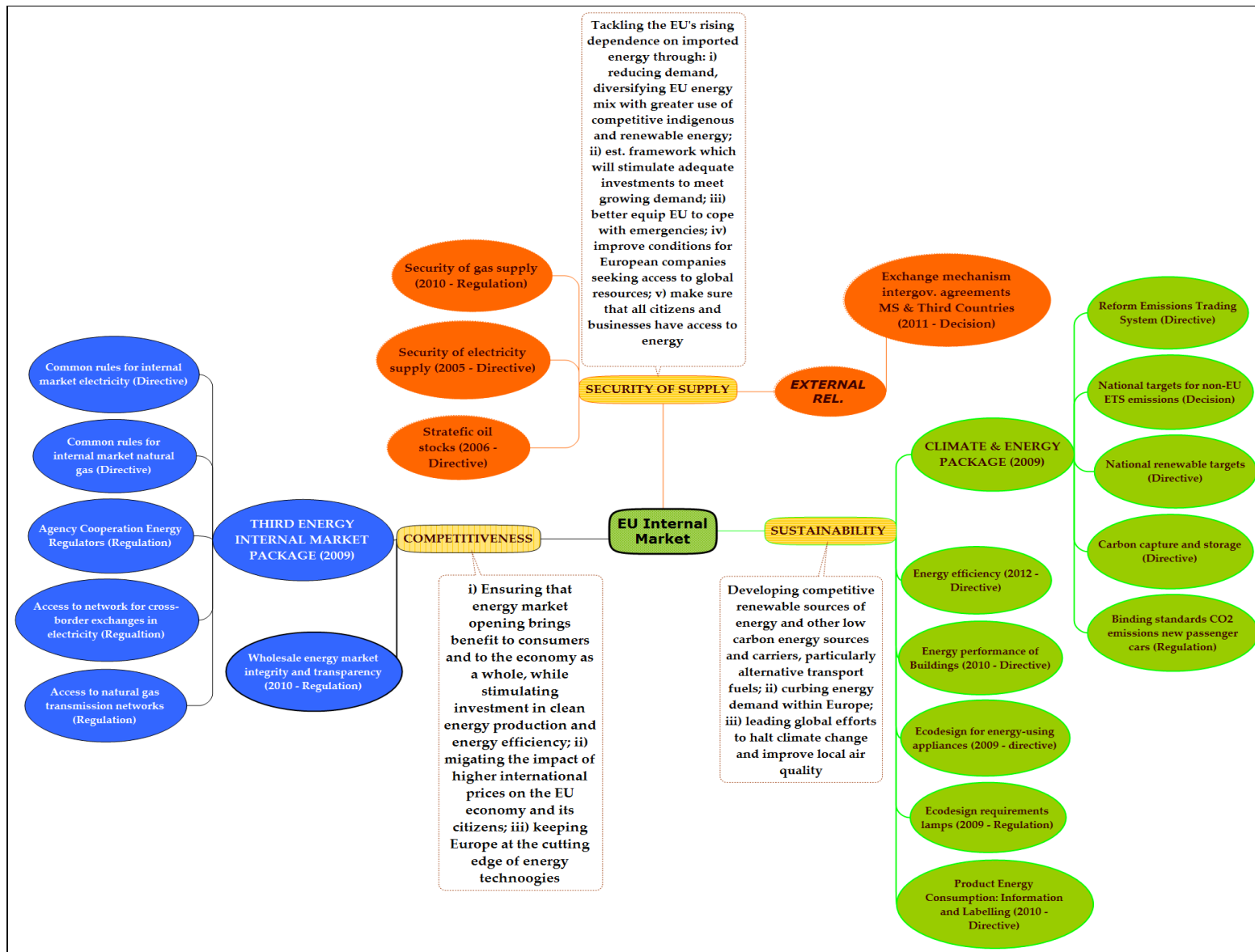


Figure 2.4: Key legislative output in the EU Energy policy.

(Source: Author)

2.5. Chapter conclusions

Before 2007, the energy and environmental policy areas developed in relative isolation from one another and energy policy was merely seen as a by-product of the single market. In both areas, the Commission and the Parliament acted as the primary policy drivers. With restricted formal powers and the sometimes outright opposition of the Council, progress in establishing the internal energy market was limited.

Between 2007 and 2010, a range of issues pushed energy to the top of the EU's political agenda. These issues include the increasing relevance of energy security, public worries about climate change and the EU's international leadership ambitions in this area. The formalization of energy policy in the Lisbon Treaty underlined the growing political importance attached to energy by the Member States. These issues led to strong support in the European Council which fuelled a more abrasive approach by the Commission in internal energy market policy. In combination, a window of opportunity was created in which the Three established a first-generation EU energy and climate policy.

In contrast to the period prior to 2007, the European Council and, to a lesser extent, the Council became the major driving forces in EU climate policy. Also different from the period prior to 2007, both policy areas came to be considered together and closely related to enhancing the legitimacy of the EU and the integration project in general.

Yet the Council remained divided on the issue of completing the internal energy market. Regarding the Third Package, and in relation to OU, countries such as Germany and France raised serious doubts as to whether integrated energy companies are not better equipped than 'unbundled companies to provide energy security via long term contracts and investments.

This specific example in the Third Package points to a larger problem, i.e. that regarding the three policy objectives of the EU's EPE (i.e. competitiveness, security of supply and sustainability), the situation differs widely across Member States. Such heterogeneity of policy choices is indicative of national trade-offs, which are attributable to different exogenous factors. These factors include geographical location (e.g. CEEC countries are better interconnected with other countries), availability of domestic energy sources, as well

as preferences and public opinion (e.g. preferences for renewables or attitudes to nuclear energy). To underline this issue, Roeller *et al.* (2007) composed an Energy Policy Index (Table 2.3 below), which shows that the positions of the Member States in relation to each of the objectives vary considerably³². The bargaining positions of the Member States in the Council correlate directly to the level of dependence or relative independence of one or more supplying countries as well as the problem of market power (Faber van der Meulen 2008)³³.

<i>Country</i>	<i>Competitiveness</i>	<i>Security of supply</i>	<i>Environmental sustainability</i>
Austria	2.7	3.0	3.7
Belgium	2.0	1.2	1.8
Cyprus	0.5	0.0	2.0
Czech Rep.	2.8	3.1	2.8
Germany	1.9	2.5	3.0
Denmark	3.6	4.0	3.4
Estonia	1.2	3.2	3.3
Spain	1.9	1.9	2.4
Finland	1.5	2.0	4.8
France	0.8	2.6	3.8
Greece	0.8	2.5	2.8
Hungary	2.9	2.1	3.2
Ireland	1.1	0.8	2.4
Italy	2.4	1.9	2.7
Lithuania	3.5	2.4	4.1
Luxembourg	3.9	3.0	2.5
Latvia	2.6	1.5	5.3
Malta	0.0	0.0	1.3
Netherlands	2.6	2.7	3.2
Poland	1.8	4.6	2.6
Portugal	2.3	1.5	3.3
Sweden	2.3	2.7	5.0
Slovenia	4.1	1.9	3.9
Slovakia	2.5	1.7	3.0
UK	2.9	3.5	3.1

Table 2.2: Energy Policy Index (EU-25). Source: Röller et al. (2006).

³² Based on several sources and criteria (Annex I in Röller *et. al* (2006: 55-56). The higher the value of a specific indicator (0 ('bad') to 6 ('good')), the better the performance in terms of the criteria defined in the Energy Policy Index.

³³ The problem of market power refers to the fact that policy responses to import dependency can differ greatly between larger and smaller Member States. In combination with the fact that, under EU law, every Member State can determine its own energy mix, the result is a situation where individual countries will have very diverse policies towards the major exporting countries.

The situation in the Council illustrates that there are important collective action problems in the EU energy policy that require trade-offs (e.g. Van der Linde 2008; Röller *et al.* 2007). Trade-offs between the tripartite policy goals are found between competitiveness and security of supply, security of supply and sustainability and competitiveness and sustainability. In relation to the ETS Directive in the Climate & Energy Package, for example, the main trade-off between this amended Directive and other EU energy objectives is with the competitiveness of energy intensive industries in the EU. Also, part of the Climate & Energy Package, the Carbon Capture and Storage (CCS) Directive implies a main trade-off between sustainability and energy security³⁴. Indeed, the possibility of capturing and storing CO₂ emissions produced by traditional fossil fuels may not provide an incentive to stop using these fuels, which in turn may perpetuate, rather than solve, Europe's present security of supply issues (Adelle *et al.* 2009; 47). Furthermore, the goal of increasing and diversifying the imports of renewables, complementing traditional energy sources, raises new dependency issues and undermines security of supply.

Based on the numbers in Table 2.2 one can understand major dividing lines in the Council on energy and climate matters. And while the Parliament is considered as 'environmental' in its overall orientation, this does not apply across the board and is issue-dependent (Lenschow 2010: 316). Furthermore, whereas the Council puts special emphasis on national energy systems hence its own competences and responsibilities, the Parliament (with the Commission) focuses on protecting the European economy and European integration for both consumers and citizens (Natorski & Herranz-Surrallés 2008: 84).

In this context, the essential puzzle is how the Three managed to overcome substantial differences in a very short period of time and adopt three major pieces of legislation that are the central focus in this thesis; all via an informal compromise established during a range of trilogue meetings. How did the Three manage to establish an informal compromise on these controversial and unresolved issues? These questions are going to be answered in the remainder of this thesis. Here this thesis will delve deeper into the 'informal politics' of EU energy for the sake of explaining outcomes in the three legislative files.

³⁴ In the CCS proposal, the Commission argues that deployment of this technology reconciles security of supply with climate change objectives. However, this reconciliation is not further elaborated upon in the proposal.

Chapter 3: The Informal Politics of the EU Climate and Energy Policy - Tools and Theoretical Model

3.1. Introduction

This chapter provides the theoretical ‘tools’ relevant in explaining informal processes of EU decision-making under co-decision rules. With these tools, the chapter seeks to explain the decision-making processes on the three Climate & Energy cases that are central to this thesis. Section 3.2 demonstrates that current theoretical approaches towards explaining EU climate and energy policy underestimate the relevance of, and lack a focus on, ‘informal politics’. Section 3.3 explicates the tools of informal politics as well as distinguishes between the formal and informal arenas of EU policy-making and how these relate to one another. Section 3.4 introduces the three branches of New Institutionalism (i.e. rational choice, historical and sociological institutionalism). Second, this section recognises the explanatory value of rational-choice institutionalism (RCI) yet argues that a ‘thin’ version of RCI has difficulty in explaining the informal politics of EU legislative decision-making. ‘Thin’ RCI contains certain weaknesses such as a focus on formal institutions and fixed preferences. In response to the imperfections of ‘thin’ RCI, this section argues that it is necessary to adjust the RCI-model by emphasizing a wider definition of institutions. This ‘thick’ version of RCI incorporates ideas which embody, select and publicise particular paths on which actors are able to coordinate their bargaining. Section 3.5 proposes a thick RCI, bargaining model of EU informal politics. The bargaining model incorporates ‘ideas’, i.e. focal points and norms, as a key variable in order to explain the informal bargaining process on the three climate & energy files that are central to this thesis. Essential in maintaining cooperation and keeping the negotiating process going in EAs, focal points are ideas that alleviate coordination problems and offer solutions to collective action problems (Goldstein & Keohane 1993: 18-19). Norms are defined here as procedural rules encompassing standards of appropriate behaviour (Stacey 2010: 20). This thesis argues that focal points and norms were instrumental in facilitating a cooperative agreement in early reading and constituted an essential mechanism in smoothing out inter-institutional difficulties between the Three. An agreement in all three cases would not have been reached so quickly without ideas having paved the

way for establishing cooperative solutions. Section 3.6 discusses the limits of this theoretical approach while section 3.7 offers some concluding remarks.

3.2. Explaining EU climate and energy policy-making

The current literature on explaining policy-making in the area of EU climate & energy is dominated by three main explanatory approaches:

- *Intergovernmentalism;*
- *Multi-level governance (MLG);*
- *International institutions/regimes.*

Intergovernmentalism argues that EU policy-making is determined primarily by national governments constrained by political interests nested within autonomous national arenas. Leaving scant room for the supranational actors to influence policy-making, the approach suggests the Commission, Parliament and the ECJ mainly serve the goals of national governments. Hence national sovereignty is not transferred but delegated to the EU institutional actors (Moravcsik 1998: 67).

Early contributions to the literature describe the EU energy sector as one where Member States remain very much in control (e.g. Egenhofer 1997; Padgett 1992). More recent contributions under this banner focus on aspects of the EU climate and energy policy and to what extent the changes in this policy area are the result of inter-state bargaining. Skjaereth & Wettestad (2010) argue that the revision of the ETS in the Climate & Energy Package reflected the interests and positions of the Member States and that the Commission acted on their request. The watering down of the final outcome of the package is explained through the fact that this was referred to the European Council for final decision-making under unanimity. This meant that Member States had more leeway in integrating their specific preferences in one or more of the policy proposals (Kerebel 2009a).

The multi-level governance (MLG) approach departs from two key assumptions: First, institutional actors (such as the Commission and the Parliament) have acquired an independent influence on policy-making that exceeds their role as agents for national governments (e.g. Bocquillon 2013; Burns 2013; Mayer 2008; Eberlein 2004; Matlary 1997).

Second, non-state actors such as lobbyists and civil society organisations influence policy-making directly at the EU-level (Andersen & Eliassen 2001). Concerning the Third Package, Eikeland (2011; 2008) notes a greater independent will of the (Barroso I) Commission in suggesting OU despite great resistance from the Member States. The Commission's more abrasive approach towards the Member States in proposing this far-reaching package is explained by Eikeland in terms of the Commission enjoying the support of a large pro-OU policy network of industrial energy consumers.

With regard to the ETS Directive in the Climate & Energy Package, Skjaereth & Wettstad (2008: 24) argue that the Commission, with support from parts of the industry and environmental organisations (ENGOs), initiated the scheme independently of the Member States. More specifically:

- 1) *The Commission actually changed its position and announced the plans for an ETS to the Member States;*
- 2) *The Commission built independent internal knowledge on emissions trading design;*
- 3) *The Commission actively promoted the idea of emissions trading to stakeholders.*

Whereas intergovernmentalist and MLG approaches emphasise EU internal actors and institutions as key determinants of policy-making, the international institutions/regimes perspective look at factors beyond the EU. A classic definition of international regimes describes these as sets of implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations (Krasner 1983: 2). The most relevant regime in the EU energy context is the climate regime, including the 1992 UN Framework Convention on Climate Change (UNFCCC), its 1997 Kyoto Protocol and the negotiation on a possible new UN-based climate treaty during the Copenhagen Conference in 2009. The international regime on global climate change, and more specifically the Kyoto Protocol of 1997, has been an important force driving the diffusion of EU climate change policy instruments.

International institutions can provide special incentives to implement particular innovative policy instruments and/or put diffuse pressure on state governments to take action in order to be able to comply with their international commitments (Oberthür & Tänzler 2007: 256).

Kulovesi *et al.* (2010) assess the influence of international law on EU law and vice versa, i.e. attempts by the EU to use its internal legislation to influence international processes. In this explanatory approach, the ambitious numbers proposed in the Climate & Energy Package are inextricably linked to the EU's ambitions in the negotiations on a future climate change regime under the aforementioned, UN-regime³⁵.

The three approaches in explaining the development of EU climate and energy policy-making should be seen as complementary (Skjaereth & Wettestad 2008)³⁶. They allow us to get a general sense of the complex range of actors and formal and informal institutions involved in the shaping of EU climate and energy policy. The approaches explain climate and energy policy as shaped and decided upon in national and international arenas by Member States, the EU institutional actors and a host of non-state actors, which all exercise (varying) influence during the three stages of the policy-making process (i.e. initiation, decision-making and implementation).

On one hand, the majority of the studies that apply these approaches focus on the policy outcomes which are usually commented upon as insufficient and/or disappointing. More importantly, concerning decision-making in climate & energy legislation, the central role played by informal decision-making - or 'politics' - is effectively ignored.

On the other hand, an increasing number of general contributions to the EU-literature recognise the fact that informal dynamics in the Union's political system are wide-ranging and influential. Regarding informal rules, processes and outcomes, other authors recognise that informal politics seems to be prevalent within the EU's policy-making process hence making this a particularly vibrant area of research within and between the Three (e.g. Gammelmin & Loew 2014; Kleine 2013; Van Middelaar 2013; Holman 2011; Eppink 2007; Christiansen *et al.* 2003; Ross 1995). Lacking a constitutional settlement itself, despite longstanding constitutional settlements in virtually all of its Member States, Stacey (2010)

³⁵ At the same time, the Package also features other intertwined international dimensions. These range from its relationship to World Trade Organization (WTO) Law to the EU's negotiating position in other multilateral fora, such as under the Convention on Biological Diversity (CBD) and discussions on 'green growth' in the lead up to the 2012 UN Conference on Sustainable Development (known as "Rio+20).

³⁶ Regarding varying explanatory power, Skjaereth & Wettestad (2010: 86) state in their study on the reform of the EU ETS that the international regime approach gained the least support. They argue that the reform of the EU ETS was not a response to changes in the international climate regime, but partly an effort to affect the international climate negotiations. More general on international regimes, Boasson & Wettestad (2013: 26) state that while there is a linkage between international developments and EU internal processes, little is known about the specific mechanisms at work.

speaks of a considerable array of formal and informal rules in the EU under which actors are motivated to press for advantage. This is not only to achieve their political aims but also to reallocate political power.

A niche in the EU climate and energy policy literature is the central role played by informal politics in the decision-making process. The central argument of this thesis is that informal decision-making in EU energy policy plays a key part in securing the interests of the Three and in smoothing out inter-institutional difficulties between these actors under co-decision rules. As further elaborated upon in section 3.4, legislative decision-making under co-decision rules cannot solely be assessed by analysing formal components (like, for instance, by using game-theoretical models). Explanations of the decision-making process and policy outcomes in climate and energy policy should consider, and integrate, both formal and informal processes of decision-making. Responding to this niche, sections 3.3 and 3.4 below propose an analytical framework through which this thesis analyses and explains the legislative decision-making process in EU climate and energy policy.

3.3. What is informal politics?

This section clarifies the concepts ‘informal politics’ and ‘informal institutions’. This section also underlines the relevance of informal politics in EU policy-making, makes a distinction between the formal and informal areas of the co-decision procedure and describes how these relate to one another. While the main focus of this thesis is on informal politics, the latter is squarely placed within the constraints of formal politics, i.e. the government and the process of governing narrowly defined. The conceptual clarifications and tools explained here are applied in Chapter 5 to Chapter 7.

3.3.1. Tools in explaining informal politics

Not exclusively related to EU politics, the adjective ‘informal’ is studied in a number of disciplines, across varying levels of analysis and is attached to a large number of terms. Disciplines include political science and law while levels of analysis range from global governance arenas (e.g. G8, United Nations) to supranational regimes (e.g. EU) to the

national and sub-national levels. As an adjective, the term 'informal' has been attached to a large number of terms, including references to 'politics', 'arrangements', 'networks', 'institutions', 'organizations', 'norms', 'rules', 'activity' and 'influence'. Studies in this area (and in different contexts) are vast. These range from explaining the relevance of inter-personal relations and trust in government-business relations in Japan (Fukuyama 1995); consociationalism in the political system of the Netherlands (Lijphart 1975) and the influence of informal governance on policy change in US Congress (Haar 2011).

More systematically, however, one can distinguish between three separate usages:

First, the designation of the framework within which decisions are taken as being informal (institutions, organisations, networks); Second, the identification of the process or procedure through which policies are made as being informal (politics, arrangements, activity); and third, the classification of the outcome of any such process as being informal (rules, norms, influence) (Christiansen & Neuhold 2011: 4)³⁷.

Let me clarify these different usages with a few examples.

Regarding the framework, in the international relations literature, Daase (2009) notes a move from decision-taking within formal institutions towards more informal modes of cooperation in bi-lateral as well as multilateral settings. Informalization of cooperation between states through informal country coalitions in the United Nations framework or in such forums as the G8 is utilised as a rational means to effective cooperation; this in times of urgency and in the face of reform-averse formal institutions.

Studies such as the one by Kardasheva (2009) focus on explaining the 'processes of politics' such as logrolling in the EU. Overall, logrolling is understood here as the exchange of loss in some issues for benefits in others, which results in a mutual overall gain between actors with different interests (Kardasheva 2009: 47). Logrolling in EU decision-making is defined here as the exchange of support between Member States in the Council and MEP's of the Parliament for the sake of negotiating legislative deals acceptable to both sides thus avoiding gridlock.

Regarding the informality of the outcome, the EU literature contains examples of regulation by information (Eberlein 2004). In other words, regulators exchange ideas,

³⁷ Underlined by author.

techniques, experiences and problems while developing behavioural standards and working practices as well as exercising influence through knowledge and persuasion.

What goes for informality also applies to the concept of informal governance. This also has been applied to a dizzying array of phenomena including corruption and civil society. Helmke & Levitsky (2011: 88-9) define informal institutions as socially shared rules usually unwritten and created, communicated and enforced outside of officially sanctioned channels by the actors themselves.

In a study on informal governance in the EU, Christiansen *et al.* (2003: 6) describe governance as informal when participation in the decision-making process is not yet, or cannot be, codified and publicly enforced. A common denominator found in these and other contributions discussing and analysing instances of informal governance is that it tends to designate it in terms of key indicators, such as the use of rules that are un-codified and unenforceable. On the other hand, these authors demonstrate a degree of variation with regard to the relationship that informal arrangements have *vis-à-vis* state institutions.

While some authors operate here with a binary approach to the subject, assuming that formal or informal arrangements are standing in opposition to one another, most actually accept that the two often coexist and indeed interact with one another. Some authors go further and even argue that there is a degree of dependency between formal and informal arrangements (Christiansen & Neuhold 2013: 2).

The focus in this thesis is on the process of EU informal decision-making in terms of explaining 'what goes on' in the informal arena of decision-making (i.e. in the so-called trilogue meetings). Trilogues are informal meetings that consist of a number of participants from the Three. The participants may include Parliament rapporteurs, shadow-rapporteurs, and political party leaders as well as Council Ministers, Council Presidency representatives, Coreper and working group officials.

In arguing for the dependency or interplay between formal and informal institutions in the EU's co-decision procedure, this thesis borrows from the typology offered by Helmke & Levitsky (2011: 91). Let's elaborate briefly on the typologies shown in Table 3.1 and where this thesis situates the 'informal politics of the EU climate and energy policy'.

<i>Performance of formal institutions</i>		<i>Effective</i>	<i>Ineffective</i>
Outcomes of informal governance	Convergent	Result: Complementary informal institutions	Result: Substitutive informal institutions
	Divergent	Result: Accommodating informal institutions	Result: Competing informal institutions

Table 3.1: *A typology of Informal Institutions.*

(Source: Helmke & Levitsky 2011).

As shown in the table, a distinction is made along two dimensions. The first is the degree to which formal and informal institutional outcomes converge, i.e. whether informal rules produce similar or different outcomes from those that would result from the adherence to formal rules. The second dimension concerns whether formal institutions are in fact effective and complied with in the practical political process (Helmke & Levitsky 2011: 91).

As further elaborated upon below, the ‘fast-tracking’ of the co-decision procedure (i.e. reaching an EA) via trilogue meetings falls into the category of accommodating informal institutions (AII)³⁸. By resorting to EAs for a majority of the adoption of legislative acts, AII create incentives to behave in ways that alter the effect of formal rules but without actually violating them (Christiansen & Neuhold 2013: 5). In the event that trilogues were set-up outside the EU formal treaty structure, then these would fall into the category of complementary informal institutions. This category covers informal institutions that stand alongside rather than replace the formal arrangements, and address deficiencies not tackled by formal rules. In case trilogues were employed by actors who seek outcomes compatible with formal rules and procedures and these would achieve what formal rules and procedures were originally designed to achieve but failed to do, then trilogues would constitute an example of substitutive informal institutions. Finally, where trilogues would compete (or coexist) with ineffective formal rules, then we would speak of competing informal institutions.

³⁸ ‘Fast-tracking’ refers to concluding a legislative file agreed upon in either first or early-second reading.

3.3.2. The formal and informal framework of EU co-decision

Based on what has been argued above, and focusing on informal institutions that are endogenous to the EU's formal institutional structure, Reh *et al.* (2011: 5) delimit the informal arena from its formal variant along four dimensions (see Table 3.2 below):

- a) Nature and status of rules;
- b) Boundaries of participation;
- c) Scope and outcomes and;
- d) Access to the decision-making process.

<i>Decision Making</i> (choice of binding outcomes or selection of preferred options)	
<i>Formal Arena</i>	<i>Informal Arena</i>
<ul style="list-style-type: none"> • Formal rules (codified and enforced through official channels) • Inclusive participation or formally restricted boundaries • Outcome: Binding decisions • Public access or justified seclusion 	<ul style="list-style-type: none"> • Informal rules (non-codified and enforced outside official channels) • Restricted participation and unofficially drawn boundaries • Outcome: Requires formalization • Seclusion

Table 3.2: The formal and informal arenas of EU co-decision.

(Source: Reh *et al.* 2011; Daase 2009).

Next to the differences between the formal and informal rules, the formal and informal differ with regard to their boundaries of participation. Membership in the formal arena is either inclusive or formally restricted. In other words, the formal political process includes all legitimate decision-makers, or it involves a formally restricted subset of actors. No matter whether membership is inclusive or restricted, it is publicly known who participates. In contrast, participation in the trilogues (i.e. the informal arena) is both restricted and non-codified and the process involves a limited group of actors. The boundaries of membership are neither formally drawn nor publicly known (Reh *et al.* 2011: 5-6).

Second, with regard to the scope of action, informal and formal arenas differ in terms of effecting differing sets of outcomes. In a political system with effective institutions such as the EU, actors in the informal arena produce intermediate rather than final (binding) outcomes as the latter can emanate from the formal process only. Any agreement reached informally must be legitimised through formalization. Yet even under such conditions, the informal arena can significantly constrain how much is left to be decided and justified in the formal arena (Reh *et al.* 2011: 6). As mentioned above, the formal arena of co-decision such as

the Parliament plenary has the function of effectively rubber-stamping political deals that are agreed upon in the trilogues.

Third, informal and formal arenas differ with regard to public access. Such differences pertain to the physical or virtual access to deliberation, negotiation, and documentation and to whether access restrictions must be publicly justified. In the formal process, decision makers will generally be sealed off. Yet even where the formal arena is secluded, documentation about the decision process will be available or the restricted access to negotiation or documentation will be justified. By contrast, the informal decision arena can be systematically secluded, and access can be denied without public justification (Reh *et al.* 2011: 6).

In sum, the informal politics of co-decision involves a restricted, non-codified set of decision makers that operates in a secluded setting. Within this setting, social interaction is structured by informal rather than codified and enforceable rules and informal compromise must be legitimised through the formal process (Reh *et al.* 2011: 8).

Regarding the formal arena, from Maastricht (1993), Amsterdam (1999) to the Lisbon Treaty (2009), the co-decision procedure has been steadily expanded to an increasing number of areas and has led to the establishment of a bicameral, legislative authority³⁹. This authority consists of the Parliament and the Council jointly adopting legislation for which both need to give their approval. As a result, co-decision was baptised the ‘ordinary legislative procedure’ in the Lisbon Treaty⁴⁰. In this sense (almost all) EU legislation now has to pass two tests to be enacted: acceptability to a qualified majority of national ministers meeting in the Council and acceptability to a majority of directly elected MEPs in the Parliament (Corbett *et al.* 2011: 232). The formal rules of co-decision are laid down in Art. 251 TEC (now Art. 294 TFEU) and are further stipulated in Arts. 16(3) (TEU) and 289 (TFEU). As stated above, the main characteristic of co-decision concerns the adoption of legislation jointly by the Parliament and the Council (with QMV in the latter) on a proposal from the Commission (based on its right of initiative). In specific cases, under Lisbon rules, legislative proposals can also be

³⁹ Under the Maastricht Treaty (1993), co-decision applied to 15 policy areas. The Amsterdam Treaty (1997) more than doubled the number of areas subject to co-decision, i.e. from 15 to 38. Under Lisbon (2009), co-decision extended its reach from 44 to 85 areas of EU activity (see Appendix 2).

⁴⁰ In this thesis, co-decision’ is used to describe the policy-making process pre- and post-Lisbon.

submitted on the initiative of a group of Member States, on a recommendation by the European Central Bank, or at the request of the Court of Justice.

Whereas Figure 3.1 shows the formal working of the procedure, Table 3.3 below shows the various stages of the co-decision procedure. It consists of up to three readings with the possibility for the two co-legislators to conclude at any reading if they reach an overall agreement in the form of a joint text (Parliament 2009: 6). These stages are well documented in the literature (Corbett *et al.* 2011; Nugent 2006; Hix 2005).

	First Reading	Second Reading	Third Reading/Conciliation Phase
<i>Text that is being negotiated on the basis of</i>	The Commission's legislative proposal	The Commission's law proposal + amendments proposed by the Council and the Parliament	Conciliation text between the Council and the Parliament
<i>The timeframe*</i>	No time limit	Max. 4 months	Max. 4 months and 8 weeks
<i>The voting rules of the Parliament</i>	Simply majority (Majority of the Members voting)	Simple majority** or Absolute majority (i.e. at least 378 votes in favour out of a possible total of 754)*** ⁴¹	Simple majority
<i>The voting rules of the Council</i>	Qualified majority	Qualified majority	Qualified majority
<i>Formal meetings between the institutions</i>	No	No	Yes

* *The timeframe in second and third reading is in some cases dependent on whether the Parliament and the Council extends it.*

** *In case of approving the common position.*

*** *In case of rejecting or amending the common position.*

Table 3.3: *The various stages of the co-decision procedure.* (Source: Own compilation based on Arts. 293 and 294 TFEU).

⁴¹ After the 2014 Parliament elections, an absolute majority consists of at least 376 votes in favour out of a possible total of 751.

On the subject of the formal co-decision framework, the literature is the subject of an extensive body of theoretical accounts. Relevant to this thesis, there is a large array of studies informed by rational choice, institutionalist approaches. This body of work is based upon spatial models drawing predominantly upon quantitative data and employing positivist research methods. Through spatial modelling these studies analyse how formal procedural rules and institutions shape legislative outcomes (e.g. Tsebelis & Garrett 2000; 1997). An important aspect of spatial modelling is that decision-making is viewed as a one-shot game; possible effects of cooperation on past or future legislation are not taken into account. These procedural models of EU legislative politics analyse situations where no trading of favours, support or votes is possible.

Formal modelling provides a valuable introduction to the basic levers of the formal co-decision procedure; i.e. the Treaty rules as basis as a starting point for understanding how actors behave. Also, formal theorists have contributed to establishing the understanding that co-decision has transformed EU law-making to closely resemble a two-chamber legislature (Hix 2005).

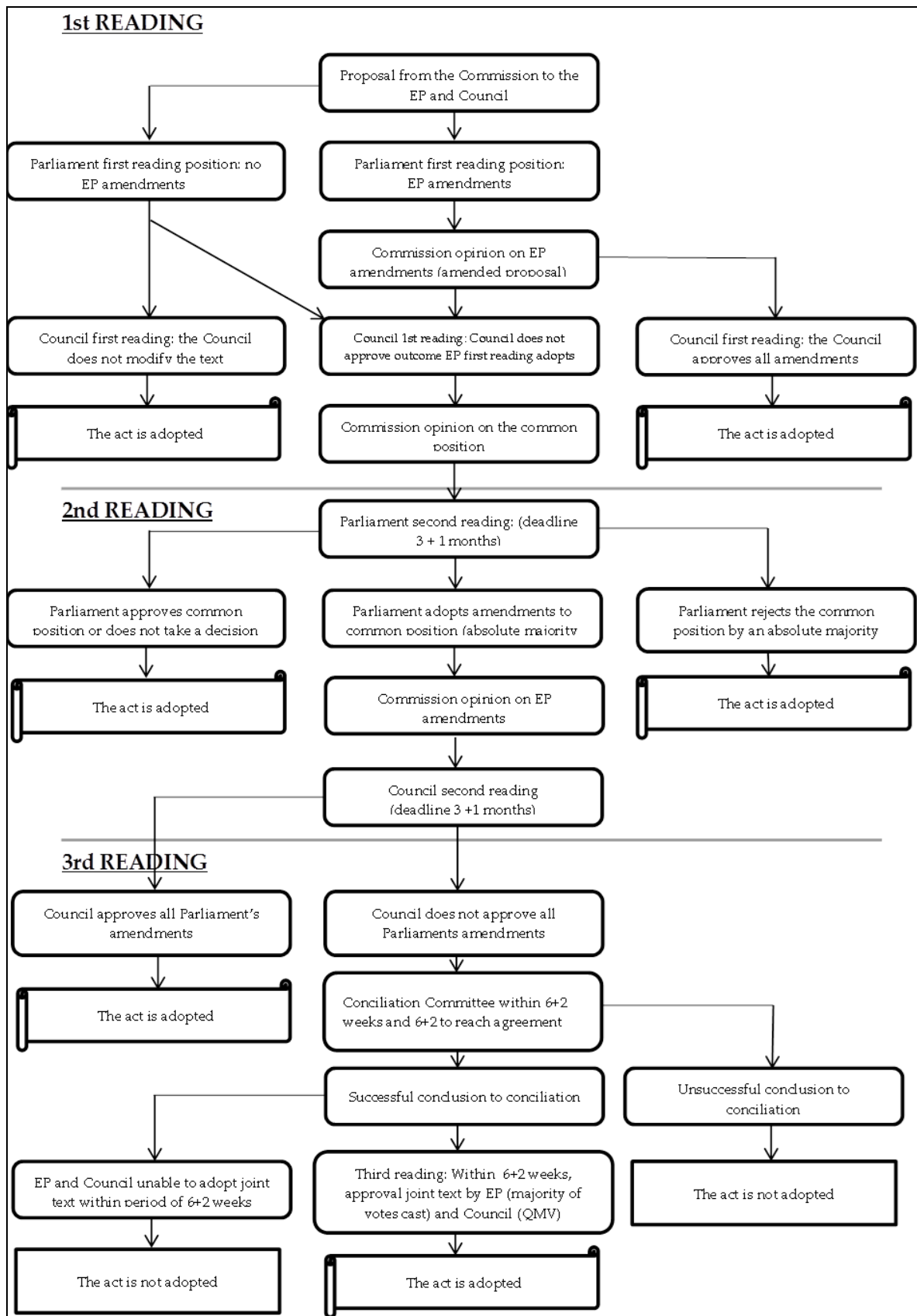


Figure 3.1: The formal structure of the co-decision procedure.

(Source: Parliament 2009).

At the same time, there is a burgeoning literature that concerns itself with the informal politics in EU policy-making under co-decision rules. The main reason for the increasing interest in this issue is the fact that the Council and the Parliament are increasingly adopting legislation early under co-decision (see Figure 3.2 below).

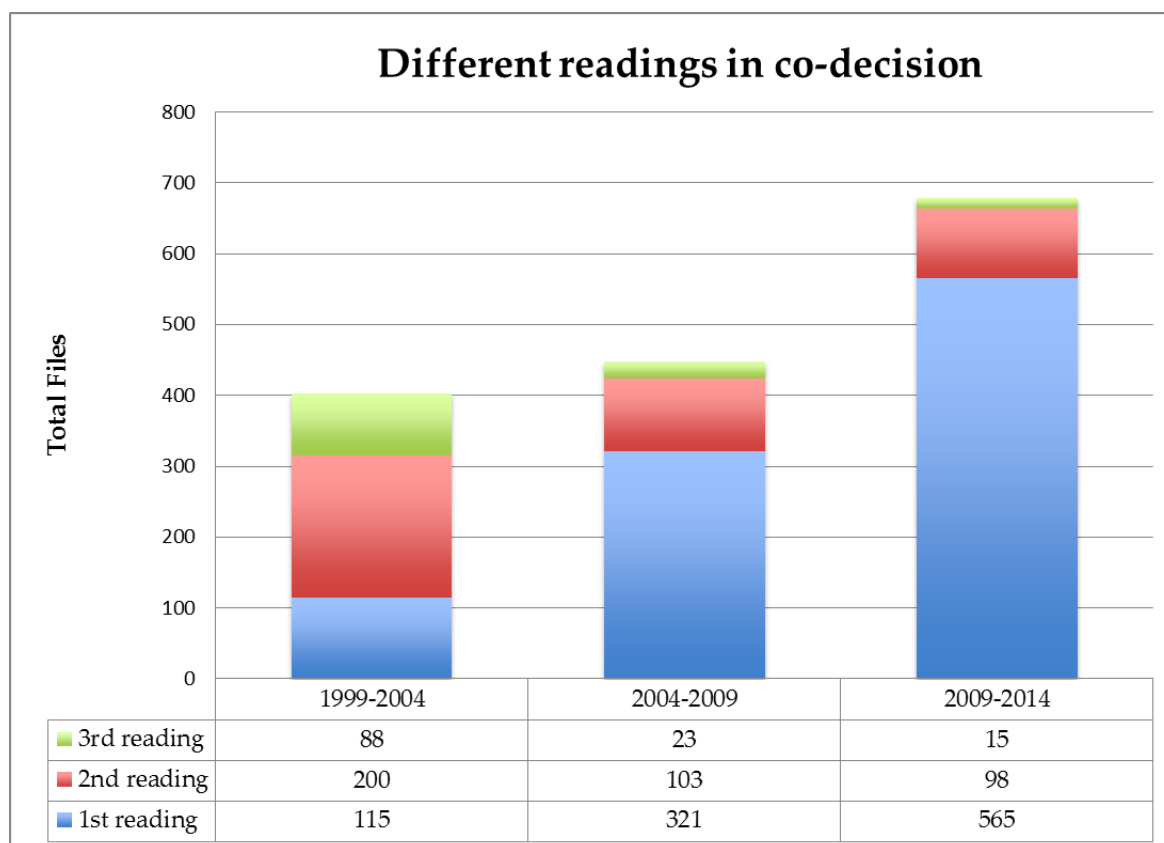


Figure 3.2: Number of co-decision files adopted between 1999-2014. (Source: Parliament Conciliation & Co-Decision site).

To qualify as an early agreement (EA), an act must meet two conditions:

- a) *It is fast-tracked, that is, concluded at either first or early second reading;*
- b) *It is based on an informal compromise established between the Council and the Parliament via one or more trilogue meetings.*

Typically, a trilogue meeting is held soon after the Council and Parliament have individually gone through a Commission proposal. This meeting may be followed by others, in which the two sides report back in broad terms about the progress of discussions within the Council and Parliament and seek both to reach agreement where possible and to identify possible areas of contention.

Initially, the literature explains that trilogue meetings served a gap left in the Treaty (Stacey 2010). Art. 251 (TEC) (now Art. 294 TFEU) does not say what, if anything, should happen after the Council has given its view on the second reading amendments of the Parliament and before delegations of the two institutional actors meet in the committee (Shackleton 2000: 334). Adopted from the EU's annual budgetary procedure, trilogues consisting of top-level figures of the Three were initially used after the second reading stage to prepare the conciliation committee meeting (Garman & Hilditch 1998)⁴². In fact, the success of these (informal) trilogues spurred Member States to formalise a procedure in the Amsterdam Treaty for fast-track legislation in which the Council and Parliament could agree on particular items of legislation during first reading. These particular items included technical and politically less controversial dossiers in which there was little chance of substantial disagreement between the two bodies (Farrell & Héritier 2004: 1197).

Nowadays, as in the three legislative files analysed in this thesis, highly politically controversial issues are decided upon as an early agreement. In other words, informal politics now takes place earlier in the decision-making process as these have moved from second and third reading to – most prominently – first-reading. EAs serve the efficiency of the decision-making process in terms of saving transaction costs of information-sharing and negotiation and have accelerated the informalization of relations between Council and Parliament. Policy-making that used to be dealt with through formal and sequential negotiations is now dealt with through informal discussions among these actors. In this last sense, an important contribution to the literature describes the growth of a new, legislative culture between the Council and the Parliament (Huber & Shackleton 2013: 1044). In contrast to viewing decision-making as a one-shot game, this culture is described as one in which the legislative actors are engaged in a permanent dialogue, i.e. permanent informal negotiations to deliver on EU legislation; with sometimes a dozen trilogues on different issues taking place every week (Shackleton & Raunio 2003). Huber & Shackleton (2013) summarise the main argument formulated above and underline the importance of a focus on 'the informal politics of EU legislative decision-making':

⁴² Trilogue meetings are not mentioned in the Treaty.

[EAs] are very different from procedures which go through two or three readings. 'The traditional method' of having two or three readings has a logic of reducing the number of contested issues successively, a process which can be followed relatively easily by those not directly involved. Documents outlining the evolution of the positions of the institutions are publicly available, Parliament meets in public during first and second reading, and hence the actors are easily identifiable. If the procedure goes as far as conciliation [third reading], it is on the basis of publicly known positions (Council and Parliament second reading positions). The actors in third reading are known (Parliament's delegation to the conciliation committee) and some basic procedural information is available (via the conciliation website). That they meet at the very end of the procedure in closed meetings to find a compromise is not seen as overly problematic. [EAs] have overturned this logic completely. (Huber & Shackleton 2013: 1047).

An essential part of the increasing use of EAs is the use of package deals. Package deals such as the Third Package and the Climate & Energy Package are informal bargains agreed between representatives of the Council and the Parliament that link decisions on multiple issues and proposals⁴³. Package deals allow the Council and Parliament to trade support for their preferred issues through logrolling. Given their interdependence, different preference intensities, repeated interactions in law-making and their ability to conclude and enforce informal commitments, both institutional actors find it profitable to cooperate through package deals. With regard to the Climate & Energy Package negotiations, and the reform of the ETS specifically, a package approach (i.e. linking this issue to other legislative proposals) allowed for more bargaining between rich and poor Member States compared to negotiating emissions trading in isolation from other policies (Skaereth & Wettestad 2010: 82).

In these and other cases, in this sense, package deals serve two purposes:

- 1) *Resolving conflict between the legislative chambers;*
- 2) *Reducing the costs associated with common action.*

Regarding the second issue, the sealing of package deals in the EU is related to collective action problems. In the context of, for example, enlargement, the larger the size of a group

⁴³ More specific, there are three types of package deals. First, package deals on single omnibus proposals that involve multiple issues. Second, package deals that contain several proposals decided upon simultaneously within the same legislative procedure. Third, package deals containing several proposals that are decided simultaneously across the co-decision and consultation procedures. This thesis focuses on package deals that contains several proposals and which is decided upon simultaneously within the same legislative procedure (i.e. co-decision).

needed to take collective action, the more difficult it is to organise individual legislators around a common position.

Taking into account the effects of informal negotiations between the Council and the Parliament as well as formal procedural rules, Kardasheva (2009) argues that package deals alter the traditional law-making process and effect legislative outcomes in the EU. Package deals in this sense can be categorised under the heading of accommodating informal institutions⁴⁴. Also, Kardasheva's (2009) quantitative study on all co-decision proposals completed between May 1999 and April 2007 applies a model that tests the effect of variables such as the presence of package deal negotiations, proposal salience, urgency and Council and/or Parliament impatience. These and other variables are also elaborated upon in the bargaining model below.

Concluding this section, figure 3.3 depicts the formal and informal arrangements between the legislative actors at the various stages of policy-making as co-existing dimensions of the co-decision procedure.

The specific role and influence in the decision-making process of the Commission, Council or Parliament is also key in explaining the decision-making process. In the informal decision-making process, and having a seat at the table in both the Council and Parliament, the designated Commission officials act as a strategic facilitator, deal-broker and instigator of ideas. Regarding its role and facilitator and deal-broker, the Commission is often able to steer the negotiations in the decision-making stage via a '*knowledge-based strategy*' based on elaborate expertise and knowledge of the proposals on the table and, of course, its exclusive right of initiative (Art. 17 TEU) (Rasmussen 2003)⁴⁵. Especially in highly technical dossiers (e.g. the Climate & Energy Package and the Third Package), the Commission's power is based on its knowledge of the topics under discussion hence can steer the negotiations in the Council. In trilogues, nevertheless, the Commission has a more moderate role as Council and Parliament are basically in charge⁴⁶.

⁴⁴ Despite their informal character, Kardasheva (2009) underlines that package deals have to be officially approved in the formal arena of EU decision-making.

⁴⁵ Telephone interview Commission official, 10 October 2012, Osnabrueck.

⁴⁶ Telephone interview Commission official, 10 October 2012, Osnabrueck.

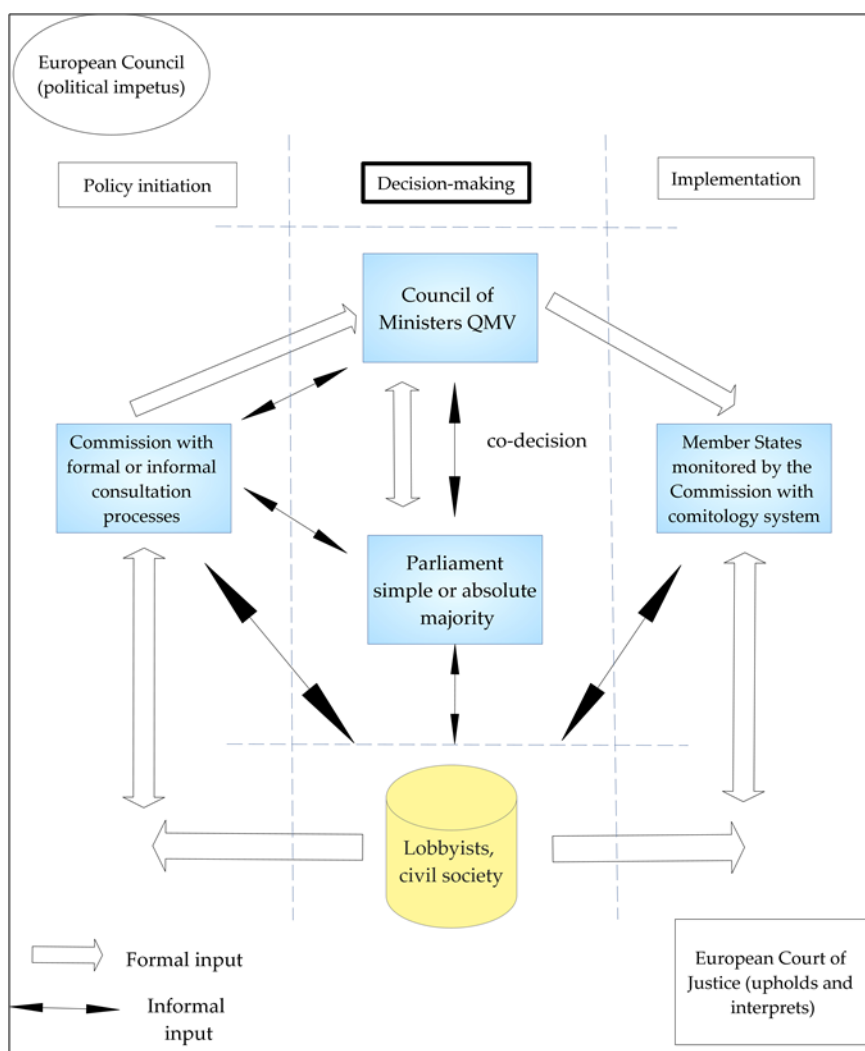


Figure 3.3: Formal and informal processes of policy-making under co-decision rules. (Source: Author).

Finally, the Commission has an important role as an instigator of ideas through its legislative proposals, impact assessments and communications in the policy initiation phase as depicted in Figure 3.3. As exemplified in the case studies in Chapter 5 to 7, and further elaborated upon in the section below, ideas (i.e. focal points and norms) formulated in these documents indicate the desired direction - from an EU perspective - of the informal legislative debates between the Council and the Parliament. This highlights that to a large extent, the linguistic tools provided by the Commission define and steer the negotiations. Inextricably linked to its role as legislative initiator, the Commission's role as instigator of ideas is paid too little attention in the literature.

Concerning the Parliament, the specific MEP acting as the rapporteur is usually in close, informal contact with the Commission and the Council Presidency and thus a vital cog in the informal decision-making process. The increasing informalization of the co-decision

procedure has dramatically increased the importance of the rapporteurs' work (Jordan & Schout 2006).

The Member State holding the six-month rotating EU (Council) Presidency possesses privileged informational and procedural resources that make it possible to steer negotiations towards the agreement it prefers most (Tallberg 2008: 187). A key task of the Presidency in reaching an EA is acting as a broker (e.g. package or honest-broker). Beyond the sources and tasks of the Council Presidency, the Council overall has a distinct, discreet and compromise-seeking diplomatic culture that it has managed to successfully establish as the standard format for informal negotiations with the Parliament (Huber & Shackleton 2013).

In sum, this section has separated and specified the formal and informal arenas of EU policy-making, the increasing relevance of understanding informal politics under co-decision rules as well the actors of the Three involved in legislative bargaining. Concerning relevance, the increasing use of EAs has turned the informal politics of co-decision into a key area for explaining legislative decision-making and subsequent policy outcomes. The three legislative files of the EU climate and energy policy that are central to this thesis are no exception to this rule. Therefore, in the next sections this thesis identifies a specific theoretical approach as well as proposes a bargaining model of EU informal politics.

3.4. Interests & Ideas in informal decision-making

With the aim of explaining the early agreements in the three EU energy policy files, this chapter proposes a rational choice institutionalism (RCI) bargaining model of informal decision-making. This model involves a specific theoretical blending of the concepts of interests and ideas. It is argued that the assumptions of the standard RCI mode are unable to explain complex forms of international policy-making such as the informal bargaining process in the trilogues central to this thesis. The bargaining model departs from a thick version of RCI by assigning a prominent role to 'ideas'. With actors engaged in interest-based bargaining within a formal framework of rules, ideas formulated as focal points and/or norms play a key role in coordinating the quick adoption of agreements in informal legislative decision-making. The sections below offer an extensive explanation of what is meant by this.

3.4.1. New institutionalism and the limits of ‘thin’ rational choice in EU informal decision-making

Whether related to energy and climate change (e.g. Sauter 2010; Zito 2000) or EU politics in general (e.g. Peterson & Shackleton 2006; Rosamond 2000; Peterson & Bomberg 1999), a large number of studies depart from one or more of the three branches of New Institutionalism (NI), which includes rational choice (RCI), sociological (SI) and historical institutionalism (HI)⁴⁷.

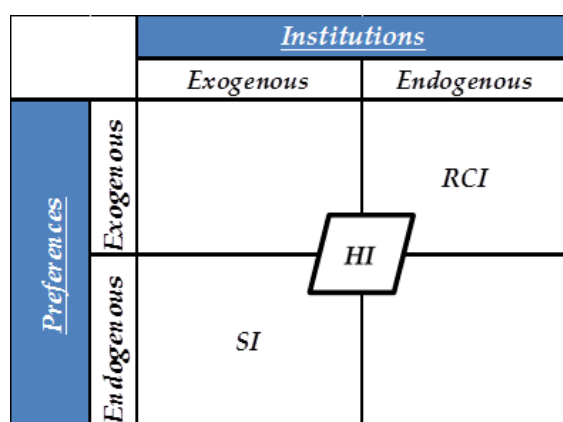


Figure 3.4: The two dimensions of NI analysis.
(Source: Jupille & Caporaso 1999).

Based on various contributions from the literature, Figure 3.4 above combines the dimensions of institutions and preferences to explain NI approaches to EU studies (Thelen 1999; Hall & Taylor 1996; March & Olson 1984). Where institutions are exogenous (i.e. outside the theory), institutional explanations examine the ways in which institutions structure incentives, instantiate norms, define roles, prescribe or proscribe behaviour, or procedurally channel politics so as to alter political outcomes relative to what would have occurred in the absence of (or under alternative) institutions. If institutions are the dependent variable, they are endogenous, and we are in the realm of explaining institutions.

Concerning the second dimension, actors’ preferences over alternative outcomes are exogenously given and remain stable (or at least uninfluenced by institutions). From a

⁴⁷ NI did not originate in the field of EU studies, but reflects a gradual and diverse reintroduction of institutions into a large body of theories (e.g. behaviourism, neorealism) in which institutions had been either absent or epiphenomenal. In response, developed during the course of the 1980s and early 1990s, three primary ‘institutionalisms’ were developed in the American political science literature.

second perspective, preferences over outcomes are partially or wholly endogenous to institutions. Institutions may work their effects directly (e.g. by specifying the outcomes to be desired) or indirectly (e.g. through effects on actors' identities). HI is situated in the centre, as it overlaps with or utilises approaches from either RCI or SI strands of the NI in several cases (Jupille & Caporaso 1999: 431-32).

These three primary 'institutionalisms' developed under the banner of NI offer a suitable approach for making sense of both the EU's rich range of institutions. NI is 'new' primarily due to its concern with factors beyond the formal roles or legal powers of executive and/or legislative actors, as well as its focus on values, norms, and informal conventions that govern exchanges between them.

Next to exogenously given preferences, RCI contributions to EU studies start from the notion that institutions alter the relative costs and benefits of various strategies but do not effect actors' underlying motivations. In other words, legislators deliberately design formal institutions, for example, to minimise transaction costs associated with EU-level policy-making (Pollack 2009; 2003). Yet with an exclusive focus on the rational pursuit of fixed preferences within formal institutions, RCI shows reluctance to accept and incorporate informal institutions in legislative decision-making.

This thesis argues that it is necessary to adjust the RCI-model by emphasizing a wider definition of institutions. This section starts, therefore, from a RCI-approach in the sense of actors acting strategically with the aim of maximizing utility. Yet it takes 'ideas' from the SI strand of NI to complement the RCI approach with its focus on formal institutions. In contrast to RCI, SI defines institutions much more broadly by including norms and conventions. In other words, SI scholars examine the ways in which institutions structure incentives, instantiate norms, define roles or prescribe behaviour; or procedurally channel politics so as to alter political outcomes relative to what would have occurred in the absence of (or under alternative) institutions (Jupille & Caporaso 1999: 432).

Hence the tenets of this thesis involve a specific blending of the concepts of interests and ideas in explaining the informal politics of EU legislative decision-making. The remainder of this chapter further elaborates on institutions, interests and ideas and why the incorporation of these in an RCI-model is relevant.

3.4.2. Institutions and interests & ideas in EU climate and energy policy: A variant of rational-choice

In general, many rationalist analysts argue that institutions facilitate the operation of reciprocity. More specific arguments under this banner state that institutions can help resolve collective action problems by providing information, overcoming the problems of multiple equilibria, reducing transaction costs, making commitments more credible and establishing focal points for coordination (Hall & Taylor 1996; North 1990).

Yet 'thin' versions of RCI have difficulty explaining the choices of policy actors in games with repeated play under circumstances of ambiguity and uncertainty (e.g. in EU policy-making). More elaborate, standard neoclassical models of economics – i.e. the theory of expected utility - are only able to explain bargaining outcomes in simple situations such as daily routines (North 1990)⁴⁸. What is left out of this simple equation is the interaction between an actor and its environment in conditions of uncertainty.

In other words, strategic interaction between multiple actors includes other aspects which are characteristic of (informal) bargaining processes in the EU. For example, actors who wish to optimise their strategies in order to maximise their utility depend on feedback from the environment. The environment, however, does not give unambiguous signals. There is always room for interpretation. Under conditions of uncertainty an actor is unable to ascribe probabilities to the different possible outcomes. In complex negotiations characterised by strong uncertainty, such as in the three legislative cases examined in this thesis, ideas about the way the environment is structured and how it functions comes to co-determine action. In situations like these, the 'mathematical elegance' of solutions offered in the prisoners' dilemma game model loses much of its explanatory value⁴⁹.

In response to the imperfections of the basic 'thin' version of rational choice theory, this thesis proposes a thicker version of RCI. This thick version incorporates ideas, or institutional 'focal points' which embody, select and publicise particular paths on which

⁴⁸ The theory of expected utility posits that each actor has a cardinal utility function, a finite set of alternative strategies, a probability distribution of future scenarios linked with each strategy and pursues a strategy that maximises his or her expected utility.

⁴⁹ The prisoners' dilemma game departs from the notion of perfect information among the involved actors. In the simplest case, the playing of tit-for-tat strategies is contingent upon actors knowing how one another played in the last round of the game. The involvement of multiple actors and complexity of 'real-world policy-making' greatly undermines the assumption that defection is easily identified and the members of the community therefore share a system of beliefs about cooperation and defection.

actors are able to coordinate their bargaining. In contrast with national political systems in terms of legitimacy, (limited) institutional properties, heterogeneous composition and complex institutional set-up, the EU puts a premium on the ability to provide convincing ideas or 'focal points' around which actors' interests can converge. Hence 'ideas' are formulated with the aim of giving direction to the Union's dealings in specific subject matters (Eising & Kohler-Koch 1999).

Focal points are concepts that play a key role in alleviating coordination problems arising from the absence of unique equilibrium solutions in games with repeated play. As Goldstein & Keohane (1993: 17-8) point out, focal points can serve to focus expectations and strategies in cases of collective action problems, incomplete contracting and when there is disagreement over which set of rules to apply.

Because almost all games with repeated play have multiple equilibria, the ideas held by players are often the key to a game's outcome. It is not only the set of objective constraints and opportunities that guide action, individuals rely on beliefs and expectations when they select from a range of viable outcomes (Goldstein & Keohane 1993: 17).

This 'thick approach' in the rational choice literature is most famously applied by Garrett & Weingast (1993) in explaining the establishment of the EU Single Market in the late 1980s. Facing waning European competitiveness early 1980s, the (then 12) EU Member States had powerful incentives to liberalise trade relations among themselves (Ross 1995)⁵⁰. Thus, there were strong functional reasons to expect that the EC Member States might seek to complete their internal market after the mid-1980s as the costs of maintaining the status quo were very high. The potential payoffs of an EC internal market were large (Garrett & Weingast 1993: 188). Also, regarding incomplete contracting, Member States had to consider delegating considerable political authority to the supranational institutional actors to interpret and to apply some 'general rules of the game' to all future trade disputes in the EU.

Yet as Garrett & Weingast explain, numerous potential paths to cooperation were possible and with disagreement between the Member States over which path to choose, the option of defection loomed on the horizon. In this case, Garrett & Weingast argue that the principle of mutual recognition – enunciated as a rule by the European Court of Justice in the

⁵⁰ Developments in the relationships between EU Member States and the other major players in the international economy, notably Japan and the United States, also generated incentives for (further) regional integration.

1979 *Cassis de Dijon* case – proved to be the mortar that made it possible to cement a cooperative agreement between the Member States⁵¹. As the preferred economic principle of the most powerful political and economic actors in the EU (i.e. Germany, France and the UK), it proved to be the key element in establishing the SEA in 1987. Otherwise: “A cooperative agreement in Europe based solely on decentralized, self-interested behaviour could neither have emerged in the mid-1980s nor would be likely to sustain itself after 1992” (Garrett & Weingast 1993: 19).

In other words, the standard version of RC would explain that the internal market was warranted on efficiency grounds. Yet this constitutes only the first step toward understanding European cooperation.

The ‘engineering of ideas’ by the involved parties (including the EU institutional actors) allowed them to coalesce around principled ideas embedded – in this case – in a court decision as the central rule for organizing market exchanges. Which idea is ultimately chosen cannot be fully explained by rational choice theory⁵². Nevertheless, the approach here suggests that some focal point was necessary to ensure coordination, to signal commitments, and to promote cooperation in a game where cooperative equilibrium was difficult to sustain (Goldstein & Keohane 1993: 19). In this case, the focal point of ‘mutual recognition’ became a successful idea in steering cooperation between the European actors (Eising & Kohler-Koch 1999).

The main arguments used by Garrett & Weingast are applied here for the sake of explaining the informal politics of agreeing legislative decision-making in EU climate and energy policy. The EU energy policy initially emerged in the 1990s as a ‘by-product’ of completing the internal energy market. From the early 2000s onwards, environment and climate policy came to be considered closely related to the EU internal market, for example through the establishment of the ETS. The European Council and the Council furthermore seized and conducted the establishment of the EU’s first-generation energy policy from 2005 onwards due to a range of internal and external factors (see Chapter 2). Specifically relevant to this thesis, the EU Member States faced strong economic incentives to decarbonise the

⁵¹ In intra-EU trade in goods, mutual recognition is the principle that a product lawfully marketed in one Member State and not subject to Union harmonisation should be allowed to be marketed in any other Member State, even when the product does not fully comply with the technical rules of the Member State of destination.

⁵² Section 3.6 further elaborates on this issue.

European economy and develop renewable energy sources so that they – over time – would benefit from a declining cost curve.

Yet due to such factors as political resistance, fears of uncertainty and entrenched economic interests (i.e. heterogeneity in energy markets), no natural route to cooperation existed to establish a first-generation energy policy. Regarding the establishment of the single market for electricity, for example, many different ways were originally possible.

Europe could, for example, have opened up the wholesale market without opening the retail market. Or it could have made opening the wholesale market mandatory with a centralised exchange system operating a single price algorithm, just as England did for more than 10 years (Glachant 2013: 38).

Concerning the other areas of EU energy, Member States proved to be divided on what kind of policy should be spelled out in detail. Clear, however, was that through increased liberalization of the electricity and gas markets (e.g. the Third Package) and the Europeanization of national prerogatives (e.g. the Security of Gas Supply Regulation (SoS)) further convergence of national energy markets would take place (Lacasta *et al.* 2010: 113). Also, the binding targets set by the European Council to mitigate climate change would mean strengthening regulatory capacity at the EU-level. In all these cases, this ‘Europeanization’ of energy policy would mean several things:

- 1) delegating political authority to an agent (the Commission) with the task to interpret and apply some general ‘rules of the game’ aimed at consolidating a functioning, single market for energy;*
- 2) ensuring secure and affordable supplies for Europe’s customers and business;*
- 3) while harnessing its potential to turn political leadership on climate change into a concrete chance for the EU’s innovative industries (Monti 2010: 47)⁵³.*

In contrast to the ESM, therefore, the involved actors did not coalesce around a focal point embedded in an important court decision. In the Climate and Energy files central in this thesis, the Three – with the European Council acting as principal agenda setter and the

⁵³ At this point, this thesis does not spell-out in detail how the collective action problem and incomplete contracting in the EU energy policy was solved. The aim here is to point out the relevance of ideas as focal points for interest-based bargaining in adopting energy legislation.

core of the EU's executive – organised their bargaining around the following focal points and norms:

- *Access principle (focal point);*
- *Flexibility principle (ibid.);*
- *Fairness principle (ibid.);*
- *Solidarity principle (ibid.);*
- *Subsidiarity (ibid.);*
- *Proportionality (ibid.);*
- *Consensus / reciprocity (norm).*

In a general sense, a focal point refers to the substance of an 'idea', i.e. the 'mortar' that makes it possible to cement an interest-based, cooperative agreement.

'Norms' such as consensus are procedural ideas and refer to providing actors a sense of being able to participate fairly in the decision-making process (Eising 2002: 90). In relation to EU policy-making, searching for a consensus also helps to ensure Member States' compliance with rules agreed upon. Formal sources of norms are procedures and principles found in the (formal) legal framework and Commission proposals such as Member States' sovereignty over (primary) energy sources and choice of energy mix. These sources contribute to forging a consensus which is required for effective cooperation. Informal sources of norms relate to the different styles of EU presidencies, for example in their roles as agenda manager and broker (Warntjen 2008). As a broker, the Presidency is expected to facilitate agreement by engineering compromise proposals around which bargaining can converge (Tallberg 2008: 190). In the informal negotiation-process on the Climate & Energy Package, for example, the radical, consensus-oriented brokering approach of the French EU Presidency played a key role in reaching an EA on a highly complex and controversial range of legislative measures⁵⁴.

Whereas the principle of mutual recognition is a tangible focal point, one can rightfully argue that the above-stated focal points and norms are merely general ideas that are used by politicians and officials in many areas of EU policy-making. What they have in common in the context of the subject of this thesis is that all these principles are key ideas found in primary and secondary EU energy law. The sections below (and Chapters 5

⁵⁴ See Chapter 5 for more details on the role of the French EU Presidency in the Climate & Energy Package negotiations.

through 7) elaborate on this argument and aim to make the focal points more tangible by explaining their substance and operationalization in the policy discourse and decision-making process on EU climate and energy policy.

In the Climate & Energy Package negotiations (Chapter 5), flexibility, solidarity and fairness acted as focal points by ensuring coordination and promoting cooperation. The March 2007 European Council conclusions, for example, refer to the UNFCCC principle of ‘common but differentiated responsibilities and respective capabilities’. This principle formulated in the European Council conclusions is taken from Art. 3 of the UN Framework Convention on Climate Change (UN 1992: 4). This reads:

Parties should protect the climate system for the benefit of present and future generations of humankind on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.

What this principle starts from is the recognition that the individual Member States face different points of departure, circumstances, potentials as well as achievements accomplished while respecting the need for sustainable growth across the Union. In more economic terms, the European Council stated that:

A cost-effective and flexible way should be followed as well when developing market-based instruments to reach energy and climate policy objectives, so as to avoid excessive costs for Member States (Council 7652/1/2008: 12).

Translating this into concrete policy proposals, the Commission affirmed that in meeting goals and setting targets, the effort required from the different Member States should be fair. Therefore, the Commission communication accompanying the proposition of the Climate & Energy Package on 23 January 2008, stated that:

In particular, some Member States are more able than others to finance the necessary investments. [Hence] the proposal must be flexible enough to take account of Member States’ different starting points and different circumstances (Commission 2008/30: 5).

With regard to the Commission policy proposals of effort-sharing (which is applied in the non-ETS sector), the target of 20% renewable energy increase and the setting of

differentiated targets for Member States, Stephenson (2008) explains the operationalization of the principles of solidarity, fairness and capacity:

Rhetoric about solidarity (unity resulting from common interests), fairness (or equitable treatment), and sharing effort between Member States in achieving common goals, is apparent in EU writing. The “shared efforts” required of EU countries are quantified, based on measured data, with reporting and monitoring a requirement. Fairness is seen to be expressed in the realistic effort sharing outcomes obtained by the formulaic approach, which embodies prior effort or partial factoring by GDP/capita as equity elements. Effort shares, once accepted by Member States, are mandatory and penalties can be imposed under EU Treaties if they are not delivered (Stephenson 2008: 8)⁵⁵.

In other words, Member States’ efforts in the area of climate action (e.g. in effort-sharing) ought to proceed according to fairness, ‘flexibility’ (i.e. taking into account national circumstances), capacity (i.e. demanding more from those most equipped to respond) and solidarity (MS undertaking effort in the service of common interests) (Ashton & Wang 2003: 64-66). All in all, and as further elaborated upon in Chapter 5, in the EU Climate and Energy package these principles were translated into:

Operational schemes [that reflect] a European perspective, i.e. formulaic, quantified effort shares for countries that incorporate key facets of their national circumstances, notably relative wealth via GDP/capita weighting and modulation to take account of prior effort towards a target (Stephenson 2008: 9, 11).

As mentioned in Chapter 2, open access to the energy grid represents a pre-condition for a true liberalization of the EU electricity and gas markets and for allowing new players to come into it. The access principle in the EU energy liberalization negotiations was operationalised via the so-called Third Party Access (TPA) principle and unbundling, i.e. two principles which support each other in EU energy law (Francese 2009: 8-9). The TPA principle is explained by the Commission as follows:

In order to have effective competition the operators of transmission networks must allow any electricity or gas supplier non-discriminatory access to the transmission network to supply customers; this is the third party access (TPA) principle. The conditions of access to the networks are regulated by national regulatory authorities. Transmission networks

⁵⁵ Underlined by author.

must furthermore apply regulated tariffs so as to avoid any abuse of dominance, and they must comply with specific rules on unbundling (Commission MEMO 11/125).

In terms of fair market access for competitors entering the market and being able to compete with incumbents, the unbundling of the network from the users as explained in Chapter 2 constitutes a complementary and necessary measure to create a real TPA. The access principle constitutes a core element in the EU *discours* on promoting competition and the general process of integration in the energy market. This thesis argues that the access principle played a key role in the informal and rapid adoption of the Third Package (Chapter 6). The access principle based on TPA and unbundling was a key focal point as it allowed the Three to reach an EA on the ‘effective separation of supply and production activities from network operations’. This agreement included three unbundling options and complementary measures (e.g. strengthening national regulators’ powers and duties) for ensuring enhanced competition in the electricity and gas markets⁵⁶.

In the proposal aimed at strengthening the Union’s security of gas supply (SoS) (Chapter 7), due to the realisation of the internal market as illustrated by the gas supply disruption of January 2009 that was mentioned in Chapter 2, the Commission justified the need for increasing action at Union level in line with the subsidiarity principle⁵⁷.

On the other hand, and according to the proportionality principle, Member States would continue to be responsible for their security of supply and would enjoy considerable flexibility in the choice of arrangements and instruments to ensure security of supply, taking into account their national characteristics in the field of gas (Commission 2009/363: 3-4)⁵⁸.

Next to grounding its proposal on subsidiarity and proportionality, the Commission suggested that the solidarity principle should be at the heart of the response of the Union and the Member States. This principle, which refers to a policy of supply security provided by Member States to other Member States, proved to be a dominant focal point for guiding the informal bargaining between the Three. It proved to be an essential instrument in

⁵⁶ Chapter 6 further elaborates on the arguments made here.

⁵⁷ Art. 5(3) TEU states that under the principle of subsidiarity, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of scale or effects of the proposed action, be better achieved at Union level.

⁵⁸ Art. 5(4) TEU states that under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

reaching an agreement (in first-reading) on controversial issues such as the scope of protected customers and the division of competences between the EU and the Member States⁵⁹. As Chapter 7 explores in more detail, the solidarity principle was made tangible by the Commission by linking this to several measures in the legislative proposal, for example:

- *Solidarity should be based on Member States making proper investments in their own security of supply (including commercial agreements between natural gas undertakings, compensation mechanisms, increased gas exports, etc.);*
- *Solidarity was declared in the obligation placed on national authorities to consult their colleagues in other Member States (and at the appropriate regional level) on a set of pre-defined procedures in order to mitigate the impact of a gas supply disruption;*
- *Solidarity should reside in the obligation for Member States and gas Transmission System Operators to enable permanent capacity to transport gas in both directions on all interconnections (so-called 'reverse flows').*

Formulating a theory of the role of ideas (i.e. focal points and norms), Garrett & Weingast (1993: 203-04) argue that the impact of ideas with respect to cooperation between actors is a function of three interrelated phenomena:

1) The gains to be expected from cooperation among a relevant set of players; 2) an idea that expresses these gains from cooperation; and 3) a mechanism devised to translate the idea into a shared belief system so as to affect expectations and hence behaviour (Garrett & Weingast 1993: 203).

Translated to the main subject of this thesis, interests were spelled out in terms of economic necessity and a political imperative for further integration in EU energy policy. Solidarity, fairness, capacity, and flexibility constituted focal points that served to overcome and lead to a convergence of the interests of the legislative actors. At the same time these focal points - together with consensus and reciprocity norms - allowed for the smoothing out of the inter-institutional difficulties between the Three in the decision-making process. Under the banner of ideas, focal points and norms constituted the mechanism which made the reaching of early agreement in the three energy files possible. Without the use of ideas, i.e. based solely on decentralised and self-interested behaviour, a cooperative agreement between the Three would not have materialised this quickly.

⁵⁹ See Chapter 7 for more details on these controversial issues.

To summarise this section, by explaining the complexities of legislative bargaining in the EU's energy policy set-up, a more sophisticated variant of RCI is proposed here. Next to the basic premise of interests, this 'thick-RCI approach' recognises and incorporates interests and ideas as key variables in explaining cooperation strategies between several players. As pointed out above, both general and more specific focal points constitute important levers in shaping the gains from cooperation. The consensus and reciprocity norms, on the other hand, are more relevant to the process of bargaining; these facilitate discussion about the merits and drawbacks of policy decision-making by ensuring that the actors' salient concerns are taken into account and by directing them toward what is considered a fair outcome⁶⁰. This thesis further elaborates on these themes by explaining why an understanding of the inter-linkage between interests and ideas is essential in explaining the rapid adoption of the three major energy files. First, however, the aforementioned theoretical aspects are incorporated into a bargaining model of EU informal politics, a task to which this thesis now turns.

3.5. An EU bargaining model of informal politics

Incorporating the variables discussed in the previous sections, this section proposes a theoretical model of informal EU decision-making in which informal bargaining processes, together with formal institutions, act as the independent variables and the policy outcome (i.e. EA) as the dependent variable. Table 3.4 below gives an overview of the concerned variables.

<i>Independent variables</i>	<i>Dependent variable</i>
Formal Processes*	Early agreement** (package deal or single file***)
Informal Processes	

Table 3.4: Involved variables in the informal politics of EU energy policy.

(*Pre- and Post-Lisbon; **First or early second reading; ***Incremental/fast, least/greatest common denominator).

⁶⁰ As such, Eising (2002: 90) labels consensus and reciprocity norms as 'intersubjectively shared fairness norms'.

The key argument is that, based on the lacunae in the formal institutional structure of the EU, informal processes have more impact on the speed and content of the bargaining process.

In the trilogues, and related to reaching an EA, bargaining is understood here as the negotiation over the terms of agreement, with the involved actors disagreeing over their ranking of preferences in this agreement. Bargaining between two players is shaped by each player's expectation of what their opponent will accept (Schelling 1960). Hence bargaining success refers to the congruence between actors' stated policy preferences and decision outcomes (Costello & Thomson 2013: 1027). Interest-based bargaining constitutes a central building block of rational choice theory. Starting from the tenets of rational choice yet developing it in important aspects, Figure 3.5 below presents a qualitative bargaining model through which this thesis explains the role and function of the informal decision-making in three EU climate and energy policy files.

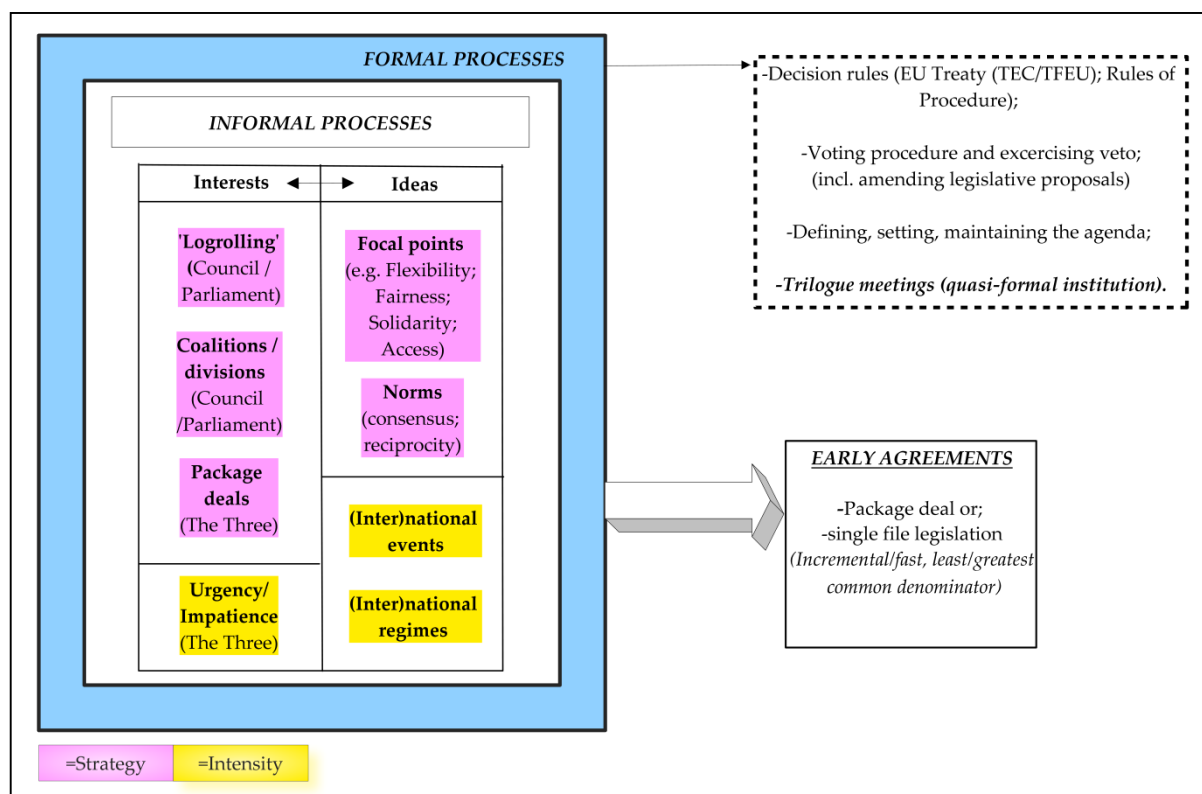


Figure 3.5: EU bargaining model of informal politics under co-decision rules. (Source: Author).

Let me elaborate here further on the various parts of the EU informal bargaining model. This model of decision-making departs from the notion that formal institutions ‘matter’ in the sense of constraining and challenging the actions of actors, in this case the Three. The informal processes depicted in the model serve as accommodating informal institutions (AII) and are played out within the interstices of formal institutions.

The bargaining model starts from the notion that the **formal processes** or framework of the EU consists of several parts. First, the decision rules consist of the EU Treaty and the Rules of Procedure (RoP) for each of the Union’s primary institutional actors. The Treaty is basically a contract agreed between the Member States, which sets out the division of competences and responsibilities between the Member States and the Union’s institutional actors.

The formal rights stipulated in the Treaty serve as a starting point for understanding how the Three behave. For example, the co-decision procedure is stipulated in Art. 294 (TFEU). Art. 238 (TFEU) explains the voting rules plus Arts. 16 (TEU) and 238 (TFEU) explain and define the concept of qualified majority. As stated in Chapter 2, energy is mentioned as an issue of shared competence between the Union and the Member States in Art. 4 (2i) TFEU and as a dedicated title in Art. 194 (TFEU). In fact, in the form of the latter article, the central goals for energy policy (security of supply, competitiveness and sustainability) are now laid down in the Lisbon Treaty. This spells out what is expected from the Member States and the institutional actors in the energy area. Secondly, as mentioned in the previous chapters, and regarding EU energy policy, the voting procedure between the Council and the Parliament differs. Whereas decisions in the Council are taken by QMV as a general rule, the Parliament votes by a simple majority in first reading. In order to amend the Council’s common position at second reading, however, an absolute majority is required (i.e. half of the MEPs plus 1).

The Commission and the Member State holding the EU Presidency have control of several (formal) resources for maintaining (or extending) the momentum for completing specific dossiers⁶¹. For example, in the Climate & Energy Package negotiations, the French EU Presidency proved to be instrumental in reaching an EA. As a large and influential

⁶¹ Resources are especially relevant in the Council. Larger Member States such as France and Germany have control of more resources and prestige – or higher standing among fellow Member States - to push forward certain files.

Member State, equipped with substantial resources (e.g. manpower, budget, prestige), France made it formally clear from the start that the adoption of the Package was one of its top priorities and was able to execute this far-reaching ambition (Vivet 2010). The fact that France did not want to handle the negotiations on the more technical, politically less ambitious Third Package in favour of the more heavyweight Climate & Energy Package should be understood within this context.

At the same time, however, we have to take into consideration a view expressed within the Council General Secretariat. This view argues that whichever Member State gets to handle a specific file during its EU Presidency is to a very large extent dependent on the time window created by external event(s), the calendar and the workload of Coreper I⁶².

Under the heading of the formal framework, finally, trilogue meetings serve as quasi-formal institutions in the model. As elaborated upon earlier in this chapter, and while not formally recognised in the Treaty, negotiating and reaching a political agreement in trilogues has become THE established way of agreeing on legislation under the co-decision rules. All together, and with the exception of the trilogues, the EU formal framework constitutes the formal rules codified and enforced through official channels. These institutions serve as the gateway through which all of the EU's institutional actors must conduct their political actions; as such, and to a large extent, these institutions condition their behaviour. At the same time, however, formal institutions in the EU are to a large extent incomplete contracts, i.e. these only sketch general codes of conduct and do not specify how participants should behave under all possible circumstances.

For this reason this thesis emphasises the importance of **informal processes** in the EU legislative process. For the sake of clarifying the dividing line between the formal and informal frameworks, where trilogue meetings are considered to be 'quasi-formal' institutions, bargaining *within* trilogues is conceived in the bargaining model as being part of the informal sphere of legislative decision-making.

In line with one of the pillars of RCI, the main factor driving the process of informal politics constitutes actors' rational pursuit of **interests**. Interests in the bargaining model are defined as the short- and long-term goals and priorities that lead decision-makers to choose one option over others in order to benefit their own position within the political agenda (Zito

⁶² Interview Council official, 18 July 2012, Brussels.

2000: 28-9). Under the banner of interests, logrolling, coalition-building (or creating divisions) and package-deal, policy formulation constitute strategies or the 'tools' that the involved actors use in maximizing utility during the informal bargaining process. The urgency of the file under discussion and the impatience of the actors involved determine the intensity of interests hence the extent to which strategies are applied.

Through logrolling between the Council (Member States) and the Parliament (with the Commission playing the role of facilitator), the two chambers trade support for their preferred issues. Logrolling refers to the exchange of loss in some issues for benefits in others which results in mutual overall gain for the involved actors holding different interests. In the EU legislative process under co-decision, logrolling refers to the exchange of support between the Council Presidency (with a mandate from the 27 Member States) and the rapporteur(s) representing the Parliament.

Additionally, interests are also the basic element that gives rise to the formation of coalitions on the EU level. Hence in the bargaining model, coalition-forming is based on material perception across a policy domain. Such coalitions might collaborate on a long-term basis, but it is also quite typical that specific actors form alliances in a case-specific *ad hoc* style (Muengersdorff 2009: 11). This thesis focuses on alliances in a case-specific *ad hoc* style. On the other hand, and related to respective voting procedures, divisions within the Council and the Parliament can reduce the bargaining success of these actors (Costello and Thomson 2013).

Although package deals are proposed by the Commission, the bargaining model perceives package deal policy-making as a strategy of the Three. Often, it is the Council and the Parliament that insist on deciding upon legislation through packages as this approach allows more bargaining between the Member States and/or with the Parliament. Package deals are more likely to be used for urgent proposals and the most prominent way in which these deals effect legislative outcomes is by extending the Parliament's legislative preferences through informal logrolls (Kardasheva 2009). As further elaborated upon in Chapter 5, the Climate & Energy Package constitutes a perfect example of an urgent file that - through package-deal decision-making - allowed for effective bargaining within the Council as well as with the Parliament.

Concerning the intensity of interests, the urgency of legislation refers to whether or not existing legislation is considered inadequate in the face of new or increased political challenges in a policy area⁶³. Concerning impatience, the bargaining model departs from both the overall as well as the relative impatience of the co-legislators. The relative impatience focuses in whether one of the players has a shorter or longer time horizon than the other, which can be exploited to win the bargaining game. Impatience in this sense is related to a number of factors, e.g. the workload, the political priorities as well as mere time-pressure that a Member State has during its six month, rotating EU Presidency. At the beginning of its term in office, the EU Presidency sets political priorities to ensure a result in terms of substantive legislative output (in a specific policy area) in a short period of time. Using the fast track legislation rather than the full formal procedure increases the chance of adopting the Presidency's policy-agenda⁶⁴. Vice versa, regarding the bargaining position of the Parliament and next to variables such as workload and political priorities, a lot depends on the rapporteur; his or her political affiliation (e.g. big party group, small party group), expertise and skill⁶⁵. The overall impatience refers to more structural changes such as the end of the legislative terms of the Commission and the Parliament.

As explained in the previous section, **ideas** may be used by actors for defining cooperative solutions in games with repeated play (and multiple equilibria). In establishing the first-generation EU energy policy, the European policymakers established several key focal points as well as consensus and reciprocity norms to signal commitments and promote cooperation in negotiating the quick adoption of several legislative files. Inextricably linked to one another, certain 'ideas' served the interest-based bargaining process between the Three in negotiating and adopting EU climate and energy policy measures.

Thus, focal points and norms constitute an essential mechanism in facilitating the interaction between players to allow them to realise collective goals. The impact or intensity of ideas is determined by issues and obligations under international regimes and effected by

⁶³ These political challenges refer to national as well as international events and regimes, on which more below.

⁶⁴ The political priorities set by a Member State during its EU Presidency are likely to be related to the domestic agenda of the national government. Hence it is unlikely that this agenda contains only issues that are low in political saliency.

⁶⁵ Country coherence of key negotiators in the Council and Parliament, i.e. whether or not they share political affiliation and/or nationality is of importance in explaining whether or not they resort to first-reading deals. If and how this influences the substance of the outcomes seems to be a tougher nut to crack and goes beyond the scope of this thesis.

national and international events. These issues and obligations can strengthen (or intensify) the appeal of certain ideas and reveal the need for either amending or proposing new EU legislation in a specific area of policy-making; in this case energy policy.

For example, international regimes relevant for the subject of this thesis that exerted considerable pressure on the 'weight' of ideas relevant to the internal EU policy-making process are the UN Framework Convention for Climate Change (1992) and the Kyoto Protocol (1997). Regarding the negotiations on establishing a successor to the Kyoto Protocol, for example, the Climate & Energy Package was framed as an instrument of EU leadership in international negotiations on climate change that would allow the EU to speak with one voice, be a credible partner and 'lead by example'. In this regard, the French EU Presidency stressed the need for the EU to reach an internal political agreement on the package and work actively for an ambitious international climate change agreement at the UN COP 15 in Copenhagen. Concerning events, the conflicts between Russia and Ukraine which led to gas cut-offs between 2006 and 2009 and hit several CEECs (e.g. Bulgaria) particularly hard underlined the need for amending European legislation in gas security.

Finally, the arrow between interests and ideas in the bargaining model indicate that these two are interconnected. It is difficult to disentangle the independent effects of these two factors.

Concerning **EAs**, the case studies applied here analyse both single file pieces of legislation (i.e. the Security of Gas Supply Regulation) as well as two major package deals (i.e. 3rd Package, Climate & Energy Package). Package deals are the ideal testing ground for 'measuring' the influence of informal bargaining on policy outcomes. The main reason is that package deals are informal bargains agreed upon between the Council and the Parliament. The cases discussed here are no exception and allow the Council and the Parliament to exchange support for their respective preferences in legislative outcomes. Package deals are agreed upon because there are prospects for gains from exchange. Logrolling in package deals, in other words, can make both the Council and Parliament better off because these chambers hold different preferences on different issues that they would not be able to agree upon if these were negotiated separately from one another.

Referring to the speed and the outcome of the policy decided upon, the dependent variable makes a dichotomy between 'incremental or fast' and 'greatest or least common denominator outcomes'.

In sum, within the framework of formal rules and with an empirical focus on EAs (dependent variable), the bargaining model assesses the role and influence of ideas in informal bargaining. Hence the central research question in this thesis is:

How did ideas (i.e. focal points and norms) facilitate the informal bargaining process between a set of legislative actors (i.e. the Three) with different preferences and make an EA possible in the three cases of EU climate and energy policy that are central to this thesis?

3.6. Limitations of the theoretical approach

The rationalist incorporation of ideas is not without its critics. The mere fact that the approach propagated by Garrett & Weingast (1993) has remained a niche in the RCI literature underlines that these authors have not gained many followers. In response to Garrett & Weingast and Goldstein & Keohane (1993), for example, Yee (1997) states that the 'brute fact' behind ideas as focal points and norms stays unexplained: "*Individuals are persuaded by ideas because through some unanalysed prior process, they already have been persuaded by, and hence already have adopted these given ideas*" (Yee 1997: 1024). In departing from the perception of belief as given within a rationalist framework, Garrett & Weingast discard important facts such as those that state focal points are dependent on cultural identities and (changing) contexts (Bicchieri 1993). This specific critique is indicative of a broader one on thick-rational choice institutionalism. Ferejohn (1991: 282) argues that the latter, even where it might seem plausible, is flawed because it contains no theory determining the selection of agent identities, values, beliefs and strategic opportunities.

In suggesting a remedy for this deficiency, Yee argues for an 'interpretive rationality', by which Yee means that rational choice needs insights from anthropology, linguistics and psychology. This is presumably because the brute properties that largely enable norms and ideas to specify preferences and help resolve collective action problems entail interpretation, intersubjectivity and language. This thesis declines to apply 'interpretive rationality' for the following reasons. First, the aim of this thesis is not to deconstruct the properties of the ideas

that serve the establishment of the EU's first-generation energy policy. While such an analysis might illuminate key factors that help resolve the problems plaguing thick rationality, it would take the focus away from the main subject of this thesis. In contrast, what is argued here is that there is no indispensable need to go as deep as discovering 'the brute facts' behind these ideas because the main focus here is to explain the nature of the ideas in formal bargaining. Hence, these ideas are taken as given and recognised as an important variable that serves the interests of the Three and are of key importance in coordinating cooperation in the informal decision-making process.

3.7. Chapter conclusions

Theoretical approaches such as intergovernmentalism, MLG and international regime theory have been applied to explain decision-making and policy outcomes in EU climate and energy policy. However, this chapter has pointed out that the central role played by informal politics constitutes a niche in the literature. This is remarkable considering the fact that an increasing number of general contributions to the literature recognise the importance of informal institutions in EU legislative decision-making. The main reason for the increasing interest in this issue is the fact that the Three are increasingly adopting legislation early under co-decision, i.e. concluding legislation (either single files or package deals) at first reading via an informal compromise established between a set of restricted actors from the Three in trilogue meetings.

Taken from the literature, this chapter has selected a range of tools to explain the process of informal legislative decision-making. Departing from the notion that there exists a dependency or interplay between formal and informal institutions in the EU's co-decision procedure, reaching an EA on the three climate and energy policy files via trilogue meetings falls into the category of accommodating informal institutions.

With the aim of explaining the early agreements in the three EU energy policy files, this chapter proposes a thick version of RCI and a bargaining model of informal decision-making. The basic 'thin' version of rational choice theory is exclusively focused on the rational pursuit of fixed preferences within formal institutions. It shows a reluctance to accept a broader definition of institutions and the possibility of changing preferences during (informal) policy negotiations. Therefore, this chapter has argued that it is unable to explain

complex forms of international policy-making such as reaching early agreements in informal settings such as 'trilogues'.

Borrowing from a niche in the RCI literature, a 'thick' version of RCI incorporates ideas which embody, select and publicise particular paths on which actors are able to coordinate their bargaining. The EU informal bargaining model proposed in this thesis involves a specific theoretical blending of the concepts of interests and ideas. With actors engaged in interest-based bargaining within a formal framework of rules, ideas formulated as focal points and/or norms play a key role in coordinating policy-making; coordinating in terms of focusing expectations and strategies in cases of collective action problems and disagreement over which set of rules to apply.

The relative strength or weakness of interests and ideas in the bargaining process is explained in terms of 'intensity'. The intensity of interests relates to the relative impatience of the actors in the EU legislative process and to what extent existing legislation is considered inadequate in the face of new or increased political challenges in a policy area. The intensity of ideas is determined by issues and obligations under international regimes and effected by national and international events. These issues and obligations can strengthen (or intensify) the appeal of certain ideas and reveal the need for either amending or proposing new EU legislation in a specific area of policy-making; in the context of this thesis, energy policy.

Chapter 4: Research Methodology

4.1. Introduction

This chapter discusses the research methodology that is applied in explaining the informal policy-making process in the three cases of EU climate and energy policy. These cases are elaborated on in Chapter 5 to Chapter 7. The focus of this chapter is on describing the logical structures and procedures of scientific enquiry used in this thesis, namely process-tracing via case-study research.

Studies on EU informal politics under co-decision rules use both quantitative (e.g. Reh *et al.* 2011; Kardasheva 2009; Thomson & Hosli 2006) and qualitative (e.g. Burns 2013; Shackleton 2000) approaches, as well as those that seek to marry the strength of both (e.g. Burns 2004). A quantitative approach in EU informal politics is particularly useful for analysing changes in terms of transaction costs and divisions of power between the Three across different legislative procedures in a larger time-frame, involving a large n and a limited number of variables.

The aim of this study, however, is to explain the complexities of the informal legislative decision-making process which includes a large range of variables and contextual factors as suggested in the bargaining model in Chapter 3. Due to the complex nature of the subject central to this thesis, the case-study approach (small n) is considered here as a suitable approach because it allows the study of a given subject in detail, including contextual factors. In addition, it does not restrict the analysis to a limited number of quantifiable variables.

Section 4.2 outlines the case-study approach used in this thesis. A fundamental tool of case-study analysis is process-tracing, which is described in section 4.3. Section 4.4 explains the collection strategies and methods used for data analysis, i.e. document research and interviews. The application of two or more research methodologies is called 'triangulation'. Triangulation is a technique that facilitates the validation of data through cross verification from several sources (Bogdan & Biklen 2003). Section 4.5 finally lists some of the limitations of the qualitative approach applied in this thesis and how to handle these. These limitations

include reducing the ability to generalise knowledge on EU informal decision-making on the basis of single cases which deal with a specific policy area.

4.2. Case study methodology

The case studies in this thesis test the variables proposed in the bargaining model and aim to contribute to theory development in the study of informal politics in EU climate and energy policy. The distinctive need for case studies in this thesis arises out of the desire to understand the complexities of the informal dimension of the EU legislative decision-making process in climate and energy policy under co-decision rules. For the analysis of informal decision-making in EU energy policy, a qualitative research design seems to be particularly suitable as it allows for tracking and analysing a broader picture including contextual factors within which policy processes take place (Sauter 2010: 52).

A case connotes a spatially delimited phenomenon (a unit) observed at a single point in time or over a number of time periods. It comprises the type of phenomenon that an inference attempts to explain (Gerring 2006: pos. 204)⁶⁶. A case study is understood here as the intensive study of a single case which provides more than one observation. The purpose of the case study in this thesis is to offer insight into the EU legislative procedure and the intentions and the reasoning capabilities of the actors involved. Also, at least in part, the case study aims to shed light on a larger class of similar cases (Gerring 2006: pos. 216). The (political) unit of analysis or 'case' in this thesis is the informal decision-making process in EU climate and energy policy (under co-decision).

All in all, case study research is about 'casing'. This involves defining the topic, including the research question of primary interest, the outcome, and the set of cases that offer relevant information vis-à-vis the research question (Ragin 1992: 217). As George & Bennett (2005) point out, a particular strength of case study research is the ability to explore causal mechanisms by looking at a large(r) number of variables and identifying unexpected aspects in the policy-making process. "*The product of a good case study is insight, and insight is the unknown quantity which has eluded students of the scientific method*" (Waller 1934: 296-7).

⁶⁶ 'Pos.' refers to 'position' in an E-Book.

The focus on a small set of legislative files in a specific area of EU policy allows for exploring the nuances of (informal) decision-making that a larger *n* analysis cannot capture. The proximity to reality and the learning process that the case study generates often constitutes a prerequisite for advanced understanding of the policy-making process in general or in a specific area.

Concerning the case studies in this thesis, these are selected according to two research objectives. The first research objective is to explain the speed and 'depth' of the decision-making process in the three EU legislative files adopted as an early agreement (EA). Related to this, the second aim is to generate as much information about the role and influence of ideas in the informal bargaining process as possible and to gain a better understanding of how these ideas (as focal points) facilitated the legislative decision-making in the three energy cases.

The cases selected for this study are characterised by either normal, atypical or extreme legislative negotiations under co-decision rules. The Climate & Energy Package discussed in Chapter 5 constitutes an 'extreme case' under co-decision. This extremely complex package was decided upon as an EA in less than eleven months with the direct involvement of the European Council in the legislative process.

Although decided upon within the average length of time required for deciding on a co-decision file in early second-reading, the decision-making process in the Third Internal Energy Market Package was atypical in the sense of it being taken hostage by a cumbersome and ideological debate between the Three on the theoretical pros and cons of ownership unbundling. As further elaborated upon in Chapter 6 this debate moved beyond bargaining and left little time for negotiating other key issues in this highly complex package.

The Security of Gas Supply Regulation central to the analysis in Chapter 7 was only atypical in the sense of it being the first energy instrument based on the energy article of the Lisbon Treaty. As for the rest the decision-making process on the Regulation, this can be regarded as normal under co-decision.

This variation in cases (e.g. in terms of the length of the decision-making process and institutional peculiarities) allows me to assess whether ideas played a different or similar role in speeding up the legislative decision-making process.

4.3. Process-tracing

In carrying out within-case analysis based on qualitative data, 'tracing the process' of the relevant events and actions of actors constitutes a fundamental research tool. Process-tracing is defined as the systematic examination of diagnostic evidence selected and analysed in light of research questions posed by the investigator (Collier 2011: 823). This method attempts to identify the intervening causal process – the causal chain and causal mechanism – between independent variables and the outcome of the dependent variable (George & Bennett 2005: 206). As a tool of causal inference, process-tracing focuses on the unfolding of events, or situations, over time. In relation to this thesis, process-tracing aims to identify the particular decision-making paths in the three case-studies and points out (relevant) variables that were otherwise left out of the bargaining model. The evidence on which process-tracing focuses corresponds to what Collier *et al.* (2010) call 'causal-process observations' (CPOs). Used in this thesis for theory testing, a CPO concerns:

An insight or piece of data that provides information about context, process, or mechanism and that contributes distinctive leverage in causal inference (Collier et al. 2010: 277).

As further elaborated upon in section 4.4, a whole range of data (primary and secondary) is used for analysing and explaining the depth and speed of the informal legislative decision-making process in the energy and climate policy cases highlighted.

Process-tracing makes a contribution to the research objectives of this thesis by:

- *Identifying and describing actors and the decision-making processes related to 'EU informal politics';*
- *Gaining insight into causal mechanisms;*
- *Assessing (possible new) claims on the role and function of EU informal politics.*

Process-tracing is regarded here as an indispensable tool for theory development because it generates numerous (and interdependent) observations within a case that must be linked in particular ways to constitute a substantiated explanation.

As an analytical tool, process-tracing is used for drawing descriptive and causal inferences from diagnostic pieces of evidence – often understood as part of temporal sequence of events or phenomena. As stipulated by Mahoney (2010), process-tracing is

fundamentally a case-based methodology that can be applied successfully only with good knowledge of individual cases. When used for testing theory, process-tracing can provide insight into the existence of causes, mechanisms, or auxiliary traces posited by the ‘thick’ RCI-approach applied in this study (Mahoney 2010: 131).

As carried out in Chapters 5 to 7, process tracing constitutes ‘detective work’ (Collier 2011). Multiple types of evidence (i.e. data sources) are employed and ‘bits and pieces’ of evidence that embody different units of analysis are drawn from unique populations. This process is captured in the simple formula:

$$X_1 \rightarrow X_2 \rightarrow X_3 \rightarrow X_4 \rightarrow \text{etc.} \rightarrow Y$$

As stated in this formula and applied in this thesis, a distinctive feature of the process-tracing methodology is to make sense of a heterogeneous sample of evidence each of which sheds light on a single outcome or set of related outcomes (Gerring 2006: Pos. 2093). Related to case-study research, process-tracing is always based on the analysis of a single case yet the conclusions drawn from this case might be generalizable. In this sense, it is the quality of the observations and how they are analysed, not the quantity of observations that is relevant in evaluating the truth claims of a process-tracing study⁶⁷.

For observations to make sense, however, several parts of the literature emphasise the relevance of imbedding the observations within a good narrative. The latter approaches the complexities and contradictions of real life (Flyvberg 2006). In other words, the process-tracing observation makes sense only if it can be categorised, “narrativized,” and this in turn rests on a broad set of assumptions about the world (Gerring 2006). Regarding the subject of this thesis, the narrative is set out in Chapter 2 to Chapter 3 and concerns issues such as:

- *The prominent role of informal politics in EU decision-making under co-decision rules;*
- *Early agreements (EAs) in EU legislative decision-making;*
- *Integration in EU climate and energy policy (before and after 2007);*
- *EAs & informal politics in EU climate and energy policy.*

⁶⁷ This subject is returned to in section 4.5.

4.4. Data collection & analysis

This thesis applies document research (4.4.1) and interviews (4.4.2) for acquiring the data that constitutes the basis for explaining the informal decision-making process in the case studies in Chapters 5 to 7. Combining two or more research methodologies in a study of the same phenomenon is called triangulation. Triangulation facilitates the validation of the data used in this study through cross verification.

4.4.1. Document research

This thesis obtained information on the decision-making process regarding the respective policy files via primary and secondary document research from different sources.

The aim of analysing a range of primary and secondary documents is to trace the informal policy-making process and explain the role of ideas and their relative weight in the bargaining process. Also, these documents are used in this thesis to analyse the logrolling process between the Three, the role and influence of certain coalitions and/or divisions in the negotiations and the use of package deals. Another important aim of the document analysis is to point to the use of certain terminology and the discourse in the policy-initiating stage of the legislative files. The cases in Chapter 5 to Chapter 7 point out that the Commission proposed certain ideas (focal points and norms). The ideas formulated in the Commission proposals indicated the Commission's aims and preferred outcomes in the legislative negotiations as well as providing a guiding principle or line of action along which the Council and Parliament could (or 'should') have conducted their bargaining.

Finally, primary and secondary documents were used at all stages of the conducted research to track the issue career for each case study in as much detail as possible.

Capturing the rapid agreement on the three major legislative files central to this thesis, the main database sources for primary documents used here are:

- A) *The Public Register of Council Documents*: <http://www.consilium.europa.eu/documents>

The Council's Public Document Register constitutes a primary research tool in tracing the informal politics of the EU Energy & Climate Policy. It offers extensive information on the evolution of individual legislative proposals. It contains, for example, the preparatory

documents for the trilogues as well as multiple versions of the so-called ‘four-column documents’. For the latter detailed documents are used in the trilogue meetings and indicate the state of the negotiations on specific issues, using, for example, the following lay-out:

- Commission proposal;
- Parliament opinion;
- Council position;
- Compromise proposals.

These documents allow me to trace the evolution of a text to its final version. The Document Register also contains other preparatory documents for the trilogues (e.g. Presidency notes on key issues), various drafts of the legislative proposals that include compromises proposed by the Council Presidency, outcomes of Parliament decisions, and Commission communications. The majority of the primary documents used in the case-study and process-tracing work were either downloaded from the Document Register or acquired with the help of Council officials⁶⁸.

- *B) Parliament Legislative Observatory (OEIL): <http://www.europarl.eu/oeil/home/home.do>*

The OEIL contains reports from the various committees, information on individual legislative proposals, their progress and their legislative procedure. The OEIL also provides a useful gateway to plenary debates, speeches, press releases and backgrounders. The database also provides the direct links to Commission proposals, committee texts, rapporteurs’ opinions, and Parliamentary positions at the various stages of the co-decision procedure as well as committee and plenary votes. The OEIL holds little to no information on the trilogue negotiations⁶⁹. Through officials in the Parliament Secretariat, the so-called ‘feedback notes’ for two of the three case-studies in this thesis were acquired. Feedback notes are internal Parliament documents written after a trilogue meeting. They provide in politically neutral language an overview of:

⁶⁸ Some of the internal Council documents, however, were obtained via email from the Council’s Services. These documents are available upon request.

⁶⁹ Considering the fact that the Parliament is the only directly elected institutional actor of the EU, and the (increasing) public call for the need for transparency in the EU legislative process, this thesis found this quite a remarkable observation. Several practitioners in the Parliament underlined the need for extending the OEIL by including the Parliament’s mandate for negotiations, all relevant documents, the names of the negotiators and (most importantly for this thesis) whether negotiations are taking place.

- The state of the negotiations on a legislative file;
- Aim of the trilogue (solving political and/or technical issues);
- Key issues addressed by representatives from the Three;
- Reflections on the aim(s) of the upcoming trilogue.

- C) *The Commission's Pre-Lex Database*: <http://prelex.europa.eu>

The third major primary source of information used in this thesis is the European Commission's Pre-Lex Database. Pre-Lex allows the user to follow the main decision-making steps taken in energy and climate files under co-decision rules. Pre-Lex furthermore contains direct links to both the official Parliament and Council documents as well as the official documents (proposals, recommendations, communications and so on) transmitted by the Commission to the Council, the Parliament and to other institutions and bodies.

For the sake of obtaining additional information on the informal decision-making processes relevant to this thesis and understanding the wider contextual developments in which these processes took place, this thesis consulted secondary document sources such as press archives and journals. These include:

- *Agence Europe*: <http://www.agenceurope.com>

Agence Europe (AE) is an independent, international press agency that provides information on all aspects of European economic and political integration. AE is one of the few press databases that provides detailed information on what is discussed in the trilogues. The AE 'Europe Daily Bulletins' were extensively consulted in all of the case-studies in this thesis.

- *EurActiv*: <http://www.euractiv.com>

EurActiv is an internet news portal that focuses exclusively on European themes and extensively covers the EU Energy & Climate Policy. The portal contains extensive background information on the legislative proposals as well as on the formal and informal politics of decision-making surrounding the cases analysed here in Chapters 5 to 7.

- *ENDSEurope*: <http://www.endseurope.com>

ENDSEurope is a British press agency that focuses exclusively on EU energy and environmental issues. ENDSEurope was consulted here in analysing the formal and informal aspects of the decision-making process in the Climate & Energy Package (Chapter 5).

- *Europolitics*: <http://europolitics.info>

Europolitics is a European affairs daily with large sections on energy and environment. Europolitics was used in providing background information on the politics surrounding the voting in Parliament on the Third Internal Energy Market Package (Chapter 6).

In addition, this thesis analysed a range of academic literature (from law, economics and political science) on various aspects of the EU climate and energy policy and the decision-making related to the three case-studies. All together, the analysis of these various documentary sources provided a detailed overview of each policy process and each step of the issue career including relevant actors, interests, formal and informal processes as well as contextual factors.

4.4.2. Interviews

The documents relevant to the case studies were also used to prepare a set of interview questions for semi-structured interviews as well as to adjust any unfathomed presumptions made during the initial stage of the document research.

In relation to the research question and explaining/clarifying the informal stages in the decision-making process in the three case-studies, interviews were conducted with the aim of receiving additional and first-hand information on the 'informal politics' of EU climate and energy policy. Interviews were also conducted in cross-checking contested claims which were not covered in the literature and served to gain a better insight into the details of the negotiations on the relevant legislative texts, i.e. to verify or falsify the previously gathered information and thus validate factors that have influenced the legislative decision-making process. The guideline was adapted according to the interviewee's position and the information gathered in previous interviews and documents.

Semi-structured interviews were conducted with officials from the Member States and officials and politicians from the European institutional actors⁷⁰. Many of these interviews focused on issues not widely available in the documents (e.g. the role of ideas in informal bargaining; the role and function of informal processes and its relation to formal institutions). Other interviews provided (subjective) thoughts on specific aspects of EU climate and energy policy.

Since it was not possible to conduct interviews with officials from all 27 Member States, this thesis aimed to acquire the views of the key participants from the Three. Interviewees were granted anonymity and therefore only their institutional affiliation is indicated. During the interviews hand-written notes were taken and afterwards the interviews were transcribed. The vast majority of the interviews were carried out in person while a few interviews were carried out over the phone. Interviews were conducted in English, German or Dutch and generally took between 30 and 60 minutes.

The recollections of one or more of the interviewees might be clouded by current preoccupations for example. As a result, generating data via interviews, specifically information provided by subjective sources creates bias. Also, certain developments in legislative decision-making may be the result of random or conjunctural phenomena not understood or realised by political actors. Referring to the triangulation method applied here this thesis challenges this bias by verifying the different answers provided on similar questions and checking what has already been written on a particular subject in the available primary and secondary documents.

4.5. Generalising research - some methodological limitations

In the introduction of this chapter it was mentioned that qualitative and quantitative approaches have been used in studies on EU informal politics. Case-study research design is sometimes viewed with extreme circumspection and this method is seen to be more prone to 'measurement error' than a more quantitative approach (King *et al.* 1994). In response to those preferring a quantitative over a qualitative method, Flyvberg (2006: 237) points out that whatever the method of inquiry, the fact of the matter is that inference is inherently an

⁷⁰ See the References in this thesis for an overview of the conducted interviews.

imperfect process. As this section attempts to explain, any methodological approach needs to address shortcomings and identify uncertainties and limitations of possible conclusions.

One of the primary virtues of the case study method is the depth of analysis that it offers. Especially when a subject is being encountered for the first time, the case study approach allows for the obtaining of insights that might not be apparent to the cross-case researcher who works with a thinner set of empirical data across a large number of cases. Rather than having to quantify variables across many cases, one can argue that case study research is less prone to some kind of measurement error because it can intensively assess a few variables along several qualitative dimensions. Regarding the inductive side of process-tracing: “[It] may identify potentially omitted variables through the intensive study of a few cases, and single cases” (George & Bennett 2005: 221).

Stated differently, this thesis considers atypical or extreme case-studies as being rich in detail and description, hence revealing more information than a large N-dataset could. Case studies can also generate concrete, practical (context dependent) knowledge and thus provide a better understanding of the legislative decision-making process analysed here. Another benefit that gives using case studies an advantage in research is ‘fuzziness’, for the single case study allows one to test a multitude of hypotheses in a rough-and-ready way (Gerring 2006: pos. 471).

Despite these strong points this thesis needs to point out some of the limitations of the methodology applied in this thesis.

In the context of studying a few cases intensively there are certain limits to process-tracing, and a number of questions are raised. Can all the evidence selected for the argument in this thesis be systematically examined in light of the research questions? And if this cannot what would this mean in terms of any conclusions drawn? This thesis replies by stating that it is typical of case study research that not everything can be tested in a rigorous fashion.

As long as sufficient documentation is included in the account, Gerring (2006) argues that the verification of a process-tracing study is eminently achievable. Another concern related to this matter, and due to several reasons, different interpretations may arise during process-tracing.

-First, competing explanations or interpretations could be equally consistent with the available process-tracing evidence, making it hard to determine whether both are at play

and the outcome is over-determined, whether the variables in competing explanations have a cumulative effect, or whether one variable is causal and the other spurious;
-Second, competing explanations may address different aspects of a case, and they may not be commensurate;
-Third, studies may be competing and commensurate, and they may simply disagree on the facts of the case (George & Bennett 2005: 222).

Largely these problems do not apply here due to the fact that the focus of this thesis (subject and approach) is rather unique. To the best of the author's knowledge, this study represents a new contribution to study in this area as there are no qualitative studies on the informal politics of EU climate and energy policy.

Nevertheless, suggestions for handling the aforementioned problems, such as identifying and addressing factual errors and identifying additional testable and observable implications of process-tracing, are taken into account in this thesis. The limitations of process-tracing do not alter the fact that this method has many advantages for theory development and theory testing, including pointing out or 'revealing' variables that were initially left out of the theoretical approach.

The second weakness of the methodology pointed out here concerns the extent to which this thesis can know how 'ideas' (focal points and norms) affect the depth and speed of an EA. The main problem with this weakness is that there is no comparative material to hand. Furthermore, there are no second or third readings of the packages studied here, only first or early second. Hence this thesis cannot carry out a comparative analysis and draw conclusions in which case(s) (or 'readings') ideas are more or less influential in speeding up the (legislative) decision-making process. This problem is amplified by the fact that the selection of case studies is biased on a lack of variation. What is meant by this is that the case studies selected do not display variation in terms of dossiers 'with informal negotiations' or 'without informal negotiations'.

A counter-argument against this apparent weakness is that this thesis does not aim to show whether or not 'informal politics' takes place. The aim of the thesis is to provide a systematic analysis of what actually happens during the informal decision-making process and how it affects the depth and speed of the EA. Hence the cases in this thesis are selected on the basis of high information content.

In solving the problem of a lack of comparative material, usually an author is forced to reconstruct a plausible account on the basis of what is known as counterfactual comparison i.e. what would happen if X_1 were different? However, this thesis argues that this counterfactual comparison in EU research is only applicable during the so-called 'grand moments' of European integration, e.g. the intergovernmental conferences (IGCs). In the study of EU informal politics it would be impossible to apply counterfactual comparison as one would be lost in selecting the manipulation of the variable of interest while controlling for other variables.

A third weakness relates to the specific focus in this thesis, i.e. on the policy areas of climate & energy. Concerning the analyses of sectoral EU policy fields, Schmidt (1996: 238-41) argues that there is no typical integration process. The course of European integration is highly fragmented, characterised by a sector-specific design of competences at the supranational level and by many differences across sectors in terms of involved actors, their interests, and national institutional features. So some sectoral policies are characterised by the strong impact of supranational factors while others may proceed in a very intergovernmental fashion. In other words: *"There are different degrees of Europeanisation and the energy sector is still at the lower end of this scale"* (Schmidt 1996: 241). This difficulty is, of course, not limited to sectoral studies alone. Hence the focus on climate and energy policy may show idiosyncrasies or somewhat unique patterns of interaction that hinders this thesis from making more general conclusions about the role of ideas in the informal decision-making process.

This deficiency is acknowledged, as my analysis is specific and not generic. The primary aim and the added-value of this thesis is that it provides a fully-fledged explanation of the informal decision-making process in the three main cases of the EU climate and energy policy. At the same time this thesis argues that the bargaining model proposed and tested here provides a general theoretical approach that can be applied to other EU policy areas under co-decision rules.

The bargaining model itself, however, is not without its shortcomings as some variables are not accounted for. These variables include the role of the Commission (who through its legislative proposals sets the tone of the discussions between the Council and Parliament) and enlargement. Yet like any theoretical model formulated and tested in a

scientific work, the bargaining model constitutes a reduction and/or distortion of the complexities of real life and the model can be adapted.

4.6. Chapter conclusions

With the aim of explaining the ‘informal politics of EU energy and climate policy’, this Chapter has elaborated on the application of information-oriented case-study research via process-tracing. In-depth, dense case studies comprising a small set of legislative files in a specific area of EU policy-making allows for a full exploration of the nuances in the (informal) decision-making process that a larger *n* analysis cannot capture. Case-study research generates as much information about the role and influence of informal negotiations as possible and provides a better understanding of the decision-making process in the three climate & energy cases.

Process-tracing is fundamentally a case-based methodology that provides insight on the *context, process, and/or mechanisms* of the decision-making process that is central to this thesis. It is described as detective work as multiple types of data employed for making sense of a large sample of data and can be successfully applied only with good knowledge of the individual cases.

The research in this thesis is carried out according to the method of triangulation. This method combines multiple research methods (in this case, document analysis and interviews) with the aim of overcoming some of the problems that come from applying a single method. A range of primary and secondary (formal and informal) documents are used for tracing changes in the legislative texts during the informal negotiations and comparing the respective bargaining positions of the Three. Comparative document analysis is further applied to study the kinds of ‘discourse’ used by the Three in the decision-making process (starting with the Commission’s legislative proposals) and how these positions shifted (or stayed the same) during the course of the negotiations. Secondary documents were mostly analysed for understanding the context in which the negotiations took place and the legislative outcomes.

Interviews were carried out to fill-in the gaps in the (informal) decision-making process which are not covered in the primary and secondary documents and gain a better insight on the details of the informal negotiations on the relevant legislative texts. Also,

interviews are used in this thesis to either verify or falsify existing claims about factors that have influenced the informal negotiations in the three case-studies.

Finally, some of the weaknesses of the methodological approach applied here have been recognised in this chapter and refuted where possible. Concerning the dispute between those preferring (single) case-study research over cross-case research in a large N analysis and vice versa, this thesis has defended the claim that the case study method is not more prone to 'measurement error' than a more quantitative approach. As will be shown in the subsequent chapters, one of the primary virtues of the case study method is the depth of analysis that it offers.

Chapter 5: Of Interests & Ideas - Fast-tracking the Climate & Energy Package (2008)

This chapter is the first of three case studies designed to test the bargaining model as formulated in Chapter 3. The aim of this case study is to show that a cooperative agreement on the Climate & Energy Package between the Three was made possible through the use of 'ideas', i.e. focal points and norms. The principles of flexibility (i.e. taking into account different national circumstances), solidarity (MS undertaking effort in service of common interests), fairness (or equitable treatment) and the consensus norm were instrumental tools in sustaining cooperation and cementing an acceptable compromise solution among a set of players with divergent interests. This chapter argues that these ideas were able to play an instrumental role in the informal negotiations because they matched with the interests of the Member States ('cost-effectiveness') and the Parliament ('environmental-effectiveness' and 'green leader Europe'). In this way ideas facilitated the interaction between the Three, alleviating coordination problems and allowed them to reach the collective goal of adopting the extremely complex package via an early agreement (EA) in less than 11 months.

5.1. Introduction

The Climate & Energy Package amounts to a major overhaul of the EU climate policy and constitutes a remarkable resurrection of hierarchical and harmonised European regulation (Lacasta *et al.* 2010: 113). The individual elements of the package together regulate the whole of the EU's GHG emissions, determine the division of the reduction efforts between emission and non-emission trading sectors as well as set the framework for how best to create synergy in achieving the objectives set by the European Council for 2020 (Oberthuer & Pallemarts 2010: 47).

The Commission proposed the Climate & Energy Package on 23 January 2008. The package comprises four pieces of complementary legislation which were intended to deliver on the '20-20-20 targets' (see table 5.2 below). After the Commission presented its proposals, the Three pushed the package through the legislative process in less than 11 months, with a political agreement reached in the European Council on 11-12 December 2008 and a first-reading agreement adopted by the Parliament on 17 December 2008.

- Proposal for a Directive amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading system of the Community, 2008/0013(COD);
- Proposal for a Decision on the effort-sharing among Member States of the 20% reduction target by 2020 with respect to the sectors not covered by the EU ETS, 2008/0014 (COD);
- Proposal for a Directive on carbon capture and storage, amending Council Directives 85/337/EEC, 96/61/EC, Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC and Regulation No 1013/2006, 2008/0015(COD);
- Proposal for a Directive repealing Directive 2003/30/EC on the promotion of the use of energy from renewable sources, 2008/0016(COD).

Table 5.1: *The Climate & Energy Package legislative proposals.*

Several contributions to the literature elaborate extensively on the many aspects of the package (e.g. Boasson & Wettestad 2013; Jordan & Rayner 2010; Helm 2009). Regarding the Renewables Directive, specifically, Muengersdorff (2009) has written an extensive study of how the interests and ideas of the Three shaped the final policy outcome. Including the Renewables Directive into the analysis would also have brought in unwanted variables in the informal bargaining model concerning intra-institutional coordination as the Parliament's ITRE and ENVI decided to share the lead on this proposal in accordance with Rule 47 of the Parliament's Rules of Procedure ('Enhanced Cooperation between Committees'). For these reasons, and given the space constraints here, this chapter focuses on the decision-making process on the Package in the other three legislative measures: ETS, Effort-Sharing and CCS.

A 'thin' rational-choice approach would explain the decision-making process on the package in terms of logrolling (i.e. the Council and Parliament trading support for their preferred issues to the exchange of loss in some issues for benefits in others) and via interest-based (i.e. case-specific *ad hoc*) coalitions between Eastern and Western Member States.

Yet strategic interaction between multiple actors includes other aspects that are characteristic of EU (informal) bargaining processes, e.g. the interaction between an actor and its environment in conditions of uncertainty. The thin RCI-approach cannot explain these aspects of legislative decision-making. Related to the Climate & Energy Package, thin RCI cannot explain the establishment of an EA through after only eleven months of legislative work on an extremely complex and politically salient package of measures. The decision-making process on this package was characterised by extreme circumstances of ambiguity and uncertainty emanating from the legislators' environment. On the one hand,

the seminal Copenhagen Conference on climate change in December 2009 led several Member States and the Parliament to urge the EU to strengthen its overall 'green leadership' ambitions. On the other hand, due to concerns with the competitiveness of EU industry in the wake of the outbreak of the global economic and financial crisis, the option of defection loomed on the horizon as some Member States questioned the package as a whole and suggested to stall the negotiations.

This chapter argues that a cooperative agreement on this package could not have emerged so quickly had it been based solely on the self-interested behaviour of the Council and the Parliament. Instead, it is argued that a thick rational choice approach that incorporates ideas (norms and focal points) in interest-based bargaining is much better equipped to explain the 'depth' and 'speed' of the 'accelerated' EA on the package.

Before discussing the decision-making process between the Three in the ETS, Effort-Sharing and CCS, this chapter introduces the Commission proposals in section 5.2 and the initial bargaining positions of the Council and Parliament in section 5.3. Section 5.4 provides an overview of the results of the overall package as agreed upon during a series of trilogue meetings. Section 5.4.4 argues that explaining the compromise reached between the Three in the trilogues cannot be explained exclusively through the prism of interest-based bargaining.

Due to the extensiveness of the package and space constraints here, section 5.5 provides an in-depth analysis of two major issues agreed upon during the trilogues, namely:

- *The auctioning principle in the ETS;*
- *The flexibility mechanisms in Effort-Sharing.*

The aim of analysing the informal bargaining process is to show that flexibility, fairness and solidarity served as key focal points which facilitated the logrolling process hence the establishment of a cooperative agreement in a collective action problem. The flexibility principle was able to serve as a focal point and promote an agreement and signal commitments because it was in line with the divergent interests of the Council and the Parliament and facilitated the political compromise established through informal bargaining.

As proposed in the bargaining model, several ideas are found to have structured and shaped the logrolling process between the Three, including the aforementioned focal points and norms. Regarding norms, the consensus-building strategy of the French EU Presidency

was elemental in averting gridlock and keeping the momentum in the legislative negotiations. External influences, like the COP talks on the one hand, and the outbreak of the global economic and financial crisis on the other hand, created time pressure and strengthened the role and influence of the ideas in defining a cooperative solution.

Section 5.6 summarises the main arguments presented in the chapter, reflects on what this case study tells us about the bargaining model that is central to this thesis and which variables require further research.

5.2. The Commission proposals

Much was at stake for the Commission when it presented its ambitious proposals in January 2008. For President Barroso, who was searching for political support for a second term at the helm of the Commission in 2009, the Climate & Energy Package provided a major chance to realise a significant policy result and prove the relevance of the EU to the general public. In his speech to the Parliament on 23 January 2008, therefore, Barroso went out of his way to present the package as a policy initiative of direct relevance to the concerns of EU citizens. In the wake of the failure of ratifying the Constitutional Treaty, Barroso utilised climate change as a crucial element of the new legitimating discourse of European integration.

The work of the European Union is sometimes seen as rather technical. As cut off from daily concerns. Interesting to specialists, but not relevant to people's daily lives. The action we are discussing today proves this theory wrong. The struggle against climate change and the quest for secure, sustainable and competitive energy touches on every European, every day. That is why we can all sense a real shift in attitudes. Europeans want a vision, and a plan of action (Barroso 2008).

Earlier that same month, Barroso claimed that the proposals put forward by the Commission demonstrated the EU's commitment to leadership and a long-term vision for a new Energy Policy for Europe that responds to climate change (Commission 2007/IP/07/29). Due to these reasons and international climate talks looming on the horizon, the Commission was impatient to reach a quick political agreement on new climate and energy policy. Anticipating the extraordinary political salience and technical complexity of the subject at hand, as well as the different preference intensities within and between the Council and Parliament, the Commission presented the climate and energy proposals as a package deal.

The package deal approach allowed for the linkage of issues and helped to resolve conflict and reduce the cost of collective action.

When presenting the package, the Commission proposals built on several ideas expressed by the spring 2007 European Council. The latter had underlined that fairness or 'equitable treatment' should be the guiding principle in agreeing upon new climate and energy legislation. The fairness principle takes into account Member States' different circumstances and the reality that differing levels of prosperity have an impact on Member States' capacity to invest. Next to fairness, the impact assessment accompanying the Package stipulated that the legislative proposals rested on the flexibility principle while pointing out the interest of cost minimization and promoting an international agreement:

- *Assuring the effectiveness of the proposals (via monitoring and compliance mechanisms) for the sake of investor trust as well as showing the EU's seriousness of intent to partners worldwide;*
- *Proposals must be flexible enough to take account of Member States' different starting points and different circumstances (e.g. projected GDP growth, changes in industry and energy sectors);*
- *Cost minimization for protecting the competitive position of EU industry. No Member State should make investments which diverge too far from 0.5% of GDP;*
- *Promoting a comprehensive international agreement to cut greenhouse emissions;*
- *Stimulating technological development, creating a competitive edge in clean energy technologies (Commission 2008/85/3/SEC: 3).*

The sections below briefly introduce the key issues in each of the Commission proposals which were subsequently central to the trilogue discussions. These sections also point out how the Commission explicated the discourse for the policy discussions on the package by proposing certain focal points in line with the (diverging) interests of the Member States.

5.2.1. ETS Proposal

First established in 2003, the ETS is the first large scale international emissions trading system in the field of the environment. The proposal that is part of the Climate & Energy Package sought to amend the 2003 Directive 2003/87/EC and strengthen, expand and improve the functioning of the ETS as one of the most important and cost-effective tools for

achieving the EU's target for reducing greenhouse gas emissions. The ETS is a cap-and-trade system, i.e. there are limits set to the overall level of national emissions but companies are allowed to buy and sell allowances for their GHG emissions within those limits. It is based on the idea that all large point-source emitters of CO₂ must have allowances equivalent to their annual emissions (Boasson & Wettestad 2013: 53)⁷¹. The revised ETS Directive covers 40% of the EU's greenhouse gas emissions while delivering 60% of the overall emission reductions to be achieved by the EU within the overarching 20% reduction target established by the European Council.

Significant changes were proposed by the Commission to reinforce and update the ETS. First, a single, EU-wide cap and the allocation of allowances on the basis of fully harmonised rules for the period 2013-2020 were put forward. This single European market for carbon should replace the conglomerate of 27 national emission schemes⁷².

Second, the Commission proposed to establish auctioning as the main principle for all allocation of allowances. The Commission proposal argued that auctioning best ensures the efficiency of the ETS as well as the transparency and simplicity of the system. Regarding auctioning, the Commission proposal introduced a key differentiation between installations:

- *Full auctioning for power producing sector from 2013 onwards;*
- *A transitional system for energy-intensive industry and other sectors covered by the ETS (free allowances from 80% in 2013 to zero in 2020);*
- *'Carbon leakage'⁷³: 100% free allowances for certain EU industries and sub-sectors subject to international competition (conditional upon certain criteria and in case of failure to reach a post-Kyoto international agreement)⁷⁴.*

Related to auctioning, the proposal suggested a so-called solidarity mechanism. More specifically, it foresaw that 90% of the total quantity of allowances to be auctioned be distributed according to the relative share of 2005 emissions in the EU ETS. The choice of 2005 was presented because it was the only year for which reliable verified emission data at

⁷¹ Around 11.000 installations in the power-producing and power-consuming/energy intensive industries such as refineries, steel and cement are targeted (Commission 769/2000).

⁷² Also, an EU-wide cap provides a long-term perspective and increased predictability, which is required for long-term investments in efficient abatement.

⁷³ Carbon leakage refers to the relocation of production to third countries with a less strict climate policy leading to increased GHG emissions in these countries.

⁷⁴ The Commission proposed that such sub-sectors ought to be identified by mid-2010 with a re-assessment carried out in mid-2011, referring to any new international or sectoral climate agreement that might then be in place.

Member State level for both the ETS sectors and sectors not covered by the ETS were available. It thus configured the most recent, complete and adequate starting point on which 2020 scenarios could be built, including assessment of cost-effective reduction potentials (Commission 2008/SEC 85/3: 5).

For reasons of fairness and solidarity, and taking into account national circumstances among the Member States, 10% of the total quantity of allowances to be auctioned was to be redistributed from Member States with an average level of income per head that is more than 20% above the EU average (Commission 2008/16: 8). Concerning the use of proceeds from auctioning, and in line with the precautionary principle laid down in Art. 174(2) TEC, the Commission argued that the Member States should dedicate at least 20 percent of their auctioning revenues to measures that would contribute to the process of adjustment to a carbon-free economy in line with the 20-20-20 targets.

Third, relating to access to external credits, the proposal argued that the ETS should be able to link to other emission trading systems in third countries. No new Clean Development Mechanism (CDM) or Joint Implementation (JI) credits were to enter the system (only those banked from the 2008-2012 ETS phase) unless a new global climate agreement and a move towards the more ambitious 30% EU goal took place. In case a future international agreement on climate change was reached, CDM credits would only be accepted in the EU ETS from third countries that had ratified this agreement.

5.2.2. Effort-Sharing Proposal (Non-ETS)

The Commission proposal on effort-sharing introduced a shift in terminology from the prior stand-alone policy established between 1997 and 1998, called 'burden sharing', to 'effort-sharing'. The shift in the Commission proposals from 'sharing the burden' to 'sharing the effort' pointed to a much more positive approach in tackling climate change. 'Burden sharing' implied action on climate change in terms of costs and had been used as a term to describe how shares of GHG emissions reduction might be allocated to countries (Stephenson 2008: 2). While in practice meaning the same thing, 'effort-sharing' was designed to have more positive connotations. Reflecting the potential and opportunities that the carbon market created in the 2000s via the ETS, effort-sharing invited Member States to

consider action in climate change as an opportunity, for example, for jobs, for innovation development and clean growth (Lacasta *et al.* 2010: 103). While the EU has not defined ‘effort-sharing’ specifically, Stephenson (2008) has made an attempt to interpret the term in relation to the contexts in which it appears within the proposed legislation. Highlighting solidarity among Member States and fairness in sharing efforts needed to meet a common commitment, understanding of the meaning of ‘effort sharing’ in the EU might be:

A vigorous or determined attempt to meet a common commitment or target which is divided equitably among EU Member States (Stephenson 2008: 3).

Thus EU effort-sharing carries its own context, including ideas of solidarity and fairness.

The proposed Decision was designed to fit the contribution of Member States to meeting the Community’s greenhouse gas emission reduction commitment from 2013 to 2020 for emissions from sources not covered by the ETS. These sectors cover mostly buildings, transport, agriculture and waste. The non-ETS sector is composed of a large number of smaller emitters, which are the source of some 60% of EU GHG emissions. The Decision set out the scope for relevant, non-ETS sectors. Together with the ETS, the calculation of the overall target of 20% emissions reduction by 2020 is displayed in Figure 5.1 below.

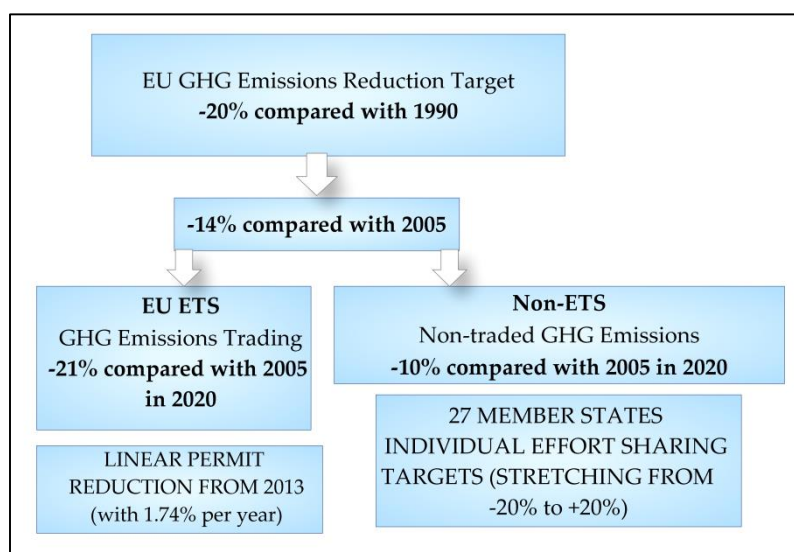


Figure 5.1: EU Unilateral Emissions Reduction Target 20% by 2020. (Source: Commission 2008/ SEC 85/3).

The main set-up of effort-sharing in the (10%) non-ETS target apportioned between Member States is based on their national emissions in 2005 then weighted by their GDP/capita. Reflecting ideas of fairness or equitable treatment, the consequence of this formulation is that countries with relatively low per capita GDP and thus high GDP growth expectations may increase their greenhouse emissions compared to 2005.

Member States with a GDP per capita below the EU average would need to reduce less than the EU average, or, in some cases, would even be allowed to increase their emissions above 2005 levels in the non-ETS sectors. Member States with a GDP per capita above the EU average would need to reduce more than the EU average. Nevertheless, boundaries of +20% and -20% were established in each case for those Member States with respectively the lowest and the highest GDP per capita (see Figure 5.2).

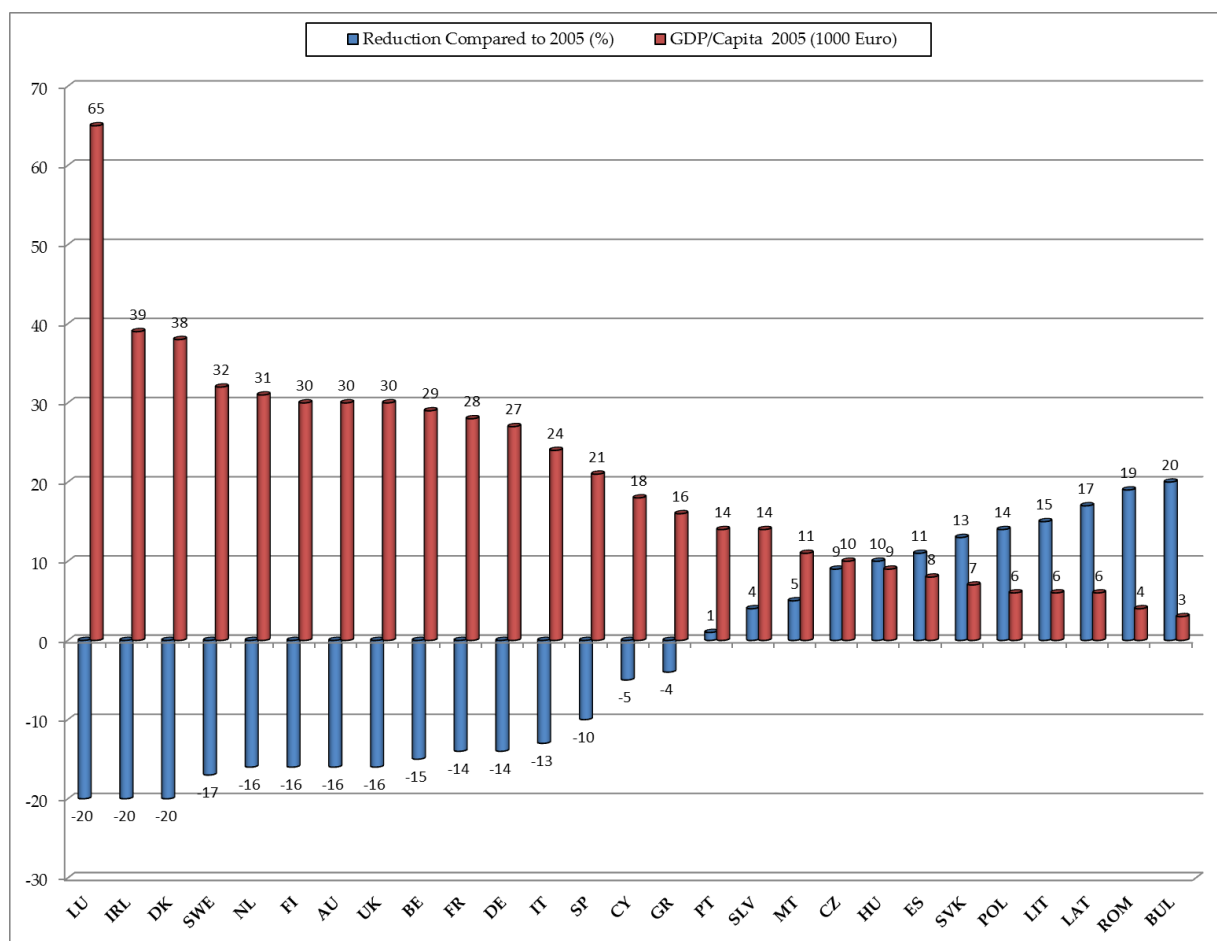


Figure 5.2: 2020 GHG emission targets of EU 27 and GDP per capita.

(Source : Lacasta et al. 2010: 105 ; Commission 2008/ SEC 85/3: 21).

Whereas countries with a low GDP per capita would thus be allowed to emit more than they did in 2005 in the non-ETS sectors, ensuring that their short-term higher GDP growth expectations and hence growing emissions trajectory can be accommodated, they would still need to limit their emissions to the cap. With this approach, and focusing on the cost-effectiveness of the proposal, the Commission estimated that overall costs for implementing the package would increase from 0.58% to 0.61% of GDP, but cost reductions in countries with relatively low GDP per capita would be significant.

Without a doubt, the set-up of the revised effort-sharing reflects the increasing economic and social differences across the EU in the wake of the big-bang enlargement from 15 to 27 Member States. Fortifying the demand for fairness, the Commission contemplated specific policy options to address differences and ensure a fairer distribution of efforts among Member States (Lacasta *et al.* 2010: 99).

Of central importance to the effort-sharing proposal is the focus on how much flexibility the Member States would have in achieving their annual reduction in GHG emission targets from 2013 to 2020. In line with Member States' interest in cost-effectiveness of any new measures, the Commission proposal included three kinds of flexibility:

- *A carry-forward clause (MS may carry forward or borrow from the following year a quantity equal to 2% of its GHG emission allocation for that year);*
- *Carry-over (MS whose emissions are below the annual target could carry over the excess emission reductions to the subsequent years);*
- *Use of international credits from project-based flexible mechanisms of the Kyoto Protocol, the CDM/JI (Commission proposes an annual limit for the use of credits defined as the equivalent of the 3% of each MS' individual 2005 emissions in the non-ETS) (Recitals 8, 13, Art. 4(4))⁷⁵.*

5.2.3. Carbon Capture Storage proposal

The CCS policy consisted of a Directive for the storage of CO₂ complemented by financial mechanisms to support specific pilot projects. The proposal aimed at establishing harmonised rules for the safe storage of CO₂ in geological formations. With regard to

⁷⁵ As explained by Environment Commissioner Dimas during a Parliamentary debate on the package on 4 December 2008, the Commission set the annual limit for CDM's to 3% because in that way it hoped to achieve a balance between flexibility and emission reduction within the EU.

developing CCS technology, the Commission's proposal was twofold⁷⁶. The first and main objective was the regulation of CO₂ storage and the removal of barriers in existing legislation to storage in terms of licensing (e.g. attribution of storage permits), risk management and liability. Regarding the development of clean energy technology, a second accompanying Communication was put forward on the realisation and funding of 10-12 CCS demonstration projects by 2015 (Commission 2008/13).

Concerning the issue of funding of early demonstration projects, the Commission had expected that the European energy business involved in power generation from fossil fuels were expected to make significant commitments of their own resources in the interest of early demonstration. Public funds might also be needed for some projects, albeit for a limited time of the demonstration period and at levels depending on the future development of ETS prices (Commission 2008/13: 8).

5.2.4. Interests & ideas in the Commission proposals

In summary, in its policy proposals the Commission acted as an entrepreneur by developing substantive policy solutions as well by framing these solutions with reference to focal points. Solidarity, fairness and flexibility served as focal points that defined cooperative solutions in the package of measures which were in line with Member States' interests in the cost-effectiveness of the proposed measures (including their different economic circumstances and/or their specific energy mix).

Regarding interests and focal points, the Commission emphasised the solidarity principle in the ETS, suggesting a redistribution of allowances for the sake of the overall EU emission reduction target of 20%. In the effort-sharing proposal, the Commission linked flexibility to cost-effectiveness and fairness to an equitable distribution of efforts among Member States. The funding of CCS demonstration projects was related to the need for the development of clean energy technology hereby strengthening the EU's leading role as a leader in climate change.

⁷⁶ CCS is a means of mitigating climate change, for example for countries which use coal as an energy source. It consists of the capture of carbon dioxide (CO₂) from industrial installations, its transport to a storage site and its injection into a suitable geological formation for the purpose of permanent storage.

Table 5.2 below summarises the main issues, interests and focal points in the Commission proposals that were central to the discussion between the Three in the subsequent negotiations.

<i>The Climate & Energy proposals</i>			
<i>Proposal</i>	<i>Key issues</i>	<i>Interests</i>	<i>Focal points</i>
ETS	-Cap setting and harmonization measures; -Auctioning as main principle for allocation of emission allowances (+ use of proceeds); -No new CDM/JI credits for 2013-2020 period.	-Cost-effectiveness.	-Solidarity mechanism.
Effort-sharing	-CDM/JI credits issue (3% of each MS' individual 2005 emissions – 24% for 2013-2020); -Sectors not covered (e.g. forestry, maritime shipping).	-Cost-effectiveness.	-Effort-sharing (from 'burden sharing'); -Flexibility principle; -Fairness /equitable treatment.
CCS	-Regulation of CO ₂ storage, licensing, risk management and liability issues; -Funding of 10-12 CCS demonstration projects by 2015.	-'Green leadership Europe'; -Funding early demonstration projects.	

Table 5.2: Key issues, interests and focal points in the Climate & Energy proposals.

5.3. The bargaining position on the package

<i>Actors</i>	<i>Formal EU rules</i>	<i>Timeframe</i>
-Environment Council (ENV) / French EU Presidency - 1 st reading	Arts. 95, 175(1), 251 TEC.	January – December 2008 (Trilogue negotiations were held from early November until mid-December 2008, briefly after which the package was politically endorsed by the European Council and the Parliament. The package was adopted in April 2009).
-Parliament (ENVI Committee)		
-Commission (DG ENV)		

Table 5.3: Actors, rules and timeframe of the negotiations.

In the context of international events like the COP-talks in Poznań (2008) and the seminal climate conference in Copenhagen (2009), time for negotiating the Climate & Energy Package was very tight. Hence discussions on the various aspects of the package within and between the Council and Parliament started as soon as February 2008, shortly after the Commission had published its proposals in early January. In July and September and at the beginning of October, Coreper prepared for the start of discussions with the Parliament once the Parliamentary Committees had stated their position with a view to reaching an agreement at first-reading by the end of the year (Council 14395/2008: 2). More specifically, the Council replied rapidly to the Parliament's amendments on the legislative package in June/July and October 2008.

The Slovenian Presidency in the first half of 2008 began the examination and discussion of the texts in working parties, Coreper and Council and established substantial progress on the discussions concerning the Renewables Directive. Yet the majority of the package (ETS, Effort-Sharing and CCS) was discussed and agreed upon under the French EU Presidency in the second half of 2008. In April/May 2008, i.e. well-before France had formally taken over the EU Presidency, it was decided 'off-the-record' to get the package adopted at the December 2008 European Council (Boasson & Wettestad 2013: 48).

By early October, discussions had led to the emergence of the main bargaining position of both the Council and the Parliament. These positions are described in sections 5.3.1 and 5.3.2 in terms of interests and the ideas used to promote cooperative efforts. The sections below point out that the Council and Parliament emphasised different ideas in the run-up to the trilogue negotiations.

5.3.1. The Council

The Climate & Energy Package constituted one of the top priorities of the French EU Presidency. At the start of his term at the helm of the Union, French President Sarkozy insisted on the absolute priority of reaching an EA on the Climate & Energy Package in a

speech to the Parliament⁷⁷. This is also highlighted in the French EU Presidency Work programme:

The Presidency will commit itself, in accordance with the mandate from the European Council of March 2008⁷⁸, to drawing up an agreement by the end of the year on the proposals contained in the “climate/energy” package, which constitute a sound basis for an ambitious European policy to combat climate change and the transition of the European economy to an economy using the minimum of carbon. Reaching an agreement by the end of 2008 on the “climate/energy” package addresses a crucial issue for the European Union namely that of reinforcing its driving role and credibility in international negotiations on climate change. Building on the momentum created in Bali, in December 2009 the European Union will steer discussions in the Copenhagen Conference on climate change post 2012 to promote an ambitious comprehensive and global agreement on climate change, which meets the aim of limiting the rise in the average global temperature to a maximum of 2°C above pre-industrial levels by 2050. The Poznań Conference in December 2008 will represent an important stage during which real negotiations must be initiated in order to put in place the necessary conditions for the success of negotiations in Copenhagen in 2009 (French Presidency of the Council of the European Union 2008: 5-6).

Next to equipping the EU as a green leader in international climate negotiations, another source of (time) pressure on the French Presidency to reach an agreement before the end of 2008 was the fact that the Czech Republic, its successor in the EU-chair in the first half of 2009, had expressed concerns about the economic sustainability of the package (Vivet 2010: 7). Combined with the realization that the success of its Presidency would be judged primarily on the rapid adoption of the package, France invested enormous political capital and energy into crafting an EA that was acceptable to the other Member States and the Parliament.

Interest-based divisions and/or coalitions in the Council presented themselves at the beginning of the French Presidency as a major problem for the quick adoption of the package. While not rejecting the objectives of the package, CEECs such as Poland, Romania, Hungary and Slovakia feared that the package could slow their economic growth as they were still in a transitory period and largely relied on fossil fuels. Seven CEECs (Hungary,

⁷⁷ What also needs to be taken into account here is that there was a convergence between the European climate package and the domestic environment agenda of President Sarkozy. The European level was thus a way of legitimising and pursuing Sarkozy's domestic agenda (Lequesne & Rozenberg 2009: 36-7).

⁷⁸ The March 2008 European Council had decided to established agreement on basic principles and the timeframe of the package.

Bulgaria, Romania, Slovakia and the Baltic States) formally expressed their concerns about this matter by drafting a joint letter on 8 June 2008⁷⁹. Out of economic considerations, a majority of the CEECs asked for derogation clauses (in the shape of transitory periods or free CO₂ quotas) for their most significant electric power plants as well as a greater scope to spread reduction efforts between sectors covered by the ETS and those currently outside its scope (non-ETS) (Agence Europe 29 February 2008).

Second, concerning the Commission's choice of 2005 as the base year against which GHG emissions reductions and increases in renewable energy shares were presented, the aforementioned CEECs expressed serious protest that this baseline did not adequately take into account Member States' earlier efforts to reduce emissions. In contrast to the differentiated targets proposed by the Commission, these CEECs proposed to use 1990 as a baseline and establish economy-wide flat rate targets for each Member State of minus 18% below their respective Kyoto targets (Lacasta *et al.* 2010: 105). These issues were discussed at some length in the Council between May-June 2008 and the protest underlined the strong opposition to the package and helped the CEECs to obtain concessions in the ETS part of the package (*ibid.*)⁸⁰.

Finally, regarding the CEECs, Lithuania expressed specific concerns about energy security. A reduction of GHG emissions on top of the planned closure of its Ignalina nuclear power plant would make it even more dependent on Russia. In a gas conflict with Ukraine in 2006 Russia had proven that it was not afraid to use energy security as a bargaining tool in its relations with near neighbours (see Chapters 2 and 7).

Concerned with the consequences of the package for industry (particularly for its car and iron and steel industries), Germany highlighted the situation of energy-intensive industries and the possibility of global "carbon leakage" if these industries were not guaranteed free CO₂ quotas. German Environment Minister Gabriel wanted criteria for identifying vulnerable sectors and options for safeguarding their competitiveness by 2010 (ENDS Europe 4 July 2008).

Concerning the use of external credits in reaching the effort-sharing targets, Council members such as the UK, Spain and Austria called for a greater use of carbon credits from

⁷⁹ Author copy of a letter from 7 energy ministers to Energy Commissioner Piebalgs, 8 June 2008.

⁸⁰ This in the form of an increased share of auctioning rights being granted to Member States with 2005 emissions already below the overall minus 20% target for 2020.

Kyoto's CDM and JI flexible mechanisms to help Member States meet their reduction targets. Regarding the issue of the degree of flexibility offered to each of the Member States in reaching the targets of the package, Sweden suggested that cuts from sectors not included in the ETS (transport, housing, agriculture and waste) could count towards their renewable targets (Lequesne & Rozenberg 2009: 38).

Overall, the environment ministers called for greater flexibility in the 2020 GHG emissions reduction target (ENDS Europe 3 March 2008). The call for more flexibility reflected concerns among the Member State governments about meeting their respective commitments in a cost-efficient manner.

Under time pressure and determined to avoid negotiating the package in the Council along the lines of an EU split into eastern and western blocks, the French Presidency utilised the focal points initiated by the Commission in the negotiation-process. In trying to define cooperative solutions in line with the diverging interests of the Member States, the Presidency actively referred to the flexibility and solidarity principles as well as fairness in steering the debate, maintaining momentum and coordinating the expectations⁸¹.

Rather than renegotiating the reference year for GHG emissions reduction by 2020, with some CEECs wanting to use 1990 rather than 2005, the focal points of flexibility and solidarity were instrumental in serving the interest of the Member States and keeping the momentum in the decision-making process going. Flexibility in moving from the 20% target to the target of 30% and solidarity between Member States with high GDPs towards those with low GDPs in sharing out the efforts to be made in the non-ETS sectors, would reduce the cost burden for some Member States. Greater flexibility would mean that account could be taken of the efforts already made since 1990 by the CEECs to meet the Kyoto targets and help could be given to those countries heavily dependent on coal (e.g. Poland) to bear the costs of restructuring needed to move to a low carbon economy (Agence Europe 5 July 2008). In implicit support for these suggestions, Member States offered broad backing for the Commission proposal to allocate 10% of the ETS carbon allowances auctioned by EU governments to help the EU's poorer member countries.

⁸¹ Interview French official, 24 April 2013, Brussels.

During the Environment Council meeting of 20 October, the French EU Presidency produced a progress report on the package stating the issues on which the Council had reached an agreement prior to the negotiations with the Parliament. These issues were:

- i. **Measures applicable to the energy sector within the EU ETS:** discussions showed that an auctioning rate of 100 % in the energy sector was accepted by most delegations. However some specific situations might justify derogations of limited duration and extent, in particular because of insufficient integration of the energy sector at European level;
- ii. **Pre-allocation of the income from auctions:** the discussion showed that several Member States thought that the use of the income from auctions was a matter for national competence and that 'merely' voluntary commitments could be given consideration;
- iii. **Financing capture and storage of CO₂:** the Council was prepared to examine the possibilities of combining several options, including national and Community financing, to supplement the contribution of the private sector;
- iv. **The risk of "carbon leakage"** (i.e. relocation of energy-intensive undertakings outside the EU), and the measures to be taken to protect both the environment and the competitiveness of industry in Europe: the Council showed its determination to provide clear answers to the problems which might arise from "carbon leakage". In this connection, it examined the need to lay down quantitative and qualitative criteria within appropriate periods of time, and arrangements for the sectors which were the most exposed to world competition;
- v. **Greater flexibility in national objectives regarding effort-sharing:** a very large number of Member States underlined the need for greater flexibility overall in the Effort-Sharing Decision. In this context, there was much support for increasing the 2% carry-over rate and allowing the transfer of part of the emissions entitlement from one Member State to another;
- vi. **ETS/Effort-Sharing:** Council support for a co-decision procedure on the question of adjustment of the ETS and the Effort-Sharing in the event of an international agreement (Source: Council 14395/2008; Council 13857/2008).

The derogations in the ETS (issue i) concerned a concession to the CEECs and their protests against taking 2005 as a base year in GHG emission reductions. It reflected the idea of equitable treatment of the transitory economies of the CEECs dependent on fossil fuels. Concerning the use of income from auctioning and financing CCS (issues ii and iii), the Council proved to be unsympathetic towards greater solidarity for stimulating a competitive edge in clean energy. In contrast, and in line with Member States' interests in cost-effectiveness, flexibility in carbon leakage (issue iv) and greater flexibility in effort-sharing (issue v) proved to be the guiding focal point in the Council negotiations. Greater flexibility in terms of reducing costs for the Member States proved to be instrumental in reaching a consensus prior to the trilogue negotiations.

Major challenges posed by the financial and economic crisis and accompanying (concerted) opposition from the industry sector against both governments and MEPs seemed to lead several Member States to push for the further strengthening of the flexibility measures in the package. Due to the likely impact of the financial crisis on the real economy and the competitiveness of EU industry, Italy even called the package as a whole into question and suggested in early October a 'pause for thought' and the drafting of a new timetable. Germany, followed by the Czech Republic, underlined the need for taking industrial interests into consideration (Agence Europe 11 October 2008).

Helping to ease the concerns of some of the most reluctant Member States (e.g. CEECs, Germany and Italy), the French EU Presidency announced an unprecedented informal procedural move during the October 2008 European Council meeting. All crucial decisions on the package would be taken via unanimity (not QMV) at the European Council level (European Council 2008: 6). On the formal level, and in contrast to QMV, the unanimity rule would provide much more leverage to the Member States and provide assurances that all of their considerations would be taken into account.

Yet it is argued here that resorting to unanimity served a different purpose for the EU Presidency. The European Council takes decisions according to the consensus norm, in accordance with Article 15(4) (TEU) of the Lisbon Treaty. The temporary suspension of QMV by the French Presidency in favour of unanimity voting served the norm of consensus-building:

L'unanimité stricte a tendance à encourager le chantage, tandis que le 'consensus building', au sens d'engagement collectif à rechercher l'unanimité, invite les parties à faire leurs meilleurs efforts. C'est exactement ce que recherche la présidence, en octobre 2008 à Bruxelles (Vivet 2010 : 12).

In the name of the 'collective commitment to seek unanimity', the French Presidency refused to acknowledge alliances such as the one in June 2008 alliance of CEECs complaining against the possible consequences of the package for their economic growth. Committed to finding the most difficult compromises through consensus-building, the Presidency focused on taking into consideration the interests of all and assembling opponents around the common goal of the quick adoption of the package. For example, in solving the

aforementioned problem of the planned closure of the Ignalina nuclear power plant in Lithuania, a French official involved in the negotiations stated the following:

«Nous avons passé beaucoup de temps à résoudre le cas de la centrale nucléaire lituanienne », affirme-t-elle pour donner un exemple de son souci de prendre en compte les intérêts de chacun. Elle aura visé, tout au long de la négociation, l'accord réel de tous. Ce qui est le contraire de la majorité qualifiée (ibid.).

In sum, in both the ETS and Effort-Sharing measures, the focal point of flexibility allowed for agreeing on an operational scheme that reflected a collective EU perspective yet incorporated key facets of Member States' different, national circumstances (e.g. use of certain energy sources, energy mix, etc.). While focused on the setting of EU-level targets, flexibility linked to cost-effectiveness (or 'cost-minimization') reassured Member States' concerns about the impact of the package on competitiveness, industry and jobs. Solidarity, on the other hand, proved to be secondary to flexibility in the Council as Member States were very cautious in committing any funding for the strengthening of the EU's competitive edge in clean energy technologies.

By informally suspending the normal co-decision procedure and committing itself to the norm of consensus-seeking, the French Presidency showed that it took all of the Member States' interests into consideration while inviting these to make a committed effort in trying to settle the most difficult compromises.

5.3.2. The Parliament

The majority of the MEPS in the ENVI Committee were committed to an EA because they feared that the Czech EU Presidency in the first half of 2009 would thwart any possibility of adopting a 'green' Climate & Energy package. The prospect of continuing negotiations with the Council throughout 2009 would also threaten agreement on the package before the parliamentary elections in June 2009. Added to these concerns, and in the context of the worsening economic situation, ENVI feared that the hostility to the package emanating from some Member States would only grow⁸².

⁸² Interview Parliament official, 18 June 2010, Brussels; Interview Parliament official 20 May 2010.

In clear support of an accelerated first reading procedure, the first debates in the Parliament on the package took place in late February after which rapporteurs were appointed relatively quickly (see table 5.4).

<i>Legislative proposal</i>	<i>Committee responsible</i>	<i>Rapporteur</i>	<i>Date appointed</i>	<i>Committee vote</i>	<i>Committee report plenary 1st read.</i>
ETS	ENVI	Avril Doyle (EPP-IRL)	5 Mar. 2008	7 Oct. 2008 44(+), 20(-), 1 abstention	7 Oct. 2008
Effort-sharing	ENVI	Satu Hassi (Greens-FI)	27 Feb. 2008	7 Oct. 2008 65(+), 1 abstention	15 Oct. 2008
CCS	ENVI	Chris Davies (ALDE-UK)	21 Feb. 2008	7 Oct. 2008 54(+), 1(-), 6 abstentions	16 Oct. 2008

Table 5.4: Parliament rapporteurs and reports for the Climate & Energy Package.

(Source: Legislative Observatory of the European Parliament).

In May the Parliament had a first formal exchange of views on different aspects of the ETS, Effort-Sharing and the CCS with the first Committee reports following in June and July. The Parliament's stance on the package overall became increasingly clear ahead of the Committee votes, which took place from early till mid-October.

The MEPs in charge of preparing the parliamentary reports played a tremendous role in convincing their counterparts to vote for the legislative proposals (Kérébel 2009a). In comparison with the Commission proposals and the Council suggestions for what it considered feasible, the amendments proposed by the rapporteurs were mainly oriented towards strengthening the environmental and solidarity dimensions of the package⁸³. Some of the main amendments of the Parliament focused on more stringent ETS targets, stricter use of external credits in Effort-Sharing and a stronger emphasis on developing clean energy technology via CCS funding projects. According to a parliamentary official, the idea behind the Parliament taking a tough negotiating stance towards the Council was that this would increase its chances of arriving at a policy outcome somewhere in the 'middle-of-the-road'⁸⁴.

With regard to the ETS, the ENVI Committee gave support to the basic reformed ETS architecture proposed by the Commission:

⁸³ Interview Parliament official, 25 April 2013, Brussels; Interview Parliament official, 15 June 2012, Brussels.

⁸⁴ Interview Parliament official, 25 April 2013, Brussels.

- *Centralisation of the cap-setting;*
- *The move to more auctioning (immediate for the electricity production sector, gradually to apply to all industrial sectors by 2020);*
- *A restrictive line on the use of external credits (CDM/JI credits);*
- *Making sustainability criteria transparent and meaningful.*

At the same time, ENVI proposed a 100% compulsory pre-allocation of auctioning revenues, at least 50% of which to be used for an international fund for emissions reduction, aid to adaptation and to combatting deforestation in developing countries which have ratified the international agreement, with the rest earmarked for a range of measures to combat climate change and support energy transition (Council 15713/2008: 5)⁸⁵. By comparison, the Commission had proposed only a non-binding 20% ring-fencing of revenues, a suggestion rejected straightaway by the Member States.

On effort-sharing, the ENVI Committee took an even more ambitious stance. Independently of a conclusion on an international agreement, rapporteur Hassi called on Member States to prepare, as of now, for the -30% for 2020, to reduce the EU emissions level by at least 50% by 2035, and by 60 to 80% by 2050. Member States exceeding their targets should be fined.

Concerning limitations to the flexibility mechanisms, Hassi suggested much tougher restrictions in several areas. The carry-forward clause through which Member States could carry forward or borrow from the following year a quantity of its GHG emission allocation was reduced from 2% to 1%. Second, concerning EU governments' access to international carbon credits, i.e. on the use of the CDM/JI credits, Hassi suggested decreasing the use of international offsets from the Commission's proposed total of 3% annual to 8% of 2005 emissions for the whole period 2013-2020. The Hassi Report preferred increasing internal flexibility measures through quota trading between Member States within the EU to outsourcing of emissions via CDM/JI credits to third countries. This argument was underpinned in terms of environmental incentives as well as cost-benefits:

The large use of JI/CDM prevents the EU from benefiting from reducing the use of fossil fuels, resulting in improved energy security and air quality. Achieving the reduction within the EU provides a much stronger incentive for innovation. The value of these co-

⁸⁵ Revenues not used, including all revenues from auctioning, shall be used to address climate change issues such as the development of renewable energy, increase energy efficiency and finance research and development.

benefits increases when the oil price goes up. The Commission analysis of 50 billion € saved on our fossil fuel energy bill in 2020 was based on 60 \$/barrel, whereas we have already passed 120 \$/ barrel and predictions go as far as suggesting a price of 200 \$/barrel in the next years (European Parliament 15 October 2008a).

For this reason the rapporteur proposed to restrict the quantity as well as the types of CDM/JI offsets. Instead of offsetting EU emissions, and in addition to their mandatory domestic reductions, Member States should be obliged to support the co-financing of climate protection investments in developing countries.

The environment dimension featured also prominently in the Davies Report on CCS. While providing no short term economic benefit, as they inevitably increase the price of electricity generated by coal, the sole purpose of CCS techniques is explained as preventing the release of CO₂ emissions and helping the fight against global warming. With a reference to the interest of the Parliament in exercising international leadership, the Report stated that:

If the EU does not set an example by encouraging rapid development of the technology there will be no hope of persuading India and China to adopt its use or to persuade these countries that it should be a requirement of a future international agreement on tackling climate change (European Parliament 16 October 2008: 81-2).

Different from the discussions in the Council, which had focused almost entirely on regulatory issues associated with risk management, licensing and liability, rapporteur Davies focused on the broader consideration of how CCS would be financed and commercialised more generally (Chiavari 2010: 160)⁸⁶.

In close cooperation with Avril Doyle, the rapporteur for the ETS Directive, Davies introduced a genuine novelty in the package. This concerned the earmarking of 500 million allowances to help stimulate the construction of up to 12 commercial CCS-demonstration projects by December 2016. These allowances were to be taken from the new entrants' reserve, a special pool of emission rights earmarked for new installations joining the ETS.

In contrast with the Council, also, the ENVI Committee's bargaining position was much more guided by the notion of strengthening the solidarity aspect of the package. For example, regarding the ETS, new Member States such as Poland and Lithuania had specific problems with full auctioning in the electricity sector by 2013. In reply to these problems,

⁸⁶ Interview Parliament official, 15 June 2012, Brussels.

rapporteur Doyle counted on an effort of solidarity. *“This also includes the proposals for 15% of the trading with the older Member States to be used to help them”* (Agence Europe 8 October 2008).

At the same time, yet to a lesser extent than the Council, the rapporteurs underlined the strengthening of European competitiveness. In her October 2008 report on the revised ETS, Doyle stated that the proposal by the Commission balanced the need for economic efficiency and fairness between sectors and Member States, thereby strengthening the EU’s international competitiveness.

It sets out projections for the emission reductions required by the sectors covered by the ETS and increased harmonisation will make the system simpler and more transparent, thereby increasing its attractiveness for other countries and regions to link up to it (European Parliament 15 October 2008b: 67).

The ENVI Committee supported several measures designed to reassure industrial interests concerned with any possible negative impact on their competitiveness (Burns & Carter 2010: 65). Regarding carbon leakage, the parliamentary vote established a list of qualitative criteria for high energy consuming sectors with high exposure to competition so that these ‘at-risk sectors’ would be eligible to receive up to 100% of their allowances free unless a global climate treaty was put in place. The sectors qualifying for the free allocation of allowances would not be named until an international agreement had been reached, with allocation based on the benchmark of the best available (climate friendly) technology. The ENVI Committee also raised the threshold for installations affected by the ETS from 10.000 to 25.000 tonnes of annual CO₂ emissions and agreed on increased flexibility of the base year. The latter matter suggests that carbon allowances should not be auctioned based on Member State emissions from the 2005, but extended to cover the 2005-2007 period.

In sum, the Parliament entered the trilogue negotiations with an interest in safeguarding the environmental effectiveness of the ETS and Effort-Sharing while promoting international leadership in climate technology by earmarking funds for the development of CCS measures. The Parliament underlined the need to use funds from auctions for tackling climate challenges by stimulating the development of GHG emissions technology. In recognizing the need to address some of industries’ most pressing concerns about competitiveness, the Parliament addressed the measures in the package in terms of their

cost-effectiveness. In Effort-Sharing, the preference for promoting flexibility within the EU was explained in economic terms such as creating incentives for innovation and energy savings.

Table 5.5 below provides an overview of the Council and the Parliament's bargaining position on the key issues of the package.

Proposals	<i>Council</i>	<i>Parliament</i>
ETS	-Distribution of auctioning rights (several CEEC want reductions since 1990 taken into account)	- Not amended Commission proposal
	-Base year (i.e. <u>2005</u> , extended)	-Favouring using the average emissions for the <u>2005-2007</u> period
	-Voluntary undertakings concerning <u>auctioning revenue</u>	-Compulsory pre-allocation of 100% of revenue generated by auctioning
	-Gradual increase (i.e. via derogations) in auctioning rate power producing sector	-100% auctioning rate power producing sector
	-Carbon leakage <u>timetable</u> (establish by 2009 at the latest, list of sectors by 2010 at the latest)	-Timetable by March 2010 (at the latest, list of sectors by 2010 at the latest)
	-Increase use of credits from CDM into ETS	-More stringent guiding principles on use of credits from CDM projects
Effort-sharing	-Linear reduction trajectory of 1.74% per year	-1.74% + compliance and sanction mechanisms strengthened
ETS/Effort-sharing	-Adjustment of the ETS/Effort-sharing recourse to the co-decision procedure in case of an international agreement	-Automatic adjustment in the event of an international agreement being concluded
CCS	-Examine the possibilities of combining national, Community and private sector financing	-500 million allowances from the ETS for financing of new technology (12 demonstration plants)

Table 5.5: Main bargaining points of the Council and Parliament prior to the trilogues.

5.4. Main elements of the final compromise

Extending what is listed in the table 5.5, this section provides an overview of the main elements of the package compromise. Through a reference to the interests and accompanying focal points and consensus norm mentioned above, sections 5.4.1 to 5.4.3 provide an indication of the resolution of conflicts of interest between the Council and Parliament. Section 5.4.4 summarises the main findings and argues that the (informal) decision-making process and the final compromise needs to be explained in terms of a thick rational-choice approach as formulated in the bargaining model.

5.4.1. Directive amending the ETS

A much more centralised ETS was agreed upon by establishing the auctioning of allowances as the main principle. Regarding the auctioning of permits for the electricity sector, the Council introduced an option for: *“Transitional free allocation for the modernization of electricity generation”* (Art. 10c). Clearly aimed at the CEECs and ‘energy islands’ such as Cyprus and Malta, the final compromise foresaw exemptions to auctioning for:

- 1) *Countries in 2006 in which more than 30% of electricity is produced from a single fossil fuel and where the GDP per capita does not exceed 50% of the average GDP per capita in the EU;*
- 2) *Where in 2007 the national electricity network was not directly or indirectly connected to the network interconnected system operated by the Union for the Coordination of the Transmission of Electricity (UCTE);*
- 3) *Where in 2007 the national electricity network is not connected or only through a single line to the network operated by the UCTE (exemption for the Baltic countries, Malta and Cyprus). In both cases the auctioning will be gradually phased-in, rising from an initial 30% in 2013 to full auctioning in 2020.*

Taking into account the cost-effectiveness of the measures with regard to other industry sectors, the initial auctioning target of 20% in 2013 was included in the final text yet full auctioning was only foreseen in 2027, thus with 7 years delay (Art. 10a (11)).

Addressing environmental concerns and strengthening the EU’s position as a green leader, the Commission proposal suggested revenue from the auctioning of permits to finance climate protection. The Parliament’s ENVI committee went further and voted for a

100% compulsory pre-allocation of revenues generated by auctioning for climate protection, with 50% of this being set aside for climate mitigation and adaptation in developing countries. In the end, Article 9a(3) provides for Member States making a voluntary, political commitment to make 50% of the revenue available for climate purposes.

Reassuring concerns about EU competitiveness, a large derogation was introduced for sectors at significant risk of carbon leakage (Art. 10a). These sectors could receive up to 100% of free permits until 2020. Indeed the rules on "transitional" free allocation were widened several times under the heading of the risk of "carbon leakage". It was now stated that sectors exposed to a "significant risk" of carbon leakage would be eligible for 100% free allocations from 2013 to 2020 pursuant to a welter of arcane provisions (Article 10a, §9, 9a-f). According to the Commission these provisions would cover more than 90% of the emissions from the 'manufacturing industries'. The Council argued that the environmental integrity of the system was maintained through the absolute (degressive) cap and by benchmarking (i.e. 100% free allocations only for the best performers)⁸⁷.

Regarding the solidarity for allocation of permits, the Commission proposed to allocate the emissions permits among Member States according to both their historical emissions (90% of the permits based on their GHG emissions in 2005) and to a solidarity mechanism (10% of the permits shifted from the richer states – whose average revenue per inhabitant is at least 20%). CEECs were worried that the choice of the reference year did not sufficiently take into account their emissions reduction efforts prior to 2005 when they experienced a major deindustrialization in the 1990s.

Strengthening equitable treatment and the respective capacity of Member States, the final compromise agreed by the European Council maintained the solidarity mechanism foreseen by the Commission (for 10% of the permits) (Council 17215/2008). Yet in addition to this 10%, 2% would be allocated to the new Member States (CEECs) for whom the transition towards sustainable energy demands the most and that reduced their emissions by more than 20% between 1990 and 2005 (see Table 5.6) (Council 17215/2008: 4). The reference year was set at 2005 or the average of the period 2005-2007, whichever one was the highest for each Member State (Art. 10 (2a-c)).

⁸⁷ Interview Council official, 18 July 2012, Brussels.

Member State	Breakdown of the 2%
Bulgaria	15%
Czech Republic	4%
Estonia	6%
Hungary	5%
Latvia	4%
Lithuania	7%
Poland	27%
Romania	29%
Slovakia	3%

Table 5.6: Additional 2% allocation of the solidarity mechanism.
(Source: Annex IIb Directive 2009/87/EC).

5.4.2. Decision on Effort-Sharing

The emission targets based on national GDP as displayed in Figure 5.2 above stayed intact in the final policy outcome. In return, and as the result of the discussions between the Council and Parliament in the informal negotiations, several mechanisms provided the Member States with a high degree of flexibility in meeting their targets. Both the carry forward and carry-over of emissions of up to 5% of its annual quota up to 2020 was allowed⁸⁸. In addition, Member States that experience extreme meteorological conditions in 2013 and 2014 were allowed to go beyond the 5% for these two years, because factors that were not foreseeable and beyond the control of Member States might require additional flexibility in the years of implementation (Art. 3(3)).

Furthermore outsourcing reductions through external offsetting (CDM/JI) was further strengthened in the final decision. Whereas the Parliament had opted for a 50% limit for offsetting, the final compromise allowed Member States to use external offsetting to account for over 70% of their overall emissions reduction target (Art.5, §4, 5).

On the other hand, limits were placed on the amount of flexibility requested by the Council via a system of fines or corrective action in case of non-compliance initiated by the Parliament (Art. 7)⁸⁹. More specifically, in case the average greenhouse gas emissions of a Member State in one-year period exceeded the limits as laid down in the other provisions of the Decision, corrective measures would kick in. These measures would translate to a deduction from the Member State emission allocation of the following year equal to the

⁸⁸ To recall, the Commission had proposed a carry-forward quantity of 3%.

⁸⁹ Interview Parliament official, 7 June 2012, Brussels.

amount in tons of the excess emissions multiplied by an abatement factor of 1.08⁹⁰. Second, the Member State concerned would have to develop and submit to the Commission a corrective action plan identifying further action to meet its emission target and a timetable for implementation. Third, it would face a temporary suspension of its eligibility to transfer part of its emission allocation and JI/CDM rights to another Member State until its emission levels were once again in line with the established pathway. The introduction of this compliance system on top of the regular EU infringement procedures was hailed as a major achievement of the Parliament⁹¹.

Finally concerning effort-sharing, the use of international credits generated by afforestation and reforestation projects in developing countries was allowed under certain conditions. In the event that no international agreement was approved by the EU by the end of 2010, Member States could specify their intentions for the inclusion of land use, land use change and forestry in the EU reduction commitment (Art. 8(g)).

5.4.3. Directive on the Geological Storage of Carbon Dioxide

While obtaining improved and more concrete security standards in the regulatory part of the Directive, the major success for the Parliament concerned the commitment to the financial mechanisms to support specific CCS pilot projects. The final compromise specified that up to 300 million permits in the new entrants reserve should be available until 31st December 2015 to help stimulate the construction and operation of up to 12 commercial demonstration projects that aim at the capture and geological storage of carbon dioxide as well as at innovative renewable energy technologies in the EU (Council 17215/2008: 5). This figure was a compromise between the offer made by the French Presidency (100-200 million permits) and the amount demanded by MEP Davies (i.e. 500 million permits)⁹².

⁹⁰ An abatement factor of 1.08 means that an exceeding Member State has to deliver 8% GHG emission reduction more the following year. This number is down from the abatement factor of 1.13 as initially requested by the Parliament.

⁹¹ Interview Parliament official, 7 June 2012, Brussels; Interview Parliament official, 25 June 2010, Brussels; Interview Parliament official, 18 June 2010, Brussels.

⁹² The Presidency argued that the ETS new entrants' reserve would no longer be able to serve its intended purpose if the Parliament's plan went ahead. Also, the intended reduction was in line with the Commission's argument that CCS demonstration plants should not be entirely financed through the new entrants' reserve, and that funds should come from a combination of sources at EU and national level, including private investment and government money (Council 15713/2008).

Rapporteur Davies was pleased with the terms of the informal agreement.

We set the foundations for the development of CCS technology that will help to secure massive reductions in CO₂ emissions from power stations and industrial installations. The regulatory framework provides the financial means to bring about the construction of nine or ten commercial CCS demonstration projects across Europe. There have not been many rapporteurs in the history of the Parliament who have tabled an initial proposal that would at best have raised EUR 1.5 billion worth of funding and ended up with a package worth five or six times that much (Agence Europe 16 December 2008; Parliament Plenary Debate 16 December 2008).

5.4.4. Reflections on the negotiations and outcome

The outcome of the Climate & Energy Package is normally explained in terms of interest-based bargaining. Skjøereth & Wettestad (2010) state that the package approach allowed for more bargaining, for example, between rich and poor Member States.

Direct links were established between the process of negotiating [the CCS] and the use of ETS allowances from the new entrants reserve to fund CCS demonstration projects. The fact that the Parliament was able to get a larger share of allowances to finance CCS projects than proposed by the Commission made it easier for the Parliament to accept the increase of free allowances for energy-intensive industries particularly, which was a main element of the European Council outcome. With regard to the Effort-Sharing Decision covering emissions of the non-ETS sectors, additional flexibility with regard to importing CDM credits probably made it easier for the Commission and Parliament to withstand an even further watering down of the ETS reform (Skjøereth & Wettestad 2010: 82).

Yet it is argued here that bargaining based solely on self-interested behaviour is not sufficient to explain the quick adoption of the package. The main elements of the final compromise discussed here point out that certain focal points ensured coordination, signaled commitments and promoted cooperation in negotiations in which the establishment of a collective agreement proved very difficult to achieve. These focal points are:

- *Flexibility (linked to costs and the perception of costs);*
- *Fairness (in terms of the relative capabilities of Member States);*
- *Solidarity (common purpose of establishing the EU as a green leader).*

These focal points allowed for an EA on a package of binding climate instruments with mandatory targets such as a common EU cap on emissions which ensure a fair distribution of costs within the EU. Without contradicting the interests of large Member States such as Germany, France and Poland, the focal points coordinated the informal negotiations on issues such as the exemptions and the use of auctioning revenues to compensate lower-income Member States in the ETS and the setting of differentiated targets in Effort-Sharing.

Admittedly, the facilitating role of these focal points in the negotiations is difficult to substantiate in the overview of the overall compromise. Therefore, section 5.5 explores in-depth the role and function of ideas in the interest-based, trilogue discussions between the Three on two issues that are at the heart of the package. These issues were:

- *The auctioning principle in the ETS;*
- *The flexibility mechanisms in Effort-Sharing.*

It is argued below that the use of the aforementioned focal points and norms ensured coordination of interests and cooperative efforts between the Three hence served as the necessary 'mortar' that made it possible to cement an EA.

5.5. Of interests & ideas: Bargaining trade-offs in the trilogues

In its determination to reach an agreement at first reading, the French Presidency launched a informal negotiating marathon at a very rapid pace and on three fronts at once: With the Parliament in trilogues; in bilateral talks with Member States experiencing difficulties; and with the EU27 to have the least arbitration possible at the level of heads of state and government during the European Council of 11-12 December. In response to differences within the Council and with the Parliament, the French Presidency repeatedly mentioned the use of flexibility as a means of forging consensus and underlined the need for solidarity in reaching an EA on the package. In underlining the need for delegations and the Parliament to give their best effort in reaching consensus, the Presidency repeatedly referred to the fact that the package had to be agreed by a 'collective commitment to seek unanimity'⁹³.

⁹³ Interview French official, 24 April 2013, Brussels.

Regarding the trilogues, and besides organizing the discussions in a coherent manner, the main achievement of these informal negotiations is that focal points in line with the interests of the Council (cost-effectiveness) and the Parliament (environmental effectiveness/ 'green leader Europe') led to the formulation of an acceptable compromise solution via an EA. Use of the flexibility principle promoted cooperation between the Council and the Parliament because it did not contradict their divergent interests of:

- 1) Preserving the environment and an ambitious package to allow the EU to keep its pole position in global climate change talks, thus helping ensure a global agreement at the COP-15 in Copenhagen (Parliament);
- 2) Answering Member States' and industry's concerns about the impact of the raft of unprecedented measures on EU competitiveness, industry and jobs (Council).

Through interest-based bargaining with ideas constituting as an essential mechanism in overcoming certain difficulties, the 11 trilogues on the ETS and Effort-Sharing proposals enabled the Parliament to abandon its initial (rather extreme) bargaining position. In turn, the Parliament achieved specific concessions such as the introduction of a system of corrective action in Effort-Sharing as well as commitments on the use of CDM/JI. While several of its major demands were either watered down or rejected in the trilogues, the outcome of the ETS negotiations was regarded as very satisfactory in the Parliament. Delivered in less than 11 months, the trilogues led to concrete results such as the renewed ETS, which constituted the most ambitious cap-and-trade system in the world⁹⁴. Shifting the focus from trying to reach an agreement on a stringent environment-oriented package, the Parliament turned towards an outcome that allowed the EU to present a progressive and binding package of measures in international climate change talks thereby inviting third countries to follow suit.

Due to the comprehensiveness of the proposals in the package, the analysis of how and what kind of compromise emerged is limited here to two of the main issues:

- *Agreement on the auctioning principle in the ETS;*
- *Increasing flexibility mechanisms in meeting national, non-ETS targets.*

⁹⁴ Telephone interview former MEP, 2 October 2012, Osnabrueck.

While the European Council acted as the final arbiter in the package negotiations, this mostly concerned ‘number crunching’ related to key issues such as carbon leakage and derogations in auctioning in the electricity sector (Council 17215/2008). 90% of the package provisions were agreed upon in trilogue meetings⁹⁵. The importance of the trilogue negotiations is underlined by a comment made by rapporteur Doyle (ETS Directive) during the debate on the ETS in Strasbourg on 16 December 2008:

The issues that went in square brackets to the [European Council] were within the parameters of what would have been acceptable to the European Parliament and to myself as rapporteur for the lead [ENVI] committee [in the trilogues]⁹⁶.

5.5.1. The auctioning principle in the ETS

<i>ETS Directive</i>
<i>Trilogues:</i>
1st trilogue: 6 November 2008
2nd trilogue: 11 November 2008
3rd trilogue: 17 November 2008
4th trilogue: 25 November 2008
5th trilogue: 4 December 2008
6th trilogue: 13 December 2008⁹⁷

Table 5.7: Overview of the ETS Directive trilogues. (Source: French Permanent Representation 12/12/2008).

The Parliament started the trilogue negotiations on the basis of results of an ENVI Committee vote held on 7 October 2008. The committee report suggested some major amendments regarding auctioning. Regarding the international dimension of auctioning, the amendments by rapporteur Doyle stated that revenues generated from auctioning of allowances must be used to address climate change via an international fund and for research purposes. This, however, proved unacceptable to the Council (Council 15430/2008). In another amendment related to auctioning the Parliament suggested that from 2013 onwards the Community scheme should only accept high quality carbon credits and units of

⁹⁵ Interview Council official, 18 July 2012, Brussels.

⁹⁶ Parliament debate, Tuesday 16 December 2008.

⁹⁷ Post-European Council meeting (11-12 December) trilogue.

GHG reductions from third countries which have ratified the future international agreement on climate change. Amongst others, these credits should represent:

Real verifiable, additional and permanent emission reductions from projects with clear sustainable development benefits and no significant negative environmental or social impacts (ibid.).

The Council proved much more reluctant to assume an international agreement. In its position formulated in the first trilogue, it stated that only once such an agreement is reached could credits from projects from third countries which have ratified that agreement be accepted in the Community from 2013 onwards.

Concerning the internal dimension of auctioning, the Commission proposed to establish auctioning as the main principle for the allocation of carbon allowances yet with key differentiation between installations (i.e. power producing sector, industrial sector and sectors exposed to 'carbon leakage') as well as introducing a solidarity mechanism for bridging the East-West dimension between the Member States.

On the issue of the auctioning rate in the industrial sector, a large majority of Member States supported the principle of gradually increasing the auctioning rate from 20% in 2013. During the first two ETS trilogues the French EU Presidency quickly established that the principle of gradual increase should be upheld with the 2020 target rate set between 70 and 100%⁹⁸.

The introduction of auctioning in the power sector proved not to be so easy to solve. In fact, solving the rift between Eastern and Western Member States in this matter served as a basic aim of the trilogue negotiations on auctioning in the ETS⁹⁹. Led by Poland, several CEECs repeated their fears that the introduction of auctioning in the power sector would threaten the economic viability of their many coal-fired power stations. Hence they argued that their specific situations warranted a gradual increase in the auctioning rate (Council 15713/2008: 3).

This issue of auctioning turned out to be one of the most fiercely debated in the trilogues. Germany stood out as a staunch supporter of securing free allowances for the

⁹⁸ Interview French official, 24 April 2013, Brussels.

⁹⁹ Interview Parliament official, 25 April 2013, Brussels; Interview French official, 24 April 2013, Brussels; Interview Council official, 18 July 2012, Brussels.

(energy intensive) industrial sector¹⁰⁰. Using the argument of its specific 'economic catching up' which is highly dependent on coal powered electricity, Poland argued that the proposal concerning the fight against the risk of carbon leaks was unacceptable cause it posed a major problem for the energy intensive industries. It was also unacceptable because it prevented any redistribution of permits to less developed countries out of the total number of emission quotas allocated¹⁰¹.

Poland is criticizing what it calls the double benefit problem because industry in old Member States will twice benefit from the free permits: Once for their companies exposed to carbon leakage and again for companies in all industrial sectors covered by the ETS on the basis of 2005 emissions levels, with the exception of the electricity production sector (Agence Europe 28 November 2008).

Based on this critique, the main winners from the system would be northern and western Member States, i.e. UK, the Netherlands, Germany, Sweden and the other Scandinavian countries. In this context, and after the fourth trilogue meeting, the Polish European affairs minister Dowgielewicz appealed to Member States to display solidarity and flexibility in order to send a positive signal before the Poznań climate conference in December 2008 (Agence Europe 28 November 2008).

Following the Parliament's resolution of 17 December 2008 on the proposal, the final draft of the ETS text shows a range of amendments on which the Three had reached an agreement during the trilogues (Council 17146/2008). Next to allocating an additional 2% of allowances to the CEECs under the solidarity mechanism (see Table 5.6), the Three reached an agreement on the following issues related to the auctioning:

- *Transitional Community-wide rules for harmonised free allocation (Art. 10a);*
- *Measures to support certain energy intensive industries in the event of carbon leakage (Art. 10b);*
- *Option for transitional free allocation for modernisation of electricity generation (Art. 10c).*

As mentioned in Section 5.4.1, changes in Arts. 10a and 10c were imposed by the Council. With reference to cost-effectiveness and the need for flexibility and solidarity with

¹⁰⁰ Interview German official, 9 July 2012, Brussels.

¹⁰¹ Interview Polish official, 18 July 2012, Brussels.

the CEECs, the rules on 'transitional free allocation' (Art. 10a) were widened several times by the Council under the heading of the risk of carbon leakage. Related to increasing flexibility and strengthening the cost-effectiveness of possible carbon leakage in Art. 10a, the Presidency proposed a methodology on extending the criteria for sectors exposed to a (significant) risk of carbon leakage. Concerning the aforementioned criteria, the Presidency suggested the identification of various levels of exposure to the risk of carbon leakage, laying down quantitative and qualitative criteria in the Directive as well as establishing a list of the sectors exposed in 2009 (Council 17146/2008: 28-29)¹⁰². During the third trilogue, a transitional exemption from paying for emission quotas applicable to Member States which are heavily dependent on coal was introduced¹⁰³. At an earlier stage, i.e. after the second ETS trilogue, a preliminary Council document on the key issues of the package drafted stipulated the conditions for awarding transitional free allocation which should be used for the modernisation of electricity generation (Council 15713/2008: 12-13)¹⁰⁴.

The Parliament, on the other hand, argued for much lighter (less extensive) provisions on carbon leakage in connection with fewer free allocations for the other industry sectors. Whereas the Council opted for 20% auctioning in 2013, with 70% in 2020 and full auctioning in 2027, the Parliament had foreseen a path from 15% in 2013 with full auctioning established by 2020; yet in the context of much lighter provisions on carbon leakage.

Furthermore, the EU Presidency recognised the need to establish systems for progressiveness and financial solidarity that ensured that Member States whose economies rely most on carbon could make the transition to other sources of energy. Therefore, the Presidency recognised the varying energy performance of industry across Europe as well as substantial carbon emissions variations in certain sectors (Council 15713/2008; 15713/1/2008). In response to the objections raised by Poland, 'energy islands' such as the Baltics and other CEECs, the measures supporting energy intensive industries (Art. 10b) were extended in the trilogues with the Commission being allowed to:

¹⁰² The Commission proposal suggests identifying the relevant sectors, at the latest, by 30 June 2010. The Council suggested in the trilogues that this identification be finalised by 30 June 2009. The date accepted in the final policy outcome (i.e. during the December European Council meeting) is 31 December 2009.

¹⁰³ Interview Polish official, 18 July 2012, Brussels.

¹⁰⁴ It should be noted here that while the numbers on the transitional free allocations have been changed by the European Council, i.e. the numbers have been upgraded substantially, allowing for greater allocations to the CEEC.

[Assess] *the impact of carbon leakage on Member States' energy security, in particular where the electricity connections with the rest of the [EU] are insufficient and where there are electricity connections with third countries, and appropriate measures in this regard* (Council 17146/2008: 30).

Concerning the use of revenue from the auctioning of permits, finally, the EU Presidency formulated a draft compromise proposal which displayed Member States' commitment to using revenues for GHG reduction efforts yet in connection to the need to respect their national constitutional and budgetary rules. Hence after the third trilogue on 17 November, the Presidency proposed the following:

- *Making the relevant provisions of the ETS Directive more detailed, in particular by stipulating that a 50% share of auctioning revenues should be earmarked for combating climate change and for energy transition;*
- *Providing for a political commitment by the Member States stressing the need to finance actions to mitigate and adapt to climate change (yet on a voluntary basis) (Council 15713/1/2008: 17-18)¹⁰⁵.*

This analysis of the auctioning principle has pointed out that a compromise was brokered over the course of the trilogues through the use of flexibility and fairness. In connection to the establishment of the informal rule on a 'collective commitment to seek unanimity', the Presidency utilised fairness and flexibility as focal points for the sake of facilitating the bargaining process among the Three. To recall, the search for consensus had been initiated by the French EU Presidency to overcome insurmountable differences and provide reassurance to Member States that no 'in-defensible' obligations would be decided upon yet. In line with the interests of the Member States, the focal points of flexibility and fairness were essential in guaranteeing the cost-effectiveness of the measures while at the same time promoting the search for a cooperative solution with the Parliament, more on which below.

First this section wants to point out that the weight of flexibility and fairness in the bargaining process was strengthened by several factors. For example, the urgency of agreeing on the auctioning principle (which is central to the reformed ETS) was strengthened by the need to reach an agreement before the COP-15 meeting in Copenhagen. Related to the

¹⁰⁵ Underlined by author.

issues of time pressure and urgency, the aforementioned East-West Dimension in the Council (and objections by Germany and Italy in the wake of the financial crisis) proved insurmountable in such a short period of time.

Although the economic concerns of the Council were the dominant factor in the negotiations, the Parliament explained the outcome of the negotiations as very satisfactory. According to the Parliament, the package (still) contained a strong focus on environmental effectiveness which allowed the EU to assume a leadership role during the international climate negotiations in Copenhagen. As explained by a Parliament official involved in the trilogue negotiations:

The environmental question in the ETS reform remained absolutely essential yet in the negotiations we tried to focus on the big picture. Although the outcome is marked by a large measure of derogations and exemptions, what defines the amended ETS is that there is a single, EU-wide cap and that auctioning constitutes the main allocation method, with allocation based on benchmarks¹⁰⁶.

Despite the array of measures increasing the flexibility in auctioning, at the same time, the Parliament was still able to claim that the renewed ETS would be the most ambitious cap-and-trade system in the world.

With regard to the environmental question in auctioning, the Parliament obtained several revisions such as:

- *More stringent guiding principles on the use of credits from projects carried out under the CDM (Recital 29)¹⁰⁷;*
- *The setting of early dates for the adoption of future regulation on auctioning principles (Recital 22; Art. 10c (5));*
- *The clarification that benchmarks for free allocations in transitional Community-wide rules must be set well in advance ('ex ante benchmarks') (Recital 23; Art. 10a(1));*
- *Reaching a clarification on free allocations for emissions related to the use of combustible waste gases for electricity generation when the production of these waste gases cannot be avoided in the industrial process (Recital 23; Art. 10a(1));*
- *An exclusion of smaller installations emitting not more than 25000 tons of CO₂ (Recital 11; Art. 27).*

¹⁰⁶ Interview Parliament official, 7 June 2012, Brussels.

¹⁰⁷ Recital 29: "It is important that credits from projects used by operators represent real, verifiable, additional and permanent emission reductions and have clear sustainable development benefits and no significant negative environmental or social impacts".

At the same time, as a compromise concerning the international dimension of auctioning, the text added the possibility of paying this revenue into the Kyoto Protocol Adaptation Fund, since agreement was reached at the Poznań climate conference to make this fund operational by 2009 and to allow auction revenue to be paid into it (Agence Europe 17 December 2008).

Furthermore, a major success of the Parliament in the informal negotiations was the earmarking of 300 million allowances to fund CCS demonstration projects. As explained in the literature and verified by officials in the Council and the Parliament, direct links were established between the process of negotiating the CCS Directive and the use of ETS allowances from the new entrants reserve to fund CCS projects.

During the final trilogue on 13 December, the Parliament accepted a compromise on the pre-allocation of auctioning revenues and Member States' willingness to devote at least half of the revenue to protect the climate.

Finally, it is important to note that not all major issues were dealt with within the trilogues. In bilateral talks with Member States experiencing difficulties, the French Presidency made a deal with a coalition of nine CEECs (Poland, Czech Republic, Hungary, Baltic States, Slovakia, Romania and Bulgaria) during a meeting of heads of state and government on 6 December. Here, Poland gained a three-year delay in the paid quota exemption for half of the permits that will be allocated under the revised ETS Directive for Member States at least 60% of whose electricity is produced by coal-fired power stations.

5.5.2. The flexibility mechanisms in Effort-Sharing

This section makes clear that the central focus in the informal negotiations on the Effort-Sharing Decision was on reaching an agreement on the amount of flexibility. Simultaneously, and in line with the interests of the Council and Parliament (though not on equal terms), flexibility and solidarity constituted the key focal points that made the cementing of a cooperative agreement between these actors possible.

<i>Effort-Sharing Decision</i>
<i>Trilogues:</i>
1st trilogue: 6 November 2008
2nd trilogue: 17 November 2008
3rd trilogue: 25 November 2008
4th trilogue: 3 December 2008
5th trilogue: 13 December 2008

Table 5.8: Overview of the Effort-Sharing trilogues. (Source: French Permanent Representation 12/12/2008).

Regarding the reaching of an agreement on the degree of flexibility available to the Member States in achieving annual reduction in GHG emission targets from 2013 to 2020, to recall, the Commission proposal included three kinds of flexibility:

- *Carry-forward clause of 2%;*
- *Carry-over clause for excess emission reductions to the subsequent years;*
- *Use of international credits from project-based flexible mechanisms of the Kyoto Protocol, the CDM/JI with the Commission proposing an annual limit for the use of credits defined as the equivalent of the 3% of each MS' individual 2005 emissions in the non-ETS.*

During the first trilogue on 6 November several Member States had argued for greater flexibility regarding limits to CDM/JI credits than that proposed by the Commission. Member States argued that these credits provided an important tool not only for the implementation of commitments but also for promoting sustainable development in third countries, in particular in developing countries through the CDM¹⁰⁸.

In contrast, rapporteur Hassi underlined her preference for promoting flexibility within the EU through quota trading between Member States rather than outside the EU via CDM/JI (Agence Europe 17 December 2008)¹⁰⁹. Linked to this preference, Hassi had demanded prior to the trilogues that the use of international offsets should be limited to 8% of 2005 emissions for the whole period 2013-2020¹¹⁰. This 'outsourcing of emissions', Hassi argued, could mean a disincentive to and delay much needed changes in domestic energy systems. Also, excessive use of international credits would render the EU vulnerable to criticism of buying its way to the 20-20-20 targets by international partners.

¹⁰⁸ Interview Italian official, 5 July 2012, Brussels.

¹⁰⁹ Underlined by author.

¹¹⁰ In comparison, the Commission had proposed a total of 24% for the 2013-2020 period.

By the fourth trilogue on 3 December, the Council and Parliament still differed on the subjects of flexibility (share of the use of CDM) and mechanisms ensuring compliance with targets (sanctions). In an attempt to overcome the resistance of the Council, the Parliament made a last offer with a quota of a maximum of 2% a year (Agence Europe 9 December 2008). This offer by the Parliament was supported by the Commission yet rejected by the Council.

In a countermove, taking in the need for the collective commitment to seek unanimity, the French Presidency presented a model for effort-sharing that would lead to the EU reducing emissions up to 70% outside the EU through CDM/JI. Following the proposal made by the Commission, an annual limit for the use of credits defined as the equivalent of 3% of each MS' individual 2005 emissions in the non-ETS sectors was agreed upon. In addition to those 3%, however, certain Member States with stricter targets would be able to use additional credits from projects in least developed countries and small island developing states amounting up to 1% of their 2005 emissions¹¹¹. Furthermore, additional flexibility measures were proposed and established as mentioned above such as increasing the carry-forward limit to 5%.

Rapporteur Hassi expressed her dissatisfaction with the model for effort-sharing proposed by the Presidency. During an ENVI Committee debate on the state of the negotiations on the package she stated that:

The present model for effort-sharing proposed by the Council would mean that the [EU] would reduce emissions mainly outside the EU through CDM/JI. It would mean moving up to 70% of the emission reductions elsewhere, mainly to developing countries. This would totally undermine the credibility of our climate policy. An absolute red line for the Parliament is a 50% limit for offsetting, which would ensure that the majority of our emissions reductions are domestic (Hassi during Plenary Debate 4 December 2008).

Despite the pressure from the ENVI Committee to restrain flexibility, however, additional flexibility measures were proposed and established. In line with the environmental concerns of the Parliament, one of the shadow rapporteurs stated that if the Member States wanted increasing flexibility there must be a guarantee that the targets would be met and consequences if the targets were not met and Member States exceeded their

¹¹¹ These Member States are: Austria, Belgium, Cyprus, Denmark, Finland, Ireland, Italy, Luxembourg, Portugal, Slovenia, Spain and Sweden. To be eligible for this additional level of flexibility, these Member States have to fulfil at least one of four conditions as stated in Art. 5a-d.

respective limits in GHG emission¹¹². On top of the normal infringement procedure, therefore, the Parliament argued for a system of corrective action in case of non-compliance¹¹³.

Despite the concession by the Council on the compliance mechanism, the other demands by the Parliament were left unheard in the trilogues. The environmental concerns of the Parliament were mostly overlooked for the sake of strengthening environmental measures in other parts of the package (e.g. ETS, funding of CCS) and obtaining some concessions in the Effort-Sharing Decision. As stated at the beginning of this section, the targets assigned to each Member State were hardly questioned and remained the same throughout the negotiations.

A thin rational-choice approach would explain this in terms of simple logrolling with a disadvantage for the Parliament. However, the bargaining model offers a more sophisticated explanation of the negotiations on the flexibility mechanism in the trilogues. According to the package deal and logrolling variables in the model, the informal decision-making in the Effort-Sharing Decision formed part of a larger whole (or package) in which the Parliament traded certain demands for gains in others. For example, giving in to additional flexibility with regard to importing CDM credits in Effort-Sharing probably made it easier for the Parliament (and Commission) to withstand a further weakening of the ETS reform.

Including the role of ideas in the informal decision-making process, however, a more well-considered explanation of the negotiations on effort-sharing takes into account flexibility, equity/fairness and solidarity. With the eye on a common commitment on the EU-level, the discussions in the trilogues were dominated by costs and the perceptions of costs hence the pledge to divide the effort-sharing target equitably among Member States.

The Council Presidency and certain Member States (e.g. CEECs) successfully utilised the principles of fairness and flexibility as instruments to keep the costs of the measures in check as well as keeping the negotiations on a cooperative agreement with the Parliament going for the sake of reaching an EA. It was also verified within the Council that the impatience of the Three in reaching an EA played a prominent role in keeping the negotiations going.

¹¹² Lebech (ALDE), Parliament debates, Strasbourg, 4 December 2008.

¹¹³ Interview Parliament official, 26 April 2013, Brussels.

There was a strong desire to finish the package and be well-prepared for the COP 15 [Copenhagen] talks. This motivated the consideration of the Council Presidency to increase the flexibility mechanisms in effort-sharing¹¹⁴.

So the flexibility focal point ensured the interests of the Council in cost-effectiveness while providing the Parliament with a tool through which the EU could signal its commitment in assuming a strengthened 'green leader' role in the global climate policy regime.

Concerning the latter, and through the Effort-Sharing Decision and the other parts of the package, the EU thus has put in place a commitment that is binding under EU law and a considerable trump card in future international climate negotiations. This is in stark contrast to the situation prior to the negotiations on the Kyoto Protocol in 1996 and 1997, when the EU entered the negotiations with nothing but a political agreement decided upon in the Environment Council (Lacasta *et al.* 2010: 112).

Although a substantial part of the emission reduction commitments was to be delivered through offsetting in third countries and not within the EU, the agreement established through the trilogues still allowed the Parliament to cry victory to a considerable extent as the outcome further contributed to a significant centralisation and Europeanisation of climate and energy policy. According to a former MEP:

We obtained some important concessions and this Effort Sharing Decision is the first of its kind worldwide and that experience in implementing such an arrangement still has to be made¹¹⁵.

Concluding this section, yet of relevance to the overall decision-making on the package, other variables listed in the bargaining model seriously weakened the Parliament's efforts in reaching its preferred outcome in the informal negotiations. The financial crisis, the presence of hostile Member States in the Council from both East and West and the fact that this was a complicated, highly technical package of legislation that was negotiated at high speed (Burns & Carter 2011: 66).

This latter issue constituted one of several informal institutional innovations of the French EU Presidency. In response to divisions in the Council and the urgency/impatience of

¹¹⁴ Interview Council Official, 20 April 2010, Brussels.

¹¹⁵ Telephone interview former MEP, 10 October 2012, Osnabrueck.

the package, without a doubt, the most important controversial informal decision by the Presidency was to directly involve the European Council in the legislative decision-making process by awarding it a role as final arbiter. This certainly undermined the Parliament's possibility to gain influence over the final agreement. Through the normal co-decision procedure, the Parliament has the opportunity to give its opinion first to try to shape the position taken by the Council. What happened in the Climate & Energy Package negotiations is that the consensus norm and unanimity rule in the European Council provided additional leverage to the Member States in obtaining certain demands.

Also, the European Council (11-12 December) gave its opinion before the Parliament (17 December). The Parliament Conference of Presidents decided to move the plenary vote from 4 to 17 December because the Parliament was said to be in need of more time to examine the extremely complex legislative proposals. Some analysts claim that the initial schedule of 4 December would have hindered a first-reading vote since the Parliament and the Council defended opposite positions on the package hence a second reading was within the bounds of possibility (Kérébel 2009a). The Parliament's vote after the Council meant that MEPs had little room for manoeuvre to push for changes and would need to either reject or accept the compromise agreed between Member States.

A rejection of the deal would lead to a second reading and would push back the date for adoption of the package to March 2009 or late in 2009 under the legislature of a new Parliament (EurActiv 17 October 2008).

The overturn of the normal procedure left MEPs with little other choice but to sign off on the European Council's deal. Reflecting the chagrin of a large number of MEPs, rapporteur Doyle stated:

There was no legal provision for the heads of state to be involved in the co-decision process. That there was trilogue negotiation and Coreper approval underlined that this high-level consultation was exceptional and could not in any way be seen to set a precedent for any other co-decision issue (Agence Europe 18 December 2008).

In sum, the unprecedented and informal procedural decisions taken by the Council (i.e. the EU Presidency) undermined the formal equality of the Council and Parliament as co-legislators.

5.6. Chapter conclusions

When looking back on the Climate & Energy Package negotiations and on the basis of the deals that were hammered out between the various rapporteurs and the French Presidency in little over 20 trilogues (for the whole package), this EA constitutes a world record.

In terms of rapidity (finalization of the parliamentary procedure in less than 11 months for the presentation of the core proposals) and complexity of the subject-matters involved, these procedures brought the world's most ambitious climate legislation into being (Parliament 2009: 15)¹¹⁶.

Right after the adoption of the package, the French Energy Minister Borloo stated that the trilogues had contributed to establishing a pact of trust between the Council and the Parliament (Agence Europe 17 December 2008).

Exploring the informal decision-making process, this chapter has aimed to explain the EA on the Climate & Energy Package. It has aimed to make clear that reaching an EA through an accelerated first-reading procedure could not have been achieved through simple horse-trading. Keeping in mind the ambiguous signals that the Three received from its environment, this thesis has argued that a cooperative agreement between the Three on the Climate & Energy Package was not based solely on (decentralised) self-interested behaviour. Had this been the case than a cooperative agreement on the package could never have emerged so quickly. Dissecting the 'pact of trust' in thick RCI terms, the argument presented here is that the focal points of fairness, solidarity and flexibility played a key role in reaching an EA through an accelerated first-reading procedure. These principles were able to serve as focal points only because they did not contradict the interests of the Member States (cost-effectiveness) and the Parliament (environmental-effectiveness), hence the focal points promoted and ensured the establishment of a cooperative agreement between the Three.

The informal decision-making procedure via trilogue meetings not only contributed to preventing possible collective action problems such as gridlock between eastern and western Member States and between the Council and the Parliament. The more detailed

¹¹⁶ Activity report of the Committee on the Environment, Public Health and Food Safety 2004-2009 Parliament.

analysis of key aspects of the ETS Directive and the Effort-Sharing Decision point out that the measures finally agreed upon during the trilogue negotiations were established via the aforementioned focal points and the consensus norm (established by the French EU Presidency). This made possible the cementing of an agreement between the Council (cost-effectiveness) and the Parliament (environmental integrity/ 'green leader Europe').

This reconciliation took place under increasing external pressure from the collapse of the international financial system and the international UN/COP climate regime. These external factors increasingly pressured the EU Presidency and the Parliament to adopt the package in a rapid fashion via an informal agreement. Several other factors such as the end of the legislative term of the Parliament and climate scepticism of the future EU Presidency fuelled the impatience of the Three in successfully negotiating an EA in a very short period of time.

By linking different issues and proposals, the Climate & Energy Package allowed for logrolling, for example between specific issues in the ETS and Effort-Sharing as mentioned in the text. Yet the main focus here was to show if and how ideas in the informal decision-making contributed to defining an EA in a bargaining game in which a cooperative equilibrium was difficult to sustain.

Through an unprecedented and informal procedural decision, i.e. by involving the European Council in the legislative decision-making process and establishing the consensus norm as the guiding principle in the informal negotiations, the French EU Presidency played a key role in framing the negotiations. The decision by the EU Presidency proved crucial in maintaining support of the Member States with the diverging interests and speeding up the negotiations. Although this procedural decision certainly allowed for the adoption of the package in a record time, it led to a disproportionate reconciliation of the interests of the Council and the Parliament. After its adoption, for example, several MEPs complained about the manner in which the Council (with help from within the Parliament) had steamrolled the highly complex package through the decision-making machinery.

Finally, through its right of initiative, the Commission played a crucial role in setting the tone of the legislative debate. Introducing such terms as 'effort sharing' highlighted the need for solidarity among Member States and fairness in sharing the efforts needed to meet a common commitment. In another crucial way, the Commission set the tone for the

negotiations by stipulating that the legislative proposals rested on several key principles such as flexibility, effort-sharing, and solidarity. This principle was able to serve as a focal point only because it did not contradict the interest of the Member States in cost minimization¹¹⁷. Second, enlargement also played a key role in the informal negotiations. Preventing a rift between Eastern and Western Member States proved one of the main concerns in the informal negotiations, with the demands from CEEC leading to a watering down of the package in several crucial ways. These variables are not represented in the bargaining model and require further research.

¹¹⁷ To recall though, the Spring 2007 European Council had already stipulated that equity and fairness should be the guiding principles in agreeing upon new climate legislation.

Chapter 6: Access & Unbundling - Negotiating the Third Internal Energy Market Package (2007-2009)

This chapter sets out the second case study designed to test the theoretical claims set out in Chapter 3. It explores the facilitating role of the Third Party Access (TPA) and unbundling principles in the decision-making process on the Third Internal Energy Market Package ('Third Package'). TPA and unbundling are the core principles in the process of liberalising electricity and gas markets in the EU. In the negotiations on the Third Package, however, the Three were deeply divided on one of the core issues, namely ownership unbundling (OU). The discussions between coalitions opposing and supporting OU turned into an abstract and ideological argument about the advantages and disadvantages of OU and a stalemate in the decision-making process loomed on the horizon. The thick RCI approach applied here explains that the TPA and unbundling principles facilitated the logrolling process between the Council and Parliament in terms of overcoming a stalemate and delay in the decision-making process on the Third Package. TPA and unbundling were key in reaching an agreement on 'effective unbundling' which paved the way for successful logrolling on other issues in the package in EA. Different from a thin RCI approach, the thick RCI approach explores the 'depth' of the decision-making process which helps us to understand the speed of the EA on the package.

6.1. Introduction

The Third Package constitutes one of the centrepieces of the EU's first-generation energy policy. It is designed to complete the regulatory framework needed to make EU market opening fully effective, and to create a single gas and electricity market in the interest of European citizens and industry.

The Commission presented a package of five pieces of legislation on 19 September 2007 (see Table 6.1 below). The main aim of the Commission proposals was to realise the effective separation of supply and production activities from network operations via full ownership unbundling (OU). However, the other proposals were not insignificant: they included the enhancement of the powers and independence of national regulators and the establishment of an Agency for the Cooperation of Energy Regulators (ACER).

- | |
|--|
| <ul style="list-style-type: none">• Proposal for a Directive amending Directive 2003/54/EC concerning common rules for the internal market in electricity, 2007/0195(COD);• Proposal for a Directive concerning common rules for the internal market in natural gas, 2007/0196(COD);• Proposal for a Regulation establishing an Agency for the Cooperation of Energy Regulators, 2007/0197(COD);• Proposal for a Regulation on conditions for access to the network for cross-border exchanges in electricity, 2007/0198(COD);• Proposal for a Regulation on conditions for access to the natural gas transmission networks, 2007/0199(COD). |
|--|

Table 6.1: The Third Package legislative proposals.

After the Commission presented its proposals, discussions on the package commenced in the second half of 2007 and ran until the end of 2008. Due to the urgency of reaching an EA on the Climate & Energy Package (Chapter 5), discussions on the Third Package were suspended until early 2009. After difficult negotiations, the Council and the Parliament reached an EA (in early second-reading) on the package in March 2009.

What made the negotiations so difficult was the fact that the bargaining process on OU had turned into a highly political, time-consuming debate between the Three. This debate was conducted along national lines and driven by a fundamental divide between Member States and MEPs. On the one hand, there was a coalition of Member States that fully embraced the vision of a single EU energy market. On the other hand, a minority coalition of Member States led by Germany and France expressed strong reservations about whether a competitive market as envisioned by the Commission would be desirable in the first place (Noël 2008: 12).

Despite strong opposition towards OU, the package was adopted as an EA. Different from the First and Second Package as described in Chapter 2, the Third Package arguably offers a good basis from which to achieve the complete liberalisation of the EU gas and electricity markets.

How can the quick adoption of the package be explained? A thin RCI approach would explain the decision-making outcome in terms of interest-based divisions and/or coalitions determining the final package deal that allowed the Council and Parliament to trade support for their preferred issues through logrolling. In more specific terms, it would explain that a deal was brokered by the Czech EU Presidency (that led the negotiations) in which it managed to convince the Parliament to agree to a final compromise which was

compatible with the position taken by the Council (Kérébel 2009). In this compromise, the Parliament gave way on OU (i.e., letting governments decide which of the three versions of 'effective unbundling' they wished to implement) in return for concessions in other areas covered by the package. The concessions included, notably, the reinforcement of powers and independence of national regulators and of the new community-level agency (ACER), as well as new rights for consumers.

This thin RCI approach does not easily explain the choices of the Three in games with repeated play under circumstances of ambiguity and uncertainty. This approach ignores several key aspects of the informal decision-making process on the package which are necessary to explain the depth and the speed of the EA in question. Explaining the agreement between the Council and Parliament in terms of self-interested behaviour is insufficient as it does not explain how a deal was reached in the face of principle-based opposition from large Member States (Germany and France). What is also left unexplained is how time pressure and urgency played a key role in the logrolling process between the Council and Parliament and why the package was decided upon through an EA. Furthermore, ambiguous signals concerning the advantages and disadvantages of OU had an effect on the speed of the legislative process as did certain events such as the Russia-Ukraine gas crisis in January 2009 (see Chapters 2 and 7) and the decision by German energy giant E.ON to sell off its electricity grid.

Regarding the depth of the agreement, the thick rational-choice approach applied in this chapter is employed to argue that the Third Party Access (TPA) and unbundling principles played a key facilitating role in the decision-making process on the package. As put forward in Chapter 3, TPA refers to the possibility of suppliers of electricity and gas or customers to have access to the energy network in order to sell or transport their products, even if they are not the owners of the network (Francese 2009: 8-9). Unbundling (i.e. legal, account and OU) refers to the separation of supply and production activities on the one hand, and grid-related activities on the other hand (Andoura *et al.* 2010: 28)¹¹⁸. TPA constitutes the spearhead principle of liberalising EU energy markets. Unbundling (of the network) constitutes a complementary measure to create real TPA, chiefly fair access to EU electricity and gas networks which, in turn, is a core element in promoting competition in

¹¹⁸ See table 2.1. in Chapter 2.

this area. These two principles, which support each other in EU energy and competition law, constituted a key facilitating mechanism in overcoming opposition to OU by ensuring a commitment to ‘effective unbundling’ and paving the way for an EA on the Third Package¹¹⁹.

Contributions to the current literature elaborate on various aspects of the Third Package. These contributions include the leverage of the Commission in initiating the package (e.g. Eikeland 2010, 2008), legal analyses of the proposals and outcomes (e.g. Garcia 2010; Jones 2010) as well as criticising the main focus of the legislators on OU in the policy debate on the Third Package (e.g. De Jong 2008b). This chapter aims to make a contribution to the literature by providing an in-depth explanation of how and why the Third Package was adopted in EA by analysing and explaining the informal decision-making process via a thick RCI approach. As further proposed in the bargaining model (Chapter 3), the intensity of interests and ideas through urgency/impatience and international events/regimes variables are analysed to identify to what extent they played a role in speeding up the negotiations and reaching an EA on the package.

The informal negotiations on the package were dominated by the electricity and gas Directives¹²⁰. For this reason, and given the space constraints here, this chapter focuses on these legislative measures. Section 6.2 introduces the legislative proposals including the Commission’s focus on TPA and unbundling.

Section 6.3 discusses the bargaining positions of the Council and the Parliament prior to the trilogue meetings. The results of the overall package as agreed upon during the trilogue meetings and reflections on the decision-making process are presented in section 6.4. This section aims to point out that a thick RCI approach is required to explain the decision-making process.

Applying this approach, section 6.5 provides a detailed analysis of the trilogue discussions. This section particularly provides an in-depth analysis of three major issues agreed upon during the trilogues, namely:

- *‘Effective unbundling’;*
- *The powers and competences of the national regulatory authorities, and;*
- *Consumer rights.*

¹¹⁹ Telephone interview former MEP, 2 October 2012, Osnabrueck.

¹²⁰ Telephone interview Czech official, 17 May 2013, Osnabrueck.

Section 6.6 summarises the main arguments presented in this chapter and draws conclusions as to the extent to which ideas facilitated the fast adoption of the Third Package.

6.2. The Commission proposals

Chapter 2 pointed out that the Third Package proposals are part of a longer liberalisation process in which the Commission has promoted optimal circumstances for new players to enter the market and consequently the creation of competition. On the basis of evidence collected in its 2007 Energy Sector Inquiry, the Commission argued that legal unbundling as required by the Second Package was not enough to develop competition (Commission 2006/1724). Another communication that preceded the Third Package entitled '*Prospects for the internal gas and electricity market*' pointed out that the current rules and measures did not provide the necessary framework to achieve a real internal energy market. Regarding obstacles to competitiveness, the Commission stated that:

The existence of different levels of unbundling in various Member States creates asymmetric situations that distort competition among market players on an EU scale, and are difficult to reconcile with the EC principle of free movement of capital. Moreover, this puts at a disadvantage Member States having the higher level of unbundling (Commission 2006/841: 8).

In March 2007 the European Council provided political impetus to the Commission's findings by reaffirming the need to take further action in achieving a truly competitive, interconnected and single Europe-wide internal energy market (Council 7224/1/2007). More specifically, the European Council invited the Commission to come forward with relevant proposals on enhancing further market integration in the internal electricity and gas markets via the following measures:

- *The effective separation of supply and production activities from network operation ['effective unbundling'];*
- *The further harmonization of the powers and enhanced independence of the national energy regulators;*
- *The establishment of an independent mechanism for cooperation among national regulators;*
- *The creation of a mechanism for transmission system operators to improve the coordination of networks operation and grid security, cross-border trade and grid*

operation;

- *Greater transparency in energy market operations.*

(Council 7224/1/2007: 16-17).

Following the European Council's invitation, the Commission presented its proposals for a Third Package on 19 September 2007. At the heart of these reform proposals was the claim that OU provided a sound and necessary basis for TPA and competition to develop. OU refers to a situation in which network companies (i.e. the Transmission System Operators (TSOs)) are wholly separate from the supply and generation companies. In the explanatory memorandum that accompanied the package, the Commission argued that a vertically integrated company has an in-built incentive both to under-invest in new networks (fearing that such investments would help competitors to thrive in its home market) and, wherever possible, to privilege its own sales companies when it comes to network access.

The Commission argued that OU is the only secure way to remove conflict of interest, which arises from one company owning both the network and other parts of the chain, causing incumbents to effectively block new entrants from the network. Having full ownership unbundled TSOs can provide advantages such as guaranteeing non-discriminatory third party access to networks, increasing internal EU infrastructure capacity (since investment decisions would no longer be distorted by supply interests) and reducing the need for detailed regulatory oversight to ensure that no discrimination takes place (Commission 2007/528). The Commission also made the connection between OU and lower prices in the impact assessment related to the Third Package (Commission 2007/1179). It did so by arguing that OU had the effect of weakening the market power of vertically integrated incumbents because removal of their vertical integration encouraged new entry, competition and thereby lower prices.

At the same time, recognising the resistance by Member States such as Germany and France who opposed unbundling and supported 'national champions', the Commission presented the Independent System Operator (ISO) as an alternative to OU. It was felt that the ISO option would enable vertically integrated companies to retain the ownership of their network assets, but require that the transmission network itself be managed by an ISO (in this case an undertaking or entity entirely separate from the vertically integrated company).

Independently from any undertaking, the ISO would perform all the functions of a network operator.

Despite the fact that the Commission clearly indicated that it strongly prefers the OU over the ISO option, in both cases, the network would have to be made neutral¹²¹. In both cases unbundling, i.e. a form of vertical separation of activities, and strengthening TPA served as the central principles of the proposals.

Furthermore, the Commission proposed complementary measures to TPA and unbundling in achieving true liberalisation of the market. For example, the Commission proposed granting new powers to enhance the powers and independence of national regulators (NRAs). Strong regulators are necessary for a properly functioning market, in particular with regard to the use of network infrastructures (Commission 2007/528). Independence of regulatory authorities, the Commission stated, is a key principle of good governance and a fundamental condition for market confidence. Hence new powers should be granted to the national regulators, involving:

- *Monitoring compliance of transmission and distribution system operators with third party access rules, unbundling obligations, balancing mechanisms, congestion and interconnection management;*
- *Approving investment plans (and checking consistency with European-wide 10-year investment plan)¹²²;*
- *Monitoring transparency obligations;*
- *Checking the level of the openness of the market and competition in collaboration with the competent authorities;*
- *Application of consumer protection measures.*

Related to this, the Commission proposed the creation of an Agency for the Cooperation of European Regulators (ACER) with the aim of establishing regulatory co-operation on the European level and simplifying and stimulating cross-border energy trade. ACER would complement at European level the regulatory tasks performed at national level by the regulatory authorities. It would do this by providing a framework for these

¹²¹ The ISO-option was viewed by the Commission as being much less effective in addressing the disincentives to invest in networks.

¹²² The idea behind the 10-year investment plan is that it not only creates incentives for the promotion of investments but also protects against fly-by-night network speculation.

authorities to co-operate and ensuring that co-operation proceeds in an efficient and transparent way. Other complementary issues to unbundling are listed in Table 6.2 below.

<i>Key issues in the Third Package proposals</i>	
Electricity and gas Directives	-Effective separation of supply and production activities from network operations via either OU or ISO;
ACER	-Provide a framework for national regulators to cooperate; -Regulatory oversight of the cooperation between TSOs; -Individual decision powers; -General advisory role.
Electricity & gas network Regulations	Formally charge European Networks of (electricity and gas) TSOs with tasks: -Development of technical codes; -Research and innovation activities of common interests; -Coordination of grid operation and investment planning.

Table 6.2: Key issues in the Third Package proposals.

The debate on advantages and disadvantages of OU as presented in the Third Package has been quite large. In line with the Commission's argument, Francese (2009: 52-4) states that there are some clear indications that OU provides a sound and necessary basis for TPA and competition to develop. A benefit of OU is that it creates a level playing field for supply companies, and eliminates the risk of cross-subsidisation and too high tariffs (*ibid*). OU has an effect on competition by putting the network company in a position to invest freely in the network itself and to have an incentive to do so.

It actually earns a fee for the gas transported so the more gas it moves, the more money it earns. An increase in capacity is a [prerequisite] to solve some of the access and congestion problems that new players often complain about. The new unbundled network company would have all the interest in carry on with them (Francese 2009: 53).

OU furthermore reduces the chances for collusion that the players on the energy market may have as they are no longer in control of the network and they cannot discriminate against anymore on that level or co-ordinate their practices in indirect ways. Related to this, OU also has effects on both the company and market level as it reduces the ability of companies to exchange key assets during mergers and acquisitions (*ibid*).

Yet, there was also major criticism on the OU proposal. The Commission was accused, from several quarters, of pushing the potential for collective measures to its political

limit. A more elaborate accusation saw the Commission accused of over-stating the causal link between unbundling, investment and lower prices. As argued by Buchan (2009: 49-69), any suggestion of the link between lower prices and OU is a fairly weak one as structural factors, including the energy mix of a Member State and variations in the oil price (to which most continental gas prices are pegged), are more important in determining final energy prices. Regarding investment, although it is logical to imagine that bundled networks might have an incentive to under-invest, the evidence is slim (*ibid.*). Finally and as further elaborated on in the next section, the suggestion of forced divestment - which is inherent to OU - was bound to raise issues of public and private property rights and the spectre of privatisation in France and of expropriation in Germany.

6.3. The bargaining position on unbundling

<i>Actors</i>	<i>Formal EU rules</i>	<i>Timeframe</i>
-Transport, Telecommunications and Energy Council (TTE) / EU Presidencies: Slovenia, France - 1 st reading (2008), Czech Republic - 2 nd reading (2009)	Arts. 47(2), 55, 95, 251 TEC.	October 2007 – March 2009 (Trilogue negotiations were held from late January until late March 2009 after which the package was politically endorsed by the Council and the Parliament. The package was formally adopted in July 2009).
-Parliament (ITRE Committee)		
-Commission (DG TREN, DG COMP)		

Table 6.3: Actors, rules and timeframe of the negotiations.

The package was placed on the Council agenda under the Portuguese EU Presidency in the second half of 2007. However, several Member States (including France and Germany) that opposed OU feared that this issue would not get a fair treatment under the Portuguese Presidency with the latter running OU for its own electricity and gas sectors¹²³.

The negotiations were pushed to the first half of 2008 as the Slovenian EU Presidency was considered to be more neutral on the matter of OU. In order to meet the deadline set by the Spring 2008 European Council to reach a political agreement at the end of its Presidency, Slovenia intensified work on the package between January and July 2008 (European Council 2008: 14).

¹²³ Interview German official, 19 April 2013, Berlin.

The Energy Council managed to reach a broad agreement on the essentials of the package (including a solution on unbundling) in June 2008 followed by a political agreement and common position at the end of that same year. The Parliament, however, rejected the Council suggestions in first-reading and kept insisting on full OU for electricity and gas sectors. As a result of this stalemate, the package was to be decided on in second-reading during the first half of 2009 under the Czech EU Presidency.

This happened despite the fact that in the autumn of 2008, the prevailing mood among MEPs, as well as governments, was a desire to get the Third Package on to the EU statute book and to change the subject to other energy issues, i.e. climate change (Chapter 5) and security of supply (see Chapter 7). At the same time, the aim was to reach a political agreement on the package before the Parliament would be dissolved ahead of the mid-2009 elections and the end of the term of the first Barroso Commission.

The sections below provide an analysis of the bargaining position of the Council and the Parliament. The main focus is on explaining the tug-of-war within the Council and with the Parliament over OU. It is argued, below, that the Member States who opposed OU referred not only to certain ways of organising government relations with the electricity and gas industries, but also to a set of ideas about the scope of competition and the appropriate legal and institutional methods to achieve public policy aims.

6.3.1. The Council

Already in the first half of 2007, under the German EU-Presidency, the policy debate was dominated by governments supporting and opposing OU. Several EU energy ministers made it clear that full OU was out of the question. Led by Germany and France, this 'anti-OU' coalition of Member States further included: Austria, Bulgaria, Cyprus, Greece, Latvia, Luxembourg and Slovakia. With 106 votes altogether, these nine Member States formed a blocking minority in the Council¹²⁴. These opponents of OU drafted a letter to Energy Commissioner Piebalgs at the end of July 2007 in which they expressed their concern about the suitability of OU in small and/or isolated (national) markets and whether OU would

¹²⁴ At a more advanced stage in the negotiations, this coalition lost Cyprus as an ally after the Commission had promised the small and isolated energy market a derogation. This did not affect the blocking minority, however.

really help increase competition and cross-border interconnector capacity. Therefore, the letter stressed that:

The idea of complete separation of production and transmission as the only key to the development of the internal energy market for electricity and gas should be avoided¹²⁵.

This letter was a response to a letter from eight ministers who had articulated their support for full OU¹²⁶. Representing 119 votes in the Council, this pro-OU coalition was led by Denmark and included Belgium, Finland, the Netherlands, Romania, Spain, Sweden and the UK¹²⁷.

The letters sent to Commissioner Piebalgs were important for the informal negotiations in the sense that these 'cemented' the positions of both the pro-OU and anti-OU Member State camps. This formalisation of positions made it very hard to go back on any respective stance concerning OU even if Member States in certain cases wanted to trade or concede during discussions within the Council and (at a later stage) with the Parliament.

This thesis argues that the discussion between Member States opposing or supporting OU should be explained here in two specific models, or 'paradigms', of government-energy industry relations¹²⁸. The traditional paradigm in the electricity and gas sectors comprises a wide variety of legal and institutional arrangements that are predicated on a model of technical organisation involving central control over a synchronised network (Cameron 2002: 6). According to 'traditionalist' Member States such as Germany and France, these network-bound systems are strategic assets for their national economies and that the nature of their production made it economically viable to have a single, vertically-integrated entity construct the system facilities and operate the transmission grids. These Member States and others from the anti-OU coalition, furthermore, emphasised stability, reliability of supply and public service.

¹²⁵ Author copy of a letter from nine energy ministers to Commissioner Piebalgs, 27 July 2007. The author thanks David Buchan for providing him with copies of all letters mentioned in this chapter.

¹²⁶ Author copy of a letter from the Danish energy minister and others to Energy Commissioner Piebalgs, 22 June 2007.

¹²⁷ Next to the aforementioned governments, the Czech Republic and Italy were also in favour of OU.

¹²⁸ As a philosopher of science, Kuhn (1962) famously described a paradigm as a coherent pattern of research organised around commonly shared theoretical propositions and models, and a paradigm shift or 'revolution' as the emergence of an alternative framework or common and shared analysis (Helm 2005: 1). As argued by Cameron (2002), paradigms and paradigm shifts happen in energy policy too.

Beyond the traditional paradigm, adherents of a new market-oriented paradigm such as the UK, the Netherlands and the Commission challenged the idea that network-bound energy industries defy the introduction of competition because of their natural monopolistic characteristics (Cameron 2002: 9). These market adherents argue that the introduction of competition (wherever possible), encouraging openness and customer-focus provides efficient solutions to traditional problems on energy markets (Stern 2001). According to these actors, vertically integrated utilities have inadequate incentives to invest in interconnector capacity (the so-called 'strategic investment withholding'). Therefore, unbundling can provide an incentive for more competition. Although their consensus is organised around a belief in markets, these liberal actors are not for the most part proponents of some kind of market fundamentalism in which all key issues are settled by way of a stringent reference to market principles.

It is not necessarily being argued that energy should be treated as just another commodity. On the contrary, the way in which governments introduce and promote competition is and will remain highly diverse (Cameron 2002: 9).

This remark is certainly important in the context of the focus of this chapter on a thick RCI explanation of the decision-making process on the Third Package. By recognising the diversity through which the Member States will promote competition, market adherents recognised indirectly that there is room for interpretation concerning the principles of TPA and unbundling, making these suitable focal points for defining a co-operative solution.

Leaving little room for interpretation, however, the blocking minority of traditionalists in the Council rejected OU as they expressed serious doubts about the legality, proportionality and efficiency of such a measure. The alternative solution proposed by the Commission in the form of the ISO model was furthermore perceived by Germany and France as not constituting a genuine alternative to OU. According to these 'traditionalists', the ISO model constituted another kind of OU and could therefore not be presented as a genuine alternative to full OU.

In a letter addressed to ITRE-chairwoman Angelika Niebler (EPP-DE), the traditionalists stipulated the main reasons that led them to reject the Commission proposals for OU or ISO:

- OU is not compatible with constitutional law and with the free movement of capital;
- There is no clear correlation between the implementation of OU and the levels of prices and investment (which are actually determined by many other factors);
- Opinion that OU is not respecting the principle of proportionality (Art. 5(4) TEU)¹²⁹, since other effective solutions are possible that do not imply the negative aspects of OU;
- OU is not per se a sufficient and appropriate tool to deliver additional opening of the European gas and electricity markets and to reach the objectives shared with the Commission (i.e. guarantee an adequate level of investment in the networks and foster the integration of national markets)¹³⁰.

In response, and together with the other members of the traditionalist coalition, Paris and Berlin worked out their own alternative called 'effective and efficient unbundling' (EEU) which they presented on 29 January 2008. EEU rested on two pillars, namely:

- *Pillar I (organisations and governance of the undertaking). The provisions listed here relate to the organizational independence of the TSO subsidiary from its parent group by ensuring that the latter's identity (in terms of assets, staff, financial resources) shall be clearly distinct from the mother company;*
- *Pillar II (grid investments, market integration and connection of new power plants). TSOs would develop a 10-year investment plan. In case the TSO would not carry out this plan national regulators could step in to force them to do so¹³¹.*

By initiating a 'third way' of unbundling via EEU the traditionalist coalition argued that fair competition could be achieved without full OU or ISO oversight by ensuring a number of safeguards concerning the independence, management and investment decisions of TSOs. Several delegations and the Commission, however, remained doubtful about the possibility of the EEU achieving the 'effective separation' requested by the European Council and whether the package would achieve real progress with this alternative (Council 6324/2008: 3).

A major impact on the discussions between the traditionalists and market adherents on unbundling was the announcement by German energy giant E.ON - prior to the 2008

¹²⁹ The principle of proportionality in Art. 5(4) TEU regulates the exercise of powers by the EU. It seeks to set actions taken by the European institutional actors within specified bounds. Under this rule, the involvement of the institutions must be limited to what is necessary to achieve the objectives of the Treaties. In other words, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The criteria for applying proportionality (and subsidiarity) are set out in the Protocol No 2 of the Treaty.

¹³⁰ Author copy of a letter from eight EU Energy Ministers to ITRE-Chairwoman Angelika Niebler, 29 January 2008.

¹³¹ *Ibid.*

February Energy Ministers Council - that a deal on full OU had been reached with the Commission. According to this deal, E.ON would sell off its German electricity grid and the Commission would drop its anti-trust investigation into alleged power market manipulation by the German utility. A very similar deal on gas between Germany's RWE and the Commission was also to precede the June 2008 Energy Council meeting.

These moves seemed to make a mockery of the bargaining position of the German government which led the traditionalist coalition. Peter Hinze, the German Secretary of State for the Economy, reacted furiously to the decision by E.ON. He accused the DG Competition of forcing unwilling Member States to bow to the Commission's liberal view of energy markets by stating:

E.ON's decision was not the best backdrop to the day's ministerial discussions. The timing coincidence of these events, at a moment when the Commission is trying to force through a very sharp position against a minority, it's a very questionable game" (Euractiv 29 February 2008).

Despite the initial shockwave caused by the E.ON decision, the coalition of traditionalists stood its ground and refused to treat the E.ON case as a game changer. Yet in another way the E.ON decision did constitute a game changer. As it annulled the material reasons for defending their companies from full OU, the German government, with the direct involvement of Chancellor Angela Merkel, elevated opposition to OU to a matter of principle (Buchan 2009: 77)¹³².

Around the time that the political fighting over OU between the traditionalists and market adherents had almost turned into an abstract and ideological argument, severe critique in the Parliament aimed to bring some common sense to the discussions. In line with the recognition of the way in which governments promote competition mentioned above, French MEP Dominique Vlasto (EPP) underlined the fact that whatever form of ownership structure was decided upon, it should be kept in mind that this would not have any impact on consumer prices as the latter would rise irrespective of the type of unbundling (Agence Europe 26 January 2008). Vlasto argued, furthermore, that improving competition on the market and its integration is not contingent on the ownership situation but rather on the

¹³² Interview German official, 19 April 2013, Berlin; Interview Parliament official, 12 July 2012, Brussels.

teeth of the regulators who have to oversee the opening of the market and the network access conditions (*ibid.*).

In this light the compromise reached in the Council in June 2008 on ‘effective separation of supply and production activities from network operations’ was not as contentious as some market adherents claimed it to be. ‘Effective separation’ was widened by incorporating the third way option championed by the traditionalist blocking minority. No longer labelled as EEU, the Slovenian Presidency and the Commission presented a joint paper in which the third way constituted an option to provide for an independent transmission operator (ITO). ITO allowed network management to stay within the integrated parent group, as the French and German government had insisted on from the beginning of the negotiations.

Linked to the presence of three different unbundling models on the Community market, a so-called level-playing field clause was introduced by the Dutch delegation in the texts¹³³. The presence of three different unbundling models raised the issue of the level playing field between different electricity and gas companies. In essence, the issue was as follows: to what extent a vertically integrated company in Member State A, having opted for the ITO model, could acquire an ownership unbundled network or a supplier in Member State B? The compromise agreed between the Member States, and untouched in the negotiations with the Parliament, was twofold: First, absolute protection against vertical unbundling, and second, a more general provision allowing Member States to ensure a level playing field within their territory.

Of greater importance, in light of the arguments brought forward by MEP Vlasto, was the compromise on the strengthening of the independence of the TSO as well as the softening of the powers of the National Regulatory Authorities (NRAs). The Council softened the Commission proposal regarding powers that did not concern the core tasks of network regulation such as renewables, research, development policies, security of supply and public service obligations.

Regarding the ‘European regulator’ ACER, the Council went in the opposite direction from the Commission because the Member States wanted to keep regulatory power mostly

¹³³ Interview Dutch official, 16 May 2012, The Hague.

in the hands of their national regulators. Therefore, the Presidency watered down the few decision-making power competences foreseen in the legislative proposal.

The Energy Council reached a political agreement on the package on 10 October 2008 and obtained a general orientation for defending its position in the upcoming discussions with the Parliament. On 9 January 2009, the Council unanimously adopted its common position on the five proposals in the package. The Commission argued that the Council's common position contained all the essential components of the Commission's proposal needed to ensure the proper functioning of the internal gas and electricity market (Commission 2008/906). The Commission's approval had much to do with the (almost certain) prospect that the blocking minority within the Council would stay intact, hence a compromise on OU was inevitable¹³⁴. The prospect of a blocking minority would stall any progress until spring 2009, at which time the Parliament would be dissolved ahead of the 2009 elections. In this scenario, at least a year would be lost with no surer prospect of getting OU through in 2010. (Buchan 2009: 76).

Around the same time as the adoption of the common position, the Czech EU Presidency underlined the necessity of reaching an agreement on the package during the first half of 2009:

The completion of discussions on the 3rd Liberalisation Package, and reaching an agreement on it within the term of the present European Parliament, is one of the main tasks of the Presidency (Czech Presidency of the Council of the European Union 2009: 8).

In sum, agreeing upon effective separation, the Council agreed to extend the idea of unbundling beyond what the Commission had initiated yet more in line with the divergent ways through which the Member States introduced and promoted competition. The Slovenian EU Presidency and the Commission broke the deadlock in the negotiations by proposing a third way in the form of the ITO option as a way of achieving 'effective separation' as defined by the spring 2007 European Council.

Discussions in the Council were conducted along national lines with a majority of market adherents (several Member States and the Commission) being in favour of full OU

¹³⁴ Interview European External Action Service official (former DG Competition), 5 July 2012, Brussels.

and seeing market-based solutions in gas and electricity markets as a core element for establishing a real internal energy market. Arguing from a (national-based) traditional industry agenda, a blocking minority of traditionalists led by Germany and France, on the other hand, argued that OU suggested forced divestment and therefore raised issues of, for example, expropriation¹³⁵. The E.ON case marked a moment in the decision-making process, however, when the disagreement over OU had moved beyond interest-based bargaining to an almost ideological controversy, with Germany elevating opposition to full OU to a matter of principle.

6.3.2. The Parliament

Legislative proposal	Committee responsible	Rapporteur	Date appointed	Committee vote 1 st read.	Committee vote 2 nd read.
				Plenary vote	
Electricity Directive	ITRE	Eluned Morgan (S&D - UK)	9 Oct. 2007	6 May 2008, 31(+), 17(-), 2 abstentions	31 March 2009, 37(+), 3(-), 1 abstention
				449(+), 204(-), 19 abstent.	
Gas Directive	ITRE	Romano Maria La Russa (UEN-IT); Antonio Mussa (UEN-IT)	9 Oct. 2007	8 April 2008, 34(+), 2(-), 3 abstentions	31 March 2009, 39(+), 0(-), 3 abstentions
			2 Dec. 2008	579(+), 80(-), 52 abstent.	
ACER Regulation	ITRE	Giles Chichester (EPP – UK)	9 Oct. 2007	28 May 2008, 43(+), 1(-), 3 abstentions	31 March 2009, 41(+), 0(-), 2 abstentions
				580(+), 40(-), 48 abstent.	
Electricity Regulation	ITRE	Alejo Vidal-Quadras (EPP-SP)	9 Oct. 2007	28 May 2008, 46(+), 0(-), 4 abstentions	31 March 2009, 39(+), 2(-), 1 abstention
				NA	
Gas Regulation	ITRE	Atanas Paporizov (S&D – BUL)	9 Oct. 2007	28 May 2008, 44(+), 1(-), 3 abstentions	31 March 2009, 41(+), 0(-), 2 abstentions
				NA	

Table 6.4: Parliament rapporteurs and reports for the Third Package.

(Source: Legislative Observatory of the European Parliament).

¹³⁵ Interview German official, 19 April 2013, Berlin.

Similar to the situation in the Council, the negotiations in the Parliament were conducted between traditionalists and market adherents, along national lines and not according to party groups¹³⁶. Prior to the publication of the legislative proposals, for example, the ITRE Committee adopted an initiative report by MEP Alejo Vidal-Quadras (EPP-SP) on the prospects for the internal gas and electricity market. Through this report a majority of market adherents in the Parliament expressed their support for full OU¹³⁷:

The Parliament considers transmission ownership unbundling to be the most effective tool to promote investments in infrastructures in a non-discriminatory way, fair access to the grid for new entrants and transparency in the market (Parliament P6_TA 2007 0326).

Other voices in the Christian Democrat group of Vidal-Quadras, however, proved to be more sceptical on full OU as the *sine qua non* for market integration. Representing a traditionalist minority in Parliament, MEP Herbert Reul (EPP-DE) stated in the plenary debate in July 2007 that:

Some sections of this Parliament have problems with the proposals. With some of these proposals, ownership unbundling really is the only way to ensure there is some liberalization on the internal market. The data do not necessarily support that. You only have to look at them. States and energy undertakings do not necessarily invest most in networks that are unbundled; the figures available show that states and undertakings are investing very heavily in interconnectors and in networks that are not unbundled (Parliament Plenary debate 9 July 2007).

The rapporteur for the Electricity Directive, Eluned Morgan (S&D-UK) took a tough stance on OU. In her first-reading report she underlined that full OU constituted the only option for the electricity market¹³⁸. Morgan defended the single option for OU by emphasising improved retail services so that European consumers could be treated equally and that a single, regulatory framework needed to be guaranteed for investments of the sum of 1 trillion euros to be raised over the next two decades¹³⁹. Similar to the debate after the Vidal-Quadras initiative report a year earlier, and as shown by the voting outcome in the

¹³⁶ Telephone interview with a former MEP, 2 October 2012, Osnabrueck.

¹³⁷ See the 'Procedure File on the Prospects for the internal gas and electricity market' in Parliament Legislative Observatory.

¹³⁸ A6-0191/2008.

¹³⁹ P6_TA(2008)0294.

plenary in Table 6.4, a majority gave its support to full OU as the single option to unbundle electricity operators' production effectively from activities linked to transport and network.

Rapporteur Vidal-Quadras was more pragmatic than Ms Morgan by being willing to accept an alternative model of OU for the electricity sector, provided that it guaranteed the effective independence of the electricity ITO and that conditions for non-discrimination for network access, investment independence and consumer protection were assured. According to Vidal-Quadras, full OU did not constitute the alpha and omega of the package:

Ownership unbundling was not a panacea but a necessary and sufficient condition, although definitely not enough on its own for achieving an integrated single market¹⁴⁰.

Concerning the gas Directive, the ITRE Committee rejected the ISO-option for gas. Combined with the fact that progress towards OU is more advanced in the EU electricity sector, the arguments that played a role in the ITRE's thinking in this rejection were to some extent linked to the traditional industry agenda mentioned earlier in this chapter. These arguments concerned, for example, the reliability of supply and public service¹⁴¹.

ITRE also rejected the third way proposal of effective and efficient unbundling presented by Germany and France in January 2008. In response, the committee adopted a new hybrid alternative to the ITO-option as presented by the Commission to Coreper in May of the same year¹⁴². This ITO-compromise drafted by Vidal-Quadras together with MEP Anne Laperrouze (ALDE-FR) gave companies and/or countries a choice between OU and an alternate ITO which emphasised the strengthening of the power of the national regulatory authority¹⁴³.

The strengthening of the role and independence of the national regulators proved one of the major amendments of the Parliament. On this issue NRAs were urged to play a more prominent role in areas such as approval and enforcement of TSOs' annual investment plans, enforcement of consumer protection measures and strong rules and intervention to restore competition on supply markets. Under existing legislation the Parliament argued, for example, that many NRAs had no remit to care for the European consumer so all decisions

¹⁴⁰ Interview MEP, 15 May 2012, Brussels.

¹⁴¹ For example, the importance of owning the network to negotiate long-term supply agreements with gas producers.

¹⁴² The third way proposal was rejected in ITRE with 22 votes for, 26 against and three abstentions.

¹⁴³ Laperrouze-Vidal-Quadras Compromise Proposal 3rd Option, 15 May 2008, internal Parliament document.

were taken only with the national consumer in mind. The Parliament argued that this situation needed to change if a truly European energy market was to succeed. The main bargaining positions of the Council and Parliament are summarised in Table 6.5.

Proposals	Council		Parliament
Electricity & Gas Directives	'Effective unbundling'	-OU	-OU (electr., gas)
		-ISO	n/a (electr., gas)
		-ITO	-ITO (gas)
			-Energy poverty; -Consumer protection measures
	- Additional powers/competences regulatory authorities	- Additional powers/competences regulatory authorities	

Table 6.5: Main bargaining points of the Council and Parliament prior to the trilogues.

In sum, the Parliament took a more complex stance on 'effective unbundling' than the Council. The pragmatic approach on OU by Vidal-Quadras contrasted with the tough stance of rapporteur Morgan. The latter's approach to this issue had much to do with her wish to trade support on this issue for including stipulations on energy poverty and consumer protection in the package. However, the Parliament proved to be divided on energy poverty. The main critique was that energy poverty had essentially nothing to do with establishing a (wholesale) regulatory framework for the European energy sector, which was in essence the main aim of the package.

Energy poverty was a British issue. [Rapporteur] Morgan [as a British socialist politician] wanted a standard definition on this issue. Yet incomparable national situations make this almost impossible to establish. In fact, most of the amendments in the Morgan Report concerned social issues that the Commission and Council could not accept¹⁴⁴.

As further explained in the sections below, an agreement between the Council and Parliament on wholesale and retail aspects of the Third Package was established through logrolling with a facilitating role for the unbundling and TPA principles as focal points.

¹⁴⁴ Interview Parliament official, 12 July 2012, Brussels.

6.4. Main elements of the final compromise

Extending what is listed in table 6.5, this section provides an overview of the main elements of the compromise regarding the amended rules for the internal market in electricity and gas. Through a reference to ideas, section 6.4.1 provides an indication of the resolution of conflicts of interest between the Council and Parliament. Section 6.4.2 reflects on the negotiations and the policy agreement and argues that the final compromise needs to be explained in terms of a thick rational-choice approach as formulated in the bargaining model.

6.4.1. Amended rules for the internal market in electricity and gas

With regard to ‘effective unbundling’, the policy outcome allowed Member States the opportunity to choose among three options for separating supply and producing activities from gas and electricity transmission networks:

- *OU (gas, electricity Art. 9);*
- *The independent system operator (electricity Art. 13; gas Art. 14);*
- *The independent transmission operator (electricity Chapter V; gas Chapter IV).*

If a Member State decided to impose OU (Figure 6.1), all integrated energy companies would have to sell off their gas and electricity grids, thus establishing separate transmission system operators to handle all network operations. In this case the compromise text agreed by MEPs and the Council stipulated that no supply and production company would be allowed to hold a majority share in a transmission system operator, (A6-0216/2009: Art. 9).

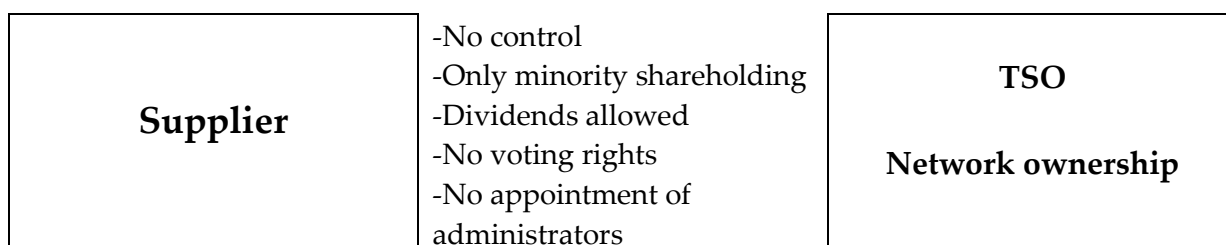


Figure 6.1: Ownership Unbundling (OU).

(Source: Cabau 2010).

In contrast to full OU, the ISO and ITO options allowed energy companies to retain the ownership of their transmission networks.

Under the ISO option (Figure 6.2), Member States could oblige integrated energy companies to hand over the technical and commercial operation of their transmission networks to a separate body designated by the Member State, i.e. the independent system operator (ISO) (A6-0216/2009: Art. 13 / A6-0238/2009: Art. 14).



Figure 6.2: Independent System Operator.

(Source: Jones & Cabau 2010).

The ITO model (figure 6.3) preserved integrated production, supply and transmission companies but compelled them to conform to certain rules to ensure that these two sections of the company operate independently in practice.

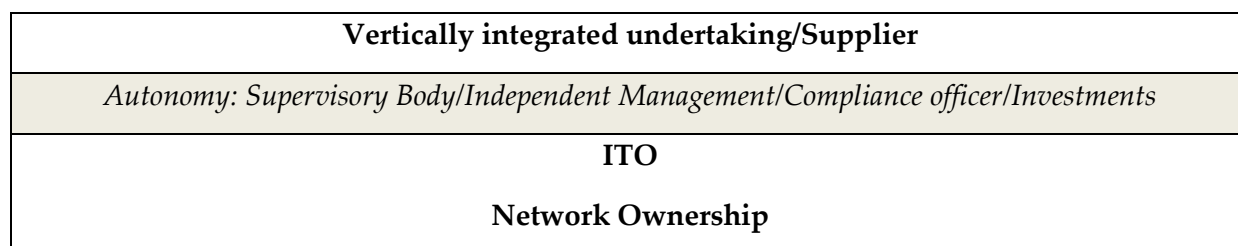


Figure 6.3: ITO Model.

(Source: Cabau 2010).

By obtaining additional provisions for the ITO option, which ensured independence of the transport operator in terms of investment and governance, rapporteur Mussa (Gas Directive) stated that the ITO-system is the true innovation in the package, constituting the area where the Parliament can be said to have achieved the best outcome¹⁴⁶. Rapporteur Vidal-Quadras affirmed this conclusion by stating that the Parliament obtained a much tighter regulatory framework, especially in Member States with the ITO model in place and where the competency of national regulators would be increased with independence from

¹⁴⁵ Legal unbundling requires that distribution system operator that is part of a vertically integrated undertaking must be established as a legally separate company (including in organisation and decision making) from other activities not relating to distribution. Legal unbundling alone, however, does not ensure separate functional management of the network business.

¹⁴⁶ Parliament plenary debate, 21 April 2009, Strasbourg.

both governments and industry¹⁴⁷. Based on what is written in the Directives on electricity and gas, the traditionalists favouring either the ISO or ITO option succeeded in wrapping themselves in red tape and in authorising national regulators to impose substantial fines on parent companies and network subsidiaries in case of their being guilty of discrimination. The imposition of fines never figured in the Commission's original proposals.

Since Member States may choose between the three options the new legislation allows them to take “*proportionate, non-discriminatory and transparent*” measures to ensure a level playing field for all energy companies operating on their territory (electricity Art. 43; gas Art. 47)¹⁴⁸.

At the insistence of the Parliament, and as part of the package deal between the co-legislators, the legislation introduced an article on customer protection (electricity, gas Art. 3). Under the provisions agreed upon consumers will enjoy universal service that is the right to be supplied with electricity of a specified quality within their territory at reasonable, easily and clearly comparable, transparent and non-discriminatory prices. Consumers also will have the possibility to change electricity/gas providers in three weeks and without costs, to resort to mechanisms to ensure that complaints filed are treated effectively (via an energy ombudsman) and to compensate for mechanisms where the level of quality of service is deficient (electricity Art. 3(5, 13); gas Art. 3(6, 9)).

Regarding energy poverty, each Member State is obliged to define the concept of vulnerable customers which may refer to energy poverty and, inter alia, to the prohibition of disconnection of electricity to such customers at critical times (electricity, gas Art 3(7)).

Subject to an economic assessment, the legislative texts stipulated that at least 80 per cent of consumers should have access to intelligent metering systems by 2020 (electricity, gas annex I). Such ‘smart meters’ measure consumption in detail - for example, they are able to provide the specific time when energy is consumed. This technology would enable suppliers to offer different tariffs for consumption based on the time of day and season.

The outcome of this raft of measures was hailed by rapporteur Morgan as the EU putting energy consumers right at the centre of the energy debate:

¹⁴⁷ *Ibid.*

¹⁴⁸ Furthermore, agreement was reached between the Three on a review clause (electricity Art. 47(3); gas 52(3)). This clause allows the Commission (by March 2013) to check whether all three models satisfy the Union goal of achieving a fully competitive market.

On the European Parliament's initiative, the new legislation also includes special protection measures for vulnerable energy consumers, and the issue of energy poverty has now been recognised at European level (Plenary debate 21 April 2009).

In comparison with the 2nd Package, the new laws strengthened the national regulator's powers and duties in ensuring the functioning of the market. Through the agreement reached in the package, national regulators are equipped to:

- *Fix or approve regulated transmission or distribution tariffs;*
- *Ensure that there are no cross-subsidies between transmission, distribution and supply activities;*
- *Issue binding decisions on energy companies, and;*
- *Impose "effective, proportionate and dissuasive penalties" on energy companies that fail to comply with third energy package requirements, including penalties of up to 10% of the company's annual turnover (electricity Art. 37(4d); gas Art. 41(4d)).*

6.4.2. Reflections on the negotiations and outcome

The package deal agreed on by the co-legislators in March 2009 offered a good basis to achieve the complete liberalisation of gas and electricity markets. The effective separation of the production and sale of energy from the transmission of energy (i.e. stricter unbundling supply from transmission activities of integrated companies) should further create a level playing field in energy markets.

The package furthermore provides for effective regulatory oversight by truly independent and competent NRAs. In comparison to the second one, the package explicitly formulates the powers and role of the national regulators (e.g. final wording in Art. 37 of the electricity Directive). The creation of the ACER should strengthen the co-ordination among NRAs.

The transparency of the markets and the rights of citizens in the market opening process, as well as the obligations on member states to protect vulnerable energy consumers, were reinforced. On the inclusion of obligations on consumer rights in the Third Package, it should be noticed that the social dimension had been completely absent in the previous packages. Hence the inclusion of consumer rights in the Third Package can be regarded as a (minor) success in establishing the retail dimension of energy retail legislation.

Last but not least, the establishment of a new European Network for Transmission System Operators (ENTSO), with the task of developing common technical codes and security standards, should further increase cross border collaboration and investment (Andoura *et al.* 2010: 30-1).

In general the decision-making process on the package is explained in terms of interest-based bargaining with the Parliament reaching a compromise by coming into line with the Council's common position (Agence Europe 25 March 2009).

In the final compromise, the Parliament gave way on ownership unbundling in return for concessions in other areas covered by the package, notably the reinforcement of powers and independence of national regulators and of [ACER], as well as new rights for consumers. Thus, the EU [’s institutional actors] have decided not to decide on the much debated (and often theoretical) pros and cons of full ownership unbundling and its presumed impact on security of supply [and competitiveness] (Kérébel 2009: 2).

This conclusion is in line with more general rational choice observations about EU package deals allowing Member States to control the policy agendas they value most and, in exchange, offer side payments to the Parliament for its co-operative behaviour.

In exchange for allowing Member States to realise their budgetary and policy preferences, the European Parliament gains additional institutional powers in policy areas where it has been traditionally weak or even excluded (Kardasheva 2009: 14).

The section below argues that this ‘thin’ RCI approach does not tell the whole story regarding the depth of the EA and the speed of the decision-making process on the package. Logrolling between the Council and Parliament on the wholesale (e.g. unbundling) and retail (e.g. consumer rights) aspects of the package certainly was an important part of the decision-making process. But logrolling - or bargaining - alone cannot explain why after long and difficult negotiations the package was agreed upon as an EA. In fact, Kérébel herself states that it is wrong to assume that during the legislative process the EU caved in to national interests and attempts to protect big national energy players. Starting with the legislative proposals, for example, the Commission probably never thought that full [OU] could be reached. *“Its proposal was made to increase the offer of the other players, in particular the national states”*(Kérébel 2009: 2).

This offer as part of the overall package deal is explained below through a thick RCI approach. It was mentioned earlier in this chapter that market adherents such as the Commission and a majority of Member States recognised room for interpretation concerning the principles of TPA and unbundling in the regulatory dimension of promoting competition. Rather than arguing that the Three decided not to decide on full OU, the argument further elaborated upon is that the Three decided to reach an EA on 'effective unbundling' and the package as a whole with the principles of unbundling and TPA acting as key focal points. In line with the diverse interests and in terms of promoting open access to the energy grid and creating a level playing field for energy companies, unbundling and TPA promoted a co-operative equilibrium between the Three in the form of 'effective unbundling'. Although not an agreement on full OU as preferred by the market adherents, effective unbundling allowed for the required flexibility in which governments introduce and promote competition and the 'thickening of the Chinese walls' between production and transmission functions. TPA and unbundling facilitated co-operation and paved the way for successful logrolling between the Council and Parliament on some of the other prominent issues in the package; hence the establishment of an EA.

The thick RCI approach further points out that the impatience of the Commission and Council in reaching an EA on the package played an important role in the informal decision-making process. The Commission's approval of the Council's position at the end of 2008 on effective unbundling had much to do with the (almost certain) prospect that the blocking minority coalition within the Council would stay intact. The prospect of a blocking minority would stall any progress until spring 2009, at which time the Parliament would be dissolved ahead of the 2009 elections. Regarding the Parliament's relative impatience, the shadow of the Climate & Energy Package loomed large over the Third Package negotiations. Some of the major groups such as the Socialists (S&D) considered the Third Package as constituting the more technical and less prestigious of the two packages. As a result the S&D Group was keen on pushing forward the negotiations on the Third Package¹⁴⁹.

Section 6.5 explores the role and function of these principles in facilitating the informal bargaining between the Three on three issues that cover the wholesale and retail

¹⁴⁹ Interview Parliament official, 23 April 2013, Brussels; Telephone interview with a former S&D official, 4 October 2012, Osnabrueck.

dimensions of the internal energy market and were at the heart of the negotiations. These issues are:

- *'Effective unbundling';*
- *The powers and competences of the national regulatory authorities;*
- *Consumer rights.*

6.5. Access & unbundling: Bargaining trade-offs in the trilogues

The trilogue negotiations on the Third Package got underway under the Presidency of the Czech Republic and in the context of a major gas crisis in January 2009, which saw Russia cut off supplies through the Ukraine to several EU Member States. Furthermore, there were several other factors which exerted time pressure. These factors included the end of the legislative term of the Commission in 2009, Parliament elections in June 2009 and the French EU Presidency having prioritised the Energy & Climate Package. Commenting on all of these factors, several officials and politicians involved in the negotiations confirmed time pressure as decisive in coming to an early agreement under the Czech Presidency¹⁵⁰. According to rapporteur:

Under the Czech Presidency the deal had to be closed. The fact that the Package was decided during early second reading was due to time pressure. To my opinion, the Parliament would have been more persistent in its stance on OU had there been more time¹⁵¹.

Related to the end of the legislative term of the Commission was the fact that Commission President Barosso needed the support of Germany and France for his re-election. Barosso therefore put pressure on the involved Commission DGs (TREN, COMP) not to push the OU-matter too far¹⁵². Andris Piebalgs, the Energy Commissioner, was keen to reach an agreement on one of his key dossiers prior to the end of his mandate. The latter fact would explain his rather passive position towards the Member States, which was heavily

¹⁵⁰ Interview Commission official, 4 July 2012, Brussels; Telephone interview with a former MEP, 2 October 2012, Osnabrueck; Telephone interview with Czech public official, 17 Mai 2013, Osnabrueck.

¹⁵¹ Telephone interview with a former MEP, 2 October 2012, Osnabrueck.

¹⁵² Interview Commission official, 29 June 2012, Brussels; Interview Commission official, 4 July 2012, Brussels.

criticised by rapporteur Morgan during the first- and second-reading stages of the package¹⁵³.

In sum, the second reading was concluded under quite a bit of time pressure. This pressure was further strengthened by the wish of all market stakeholders to have a clear legislative framework for making the necessary investment to ensure EU supply security and the competitiveness of its energy markets (Agence Europe 20 February 2009). Therefore all involved institutions had an interest to secure a deal on the whole package in May 2009, at the latest, as the last plenary of the Parliament before the 3 June 2009 elections was in May. A conciliation procedure in autumn 2009 would have meant that new members of the Parliament would have had to take over this complex dossier in a difficult phase of the procedure and at a time when the Commission was scheduled to be replaced as well (Ermacora 2008: 265).

<i>Trilogues</i>	<i>Issues</i>
<i>First trilogue</i> (27 January 2009)	<i>Unbundling, consumer rights and tackling energy poverty, regional cooperation, establishment of 10-years investment plans, powers ACER and NRAs</i>
<i>Second trilogue</i> (3 February 2009)	<i>Unbundling, NRAs</i>
<i>Third trilogue</i> (18 February 2009)	<i>Unbundling, NRAs, consumer protection and energy poverty</i>
<i>Fourth trilogue</i> (3 March 2009)	<i>ACER; Consumer protection and energy poverty (Morgan & Mussa Reports); finalizing provisions NRA; return to Unbundling (Morgan & Mussa Reports); gas and electricity Regulations (Chichester, Vidal-Quadras and Paporizov Reports)</i>
<i>Fifth trilogue</i> (10 March 2009)	<i>Regulatory issues (Vidal-Quadras and Paporizov Reports), institutional powers ACER (Chichester Report)</i>
<i>Sixth trilogue</i> (18 March 2009)	<i>Gas & electricity Directives (Morgan & Mussa Reports); ACER (Chichester Report) Unbundling, regional cooperation, 3rd country and level playing field clauses, ACER (exemptions); gas Regulation (investment plans, network codes, scope of codes)</i>
<i>Seventh trilogue</i> (23 March 2009)	<i>Concluding the five dossiers & final-deal on Unbundling</i>

Table 6.6: The trilogues in the Third Energy Package.

(Source: European Parliament Feedback Notes on trilogues on the Third Package).

¹⁵³ Parliament plenary debate, 17 June 2008, Strasbourg.

First and foremost, the trilogue negotiations were key in facilitating an early agreement on the package. The dates as well as the issues discussed in the trilogues are listed in Table 6.6.

The discussions on the Third Package were set-up to approach the package as a whole. The focus in the trilogues was on coming to an agreement on the operation and legal issues of the package and providing consistency by establishing a framework (including the tasks of the regulator) that would be applicable to both the electricity and gas sectors¹⁵⁴.

During the first informal trilogue on 27 January, the main issues for bargaining were divided into five blocks:

-Block 1 ('unbundling', level playing field, third country clause);
-Block 2 (national regulatory authorities, including their role in regional cooperation);
-Block 3 (Consumer Rights and Energy Poverty);
-Block 4 (Codes/Guidelines, ACER, ENTSOs, regional cooperation);
-Block 5 (Other issues such as gas specifics, comitology, etc.).

The focus here is on unbundling, the national European regulators (i.e. ACER) plus consumer rights (blocks 1 to 4). At the first trilogue meeting the five rapporteurs (i.e. Morgan, Mussa, Chichester, Vidal-Quadras and Papparizov) presented their priorities for the negotiations:

- *Effective provisions on unbundling;*
- *Consumer rights and tackling energy poverty;*
- *Regional cooperation; the establishment of 10-year investment plans;*
- *Stronger powers for the ACER and the national regulatory authorities, including the need to get the right market structures (i.e. adoption of network codes and guidelines)* (Parliament Feedback Note 28 January 2009).

At the same trilogue, the Presidency then presented the Council's (unchanged) position, outlining the Council's stance on unbundling that included treating gas and electricity markets equally hence applying the three options to both.

¹⁵⁴ Interview Council official, 18 July 2012, Brussels.

During the second trilogue on 3 February, an agreement was reached on a recital which was important for establishing a consensus on effective unbundling. The final compromise proposal on this recital agreed upon by the Council and Parliament read:

Any system for unbundling should be effective in removing any conflict of interests between generators and transmission system operators, in order to create incentives for the necessary investments and guarantee the access of new market entrants under a transparent and efficient regulatory regime and should not create an overly onerous regulatory regime for national regulatory authorities (Council 5437/5/2009: 8)¹⁵⁵.

In line with market adherents' recognition of diversity in promoting competition, the Council and Parliament also agreed that different types of market organisation would exist in the internal electricity and gas markets, and that measures Member States could take in order to ensure a level playing field should be compatible with both the Treaty and Community law (Council 5438/1/2009: 13; Council 5437/2/2009: 11).

These compromises were important for the subsequent bargaining process as the Council and Parliament recognised diversity in which governments would remove any conflict of interest between energy producers and the transport operator. As underlined in the compromise proposal mentioned above, the TPA and unbundling principles facilitated a consensus on this issue. In line with the Council's suggestion of applying the OU, ISO and ITO in an equal manner to the electricity and gas sectors, the compromise proposal paved the way for an agreement on 'effective unbundling' (Table 6.7 below) and for the subsequent logrolling process in other parts of the package.

The Russia-Ukraine gas crisis in January 2009 had furthermore strengthened the coalition of the Member States and MEPs that opposed full OU as the sole option for achieving the further liberalisation of the energy market¹⁵⁶. This crisis had a major impact on the supply of gas to the CEECs strengthening the argument of the traditionalist delegations in the Council, notably the French, for the need for strong integrated companies and applying the third option to both gas and electricity. According to the traditionalist logic, without vertically integrated companies, European consumers would continue to be exposed

¹⁵⁵ Underlined by author.

¹⁵⁶ The Russia-Ukraine gas crisis is further elaborated on in Chapter 7.

to security of supply problems caused by third-country oligopolies (Europolitics 19 March 2009).

Arts. proposed by the Commission	Arts. proposed by ITRE Committee and accepted by Parliament at 1 st reading	Commission opinion	Amendments adopted by Council Common position	Arts. proposed by ITRE Committee for 2 nd reading	Arts. adopted by Parliament and accepted by Council: Final text
<i>Effective unbundling</i>					
Electricity: (Art. 8) <i>Unbundling of transmission systems and transmission system operators;</i> (Art. 10) <i>Independent system operators</i>	Art. 8 (amendments 61-69); Art. 10 (deleted)	Accepted: Arts. 8, 10	(Art. 9) <i>Unbundling of transmission systems and transmission system operators;</i> (Art. 13) <i>Independent system operators</i> added: (Chapter V) <i>Independent Transmission Operator</i>	Art. 8 (amendments 61-69); Art. 10 (deleted)	(Art. 9) <i>Unbundling of transmission systems and transmission system operators;</i> (Art. 13) <i>Independent System Operator;</i> (Chapter V) <i>Independent Transmission Operator</i>
Gas: (Art. 7) <i>Unbundling of transmission systems and transmission system operators;</i> (Art. 9) <i>Independent system operators</i>	Art. 7 (amendments 56-67) Art. 9 (deleted) (endorsement of Independent Transmission Operator model)	Accepted: Arts. 7, 9	(Art. 9) <i>Unbundling of transmission systems and transmission system operators;</i> (Art. 14) <i>Independent system operators</i> (Chapter IV) <i>Independent Transmission Operator</i>	Art. 7 (amendments 56-65) Art. 9 (deleted) Amendments 78, 125/rev, 135/rev and 138/rev	(Art. 9) <i>Unbundling of transmission systems and transmission system operators;</i> (Art. 14) <i>Independent System Operators;</i> (Chapter IV) <i>Independent Transmission Operator</i>

Table 6.7: The decision-making process on effective unbundling in the Third Package.

In addition to the impatience of some of the players in adopting the package as an EA, the Russia-Ukraine strengthened the need for reaching an agreement on effective unbundling. Moreover as the Czech EU Presidency underlined the fact in the trilogues that the Council's common position was already a difficult compromise and that the Presidency lacked a mandate to propose changes on the unbundling concept (Parliament Feedback Note 3 February 2009). Therefore, the Czech Presidency consistently stuck to the common position that offered three alternative options to both gas and electricity companies.

Most of the rapporteurs accepted the three options (including ITO for gas markets) yet aimed to trade their support on this issue for concessions from the Council in other parts of the package. Despite the compromise proposal mentioned above, therefore, the rapporteurs underlined its strong mandate from the Parliament in first reading to treat unbundling in the gas and electricity sectors differently (Parliament Feedback Note 19 February 2009). Rapporteur Morgan took this bargaining position to the extreme as she kept pressing for full OU as the sole option for electricity with the aim of receiving concessions on the issues of consumer rights and energy poverty¹⁵⁷. As mentioned in the sections above, Morgan received several concessions in the retail dimension of the package yet was still able to claim that effective unbundling would contribute to a ‘thickening of the Chinese walls between production and transmission functions’¹⁵⁸.

A key issue of interest not just of Ms Morgan but of the Parliament as a whole concerned the strengthening of regulators’ ‘teeth’. As pointed out by MEP Vlasto earlier in this chapter, improving competition on the market and its integration is contingent on the teeth of the regulators who have to oversee the opening of the market and the network access conditions. The trilogues produced concrete progress towards a compromise in several parts of the text, adding additional provisions that ensured greater independence for the NRAs (Arts. 34-6). For example, the Council accepted the Parliament’s amendments that the regulatory authority be able to take autonomous decisions independently from any political body (Art. 34). The compromise text formulated in the trilogues strengthened the autonomy of the regulatory authority (i.e. decision-taking, separate allocation and implementation of its budget), the terms of appointment of its staff (Members of the Board) as well as its monitoring powers. With regard to:

- *The occurrence of restrictive contractual practices;*
- *Compliance with network security;*
- *The level and effectiveness of market opening;*
- *Technical cooperation between Community and third country transmission system operators;*
- *Competition at wholesale and retail levels;*
- *Helping to ensure, together with other relevant authorities, that the consumer protection measures are effective and enforced.*

¹⁵⁷ Interview MEP, Brussels, 15 May 2012, Brussels.

¹⁵⁸ Telephone interview with a former MEP, 2 October 2012, Osnabrueck.

The majority of these provisions made it into the final text.

Regarding the objectives of the regulatory authority, a compromise was also inserted regarding the monitoring of investment plans of transmission system operators (Art. 35). Against the wishes of the Parliament, however, the Community-wide 10 year network development plan for electricity remained non-binding and ended up in the final text of the Regulation concerning cross-border exchanges in electricity (Art. 8 3(b)).

Further compromises on the duties and powers of the national regulatory authorities (including their role in regional cooperation) were established during the third and fourth trilogue meetings.

The rapporteurs and the Czech EU Presidency reached agreement on the whole of the Third Package in the seventh (and final) trilogue held on 23 March 2009. As set out above in detail, the amendments were the result of an informal compromise negotiated by rapporteurs from the ITRE-Committee with the Czech EU Presidency. The compromise reached was endorsed on 27 March by Coreper while the ITRE Committee adopted the package on 31 March 2009.

6.6. Conclusion

This chapter has argued that the TPA and unbundling principles played a key facilitating role in the adoption of the Third Package as an EA. An informal agreement on 'effective unbundling' which respects the TPA principle and guarantees the unbundling of the network in one form or another made it possible for the Council and Parliament to agree on including three options for separating supply and producing activities from gas and electricity transmission networks. The TPA and unbundling principles promoted co-operation in a game in which co-operative equilibrium was difficult to sustain, i.e. where there was a strong disagreement between the co-legislators over which set of rules to apply in the further liberalisation process of the EU electricity and gas markets.

During the decision-making process between the Three, the fundamental disagreement between traditionalist Member States and those who advocated a market-oriented approach turned into a highly abstract and ideological argument about the pros and cons of pushing OU as the sole option for achieving effective liberalisation. The prospect of

legislative gridlock loomed on the horizon as a deal based solely on the self-interested behaviour of the Council and Parliament was impossible to achieve in a short-period of time.

Despite these strong divisions (or coalitions) on OU, the trilogue meetings managed to facilitate the speedy adoption of the legislative texts in little over two months. The TPA and unbundling principles were instrumental in the informal negotiations on establishing an agreement which should lead to a separation between production and transmission functions. Settling the heated disagreement on OU allowed the Council and Parliament to logroll their preferences on other issues and reach an agreement on wholesale (e.g. strengthened role and duties of national regulators and the ACER) and retail (introducing consumer rights) aspects of the package. The deal-breaker for the Parliament, i.e. the strengthening of the independence of both national regulators and the ACER was made possible through the prior agreement reached on effective unbundling.

The relevance of TPA and unbundling as focal points was strengthened by ambiguous feedback from the legislators' environment, such as the January 2009 gas crisis, the decision by E.ON to sell of its transmission networks and the demand of market stakeholders for a legislative framework for investment purposes. Furthermore, the second-reading of the package was marked by the end of the lifecycles of the Parliament (2004-2009) and the Barroso I Commission (2004-2009). Therefore, the negotiations were concluded under quite a bit of time pressure as the Three had an interest to secure a deal on the whole package before June 2009 (when the Parliamentary elections were held) as no surer prospect existed among the Three of getting OU through under a new Parliament and Commission in 2010.

In retrospect, a defining moment in the decision-making process on the Third Package proved to be the letters sent by those for and against OU to Commissioner Piebalgs in the summer of 2007. This action set an important precedent for the informal negotiations in the sense that it 'cemented' the positions of both the pro-OU and anti-OU Member State camps. This formalisation of positions made it very hard to go back on any respective stance concerning OU, even if Member States in certain cases wanted to trade or give in during discussions within the Council and (at a later stage) with the Parliament. Although not represented in the bargaining model and therefore requiring further research, this moment in the decision-making process underlined the inevitability of the need to cement a deal on a

wider definition of the 'effective separation of supply and production activities from network operation'.

Chapter 7: In a Spirit of Solidarity - The Informal Adoption of the Security of Gas Supply Regulation (2010)¹⁵⁹

This chapter constitutes the third and final case study that tests the thick rational-choice bargaining model that is central to this thesis. This thick RCI approach explains that the principles of solidarity, subsidiarity and proportionality were instrumental in reaching an early agreement on this policy file. These three principles facilitated the decision-making process in terms of promoting cooperation between the Three and serving as essential mechanisms for reaching an early agreement over the course of four trilogue meetings. In thick RCI terms, these principles were necessary to ensure coordination, signal commitments from the Council to the Parliament and vice versa and promote a cooperative agreement over a short period of time in a policy area (security of gas supply) that Member States consider a national prerogative. Without solidarity, subsidiarity and proportionality defining a cooperative solution, an agreement based solely on the self-interested behaviour of actors with strongly divergent interests would not have emerged in such a short period of time.

7.1. Introduction

This chapter focuses on explaining the informal legislative decision-making process on the Security of Gas Supply (SoS) Regulation (2009/0108(COD)). The SoS Regulation established an EU emergency plan to deal with short-term supply shortfalls or disruptions beyond the level at which market mechanisms, industry and national emergency measures can provide solutions. This security of supply framework builds on the concept of shared responsibility of natural gas undertakings, Member States and the Commission. With the adoption of the Regulation, the concept of gas supply shifted from a purely national concept and a justification for derogating from internal market rules to a European framework (Beyer 2012: 125).

The proposal was tabled by the Commission in July 2009 and the Regulation was adopted in June 2010 in first-reading, entering into force on 3 December 2010. The SoS Regulation was the first legally binding instrument based on Art. 194 (TFEU) of the Lisbon

¹⁵⁹ The EU security of supply policy constitutes an external dimension (EU approach towards third countries through instruments such as the Energy Community) and the development of internal EU legislation. Although in the context of external events, the focus in this chapter is exclusively on the internal dimension of EU security of supply policy.

Treaty¹⁶⁰. Art. 194(1b) states that Union policy on energy shall aim, in a spirit of solidarity between Member States, to ensure security of energy supply in the EU. This stipulation in the Treaty is an acknowledgment of the fact that security of supply is moving from the national towards the EU level. Although primary legislation does not contain a legal obligation on the Member States to provide mutual support to one another, solidarity does constitute a key principle in EU energy policy.

Solidarity is a policy of supply security provided by the Member States to other Member States. It complements the wider effects of the achievement of the internal market where this market reaches its limits. As there has been no legal obligation yet for active solidarity, Member States are confronted with a kind of constitutionalisation of this principle (Glachant & Ahner 2012: 20).

Constitutionalisation here refers to the fact that principles such as solidarity have become embedded in the EU's legal order (i.e. in primary and secondary law). This legal order, in turn, has affected Member States in terms of exerting pressure on them to act according to the EU's liberal democratic identity, principles and norms (Rittberger & Schimmelfennig 2005: 5).

The SoS Regulation must be understood as a new instrument that explicitly addresses EU security of supply, with certain provisions making the 'spirit of solidarity' in the Energy Article of the Lisbon Treaty operational.

The main focus of this chapter, however, is on explaining how the principles of solidarity, subsidiarity and proportionality facilitated the legislative decision-making process and made an early agreement on the SoS Regulation possible.

A 'thin' version of RCI would explain the decision-making on the SoS Regulation in terms of a simple trade-off between the Council and Parliament. In thin RC-terms, this trade-off consisted of the Member States maintaining the majority ownership of their national (gas) sovereignty for a (minimum) role for the Commission in national plans dealing with security of supply. This explanation, however, is unable to explain the speed of the negotiations and the 'depth' of the agreement, i.e. why under conditions of uncertainty the Three choose this particular outcome which in the end is much more than just simple 'tit-for-tat'.

¹⁶⁰ See Chapter 2 for details on the energy title (Art. 194 TFEU).

The 'thick' RCI explanation as proposed in the bargaining model and applied in this chapter provides a more comprehensive explanation of the decision-making process on the Regulation. This explanation takes into account the interaction between the Three and their environment and how principles acted as focal points that paved the particular path on which the Three were able to coordinate their bargaining.

The Russia-Ukraine gas crisis in January 2009 provided the environment which accelerated the need for a quick policy response and strengthened the relevance of the principles as focal points suitable for giving direction to the Union's dealings in security of gas supply. As described in Chapter 2, this major disruption had underlined the huge interdependence between a large number of Member States and the necessity to improve the EU's preparedness at both the individual and collective levels as soon as possible. Facilitated by solidarity, subsidiarity and proportionality, the legislators quickly established a cooperative agreement that recognised the need and competence to ensure security of gas supply at national level while assigning a stronger role to the EU in coordinating Member States' response to supply disruptions and declaring emergencies. Recognizing the increasing importance of the Union dimension in security of gas supply, the role of the Commission was strengthened in regional and Union emergencies as well as with regards to actions by the Member States. Although the Council put on a check on the Commission in its ambitions to coordinate national actions, a more harmonised and consistent package of measures was established which have led to a higher degree of solidarity or preparedness in most Member States in case of a gas crisis.

First, section 7.2 describes the key issues in the legislative proposal put forward by the Commission. The Commission introduced subsidiarity, proportionality and solidarity as focal points that expressed gains for the further Europeanization of security of gas supply. Regarding solidarity, the Commission also included proposals for the operationalization of this principle.

The analytical focus in section 7.3 is based on the initial bargaining positions established in the Council and Parliament. The main outcome of the negotiations between the Three on the Regulation is discussed in section 7.4, including how the solidarity principle found its expression in the various provisions of the final text decided upon as an EA.

Section 7.5 focuses on the informal decision-making process in the trilogues. It points out that the three principles were instrumental in reaching an EA as well as reconciling the interests of the Council and the Parliament in two of the major political issues in the Regulation. These issues were:

- *Definition of protected customers;*
- *The role and competences of the Commission in ensuring security of gas supply in regional and Union emergencies.*

The Council argued that its wording on protected customers and the accompanying supply standard provided the right means to intervene in ‘a spirit of solidarity’ should the need for gas supply arise in other Member States. The Parliament aimed to strengthen the Commission’s role in the security of gas supply by repeatedly referring to the latter as a ‘keeper’ of an EU solidarity mechanism. This section explains how this cooperative agreement was established via a thick RCI approach.

Finally, section 7.6 summarises the main arguments presented in this chapter and reflects on variables that are not represented in the bargaining model.

7.2. The Commission proposal

In November 2008 the Commission published a Communication on the implementation of the 2004 Gas Directive with the aim of opening a debate with the Member States and the other European institutional actors on a revision of this Directive (Commission 2008/769: 8). In a nutshell, the Gas Directive had provided a very flexible framework for Member States to develop their national security of supply measures with a number of shortcomings, for example:

- *There was a lack of consistency and comparability between the various definitions and measures of the different Member States;*
- *Where emergency planning existed, the emphasis was on small, practical steps at a local or national level, focussed on short term measures such as the use of gas storage, and there was a lack of options to diversify supplies;*
- *There was not enough information available regarding in particular cross-border gas flows and a lack of transparent information on the flow of gas into the EU;*

- *There was inadequate coordination between Transmission System Operators (TSOs) which seemed to have still had more national view of their market and caused difficulties to neighbouring States;*
- *Arrangements between Member States and companies to collaborate were used and proved to be essential, but there was no strategy at EU level or a regional strategy among the affected Member States;*
- *In many cases, demand side management proved to be insufficient;*
- *There were shortcomings in the pipeline network. In concrete terms, there seemed to be finally more a lack of infrastructure and interconnections than a lack of gas itself (Rackow 2010).*

In response to these shortcomings the November 2008 Communication underlined the need to define security of supply standards in more detailed and harmonised way, to minimise market distortion and to have an adequate level of security of supply everywhere in the EU. It also argued for the need to have an EU emergency plan and solidarity mechanisms, as current mechanisms would not offer an effective and timely response in case of a crisis.

The January 2009 Russia-Ukraine gas crisis briefly described in Chapter 2 made it clear that the existing Gas Directive had provided an insufficient framework for responding in an effective manner to regional and EU emergencies. This crisis offered a window of opportunity for accelerating the revision of this Directive, hence the Parliament urged the Commission in February 2009 to propose a review of the 2004 Directive before the end of the year (Agence Europe 4 February 2009). In response to the Parliament's request, the Commission published its legislative proposal for a SoS Regulation in July 2009¹⁶¹.

Due to the realisation of the internal energy market and exemplified by the January 2009 gas crisis, the legislative proposal underlined the increasing importance of the Union dimension in this area which justified - according to the subsidiarity principle - the involvement of the Union's institutional actors and the Commission in particular (Commission 2009/363: 2-3).

At the same time, the Commission argued that the SoS proposal complied with the proportionality principle in the sense that it did not go beyond what was necessary in order

¹⁶¹ In the legislative proposal, the Commission argued that a regulation was a more appropriate instrument than a directive because a regulation is directly applicable to the competent authorities in the Member States, to natural gas undertakings and to customers. Furthermore, the Commission argued that a regulation does not require lengthy transposition, it ensures clarity and coherence of standards and obligations across the Union and it defines directly the involvement of the EU institutions. This approach was accepted by the Three throughout the procedure.

to achieve the objectives. In line with stipulations in the Treaty, the measures proposed would not affect a Member State's responsibility for its security of gas supply and it would continue to enjoy considerable flexibility in the choice of arrangements and instruments (*ibid.*)¹⁶².

The section below points out that in the key issues of the legislative proposal the Commission tried to strengthen the Union dimension in ensuring European security of gas supply, while at the same time offering flexibility to Member States in their choice of arrangements.

First, the legislative proposal suggested the establishment of binding and common European standards in a number of areas. Thus, the Regulation suggested the definition of a major supply disruption. Art. 10 proposed the declaration of a Community emergency at the request of one Competent Authority (CA) or when the Community lost more than 10% of its daily gas imports from third countries. The same article in the proposal conferred on the Commission the power to impose measures on competent authorities in order to respond to a gas crisis. Stated differently, the Commission suggested that it should be given the power to decide which measures should be taken during a gas crisis and to impose them on the national CAs.

Second, the proposal formulated a common EU concept of protected customers (Art. 2(1)). It provided for the security of supply of all household customers that are connected to a gas distribution network in the EU. In addition, Member States could also include small and medium-sized enterprises, schools and hospitals. As further elaborated upon below, the scope of protected customers was one of the major points for discussion during the negotiations between the Three. This was important as it determined indirectly the scope of the supply standard, the costs to society and the room for solidarity (Beyer 2012: 116).

Related to the definition of the protected customers, tools were spelled out in several provisions of the proposal for achieving a Europeanised emergency mechanism. The proposal provided for two obligatory security of supply standards:

- *A supply standard for protected customers (i) and;*
- *An infrastructure standard based on the N-1 principle and the development of reverse flow (ii).*

¹⁶² These stipulations in the Treaty are Art. 5(3, 4) TEU and Art. 194(2) TFEU.

Regarding the protected customers (i), the Commission proposed that the CA (i.e. the designated national regulatory authority or national governmental authority) in a Member State should take measures to ensure gas supply to these customers for a period of sixty days, including in the event of an emergency like in January 2009.

The proposal also introduced a minimum supply standard according to the N-1 indicator (ii). The N-1 indicator formulated in Annex I obliges the Member States (or CA) to ensure that their gas network can cover the total demand in the event of a disruption of the single largest gas infrastructure. The Commission proposed that this infrastructure standard should be able to deliver gas during a period of sixty days of exceptionally high gas demand during the coldest period statistically occurring every twenty years¹⁶³. As a complement to the N-1 rule, the Commission proposed an obligation of physical bi-directional capacity ('reverse flows') to be installed on all interconnections between Member States (Art 6(5))¹⁶⁴.

The January 2009 gas crisis showed that preparedness levels in case of a gas supply emergency were very different from Member State to Member State. They depended on the role of gas, the gas networks, the level of competition and past experience with supply disruptions. In strengthening preparedness for supply disruptions at national, regional and EU level, the Commission suggested the establishment of a Preventive Action Plan (PAP) and an Emergency Plan (Art. 4).

The PAP proposal aimed at achieving flexibility in the internal gas market to mitigate gas supply disruptions and to do this by meeting the level of infrastructure and supply standards required by the Regulation. The Emergency Plan constituted a set of pre-defined procedures to be followed and measures to be taken at national level and mechanisms of cooperation with other Member States in order to mitigate the impact of a gas supply disruption, in particular by maintaining gas supply to protected customers for as long as possible. The proposal suggested that the Commission could review the Member States' PAPs and Emergency Plans and that the CAs would have to comply with the Commission

¹⁶³ The N-1 formula set out in Annex I of the Regulation measures overcapacity of the network and gives an indication of the level of security of gas supply for each individual system. Fulfilling the N-1 rule implies that the gas network can meet peak demand to 100%, leaving it to the market and the Member State to decide on the needed level of overcapacity (Beyer 2012: 119).

¹⁶⁴ Underlined by author. The Second and Third Internal Energy Market Packages required virtual reverse flows on all interconnections. The next logical step would thus be to ensure the obligation to install physical reverse flows.

decision to modify or withdraw any Plans. The proposal suggested the empowerment of the Commission to substitute its own binding decisions in relation to the national Plans if and when it considered that a Plan would not comply with the provisions of the Regulation or other provisions of Union law.

Next to subsidiarity and proportionality, the Commission suggested in the proposal that solidarity should be at the heart of the Union and national response. The Impact Assessment accompanying the proposal had underlined the importance of defining the solidarity principle as well as pointing towards its operationalization.

Each Member State should comply with the defined security of supply standards. If a situation arises in which the effects go beyond the defined standards (a real crisis), this event would automatically trigger the declaration of an emergency situation and the activation of the Community response – solidarity (Commission 769/2008: 10).

Regarding operationalization, solidarity would be based not on charity but applicable only when the Member States made the proper investments in their own security of supply. Recital 23 in the Commission proposal suggested specific measures to promote solidarity between Member States. These measures included commercial agreements between natural gas undertakings, compensation mechanisms, increased gas exports or increased releases from storage (Commission 2009/363: 8).

Solidarity was declared in the obligation placed on the CAs to consult the other CAs concerned at the appropriate regional level, and also the Commission, on the draft PAP and Emergency Plan (Art. 4 (2)). This cooperation was established in order to avoid inconsistencies between the different national plans and to avoid measures which could negatively impact on other Member States.

Solidarity also resided in the obligation for Member States and Transmission System Operators (TSOs) to enable permanent capacity to transport gas in both directions on all interconnections in a cost efficient way (Art. 6). In response to a Union emergency (Art. 10), both Member States and operators would need to cooperate and comply with the internal market rules and their contractual obligations (e.g. obligations concerning gas flows into markets affected by the crisis). The Commission argued that measures such as shutting down interconnectors to keep the gas inside one national market should no longer be taken

All these measures suggested that addressing the risk of moral hazard constituted the prerequisite for active EU solidarity. Moral hazard occurs when a Member State is partly insulated from risks because of EU guarantees and therefore takes bigger security of supply risks than it would if it had to bear the full effects of a supply disruption itself (Egenhofer & Behrens 2011: 126).

<i>Key issues in the SoS proposal</i>
-Protected customers; -Supply standard; -The N-1 rule and the reverse flow obligation; -The Preventive Action Plan and the Emergency Plan.

Table 7.1: Key issues in the SoS proposal.

7.3. The bargaining position on the Regulation

<i>Actors</i>	<i>Formal EU rules</i>	<i>Timeframe</i>
-Transport, Telecommunications and Energy Council (TTE) / EU Presidencies: Sweden (2009), Spain (2010) - 1 st reading -Parliament (ITRE Committee) -Commission (DG Energy)	Arts. 95, 251(2) TEC; Arts. 194(2), 294(3) TFEU.	November 2009 – June 2010 (Trilogue negotiations were held from late April until late June 2010 after which the Regulation was politically endorsed by the Council and the Parliament. The Regulation was formally adopted in October 2010).

Table 7.2: Actors, rules and timeframe of the negotiations.

The Regulation was first discussed in the Council under the Swedish EU Presidency in the second half of 2009. In the first-half of 2010, Spain was in the chair of the rotating Council Presidency. At the end of 2009, Spain had pronounced its aim to reach a first-reading agreement on the text before the end of its Presidency on the 1st of July 2010 (Commission MEMO/09/538).

Section 7.3.1 points out that the Council placed emphasis on the proportionality principle and argued against assigning the Commission with powers to impose measures on national authorities and coordinate the actions of the Member States. Section 7.3.2 explains that the Parliament's position focused on strengthening the Union dimension of security of gas supply while recognizing the need for Member State flexibility (e.g. in definition of protected customers).

7.3.1. The Council

Initial talks on the Commission proposal commenced in the Working Party on Energy in early November 2009. A first policy debate on the proposal in the Energy Council took place on 7 December 2009. The discussions ran until the end of March 2010. Under the Spanish EU Presidency, from early March onwards, the Council text started incorporating amendments suggested by the ITRE Committee. Preparatory work for the trilogues started in early April and the trilogues themselves commenced at the end of that month.

A major part of the discussions focused on responsibility for security of gas supply and Union and regional emergency responses. Many delegations in the Council stressed the need for clarifying the roles and responsibilities of the market actors, Member States and the Commission. Member States such as Germany, UK, the Netherlands and Denmark repeatedly highlighted subsidiarity and proportionality as the guiding principles of EU law and argued that a Union or regional emergency could only be declared following a national emergency as a trigger. This was because they were against new binding competences for the EU to take measures in the event of a Union or regional emergency that would limit or alter Member States' emergency actions (Beyer 2012: 126). For this reason, the Council strengthened the text on the division of roles regarding the responsibility of security of gas supply (Council 5338/3/2010: 4). The extended text also explained the role of National Regulatory Authorities (NRAs) and industrial customers. In line with the provisions in the Lisbon Treaty (Arts. 4(2i), 194(2)), it was underlined that security of gas supply constitutes a shared responsibility of natural gas undertakings, Member States (notably through their CAs) and the Commission within their respective areas of activity and competence.

On the role division in guaranteeing security of gas supply, the Council Legal Service made an oral intervention in the Energy Working Group in March 2010. This intervention focused on the role of the Commission in reviewing the Preventive and Emergency Plans and actions of the CAs and a Community Emergency (Council 7635/2010). The Legal Service and several Member States questioned the role that the Commission granted itself, i.e. empowering itself to substitute its own binding decisions to the national Preventive and Emergency plans and imposing measures on CAs to respond to a gas crisis. The question was raised as to what extent the decision-making powers of the Commission would exceed

the powers conferred on the Commission under the Energy Title (Art. 194 (1)) in the Lisbon Treaty. In its preliminary position, and in case of a Community Emergency, the Council argued that the Member States (and its CAs) would carry the responsibility to ensure that the measures introduced on the basis of the Emergency Plans would:

Not unduly restrict the flow of gas nor put at risk the security of supply of another Member State and that they are in line notably with the cross-border access rules of the gas access Regulation [in the Third Package]. It is not foreseen that the Commission could impose additional obligations on Member States or undertakings which would go beyond the measures of the [Preventive and Emergency Plans] (Council Brief for the President 26 May 2010: 3).

The role and competences of the Commission in these issues as well as the response in Union and regional emergencies proved to be a major political point that needed to be solved in the trilogue discussions (see section 7.5).

On the definition of protected customers, the main issue in the Council was how wide or narrow the scope of the protected customers should be. Some Member States aimed for a minimum standard with maximum flexibility. This would allow Member States to go beyond minimum conditions under certain specific circumstances. This approach was particularly favoured by Germany, the UK, the Netherlands and Denmark. Other Member States like France and Poland saw the importance in considering also solidarity aspects and to avoid internal market distortion (Beyer 2012: 117). In the end, the Council insisted on the need for a more flexible definition of protected customers. Next to the actors proposed by the Commission (e.g. SMEs, schools and hospitals), the Council suggested widening the scope of protected customers to include district heating installations.

The Commission expressed its discontent with the Council's suggestions during the Energy Working Group meetings. Commission officials argued that the broader the scope of protection, the more public service obligations would be needed with the emergency level triggered earlier than would happen with a narrower scope where only household customers would be protected¹⁶⁵. This would hinder the flow of gas to other Member States in case of an emergency and undermine the solidarity principle underlying the Regulation. Together with the Parliament (see section 7.3.2), the Commission held a different opinion from the Council

¹⁶⁵ Interview Commission official, 17 March 2010, Brussels.

on the definition of protected customers. Similar to the role of the Commission mentioned above, the issue of the protected customers would be central in reaching an agreement in the trilogue negotiations.

Mandatory infrastructure and supply standards were recognised early on as playing a key role in the proposal regarding both security of supply and solidarity within the EU (Council 1600/2009). Yet the setting of standards proved a hard nut to crack. Initially, the Member States did not want an infrastructure standard as this would undermine the national latitude in ensuring security of supply¹⁶⁶. In contrast with the Commission proposal, the Council asked for increased flexibility in order to take account of national circumstances and specificities. Amendments to the proposal made in the Council reflected the Member States' argument that the implementation of the infrastructure standard should be based on a cost-benefit analysis with due priority given to market-based instruments. Regarding cross-border interconnection (reverse flow) in the infrastructure standard, for example, the Council stated that new reverse flow capacity, or enhancing or keeping the existing level, should apply only where there is either market demand or it is needed for security of supply reasons. The Council also placed a strong emphasis on exemptions for reverse flows:

- *In cases such as connections to production facilities, to liquid natural gas (LNG) facilities, to distribution networks and to third countries, or:*
- *When the addition of bidirectional flow capacity would not significantly enhance security of supply of any Member State or region or that the investment costs significantly outweighed the prospective benefits for security of supply (Council 5338/4/2010: 10-11).*

On the supply standard, the Council reached an agreement on understanding this as a minimum standard, allowing Member States to go beyond the minimum requirements set out in the Regulation under specific conditions (related, e.g., to solidarity, competition and the functioning of the internal gas market). In its preliminary position, the Council argued that:

Imposing the two standards on Member States contributes to reaching a balance between Member States' own responsibility and solidarity between Member States (Brief for the Chair of the Permanent Representatives Committee (part 1) 20 May 2010: 3).

¹⁶⁶ Interview former Commission official, 23 April 2013, Brussels.

Concerning Union emergency responses, finally, the Council stated that emergency measures at this level should only be envisaged where national measures would be insufficient in solving a possible crisis. In addition, for ensuring gas supply, the hierarchy going from gas undertakings, Member States to the regional and the EU level was underlined. Emphasis was placed on crisis management based on an in-depth risk analysis and with a balance between solidarity, the market's responsibilities and Member States' responsibility for their own gas supply.

Next to the Union response, the need for a regional response was not only recognised by Member States, but there was a widespread request for such cooperation. In December 2009 the Spanish EU Presidency drafted a non-paper on regional cooperation which was incorporated as Annex 3a in the draft text in February 2010¹⁶⁷. Next to listing several Member States who recognised the need to cooperate to enhance their individual and collective security of gas supply, the paper stated that the various actors responsible for security of gas supply (Art. 3) shall cooperate at regional level within their respective areas of activity and competence. More specifically:

In the spirit of solidarity, regional cooperation, involving public authorities and gas undertakings, will be widely established to implement this Regulation in order to optimise the benefits in terms of coordination of measures to mitigate the risks identified and to implement the most cost effective measures for the parties concerned (Council 5338/ADD 1/ 2010: 3).

The Council emphasised that these arrangements should remain voluntary and applied in a flexible manner (Council 5338/2/2010: 26). The annex stated that regional cooperation is required in particular for the establishment of the risk assessment, the Preventive and Emergency Plans, the standards mentioned above and the provisions for Union and regional emergency responses (Council 5338/1/2010: 26).

In a spirit of solidarity, furthermore, the Council specified the Union and Regional Emergency Responses in early February 2010:

The Competent Authorities shall ensure:

¹⁶⁷ This text ended up as Annex IV ('Regional Cooperation') in the Regulation.

- (i) That no measures are introduced which unduly restrict the flow of gas within the internal market at any time, notably the flow of gas to the affected markets; or
- (ii) That no measures are introduced that are likely to endanger seriously the situation in another Member State;
- (iii) That cross-border access to infrastructure in line with Regulation (EC) No 715/2009 is maintained (Council 5338/1/2010: 16).

7.3.2. The Parliament

<i>Legislative proposal</i>	<i>Committee responsible</i>	<i>Rapporteur</i>	<i>Date appointed</i>	<i>Committee vote</i>	<i>Committee report plenary 1st read.</i>
Sos Regulation	ITRE	Alejo Vidal-Quadras (EPP-SP)	16 Sept. 2009	18 March 2010, 52(+), 0(-), 0 abstentions	601(+), 27(-), 23 abstentions

Table 7.3: Parliament rapporteur and reports for the SoS Regulation.

(Source: Legislative Observatory of the European Parliament).

After the publication of the Commission proposal, Spanish MEP Alejo-Vidal Quadras (VQ) from the ITRE Committee was assigned as Rapporteur in September 2009¹⁶⁸. According to a Parliament official, he was chosen as Rapporteur to mediate between Eastern and Western Member States. And while new gas infrastructure and interconnections would be beneficial to Spain, Spain's gas sector was already unbundled and would face no major consequences in case of new legislation¹⁶⁹.

The rapporteur published two reports in formulating the Parliament's position: A draft-report in November 2009 and a final, first-reading, report in March 2010. These reports proposed a range of amendments in several areas of the Commission proposal.

The VQ report of 29 March 2010 argued for a narrower definition of protected customers – allowing for a greater capacity for solidarity between Member States – while also allowing for additional supply obligations of benefit to other customers which deliver important public services (e.g. fire stations). The latter could be defined by the Member States concerned as the text should allow for some flexibility for Member States to adjust to their national circumstances with clearly defined criteria (Parliament A7-0112/2010: 68). Similar to the Commission, ITRE made a clear link between defining the scope of the protected customers and the levels of supply standard and consequently the room for solidarity. Measures to ensure the gas supply to protected customers should be guaranteed

¹⁶⁸ VQ had worked as a rapporteur on energy issues before, e.g. on the Electricity Regulation in Third Package.

¹⁶⁹ Interview Parliament official, 12 July 2012, Brussels.

for any period of forty five days (rather than sixty days). ITRE argued that the longest crisis so far (i.e. the January 2009 gas crisis) lasted two weeks so a standard of sixty days seemed inordinate.

With respect to the infrastructure standard (N-1), the Rapporteur supported the Commission proposal that this standard should be the main element of subsidiarity in the Regulation in order for all (and diverse) national circumstances to be reflected. This was because one Member State might not have a good N-1 score but at the same time a supply disruption of gas would have little impact in its energy market or mix since it was not very dependent on gas. Therefore Member States should be given flexibility when deciding how to face a gas supply crisis, whether by increasing gas infrastructure or by developing further their indigenous production of energy. Related to the infrastructure standard, i.e. the obligations on reverse flows, the report from 29 March added, amongst others, the following amendments:

- *CAs may request the Commission to issue a decision to exempt a specific interconnection from the obligation of bi-directional flow;*
- *The level of bi-directional flow capacity shall be reached in a cost efficient way, with aspects that are not strictly economic such as security of supply and contribution to the internal market being taken into account as part of the assessment and at least take into account the capacity required to meet the supply standard set in the text;*
- *With regard to costs incurred in more than one Member State or in one Member State for the benefit of other Member States, the Commission may propose appropriate EU instruments for the financing of interconnections.*

The competences of the Commission were strengthened by the VQ report in several areas. On the responsibility for security of gas supply (Art. 3), a new amendment on the development of a long-term supply strategy suggested that the Commission should present a report on instruments and measures to increase the diversification of gas supply sources for the Union and the routes of supply into the Union. With regard to Community Emergency Responses (Art. 10), the ITRE Committee expanded the Commission's areas of action, for example, when providing assistance to regions that have been severely affected. The terms of the amended text also stipulated that EU emergency measures would automatically apply, together with verification by the Commission on respect for conditions when:

- *More than one Member State declares a situation of national emergency;*
- *When the EU loses more than 20% of its daily gas imports from third countries [up from 10% as proposed by the Commission];*
- *When a Member State or specific EU region declares an emergency situation where the whole of the region is losing more than 10% of its daily gas imports from a third country (Amendment 93 in Parliament A7-0112/2010).*

The Commission was also assigned by ITRE with developing Union and regional Preventive and Emergency Plans. The EU PAP would build on all national and regional plans, identify possible crisis scenarios and the most efficient measures to mitigate such crisis in order to guarantee efficient coordination of actions during a Union emergency. A Union Emergency Plan would identify possible inconsistencies between national and regional plans as well as possible coordination measures taken by the Commission during an emergency (Amendment 79 in Parliament A7-0112/2010).

A new clause was inserted that specified that the Commission should establish a system of continuous monitoring of and reporting on security of gas supply, including monitoring of contracts for natural gas concluded between Member States and third countries as regards to their conformity with EU internal market rules¹⁷⁰. Table 7.4 summarises the bargaining position of the Council and the Parliament on key issues in the SoS Regulation.

SoS Regulation		
Issue	<i>Council</i>	<i>Parliament</i>
-Supply standard for protected customers	-Extended definition of protected customers with minimum supply standard (allowing MS to go beyond this in certain circumstances).	-Narrower def. of PCs while allowing for additional supply obligations to the benefit of other customers.
-Infra-structure standard (N-1)	-Flexibility and market mechanisms; -Exemptions for reverse flows.	-Flexibility and market mechanisms; - Role for economic + non- economic aspects in level of bi-directional flow capacity; -Role for Commission in

¹⁷⁰ This was a forerunner of the Decision establishing an information exchange mechanism on intergovernmental agreements between Member States and third countries in the field of energy. This Decision was adopted by the Three in October 2012.

		reverse flow obligation.
-Responsibility for security of gas supply	-Emphasis on Division of roles regarding the responsibility of security of gas supply (according to principles of subsidiarity & proportionality).	-Stronger decision-making powers for the Commission.
-Community & regional emergency responses	-No additional power for Commission to impose measures on CAs.	-Commission may declare an emergency at request of one CA where the Union loses more than 20% of its daily gas import from 3 rd countries.
-PAP & Emergency Plan	-Responsibility of MSs / CAs, Commission cannot impose add. Obligations on MSs or undertakings which would go beyond the measures of these Plans.	- Commission develops Union Preventive and Emergency Plans).

Table 7.4: Main bargaining points of the Council and Parliament prior to the trilogues.

7.4. Main elements of the final compromise

The main elements of the agreement as discussed below point towards a more harmonised and consistent implementation of measures for the security of gas supply and to a higher degree of preparedness in most Member States in case of a gas crisis. In other words, by building upon the concept of shared responsibility of the natural gas undertakings, Member States and the Commission, the SoS Regulation established a Europeanised approach on security of supply. The sections below elaborate on this Europeanised approach as agreed upon by the Council and the Parliament.

For the first time, the Regulation established binding and common European standards for the definition and supply of protected customers, marking an important progress from the 2004 Gas Directive. Art. 2(1) defines protected customers in the flexible manner as envisaged by the Council. Described as a ‘household-plus-scope’, protected customers in the final text constituted all household customers connected to a gas distribution network while providing Member States with the possibility to include SMEs, essential social services and district heating installations (provided they do not represent more than 20% of the final use of gas) (Beyer 2012: 116).

Equally in line with the Council's preferences, the supply standard (Art. 8) is established as minimum standard in the following cases:

- *Extreme temperatures during a 7-day peak period occurring with a statistical probability in 20 years;*
- *Any period of at least 30 days of exceptionally high gas demand with a statistical probability of once every twenty years; and*
- *For a period of at least 30 days in case of the disruption of the largest gas infrastructure during an average winter.*

Art. 8(2) provides that any supply standard going beyond 30 days or additional obligations imposed for the security of supply have to be justified in the Risk Assessment and reflected in the PAP. Any increased supply standard should not hamper the internal market functioning, unduly distort competition or limit other Member States' ability to supply its protected customers in a national, Union or regional emergency. In addition, the CA is obliged to indicate in the Preventive and Emergency Plans how an increased supply standard beyond 30 days can be temporarily reduced for solidarity action in the event of a Union or regional emergency.

Art. 6 of the Regulation provides for the infrastructure standard (N-1). This standard obliges the Member States (or CAs) to ensure that their gas network (including entries from storage, cross-border IPs and LNG terminals) can cover the total demand in the event of a disruption of the single largest gas infrastructure (N-1) for a 1-in-20 years peak demand scenario. N-1 integrates the specifics of the national or regional gas network, avoiding a "*one fits all approach*" (Beyer 2012: 119). The N-1 formula listed in Annex 1 of the Regulation implies that the gas network can meet peak demand to 100%, leaving it to the market and the Member State to decide on the needed level of overcapacity. With regard to achieving a level of solidarity, the N-1 standard ensures the security of gas supply mainly at national level and it does not automatically ensure the deployment of the infrastructure needed to enhance market integration or competition in a wider European gas market (Beyer 2012: 120).

Related to the infrastructure standard, the Regulation established a procedure for enabling reverse flow capacity or requesting an exemption from it (Art. 7).

An essential part of the provisions of the Regulation relate to the preparedness for a possible gas crisis situation. The Regulation aims to ensure that Member States and gas

market participants take effective action well in advance and mitigate the potential disruptions to gas supplies by identifying risks to security of gas supply through the establishment of Risk Assessment and Preventive and Emergency Plans. Figure 7.1 shows that the Regulation has placed the national Preventive and Emergency Plans (Art. 4) in a European framework with a clearly defined role for the Commission (and the Gas Coordination Group).

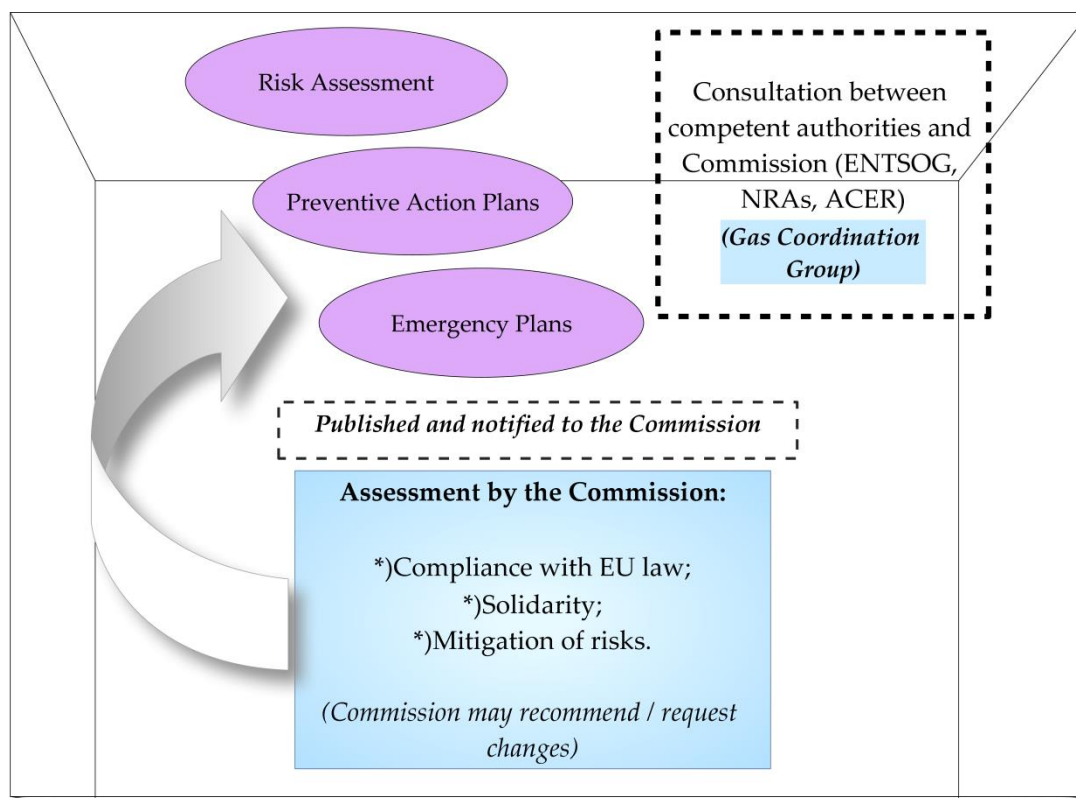


Figure 7.1: The EU gas emergency management tool box (Source: Author, Vinois 2010).

Art. 4 gives the Commission the possibility to reject the PAP of a Member State should this endanger security of supply to other Member States and to recommend how to amend it. In addition to the PAPs, Art. 4 stipulates that CAs may decide to establish joint PAPs and joint Emergency Plans at regional level. The role of the Commission in establishing the Preventive and Emergency Plans is considerable. For example, where the PAP endangers the security of gas supply of other Member States (or of the Union as a whole), the Commission may veto this and present specific recommendations for amendments. Also before adopting the Preventive and Emergency Plans at national level, the CAs shall exchange their draft Plans, consult each other at the appropriate regional level and consult

the Commission (Art. 4 (2)). Consultation with the Commission is established with a view to ensuring that the national draft Plans and measures are not inconsistent with the Plans of another Member State and that they comply with this Regulation and with other provisions of Union law.

While the 20% threshold of Union gas as suggested by the Parliament (see table 7.4.) was deleted from the final text, the Commission may declare a Union or a regional emergency for a specifically affected geographical region at the request of a CA (Art. 11 (1)). At the request of at least two CAs (and where the emergencies are linked), the Commission may declare a Union or regional emergency (*ibid.*). As with the obligation to develop reverse flow mentioned above, solidarity resides in the obligation for Member States and operators to cooperate and comply with the internal market rule under normal circumstances as well as in emergency situations (Art. 11 (5a-c)).

Finally, Art. 14 stipulated continuous monitoring and reporting competences for the Commission on security of gas supply measures, including its reporting duties to the Council and Parliament. Furthermore, the Commission shall:

- *Draw conclusions as to possible means to enhance security of supply at Union level, assess the feasibility of carrying out risk assessments and establishing PAPs and Emergency Plans at Union level and report to the Parliament and the Council on the implementation of this Regulation, including inter alia the progress made on market interconnectivity; and*
- *Report to the Parliament and the Council on the overall consistency of Member States' PAPs and Emergency Plans as well as their contributions to solidarity and preparedness from a Union perspective (Art. 14 (a-b)).*

There are various explicit provisions related to the solidarity principle in the Regulation. On a general level, solidarity is essentially provided for by the well-functioning of the internal energy market, and the Regulation gives priority to the market-based measures listed in Annex II ('List of Market-Based Security of Gas Supply Measures').

Solidarity hence starts before the crisis with good prevention and requires transparency on all emergency measures, cooperation between Member States and a level-playing field for the industry (Beyer 2012: 127).

More specifically, solidarity is expressed by the close links between the scope of the protected customers (Art. 2(1)) and the possible reduction of the minimum supply standard in Art. 8(2) in case of a Union or regional emergency pursuant to Art. 11(5). Furthermore, the provisions on the supply standard (Art. 8) make the reference to the 'spirit of solidarity' in the Energy Article of the Treaty operational and ensure that the functioning of the internal energy market can guarantee a level of solidarity. Another expression of the solidarity principle is regional cooperation (Art. 11 and Annex IV), whose value is acknowledged and reflected in the Regulation. Solidarity is also reflected in the obligation which is put on the CAs to consult the other CAs concerned at the appropriate regional level and the Commission on the draft Preventive Action and Emergency Plans. This measure is established in order to avoid inconsistencies between the different national plans and to avoid measures which could negatively impact on the other Member States. Finally, Union solidarity and consistency aspects of the Preventive and Emergency Plans are also highlighted by requesting in Art. 14 that the Commission report on the consistency and contribution of Member States' Plans to solidarity and preparedness from a Union perspective.

7.4.1. Reflections on the negotiations and outcome

Although the bargaining positions of the Council and Parliament differed substantially on the main elements of the Regulation, an EA was reached which assigned a stronger role to the EU in coordinating Member States' responses to supply disruptions and declaring emergencies. The outcome also introduced supply and infrastructure standards to ensure that normal supplies could be maintained during the coldest winters and provided for the introduction of reverse flow technologies in all interconnections between the Member States. Although the Council watered down the solidarity elements in the final deal, this thesis argues that the final compromise contains more than the Council and the Parliament playing off tit-for-tat strategies. The argument that 'thin' versions of RCI have difficulty explaining the choices of policy actors is acknowledged here. So explaining what happened in the trilogues via a 'thick' RCI approach is essential to understanding the 'depth' and 'speed' of the agreement. The section below explains that the principles of solidarity, proportionality

and subsidiarity were essential cogs in the informal legislative decision-making process between the Council and the Parliament and essential in reaching an EA.

7.5. In a spirit of solidarity: Bargaining a trade-off in the trilogues

The trilogue negotiations on the SoS Regulation served the dual purpose of reaching an agreement on several unresolved technical and political issues in the text. The issues are pointed out in Table 7.5 below.

<i>Trilogues</i>	<i>Issues</i>
First trilogue (29 April 2010)	<i>Technical: Infrastructure Standard (Art. 6, Annex I); Reverse flows in the gas pipelines (Art. 6a); Content of the Preventive and Emergency Plans + Risk Assessment (Art. 5, Art. 9, Art. 8); other technical issues (Annexes II, III and IV).</i>
Second trilogue (6 May 2010)	<i>Technical: Security of Supply Standard and Emergency Plan and Crisis Levels (Arts. 7, 9 (2-7)); Technical aspects of Arts. 12, 14, 15, 15a + 16.</i>
Third trilogue (2 June 2010)	<i>Political: Security of Supply Standard and related issues; Definition of Protected Customers (Art. 2(1)); Competences and role of the Commission, Member States and other stakeholders (including Parliament and High-Representative) in relation to PAPs and Emergency Plans, Infrastructure Standard, Union/Regional Emergency (Arts. 4, 6, 9, 10).</i>
Fourth trilogue (23 June 2010)	<i>Ibid. plus general issues (e.g. conditions for the supply from third countries (Recital 30), Information exchange (Art. 12).</i>

Table 7.5: The trilogues in the SoS Regulation.

(Sources: Council 8304/7/2010; European Parliament Feedback Notes on trilogues on the SoS Regulation).

The focus in the first two trilogues (and the accompanying ‘technical meetings’ between the Presidency and Parliament officials) was on the technical issues in the Regulation. The first trilogue focused on some of the technical measures which form part of the mechanisms and standards that Member States were required to adopt so as to achieve a harmonised level of risk management in case of a serious gas supply disruption (Parliament Feedback Note on First Trilogue, 29 April 2010).

On the whole the Council and Parliament shared the same approach, and the debates were mainly focused on appropriate wording in clarifying technical matters and pointing out underlying political issues (e.g. the infrastructure standard and reverse flows). These political issues were left open and remained to be tackled in the third and fourth trilogue meetings. From the perspective of the Parliament, a main political issue concerned the lack of a Union level in the reverse flows in the gas pipelines. On the procedure proposed by the Council, the Rapporteur deemed this as too complex and mainly lying in the hands of national authorities without any mechanism of mediation in case of conflicts between Member States. The role of the Commission would be limited to a final say, preventing it from adopting a coordinated approach at EU level (Council 9817/2010: 2; Parliament Feedback Notes on First/Second Trilogues, 29 April/ 6 May 2010). The need for a coordinated EU-approach was recognised by the Council which showed a willingness to work on this issue and integrate the role of the ENTSO-G and of the ACER Agency with regard to interconnections as defined in the Third Package (see Chapter 6).

Building on the technical work conducted in these two trilogues, the Council and Parliament aimed to find the right - political - balance during the third and fourth trilogue meetings on the remaining key elements. The Parliament had made it clear during these first meetings that the following issues were seen as linked and would be key to an agreement in first-reading:

- 1) The scope of the protected customers and;*
- 2) The role and competences of the Commission in ensuring the European dimension of security of supply.*

Facilitated by the idea of promoting a policy of supply security between the Member States and a strengthened Union dimension with consideration for Member State flexibility and sovereignty, an interest-based trade-off between the Council and the Parliament was established. This deal consisted of a more ambitious block of provisions on protected customers for the Council and a reinforcement of the Commission role for the Parliament. These issues are analysed in the sections below.

7.5.1. Protected customers and the role of the Commission

The Commission's original proposal on protected customers had focused on households, small and medium-sized enterprises, schools and hospitals. The Parliament had called for a narrow scope of protected customers, hence allowing for greater energy solidarity between Member States in case of an emergency in which gas had to be redistributed from one Member State to another. The Council, on the other hand, had insisted on the need for flexibility with a wider scope. In addition, the state of the negotiations was that the Council had amended the list of protected customers by making this broader than the Parliament. Besides all households connected to a gas distribution network (i.e. preference of the Parliament), the Council had extended the scope of the protected customers by including SMEs, essential social services and district heating installations.

On the basis of the scope of the protected customers, the supply standard (Art. 7) was set by the Council as a minimum standard which included an option for Member States to adopt increased standards beyond the fixed minimum period (of 30 days).

In the first two trilogue meetings, the Rapporteur had expressed his concern with the Council's more extended definition of protected customers. Together with the Council's design of the supply standard as a minimum standard, the Rapporteur stated that these two aspects taken together would entail a risk of lack of capacity to implement the solidarity principle in case of an emergency (Council 9817/2010: 2). In support of a narrower definition, the Rapporteur underlined that the Parliament's amendments provided for the possibility to include other protected customers than those mentioned in Art. 2(1) and which also deliver important public services such as schools and hospitals. The Rapporteur had underlined that these additional obligations would not be allowed to conflict with the principles of European or regional solidarity towards Member States with supply problems (Amendment 69 in Council 8304/5/2010: 71).

The Spanish EU Presidency defended the Council's position on a wider definition of protected customers and a minimum supply standard. The Presidency argued that this definition was better equipped to handle the high costs of such protection to society and the need to safeguard the competition and flexibility of market response. The wider definition was also better in accommodating the differences in the role of gas across the EU-27. The

Council underlined, furthermore, that its definition of protected customers reflected well the 'spirit' of the Parliament's Amendment 69 to impose obligations on certain other customers in addition to the narrowly defined protected customers. This would take place in a more transparent way since:

It is clear from the outset in the Council's definition which groups of customers belong to the protected customers and consequently to whom the supply obligations must apply (Brief for the Chair of Coreper, 3rd informal trilogue Gas SoS Regulation 2 June 2010: 3).

Similarly, in line with the ideas of flexibility in national choice of arrangements while taking account of national characteristics in the field of gas, the Council underlined the possibility for Member States to adopt increased supply standards and that these should not endanger the solidarity principle. All Member State delegations and the Commission supported the text on protected customers, thus the Spanish EU Presidency was invited to defend this text during the further discussions on this issue in the final trilogues.

While the Parliament Feedback Notes described the Council as showing a lack of willingness to give in on the definition of protected customers, it underlined that a possible agreement on this issue would require a stronger role for the Commission in the Union and regional dimensions of security of gas supply.

Rather than defining a possible agreement on these issues in simple give-and-take terms, however, the Rapporteur explained that the negotiations on protected customers should be linked and balanced with the conception of the role of the Commission for the sake of strengthened solidarity and the Union dimension in security of supply:

(i) Prevention at EU level: the aim would be to develop a more significant European dimension by giving more competences to the Commission, in particular in the supervision and assessment of the preparation of the national Preventive Action Plans and Emergency Action Plans;

(ii) Capacity of reaction: since the proposed Regulation does not contain any specific solidarity mechanism in situations of emergency, it could be envisaged that the Commission provides for ad hoc solidarity measures, complementary to the national plans (Parliament Feedback Note on Third Trilogue, 2 June 2010).

Continuing with an emphasis on solidarity and subsidiarity, the Parliament considered that the EU-dimension constituted the real added-value of the Regulation. Strengthening this dimension via an enhanced role for the Commission would be necessary to counter-balance the flexibility allowed to Member States. A strengthened EU-level would provide a: “Permanent system to ensure solidarity in line with the Lisbon Treaty” (*ibid.*). The Rapporteur declared that this ‘EC supervision’ would solve the fear of a: “Somewhat variable geometry in the definition of the level of protected customers” (*ibid.*).

The Spanish Presidency proved forthcoming to the Parliament’s idea-based argument and formulated a compromise text in which decision-making powers were assigned to the Commission in several areas. First, in the procedure for establishing reverse flow capacity, the Union dimension was strengthened by assigning the Commission the power to request a concerned authority to amend its decision in case of discrepancies with other authorities¹⁷¹. Second, at the request of one CA, the Commission could declare a Union or a Regional Emergency for a specifically affected geographical region. At the request of at least two CAs, the Commission should declare – as appropriate – a Union or regional emergency¹⁷².

Although the final decision would be made by the CAs, the Commission could request changes to the Preventive and Emergency Plans, including to the increased supply standard¹⁷³. Finally, without being able to impose its position, the Commission could intervene on measures taken by Member States or CAs in case of a national, regional or Union emergency¹⁷⁴.

In sum, the EU Presidency acknowledged the interests of the Parliament in strengthening of solidarity measures and Union competences in the wake of the January 2009 gas crisis yet clarified that it could only go so far in strengthening these.

The EU Presidency explained the more consultative role of the Commission in the two last-mentioned measures with a reference to the division of competences between the Union and the Member States¹⁷⁵. From a legal point of view, the Presidency argued that awarding the Commission full decision-making powers in these issues would exceed its

¹⁷¹ See Art. 7(5) of the Regulation.

¹⁷² Art. 11(1) (*ibid.*).

¹⁷³ Art. 4(7) (*ibid.*).

¹⁷⁴ Arts. 10, 11 (*ibid.*).

¹⁷⁵ Art. 4(2i) TFEU defines energy policy as a shared competence between the Union and the Member States.

powers under Art. 194 of the Treaty¹⁷⁶. With reference to the stipulations in the Treaty, the Council Legal Service had pointed out in March 2010 that it is legally impossible for the Member States to transfer national competences to the European institutions in energy policy¹⁷⁷. The Spanish Presidency underlined these arguments in the trilogues:

Corresponding to the right balance between subsidiarity and efficient decision-making procedures, final responsibility for preparation of Preventive Action and Emergency Plans and in cases of emergency should rest with the Competent Authorities (Brief for the Chair of Coreper, 4th informal trilogue Gas SoS Regulation 22 June 2010: 4).

Guided by these arguments, the Presidency and the Rapporteur were able to reach an agreement during the subsequent informal negotiations on the further reinforcement of the European dimension and the role of the Commission in the PAP. The compromise text in the wake of the third trilogue explicated the steps which would give the Commission the possibility to reject the PAP should it endanger the security of supply of other Member States and to recommend how to amend it (Brief for the Chair of Coreper, 4th informal trilogue Gas SoS Regulation 22 June 2010: 3). Steps in this process include the possibility for the Commission to present recommendations for amending the PAP in case this endangers the security of gas supply of other Member States or of the Union as a whole. Included is a 'name-and-shame' procedure. This procedure lays down that in case where the final decision of the CA on the PAP differs from that of the Commission (i.e. where it explains whether it will amend its plan(s) or not), the CA adopts its final plan and makes it public together with the Commission's position (Council 11136/2010: 18-19). If the Commission is still unhappy, it may recommend further changes to the PAP of which the CA shall take utmost account (*ibid.*).

In the run-up to the final trilogue the Council prepared further possible offers to the Parliament concerning extra powers to be given to the Commission. Under the banner of strengthening solidarity and consistency aspects of the Preventive and Emergency Plans (plus Risk Assessment), the Spanish Presidency offered to strengthen the Commission's role. In relation to the Article on Union and Regional Emergency, a recital was inserted which emphasised that the Commission has an important role to play on either one of these

¹⁷⁶ See Chapter 2 for an explanation of the Energy Title in the Treaty.

¹⁷⁷ Interview Council official, 27 May 2010, Brussels.

levels¹⁷⁸. This recital was agreed upon in reply to concerns by Member States such as Poland that certain 'regional' emergencies could lack adequate support and/or involvement of the Commission.

In Art. 14 on monitoring, the Presidency offered a new draft regarding the Commission's reporting requirements to the Parliament and the Council on the:

Overall consistency of Member States' Preventive Action Plans and Emergency Plans as well as their contribution to solidarity and preparedness from a Union's perspective (Council 11136/2010: 36; Parliament Feedback Note on Fourth Trilogue, 22 June 2010).

The final compromise text was agreed during the fourth trilogue on 22 June 2010. It contained the rather flexible definition of protected customers under the aegis of the Member States. This wider definition was not allowed to conflict with the European dimension of security of gas supply. The trade-off was agreed upon with a reference to solidarity and translated into a more significant supervisory role for the Commission in the areas mentioned above.

7.6. Chapter conclusions

This chapter has aimed to explain the speed, scope and content of the decision-making process on the SoS Regulation through a thick RCI approach as proposed in the bargaining model in Chapter 3. The bargaining model refutes the thin-RCI notion that the decision-making process can be explained exclusively in terms of simple horse-trading. Major disagreements between the Council and the Parliament on what set of rules to apply and which path to choose to ensure EU security of gas supply could have easily ground negotiations on this collective action problem to a halt. In other words, this chapter has shown that a cooperative agreement in EU security of gas supply would not have emerged as an EA if it had been based solely on the self-interested behaviour of the Three.

The thick RCI approach applied here offers a more thorough explanation of the decision-making process leading to the Regulation. Related to the impact of events on the relevance of policy action and ideas as focal points, the January 2009 gas crisis strengthened

¹⁷⁸ Recital 37 of the Regulation.

the need for a better equipped Union solidarity mechanism in security of gas supply. This crisis triggered the co-legislators to accelerate the process of revising the 2004 Gas Directive and underlined the need for one or more focal points around which the divergent interests of the Three could converge.

In establishing a European framework for security of gas supply, the in-depth analysis of the decision-making process on the SoS Regulation points out that the solidarity, subsidiarity and proportionality principles served as focal points that facilitated the process of logrolling between the Council and the Parliament. These three focal points are key principles in both primary and secondary EU legislation related to energy policy and were utilized by the Commission in setting the tone for the legislative discussions between the co-legislators. Solidarity refers to a policy of supply security provided by the Member States to other Member States. According to the subsidiarity principle, the Union shall act only if and in so far as the objectives of the proposed action cannot sufficiently be achieved by the Member States and, due to reasons of scale, can be better achieved at Union level. Under the proportionality principle, however, the content and form of Union action shall not exceed what is necessary to achieve the objectives.

As agenda setter, with support from the Parliament, the Commission seized the opportunity offered by the 2009 gas crisis and proposed measures in which these three focal points suggested a particular path to successfully adopt a cooperative agreement. It suggested measures for operationalizing the solidarity principle via defined security of supply standards, automatic emergency triggers and the activation of a community response.

With reference to subsidiarity, the Commission underlined the increasing importance of the Union dimension in security of gas supply. It proposed measures to strengthen the involvement of EU institutional actors in coordinating the actions of the Member States in case of a Union emergency. Complying with the proportionality principle, however, the Commission argued that the proposal did not go beyond what is necessary to achieve the strengthening of the Union security of supply.

The three focal points facilitated the establishment of a cooperative agreement in first-reading by smoothing out of the inter-institutional difficulties between the Three in the

decision-making process. For example, wide-ranging disagreements existed between the Three on the division of roles regarding the responsibility for security of gas supply.

The solidarity principle proved to be instrumental in serving the interests of the Three which made it possible to reach an EA in which a balance was found between ensuring gas supply at national level and a strengthened EU-dimension. According to the Council, the wider definition of protected customers - i.e. ensuring security of supply for national consumers - and the security standards for customers and infrastructure contributed to reaching a balance between Member States' own responsibility and solidarity with the other Member States. The Parliament argued during the informal negotiations that a deal on protected customers should be linked and balanced with a deal on strengthened solidarity and a strengthened Union dimension in security of supply. The Parliament therefore referred to the need for the Commission to provide ad hoc solidarity measures complementary to the national plans. This required the strengthening of the latter's role in the EU emergency management tool box depicted in Figure 7.1. In this tool box, for example, the Commission acquired the power of veto in cases where it deemed specific national measures likely to endanger the security of supply of other Member States. And although the Council put on a check on the Commission in its ambitions to coordinate national actions, the final outcome of the SoS Regulation established a more harmonised and consistent package of measures which have led to a higher degree of solidarity or preparedness in most Member States in case of a gas crisis.

Finally, the informal decision-making process between the Council and Parliament was encouraged by several measures that are not represented in the bargaining model and therefore require further research. During the trilogue negotiations, the Spanish Presidency sent its amendments to Member States' delegations as well as to the Parliament (i.e. the ITRE Committee and the shadow rapporteur). This approach was not common among presidencies but was well-appreciated by the Rapporteur and the shadow-Rapporteurs¹⁷⁹. Furthermore, before trilogues and plenary sessions, the Presidency arranged for so-called 'pre-negotiating meetings'. These pre-negotiations allowed the Spanish Presidency to substantiate the line taken by the Council. This approach was well-appreciated by the negotiating team of the Parliament (i.e. Rapporteur and shadow rapporteur).

¹⁷⁹ Interview Spanish official EU Presidency, 8 July 2010, Brussels.

Chapter 8: Conclusion

In the European Union, we are often caught between “the one” and the “the many”, between “the whole” and “the parts”. This tension is part of our identity. The génie européen is to invent ever new ways to deal with this tension.

-Herman van Rompuy¹⁸⁰

Between 2007 and 2010, after decades of hesitation and piecemeal progress, the EU took radical action to quickly establish its first common climate and energy policy. Despite highly controversial issues and some of the most difficult negotiations that ever occurred between the Member States and the Parliament in a policy area under co-decision rules, key dossiers such as the Third Internal Energy Market Package, the Climate & Energy Package and the Security of Gas Supply Regulation were adopted as an Early Agreement (EA). In answering the question of how the EU managed to adopt these files in a short timeframe, this thesis has argued that an EA based solely on self-interested behaviour could not have emerged because the participants had – and continue to have – divergent preferences over the potential paths to co-operation. In other words, this thesis has sought to explain the climate and energy policy dossier in terms of a European collective action problem and as an area which is characterised by a strong disagreement over which set of rules to apply.

This thesis has argued that the standard or ‘thin’ rational choice approach of explaining EAs exclusively in terms of interest-based bargaining is insufficient to account for the rapid speed of the decision-making process on the three legislative dossiers. In dealing with the need for collective action in climate and energy policy over a very short period of time, this thesis has argued that decision-taking in the three files was made possible via the use of principles found in EU primary and secondary legislation, and informal and procedural norms (Table 8.1 below).

¹⁸⁰ Address by Herman van Rompuy, President of the European Council to the Collège d’Europe, Bruges, February 2010.

	<i>What?</i>	<i>Source:</i>
<i>Access principle</i>	<i>focal point</i>	EU energy law; competition law; case law ("essential facility doctrine")
<i>Flexibility principle</i>	<i>ibid.</i>	Communications, impact assessments, legislative proposals
<i>Fairness</i>	<i>ibid.</i>	Communications, impact assessments, legislative proposals
<i>Solidarity principle</i>	<i>ibid.</i>	Communications, impact assessments, legislative proposals, EU Treaty (Art. 194 1(b) TFEU*) (*non-legal obligation);
<i>Subsidiarity</i>	<i>ibid.</i>	EU Treaty (Art. 5(3) TEU)
<i>Proportionality</i>	<i>ibid.</i>	EU Treaty (Art. 5(4) TEU)
<i>Consensus</i>	<i>norm</i>	EU-Presidency

Table 8.1: The source of ideas.

How were 'ideas' operationalised? In the negotiations on the Climate & Energy Package (**Chapter 5**), the focal points of flexibility, solidarity and fairness were quantified, based on measurable data and formulaic approaches linked to sanctions if they were not delivered.

By focusing on taking interests into consideration and assembling opponents around the common goal of the quick adoption of the package, the consensus norm initiated by the French EU Presidency encouraged the delegations to commit to finding the most difficult compromises. These principles and norms cemented a fast and acceptable informal compromise solution. The solution included an agreement on the auctioning principle in the revised European Emissions Trading Scheme (ETS) and increasing flexibility mechanisms in meeting national, non-ETS targets.

During the decision-making process on the Third Package (**Chapter 6**), the access principle in the EU energy liberalization negotiations was operationalised via the so-called Third Party Access (TPA) principle and unbundling - namely two principles which support each other in secondary EU energy and case law. These principles facilitated an agreement between opponents and adherents of the option of ownership unbundling.

The 'engineering' of the TPA and unbundling principles by Commission and Council allowed the Three to coalesce around these focal points as the central rule for organizing the effective separation of supply and production activities from network operation. 'Effective

separation' included three options for 'unbundling' and the informal agreement on this issue paved the way for successful logrolling between Council and Parliament on other parts of the package deal. These parts included issues such as the strengthening of the independence of national regulators as well as introducing consumer rights.

The analysis of the decision-making process on the SoS Regulation (**Chapter 7**) pointed out that the solidarity, subsidiarity and proportionality principles served as focal points that facilitated the process of logrolling between Council and Parliament. Solidarity refers to a policy of supply security provided by the Member States to other Member States. The Commission suggested measures for operationalising the solidarity principle via defined security of supply standards, automatic emergency triggers and the activation of a community response.

With reference to subsidiarity, the Commission underlined the increasing importance of the Union dimension in security of gas supply. It proposed measures to strengthen the involvement of EU institutional actors in co-ordinating the actions of the Member States in case of a Union emergency.

To comply with the proportionality principle, however, the Commission argued that the proposal did not go beyond what is necessary to achieve the strengthening of the Union security of supply. Table 8.2 provides an overview of the operationalisation of ideas in all three cases.

<i>Legislation:</i>	<i>Ideas:</i>	<i>Operationalization:</i>
Climate & Energy Package	<i>Flexibility, solidarity and fairness (focal points);</i>	Formulaic, quantified effort-shares for MS that incorporate key facets of their national circumstances (notably relative wealth via GDP/capita weighting)
	<i>Consensus (norm)</i>	Informal procedural move 'collective commitment to seek unanimity'
'Third' Package	<i>Access (focal point)</i>	Third-Party-Access, unbundling
Security of Gas Supply Regulation	<i>Solidarity, subsidiarity, proportionality (focal points)</i>	Treaty articles (5, 194), specific policy measures to promote solidarity

Table 8.2: The operationalization of ideas.

What has been learned from the comparison of the three cases? What is similar? What is different? In every case the point is made that a quick agreement would not have been possible via ‘just’ bargaining. Focal points in line with the interests of the legislative actors (Parliament and Member States) served as essential cogs that enabled them to find agreement in extremely complex and controversial pieces/packages of legislation within a very short period of time. Moreover, the agreements reached contained more than they would have done if there had simply been a “tit-for-tat” approach based on self-interested behaviour.

The outcome of the ETS-scheme in the Climate & Energy Package further contributed to a significant centralisation and Europeanisation of climate and energy policy. The instruments in package such as the revised ETS and renewable targets, energy efficiency policies and choices regarding fuel mixes all impact the EU’s regional and national energy markets. The TPA and unbundling principles in the Third Package paved the way for agreement on “effective separation of supply and production activities from network operations”, which created, however imperfect, a level playing field in the EU energy markets. As such, the package has made a substantial contribution to the integration of energy markets on regional levels with cross-border TSO co-operation and company mergers underlining the fact that purely national energy policies no longer make sense (De Jong & Groot 2013). And in the informal negotiations on the SoS Regulation, the solidarity principle proved to be instrumental in serving the interests of the Three which made it possible to reach an EA in which a balance was found between ensuring gas supply at national level and a strengthened EU-dimension. Thanks to the regulation, the internal market for gas is better equipped to redirect gas to places where it is needed. The regulation is therefore considered to be the EU’s key solidarity mechanism and a solid basis for the management of unforeseen supply interruptions in the internal market for gas on a short-term basis.

Certain issues that still need to be resolved or are missing [in the regulation] can be overcome based on the experiences from past crises. The transposition of the lessons learnt into the existing framework can further refine and improve the procedure in place (De Jong et al. 2012: 40).

The main lesson drawn from the comparison of the three cases analysed in this thesis is that focal points and norms mentioned above proved to be key mechanisms in the

decision-making process that (at least to a large degree) successfully dealt with solving the tension between the 'whole' and the 'parts' of the Union; chiefly the need for taking common action in climate and energy policy yet not against the national interests of the Member States. The ideas were able to serve as essential cogs in the decision-making process only because they matched or did not contradict the interests of the Member States. The main interests of the co-legislators in the respective cases were:

- The Climate & Energy Package: Council (cost-effectiveness), Parliament (environmental integrity/ 'green leader Europe' ambitions);
- The Third Package: 'Traditionalists' (3rd way / Independent Transmission Operator option), 'market adherents' (ownership unbundling option);
- The SoS Regulation: Council (energy sovereignty, Member State flexibility), Parliament (strengthened Community dimension in security of supply, Member State flexibility).

What was similar across all three cases? Next to interests and ideas, the bargaining model also introduced the idea that the speed of (informal) decision-making was influenced by interaction between the Three and their environment in conditions of uncertainty. First, there was the pressure generated by the international climate negotiations via the 'post-2012 regime' mentioned in Chapter 5. This influence from the international environment triggered the French EU Presidency's impatience in reaching a deal on the package through an accelerated first-reading procedure and getting this adopted before the end of its term in December 2008. The Russia-Ukraine gas crisis mentioned in Chapters 6 and 7 triggered the urgency for amending existing legislation and/or the impatience of one or more of the legislative actors to reach an EA.

In more general terms, the impact or intensity of ideas was determined by issues and obligations under international regimes and affected by national and international events. These issues and obligations strengthened (or intensified) the appeal of certain ideas.

Second, all three pieces of legislation were concentrated on inter-institutional coordination between single Council and Parliament committees. For the sake of not bringing in unwanted variables regarding intra-institutional dynamics, the renewables directive, which is part of the Climate & Energy Package, was left out of the analysis. This as the Parliament's Environment and Industry Committees decided to share the lead on this proposal.

Finally, bargaining within the trilogues constituted a key moment in the decision-making process in all three cases. The trilogues contributed to establishing a pact of trust between Council and Parliament which allowed the co-legislators to reach an agreement on both technical and political issues in the legislative proposals. The main achievement of the informal negotiations in the trilogues was that focal points in line with the interests of Council and Parliament led to the formulation of acceptable compromise solutions via an EA.

What was different between the three cases? First, there was the particular nature of the decision-making process on the Climate & Energy Package. The unprecedented move by the French Presidency to directly involve the European Council in the legislative decision-making process completely overturned the normal co-decision procedure. As stated by an angry MEP and rapporteur in Chapter 5, there was no legal provision for the Heads of State to be involved in the co-decision process. This high-level consultation was exceptional and could not in any way be seen to set a precedent for any other co-decision issues. French President Sarkozy underlined the need for the maximum commitment of the Member States when he defended his decision to temporarily suspend QMV in favour of unanimity voting and consensus-building during the decision-making process on the Climate & Energy Package. Before the Parliament at the end of 2008, he stated:

I agreed to unanimity for one simple reason: the environmental choices that Europe makes must not be forced choices, but deliberate choices. Can you imagine how weak an agreement obtained by majority voting would have been, with a number of countries that would not have stuck to it? How credible would the energy and climate change package have been if it were ratified by a majority, when everyone can see that it is unanimity that guarantees that our political commitments will be met?¹⁸¹

Convinced of the idea that the success of its Presidency would be judged primarily on the rapid adoption of the Climate & Energy Package, France invested enormous political capital and energy into crafting an EA that was acceptable to the other Member States and the Parliament. This was much less the case with the Czech Presidency during the bicameral negotiations on the Third Package. And with Spain's gas sector having no obligations in case

¹⁸¹ Parliament debate, Tuesday 16 December 2008.

of new legislation in security of gas supply, the Spanish EU Presidency did not consider the SoS Regulation as the showpiece of its EU presidency. Hence Spain invested less political capital in the EA than France during the Climate & Energy Package negotiations.

Second, there was the decisive role played by “institutional impatience/urgency” in the Third Package and the Climate & Energy negotiations. The end of the lifecycle of the Commission and the Parliament added pressure to successfully complete the informal negotiations on the Third Package. According to one rapporteur, the Parliament would have been more persistent in its stance on OU had there been more time¹⁸². And DG Competition might have pushed the OU-matter a lot further had President Barosso not been seeking political support from France and Germany for a second term at the helm of the Commission in 2009.

While the thesis argues convincingly as to why a “thin” RC approach is deficient in explaining collective action in the EU, one can rightfully argue how much value the “thick” rational choice adds to the standard bargaining explanation which already incorporates rhetoric such as, for example, flexibility and solidarity.

In other words, what is the added-value of focal points? How do we tell a focal point or idea apart from interests? Do focal points have an independent effect on outcomes? The arrow between interests and ideas in the bargaining model indicate that these two are interconnected¹⁸³. It is difficult to disentangle the independent effects of these two factors. The focal points and norms pointed out in the three cases were successful in contributing to the establishment of a quick agreement because they were in line with the interests of the legislative actors.

Nowhere does the thesis state the claim that focal points can have an independent effect on outcomes. The inclusion of ideas in interest-based bargaining provides a more sophisticated (or ‘enriched version’) of the rational-choice debate on the way in which the complex world of legislative politics in the EU works.

The primary aim of this thesis is that it provides a fully-fledged explanation of the informal decision-making process in three main cases of the EU climate and energy policy. The central claim of the thesis, namely that the speed and depth of rapid early agreement by the EU on extremely controversial pieces of legislation cannot be explained by the normal

¹⁸² Telephone interview with a former MEP, 2 October 2012, Osnabrueck.

¹⁸³ See Figure 3.5 in Chapter 3, p. 72.

interplay of interest politics, lays down a bold challenge to orthodox interpretations of the decision-making process in EU climate and energy policy. Furthermore, the thesis represents a new contribution to study in this area as there are no qualitative studies on the informal politics of EU climate and energy policy.

The thesis provides an in-depth understanding of the way in which the complex world of legislative politics in the EU works, and offers novel material on the decision-making on three important policy cases. It explains the use of ideas in facilitating decision-making in climate and energy policy as part of a larger legislative culture under co-decision rules. This culture is adopted from the Council's secretive way of 'doing business' and established with the aim of saving transaction costs and promoting compromise between the Three and between the Member States.

However, the specific focus of this thesis on three cases of EU climate and energy policy raises questions regarding the generalisability of the findings. In the field of European integration, which is characterised by heterogeneity and fragmentation, single case study evidence is even less representative than in a more homogenous environment (Schmidt 1996: 250). And while climate and energy policy is not exactly at the lower end of the Europeanisation scale anymore, sectoral studies such as these are marked by the specific design of competences at the supranational level and by differences regarding involved actors, their interests and national institutional features (Schmidt 1996: 240). Hence the focus on climate and energy policy shows idiosyncrasies or unique patterns of interaction that hinders this thesis from making more general conclusions about the role of ideas in the informal decision-making process in other areas under co-decision rules. So it is difficult to draw general conclusions based on three sectoral cases in which the variation in the variables is inherently limited. The recourse to detailed process tracing furthermore inherently limits the number of observations (Eising & Jabko 2001: 763).

This deficiency is acknowledged in **Chapter 4**, where the analysis offered is specific and not generic. The primary aim and the added-value of this thesis is that it seeks to provide a fully-fledged explanation of the significance of the informal decision-making process in three major cases of the EU climate and energy policy.

At the same time this thesis argues that the tested bargaining model proposed and tested here provides a general theoretical approach that can be applied to other EU policy

areas under co-decision rules. The bargaining model proposed provides a general theoretical approach that can be applied to explain the informal policy-making process in other areas under co-decision rules within the constraints of the EU's formal institutional framework. In addition, the model incorporates interest-based variables such as package deals, logrolling, proposal salience, actor impatience and ideas which are recognised in the literature as key variables in EU legislative decision-making under co-decision (e.g. Kardasheva 2009; Muengersdorff 2009; Garrett & Weingast 1993).

Appendix 2 of the thesis provides an overview of all areas decided upon under co-decision rules. Certainly one could apply the model to one or several of these policy areas but one would have to have a keen awareness of the specific ideas (and importantly, their operationalisation in tangible policy documents) because nowhere does this thesis suggest that focal points such as solidarity, subsidiarity and proportionality play an equally important role in serving a quick agreement.

Perhaps in the EU's Common Agricultural Policy (CAP), flexibility complete with a quantitative mechanism constituted a key focal point in establishing the Single Farm Payment (SFP)?¹⁸⁴ Did a specific international regime (for instance, the UN Food and Agriculture Programme) play a role during the negotiations on the SFP? How about the impatience of one or more of the legislative actors? Was SFP part of a package deal or a single piece of legislation? These are questions that need to be answered before one can apply the bargaining model to other EU policy fields as different from climate and energy policy as the CAP.

On the other hand, any theoretical model formulated and tested in scientific work constitutes a reduction and/or distortion of the complexities of real life. In the bargaining model important variables were not captured yet exert great influence on the speed of the informal decision-making process. Thus, enlargement played a key role in the informal negotiations yet is not accounted for in the model. The formalisation of the bargaining position of coalitions prior to the decision-making process as mentioned in the Third Package negotiations requires further research. The same goes for the role and influence of

¹⁸⁴ A 2003 reform has introduced the SPS, which allows farmers who receive SPS to have the flexibility to produce any commodity on their land except fruit, vegetables and table potatoes. In addition, they are obliged to keep their land in good agricultural and environmental condition (cross-compliance). Farmers have to respect environmental, food safety, phytosanitary and animal welfare standards. This is a penalty measure, if farmers do not respect these standards, their payment will be reduced.

informal institutional innovations such the ‘pre-negotiating meetings’ between the Rapporteur and the Member State holding the EU Presidency during the negotiations on the SoS Regulation.

Finally, and to a large extent, the Commission set the tone and defined the course for the negotiations by stipulating key principles in the legislative proposals. And although the Commission has a relatively modest role during the informal negotiations (as the Council Presidency and Parliament are effectively in charge), the question remains as to how the ideas initiated by the Commission affected the drafting of the compromise texts and parliamentary amendments. This is an important aspect of the decision-making process that is not fully explored in this thesis. For example, a senior Commission official who was closely involved in the Third Package negotiations claimed that 70 per cent to 80 per cent of the final texts – including the major issues - came from the pen of the Commission and the Council Secretariat (the latter, another actor whose influence on the decision-making process requires further elaboration)¹⁸⁵. So, while not covered by the bargaining model, a more thorough analysis of the ‘measurement’ of the bureaucratic influence from the Commission and Council Secretariat on the drafting of the texts is required for a more elaborate understanding of the speed, scope and content of the decision-making process and the policy outcomes.

Due to different circumstances which cannot be fully explored here, the results of the EU’s first-generation climate and energy policy efforts are a ‘mixed bag’.

The current surge in cheap coal as a result of American utilities shifting to shale gas - together with a high price of gas in Europe - has led to the amount of electricity generated from coal rising at annualised rates of as much as 50 per cent in some European countries (The Economist 5 January 2013). This coal surge is making a mockery of the revised ETS scheme in the Climate & Energy Package which was set up to reduce carbon emissions and not to see a growing market share of ‘dirty coal’ in electricity generation¹⁸⁶. Together with the proper implementation of the Third Package by all Member States, there still remains a lot of

¹⁸⁵ Interview Commission official, 10 October 2012, Brussels.

¹⁸⁶ The main problem is that an oversupply of auctioning permits has hindered the carbon price from going up when emissions do. Instead the oversupply for the electricity sector has swamped the impact of emissions from coal-fired power plants.

work to be done before the EU can take another substantive step forward in establishing a fully-fledged climate and energy policy¹⁸⁷.

The fact of the matter remains that the window of opportunity for climate and energy policy that opened in 2007 had closed again by 2010, mainly because Europe's political leaders were preoccupied with managing the economic and financial crisis. The current political and economic reality in the Member States is that energy and climate policy is being carried out through increasing doses of random national intervention in the energy market, exactly what the liberalisation measures in the Third Package were supposed to remove (Buchan 2013: 7). Germany's unco-ordinated decision between 2010 and 2011 to single-handedly establish an energy transition (or 'Energiewende') from fossil fuels and nuclear power to renewables constitutes a prominent example of the current trend of 're-nationalizing' climate and energy politics¹⁸⁸. The Secretary General of EURELECTRIC raises concerns over this re-nationalization¹⁸⁹:

Instead of opening up borders to ensure security of supply, Europe's governments are trying to achieve national energy self-sufficiency. Instead of letting market forces determine the correct price, governments are intervening in the market to set wholesale and/or retail prices. Instead of allowing the internal market to develop, governments are introducing discretionary – and sometimes retroactive – taxes with the stroke of a pen (Ten Berge 2013: 60).

Next to the process of 're-nationalisation', varied levels of interactions with external economies, differences in the crisis perception in energy among eastern and western Member States and lucrative bilateral energy deals between governments (e.g. Germany) with third countries (e.g. Russia) continue to hinder the EU from increasing its bargaining power as a bloc.

¹⁸⁷ The Commission has complained that many Member States have failed to implement or apply completely or properly the requirements set out in the Third Package even long after the expiration of the implementation deadlines of March 2011 (Commission Staff Working Document 9 June 2011).

¹⁸⁸ The decision by the German government in 2011 to immediately shut down some of its nuclear plants led to a mismatch in the overall supply/demand power balance between the north of the country (where wind energy is concentrated) and the south (where demand is concentrated). More important from an EU perspective, the connection of significant amounts of renewable generation to the grid has led to an uncoordinated capacity build-up of renewable energy (i.e. high wind feed-in/power surplus in northern Germany) which is causing undue cross-border effects such as an overload of the networks in Poland and the Czech Republic.

¹⁸⁹ The Union of the Electricity Industry – EURELECTRIC - is the sector association which represents the common interests of the electricity industry at pan-European level, plus its affiliates and associates on several other continents. EURELECTRIC currently has over 30 [full members](#) which represent the electricity industry in 32 European countries.

Europe wants more security in energy but is unable to define together what success should look like. It wants more stability but refuses to create a more transparent market by sharing information. It also asks for more diversity but the very term (ironically) seems to mean a different thing in each Member State, with regards to both internal and external policies (Jemelkova & Hack 2014).

That the European climate and energy policy is caught between ‘the whole’ and ‘the parts’ of the Union was underlined by the October 2014 European Council meeting which forged a political compromise on the following targets for 2030:

- *A binding EU target of 40% reduction in GHG emissions by 2030 compared to 1990;*
- *A renewables EU target of “at least” 27%” for the share of renewable energy consumed in the EU in 2030 which is binding at EU-level¹⁹⁰;*
- *An indicative EU-level target of improving for energy efficiency with “at least” 27% in 2030 (EUCO 169/14/2014: 1-5).*

This time the renewables target was not supposed to be translated into national binding targets as in the 2020- framework, but it would rather be binding at EU level. All three areas were treated with quantified targets (40 per cent; 27 per cent; 27 per cent) and an “at least” formula, which opens the floor for raising the target at a later date. Finally, reflecting the demands of the CEECs, neither the renewable energy target nor the energy efficiency formula will directly influence national decisions on energy mix and national energy strategies. Thus no direct implementation on member- state level is foreseen (Fischer 2014). Also, the European Council meeting extended extensive financial transfers to and exemptions for CEECs. With the aim of creating a well-functioning ETS scheme, an agreement was reached on measures such as establishing a new reserve of 2 per cent of the allowances to address high additional investments needs in low income Member States. For the purpose of solidarity, 10 per cent of the ETS allowances to be auctioned by the Member States will distributed among those countries (read: CEECs) whose GDP per capita did not exceed 90 per cent of the EU average (EUCO 169/14/2014: 3). In addition, the CEECs may keep on allocating 40 per cent of their allowances in the electricity sector for free.

In the coming months the Commission will be asked to give the political compromise

¹⁹⁰ A target binding at EU level means that this target will be fulfilled through the different Member States contributions and without preventing Member States such as Germany from going beyond the minimum 27% share in the national energy mix.

forged by the European Council a legal form, namely by submitting legislative proposals to address outstanding issues. This includes reforming the ETS, effort-sharing not covered by the ETS and setting up an Energy Union and governance mechanism. The leeway provided by the European Council for setting up effective policies in these areas appears narrow since the Commission must leave the energy mix of the Member States untouched. In fact, since the European Council agreed in October 2014 to abolish binding national targets for the expansion of renewable energy in the next decade and instead to formulate only a binding EU-wide target for 2030, the Commission will have to strike a delicate balance between voluntary commitments by Member States and robust monitoring of national measures.

This short overview makes clear that current efforts in establishing the post-2020 climate and energy policy framework are still marked by disagreement over which set of rules to apply, fears of uncertainty and entrenched economic interests, and therefore continue to be caught between 'the whole' and 'the parts' of the Union. On the one hand, Member State action in terms of both internal and external policies continues to be based on decentralised and self-interested behaviour, emphasising the role of national strategies in energy. On the other, the Union is pushing for an accelerated effort in establishing the 2030 framework for climate and energy policy¹⁹¹. Although less ambitious than the '20-20-20 targets' formulated by the European Council in 2007, the 2030 framework suggest establishing further common policy measures which take into account the different choices, circumstances and capacities of the Member States.

As indicated by the pillars in 2030 energy framework proposals, any EA on EU-wide climate targets, improving key infrastructure and completing the internal energy market will need to be facilitated by the principles and mechanisms of solidarity, flexibility and effort-sharing. This to ensure that the actors' salient concerns are taken into account and to direct them towards what is considered a fair agreement. Further analysis of the formal and informal decision-making process, including under what circumstances ideas have more or less impact, can commence after the whole decision-making process on all parts of the 2030 framework will be concluded at the end of 2015.

The debate over what form an improved European co-ordination of national energy and climate policies should take, and what the focal points of that co-ordination should look

¹⁹¹ The first signs of Europe's economic recovery after the economic and financial crisis began in the second quarter of 2013.

like shares many similarities with the deliberations over intensified economic policy co-ordination within the EU ("European Semester") (Fischer & Geden 2015). But further comparison with similar co-decision cases which were not subject to substantial pressure caused by (inter)national events and regimes could provide a more definitive answer on the relevance of the latter in strengthening focal points and norms in the legislative decision-making process.

This thesis has argued that the relevance of focal points and norms in facilitating the bargaining process on the three dossiers between 2007-2010 was strengthened by international events and regimes. In a similar manner, the appeal and impact of focal points and norms in reaching an EA on the 2030 framework will be highly dependent on further developments in the international climate change regime, in relations with Russia and Ukraine and in Europe's recent (yet fragile) economic recovery. For example, further deteriorating relations with Russia could strengthen the appeal of the solidarity principle as a focal point in reinforcing European emergency and solidarity mechanisms and improved co-ordination of national energy policies. The COP in Paris in 2015 and continuing economic recovery could contribute to a renewed European engagement in exercising green leadership, while not contradicting national interests via flexibility, effort-sharing and the consensus norm. Vice versa, a renewed European economic downturn could strengthen energy nationalism and emphasise the divergent preferences of the Member States over potential paths to further co-operation which would undermine the facilitating role of ideas in promoting common action.

Besides what is left out of the bargaining model, there are other, broader questions that have not been answered in this thesis such as those related to the balance between efficiency and transparency. For example, the overturning of the normal co-decision procedure during the Climate & Energy Package negotiations undermined the formal equality of the Council and Parliament as co-legislators. Given the Parliament's role as guarantor of EU legitimacy, Obholzer & Reh (2012) suggest a number of rules designed to facilitate effective decision-making on urgent files in EA while placing a premium on transparency and inclusiveness, namely the norms that spurred the promotion of the Parliament to become a co-legislator in 1993.

No doubt, any effort in reforming the informal decision-making process will be highly relevant for explaining the speed at which proposals are 'pushed through' the legislative machinery and Europe's increased or decreased ability to deal with the tension between 'the one' and the 'the many' or between 'the whole' and 'the parts' of the Union. This thesis has restricted itself to explaining how the EU deals with this tension in 'the informal politics of the EU's first-generation climate and energy policy'. At the very least this thesis hopes to have contributed to a better understanding of the complexities of the EU's efforts in establishing a climate and energy policy and the remarkable efficiency at which the legislation discussed here was 'pushed through' the European legislative machinery.

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Appendices

Appendix 1: EU climate and energy policy in the Treaties

Treaty of Nice	Provision	Innovation	Treaty of Lisbon
<i>Treaty on European Union</i>			
Title III – Provisions on the Institutions			
	European Commission and its presidential role: -external representation -(...)	Art. 17 (1): (...) <i>With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union’s external representation</i> ¹⁹² .	Art. 17 TEU
Title IV – Provisions on Enhanced Cooperation (TEU)			
Arts. 27 (a-e), 40 to 40b and 43 to 45 TEU; Arts. 11 and 11a TEC		Art. 20 (2) The enhanced cooperation provision allows at least nine Member States to establish enhanced cooperation between themselves ¹⁹³ .	Art. 20 TEU
Title V – General Provisions on the Union’s External Action and Specific Provisions on the Common Foreign and Security Policy (TEU)			
	General provisions on the Union’s external action concerning increased coherence	<i>The Union shall define and pursue common policies and actions and shall work for a high degree of cooperation in all fields of international relations in order to: (...) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global resources in order to ensure sustainable development.</i>	Art. 21 (2f) TEU
Art. 11 TEU	Legal basis for the adoption of international agreements with a security component	24 (1) <i>The Union’s competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union’s security (...)</i>	Art. 24 TEU
<i>Treaty establishing the European Community</i>		<i>Treaty on the functioning of the European Union</i>	
Part One, Title I – Categories and Areas of Union Competence			
	The Union shall have exclusive	3 (1b) <i>The establishing of</i>	Art. 3 TFEU

¹⁹² This includes the external dimension of climate and energy policy.

¹⁹³ Enhanced cooperation is mentioned prominently in relation to building a common EU energy policy by the more ambitious Member States and the Energy Union proposed by Poland. See Andoura *et al.* (2010).

	competence in several areas, amongst these: (...)	<i>the competition rules necessary for the functioning of the internal market (...)</i> <i>(e) Common commercial policy</i>	
Art. 3 (1 l, o, u) TEC	<i>The activities of the Community shall include:</i> - <i>A policy in the sphere of environment</i> - <i>Encouragement for the establishment and development of trans-European networks</i> - <i>Measures in the spheres of energy, civil protection and tourism</i>	Instead of being relegated to the same level of importance as measures in the spheres of civil protection and tourism, energy is mentioned separately as a principal area of shared competence between the Union and the Member States	Art. 4 (2i) TFEU
Part Three, Title VIII – Economic and Monetary Policy			
Art. 100 (1) TEC	<i>Without prejudice to any other procedures provided for in this Treaty, the Council, acting by a qualified majority on a proposal from the Commission, may decide upon the measures appropriate to the economic situation if severe difficulties arise in the supply of certain products</i>	<i>Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation if severe difficulties arise in the supply of certain products, notably in the area of energy</i>	Art. 122 (1) TFEU
Part Three, Title XVI - Trans European Networks			
Arts. 154-156 TEC	Trans-European Networks (TENs) aims at promoting the interoperability of national networks and the access to those networks, not only within the EU, but also in its neighbouring area.		Arts. 170-172 TFEU
Part Three, Title XX - Environment			
Arts. 174-76 TEC	<i>Union policy on the environment shall contribute to the pursuit of the following objectives: (...)</i> The Council shall act unanimously concerning:	191 (1). <i>Promoting measures at international level to deal with regional or worldwide environmental problems and in particular combating climate change.</i>	Arts. 191-193 TFEU
Part Three, Title XXI - Energy			
	<i>In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of</i>	1(a) <i>ensure the functioning of the energy market</i> (b) <i>ensure security of energy in the Union</i> (c) <i>promote energy efficiency and energy saving and the</i>	Art. 194 TFEU

	solidarity between Member States, to:	development of new and renewable forms of energy; and (d) promote the interconnection of energy networks (ordinary legislative procedure) Measures listed above shall not, however, affect a Member State's right to determine the conditions for exploiting its energy sources and the general structure of its energy supply, (...). Any fiscal measures under the new Energy Title will still require a unanimous Council vote (the 'special legislative procedure')	
Part Five, Title V – International Agreements			
Art. 300 TEC	New Procedure to conclude international agreements	6. The Council shall adopt the decision concluding the agreement after obtaining the consent of the European Parliament in the following cases (...) -(a)(v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required ¹⁹⁴ .	Art. 218 TFEU

Sources: Own elaboration based on Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community of Nice, in: Official Journal of the European Union, Nr. C 321, 29 December 2006, pp. 1-331; Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union of Lisbon, in: Official Journal of the European Union, Nr. C 115, 9 May 2008, pp. 1-359.

Appendix 2: List of legal bases providing for the co-decision procedure in the Treaty of Lisbon¹⁹⁵

1. Services of general economic interest (Art. 14 TFEU)
2. Procedures regulating the right of access to documents (Art. 15(3) TFEU)
3. Data protection (Art. 16(2) TFEU)
4. Measures to combat discrimination on grounds of nationality (Art. 18 TFEU)
5. Basic principles for anti-discrimination incentive measures (Art. 19(2) TFEU)

¹⁹⁴ As stated in Art. 194 TFEU, the ordinary legislative procedure applies to most energy proposals.

¹⁹⁵ The subject areas underlined are those for which co-decision/ordinary legislative procedure has been introduced or extended through the Lisbon Treaty.

6. Measures to facilitate the exercise of the right of every citizen of the Union to move and reside freely in the territory of Member States (Art. 18, paragraph 2, TEC)
7. Citizens' initiative (Art. 24 TFEU)
8. Customs cooperation (Art. 33 TFEU)
9. Application of competition rules to the common agricultural policy (Art. 42, which refers to Art. 43, paragraph 2, TFEU)
10. Common organisation of the markets under the common agricultural policy and the common fisheries policy (Art. 43(2) TFEU)
11. Free movement of workers (Art. 46 TFEU)
12. Social security measures for migrant workers (Art. 48 TFEU)
13. Right of establishment (Art. 50(1) TFEU)
14. Exclusion in a Member State of certain activities from the application of provisions on the right of establishment (Art. 51(2) TFEU)
15. Coordination of treatment of foreign nationals with regard to the right of establishment (Art. 52(2) TFEU)
16. Mutual recognition of diplomas and measures concerning the taking-up and pursuit of activities as self-employed persons (Art. 53(1) TFEU)
17. Extending provisions on freedom to provide services to third-country nationals established within the Union (Art. 56(2) TFEU)
18. Liberalisation of services in specific sectors (Art. 59(1) TFEU)
19. Services (Art. 62 TFEU)
20. Adoption of other reasons on the movement of capital to and from third countries (Art. 64(2) TFEU)
21. Administrative measures relating to capital movements in connection with preventing and combating crime and terrorism (Art. 75 TFEU)
22. Visas, border checks, free movement of nationals of non-member countries, management of external frontiers, absence of controls at internal frontiers (Art. 77(2) TFEU)
23. Asylum, temporary protection or subsidiary protection for nationals of third countries (Art. 78(2) TFEU)
24. Immigration and combatting trafficking in persons (Art. 79(2) TFEU)
25. Incentive measures for integration of nationals of third countries (Art. 79(4) TFEU)

26. Judicial cooperation in civil matters (excluding family law) (Art. 81(2) and, potentially (3) (family law) TFEU)
27. Judicial cooperation in criminal matters – measures to facilitate mutual recognition, avoidance of conflicts of jurisdiction, training and cooperation between judicial authorities (Art. 82(1) TFEU)
28. Judicial cooperation in criminal matters – rules for cross-border cases regarding mutual admissibility of evidence rights of individuals in criminal proceeding and rights of victims (Art. 82(2) TFEU)
29. Minimum rules concerning the definition of criminal offences and sanctions in areas of particularly serious crime with a cross-border dimension (Art. 83(1) and, possibly, (2) TFEU)
30. Measures to support crime prevention (Art. 84 TFEU)
31. Eurojust – structure, operation, field of action, tasks (Art. 85(1) first subparagraph, TFEU)
32. Arrangements for involving the European Parliament and national parliaments in the evaluation of Eurojust’s activities (Art. 85(1) last subparagraph, TFEU)
33. Police cooperation (certain aspects) (Art. 87(2) TFEU)
34. Europol – structure, operation, field of action, tasks (Art. 88(2) first subparagraph, TFEU)
35. Procedures for scrutiny of Europol’s activities by EP and national parliaments (Art. 88(2) second subparagraph, TFEU)
36. Implementation of the common transport policy (Art. 91(1) TFEU)
37. Sea and air transport (Art. 100(2) TFEU)
38. Internal market harmonisations (Art. 114(1) TFEU)
39. Measures to eliminate distortions in the internal market caused by national actions (Art. 116 TFEU)
40. Intellectual property rights, except language arrangements (Art. 118 first subparagraph, TFEU)
41. Multilateral surveillance (Art. 121(6) TFEU)
42. Modifications of the Protocol on the Statutes of the ESCB and ECB (Art. 129(3) TFEU)
43. Measures necessary for the use of the euro (Art. 133 TFEU)
44. Incentive measures for employment (Art. 149 TFEU)
45. Social policy: health & safety, working conditions, information & consultation of workers, integration of persons excluded from the labour market, equal opportunities, combatting

social exclusion and modernization of social protection systems (Art. 153(2)(b), second subparagraphs, TFEU)

46. Social policy: equal pay for men and women (Art. 157(3) TFEU)

47. European Social Fund (Art. 164 TFEU)

48. Education & sport (incentive measures, excluding harmonization) (Art. 165(4) TFEU)

49. Vocational training (measures, excluding harmonization) (Art. 166(4) TFEU)

50. Culture (incentive measures, excluding harmonization) (Art. 167(5) TFEU)

51. Public health – measures to tackle common safety concerns in the health sphere (Art. 168(4) TFEU)

52. Public health – incentive measures to protect human health and in particular to combat the major cross-border health scourges, and measures to tackle tobacco and alcohol abuse (Art. 168(5) TFEU)

53. Consumer protection (Art. 169(3) TFEU)

54. Trans-European networks (Art. 172 TFEU)

55. Industry (measures, excluding harmonization) (Art. 173(3) TFEU)

56. Measures in the area of economic and social cohesion (Art. 175 (3) TFEU)

57. Structural Funds (Art. 177(first sub para) TFEU)

58. Cohesion Fund (Art. 177(second sub para) TFEU)

59. European Regional Development Fund (Art. 178 TFEU)

60. Framework Programme for Research (Art. 182(1) TFEU)

61. Implementation of European research area (Art. 182(5) TFEU)

62. Implementation of the Framework Programme for Research: rules for the participation of undertakings and dissemination of research results (Arts. 183 and 188(2) TFEU)

63. Supplementary research programmes for some Member States (Arts. 184 and 188(2) TFEU)

64. Participation in research programmes undertaken by several Member States (Arts. 185 and 188(2))

65. Space policy (Art. 189 TFEU)

66. Environment, except measures of a fiscal nature (Art. 192(2) TFEU)

67. Environment Action Programme (Art. 192(2) TFEU)

68. Energy, except measures of a fiscal nature (Art. 194(2) TFEU)

69. Tourism – measures to complement the action of the Member States in the tourism sector (Art. 195(2) TFEU)
70. Civil protection (cooperation, excluding harmonization, in combatting disasters (Art. 196(2) TFEU)
71. Administrative cooperation in implementing Union law by Member States (Art. 197(2) TFEU)
72. Commercial policy – implementing measures (Art. 207(2) TFEU)
73. Development cooperation (Art. 209(1) TFEU)
74. Economic, financial and technical cooperation with third countries (Art. 212(2) TFEU)
75. General framework for humanitarian operations (Art. 214(3) TFEU)
76. European Voluntary Humanitarian Aid Corps (Art. 214(5) TFEU)
77. Regulations governing political parties and their funding (Art. 224 TFEU)
78. Creation of specialised courts (Art. 257 TFEU)
79. Modification of Statute Court of Justice, except Title I and Article 64 (Art. 281 TFEU)
80. Procedures for monitoring the exercise of implementing powers (Art. 291(3) TFEU)
81. European Union Administration (Art. 298(2) TFEU)
82. Adoption of financial rules (Art. 322(1)(a) TFEU)
83. Responsibilities of authorizing and accounting officers (Art. 322(1)(b) TFEU)
84. Fight against fraud affecting the Union’s financial interests (Art. 325(4) TFEU)
85. Staff regulations of EU officials and other staff (Art. 336 TFEU)

(Source: European Parliament 2009: 45-51).