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Sub-Constitutional Engineering: Negotiation, Content, and Legal Value of Interinstitutional Agreements in the EU

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Abstract: *This article analyses the roles and impact of Interinstitutional Agreements (IIAs) in the EU, taking into account their relationship to primary law. Concretely speaking, these roles range from (a) explicitly authorised specifications of Treaty provisions via (b) not explicitly authorised specifications of vague Treaty law to (c) pure political undertaking. Based on the distinction between the constitutional and the operational level of the political game, we challenge the assumption that IIAs usually strengthen the European Parliament. As our case study, the 1993 interrelated package of IIAs on democracy, transparency and subsidiarity, illustrates, the European Parliament is not the only institution that benefits from IIAs, especially if they lack a sufficiently precise Treaty basis. Furthermore, if Treaty provisions underlying IIAs are precise, they also tend to produce precise and thus legally relevant content. Conversely, if IIAs deal primarily with elusive concepts they are likely to be legally ambiguous or even irrelevant at all.*

I Introduction

Constitutionalisation of the European Union has to be understood as a process that started with the founding treaties in the 1950s and included several amendments by Intergovernmental Conferences (IGCs) in 1986, 1992, 1997, and 2000. But the constitutional reality is more than the 'grand bargains' negotiated at IGCs. Important constitutional developments have also occurred between amendments of primary law, notably through legislative activity by the Community institutions and the rulings of the European Court of Justice. Apart from legislative and judicial activities, numerous institutional innovations have commenced outside formal Treaty law and have—sometimes though not always—been included into the Treaties at a later stage.

Some of these phenomena have resulted from Interinstitutional Agreements (IIAs) which have a long history in the European Union.[1] Since the Single European Act has strengthened the role of the European Parliament, the need for interinstitutional

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[1] The so-called 'Luns Procedure' of 25 February 1964, which ensured the involvement of the European Parliament in the negotiation of association agreements is considered to be the first IIA, see C. Bobbert, *Interinstitutionelle Vereinbarungen im Europäischen Gemeinschaftsrecht* (Peter Lang, 2001) p. 1.

cooperation has led to an increased importance of IIAs.[2] Empirical evidence suggests that there have been well over 100 IIAs adopted over the years.[3] However, as yet we do not know the exact number of IIAs, nor do we have comprehensive knowledge about their political functions and legal status. One of the statements that can be found in the sparse literature on this subject is that IIAs have strengthened the position of the European Parliament within the EU's institutional arrangement.[4] This article takes a different stance: After providing a succinct overview of what we understand as IIAs as well as of their legal status, we argue that IIAs *per se* do not strengthen the European Parliament. In order to give a proper understanding of IIAs we have to take into account their relationship to primary law which provides the framework for the negotiations and the concluded content of IIAs. Or in the words of historical institutionalism: Decisions at an earlier point of time (e.g. adoption of primary law) will structure the negotiations as well as the possible outcome (e.g. IIAs) occurring at a later point of time.[5] By emphasising the impact of (formal) institutions on politics over time, we can easily see that the negotiation success of any given Community institution depends on its surrounding legal environment, i.e. Treaty law. To put some flesh to this argument we take the 1993 interrelated package[6] of IIAs on democracy, transparency, and subsidiarity as an example to show that IIAs not only have to be analysed against the backdrop of primary law, but also that IIAs fulfil three different roles depending on their relationship to primary law. Concretely speaking, these roles range from (a) explicitly authorised specification of Treaty provisions via (b) not explicitly authorised specification of notoriously vague Treaty law to (c) pure political undertaking.

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[2] See P. Craig and G. de Burca, *EU Law. Text, Cases, and Materials* (Oxford University Press, 2003) p. 159; J. Monar, 'Interinstitutional Agreements: The Phenomenon and its New Dynamics after Maastricht', (1994) 31 CMLR 693; F. Snyder, 'Interinstitutional Agreements: Forms and Constitutional Limitations, in G. Winter (ed.), *Sources and Categories of European Union Law* (Nomos Verlag, 1996) p. 453.

[3] In a recent publication, W. Hummer speaks of 161 IIAs he has collected over the years, but unfortunately fails to provide detailed references of the relevant documents: see W. Hummer, 'Interinstitutionelle Vereinbarungen und "institutionelles Gleichgewicht" ', in W. Hummer (ed.), *Paradigmenwechsel im Europarecht zur Jahrtausendwende. Ansichten österreichischer Integrationsexperten zu aktuellen Problemlagen. Forschung und Lehre im Europarecht in Österreich* (Springer Verlag, 2004) pp. 129–136. The authors are currently involved in an international research project funded by the Austrian Ministry of Education, Science and Culture, which *inter alia* aims to provide a complete list of all IIAs ever concluded.

[4] Hummer, *op. cit.* note 3 *supra*, at 115; Monar, *op. cit.* note 2 *supra*, at 693; A. Maurer, D. Kietz and C. Völkel, *Interinstitutional Agreements in CFSP: Parliamentarisation through the Backdoor?,* (2004) EIF Working Paper No.5.

[5] See P. Pierson, 'Increasing Returns, Path Dependence, and the Study of Politics', (2000) 94 *American Political Science Review* 251; M. A. Pollack, 'The New Institutionalisms and European Integration', in A. Wiener and T. Diez (eds), *European Integration Theory* (Oxford University Press, 2004) pp. 139–141.

[6] We choose the term 'package' because it highlights the fact that the adoption of the IIA on subsidiarity was made conditional by the European Parliament on the conclusion of another IIA on democracy and transparency. Their common political context is further confirmed by the fact that they were published in the same section of the *Official Journal* and mentioned in the Interinstitutional Declaration of 25 October 1993 of the European Parliament, the Council, and the Commission on Democracy, Transparency and Subsidiarity (number 4–6). Concretely, we are dealing with the following three documents: (a) The Interinstitutional Declaration of 25 October 1993 of the European Parliament, the Council and the Commission on Democracy, Transparency and Subsidiarity (OJ C 329/133 25/10/1993); (b) Draft Interinstitutional Agreement on Procedures for Implementing the Principle of Subsidiarity (OJ C 329/135 1993); (c) Draft Decision of the European Parliament laying down the regulation and general conditions governing the performance of the Ombudsman's duties (OJ C 329/136 1993; the Decision was finally adopted on 9 March 1994 (OJ L 113/15 1994).

We will find that the European Parliament gets the most out of IIA negotiations if the Treaty provisions are already sufficiently clear and explicitly authorise Community institutions to determine only some 'lower level' operational details. If, by contrast, the Member States are unable to forge a viable and precise compromise at an IGC, resorting to vague terms without real meaning, the European Parliament is far less successful in overcoming these differences among the Member States through an IIA. While the former results in sufficiently clear and enforceable IIA provisions, the latter tends to lead to political declarations or vague provisions that closely resemble their corresponding Treaty provisions.

II What are IIAs and What is their Legal Status?

This article defines an IIA as an agreement between institutions of the EU.[7] This broad definition allows us to include a wide variety of existing agreements regardless of their denomination, form and content and to consider their potential common features. As mentioned above, there is as yet no comprehensive list of adopted IIAs.[8] This can at least partly be explained by the fact that IIAs are often difficult to detect.[9] While the term 'Inter-institutional Agreement' was first used in 1988,[10] IIAs come in many denominations ranging from joint declaration, exchange of letters, Council Note, or Decision of the European Parliament.[11] Second, there is no Treaty provision regarding the publication of IIAs. As a consequence, numerous IIAs, especially the early ones, are not published in the *Official Journal*.[12] Even within the group of IIAs published in the *Official Journal*, we can discern differences: while most IIAs are published in the C series of the OJ, some are published in its L series. Third, IIAs are used in a huge number of

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[7] A different more political science oriented conceptualisation of IIAs can be found in J. Stacey, *Constitutional Re-engineering in the European Union: The Impact of Informal Interinstitutional Dynamics.* Paper presented at ECSA Seventh Biennial International Conference, 31 May–2 June 2001, Madison, Wisconsin, at 36. In most cases, IIAs are concluded between two or three Community institutions, namely the European Parliament, the Council, and the Commission. However, there are numerous other IIAs which also involve other institutions such as the Court of Auditors, the European Court of Justice, the Economic and Social Committee, and so on.

[8] For a preliminary number of IIAs see Hummer, *op. cit.* note 3 *supra*; in 1973 the Commission published a Communication which seems to be the only official document on 'practical measures' bilaterally agreed upon between the Commission and the Parliament, see Commission Communication to the European Parliament on 'Practical Measures to Strengthen the Powers of Control of the Parliament and to Improve Relations Between the Parliament and the Commission', (COM(73)999). Some examples of IIAs can also be found in Snyder, *op. cit.* note 2 *supra*, at 455–458 and Bobbert, *op. cit.* note 1 *supra*, at 13–40.

[9] While English and French scholarly literature seems to stick to one term (inter-institutional agreement; *accords interinstitutionnels*), German legal literature uses various terms to deal with IIAs, namely '*interinstitutionelle Vereinbarung*', '*Interorganvereinbarung'*, or '*Inter-Organ-Verträge*', see Bobbert, *op. cit.* note 1 *supra*, at 6.

[10] Interinstitutional Agreement of 29 June 1988 between the European Parliament, the Council and the Commission on Budgetary Discipline and Improvement of the Budgetary Procedure, OJ L 185/33 1988.

[11] For an overview see Hummer, *op. cit.* note 3 *supra*, at 133.

[12] The first IIA was published in 1975, see Joint Declaration of 4 March 1975 of the European Parliament, the Council, and the Commission on the Conciliation Procedure in Budgetary Matters, OJ C 89/1 1975. For example the so-called 'Luns' procedure (see note 1 *supra*) was not published and can only be found in the academic literature, see J-V Louis, 'Le rôle du Parlement européen dans l'élaboration et la conclusion des accords internationaux et des traités d'adhésion', *Liber Amicorum Frédérique Dumon* (Kluwer, 1983) 1153; H-W. Rengeling, 'Zu den Befugnissen des Europäischen Parlaments beim Abschluß völkerrechtlicher Verträge im Rahmen der Gemeinschaftsverfassung', in I. von Münch (ed.), *Staatsrecht-Völkerrecht-Europarecht, Festschrift für Hans-Jürgen Schlochauer* (Walter de Gruyter, 1981) p. 879.

policy fields including budgetary procedure and comitology, as well as legislative procedures.[13] Given the sheer number and complexity of IIAs, it seems plausible to advocate first and foremost an official compilation of all currently existing IIAs.[14] Additionally, the IIAs should have an explicit legal basis in the Treaty ensuring a standardised denomination as well as mandatory publication in the *Official Journal*.[15]

Against this background of pluralism, we turn our attention to the legal status of IIAs. While it is beyond the scope of this article to provide a detailed legal analysis of IIAs as such it seems appropriate to focus on legal effects of IIAs in general and of our selected IIAs in particular. Although the Treaties do not contain an explicit provision allowing for the adoption of IIAs *per se*, Community institutions are entitled to adopt IIAs on the basis of either an explicit authorisation[16] or the duty of loyal cooperation (Article 10 EC).[17] It remains undisputed that IIAs cannot modify primary or secondary law.[18] But within these legal boundaries, IIAs may eventually have legal effects[19] deriving either from their Treaty basis or the intention of the drafting parties. Although there is no comprehensive jurisprudence of the Court of Justice on IIAs, we may assume that contracting parties expressly intend to bind themselves if the wording is 'clear'[20] or 'sufficiently precise and unconditional'.[21] In these cases, IIA provisions tend to be binding at least among the parties involved. Conversely, IIA provisions that are vague or ambiguous may imply that the parties involved do not intend to bind themselves.[22] Another indicator of the legally binding intention is a provision that an IIA can only be amended by common agreement of the institutions involved.[23] All other

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[13] For a good list of IIA affected policy fields see Hummer, *op. cit.* note 3 *supra*, 134 *et seq.*

[14] The role model could be the so-called register of Comitology of the Commission, see <http://europa.eu.int/comm/secretariat_general/regcomito/registre.cfm?CL=en>.

[15] See Art III-397 of the Treaty establishing a Constitution for Europe, which states that the Parliament, Commission and Council may conclude inter-institutional agreements—which may be of a binding nature—in order to arrange their cooperation. While this may be regarded as a step in the right direction, the provision fails to ensure a uniform denomination and mandatory publication.

[16] See Art 218(1) EC; Art 193(3) EC; Art 195(4); Art 248(3) EC; Art 272(9) EC.

[17] Hummer, *op. cit.* note 3 *supra*, at 253.

[18] Snyder, *op. cit.* note 2 *supra*, at 464, referring to Advocate General Manchini's often-cited statement: '[I]t remains nevertheless undeniable that joint declarations and similar measures merely constitute "droit de complement" which may not derogate from primary law on pain of invalidity.' (Case C-204/86 *Greece v Council* [1988] ECR 5323, para 9).

[19] Snyder has pointed out that the legal effect of IIAs 'does not necessarily mean to be legally binding *erga omnes*', but may in fact appear in many forms ranging from expressing general principles, creating expectations of conduct to serving as an aid in judicial interpretation. Moreover, IIAs may be legally binding among the contracting Community institutions (e.g. Case C-25/94 *Commission v Council* [1996] ECR I-1469, para 49); in contrast to contracting agreements, Community institutions are also entitled to commit themselves unilaterally, i.e. they may adopt rules and thus be 'bound to observe those rules, even if [there] was under no legal obligation to adopt them' (see Joined Opinions by Advocate General Vesterdorf on T-1-4/89, T-6-15/89 ECR [1991] II-867; see also Case 81/72 *Commission v Council* ECR [1973] ECR para 10). They may also impact on third parties (as will become obvious with regard to the Decision of the Ombudsman, see below), for details see Snyder, *op. cit.* note 2 *supra*, at 461–463.

[20] Case C-25/94 *Commission v Council* [1996] ECR I-1469, para 49; Case C-58/94 *Netherlands v Council* [1996] ECR I-2169, para 25; Case C-106/96 *UK v Commission* [1998] ECR I-2729 para 25.

[21] See Advocate General Mancini in Case 204/86 *Greece v Council* [1988] ECR 5323 para 9.

[22] Snyder, *op. cit.* note 2 *supra*, at 464.

[23] See e.g. Joint Declaration of 30 June 1982 by the European Parliament, the Council, and the Commission on various measures to improve the budgetary procedure (OJ C 194/1 1982) and the pertinent Court of Justice ruling in Case 204/86 *Greece v Council* [1988] ECR 5323 para 16 *et seq.*; see Bobbert, *op. cit.* note 1 *supra*, at 110.

IIAs whose binding quality can neither be based on explicit Treaty law nor on the intention of the drafters can be regarded as mere political declarations without any legal impact whatsoever.

III Treaty Law and IIAs: A Crucial Relationship

Before we deal with the relationship between primary law and IIAs in greater detail, we would like to recall that EU studies have undergone a 'constructivist turn' in the recent past.[24] Hence, political choices are not only driven by material interests, as rational-oriented theories would suggest, but also by ideas.[25] We argue, however, that interests and ideas are involved in different ways depending on the level of institutional interaction. Rittberger rightly points out that we have to distinguish between the constitutional and the operational level of the political game.[26] As to constitutional issues, policy makers are concerned with 'higher level' concerns such as the basic options of institutional design. Whenever 'higher level' issues are negotiated, there is uncertainty about interpretation of fundamental principles and norms guiding the political process.[27] As a consequence, debates on 'higher level' issues tend to revolve not only around material interests but also around general ideas including 'philosophical assumptions concerning the interplay among human nature, political institutions, and the good society'.[28] Once 'higher level' decisions have been taken, policy makers turn to 'lower level' issues specifying provisions which have been agreed upon beforehand. 'Lower level' negotiations operating 'within a given set of rules' are mainly 'concerned with who gets what, when, and how',[29] which can be called distributive bargaining. In the following we will discuss the three—already mentioned—roles of IIAs emphasising on their impact on negotiation style, content, and legal value.

A Explicit Authorisation

Neither the TEU nor the TEC have a general provision that explicitly authorises the Community institutions to conclude IIAs whenever they want to. But there are numerous Treaty provisions that authorise either two or three Community institutions to adopt specific IIAs in certain policy fields.[30] Additionally, both the IGC in

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[24] T. Christiansen, K. E. Joergensen and A. Wiener, 'The Social Construction of Europe', (1999) 6 *Journal of European Public Policy* 528 at 543.

[25] V. Vanberg and J. M. Buchanan, 'Interests and Theories in Constitutional Choice', (1989) 1 *Journal of Theoretical Politics* 49 at 51 (quoted in J. Lindner and B. Rittberger, 'The Creation, Interpretation and Contestation of Institutions—Revisiting Historical Institutionalism', (2003) 41 *Journal of Common Market Studies* 445 at 449).

[26] B. Rittberger, 'Which institutions for post-war Europe? Explaining the institutional design of Europe's first community', (2001) 8 *Journal of European Public Policy* 673 at 677; see also J. M. Buchanan and G. Tullock, *The Calculus of Consent. Logical Foundations of Constitutional Democracy* (University of Michigan Press, 1962).

[27] Lindner and Rittberger, *op. cit.* note 25 *supra*, at 450.

[28] C. Jillson and C. Eubanks, 'The political structure of constitution making: The Federal Convention of 1787', 28 (1984) *American Journal of Political Science* 435, at 438.

[29] See V. Ostrom, *Constitutional Level of Analysis: Problems and Prospects*. Convention Paper presented at the Meeting of the Western Political Science Association, Portland on 22–24 October 1979 (quoted in Jillson and Eubanks, *op. cit.* note 28 *supra*, 438).

[30] With regard to Structural Funds (Art 161(3) EC); the European Parliament's Committee of Inquiry (Art 193(3) EC); Ombudsman (Art 195(4) EC); Treaty basis for bilateral IIAs between Commission and Council (Art 218(1) EC); Court of Auditors (Art 248(3) EC); budgetary procedure (Art 272(9) EC).

Amsterdam[31] and Nice[32] adopted Protocols or Declarations that referred to certain IIAs or stipulated that IIAs may have to be concluded in certain policy fields if deemed necessary.

If primary law explicitly authorises the Community institutions to adopt an IIA the institutions involved usually have to operate within rather tight legal boundaries. Generally speaking most 'higher level' issues would have been solved already during the IGC, thus leaving 'only' technical specification to the IIA negotiators. As a corollary, negotiations of that kind tend to revolve around 'lower level' issues,[33] i.e. making procedures work or governing the performance of institutions, such as the Ombudsman. However, this does not mean, that this kind of situation is less adversarial or competitive. On the contrary, negotiations of 'lower level' issues are dominated by distributive bargaining, which implies that the parties involved try to get as much as they can for themselves. Preferences of an actor/institution engaging in these negotiations are fixed during the whole communicative process and negotiation is only about costs and benefits of a certain negotiation outcome. Usually, the agreed content of this zero-sum game is clear and precise, which indicates that the drafting parties intend to commit themselves.

B Specification of Treaty Provision Without Explicit Authorisation

While vagueness can be regarded as an inescapable trait of language, it is especially pertinent for legal language.[34] Generally speaking, legislators are faced with the 'impossibility of foreseeing all possible combinations of circumstances that the future may bring. . . . This means that all legal rules and concepts are "open" '.[35] Because the EU founding Treaties 'lack . . . detailed rules governing relations among institutions',[36] IIAs are viewed as a 'pragmatic answer' to arising coordination problems and conflicts stemming from this institutional arrangement, as they allow circumvention of the time-consuming procedure of formal Treaty amendment.[37] In absence of sufficiently precise Treaty law, IIA negotiators tend to operate under lesser constraints than those who are explicitly authorised by primary law. But lesser legal constraints could mean that fundamental constitutional choices have not been made thus turning supposedly 'lower level' negotiations into 'higher level' ones characterised by conflicting interests and ideas. Consequently, negotiations of that kind are a mix of both distributive bargaining and arguing on conflicting ideas. Similarly, the content of such IIAs in terms of precision is difficult to predict and may vary. Because these IIAs do not derive directly from an explicit Treaty provision, one has to analyse the intention of the concluding parties in order to find out whether such an IIA can be considered legally binding or not.

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[31] See Protocol No 30 on subsidiarity; Declaration No 33 on Art 188c(3) EC.

[32] See Declaration No 3 on Art 10 EC; Declaration No 6 on Art 100 EC.

[33] See Jillson and Eubanks, *op. cit.* note 28 *supra*, 438 (as quoted by Rittberger, *op. cit.* note 26 *supra*, at 677–680).

[34] See G. C. Christie, 'Vagueness and Legal Language', (1964) 48 *Minnesota Law Review* 885.

[35] H. L. A. Hart, 'Jhering's Heaven of Concepts and Modern Analytical Jurisprudence, in: H. L. A. Hart (ed.), *Essays in Jurisprudence and Philosophy* (Oxford University Press, 1983) 265 at 269.

[36] Snyder, *op. cit.* note 2 *supra*, 463.

[37] Monar, *op. cit.* note 2 *supra*, 695–696.

C Pursuit of General Political Interests

As already mentioned, Community institutions are entitled to adopt IIAs even without referring to a specific Treaty provision in order to pursue a given political goal. They only have to take into account the rule that they are not allowed to amend Treaty law through IIAs. These are the only legal constraints they face, which means that the negotiations as well as the content of the respective IIA will deal with issues that have not been tackled by Community or Union law before. Consequently, negotiations tend to revolve around 'unresolved' or 'higher level' issues, which means that we can expect conflict of interests and ideas among the institutions concerned. To put it differently: Negotiations of that kind can be conceived as negotiations that happen typically *before* parties are ready to legalise their commitment. This means that Community institutions are not necessarily involved in zero-sum bargaining, but may find themselves arguing about 'higher level' issues such as general principles of democracy and the like. This implies that the various positions may not always be fully developed or may still be subject to intra-institutional debates. Negotiation outcomes therefore tend to be rather general and vague, leaving a great margin of interpretation and discretion, and—in combination with the lack of pertinent Treaty law—are thus closer to mere political declarations that cannot be regarded as legally binding.[38]

IV Case Study: The 1993 Package of IIAs on Democracy, Transparency, and Subsidiarity

In the course of the negotiations of the Maastricht Treaty, an 'inter-institutional conference' was set up enabling representatives of the Member States to discuss the Treaty reform with the Parliament and the Commission. After the Maastricht Treaty had been signed, the inter-institutional conference was recreated in order to tackle various interrelated issues stemming from the new Treaty.[39] Intense negotiations between November 1992 and October 1993 led the European Parliament, the Commission and the Council to adopt a package of IIAs revolving around 'democracy, transparency, and subsidiarity'. As said, this package is an excellent example in order to highlight that IIAs fulfil three roles depending on their relationship to primary law and their consequences for the negotiation style, content, and legal value. For each function we have selected one IIA,[40] namely (a) specification with explicit authorisation: the Ombudsman, (b) specification without such an authorisation: subsidiarity and (c) pursuit of general political need: democracy and transparency and focused on those issues that have proved to be most controversial during the negotiations at the inter-institutional conference.

A Ombudsman

The institutional design of the European Ombudsman is derived from Nordic constitutional and administrative tradition. In the course of the second half of the twentieth

[38] However, it is—once more—important to recall Snyder's remarks that 'what counts as "legally binding" or "fully binding under Community law" is a highly complex concept' and that IIAs may also be a source of information or an aid of interpretation of legally binding acts, see Snyder, *op. cit.* note 2 *supra*, 460–462.

[39] R. Corbett, F. Jacobs and M. Shackleton, *The European Parliament* (John Harper, 2003), at 277.

[40] For a detailed overview of the IIAs concerned see R. Corbett, *The European Parliament's Role in Closer EU Integration* (Macmillan, 1998), 344–347; Bobbert, *op. cit.* note 1 *supra*, 24–34.

century Ombudsman offices have been installed in the majority of European nation states.[41] However, there are differences in how the office was adapted to the various political systems. In general, Ombudsmen are non-judicial bodies established to safeguard citizens' political, civil and social rights *vis-à-vis* national public administrations. As parliamentary institution it acts as supplementary to parliamentary control.[42]

Thanks to a proposal by the Spanish government[43] supported by Denmark[44] the European Ombudsman was—despite a widespread reluctance among most of the other Member States—finally set up by the Maastricht Treaty. The position of the European Parliament was also rather ambivalent. On the one hand, it has advocated the creation of such an institution since the end of the 1970s[45] but feared, on the other hand, that the Ombudsman may rival its claim as the proper institution representing citizens' concerns.[46] The institutionalisation of the Ombudsman was part of a campaign trying to persuade sceptics of political union, and was closely linked to the introduction of European citizenship.[47] Furthermore, it was designed to complement parliamentary control over the EU administration, thus strengthening the democratic quality of the European polity.[48] The long-lasting 'higher level' debates within the IGC led to a 'very precise definition of the role of the Ombudsman'[49] in the Treaties, which left only comparably 'lower level' issues to be dealt with on the IIA level. The European Parliament was explicitly authorised to take the initiative to draft and adopt a Decision with prior approval of the Council that lays down the regulations and general conditions governing the performance of the Ombudsman's duties.[50]

The inter-institutional negotiations came close to conclusion after only one session. However, two issues remained unresolved and heavily debated:[51] (a) the time limit for referring complaints to the Ombudsman and (b) his/her access to documents of the Member States in possession of the Commission. Each institution tried to secure its

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[41] P. Bonnor, 'Ombudsmen and the Development of Public Law' (2003) 9 *European Public Law*, 237 at 237.

[42] T. Läufer, in E. Grabitz and M. Hilf (eds.), *Kommentar zur Europäischen Union*, Art 138e EGV at 1.

[43] Letter by the then Spanish Prime Minister, F. Gonzales, to the Members of the European Council, 4 May 1990, see A. G. Ibanez, 'National Positions: Spain', in: F. Laursen and S. Vanhoonacker, *The Intergovernmental Conference on Political Union*, (EIPA and Nijhoff, 1992) at 106; J. Söderman, 'The European Ombudsman, Report for the year 1995', available at <http://www.euro-ombudsman.eu.int/report95/en/default.htm>.

[44] The Danish delegation at the IGC issued a memorandum including Draft Treaty Articles on the Appointment of an Ombudsman on 4 March 1991, see Laursen and Vanhoonacker, *op. cit.* note 43 *supra*, at 263.

[45] European Parliament resolution OJ C 140/153 1979; see also the 1985 Report by the Adonnino Committee, 'A People's Europe', Bulletin EC, Supplement 7/85 at 21.

[46] See Resolution of 7 April 1992 on the results of the Intergovernmental Conferences, OJ C 125/81 1992, Doc. A3–123/92. The European Parliament saw the Ombudsman as a potential source of competition in its function as guardian of citizens' rights. V. Reding (EPP, Luxemburg), the then spokeswomen of the European Parliament Petitions Committee, declared that it was 'a political manoeuvre which deprives citizens of some of their rights' (Agence Europe, 16 May 1991; quoted in P. Magnette, 'Between parliamentary control and the rule of law: the political role of the Ombudsman in the European Union', (2003) 10 *Journal of European Public Policy* 677 at 680).

[47] P. Leino, 'The Wind is in the North, the First European Ombudsman (1995–2003)', (2004) 10 *European Public Law* 333 at 334; W. Wessels and U. Diedrichs, *A New Kind of Legitimacy for a New Kind of Parliament—The Evolution of the European Parliament*, European Integration online Papers, 6/1997, 7.

[48] Magnette, *op. cit.* note 46 *supra*, at 678; Söderman, *op. cit.* note 43 *supra*.

[49] Magnette, *op. cit.* note 46 *supra*, at 680.

[50] See Art 195(4) EC.

[51] C. Reich, 'La mise en oeuvre du Traité sur l'Union européenne par les accords interinstitutionnels', (1994) 375 *Revue du Marché Commun et de l'Union européenne* 81 at 84 (note 7).

distributive gains based on a set of unitary and predefined preferences. The agreed procedural details are consequently precise and will most probably prove rather resistant to future attempts of 'creative' interpretation. They thus provide a clear and enforceable set of rules representing high legal value.

a) Time Limit

Besides a number of minor procedural issues,[52] a major controversy revolved around the time limit for cases to be brought to the Ombudsman. Obviously, it was in the interest of the European Parliament not to have any time limitation on the filing of complaints or—if this could not be achieved—to come as close as possible to this ideal. Conversely, the Council, and to a lesser extent the Commission, pleaded for a preferably short time limit because they assumed that they would be the subject of most of the expected complaints.

The first parliamentary draft[53] reflected its maximum demand and received fierce opposition from the two other institutions that demanded a time limit of one year,[54] pointing to the extent of workload and practicality. In response, the European Parliament proposed a time limit of five years, arguing that this would correlate with the Commission's term of office, as well as with the time limit for actions before the Court of Justice on the grounds of non-contractual liability. Both Commission and Council rejected the European Parliament's arguments and insisted on their initial demands.[55] During the negotiations, the Commission and the European Parliament became more flexible and were ready to agree on a three-year time limit.[56] But the Council refused to join the offered compromise, fearing that it would be the institution most affected by the Ombudsman's activities. Nonetheless, the Council also showed willingness to forge a compromise and extended its proposal to a two-year time limit for issuing complaints to the Ombudsman.[57] Eventually, the Council's last offer proved to be

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[52] E.g. should the Ombudsman take his/her oath of office in front of the European Parliament or the Court of Justice?, see Corbett, *op. cit.* note 40 *supra*, at 345.

[53] Résolution A3-0298/92, Annex: 'Décision du Parlement Européen concernant le statut et les conditions générales d'exercice de ses fonctions du médiateur européen', Jeudi 17 décembre 1992, OJ C 21/142–147 1992.

[54] Monar, *op. cit.* note 2 *supra*, at 707; see also J. Delors, the then President of the Commission, who '*rappelle l'importance que revêt la discussion pour la Commission en tant qu'institution devant être la plus souvent sollicitée par le médiateur. . . . Il faut établir un délai fixe d'un maximum d'un an pour saisir le médiateur. . . . M. Delors attire également l'attention sur la nécessité de tenir compte des problèmes budgétaires afférents à la charge de travail du médiateur.*' (Conférence Interinstitutionnelle, Compte Rendu Analytique des Débats, 7 June 1993, PE 205.271).

[55] The then Council's President N. Helveg Petersen '*estime que la comparaison avec la Cour de Justice n'est pas pertinente, d'autant que si le délai d'un ans pour saisir le médiateur, est dépassé, il est toujours possible de saisir la Cour de justice*'. (Conférence Interinstitutionnelle, Compte Rendu Analytique des Débats, 7 June 1993, PE 205.27 1)

[56] Comment by MEP Baron: '*Pour ce qui est du délai du saisine, le délai de trois ans suggéré par Mme Vayssade a déjà convaincu M. Delors*'. (Conférence Interinstitutionnelle, Compte Rendu Analytique des Débats, 7 June 1993, PE 205.27 1)

[57] 'M. Helveg Petersen '*déclare que beaucoup d'États membres jugent excessif ce délai de trois ans et qu'en définitive, il s'agit de réflexions sur la méthode de travail la plus adéquate pour le médiateur',* whereas MEP Baron *'considère que la proposition du Conseil s'apparente à du marchandage et qu'il ne motive pas sa proposition d'un délai de deux ans*'. The then Council President N. Helveg Petersen put pressure on concluding this issue by pointing at '*la nécessité de finir le plus rapidement possible vu l'ordre du jour très chargé du Conseil pour les deux journées qui viennent*'. (Conférence Interinstitutionnelle, Compte Rendu Analytique des Débats, 7 June 1993, PE 205.271).

acceptable for all parties involved.[58] This successive exchange of demands confirms that these procedures followed the logic of distributive bargaining typical for 'lower level' issues in IIA negotiations. The content of the outcome can be regarded as precise and thus easily enforceable.[59,60]

b) Confidentiality/Secrecy

Negotiations on the Ombudsman's access to Member States' documents in the possession of the Commission were even more controversial. Similar to the first case, the Community institutions had clear and fixed preferences. In order to strengthen its grip on the other two institutions, especially on the Council, the European Parliament wanted the Ombudsman to have access to as many documents as possible expressly excluding only secret documents.[61] The Council, as the institution whose politically sensitive documents were at stake, held a more restrictive view. It advocated that even confidential documents should not be handed to the Ombudsman.[62] The Commission did not engage actively in this dispute, but may be interpreted as having an interest in shedding light on the Council's internal documents, and thus to support the European Parliament's position.[63]

Finally, the institutions reached a political compromise obliging the Member States 'to provide the Ombudsman, whenever he may so request . . . with any information

[58] See Art 2(4) Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (OJ L 113/15 1994).

[59] It has to be noted that the term 'enforceable' must not be confused with 'legally binding'. It just points to the fact that the precise content of the negotiation outcome, namely the two year time limit, allows the Ombudsman to declare complaints which exceed this time limit inadmissible (in 1996: 12 complaints were declared inadmissible on this ground; 1997: 4; 1998: 6; 1999: 5; 2000: 2; 2001: 7; 2002: 10).

[60] However, the first annual report of the European Ombudsman highlights problems in strictly applying the two-year time limit. It argues that 'it would be harsh to apply strictly the provision in Article 2(4) of the Statute' and underlined its argument with a reference to national Ombudsman systems advocating the possibility to 'waive such time limits where it is necessary to do so in the interests of justice', see Söderman, *op. cit.* note 43 *supra*. If a complaint is made after the date on which the facts underlying it came to the attention of the person lodging the complaint, the Ombudsman can decide to conduct further inquiries on his/her own initiative, see e.g. J. Söderman, 'The European Ombudsman, Report for the year 1996', at 68, available at <http://www.euro-ombudsman.eu.int/report96/pdf/en/rap96_en.pdf>.

[61] The then European Parliament President E. Klepsch referred to '*la différence entre la notion de confidentialité, utilisée par les fonctionnaires et ne figurant nulle part dans les traités, et celle de secret, qui y figure. Le pouvoir d'un fonctionnaire de qualifier de confidentielle une information ne peut pas constituer une position politique et ne peut pas être acceptée par les citoyens comme moyen de priver le médiateur d'une telle information*'. (Conférence Interinstitutionnelle, Compte Rendu Analytique des Débats, 7 June 1993, PE 205.271.); see also Résolution A3-0298/92, Annex: 'Décision du Parlement Européen concernant le statut et les conditions générales d'exercice de ses fonctions du médiateur européen', 17 December 1992, OJ 1992 C 21/142–147, at 144, Art 3(2): 'Les institutions et organes communautaires sont tenues de fournier au médiateur les renseignements demandés et lui donner accès aux dossier concernés. Ils ne peuvent s'y refuser en opposant le secret.'; see also Art 4 (1): 'Le médiateur . . . est tenu de ne pas divulguer les informations et pièces confidentielles dont il a eu connaissance dans le cadre de ses enquêtes'.

[62] The then Council President N. Helveg Petersen pointed to the 'position commune du Conseil' and '*précise que le Conseil voudrait voir rétablis les deux concepts de secret et de confidentialité seulement lorsqu'il s'agit de documents émanent d'un Etat membre*' and makes clear that '*[l]e Conseil n'est pas en mesure de faire des concessions sur ce point*' (Conférence Interinstitutionnelle, Compte Rendu Analytique des Débats, 7 June 1993, PE 205.271).

[63] '*J. Delors estime que la Commission peut très bien travailler avec la notion du "secret" car effectivement la "confidentialité" est une notion subjective*' (Conférence Interinstitutionnelle, Compte Rendu Analytique des Débats, 7 June 1993, PE 205.271).

. . . unless such information is covered by laws or regulations on secrecy or by provisions preventing its being communicated'.[64] While a first superficial reading of this result might suggest that the European Parliament has succeeded in the IIA negotiations, it is in fact the Council that accomplished a victory over the European Parliament, because it is left to the Member States' discretion to refuse the communication of a given document.[65]

The two controversial issues with regard to the Ombudsman showed that the main adversaries were the Council and the European Parliament. Both institutions came up with fixed and precise preferences reflecting the institutional roles as laid down in the Treaties. The Commission was more ready to compromise as to the time limit and had no clear and strong interest with regard to the issue of confidentiality/secrecy. The results of the negotiations showed that—contrary to widespread expectation in the pertinent literature—it was not the European Parliament but the Council that succeeded in the issues discussed. That does not mean that the European Parliament was not in a better position *vis-à-vis* the two other institutions, especially *vis-à-vis* the Council, than before the Maastricht Treaty. Far from it! But it primarily benefited from the favourable legal framework as set out in the Treaty and less from the IIA itself. With regard to the legal consequences, we argue that the IIA on the Ombudsman is legally binding among the institutions involved as well as with regard to third parties, not only because it was explicitly authorised by Treaty law, but also because of its precise content. Based on the latter we conclude that the institutions involved intended the IIA to have a legal effect.

B Subsidiarity

Subsidiarity has been on the European Agenda since as early as the 1970s and 1980s.[66] But only with the Treaty of Maastricht has this principle explicitly been recognised in Community law.[67] As the project of European integration became more political, some Member States proposed subsidiarity as a tool to contain the perceived increase in power of the Commission. Coming from opposite angles,[68] Germany along with the United Kingdom joined forces and spearheaded the effort to incorporate subsidiarity into the Treaty. However, fundamental ideational differences between the Member States, especially between the British and German governments, on the precise meaning of subsidiarity led to a vague formulation of the relevant Treaty provision. In fact, it lacked precise criteria for its application. The subsidiarity principle as determined by the Treaty rather 'tends to describe an abstract goal than a method of achieving it'.[69]

In the wake of the negative Danish referendum on the Maastricht Treaty in June 1992, the political context changed. While Treaty amendments were out of the question, the political need to specify the vague concept of subsidiarity was so strong that

[64] See Art 2(3) Draft Decision of the European Parliament on the Regulation and general conditions governing the Ombudsman's duties (OJ C 329/138 1993).
[65] Ibid.
[66] For an historical overview see K v. Kerksbergen and B. Verbeek, 'The Politics of Subsidiarity in the European Union', (1994) 32 JCMS 215, at 217–218.
[67] See Art 5 EC.
[68] A. L. Teasdale, 'Subsidiarity in Post-Maastricht Europe', (1993) 64 *The Political Quarterly* 187, at 191.
[69] G. A. Bermann, 'Subsidiarity and the European Community', (1993) 17 *Hastings International and Comparative Law Review* 97, at 103 (note 28).

the Member States along with the Community institutions looked for 'extra-Treaty safeguards against the growth of Community power'.[70] Following a number of activities by all relevant institutions,[71] the Presidency Conclusions of the European Council in Edinburgh (December 1992) included a declaration on subsidiarity that was meant to serve as a basis for an IIA[72] between the European Parliament, the Council, and the Commission.[73]

The IIA negotiations revolving around subsidiarity are difficult to grasp. The following examples serve to illustrate the negotiation style within the field of subsidiarity: (a) the general debate on the principle of subsidiarity shows not only the 'higher level' negotiation style but also the insurmountable differences among the parties concerned; (b) during the negotiations the question emerged what kind of institutions should deal with difficulties possibly arising in the future. As these matters were by no means ambitious and tackled the topic rather superficially, the institutions were soon ready to reach a compromise. The rapid adoption of the IIA was primarily inhibited by the parliamentary demand—backed by the Commission[74]—to bind the IIA on subsidiarity to another IIA on transparency and democracy.[75]

a) General Debate on the Concept of Subsidiarity

Because the Member States were not able to settle their ideational differences on subsidiarity at the IGC, their 'higher level' disagreements continued during IIA negotiations.[76] Or, to put it differently, deep ideational conflicts that could not be resolved by the Member States at an IGC, could also not be solved during IIA negotiations.

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[70] Teasdale, *op. cit.* note 68 *supra*, at 193.

[71] See e.g. the Memorandum presented by the then Commission President J. Delors shortly after the negative Danish referendum, the Declaration of the European Council meeting in Lisbon (June 1992), the so-called Birmingham Declaration on a 'Community Close to Its Citizens' (October 1992), the European Parliament's intensive preparatory work that formed the basis of the Commission's initiatives (see Conférence Interinstitutionnelle, Compte Rendu Analytique des Débats, 10 November 1992, PE 202.939/CI/2), e.g. a parliamentary resolution on the application of the subsidiarity principle including procedural details, 18 November 1992, PE 162.877/RC1/déf., 162.883/RC1/déf.

[72] Monar, *op. cit.* note 2 *supra*, at 705.

[73] Conclusions of the Presidency, Edinburgh, 12 December 1992, SN 456/92 at 4.

[74] The then Commission President J. Delors was inclined to agree to a global version of an IIA. Furthermore, he tried to link the negotiations on subsidiarity, transparency, and democracy with budgetary issues. See Conférence Interinstitutionnelle, Compte Rendu Analytique des Débats, 7 June 1993, PE 205.271.

[75] In a note to the then Director of the EP Presidential Cabinet, J. Dohmes, it was noted that '*la négociation sur l'application du principe de subsidiarité soit élargie aux problèmes de la transparence et á certains aspects du dossier démocratie; à ce propos, le Conseil devrait accepter une négociation sur l'ensemble du dossier, d'ailleurs, le Conseil européen d'Edimbourg s'est penché sur ces aspects (au moins sur deux, transparence et subsidiarité)*' (Commission institutionnelle, Sécretariat, 'Note a l'attention de M. Dohmes', no date). The Council Presidency was caught by surprise with this new parliamentary strategy: 'Both Mr. Helveg Petersen and Mr. Østrøm Møller expressed regret that Parliament now seemed to be linking various issues. This did not correspond to earlier indications from Mr. Klepsch according to which Parliament was prepared to sign immediately the [EP] text on subsidiarity' (General Secretariat of the Council, Internal Note on the meeting in Copenhagen on March 29 between the Presidency (Mr Helveg Petersen and Mr Østrøm Møller) and Mr Oreja, President of the European Parliament's Institutional Committee, 30 March 1993).

[76] For example, the then Italian Under-secretary on Domestic Affairs, V. Spini, '*souhaite que le document de la présidence du Conseil soit approfondi et rediscuté. Le document de la Commission apparaît en revanche comme un point de référence positif*' (see Conférence Interinstitutionnelle, Compte Rendu Analytique des Débats, 10 November 1992, PE 202.939/CI/2). On Member states ideological positions regarding the interpretation of subsidiarity see van Kersbergen and Verbeek, *op. cit.* note 66 *supra*. The then British Council

The European Parliament as well as the Commission feared that subsidiarity may entail an intergovernmentalist turn,[77] and advocated concrete procedural measures, including an annual public debate on a Commission report on the application of the subsidiarity principle.[78] Furthermore, the European Parliament linked its assent for the IIA on subsidiarity to the signing of an additional IIA on transparency and democracy. While the Council was ready to agree to rather general implementation measures regarding the Community legislative process, it rejected the parliamentary demand for a global agreement, including transparency and democracy measures.[79] Though the Commission supported the position of the European Parliament,[80] it took an observer position in further discussion.[81] Despite the lack of agreement on subsidiarity itself, the Community institutions managed to adopt some modest implementing measures. The outcome can be summarised as an inter-institutional commitment to 'take into account the principle of subsidiarity and show that it has been observed'. Each institution 'shall, under their internal procedures, regularly check that action envisaged complies with the provisions concerning subsidiarity'. Additionally, the Commission 'shall draw up an annual report for the EP and the Council on compliance with the principle of subsidiarity'.[82] To make a long story short: the European Parliament did not succeed with its claim.

b) Conference versus Meeting

As a result of the predominant focus on 'higher level' issues, distributive bargaining only occurred to a minor degree in inter-institutional negotiation on the subsidiarity principle.[83] The only controversial 'lower level' issue revolved around the denomination of the institutional forum designed to settle future difficulties and entitled to amend

President Garel-Jones stated: '*Le fonctionnement de ce principe est difficile à saisir dans des termes théorique mais on peut reconnaîtré la nécessité de l'appliquer dans des cas concrets. . . . L'approche de la présidence est d'examiner l'Article 3B paragraphe par paragraphe et même mot par mot pour voir comment il peut devenir réalité*' (see Conférence Interinstitutionnelle, Compte Rendu Analytique des Débats, 26 November 1992, PE 202.943).

[77] MEP Herman argued that '*il semble que l'on assiste à un glissement vers l'intergouvernemental, alors que celui-ci a fait preuve de son inefficacité*' (see Conférence Interinstitutionnelle, Compte Rendu Analytique des Débats, 26 November 1992, PE 202.943).

[78] MEP J-P. Cot underlined that '*En focalisant l'attention sur des questions de procédures, le Parlement européen ne doit justement pas être trop ambitieux mais plutôt modeste. Les questions de fonds seront clarfiées dans la pratique*' (see Conférence Interinstitutionnelle, Compte Rendu Analytique des Débats, 10 November 1992, PE 202.939/CI/2).

[79] The then German Minister for European Affairs, Mrs Seiler Albring, expressed her satisfaction that '*les négociations sur la subsidiarité soient sur le point de se conclure. . . . Les thèmes de la démocratie et de la transparence sont importants, mais les propositions soumises par le Parlement dans son projet vont trop loin. La premier pas doit être la conclusion d'un accord institutionnel sur la subsidiarité exclusivement*' (see Conférence Interinstitutionelle, Compte Rendu Analytique des Débats, 7 June 1993, PE 205.27 1).

[80] See Commission des Communautés Européennes, 'Le Principe de la Subsidiarité, Communication de la Commission au Conseil et au Parlement européen', 27 October 1992, SEC (92) 1990 final, and also Conférence Interinstitutionnelle, Compte Rendu Analytique des Débats, 10 November 1992, PE 202.939/CI/2; for a discussion on the IIA concerning democracy and transparency, see the following section.

[81] The then Commission President J. Delors '*annonce que la Commission n'a aucun problème ni divergence avec les quatre principes énoncé par le Parlement. La Commission à ce stade des travaux préfère écouter les échanges de vues qui vont être exprimés par les différents intervenants*' (see Conférence Interinstitutionnelle, Compte Rendu Analytique des Débats, 26 November 1992, PE 202.943).

[82] 'Draft Interinstitutional Agreement between the European Parliament, the Council and the Commission on procedures for implementing the principle of subsidiarity', OJ C 329/135–136 1993.

[83] Conférence Interinstitutionnelle, Compte Rendu Analytique des Débats, 10 November 1992, PE 202.939/CI/2 and Conférence Interinstitutionnelle, Compte Rendu Analytique des Débats, 26 November 1992, PE 202.943.

the IIA. The European Parliament had a natural interest in adding weight to this inter-institutional talk and preferred the term 'interinstitutional conference'. Trying to downplay the importance of the entire IIA negotiations, the Council advocated the more low-key term 'interinstitutional meeting'.[84] The Commission was hardly engaged in the debate. At the end of the day, the European Parliament succeeded and the term 'interinstitutional conference' was adopted. This was mainly because it was already used to denominate the inter-institutional dialogue preceding IGC negotiations.[85]

Although the Treaty did not explicitly authorise the adoption of an IIA on subsidiarity, the Community institutions felt the political as well as legal need to specify this deliberately vague Treaty provision. Contrary to the Ombudsman, IIA negotiations on subsidiarity revolved around conceptual core elements which is characteristic of 'higher level' debates. Because of fundamental disagreements among the Member States, the Community institutions were not able to reach a substantial compromise, i.e. to achieve a sufficiently precise and workable definition of subsidiarity (e.g. precise criteria against which a legislative act has to be tested in order to fulfil the subsidiarity provision). The confusion about the normative concept behind the Treaty provisions prevented distributive bargaining on other 'lower level' issues than the denomination of the inter-institutional forum. This means that IIAs do not have the power to specify Treaty provisions, which were deliberately kept vague because of fundamental differences. To put it bluntly, IIA negotiations cannot act as a substitute for a missing political consensus at the IGC.[86] Consequently, the IIA on subsidiarity only includes rather harmless and uncontroversial issues, thus circumventing the tricky task of conceptual clarification. Moreover, it seems that even these minor measures do not have legal effects. At least the text states that compliance with subsidiarity 'shall be reviewed under the normal Community process, in accordance with the rules laid down by the Treaties'. It can therefore be argued that the Community institutions did not intend to create new legal rights and duties.[87]

C Transparency and Democracy

In the aftermath of the first Danish referendum on the Treaty of Maastricht, the European Parliament seized the opportunity opened up by the Council's preference to adopt an IIA on subsidiarity, and successfully linked its assent to this IIA to the adoption of another IIA on transparency and democracy.[88] Because these elusive concepts were not

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[84] The then Foreign Minister of Luxemburg, Mr J. Poos, argued that '*le terme de conférence, plus formel, doit être réservé, par exemple, pour la révision des traités*' (see Conférence Interinstitutionnelle, Compte Rendu Analytique des Débats, 7 June 1993, PE 205.271).

[85] Corbett, Jacobs and Shackleton, *op. cit.* note 39 *supra*, 277; Corbett, *op. cit.* note 40 *supra*, 294–296; M. Westlake, *A Modern Guide to the European Parliament* (Pinter, 1994), at 37.

[86] This theoretical argument is confirmed by the then French Minster for European Affairs, Mrs Guigou, stating that '*il faut éviter de précipiter les choses si les idées ne sont pas claires*' (see Conférence Interinstitutionnelle, Compte Rendu Analytique des Débats, 10 November 1992, PE 202.939/CI/2).

[87] The Protocol No 30 on subsidiarity added to the Amsterdam Treaty can be regarded as a specification as well as proceduralisation of the subsidiarity principle as laid down in Art 5 EC and the IIA concerned. However, it remains highly doubtful whether this attempt may substantially change the low legal value of this principle; see e.g. A. G. Toth, 'Is Subsidiarity Justiciable?', (1994) 19 *European Law Review* 268.

[88] Reich, *op. cit.* note 51 *supra*, at 81; Monar, *op. cit.* note 2 *supra*, at 706; see also European Parliament, 'Résolution sur l'état de l'Union européenne et de la ratification du Traité de Maastricht', par. 4, OJ C 299/8–10 1992, at 9; 'Avant-projet de Déclaration Solennelle du Parlement Européen, du Conseil et de la Commission sur la Transparence et la Démocratie', Bruxelles, le 26 novembre 1992.

delimited on the level of primary law beforehand, they raised controversial 'higher level' debates stemming from a pot-pourri of divergent interests and ideas even within the particular institutions. The major contested issues were found to be (a) the degree to which Council debates should be opened to the general public and (b) a commitment of the Council demanded by the European Parliament not to adopt legislative texts previously rejected by the Parliament.[89]

In contrast to the IIAs on the Ombudsman and subsidiarity, the negotiations on transparency and democracy were neither based on an explicit Treaty authorisation nor on a perceived need to specify vague Treaty provisions. As a consequence, an IIA on these issues ran the risk of creating primary law—which is legally not possible. Moreover, such negotiations tend to be 'higher level' ones dealing with issues that have never been tackled or could not be agreed upon at an IGC.

Similar to the negotiations on subsidiarity, the debates on transparency and democracy did not succeed in clarifying these concepts but concentrated on concrete issues supposed to fall under the broad and elusive category of 'transparency and democracy'.

a) Publicly Held Council Debates

The European Parliament that insisted on publicity of Council debates on co-decision matters was confronted with a Council that had difficulties to find a common view on this issue which weakened its bargaining position *vis-à-vis* the European Parliament. However, the Council's lowest common denominator was to publish its voting results. While some Member States wanted to go further,[90] others feared that publicly held debates would block the decisional process thus leading to inefficiency.[91] Eventually, the Council agreed *inter alia* to 'open some of its debates to the public'. An amendment of the Council's rules of procedure provided for 'retransmission by audiovisual means' of policy debates on the six-monthly work programme of the Council Presidency and the Commission's annual work programme. Furthermore, other debates on 'important issues' could be subject to public retransmission depending on a unanimity vote of the Council.[92]

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[89] See Conférence Interinstitutionnelle, Compte Rendu Analytique des Débats, 10 November 1992, PE 202.939/CI/2. Both demands had already been mentioned in a parliamentary resolution from 14 October 1992 which further included other parliamentary requests as regards transparency and democracy such as adopting a legislative programme, the codification of Community law, a unitary voting system for the European Parliament or the simplification of the comitology system see 'État de l'Union européenne et Traité de Maastricht', OJ C 299/8 1992.

[90] The then Danish Minister for European Affairs, N. Helveg Petersen, declared that '*certaines délégations, en particulier la sienne, estiment elles aussi que les règles sur la publicité des votes sont insuffisantes et qu'elles doivent être améliorées*' (see Conférence Interinstitutionnelle, Compte Rendu Analytique des Débats, 25 October 1993, PE 207.009).

[91] The then Foreign Minster of Luxemburg, J. Poos, gave several reasons for the refusal of publicly held Council debates '*un danger de surenchère pouvant conduire a un report permanent des compromis nécessaires à la décision;—une tendance à voir les problèmes complexes traites en dehors du Conseil lui-même, à l'image de ce qui se passe au Conseil de sécurité des Nations Unies, processus conduisant à une marginalisation des petits pays.—un risque de transfert de la prise de décisions à un niveau inférieur tel que le Comite monétaire et le COREPER*', (see Conférence Interinstitutionnelle, Compte Rendu Analytique des Débats, 26 November 1992, PE 202.943).

[92] 'Council Decision of 6 December 1993 adopting the Council's Rules of Procedure', OJ L 304/2 1993.

b) Council Commitment not to Adopt a Legislative Proposal Previously Rejected by the European Parliament

The European Parliament was aware of the fact that it could not amend the Treaties by an IIA. It therefore tried to argue that its demand that the Council shall be no longer entitled to adopt a legislative proposal that has already been rejected by the European Parliament could be based on an extensive interpretation of existing Treaty provisions.[93] However, this argument clearly transgressed the Treaties. As a consequence the Council dismissed the European Parliament's demand during these IIA negotiations[94] only to accommodate it in the Amsterdam Treaty. This underlines, once again, our thesis that the IIA *per se* does not necessarily strengthen the role of the European Parliament. It can do so only if the European Parliament succeeds to base its claim raised within the setting of IIA negotiations on pertinent Treaty law. That does not mean, however, that an IIA cannot be utilised to press the Member States politically with the aim to get the desired Treaty amendment later on.[95]

In sum, the outcome of the inter-institutional negotiations on transparency and democracy confirm our theoretical assumption about IIA negotiations with regard to controversial 'higher level' issues in absence of primary law. Since it has no grounding in Treaty provisions, the Interinstitutional Declaration on Democracy, Transparency and Subsidiarity is largely vague, imprecise, and resembles more a mere political declaration without any significant legal value.[96]

V Conclusion

The growing number of IIAs that have been adopted over the recent past indicates that this instrument—though not entirely new—has gained more and more importance in the EU's legal and political system. Depending on their relationship to Treaty law, IIAs serve different roles in the EU's institutional architecture. Against this backdrop, we challenge the assumption that IIAs usually strengthen the role of the European Parliament. As our case study on the negotiation process and its outcome illustrates, the European Parliament is by no means necessarily the only institution which benefits from IIAs—irrespective of the roles IIAs fulfil. Generally speaking, the Maastricht Treaty increased the power of the European Parliament. As IIAs operate within the rules set by the Treaty, they reflect this increased power but are not primarily responsible for it. Though the European Parliament may often initiate IIAs in order to strengthen its power *vis-à-vis* the other Community institutions it has not necessarily a privileged bargaining position—let alone the power to impose its interests and ideas upon the other relevant institutions.

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[93] The then European Parliament President, E. Klepsch, made clear that, '*il ne s'agit pas de modifier le traité, mais de l'appliquer d'une façon non restrictive et de l'interpréter de façon positive*' (see Conférence Interinstitutionnelle, Compte Rendu Analytique des Débats, 7 June 1993, PE 205. 271).

[94] The then Foreign Minister of Luxembourg, J. Poos, declared that '*La proposition selon laquelle 'le Conseil s'engage à ne pas adopter de texte législatif qui aurait été rejeté auparavant par le Parlement': celle-ci est en contradiction avec la procédure retenue par le Traite lui-même*' (see Conférence Interinstitutionnelle, Compte Rendu Analytique des Débats, 26 November 1992, PE 202.943).

[95] S. Hix, 'Constitutional agenda-setting through discretion in rule-interpretation: why the European Parliament won at Amsterdam', (2003) 32 *British Journal of Political Science* 259 and R. Corbett, 'Academic Modeling of the Codecision Procedure: A Practitioner's Puzzled Reaction', (2000) 1 *European Union Studies* 73.

[96] Bobbert, *op. cit.* note 1 *supra*, at 148; see also Lindner and Rittberger, *op. cit.* note 25 *supra*, at 451.

This can be underlined by a closer look at the IIA's negotiation process and its outcome. In case of those IIAs that are explicitly authorised by the Treaty, the European Parliament, like the other institutions, is engaged in distributive bargaining. As a corollary, the bargaining power of each institution is the crucial variable to explain why one institution failed or succeeded in the negotiations concerned. Taking this into account, it is impossible to argue that the European Parliament always wins IIA negotiations or strengthens its role through IIAs. This is even more obvious if we turn our attention to the two other roles that are performed by IIAs. Both the specification of vague Treaty provisions without an explicit authorisation and the initiative to conclude an IIA without basing the political claims on a Treaty provision illustrate that it is more than unlikely that the European Parliament will succeed in these kinds of negotiations. As the IIA on subsidiarity shows, the decisive differences among the Member States resulting in a more than vague Treaty provision could not be substantially bridged by arguments brought forward by the European Parliament. The same holds true for our last category. While the European Parliament successfully linked its assent to the IIA on subsidiarity to the adoption of another one on democracy and transparency, a closer look at both IIAs reveals that their content was rather vague and imprecise.

But the different roles of IIAs do also influence the content of IIAs in terms of precision and—as a consequence—its legal value. If Treaty provisions underlying the IIA are already precise, the IIA negotiations tend to produce a precise and thus legally relevant content. This point is supported by the IIA negotiations on the Ombudsman. These tackled very concrete issues, such as the exact time limit of complaints and the right to deny access to documents on the grounds of secrecy or even confidentiality. Conversely, the negotiations on the other two IIAs revolved around more elusive concepts such as subsidiarity, transparency, and democracy. The content of such IIAs are thus likely to be legally ambiguous or even irrelevant at all. Nevertheless their long-term political consequences may be considerable, and even lead to future Treaty amendments.

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