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## Can You Keep a Secret?

How the European Parliament Got  
Access to Sensitive Documents in the  
Area of Security and Defence

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*Guri Rosén* is PhD Fellow at ARENA - Centre for European Studies, University of Oslo. E-mail: [guri.rosen@arena.uio.no](mailto:guri.rosen@arena.uio.no).

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Centre for European Studies

University of Oslo

P.O.Box 1143 Blindern | 0318 Oslo | Norway

Tel: +47 22 85 87 00 | Fax +47 22 85 87 10

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## **Abstract**

In 2002, the European Parliament and the Council concluded an Interinstitutional Agreement (IIA) on access to sensitive documents in the area of security and defence. The agreement gives the Parliament privileged access to documents that are withheld from the public. This article suggests two explanations of why this agreement was established. One proposes that the Parliament was able to convince the Council of the Parliament's legitimate right of access. The other explanation puts forward that it was the Parliament's bargaining strategy that secured the deal. It is argued that both explanations are necessary to capture the key features of the negotiation process and the outcome.

## **Keywords**

Bargaining - CSDP/ CFSP - European Parliament - Learning - Transparency



## Introduction

European Union (EU) foreign policy, and particularly the Common Security and Defence Policy (CSDP), is dominated by the member states' governments, and community institutions such as the Commission, the European Court of Justice and the European Parliament (EP) play a marginal role. Compared to national parliaments, the EP is in good company, as foreign policy has traditionally been conceived of as a governmental prerogative. One of the main reasons for this has been that foreign policy requires efficient decision-making behind closed doors to ensure the necessary level of confidentiality (Thym 2006). Thus, when the European Parliament demanded access to sensitive Council documents in 2000 major conflict was a predictable result. The EP's demand challenged the parameters of an acceptable level of confidentiality and hence also the member states that preferred to reserve confidential information for the executive. Moreover, it raised the issue of the appropriate role of the European Parliament in what is perceived to be an intergovernmental policy area.

Nevertheless, the two parties managed to come to an agreement after two years of negotiations, where the EP had to overcome considerable opposition on the part of the Council (European Parliament 2002a). The result was the Interinstitutional Agreement (IIA) concerning access by the European Parliament to sensitive information of the Council in the field of security and defence policy (European Parliament and Council 2002). In short, through this agreement the EP got privileged access to documents that the public cannot access. But why did the Council allow Parliament access to documents in the most sensitive of policy areas coordinated at the EU-level? What can explain this outcome?

To be able to scrutinise any policy, access to information is vital, but within the field of foreign and security policy there is also the widespread view that foreign policy is somehow exempt from the same democratic criteria as domestic policies (Wagner 2007). The dilemma is striking the right balance between protecting national security and allowing access to information (Coliver et al. 1999). Adding to this, it is not obvious that it is the European Parliament's job to perform the task of scrutinizing EU's foreign policy. Many member states and quite a few Members of the European Parliament (MEPs) are of the opinion that EU foreign policy, and particularly the CSDP should remain an intergovernmental policy and that national parliaments will scrutinize their governments and hold them to account. Furthermore, several big member states were opposed to granting the EP access to sensitive documents, and within the second pillar the European Parliament has very few formal powers that define its role and give it leverage. Despite all this, the EP increased its involvement in the CSDP by gaining access to sensitive documents. Given this background, the conclusion of the IIA is an interesting case to study.

With few formal powers, and faced with considerable opposition in the Council, how can one explain this agreement? One could think of several normative reasons why the EP ought to have an explicit role in the CSDP. For instance, the CSDP will imply obligations that are to be implemented nationally, but that are decided upon in the EU, as well as lock-in effects following from EU-decisions, that leave little room for parliamentary influence at the national level (Lord 2008: 31-35). Although the role of the EP is controversial, it is still the only directly elected body at the European level

and thus in a particular position to exercise democratic control of the CSDP. Can the agreement be understood as the result of the recognition of the European Parliament's legitimate right to be involved in the Common Security and Defence Policy? It has indeed been claimed that the IIA represents an "acknowledgement of the EP's rights to be seriously engaged in political dialogue in foreign and security policies" (Barbé and Surrallés 2008: 80-81). Still, it remains to be demonstrated how and why this recognition or acknowledgement contributed to the establishment of the IIA. Considering the opposition from many of the member states towards granting the EP access to sensitive documents, a change must have taken place that led to a recognition of the EP's legitimate rights to involvement in the CSDP and agreement on an IIA.

In order to study whether recognition played a part in bringing about agreement on the IIA, it is necessary to employ an analytical framework that is open to the potential influence of principles on action. Based on communicative theory, I suggest to analyse the process behind the conclusion of the IIA as a putative instance of learning through arguing, whereby arguments that are perceived as valid impact subsequent behaviour (Deitelhoff 2009; Eriksen 2003; Riddervold forthcoming; Risse 2004). Although there are differences of opinion within the European Parliament, its key argument has always been that as the only directly elected body at the European level it has a right and a duty to scrutinize EU foreign policy, including the CSDP. Thus, one hypothesis is that the EP convinced the Council that its claims for involvement, justified by democratic arguments, were valid, resulting in an IIA that gave the EP access to sensitive documents.

At the same time, there are clear signs that the EP's approach vis-à-vis the Council was not limited to presenting justified arguments. For instance, the negotiations on the IIA were part of a process of agreeing a Regulation on public access to EU-documents (European Parliament and Council 2001), and studies of this process have argued that access to sensitive documents was part of the compromise reached between the Parliament and the Council (Bjurulf 2001; Bjurulf and Elgström 2004). The example suggests another explanation of why the EP and Council agreed on the IIA in 2002, notably that the IIA was the result of a comprehensive bargaining process. Such an explanation would be more in line with the majority of studies analysing the influence of the EP over EU policies, which tend to emphasise the EP's relative bargaining powers (for an overview see Judge and Earnshaw 2008). The EP's leverage is probably strongest when its demands can be backed by legislative or budgetary powers established in the treaties, but it can also be strengthened by other factors such as linkage to other issues or areas (Farrell and Héritier 2003). Thus, the second set of hypotheses to be explored in this article is that EP's access to sensitive documents was a result of the Council succumbing to the threats or promises of the Parliament.

By tracing the process that led to the conclusion of the Interinstitutional Agreement on access to sensitive documents from 2002, based on data material consisting of official documents, secondary material and interviews, the aim is to explain why the two parties were able to reach an agreement on the IIA. In the following, I will first elaborate on the analytical framework and describe the data and method. Subsequently, in section three, the two explanatory hypotheses are explored, while the fourth part presents the conclusion.

## Analytical framework

In this section, I present the theoretical reasoning behind the two hypotheses that will be explored in the empirical analysis, as well as the data that is utilised and the method that guides the analysis. However, first I will give a brief presentation of the case to be analysed and why it is an interesting case to study.

### The Interinstitutional Agreement

The Interinstitutional Agreement concerning access by the European Parliament to sensitive information of the Council in the field of security and defence policy established an arrangement whereby a special committee, or so-called 'select committee' from the EP, could gain privileged access to confidential documents. In other words, through the IIA the EP gets access to documents that the Council finds necessary to withhold from public access. The committee is led by the Chairman of the Foreign Affairs Committee (AFET), and also comprises four additional members. It is supposed to meet the High Representative, or his/her representative, every six weeks to discuss confidential information (Brok and Gresch 2004). However, the Council may still choose not to disclose certain documents to the EP, and in the advent of a conflict between the two parties, there are no provisions on who should judge (Reichard 2006).

The agreement was the result of several years of negotiation. A European Parliament negotiating team was established in the autumn of 2000; however, the discussions had already been ongoing for a while. The negotiations on the IIA cannot be studied in isolation, since it was elaborated and settled in the context of the negotiations on the Regulation to public access to EU documents, which commenced with the Commission's proposal in January of 2000. The treatment of sensitive documents was not part of the Commission's initial document, but was catapulted onto the scene in August 2000, when the Council, decided to exempt sensitive from the scope of the Regulation. Subsequently, the handling of sensitive documents became one of the most difficult issues to resolve (Bjurulf 2002). Two camps were formed. On the one side stood the European Parliament and some member states that were generally supportive of more openness. On the other side stood the big, secrecy-oriented member states (Bjurulf and Elgström 2005). The European Parliament had to overcome considerable opposition on the part of the Council (European Parliament 2002a) and in the end, the Council and the EP were not able to resolve their differences until the spring of 2002, one year after the Regulation on public access had been agreed.

Empirically, this is an interesting case because it goes to the core of the tension between secrecy and democracy in foreign and security policy. On the one hand, in dealing with matters of foreign and security policy a certain degree of secrecy is needed. On the other hand, if the public or the parliament is to scrutinise foreign and security policy they need access to information to perform that task. Secrecy "gives those in government exclusive control over certain areas of knowledge and thereby increases their power, making it more difficult (...) to check that power" (Curtin 2003: 102). Thus, studying the process that led to the IIA gives an important insight into the conditions for democracy in the area of foreign and security policy at the European level.

Furthermore, this case is also illustrative of the conflict that surrounds the role of the European Parliament under the second pillar. While the powers of the EP have been gradually increased under the former first pillar, its formal powers over the CSDP have remained at a standstill since the Maastricht treaty. Both within the Parliament itself and within the Council there is internal disagreement about the appropriate role of the EP in the CSDP. This divergence was clearly evident in the case of the IIA where several big member states opposed the involvement of the EP, and within the CSDP-pillar the Parliament has few formal powers to back its claims. Nevertheless, an IIA was concluded that increased the involvement of the EP by giving it access to sensitive documents. This makes the IIA an interesting case to study.

The IIA is also slightly puzzling from a theoretical point of view. With few formal powers under the CSDP-pillar, and considerable internal opposition, why did the Council consent to the agreement? As was mentioned in the introduction, there may be several normative reasons for why the EP should be more involved in the CSDP. CSDP-decisions are made at the EU-level, making it harder for national parliaments to control their own governments. Empirical studies have also shown that the degree of national parliamentary involvement in the CSDP varies considerably, to the effect that the CSDP suffers from a “double democratic deficit”, both at the national and European levels (Born and Hängii 2004). Thus, it is plausible to see the IIA as an attempt to alleviate that deficit. Although the role of the EP is controversial, it is still the only directly elected body at the European level and thus in a particular position to exercise democratic control of the CSDP. It has also been claimed that the IIA represents an “acknowledgement of the EP’s rights to be seriously engaged in political dialogue in foreign and security policies” (Barbé and Surrallés 2008: 80-81). But this claim is still unaccounted for. This is why I have chosen to explore the process that led to the IIA from a communicative perspective that is open to the possible influence of principles on action.

At the same time, there are ample descriptions in previous studies indicating that the IIA was part of a larger package deal having to do with the agreement between the European Parliament and the Council on the Regulation of public access to EU-documents (European Parliament and Council 2001). Although the EP has few formal powers over the CSDP, its ability to bargain for its demands is not only a derivative of formal decision-making powers. If the Parliament is able to link up to another decision-making process where it has formal powers, this may increase its leverage. The Regulation on public access was decided under the co-decision procedure where the EP can both amend and veto the Commission’s proposals, making the EP a co-legislator to the Council (Stie 2010). To the extent that the EP linked the IIA to the Regulation, this would have made any threats or promises with regard to the former, more credible. Thus, from a bargaining perspective, this could mean that the IIA was a result of the EP’s bargaining strategies, even if it had not formal decision-making powers with regard to the IIA. The two perspectives are presented below. It is important to note that the two explanations are not thought of as mutually exclusive, the goal is to give a thorough account of an agreement between the Parliament and the Council as reached, and thus not to treat the perspectives as two competing theories.



## The communicative perspective

The central idea in communicative theory is that actors can change their behaviour when they are presented with the better argument (Eriksen and Weigård 2003; Habermas 1996; Risse 2004). This rests on the idea that arguments can have coordinating effects, and that it is equally rational to be convinced by an argument, as it is to act according to one's interests. A rational actor is able and ready to justify and explain his or her own opinion or position (Risse 2000; Sjørnsen 2002). In terms of action coordination, the determining factor is the extent to which the actors perceive the arguments presented as valid (Eriksen and Weigård 1997). The validity of arguments that involve claims about causality or facts hinges on empirical proof, while the validity of normative arguments is connected to its appeal to norms that can display universal legitimacy and impartiality (Ulbert and Risse 2005). As a result, rational decision-making means "that the validity of the argument rather than instructions, rules, votes, force, manipulations, tradition, etc. governs the choices" (Eriksen and Weigård 1998: 227).

A process of arguing can generate a learning process by which "actors acquire new information, evaluate their interests in light of new empirical and moral knowledge, and – most importantly – can reflexively and collectively assess the validity claims of norms and standards of appropriate behaviour" (Risse 2004: 288).<sup>1</sup> In other words, learning provides a link between argument to action, which can also be called argument-based learning (Riddervold forthcoming). To get a better grip on the exact arguments that lead to an outcome, it is helpful to differentiate between different types of learning, based on the type of argument that has instigated a learning process. However, what is most interesting in this paper, is the effect of the EP's normative argumentation. Normative arguments have to be justified according to impartial standards to be recognized as valid. In practice, this will mean "a norm or a common interest that commands the consent of all" (Eriksen 2003: 192). Therefore, if an actor is convinced by a normative argument, and changes his or her behaviour accordingly, one can speak of normative learning.<sup>2</sup>

Following from this perspective, the reason the EP gained access to sensitive documents in the 2002 IIA is because it was able to convince the Council that its demands for involvement were valid. In other words, the Council accepted the Parliament's reasons for requesting access to sensitive documents as valid, and hence agreed to an IIA. This can be further formulated into the following hypothesis:

*The EP gained access to sensitive documents in the 2002 IIA because it was able to convince the Council of the normative validity of its demands.*

To determine whether the agreement on the 2002 IIA resulted from the Council changing its behaviour after being presented with convincing arguments, one has to find out if learning did in fact take place. Signs of normative learning consist of

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<sup>1</sup> Risse (2004: 301) argues that: "actors giving similar reasons for their opinion or position indicates learning". I hold this be a sufficient, but not a necessary requirement. The validity of an argument can also be demonstrated by how it potentially trumps counterarguments. Thus, an argument may lead to a change in behaviour even if a change in preference has not occurred. In other words, actors may disagree with an outcome, but still hold it to be the right one.

<sup>2</sup> Factual arguments, on the other hand, will need to be supported by references to empirical evidence.

changes in the normative frames of reference. Actors may try to “activate norms” by referring to already existing standards, making analogies to similar cases, or attempt to reframe issues making such analogies possible (Ulbert and Risse 2005). Thus, if normative learning can account for the EP’s access to sensitive documents in the 2002 IIA, one would expect the normative premises of the discussion to change. In other words, one should find signs of the Council accepting and adopting the EP’s normative argumentation. One would for instance expect to see references to the relevance of democratic principles for the negotiations. In more concrete terms, this could mean references to the standards under the (former) first pillar as a relevant analogy to the arrangements under the second pillar (Smith 2003). Or, that more general democratic principles not commonly used in the field of foreign policy are used as premises for the arrangements in the IIA, e.g. the need for insight. Another alternative is that existing arrangements in member states’ parliaments are held out as the proper standard.

However, as pointed out above, previous studies have also claimed that the IIA was part of a larger package deal that also encompassed the Regulation on public access to EU-documents (Bjurulf and Elgström 2004). This suggests another reason for the establishment of the agreement, namely that the IIA was the result of a comprehensive bargaining process. Such a perspective would be more in line with the bulk of studies that have focused on the Parliament’s influence over EU policies at large. In these studies, the EP’s relative bargaining powers are key to explain its influence, often as a function of its formal decision-making powers (Judge and Earnshaw 2008). Bargaining is “the process of reaching agreement through credible threats and arguments” (Elster 2007: 419). From this perspective, if the EP’s bargaining powers contributed to agreement on the IIA, it would entail that the EP was able to present the Council with credible threats and/or promises making the Council succumb to the EP’s demands. This is the second explanation that will be explored in this paper.

### **The bargaining perspective**

This perspective rests on the assumptions that actors are strategic and put maximization of own interests first, that preference formation is exogenous to interaction processes, and that social interaction equals social exchange governed by a logic of cost-benefit calculations (Checkel 2001). Moreover, the outcome of a bargaining process hinges on the extent to which threats and promises are perceived as credible, meaning that the actor posing the threat is ready and able to carry it out if its demands are not complied with (Elster 2007). Based on this, for the EP to change the position of the Council and thus bring about agreement to an IIA, the Parliament would have to be able to present the Council with a credible threat and/or promise that could alter the latter’s cost/ benefit-calculations. The area of EU foreign policy, and particularly the Common Security and Defence Policy (CSDP), is not an area where the European Parliament has enjoyed much formal power (Diedrichs 2004; Thym 2006). Thus, at the outset, the EP has less bargaining power under the second pillar compared to its potential opponent, i.e. the Council. However, building on previous studies of inter-institutional relations in the EU, the above trio of bargaining power, actor preference and formal decision-making rules, needs modification. First, bargaining power is not only a product of formal decision-making rules. In a dense policy-making setting such as the European Union, the EP has the opportunity to trade different policies against one another, to link policies to

institutional issues or to push for package deals (Farrell and Héritier 2003; Kardasheva 2009a; Rasmussen and Toshkov 2011).

In addition, studies have pointed out that the Parliament is less time-sensitive than the Council, and therefore willing to forfeit in the short-term to obtain potentially larger victories later (Hix 2002; Kardasheva 2009b; Rittberger 2000). A similar aspect is sensitivity to failure, i.e. an actor's dependence on reaching an agreement. Both constitute a certain bargaining leverage when the EP also has the power to block or delay policies because it increases the credibility of the EP's threat to delay the process (Farrell and Héritier 2007). Furthermore, Farrell and Héritier have argued that the "justiciability of the matter" can also increase an actor's bargaining power (2007). In other words, while the role of the European Court of Justice (ECJ) is severely restricted in the case of the CSDP, the ability to call upon the ECJ could nevertheless increase the bargaining power of the EP depending on how the Council reacts, and the Court's ruling.

This leads to three hypotheses about the factors that could have given the EP sufficient bargaining power to win over the Council:

*The EP gained access to sensitive documents in the 2002 IIA because it established a link to one or more other issue(s.)*

*The EP gained access to sensitive documents in the 2002 IIA because it was less sensitive to time and failure, compared to the Council.*

*The EP gained access to sensitive documents in the 2002 IIA because it appealed to the ECJ.*

Indicators of the first hypothesis would include successful threats by the EP to disrupt policy processes in other areas unless their demands for an IIA were complied with. Alternatively, it could also be successful promises to consent to the Council's wishes in other policy areas or on other institutional issues. Indicators that substantiate the second hypothesis would be threats by the EP to delay the process unless the Council agreed to an IIA. Or alternatively, it could be promises of a smooth decision-making process, should the Council give in to its demands. Furthermore in order to say that the Council was less sensitive to time or failure than the EP, one would expect repeated pleas on the part of the Council to speed up the process. Thirdly, the indication of the importance of a Court appeal would be that the Council changed its behaviour after the EP launched a Court case, after the EP threatened to appeal to the Court or after it promised not to appeal to the Court.

## **Data and method**

The data material in this paper consists of official documents such as European Parliament reports, parliamentary debates, minutes from the Conference of Presidents (CoP)<sup>3</sup> in charge of the negotiations of the IIA as well as Council working documents and drafts. Furthermore, the organisation Statewatch followed the process behind the Regulation on public access to EU-documents closely, and made available several documents concerning these negotiations as well as the negotiations

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<sup>3</sup> The Conference of Presidents consists of the EP's presidents and the chairmen of the political groups.

on the IIA. Thus, publications by Statewatch<sup>4</sup> are included in the data material. In addition, I have conducted nine interviews with politicians and officials from the European Parliament, the European External Action Service and the Council. A complete list of these interviews can be found at the end of the paper.

With regard to the methodology employed in the paper, I have attempted to conduct a process tracing analysis whereby I sought to recreate the processes leading to the IIAs in accordance with the analytical framework drawn up above. Because process tracing accommodates the possibility of equifinality, i.e. that there are several causal paths leading to the same result (George and Bennett 2005), it is well-suited to this study where I have suggested two potential pathways leading to agreement. Moreover, because I am interested in exploring the mechanisms that can explain what happened between the EP's request for influence to the outcomes of the IIAs, process tracing is ideal because it entails "looking for the observable implications of hypothesized causal processes within a single case" (Bennett 2008: 705).

Secondly, the study is based on the belief that in order to understand social phenomena it is necessary to depart from the actors' own interpretation of what has taken place and their own reasons for why they chose to act as they did. In addition, following Weber's understanding of how the interpretation of meaning is part of social explanation, interpreting the actual behaviour is equally important as the account an individual gives as to the reasons for his or her actions (Adler 1997). Thus, both the official documents and the interviews were perused and the accounts categorised according to the indicators for argument-based learning and bargaining. The accounts given by the various actors were checked against each other to find out whether one set of actors gave a different set of reasons for why the IIA was agreed to than others. Moreover, the reasons given were compared across time and against actual behaviour.

## **How and why did the Parliament get access to sensitive documents?**

As described above, the Interinstitutional Agreement between the EP and the Council on access to sensitive information was the result of several years of negotiations. In order to make sense of the decision-making process that led to agreement, I have argued that it is necessary to employ two analytical perspectives. First, the data material is analysed according to the hypothesis on normative learning, and afterwards the three bargaining hypotheses are employed, thus contributing to a comprehensive account of a case that is both empirically and theoretically interesting.

## **An IIA that recognizes the EP's legitimate role?**

Can the notion of argument-based learning help to explain why an agreement was reached? In other words, was it the case that the Council accepted the EP's demands for access as valid, and subsequently decided to grant the Parliament access to sensitive documents? Throughout the entire process leading to the conclusion of the

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<sup>4</sup> Available at [www.statewatch.org/secret/observatory.htm](http://www.statewatch.org/secret/observatory.htm)

Interinstitutional Agreement, the European Parliament presented a coherent set of justifications for their demands. For instance, the basic normative argument on the part of the Parliament was that although they respected the need for confidentiality for reasons of security, the aim of demanding an IIA was “defending democracy and transparency within the European Union” (MEP Baron Crespo, CoP-minutes, 07.09.00). If the Council perceived these arguments as valid, this would indicate that normative learning took place.

In the summer of 2000, a deal between NATO and EU on the exchange of documents was in the process of being finalised, but NATO wanted reassurances that any intelligence sent to the EU would be properly protected (Reichard 2006). Thus, the Council launched its Security Regulations adjusting to the ‘NATO-model’, which excluded Top Secret, Secret and Confidential documents from the 1993 Council Decision on public access to documents (Council 1993). Another rationale for these new rules was the introduction of ESDP-documents. When the 1993 decision was made, the ESDP did not exist, and the exceptions in that decision were not secure enough to protect documents concerning “operational issues [and] highly classified material” (House of Lords 2001). Based on a decision by High Representative Solana (Secretary General/ High Representative 2000), the rules were adopted at the end of July while most MEPs were on holiday (Council 2000a). This was met with massive criticism by the European Parliament, journalists, civil society groups and several Member States (Statewatch 2000).<sup>5</sup> Moreover, the “Solana decision” ensured that the treatment of sensitive documents became a point of conflict in the negotiations on the Regulation on public access to documents.

Although the European Parliament only established its negotiating team for an IIA after the “Solana decision”, the idea of setting up an arrangement for privileged parliamentary access to sensitive documents had already been discussed prior to this decision, during the Portuguese presidency (MEP Watson, CoP-minutes, 07.09.00, Driessen 2008: 124). Moreover, the idea of an EP special committee, sometimes also called a ‘select committee’, that would have privileged access was not included in the EP’s very first draft for the Regulation on public access from early August 2000 (European Parliament 2000a). However, it was part of the draft that the EP presented at its hearing one month later (European Parliament 2000f). Thus, the idea was already circulating in the Parliament prior to Solana’s move to exclude sensitive documents from the upcoming Regulation on public access, which again may explain how it afterwards promptly became part of the EP’s official demand. Moreover, the idea quickly caught on with the other institutions. At a meeting in the Conference of Presidents in early October, Solana reportedly “endorsed the idea of setting up a ‘select committee’ to deal with the forwarding and consideration of confidential documents” (CoP-minutes, 05.10.00). Furthermore, a couple of weeks later, the French presidency presented the EP with a similar arrangement (Council 2000b).

According to one of the interviewees, the first step in the process towards the agreement was the building of a consensus of opinion “that there had to be some

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<sup>5</sup> Finland, Netherlands and Sweden also voted against the decision in the Council, whereas two countries abstained (House of Lords 2001)

kind of mechanism” for allowing the EP access to sensitive documents (EP1). Moreover, it is underlined that this consensus was connected to the “need for democratic oversight and control” (EP1). Others refer to how the Council could not simply say that the EP did not have the right to have access to sensitive documents (EP2). Since the Parliament according to article 21 was “entitled to be informed, it was also part of the game that if we were to be informed, then that was an obligation from the Council to inform us, to create a mechanism that would enable members to have the confidential documents” (EP2). This suggests that the EP was able to activate the norm of parliamentary scrutiny, albeit in practice subjected to several restrictions. The EP was aware, and to some extent also agreed, that there would have to be special procedures protecting the “confidentiality of documents which if they are leaked might endanger the internal or external security of the Union or its Member States” (European Parliament 2000c). But at the same time the Council “understood that the Parliament did not accept the basic solution on the question on the public access to documents, which was the Solana decision” (EP4). In other words, the EP accepted the Council’s argument that sensitive documents needed special protection, while the Council seemingly accepted the EP’s arguments that it has a right to be informed required privileged access to sensitive documents (NAT1). Consequently, it seems plausible to infer that normative learning was partly responsible for bringing about the decision to establish an IIA.

Furthermore, once an agreement that there would have to be some kind of mechanism had been established, then the specifics of the arrangement had to be worked out (EP1). The French presidency offered the EP a deal on the IIA in the autumn of 2000 (Council 2000b), but the EP was dissatisfied with the draft because “it was not for the Council to decide which members should serve on the Select committee” (MEP Brok, CoP-minutes, 16.11.00). There were reports that a common ground seemed to be emerging between the Council and the EP, and that the Council had responded quickly to the Parliament’s alternative draft. However, no agreement could be found on some of the key issues, notably the access to third party documents as well as the EP’s demand that the EP’s access to sensitive documents should compare to “the most favourable treatment accorded by a government of a Member State to its national parliament” (European Parliament 2000e).

The latter was one of Parliament’s key arguments throughout the negotiations. In addressing the French presidency a few weeks after the “Solana-decision”, MEP Brok stated: “We must work closely together over the next few days in order to guarantee and secure the necessary secrecy of certain documents. On the other hand though, we must also guarantee the same level of transparency and control that the public expects from national governments and national parliaments” (EP-plenary debate, 05.09.00). Subsequently, the EP asked its secretariat to conduct a comparative study of the treatment of confidential treatment by national parliaments, which was presented to the Conference of Presidents in the end of September 2000 (European Parliament 2000d). Based on this document, it was pointed out that the draft agreement suggested by the French presidency “did not reflect existing practice in most national parliaments” (MEP Elles, CoP-minutes, 19.10.00).

In its early drafts of an agreement, the French presidency did make reference to practice in the member states, but not to “best practice” (European Parliament 2000d). However, in the draft that was agreed under the Swedish presidency, a reference to

“treatment inspired by best practices in Member States” was introduced (Council 2001). Moreover, as was mentioned above, in the first draft from the French presidency, the Council was to co-decide which MEPs would get access to documents (European Parliament 2000d). The Parliament on the other hand claimed that the Conference of Presidents should choose the members of a special committee, and this was subsequently incorporated in the second French draft (and became the final arrangement). Similarly, a reference to the EP’s need for access to classified information “where it is required for the exercise of the powers on the European Parliament by the Treaty” (Council 2000c) was a variant of the EP’s justification that access was required for it to exercise its powers of scrutiny “taking into account the public interest in matters relating to the security and defence of the European Union” (European Parliament 2000e). This is not to suggest that the Parliament got all its demands through with regard to the content of the IIA. Nevertheless, the examples give further indications that argument-based normative learning took place.

First, the reference to the EP’s need for access to sensitive documents in order for it to do its job signifies a change in the normative premises of the negotiations, which again is one indicator of normative learning. Secondly, the analogy to the standards of the national parliaments can be seen as another example of normative learning. As some of the above quotes have already shown, the need for at least as good an arrangement for democratic scrutiny at the European level as at the national level was a consistent argument on the part of the Parliament. And eventually the fact of established precedents in the member states contributed to the arrangements in the IIA: “The way it was done, was as they do it in national parliaments, you agree to share sensitive information with a very limited number of very senior MEPs (...) and so you gave a mechanism for democratic oversight, but only among people you feel you can trust” (EP1). This is an indication of normative learning. By accepting that national models could set precedent for a European arrangement, there also seemed to be an acceptance that the European Parliament did have a role to play in the EU’s foreign policy as well, even in an area as sensitive as the security and defence policy. And it goes beyond copying, because there was not automatism in how it was adopted. This is a significant finding, since it was clear from the very beginning of the negotiations that the issue of EP’s access to sensitive documents “raised the more general question of Parliament’s involvement in an intergovernmental security policy” (MEP Hautala, CoP-minutes, 07.09.00). In the words of one interviewee, the “nob of the problem” was that the Council did not want to end up “giving Parliament information which member states were not prepared to share with their own parliaments” (EP1). But in the end many of them did, and normative learning may help explain why.

At the same time, there are also aspects of this story that the communicative perspective cannot explain. Studies of the Regulation on public access to EU documents have indicated that the negotiations on the IIA were part of a more comprehensive negotiation process. If normative learning were to provide a sufficient explanation for the IIA, one would not expect to see indications of a bargaining process because it would not be necessary to reach agreement. However, the already existing research makes it necessary to explore the process leading to agreement from a bargaining perspective as well.

## Two years of bargaining? From the French to the Spanish presidency

The “Solana decision” was not only met with massive criticism, the Netherlands, supported by Sweden and Finland, even took the Council to the European Court of Justice (ECJ) over the decision (ECJ 2000a).<sup>6</sup> The European Parliament was considering a similar action, which did seem to have an effect to the extent that the French presidency presented the Parliament with a draft for an IIA soon after the EP’s Legal Affairs committee had made its recommendation to proceed with the case. However, as mentioned above, the EP was dissatisfied with the draft. After having waited in vain for a further conciliatory response by the Council, the European Parliament also decided to take the Council to Court demanding an annulment of the “Solana-decision” (ECJ 2000b). This was a response to the Council’s refusal to include the EP in its efforts to establish arrangements for access to security-related documents and was justified by an alleged “infringement of procedural requirements”, “breach of the obligation to cooperate in good faith” and the “principle of institutional equilibrium”. In addition, the Parliament argued that the rights of citizens to obtain information were being infringed by the complete exclusion of a group of documents (European Parliament 2000b). In a press statement by the Greens, the party group stated that if the Council would “not listen to Parliament then they will have to listen to the Court” (The Greens/EFA 2000).

To what extent the “effect” of the court appeal can be attributed to a cost-benefit calculation on the part of the Council will be elaborated further below. However, at the time when it was discussed in the Parliament, it was reported that the member states’ conviction to stand firm “may have been reinforced by the fact that even the Parliament’s own legal advisors believe the case against them is, at best, shaky” (European Voice 2000). Suffice it here to say that although the French presidency approached the Parliament with a draft for an IIA, they were not able to come to an agreement, and the negotiations continued into the Swedish presidency and the first half of 2001.

The negotiations on the IIA were entwined with the Regulation on public access to EU documents. According to article 255 of the Amsterdam Treaty, the Regulation had to be agreed within two years after the treaty entering into force – i.e. by May 2001 – through co-decision. In January 2000, the Commission put forward its proposal for a Regulation. Partly as a result of the “Solana-decision” in the summer of 2000, the treatment of sensitive documents became one of the main conflict issues (Bjurulf 2002). The issue split the actors into two fractions. On the one side stood the European Parliament and member states who favoured an open approach, and on the other stood “states with a strong security interest” (Bjurulf and Elgström 2004: 253). The majority of member states, including the big three, were especially concerned with this question as they held it to be a matter of national security (Bjurulf and Elgström 2005).

The Swedish presidency traded with both the EP and those member states of the Council that were unwilling to make concessions (NAT1, NAT2). Through parallel negotiations with the two institutions, the presidency used the EP’s demands to push reluctant Council members to support greater transparency initiatives. At the same

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<sup>6</sup> <http://www.statewatch.org/secreteurope.html>, accessed on 17.03.2011.



time, the EP had to accept that sensitive documents had to be protected (Bjurulf and Elgström 2004) and the EP was informed by the Swedish presidency that several issues were non-negotiable (NAT1). In addition, the parliamentarians had their hopes set for the Swedish Presidency, and wanted to make sure that a deal was reached during this Presidency because they doubted that its successors would be as committed to transparency (EP1). As a result, the EP agreed to the inclusion of article 9, which deals with the treatment of sensitive documents (EP1, EP5). In the words of one MEP: “They had to give the secrecy advocates something in order to save the general principles” (quoted in Tallberg 2006: 154). The content of the article replicates the content of the infamous “Solana-decision”. In addition, it also includes the provision that: “The Commission and the Council shall inform the European Parliament regarding sensitive documents in accordance with arrangements agreed between the institutions”. This was the Parliament’s demand for agreeing to article 9 (EP4). However, the actual arrangements were yet to be agreed upon, and it was going to take another year before an agreement was in place.

Moreover, the Council had continued to act solo, and on the 19<sup>th</sup> of March 2001 adopted a set of new security regulations, before the parties had come to a final agreement on the Regulation on public access.<sup>7</sup> Although Brok had expressed hopes that the informal talks with the Swedish Presidency would come to a conclusion (CoP-minutes, 15.02.01), the Parliament was in for an unpleasant surprise when the Council decided to attach a unilateral statement to the draft at a COREPER meeting in April. The statement said *inter alia* that “requests for access to classified information or documents will be handled in accordance with the Security Regulations of the Council”. Although the wording of the statement was later modified, the EP-negotiators could not make the Council withdraw it completely (CoP-minutes, 13.06.01).<sup>8</sup> Despite the fact that the EP agreed to the Council’s demands, one member state decided that it still could not accept the draft agreement, and the negotiations went into a limbo (CoP-minutes, 28.06.01).

Simultaneously, the EP was considering taking the Council’s security regulations to Court once again, because “bringing another action could help in negotiations” and “it was always possible to withdraw it” (MEP Palacio Vallersundi, CoP-minutes, 28.06.01). The decision to do so was made in the end of June 2001, on the grounds that the Council had not involved the European Parliament in the decision-making process and thereby had broken the procedural requirements. In addition, the Parliament claimed that the decision was an infringement of the EC treaty because the decision was taken before the new regulation on public access to documents was in place (ECJ 2001). Thus, the arguments were much the same as with the action previously brought against the Solana decision, and at the subsequent negotiations the EP’s appeal was at the centre.

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<sup>7</sup> This replaced the Council decisions of August 2000, but did not change them significantly with regard to access to sensitive documents. By contrast, Statewatch claimed that the new security regulations went even further by classifying more documents, also from other areas than foreign policy, as sensitive.

<sup>8</sup> As a result, the EP decided to adopt a counter-statement in which the importance of a two-year review was underlined in order to demonstrate that the agreement would not be considered valid unless it “was being applied in a reasonable fashion” (MEP Brok, CoP-minutes, 13.06.01).

During an exchange of views with the Belgian Presidency in November 2001, the EP-president said that “there was a strong possibility that the Parliament would withdraw the legal action it had taken against the Council with respect to its security regulations, provided the negotiations on an agreement on information to Parliament on external policy and security matters was reached speedily” (CoP-minutes, 29.11.01). The Council on its part emphasized it was ready to conclude the negotiations with the EP, but that the EP should “re-examine its position on its application to annul the Council security regulation” (EP-plenary, 12.12.01). This indicates that bringing a case before the ECJ is part of the explanation of why an IIA was agreed upon, and in the end, it became part of the package deal that was negotiated with the Spanish presidency during the first half of 2002. The essence of the agreement was the same as the one that the Swedish presidency had negotiated one year before. As part of the agreement the Council would withdraw its unilateral statement and Brok recommend that Parliament discontinue its legal action against the Council’s security regulation.<sup>9</sup> Another prerequisite was that the EP adopted its own security regulations for handling sensitive documents comparable to the other institutions (CoP-minutes, 13.03.02). Thus, a statement on the requirement of EP’s internal security arrangements in order for the IIA to enter into force was annexed to the agreement (European Parliament 2002b).

To sum up, the Parliament’s bargaining strategy was clearly a key element to reaching an agreement on the IIA, and several of the bargaining hypotheses are substantiated. The link between the Regulation on public access explains the chiselling out of an agreement during the Swedish presidency. Wanting to secure an agreement on the regulation on public access, the EP had to forfeit on the matter of sensitive documents. In return, the EP got the provision in article 9 on the obligation of the Commission and Council to inform the Parliament regarding sensitive documents and the reference to a future interinstitutional agreement. That there would be a subsequent agreement was part of the package deal (EP1). In the words of one interviewee: “Since the very beginning, the Parliament (...) realised that by combining the two issues, it could also gain something as an institution” (EP4).

With regard to the hypothesis about the EP being less sensitive to time and failure compared to the Council, this does not seem to be supported by the data. This is for instance reflected in an intervention by MEP Barón Crespo at a meeting of the Conference of Presidents in mid June 2001, after the EP had been presented with a draft IIA by the Council, which other MEPs were reluctant to accept. He argued that: “At present, Parliament had nothing, whereas the agreement established a committee comprising selected parliamentarians. Neither the Legal Affairs Committee nor the Court of Justice could make any improvements to the situation. (...) The choice was therefore either to conclude the agreement or not to have an agreement at all” (CoP-minutes, 13.06.01). Moreover, although at earlier stages of the negotiations the EP could link up to the co-decision procedure on the Regulation on public access, it still wanted this to be in place by the end of the Swedish presidency.

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<sup>9</sup> The EP did suspend the Court action, but there was internal disagreement amongst the MEPs as to the consequences of the draft IIA, removing the right of the EP to bring a case against the Council in case of a dispute over access (MEP Watson, CoP-minutes, 06.06.02). In this context, terminating the suspended action was described as a fall-back position. And again, the two-year review was held out as a possible escape clause, should the IIA prove to work against the EP’s interests.

It was clear that several MEPs did not have high hopes for the forthcoming Belgian and Spanish presidencies (CoP-minutes, 13.06.01, EP1). In short, the EP was on the demanding side, and it was the Council, or more specifically some of its member states, that were dragging their feet, and postponed the final agreement.

Finally, as has already been discussed above, the EP's appeal to the ECJ did increase the Parliament's leverage in the negotiations, and contributed to explain the final agreement under the Spanish presidency. At the same time, it could also be debated to what extent the Council's response to the EP's appeals to the Court should be seen as a result of bargaining. The Council is obviously also concerned with the potential implications, should it lose the case. It is for instance plausible to assume that the Council did not want to risk getting tangled up in a process that could disturb its agreements with NATO. On the other hand, there is still the question of why the Council would be afraid of losing, and what the mechanism behind its subsequent choice of action then was? The threat of a lawsuit is more credible if the justification for an appeal is perceived as valid. Thus, one could argue that the Council's response to the EP's appeal also indicates an instance of normative learning, if one sees the law as part of a larger normative framework.

In both cases, i.e. the appeal against the "Solana decision" and against the Council's security regulations in March 2001, the European Parliament clearly invoked general normative principles of democratic legitimacy and tried to activate norms by referring to standards of appropriate behaviour. Whether or not the EP meant to use the appeal as a bargaining tool is not relevant in this regard since what matters is how the Council reacted to its justifications. In the case of the appeal against the Council's security regulations, we know that the presidency requested the EP to remove the case as part of the final agreement.<sup>10</sup> Why was this important to the Council? It is plausible to argue that this would only be of essence if the Council actually believed that the EP's grounds for appeal were somehow valid (Sjursen 2002). Thus, I would argue that this could also be seen as an instance of normative learning, understood as the already existing norms, i.e. the law, being activated to the effect that it changes the premises, and eventually also the outcome, of the process. This does not mean that there were no cost-benefit calculations involved in the process, only that the evaluation of the validity of the appeal came prior to the evaluation of the credibility of the threat. In other words, that the mechanism of normative learning also had an impact on the cost-benefit calculations.<sup>11</sup>

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<sup>10</sup>In the case of the "Solana decision" it is more difficult to determine the impact of the Court-case because of the speculations of how solid the EP's case against the Council was. This could have been part of the actors' strategies, and if so, the same would apply as to the security regulations. However, if the case of the EP were indeed rather weak, then one would have to look to the other suggested explanations in order to understand why the Council agreed to an IIA.

<sup>11</sup> Although rationalist frameworks do not concede that norms have independent effects on action, some nevertheless emphasise their strategic potential. Acting within a 'community environment' understood as a community's standards of legitimacy, actors can compensate for their lack of bargaining power by using rhetorical action and shaming their political opponents into conceding (Rittberger and Schimmelfennig 2006; Schimmelfennig 2003). This would imply that the instances of argument-based learning that have been identified above were "really" a form of rhetorical entrapment. But although one could perhaps find examples of actors saying different things in public and behind closed doors, or saying one thing and doing the opposite, these have had little impact on the final outcome. Moreover, to determine whether what I have identified as argument-based learning is really rhetorical entrapment, is first of all impossible, and secondly, somewhat beside the point. First of all, how can one know the true

At the same time, an appeal to the Court goes beyond an appeal to norms. Breaking the law has different ramifications than not subscribing to a norm since the possible sanctions involved are more extensive and tangible than the “naming and shaming” that might be the result of violating a norm. Furthermore, a Court appeal adds a new normative layer to the debate. On the one hand, there are the specific provisions one is accused of breaking. On the other hand, the moral code of not breaking the law potentially introduces another mechanism. Although I would still argue that normative learning could contribute to explaining why the Council was afraid of losing a potential Court case against the EP, to conclude that this was the main mechanism is far too premature. Not only are there elements of cost-benefit calculations involved, but there may also be other mechanisms connected to the position of law in more general terms. These issues warrant further investigation, but cannot be developed within the parameters of this paper.

## Conclusion

The above analysis has shown that both normative learning and bargaining contributed to the establishment of the Interinstitutional Agreement on access to sensitive documents. Without employing both perspectives, the explanation of the agreement would not have been complete. In other words, one would not have gained a full understanding of the reasons why the agreement was established. The bargaining perspective would for instance have ignored the formation of an initial consensus on the need for accommodating the EP’s access to sensitive documents. And the communicative perspective would not have been able to capture the material side of the negotiations, particularly the linkage between issues.

In a qualitative single-case study it is obviously difficult to isolate the effect of one mechanism, thus the relative contribution of the two is unresolved. However, the aim of this paper is to explain the agreement, not to test theories. At the same time, it is possible to say something about the relation between the two mechanisms, without assessing their relative explanatory contributions. Another side of the relationship is how they interact in practice, which is equally interesting given that negotiations commonly contain arguments, threats and promises at once. Whereas previous studies have emphasised that bargaining to establish a deal precedes learning (see for instance Deitelhoff 2009), in the case at hand, normative learning seems to have contributed to this initial deal-making as well. Furthermore, the distinction between argument-based learning and bargaining is for analytical purposes and in real life, they will overlap. However, not only does argument-based learning and bargaining take place simultaneously in a negotiation setting, but they may also reinforce each other, as the example with the EP’s court appeal shows. These are interesting observations that should be investigated further.

Furthermore, it is important to note that the impact of normative learning that was demonstrated in this case is interesting in and of itself. Formally at least, the Common Security and Defence Policy is an intergovernmental policy, a feature that

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motives behind actions if the results are the same, i.e. if there is little evidence of inconsistency either with regard to words or deeds? Secondly, it is difficult to see why norms should have any effect on actors in the first place if they have no independent power.

many member states are eager to protect. Consequently, it is surprising to find that member states (if not all) seem to have accepted that the European Parliament should get privileged access to documents. Without exaggerating the concessions made to the EP, since a lot of restrictions apply to the arrangement, it is a noteworthy development. Furthermore, it would be interesting to study the findings of this paper in a larger context. Research that has dealt with the development of the European Parliament's power in general have pointed to the connection between the delegation and pooling of national sovereignty, causing a perceived legitimacy deficit and thus the extension of the EP's powers (Rittberger 2005). It would be interesting to look closer into whether a similar process can be identified within the CSDP. This would not only provide a broader context for why the perception of the EP's legitimate role may have developed, it would also give interesting insight into the development of the Common Security and Defence Policy as a whole.

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