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**How issues move or get stuck:  
Or how to be effective in the EU Council of Ministers\***

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**Abstract:** Determining the locus and the logic of decision making in the EU Council of Ministers continues to be a major challenge. Insiders and outsiders have difficulty explaining why some issues move swiftly and smoothly through the Council, while others 'get stuck' at working party, Coreper or the ministerial level. This paper reconceptualises the internal negotiations as battles between drivers and brakemen, whereby the goal is to keep issues on or off the (ministers') agenda. It also addresses the follow up question: whether either side has a structural advantage in these procedural battles? It clarifies the working of this mechanism by means of a process tracing analysis of one particular decision-making trajectory: that concerning the opening of accession negotiations with Croatia.

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**Keywords:** Council of Ministers; COREPER; enlargement; intergovernmentalism; neo-functionalism; pre-negotiation.

## Table of Contents

Introduction.....	2
1. Finding the locus .....	4
2. Determining the logic of action .....	7
3. The Battle for Gotovina.....	9
3.1. Round I: Asking the Commission for an avis.....	10
3.2. Round II: Setting the terms of the debate .....	10
3.3. Round III: Noting the Commission avis .....	12
3.4. Round IV: Getting the (conditional) date .....	12
3.5. Round V: ‘Suspend and complement’ .....	13
3.6. Round VI: ‘Delivering Del Ponte’ .....	15
Conclusion .....	16
References.....	18

## List of Figures

Figure 1: Four levels of play in Council negotiations.....	4
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## Introduction

The Council of Ministers, the main decision-making forum in the European Union, continues to serve as a classic example of a black box. From the outside, the Council (quite literally) appears a monolithic bloc, spewing out its decisions from time to time. From the inside, it rather looks like a perpetual mobile, engaged in continuous negotiations on a sheer, endless stream of initiatives and proposals. Determining the locus and logic of decision-making within the walls of the Justus Lipsius continues to be a major challenge. In fact, even long-time participants have difficulty explaining why some issues move swiftly and smoothly through the Council decision-making machinery while others ‘get stuck’ at working party, Coreper, or Council level<sup>1</sup>. For outsiders, the challenge is even greater. A lot of effort so far has been put into determining the *degree* to which decisions were taken at the ministerial, the

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<sup>1</sup> These and subsequent ‘insider views’ are based on the participant observations of the author while working in the Council Working Party on the Western Balkans (Coweb) in 2010, internal reports of all Balkan related meetings at the different Council levels in the period 2003-2010, and in-depth interviews with 75 key players within the Council and the Commission who concerned themselves with the EU’s Balkan policies. More information on the methods for data collection can be found at: [www.ru.nl/fm/smeets](http://www.ru.nl/fm/smeets).

committee, or civil servant level. For years scholars have been mimicking each other when stating that 70% of work is done by the working parties, 15% is done by the Ambassadors, while another 15% is left for the Ministers themselves to decide on (cf. Hayes-Renshaw and Wallace 2006; Juncos and Pomorska 2011; Van Schendelen 1996. More recent studies speak of a 35%-22%-43% division (Häge 2008). Their approach was primarily procedural: determining the (highest) level at which an issue was (last) put on the agenda. While insightful, this does not explain the interplay *between* the different levels. It does not tell us about how, when, and why issues move up and down the organizational chain.

Conventional bargaining theory is relatively silent when it comes to explaining the *when* and *how* of Council decision-making. The focus tends to be on accounting for (positive) outcomes rather than the policy processes that precede them (cf. Arregui and Thomson 2009; Bailer 2004). Most models consciously neglect the varying ability of individual negotiators to strike a deal under the assumption that such differences will cancel out on average (Bailer and Schneider 2006: 155). It does not really matter then what exactly is said and done in the ‘smoky backrooms’ of the Justus Lipsius. Decisions result from member states taking positions, member states deciding on the employment of their resources, and consequently member states that ‘win’ or ‘lose’ negotiations. Although they acknowledge the importance of agency, mainly in the relative attribution of salience, the focus is definitely on the structural level.

This is a valid approach if one primarily seeks to account for the content of the deal(s). It is less useful if one wants to explain how decisions actually came about, more specifically when and why suggestions for decisions actually reached the ministers. This paper’s main contribution lies in uncovering these internal procedural battles. It seeks to explain how national representatives try to influence the course and pace of the decision-making process. It suggests reconceptualising day to day negotiations as incessant battles between drivers and brakemen (Schimmelfennig 2003), whereby the goal is to keep issues (from) moving through the Council’s decision-making machinery. The central question is twofold: what constitutes success in these internal interactions? And, how does one secure such success?

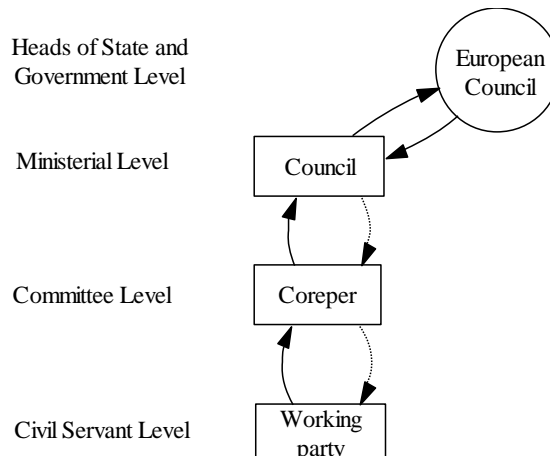
The approach is as follows. I will first present the Council’s decision-making machinery, whereby the goal is to find the locus of decision-making inside the Justus Lipsius. I will then elaborate on the logic (of action) and whether this logic might be biased, so that it favours one side over the other. The larger part consists of process tracing analysis of one particular decision-making process. These are the negotiations about opening accession negotiations with Croatia. Process tracing is a method that is particularly suited to establishing (causal) mechanisms (cf. Beach and Pedersen 2012). The underlying idea is to find a more general mechanism by studying the particularities of one specific case. The crux lies in the ability to distinguish between the idiosyncratic (case-specific) and the more systematic elements in the explanation of events. It is to these systematic elements that I will return in the conclusion.

## 1. Finding the locus

What should we understand to be success in Council decision-making? To be able to determine effectiveness and account for success, we need to know who is actually negotiating. Figure 1 shows the institutional framework in which Council negotiations take place. Ministers (commonly referred to as ‘the Council’) are the only ones with ‘de jure’ decision-making authority. Even the European Council does not take decisions. Rather, the decisions are adopted by the General Affairs Council. The other levels presumably work as a clearing house.

For substantive as well as methodological reasons, scholars tend to focus on specific levels. The methodological reasons are straightforward. For Council proceedings taking place *below* the ministerial level, the documentation is extremely sparse and often not accessible to outsiders. In fact, even our understanding of what goes on *at Council level* is limited. Scholars have had to limit themselves to studying the scarce documentation that is available (agendas, press reports, formal outcomes), or rely on ‘anecdotal evidence’ (cf. Bostock 2002; De Zwaan 1995; Hayes-Renshaw and Wallace 2006; Heisenberg 2008; Schneider 2008; Westlake and Galloway 2004). Thus, the most important reason why scholars choose to limit their attention to the top levels is that we know little about what goes on at the bottom two.

**Figure 1: Four levels of play in Council negotiations**



(Source: Author's own diagram)

The substantive reasons are more difficult to pin down. They are related to the particular aspects of social reality on which scholars are theoretically inclined to focus their attention (cf. Warntjen 2010). To make matters more concrete, from an intergovernmental bargaining perspective it makes sense to focus on the proceedings at Council and European Council level (cf. Achen 2006; Bailer and Schneider 2006). This is, after all, where the actual bargaining takes place. Lower level negotiators are obviously limited in their bargaining possibilities. They cannot credibly promise rewards or threaten with punishments, nor can they significantly alter their counterparts' pay-off structure by means of side payments or package deals. All these means are usually the prerogative of the political level(s), which means that at the lower levels the bargaining space is usually quite small. In this line of reasoning, they mostly serve as throughput or 'stand-in negotiators for their ministers' (Häge 2007: 307).

However, limiting our attention to the higher level(s) is problematic. This is because of the matter of *orchestration*. Ministers meet once a month to rush through their overloaded agenda (cf. Gomez and Peterson 2001). In fact, the proceedings at the ministerial level hardly deserve the designation 'debate'. If anything, they look like ritual dances. Much of the statements are declaratory, much of the debate is 'pre-cooked'. There is little room for replies or rebuttals. Often, there is no need for them. The ministerial intervention in itself will generally suffice to get that member state's concerns noted and taken into account. All potential pitfalls and controversies have been addressed at the lower levels by then. So once an issue finally makes it onto the table of the ministers, insiders can usually anticipate the results. That there is little 'spontaneous interaction' at the ministerial level is understandable. Ministers are public actors, who will generally only want to concern themselves with an issue if there is a clear chance for arriving at a decision. One insider put it more succinctly:

'Nobody has an interest to end up in a divisive debate at Council or even European Council level. Ministers have little time and a Presidency will surely not want to waste any of it on unpredictable debates with uncertain outcomes' (Author's interview, Brussels 2010).

The Council is typically the final link in the chain. Member states are very much aware of the fact that once an issue makes it onto the ministerial agenda, they are usually already too late. Even a minister will have little chance to significantly change a decision-making process in motion, let alone turn it around as he or she wishes (cf. Heynen 2011: 12). It would appear that once issues (finally) reach the ministers, most battles have already been fought.

There seems to be ample reason to look for the more substantive part of the negotiations at the lower levels. These are the civil servants and ambassadors who meet on a weekly (sometimes even daily) basis, and who therefore have the time and the technical expertise to engage in substantive deliberations (cf. Aus 2008; Niemann 2006; Risse and Kleine 2010). Those who study the working party level tend to argue that these civil servants play the most important part while ambassadors only deal with general matters (cf. Beyers and Dierickx 1998; Fueilleux et al. 2005; Juncos and Pomorska 2011). Those focussing on the Committee (Coreper) level typically explain why this is in fact the most crucial node ('the place to do the deals') in the Council (cf. Lewis 2005; De Zwaan 1995). But both groups primarily attribute agency and influence to the negotiators at the lower levels.

However, focussing solely on the lower levels is equally problematic. This is because of the concept of *anticipation*. In their day to day negotiations, the lower levels are not acting as ‘free agents’ but are anticipating what their respective ministers would be willing to accept (Westlake and Galloway 2004: 262–64). The leeway they have in carrying out their instructions is usually limited. Working party and Committee members are essentially negotiating from fixed positions (Pollack and Shaffer 2008: 149). After all, it is not as if they themselves are taking a position on certain matters instead of their capital(s). Lower level negotiators are thus primarily exchanging positions and notifying each other about the salient points of the dossiers on which their respective ministers would like to personally state their opinion. Negotiations are to a large degree about deciding whether, when, and how the political level will concern itself with a certain matter (Bostock 2002: 231–32). Lower level proceedings serve to get an overview of who is seriously committed to playing this round and wherein his or her interests or concerns lie. But even Coreper ambassadors are very much aware of the fact that the buck does not stop with them. So the decision-making power these lower levels have is primarily procedural.

This short overview of the decision-making levels in the Council clearly shows why scholars have had difficulty determining ‘who decides’ in the Council (Häge 2008). Trying to find the locus of decision-making gives the impression of looking for the proverbial ‘ghost in the machine’ (cf. Lieshout 1995). Due to the twin processes of orchestration and anticipation it is hard to determine the primary level of play. In their day to day negotiations, the lower levels are clearly anticipating what their respective ministers would be willing to accept. But they are simultaneously setting the terms of a potential ministerial debate. It seems that there is no (unitary) actor taking decisions in the Council. Decisions do not stem from the proceedings at one particular level, but are rather the (to a certain degree unintended) result of the strategic interplay between the different levels.

What is the mechanism behind this strategic movement of issues back and forth across the Council hierarchy? Schneider and Cederman (1994) suggested explaining the stop and go pattern of European integration as the result of battles between those who want to slow down and those who want to speed up the integration process. The same logic, I believe, underlies the more routine interactions in the Council. Day to day negotiations are incessant attempts to enhance (drivers) or reduce (brakemen) the momentum behind specific decision-making processes. They are ultimately about keeping issues on or off the (Ministers’) table. The negotiation phase is in essence always a battle between those who want to change and those who want to preserve the status quo, meaning the existing line of policy. Those who challenge the status quo will do so by opening up a debate in which they will present a claim about their preferred change. Such claims will typically enter the arena at the working party level. Generally speaking, the drivers’ goal is to swiftly steer them through these lower level negotiations, through Coreper, and up to the Ministers, so that an actual decision can be taken. The brakemen will want to keep matters off the ministerial agenda, either by preventing them from moving to the higher levels or by keeping referring them back to the lower levels.

The main ‘argumentative resource’ Council negotiators can use in their interactions is that of potential higher level support. Both drivers and brakemen can claim that they will be backed up on the matter by their ambassadors and (prime) ministers respectively. In this way, drivers can try to induce the Presidency to put issues on the Coreper or Council Agenda, whereas brakemen will want to prevent this from happening. There is an element of bluff in the game. Negotiators can claim that they are backed up, even though he or she is unsure whether that level is really willing to invest in the matter.<sup>2</sup> After all, the main thing that negotiators are unsure about is the salience that others (currently) attach to a particular issue (cf. Naurin 2009: 44). It is salience that determines how far – or to put it more precisely ‘how high up’ – member states are willing to take an issue. Whether an individual negotiator is successful ultimately depends on the willingness of others (and the Presidency in particular) to call their potential bluff.

## 2. Determining the logic of action

In the previous section I elaborated on the battles between drivers and brakemen that underlie the interplay between different Council levels. This provides us with an answer to the first question: what constitutes success in internal negotiations? As I explained above, in lower level debates there is usually little to bargain for and no-one to deliberate with. Success rather lies in the ability to procure or preclude procedural progress. This brings us to the second question: how to be successful? Are these procedural battles fought on equal ground? Or do either the drivers or the brakemen find themselves in a better position? As will become clear below, there appear to be valid reasons to back up either one of these claims.

Departing from an intergovernmental bargaining logic, one would be inclined to favour the brakemen. In battles about whether to move forward or to stay put, brakemen obviously hold the power of the status quo. Common bargaining logic holds that those that are set to gain most from a certain decision will have to make the most concessions (Moravcsik 1998: 54). Put differently, those who are most satisfied with the status quo will be able to dictate the terms of any new agreement, which explains why the pace of decision-making is generally determined by those who are least receptive to change (cf. Thomas 2009: 349). Because EU member states have little means to force each other into accepting an agreement, such agreements will rarely surpass the lowest common denominator. In decision-making under the unanimity rule, the lowest common denominator is often found in maintaining the status quo (ante).<sup>3</sup>

In this particular type of game, leverage stems from the ability to strategically deploy one’s domestic constraints (Schneider and Cederman 1994). The underlying logic is Thomas

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<sup>2</sup> ‘Investing’ means that he or she is willing to make a *plenary intervention* on the matter. A higher level intervention equals a higher investment by that member state.

<sup>3</sup> Assuming that possibilities for otherwise achieving the set objectives, for example by unilateral action or by constructing alternative coalitions, are limited (Moravcsik 1998: 63–5).



Schelling's paradox of weakness, in which the power of the negotiator rests on a 'manifest inability to make concessions and meet demands' (1980: 19). If on the national level, an actor can openly commit himself to a specific position, thereby creating domestic audience costs, he acquires an advantage at the European level. Putnam (1988) referred to it as the logic of two-level games. Politicians are always simultaneously operating on the international level (level I) and the domestic level (level II). Those with a small domestic win-set – meaning those who face severe limits on what they can get accepted back home – have a bargaining advantage at level I. They can credibly threaten the others with negotiation failure. Conversely, those who have a large domestic win-set can be 'pushed around' on level I (Putnam 1988: 440). They will be the ones making concessions, simply because they are considered to be able to make them.

The implications for the internal negotiations are that the Council is severely limited in its possibilities to act decisively, because it continuously needs to cater to the needs of those who do not feel a particular need to act (cf. Westlake and Galloway 2004). This logic obviously works to the advantage of the least willing (i.e. the brakemen).

In spite of this bargaining logic, there are persistent claims that routine Council decision-making favours those who want to move forward (cf. Niemann 2006; Stone Sweet and Sandholtz 1997). This also seems to be the dominant impression amongst insiders. It has to do with day to day realities inside the Justus Lipsius that appear to create their own momentum and in which the default option is to proceed. International relations theorists are inclined to see something of a neo-functionalist logic at work, in which decision-making processes develop their own dynamics, while the participants stumble from one negotiation round right into the next (Haas 1958, Niemann 2006). It is a process driven by the agenda-setting powers and brokerage role of the Commission and the rotating Council Presidency. As one insider put it:

'Commission and Presidency are committed to keep the process going. Those accused of being in a blocking position constantly find themselves in the dock, having to explain to the others what is so terribly important for them' (Author's interview, Brussels 2010).

According to this view, Council negotiators are not really playing a two level game (Niemann and Schmitter 2009: 48). It is rather an elite-driven process of technocratic decision-making and incremental change. This particularly applies to the lower level negotiations which have presumably evolved into 'a cumulative pattern of accommodation in which the participants refrain from unconditionally vetoing proposals and instead seek to attain agreement by means of compromises upgrading common interests' (Haas 1958: 66). Scholars opting for this perspective focus less on formal bargaining constraints and more on the informal norms guiding lower level interactions; the most important of which is 'the shared responsibility to come up with solutions and keep the process going' (Lewis 2005: 949–50). Being part of an organization creates a sense of ownership and responsibility (cf. Kerremans 1996: 232). Such feelings will probably not be strong enough to override pressing national concern, but at the very least they can 'empower' the willing (i.e. the drivers). This of course does not mean that the drivers can constantly and carelessly ask for matters to be brought before the ministers.

To remain effective, they (also) have to safeguard the image of responsible decision-making. But one would expect them to be able to employ a strategy of shaming, referring to the public exposure of illegitimate goals or inappropriate (delaying) tactics (cf. Schimmelfennig 2003: 199). This would imply a process in which the brake is at best a temporary option. Decisions might at times appear long overdue. But the neo-functional logic ensures that progress will eventually be made.

### 3. The Battle for Gotovina

This article has (re)defined negotiation success as the ability to control the movement of issues through the different Council levels. With regard to being successful there are well-founded reasons to expect those who want to take issues upward (drivers) as well as those that want to keep them at the lower levels (brakemen) to be in a better position. An answer to the second question can thus only be found by means of an in-depth analysis of actual negotiating dynamics.

The issue area under focus is that of foreign policy-making and enlargement (of the Western Balkans). The reason for selecting it is that this is an issue area in which the Council can act rather autonomously, meaning without formal involvement of the European Parliament and without much interference from lobbyists and pressure groups<sup>4</sup>. Although the European Commission(er) formally only has an advisory role, it is nevertheless prominently present. However, I still maintain that the issue-area offers perhaps the best opportunity for studying Council proceedings in and by themselves. We are dealing with decision-making under the unanimity rule<sup>5</sup>, which means that one side cannot outvote or outnumber the other. Drivers and brakemen are basically forced to continue their negotiations until a decision is reached or the matter is dropped (non-decision or inaction). Admittedly, we could be dealing with an ‘extreme’ rather than ‘typical’ case of Council decision-making, which might limit the possibilities for generalizations.<sup>6</sup> However, when the goal is hypothesis generation and theory development instead of theory testing, such cases tend to be more insightful (Gerring 2007: 89).

The outcome this paper is trying to explain is the October 2005 decision to open accession negotiation with Croatia. The decision stemmed from negotiations that had spanned three years and six Presidencies. The debate was largely (but not solely) about Croatia’s need to ‘fully cooperate’ with the International Criminal Tribunal for the former Yugoslavia (ICTY). The bone of contention was Croatia’s unwillingness/inability to capture Ante Gotovina, a Croatian General and commanding officer during ‘Operation Storm’ which, in August 1995,

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<sup>4</sup> Although the European Parliament has the power of consent in the final decision to allow a new member state.

<sup>5</sup> Although under the rules of unanimity, an abstention does *not* count as a no-vote, which means that the Council can also ‘move’ with some member states abstaining.

<sup>6</sup> Moreover, if one wants to consider this an extreme case, it was one that was dealt with through the routine or ‘day to day’ decision making channels, as they were presented above.

led to the ‘recapturing’ of Serb held territories in Croatia. Gotovina was indicted by the ICTY in July 2001. The main drivers were the enlargement friendly member states (Italy, Greece) as well as the ‘friends of Croatia’ (Austria, Germany). The primary brakemen were the enlargement-weary member states (France, the Netherlands) as well as the ICTY-minded member states (the UK, Sweden, and again the Netherlands). The battle would consist of six rounds, which will be analyzed below.

### **3.1. Round I: Asking the Commission for an avis**

On 21 February 2003, Croatia was the first Western Balkan country to apply for EU membership. The first procedural battle that needed to be fought inside the Justus Lipsius was about asking the Commission for an avis. It was initiated by the brakemen, who had continuing doubts about Croatia’s commitment to ICTY cooperation. As it turned out, Article 49 of the Treaty on European Union (TEU) did not give a definitive answer as to whether such an application was to be transferred automatically to the Commission. It was unclear whether it required a political decision by the Council. In the relevant working party, brakemen started to argue that such a political decision was in fact needed. However, these lower level discussions made it clear that most of the other member states considered this to be a technical step.

The brakemen therefore offered to settle on this matter. Already in April 2003 the Council asked the Commission for an avis. However, this decision came with (verbal) side-payments to the brakemen. The April 2003 Conclusions were not positively framed; they merely stated that the Council decided ‘to implement the procedure laid down in Article 49’.<sup>7</sup> Apparently, the aforementioned ambiguity in the Article was gone. What the brakemen obtained with this ‘neutral’ formulation was the guarantee that a political debate would in due time be necessary. The Conclusions confirmed that asking the Commission’s avis in no way precluded a decision by the Council on the feasibility of Croatia’s application. Seeing that the Commission reserved a year for the preparation of the avis, this debate would probably take place when brakemen (i.e. the Netherlands) instead of drivers (Greece, Italy) were presiding over the proceedings.

### **3.2. Round II: Setting the terms of the debate**

As the Commission was working on its avis, the brakemen would have preferred not to talk about Croatia for a while. Like the Chief Prosecutor of the ICTY, Carla Del Ponte, they were primarily on a quest for Gotovina, and on that front there had been little progress. To the

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<sup>7</sup> 2501<sup>st</sup> General Affairs and External Relations Council meeting, Luxembourg 14-4-2003. Croatia. *Agence Europe* 16-4-2003: 7.

drivers, and the Italian Presidency in particular, it was clear that this matter would not simply blow over. Instead of continuing to monitor the matter at working party level, they decided to face the problem head-on and invite Del Ponte to the October 2003 Council meeting.

This first attempt to take matters to the ministers would be only mildly successful (for the drivers). Perhaps the Presidency had acted too rashly, or perhaps they overestimated their ability to steer the ministerial debate. Most probably, they underestimated the influence of the General Prosecutor. From the start, Del Ponte and her team adopted a clear-cut strategy. Basically, they wanted the EU to adopt a policy line in which each and every step towards EU-membership was conditional upon full cooperation with the ICTY, as defined by the Prosecutor of the ICTY. This last part was key. It was also Del Ponte's message to the Council:

‘The assessment: that is my job. You provide the political pressure. I will be the one to judge the efforts made by the Balkan states’ (Author's interview, Carla Del Ponte, Ascona 2011).

In a way, this approach guillotined the debate. Most ministers predictably paid lip service to the importance of the ICTY. The Dutch and British foreign ministers made it abundantly clear that they would take this into account when judging Croatia's application. Some of the drivers wondered whether it would not be better to ‘let justice take its course’ or apply this particular conditionality ‘later on in the process’. But what the brakemen were unable to get the drivers to acknowledge was the political unwillingness in Zagreb. The Council Conclusions did not directly address this matter. They merely ‘noted with deep concern that a number of countries and parties in the region were still failing to cooperate fully with the Tribunal’<sup>8</sup>.

What the drivers ‘won’ with this rather ambiguous wording was the possibility to reopen the debate in the near future. For the brakemen the battle was about capturing Gotovina. But they were reluctant to frame it in such a way, as it would provide Croatia with an easy way out. It could simply maintain that the General was dead or not in Croatia. Their strategy was thus to keep out of a debate about the meaning of full cooperation. Instead, they unequivocally aligned themselves with the judgment of the General Prosecutor. The ICTY itself had every interest in not defining full cooperation, because this would mean the eventual judgment could also be made by others. Thus from the outset, a lot of emphasis was put on who should be allowed to judge Croatia. Lower level negotiations were primarily about the weight that should be given to Del Ponte's judgment, and how her assessment would be procedurally embedded in the Council. Drivers might have had their doubts about always having to go via Del Ponte, but they were as of yet unable to by-pass her assessments.

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<sup>8</sup> 2533<sup>rd</sup> External Relations Council meeting, Luxembourg, 13 October 2003. Western Balkans Council Conclusions.

### 3.3. Round III: Noting the Commission avis

At the beginning of 2004, things were beginning to look better for the drivers. Due to their behind the scenes efforts, the Council had asked for the Commission avis to come out in the spring, so that a decision could be taken at the European Council in June at the latest.<sup>9</sup> For the Irish Presidency, deciding on Croatia's membership application was the only potential deliverable in the issue area. With this purpose in mind, Croatia's Minister of Foreign Affairs, Zuzul, visited Coreper on 25 February, trying to convince the Ambassadors that Gotovina was nowhere to be found. On 17 February, SG/HR Solana met with the Croatian Prime Minister Sanader, subtly mentioning the fact that Del Ponte was not a member of the EU and that it would be up to the Council to decide on the application<sup>10</sup>. In the meantime, Enlargement Commissioner Verheugen was lobbying Del Ponte for a (positive) assessment, so that the avis could come out. This assessment came in the form of a telephone conversation and a letter in which Del Ponte reassured Verheugen that Croatia was fully cooperating at the moment. It was Del Ponte's remarkable turn that enabled the Commissioner to present his avis on 20 April<sup>11</sup>.

The obvious question Coreper had to concern itself with was how to react to it. Drivers, Austria in particular, were pushing for a welcoming reaction. Brakemen in fact hoped to avoid all sorts of reactions. The April Council further discussed the matter. Most member states welcomed the avis, but the brakemen managed to avoid Council Conclusions on the matter. They were, however, unable to prevent it from being taken to the European Council. In the run up to the June 2004 Summit, Coreper necessarily engaged in a debate about procedural pathways: whether the European Council should set a specific date for the opening of the accession negotiations. Brakemen generally consider dates to be dangerous because they imply automatism, which is certainly why drivers like them. Coreper managed to find the compromise in agreeing on a time frame instead of a specific date.<sup>12</sup> The European Council would award Croatia candidate status and the Conclusions would read: negotiations could commence 'early in 2005'<sup>13</sup>.

### 3.4. Round IV: Getting the (conditional) date

When the Netherlands took over the Presidency, they were already anticipating the European Council of December 2004, which would simultaneously have to decide on the opening of accession negotiations with both Croatia and Turkey. The main players were the same: the UK pushing for Turkey and on the brake on Croatia, Austria pushing for Croatia while on the brake on Turkey. Fears about a political trade-off were certainly justified. As the German

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<sup>9</sup> 2559<sup>th</sup> External Relations Council meeting, Brussels 26-1-2004.

<sup>10</sup> Joint Press conference of HR/SG Solana and Prime Minister Sanader, Zagreb 17-2-2004.

<sup>11</sup> *EU observer* 21-4-2004, *Agence Europe* 21/22-4-2004 : 4,7.

<sup>12</sup> Coreper 10-6-2004, Internal Report, Dutch Ministry of Foreign Affairs.

<sup>13</sup> European Council meeting, Brussels 18-6-2004. Presidency Conclusions. Enlargement. Croatia: 29.

Chancellor Schröder's amicable relations with Sanader were the mirror image of his attitude towards Del Ponte, one could more or less count on Croatia 'getting the date'. What the Dutch were aiming for was a conditional one. To achieve this, they wanted the Council to adopt firm Conclusions on Croatia's lacking ICTY cooperation.

The Netherlands stuck to their strategy of protracting the lower level debates. Members of Del Ponte's team were constantly invited to share their views with relevant working parties. These debates were quickly turning into ritual dances about Croatia's inability or unwillingness to apprehend the General. The main event would be the October 2004 meeting, at which Del Ponte was invited to share her 'deep concerns', after which the Council was to adopt unambiguous Conclusions on the matter. The strategy apparently worked. The Conclusions explicitly state that: 'continued failure to cooperate fully and in a timely manner with the ICTY would seriously jeopardize further movement towards the EU'<sup>14</sup>. The matter was then transferred to Coreper and the Council. But here drivers and brakemen were more evenly matched. The debate was on whether the Conclusions should explicitly mention that it was the Council or rather Del Ponte that had to confirm full cooperation. Ambassadors and ministers struggled to find the right dictum, but eventually settled for a minimalistic approach. The European Council would suggest the opening of accession negotiations on 17 March 2005: 'provided that there is full cooperation with the ICTY'<sup>15</sup>.

### **3.5. Round V: 'Suspend and complement'**

The European Council Conclusions clearly stated that the Council had to consult with Del Ponte before 17 March 2005, in order to be able to decide on the opening of accession negotiations. The question was when and how. Brakemen would have liked again to invite Del Ponte to the Council, or else get a complete Report from her about the current level of cooperation. But what the Luxembourg Presidency foresaw was a last minute meeting of Foreign Minister Asselborn and Prime Minister Juncker with Del Ponte, after which they would present a proposal to be discussed in the Council. Until that date, they would have liked to avoid Council level debates on the ICTY.

The new Enlargement Commissioner Rehn made this approach impossible. He opened the attack at the Council meeting in January 2005. According to Rehn, Croatia felt too comfortable and convinced that it would achieve the opening of accession negotiations without any further efforts. The brakemen obviously agreed with the Commissioner. For the drivers, this was a battle which they had not anticipated. The ministers were caught off guard, as the Presidency tried to no avail to smother the debate. As a result, the January Conclusions went even further than those of October: 'Full and unconditional cooperation with the ICTY

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<sup>14</sup> 2609<sup>th</sup> General Affairs and External Relations Council meeting, Luxembourg 11-10-2004: Western Balkans - Council Conclusions.

<sup>15</sup> European Council meeting, Presidency Conclusions, Brussels 17-12-2004. Enlargement Croatia.

remains an essential requirement for further movement towards the EU'<sup>16</sup>. Only three days after the Council, Del Ponte was invited for a lunch with the Coreper Ambassadors.<sup>17</sup> She decided to pour some more oil on the fire, recounting how Sanader flaunted his German and Austrian friends who would safeguard the accession negotiations for him.

The Conclusions of March 2005 were the anticipated result. They provide us with one of those rare moments when the Council did not cloak its difference of opinion. They stated that: 'after deliberation by the Council, and in the absence of a common agreement, the opening of accession negotiations has been postponed'<sup>18</sup>. These 'deliberations' had again been mainly procedural: whether the suspension was a technical decision that could be taken by Coreper or a political one that should be dealt with by the Council. Coreper would also have to decide on the follow up<sup>19</sup>. While the suspension itself was certainly a clear victory for the brakemen, the drivers managed to get the side payments this time. First, they got the negotiation protocol approved so the Commission could begin negotiations as soon as the Council would give the green light. Second, the Council felt it necessary to stress that it was the ultimate assessor. The Conclusions stated that negotiations will start 'as soon as the Council has established that Croatia is fully cooperating with the ICTY'<sup>20</sup>. What lay beneath this truism was an attempt to undermine Del Ponte's assessment capabilities. Third, since brakemen refused to openly admit that it was about 'achieving a given result' (Gotovina), the drivers could reframe it into 'an obligation in substance'<sup>21</sup>. In other words, all Croatia would now have to do was prove to the Council that it showed the necessary efforts. The battle changed. It was now primarily about how the Council should judge these efforts. For this, the drivers had suggested something of a collective monitoring mechanism that could 'objectively assess' the current level of cooperation.

The brakemen had (again) been set on avoiding a debate at European Council level, something which they (again) failed to prevent. The drivers reopened the debate at the European Council of 23 March, but this did not lead to changes in the Conclusions. What it did lead to was the announcement of a taskforce which was to monitor Croatia's efforts to apprehend Gotovina<sup>22</sup>. Drivers scored an important victory with this. While brakemen tend to see it as a face-saver or at best 'consultative body', drivers expected it to fulfil a complementary role in assessing Croatia. Coreper subsequently concerned itself with the 'political assessment faculty' of this taskforce. While its formal competencies would indeed

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<sup>16</sup> 2637<sup>th</sup> General Affairs and External Relations Council meeting, Brussels 31-1-2005. Western Balkans Council Conclusions.

<sup>17</sup> Coreper 3-2-2005, Internal Report Dutch Ministry of Foreign Affairs. Author's interview with Carla del Ponte, Chief Prosecutor of the ICTY, 14-6-2011.

<sup>18</sup> 2649<sup>th</sup> General Affairs Council meeting, Brussels 16-3-2005. Enlargement. Croatia. Council Conclusions.

<sup>19</sup> 2640<sup>th</sup> General Affairs and External Relations Council meeting, Brussels 21-2-2005. Coreper 25-2-2005 & 4/9/10/15-3-2005. Internal Reports Dutch Ministry of Foreign Affairs.

<sup>20</sup> 2649<sup>th</sup> General Affairs Council meeting, Brussels 16-3-2005. Enlargement. Croatia. Council Conclusions.

<sup>21</sup> *Agence Europe*, 17-3-2005: 4-5.

<sup>22</sup> *Agence Europe* 24-3-2005: 3. The Taskforce was to present its first Report already on 25 April. It was to consult with Croatia and the ICTY right away, which did not seem very useful seeing that Del Ponte had just concluded that Croatia was not fully cooperating at the moment.

be limited, what the drivers managed to achieve was to banish Del Ponte from the Plenaries. It was decided that, from now on, she would present her views and opinions to the taskforce, instead of directly to the Council. From this point onwards, the battle was merely about when she would be invited to do so.

### 3.6. Round VI: ‘Delivering Del Ponte’

A lot of conjectures surround the UK Presidency of 2005, the most persistent of which is the trade-off that presumably took place at the Council meeting of 3 October, at which the UK managed to get Austria to agree to accession negotiations with Turkey in return for the opening of negotiations with Croatia. However, according to this study, the more relevant question is how the matter actually reached the ministers. This shows that the UK was really not that sure about their ability to steer Del Ponte and thus procure the trade-off. This is why the UK had tried to decouple the two files. They got the Council to ask for a report of the taskforce already in July 2005. Del Ponte had tried to preclude such hasty assessments by suggesting, at the beginning of June, to give Croatia another three or four months to produce tangible results.<sup>23</sup> This made it hard for the July Council to conclude anything else than a promise to come back to the issue in October.<sup>24</sup>

After this decoupling attempt had failed, the UK Presidency wanted to make sure that Del Ponte’s assessment would be as close as possible to the actual Council meeting. In this, they succeeded. Del Ponte was invited to address the taskforce that very same day. There were three possible scenarios: either Del Ponte was completely satisfied, still very unsatisfied, or something in between. Many expected the last. Drivers as well as brakemen were thus surprised by her assessment that ‘Croatia had been cooperating fully for a couple of weeks now’<sup>25</sup>. But the fact that she spoke those magic words precluded further debate in the Council. Brakeman had become entrapped in their strategy of hiding behind the judgment of Del Ponte. Therefore, they could not even make use of their most important substantive argument, which was that Gotovina had not been located or apprehended. They could only ask for this ‘full cooperation to be maintained, until the last remaining indictee was in The Hague’<sup>26</sup>.

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<sup>23</sup> *Agence Europe*, 9-6-2005: 7.

<sup>24</sup> 2764<sup>th</sup> General Affairs Council meeting, Brussels, 18-7-2005. Council Conclusions, Enlargement.

<sup>25</sup> *Agence Europe*, 4-10-2005: 4-5.

<sup>26</sup> 2678<sup>th</sup> General Affairs Council meeting, Luxembourg, 3-10-2005. Enlargement. Croatia: opening of negotiations. Council Conclusions. Gotovina would in fact be arrested in Tenerife on 7 December.



## Conclusion

This paper departed from two research questions: What constitutes success in internal Council negotiations and how does one bring about such success? Intergovernmental bargaining theory would look for success in the substance of the matter. Effectiveness is attributed to member states that are able to realize favourable bargains, primarily by means of trade-offs or package deals.

Yet it would be hard to explain the October 2005 decision on Croatia in such a way. After all, the drivers wanted the opening of accession negotiations; the brakemen wanted Croatia to deliver Gotovina. What did come out was what neither side had wanted: a heavily delayed accession process in return for an uncertain promise (that Gotovina would indeed be apprehended). Moreover, if this was supposed to be a package deal, it was a highly unfavourable one for Austria.<sup>27</sup> Nor was the opening of accession negotiations the very least (the lowest common denominator) the Council could do. That would have been simply to wait for Gotovina.

This article suggests looking for success on the procedural level. Internal negotiations are essentially about agreeing on the appropriate way to proceed with the decision-making on an issue. More specifically, they are about moving issues back and forth between the Council's decision-making levels.

There is the persistent impression that in this kind of routine decision-making, the advantage lies with those who want to move forward. There is neo-functionalist reasoning behind this; the kind of reasoning we also see in this specific case. Drivers like to present the opening of accession negotiations as something that was bound to happen:

‘Gotovina and the suspension of the opening of accession negotiations was just a delaying factor. Everyone knew we were going to move ahead in due time.’ (Author’s interview, Stefan Lehne, Vienna 2010).

The detailed reconstruction of the actual negotiation dynamics, I believe, convincingly shows that such reasoning is flawed. If one only looks at the amount of time and investment it took, it is clear that there was little self-evidence in the process. Nor was there a guarantee that the Council was indeed going to move ahead ‘in due time’.<sup>28</sup> In fact, if Del Ponte’s judgment had been even slightly different, it would most probably have led to protracted delays.

Thus, rather than being intergovernmental or neo-functionalist in nature, the game displays a different kind of logic; a logic wherein one side was trying to induce while the other side was trying to preclude the next step towards an eventual decision (about opening accession negotiations). A pro-active Commissioner could help to maintain, but also diffuse, the momentum, as did Verheugen in April 2004 in favour of the drivers or Rehn in January 2005

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<sup>27</sup> Cf. *Die Presse*, 4-10-2005, ‘Türkei-Beitritt: Österreich lenkt ein’.

<sup>28</sup> Had Del Ponte concluded that cooperation was insufficient in October 2005, Croatia’s progress towards membership would have been stalled or perhaps even stopped; like for instance that of Macedonia or Serbia. Croatia in fact managed to slip through before the doors closed.

to the benefit of the brakemen. A pseudo-neutral Presidency could do the same, be it the Dutch in their quest for tough ICTY Conclusions or the British in their sudden willingness to be pragmatic about the actual arrest of Gotovina. However, the main battles were fought between the drivers and brakemen themselves. Whereby the drivers were constantly trying to take matters to the Council and European Council, the brakemen were trying to keep the discussions at the lower levels. To be sure, brakemen would have preferred to wait quietly for Gotovina, instead of engaging in these repetitive debates about ‘full cooperation’.<sup>29</sup> But it seems that there was simply no way to avoid these debates. It was the most promising reaction to the drivers’ successful attempts to keep the matter on the table.

This brings us to the second question of how to be successful. Here I will travel from idiosyncratic to systematic characteristics. There is a reason why Council negotiations are commonly referred to as battles of attrition. Negotiators need to pick their battles, but then be willing to stand their ground in the battles they decide to pick (Bostock 2002). Scholars generally try to account for Council decisions either as the result of high level bargains or lower level deliberations (cf. Arregui and Thomson 2009; Niemann 2006). However, in internal Council negotiations, there is usually little to trade and no one to convince. This is why I approached the negotiations from a different angle. Here, decisions result not from the proceedings at specific levels, but are the result of the interplay between these levels. The mechanism behind this interplay is in essence *bureaucratic*. It seeks to explain decisions by means of the interactions of semi-autonomous sub-units fulfilling their organizationally defined roles (cf. Allison 1971; Lieshout 1995). This makes it difficult to assign agency to one particular level in the Council. The lower levels are anticipating a higher level debate, the contours of which they themselves are inadvertently marking out.

In terms of the structure versus agency debate, which is the topic of this Special Issue, this paper urges us to pay more attention to the matter ‘embedded agency’ (Ripoll Servent and Busby, this issue). In our quest to determine the logic behind EU decision-making, this paper has departed from a set of simple and straightforward questions. What are the actual interests of individual working party delegates, ambassadors, or ministers? What can they realistically hope to achieve by means of their interactions? And most importantly, what are the behavioural options open to them? Bureaucratic theorizing dictates that an institution can only function if it manages to ‘reward’ the behaviour of some while ‘punishing’ the behaviour of others. This paper can be seen as an attempt to determine the (negotiating) behaviour that is generally rewarded (with success) inside the Council. Council negotiators might be limited in their ability to change their counterparts’ interests, positions, or pay off structures. However, what they can try to do is keep the issue on or off the ministerial agenda; this under the supposition that those who have to ‘raise their flag’ too often and on too high a level will at some point realize that they might have to settle on the matter. The

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<sup>29</sup> More in general, brakemen might want to ‘kill’ issues rather than keep discussing them at the lower levels. It is just that, due to the efforts of drivers and agenda setters, they will usually *not* be able to keep issues off the table entirely. This is why they will opt for a strategy of keeping the discussions going at a lower level.

key to success then lies in the ability to keep the debate going, either at the higher (drivers) or at the lower (brakemen) levels.

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