Chapter 6

Negotiating criminal law measures for environmental protection

‘… what is important to understand here is that the technicians wanted to focus on the substance. Unlike the politicians. For the politicians [...] the question was a matter of principle. The question that the Community should not have the power to deal with criminal law. That was the issue! And it was really a hot issue! I can tell you we had really here a heated debate about this! But once we had the Court’s decision, the technicians calmed down and they focused on the definitions of the offences’ (Head of Criminal Justice Unit, Directorate-General for Justice, Freedom and Security, European Commission, interview, 9 May 2011, Brussels).

6.1 Introduction

The decision-making process leading to the adoption of the Directive on the protection of the environment through criminal law, sometimes also referred to as Environmental Crime Directive (hereinafter: ‘ECD’), was, strictly speaking, a regular first-pillar process. The Directive was adopted, on 19 November 2008, by both the European Parliament and the Council (2008b). And in the Council, it was adopted by qualified majority voting (QMV). Moreover, the Commission, which tabled the ECD proposal on 9 February 2007, was the sole initiator of the legislative process. This position offered the Commission during the drafting and amending of the proposal the leverage to withdraw it whenever it saw fit to do so.

However, for all the formal features of first-pillar procedure, the ECD process, also had elements that were somehow related to the third-pillar context. Firstly, the subsidiary bodies in the Council working structure that worked on the ECD proposal, usually operated in the institutional context of third-pillar procedure and practice. These subsidiary third-pillar bodies, which proved to be the key venues of ECD discussion in the Council, were the Working Party on Substantive Criminal Law (hereinafter: ‘Droipen’475) and the CATS. Secondly, the subject matter of the Directive

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475 As with Council Working Party on Cooperation in Criminal Matters (referred to as ‘Copen’), the Council documents resulting from the proceedings of the Working Party on Substantive Criminal Law were indicated with the label ‘Droipen’. Droipen was an acronym for
included also a typical third-pillar key element: the establishment of criminal law measures. At the time, criminal law fell under third-pillar competence and was hence considered part and parcel of the third pillar’s intergovernmental policy area of judicial cooperation in criminal matters. Protection of the environment, on the other hand, fell under the competence of the first pillar, where supranational or ‘Community’ powers were exercised. What the Directive basically did was bringing together two fields of EU activity of which each belonged to a different pillar setting.

The aim of the Directive was to provide a penal framework that was to ensure that the rules laid down in the field of environmental protection were to be effectively enforced. The Directive replaced a Framework Decision that provided for (almost) exactly the same legal framework – i.e. the protection of environment through criminal law. This legislative instrument was exclusively drafted in the context of the third pillar and adopted on 27 January 2003. During the negotiations on this Framework Decision an interinstitutional conflict arose over the question of whether the adoption of a legislative instrument on the protection of the environment by means of criminal law should fall within the competence of the first pillar, instead of the third pillar. The Commission, which claimed that the adoption of the Framework Decision would encroach upon first-pillar powers, tabled on 13 March 2001 a proposal for a Directive on a similar subject (Commission 2001b). The Commission thereby argued that the first pillar was the appropriate legislative context for adopting a criminal law instrument on environmental protection because there was already an enormous acquis of environmental law that provided much scope for defining “reliable, clear-cut and concrete” environmental criminal offences.

For its part, the Council claimed that the ‘Community’ – that is: the first pillar of the EU – did not have the competence to require member states to adopt criminal measures and criminal sanctions. It eventually set aside the Commission proposal, ‘droit pénale’. Its regular task is to examine legislative proposals regarding substantive criminal law. The focus thereby was in particular on proposals for instruments aimed at the harmonization of national provisions of substantive criminal law.

476 On 23 September 1999, Denmark forwarded proposal for a Framework Decision on the protection of the environment through criminal law (according to third-pillar procedure a member state was allowed just as well to propose legislation) in response to an invitation of the JHA Council that the EU should adopt its own instrument on the subject matter. The idea was that this framework decision should take over elements of the European Convention on the Protection of the Environment through Criminal Law (Press Release 11705/00/JHA Council of 28/9/2000). This convention, which was opened for signature in 1998, was not ratified by any of the EU member states.

took over some of its elements and proceeded with the Framework Decision.\textsuperscript{478} The JHA Council adopted the Framework Decision on 27 January 2003. In a resolution of 15 November 2001, the European Parliament expressed its view on the competence issue. In this resolution it asked the Council not to take “any action on environmental criminal law” before the draft Directive on the protection of the environment through criminal law is adopted (European Parliament 2001: 524). It also recommended the Commission to “take appropriate action” should the Council adopt the Framework Decision “prior to the adoption of the abovementioned draft Directive”.

And so the Commission did. After the Council adopted the Framework Decision, the Commission went to Court on 15 April 2003 and brought an action for annulment of the Framework Decision. Seventeen months later, on 13 September 2005, the Court of Justice annulled the Framework Decision on the grounds that there was (implied) competence in the first pillar to adopt criminal law measures “when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences” (Court of Justice 2005: paragraph 48). The Council was thus obliged to redo the drafting, but this time in the form of a first-pillar Directive and in co-decision with the European Parliament. Obviously, the Council was also required to reach decision by qualified majority.

The new ECD proposal, which the Commission forwarded on 9 February 2007, was broad in scope (Commission 2007; see also Mullier 2010). It extended to law – either European or national – that was concerned with the protection of the environment in general. The cornerstone of the proposal was the provision that specified a number of types of unlawful conduct that were to be considered as an offence when committed intentionally or “with at least serious negligence” (Commission 2007: article 3). Basically, it was a provision of harmonized definitions of (constituent elements of) environmental criminal offences. A total of nine categories of conduct were listed in the provision. These included the discharge of material or ionizing radiation, the disposal or shipment of waste, the storage of nuclear materials, the killing of or trading in protected wild fauna or flora species, the “significant deterioration” of a habitat or the use of ozone-depleting substances. Aiding and abetting any of these violations were also to be considered an offence.

Also, the Commission proposal included provisions that defined quite elaborately under what (aggravating) circumstances what level and type of sanctions were to be applied. It prescribed for instance that in case of a violation of rules on discharge of ionizing material committed with serious negligence by a natural person,

member states were to ensure that such a violation should be punished by a maximum of at least between two and five years imprisonment. Or if a legal person is held liable for the unlawful disposal of waste then the national authorities were required to impose a fine of a maximum of at least between € 300,000 and € 500,000.

The high level of ambition of the ECD proposal was reflected in a Communication, in which the Commission gave its interpretation of the Court’s judgment of 13 September 2005. In this document the Commission acknowledged that criminal law as such did not come within the sphere of Community policy. Adoption of measures containing criminal law matter could, as the Commission conceded, “only be based on implicit powers associated with a specific legal basis” (Commission 2005b: 3). Criminal law measures in the Community sphere could thus be adopted “only at sectoral level” and only on the condition that there is a clear need. Still, the Commission gave the Court’s ruling also a quite lenient interpretation. It considered that if in a given sector criminal law instruments would be required then they “may, depending on the needs of the sector in question, include the actual principle of resorting to criminal penalties, the definition of the offence – that is, the constituent element of the offence – and, where appropriate the nature and level of the criminal penalties applicable, or other aspects relating to criminal law”. In sum, the Commission intended to give full effect to the ruling by allowing itself to include all possible elements of substantive criminal law in the ECD proposal (Mitsilegas 2008a).

In the next section of this chapter (Section 6.2) an overview is given of the various issues that have featured on the ECD agenda. In that light, seven discussion threads have been identified. The purpose of this section is to provide an appraisal of the occurrences of shifts in position and ensuing (partial or complete) agreements on the various issues. Findings on certain aspects of systemic interaction – more specifically, frequencies of meetings officially reported – are presented as well. The findings presented in this section are based on the examination of 108 policy documents. Section 6.3 then turns the attention to findings on the basis of evidence found in thirteen interview transcripts on how the ECD discussions were conducted and in what sort of setting they took place. The main focus of analysis in this section is on the occurrences of reciprocity and reflexivity, and on the effects of the institutional setting, insulation, and some aspects of systemic interaction (for instance on the frequencies of informal consultations). This chapter ends with a conclusion on the findings presented.
6.2 The unfolding of the ECD process

The annulment by the Court of Justice of the Directive’s predecessor, the ‘ECD’ Framework Decision, signified that the EU legislator had to arrive to a decision on the basis of an agreement between two institutions – the European Parliament and the Council. The ‘communicative space’ therefore extended, in addition to internal discussions in the Council, also to internal discussions in the European Parliament, and interinstitutional exchanges between the Council, the Parliament and the Commission at the trialogue level. This section presents findings on the contents of discussion, the frequencies of official meetings, and the shifts that occurred in the course of the process across these three venues of discussion.

The findings presented were drawn from data in 108 Council documents and working documents of the European Parliament on the ECD process. The Parliament documents were not as elaborated as the Council documents, where sufficient data could be found on the occurrence of discussion on each issue. Relevant data found in Parliament documents consisted only of proposals for amendment and supporting justifications presented by the Rapporteur, the Shadow Rapporteurs, draftsmen and other MEPs of the Parliamentary Committees that were involved in the ECD process (unlike the VIS-Access case, there were more Parliamentary Committees involved in the ECD process). Neither was there detailed reporting of the discussions at the trialogue level. References to issues that were reported to have some salience at this level were found in Council documents as summary briefings on the trialogue outcomes presented by the Presidency to the delegations in the Council. Less details were therefore found on the contents and frequencies regarding both the internal discussions in the European Parliament and the trialogue discussions.

A timeline of the process is first presented in Subsection 6.2.1. An overview of seven discussion threads, with an outline of the most salient issues, is then presented in subsequent subsection (6.2.2). Also in this subsection, the findings of an examination of the frequencies of the formal meetings are presented, as well as an overview of the shifts and changes in negotiation positions that occurred in the process.

6.2.1 The timeline of the ECD process

The ECD process covered three presidencies. With the tabling of the Commission proposal for a Directive, on 9 February 2007, the process started under the German Presidency. In the second half of 2007, it continued under the Portuguese. And it was rounded off in the first half of 2008, under the Slovenian Presidency. The Council and the European Parliament reached an agreement on the ECD Directive in May 2008.
Chapter 6

Already before the Commission tabled the ECD proposal, the European Parliament took position on the ECD matter. In the so-called ‘Gargani Resolution’ of 14 June 2006 on the implications of the Court’s ruling on the ‘ECD’ Framework Decision, the Parliament took a line of caution and restraint with regard to the issue of criminal legislation competence in the first ‘Community’ pillar. The resolution, which was drafted under the responsibility of Rapporteur (Giuseppe) Gargani (EPP), called for cautious optimism. It was noted that “there appear to be no grounds for an automatic presumption in favour of a broad interpretation of the judgment” (European Parliament 2006: 3).

The Commission was even urged to “not to automatically extend the conclusions of the Court of Justice to every other field falling within the scope of the first pillar”.

The line of caution and restraint was continued by the Parliamentary committee that became responsible for the ECD file: the Committee ‘on Legal Affairs’ (in parliamentary circles referred to as ‘JURI’). It appointed (Hartmut) Nassauer, member of the Christian-Democratic EPP, as the Rapporteur responsible for drawing up the ECD Report. The JURI Committee was not the only committee involved in the ECD process. There were two other committees: the Committee on the Environment, Public Health and Food Safety (hereinafter: ‘ENVI Committee’) and the LIBE committee. The JURI Committee however took the lead in the ECD discussions on behalf of the Parliament. It was selected as the ‘committee responsible’ for drawing up the ECD Report, while the other two were ‘opinion-giving’.

The fact that the JURI Committee was the ‘committee responsible’, implied that it was in principle not obliged to take on board the amendments of the other two committees. Still, in the course of the ECD process, it was decided that there was to be “enhanced cooperation” between the JURI and the ENVI Committee. This decision, taken on 12 July 2007, implied that the two committees jointly had to agree on a timetable for examining the ECD proposal and that the Rapporteurs involved were expected to keep each other informed and “endeavour to agree” on the reports each was working on.

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479 For more details on the differentiation of these roles see Corbett et al. 2007: 135-136.
480 European Parliament, PE 392.945, Minutes of the meeting of 12 July 2007
481 Nowadays, the procedure is foreseen in “Rule 50: Procedure with associated committees”, Rules of Procedure of the European Parliament.
In anticipation of the first discussion of the JURI Committee on the ECD file (on 25 June 2007), the Rapporteur of the Committee issued a *Working Document on protection of the environment through criminal law* (European Parliament 2007b). In this document, the Rapporteur was critical of the principle of implied Community competence to adopt criminal law measures. The reservations which he raised in this document were later included in the Draft Report, which the Rapporteur tabled on 6 February 2008 (European Parliament 2008b). The JURI Committee adopted the final text of the Report on 8 April 2008. The Report was adopted with fifteen votes in favour to eleven with two abstentions. It was adopted only nine days before discussions at the triilogue level between the Council and the Parliament officially started. Two discussion threads were identified in the internal debates in the European Parliament:
one on the ‘scope of the Directive’ and the other on the ‘list of offences’ (for details see Table 6.1).

The first internal discussions on the ECD file in the Council started with a meeting at the national expert level in the Droipen working party on 16 March 2007. It was at this level that the internal Council discussions on the ECD file were chiefly taken forward. In April 2008 the Droipen working party reached agreement on a few issues (see Figure 6.1). Three discussion threads were identified that kept the delegations in the Council for some time engaged: ‘ionizing radiation’ issue, the issue concerning ‘protected wild fauna and flora species’ and the ‘habitat’ issue (for more details see next section). In the aftermath of the trialogue talks, two other issues appeared in the Council discussions (the ‘correlation tables’ issue and the ‘actualisation of annexes’). In this period, other levels of the Council working structure were also involved in the ECD discussions. According to official reporting, only the Coreper became involved in the aftermath of the ECD discussions, and also the JHA Counsellors (see Section 6.3.4).

Encounters between the European Parliament and the Council delegations on the ECD file were for the first time officially reported in December 2007. Members of the (Portuguese) Presidency team then met the Rapporteur of the JURI Committee (Nassauer) and the Draftsman of the ENVI Committee (Dan Jorgensen). In the first half of 2008, during the Slovenian Presidency, three political trialogue meetings were held. They all took place in a period of only four weeks. The first two were on 17 and, one week later, 24 April 2008. The third and last trialogue at political level took place on 6 and 7 May 2008 (in Strasbourg).

On 21 May 2008, the plenary of the European Parliament adopted forty amendments which corresponded to what was agreed during the trialogue discussions. For the Council, it still took five more months before the issues that arose from the trialogue discussions were solved. In this stage the outstanding issues were mainly discussed at the Coreper level. The JHA Council adopted the final text of the ECD Directive on 24 October 2008. The ECD Directive was eventually adopted by the Parliament and the Council, in first reading, on 19 November 2008.

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6.2.2 Identifying issues, frequencies and changes in the ECD process

Almost all issues revolved around the basic question of how far the legal scope of the ECD Directive and its respective provisions was allowed to extend. Only two issues were about procedural requirements – one concerned the obligation for member states to present ‘correlation tables’ and the other the ‘updating of annexes’ which listed EU’s environmental legislation to which the Directive was to be applied (see Table 6.1; for a more detailed account see Appendix 5). Documents reported quite legal-technical exchanges on determining which types of harmful conduct were considered to be liable to prosecution, which (constituent) elements would provide more precision for the definition of an offence or which environmental interests were to be protected from which type of harmful conduct. The arguments that were reported frequently referred to such legal principles as ‘legal certainty’, ‘legality’, ‘proportionality’ or ‘legal clarity’. The reporting of discussions on issues that concerned the inclusion of ‘ionizing radiation’ or ‘nuclear material’, the definition of the ‘habitat’ offence, or the inclusion of a separate annex with legislation based on the Euratom Treaty also gave the impression that more political concerns were at stake (see Table 6.1).

All in all, three discussion threads were identified which kept the delegations in the Council engaged for some time. These were the ‘ionizing radiation’ issue, the issue concerning ‘protected wild fauna and flora species’ and the ‘habitat’ issue. Debate on another issue was postponed until the Court of Justice settled this issue in a case on a different legislative file. The issue concerned the provision of the ECD proposal on the approximation of the types and levels of criminal penalties. It was part of the question how broad the scope of the Directive should be (see Table 6.1). The national delegations had serious concerns about the of the provision proposed in the Commission proposal, which elaborately prescribed levels and types of sanctions. In the provision, the Commission set out in quite some detail under what circumstances what type and level of (minimum) sanction were to be applied by the member states in case of infringement of environmental protection rules.

This issue was settled by the Court in a case on a third-pillar instrument (a framework decision) concerning criminal law measures against ship-source pollution. In this case, the Commission brought an action for annulment of this instrument contending that approximation of types and levels of criminal penalties should fall within the remit of first-pillar decision making. The Court, however, ruled that the specification of types and levels of criminal penalties did not fall within the Community’s first-pillar sphere of competence (Court of Justice 2007). For the delegations discussing the ECD file in the Droipen it meant that examination of the
Table 6.1 Overview of discussion threads in the ECD process

<table>
<thead>
<tr>
<th>Discussion thread &amp; issue(s)</th>
<th>Outcome</th>
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<tbody>
<tr>
<td>1. ‘Scope of the Directive’</td>
<td>The inclusion of a list of relevant Community (and Euratom) legislation in an annex was maintained and incorporated in the final text of the Report.</td>
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<tr>
<td>How far should the legal scope of the Directive stretch: enforcement of only environmental rules of Community law or also of national law?</td>
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<tr>
<td>Like the national delegations in the Council, the Rapporteur and other MEPs affiliated to centre-right political groups were keen on curtailing the scope by attaching an annex to the Directive with all relevant Community environmental legislation to which the Directive was intended to be applied (European Parliament 2008b: Amendment 27). Some of them (particularly French MEPs) also wanted a separate annex containing relevant Euratom legislation. The MEPs who wished for a broader scope – most of whom were affiliated to centre-left political groups – objected to the inclusion of an annex.</td>
<td></td>
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</table>

approximation of the types and levels of criminal penalties could be set aside in the ECD process. They simply dropped the provision from the ECD text.

Discussions in the Parliament working structures centred mainly on the ‘scope of the ECD Directive’ and the ‘offences list’ (for more details see Table 6.1). Issues that were reported to have some salience at the interinstitutional level were the ‘habitat’ issue, the ‘correlation table’ issue and the ‘actualisation of the annexes’ attached to the ECD Directive (see Table 6.1 for more details). In the aftermath of the triilogue debate, the national delegations in the Council reached agreement on the ‘correlation tables’ issue by means of the adoption of a separate statement in which they questioned the legal basis of the obligation to present ‘correlation tables’.

Official reporting revealed instances of bargaining pressure in relation to the discussions on the ‘habitat’ offence. In this case, the German delegation lifted its reservation concerning the matter, only after the Presidency reached agreement with the Parliament on the final compromise text. A text concerning the ‘habitat’ offence was agreed that was far less detailed than the one preferred by the German delegation.
In all likelihood, the German delegation felt it had to lift its reservation, once it became clear that an overall political agreement both at the Council and interinstitutional level was within arm’s reach and the delegation’s reservation was one of the very few (if not only) stumbling blocks towards that agreement. The ECD process

Table 6.1 Overview of discussion threads in the ECD process

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<tr>
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<tbody>
<tr>
<td><strong>2. ‘Offences list’</strong></td>
<td>In the final text of the Report the basic restrictive approach adopted by the Rapporteur and the more conservative MEPs (of the EPP group) were combined with a few elements proposed by other MEPs that gave a bit more scope to the list. Elements proposed by the ENVI Committee were also taken on board by the Rapporteur in the final Report. While for instance the element of ‘public health’ was not included in the final text, other amendments proposed by the centre-left and left-wing MEPs were taken over and incorporated in the final text of the Report. One such amendment concerned the restoration of the element ‘serious negligence’. A quite elaborated definition of the conduct causing harm to habitats was taken over from the ENVI Committee. The more limited definition of the conduct of ‘possession or taking of protected wild fauna and flora species’, as envisaged by the Rapporteur and other MEPs affiliated to centre-right political groups was adopted in the final text.</td>
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</table>

A significant share of the differences in the JURI Committee centred on the question how and to what extent to curtail or extend the offences list that defined the types (and constituent elements) of conduct considered to be harmful to the environment. The Rapporteur and other MEPs affiliated to centre-right political groups wished for more precision and restriction in the definition of offences. Instigation of negligent behaviour was for example to be left out (European Parliament 2007b). With regard to for instance the conduct of possession or taking of ‘protected wild fauna and flora species’, an amendment was proposed that would narrow the definition of the offence “so as to exclude insignificant cases” (European Parliament 2008b: Amendment 15).

The MEPs aiming for a widening of the scope of the offences list proposed for instance an amendment to include an extra dimension, namely ‘protection of public health’ – on top of ‘protection of environment’ – (Amendment 40 proposed by Monica Frassoni – the ‘Greens’ – Diana Wallis – ALDE – Aloyzas Sakalas – PES – and Dan Jørgensen – PES). Another claim of the latter group was the restoration of the element ‘serious negligence’ that was dropped from the proposal text by the Rapporteur (Amendment 58 proposed by Monica Frassoni – the ‘Greens’ – Diana Wallis – ALDE – Aloyzas Sakalas – PES – and Dan Jørgensen – PES).
### Table 6.1 Overview of discussion threads in the ECD process

<table>
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<th>Discussion thread &amp; issue(s)</th>
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<tbody>
<tr>
<td><strong>1. ‘Scope of the Directive’</strong></td>
<td>This issue discussed in the Council contained two elements. First, there was the question whether the Directive should also provide for the approximation of types and levels of penalties? Second, should the scope of the Directive be limited to ensuring enforcement of environmental rules of only Community law or also include national environmental law?</td>
<td>As regards the first, the original provisions (of the Commission provisional) on the approximation of types and levels of penalties were eliminated (following the Court ruling of 23 October 2007 on ship-source pollution). As to the second element, the Directive should be limited to ensuring enforcement of environmental rules of only Community law. The agreement entailed that a list of Community environmental legislation was to be included in an annex to the Directive (which would further define the scope).</td>
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| **2. ‘Ionizing radiation’** | As in the European Parliament, a substantial share of the discussions centred on issues related to the question how and to what extent to curtail or extend the offences list that defined the types (and constituent elements) of conduct considered to be harmful to the environment. One of them was the ‘ionizing radiation’ issue. Should references to ‘ionizing radiation’ and ‘nuclear material’ be deleted from the draft text? | The references remained in the text, but the ‘unlawful conduct’ notion was altered to the effect that it covered violations of both Community and Euratom legislation (Council Document st8328 of 15/4/2008). The legislative instruments of Euratom legislation that were to be covered by the ‘unlawful’ term, were included in a separate annex (‘Annex B’) to the Directive | Agreement was reached at the Droipen level, on 13 June 2006, five days before the first tria-legue meeting (Council Document st8408 of 15 April 2008). It appeared eleven times in the Droipen and twice at the Coreper level. |
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<tbody>
<tr>
<td>3. ‘Protected wild fauna and flora species’</td>
<td>An extra provision was inserted that was to provide further precision to the term 'protected wild fauna and flora species' – by referring to the Annexes of the 1979 ‘Birds’ and the 1992 ‘Habitat’ Directives (Council Document st15339 of 20/11/2007). Also, a clause was inserted specifying that the conduct concerned should be considered an offence “except for cases where the conduct concerns a negligible quantity [...] and has a negligible impact” (Council Document st08408 of 15/4/2008).</td>
<td>The discussion required seven meetings, all of which were held at the Droipen level.</td>
</tr>
<tr>
<td>3. ‘Definition of habitat’</td>
<td>A clause was added that would demarcate in more precise terms the scope of the definition: “any conduct which causes the significant deterioration of a habitat within a protected site” (Council Documents st06572 of 20/2/2008 and st06749 of 26/2/2008).</td>
<td>It appeared eleven times at the Droipen level, four times at the Coreper, and once at the JHA Council level.</td>
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was rather straightforward not only because of the low number of longstanding issues, which, moreover, revolved around one basic issue (i.e. curtailing the Directive’s legal scope). It was straightforward also because the official documents did not report a crisscross pattern of exchanges between the various levels or venues of discussion (see Table 6.2). Rather, the exchanges that were reported, followed a rather long sequence of discussions held in each institution at one level of discussion. Throughout 2007, the file was mainly, even almost exclusively, examined at working party level in the Council. During 2007 the national experts convened eight times in the Droipen to
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<tr>
<td>5. ‘Correlation tables’</td>
<td>Although many member states were reluctant, the obligation remained in the final text, due to an agreement reached at the trialogue level. In the aftermath of the trialogue agreement, it was eventually agreed in the Council that member states having objections to the inclusion of the correlation table provision, were enabled to make a separate statement that the inclusion of the provision “cannot be construed as establishing any legal obligation” (the delegations supporting the statement were the French, Luxembourg, Portuguese, Romanian, Latvian, Bulgarian, Spanish, Czech, and Maltese). In the statement they explained that directives were only binding as to the result to be achieved while leaving to the member state authorities the choice of form and methods (see Council Document st14242/Add01 of 15/10/2008).</td>
<td>This issue dominated ECD discussions in the Council in the aftermath of the trialogues. It appeared once at the Droipen level and three times at the Coreper level.</td>
</tr>
</tbody>
</table>

discuss the ECD file. The file appeared the Coreper agenda that year only on 5 December 2007 (see Table 6.2). It can be safely concluded that, at least according to official reporting, throughout the year 2007 the national experts of the Droipen took the brunt of the ECD discussions both in the Council and outside. In the European Parliament, the file appeared on the JURI agenda twice that year – on 25 June and 19 December.

Interesting is the comparison with the pattern of discussions on the ‘ECD’ Framework Decision that took place before the ECD process – concerning (almost) the same subject matter. While official reports of the ECD process demonstrated that the file was taken forward mainly at one level of discussion in the Council – at the Droipen level – discussions of the Framework Decision file involved clearly more
Negotiating the Environmental Crime Directive

Since the Commission delegation entered a general reservation on the draft text of the Framework Decision – because of the competence issue – the file crisscrossed as many as four levels of decision making in the Council.

Also interesting is the pattern of internal Council discussions on the ECD Directive that took place in the first half of 2008. Then, the ECD file crisscrossed more levels in the Council. There was an intensification of interaction in the Council between the Coreper and the Droipen. Since January 2008, while the national experts met six times in the Droipen setting, the ambassadors (and most likely also the JHA Counsellors) also discussed the ECD file on six occasions. In the aftermath of the triilogue talks, the national experts met once, while the ambassadors discussed the ECD file three times.

In 2008, an increase in the number of appearances of the dossier also occurred in the Parliamentary Committees. The file appeared on six occasions (once in LIBE, twice in ENVI and three times in JURI). In that period the ECD dossier also appeared on the agenda of a plenary sitting, after agreement on a final compromise text was reached with the Council. Moreover, three trialogue meetings were held in that period. They all took place in a round of three weeks. The first two trialogues were on 17 and 24 April 2008, the last on 6 and 7 May 2008 (in Strasbourg).

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<tbody>
<tr>
<td>1. ‘Actualisation of the annexes’</td>
<td>A recital, instead of an article, was inserted but with the wording that was preferred by the Parliament (see Recital 15 of the ECD Directive).</td>
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</table>

How should the annexes be updated whenever a new legislative instrument in the field of environment protection is adopted? The Council discussed the issue only once and dropped the relevant provision from the text – deciding that the new instrument must expressly provide for its inclusion in the annex (Council Document ST4021 of 17/10/2007, p.2). The Parliament preferred an explicit reference to the procedure – in the form of a legal provision.

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levels. Since the Commission delegation entered a general reservation on the draft text of the Framework Decision – because of the competence issue – the file crisscrossed as many as four levels of decision making in the Council.
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<th>Discussion threads at interinstitutional (trialogue) level</th>
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<tbody>
<tr>
<td><strong>Discussion thread &amp; issue(s)</strong></td>
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<tr>
<td>2. ‘Definition of habitat’</td>
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<td>Among the various elements discussed with regard to the offences list, the definition that would qualify conduct causing harm to habitats stood out. While the Council preferred a relatively looser wording of “significant deterioration of a habitat within a protected site”, the Parliament proposed a significantly more elaborated wording – which was forwarded by the ENVI Committee (European Parliament 2008d: Amendment 29).</td>
</tr>
<tr>
<td>3. ‘Correlation tables’</td>
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<tr>
<td>A comparatively difficult issue at the trialogue level was whether or not to include a provision obliging member states to draw up a correlation table between the national provisions transposing the ECD Directive and the provisions of the Directive itself. The presentation of correlation tables would facilitate monitoring of the implementation of the Directive in each member state. While the national delegations in the Council internally agreed on a rather loose, open-ended formulation of this duty in the form of a recital in the preamble (see Recital 13b in the draft text of for example Council Document st08090 of 9/4/2008), the Rapporteur of the JURI Committee adopted the original version of the Commission proposal which was a stricter formulation in the form of a provision. (In a justification supporting Amendment 36 of the JURI Report of 15 April 2008 it was first decided that the clause was to be moved to a recital. However, according to a later version the clause was reinstated in its original place: Article 9; see column two of the three-column table attached to Council Document st08328 of 15/4/2008).</td>
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</table>

official reporting, there was little evidence of the occurrence of trialogue discussion at the more informal or technical level. Only in December reference was made to prepa-
Negotiating the Environmental Crime Directive

... (continued from previous page)...

Shifts in position acceptance, and (partial) agreements on various aspects of the draft text occurred already in the course of 2007. They concerned minor, legal-technical issues at Droipen working party level (such as a preparation of the lists of relevant Community and Euratom legislation in the annexes). Even issues of greater concern were settled quite speedily in the Droipen in 2007. Such was the case with the settlement of the question whether the ECD Directive should be confined to ensuring only the enforcement of Community law or to apply also to national environmental law (i.e. the overall legal scope of the Directive). Settlement of such issues required comparatively little effort. Agreement on the overall legal scope of the Directive basically entailed the identification and ensuing confirmation of an already existing understanding between the national delegations. The settlement of the issue concerning the provision on types and levels of sanctions merely entailed awaiting a ruling of the Court of Justice on another case that would clear the way in the ECD process.

Issues which have engaged the discussants in the Council for a considerable time were the inclusion of ‘ionizing radiation’ in the list of offences, the definition of ‘protected wild fauna and flora species’, and the definition of ‘significant deterioration of a protected habitat’. With regard to the ‘habitat’ issue, the national experts managed to settle the issue only on 6-7 May 2008 – after the trialogues. Agreement on the ‘ionizing radiation’ and the ‘protected species’ issues was reached earlier, on 10-11 April 2008. There is ground to assume that shifts in position and settlement of possible differences in the Parliamentary Committees could only have occurred in the first half of 2008, that is: after the Rapporteur officially took position with the publication of the Draft Report on the ECD proposal on 6 February 2008. In a round of two JURI meetings agreement was reached on a final text of the Report that combined the basic restrictive approach adopted by the Rapporteur and other MEPs (of the EPP group) with a few elements (proposed by other political groups) that gave a bit more scope to the Directive. Elements proposed by the ENVI Committee were also taken on board by the Rapporteur in the final Report. Such was the case with the incorporation of a more elaborated definition of the ‘habitat’ offence as proposed by the ENVI Committee. The Draftsman of the ENVI Committee (Jorgensen) was even directly involved in drawing up some of the amendments for the final JURI Report (European Parliament 2008d).

### Table 6.2 Overview of the discussions in the ECD process

<table>
<thead>
<tr>
<th>No.</th>
<th>Date of Meeting</th>
<th>Action/Event</th>
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<tbody>
<tr>
<td>1.</td>
<td>Council/Dropen 16 March 2007</td>
<td>discussed</td>
</tr>
<tr>
<td>2.</td>
<td>Dropen 14 May 2007</td>
<td>accepted</td>
</tr>
<tr>
<td>3.</td>
<td>Dropen 1 June 2007</td>
<td>discussed</td>
</tr>
<tr>
<td>3.</td>
<td>JURI Committee 25 June 2007</td>
<td>discussed</td>
</tr>
<tr>
<td>4.</td>
<td>Dropen 24 July 2007</td>
<td>discussed</td>
</tr>
<tr>
<td>5.</td>
<td>Dropen 30 October 2007</td>
<td>discussed</td>
</tr>
<tr>
<td>6.</td>
<td>Dropen 12 and 13 November 2007</td>
<td>discussed</td>
</tr>
<tr>
<td>7.</td>
<td>JHA Council 9 November 2007 (Informal lunch)</td>
<td>discussed</td>
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<tr>
<td>8.</td>
<td>Dropen 26 November 2007</td>
<td>discussed</td>
</tr>
<tr>
<td>9.</td>
<td>Coreper 5 December 2007</td>
<td>discussed</td>
</tr>
<tr>
<td>10.</td>
<td>Dropen 18 December 2007</td>
<td>discussed</td>
</tr>
<tr>
<td>11.</td>
<td>URB Committee 18 December 2007</td>
<td>discussed</td>
</tr>
<tr>
<td>12.</td>
<td>ENVI Committee 19 December 2007</td>
<td>discussed</td>
</tr>
<tr>
<td>13.</td>
<td>JURI Committee 19 December 2007 (Hearing)</td>
<td>discussed</td>
</tr>
<tr>
<td>14.</td>
<td>Dropen 16/17 January 2008</td>
<td>discussed</td>
</tr>
<tr>
<td>15.</td>
<td>ENVI Committee 28 January 2008</td>
<td>discussed</td>
</tr>
<tr>
<td>16.</td>
<td>Dropen 31 January / 1 February 2008</td>
<td>discussed</td>
</tr>
<tr>
<td>18.</td>
<td>Dropen 25 February 2008</td>
<td>discussed</td>
</tr>
<tr>
<td>19.</td>
<td>ENVI Committee 26 February 2008</td>
<td>discussed</td>
</tr>
<tr>
<td>20.</td>
<td>Coreper 6 March 2008</td>
<td>discussed</td>
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</tbody>
</table>
Table 6.2 Overview of the discussions in the ECD process

<table>
<thead>
<tr>
<th>Date</th>
<th>Subject</th>
<th>Discussion Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>12 March 2008</td>
<td>Scope of the Directive</td>
<td>discussed</td>
</tr>
<tr>
<td>26 March 2008</td>
<td>Ionising radiation &amp; nuclear material</td>
<td>discussed</td>
</tr>
<tr>
<td>27 March 2008</td>
<td>Protected wild fauna &amp; flora species</td>
<td>discussed</td>
</tr>
<tr>
<td>8 April 2008</td>
<td>Habitat</td>
<td>discussed</td>
</tr>
<tr>
<td>10-11 April 2008</td>
<td>Actualisation of the annexes</td>
<td>discussed</td>
</tr>
<tr>
<td>16 April 2008</td>
<td>Correlation table &amp; reporting requirements</td>
<td>discussed</td>
</tr>
<tr>
<td>17 April 2008</td>
<td>Offences list</td>
<td>discussed</td>
</tr>
<tr>
<td>6 &amp; 7 May 2008</td>
<td>Inst. Agreement</td>
<td>confirmed</td>
</tr>
<tr>
<td>6 &amp; 7 May 2008</td>
<td>Inst. Agreement</td>
<td>confirmed</td>
</tr>
<tr>
<td>5 June 2008</td>
<td>confirmed</td>
<td>confirmed</td>
</tr>
<tr>
<td>6 June 2008</td>
<td>confirmed</td>
<td>confirmed</td>
</tr>
<tr>
<td>22 October 2008</td>
<td>Inst. Agreement</td>
<td>confirmed</td>
</tr>
</tbody>
</table>

**Discussion Outcomes:**
- **Discussed:** discussed but no shifts in position were reported
- **Accepted:** discussion resulting in an agreement reached on one aspect of the issue
- **Internal Agr.:** discussion resulting in an internal agreement, within the institution, reached on all aspects of the issue
- **Inst. Agreement:** discussion resulting in an interinstitutional agreement, between institutions, reached on all aspects of the issue
- **Confirmed:** internal confirmation of interinstitutional agreement
The amendments that were adopted in the final text of the JURI Report brought the Parliament’s position quite close to that of the Council. Documents clearly reported a shared interest in curtailing the scope of the proposed ECD Directive. There is sufficient evidence to conclude that discussants at the trialogue level did not argue from incompatible positions. Still, there were issues that needed to be settled at this level, such as insertion of the obligation for member states to submit a ‘correlation table’ and the rewording of the definition of the ‘habitat’ offence.

An overall assessment of the relative distribution of discursive effort and position shifts across the various levels of discussion in the respective institutions and between them has led to the following conclusions. Firstly, the Droipen was the key venue of discussion in the Council working structures. Already in 2007 the delegations in the Droipen managed to bring their positions on several issues closer and paved the way towards an understanding on a common Council text in the first half of 2008. In this period, they managed to settle all possible issues in the Council, except for one. It was the issue on the obligation of the ‘correlation table’ that originated from the trialogue negotiations. It necessitated an intervention from the Coreper later that year, in October 2008.

Secondly, discussants in Parliament circles managed to arrive at a common text for the final Report in a round of only two JURI Committee meetings (plus three ENVI meetings). With the Gargani Resolution adopted by the Plenary (in June 2006) as a point of departure most (if not all) MEPs followed a line of caution and restraint with regard to the (thorny) subject matter of criminal law competence in the first pillar of the EU. Thirdly, it resulted in a mandate for the Rapporteur and his team of delegates that was in many ways compatible with the common view held by most national delegations in the Council. In other words, it was in various respects compatible with the mandate of the Council Presidency for its part in the trialogue negotiations. This enabled both parties to come to an understanding, in the form of a first-reading agreement, in a round of three trialogue meetings within three weeks’ time.

6.3 Identifying the nature of discussion in the ECD process

The main purpose of this section is to identify instances of reciprocity and reflexivity in the ECD discussions. Occurrences of insulation and systemic interaction were also taken into account. As in the previous two case-study chapters, it has been done on the basis of first-hand accounts and interpretations of participants and observers who were involved in the ECD process. The accounts and interpretations that were found in a total of thirteen interview transcripts, have been subject to narrative analysis. The
narrative analysis of these interpretations and accounts has been subdivided in four subsections or ‘themes’. First, an assessment of the general nature of the ECD discussions is presented. Subsection 6.3.2 then shifts the attention to the question how the positions of the various parties to the discussions have been viewed by respondents. Analysis then turns (in the subsections 6.3.3-6.3.5) to the internal discussions at various levels in each of the two ‘co-legislating’ institutions: the European Parliament and the Council. Subsection 6.3.6 then shifts the attention to the trialogue discussions at the interinstitutional level.

6.3.1 General nature of the ECD discussions

It was commonly held that discussions on the proposal for the ECD Directive were generally not difficult. A senior official of the Council Secretariat observed that discussions both in the Council and with the European Parliament was an event “where everything was done basically automatically.”\(^{487}\) “It was not one of those sensational files”, he noted.\(^{488}\) A member of a national delegation considered the ECD proposal a file on which “everyone can agree”.\(^{489}\) In Parliament circles, an official could not recall “any big fight” over issues, not between the MEPs, nor between the Parliament and the Council.\(^{490}\) A legal expert at the staff of the Parliament’s JURI Committee considered it “a fact that the Council and the members of the European Parliament were swimming in the same waters”.\(^{491}\)

Recurrent was the explanation that the ground was already prepared, before the ECD discussions actually started. Obviously, reference was recurrently made to the settlement of the competence dispute by the Court ruling of 13 September 2005, prior to the ECD discussions. It cleared the air to the extent that the discussants involved were able to concentrate more on the legal-technical aspects of the ECD file, than on politically contentious issues.\(^{492}\)

Reporting convincingly showed that a lot of effort was made in sorting out the various technicalities of the subject matter. Discussants were indeed quite extensively engaged in discussions on such technical issues as the definition of the concept ‘serious negligence’, ‘harmful effect’, the identification of requirements of legal cer-
tainty or the listing of legislative instruments in the Annexes of the Directive. Mindful of the implications for the practitioners in the field or the technical differences between national legal systems, the attention throughout the process was almost entirely focused on legal-technical detail.

A delegate who attended the ECD meetings at national expert level explained in that light that even though the very notion of having criminal law instruments in first-pillar legislation was "very political", the drafting of the Directive itself was not a big challenge as the political groundwork was already laid. A JHA Counsellor of a Permanent Representation observed that "once you know what the Court of Justice said and you analysed the judgment, then it is more a technical matter: how to sort it all out and how to put everything in place". Similar words were expressed by a senior official of the then DG 'Justice, Freedom and Justice' of the Commission, who noted that:

"what is important to understand here is that the technicians wanted to focus on the substance. Unlike the politicians. For the politicians [...] the question was a matter of principle. The question that the Community should not have the power to deal with criminal law. That was the issue! And it was really a hot issue! I can tell you we had really here a heated debate about this! But once we had the Court's decision, the technicians calmed down and they focused on the definitions of the offences."

The observation that the ECD discussions were a highly legal-technical and (hence) politically harmless affair was not only ascribed to the 'soothing' effect of the Court's decision. Respondents related the relative ease of the ECD negotiations also to the fact that the text material under discussion was largely taken over from other texts that were already talked over or even hammered out in previous decision-making events. In that light it was recurrently reminded that the many elements of the text of the Commission proposal was a copy of the text of its predecessors, the 'ECD' Framework Decision on environmental of January 2003 and an earlier ECD proposal of the Commission.

493 Interviews 4/5/2011 (Qt 337:17); 5/5/2011 (Qt 336:26); 24/5/2011 (Qt 341:65; Qt 341:73 and Qt 341:77); 2/11/2012 (Qt 345:47 and Qt 345:119).
494 Interviews 5/5/2011 (Qt 336:22); and 28/6/2011 (Qt 343:115).
495 Interviews 5/5/2011 (Qt 336:90); and 26/5/2011 (Qt 334:29).
496 Interview 2/11/2012 (Qt345:151).
497 Interview 23/5/2011 (Qt 338:7).
498 Interview 9/5/2011 (Qt 335:9).
499 Interviews 4/5/2011 (Qt 337:29); 24/5/2011 (Qt 341:29); 2/11/2012 (Qt 345:152); and 19/11/2012 (Qt 339:36).
Moreover, important elements of the Framework Decision were in their turn taken up from a document that was negotiated by almost the same people who also attended the discussions on the Framework Decision. This document was the 1998 Convention on environmental crime of the Council of Europe.\textsuperscript{500} Also, a desk officer of the Commission reminded that the provision that replaced the quite elaborate provision on sanctions on legal persons of the Commission proposal was simply copied from similar provisions of previously adopted framework decisions.\textsuperscript{501} The same was done with the provision on criminal sanctions on natural persons.\textsuperscript{502}

In addition to the availability of already existent legislative text material, the examination of criminal law instruments in case of violation of Community rules was not entirely new to the delegations. Legal experts of the Commission’s Legal Service in particular reminded that similar subjects were already discussed on various earlier occasions long before the ECD process.\textsuperscript{503} The question emerged for the first time in the nineties when a directive on money laundering was drafted.\textsuperscript{504} During the drafting of this directive, criminal law provisions were included in the draft text which were later deleted from the final text version.\textsuperscript{505}

Another explanation provided by respondents for the low degree of difficulty of the ECD discussions was that there was a common objective shared by most (if not all) delegations in the Council. That is, the objective of strictly circumscribing criminal law competence in EU’s first pillar. A similar alignment of positions was also at the interinstitutional level, between the Council and the Parliament (more on this will be discussed in Subsection 3.5).

While referrals were made to the relative ease of discussing the ECD file (whether due to shared views, prior familiarization with the subject matter or prior settlement of politically controversial issues), there was however also recurrent reporting of excessive length and complexity of the ECD subject matter. It was in the Council working structures, in particular at the Dripen level, that much time and effort was devoted to the examination of the ECD proposal. In the previous section, it was already mentioned that even though the draft text of the ‘ECD’ Framework Decision proposal was quite similar to that of the Commission ECD proposal, dis-

\textsuperscript{500} Interviews 4/5/2011 (Qt 337:40); and 24/5/2011 (Qt 341:83).
\textsuperscript{501} Interview 4/5/2011 (Qt 337:29).
\textsuperscript{502} Ibid.
\textsuperscript{503} Interviews 24/5/2011 (Qt 341:34); and 23/6/2011 (Qt 340:1).
\textsuperscript{505} Interview 23/6/2011 (Qt 340:2).
cussions on the latter instrument were much more lengthy than those on the former. While agreement on the Framework Decision text required not more than four Droipen meetings (leaving out one Droipen meeting and many other discussions at higher Council levels focusing on the competence issue), the drafting of the Directive proposal required as many as 15 meetings at national expert level.

The impression that the ECD process took so long was expressed by many respondents. On most occasions, surprise was even expressed at the fact that the ECD negotiations were a lengthy process considering that most of the ECD proposal text was already reviewed in the negotiations on the ‘ECD’ Framework Decision. A Commission official expected that it would be a simple “copy-paste” exercise of existent legislative material, but instead it became “a long discussion”. One of the clarifications brought forward by the respondents was that, despite familiarity with the subject matter and the copying of existent legislative material, it was still a technically challenging dossier requiring much legal expertise and time of the discussants. Another legal expert of the Commission’s Legal Service explained that negotiating the ECD file was “a discussion of fine tuning which was rather technically difficult”. He thereby referred to such issues as the definition of the ‘habitat’ offence and the reinsertion of the obligation for the member states to provide ‘correlation tables’.

The senior official of the DG ‘Justice, Freedom and Justice’ of the Commission explained that the question of determining which instrument of the Community environmental legislation was to fall under the scope of the Directive (and hence to be included in the Annexes of the Directive) was cumbersome and time consuming. He noted that:

‘[i]t was tricky! Because what we had to do is to take into account all the already adopted legislation on environmental law. Which was tons of material! All the regulations! All the emission standards, et cetera! Which had been adopted by the Community legislator over the past, I don’t know, thirty years. They all had to be taken into account! There is a very long list of instruments whose breach could be understood as a criminal offence."

There is the shared view among a number of respondents that the reason why national delegations in the Council demonstrated extra care for legal-technical matters was the changed institutional context. One of officials of the Commission’s Legal

506 Interview 24/5/2011 (Qt 341:83; translated).
507 Interview 23/6/2011 (Qt 340:31).
508 Interview 9/5/2011 (Qt 335:8).
Service observed that the rigor with which the ECD text was examined, even though it was considered to be “quasi-identical” to that of the Framework Decision, was to be attributed to the “obvious reason” that a framework decision had far less “impact” than a directive.509 Other respondents in Commission circles were also keen on attributing this institutional aspect to the particular care that was taken in the Council’s Droipen working party for examining the ECD file.

As was explained, the national experts of Droipen habitually worked in a (third-pillar) institutional setting where a mechanism was lacking that would ensure proper implementation or transposition of EU rules into national law.510 The third-pillar arrangement of monitoring and reporting transposition by member states of EU legislation into their national law was far less effective than in the first pillar. This was mainly because of the lack of the possibility to start up an infringement procedure before the Court in case of non-compliance. A respondent who at the time was desk officer at the DG Justice Freedom and Security of the Commission was quite forthright in her evaluation of the quality of the monitoring and reporting system in the third pillar: “the Commission writes implementation reports but nobody cares; and the reports were not very good because we didn’t get very good information [from the member states]”.

With the ECD file it was different. The delegations in the Droipen working party, which were used to the soft compliance mechanisms of the third pillar, had to come to terms with a more efficient compliance mechanism of the first pillar. In the ECD process they were faced with the unusual situation that what they jointly would produce would commit them to more strict rules on transposition, implementation and application of Community law in their national legal systems. It was pointed out that the national delegations became aware that they had to be more cautious on what they were about to agree. In that light, one of the officials of the Commission’s Legal Service noted that for the Droipen delegations examination and adoption of the of the ECD Directive was a different exercise: “it’s not just a gentlemen’s agreement among member states […], but a binding instrument in which it is not possible to camouflage what you should do”.

A Commission official who attended all Droipen meetings on the ECD file, observed that it took some time for various national delegations, which were used to

509 Interview 24/5/2011 (Qt 341:71).
511 Interview 5/5/2011 (Qt 336:15).
512 Interview 23/6/2011 (Qt 340:21).
third pillar rules and procedures, to become fully aware that they were operating in a different institutional setting.

’Soo the whole idea that there would be serious infringement proceedings and that the Commission would have a lot of power in the end … because whatever they agreed on would seriously be monitored and could be subject to a Court ruling. Whatever! I think it took them a long time to get used to it. And to accept it. And, I think, somewhere in the middle of the negotiations, in the Council, when they became more aware or more familiar with this whole set up. Then, they became extremely cautious. Because then suddenly there was this understanding like ‘Wow! This is really serious what we are doing here! Every word can be checked afterwards! We have to be very cautious on what we agree!’ I think on the other hand, in the third pillar, you could always say: ‘Yes, we agree on that! It’s a little bit unclear, but [mimicking Council’s imaginary attitude of indifference] in the end we will all interpret it the way we like. And the Commission can’t do a lot anyway!’’ I don’t know, this was always my feeling.’

It was acknowledged also in Council circles, that the particular attention that was given to the ECD file was related to the change of the institutional setting. A JHA Counsellor who represented a country that also held the Presidency in the ECD period, reported a rather cautious attitude among various national delegations in the Droipen. This attitude was reflected in the need that was felt by the national delegations to ensure what the consequences or implications of the implementation of the Directive would be. The delegations wanted ‘a clear picture of what is exactly meant’, the JHA Counsellor noted. In that light, she observed that delegations were on several occasions inclined to ask questions to the Commission delegation such as ‘What would this obligation exactly imply?’ or ‘How are you going to monitor?’ She concluded that the delegations in the Droipen working party took the matter ‘more seriously’.

The relatively high degree of care with which the Directive was discussed and drafted in the Droipen working party, and the (eventually) perceived need to arrive at a text that would ensure as much as possible that the Commission or the Court would not intervene in the stages of transposition and implementation, seemed also to have reinforced the need to agree on various ECD issues by (qualified) majority, and not by consensus. This aspect was first and foremost identified by members of the Commis-

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513 Interview 5/5/2011 (Qt 336:16).
514 Interview 28/6/2011 (Qt 343:131).
515 Ibid. (Qt 343:127).
516 Ibid, (Qt 343:128).
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mission delegation who participated ECD meetings. One official was quite plain about this:

‘[T]here is] always the risk that in third-pillar legislation based on the unanimity principle everything what you propose is watered down. Whereas in Community law, where you had the qualified majority voting, if one or two member states are not really in favour of a given sanctioning policy, they know they could be overruled by majority voting.’

It was also acknowledged by the JHA Counsellor who as member of a Presidency team closely followed the preparation and supervision of various Droipen meetings. In her account of the nature of the Droipen discussions on the ECD Directive she noted a difference from discussions on framework decisions. She observed that if in discussions on a framework decision unanimity was still not within reach, “we would make some special exceptions for some member states.” With respect to the discussions on the ECD Directive, it was different. She commented in that regard that “you [as Presidency] cannot accommodate everyone”, because otherwise there would be “really bad legislative drafting”. She thereby considered the risk of creating compromise packages where recitals, separate statements or declarations do not have a link with a matching provision in the operative part of the instrument (i.e. the legally binding part). Another respondent explained how assiduously national experts with legal backgrounds usually work in the first pillar in order to arrive at a legally precise and unequivocal text. To him, there is nothing more discouraging than to see certain passages being subject to political compromise at higher levels of Council decision making. At these levels, he noted that:

‘it remains a play of devising compromises. And you are not allowed to behave there as a lawyer. …. Actually, my heart bleeds each time I see texts or directives resulting from one and a half year of negotiations between experts, with the Commission, with the European Parliament and then being subject to … If you then look at them! The label ‘compromise’ is just dripping from every syllable of the text [that is subject to that compromise at higher levels]! Because of the broad provisions. Because of the very vague definitions. Because of the exceptions. […] Sometimes, it’s hopeless! It is just not possible! It really sometimes is too ridiculous for words!’

518 Interview 23/6/2011 (Qt 340:14).
519 Interview 28/6/2011 (Qt 343:21).
520 Ibid. (Qt 343:112).
521 Interview 6/6/2012 (Qt 2:30; translated).
Respondents identified also another reason for why national delegations in the Council took particular care and a lot of time to discuss the ECD file. The particular care and extra time appeared also to originate from a shared need to curb Community competence in the field of fighting environmental crime to the maximum possible extent. As a JHA Counsellor of a Permanent Representation explained, the adoption of criminal law instruments in the ECD instrument “was always ancillary to protecting the environment”.522 Another JHA Counsellor observed that this was all the more important because whatever would be decided on the ECD file it would have far-reaching implications for the future. She reported that a colleague of another delegation warned that “we have to be careful what we put in this Directive, because it’s going to be a model for other, future directives”.523 Similar words have been voiced by members of other national delegations.524 Reference was frequently made in that light, by respondents in national delegation circles, to the particular position that the Commission delegation adopted in the Council discussions.525 In one of these references, suspicion was even expressed with regard to the intentions of the Commission in the ECD process. One of the JHA Counsellors felt that:

“The Commission’s got it’s big plan to issue a proposal. And the states are against that! But then they [i.e. the Commission] are going to proceed anyway. I think it’s just the Commission: they need, in a way, to preserve themselves. They aim, you know, for wider and wider competences.” 526

6.3.2 The Commission’s role in the ECD discussions

In the first pillar, the Commission enjoyed the exclusive right to propose initiatives for legislation. As it was widely known, this right provided the Commission with the leverage to withdraw its proposal whenever it saw fit to do so. In a more refined way, which was also widely known, the Commission had influence in the drafting process also due to the fact that it was more difficult for the Council to enforce modifications which the Commission did not agree to. Instead of qualified majority the Council then had to decide by unanimity. Obviously, one of the motives for the Commission to draw the ECD instrument into the spheres of Community competence was to have

522 Interview 23/5/2011 (Qt 338:3).
523 Interview 28/6/2011 (Qt 343:141).
525 Interviews 4/5/2011 (Qt 333:48); 28/6/2011 (Qt 343:146); and 2/11/2012 (Qt 345:46).
526 Interview 28/6/2011 (Qt 343:146).
more control on a legislative agenda in the field of environmental protection through criminal law.

It was not the first time that the Commission took the position that criminal law was needed as an ancillary instrument in developing first-pillar policies. Basically, the discussion on whether to include criminal instruments in first-pillar legislation for ensuring effective implementation of Community rules stretched back as far as early 1990s. Throughout the 1990s the Commission reconciled with the approach that served more the interests of the Council than its own. As was discussed in the first chapter, the approach consisted of the adoption of a first-pillar instrument containing certain rules and the adoption of a separate third-pillar instrument with criminal penalties in case of violation of these rules (the ‘double-text’ approach). Following this ‘double-text’ approach in the fight against money laundering, the approach was also applied to other Community policies such as the protection of the Community’s financial interests (Council 1995a; 1995b), the protection of the Euro against counterfeiting (Council 1998; 2000) and the fight against illegal immigration (Council 2002a; 2002b).

In Commission circles, officials looked back at this approach with some resentment.527 One of the officials of the Commission’s Legal Service brought to mind that in the money laundering Directive it was provided that

‘member states only have the obligation to adopt adequate, proportionate and dissuasive measures. Like: "Rest assured! It’s not a criminal Directive! Because we say nothing about the nature or type of sanctions!” The half-heartedness of the text! While it was very clear! Everyone knew it was about criminal law! And yet, they did not want to have an instrument of the European Community imposing criminal law obligations on the member states. Why not? Because the member states say: "Criminal law! That is our sovereignty! It cannot be touched" […]

And basically, the proof of this ‘passion symbolique’, of this symbolic contorted behaviour, was actually enshrined in a statement to that Directive. This statement says that the Member States will qualify certain conducts as criminal offences “in accordance with their international obligations”. Or something like that. So what you see is actually that everyone knows that it is about criminal law, but nobody agrees to confirm this in the Directive.528

527 Interviews 24/5/2011 (Qt 341:53); and 23/6/2013 (Qt 340:11).
528 Interview 24/5/2011 (Qt 341:35; translated).
When Denmark responded in 2000 to the invitation of the Tampere European Council to adopt an instrument against environmental crime with a proposal for a framework decision, in Commission circles it was considered that it was time to act. Respondents pinpointed various reasons. One of the reasons was, as a Commission legal expert has put, that

‘environmental law is a rather complicated, complex and detailed area. Where you have rules on birds and rules on plants and rules on how to deal with waste and rules on products that affect the ozone layer and et cetera. It is an extremely complex issue. And there were lots of instruments dealing with every single matter. And the Commission was quite busy in organizing legal acceptance and compliance with all these rules.’

For the Commission it was not only that the environmental policy area consisted of a vast and complicated acquis that required detailed knowledge and a full overview of all different instruments operating in this area (which could only be found at the EU and not at the national level). The Commission was at the time also in the process of making the necessary improvements to the compliance and implementation mechanisms in this area, to which it attached great importance. The Commission considered it not expedient to leave it to the member states. In Commission circles, there was the conviction that the Danish proposal for a framework decision was “really a case in which we really could not accept that the effectiveness of environmental acquis was to be protected with intergovernmental instruments”.

And there were good reasons to see it this way. A Commission legal expert explained that in the environmental area there were many cases of insufficient implementation, lack of implementation, or no implementation which prompted the Commission to bring member states to the Court on a regular basis. These considerations provided the Commission with the arguments to engage in a serious debate with the Council. They placed the Commission, as it has been put, in “a position to persuade.” Upon finding that its arguments were not heard during the negotiations on the ‘ECD’ Framework Decision, the Commission went to court. Interestingly, once it was known that the Framework Decision was challenged before the Court of Justice, the Commission delegation was sent out of the meeting room at one of the Council meetings. It happened at the Coreper level, when the final draft text of the Framework Decision was discussed and sent to the JHA Council for adop-

529 Interview 23/6/2013 (Qt 340:12).
530 Interview 24/5/2011 (Qt 341:52; translated).
531 Interview 23/6/2013 (Qt 340:11).
532 Interview 24/5/2011 (Qt 341:52; translated).
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tion. The motive for this “throwing out” of the Commission delegation from a Council meeting was that recitals (as part of the final text) were also discussed at the meeting. The national delegations included a justification in the recitals on why according to the Council it should be a third-pillar and not a first-pillar instrument. 533 The justification subject to that discussion went, as it was put by a senior official of the Council Secretariat, “straight into the heart of the legal defence of the Council before the Court of Justice”. 534 It was an event that the long-serving senior official never experienced before.

The Commission was well-prepared to engage in the ECD discussions on the ins and outs of both the notion of defining criminal law as an ancillary to Community policy and the subject of protection of the environment against transgressions. For all involved departments of the Commission the subject of protection of the environment was a “textbook example” of a long felt necessity of adopting criminal law instruments in the sphere of Community law. 535

The then Directorate General ‘Justice, Liberty and Security’, the Directorate-General ‘for the Environment’ and the Commission’s Legal Service were reported to have been in full consultation with each other at various levels. 536 While contacts were more intense at desk officer and head of unit levels, exchange on the ECD file were certainly also taking place at the levels of Chef de Cabinet and Commissioners. 537 These internal exchanges were held both during the drafting of the proposal and throughout the participation in the Council discussions (at all relevant Council levels). 538 The Commission delegations that were sent to the Council meetings on the ECD file, always consisted of an official from the DG ‘Justice, Liberty and Security’ and the DG ‘Environment’. 539 The delegated officials were throughout the ECD process also in continuous contact with the legal experts at the Legal Service.

The internal exchanges in the Commission were in various respects of mutual benefit. For example, as the experts of the Legal Service were more distanced from discussion in Council meetings, they were able to be of assistance to their colleagues from the line directorates-general in keeping an eye on the broad picture. The officials from the line directorates-general (DG ‘Environment’ and DG ‘Justice, Liberty and

533 Interview 19/11/2012 (Qt 339:21).
534 Ibid.
535 Interview 24/5/2011 (Qt 341:53).
536 Interviews 4/5/2011; 5/5/2011 (Qt 336:36); 9/5/2011 (Qt 335:32); 24/5/2011 (Qt 341:68).
537 Interview 24/5/2011 (Qt 341:68).
538 Ibid. (Qt 341:29 and Qt 341:87).
539 Interview 5/5/2011 (Qt 336:1).
Security) who had to visit every Droïpen meeting on the ECD dossier sometimes got carried away by technical detail. As it was put by a Commission official from the Legal Service: “while our colleagues [who visited all Droïpen meetings] could, inevitably, not see any more the wood for the trees, we kept on seeing the wood despite the trees”.540

The DG ‘Justice, Liberty and Security’ and the criminal law unit of the Commission’s Legal Service were comparatively young services, compared to the DG ‘Environment’ with its long years of experience. Nevertheless, the legal specialists of these services added valuable substance to internal discussion also because a number of them were drawn from the national justice ministries to the Commission as so-called ‘Seconded National Experts’ – ‘Experts Nationaux Détaillés’.541 As such they provided valuable insights from a member state point of view.

Also, the longstanding experience and the vast amount of knowledge of the DG ‘Environment’ was of significant benefit to the other services of the Commission. Not only because of its expertise in the highly technical and diverse policy area of environment, also because of the experience this department acquired in the long years of dealing with co-decision files. An official at the DG ‘Justice, Liberty and Security’ noticed in that regard that her department was, compared to the DG ‘Environment’, at the time:

’a newcomer, when it comes to the Parliament and anything outside LIBE. We had no idea how to prepare triilogues and how to conduct them. This was all new. So I think the Commission benefited a lot from this experience [of DG ‘Environment’].”542

The experience and expertise the Commission could rely upon was not only of mutual benefit between the various services in the Commission. It also gave its representatives the confidence to engage in debate with third parties or, as it has been put, to rely on “authority”, which was defined in terms of “technical competence”.543

This was also appreciated by some officials of national delegations. Members of the Slovenian Presidency team frequently had meetings with the delegates of the Commission just before each Droïpen meeting to call upon their “extensive knowledge”.544 A national expert observed that during the Droïpen discussions the

540 Interview 24/5/2011 (Qt 341:94).
541 Ibid. (Qt 341:4).
542 Interview 5/5/2011 (Qt 336:57).
543 Interview 24/5/2011 (Qt 341:24 and Qt 341:98).
544 Interview 28/6/2011 (Qt 343:90).
delegates of the Commission were “very cooperative”.545 Appreciation was expressed in both Presidency and national expert circles of the assistance the Commission provided in ensuring progress during the Council discussions.546 Such was for instance the case with the substantial, Commission’s contributions to the detailed work that needed to be carried out in seeing to it that all environmental legislative instruments were reviewed and put, if agreed, on the right place in the Annexes of the Directive.547 Appreciation was also reported in Parliament circles. The policy adviser to the EPP group in the JURI Committee found that the Commission “really put a lot of emphasis on good preparation”.548 Constructive participation of the Commission at the trialogue level was also reported, particularly in explaining the various technical aspects of the file to the Parliament delegation.549 It was even reported that national expert delegations went to Brussels for an informal exchange, outside the framework of official Droipen meetings, with officials of the Commission in order to gain an overview.550

While various referrals were made to the Commission’s constructive behaviour, mostly in relation to its knowledge and expertise, both in Council and in trialogue meetings, instances were also reported where the Commission have tended to be inflexible or adamant as well. Reporting of such instances were made particularly in relation to its being attached to its proposal. They indicated a quality that was different from the traditional role of honest broker which has commonly been attributed to the Commission.

It was the “usual role” of the Commission delegation, as has been commented by an official of the Council Secretariat, to take a stand in the working party discussions, simply because it defended its proposal.551 A respondent who had years of experience in the negotiations of the Droipen (which were usually taking place in third-pillar setting), reported that in the ECD discussions one had to make considerably more effort to successfully engage in an informed debate where also the Commission was involved.552 There was the general view, shared by all respondents that “they, the Commission, always pursue their own interests”.553

545 Interview 2/11/2012 (Qt 345:4).
546 Interviews 28/6/2011 (Qt 343:88); 2/11/2012 (Qt 345:49); and 6/6/2012 (Qt 2:18).
547 Interview 2/11/2012 (Qt 345:49).
548 Interview 11/7/2013 (Qt 344:50).
549 Interviews 28/6/2011 (Qt 343:85) and 19/11/2012 (Qt 339:40).
550 Interview 2/11/2012 (Qt 345:143).
551 Interview 4/5/2011 (Qt 333:51).
552 Interview 2/11/2012 (Qt 345:74).
553 Interview 28/6/2011 (Qt 343:82).
Observations about the Commission pursuing its own interest were also made with regard to its role in the discussions at the interinstitutional level. An official of the Council Secretariat argued that Commission officials often arranged informal meetings with MEPs and officials of the Parliament in order to convince the latter to cancel some of the modifications that were made by the Council to the Commission’s original text.Officials of the Commission confirmed this practice as a natural way of doing business. One of the Commission delegates to the ECD discussions in the Council explained in that regard that:

‘[when] there is a general agreement in the Council, there usually remain certain Commission reservations on issues that the Commission really considers crucial. And that they won’t give up before the whole deal is made. […] Before the Council goes to the Parliament. Before there is a final agreement between Council and Parliament. So on these key issues, the Commission obviously has an interest in getting the Parliament on its side. So the Commission would have informal talks and try to convince the Parliament that these are valid points. That the Parliament should support the Commission. So that is for sure the part before the official trialogue starts.’

Still, even though the Commission pursued its own agenda, it also continued promoting dialogue and knowledge sharing. The Commission was reported to facilitate discussion both during the informal exchanges with the Council and the Parliament in the process leading up to the formal trialogue meetings and during these trialogue meetings themselves. A senior official of the Commission referred to what has commonly been ascribed to the Commission, namely its task as ‘honest broker’ in the discussions between the Council and the Parliament. He observed on that point that:

‘Absolutely! We played the role of the honest broker. And both the Environmental Committee and JURI Committee, which was the lead committee, asked the Commission’s expertise all the time. And we were the ones who knew the file in detail. So they listened to us. They asked questions during the trialogues. And we have offered help and we did draft the compromise text. Solutions! So we went back at the trialogue, redrafted the text, circulated it to members of Parliament and to the Council. And in the next trialogue we agreed on this. We played a very active role in helping achieve a compromise solution.’

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554 Interview 4/5/2011 (Qt 333:47).
556 Interviews 5/5/2011 (Qt 336:50) and 28/6/2011 (Qt 343:91).
557 Interview 9/5/2011 (Qt 335:29).
Other respondents gave a somewhat different meaning to the role that the Commission played during the trialogue discussions. While sometimes it was observed that the Commission assisted the Council in appeasing the Parliament on some thorny issue (during the last trialogue), it was also reported that the Commission helped the Parliament team in strengthening its position on another difficult issue. 558

In the latter case, it was reported that during the trialogue negotiations the Commission team discovered that its position on the ‘correlation table’ issue coincided with that of the Rapporteur and his team. Both wanted to restore the clause obliging the member states to submit a correlation table listing all national provisions and corresponding provisions of the ECD Directive. Presentation of correlation tables would help the Commission in monitoring the implementation of the Directive in each of the member states. The national delegations, which deleted in the Droipen discussions the clause from the draft text, fiercely opposed the Commission’s suggestion to restore it. During the trialogue discussion, however, when the Parliament asked the Commission for argument and detail that would endorse the Parliament’s position in the debate with the Presidency, the Commission was keen on providing the Parliament team with all the necessary details on this topic.

It thus appeared that the widely perceived facilitating role of the Commission to a certain extent coincided with what has been identified as ‘pursuing one’s own interests’. That is, in facilitating a compromise at the interinstitutional level the Commission proceeded in a way that would serve to the maximum possible extent its own interests – which boiled down to preserving the original text of the proposal to the maximum possible extent. This view was confirmed by the respondent who took part in the then Slovenian Presidency team. She witnessed that the Commission can “cooperate with the EU Presidency [….] and they can really influence the Parliament”, “but they always pursue their own interests” 559

More particularly, according to the official of the DG ‘Justice, Liberty and Security’ who participated on behalf of the Commission the trialogue negotiations, there was a marked shift in the Commission’s role from that of actively promoting its interest in the stages preceding the formal trialogues to that of passively facilitating dialogue between the Council and the Parliament while at the same time keeping an eye on its own interests. She put it quite succinctly in the following words:

558 Interviews 28/6/2011 (Qt 343:85) and 5/5/2011 (Qt 336:70) respectively.
559 Interview 28/6/2011 (Qt 343:81).
Officially, the role of the Commission changes. I mean, in a trialogue, the Commission is supposed to be a mediator. A facilitator between the Council and the Parliament. Which it tries to be of course, but I mean also obviously the Commission has a certain interest. It has an initial proposal and it wants an agreement. But obviously it has an interest in an agreement as close as possible to its original proposal. That’s kind of logical!

So, the Commission takes a bit of a more passive stance in the official meetings between the Council and Parliament. In the trialogue meetings, the Commission kind of steps backwards and just has to kind of observe. Maybe mediate if there is disagreement. And give arguments how to reconcile the positions. But officially the Commission is very much in the background.

So, that’s why the Commission does obviously previous work through informal meetings. Like everybody does. The Presidency talks to all the parliamentarians, as we do. You know. They talk to the same people, trying to convince them of the member states’ views. The Commission tries to give arguments why they should maybe not follow their views, if it’s something the Commission thinks it’s really crucial for achieving the goals of its proposal.\textsuperscript{560}

\subsection*{6.3.3 ECD discussions in the Droipen}

As was demonstrated in the previous section, the discussions in the Droipen working party bore the brunt of the ECD process, both in terms of number of meetings and in terms of the length of the period that covered the process. The fact that the discussions at the Droipen level constituted the biggest share of the internal ECD discussions in the Council, reflected the shared view by the respondents that the ECD file was indeed a ‘technical’ file. Of the ‘ECD process, “the main drive was to be found at expert meeting level”, as a Commission official noted.\textsuperscript{561} Issues were more or less already arranged internally, in the Council, at the Droipen level, as it was recalled by a senior official of the Council Secretariat.\textsuperscript{562} A respondent who participated in the ECD discussions as national expert noted that it was “too technical” to leave much room for discussion at higher Council levels.\textsuperscript{563} The examination of the ECD file required “craftsmanship” which could be only found at the Droipen level, a JHA Counsellor

\textsuperscript{560} Interview 5/5/2011 (Qt 336:63).
\textsuperscript{561} Interview 4/5/2011 (Qt 337:28).
\textsuperscript{562} Interview 19/11/2012 (Qt 339:27).
\textsuperscript{563} Interview 2/11/2012 (Qt 345:121).
observed. Only a very few issues (like the ‘habitat’ issue) were left to be discussed at higher levels in the Council.

The share of ECD discussions held in Droipen not only exceeded discussions at other levels in terms of number of official meetings. It also exceeded (by far) in terms of the discussion time devoted to the ECD file during each meeting, both internally and interinstitutionally. While the file appeared as one of the many agenda items during a Coreper or a JURI Committee meeting, it was the only item on the agenda during a Droipen meeting. Moreover, at least five of the fifteen meetings were held in two consecutive days (see Table 6.2). On all five occasions, the ECD file was the exclusive agenda item. Despite all the focus on one file alone, discussions at the Droipen level were still considered a “time consuming affair.” They usually advanced at a slow pace, but occasionally, when the “pressure cooker” was on, they moved forward a bit faster. An official of the DG ‘Environment’ of the Commission who attended all Droipen meetings on the ECD file observed in that light: “we had a lot of discussion. On words! On definitions! Every single word was discussed for hours, hours and hours!”

As in all working party meetings the formal setting of the Droipen meetings did certainly not allow for a smooth running of discussion during a meeting. An increase of the frequency of working party meetings, which on average took place once a month, was simply impossible because the resources and facilities available to the Council did not allow for more. Due to the limited capacity of room and interpretation facilities, a country holding the Presidency had to schedule a series of working party meetings far in advance, even before it actually started to take up officially the role of Presidency. Interactive exchange between delegations during a working party meeting was a difficult affair as well. Due to group size (at the time there were 27 delegations plus the Commission) and the use of interpretation, the exchange of arguments and proposals was severely constrained. A national expert who attended all working party meetings on the file experienced that “after a while you will come to understand that you can simply not intervene enough, because all has to be translated”.

One of the ways to circumvent the constraints imposed by the formalities of a working party sitting was to arrange a temporary suspension during a meeting. It

564 Interview 23/5/2011 (Qt 338:35).
565 Interview 24/5/2011 (Qt 341:91).
566 Interview 2/11/2012 (Qt 345:11).
567 Interview 4/5/2011 (Qt 337:9).
568 Interview 2/11/2012 (Qt 345:10).
569 Interview 4/5/2011 (Qt 333:3).
570 Interview 2/11/2012 (Qt 345:79).
would allow for more interactive exchange between smaller groups of delegations.\textsuperscript{571} During the Slovenian Presidency (in the first half of 2008), it was done on quite a regular basis, as an official of the Slovenian Permanent Representation explained.\textsuperscript{572} A respondent who was national expert on the file had a distinct recollection that there were numerous side meetings during the ECD process. There, he also noted, exploratory suggestions could freely be exchanged, also because there was no interpretation that could hinder exchange.\textsuperscript{573} Also, the Presidency organized preparatory talks, just before the official working party meeting started, in order to acquire more in-depth knowledge of the subject matter.\textsuperscript{574}

Another way that was used to circumvent the constraints of formal working party sittings, was the involvement of JHA Counsellors in the Droïpen discussions. While (particularly smaller) member states with less human and financial resources sent their JHA Counsellors from the Brussels-based Permanent Representations on a more regular basis, some of the member states with more resources (like the large member states) also sent their JHA Counsellors on a frequent basis to the Droïpen meetings.\textsuperscript{575} Reporting indicated that JHA Counsellors of the German and French delegations attended practically all the ECD discussions at the Droïpen level.\textsuperscript{576} It was also reported that more or less half of the delegations present at the Droïpen meetings were represented by JHA Counsellors.\textsuperscript{577}

Their constant availability as Brussels-based delegates (able to convene in a day’s notice) who were moreover experts in the field of criminal justice, was considered to be one of the major benefits, as a former desk officer of the Council Secretariat noted.\textsuperscript{578} As Brussels-based experts in the JHA field, they were more able to facilitate the exchange of proposals and suggestions also outside the formal sittings of the Droïpen working party.\textsuperscript{579} In addition, it was acknowledged by a then national expert that the JHA Counsellors were more experienced with the various decision making procedures and practices in Brussels – including those regarding co-decision

\textsuperscript{572} Interview 28/6/2011 (Qt 343:11).
\textsuperscript{573} Interview 2/11/2012 (Qt 345:86 and Qt 345:90).
\textsuperscript{574} Interview 28/6/2011 (Qt 343:90).
\textsuperscript{575} See interviews 26/5/2011 (Qt 334:17); 28/6/2011; and 2/11/2012 (Qt 345:25).
\textsuperscript{576} Interview 26/5/2011 (Qt 334:2) and (Qt 334:18).
\textsuperscript{577} Interview 2/11/2012 (Qt 345:64).
\textsuperscript{578} Interview 4/5/2011 (Qt 333:6).
\textsuperscript{579} Interview 26/5/2011 (Qt 334:133).
with the European Parliament – than the national experts coming from the home capitals.580

Respondents referred in various wordings to the added value of the presence of JHA Counsellors in the working party discussions. One respondent referred to their skill to “liaise” with the various institutions and agencies in Brussels, which gave them an advantage over the national experts who were less well-acquainted with daily routine in Brussels.581 In this context, it was reported that JHA Counsellors, and also ambassadors of the Coreper, kept themselves informed by attending some of the Committee meetings in the European Parliament.582

In identifying the added value of JHA Counsellors, other respondents referred to their focus on solution instead of on detail, which was believed to have beneficial effect on discussion at working party level when it tended to get bogged down on technical detail.583 While JHA Counsellors were not necessarily experts in terms of close proximity to technical detail of the file under discussion, they were considered as experts possessing the relevant knowledge to engage in an informed debate on JHA matters and to facilitate it. As one of the JHA Counsellors has aptly put: “[w]e have to have the technical understanding but we don’t normally have the technical expertise”.584

Yet, weaknesses were also reported with regard to the involvement of the JHA Counsellors in the ECD discussions. The respondent who at the time was national expert pointed for instance out that it “was sometimes difficult to do business with them as they had an instruction”.585 For most JHA Counsellors the situation was that, while representing their country during a working party meeting, they had to take into account the instruction that was drawn up for them in the home capital by one or several experts in one or more ministries.586 The experienced national expert came with a very apt qualification in that light. He observed that the decision taking at the working party level “gravitated towards the home capital”.587 He explained that for his country it was important to have the experts from the ministries closely involved in

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580 Interview 2/11/2012 (Qt 345:64).
581 Interview 4/5/2011 (Qt 333:9).
582 Interview 2/11/2012 (Qt 345:138).
583 Interviews 23/5/2011 (Qt 338:27); and 6/6/2012 (Qt 2:27).
584 Ibid. (Qt 338:10).
585 Interview 2/11/2012 (Qt 345:25; translated).
586 Interviews 26/5/2011 (Qt 334:68); 6/6/2012 and 2/11/2012 (Qt 345:6 and Qt 345:33).
587 Interview 2/11/2012 (Qt 345:101; translated).
the working party discussions in Brussels, since they were the people who will also have to implement the final outcome of the negotiations.\textsuperscript{588}

Generally, although JHA Counsellors were considered to be (legal) experts in the field of justice and home affairs, they still were generalists always preoccupied with several JHA files while the national experts could concentrate on one file alone. The respondent who at the time was JHA Counsellor on the ECD file also pointed out that close and constant contact with the expert in the justice ministry in the home capital was therefore of major importance.\textsuperscript{589} On this aspect, he observed that he “had just an observing function with quasi-expert status in the preparation and aftermath of the meeting”.\textsuperscript{590} Still, over time, he managed to develop a relationship of understanding and trust with the national expert, which enabled him to make use of a more lenient ‘marge de manoeuvre’.\textsuperscript{591} This was particularly important in the more intense stages when informal consultations, bilateral contacts and multilateral meetings and “spontaneous ideas” were likely to occur more frequently. A JHA Counsellor was then faced with the challenge of providing a quick and adroit response during discussion in the working party meeting while at the same securing support of the national expert who stayed in the national justice ministry.\textsuperscript{592}

Reporting on the ‘marge de manoeuvre’ of the national experts themselves, on the other hand, showed that there was flexibility in their position-taking. A respondent who was national expert at the ECD discussions, reported that as author or co-author of his own instruction he “just” knew how far he could go or what the width of his ‘marge de manoeuvre’ was often without even taking to Brussels with him a written document with the instructions.\textsuperscript{593} Even at times when an instruction was drawn up on the basis of inter-ministerial consultation in the home capital (in this case between Justice and Environment & Agriculture ministries), he still went to Brussels without a written document.\textsuperscript{594}

On those occasions, before leaving for Brussels, the national expert prepared the subjects for discussion and made notes in view of the upcoming Droipen meeting in Brussels. As an experienced negotiator, he was deeply aware of where to draw the lines and what the bottom line of his instruction was (which in his view boiled down

\textsuperscript{588} Ibid. (Qt 345:29).
\textsuperscript{589} Interview 26/5/2011 (Qt 334:33).
\textsuperscript{590} Ibid. (Qt 334:133).
\textsuperscript{591} Ibid. (Qt 334:34).
\textsuperscript{592} Ibid. (Qt 334:28) and (Qt 334:35).
\textsuperscript{593} Interview 2/11/2012 (Qt 345:34).
\textsuperscript{594} Ibid. (Qt 345:35).
the strictest possible definition of criminal law competence in the first pillar). More discussants in the Droipen discussions were reported to act as more experienced negotiators enjoying a more flexible ‘marge de manoeuvre’. Not all national experts, however, were reported to operate in the same way. For instance, the experienced national expert, observed that colleagues from other ministries in his delegation (from the ‘environment’ ministry) were used to other, more structured practices. He also noticed, as a more experienced negotiator, that in the Droipen discussions the less experienced and less secure national experts were more likely to stick to their instructions.

The national experts who convened in the Droipen to discuss the ECD file, were not only criminal-law experts (although they formed a majority). The Droipen meetings on the ECD file also included environmental-law experts who came from the environmental and agricultural ministries. The participation of the environmental-law experts to the discussion was much appreciated. It was, as was pointed out by a respondent, complex subject matter where “you had to combine the elements of criminal law expertise with expertise of environmental law”. A respondent who represented the Commission in the Droipen discussions attached particular value to their contribution in the discussions. Without them, she noted, the criminal-law experts would have been “completely overwhelmed by the technicalities of environmental law”. It was explained that their presence enabled the discussants to engage in an informed debate on matters that required diversity of detailed, technical knowledge of the EU environmental acquis. A senior official of the then DG ‘Justice, Liberty and Security’ observed the following in that regard:

‘it was a very sophisticated and complex discussion, because we had two working parties, basically, merged into one single group, Droipen. […] On the one hand, you had the criminal lawyers arguing the substantive parts of the definition, so what is meant by ‘intentionally’. What is meant by ‘negligence’. What is meant by ‘causing serious harm’. Or ‘the exception from serious harm’. Or ‘non-negligible material’. These kind of things. And then you had the other members of the

595 Ibid. (Qt 345:43).
596 Interviews 26/5/2011 (Qt 334:34) and 2/11/2012 (Qt 345:149).
597 Ibid. (Qt 345:35).
598 Ibid. (Qt 345:111).
599 Interviews 4/5/2011 (Qt 337:37) and 5/5/2011 (Qt 336:93).
600 Interviews 4/5/2011 (Qt 337:37); 5/5/2011 (Qt 336:35); 9/5/2011 (Qt 335:13) and 2/11/2012 (Qt 345:29).
601 Interview 9/5/2011 (Qt 335:13).
602 Interview 5/5/2011 (Qt 336:93).
delegation, who were the environmental lawyers. And who said: "Sorry, this is a bit different because that is not how it is termed in the habitat directive". It was a lengthy and complex debate!  

A difference in attitude between the two expert groups was also noted by another respondent, who found that:

‘the two sides involved had very different perspectives on this thing. I mean, the environmental side being: “All great! We do more protection! More of this, more of that! That’s good!” And the criminal law side being very cautious, and not wanting so much.’

Another advantage was identified in relation to the presence of the environmental-law experts in the Droipen working party. The Droipen usually consisted of criminal-law experts who were used to third pillar decision-making procedures. The environmental-law experts, on the other hand, had longstanding experience with establishing common positions in view of interinstitutional negotiations with the Parliament. In other words, the rules and practice of co-decision procedure were familiar to them. While for them it was “business as usual”, for the criminal-law experts discussing the ECD file in a co-decision procedure was “revolution”. A respondent who as official of the Commission’s DG ‘Environment’ was used to the practice of co-decision, sensed a certain nervousness among the criminal-law experts:

‘the Environment Directive was the first […] chance, really, of adopting criminal law at European level. So the member states were quite nervous about that. It’s new. And they didn’t know what they were creating. Or how the Commission would use its ‘new’ powers.’

Confusion about the legal nature of the ECD instrument was even detected with one of the respondents who then worked at the ‘Criminal Justice’ unit of the Council Secretariat. During the interview she mixed up the ECD Directive with a third-pillar instrument. While, later in the interview, she acknowledged that it was about a Directive that was adopted in co-decision with the European Parliament, she still contended that the provisions of the ECD were “never a first-pillar instrument”.

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603 Interview 9/5/2011 (Qt 335:11).
604 Interview 5/5/2011 (Qt 336:33).
605 Ibid. (Qt 336:96).
606 Interview 4/5/2011 (Qt 337:8).
607 Interview 4/5/2011 (Qt 333:52).
Other respondents, who attended the Droipen discussion noted that delegations had difficulty in appraising the changed situation. A then JHA Counsellor who also experienced the ECD discussion as member of a Presidency team, observed the following in that regard:

“They were not used to it. It was a first pillar instrument. Even my colleagues of the JHA Counsellors meeting, but especially the experts, they were not aware of the co-decision functions. They didn’t know what a ‘trialogue’ is! And how to deal with the Parliament! That was absolutely ‘terra incognita’ for them. [...] So the whole process was to combat, internally, against this misunderstanding that this is a law instrument like each and every other criminal law instrument.”

Several indications were provided by respondents to this unfamiliarity with institutional procedure and practice in terms of an incomplete or slow appreciation of co-decision with the European Parliament. It was observed that it took some time for delegations to get used to the fact that there was a Parliament that also had a say in the matter. One respondent, who represented the Commission in the Droipen discussions, sensed that there was for quite a while a feeling of “We are the Council! And we are going to decide!”

Another noted that most of the instructions in the Droipen with regard to developing a common position vis-à-vis the Parliament boiled down to the recommendation “no compromise”. And another respondent observed that when a common position between the delegations in the Council was within reach, there was this attitude of “now we are almost there!” Still, delegations gradually became eventually aware of the changed situation, also due to the recurrent referral by the Presidency to the interinstitutional exchanges with the Parliament. What also helped was, as recurrently referred to by respondents and already indicated above, the participation of the environmental-crime experts and the JHA Counsellors to the Droipen discussions. As discussed, these discussants were familiar with the rules and practice of co-decision procedure.

The practice of co-decision entailed also the practice of qualified majority voting (QMV). As regards this aspect, it was reported on more than one occasion that

608 Interview 26/5/2011 (Qt 334:76).
609 Interview 5/5/2011 (Qt 336:14).
610 Interview 26/5/2011 (Qt 334:116).
611 Interview 24/5/2011 (Qt 341:81; translated).
612 Interview 5/5/2011 (Qt 336:58) and 28/6/2011.
613 Interviews 26/5/2011 (Qt 334:117) and 28/6/2011 (Qt 343:137).
national experts had difficulty in abandoning the practice of taking into account the position of all national delegations (due to the unanimity rule). A respondent who then was member of the Commission delegation explained that:

‘because there was always the unanimity requirement, there was a lot of understanding amongst member states, that everybody with all their concerns had to be taken into consideration. And that nobody can be too ambitious because we need to reach unanimity.’

The practice of taking into account the position of each and every national delegation due to the unanimity rule, as was pointed out by several respondents, usually resulted in the adoption of instruments that were “watered down” and replete with “special exceptions for some states” and “unclear terms.”

Remarkable was the observation of the respondent who as national expert drew on years of experience with third-pillar decision making. He said that with the unanimity rule he “sometimes had no clue what the other countries thought of certain things.” Exchange of proposal, preference, idea or argument under the unanimity rule seemed thus to be heavily constrained.

With the QMV rule the situation appeared to have changed completely. The senior official of the DG ‘Justice, Liberty and Security’ has put the change of situation for the, say, ‘third-pillar experts’ quite pointedly in the following words:

‘it changes completely the debate! If you know that you can be isolated, because it is qualified majority, you don’t matter anymore! If you are alone you can repeat as many times as you want that you don’t agree with this, that you hate the Court decision, that the Union should not have this competence. It doesn’t matter! You are isolated! It’s qualified majority! Unless you have a blocking minority, with six, seven, eight member states.’

Abandoning the habit of reaching consensus under the unanimity rule involved also the growing awareness that one could not keep on maintaining a reservation while support for one’s reservation is declining. The respondent with years of experience of negotiations at working party level, noticed that during the ECD discussions it was “quite soon that the cards have been dealt”, a majority was formed and that therefore one

614 Interview 5/5/2011 (Qt 336:9).
615 Interviews 23/6/2011 (Qt 340:14) and 28/6/2011 (Qt 343:4 and Qt 334:112).
616 Interview 2/11/2012 (Qt345:78; translated).
617 Interview 9/5/2011 (Qt 335:15).
had to abandon one’s own “individual ideas” quite soon. In that light he also observed that:

‘you have to give up your ideas because you see that there is no support for it. And that, of course, you don’t have any more the instrument of bluffing on veto threat. Which, by the way, must be used with care. That you don’t say: “Listen! As it stands now, I cannot accept it!” Well, you can say it, but in a decision-making process where the qualified majority rule is applied. Well! At a certain moment it becomes clear that you will not make it!

At a certain moment, during the ride, various exclusive ideas came from the environmental department [of the home capital]. Well, I have brought them forward in the course of [Droipen] discussion a couple of times. But at a certain point it became clear that you just have to leave it. It has no point.

Reference was also made, in this regard, to the fear of exposure in the group. The realization that a position or preference on a certain issue did not enjoy the support of a majority in the group dissuaded delegations from maintaining a reservation or forwarding a proposal that opposed the majority’s position. This was, as argued by a Commission official, apparent in the ECD discussion “where member states don’t want to stick out; it doesn’t look nice, if you are against the environmental crime area”.

As discussed earlier, the discussants in the Droipen working party were extensively engaged in discussion that was almost entirely focused on legal-technical detail. Also, what was equally frequently reported was the vivid and informal nature of exchanges in the working party. There was the concurring view among respondents that exchanges in the working party were markedly more interactive during the ECD process than the average dynamic of discussion in a regular Droipen meeting (where third-pillar rules usually applied).

The respondent who had longstanding experience as national expert in negotiations in Droipen on criminal law instruments noticed that in the ECD discussions there were clearly more informal breaks for small-group exchanges than in a discussion on “all these usual third-pillar files”. For the national experts of the Droipen working party, “who were used to operate in third pillar structure”, he observed, “it

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618 Interview 2/11/2012 (Qt345:60).
619 Ibid. (Qt 345:61; translated).
620 Interviews 5/5/2011 (Qt 336:25) and 2/11/2012 (Qt345:96).
621 Interview 2/11/2012 (Qt345:96).
622 Interview 2/11/2012 (Qt345:90-93).
was more intensive and, yes, doing more business”\textsuperscript{623} Another respondent noted that “in the co-decision you just had to do a lot of drafting and redrafting” during what she referred to as “side meetings”\textsuperscript{624} Yet another respondent noted that there were “a lot of discussions on the side.”\textsuperscript{625} The JHA Counsellor who took part in the Slovenian Presidency team during the first half of 2008, noted that “\textit{it was a lot of work for the Presidency, more than before, when you had to do a deal only in the Council}.”\textsuperscript{626}

To the national expert with years of experience in the Droipen working party, it was evident that in the ECD process there were a lot of side meetings during the short adjournments which enabled small groups of discussants, without intervention of interpreters, to freely discuss in one language (English) the issues that were of great concern to them.\textsuperscript{627} He noted that in these side meetings there were often native speakers who facilitated the redrafting of texts. Often, delegates of the Presidency, the Commission and the Council Secretariat, were reported to be regularly present to provide expertise in these discussions in the margins of plenary discussion.\textsuperscript{628}

Side meetings were generally considered to be “creative”, “explorative” or “constructive”.\textsuperscript{629} The benefit of these vivid, creative exchanges were particularly noticeable during two-day meetings. Five of the fifteen Droipen meetings on the ECD file were two-day sessions. It was observed, in that light, that usually at the second day, after lunch, a new concept was introduced that pushed the discussion forward.\textsuperscript{630} Meaningful was the praiseful qualification of the Droipen discussions by the respondent who on behalf of the Commission defended the ECD proposal in discussion with the national delegations in the working party. She observed that whilst debate on such principled issues such as the levels and types of sanctions was a “no-go” for the national delegations in Droipen:

\begin{quote}
‘on the more detailed things, I always thought people were really constructive and trying to find solutions. And there was a lot of personal contact. Really lots of people calling and asking things like “Okay, here we have this and this problem in our national system. We have to find a solution for that.” And then we would really discuss what we can do to accommodate it. I mean, the delegations in the Council and the member states had contact. There were always the more active
\end{quote}

\textsuperscript{623} Ibid. (345:66).
\textsuperscript{624} Interview 28/6/2011 (Qt 343:51).
\textsuperscript{625} Interviews 5/5/2011 (Qt 336:87)
\textsuperscript{626} Interview 28/6/2011 (Qt 343:51).
\textsuperscript{627} Interview 2/11/2012 (Qt345:86).
\textsuperscript{628} Interviews 4/5/2011 (Qt 337:33); 6/6/2012 (Qt 2:18); and 2/11/2012 (Qt345:90-91).
\textsuperscript{629} Interviews 5/5/2011 (Qt 336:91); 28/6/2011 (Qt 343:107); and 2/11/2012 (Qt345:97).
\textsuperscript{630} Interview 2/11/2012 (Qt345:14); (Qt345:58); and (Qt 345:84). 

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ones. There is always a group of some [delegations] that are more active from the rest that is just sitting there, waiting for things to happen. And there were those people who talked a lot over the phone with the [home capital]. I really liked going to the Council because there was a good atmosphere. I always enjoyed it.631

For the national expert (with years of experience in third-pillar negotiations) it was a new experience to see an interactive exchange of views that involved both the national delegations and the Commission delegation.632 He particularly noted, in this regard, that during the informal side meetings “every effort” was made to get the message across.633 He also found that the situation on the ECD file was quite the opposite of what he experienced in a regular third-pillar discussion, i.e. delegations usually had difficulty in appraising each other’s position.634

 Instances were also reported where the discussants had difficulty in engaging in interactive or constructive discussion, but these instances were related only to the initial stage of the ECD process. It was for instance indicated that some of the delegations initially tended to regularly express what their “red line” was.635 There was also the comment that “in the beginning everybody had their statements written from home, and they just read that statement”.636

 Some delegations were even reported to be dismissive of the ECD proposal at the beginning.637 In particular, the respondents who participated in the Droipen discussions on behalf of the Commission, noted a lot of disapproval among the national delegations regarding the Commission’s proposal.638 In that light, one of the Commission officials described a highly critical attitude of one of the delegations in the following words:

I mean in the beginning it always starts that we present our proposal, and then every member state can make a statement. A general statement. About the Commission’s proposal and the initiative. And [one delegation] gave a very negative statement, stating that “Yes we do accept the ruling, but… “ And then they presented their interpretation of the [Court] ruling, which was very restrictive. Saying that “Even if there could be a competence of the Community, you still have to

631 Interview 5/5/2011 (Qt 336:88).
632 Interview 2/11/2012 (Qt 345:74).
633 Ibid. (Qt345:70; translated from Dutch: “uit mijn sloffen lopen”).
634 Ibid. (Qt 345:74).
635 Interview 28/6/2011 (Qt 343:159).
636 Interviews 4/5/2011 (Qt 337:23)
637 Interview 5/5/2011 (Qt 336:11).
638 Interviews 4/5/2011 (Qt 337:14) and 5/5/2011 (Qt 336:11).
check whether the measure is really necessary for better implementation of the environment policy.”
And “You will have to prove that for every single offence that is listed”. And “You also have to examine in accordance with the subsidiary principle. You could achieve this objective better at national level.” And so on.639

The respondent who participated in all the Droipen discussions as JHA Counsellor and later also as member of the Slovenian Presidency team, found that delegations became more flexible due to the many bilateral meetings that were held in the course of the ECD discussions. She explained that it was during these meetings one was more able to take the effort to better understand the first-pillar situation and the concerns of the other.640 More or less the same view was expressed by the Commission officials who attended all ECD discussion in the Droipen. One of them reported:

‘the more discussions we had, the more, we, the Commission, could explain why we needed this and what we wanted. And that we don’t want to take over their whole criminal law system and make it an EU wide system. But that really our objective was only to ensure a better protection of the environment. And that we wanted to leave them as much flexibility as possible. Leave them their legal and criminal law traditions. It was an extremely important point for the member states. Once they believed that this was our objective, the atmosphere got much better and the cooperation worked very well.’

There was also the concurring view among a few respondents that the discussions, both during plenary meeting and exchange ‘on the side’, were also geared towards setting the right tone. References were recurrently made in that light to “building trust”, “creating understanding” or “getting to know each other better”.642 The other Commission official (than the one of the just quoted passage) considered the atmosphere in the working party and the increasing familiarity with the subject matter to be conducive to the remarkably interactive nature of exchange in the Droipen. She saw that:

‘in the beginning everybody had their statements written from home, and they would read that statement. Then, the more they got to know each other, the more they got to know the file, the more confident they felt. To react immediately to a proposal made by someone else. And to say ‘yes, I

639 Interview 4/5/2011 (Qt 337:14).
640 Interview 28/6/2011 (Qt 343:156).
641 Interview 5/5/2011 (Qt 336:11).
642 Interviews 4/5/2011 (Qt 337:15); 5/5/2011 (Qt 336:11); and 2/11/2012 (Qt345:39) and (Qt345:58).
Reporting on the exchanges at the Droipen level not only showed that they were interactive and constructive, it also suggested that discussants were responsive to each other’s argument. As it was mentioned in the just quoted passage, “other aspects” were brought into the discussion, which indicated that in the course of discussion discussants were challenged to bring in fresh ideas and points of view that were believed to bring the discussion further.

New arguments that were introduced and shared by the discussants in the course of a meeting, appeared also to have been shared with the ministries in the home capital (through mobile phone) during the meeting itself. It was taken that these exchanges with the capital during a Droipen meeting were held in order to inform and convince the capital of the changes occurring during the discourse between the Droipen delegations.644 One of the respondents who noted this aspect of exchanges at the Droipen level, referred in that regard to the ability of the delegates to “to sell their case and get their governments to move”.645

More respondents acknowledged this dynamic of new insights and views following from exchanges of argument. The JHA Counsellor of the Slovenian Permanent Representation stressed the importance of understanding the other’s argument and “rethinking things”, also because of the technical complexity of the subject matter.646 The Presidency, as she explained, was particularly attentive to fostering understanding among delegations during the informal side meetings.647 The respondent who had years of experience in third-pillar negotiations at national expert level, observed that, whilst in third-pillar discussions one even sometimes did not have a clue of what the other delegation was thinking, in the ECD discussions he reported that:

‘sometimes one could, on the spot, through discussion and exchange of views, come up with new arguments. And that’s also often what I enjoyed most. When there, in the group, really a dynamic

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643 Interview 4/5/2011 (Qt 337:23).
644 Interviews 5/5/2011 (Qt 336:27) and 2/11/2012 (Qt:345:126).
645 Interview 5/5/2011 (Qt 336:27).
646 Interview 28/6/2011 (Qt 343:157).
647 Ibid. (Qt 343: 166).
was emerging whereby the countries really spoke their mind, which you then could discuss further.\textsuperscript{648}

6.3.4 ECD discussions at other levels in the Council

There is no doubt that the share of (discursive) effort and attention devoted to the ECD file in the Droipen working party exceeded by far the effort made at the other levels of the Council. Still, some attention was given to the file at other levels. As for the CATS, only one meeting was reported where the ECD file (in particular the ‘habitat’ issue) came to the attention of the senior officials.\textsuperscript{649} One respondent expressed doubts about the added value of the CATS involvement in the ECD discussions.\textsuperscript{650} As for the JHA Counsellors – as a group – documents reported that they discussed the file only on one occasion, when the outcome of the ECD discussions and ensuing voting in the European Parliament was reported back to the Council.\textsuperscript{651}

Nevertheless, the JHA Counsellors were on an individual basis quite closely involved in the ECD discussions at national expert level, in the Droipen. At least half of the national delegations in the working party had a JHA Counsellor. Evidence also indicated involvement of JHA Counsellors in both the side meetings of the official (plenary) Droipen meetings and the bilateral contacts outside these plenary meetings.\textsuperscript{652} Reporting showed as well that some of them were even the delegates exclusively taking the floor on behalf of the delegation in the Droipen meetings.\textsuperscript{653}

Relevant in this context is the qualification “informal configuration of working parties”, a qualification that was used by one of the respondents (an official of the Council Secretariat) to explain the role of the JHA Counsellors – as a group – for the development of the ECD discussions in the Council.\textsuperscript{654} Their role was believed to be particularly important in stages when frequency and intensity of contacts increased particularly due to the need to bring the process to a conclusion or the need felt by the Presidency to report back to the Council on the latest developments of discussion with the Parliament at the interinstitutional level.\textsuperscript{655} In such circumstances when time

\textsuperscript{648} Interview 2/11/2012 (Qt345:74; translated).
\textsuperscript{649} Interviews 28/6/2011 (Qt 343:143) and 19/11/2012 (Qt 339:28). See also Council Document st09271 of 16/5/2008.
\textsuperscript{650} Interview 2/11/2012 (Qt345:103).
\textsuperscript{651} Interview 4/5/2011 (Qt 337:25).
\textsuperscript{652} Interview 26/5/2011 (Qt 334:133).
\textsuperscript{653} Ibid. (Qt 334:2) and (Qt 334:19).
\textsuperscript{654} Interview 4/5/2011 (Qt 333:2).
\textsuperscript{655} Interview 2/11/2012 (Qt 345:106).
was pressing and a last-minute meeting was needed, the convocation of JHA Counsellors’ group made more sense than the organization of a (large-scale) national expert meeting.656

The involvement of the JHA Counsellors in the ECD process was not only manifest in their attendance at plenary meetings and informal exchanges at the Driopen level. Their involvement in the ECD discussions also took the form of assisting the ambassadors of the Coreper on the file and preparing the file for an upcoming Coreper meeting. Their role at the Coreper level consisted mainly, as was pointed out by several respondents, of summarizing the outstanding issues arising from the working party discussions to their respective ambassadors.657 It was recurrently explained in that regard that the ambassadors of the Coreper had to cope with a lot of different policy areas and related agenda items and that the specialized assistance of the JHA Counsellor on matters of JHA importance was indispensable.658

According to one respondent, who at the time was JHA Counsellor, it was more than just summarizing outstanding issues for the ambassador. To him it was rendering the quite technical instruction from the ministry in the home capital more amenable to discussion between generalists at the Coreper level.659 In that light he explained:

“I wrote my own briefing paper based on these instructions where I translated the instruction in a language that was understandable for the ambassador. And it could be that the content of my paper was slightly different from the paper of instruction. It should not be. But it could be, if, for example, the instructions were not helpful in a certain manner, then you should have the freedom to say: ‘Well, this is an instruction but at this point it cannot be really understood by [other delegations]. So I would advise you not to speak too vividly and too loudly and too lengthy about this problem. This is a part of the instruction which is not helpful for our own negotiation position’.” 660

What the respondent of the just quoted passage basically conveyed, was that a JHA Counsellor had to ensure a certain degree of independence from the national instruction so as to enable the ambassador to engage in a discussion, at the Coreper level, in

656 Interview 4/5/2011 (Qt 333:13).
659 Interview 26/5/2011 (Qt 334:62).
660 Ibid. (Qt 334:45).
a manner that could be inconsistent with the instruction of the national justice ministry.

Usually, in a Coreper session, whenever issues were still open, ambassadors would however only read out (a summary of) the instruction, as was explained by a respondent who as a Commission delegate regularly attended Coreper meetings.\textsuperscript{661} If there were no outstanding issues in the instruction, the ambassador would then just remain silent, as another respondent pointed out.\textsuperscript{662} The Commission official who regularly attended Coreper meetings, explained that this way of working at the Coreper level was done to test the waters as to whether a majority was taking shape.\textsuperscript{663} If a majority was not yet identified, then the file would be sent back to the working party for further discussion. In the ECD process there were a “very few” delegations at the Coreper level that read out their instructions (as there were only a few outstanding issues).\textsuperscript{664}

Securing independence from national instruction for discussions at the Coreper level was not easy for a JHA Counsellor. It could place the JHA Counsellor in a difficult position, as was explained by the respondent who was JHA Counsellor during the ECD discussions.\textsuperscript{665} On the one hand, both as an employee of the national justice or home affairs ministry and as a JHA expert, the JHA Counsellor would feel obliged to operate in accordance with the line set out by his national ministry. On the other, as an official seconded to the Permanent Representation in Brussels and as an adviser to his direct superior at the representation, the ambassador, he would have also to take into account the objectives of his superior. And the objectives of the latter did not necessarily coincide with the policy line set out by the justice or home affairs ministry. In this regard, the former JHA Counsellor observed that:

“for a JHA Counsellor it is difficult time to answer because you have to be loyal to your Ministry of Justice. But on the other hand you are working here in Brussels and the ambassador is your formal superior. So one who can make your day to day life really tough. So you should not bluntly say “Oh no Mr. Ambassador, it is not up to you to question the opinion of the competent ministry!” That would not be helpful for your working relationship with the ambassador. So you have to find a way to explain why the colleagues in [the home capital] are thinking this is really an important thing without attacking openly the opinion of your ambassador. And especially if

\textsuperscript{661} Interview 4/5/2011 (Qt 337:26).
\textsuperscript{662} Interviews 19/7/2010 (Qt 102:26).
\textsuperscript{663} Interview 4/5/2011 (Qt 337:26).
\textsuperscript{664} Ibid.
\textsuperscript{665} Interview 26/5/2011 (Qt 334:49).
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you have e a very strong ambassador, he would just not care about the opinion of the Ministry of Justice.\textsuperscript{666}

The respondent made it strikingly clear that ambassadors in the Coreper followed quite a different approach of engaging in discussion, which was far less technical than the exchanges at other Council levels. Another respondent emphasized that the main concern at the Coreper level was credibility of the country they represent in the long run than the technical concerns of a line ministry on a certain file.\textsuperscript{667} The former JHA Counsellor attributed this difference to the fact that the Coreper ambassadors were attached (and therefore loyal) to the ministry of foreign affairs and not to the line ministry (such as the national justice ministry) that was competent on the issue under discussion in Coreper. Other respondents expressed similar views on this sort of approach adopted by Coreper ambassadors.\textsuperscript{668} The respondent who was JHA Counsellor during the ECD process, described the approach of the Coreper ambassador in the following way:

“\textquote{in cases where] he just knows that the instruction of the Ministry of Justice is for his own minister [of Foreign Affairs] not really the right way to proceed. Then he takes this instruction, of course in a form of loyalty, but in a way that he distances himself from these instructions at the meeting. For example by saying ‘Dear colleagues, well we have this very special point from [the home capital], and I would like to remind you that our point, the point which was raised at working party level has not changed in the instructions.’ Then everyone feels that the ambassador is not sharing this point and it may be that this point then is already outvoted in Coreper.

And then he reports back to the Ministry of Justice “Oh yes we had this opinion, but twenty countries were against this point. You should reflect on this, so please do not proceed on this line.” So that’s the way the Ministry of Foreign Affairs can really torpedo, can really hinder the other ministries from getting points that the Ministry of Foreign Affairs sees as harmful for European integration. For the foreign policy of Europe.\textsuperscript{669}

This portrayal is much in line with the observations other respondents made on discussions at the Coreper level. A national expert noted in that regard that at the Coreper level it is more about making choices than about engaging in exchanges on

\textsuperscript{666} Ibid. (Qt 334:57).
\textsuperscript{667} Interview 6/6/2012 (Qt 2:22).
\textsuperscript{668} Interviews 19/7/2010 (Qt 102:26) and 6/6/2012.
\textsuperscript{669} Interview 26/5/2011 (Qt 334:56).
substance. An official of the Commission delegation who attended Coreper discussions on the ECD file, pointed out that “often ambassadors don’t want to be seen as the one blocking all the time; so they kind of push their governments to reconsider”. The JHA Counsellor who was member of the Slovenian Presidency team recalled that during the first half of 2008 on two occasions the ambassadors were involved in a more interactive exchange on the file. These discussions were held just following the triilogue meetings with the delegation of the European Parliament. At that stage, the ‘habitat’ and the ‘correlation table’ issues needed to be resolved internally in the Council. It is safe to assume that exchanges on these issues at ambassadorial level followed the dynamic just described.

There was clearly less animosity in the discussions on the ECD file at the ministerial level of the JHA Council. Exchanges at ministerial level on the subject matter, as was reported, “were very formal and the result was clear […] in advance”. It was more about “ticking-off” items from a list. As was pointed out by the respondent who took part in the Slovenian Presidency team at the time, the ECD file was, in the first half of 2008, presented to the JHA Council as an “information point” or an A-point – i.e. a point on which agreement was already achieved at lower levels in the Council. Moreover, the ECD dossier was so technical that it prevented the more assiduous ministers from getting caught in extensive discussion. It was the decision-making level where “it was very clear that you cannot fix the sentences”, as was observed. A respondent who attended the JHA Council meetings as member of the Commission delegation, observed the following in that regard:

“I mean, which minister wants to say for [a] very technical reason: “I don’t want to support the European fight against environmental crime”. I mean it’s the higher up you go, the less inclined people are to raise these more technical concerns.”

Another respondent acknowledged that the ECD file was too technical a file for being subject to extensive discussion in the JHA Council, but he also added that in general it

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670 Interview 6/6/2012 (Qt 2:22).
671 Interview 5/5/2011 (Qt 336:31).
672 Interview 28/6/2011 (Qt 343:169).
673 Interview 26/5/2011 (Qt 334:65).
674 Interview 6/6/2012 (Qt 2:24).
675 Interview 28/6/2011 (Qt 343:168).
676 Interview 26/5/2011 (Qt 334:71).
677 Interview 5/5/2011 (Qt 336:32).
is not unthinkable a more interactive exchange between the more committed ministers:

'some ministers are really interested in some dossiers. And they are very intelligent people. And they can really discuss! They can really counter-argue! And if a minister is really capable of understanding the dossier and weighing the arguments. Then! You can really have a discussion on it. But only with those few ministers who are also in that state of being very, very firm on the content. And it has to be a very, very important dossier on which each and every minister don’t want to be un-briefed. It can be even those who are not so motivated to come to Luxemburg, that they have to do a little bit more than just to read a paper that is in front of them. But in very technical dossiers you seldom will find other ministers who would like to argue with the same fierce intensity on points that are not that political. So it is really up to the political importance of the negotiation topic and to the personality of the minister. Whether he is really interested in EU Affairs.'

6.3.5 ECD discussions in the European Parliament

As discussed earlier, the so-called ‘Gargani’ Resolution on the implications of the Court ruling on the ‘ECD’ Framework Decision already set the tone of the internal discussions in the European Parliament on the ECD Directive before they even started.679 With the Resolution, passed by plenary session on 14 June 2007, the Parliament welcomed the decision of the Court that the ECD instrument was to fall within the Community’s sphere of competence. It thereby also adopted a line of caution and restraint on this delicate subject matter. It should not come therefore as a surprise that respondents reported a general atmosphere of consensus in the Parliament on the basic orientations with regard to the ECD file. There was consensus “already from the start”.680 It was “obvious”, as a staff member in the Parliament remarked, that the Parliament was “interested in having everything at that time in co-decision, so to bring it out from the intergovernmental process”.681

The leading MEPs in the ECD discussion, regardless of their political affiliations, were “quite united” on the subject matter as another Parliament official noted.682 It was even suggested that the Draft Report on the ECD Directive, which was tabled by the Rapporteur – Nassauer – on 6 February 2008, was already viewed at

678 Interview 26/5/2011 (Qt 334:69).
679 Interviews 2011/6/10 (Qt 342:19) and (Qt 342:55) and 11/7/2013.
680 Interview 11/7/2013 (Qt 344:6).
681 Interview 10/6/2011 (Qt 342:11).
682 Interview 11/7/2013 (Qt 344:27).
as practically the basis for a mandate for the Rapporteur to conduct negotiations with the Council at the trialogue level. Most amendments proposed by the fellow MEPs in the JURI Committee were in line with the position taken by the Rapporteur – who himself was member of the Christian-Democratic EPP (European Parliament 2008c). The amendments that reflected most the position of the Rapporteur were proposed by MEPs of the EPP political group. The EPP was, with 12 MEPs, the largest group in the JURI Committee (which consisted of a total of 24 members). Second came the PES, with eight members. Amendments coming from MEPs of other political groups differed to the extent that they aimed for some extension of the Directive’s scope (for more details see Table 6.1). Amendments from these MEPs were however not incompatible with the Rapporteur’s position. Like the amendments proposed by the Rapporteur, most amendments of other MEPs – regardless of their political affiliation – generally aimed at defining more precisely the provisions, terms and definitions of the draft Directive.

Against this backdrop, comparatively little effort was needed to overcome the differences that were still present in both the JURI Committee and at the Parliament’s plenary level. This was also for more practical reasons. With regard to the JURI Committee, a respondent who (regularly) visited and followed the debates in the JURI Committee on the ECD dossier (as official of a Permanent Representation), observed that

“The rest of the Committee was mostly not that interested in the dossier. With the exception that you have questions of common, general political interest. So [such a detailed issue as] ‘punishing legal persons’ was not very sexy for somebody who has other dossiers, other subjects to follow. So it was not that wide of an interest that you really have a discussion on this at Committee level. You have only discussion on it at Shadow Rapporteur - Rapporteur levels. And there you had Mr. Nassauer with very strong personality. And with very strong arguments.”

A legal adviser in the Parliament staff remarked that “there was not a great deal of political argument” in the JURI Committee. Considering these observations on the limited attention towards the ECD file, it is perfectly conceivable that even less attention was given to it in the other committees that were also involved in the ECD process – the ENVI and the LIBE Committees. As regards discussion at the Parliament’s plenary

\footnotesize{\textsuperscript{683} Ibid. (Qt 334:66).}  
\footnotesize{\textsuperscript{684} Interview 26/5/2011 (Qt 334:124).}  
\footnotesize{\textsuperscript{685} Interviews 10/6/2011 (Qt 342:47).}
level on the ECD file, it was reported that the file “was too detailed to be of general interest in the debates in plenary session.”686 As a matter of fact, when the file appeared on the agenda of plenary debate, held on 19 May 2008, it was the subject of only a set of speeches or statements.687

The little attention that the file received at the committee and the plenary level, should not come as a surprise. The MEPs faced such a multitude of activities and a wide range of files, that it was practically impossible for them to engage into an informed debate on each and every file that came to their attention, whether at committee or at plenary level.688 Moreover, they had to cope with this heavy workload within the constraints of limited resources. In that regard it was noted that whilst a directorate-general of the Commission, or of the Council Secretariat, had staff of at least seventy officials at its disposal, the standing committees of the Parliament were left with no more than ten administrators each.689

For all the concurrent views in the Parliament on the basics of the ECD file, it would be rash to conclude that discussions in the Parliament took place without any difficulty. At inter-committee level, even though differences there were not insurmountable either, difference in focus was still present. While (obviously) the ENVI was more focused on environmental protection, the JURI was more on legal precision and legal certainty. A Commission official who conducted business with the Parliament delegates on the ECD file, reported that while the JURI Committee was “extremely conservative”, the ENVI Committee was “super-supportive” (of the Commission proposal) and having “very ambitious amendments”, sometimes even “a bit over the top”.690 A respondent who at the time was policy adviser to the Christian-democratic EPP group, recalled that there was insistence from the ENVI Committee side on “one or two points” which were considered “red line” issues (that is: issues on which ENVI was not willing to concede).691 A closer look at documents suggests that the points on which the positions of the two Committees were likely to differ, concerned the issues of a more elaborate definition of the ‘habitat offence’ and the restoration of the element ‘serious negligence’ in the offences list (for more details see Table 6.1).

686 Interview 26/5/2011 (Qt 334:128).
688 See also Corbett et al. 2007: 57-59.
689 Interview 19/11/2012 (Qt 339:15).
690 Interview 5/5/2011 (Qt 336:37).
691 Interview 11/7/2013 (Qt 344:29).
In the first-reading stage of a co-decision procedure, the Rapporteur usually enjoyed considerable leeway in negotiating a file with the Council.692 This was attributed to the informal nature of first-reading procedure, where the steps and decisions of the Rapporteur were not entirely subject to formal rules.693 As a result, the Rapporteur had the opportunity to minimize intervention of other MEPs – i.e. Shadow Rapporteurs and Draftsmen – to the minimum possible extent. It was explained that a Rapporteur in a first-reading stage could actually conduct negotiations with the Council Presidency “without prior notice” and without prior meetings with Draftsmen, or Shadow Rapporteurs and other leading figures of the Committee of which the Rapporteur was a member. In the ECD process, however, the Rapporteur was opposed to the idea of reaching first agreement, for reasons of lack of transparency.694 Nassauer actually held five to six preparatory meetings with the Shadow Rapporteurs of the JURI, the Draftsman of the ENVI Committee before and during the trialogues at the interinstitutional level in order to maintain continuous exchange among the various views and positions on the ECD subject matter.695

Data showed that, rather than a debate at the plenary, committee, or intercommittee level, interactive discussion took place at interpersonal level. A respondent who noticed scarcely any discussion in the JURI, observed that it was with the draftsman of the ENVI Committee and the Shadows the Rapporteur had discussion. “They knew these problems; so with them you had to argue”, he said.696 A JHA Counsellor, who attended trialogue meetings with the Parliament delegates, sensed that a lot was discussed between a limited group of people in the Parliament directly responsible for the ECD file.697 A Commission official who participated in the Commission team at the trialogue discussions, believed that a certain group of people in the Parliament had “a lot of background cooperation that we don’t know about”.698 The legal adviser to the JURI Committee explained that “a lot of it is done by people talking together in the corridors afterwards [after the plenary sessions of the Committee]”.699 The observation that “the lines are short because you know all the people you often meet”, which is made by a national expert who

692 Interview 26/5/2011 (Qt 334:87).
693 Interviews 26/5/2011 (Qt 334:85) and 10/6/2011 (Qt 342:20).
694 Interview 26/5/2011 (Qt 334:84).
695 Interviews 10/6/2011 (Qt 342:51) and 11/7/2013 (Qt 344:21).
696 Interview 26/5/2011 (Qt 334:124).
697 Interview 28/6/2011 (Qt 343:78).
698 Interview 5/5/2011 (Qt 336:48).
699 Interview 10/6/2011 (Qt 342:48).
reasonably assumed that daily business in Brussels is as anywhere, certainly befits this image of daily running in Parliament circles.\textsuperscript{700} Several respondents referred to the involvement in ECD discussions at interpersonal or small-group level. Reference was often made, in that light, to exchanges between the Rapporteur of the ECD file – Nassauer – the Shadow Rapporteurs, and the Draftsman of the ENVI – Jorgensen. Reference was also made to the involvement of Shadow Rapporteur (Diana) Wallis (in the JURI Committee, on behalf of the ALDE group).\textsuperscript{701} More frequent were the referrals to the involvement of the Draftsman of the ENVI (Dan) Jorgensen\textsuperscript{702}, and that of the Shadow Rapporteur of the Group of the Greens in the JURI Committee (Monica) Frassoni\textsuperscript{703} in interpersonal and small-group discussions.

Despite a general concurrence of views on the basics of the ECD file, differences among the MEPs closely involved were certainly reported. Frequent reference was made to the conservative and cautious approach of the Rapporteur, which stood in contrast with the policy preferences of the Shadow Rapporteur of the ‘Greens’ Frassoni. In that regard, it was recalled that it was Frassoni who insisted on the inclusion of a clause obliging member states to forward ‘correlation tables’, also during the trialogue discussions.\textsuperscript{704} Jorgensen, the Draftsman of the ENVI, also insisted on one or two points (which included in all probability the ‘habitat’ issue).\textsuperscript{705} Reference was also made in terms of personal qualities and professional background. While the Rapporteur of the leading JURI Committee, Nassauer, was a Christian-Democrat with years of experience both as a lawyer, a national politician and an MEP, the Draftsman of the ENVI Committee was a young social-democrat with far less years of experience as MEP.

Yet, despite differences in approach, in policy preferences and in personal qualities, the Rapporteur, Shadows and the Draftsman appeared to have little difficulty in identifying a common understanding on the ECD file. A respondent who was legal adviser to the JURI Committee noted that “\textsuperscript{706}In JURI circles the Rapporteur and the ENVI Draftsman were said
to be both “reasonable”.\textsuperscript{707} It was vividly remembered by a policy adviser of the EPP Secretariat that when the Draftsman, Jørgensen, considered a particular issue to be very important for the ENVI Committee (in all likelihood the reinsertion of the provision on ‘correlation tables’), Nassauer reassured his fellow MEP saying: “Of course, we are going to ask for it. And if not, then there is no first-reading agreement”.\textsuperscript{708} The legal adviser of the JURI Committee observed that Nassauer “was quite happy to go and defend what was obviously the majority view in the Parliament”.\textsuperscript{709}

### 6.3.6 ECD discussions at the interinstitutional level

The widely shared view that the ECD proposal was not a difficult file was also applicable to the situation at the interinstitutional level. What undoubtedly helped forward ECD discussions at this level was that the draft text that was agreed in the internal discussions in the Council, was much in line with the amendments presented by the MEPs in the Draft Report – and vice versa. Still, some hurdles were identified. For the national delegations in the Council it took some time to fully understand the implications of adopting decisions in co-decision with the European Parliament. One respondent, a former JHA Counsellor, explained that it had a lot to do with the unfamiliarity with co-decision practice in the Council, in particular at the working party level. He explained that in co-decision dossiers delegations and Council presidencies usually needed to “actively negotiate for [their] dossiers with the Parliament”, which he considered to have hardly taken place in the ECD process.\textsuperscript{710} Another (former) JHA Counsellor even noted that the Presidency failed to timely start exchanges with the Parliament on the ECD file. In Parliament circles, it was also observed that exchanges started to take place only in the first half of 2008.\textsuperscript{711} The former JHA Counsellor was quite clear as to the difficulty experienced by national delegations in coping with co-decision:

> they were not used to it. It was a first pillar instrument. [...] So the whole process was to combat, internally, against this misunderstanding that this is a law instrument like each and every other

\textsuperscript{707} Interviews 10/6/2011 with the legal adviser of the JURI Committee (Qt 342:25); 28/6/2011 JHA Counsellor at the Permanent Representation of Slovenia (Qt 343:29); and 11/7/2013 with a policy adviser of the EPP Secretariat (Qt 344:69).
\textsuperscript{708} Interview 11/7/2013 (Qt 344:34).
\textsuperscript{709} Interview 10/6/2011 (Qt 342:44).
\textsuperscript{710} Interview 26/5/2011 (Qt 334:80).
\textsuperscript{711} Interview 11/7/2013 (Qt 344:12).
criminal law instrument. Where you get the opinion of Parliament and then you put it in the waste basket. Which was normally done. It was the first time you had to take the opinion of Parliament and you had to deal seriously with it. And that was quite new for my colleagues from Council business. [...] Because all the people dealing with this dossier in Council were third pillar. They were used to third pillar negotiations. Not to first pillar. And that was quite an awkward situation.\(^\text{712}\)

This was also noticed in Commission circles.\(^\text{713}\) One of the officials who attended all Droipen meetings on the ECD file as well as many trialogue meetings, equally straightforwardly observed that:

"I think in general there is a very self-confident attitude of member states from the third pillar. I mean, because there was a unanimity requirement. So there was a lot of understanding amongst member states, that everybody with all their concerns had to be taken into consideration. And that nobody can be too ambitious because we need to reach unanimity. And well, the Council is the one to decide it! And now, that there is an equally powerful, other actor, the Parliament, I think it came to them a little bit as a choc once the trialogues started. And once the Parliament, self-confident, made a lot of proposals for change. They really had to get used to it."\(^\text{714}\)

In explaining the (albeit few) difficulties identified at the interinstitutional level, respondents also referred to the general unease in the relationship between the Council and the Parliament when it comes to discussing criminal justice matters.\(^\text{715}\) The former desk officer of the Council Secretariat felt that the Council, during the interinstitutional ECD discussions, was treated as if it were on trial.\(^\text{716}\) She had the impression that some of the MEPs believed that the Council was only interested in adopting EU instruments that would have the smallest possible impact on the member states’ criminal law systems.

Various respondents in Council and national delegation circles were convinced that the difficulties in the interinstitutional discussions were related to the unfamiliarity in Parliament circles with the technicalities and practicalities of criminal law and procedure in the national systems.\(^\text{717}\) The JHA Counsellor, who participated in the

\(^{712}\) Interview 26/5/2011 (Qt 334:76).
\(^{713}\) Interviews 5/5/2011 (Qt 341:81); and 5/5/2011.
\(^{714}\) Interview 5/5/2011 (Qt 336:11).
\(^{715}\) Interviews 4/5/2011 (Qt 333:43); 23/6/2011 (Qt 340:18); and 28/6/2011 (Qt 343:164).
\(^{716}\) Interview 4/5/2011 (Qt 333:29).
\(^{717}\) Interviews 4/5/2011 (Qt 333:32) and (Qt 333:40); 28/6/2011 (Qt 343:75); and 19/11/2012 (Qt 339:20).
Slovenian Presidency, on the other hand, acknowledged that much of the uneasiness in the working relationship between the Council and the Parliament in the discussions on third-pillar instruments could be taken away by showing (on the Council side) more respect towards the Parliament delegates.718

Despite the difficulties identified in Council circles, exchanges at the interinstitutional level were not complicated. Only three official trialogue meetings were needed to reach an interinstitutional agreement. The senior official of the Council Secretariat, who was the head of unit on criminal justice cooperation, reminded that many co-decision files required much more trialogue meetings, sometimes as much as nine meetings, in order to reach interinstitutional agreement.719 All three trialogue meetings took place under the Slovenian Presidency, in the first half of 2008. The first two trialogues were held on 17 and 24 April 2008. Agreement on a final compromise text between the two co-deciding institutions (and the Commission) was reached with the third trialogue, which was held on 6 and 7 May 2008 (in Strasbourg).720 Respondents reported formal and informal interinstitutional exchanges only during the Slovenian Presidency. There is no reporting of formal interinstitutional contact, either at technical or at informal level, between the Presidency team and the Rapporteur and his team in the period before. This should not come as surprising. It was only on 6 February 2008 that the Rapporteur presented his Draft Report on the ECD Directive, which then formed the point of departure of internal discussion in the Parliament on the mandate for negotiations with the Council.

For Slovenia, which acceded to the EU in 2004, it was the first time it took up the role of Presidency. Even though it was established at the start of the Presidency that the ECD file was considered ripe for completion (also by leading officials in the Council Secretariat), some anxiety was still reported among the members of the Slovenian Presidency team who took care of the ECD file.721 It was also the first time the team had to deal with a co-decision file. It was observed, in this light, by one of the respondents of a national delegation that the team was not “very well prepared and that the communication between the trialogue team of the Presidency and the Council was not that close”.723

718 Interview 28/6/2011 (Qt 343:53) and (Qt 343:59).
719 Interview 19/11/2012 (Qt 339:4).
721 Interview 19/11/2012 (Qt 339:31).
722 Interview 28/6/2011 (Qt 343:97).
723 Interview 26/5/2011 (Qt 334:111).
Negotiating the Environmental Crime Directive

Basically, the whole range of discussions that took place at the interinstitutional level, between the Presidency team, the Rapporteur’s team and the Commission team, were conducted in an informal environment. All respondents referred to the informal nature of the interinstitutional meetings, not only in relation to the various informal and bilateral exchanges between the three institutions preceding the trialogues, but also to the trialogue meetings themselves.

It was recurrently pointed out that as the trialogues were held in view of reaching a first-reading agreement, discussion in these settings were not subject to formal rule or procedure. One respondent, the JHA Counsellor of the Presidency team, explained that it was problematic to qualify the tripartite meetings, because they were “not really defined”. They were “just informal meetings”.\(^{724}\) Another respondent, who at the time was JHA Counsellor for another delegation, pointed out that agreements reached in a first reading were informal, because all that was done and agreed, happened in a stage before the formal legislation process would actually start.\(^{725}\)

In Parliament circles it was acknowledged that with negotiating the file only in the first-reading stage, there was the risk of engaging in discussions away from public scrutiny. At the time\(^ {726}\), “things were a lot more flexible”, as the legal expert at the Secretariat of the JURI Committee explained.\(^ {727}\) Another official of the Parliament staff noted that first-reading agreements were basically “gentlemen agreements”. She thereby pointed out that first-reading agreements could in principle be entered into by Parliament delegates even “without asking the mandate from the Committee”.\(^ {728}\) It was reported that the Rapporteur on the ECD file – Nassauer – was contrary to a conclusion of interinstitutional negotiations in first reading, because of his concern about limited parliamentary and public scrutiny.\(^ {729}\) A respondent reported that in the Rapporteur’s view a second-reading agreement would be “better for the political hygiene of the Parliament, because then you have the formal discussion”.\(^ {730}\) Because of early exchanges with national delegations, notably with the German delegation, Nassauer nevertheless decided to focus all of his efforts on reaching a first-reading agreement with the Council.

\(^{724}\) Interview 28/6/2011 (Qt 343:24).
\(^{725}\) Interview 26/5/2011 (Qt 334:91).
\(^{726}\) Nowadays, the Parliament has subjected also first-reading discussions and ensuing agreements to internal rules of procedure.
\(^{727}\) Interview 10/6/2011 (Qt 342:20).
\(^{728}\) Interview 11/7/2013 (Qt 344:65).
\(^{729}\) Interview 26/5/2011 (Qt 334:102).
\(^{730}\) Ibid. (Qt 334:101).
Still, respondents, both in Parliament and Council circles, noted that Nassauer made every effort to keep the interinstitutional discussions on the ECD file open and accessible to other interested MEPs of both the JURI and ENVI Committees.\textsuperscript{731} The legal adviser of the JURI staff for example observed that Nassauer conformed to a policy adopted in the JURI Committee, according to which interinstitutional discussions were to be kept open to all responsible MEPs who wish to take part in these discussions.\textsuperscript{732} Reporting also showed that both national, Council, and Commission delegations engaged in discussions with several other MEPs (specifically the Shadows and the Draftsman of the ENVI Committee) during and outside the trialogue meetings on the ECD file.

While there was no reporting of criticism in Parliament circles, critical observations were however expressed on the lack of transparency in Council circles. The experienced national expert noted in this context that although the Presidency recurrently reported back to the Council, it was difficult to gain insight into this “somewhat opaque process”.\textsuperscript{733} For the Presidency it was a necessity to keep the discussions at the Council level and those at the interinstitutional level separated. The respondent who took part in the interinstitutional discussions as member of the Slovenian Presidency team quite recurrently reminded that it was a daunting task to accommodate twenty-seven different national preferences in the Droipen working party and at the same to negotiate with the Parliament. She made it clear that it was “for the Presidency to do the job, to negotiate with the Parliament”.\textsuperscript{734} She thereby added that the Presidency had to keep the national delegations duly informed on the latest developments and to keep its bargaining position within the margins identified in the Council discussions.

A senior official of the Commission explained that in co-decision procedure the Council Presidency needed to have “a relatively flat, simple mandate to discuss this issue with the Parliament”.\textsuperscript{735} Interesting was the remark made by one of the Commission officials who attended both the Droipen and trialogue discussions. She observed that once the ECD process reached the stage of trialogues:

\textsuperscript{732} Interview 10/6/2011 (Qt 342:21).
\textsuperscript{733} Interview 2/11/2012 (Qt 345:80; my translation, from “vrij ondoorzichtige proces”).
\textsuperscript{734} Interviews 28/6/2011 (Qt 343:135); (Qt 343:153); and (Qt 343:163).
\textsuperscript{735} Interview 9/5/2011 (Qt 335:22).
Negotiating the Environmental Crime Directive

‘that’s the point when power [in the Council] shifts to the Presidency. Then, there goes a lot of power to the Presidency. It has then a lot of power in the Council. Because at the trialogues, I mean, obviously, not the whole Council can be there!’

The three trialogues in the ECD process were not preceded by technical trialogues. There were not so many issues that would have made technical trialogues necessary. Instead of more formalized tripartite meetings at technical level, respondents reported highly informal bilateral exchanges that were held quite frequently in a short period between the Presidency and the Rapporteur’s team. On average they took place once a week and were held either by phone or in an informal meeting.

Apart from discussing technical details of a few items, the bilateral exchanges were believed to be “very useful” because they enabled the parties to explore the other’s position. The aim of these informal bilateral exchanges was, as the policy adviser of the EPP Secretariat qualified, to identify “what are the redlines for the Council, what are the redlines for the Parliament; and what can we give up later or can fight now and maybe give up later.” These bilateral, “exploratory” exchanges not only involved the Rapporteur, his assistant and a political adviser to the EPP group on the side of the Parliament and a senior official (who also chaired the Droipen meetings) and the JHA Counsellor of the Slovenian Presidency team. Bilateral contact at the interinstitutional level included also exchanges between members of the Slovenian Presidency team and MEPs of other political groups and committees. Exchanges were for instance reported between the Presidency team and Shadow Rapporteurs (for example with Frassoni of the Greens Group) and the Draftsman of the ENVI Committee (Jorgensen).

Bilateral exchanges on the ECD file were also held between the Commission and the Parliament. These meetings were also highly informal in nature (“we had coffee and talked around a lot”). In anticipation of the trialogues, and in-between them, Commission officials had seven to eight meetings with the MEPs (including the Rapporteur, the Shadows, and the Draftsman) and their assistants. The policy adviser to the EPP group in the JURI Committee noted that

736 Interview 5/5/2011 (Qt 336:58).
737 Interview 26/5/2011 (Qt 334:13).
738 Interviews 28/6/2011 (Qt 343:19); and 11/7/2013 (Qt 344:15).
739 Interview 11/7/2013 (Qt 344:63).
740 Interviews 28/6/2011 (Qt 343:19); and 11/7/2013 (Qt 344:58).
741 Interviews 28/6/2011 (Qt 343:32); and 11/7/2013 (Qt 344:36).
742 Interview 5/5/2011 (Qt 336:49).
They [the Commission officials] were contacting us. I think they really put a lot of emphasis on good preparation in the relations with the Parliament. […] I mean, it depended on the Parliament whether this file is going to be adopted or not. And they wanted to have this file under this Presidency. So they knew of course it depended on us. How we push it forward. With the Rapporteur, the cooperation was highly important to them. And they did their job quite well, in this sense. So they really counted on us. They really involved us, they really… we had real close cooperation.”

In the trialogue meetings themselves, the Commission was (obviously) involved. These tripartite meetings consisted of some ten people. The senior official of the Slovenian Presidency (who also chaired the Droipen meetings during the Slovenian Presidency), the JHA Counsellor of the Slovenian Presidency and two or three officials of the Council Secretariat represented the Council. Two or three officials represented the Commission. The Rapporteur, his assistant, an official of the staff of the JURI Committee and the Draftsman of the ENVI Committee represented the Parliament. Presence of the Shadow Rapporteurs at the trialogue meetings was not reported. Their involvement was reported only in relation to (prior) informal bilateral meetings.

In relation to the limited group size, respondents conveyed interesting views on the importance of individual qualities in a small-group discussion such as a trialogue or a bilateral meeting. According to one respondent it boiled down to “human interaction” and interpersonal relationships. “It was often about personalities” as another respondent explained. Indeed, those respondents who described the discussions at the trialogue level always made reference to the personal quality of the discussants, their interpersonal relationships and the ways in which these aspects affected discussion in the trialogue meetings. Reference was for instance made to the strong personality of the (experienced) Rapporteur Nassauer and his willingness to reason. More or less the same was said of the senior official representing the Slovenian Presidency. In that light it was also observed that it worked out quite well between these two key discussants, as they were “similar kind of people” with the same professional view and

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743 Interview 11/7/2013 (Qt 344:50).
744 Interview 28/6/2011 (Qt 343:98).
745 Interview 5/5/2011 (Qt 336:74).
746 Interview 11/7/2013 (Qt 344:39) and (Qt 344:40).
747 Interview 28/6/2011 (Qt 343:103).
748 Interview 10/6/2011 (Qt 342:1).
749 Interview 26/5/2011 (Qt 334:126).
Reference was made as well to the personal qualities of the shadows (who were only involved through informal bilateral meetings). With regard to Shadow Rapporteur Frassoni (of the ‘Greens’ Group) it was noted that she was a strong personality, well-informed on the dossier and able to “use actually legal arguments to convince” (even though she did not have a legal background). With regard to the nature of discussion during the bilateral contacts, the desk officers of the Commission noted that the Rapporteur, the Shadows and staff of the JURI Committee were “willing to listen to arguments, if they had validity, and to take them into consideration”. With regard to bilateral exchanges with other MEPs, especially those from the ENVI Committee, discussion was not without difficulty. The JHA Counsellor of the Presidency team noted that these MEPs proposed amendments that were impracticable or even “unreasonable” to be taken into account for adaptation of the draft text. The same was also pointed out by the desk officer of the Council Secretariat who also participated in the exchanges in the run-up to the trialogues.

Both respondents felt that the MEPs proposing impracticable amendments either did not have the time (due to the onerous workload) to gain a deeper knowledge of the ECD file or they were as environmental experts not familiar with the basics of criminal law. The JHA Counsellor noted that some of the MEPs insisted on “broad protection of high standards [for environment] but sometimes also at the expense of legal certainty”. Provisions were proposed, as both respondents explained, that simply did not fit in any kind of criminal code. It was reported that discussion easily got bogged down on such “technical details” as the quality of the soil or water whilst criminal law subjects were at issue. According to the official of the Council Secretariat, 

“It was extremely difficult to make them understand why we had made this and this wording in this case and not in the way they wanted. It was extremely difficult to persuade them.”

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750 Interview 28/6/2011 (Qt 343:98).
751 Ibid. (Qt 343:38); (see also Qt 343:66 and Qt 343:73).
752 Interview 5/5/2011 (Qt 336:51).
753 Ibid. (Qt 343:29) and (Qt 343:52).
754 Interview 4/5/2011 (Qt 333:34).
755 Interviews 28/6/2011 (Qt 343:69) and 4/5/2011 (Qt 333:30).
756 Interview 28/6/2011 (Qt 343:29).
757 Interviews 28/6/2011 (Qt 343:56) and 4/5/2011 (Qt 333:34).
758 Interview 28/6/2011 (Qt 343:61).
759 Interview 4/5/2011 (Qt 333:30).
She felt that there was mistrust among various MEPs who suspected the Council of making a case for a draft text that would create the least possible problems for the member states in implementing and applying the Directive. Similar words, on the strong opposition of various MEPs, were expressed by the JHA Counsellor of the Presidency team, who moreover observed that:

“They would just tell you “we’re against this and this”, but without giving any reasons! So we knew, they were just briefed by someone. And at the end they’re going to vote according to the instructions they will receive.”

Even the Legal Service of the Council was called upon to add more substance and argument to the bilateral exchanges with some of the MEPs. On that account, the JHA Counsellor of the Slovenian Presidency team reported that:

“once I also asked the representative of the Legal Service to go with us. To join us. Because then he could give a really good explanation. From a legal point of view. To reason. So we tried to use all the means.”

Eventually, the MEPs became more flexible. It was explained that gradually they came to realize that the ECD file, with its many criminal law elements, was an entirely different subject matter, which required an entirely different kind of knowledge, than the files they used to discuss (which were more civil law oriented). The JHA Counsellor attributed the change of mind also to the ability of the Rapporteur to persuade his fellow MEPs, in particular the Shadow Rapporteurs (who in their turn persuaded the others in the respective political groups), and to explain them about the ins and outs of the subject matter.

Different was the reporting on the nature of discussion in the three trialogue meetings themselves. In Parliament circles it was noted that “[t]here wasn’t a lot of scope of disagreement” and that it “was not a very hard negotiation”. After all, the line of thinking of the Rapporteur and the amendments he included in the Draft Report were very much in line with the common position that was identified among the delegations in

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760 Ibid. (Qt 333:41).
761 Interview 28/6/2011 (Qt 343:75).
762 Ibid. (Qt 343:29).
763 Ibid. (Qt 343:54) and (Qt 343:56).
764 Ibid. (Qt 343:29); (Qt 343:77); and (Qt 343:182).
765 Interview 10/6/2011 (Qt 342:59) and 11/7/2013 (Qt 344:38).
the Council. There was a firm belief, in Parliament circles, that there was commitment on all sides of the trialogue table to come to an understanding, even on those issues that would require more effort to resolve. 766 The legal expert of the JURI Secretariat, who also attended the trialogue meetings, observed that the Rapporteur

‘conducted the trialogues in a very fair way. He conceded when he realized that the view that he was bringing across, was not going to get through. He was quite happy to go and defend what was obviously the majority view in the Parliament and in the Council.’ 667

This view was also expressed in Council circles, by the JHA Counsellor of the Slovenian Presidency team, who reported noted that “the Rapporteur, he was quite reasonable, in a way, really cooperative”. 668 More interestingly, she also observed how common understanding was facilitated by a shared set of norms and principles based on shared professional background and knowledge. In that light the JHA Counsellor reported that the Rapporteur

‘would understand when we were talking about liability or about definitions [of crimes]. So I think he was really willing to find compromises. Because I think it also helped that he was a lawyer. He is not just a politician.’ 669

Reporting on the Council delegation’s posture in the trialogue discussions offers a picture that is not dissimilar to that of the Parliament’s team. The policy adviser of the EPP Secretariat felt that there was an open and free discussion with the Presidency team. She noted that the members of the Parliament team “were closely involved and [that members of the Presidency team] sent us the information we needed”. 770 The Commission’s senior official who participated in the trialogue discussions on the ECD file, observed that the delegates of the Council/Presidency team

‘accepted to a large extent the many proposals of the Parliament. Amendments. The Parliament came with a large number of amendments. Many of them ended up in the text. So the Council felt that there was an expectation and that it would be inappropriate for the Council to resist on things

766 Interview 11/7/2013 (Qt 344:38).
767 Interview 10/6/2011 (Qt 342:45).
768 Interview 28/6/2011 (Qt 343:33). See also (Qt 343:17) and (Qt 343:95).
769 Ibid. (Qt 343:65).
770 Interview 11/7/2013 (Qt 344:71).
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where you can’t explain. Where it was legitimate for the Parliament to want to reinforce the guarantees. 771

The JHA Counsellor of the Slovenian Presidency team also stressed the importance of reason and argument for the Council delegation in the discussions with the Parliament delegation. At the same time, she however also acknowledged that “sometimes” the Council delegation sought to link up with the more conservative, centre-right groups and MEPs (including the Rapporteur), whose position was more in line with that of the Council. In this light she reported that “usually we would use actually legal arguments to convince them, but sometimes we would also see if the right-wing is going to be in favour”. 772

With regard to the Commission’s role in the trialogue discussions, it was already discussed that the Commission at this stage of decision making had a facilitating role (i.e. promoting an interinstitutional compromise) but that it proceeded in a way that would serve best its own interests (i.e. the preservation of the original text of the proposal to the maximum possible extent). This was acknowledged in Commission circles. 773 One of the defining features of the Commission’s role during the actual trialogue discussions was its “more passive stance in the official meetings between the Council and Parliament”. 774 This was also perceived by the JHA Counsellor of the Slovenian Presidency team. She witnessed a situation in which the Commission refrained from intervening in the discussion on an issue that would otherwise have harmed its own interests and would have made agreement between the Council and the Parliament more difficult to reach. 775

Reference was also made to the facilitating role of the Commission during discussion at the trialogue level. One of the Commission delegates felt that the Commission’s role was helpful because it provided the necessary expertise in the discussion. The Commission’s facilitating role was for instance reported with regard to its assistance to the Parliament delegation in relation to the reinsertion of the ‘correlation table’ provision. Prior to one of the three trialogue meetings the Commission delegation provided the Parliament team with the necessary information to make a case for the reinsertion of this provision. 776 Obviously, what the Commission did coincided completely with its own position: in the original proposal of the

771 Interview 9/5/2011 (Qt 335:23).
772 Interview 28/6/2011 (Qt 343:39).
773 Interview 5/5/2011 (Qt 336:63).
774 Ibid.
775 Interview 28/6/2011 (Qt 343:91).
776 Interview 5/5/2011 (Qt 336:70).
Commission there was such a provision, which was later deleted by the national delegations in the Council. The Commission’s facilitating role during trialogues was however also appreciated by the Council team. The JHA Counsellor of the Slovenian Presidency team appreciated for instance the presence of the Commission’s delegation during a trialogue discussion on the ‘habitat’ issue, also because of the fact that one of the Commission delegates, from the DG ‘Environment’, was able to bring in the required knowledge and insight in the field of environmental protection.777

6.3.7 Internal discussions on the trialogue outcome

After interinstitutional agreement was reached at the last trialogue of 6 and 7 May 2008, the ECD dossier appeared only once on the agenda of the Parliament. The file was subject to a highly formalized exchange in a Plenary session on 19 May 2008, where (as mentioned earlier) there was little room for further discussion. On 21 May 2008 forty amendments – corresponding to what was agreed at the trialogue level – were adopted by a simple majority.778

In the Council, reaching internal understanding on the outcome of the trialogue discussions required more effort. In the aftermath, the ECD file appeared once at the Droipen level, three times at the Coreper level, before the ministers at JHA Council level officially adopted the compromise text resulting from the trialogues on 24 October 2008. In this period, the dossier also appeared once in the JHA Counsellors’ group. As several respondents pointed out, it was normal procedure that during and after trialogues, the Coreper took a more prominent role, to modify (whenever needed) the mandate of the Presidency for further negotiation with the Parliament, to sort out the very last internal differences (if there were any) and to reach an informal agreement in the Council before the file was to be sent to the ministerial level for final adoption.779 The procedure required also that after informal agreement at the Coreper level has been reached, the chair would send a letter to the Parliament in which it confirmed the interinstitutional agreement reached at the trialogue level.780

Debate on two outstanding issues took place in the Council, in the period after the trialogues. When the Presidency reported back the trialogue outcome in the Council, a few national delegations at the Droipen working party, on 6 and 7 May

777 Interview 28/6/2011 (Qt 343:91).
779 Interviews 9/5/2011 (Qt 335:30); 26/5/2011 (334:92); and 28/6/2011 (Qt 343:170).
780 Interview 28/6/2011 (Qt 343:167).
2008, raised reservations on two items. One concerned the offence related to deterioration of a protected habitat (referred to in this chapter as the ‘habitat’ issue). It was mainly the German delegation that insisted on a more elaborated definition of the offence than the text agreed upon at the trialogue level. The other concerned the reinsertion of a provision that obliges member states to draw up a correlation table between the national provisions transposing the ECD Directive and the provisions of the Directive itself (referred as the ‘correlation table’ issue). Almost all national delegations had reservations on this issue.

Despite the two outstanding issues it was reported that the briefing by the Presidency of the package resulting from the trialogues and subsequent informal agreement went “relatively fast”. One of the Commission officials who attended almost all internal Council meetings on the ECD file, noted that once the trialogues were concluded both the Presidency and Commission delegations were convinced that the compromise text was “sellable” to the national delegations in the Council. Another Commission official explained that even though the ‘habitat’ and ‘correlation table’ issues were still of concern to some delegations, there was the shared feeling in the Council that good care was taken of the items that mattered most to all national delegations. These major items concerned the limited scope of application for the ECD Directive and the inclusion of the two annexes listing Community and Euratom legislation (that would further circumscribe the scope of application of the Directive).

Respondents pointed out that there was little room for internal discussion after the trialogues. The respondent who attended as national expert all Droipen meetings remembered that various items became non-negotiable as an agreement was gradually taking shape at the trialogue level. Another respondent, a Commission official who attended both the Droipen and trialogue discussions, observed that the delegates of the Presidency team considered it their task to communicate clearly to the national delegations that “they had to give something to the Parliament, because otherwise they would not get an agreement”. The same was basically reported by the JHA Counsellor who took part in the Slovenian Presidency team. She also told, in this context, that there were a few delegations, representing some of the then new member states, which raised

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782 Interview 9/5/2011 (Qt 335:30).
783 Interview 5/5/2011 (Qt 336:80).
784 Interview 4/5/2011 (Qt 337:19).
785 Interview 2/11/2012 (Qt 345:141).
786 Interview 5/5/2011 (Qt 336:76).
787 Interview 28/6/2011 (Qt 343:162).
reservations on an item on which they remained silent all the time before. About that event, the JHA Counsellor revealed:

‘Once we had a long discussion about the annex. [...] I remember there were some member states, they had problems but they never mentioned them before. Which was a bit bizarre. [...] But before, they kept quiet. All the time. You’re not supposed to do that. If you have a problem, you have to mention this immediately. And they came really late. [As] the Presidency, you just took note. But then you tell them “It’s not appropriate”. Informally. [...]’

I Do you still have to accommodate them?

R No, you had to be kind of friendly.”

6.4 Conclusion

There is sufficient evidence to conclude that the exchanges and related shifts that provided the necessary impetus to move the ECD agenda forward, took place at the levels where specialist knowledge was required. More specifically, it was the exchange between the delegations in the Droipen, the interpersonal exchange between a limited group of MEPs in the Parliament and the interinstitutional exchange between the three negotiating teams at the trialogue level that formed the driving force of progress in the ECD process. At these levels, there was the required specialist knowledge to take the ECD agenda forward. The ECD subject matter was of a highly detailed and technical nature, which encompassed both legal-technical and environmental-technical intricacies. With the highly technical and detailed nature of the draft text, the discussants at these levels were induced to bring a great deal of substance, fact, evidence, example, and knowledge of legal sources to the debate.

Moreover, discussion at these levels formed the pathway that shaped the final outcome of the ECD process, which was largely based on reasoned understanding. There is ample ground to argue that the discussants, with their specialist knowledge, were drawn into a reciprocal dynamic where they needed to avail themselves of sound argument and reason in order to convince the others of the plausibility or validity of their view or position. Also, demonstrations of reflexivity resulting in shifts of position – in other words: reorientation – were identified.

788 Interview 28/6/2011 (Qt 343:171).
As regards the exchanges at the Droipen level, evidence not only demonstrated that they were not only ‘remarkably’ more interactive (than in an average third-pillar setting), it also showed that discussants were responsive to each other’s argument and were challenged to bring in fresh ideas and points of view that were believed to bring the discussion further. Occurrences of this ‘unusually’ interactive exchange were reported in reference to the numerous side meetings (temporary suspensions of a plenary sitting) that were held in order to circumvent the constraints imposed by the formalities of a plenary sitting, which was generally characterized as a static ‘tour de table’ event. Side meetings were believed to facilitate the more reciprocal and even explorative exchange between smaller groups of delegations. What was also considered to have facilitated free and interactive exchange, were the two-day meetings of the working party. It was reported that at the second day new concepts were proposed that pushed discussions forward.

Occurrences of interactive exchange were reported also in relation to the effect of the QMV rule. The highly technical nature of the ECD instrument not only challenged the national experts, who worked as specialists with national expertise on the file on behalf of their respective national justice ministries, to think beyond their national frame of reference. Evidence also showed that QMV provided incentives for discussants in the Droipen working party to seriously engage in an informed debate so as to persuade other delegations of the validity of one’s own position. This with the aim to shape or help shaping a majority that would support (partly or entirely) one’s own position.

Meaningful discussion in the Droipen on the ECD file not only required the knowledge of the intricacies of both criminal law and environmental protection. It also required knowledge of national as well as Community legislation in both fields. The active contribution of the Commission experts to the Droipen discussions was indispensable in that regard. Delegates of the Commission not only brought in a variety of relevant expertise (there was one criminal law expert and one environmental expert), which moreover allowed it to ‘feed’ discussion with expertise and insight from a Community or EU point of view. With a firmly positioned Commission in the first-pillar ECD discussions – and a robust first-pillar compliance mechanism – the national experts were also likely to have been challenged by the Commission’s involvement to engage in exchanges of informed arguments that went beyond the limits of national legal thinking.

In the same vein, there is the likelihood that the national experts, who came from the justice ministries, were challenged to think ‘out of the box’ by the presence
of environmental experts and the JHA Counsellors in the discussions. With their specialist knowledge of environmental protection, the environmental experts were likely to have enriched discussion with environment-oriented substance, fact, evidence and example. The Brussels-based JHA Counsellors, as well as the environmental protection experts, were likely to have also contributed to more interactive exchange in the informal side meetings and bilateral exchanges, since they were more experienced with the daily practice of first-pillar decision-making. Furthermore, the role of the Presidency also had a facilitating effect on the deliberative nature of the discussions, in that it promoted informal interactive exchange (by scheduling for instance side meetings), which would ensure a mandate flexible enough for conducting discussions at the trialogue level.

Of particular note is that the highly technical nature of the ECD file and the requirement of specialist knowledge provided the discussants in the Droipen working party with an almost exclusive ownership over the drafting of the ECD file in the Council. There is sufficient ground to assume that discussions in the Droipen were insulated from outside influence in this respect.

As regards internal discussion in the Parliament, evidence demonstrated that reciprocity and reflexivity occurred outside the formal venues of discussion. Reporting on the discussion in formal settings, such as the five official meetings in the JURI Committee or the Plenary sitting, showed that interactive exchange was difficult to achieve in formal setting. Instances of reciprocity were reported to have taken place at interpersonal level in smaller meetings and frequent or occasional contacts that took place outside the formal working structures – “in the corridors” – of the Parliament. They often involved exchanges between the Rapporteur, his staff, the Draftsman of the ENVI Committee and the Shadow Rapporteurs of the other Political Groups of the JURI Committee. There is good ground to assume that these exchanges went beyond interactive exchange. It was for instance observed that the Rapporteur’s was reflexive to the views of the Draftsman of the ENVI Committee and the Shadows of the JURI Committee.

At the interinstitutional level, it was recurrently reported that there was a strong commitment to come to an understanding on the issues that still divided the negotiating parties. With the highly technical and detailed nature of the draft text, a great deal of substance, fact, evidence, example, and knowledge of legal sources were brought to the interinstitutional debate. It helped (or perhaps even compelled) the discussants to focus on substance and detail, which in turn was highly likely to have induced the discussants to make use of valid argument (if they ever wanted to succeed
in convincing the other party of the validity of their position). While the highly technical and detailed nature of the ECD file required specialist knowledge and focus on substance, common professional background and good interpersonal relationship helped to create an atmosphere of mutual respect which enabled the discussants to make successfully use of their specialist knowledge in order to convince the other interlocutor of the plausibility or validity of their argument. There is good ground to believe that these circumstances, particularly in a small-group setting, were conducive to a vivid reciprocal exchange of substantiated arguments and demonstrations of reflexivity resulting in shifts of position – in other words: reorientation.

Although the number of trialogue meetings was remarkably low (only three), reporting convincingly showed that this low number of official exchange was largely accompanied by numerous informal, bilateral exchanges. They were conducted on a highly frequent basis. In relation to the preparatory bilaterals, it was for instance reported that they took place even once a week.

There is sufficient evidence to support the view that deliberative exchange and endogenous change, in particular at the Droïpen, the interpersonal MEP, and the trialogue levels, formed the pathway that shaped the final outcome. The conditions of systematic interaction, also in terms of frequency of personal and informal contact, and of insulation, particularly in terms of proximity to legal-technical detail, had a facilitating effect on deliberative exchange at these levels. Nevertheless, evidence also showed that during and after the trialogue discussions when the outcomes of the trialogue discussions were reported back respectively in the Council and the Parliament, bargaining was likely to be the more predominant form of discursive behaviour. In the Parliament, pressure was likely to have occurred when the Rapporteur had to ensure support for the trialogue outcome from MEPs who showed an uncompromising stance during bilateral discussions with Council and Commission delegates. Nor should it be excluded from the discursive processes in the Council, when the Presidency had to ensure support for the trialogue outcome from the national delegations in the Council. The fact that after the conclusion of the agreement at the interinstitutional level the ECD file then only appeared at the Coreper level, provides reason to assume that a different style of discussion was needed to secure internal agreement on the still outstanding issues. It was highly likely that a more cursory examination at the Coreper level was needed which allowed for a speedy settlement of the unresolved issues. The acceptance of a separate statement for those member states who had difficulty with the obligation to present a correlation table bears testimony to that.