Chapter 7

Conclusion


7.1 Introduction

Autonomous processes of change in the intervening periods of everyday business of EU decision making are at odds with the idea that member states are supposed to be in control of the EU and its development. The policies and legislative outcomes that see the light in these intermediate periods do not always – or perhaps even rarely – reflect the long-term objectives or multi-annual policy agendas that have been agreed upon by the member states at the higher levels of intergovernmental decision making. Looking at the findings of this study, there is good reason to argue that the outcomes of high-level events of decision making between member states, such as IGC’s, cannot account for all the changes – or continuities – that occur in everyday decision making in the EU and that a separate analysis is needed that explains these changes.

Furthermore, explaining the occurrences of change in the EU by focusing only on high-level intergovernmental events of decision making is problematic for a theoretical reason. These events are usually considered as strategic exchanges between member states that act as autonomous political agents with fixed interests. It is doubtful whether the rational-choice paradigm would successfully capture occurrences of change in the actual business of everyday decision making in the EU. This study has taken on a sociological perspective that considers the EU as an evolving polity where, in view of its institutionally dense environment, interests of a multitude of parties interacting on a daily level are more likely to intermesh – and therefore change – rather than compete. More specifically, the EU has been captured as an evolving polity where actors are likely, considering EU’s institutionally dense setting, to engage in deliberative discourse which can induce them to shift or change their interests beyond their initial positions towards a reasoned understanding on policy outcomes.

The basic argument of this study is that if arguments carry the day, negotiating parties are induced to change preferences or interests (i.e. reorientation or endogenous change). Put differently, the basic argument is that deliberation in everyday decision making matters, but that its prevalence is contingent upon institutional context and
social patterns. While bargaining exchange may just as well occur in everyday decision making, deliberation can be a prevalent discursive mode, even in such politically sensitive areas as justice cooperation, police cooperation or criminal law. Deliberative exchange may thus be the prevalent mode of interaction that forms the pathway leading to a reasoned understanding on the outcome to be achieved. The key question thereby was under what circumstances, and to what extent, does deliberation induce change in the everyday practice of decision making in the EU?

In this chapter, a summary of this study as well as conclusions drawn from the findings on this key question are presented. Section 7.2 starts with a summary of the study, its purpose, and its design. Then, in the sections 7.3 and 7.4, the empirical findings and related conclusions are discussed. Section 7.5 reviews the theoretical findings of this study. This chapter concludes (in sections 7.6 and 7.7) with some final reflections on the implications of the findings for the future development of the EU.

7.2 Summary: purpose and design
Subject of empirical inquiry were processes in an EU policy area that has for a long time been considered to belong to the realm of intergovernmental decision making: the area of justice and police cooperation (JHA). More specifically, empirical inquiry was focused on everyday decision-making in a policy field that took place in a time when the subject matter of justice and police cooperation was believed to be primarily the subject of interstate bargaining. It was in the period between 2003 and 2009, when a lot of changes in this policy field took place. The reason for selecting this specific policy area was to determine whether interests did actually change through deliberative discourse, in spite of the widely shared view that this area was considered as the arena of competing state interests. It can be said that decision making processes in the field of JHA in the period of 2003-2009, as such, formed a least-likely case of deliberative discourse and endogenous change. That is, if deliberation would be identified as a trigger of change or policy progress in an area that is widely considered as an arena of interstate bargaining then where else would deliberation not be operative in the EU? At the same time, the empirical focus was also on decision making at everyday level. This aspect of the subject under investigation basically constituted a most likely case. That is, if deliberation has not been found to be prevalent – or even operative – at the level of everyday decision making, then where else would it be?

The variation of theoretical interest worked thus in two ways. It was hypothesized that, at one extreme, the more supranational the institutional setting was and the more ‘everyday’ the social patterns between the negotiating parties were, the more
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likely it would be that deliberation had a facilitating effect on the shaping of an agreement. At another extreme, the more intergovernmental the institutional setting was and the less 'everyday' the social patterns were, the less likely it would be that deliberation had a facilitating effect on the shaping of an agreement. Empirical inquiry was thus focused, on the one hand, on the impact of conditions that were related to the institutional setting – access of non-state actors to decision making and qualified majority voting in the Council of the EU. On the other, it was focused on the impact of conditions that have been assumed to generally govern the social patterns of day-to-day dealings of multilateral decision making – systematic interaction and insulation from outside pressure. Variation in these conditions helped to ascertain whether the conditions actually triggered deliberation inducing reorientation.

Variation in the conditions of theoretical interest underpinned the design of empirical research. It consisted of three decision making events – all of which took place in the field of JHA in the period of 2003-2009 – that varied among themselves in terms of institutional setting. That is, they varied in terms of voting rule and non-state access. The EEW event took place in a purely intergovernmental setting (unanimity in the Council and access only for member state delegations). The VIS-Access event evolved in an institutional setting that had both intergovernmental and supranational features (the European Parliament had full access but there was unanimity in the Council). And the ECD event took place in a regular supranational setting (QMV in the Council and all European institutions had full access). The design was also based on variation in terms of the conditions related to social pattern: systematic interaction and insulation. They varied according to the various levels of decision making. Systematic interaction and insulation were, prior to empirical analysis, expected to be fully operative at lower levels of decision making and significantly less operative at the higher levels of decision making.

Considering the hypotheses and the expected values of the hypothesized conditions in each of the three decision making events and at the various levels of decision making, it was expected that lower or preparatory decision making levels in the first pillar setting would be the most likely venues of deliberation resulting in reasoned consensus on (elements of) the final outcome. These expectations are illustrated in Figure 7.1. The most shady area of the table (upper-left corner of the figure) is the part where the values of all four conditions are high and where deliberation is expected to be a prevalent mode of discussion. The bright area (lower-right corner) represents the part where values of the four conditions are low and where deliberation is less or not prevalent. The expectation was that the higher, political levels of decision
making in the third pillar setting, where the values of the institutional conditions would be low, would be the least likely venues of deliberation leading to reorientation or endogenous change.

Together with these conditions of theoretical interest, a deliberative model was further developed with the specification of concepts that helped to pinpoint the occurrence of deliberation. They served as tools for empirically identifying the occurrence of deliberative exchange, as well as the ways in which and the extent to which it actually affected the course and outcome of decision-making process. Reciprocity was one such notion. It indicated the extent to which discussants were engaged in an interactive exchange of reasoned argument. The other was reflexivity, which indicated the degree to which discussants were prepared to (re)consider their position or preference in light of other positions or alternatives. Reorientation indicated the actual (endogenous) change that followed from deliberative discourse. Finally, reasoned consensus
was a notion to identify a final negotiation outcome that followed from deliberation. An outcome is based on reasoned consensus if it is intelligible, unambiguous to all and as such acceptable to most of the negotiating parties.

The deliberative model – with its conditions of theoretical interest and notions specifying deliberative exchange – served as the theoretical baseline for empirical analysis. Two types of data were collected and analysed for the empirical analysis, namely interview transcripts and policy documents. Policy documents (a total of 285) were examined mainly for the purpose of reconstructing sequences of events and changes in each of the three cases and for the identification of the issues at stake and the composition, size, format, frequency, and/or duration of official meetings. Data on the nature of discourse were acquired through interviewing. A total of 46 interviews were conducted, mainly with people who participated directly in the discussions in either of the three decision-making events.

7.3 Deliberation mattered
Findings on the three decision making events showed that deliberation mattered. It was found that when circumstances were most favourable, deliberation proved to be the prevalent mode of discussion that induced negotiating parties to shift or change their position towards an outcome based on reasoned consensus. Marked differences were indeed found among the three decision making events. While evidence clearly showed that in the VIS-Access and ECD cases, where the conditions were found to be most operative, discussants managed in shaping an outcome mainly through deliberation, the EEW case, where the conditions were least favourable, deliberative dialogue was far less decisive in reaching an outcome.

This is particularly apparent from the way in which progress towards the final outcome took shape in the VIS-Access and ECD cases. A pathway towards a reasoned consensus gradually took form as delegations shifted their positions beyond their initial preferences. More in particular, incisive impact on the shaping of the outcome in both the VIS-Access case and the ECD case came from venues of discussion where deliberation was the predominant style of discussion.

In both the VIS-Access and the ECD case, incisive impact came from the interinstitutional level. There, exchanges constituted a succession of shifts, acceptances, and agreements most of which were occurrences of reorientation resulting from deliberative exchange. Positions were allowed to be subject to discursive challenges during the exchanges at this level. Also, in the ECD case the internal discussions in the European Parliament and in the Council (at working party level)
which had a facilitating effect on the shaping of the outcome, were of a predominantly deliberative nature. Deliberative discourse – including demonstrations of reflexivity resulting in shifts of position – were mainly found in the more interactive exchanges at the interpersonal level in the European Parliament and in the margins of the plenary working party meetings in the Council. There is ample ground to argue that at these levels 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.

Progress toward the outcome in the EEW case was only occasionally facilitated by instances where interlocutors were induced to change their mind, belief, position or preference through deliberative exchange. Evidence demonstrated that some of the progress that was made in the early and intermediate stages of the process followed from occurrences of deliberation at the JHA Counsellors and national experts levels. On the whole, however, most of the delegations’ initial preferences (be they political, technical, or practical) were rarely challenged – and reconsidered – through deliberative exchange. It was in the concluding stages that a final settlement of outstanding issues was reached through bargaining exchange – at the JHA Counsellors, Coreper and JHA Council levels.

In sum, while in the VIS-Access and ECD cases the critical contributions to progress were mainly achieved through deliberative exchange, in the EEW case it was mainly bargaining exchange that promoted progress at critical junctures. It should be noted, however, that in the VIS-Access and as well as in the ECD case, when the locus of discussion gravitated from internal discussion in the respective institutions to the interinstitutional level, the trialogue delegations – the Presidency and Rapporteur teams – availed themselves of the use of bargaining pressure in the internal discussions in their respective institutions during and after the trialogues. This was in order to secure the (reasoned) understanding that was taking shape at the interinstitutional level.

That deliberation mattered is also apparent from the nature or quality of the outcome. The discussants in the VIS-Access and ECD cases managed to come to an understanding – or rather: to reason towards an outcome – that was unambiguous and yet also broadly acceptable. Both outcomes showed ‘parsimony’ in that there was little room for exception, diverse interpretation, derogation, or escape clauses. Also, both outcomes were considered practicable, especially for practitioners in the working field who had to work with the instruments and their implementing rules. As to the EEW process, most references indicated that discussants were often persistent in holding on
to their positions, which resulted in an outcome that was replete with derogations, exceptions ("exceptions to exceptions"), opt-outs, and separate statements. The EEW instrument became unworkable for practitioners in the working field.

Admittedly, the discussants in the VIS-Access or ECD processes were not always motivated by the desire to reach reasoned consensus. In the ECD process, for instance, a separate statement was made in the Council in the aftermath of the tria-logues. This can certainly be regarded as a shady deal providing a great deal of legal ambiguity. It allowed some member state delegations that had objections to the obligation of providing a correlation table, to state that they did not feel obliged to do so. However, this act of political engineering did not affect the overall legal quality of the outcome. In the end, the ECD final outcome overarched any side deals and provided clear safeguards for member state compliance with the ECD Directive obligations.

7.4 Opportunities for deliberative exchange

There is proven importance of the conditions related to both institutional setting and social pattern. This can be illustrated by comparing the conditions at work in decision-making levels which strongly contrast with each other in terms of occurrence of deliberation. On the one hand, in the EEW case at the Coreper and JHA Council levels, where deliberative discourse was weak, there was a low degree of systematic interaction (low meeting frequency and severe agenda constraints) and insulation (political pressure), where the unanimity rule applied, and where non-state actors had no formal role in the decision making. On the other, in the ECD case at the working party level, where deliberative discourse was prevalent, there was a significant degree of insulation and systematic interaction (owing to the many "side meetings"), where the QMV rule applied, and where non-state actors had full engagement in the decision making.

The differences that were found in the three cases much reflected the expectation that the more frequent and insulated the exchanges and the more supranational the institutional setting, the more prevalent was deliberative exchange as the mode of negotiation. These findings are portrayed heuristically in Figure 7.2, where the specific points are merely intended to be illustrative. In this figure the points or dots which are situated in the shady area represent the venues of discussion where deliberation has been found to be prevalent. Conversely, the points located in the bright area represent the venues of discussion where deliberation has been found
to be weak. The points located in the less shady part represent sites of discussion where deliberative exchange was identified to some extent, but not to the extent that it induced the negotiating parties to shift their positions beyond their initial interests. In such cases most exchange did not go beyond the exchange of justification or reasoned argument (i.e. reciprocity). The mutual preparedness to consider one’s own position in light of another’s argument or alternative view were rarely reported in these cases. Note that the shady area is smaller and that the slope of the line demarcating the di-
vide between the shady and bright areas of the figure is somewhat flatter with respect to the size of the shady area and the demarcation line depicted in figure 7.1 (which illustrates the expectations). This is merely to illustrate that fewer venues of discussion were found than expected where deliberation was the prevalent mode of discussion and that in the first pillar setting more occurrences were found than expected where deliberative discourse was weak while in the third pillar setting more occurrences were found where deliberation was considered prevalent.

7.4.1 The impact of institutional conditions

Looking at the findings on the impact of institutional conditions, six elements are important in determining whether there was opportunity for deliberation and reorientation. First, the case studies showed that there was a relation between the voting rule and the mode of discussion in the Council. When QMV applied, the delegations were induced to seriously engage in an informed debate so as to persuade other delegations of the validity of one’s own position with the aim to form a majority that would support one’s own position. When there was unanimity, delegations were induced to take seriously the position of the other even though the justification of a delegations’ position could be questioned. As the EEW and the VIS-Access case showed, the discussants in the Council working parties did not really bother to subject their preference to critical review or discursive challenge. It induced discussants to hold on to their positions. Ultimately, it resulted in a watering down of the draft text.

Secondly, there is good reason to assume that the QMV rule provided the opportunity to deliberative exchange only in conjunction with other factors. In the ECD case, its facilitating effect on the more vivid exchanges in the Droipen working party is to be understood in conjunction with systematic interaction. This is apparent from a comparison with the situation in the Coreper in the ECD case. While the national experts in the Droipen working party had more time and expertise to elaborately discuss the dossier, the ambassadors had comparatively little technical expertise and even less time which prevented them from discussing the file in great detail. The possibility to deliberate at the Coreper level was comparatively little, even though the QMV rule applied also at this level. In the case of Droipen, the impact of QMV also coincided with the condition of national experts’ proximity to technical detail. The fact that the Droipen delegations had specialist knowledge and sufficiently robust insight into the file to successfully argue their position and convince others of its plausibility, favoured an informed debate that became only more vivid or more interactive considering the need to shape majorities.
Thirdly, when the locus of discussion gravitated from the institutional level to the interinstitutional level where there were ample opportunities triggering deliberative debate, deliberative dynamics became a prevalent mode of negotiation. This could only happen if the European Parliament had a firm position in the discussions on the basis of the co-decision procedure. As both the VIS-Access and ECD cases demonstrated, when discussions were lifted to the interinstitutional level, where circumstances turned out to be significantly more favourable for deliberative exchange, the decision making took a decidedly deliberative turn. The outcome that was produced at the interinstitutional level had an incisive impact on the final outcome of the entire process in both cases.

Fourthly, the Presidency provided the best possible opportunities in the co-decision context. In the EEW case – under the consultation procedure – the Presidency did not necessarily always promote deliberative discourse in the Council. It actually encouraged the use of bargaining pressure, in particular in the later stages of the EEW process (as was said: the Presidency was “pushing for it to happen”), when pressure for a final agreement was mounting. On the other hand, its role was, as was found in both the VIS-Access and ECD case, particularly important if not crucial for deliberative exchange to occur at the interinstitutional level. During and after trialogue negotiations, the Presidency took a more forceful stance in the internal discussions in the Council in order to shield the process of progressive understanding that was taking shape at the interinstitutional level from the internal Council debate. Basically, securing a flexible mandate and keeping the national delegations away from (the details of) interinstitutional discussion provided scope for deliberative exchange at the interinstitutional level. If the Presidency would not have taken up this forceful role, a free, interactive exchange and development of a reasoned understanding at the interinstitutional level would in all likelihood have been thwarted.

Fifthly, full access of the Commission to decision making provided incentives for deliberative exchange in two ways. With a firmly positioned Commission – under the first-pillar procedure – the discussants in the Council and at the trialogue level were challenged to engage in exchanges of informed arguments that went beyond the limits of national legal thinking and expertise. Moreover, the Commission brought to the discussions a variety of relevant expertise and detailed knowledge of EU policy and legislation, which enriched discussion with EU-oriented substance, fact, evidence, and example. Such was the case in the ECD process. Even if it pursued its own agenda, the Commission’s input was considered valuable in this process. Also in the VIS-Access case, it was reported that the Commission challenged delegations in the
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Council with arguments that went beyond national concern. In the EEW case on the other hand, where the institutional position of the Commission was weak, the delegations were caught up in national-legal reasoning and rarely challenged by the Commission to think out of the box.

Sixthly and lastly, the Council Secretariat, its Legal Service, and the EDPS provided, like the Commission, the discussions with a knowledge base for understanding the common rationale (whenever expertise from a non-state point of view was needed). The Council Legal Service in the ECD case, for instance, provided internal Council discussions with a legal-technical knowledge base for understanding the highly disputed competence issue from a disinterested non-state based point of view. It was also called upon by the Presidency to provide substance and argument in the bilateral discussions with MEPs on the ECD file. Much the same can be said of the EDPS in the VIS-Access case. As a disinterested third party it provided detailed knowledge and expertise concerning data protection law to the interinstitutional discussions enabling the Parliament, Council and the Commission delegations to refine their views on the subject matter. As non-treaty-based institutions, the Council Secretariat and the EDPS were however, unlike the Commission, not able to challenge delegations during discussion beyond the limits of national legal thinking and expertise.

7.4.2 The impact of conditions of social pattern

Five aspects came to light when looking at the impact of the conditions of social pattern on the occurrence of deliberation and reorientation. First, systematic interaction proved to provide the necessary incentives for deliberal discourse if it is understood as a high degree of interaction density during and outside official meetings. In more concrete terms, systematic interaction proved to be an important, necessary factor if it is understood in terms of frequency, duration, and number of official discussion, as well as in terms of frequency of personal and informal contact. The case studies showed, in particular at the Brussels-based levels of decision making, that constant availability, easy access to other venues of decision making, the time available to discuss the relevant file in more detail, proximity to the day-to-day running of decision making in Brussels, were highly conducive to deliberative discourse.

This was particularly apparent from the findings on the social patterns in the JHA Counsellors’ group in the Council, between the MEPs who were closely involved in the discussions on the relevant legislative file in the European Parliament, and the preparatory meetings at the trialogue level. Advanced levels of progressive under-
standing were reached at these levels, where highly frequent exploratory informal, sometimes bilateral, exchanges were held, often on a weekly basis. In these settings there was time to establish personal contact and develop familiarity with the material and confidence with the other discussants. In contrast, findings on the social patterns at the capital-based levels of decision making, where there was a comparatively low degree of systematic interaction, showed that deliberative discourse was found to be generally weak. The national experts of the working parties and the senior officials of the CATS convened once a month, sometimes a bit more or sometimes even less. As it is clear from the EEW case, personal contact was difficult to establish in these settings. Instances of reciprocity were a rarity. Similar patterns were identified at the JHA Council level, where the ministers met once every three to six months.

Secondly, of particular note is the aspect duration of discussion. Systematic interaction only provided the opportunity to engage in deliberative exchange when there was also sufficient time to discuss the file. This aspect of systematic interaction explains the differences found between for instance the JHA Counsellors and the ambassadors of the Coreper. On the one hand, both levels of decision making were Brussels-based, which meant that high frequencies of formal, personal, and informal contact, constant availability, proximity to the daily dealings in Brussels were found at both levels. On the other, while the JHA Counsellors had time available to discuss in detail the relevant file, the ambassadors were barely able to engage in interactive exchange on the details of the file due to agenda constraints.

Thirdly, another aspect emerged from the findings that can be subsumed under systematic interaction if the latter is understood in terms of interaction density in and outside official meetings. It concerns the size of the group of discussants. It turned out that settings where the modest group size allowed discussants to have direct contact with each other, there were much more opportunities to engage in interactive exchange of reasoned arguments. There was a limited number of discussants involved in for instance the discussions at the trialogue levels where instances of both reciprocity, reflexivity, and reorientation were found. And so was the number of MEPs who were directly involved in the internal discussions in Parliament (i.e. the Rapporteur, the Shadows, the Draftsman, and staff). Albeit in a different way, the situation of the JHA Counsellors’ group resembled also ‘small-group interaction’. Considering the ample scope for informal contact and the informal nature of the meeting there was a high density of interaction in the JHA Counsellors’ setting. The setting at all the three levels just mentioned allowed discussants to establish direct, personal contact easily and to develop familiarity and confidence with each other. There was a more dense
exchange of views and discursive challenges and more preparedness to reconsider positions.

This aspect, which can be considered an indicator of systematic interaction, is all the more important considering two contrasting situations found at working party level. On the one hand, in all three case studies formal discussion at the Council working party level always took place in official setting, which meant that interaction was constrained by low meeting frequency, large size of plenary sittings, formal rules of procedure and intervention of interpreters. Interaction was straightjacketed to the extent that only a ‘tour de table’ was possible, which provided scarcely any room for interactive debate. On the other, the ECD case demonstrated that despite these constraints, far more interactive exchanges developed in the many side meetings that were organized in the margins of plenary sessions. Discussants in the Droipen made full use of the time outside the formal, plenary setting of discussion to shape an understanding through deliberation (which could be supported by a majority). Relatively high degrees of interaction density were thus reached when national experts discussed the subject matter in a small-group setting, during the side meetings.

Fourthly, insulation from outside political influence or pressure provide necessary conditions for deliberative discourse and endogenous change. In the VIS-Access and ECD case, flexibility of mandate proved to provide the necessary opportunity for the key interlocutors at the trialogue level to freely engage in an interactive exchange and to be open to (valid) discursive challenges from the other party. In the ECD case at the working party level, also, the experts who were more experienced and less dependent on instructions, were more able to participate freely in interactive, informal exchanges and to propose new ideas. In contrast, the JHA Counsellors and the ambassadors of the Coreper got caught in a bargaining dynamic in the later stages of the EEW process, when political pressure for a final agreement was mounting and the room for manoeuvre was “unusually” strict.

Fifthly and lastly, from the findings emerged that proximity to subject matter in conjunction with a common knowledge base provided the necessary opportunities for deliberative interaction and reorientation. This is apparent from the levels where a relation was found between instances of deliberation and the focus on the subject matter and its various legal-technical details in conjunction with the participation of discussants having knowledge of, and experience with, the workings of EU legislation and policy making. Detailed knowledge of, and experience with, the workings of both national and European policy and law provided discussants with a common
knowledge base to which they could make successfully reference in substantiating their views and arguments.

At the trialogue level in the ECD and VIS-Access cases, for instance, there was focus on the subject matter and its various legal-technical details and the discussants, most of whom came from the Council Secretariat, a national Permanent Representation or the European Parliament, shared detailed knowledge of EU policy and legislation and extended experience with the daily running of EU decision making. In this case, the discussants enjoyed enough insight to be able to engage in reciprocal exchanges of learned, well-informed views on the various details of the subject that was (supposed to be) familiar to all. To a certain extent the same pattern was found at the working party level in the ECD case. There, where there was exclusive focus on the technical details of the subject matter, some of the discussants – notably the JHA Counsellors and environmental law experts – were able to bring to the discussion a variety of relevant expertise and detailed knowledge of EU policy decision making, and legislation which brought discussion beyond the exchange of state-oriented views.

A similar pattern was also found in the EEW case at the JHA Counsellors level. Telling in this case is the comparison between the JHA Counsellors and the Council working party on the hand and that between the JHA Counsellors and the Coreper on the other. On the one hand, the national experts of the Copen working party were exclusively focused on the subject matter of the EEW instrument and its various legal-technical details, but they were also caught up in national-legal reasoning and therefore less open to discursive challenges and alternative views during discussion. On the other hand, the ambassadors shared to a significant extent the knowledge of the workings of EU policy and legislation and had extended experience with the daily practice of EU decision making, but lacked the time and technical expertise to engage in reciprocal exchanges of well-informed views on the various details of the subject under discussion. Compared to the Coreper and the Council working party in the EEW process, the JHA Counsellors were, during the early stages of the EEW process, in a more favourable position. What was apparent from the exchanges among the JHA Counsellors was that, unlike the Coreper ambassadors, they had sufficient expertise to engage in an informed debate on the specifics of the file. Discussion was driven by the use of substance, fact, evidence and example. At the same time, proximity to the subject matter was so ‘well-calibrated’ that the JHA Counsellors were less dependent on detail than the national experts and more able to explore and reconsider views. Their familiarity with the daily practice of decision making at EU
level enabled them to be more appreciative of alternative views that went beyond national preferences.

7.4.3 Conditions of EU’s densely institutionalized environment

Across the various venues of decision making, pathways have been identified where a conjunction of conditions triggered deliberation which in its turn induced position or shifts towards a reasoned understanding on the final outcome. Some of the conditions formed the necessary triggers of deliberative discourse, others were key to shaping an environment where it became the prevalent mode of negotiation in the process. The conditions that appeared to be necessary for deliberation to develop were related to social pattern: systematic interaction, insulation and also proximity to technical detail in conjunction with a common knowledge base. It was apparent from the findings on discussions at the triilogue levels in the VIS-Access and ECD cases, at the working party level in the ECD case, and at the JHA Counsellors level in the EEW case that deliberative exchange induced change when a conjunction of the three conditions of social pattern was at work. These ‘fragments’ of pathways of deliberative discourse and reorientation, were all triggered by a configuration of the social pattern conditions of theoretical interest. Instances of deliberation were not found in circumstances where either of the social pattern conditions was not at work. Nor were instances found where either of the social pattern conditions was sufficient for deliberation and ensuing change to occur. In sum, pathways have not been found where only one of them triggered deliberation and ensuing change.

While the conclusion can be drawn that social pattern conditions were necessary, there is no evidence that the conditions related to the institutional setting were the necessary triggers of deliberation and ensuing change. This could best be demonstrated by making a comparison between the three cases where deliberation and reorientation were fully at work. On the one hand, the conditions related to both social pattern and institutional setting provided, in conjunction with each other, ample opportunities for deliberation and reorientation at the triilogue levels in the ECD and VIS-Access cases and the Council working party level in the ECD case. On the other hand, even without the incentives coming from QMV, the presence of a firmly placed Commission and the co-decision requirement of interinstitutional exchange with the European Parliament, instances of deliberation and of delegations changing their interests beyond initial positions were nevertheless found at the JHA Counsellors level in the EEW case. It indicates that the institutional conditions did not necessarily lead to deliberation and endogenous change.
Nevertheless, even though the institutional conditions were not to be the necessary triggers of deliberation and change, they were found to be key in shaping an environment where deliberation became the crucial motor of progress in the decision making. Indeed, as the findings on both the VIS-Access ECD cases clearly suggest, when discussions were lifted to the interinstitutional level, the decision making took a decidedly deliberative turn. As a result of the co-decision procedure the locus of discussion gravitated from the institutional level to the interinstitutional level where the necessary triggers of deliberative exchange were fully at work – i.e. the conditions related to social pattern. As a matter of fact, as the locus of discussion gravitated towards the interinstitutional level, the occurrences of deliberation and ensuing change found at this level became the factors having an incisive impact on the shaping of the final outcome of the entire process. In the same vein, the Council working party in the ECD case, which bore the brunt of the discussions in the decision making process, became a site of deliberation and reorientation when additional incentives were provided by the QMV rule (in conjunction with social pattern factors). Basically, it moved the most productive part of debate at this level – interactive exchange and ensuing instances of reflexivity and reorientation – from the static plenary setting to the more dynamic side meetings.

From the findings discussed in this section it is clear that each of the conditions in itself is not sufficient for the occurrence of deliberation and change. It is a configuration of conditions that explains the occurrence – and prevalence – of deliberation and related progress in the everyday decision making of the EU. Together, these conditions formed in a mutually reinforcing fashion various configurations which were part and parcel of the densely institutionalized environment that was – and still is – typical of the EU. It provided an environment in which it would be difficult to miss out on a discursive process where deliberation was predominant and induced change. Even in such a politically sensitive policy area as the JHA.

7.5 The findings considered in a theoretical light
The sociologist or constructivist perspective – based on Habermas' theory of communicative action – has allowed this study to deliver a set of findings and insights which are fundamentally different from the rational-choice perspective on European integration. It allowed this study to move beyond the focus on social, rational behaviour orientated at maximizing, optimizing, or satisfying given/fixed – mostly member state – interests. The sociologist or constructivist perspective allowed the identification of transformative elements – i.e. interest or preference change through interaction –
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when negotiating parties were engaged in communicative practice on a ‘daily’ basis, beyond the remit of member state control. It has even been found, as the process at the JHA Counsellors level in the EEW case demonstrated, that deliberative exchange and the shifting of positions beyond initial interests during exchange can also take place in an intergovernmental setting (under specific circumstances).

In rational-choice circles, it is readily admitted that many aspects of everyday process in the EU fall outside the reach of rational-choice explanation – even though the JHA policy area was still considered to fall within its scope (Schimmelfennig 2004: 83). However, the acknowledgement of this shortcoming does not seem to go hand in hand with Moravcsik’s claim, as one of the most prominent rationalists, that when actors appear to be induced to change position by argument it is usually because, ultimately, incentives of instrumental rationality are at work (2001: 238). He thereby expressed serious doubts whether academic research would ever succeed in demonstrating the causal importance of ideas, argument, or discourse (2001: 231). The exchange of views and arguments, or deliberation, is “causally epiphenomenal” to “more fundamental underlying” instrumentalist or material incentives, Moravcsik argued (2001: 229).

It is with this claim that this conclusive chapter takes issue. This study has demonstrated that – far from being “causally epiphenomenal” – discourse and argument do matter. Arguments matter because they bring discussants nearer to an outcome or a compromise that provide certainties as to what future situation it is intended to achieve. Put differently, the mutual preparedness to be open to arguments and counterarguments which might challenge inner beliefs on profound values helps discussants to arrive at a common definition of a situation or a future situation that is considered necessary to be attained. In this light, the constructivist perspective is not different from the rational-choice perspective. Both emphasize goal-oriented nature of social behaviour (Risse 2000: 12), but instead of maximization or preservation of one’s own interest, the constructivist view highlights the willingness to subject one’s own interests to argument and reason and the preparedness to reconsider preference or position in order to come to a valid consensus that is accepted and understood in the same way by all concerned.

It has been demonstrated in this study that when deliberation was prevalent, discussants were able to arrive at an outcome that provided certainties about a future situation – whether law enforcement access to VIS or protection of the environment against crime. When it was not, as the EEW case showed, reasoned consensus on the outcome was difficult to achieve. Due to escape clauses, imprecise phrasing and
exceptions the EEW outcome left it uncertain as to what future situation it was intended to achieve. Issuing and executing evidence warrants were even considered impracticable under the EEW instrument.

What about the outcomes of such successful, highly intergovernmental ‘bargaining’ events as the IGC on the Maastricht Treaty or on the Amsterdam Treaty? Are outcomes of such events then by definition ‘non-reasoned’, because they are, like the EEW instrument, the fruits of intergovernmental, interstate exchange? Perhaps they are, considering the many general concepts, open-ended terms, and the generally phrased objectives in the treaty texts and opt-out clauses in protocols. The frequent intervention of the Court of Justice to clarify the scope and meaning of treaty provisions only confirm this surmise. What is more plausible however is that the outcomes of IGC’s are not the products of bargaining exchange only. Deliberative exchange might also be at work (at for instance the technical, preparatory levels of an IGC), albeit perhaps to a much lesser extent than the outcomes resulting from everyday decision making. Findings on the exchanges in the EEW case at JHA Counsellors level at least showed that deliberation in intergovernmental context is not unthinkable. This consideration does not, by all means, imply that the deliberative perspective can replace the rational-choice perspective in explaining outcomes of intergovernmental, interstate exchange. Rather, it merely suggests that instances of deliberative exchange cannot be entirely excluded from intergovernmental decision-making events, just as bargaining behaviour cannot be excluded from the everyday practice of decision making.

The main ground which Moravcsik adduces in support of his argument that discourse, ideas, or arguments are causally epiphenomenal is that constructivist approaches lack the rigor and precision to specify the causality of ideas or argumentation (2001). Middle-ground constructivists themselves acknowledge that it is an arduous task to establish which discursive mode is prevalent because arguing and bargaining are difficult to disentangle (Checkel 2001b; Risse and Kleine 2010: 711). They have circumvented this difficulty by focusing only on the articulation of ‘scope conditions’ under which deliberative process is assumed to prevail. Nevertheless, the criticism that ideas or arguments are causally epiphenomenal to ‘more fundamental underlying’ material incentives such as relative power or economic interest still persists. It persists because, as Moravesik pointed out, the middle-ground constructivist approach fails to convincingly specify the occurrence of what may constitute a deliberative event. And yet this criticism is fallacious. The fact that rational-choice approaches have less difficulty in explaining the causal effect or importance of the more readily apprehensible
Conclusion

phenomena such as relative power or economic interest, is in itself not a confirmation of the assertion that the less readily apprehensible phenomena such as language, ideas, or discourse are (therefore) causally less important or do not have any causal effect or importance at all.

With the aim of acquiring more substance and precision, this study has turned to insights developed in the field of communications science and of deliberative democracy theory. On the basis of these insights, a deliberative model has been developed which involved a set of concrete, observable terms that has been specified for assessing instances of communicative practice. In this model, internalized factors of deliberative process such as reflexivity have been rendered tangible by defining them as objects of social interaction. In terms of data collection, it entailed the technique of self-reporting (interviewees reported instances of reflexivity without being asked to) and the use of multiple data sources in order to triangulate across them. In terms of data analysis, it entailed meta-reading (coding textual references to instances where discussants have been reported to be responsive or reflective).

Deliberative practice was captured – also in terms of reflexivity and reorientation – and distinguished from bargaining practice in all three case studies. However, a more robust empirical basis could have been acquired if a more effective triangulation across the two types of data sources was applied. Prior accurate reading and coding of policy documents, for establishing the critical junctures in the decision-making process, and a subsequent round of interviews, would have yielded a more complete reporting of critical discursive events and the circumstances in which they took place.

While the deliberative model in this study draws on the constructivist propositions concerning insulation and systematic interaction, it also provides hypotheses that were specific to the institutional setting of the EU. The findings demonstrated that even though the conditions related to the institutional setting – voting rule and non-state access – were conducive to deliberation and ensuing change, they were not necessary. On the other hand, they proved to be necessary for shaping an environment where deliberative exchange was likely to be prevalent. Findings on the propositions concerning insulation and systematic interaction confirmed that they were indeed necessary for deliberative exchange to provide incentives for progress and position change. On some points refinement was needed though after the findings brought unanticipated aspects to light. For instance, it emerged from the findings that systematic interaction would acquire more explanatory power if it is understood also in terms of interaction density in and outside formal settings of discussion. Another
refinement was the identification of an unanticipated factor that proved to be necessary for the occurrence of deliberative interaction and reorientation, namely: proximity to subject matter in conjunction with a common knowledge base. This refinement still echoes the proposition of Risse and Ulbert on "external authority" (Ulbert et al. 2004; Ulbert and Risse 2005). But rather than a condition, they consider it a distinguishing feature of argumentation/deliberation when discussants make references to a mutually accepted external authority to validate positions or arguments (such as earlier agreements, treaties, legal rules or scientific evidence).

In developing a deliberative model with more empirical robustness, this study has sought to elaborate a causal mechanism for specifying and identifying occurrences of deliberation, its conditions and endogenous change in the reality of day-to-day decision making in the EU. Hopefully, in spite of the daunting task of demonstrating its occurrence, this study has managed to contribute to the constructivist idea that the causality of such an ‘immaterial’ phenomenon as deliberation – or argumentation – is worth investigating.

7.6 Implications for the member states and the EU
As an alternative to the traditional rational-choice perspective on decision-making, the constructivist view allowed this study to focus on discourse in daily usage as a potential source of policy change. This perspective allows to perceive the EU as an environment where interests are more likely to intermesh and change than an arena of competing interests that remain fixed throughout the process of everyday decision and policy making. But if the EU is such an environment – where interests are thus more likely to intermesh and change than remain fixed – what would this imply for the member states – as the key constituent parts of the EU – and for the EU itself?

For the member state governments, it implies that the scope for member state action to shape EU policy on an individual basis is quite limited. Even when only the member states decide – without the intervention of the European Parliament as co-decider or the Commission as agenda-setter – the scope for shaping an outcome that has a reasonable prospect of success in the implementation of its goals and objectives is contingent on a wide variety of conditions operating at the day-to-day level of EU decision making. The constraints on member state action for shaping EU policy are even more stringent, because – as it was apparent from the VIS-Access and ECD cases – the shaping of the final outcome was highly contingent on the circumstances operating at the interinstitutional level of everyday decision making. For the member states, it is difficult to disentangle from such a densely institutionalized arena where
interests are likely to enmesh and to change through daily deliberative discourse. And yet, there is little acknowledgement of this in today's discourse. In domestic politics and public discussion, it seems that the EU is still perceived as an arena of competing national interests. The main tendency is still to perceive and value EU policies according to the desiderata set forth in national agendas than to perceive and value them in terms of challenges and possibilities that the EU as such is facing.

For the EU, it poses both opportunities and challenges if incentives for deliberative discourse and endogenous change stem only from insulated venues with a high interaction density and a shared legal-technical knowledge base (facilitated by institutional conditions). On the one hand, they are likely to trigger reasoned debates that go beyond the mere exchange of state-oriented views and are likely to allow for the finding and shaping of practical solutions and outcomes based on a truly reasoned, common understanding. On the other, if incentives for shaping such outcomes would only be possible in circumstances of insulated, technical debate, then a severe strain is placed on the public accountability, accessibility, and transparency of EU decision making. The implication that changes having incisive impact on EU policies only come from debates which are difficult to access and to scrutinize due to their highly technical and insulated nature places, in other words, a severe strain on the functioning of democracy at the European level.

And yet, reasoned consensus does not necessarily follow from deliberative discourse in insulated, technical discursive events alone. Both in middle-ground constructivist thinking and deliberative democracy theory the likely venues of deliberative discourse have also been considered to be those settings where there is a public that acts both as a jury or as the third (listening) party that needs to be persuaded by reasoned argument (Bobbio 2007; Dryzek 2009; Risse and Kleine 2010; Ulbert et al. 2004). In such a setting there is a presentation of clearly defined positions and personalities that enables the public – the voter, juror, or citizen – to identify the interests or preferences in particular when highly contentious issues are at stake. For the EU, where the highly contentious political issues are more likely to be discussed – or rather: bargained – in an intergovernmental get-together, it would mean that discussion on such issues are instead made accessible to public. It could imply, for the EU, that in addition to the technical debates in insulated venues of (preparatory) decision making, reasoned consensus could also be achieved in settings where differences are stripped of their technical terminology and presented as clearly identifiable alternatives for public discussion and opinion shaping at the EU level.
7.7 The tectonic shifts of European integration

To conclude, there are three reasons to argue that the findings identified stretch further than what has been found on the basis of the three case studies. First, if findings on the three everyday decision-making events in the politically sensitive field of JHA have demonstrated that even under the most unfavourable of circumstances, instances of deliberation and reorientation have nevertheless occurred, then it is highly likely that a manifold of – incisive – instances of deliberative exchange and reorientation can be found elsewhere, in the other, more supranational fields of policy activity. In these – undoubtedly even more – densely institutionalized settings, it is difficult to miss out on deliberative processes that produce cumulative changes which have the potential to affect the scope and pace of policy processes in the long run.

Secondly, considering that with non-treaty-based institutions – like the EDPS in the VIS-Access case – a rich variety of technical expertise, detailed knowledge and experience from a non-state point of view has ‘fed’ discussion – shifting it beyond the exchange of state-oriented views – it is not difficult to see a similar process occurring in other policy areas where far more, public and private stakeholders – at local authority, civil society and/or (economic) sectoral levels – are involved. It is not unlikely that for instance in discussions on such topics as consumer protection, transport, social policy, or climate change various incentives are provided for the legislators to take in the multifaceted views from a wide variety of stakeholders and to engage in debates that go beyond the mere exchange of state-oriented views and preferences. Some have even an (albeit often moderately) institutionalized role in the decision making, such as for instance the social partners represented in the ‘Tripartite Social Summits’ or the local authorities convening in the Committee of the Regions.

Thirdly, considering that in the case studies – conjunctions of – incentives for deliberative exchange were found to be most favourable in a supranational setting, the likelihood that deliberation generally induces change in the intervening periods of everyday decision making between grand moments of interstate bargaining has only increased with the changes following the Lisbon Treaty. More (sub)fields of policy activity have been brought under the regime of supranational decision making, including various elements in the field of justice cooperation in criminal affairs. It is perfectly conceivable that in the upcoming years more unanticipated changes will follow – both in terms of expansion and retraction – from processes of deliberative exchange at day-to-day level that may, in a cumulative way, affect the scope, pace and perhaps even the direction of policy process in the long run and which may necessi-
tate acknowledgement at the highest level of intergovernmental decision making during a next IGC.

Appropriate in this light, is the metaphor from geophysics, ‘tectonic shift’. While treaty modifications, Council Conclusions or multiannual programmes following from IGCs other ‘grand bargaining’ events can be likened to earthquakes, the changes occurring in the hurly burly of everyday EU decision making are like the movement of tectonic plates. While outcomes of the ‘grand’ events of decision making – at least aim to – dramatically change the institutional and policy landscape of the EU, shifts in day-to-day decision making go unnoticed. The latter are like the movement of tectonic plates: they shift only between 50 and 100 mm annually. Their effect on the formation of continents is however only visible in the long run.

It is safe to conclude that the changes and outcomes occurring in the grand bargaining events do not exclusively shape the policy area of justice and home affairs. They are to be considered a part of the bigger whole of which daily and minutely changing practices, positions and views taking place at the day-to-day level of decision making are just as much a part. It is this through this ‘tectonic shift’ perspective that EU decision making has been explored in this study. That is, shifts in positions and preferences and changes in (daily) decision-making practice (whether formal or informal), as well as their ‘immaterial’ origins of daily discourse have been examined. For all the obviousness that may appear from each change or shift due to act or decision in daily practice, they are usually overlooked. They are however extremely meaningful if they are considered in a perspective that seeks to explain that policy shaping is a process made up of little instances of daily deliberative discourse resulting in unobtrusive changes that may in the long run affect the overall shaping of policies in the EU and of the EU itself.