

All Roads Lead Away From Rome

A Liberal Theory of International Regimes

by

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Abbreviations

CAP	Common Agricultural Policy
CoG	Chief of Government
COREPER	Committee of Permanent Representatives
CP	Council Presidency
DG	Directorate-General
EC	European Community
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
EEC	European Economic Community
EP	European Parliament
EU	European Union
Euratom	European Atomic Energy Community
GDP	Gross Domestic Product
IGC	Intergovernmental Conference
PSC	Political and Security Committee
QMV	Qualified Majority Voting
RoP	Rules of Procedure
SCA	Special Committee on Agriculture
SEA	Single European Act
TEC	Treaty establishing the European Community
WG	Working Groups
WTO	World Trade Organization

- Theory -

CHAPTER 1

Introduction

The Puzzle: A Mix of Formal Rules and Informal Practices¹

Scholars and politicians alike agree that the European Union (EU) is the epitome of international cooperation and a triumph of institutionalism in international politics. Over the past fifty years, the member states increasingly pooled their sovereignty and delegated authority to the EU's supranational institutions in order to implement and uphold cooperation among them. At every single stage in decision-making, formal rules on agenda setting, voting, and implementation provide for the possibility of imposing outcomes on reluctant governments. This depth of formalized cooperation in Europe today is unparalleled in modern international politics.

Yet, at the EU's very core lies a troubling puzzle: governmental behavior in everyday decision-making bears little resemblance to formal rules. Instead, informal practices abound as European governments regularly display behavior contrary to the behavior we might expect on the basis of formal rules. For instance, the "Treaty of Rome", which founded the European Community (EC)² in 1958, was acclaimed for endowing an independent, supranational Commission with the monopoly of initiative within the EC. Nowadays, however, the agenda is regularly predetermined by the heads of state convening within the European Council, an institution not provided for in the founding treaty. To give another example, the treaty

¹ In line with the institutions-as-equilibria approach pursued in this study, this study employs the following terminology borrowed from Stephen Krasner and Avner Greif. **Institutions**, or **regimes**, are "*explicit or implicit* principles, norms, rules, and decision-making procedures around which actor's expectations converge in a given area of international relations. Principles are beliefs of facts, causation and rectitude. **Norms** are standards of behavior defined in terms of rights and obligations. **Rules** are specific prescription or proscriptions of actions." (Krasner 1982, 185). The focus in this study is primarily on norms and rules in decision-making. According to this approach, every institution in principle manifests itself in a set of observable regular patterns of behavior, often called strategy, which will be referred to as **practices** (see Greif 2006, 351). Practices, derived from formal or informal institutional elements, are the dependent variable in this study.

² The EC succeeds the EU, which was only founded in 1992. Today, the EC is the EU's most important pillar.

provides for the possibility of outvoting recalcitrant governments. Yet, governments within the EU regularly seek consensual outcomes and rarely vote explicitly as is common in domestic political systems. Many of these discrepancies between formal rules and *de facto* behavior have been documented in several individual studies and interpreted in various ways.

Two rationalist theories, which advance contrasting causal mechanisms, are commonly invoked in the scholarly literature and in public debates to explain the phenomenon of informal practices in international and European politics. Simple rationalist theories expect states to evade formal rules and embrace informal practices in order to guard their autonomy. For studies in the neofunctionalist tradition, the emergence of informal practices demonstrates quite the contrary, that informal practices are usually associated with a loss of autonomy for member states. Institutions like the EU work only too well, because their very complexity provides institutional actors like the Commission with the opportunity to informally increase their power at the governments' expense.

Obviously, both explanations can't be true at the same time. But existing analyses are of little help, because they tend to focus on cases that confirm their theory. When properly tested, as we shall see, both theories are empirically questionable. As a consequence, the broader picture, the most astounding puzzle of European integration, has been neglected: the emergence of a mix of formal rules and informal practices in European decision-making that varies both over time and across issue-areas. Its explanation remains outstanding.

The Argument: Decision-Making Under an Informal Norm of Discretion

In contrast to these commonly invoked explanations, which interpret informal practices as some sort of pathology within the original institutional design preventing governments from reaching Pareto-improving outcomes, this study proposes a functional explanation of informal practices and a new way of thinking about how international organizations work in reality. This theory, however, does not rest primarily on a conventional regime theoretical view that international norms help states overcome collective action problems. Instead it builds on the

two-level insight of liberal theories in International Relations: that international institutions are always socially embedded in the interests and values of the societies that form their constituent parts, and that these institutions contribute to the management of domestic as well as transnational state-society relations. The theory will be referred to throughout this study as Liberal Regime Theory.

The central argument is that informal practices embed a norm of discretion among governments, which provides the flexibility necessary to harmonize institutionalized international cooperation with uncertain domestic demands. In other words, governments exercise discretion when one of them no longer has an incentive to abide by formal rules. Thus, governments neither lose control over institutional design, nor do institutions lose their efficacy. Governments informally adapt institutions in order to improve their everyday operation. Institutions therefore remain functional throughout, even though they are informal and adaptive.³

Why is discretion necessary? The reason is as follows: institutions are only effective as long as governments have incentives to defer to them. Formal rules on the delegation of authority and the pooling of sovereignty at the international level foster this incentive, because they generate stable expectations about governments' future behavior by signaling a credible commitment to cooperation. Such rules also convey this commitment to private actors, who are consequently able to plan ahead and allocate long-term capital more efficiently. But formal rules become inadequate when institutions, designed under the condition of uncertainty about the future, face changes in underlying patterns of interdependence that alter the distribution of the domestic costs and benefits of cooperation. A situation may therefore arise where an indiscriminate application of formal rules, although beneficial for a society as a whole, generates a distributional shock – that is, an unanticipated concentration of the adjustment costs of cooperation for one of its segments.

To give a recent, seemingly innocent example for such a distributional shock: a recent Commission proposal on the common organization of the wine market provided for the standardization of the definition of wine, namely as product obtained in the Community from

³ This study will treat the question of the extent to which actors constantly optimize their behavior as an empirical rather than a theoretical question. On this question more generally see e.g. Kahler 1999.

harvested grapes.⁴ This definition, however, excluded the so-called “Ebbelwoi” (“apple-wine”), a cider-like alcoholic drink made from apples, which is produced in various regions of the German state of Hesse. If the proposal had been adopted, wine pressers would have had to rename the product, which would have damaged the wine’s standing as a cultural asset, and most likely caused a considerable decline in its market share. The proposal was submitted during a charged election campaign in Hesse that was of great importance at the federal level. It immediately caused a great stir and even generated demands to pull the state of Hesse out of the EU.⁵

Incidents like this are not always resolved with similar ease, because other governments or the Commission might have a strong interest to implement the treaty even at the expense of a domestic group. Yet, if adjustment costs are particularly high and concentrated, this group may overcome initial barriers to mobilization and tempt its government into defection. This situation of unmanageable interest group pressure will be referred to as *political uncertainty*. It poses a strong problem for all governments: unauthorized defection undermines the credibility of their mutual commitment and leads to an unraveling of cooperation. Thus, all governments prefer an institution that tolerates situational defection in the wake of a distributional shock, while at the same time maintaining the commitment.

Why is it optimal for such institutions to be informal? There are multiple ways to provide such flexibility in the application of formal rules, reaching from formal escape clauses to tacit agreements. While the formalization of rules enables private actors to make efficient long-term investments, additional flexibility needs to remain informal in order to prevent economic actors from lobbying and from making inefficient investments upon false expectations about the future application of discretion. Governments therefore devise an informal norm of discretion around formal rules that prescribes the accommodation of governments in the face of political uncertainty. In other words, the mix of informal norms

⁴ Council of the European Communities 2007.

⁵ See http://www.hr-online.de/website/rubriken/nachrichten/index.jsp?rubrik=15662&key=standard_document_33340272. Retrieved on 29.09.2009.

and formal rules endogenizes uncertainty about domestic demands for cooperation in such a way that neither formal rules nor informal norms alone permit.

While it seems intuitive that it is often prudent to exercise discretion instead of insisting on the letter of the law, the realization of discretion is difficult for two reasons. Both involve interstate collective action problems, bringing classical regime theoretical concerns back into the analysis. First, governments commit to cooperation by surrendering some control over decision-making and accepting the possibility of being overruled on individual decisions. In the case of the EU, for instance, formal rules on the pooling of sovereignty and the delegation of authority are explicitly designed to prevent any opportunistic defection. In order to be able to exercise discretion whenever it is deemed necessary, governments need to retain a measure of collective governmental control over decision-making. Thus, the informal norm of discretion consequently becomes manifest in various informal practices evolving around formal agenda-setting and voting rules at each stage of the decision-making process. Second, given that the circumstances requiring discretion might not always be perfectly observable, some governments will be tempted to exploit the norm by claiming unjustifiably high concentrated adjustment costs even if this is not the case – a classic problem of moral hazard. Thus, any arrangement to manage domestic pressures requires auxiliary institutions that permit governments to collectively adjudicate such demands on the basis of relatively accurate information about the true extent of the distributional shock. The norm of discretion, in other words, is only sustainable in combination with additional institutions able to prevent this problem of moral hazard through monitoring and control.

Thus Liberal Regime Theory predicts informal practices on the one hand, and auxiliary institutions on the other, and these implications lead to two distinct aspects of informal norms that can be observed. First, informal practices vary systematically across issue-areas with the extent of political uncertainty. Second, auxiliary institutions to adjudicate discretion in decision-making coevolve with informal practices. In each case it is possible to collect direct evidence both about the behavior of political actors and their subjective motivations. These two types of hypothesis are considered separately in two consecutive parts of this study, in which each claim will be evaluated against alternative explanations. While the study assesses the causal importance of the theory as applied to decision-making in the European Community

(EC) from the Rome Treaties of 1958 until today, the results apply to international politics more generally.

The Relevance of the Study

In solving the puzzle of informal practices in the EU, the study draws on and speaks more generally to a body of literature in International Political Economy on the interplay of domestic politics and international cooperation. Specifically, the study joins and advances the debate on the demand for flexibility mechanisms in the face of political uncertainty.⁶ This literature focuses exclusively on the design of formal mechanisms like escape and sunshine clauses. This theory will be extended in three important respects. First, instead of focusing on the design of the treaty, the focus is on the everyday operation of international institutions. It is assumed that just as formal treaty provisions may turn out to be deficient in the event of political uncertainty, so may the formal decision-making rules that facilitate the implementation of the treaty prove inadequate. They, too, require some form of inbuilt flexibility. Second, while existing studies focus exclusively on formal institutional design, the study broadens the scope of the dependent variable, arguing that an informal norm of discretion in the application of formal rules, that is, the mix of informal and formal rules, is superior to either informal norms or formal rules only. Third, the theory is subjected to a more explicit test, evaluating issue-specific variation in political uncertainty and, thus, in the demand for informal discretion. Drawing on the literature of collective action, the study tests whether welfare schemes that stabilize a domestic group's support for institutionalized cooperation also reduce the demand for an informal norm of discretion.

In addition to this theoretical contribution, the study aims to advance the debate on informal practices in the European Union. Although many excellent empirical studies have enhanced our knowledge about the everyday operation of certain institutional details, the literature as a whole has for a long time not progressed beyond description. Rationalist and

⁶ Downs and Rocke 1995, Koremenos 2005, Koremenos, et al. 2001a, Rosendorff and Milner 2001.

constructivist scholars of *governance* have begun to identify a number of potential explanatory variables for the emergence of informal practices.⁷ But this more theoretically oriented literature is still far from identifying testable scope conditions, not least because it has yet to agree on a common and unbiased definition of informal practices. As a result, studies commonly select affirmative cases on the dependent variable so that we are unable to assess the theory's explanatory power. Formal theorists have sought to assess the relative importance of informal and formal institutions in EC decision-making by evaluating the models' predictive power for decision outcomes. But since these models are usually derived from insights about decision-making in domestic political systems, they are usually based on the assumption of enforceability of single decisions – an assumption that may turn out to be strong for the EU.⁸ Moreover, instead of theorizing the source and certainty of state preferences, they merely measure actors' positions in one-shot bargaining situations. Accordingly, existing formal models turned out to perform poorly in predicting decision outcomes.⁹ This dissertation therefore seeks to make two essential contributions to this body of literature: first, it proposes testable hypotheses for the emergence of informal practices, which allow us to select cases on the independent variable. Second, it develops an original analytical approach that avoids selection bias in the mapping of the dependent variable over time and across issue-areas. On this basis, the study provides an explanation for the astounding emergence of a mix of formal rules and informal practices in the world's most advanced and successful international organization, the European Union.

The State of the Art: Studying Institutions as Rules

Most existing studies are unable to explain the mix of informal practices and formal rules as a direct result of the institutions-as-rules approach they employ. For instance, a recent interest

⁷ The literature is enormous and cannot be listed in detail. Excellent recent rationalist studies are e.g. Héritier 1996, Héritier 2007, Tallberg 2006. Constructivist and sociological studies are, for instance, Checkel 2007, Lewis 2005.

⁸ See the critique in Achen 2006a, 89.

⁹ See, for instance, the recent evaluation of the predictive power of formal models of decision-making in Achen 2006b.

in International Relations research in formal institutional design has led scholars to approach institutions as “*explicit* arrangements negotiated among international actors.”¹⁰ The field of European studies has adopted a similar approach, adding official adjudication as a necessary definitional component of formal rules. Informal practices are consequently commonly defined as the mirror image of formal rules, namely as non-codified rules that are “not subject to third-party dispute resolution.”¹¹ The attention is hence directed to non-codified changes in the European Parliament’s power to appoint and invest the Commission.¹²

Yet this definition takes for granted what should be an empirical question, namely the effect of formal rules. Formal rules, even if subject to enforcement, may turn out to be empty shells with no bearing on behavior. The approach consequently implicates a dichotomy of the dependent variable between informal and formal practices. A more fine-grained variation in the prevalence of informal practices is ignored. As a direct consequence, these studies risk introducing strong bias in their analyses by focusing on less significant informal practices. They ignore more significant ones emerging under the veil of formal rules as, for instance, the search for consensus in spite of the formal option of voting.

This bias in the description of the dependent variable is aggravated through another recent trend, namely the analysis of institutions from the perspective of a Principal-Agent (P-A) relationship. In this approach, supranational institutions are conceived of as “agents” to whom the “principal,” that is, the governments delegate authority.¹³ The focus of the analysis is thus being directed to everyday interaction between principal and agents. For instance, P-A studies approach the problems of agency slack, that is, independent action by the agent that is not desired by the principal, by studying various contract designs that are supposed to ensure an efficient task fulfillment.¹⁴ The very interaction among governments, however, which constitutes the “principal” in the first place, falls by the wayside.¹⁵ Thus, any informal

¹⁰ Koremenos, et al. 2001a, 276 (Italics added).

¹¹ See Farrell and Héritier 2007, FN 1 and Stacey and Rittberger 2003, 859. Van Tatenhove and colleagues (2006, 14), however, focus on behavior and define it as non-codified interaction that is not structured by formal rules. Yet, they fail to operationalize this definition any further.

¹² To be sure, the approach has brought about many excellent studies as for instance that of Moury 2007.

¹³ See e.g. Hawkins, et al. 2006, 6-7. For the EU see most prominently Farrell and Héritier 2007, Pollack 2003b.

¹⁴ A general introduction into P-A analysis is provided by Bendor, et al. 2001. On various *ex post* and *ex ante* control mechanisms see McCubbins and Schwartz 1984.

¹⁵ To be sure, some P-A approaches discuss problems of multiple and collective principals. See Bendor, et al. 2001, 244-245, Nielson and Tierney 2003, 247-249. Yet, these studies primarily draw attention to the problem of

practice is necessarily interpreted as an unintended outcome, which either increases the agent's autonomy or is a reaction to such an attempt. Other informal practices, as well as alternative explanations, are precluded from the outset.

In sum, the institutions-as-rules approach introduces bias in the analysis by dichotomizing the dependent variable into formal and informal practices. More fine-grained variation is obliterated, with the effect that it becomes increasingly difficult to interpret the importance of informal practices in the broader institutional context. The P-A approach aggravates the problem by drawing off the attention from interaction between governments. Yet these threats to inference can be rectified.

The Approach: Studying Institutions as Equilibria

In order to provide a more meaningful and unbiased description of informal practices, the analysis centers on the game-theoretic notion of institutions as equilibria, that is, as an *interaction in which no actor can be made better off by unilaterally choosing a different course of action.*¹⁶ *Informal practices are consequently defined as deviations from formal rules in equilibrium.*

In equilibrium, following the institution's set of explicit or implicit rules is a rational actor's best response to other actors' rule-following behavior.¹⁷ Refraining from setting unilateral barriers to trade, for instance, is the best response to other states' free trade policy. Accepting occasional decisions against oneself is the best response to other states acceptance of being overruled. In other words, actors are expected to refrain from this course of action ("strategy" in game-theoretical language) in a counterfactual situation. An institution in the

formal contracting and re-contracting of an agent, not to the effect of the existence of multiple or collective principals with possibly changing interests for the very design of the contract.

¹⁶ On this approach see Greif 2006, esp. chap 11.

¹⁷ This study therefore goes back to the original regime definition as "*explicit or implicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations.*" See Krasner 1982, 185. Institutional rules consequently create stable expectations about each other's behavior and thereby induce actors to adopt their strategies to begin with.

functional sense is Pareto-improving: It is an equilibrium for which there is a counterfactual equilibrium that makes all actors worse off.¹⁸

Figure 1: Institutions as equilibria

Independent Variable	→ Intervening Variable	→ Dependent Variable
Actors' interests	→ Institutional elements (formal or informal norms and rules)	→ Actors' behavior (strategies)

The value of studying institutions as equilibria as opposed to studying them as rules is that this approach directs our attention to where institutions indeed exist, namely at the level of behavior. While the definition is initially agnostic towards the institution's function and, thus, actors' behavior in equilibrium,¹⁹ we can operationalize it for empirical research by specifying actors' common interests and, if appropriate, their information and beliefs. Every institution in equilibrium is hence in principle observable in reality, because actors pursuing their interests in interaction can be expected to display certain behavior and refrain from other courses of action. Of course, multiple equilibria and, thus, multiple institutions are bound to exist under the long shadow of the future. Institutions like the European Council or the Council Presidency are hence historically contingent and particular to a specific context. But this is an opportunity for, rather than an obstacle to generating testable implications, because it allows the researcher to incorporate contextual knowledge, rule out unfeasible equilibria and specify the theory's implications even further.²⁰

We are consequently able to discern variation in the prevalence of formal and informal practices. Specifying actors' interests underlying the original design of a specific formal institution permits us to deduce the patterns of behavior that these formal rules are expected to generate in equilibrium. In the case of the EC, these formal rules are the treaty rules on everyday decision-making in the EC, the so-called Community Method. The difference between what we expect and what we observe in practice then constitutes an informal practice. The resulting mix of formal and informal practices subsequently describes a new equilibrium in need of explanation – the very puzzle driving this study. In short, *informal practices are*

¹⁸ Note that this definition may or may not imply “**Pareto-optimality.**” As we shall see below, it is the very premise of this theory that governments can only approach such a state.

¹⁹ In fact, it is even agnostic with regard to the specific social scientific theory, because it is open to a contextual specification of interests and beliefs. For a discussion see Greif 2006, chap. 2.

²⁰ Greif 2006, 358.

defined as deviations from formal rules in equilibrium. Informal practices in the EC will be defined as deviations from the Community Method in equilibrium. Purely formal and purely informal practices are consequently two endpoints of a continuum. Practices become more informal the more frequently governments deviate from formal rules in equilibrium. Therefore, instead of dichotomizing and truncating the dependent variable, the institutions-as-equilibria approach allows a description of the full range of informal and formal practices and of fine-grained variation in their prevalence.

Research Design and Methods

As mentioned above, a common bias in existing studies of informal practices has been the selection of affirmative cases on the dependent variable. This study, in contrast, specifies the independent variable that creates the demand for an informal norm of discretion as well as the informal practices we expect to arise on this basis. The theory can thus be subjected to falsification through the selection of cases on the explanatory variable.²¹ According to Liberal Regime Theory, this independent variable is political uncertainty. It creates a demand for an informal norm of discretion, which necessitates not only the development of informal practices around formal rules, but also auxiliary institutions to sustain the norm.

Liberal Regime Theory is a general theory about institutions in international politics. In principle, the full universe of cases consists of formal and informal practices in the context of all existing international institutions. Since this is more than one can possibly address in a single study,²² the test of Liberal Regime Theory is here confined to one very important domain, namely the European Community. The multiplication of the total number of

²¹ On case selection and possible bias see King, et al. 1994, chap. 4.

²² The reason is that informal practices are by definition contingent on a specific set of formal rules, which makes the mapping of the dependent variable a very time-consuming task. This study further narrows the category of informal practices to those arising in the context of a consistent set of formal decision-making rules, the Community Method. As a result, the study focuses on all EC policies except the European Monetary Union.

observations within this domain in various ways allows a rigorous test that enhances the theory's potential causal leverage.²³

The first part of the analysis on issue-specific variation in informal practices deduces seven expectations with respect to observable aspects of governments' behavior in agenda setting, voting, and implementation under the Community Method in equilibrium. The degree to which these expectations are met will be evaluated on the basis of both qualitative and quantitative data throughout four partially independent time periods from 1958 to 2001. The result is a medium sized data set of 56 observations, most of which in fact constitute qualitative mini case studies. This *large-N* qualitative approach, though time-consuming, has a major advantage compared to quantitative analyses and qualitative single case studies. Instead of showing mere correlation, it allows one to focus on the operation of the causal mechanism, consider the context and idiosyncrasies of the case, while still accounting for the big picture of general trends in the full range of cases.²⁴

The second part of the analysis, which focuses on the role of the Council Presidency in sustaining the norm by adjudicating on the exercise of discretion, generates three more specific observable implications. The first is the expectation for the Presidency to coevolve with the emergence of informal practices and is assessed using descriptive inference of its role in Council decision-making over time and across issue-areas. A second expectation is for all governments to create conditions that are conducive to an accurate provision of information by dropping dossiers from the agenda where the Presidency itself stands to gain from exercising discretion. This claim is evaluated in two ways: on the basis of a multivariate analysis performed using an original data set and on the basis of two randomly chosen mini-case studies. And finally, we zoom in on the causal mechanism and weigh its explanatory power against competing claims by studying the Presidency's exact function in a "least likely" in-depth case study of the Working Time Directive.²⁵

²³ King, et al. 1994, 223-228.

²⁴ For a similar approach see Fortna 2004, 54-56.

²⁵ The Working Time Directive is a secondary law proposed by the Delors Commission in the early 1990s to regulate daily and weekly working hours in the member states of the European Union.

Data

A consistent set of competing hypotheses tested with an adequate number of observations is only as convincing as the data used to test them. Finding reliable data, however, is particularly challenging in the case of informal practices. For one, informal practices quickly escape researchers' and practitioners' attention. Secondary analyses are consequently less common than mere descriptions of the development of formal rules. Furthermore, primary data are scarce, because official documents in the EC used to be classified for a vesting period of 30 years. This leads to two problems: first, especially on politically contested and ideology-laden issues like European integration, data scarcity quickly leads to the creation and reification of myths in secondary analyses. Ian Lustick hence cautions political scientists strongly against the careless use of historiographies.²⁶ Second, the absence of secondary analyses of informal practices cannot be interpreted as the absence of informal practices in reality.

This study therefore draws primarily on newly collected archival material.²⁷ In order to increase the source's inter-subjective validity, the strongest primary source was identified and its content crosschecked with weaker sources drawn from contending schools of thought. Classified materials from different historical archives were treated as "strong" primary sources. Particularly useful in that regard were the Council of Minister's occasional internal reviews of working methods, in which governments identified and discussed their own decision-making practices in the light of possible alternatives. Contemporary practitioner reports and newspaper commentaries are treated as "weak" sources, because they are usually published for a specific political purpose. Since regular patterns of behavior are rarely newsworthy, these weak sources usually point to norms by identifying exceptional deviations from them. In addition to this qualitative material, the analysis also draws on a number of publicly available *large-N* data sets. Whenever the available data turn out to be inadequate for assessment, this uncertainty is reported and discussed in light of alternative interpretations. All material used in this study is publicly available at <http://www.princeton.edu/~mkleine>.

²⁶ Lustick 1996, 605.

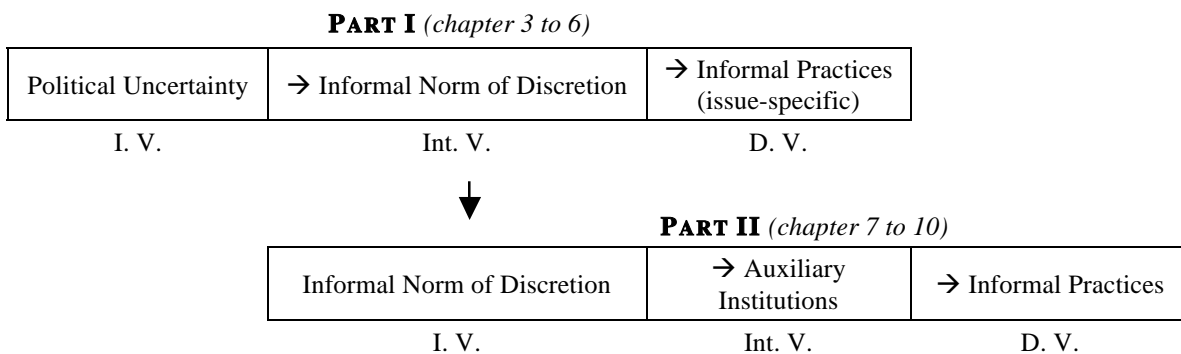
²⁷ On the use of archival material see Trachtenberg 2006, chap. 5.

Plan for the Dissertation

As mentioned, Liberal Regime Theory generates two types of hypothesis on the issue-specific variation of informal practices and the development of auxiliary institutions in decision-making. These hypotheses subdivide the study into two parts, each of which will be prefaced with an introductory chapter specifying the hypotheses for the context of EC decision-making. The first part (chapters 3 to 6) focuses on the set of claims that informal practices vary systematically with the extent of political uncertainty. Chapter 3 develops an analytical approach to the study of informal practices in the European Union and deduces seven observable implications under the first hypothesis. The following chapters trace these implications for agenda setting (chapter 4), voting (chapter 5) and implementation (chapter 6).

The second part (chapter 7 to 10) turns the informal norm of discretion into the new explanatory variable and traces the hypothesis that for the norm to be sustainable, it must bring about auxiliary institutions in decision-making able to provide a solution to the problem of moral hazard. Chapter 7 specifies this hypothesis, arguing that the Council Presidency is under certain circumstances able to solve this problem. Chapter 8 to 10 trace three observable implications of this hypothesis, employing a variety of quantitative and qualitative techniques. The study concludes with a discussion of the positive and normative implications of the findings (chapter 11). The causal mechanism and the structure of the dissertation are depicted in the following graph.

Figure 2: Causal mechanism and structure of the study



CHAPTER 2

Liberal Regime Theory

This chapter presents a liberal theory of regimes in international politics. The central argument is that informal practices reflect an informal norm of discretion that governments devise around formal rules in order to harmonize cooperation with its future uncertainty in domestic demands due to certain types of exogenous shocks. The theory is introduced in six steps. First, the chapter presents common explanations for states' decisions to delegate authority to formal institutions. Second, it explains why formal institutions, designed with great foresight, may prove inadequate. It is argued that because formal institutions are always created under the condition of uncertainty about the future, their unfettered application can have self-undermining effects. The third step explains why and under what circumstances this problem translates into a demand for discretion in the application of formal rules while maintaining the credible commitment these rules embody. In a fourth step, alternative formal and informal institutional designs for flexibility are considered. In light of this, it will be argued that informal flexibility mechanisms are more efficient than formal mechanisms. Fifth, the chapter will explain why, given that the circumstances that require discretion are not perfectly observable, the informal norm needs to be accompanied by auxiliary institutions that prevent its exploitation. The final, sixth step considers three alternative explanations for informal practices in decision-making – new neofunctionalism, simple rationalism, and classical regime theory – and explains how these theories can be tested against each other.

Why States Create Formal Institutions

In situations characterized by interdependence, where attaining one's objective is contingent on another actor's behavior, institutions can be critical for achieving mutually beneficial outcomes. Key for understanding how institutions operate is uncertainty about other actors' future behavior: institutions manipulate the distribution of information among states by creating stable expectations about each other's actions. These, in turn, induce other states to adopt cooperative strategies at the outset.²⁸ The precise function of an institution depends on the issue-specific type and extent of the problem it is supposed to solve.²⁹ They may, for instance, provide expertise, establish focal points, reduce transaction costs, and render commitments credible.³⁰ Since there are multiple ways to coordinate state behavior, some of which are more convenient for one actor than for another, institutions always also bias the distribution of gains from cooperation.³¹

Increasingly, states have chosen to pursue cooperation within formal institutional frameworks and have invested numerous international organizations with certain powers necessary to achieve the broader objectives of cooperation.³² Drawing on work in American politics, International Relations scholars have put forward different, though not mutually exclusive explanations for this phenomenon.³³ Earlier neofunctionalist theories stressed decision-makers' cognitive limitations and emphasized the demand for the centralized expertise formal organizations embody.³⁴ Others pointed to the difficulties faced by governments in committing credibly to enacting mutually beneficial policies in the face of varying and conflicting demands for cooperation.³⁵

²⁸ The seminal work in International Relations is Keohane 1984.

²⁹ Koremenos, et al. 2001a, Martin 1992.

³⁰ Keohane and Martin 1995, 42.

³¹ See Krasner 1991.

³² Shanks, et al. 1996.

³³ Hawkins, et al. 2006, Kiewiet and McCubbins 1991.

³⁴ See e.g. Haas 1963, 65.

³⁵ The so-called distributional literature, focusing on the role of institutions in enabling bargains over time or across committees. See e.g. Weingast and Marshall 1988. Fiorina (1982, 46-52) argues that institutions allow leaders to shift blame for unpopular policies as long as they have an interest in abiding by a certain policy. For a discussion of credible commitment see e.g. Majone 2001, 105.

This latter explanation was pursued further in liberal theories of international relations, which stress state preferences as the fundamental causes of state behavior.³⁶ Building on the insight in endogenous trade policy that, when choosing the optimal foreign economic policy, leaders trade off overall welfare gains from cooperation (and hence votes) against rents from special interest groups in exchange for protection,³⁷ scholars pointed to a possible time-inconsistency in governmental policies: If governments must be expected to be susceptible to ad-hoc influences from special interests, cooperation is difficult to achieve and policies become inefficient in the long-run. Governments therefore need to find credible ways to commit to a consistent, cooperative policy. Andrew Moravcsik, for instance, argued that the insulation of European decision-making from domestic politics through the pooling of sovereignty and the delegation of authority rendered their mutual commitment credible.³⁸ Mansfield and colleagues emphasized the signaling function of formal institutions toward publics at home, while Thompson studied how states use institutions to convey information to audiences abroad.³⁹ Giovanni Maggi and Andres Rodriguez-Clarke pointed to an additional economic rationale for formal institutions, stressing their signaling function for domestic and foreign investors. Since time-inconsistent policies lead to a misallocation and maladjustment of long-term investments, the argument goes, formal credible commitments permit economic actors to plan ahead. This leads to a more efficient allocation of capital and higher aggregate welfare gains.⁴⁰ In short, governments establish formal institutions that insulate decision-making from special interest group pressure in order to signal time-consistent cooperative behavior to their counterparts as well as to foreign and domestic private actors.

³⁶ For a formulation of liberal theories and their comparison to alternative theories like realism and institutionalism see e.g. Milner 1997, Moravcsik 1997.

³⁷ See Grossman and Helpman 1994. Rents are usually measured as campaign contributions, but they can in fact be anything from illegal bribes to pledges of support on other issues. Factors like relative bargaining power and tariff revenues also enter the calculation.

³⁸ See Moravcsik 1998, 73-77. Mark Pollack (2003b, 153) demonstrated that this explanation indeed does a good job explaining the patterns of delegation in the European Union.

³⁹ Mansfield and colleagues argue that the formal commitment economic openness protects governments in bad economic times from being erroneously punished for having catered to special interests when the economic conditions are in fact the result of an adverse economic shock. Mansfield, et al. 2002, 480. One might object, however, that governments can still be erroneously blamed for bad economic times when publics regard the reason for policy failure lie in domestic rather than foreign economic policies. Alexander Thompson stressed the signaling function of institutions for domestic publics at home and abroad. See Thompson 2006, 12.

⁴⁰ Maggi and Rodriguez-Clare 1998. Mitra (2002) argues that this inefficiency already arises because of fix lobbying costs. I thank Jeff Frieden and Helen Milner for pressing me on this point.

Why Formal Institutions May Prove Inadequate

In the absence of a monopoly of force in international politics, formal institutions have to be self-enforcing to be sustainable. Their effect consequently has to be such as to reproduce states' interests for them to adhere to institutional rules. Yet, as Kenneth Shepsle put it, "what can be anticipated in advance is that there will be unforeseen contingencies."⁴¹ In other words, exactly because formal institutions are created under the condition of uncertainty about the future – which is, after all, their *raison d'être* – their precise effects are never entirely predictable.⁴² Situations may therefore arise where formal rules no longer generate, or in fact even undermine the support necessary to sustain them.

A major source of uncertainty about the institution's basis of support is the special interest groups' ability to pressure their government for defection from the formal commitment.⁴³ As explained above, because they might be tempted to accept rents in exchange for protection, governments commit to a certain level of openness and design institutions accordingly. But economic transactions at both the domestic and global level are highly sensitive to multiple unpredictable factors such as shocks in demand or supply, subsequent fluctuations in world price, and technological changes.⁴⁴ This implies that the exact distribution and concentration of the domestic costs from cooperation cannot be predicted at the time of institutional creation. Some domestic groups may therefore face sudden concentrated costs, that is, unanticipated losses in expected income, if governments fully apply and implement formal rules.

In the politics of collective action, concentrated interests have advantages over diffuse interests like the general public, because a small group's marginal utility from successful mobilization is higher than that of a large one. Domestic groups facing concentrated adjustment costs from cooperation may therefore unexpectedly overcome initial obstacles to

⁴¹ Shepsle 1989, 141.

⁴² This study will therefore speak of uncertainty instead of risk. Uncertainty is the possibility that a strategy yields more than two outcomes. It entails risk, which is a more precise measure of probability of outcomes and impact. See e.g. Abbott and Snidal 2000, 442, Wendt 2001, 1029-1032 on the fallacies of conflating uncertainty with risk.

⁴³ Other sources may be changes in political systems that alter group's ability to lobby for protection.

⁴⁴ Depending on the source of shocks, openness can also decrease risk, for instance if it allows substituting for domestic demand shocks. The principal point, however, is that trade is a highly uncertain issue-area compared to other issues.

mobilization.⁴⁵ Governments, weighing potential rents from special interest groups in exchange for defection against aggregate welfare gains of the diffuse public, are suddenly tempted to renege on the formal commitment. Given that there are countless ways to influence trade flows across borders,⁴⁶ there are also multiple obvious and hidden ways for governments to cater to these demands, from open defection to the simple obstruction of cooperation.⁴⁷ And since governments usually have short time horizons, official and commonly arduous infringement procedures can barely deter governments from this sudden temptation to renege.

The result of this unexpected defection is not just the decline of overall welfare gains. Even worse, the credible commitment embodied in the formal institutions is undermined by an unauthorized breach of the rules. In short, formal rules intended to uphold, implement and deepen the level of cooperation may suddenly prove inadequate in the face of uncertainty about a government's incentive to comply with formal rules. Their unfettered application can undermine the institution's own basis of support. Following Rosendorff and Milner, this problem will be referred to as **political uncertainty**.⁴⁸ *It can be defined as uncertainty about domestic groups' ability to tempt their government into defecting in the face of an imminent loss in income.*

The causal chain leading to political uncertainty is depicted in the following graph. The black stages 1 and 2 depict the stages in the formation of a government's foreign economic policy: A government trades off the electoral support it expects to receive from an aggregate improvement in welfare against the rents it receives from special interest groups when deviating from cooperation. All governments at stage (3) subsequently agree on a certain level of cooperation. They design formal institutions in order to implement or uphold cooperation and signal their intention to private actors at home and abroad. Yet, as depicted in the red parts of the figure, governments cannot predict the distributional effects of their

⁴⁵ On collective action see Olson 1965. On the relative influence of consumers and special interest groups on trade policy see Grossman and Helpman 1994.

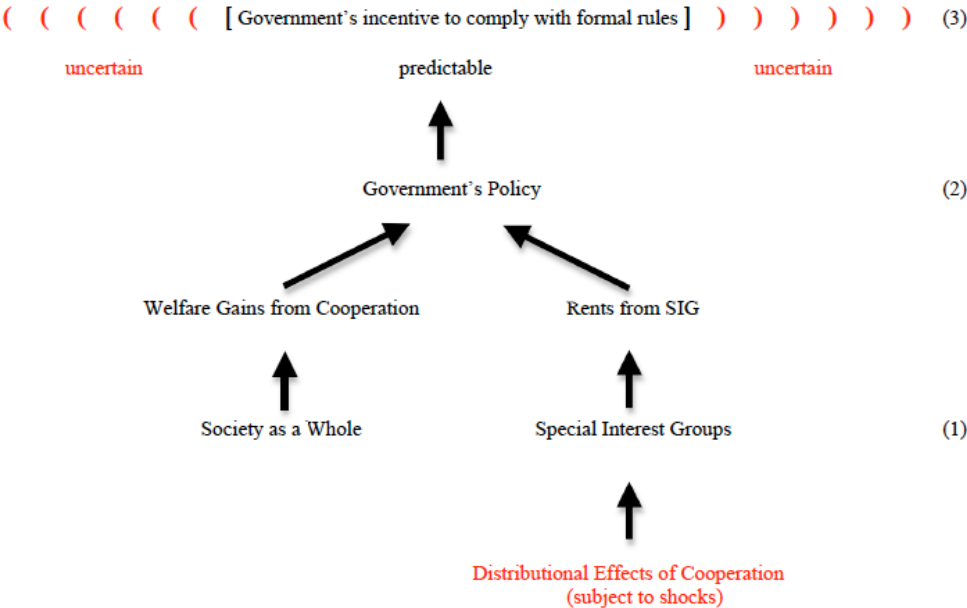
⁴⁶ Interest groups' demands may span from open defiance, unilateral trade barriers to obfuscated domestic regulations, taxes and subsidies. See Copeland 1990, Ederington 2001. On various kinds of trade barriers see Kono 2006.

⁴⁷ Which form of protection industries lobby for is endogenous to the structure and organization of the industry concerned and therefore remains an empirical question. See Rodrik 1986.

⁴⁸ Rosendorff and Milner 2001, 832. Downs and Rocke (1995, 130) speak of domestic uncertainty.

cooperation. For this reason, they are also unable to predict their own and their successor’s incentives to abide by the formal institutions meant to implement and uphold cooperation. A situation may therefore arise where formal rules no longer generate the support necessary to sustain them.

Figure 3: Political uncertainty



Why Deviations From Formal Rules Are in the Common Interest

We just established that although they bolster states’ credible commitments and lead to a more efficient allocation of capital, formal rules that uphold and implement the treaty can have self-undermining effects in the face of political uncertainty. A strict abidance by them may generate unanticipated concentrated costs that induce domestic recalcitrance by special interest groups. These consequently mobilize and tempt their governments into defection. As mentioned, the ways to defection are manifold.

Importantly, defections do not only diminish overall welfare gains from an individual decision: if unauthorized, they undermine credible commitment to the institution and quickly

lead to an unraveling of cooperation.⁴⁹ All governments are therefore better off when they prevent such situations from arising. This can be achieved by deciding to collectively refrain from insisting on the letter of the law, instead accommodating governments facing an imminent distributional shock. In other words, the problem can be rectified through discretion.

When exercising discretion, governments must avoid merely shifting concentrated costs and, thus, the very problem from one state to another. This is achieved by dispersing the concentrated costs across all member states to such an extent as to mitigate a domestic group's incentives to mobilize for defection.⁵⁰ A concession to a government facing a distributional shock may, for instance, be compensated by concessions on other items. The result is a norm of discretion similar to an insurance regime. Governments agree on a regular and guaranteed small loss in order to prevent a large, possibly devastating loss. A comparison of the norm of discretion to car insurance illustrates this point. Since accidents are not predictable, drivers buy car insurance in order to protect themselves against the unanticipated, concentrated costs of an accident. They agree on contributing a regular small amount to a large fund out of which accidental damages are paid in the insured event. If car accidents were fully predictable, there would be no demand and therefore no market for insurances to begin with. Insurance regimes therefore arise out of uncertainty about the occurrence of certain events and allow it to be dealt with by dispersing sudden, concentrated costs among all insured. In international politics, the informal norm of discretion arises in a classic regime theoretical sense out of uncertainty about governments' ability to abide by formal rules, which is what we have referred to as political uncertainty. In our case, governments collectively insure the formal institutions from unauthorized defection instead of an individual car from an accident. In short, *when international cooperation is susceptible to political uncertainty, all governments prefer institutions that allow for situational discretion in the application of formal rules.*

⁴⁹ See e.g. Bagwell and Staiger 1990. Protection may under certain circumstances even increase welfare. For a (second-best) argument for protection as efficiency-enhancing insurance see e.g. Eaton and Grossman 1985.

⁵⁰ The direct compensation for losses is a special case of the dispersion of costs, since it assumes that the costs of compensation are only borne by one or few states. The larger the number of states being compensated, the more we can speak of dispersion.

Liberal Regime Theory therefore proposes a rational explanation for what John Ruggie termed *embedded liberalism* in the realm of global economic cooperation, the essence of which

“(…) is to devise a form of multilateralism that is compatible with the requirements of domestic stability. Presumably, then, governments so committed would seek to encourage an international division of labor which, while multilateral in form and reflecting *some* notion of comparative advantage (and therefore gains from trade), *also* promised to minimize socially disruptive domestic adjustment costs as well as any national economic and political vulnerabilities that might accrue from international functional differentiation. They will measure social welfare by the extent to which these objectives are achieved.”⁵¹

For Ruggie, the norm of embedded liberalism constitutes an “inter-subjective framework of meaning” among states about the legitimate purpose of an institution.⁵² Variation in meaning, not in interests, information or power, determines the design and change of institutions.⁵³ From the perspective of Liberal Regime Theory, however, embedded liberalism reflects a functional, informal norm of discretion with the purpose of maintaining the institution’s domestic basis of support. In other words, societies may well hold certain ideas about the legitimate distribution of welfare at the domestic level. Yet the principal micro-mechanism upholding the norm at the international level is the member states’ common interest in maintaining the formal institution in the face of political uncertainty.

Why States Prefer Informal Norms to Formal Rules

So far we have established that political uncertainty creates a demand for a norm of discretion with a view to harmonizing the operation of formal rules with varying domestic demands for cooperation. But situational discretion is by definition a deviation from formal rules, and these are usually deliberately designed in such a way as to preclude any ad-hoc interference with their daily operation. In the case of the EC, for instance, member states explicitly

⁵¹ Ruggie 1982, 399, drawing on Polanyi 1944. For an argument that openness requires domestic redistribution see Cameron 1978, Katzenstein 1985, Rodrik 1997, Rodrik 1998.

⁵² Ruggie 1982, 380.

⁵³ Ruggie 1982, 404-405.

designed institutions in such a way as to overcome possible opposition at every single stage of the decision-making process. They invested the Commission with extraordinarily strong agenda-setting powers, provided for the possibility of overruling recalcitrant governments, and delegated the implementation of individual decision to the European Commission and the oversight thereof to the European Court of Justice (ECJ). Moreover, the formalization of these rules bolsters their effect by signaling the governments' commitment to private actors at home and abroad.

Governments therefore find themselves in a dilemma: on the one hand, the strict application of formal rules may generate concentrated adjustment costs at the domestic level, undermine the institution's domestic basis of support, and jeopardize the credible commitment to the formal institution. On the other hand, a deviation from formal rules, although prudent in a situation like this, is at conflict with the design and very purpose of formal rules. In other words, the challenge states face is to collectively authorize defection without at the same time undermining the credible commitment the formal rules entail.

There are two possible ways out of the dilemma: the first is to design formal flexibility mechanisms into the original set of formal rules. The other way consists of devising an informal norm of discretion around formal rules. In recent years, trade economists,⁵⁴ lawyers⁵⁵ and political scientists⁵⁶ have focused on the formal flexibility mechanism, arguing that uncertainty about governments' future domestic support for cooperation is the rationale behind the design of escape and sunshine clauses into formal international institutions. These clauses provide mechanisms for cooperating states to discontinue international obligations in the face of distributional shocks such as, for instance, damaging import surges. One important effect of formal flexibility mechanisms is that they make it easier for risk-averse governments

⁵⁴ See e.g. Bagwell and Staiger 1990, 794, Dixit 1996, Hoekman and Kostecki 1995.

⁵⁵ See Schwartz and Sykes 1996, 28, Schwartz and Sykes 2002, S180, 182, Sykes 1991.

⁵⁶ In political science and international economic law it triggered the positive analysis of escape clauses and other flexibility mechanisms. See e.g. Downs and Rocke 1995, 130-138, Koremenos 2005, Rosendorff and Milner 2001, 832.

to conclude agreements on deep cooperation than it would have been in the absence of this kind of insurance.⁵⁷

Formal flexibility mechanisms, however, cannot be designed in an optimal way for the everyday operation of formal decision-making rules. Recall that the demand for discretion arises out of the impossibility of predicting governments' future incentives to abide by formal rules. By the same token, governments are unable to precisely circumscribe the scope of application of such a flexibility mechanism. In other words, discretion can only be optimal if granted on a case-by-case basis. Although it may facilitate the agreement on the initial level of cooperation, the formalization of flexibility necessarily conveys ambiguous information about the circumstances under which discretion applies.⁵⁸ Some private actors will therefore be induced to act under false premises. This results in two inefficiencies: first, some private groups spend resources on lobbying under the false assumption of eligibility for discretion.⁵⁹ Second, economic actors misallocate capital and misadjust to economic change in anticipation of discretion.⁶⁰

The alternative to formal flexibility mechanisms is the informal exercise of discretion on a case-by-case basis. Just like formal flexibility mechanisms, an informal norm of discretion can be expected to make it easier for governments and new members to agree on a high level of cooperation, because they know that they will be accommodated when facing unjustifiably strong adjustment costs. Governments consequently adopt informal practices that allow them to collectively resume control over decision-making. In the case of the EC, governments adopt informal practices that allow them to collectively resume control of all stages in decision-making whenever deemed necessary. They resume control over the agenda, they regularly accommodate governments facing domestic adjustment costs instead of overruling them, and because governments mitigate incentives to renege, governments in turn

⁵⁷ Rosendorff and Milner 2001, 832, arguing against James Fearon's (1998) conjecture that distributive uncertainty makes it more difficult to reach deep agreements. For an earlier formulation see Fernandez and Rodrik 1991.

⁵⁸ For a discussion of the problems of formalization (and legalization) see Goldstein and Martin 2000, 606-609.

⁵⁹ For a similar argument with a view to explaining institutionalized cooperation instead of flexibility clauses see Mitra 2002.

⁶⁰ Kohler and Moore 2001, Maggi and Rodriguez-Clare 1998, Staiger and Tabellini 1987, 824, Staiger and Tabellini 1989.

relax centralized control of implementation.⁶¹ Decision-making governed by a norm of discretion consequently resembles what Robert Keohane coined *diffuse reciprocity*: it is a give and take with a view to accommodating legitimate preference outliers in such a way that the equivalence of these transactions and their sequence remains imprecise.⁶² From the perspective of Liberal Regime Theory, the nature of the transaction is the reciprocal dispersion of concentrated costs to such an extent as to restore the domestic support for the institution. It is imprecise, because the demand for transactions like this is inherently uncertain.⁶³

To be sure, the informal norms of discretion will not remain secret to well-organized special interests. But instead of constituting an ambiguous right, it constitutes a favor that is granted on a case-by-case basis. Governments and private actors consequently need to regard the application of formal rules as the default condition, to which exceptions are only made if a government can demonstrate unbearably high concentrated adjustment costs and – as will shortly be explained – its counterparts are able to clearly distinguish between legitimate and illegitimate demands. Private actors consequently invest capital and adjust to economic changes in a more efficient way than they would do in the case of formal flexibility. The mix of formal rules and informal norms of discretion is therefore superior to either one or the other institutional form: it bolsters states’ credible commitment and induces efficient long-term investment while at the same time providing the opportunity to collectively exercise discretion.

First Implication: Political uncertainty leads governments to devise an informal norm of discretion around formal rules. This translates into the adoption of informal practices in decision-making.

⁶¹ Horn, et al. 2006, 5. This is not the same as control mechanisms in a Principal-Agent relationship. Control mechanisms are supposed either to induce an agent to perform his job in the most efficient way, or to prevent it from cutting loose. In this case, however, governments need mechanisms to prevent the agent exactly from doing its job in the most efficient way.

⁶² See Keohane 1986, 8.

⁶³ Note that for this argument to hold true, the **shadow of the future** is only necessary in so far as it generates governments’ common interests in maintaining the formal credible commitment to cooperation in the first place. It is redundant for the explanation of the emergence of an informal norm of discretion.

Why Informal Practices Are Not Enough

How much discretion is enough? Governments find themselves in a dilemma when trying to answer this question. Accommodating a cooperating partner too little can lead to the obstruction of cooperation and the undermining of the credible commitment. Too much accommodation, however, leads to deadweight loss for all of them and may create false expectations about the circumstances under which the norm applies. Yet it is difficult to determine the right level of discretion, because individual governments are better informed about their incentives to keep the commitment than other governments are. They may therefore exploit the norm by exaggerating their situation and demanding excessive concessions.⁶⁴ This is a classic problem of moral hazard. Thus, for the norm of discretion to be sustainable, governments need to devise auxiliary institutions to eliminate this problem.

The economic literature on insurance regimes suggests multiple ways to deal with the problem of moral hazard, some of which are more suitable for international politics than others. As explained in more detail in the second analytical part of this study, European governments solved this problem by adjudicating on the right amount of discretion on a case-by-case basis. The argument that will be advanced is that European governments have delegated the task of adjudication to an agent and created the conditions necessary to ensure that this actor grants neither too much, nor too little discretion. They do this by selecting actors with encompassing interests in the norm on the one hand, but who stand to lose from excessive deviations from formal rules on the other.

Second Implication: Political uncertainty leads governments to devise an informal norm of discretion around formal rules. This translates into the adoption of auxiliary institutions in order to prevent moral hazard.

⁶⁴ Feenstra and Lewis 1991, 1288. See also Goldstein and Martin 2000, 621. They do so in order to extract rents from special interest groups. Large states may also try to manipulate the terms of trades in their favor.

Alternative Theories and Testable Implications

We have established so far that political uncertainty, that is, the degree of uncertainty about governments’ incentives to abide by formal rules, creates a demand for an informal norm of discretion. It remains informal in order to prevent an inefficient allocation of capital and adjustment on part of private actors under the false premise of a right to discretion. This informal norm subsequently translates into two observable aspects: first, governments adopt informal practices around formal rules that allow them to collectively exercise discretion when they deem it necessary. Second, they devise auxiliary institutions in decision-making, which permit them to elicit accurate information about a country’s true adjustment costs. The causal mechanism of the theory is depicted in the following table:

Table 1: Liberal Regime Theory – the causal mechanism

Independent Variable	→ Intervening Variable	→ Dependent Variable
<p><i>Political uncertainty</i></p> <p>Governments are uncertain about the distribution and concentration of domestic costs and benefits of cooperation and, thus, the institution’s domestic basis of support.</p>	<p>→ <i>Informal norm of discretion</i></p> <p>An informal norm of discretion emerges around formal rules.</p>	<p>→ <i>Informal practices</i></p> <p>1) Governments adopt informal practices. They resume control over the agenda, accommodate governments facing concentrated adjustment costs, and relax centralized control of implementation.</p> <p>2) Governments devise auxiliary institutions eliciting information about a country’s domestic circumstances.</p>

The Liberal Regime Theory is now contrasted with three alternative explanations of informal practices in international cooperation. The first says that informal practices are unintended, erratic consequences of a power play between governments and institutional actors, because the latter constantly seek to maximize their autonomy. The second maintains that informal practices demonstrate that governments unilaterally escape from their commitment whenever their important interests are at stake. In these cases, negotiations degenerate into decentralized bargaining. The third explanation says that regimes primarily resolve interstate collective action problems. Informal practices facilitate coordination where formal rules have remained incomplete. Liberal Regime Theory maintains, in contrast, that

informal practices embed an informal norm of discretion in order to manage domestic state-society relations. Decision-making will center on auxiliary institutions that help states to determine the right amount of discretion.⁶⁵ These four different theories generate two distinct types of hypothesis on the issue-specific variation of informal practices on the one hand, and decision-makers' behavior in negotiations on the other.

*Alternative explanation 1: new neofunctionalism*⁶⁶

Recent studies in the neofunctionalist tradition maintain that because modern international organizations deal with, and are themselves, highly complex systems, they are necessarily based on incomplete contracts that are bound to become the object of contestation.⁶⁷ Once a treaty becomes effective, its incompleteness creates gaps in governmental control over institutional design. In his reformulation of neofunctionalism, Paul Pierson argues that because they usually have longer time horizons than governments do, institutional actors are quick to exploit these gaps in order to further their own autonomy at the member states' expense.⁶⁸ The result of this inter-institutional conflict in everyday decision-making, Henry Farrell and Adrienne Héritier maintain, is informal, "interstitial" institutional change.⁶⁹ Dependent on institutional actors' relative bargaining power, this conflict either results in enhanced autonomy for institutional actors or in the emergence of governmental control mechanisms in response to an institutional actor's attempt to increase its autonomy.⁷⁰

The literature has not yet specified the scope conditions under which we would expect such informal practices to arise. Farrell and Héritier speculate that apart from the initial treaty ambiguity, the emergence and direction of informal practices must be expected to depend *inter alia* on the bargaining strength of actors varying across different procedures and policy fields,

⁶⁵ One might object that sociological institutionalism constitutes another alternative to Liberal Regime Theory. But in line with recent directions in sociological research (e.g. Lewis 2005, 941, Zürn and Checkel 2005), the theory is treated as a complementary rather than a competing claim and dropped from the analysis.

⁶⁶ Neofunctionalists regard complexity as the driving force of institutional autonomy. Based on insights of historical institutionalism, recent approaches seek to specify the exact mechanism that may lead to centralization. For a sociological version see Barnett and Finnemore 2004.

⁶⁷ See e.g. Cooley and Spruyt 2009, Farrell and Héritier 2007.

⁶⁸ Pierson 1996, 135, Pierson 2000, 261.

⁶⁹ Farrell and Héritier 2007, 228.

⁷⁰ On control mechanisms in the case of the EU see Pollack 1997, Pollack 2003b.

as well as the possible consequences of appealing to the Court.⁷¹ Yet, the very fact that the complexity of modern institutions triggers inter-institutional conflict,⁷² a complexity that by definition neither governments nor the researcher can identify in advance,⁷³ makes it difficult to formulate exact scope conditions for and patterns in informal practices. The most plausible prediction the theory yields against this background is that – if anything – informal practices emerge erratically rather than in precise patterns.

Alternative Explanation 1a: Informal practices emerge erratically across issue-areas.

From the perspective of new neofunctionalism, institutional actors constantly seek to maximize their autonomy in decision-making within the given institutional framework.⁷⁴ Governments acquiesce to this behavior for several reasons. They have, for instance, limited time horizons or face institutional barriers to collective fight back.⁷⁵ Thus, only if an institutional actor were to go “too far,” and court the resistance of a broad majority of governments, would these collude to put the institutional actor in place.⁷⁶ In short, most of the time we should see institutional actors effectively make full use of formal rules in decision-making.

Alternative Explanation 1b: Institutional actors play an autonomous role in decision-making semi-independent from governments.

Alternative explanation 2: simple rationalism

Simple rationalist theories maintain that international institutions rarely constrain state behavior and are epiphenomenal to state interests almost all the time.⁷⁷ States jealously guard their sovereignty and only accept binding commitments when the benefits clearly outweigh sovereignty costs. Accordingly, countries with alternative options to a formal commitment,

⁷¹ Farrell and Héritier 2007, 236.

⁷² Farrell and Héritier 2007, 227-228. See also Peters 2006, 26-27, Pierson 1996, 136.

⁷³ For a critique see Caporaso 2007, 400.

⁷⁴ Farrell and Héritier 2007, 229, Pierson 1996, 132, Pollack 2003b, 10-11.

⁷⁵ On these various aspects see Pierson 1996, 142-148.

⁷⁶ Farrell and Héritier 2007, 239-240.

⁷⁷ See e.g. Mearsheimer 1994/1995. Krasner (1991, 364-365) argues that institutions in international politics are unlikely to go beyond mere coordination devices, in which case the distribution of gains is the far more important problem.

usually large states, avoid and renege on binding agreements from the outset when their gains from binding themselves are too low or uncertain.⁷⁸ In short, institutionalized international cooperation is, and will remain, shallow.⁷⁹

Therefore, Randall Stone argues, small and large states strike a compromise. Informal practices in international organizations provide loopholes in a formal agreement that permit a powerful state to throw off institutional constraints whenever its critical interests are jeopardized.⁸⁰ Small states accept such informal practices in exchange for formal rules that give them a greater say on less important matters. In this argument, informal practices are less binding than formal rules are. Formal rules, *ceteris paribus*, impose high sovereignty costs and signal the more binding commitment. Therefore, informal practices must be expected to arise in very sensitive issue-areas that impinge on questions of national sovereignty, concern strong and predictably strong special interests, or have high distributive consequences. Formal rules are adhered to only in issue-areas of lower sensitivity that neither have strong distributive consequences, nor encroach on states' core sovereignty or on constantly well-organized special interests.⁸¹

In the case of the EC, at least two of these indicators hold true for the Common Agricultural Policy (CAP). First, it is the issue-area with the highest direct redistribution of wealth among member states. At its peak the agricultural budget accounted for more than 70 per cent of the overall EC budget. The former French Representative and Minister for Agriculture, Michel Cointat, complained that given these high stakes, even small delegations like Luxembourg usually adopt a strategy of "all or nothing" with the result that the ambience is embittered and delegates raise their voices. He concludes: "It is far easier to be a trade strategist than to come to an understanding among neighbors about the selling of carrots."⁸² Second, European farmers are extremely well organized and of high electoral importance.⁸³

⁷⁸ Voeten 2001, 853.

⁷⁹ See Downs, et al. 1996, 399. Jim Fearon (1998) argued that uncertainty about the distribution of gains under a long shadow of the future makes it more difficult to achieve deep cooperation in the first place.

⁸⁰ Stone 2008, 7. Stone (2002) studies a version of this argument at the case of the IMF.

⁸¹ Abbott and Snidal 2000, 439-40. This study will consider two measures of power, namely coercive capabilities (money, control over security) and asymmetric interdependence (preference intensity due to domestic group pressure).

⁸² Cointat 2002, 118.

⁸³ Keeler 1996, 130.

Their influence may occasionally even trump conservative national interests.⁸⁴ Accordingly, the CAP triggered or affected the Community's deepest crises.⁸⁵

One might object that it is the very sensitivity of the CAP that makes it necessary for governments to make full use of formal rules in order to shift the blame for unpopular policies to "Brussels." This objection is unconvincing for at least three reasons. First, it is solely negative in that it begs the question of why informal practices would evolve in other issue-areas. Second, the objection presumes that governments surrendered more sovereignty than necessary in all other issue-areas. This seems implausible against the background of what we know about the tough bargaining and institutional choices at the Intergovernmental Conferences (IGCs).⁸⁶ Third, it quite possibly underestimates the abilities of well-organized interests to obtain information about the internal dynamics of decision-making.⁸⁷

In short, the CAP is to be considered the most sensitive issue-area within the EC. Accordingly, this is where simple rationalist theories expect informal practices to arise. Other issue-areas are less sensitive and must therefore be expected to feature regular rule-following behavior to a greater extent.

Alternative Explanation 2a: Informal practices vary systematically with the sensitivity of an issue-area. Governments adopt informal practices where issue-areas impinge on core national sovereignty, are subject to very strong domestic lobbying, or have strong distributive consequences, as with the CAP. Governments more regularly follow formal rules where issues are less sensitive.

From the perspective of simple rationalist theories, regular deviations from formal rules in decision-making indicate that these are losing their effect.⁸⁸ Thus, where informal practices prevail and the original credible commitment is slowly undermined, negotiations

⁸⁴ Moravcsik concludes in his analysis of French European policy under De Gaulle that it was primarily designed to appease powerful agricultural groups despite the President's very strong inclination to resist the demands of farmers for subsidies. See Moravcsik 2000b, 5.

⁸⁵ One might already mention the initial set up of the CAP, the empty chair crisis, the vetoes of British accession, the "budget crisis" and BSE.

⁸⁶ On the treaty bargains see, for instance, Moravcsik 1998, Rittberger 2001.

⁸⁷ See Evans 1993, 400. One might finally add that if governments indeed used formal rules in order to shift the blame for unpopular CAP policies to "Brussels", it is puzzling why this strategy has ultimately been so unsuccessful in, for instance, price negotiations.

⁸⁸ Optimality is a stylized assumption in many game-theoretic models of institutional design. The extent to which actors optimize is ultimately an empirical question. Defining institutions as "explicit arrangements" as the rational institutional design approach does, implicitly assumes optimality. Koremenos and colleagues (2001b, 1082) acknowledge this flaw in their project. For a critique see Wendt 2001, 1031.

degenerate into decentralized bargaining. Governments consequently coordinate on an outcome solely on the basis of credible threats of exit and exclusion or issues-linkages.⁸⁹ Thus, the outcome becomes determined by the relative bargaining power of the various governments. In other words, when informal practices prevail, formal rules are nothing but “organized hypocrisy,” maintained for external display, for instance in order to help legitimize bargaining and outcomes for domestic audiences.⁹⁰

Alternative Explanation 2b: Decision-making is determined by threats of exit and exclusion or issue-linkages where governments adopt informal practices. It is governed by formal rules otherwise.

Alternative explanation 3: classical regime theory

Classical regime theory regards institutions as solutions to interstate collective action problems. Institutions enable cooperation because they allow governments to create stable expectations about their counterparts’ future behavior. Rational institutionalists do not expect formal international institutions to spell out rules for every single contingency when the transaction costs of doing so are too high.⁹¹ There will remain gaps and ambiguities in the treaty. But this “incompleteness” is deliberate as it provides an optimal mix between prescription and discretion.⁹² Informal institutional change arises when actors identify opportunities to increase the efficiency of the institution.⁹³ As in the case of new neofunctionalist approaches, classical regime theorists fail to predict where and when such informal practices will emerge. If the most knowledgeable actors, governments and their experts, were unable to identify the demand for additional institutions, it is unlikely that the researcher will be able to tell us where additional institutions will emerge. In contrast to new neofunctionalist approaches, classical regime theorists do not clearly spell out the causal

⁸⁹ On bargaining in an institution-free environment and its observable implications see e.g. Moravcsik 1998, 60-67.

⁹⁰ See e.g. Steinberg 2002, 365. More generally see Krasner 1999.

⁹¹ In fact, the initial definition of Stephen Krasner refers to regimes as “*explicit or implicit* principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of international relations.” (Krasner 1982, 185).

⁹² For a review of the literature on incomplete contracting see Tirole 1999.

⁹³ This process may, of course, mix with struggles for power. For an excellent discussion see Caporaso 2007.

mechanisms of this efficiency-driven institutional change. We must therefore refrain from making any predictions about the likely issue-specific variation in informal practices.⁹⁴

However, classical regime theorists make distinct predictions about the functions of formal and informal institutions. The demand for international regimes arises from problems of collective action. Regimes enable states to coordinate on a better outcome by providing information and focal points, making commitments more credible, reducing transaction costs and so forth.⁹⁵ Yet the sources of state preferences remain neglected and are treated as static or exogenous. The focus is hence primarily on those collective action problems that arise out of state interaction instead of state-society relations.⁹⁶ Jonas Tallberg, for instance, recently argued that intergovernmental negotiations create problems of agenda-management, brokerage and representation. The problems, he argues further, arose after the treaty had become effective and led to the demand for leadership in decision-making. In his case, it led to the emergence of the EU's Council Presidency.⁹⁷ In short, informal institutions are primarily rooted in interstate collective action problems.

Alternative Explanation 3b: Informal institutions help governments overcome interstate collective action problems in decision-making.

Liberal Regime Theory

From the perspective of Liberal Regime Theory, informal practices permit governments to collectively manage varying domestic demands for cooperation. In contrast to the expectations of new neofunctionalism, they permit them to retain control over institutional design in order to exercise discretion when they deem it necessary. In contrast to simple rationalist theories, Liberal Regime Theory does not expect informal practices to emerge where issues are predictably sensitive. It is *uncertainty* about the very sensitivity of issues that

⁹⁴ As argued above, we may classify Stone as a classical regime theorist, since his formal theory suggests that the trade-off between formal and informal rules constitutes an equilibrium.

⁹⁵ Seminal works are e.g. Keohane 1982, Keohane 1984, Keohane and Martin 1995.

⁹⁶ See the critique in Moravcsik 1997, 536-538. On possibilities for syntheses between American Politics, Comparative Politics and International Relations see Milner 1998.

⁹⁷ Tallberg 2006, 19-29.

creates a demand for an informal norm of discretion. In other words, Liberal Regime Theory expects informal practices to vary with the extent of political uncertainty.

Political uncertainty will be measured indirectly by focusing on the ability of domestic groups' ability to mobilize in response to a distributional shock. Measuring political uncertainty more directly is not possible for three reasons. First, we cannot measure it *ex ante*, because political uncertainty lies by definition within the realm of things that are difficult to know – otherwise, governments would design optimal institutions from the outset.⁹⁸ Second, we cannot measure the distributional shock that triggers political uncertainty, because governments have an incentive to manipulate information about its true extent. Third, we cannot measure political uncertainty *ex post* independent from the institution we expect it to generate, because this institution endogenizes the problem by nipping it in the bud.⁹⁹ These difficulties in measuring political uncertainty are the reason why most studies of the design of flexibility mechanisms have remained largely formal, and have been tested only on the basis of a few plausibility probes.¹⁰⁰

This study goes a step further towards an operationalization of political uncertainty, arguing that it is not simply inherent to an issue-area. Recall again that the initial trigger for political uncertainty is a distributional shock, an unexpectedly concentrated loss in income resulting from the implementation of formal rules. This induces domestic groups to overcome initial barriers to mobilization. Political uncertainty must therefore be expected to be contingent on a group's marginal utility of mobilization. Thus, the factors influencing this marginal utility, *ceteris paribus*, can serve as proxies for the extent of political uncertainty. A factor like this has been identified in welfare schemes stabilizing expected incomes. Dani Rodrik and Peter Katzenstein, among others, argued that where openness to trade exposes a country to the uncertainties of the world market, welfare schemes can even be necessary to maintain the level of openness by compensating domestic losers for the distributive effects of

⁹⁸ See e.g. Abbott and Snidal 2000, 442, Wendt 2001, 1029-1032 on the distinction between risk and uncertainty.

⁹⁹ For a discussion see Downs and Rocke 1995, 3.

¹⁰⁰ Koremenos (2005) is the only study I am aware of that tries to come up with a proxy for uncertainty. Her measures are debatable, however, and do not account for the fact that distributional shocks are still mediated through additional variables such as domestic and international institutions as well as group size.

economic integration.¹⁰¹ Therefore, if social compensation mechanisms are explicitly designed in order to stabilize a group's income from things like sudden changes in world price or demand, its marginal utility of mobilization is much lower than in the absence or incompleteness of any such system. The existence of social welfare schemes sheltering a segment of society from sudden income losses can therefore be treated as a proxy for political uncertainty. *Ceteris paribus*, where groups are protected against sudden income losses (low political uncertainty), governments devise an informal norm of discretion around formal rules. Governments more frequently follow formal rules where these arrangements are incomplete (high political uncertainty).

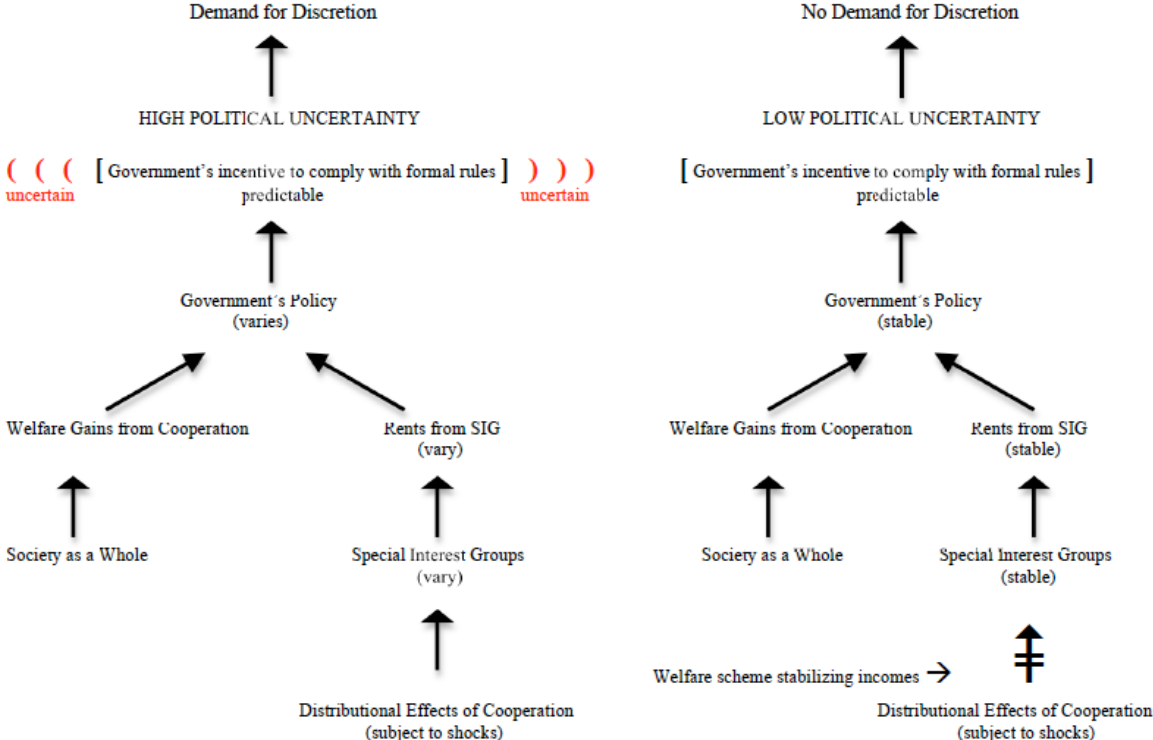
Importantly, the extent of political uncertainty thus defined varies predictably in the EC across issue-areas. It is to be considered particularly low in the Common Agricultural Policy (CAP), which stands out as by far the EC's most protected issue-area. Fixed prices on more than 90 percent of all agricultural goods and direct subsidies guarantee stable income levels for European farmers. One might of course argue that agriculture is an issue-area with great inherent uncertainty that demands such a system in order to be functional. But it is well established that the extent of CAP welfare schemes is not endogenous to the nature of the issue-area, but primarily due to farmers' ability to mobilize, their electoral importance and consequent lobbying success.¹⁰² The CAP must therefore be considered an issue-area with an extraordinarily low political uncertainty that is in fact far lower than in other issue-areas. The same holds true for horizontal matters such as budget or procedures, which either have little or an entirely predictable distributive effect. In other EC issue-areas implementing the treaty by creating and regulating the common market, however, domestic distributive effects are far less certain.

¹⁰¹ Katzenstein (1985) makes this argument for small states, which are more susceptible to shocks in terms of trade than are large states. Rodrik (1998) finds a fairly strong correlation between an economy's exposure to trade and the size of its government. As mentioned before, whether openness increases the volatility in terms of trade is an empirical question. See Kim 2007, 193-196, Rodrik 1998, 1022. The principal point, however, is that incomes of groups engaged in economic transactions, global or domestic, are always subject to risk and induce actors to lobby for some form of protection. If this is ultimately a trade barrier, an export subsidy or direct compensation is, again, an empirical question. See Rodrik 1986. I thank Gene Grossman for helping me clarify this point.

¹⁰² Gawande and Hoekman (2006), for instance, show that the level of protection provided for American farmers is primarily the result of intense lobbying measured by campaign contributions. Since the level of protection is on average even higher for European farmers, we can safely assume that the welfare schemes in this issue-area are not endogenous to the nature of the issue-area.

To be perfectly clear, this is not to argue that farmers never lobby their governments. It is argued that that farmer’s lobbying efforts are entirely predictable! The reason is that their costs and benefits from cooperation are entirely quantifiable and predictable – not uncertain. Farmers can therefore be expected to lobby whenever governments make changes to the policy itself (e.g. price revisions), but they do not lobby on a regular basis. More than in any issue-area, this actually makes a distinction between technical and sensitive issues possible in the first place. This distinction is impossible to uphold in other issue-areas. Chapter 3 describes the various issue-areas in more detail. The causal mechanism is depicted in the following figure.

Figure 4: Variation in political uncertainty and the demand for discretion



In short, when there is high uncertainty about the ability of governments to abide by formal rules, they demand an informal norm of discretion. This is the case in most issue-areas implementing the treaty by creating and regulating the common market. When there is little uncertainty about the governments’ incentives to abide by formal rules, because domestic demands for cooperation are entirely predictable, there is also no demand for an informal

norm of discretion. This is the case in CAP and horizontal matters. To draw yet another comparison to insurances: just as insurance markets arise out of uncertainty about car accidents, informal norms and subsequent informal practices arise out of unpredictable demands for cooperation (high political uncertainty). If car accidents were entirely predictable and their costs quantifiable in advance, there would be no market at all for car insurance. Accordingly, where there is no demand for an informal norm, because domestic demands for cooperation are entirely predictable (in other words, when political uncertainty is low), decision-making will take place within the framework of existing formal rules.

Hypothesis 1: Informal practices vary systematically with the extent of political uncertainty. Governments regularly follow formal rules where political uncertainty is low such as on agricultural matters. Governments adopt informal practices where it is high.

Throughout, formal rules remain effective. But they are first and foremost governed by an informal norm of discretion. This norm must be considered an informal meta-rule regarding the appropriate application of formal rules. Yet, since the circumstances that demand temporary deviation are not always perfectly observable to other actors, parties will be tempted to exploit the norms of discretion in order to extract rents from special interests. In addition, large states may be tempted to manipulate the terms of trade in their favor by pretending to face concentrated costs when this is not the case.¹⁰³ In short, the norm of discretion induces *moral hazard*.¹⁰⁴

In order to sustain the norm in the face of moral hazard, governments need to be able to discriminate between legitimate and non-legitimate cases for accommodation. We established above that because the timing and extent of political uncertainty are by definition unpredictable, discretion is best exercised on a case-by-case basis. Governments therefore devise auxiliary institutions that allow adjudication of the appropriate amount of discretion on the basis of situational information. In other words, the informal norm is turned into the new explanatory variable that brings about auxiliary institutions and, thus, additional informal practices.

¹⁰³ Feenstra and Lewis 1991, 1288. See also Goldstein and Martin 2000, 621.

¹⁰⁴ The problem can be compared to problems of creating optimal markets for risk bearing. Policies providing insurance for risk may create moral hazard. This means that the policy itself changes incentives and therefore the probability upon which the insurance policy has relied. A person may suddenly start smoking inside his house *after* he has bought fire insurance. On this problem in general see Arrow 1963.

Governments face the following problem when exercising discretion: granting too little discretion leads to the obstruction of cooperation and undermines the credible commitment the institution embodies. Granting too much discretion, however, leads to deadweight loss. Considering various alternative designs and the given institutional context of the EC, this study argues (in Chapter 7) that European governments solved this problem through the delegation of information-provision and adjudication to the Council Presidency (CP), rotating on a six-monthly basis among member states. As a member state, the CP has an incentive to grant just enough discretion to maintain the norm. In order to make sure that the CP does not grant *too much* discretion, governments have it preside over those issues where the CP stands to lose from accommodating another government. On these issues, the CP can be expected to report accurately about the true extent of the distributional shock in the country demanding discretion. Under this condition, governments are able to determine the right amount of discretion. This discussion leads to a second hypothesis on negotiation behavior, for which more specific observable implications shall be deduced in the second part of the analysis.

Hypothesis 2: Governments devise additional institutions and adopt distinct informal practices suited to prevent moral hazard where decision-making is governed by an informal norm of discretion.

Conclusion

This chapter developed a liberal theory of international regimes. It is based on the insight of liberal theories that in order to be effective, international institutions need to be embedded in the interests and values of their constituent parts. At its core is the argument that informal practices embed an informal norm of discretion that governments devised around formal rules in order to harmonize cooperation with their uncertain domestic demands. The reason is that states cannot predict the amount, distribution and concentration of the domestic costs and benefits of international cooperation. An indiscriminate application of formal rules, therefore, may well be self-undermining when it generates distributional shocks. Distributional shocks induce domestic groups to lobby for defection and ultimately undermine the credible

commitment the institutions embody. This problem is referred to as political uncertainty. All governments therefore prefer a norm of situational discretion in the application of formal rules that at the same time allows credible commitment to the institution to be maintained. It remains informal in order to prevent lobbying and inefficient investments under the false expectation of discretion. Governments adopt informal practices around formal rules as a result. The theory has two principal implications: first, informal practices vary systematically across issue-areas with the extent of political uncertainty. Second, auxiliary institutions that prevent the exploitation of the norm accompany informal practices. These hypotheses and alternative explanations are summarized in the following table. They will be tested in the remainder of this study.

Table 2: Summary of hypotheses

Theory Dimension	(1) New Neofunctionalism	(2) Simple Rationalism	3) Classical Regime Theory	(4) Liberal Regime Theory
Issue-Specific Variation	Informal practices emerge erratically across issue-areas.	Governments vary with the predictable sensitivity of an issue-area.	N/A	Informal practices vary with the extent of political uncertainty.
Decision- Making Behavior	Institutional actors play autonomous roles in decision-making semi-independent from governments.	Decision-making degenerates into decentralized bargaining.	Informal institutions help governments overcome interstate collective action problems in decision-making.	Auxiliary institutions provide solutions for the problem of moral hazard in decision-making governed by a norm of discretion.

– P a r t I –

The Informal Norm of Discretion in EC Decision-Making

1958-2001

INTRODUCTION TO PART I

The central purpose of this first analytical section (chapters 3 to 7) is to demonstrate that informal practices in European decision-making are a means by which governments deal with otherwise unmanageable interest group pressure, by exercising discretion in the application of formal rules. Accordingly, this section shows that informal practices vary systematically across issue-areas in response to the extent of uncertainty about governments' ability to cope with interest group pressure. This problem is referred to as political uncertainty. Governments adopt informal practices where political uncertainty is high, but they more readily follow formal rules where political uncertainty is low.

This hypothesis is at odds with other theories. New neofunctionalists regard informal practices as a result of a power play between institutional actors and governments. The claim about the constant power play between institutional actors is rooted in the complexity of institution that leaves room for diverging interpretations of formal rules. As explained in chapter 2, new neofunctionalists expect informal practices to emerge erratically over time and across issue-areas. Simple rationalist theories, in contrast, attribute informal practices to large states' ability to shake off formal rules when they deem their important interests jeopardized. Small states, in turn, acquiesce to these informal practices in exchange for more favorable formal rules on less substantive issues. Thus, simple rationalists expect informal practices to vary with the predictable sensitivity of an issue-area. Classical regime theory, the final contender to Liberal Regime Theory, makes no substantive prediction about variation in informal practices. We shall get back to this theory in Part II of this study.

But what counts as an informal practice and what as rule-following behavior? On the basis of the institutions-as-equilibria approach introduced above, we defined informal practices as behavioral deviations from formal rules that are in equilibrium within a continuum between full purely rule-following behavior and constant departures. The institutions-as-equilibria approach is initially agnostic toward the precise function of formal rules and, thus,

towards the very practices we would expect actors to adopt in equilibrium. Part I therefore begins by specifying formal and informal practices for the context of the EC (Chapter 3). Drawing on established explanations of institutional design, the chapter identifies a set of important formal rules in decision-making that enable actors to optimally implement the treaty objectives. On that basis, we deduce seven formal practices as well as their mirror images, which permit us to specify the first hypothesis and alternative explanations concerning issue-specific variation in informal practices in the EC. The subsequent chapters test hypotheses concerning issue-specific variation in informal practices by tracing seven implications for practices in agenda setting (Chapter 4), voting (Chapter 5), and implementation (Chapter 6) across all EC issue-areas through four time periods in European integration history from 1958 to 2001. The result is a *large-N* data set consisting of 56 observations, most of which are qualitative mini case studies. Throughout the analysis, we also assess qualitative evidence for or against the different theories.

To foreshadow the findings of this part: Informal practices are essential for our understanding of EC decision-making. Only a few years after the Treaty of Rome had become effective, governments adopted a number of informal practices in agenda setting, negotiation, and the implementation of decisions. These practices remained astonishingly stable over time in spite of various changes to formal rules and in membership. Together, they permitted governments to collectively resume control of decision-making whenever they deemed it necessary. Informal practices in agenda setting, for instance, provided the opportunity to influence both the content and timing of a proposal. Informal practices in voting permitted governments to largely determine the content of the final outcome. Informal practices in implementation constrained the Commission in its ability to impose a decision on individual member states. As a result, the Commission's formal powers to impose outcomes on governments were heavily weakened and barely restored by a recent empowerment of the European Parliament.

The findings by and large support Liberal Regime Theory. To repeat, the theory expects informal practices arise systematically in issue-areas where there is high political uncertainty. Indeed, the variation in informal practices across issue-areas turns out to be much more pronounced than the variation over time. Agriculture – an issue-area where domestic

demands for cooperation are entirely predictable and the demand for discretion consequently low – turns out to be a regular outlier, and in this area governments regularly follow formal rules. Qualitative evidence, moreover, suggests that although member states have occasionally disagreed about the extent to which informal practices are employed, such practices generally met with full approval of all member states. Thus, informal practices are not unanticipated and erratic consequences of inter-institutional conflicts, as new neo-functionalists would predict. Nor do they emerge where sovereignty costs are high, as simple rationalist theories anticipate. For European integration history, informal practices vary systematically with the extent of political uncertainty.

CHAPTER 3

Formal and Informal Practices in the European Community

The central argument of this chapter is that political uncertainty leads governments to adopt informal practices in relations to the most important formal rules in EC decision-making. The reason is that although these rules enable governments to optimally implement the treaty, they also carry with them the danger of generating distributional shocks and unmanageable interest group pressure. The argument is developed in five steps. The first step provides a brief description of the origins and objectives of the European Community. The three stages of the Community Method – agenda setting, voting, and implementation – are identified as key elements of the European decision-making process. Second, drawing on established theories of institutional design, causal mechanisms are identified through which the formal rules in these stages enable an optimal implementation of the treaty. The third step consequently defines the first endpoint of our dependent variable by deducing seven formal practices actors must be expected to display on the basis of the Community Method in equilibrium. Their mirror image, informal practices defined as regular deviations from formal rules, constitutes the other endpoint of the dependent variable. Against this background, the fourth step specifies the first hypothesis of Liberal Regime Theory on issue-specific variation in informal practices. It is explained how it can be tested against its main contenders, new neofunctionalism and simple rationalist theories. The fifth and final step discusses case selection and method.

The Origins and Objectives of the European Community

With the 1958 Treaty of Rome, France, Germany, Italy, and the Benelux committed to establishing a European Atomic Energy Community (EURATOM), and, more importantly, the European Economic Community (EEC).¹⁰⁵ The EEC was based on two pillars: a Customs Union and an Economic Union. The Customs Union involved the stepwise abolition of tariffs, quotas, and similar obstacles to the free movement of goods between its members, as well as the development of a common trade policy by substituting the separate national tariffs on goods from external countries with a common external tariff. The Economic Union provided for the establishment of a genuine common market among member states. It was to be composed of common policies governing agriculture, transport and competition, and the free circulation of goods, capital, services, and labor (“four freedoms”). This commitment was renewed and taken a step further in the 1980s with a view to creating a genuine Single Market, “an area without internal frontiers in which the free movements of goods, persons, services, and capital is ensured (...).”¹⁰⁶

In most of these areas, however, the Rome Treaty and its amendments only gave a broad outline of how these objectives were to be achieved. Governments found it especially difficult to come to an agreement on the very sensitive issue of a Common Agricultural Policy.¹⁰⁷ It therefore remained a *traité cadre* to be negotiated and filled out over the course of a twelve-year transition period. Implementing the objectives of the treaty would therefore bring about a stream of individual decisions to be dealt with within the Community’s institutional framework, which would itself be subject to several official and semi-official revisions. Today, there is no shortage of formal rules in the European Community. Hundreds of pages of primary law and many treaty revisions spell out in detail how governments and institutional actors ought to behave in various contexts in order to approach an optimal implementation of the treaty’s objectives.

¹⁰⁵ These states had already been members of the European Coal and Steel Community (ECSC),

¹⁰⁶ Article 8a TEC (SEA).

¹⁰⁷ For accounts of the negotiations and conflicts, stressing member states’ conflicting preferences, see Milward 2000, Moravcsik 1998, von der Groeben 1985.

Which Formal Rules Are Important and Why

How are we to identify those formal rules that are to be considered important? Rational theories of institutional design shed light on this question by explaining the causal mechanisms that enable governments to approach an optimal implementation of the treaty. Sociological research explains how governments at the same time improve the legitimacy of decision-making. There is strong evidence that all of them, albeit to different degrees, played a role in the EC's institutional design.¹⁰⁸ Together, they point to a set of important formal rules, the so-called Community Method, which almost invariably governs decision-making across all EC issue-areas.¹⁰⁹ It can be divided into three stages: agenda setting, voting, and implementation.

Formal rules on agenda setting

The Commission was granted an *exclusive* right of initiative on matters covered by the treaty (Article 149) and those intended to realize its objectives (Article 235). It was thereby allotted an essentially political and extraordinarily strong role, because the Community's cogs would only turn upon its initiative. Although the Council could request the Commission to take action on an issue (Article 152), the Commission was entirely free in determining its content and legal basis. As we shall see shortly, its proposals were heavily protected throughout the legislative process, because it was more difficult for the governments to amend them than it was to adopt them.

¹⁰⁸ Mark Pollack (2003b) found evidence for all these explanations. The fact that he also found issue-specific variation in institutional design need not concern us here. The set of formal rules we focus on in the following analysis applies invariably to all issue-areas. Since Pollack also includes secondary laws and what we have defined as informal practices in the analysis, much of the variation he describes can in fact be explained by Liberal Regime Theory. Finally, as we shall see in an instant, it is likely that formal rules are applied in the same way across issue-areas even if the rationales behind formal design vary in extent.

¹⁰⁹ It had been inspired by the legislative procedure of the ECSC. This process had centered on a supranational "High Authority," which the governments endowed with substantial formal powers at all stages of decision-making. The starkly supranational features were to some extent toned down in the Rome Treaty. It was now a Council of Ministers, which following a proposal of the Commission (the High Authority's successor) took decisions on most major issues. See Rittberger 2001 on the ECSC and Devuyt 2006, chap. 1 on the origins of the Community Method in general.

Why would governments delegate the preparation of proposals to another actor? According to the “informational” rationale,¹¹⁰ governments themselves are unable to collectively generate and exchange expertise necessary to manage complex interdependent societies.¹¹¹ Agenda setters, in turn, may provide unbiased and centralized expertise that is necessary for an optimal implementation of the treaty.¹¹² This explanation was generally accepted among practitioners. For Walter Hallstein, the European Commission’s first president, the Commission’s power stemmed primarily from the indisputably high quality of its proposal.¹¹³

But why would governments in addition endow the agenda setter with such extraordinary power? According to “distributive” theories, governments endow an agenda setter with the exclusive right of initiative, that is, the ability to withhold rival proposals from the agenda, to avoid the problem of *ex post* opportunism.¹¹⁴ Although the agenda setter’s proposal may promise a mutually beneficial outcome, unilateral defection may be individually rational when governments face incentives to heed to varying domestic demands for protection. This leads to a constant uncertainty about other governments’ future ability to uphold the credible commitment. The delegation of an exclusive right to set the agenda permits a faithful implementation of the treaty in two ways. First, the agenda setter is able to propose individual policies that are best suited to attaining the treaty’s objectives. Second, it can prevent governments from changing effective policies by bringing them back on the agenda.¹¹⁵ Third, the agenda setter is able to submit the proposals for policies when it

¹¹⁰ This “informational” rationale is an (implicit) assumption in neofunctionalist writings emphasizing the crucial role of the Commission and other supranational institutions in the centralized provision of independent, technocratic expertise in managing European economies. Haas 1963, 65.

¹¹¹ The problem of informational inefficiency constitutes the basis for informational theories of congressional institutions as outlined in Krehbiel 1991

¹¹² See Krehbiel 1991, 76; for a discussion see Pollack 2003b, 29 and Moravcsik 1999, 272.

¹¹³ This is commonly termed informal agenda setting. The reason, according to Hallstein, was that the “persuasiveness of a proposal always lies with the quality of its rationale.” See Hallstein on “The ethos of European civil servants,” speech delivered before senior Commission officials, Brussels, 30 September 1963; reproduced in Oppermann 1979, 441-446. On the “Federalist” and “Gaullist” concept of a civil service see Coombes 1968, 10-11, Rometsch and Wessels 1994, 203.

¹¹⁴ The problem of ex-post opportunism is the basis of distributive theories of congressional institutions as outlined in Weingast and Marshall 1988. Kenneth Shepsle (1979) emphasized the demand of a structure-induced equilibrium in the face of the problem of issue-cycling under majority voting. For the EU see Moravcsik 1998, 74, Pollack 2003b, 29, 380.

¹¹⁵ The principal proponent of this perspective in EU studies is Andrew Moravcsik (1998, 73-74), who argues that the pooling of sovereignty and delegation of authority is a means of committing to the substantive bargain

considers the circumstances for their adoption most favorable. As we shall see shortly, this can be the case when conflicts among member states generate a knife-edge majority decision in favor of the proposal. Walter Hallstein described this essentially political role as follows:

“A Commission proposal is not merely the result of a technocratic administration; it is an eminently political act. For one, it is political because the Commission may choose among different feasible solutions. Considering what a majority under the terms of the treaty can just accept, it chooses in complete independence a solution that best approximates the Community interest. It is also a political act because the Commission determines the point of time of a decision: What was unthinkable yesterday, might suddenly be possible today.”¹¹⁶

Formal voting rules

Formal voting rules stipulated that the Council would adopt the Commission’s legislative proposals with a *qualified majority vote* (QMV), which was introduced stepwise until the end of the transition period in 1970. This provision augmented the Commission’s formal power substantially, because it was more difficult for the governments to amend the legislative proposal than it was for them to adopt it. In fact, the Council needed to attain unanimity in order to alter the proposal against the will of the Commission (Article 148). This was an extraordinarily restrictive rule for the amendment of proposals, one that represented an even greater protection for the agenda setter’s proposal than that provided to most US Congressional legislation.¹¹⁷ Furthermore, the Treaty permitted the Commission to modify and withdraw its proposals at any point during the negotiations, thus essentially endowing it with a veto in case Council negotiations did not develop satisfactorily.

In addition, a European Parliamentary Assembly (renamed as European Parliament), as well as an Economic and Social Committee representing the social partners, were set up in order to advise governments before the adoption of a legal act (Article 137). Parliament would in the course of time be promoted to a co-legislator. Some variations of the Community Method provided it the opportunity to make the Commission include its demands

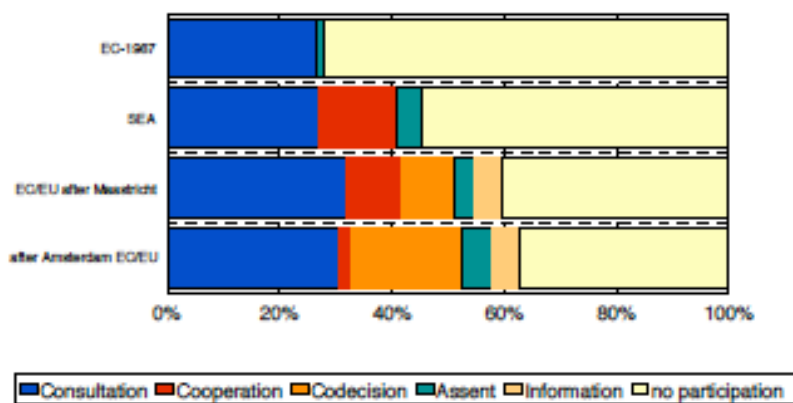
about the distribution of gains from European integration. Mark Pollack (2003b, 380) finds that the patterns of delegation to the Commission indeed lend support to this interpretation.

¹¹⁶ Walter Hallstein before the British Institute of International and Comparative Law, London, 25 March 1965. Speech printed in Oppermann 1979, 545-559, here p. 549.

¹¹⁷ Pollack 2003b, 85.

into the legislative proposal.¹¹⁸ In other variations, Parliament negotiated with governments over changes to the proposal. Various treaty revisions would increase Parliament’s initially feeble bargaining power and gradually increase its scope of influence to most issue-areas but agriculture. This development is depicted in the following graph.

Figure 5: Changes in the Parliamentary involvement in EC Decision-Making¹¹⁹



Why would governments surrender their national vetoes? The principal reason, according to the distributive explanation, is that this provision allows governments to commit credibly to cooperation in the face of constant pressure from special interests, because governments signal that they are willing to accept the risk of being outvoted on an individual matter.¹²⁰ This rule is consequently conducive to the adoption of proposals that promise to implement the treaty in an optimal manner.

Why would governments concede influence to the Parliament? The involvement and gradual empowerment of the European Parliament initially seems to defy conventional rational explanations.¹²¹ Sociological explanations of this phenomenon point out that political elites responded to domestic pressure to remedy the growing “legitimacy deficit” of the

¹¹⁸ Tsebelis calls this “conditional” agenda setting. See Tsebelis 1994.

¹¹⁹ Source: Maurer 1996.

¹²⁰ See Moravcsik 1998, 485-489 and Pollack 2003b, 153. Majority voting also increases the efficiency of decision-making, because recalcitrant governments are no longer able to block decisions.

¹²¹ McElroy 2006. There might be an additional informational rationale for the empowerment of the Parliament. This explanation was dropped, because it is empirically implausible to assume that the EP is able to draw on expertise that is superior to that of the Commission or governments.

European Community by subjecting themselves to parliamentary constraints.¹²² The influence on and approval of individual decisions by an institution that is regarded as legitimate may then transmit information about the legitimacy of decisions to European publics.¹²³

Formal implementation rules

In addition to its political role in the preparation and negotiation of legislation, the Commission was also slated for the management of community policies (Article 155). For a few policies such as competition, the common commercial policy, transport and agriculture, the treaty directly conferred executive powers on the Commission. In other areas, the Council was free to delegate the implementation to the Commission or to national administrations. Once delegated authority, however, the Commission enjoyed extraordinarily high discretion, because the treaty provided no means for the Council to withdraw or change effective implementation measures.¹²⁴

The rationale for the delegation of implementation and that of agenda setting are the same. The distributive rationale points to the demand for credible commitments. Since governments may face rational incentives to renege and because cheating is often difficult to detect, governments delegate implementation powers to an agent in order to guarantee the faithful execution of individual decisions in line with the objectives of the treaty.¹²⁵ The informational rationale again points to the demand for expertise. If the causal link between policy decisions and their exact outcomes on the ground is uncertain, governments can improve an optimal implementation by delegating it to agents drawing on superior policy-relevant expertise.¹²⁶

¹²² Rittberger 2005, 4-7. It neither possesses special expertise, nor does it speed up decision-making or be helpful in overcoming problems of ex-post opportunism.

¹²³ See e.g. Thompson 2006, 12 on the UN Security Council.

¹²⁴ The ECJ more generally controlled and adjudicated on the implementation of primary and secondary law.

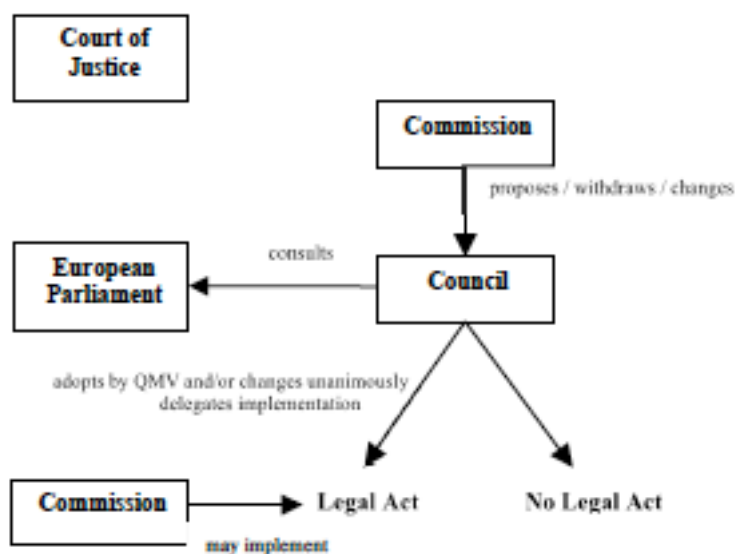
¹²⁵ See the discussion in Pollack 2003b, 29-30.

¹²⁶ On theories of delegation see Epstein and O'Halloran 1999, Huber and Shipan 2003. On informational theories of delegation see Krehbiel 1991, McCubbins 1985.

Which practices arise in equilibrium and why

So far we have identified important formal rules in agenda setting, voting, and implementation. The Community Method's three stages are again depicted in the figure below. All these provisions enable governments facing a constant demand for expertise and credible commitment to implement the treaty in an optimal and legitimate way. It was argued above that informal practices are to be conceived of as deviations from formal rules in equilibrium. Therefore, formal rules and informal practices are not a dichotomy. They rather constitute the two endpoints of a continuous dependent variable measuring the extent of deviations from purely formal rules.

Figure 6: The Community Method (1958)



But which behavior must we expect governments and institutional actors display on the basis of the Community Method in equilibrium? To answer this question, we have to make additional, empirically plausible assumptions. The result is a deliberately stylized model of the Community Method in equilibrium.¹²⁷ Apart from the premise that actors are rational and have complete information about the rules of the game, the model is based on three assumptions about actors' preferences, information, and time horizons in everyday decision-

¹²⁷ The fact that it is based on plausible, broad rather than specific, demanding assumptions ensures that the model yields more testable observable implications and applies equally to all issue-areas. We are consequently able to discern fine-grained variation in informal practices.

making. First, in line with the bulk of the literature in European Studies, it is assumed that there is a single policy dimension representing the degree of integration.¹²⁸ The *status quo* is the least integrationist outcome in this dimension.¹²⁹ The Parliament and the Commission seek an optimal implementation of the treaty's objectives and frequently favor more EU policy-making than the Council does. The second assumption follows from the first. In line with procedural models of EC decision-making, it is assumed that actors have complete information about each other's preferences.¹³⁰ Thus, everyone knows the preferences of others relative to their own and the location of the status quo.¹³¹ This is plausible, because actors primarily assess each other's preferences along a single important dimension (anti-versus pro-integration). Furthermore, information is not impossible to obtain, given that the Council, the Commission, and the EP are collective actors that at first have to find agreement on their own position.¹³² Third, governments seeking reelection have more limited time horizons than institutional actors.¹³³

Agenda setting

Formal rules that endow the agenda setter with an exclusive right of initiative permit it to select one out of many possible proposals that is most suitable for the implementation of the treaty. Furthermore, since governments under constant pressure from special interests may try to change a policy by bringing it back on the agenda, the monopoly of initiative locks such policies in by barring alternatives from the agenda. These rules will not prevent governments

¹²⁸ The literature is too vast to be cited *in extenso*. See e.g. the discussion in Pollack 2003b, 35-39, FN 14. Simon Hix and others (Hix 1994, 22, Hix 1998), among others, argued that the left-right dimension has become increasingly important within the European Parliament and other institutions. Yet, there is no *prima facie* theoretical reason for why the left-right dimension would actually trump the pro-/anti-integration dimension. Empirical evidence moreover suggests that the Commission's and the ECJ's policy preferences vary strongly across issue-areas. See e.g. Maduro 1998 for the Court and Cini 1996 for the Commission. Therefore, the pro-/anti-integration dimension is to be considered logically prior to other dimensions.

¹²⁹ Garrett and Tsebelis 1996, 280.

¹³⁰ The countries and institutions know each other's preferences, the location of the status quo, the impact of proposed policies, and the sequential structure of the model. They have perfect information on the actions taken in prior stages of the model. For an overview and test of this literature see, for instance, Steuenberg and Selck 2006.

¹³¹ Garrett and Tsebelis 1996, 280.

¹³² Even if the assumptions does not hold true at all times, there is little reason to assume that there is systematic issue-specific variation in this regard that could bias the analysis.

¹³³ Pierson 1996, 135.

from making such attempts even if they expect them to be blocked, because they are thus able to signal their negotiation effort to domestic constituencies. We should therefore observe the Commission to withhold alternative initiatives from the agenda. Conversely, a practice that allows governments to make the Commission endorse its initiatives constitutes an informal practice.

1. In equilibrium, we expect the Commission to selectively withhold rival proposals from the agenda.

Indicators: The empirical analysis focuses on the sequence of moves in decision-making. Specifically, it asks whether governmental attempts to initiate and change policies prove successful.

The monopoly of initiative, that is, the right to propose one among many other feasible alternatives as legislation, permits governments to capitalize on the agenda setters' policy-relevant expertise. In other words, given that the agenda setter is endowed with extraordinary power over outcome, we expect governments to provide it with the means to propose legislation that promises to implement the treaty's objectives in an optimal way. They consequently enable the agenda setter to centralize superior expertise and shield it from ad-hoc influences on its internal decision process. As Jean Monnet explained:

“The independence of the Authority [the Commission's predecessor, M. K.] vis-à-vis governments and the sectional interests concerned is a precondition for the emergence of a common point of view which could be taken neither by governments nor by private interests. It is clear that to entrust the Authority to a Committee of governmental delegates or to a Council made up of representatives of governments, employers and workers, would amount to returning to our present methods, those very methods which do not enable us to settle our problems.”¹³⁴

Practices that prevent the Commission from centralizing superior expertise and that allow them to regularly intervene in internal Commission politics constitute informal practices.

2. In equilibrium, we expect the Commission to draw on superior and independent expertise.

Indicators: This should be reflected in the Commission's internal organization. First, it must be able to compete with national administrations about experts. Because the absolute number of staff is for many reasons not representative for expertise, the focus is primarily on the Commission's dependence on government

¹³⁴ Monnet 1950

experts. Second, to assess independence, governments' influences on internal Commission politics will be assessed.

The monopoly of initiative and the right to withdraw and resubmit a proposal at any point during negotiations permit the Commission to take advantage of time. It may submit those proposals that most faithfully implement the treaty when it considers the circumstances for its adoption most favorable. This can, for instance, be a situation of conflict among governments that leads to the formation of a majority coalition in favor of the proposal. Hence we would expect the decision process to start off immediately after submission of the proposal. In contrast, practices that allow governments to resume control over the timing of a decision must be considered informal practice.

3. In equilibrium, we expect the decision process to start off shortly after submission of the proposal.

Indicators: The focus in the empirical analysis will be on the time lapse between submission and the initiation of official discussions.

Voting

Formal voting rules permit governments to impose a Commission proposal on governments under pressure of special interest groups. Precisely as a result of governments' ever-present uncertainty about the ability of their counterparts' to stick to the treaty's objectives, majorities have a strong incentive to call votes and secure today's preferred outcome.¹³⁵ These votes should take place openly, since governments in the minority are thus able to signal their negotiation efforts to domestic constituencies and shift the blame to Brussels. The practice of making concessions to minorities is to be considered an informal practice.

4. In equilibrium, we expect votes to be cast frequently and openly.

¹³⁵ This holds true for package-deals as well as for individual decisions if there is one dominant policy dimension. One might object that governments may want to trade votes over time or across issue-areas by giving up power over one decision in order to gain power on an issue one prefers more intensely. But vote trading is difficult, because opportunities for and the effects of such deals are usually not simultaneous. Uncertainty about the future implies that it is difficult to compare the exact value of an exchange, and trust others to stick to their part of the bargain at a later point of time. See Weingast and Marshall 1988, 135. Empirical examples for vote trading in the EC are consequently very rare. See the discussion in Mattila and Lane 2001, 46-48.

Indicators: The analysis focuses on quantitative and qualitative data on the frequency of open voting in the Council.

Formal rules not only enable the Commission to tailor a proposal to a majority coalition in the Council.¹³⁶ Its right to withdraw proposals and resubmit them at more favorable times means that the Commission can prevent governments from watering the proposal down.¹³⁷ We would therefore expect proposals to remain largely unaltered during Council negotiations. Regular changes to Commission proposals constitute an informal practice.

5. In equilibrium, we expect Commission proposals to remain unaltered during Council deliberations.

Indicator: The focus in the analysis will be on the intensity of negotiations prior to the actual decision. It is assumed that the more governments negotiate before the actual decision, the more will the proposal be subject to change.

Governments concede influence on individual decisions to Parliament with a view to increasing the legitimacy of decision-making. As a consequence, European audiences, presumably representing the European median voter, are able to assess if an individual decision serves the public as a whole. Parliament and the Council therefore have an incentive to bring this influence out into the open, and we consequently expect them to conduct their negotiations openly. A practice that implicates Parliament into informal decision-making constitutes an informal practice.

6. In equilibrium, we expect governments to openly display parliamentary influence on individual decisions.

Indicator: The analysis will focus on variation in the publicity of parliamentary participation in decision-making.

¹³⁶ This is in fact the logic behind the model of Baron and Ferejohn (1989, 1199), for whom gains from acceleration of decision-making is one of the reasons for closed rules decision-making.

¹³⁷ This right turns the Commission's agenda-setting power into sequential veto bargaining and decreases the chance for a veto to occur. See the discussion of the various models in Cameron and McCarty 2004. One might object that the Commission and the Council need to bargain over the content of the proposal. This objection presumes two things: first, the Commission has incomplete information about the preferences of the Council so that it is unable to anticipate majority coalitions. Second, the Commission is pressed by time so that it refrains from withdrawing the proposal. These are already very specific assumptions that may obscure important informal practices.

Implementation

Formal rules provide for the possibility of delegating the implementation of individual decisions to the Commission. In other areas, the treaty even stipulated an automatic transfer of implementation power to it. Governments that are uncertain about their counterparts' incentives to renege on individual decisions must be expected to delegate the faithful execution of an individual decision to the Commission. They will also endow it with the discretion necessary to fulfill its task. If governments regularly refrain from delegating power to the Commission, and narrow its discretion, this is said to be an informal practice.

7. In equilibrium, we expect governments to decide to delegate implementation powers to the Commission and provide it with discretion.

Indicator: The analysis draws on quantitative data on a) the agent chosen by the Council and b) the room for maneuver of this actor in implementing decisions.

Summary

In sum, the Community Method in equilibrium generates seven formal practices. Informal practices are defined as behavioral deviations from the Community Method in equilibrium. They constitute the two endpoint of the dependent variable between fully formal and entirely informal practices – the dependent variable in this study. Informal and formal practices as well as the indicators used to identify them are summarized in the following table.

Table 3: The dependent variable – formal and informal practices

Stage	Formal Practice	Informal Practice	Indicator
Agenda Setting	The Commission selectively withholds rival proposals from the agenda.	The Commission regularly endorses governmental proposals.	Sequence of moves in decision-making
	The Commission draws on independent, superior policy expertise.	Governments prevent the centralization of expertise and regularly interfere in internal Commission politics.	Commission dependence on governmental expertise; governmental influence on Commission politics
	The Commission proposal initiates the decision-making process.	Governments control the timing of a decision.	Time lapse between submission of a proposal and official initiation of the process
Voting	Voting takes place frequently and openly.	Governments rarely vote.	Data on voting
	Commission proposals remain unaltered during the legislative process.	Commission proposals are regularly changed during Council negotiations.	Intensity of intergovernmental negotiations
	Parliament's influence on individual decisions is visible.	Parliament's influence is not openly visible.	Visibility of parliamentary involvement
Implementation	The Council decides to delegate implementation powers to the Commission.	Governments regularly refrain from delegating power to the Commission and narrow its discretion.	Data on the agent implanting decisions and its discretion

Alternative Explanations and Testable Implications

Why would governments adopt informal practices in decision-making? Liberal Regime Theory argues that governments deviate from formal rules in order to exercise discretion. Simple rationalist theories argue that these deviations allow (powerful) states to eschew formal rules when sovereignty costs are predictably high. New neofunctionalist theory regards informal practices as the consequence of institutional actors' attempts to informally enhance their autonomy. In other words, these three alternative explanations identify very different reasons for the emergence of informal practice. They therefore make very different predictions about their variation across issue-areas and over time.

Liberal Regime Theory

For Liberal Regime Theory, political uncertainty creates a demand for an informal norm of discretion in decision-making. Because governments cannot anticipate all contingencies in advance when designing formal institutions, a situation may arise in which abiding by the letter of the law generates a distributional shock. This is a situation where a domestic group suddenly faces high and concentrated adjustment costs as a result of the implementation of the treaty, and these induce it to tempt its government into defection. For example, formal rules on agenda setting, voting and implementation, which provide for the possibility of imposing outcomes on recalcitrant governments as well as locking in policies, enable an optimal implementation of the treaty across the board. Yet the individual decisions that these formal rules shape may also generate a distributional shock in one of the member states. In addition, the centralization of expertise that is necessary for an optimal implementation of the treaty may also blind decision-makers to the circumstances that lead to distributional shock and require discretion.

To repeat, the group facing the distributional shock suddenly overcomes barriers to mobilization and tempts its government into defection. Since unauthorized defection ultimately undermines the credible commitment that the formal institution embodies, all governments prefer an informal norm of discretion around formal rules. This informal norm

manifests itself in informal practices in decision-making, that is, in deviations from formal rules in equilibrium.

Accordingly, Liberal Regime Theory expects informal practices to vary systematically with the extent of political uncertainty. Governments regularly adopt informal practices where political uncertainty is high. Where political uncertainty and therefore the demand for discretion, are low, however, governments more regularly follow formal rules. As argued in chapter 2, it is difficult to measure political uncertainty directly. Yet this does not mean that we have to abandon the attempt to test the theory. Drawing on insights from collective action theory, it was proposed to use factors that influence domestic groups' marginal utility of mobilization as a proxy for political uncertainty. Drawing on insights from the "compensation" literature, it was argued that welfare schemes that deliberately shield domestic groups from unanticipated concentrated adjustment costs constitute such a factor. This allowed us to operationalize the hypothesis for the context of the EC.

In the EC, the Common Agricultural Policy is to be considered an issue-area with particularly low political uncertainty. The reason is that in contrast to other common market policies, the CAP stabilizes prices of agricultural commodities and provides direct subsidies for farmers. This renders farmers' demands for cooperation entirely predictable. Although they rarely play a role in everyday politics, the same should hold true for horizontal matters such as budget or procedures, which either have little or an entirely predictable distributive effect. In short, since political uncertainty and therefore the demand for discretion is particularly low, we would expect governments to frequently follow formal rules in the CAP and on horizontal matters. In other EC issue-areas creating and regulating the common market, however, domestic groups are less protected to the extent that the domestic distributive effects from cooperation are far more uncertain. Because these issue-areas feature high political uncertainty, and therefore a high demand for discretion, we would expect informal practices to arise and remain stable over time.

Additional evidence for the operation of the causal mechanism can be found in dominant cleavages. Since the informal norm of discretion is considered a functional institution that all governments prefer to the initial formal set up, the emergence of informal

practices should create very strong conflicts between institutional actors and the governments, but not among the governments themselves.

Hypothesis 1: Governments regularly follow formal rules in CAP and on horizontal matters. Decision practices approach the following patterns:

Agenda setting:

- The Commission selectively withholds governmental proposals.
- The Commission draws on independent, superior policy expertise.
- The Commission proposal initiates the decision-making process.

Voting:

- Governments vote frequently and openly.
- Commission proposals remain unaltered during negotiations.
- Parliament's participation in decision-making is visible.

Implementation:

- Governments confer implementation powers on the Commission and grant it high discretion.

Governments adopt informal practices with a view to exercising discretion where political uncertainty is high, that is, in policies regarding the common market except the CAP and horizontal matters. Their practices approach the following patterns:

Agenda Setting:

- The Commission regularly endorses governmental proposals.
- The Commission needs to draw on governmental expertise. Governments interfere in internal Commission politics.
- Governments are in control of the timing of decisions.

Voting:

- Governments rarely vote.
- Commission proposals are frequently changed during negotiations.
- Parliament's participation in decision-making is not visible.

Implementation:

- Governments regularly delegate to national administrations and narrow the Commission's discretion.

New neofunctionalism

From the perspective of new neofunctionalists, informal practices emerge in response to institutional actors' attempts to enhance their autonomy at the governments' expense. Political conflicts among these actors are rooted in the initial complexity of an institution, which creates ambiguity in the interpretation of formal rules. Several additional factors determine whether or not institutional actors succeed in their attempt to informally exploit these ambiguities. A major factor contributing to the assertiveness of institutional actors are internal divisions

among governments that prevent them from collectively fighting back.¹³⁸ New neofunctionalist theorists do not identify more specific scope conditions for an issue-specific emergence of informal practices. It was argued in chapter 2 that these various elements, in combination with complexity as a general state, imply an erratic emergence rather than any predictable pattern across issue-areas and over time.

Alternative Explanation 1a (New Neofunctionalism): Informal practices do not vary systematically across issue-areas and over time.

Additional evidence for the operation of this causal mechanism can be found in dominant cleavages. Since institutional actors will attempt to strive for autonomy where governments are divided, we would expect the emergence of informal practices to be accompanied by conflicts both between institutional actors and governments as well as among governments themselves.

Simple rationalist theories

Simple rationalist theories are skeptical about the abilities of international institutions ability to constrain state behavior. When it comes to the pinch, states shake off these constraints and deviate from formal rules. The deviating actors are typically large states, because smaller states are too dependent on cooperation to be able to afford defection. It has been argued that small states therefore agree to large states' regular deviations from formal rules on sensitive issues in exchange for formal rules that grant them a stronger position on less sensitive issues.¹³⁹ Thus, simple rationalist theories expect governments to adopt informal practice in particularly and predictably sensitive issue-areas. As argued in chapter 2, the CAP must be considered the most sensitive of all EC issue-areas. It is the issue-area governments had most trouble agreeing on, where most of the "Community crises" occurred, and where the "money is." Thus, simple rationalists would predict exactly the opposite issue-specific variation in informal practices to that predicted by Liberal Regime Theory. Additional evidence for the

¹³⁸ Farrell and Héritier 2007, 239, Pierson 1996, 143.

¹³⁹ Stone 2008.

operation of this causal mechanism is provided by conflicts between large and small member states as well as by conflicts between institutional actors and large member states.

Alternative Explanation 2a (Interest-based theories): Informal practices vary systematically with the predictable sensitivity of an issue-area. Governments adopt informal practices in sensitive issue-areas like agriculture, and regularly follow formal rules in less sensitive issue-areas.

Summary

Liberal Regime Theory expects governments to adopt informal practices in order to exercise discretion in the application of formal rules. They will therefore emerge where political uncertainty is particularly high. Other theories disagree. New neofunctionalists regard informal practices as the result of an unpredictable power play between institutional actors. They will therefore arise erratically over time and across issue-areas. Simple rationalist theories expect governments to deviate from formal rules where sovereignty costs are exceedingly high. The different hypotheses on variation in informal practices across issue-areas and over time are summarized in the following table.

Table 4: Hypotheses concerning issue-specific variation of informal practices

	New neofunctionalism	Simple rationalism	Liberal Regime Theory
Issue Specific Variation	Informal practices do not vary systematically across issue-areas or over time.	Governments adopt informal practices in sensitive issue-areas like the CAP. Governments regularly follow formal rules in other issue-areas.	Governments adopt informal practices in issue-areas of high political uncertainty. They regularly follow formal rules in issue-areas of low political uncertainty like the CAP and horizontal matters.
Variation over Time	Yes	No	No
Cleavages	Conflict between institutional actors and governments as well as between the governments themselves.	Conflicts between large and small member states.	Conflicts between institutional actors and the governments. Agreement among governments

Cases, Observations and Plan for the Subsequent Chapters

The following chapters test these different predictions by comparing the seven formal practices in agenda setting (chapter 4), voting (chapter 5) and implementation (chapter 6) with the behavior we observe in reality. The focus is on decision-making in all European Community issue-areas from 1958 to 2001.¹⁴⁰ A broad distinction is drawn between horizontal policies (budget, institutions), policies towards third countries (enlargement, common commercial policy), and policies regarding the establishment of the common market (e.g. industry, transport, environment, agriculture etc.).¹⁴¹

As argued above, by focusing solely on EC decision-making, the study faces a *small n problem*, because the number of observations is not yet sufficient to corroborate any causal claim.¹⁴² Within the subsequent chapters, therefore, the domain of EC decision-making will be split up into four different time periods distinguished by important changes in formal rules. The “Formative Years” span from 1958 to 1969. The next time period includes the years from 1970 until the 1986 negotiation and adoption of the Single European Act (SEA). It will be referred to as the “Transformative Years.” The SEA governed decision-making until the Treaty of Maastricht became effective in 1993. These are the years of “Establishing the Internal Market,” in which the Community Method was used to provide impetus to creating a genuine Single Market among the member states. The “European Union Years” deals with decision-making from the Treaty of Maastricht until the conclusion of the currently effective Treaty of Nice in 2001.¹⁴³ These four time periods are partly independent cases, because each

¹⁴⁰ The EU’s intergovernmental pillars are excluded from the analysis, because these policies neither pool sovereignty nor delegate strong powers to supranational institutions in everyday decision-making. In other words, decision-making in intergovernmental pillars is heavily decentralized so that a distinction between formal and informal practices as defined above is rendered largely futile.

¹⁴¹ The reason is that it is not always easy to discriminate clearly among different issue-areas, because decision-makers do not always make this distinction themselves. The different treaty categories, for instance, are neither reflected in the organization of the Commission or in the various, changing sectoral Council formations. Furthermore, if governments find an early agreement on an issue before it is officially discussed in the Council, it is simply nodded through by the next best sectoral Council. It may therefore happen that the Fisheries Council adopts the “Directive on the approximation of laws of the Member States relating to heating systems for the passenger compartments of motor vehicles.”

¹⁴² King, et al. 1994, 119. Multiplying the number of observations like this has several advantages. It enhances the explanatory leverage of the theory as it puts the theory to risk of being falsified more times. The theory can also be tested with more and a greater variety of data. And it provides the opportunity to evaluate the operation of the proposed causal mechanism by focusing on additional qualitative evidence.

¹⁴³ It includes the treaty revisions in the 1997 Amsterdam Treaty, because these formal rule changes were already partly anticipated (as leftovers) in the previous Treaty of Maastricht.

treaty bargain provided governments with the opportunity to remedy institutional pathologies and align behavior with formal rules.¹⁴⁴ The result is a *large-N* data set of 56 observations, most of which constitute qualitative mini case studies. Mini case studies confirming the predicted issue-specific variation will be coded as “confirming” observations. The remaining observations will be coded as “disconfirming.”

¹⁴⁴ King, et al. 1994, 221-223.

CHAPTER 4

Agenda Setting

This chapter examines informal practices in agenda setting in order to show that they emerge systematically in those issue-areas where high political uncertainty requires governments to exercise discretion in the application of formal rules. The reason is that the treaty's formal rules on agenda setting provide several ways to impose outcomes and lock in policies. First, the Commission's monopoly of initiative permits it to choose one among several alternative proposals while selectively withholding rival proposals from the agenda. Second, the Commission is thus able to submit proposals at a point of time when the circumstances are considered particularly favorable for their adoption as, for instance, in the case of strong conflicts in the Council. Yet although these formal rules enable states to increase their aggregate welfare, they may also generate distributional shocks that turn out to be unmanageable. Third, formal rules provide the possibility of centralizing policy-relevant expertise. At the same time, however, the focus on expertise that is necessary for reaching the objectives of the treaty may also blind the Commission to the circumstances requiring discretion. For all these reasons, Liberal Regime Theory expects governments to adopt informal practices in order to resume control over the agenda in case of need. This need, we established before, is particularly high in all issue-areas except CAP and horizontal matters. Little conflict between governments, and strong conflict between governments and the Commission, provide further qualitative evidence. The dependent variable, formal and informal practices, and its indicators are depicted in the following table.

Table 5: Formal and informal practices in agenda setting

Formal practices	The Commission selectively withholds governmental proposals.	The Commission draws on independent, superior policy expertise.	The Commission proposal starts off the decision-making process.
⋮	⋮	⋮	⋮
Informal practices	The Commission frequently endorses governmental proposals.	Governments prevent the centralization of expertise and frequently interfere in internal Commission politics.	Governments control the timing of a decision.
Indicators	Sequence of moves in decision-making	Commission dependence on governmental expertise; governmental influence on Commission politics	Time lapse between submission of proposal and official initiation of negotiations

Other theorists disagree with the claim that informal practices emerge systematically where political uncertainty is high. New neofunctionalists do not expect informal practices to show any clear pattern across issue-areas. In addition, they expect conflict both between institutions and governments as well as among governments themselves wherever informal practices arise. Simple rationalists, in contrast, do expect systematic variation across issue-areas. But they expect governments to eschew formal rules where issues are predictably sensitive, the prime example here being agricultural matters. In other words, simple rationalists predict exactly the opposite pattern of issue-specific variation from that predicted by Liberal Regime Theory does. Strong conflicts between large and small states would provide further qualitative support.

To foreshadow the findings of this chapter: very early after the inception of the treaty, governments gradually and informally resumed control over the agenda in several respects. First, they adopted various practices, such as for instance the informal institution of the European Council, which made it impossible for the Commission to withhold governments' collective initiatives from the agenda. Second, governments impeded the centralization of expertise in the Commission with the effect that it increasingly had to draw on government experts. Furthermore, governments found various ways to influence internal Commission politics. Third, governments quickly resumed control over the timing of decision-making by

passing Commission proposals to a large substructure of government experts before officially initiating the decision-making process.

The observed pattern of issue-specific variation confirms the hypothesis derived from Liberal Regime Theory. Contrary to the predictions of new neo-functionalism, informal practices vary systematically across issue-areas and remain stable over time. And contrary to the expectations of simple rationalists, the CAP turns out to be an exception to most of these trends. In addition, qualitative evidence suggests that the emergence of these informal practices met with the agreement of all member states.

Does the Commission Selectively Withhold Rival Proposals from the Agenda?

Although formal rules provided the Commission with the opportunity to guarantee the most faithful implementation of the treaty by selectively withholding alternative policies from the agenda, decision-making practice quickly veered away from this ideal type. Informal practices constrained the Commission's freedom to act upon its own initiative and allowed the governments to put issues back on the agenda. Evidence of this is seen in governments' frequent collective initiation of projects, which ultimately constrained the Commission's own choice set whenever, and to the extent that, the governments deemed necessary. The Commission was further constrained by an informal norm of prior consultation, on which basis the Commission was punished for an independent submission of proposals. These practices emerged across all issue-areas and remained quite stable over time. This pattern therefore supports none of the three contending theories. Liberal Regime Theory expects agricultural and horizontal matters to be an exception. Simple rationalist theory makes exactly the opposite predictions, while new neofunctionalists expect an erratic emergence of informal practices.

The Formative Years 1958-1969

Commission officials were well aware of their formal power to establish a common market and customs union even in the face of changing preferences and short-term incentives to defect. Walter Hallstein coined the comparison of the Commission with a “motor” of integration¹⁴⁵ providing the necessary impetus for the implementation of the treaty policies even in the face of individual governments’ displeasure. In the first years after inception of the treaty, the Commission indeed made full use of its room for maneuver.¹⁴⁶ Member states and Parliament occasionally put forth alternative suggestions for legislation. In 1963, for instance, Germany devised an action plan that was supposed to provide new impetus to the Community after the failure of the first enlargement talks with Great Britain. A series of other action plans and work timetables followed. But the Commission was under no obligation and in fact did not heed all these requests.¹⁴⁷

However, the Commission’s formal power over the agenda did not remain unquestioned. The French President, Charles De Gaulle, for instance, frequently criticized the Commission for its eminently political role and demanded that the agenda be in the hands of the Chiefs of Government (CoGs). In 1960 and 1961, the CoGs met three times at the initiative of France as part of a general effort towards institutionalized political cooperation regarding economic integration. To that effect, it was proposed to hold regular meeting at the level of the Heads of State and Government. In 1961 and 1962, France specified its ideas in plans for the future design of the Political Union. According to the so-called Fouchet Plans, a Council composed of the Heads of State and Governments would meet three times a year in order to determine the legislative agenda for both foreign affairs and Community matters.¹⁴⁸ In line with simple rationalist expectations, France’s partners were initially divided on this proposal.¹⁴⁹ The Netherlands, in particular, feared the creation of an intergovernmental

¹⁴⁵ Hallstein 1962, 21.

¹⁴⁶ The Commission’s room for maneuver was initially circumscribed by the specificity of the objectives and deadlines set out by in the Treaty. They were most detailed with regard to Customs Union, but left rather vague on common economic policies. As mentioned, particularly with regard to the CAP the treaty had remained a *traité cadre* to be filled out in the course of the transition period.

¹⁴⁷ See the discussion in Ludlow 2003, 23-24.

¹⁴⁸ “The Council shall deliberate on all questions whose inclusion on its agenda is requested by one or more Member States.” Fouchet Committee 1962, Art. 5 and 6.

¹⁴⁹ Silj 1967, 5.

superstructure that would gradually undermine the Community Method.¹⁵⁰ The Fouchet Plan ultimately failed,¹⁵¹ but the idea of institutionalized meetings among the CoGs to predetermine the agenda on political affairs and Community matters remained a regular point of discussion.¹⁵²

At the same time heads of states discussed possibilities to predetermine the agenda, an informal norm evolved for the Commission not to submit proposals without prior contact with the Council. The norm consequently narrowed the set of proposals for the implementation of the treaty among which the Commission could choose, because it prescribed that the Commission regularly notify governments' permanent representatives in Brussels about the preparation of legislative initiatives.¹⁵³ In the early 1960s, it occasionally tried to circumvent this convention, particularly by making its proposal public through advance publication and presentation in the Assembly. However, the governments usually punished attempts like this.¹⁵⁴ In 1960, for instance, Hallstein tried to present the Council with a *fait accompli* by leaking a proposal on the acceleration of the establishment of the customs union to the press. He also encouraged the EP to schedule a debate on the proposal before the governments had had the chance to discuss it.¹⁵⁵ The Dutch delegation and the Council, which immediately rebuked the Commission and responsible civil servants for having put them under domestic pressure, meticulously documented the incident.¹⁵⁶ Also the proposal, which became the point of contention in the infamous "empty chair crisis" (see below), in which De Gaulle withdrew French representatives to the EC and consequently blocked decision-making for half a year, constituted an infringement of this norm of consultation. Hallstein had deliberately aired the contested Commission proposal on the financing of CAP to the EP before submitting it formally to the Council.¹⁵⁷ This course of action was widely regarded as a clear "breach of

¹⁵⁰ Jouve 1967, 286-287.

¹⁵¹ For an account of the French negotiation strategy, arguing that De Gaulle used the Plans as a bargaining chip, but never tried to push them through, see Moravcsik 2000a, 34-42. On the negotiations more generally see Bodenheimer 1967.

¹⁵² For a discussion see Werts 2008, 2-9.

¹⁵³ Vertretung der Bundesrepublik Deutschland bei der Europäischen Wirtschaftsgemeinschaft und der Europäischen Atomgemeinschaft 1964. See also Noël 1967a, 31.

¹⁵⁴ See the discussion in Altling von Geusau 1966, 238.

¹⁵⁵ Räte der Europäischen Gemeinschaften 1960. On the legality see van Miert 1969, 228.

¹⁵⁶ Auswärtiges Amt 1960, Rat der Europäischen Wirtschaftsgemeinschaft 1960f, 24-27.

¹⁵⁷ For a discussion see Scalingi 1978, 152-153.

etiquette”¹⁵⁸ – a violation of an established norm in decision-making.¹⁵⁹ According to the French Commissioner Marjolin, Hallstein’s ruse “shocked a lot of people, particularly in the French camp but elsewhere too.”¹⁶⁰ The norm of prior consultation was consequently recorded in the extra-legal 1966 Luxembourg compromise which resolved the “empty chair crisis.” In line with the expectations of Liberal Regime Theory, it was the one part of the compromise that met with general approval by all governments.¹⁶¹

The Commission’s room for maneuver had initially been circumscribed by the task, specified to varying extents in the treaty, of implementing the Customs Union and other policies until the end of the transition period. But when these tasks were gradually accomplished and the transition period drew to a close, the Community agenda slowly opened up to other policy concerns. Hopes that the Commission would now go a step further and take the political lead in achieving the broader objectives of the treaty such as the completion of a proper common market were soon disappointed. First, member states increasingly met outside the Community framework and put forth their own work programs.¹⁶² These so-called extramural meetings on foreign affairs, financial cooperation, but also genuine Community matters, remained unconstrained by any formal procedure and regularly took place without the Commission’s attendance.¹⁶³ The Commission was thus unable to choose the proposal that was put on the agenda.

Second, the CoGs also revived ideas about intensified cooperation among them. They decided to get more directly involved in Community affairs and attend to its current problems. At their summit in The Hague in 1969, the CoG launched a number of new initiatives that

¹⁵⁸ von der Groeben 1985, 185.

¹⁵⁹ See Camps 1966, 48-49, Lambert 1966, 198, Ludlow 2006, 76, Newhouse 1967, 84, Spaak 1969, 570-576. For a different point of view see Lindberg 1966, 238.

¹⁶⁰ Marjolin 1989, 349.

¹⁶¹ Représentation Permanente de la Belgique auprès des Communautés Européennes 1966a, Représentation Permanente de la Belgique auprès des Communautés Européennes 1966b. See also Noël 1973, 126, van Miert 1969, 218-219. The paragraph states: “1. Before adopting any particularly important proposal, it is desirable that the Commission should take up the appropriate contacts with the Governments of the Member States, through the Permanent Representatives, without this procedure compromising the right of initiative which the Commission derives from the Treaties. 2. Proposals and any other official acts which the Commission submits to the Council and to the member States are not to be made public until the recipients have had formal notice of them and are in possession of the text.” European Communities 1966 Edwards and Spence 1994, 9. Less critical are Amphoux, et al. 1979, 343.

¹⁶² See Ludlow 2003, 24, Ludlow 2006, 39.

¹⁶³ Mortelmans 1974, 72-74, 88-91.

would set the Community agenda for the years to come. In line with Liberal Regime Theory, the summit was widely hailed as a watershed heralding a re-launch of European integration, because it broke the deadlock on several pending problems such as British accession and monetary union.¹⁶⁴ Yet it also made apparent the dilution of the Commission's formal monopoly of initiative. The meeting of the CoGs in fact constituted a direct interference in Community affairs by an intergovernmental body that was not provided for in the treaties. Importantly, since they were the masters of the treaty and were therefore in a position to amend it, their instructions were impossible for the Commission to disregard.¹⁶⁵ It thus suffered the loss of its formal power to withhold rival proposals from the agenda.

In short, only a few years after the inception of the Treaty of Rome, several informal practices allowed governments to constrain the Commission's room for maneuver. An informal norm of prior consultation constrained the Commission by obliging it to consult with governments before officially submitting proposals. Extramural meetings of ministers and the CoGs moreover severely weakened the Commission's power to withhold rival proposals from the agenda. There is little evidence that the CAP, given that it was still in the process of developing, or budgetary matters, constituted an exception. These developments increasingly met with the general approval of all governments.

The Transformative Years 1970-1986

The CoGs' meeting in The Hague in 1969 was indeed only the first of a series of nearly annual summits.¹⁶⁶ The discussions among the CoGs did not remain confined to extra-Community matters such as foreign affairs (called Political Cooperation) or monetary union. Instead, they usually broached current Community affairs as well. In 1974, at their summit in Paris, the CoGs ultimately declared themselves prepared to take greater responsibility for European issues. The initial Dutch misgivings notwithstanding, they agreed on meeting on a permanent

¹⁶⁴ For a discussion see van der Harst 2003.

¹⁶⁵ See the discussion of The Hague in Ludlow 2003, 22-24.

¹⁶⁶ Werts 1992, XVII. On the evolution of the European Council in the 1970s and 80s see Bulmer and Wessels 1987, Johnston 1994, Morgan 1976, Wessels 1980.

basis at least three times a year.¹⁶⁷ In the format of the European Council they would aim to “ensure progress and overall consistency in the activities of the Community.”¹⁶⁸ Despite a general excitement over the impetus that the European Council was expected to provide,¹⁶⁹ advocates of the Community Method still viewed this new agenda setter with mixed feelings.¹⁷⁰ While Jean Monnet, who had become the icon of the federalist European Movement, in fact welcomed the new “autorité européenne,”¹⁷¹ the new Commission President Francois-Xavier Ortoli was much more skeptical about this new institutional arrangement. He cautioned against the European Council as a threat to the Community Method. In his address to the European Parliament in 1975 he augured:

“[The European Council] represents a change in spirit and content and may, if we are not careful, shake the institutional structures set up by the Treaties to their very foundations. If this major innovation increases Europe’s ability to take decisions; (...) and if it respects the strictness of the Community rules which is the very source of their dynamism, then we shall have gambled and won. But let us not close our eyes to the danger that force of circumstances, a lack of courage, expediency or confusion as to who is responsible for what, may tempt us to choose the low road of intergovernmental cooperation when we should be striking out on the high road of integration.”¹⁷²

The European Council was not given a legal basis in the treaty and was organized partly within, and partly outside the Community framework.¹⁷³ Its extra-legal character implied that the Commission had no formal say on the agenda. To be sure, it was not denied

¹⁶⁷ Werts 2008, 10.

¹⁶⁸ European Council 1974. Periodical meetings were already part of the Fouchet Plans of 1961. The idea was again taken up first by the French Presidents Pompidou and Giscard D’Estaing. On the genesis of the European Council see Werts 2008, 9-11.

¹⁶⁹ See also European Commission 1975a, 137, European Commission 1976, 19 and Noël 1976a, 34.

¹⁷⁰ In particular, small member states were rather skeptical. In 1975, Jean Dondelinger, the Grand Duchy’s Permanent Representative, wrote: “They (the CoGs) constitute a new political authority that threatens to undermine the authority of the Commission, which already faces great difficulties in assuming its role in full, in particular with respect to its right of proposal.” See Dondelinger 1975, 43.

¹⁷¹ Monnet 1976, 760-762.

¹⁷² Address by Mr. Francois-Xavier Ortoli, President of the Commission of the European Communities, to the European Parliament on 18 February 1975, reprinted in European Commission 1975b, IX-XXVIII, here XI-XII. Likewise the Commission President Roy Jenkins (cited in Lauwaars 1977, 43) in his 1976 address to the EP, who remarked that there is the risk that “the Community machinery might be encroached upon by the less reliable procedures of intergovernmental cooperation.”

¹⁷³ On the controversies surrounding a permanent secretariat see Glaesner 1994, 103-104. Its agenda on Community-related questions was going to be prepared within the Council by the intergovernmental Committee of Permanent Representatives (COREPER). Matters of Political Cooperation were going to be prepared by the so-called Political Committee, which consisted of the political directors of the member states’ Foreign Ministries. The country holding the CP was supposed to host and shoulder the organization of the summits. It was thus granted some discretionary role in narrowing down the agenda to a manageable set of topics. Bulmer and Wessels 1987, 52.

the right to submit proposals on Community-related decisions. But in stark contrast to its formal powers under the Community Method, its proposals now had to compete with alternative initiatives from other governments, the Council, and the Council Presidency.¹⁷⁴ The role of the Commission President at the summits was initially left vague and subject to dispute. From the mid-1970s on, the President usually attended non-restricted meetings that concerned Community matters. But the Commission President was not allowed to participate in specific decisions.¹⁷⁵

The European Council's range of activities was very broad from the outset. Importantly, in addition to its role in Political Cooperation (i.e. foreign affairs) and general institutional and political questions, it also dealt with genuine Community matters. Wolfgang Wessels finds that in fact every second decision by the European Council dealt with economic matters, most of which were genuine EC decisions. He does not distinguish between agricultural and other matters, and there is no evidence that the CAP constituted an exception in this regard. Foreign affairs (including the EC's external relations) and constitutional questions accounted for 29 and 12 per cent, respectively.¹⁷⁶ Also, the CoGs did not limit themselves to setting guidelines: they also got intervened in the technical details of policies.¹⁷⁷ Official outcomes of their meetings were then summarized in and published as so-called "Conclusions of the Presidency." The 1977 London Declaration acknowledged the European Council's broad scope. It acknowledged that it "will sometimes need (...) to settle issues outstanding from discussions at lower levels."¹⁷⁸

Importantly, although the European Council's guidelines and proper decisions were not legally binding *strictu sensu*, the fact that the CoGs were always in the position to change the treaties made it impossible for the Commission and the Council to ignore them.¹⁷⁹ Its decisions were effectively treated as binding "framework-laws"¹⁸⁰ to be implemented by the

¹⁷⁴ Werts 2008, 34, Westlake 1995, 167-168.

¹⁷⁵ Werts 2008, 35-37. This "junior" membership was recognized in the 1983 Stuttgart Solemn Declaration, which stated that the "European Council brings together the Heads of State and Government and the President of the European Commission." European Council 1983.

¹⁷⁶ Wessels 2008, 164.

¹⁷⁷ Bulmer and Wessels 1987, 67.

¹⁷⁸ Conseil Européen 1977.

¹⁷⁹ On these legal aspects see Glaesner 1994, 111.

¹⁸⁰ Morgan 1976, 50.

Commission or the Council.¹⁸¹ Furthermore, the European Council was free to specify them in detail. They ranged from mere policy statements and guidelines to detailed instructions and genuine decisions, on which the Ministers had not been able to reach agreement.¹⁸² Thus, even though member states had declared that these “arrangements do not in any way affect the rules of the Treaty,”¹⁸³ the European Council *de facto* predetermined the Community agenda. Its decisions on guidelines for the Community matters, and its freedom to specify these guidelines in detail, provided it with the opportunity to constrain the set of choices out of which the Commission would ultimately pick its proposal. In other words, the informal practice of intergovernmental meetings outside the Community framework constrained the Commission’s ability to selectively withhold alternatives from the agenda.

Over time, the CoGs’ summits thus developed into a fact of Community life, “une des données politique nouvelles que nul ne peut plus ignorer,” as the longtime Executive Secretary of the Commission, Emile Noël, expressed it.¹⁸⁴ The CoGs’ practice of frequently setting the Community agenda was mentioned only briefly in the Single European Act, which renewed the member states’ formal commitment to establish a genuine common market among them. At the insistence of small member states, the Act merely confirmed the European Council’s existence and denied it the official status of an institution. To some proponents of the Community Method this was already regarded as a “grave blow to the prestige of the Commission” that “did not objectively leave much hope for the political future of the Commission.”¹⁸⁵ However, there is again little evidence for any issue-specific variation in this new informal practice.

¹⁸¹ Council of the European Communities 1980, chap. 2.

¹⁸² Wessels 1988, 16, Bulmer and Wessels 1987, 104.

¹⁸³ European Council 1974

¹⁸⁴ Emile Noël, cited in Wellenstein 1981, 157.

¹⁸⁵ See Edwards and Spence 1994, 9. For similar assessments see Dondelinger 1975, 45, Werts 1992, 144. On the relationship European Council-Commission see Bulmer and Wessels 1987, 109-113.

Establishing the Internal Market 1987-1993

The relationship between the Commission under President Roy Jenkins and the European Council had gradually improved in the late 1970s.¹⁸⁶ But it was only under Jacques Delors, who assumed the position of Commission President in 1985, that the Commission fully acknowledged the European Council's superior position within the Community framework. Instead of fighting the CoGs, Delors decided to use the European council to his advantage. Delors explained in his memoirs that he tried to use his junior membership in the European Council in order to win intellectual influence over the governments due to his superior expertise on issues (see below).¹⁸⁷ It henceforth became practice that the Commission President would give an introduction to most Community matters under discussion.¹⁸⁸ In fact, he regarded the European Council as an opportunity to circumvent opposition within the Commission. Asked whether he valued his junior membership in the European Council more than his Commission Presidency, Delors answered in the affirmative and explained: "The fact that I fully participate in the European Council gives me a certain authority over my colleagues, whether they like it or not."¹⁸⁹ The European Council's right to set the agenda whenever deemed necessary had therefore become unquestioned. In his speech before the European Parliament in 1990, Delors explained:

"The Commission has the right of initiative. But the position is different according to whether this right is exercised within a specified institutional framework or at a more general political level. When we are operating within a specified institutional framework, our duty is to apply whatever has been decided upon solemnly by the European Council or in a modification to the Treaty. (...) I would like these things to be borne in mind when the Commission's role is assessed. It is all very well to dream about greater powers for the Commission, but that is the framework in which we have to work."¹⁹⁰

In this period, the European Council concerned itself more with external relations and foreign affairs (in 43% of all decisions) than with economic matters (28%).¹⁹¹

¹⁸⁶ Endo 1999, 57, Jenkins 1989, 74.

¹⁸⁷ Delors 2004, 308. On Delors' informal leadership see e.g. Endo 1999, Ross 1995, Sandholtz and Zysman 1989, 189. But see Moravcsik 1999, 296.

¹⁸⁸ Werts 1992, 150.

¹⁸⁹ Interview with Delors, French original cited in Endo 1999, 58.

¹⁹⁰ Delors before the European Parliament, 16 February 1989, in European Parliament 1989.

¹⁹¹ Wessels 2008, 164.

An internal, confidential study conducted by the Commission for the years 1991 and 1992 on the source of legislative initiatives finds that in fact 94% of all major legislative acts in 1991 and 96% in 1992 originated from initiatives from governments, the European Council and other institutional bodies, as well as from international obligations. The majority of these proposals concerned themselves with economic development, the Internal Market and external relations. The six percent of “spontaneous initiatives” of the Commission were identified as

“(…) a proposal concerning the designation of telemetric frequencies for transports, the establishment of a system for bank deposit securities, and the fight against various emissions in the framework of the strategy for the improvement of the environment.¹⁹²

These numbers do not, of course, indicate whether the Commission chose to ignore other rival initiatives. However, the study concludes by noting that the Commission is responsive to all interests affected by European decisions, suggesting that the Commission was unlikely to have disregarded a significant proportion of governmental initiatives.

European Union Years 1994-2001

From the late 1980s onwards, the CoGs within the European Council sought to free themselves from acting as an arbiter on issues referred to them by their Ministers in the Council in order to consolidate their role as agenda setter. At each meeting, the CoGs checked whether the Ministers were making progress on the dossiers under discussion.¹⁹³ It was hence considered necessary to streamline the European Council’s activities with the Commission’s legislative program. The Commission regarded this as an opportunity to reassert itself. In its White Paper on Governance, it proposed to assume greater responsibility in preparing the European Council summits and steering its long-term agenda.¹⁹⁴ The CoGs preferred, however, to confer this task on the CP. In 2002, the Seville European Council decided to adopt on the basis of a recommendation by the successive Council Presidencies a multi-annual strategic program for three years.¹⁹⁵ This further consolidation of the European Council’s

¹⁹² Commission des Communautés Européennes 1993.

¹⁹³ Cited in Werts 2008, 79.

¹⁹⁴ European Commission 2001.

¹⁹⁵ European Council 2002, Annex 2.

agenda-setting power was immediately exploited by Delors' successor in office, Jacques Santer, in order to improve his position within the college of Commissioners. Shortly after taking office, he presented his program of term to the CoGs at their informal meeting in Mallorca in September 1995. He received the backing of the European Council and thus set out the path for his entire term of office until 1999.¹⁹⁶

In short, there was little change in the governments' informal practice to predetermine the agenda. If anything, during the 1990s the European Council consolidated its role as the Community's principal agenda setter. Ferdinando Riccardi, editor-in-chief of the influential European news agency *Agence Europe*, critically commented on this development:

“The Community method that enabled us to go beyond the historic but ineffective system of alliances is the only guarantee of the perennial nature of what has been achieved. (...) The increasingly pre-eminent role of the European Council is both salutary and dangerous. Salutary, because the Heads of State and Government have indisputable democratic legitimacy, are “visible” to the public and may provide the EU with the political impetus it needs. Dangerous, because the European Council could slide towards a “G8”-type mechanism, in which some essential elements of a Community are lacking: the largest powers dominate, and no independent institution prepares decisions basing itself on the “general interests”, nor manages follow-up to directions decided upon. To slide along that path would be the end of Community Europe.”¹⁹⁷

However, there is also little evidence for any issue-specific variation. From 1994 to 2001, the European Council primarily dealt with matters of external relations and foreign affairs (47 per cent) as well as economic matters (26 per cent).

Summary

Informal practices provided governments with the opportunity to predetermine and to put issues back on the agenda. To be sure, the Commission was still able to select proposals from among various alternatives that promised to best implement the treaty and at the same time maximize the Commission's power. However, the European Council in particular heavily constrained the Commission's choice set by spelling out guidelines and determining their

¹⁹⁶ Werts 2008, 52.

¹⁹⁷ Agence Europe 2001a.

specificity. We have seen that the European Council, despite its informal and extra-Community character, indeed met ever more frequently over the period from 1958-2001 and intervened in all Community matters.

While the general trend of the constant weakening of the Commission’s formal agenda-setting power through the adoption of informal practices is clear-cut, it is more difficult to establish precise issue-specific variation. The quantitative data collected by Wolfgang Wessels does not distinguish between agricultural and other matters. Also the qualitative evidence did not indicate any variation in this regard. The evidence therefore fails to confirm the expectations of all three theories. To repeat, Liberal Regime Theory expects less informal practices in agriculture, because this issue-area features a low extent of uncertainty. Simple rationalist theories, in contrast, predict more informal practice in agriculture, because this issue-area is the most sensitive one. New neofunctionalists, finally, expect an erratic emergence of informal practices. Also qualitative evidence supports all theories. The European Council was clearly viewed with suspicion by the Commission. Although agreeing to this informal practice in principle, small member states seemed to be less enthusiastic about the meetings of the heads of state and government than larger member states. In order to give alternative theories the benefit of doubt, all observations were coded “disconfirming.”

Table 6a: Informal practices in agenda setting and confirmation of Liberal Regime Theory

	Agriculture, Horizontal Issues	Common Market, External Relations
1958-1969	NO	NO
1970-1986	NO	NO
1987-1993	NO	NO
1994-2001	NO	NO

Does the Commission Draw on Superior Policy Expertise?

Although formal rules provided the opportunity to centralize expertise in the Commission in order to guarantee the most faithful implementation of the treaty, the practice quickly

developed in a different direction. First, the Commission, initially torn between its two tasks of agenda setting and the execution of policies, became increasingly occupied with the latter. Member states proved unwilling to provide it with the means necessary to centralize expertise. As a consequence, it had to rely heavily on governmental expertise in drawing up proposals. Second, member states found various ways to intervene in the Commission's internal affairs, particularly through the so-called cabinet system, thereby influencing policy proposals even when they came from the Commission.

Liberal Regime Theory expects such practices to emerge where there is a high demand for discretion. The reason is that the centralization of expertise necessary for the best implementation of the treaty¹⁹⁸ at the same time makes bureaucracies blind to exactly those circumstances that require discretion. A dialogue between Hallstein and the then French Commissioner Robert Marjolin illustrates this rationale, which does not leave any room for discretion:

“I would often use the word ‘reasonable’ to describe a project or a proposal that seemed to me not only to be consistent with reason, but also to have qualities of moderation in a good sense. ‘I don’t understand what you’re trying to say,’ Hallstein would object. ‘What does reasonable mean? An idea is rational or it is absurd, there is no intermediate term.’”¹⁹⁹

The theory therefore predicts that governments permit the centralization of superior, independent expertise on agricultural and horizontal matters where political uncertainty is low. The Commission will be less able to draw on independent, superior expertise where political uncertainty is low. New neofunctionalists would expect random patterns in the centralization of expertise. Simple rationalist, arguing that governments deviate from formal rules when issues are sensitive, expect informal practices to emerge in agriculture rather than anywhere else.

¹⁹⁸ This was a commonly accepted justification for the Commission's extraordinary formal powers. According to Walter Hallstein, the key to the Commission's influence on outcomes was the indisputable quality of its proposals. In his words, the “persuasiveness of a proposal always lies with the quality of its rationale.” See Oppermann 1979, 441-446. Making compromises would accordingly weaken its power.

¹⁹⁹ Marjolin 1989, 313.

The evidence in this section by and large supports Liberal Regime Theory.²⁰⁰ Although the CAP, too, was heavily constrained in the centralization of expertise and the formulation of independent proposals, these aspects were for most of the time far less pronounced in agriculture than in any other issue-area. The Directorate-General (DG VI) responsible for agriculture, the so-called “Agricultural Empire” was in comparison to other DGs very well equipped and able to draw on its very own expert services.

The Formative Years 1958-1969

The Commission never conformed to an ideal-typical European Civil Service able to centralize independent policy-expertise.²⁰¹ First, the civil service was not entirely based on a system of competitive examination of merit. Instead, following the example of the ECSC, recruitment and promotions at senior levels had to maintain an overall national, regional, and political balance. The existence of national contingents placed the Commissioners and member governments in the position of protectors of their respective national and national-political groups.²⁰² Highest posts thus remained reserved for particular types of candidates, on grounds such as nationality or party affiliation.²⁰³ Hallstein was well aware of this obstacle to competitive recruitment. In the very first years, he therefore hired expansively and far beyond

²⁰⁰ One caveat is in order with regard to data. As we shall see below, the Commission soon adopted the practice of consulting national governmental and independent experts. Official figures, however, are incomplete and confusing. First, the Commission kept no record of and moreover paid experts under changing budgetary lines. The situation is and has always been, as the Commission itself observes, confusing, opaque and expensive. Commission of the European Communities 2000, 16. See also the critique in Committee of Independent Experts 1999, 59-76. It is consequently difficult to distinguish clearly between governmental and non-governmental experts on the one hand, and experts involved in the drafting of proposals and the implementation of decisions on the other hand. On this problem of measurement see Rometsch 1999, 321-331. Second, there are few data on the reliance on government expertise across issue-areas, and it has to be kept in mind that the Commission’s various departments, the Directorate-Generals (DG), were regularly restructured to fit the portfolios of a growing number of Commissioners and maintain national balances rather than to meet demands in expertise. On these changes see Page 1997, 30-34. The data are discussed in this light and crosschecked whenever possible. In addition, horizontal matters were not dealt with on a daily basis and within a single DG. Special, horizontal task forces usually prepared proposals on these questions, but there are few data available on these experts. These issue-areas are consequently dropped from the analysis.

²⁰¹ See the discussion in Siotis 1964, 242-249 and the reply by Sidjanski 1964. On Monnet’s views and the organization of the High Authority see Mazey 1992.

²⁰² Siotis 1964, 248.

²⁰³ See Clark 1967, 67, Coombes 1968, 20-22, Coombes 1970, 131, Wallace 1973, 57. For a description of this practice see Vertretung der Bundesrepublik Deutschland bei der Europäischen Wirtschaftsgemeinschaft 1965b, 68, Vertretung der Bundesrepublik Deutschland bei der Europäischen Wirtschaftsgemeinschaft 1967, 2, von der Groeben 1995, 302-303.

the Commission's actual need.²⁰⁴ The staff of the EEC Commission grew on average by 11.6% per year. The formal merger of the various Communities' executives between 1965 and 1967, however, largely undid these efforts. Hallstein's Commission, now united with the Euratom Commission and the ECSC Commission, had to accept large cutbacks, especially in senior staff.²⁰⁵

The service was also not able to use its resources for the preparation of high quality proposals. Increasing administrative and secondary legislative functions²⁰⁶ conflicted with its task of initiating policies of high quality, as David Coombes observed in 1970 in his excellent study on "Politics and Bureaucracy in the European Community."²⁰⁷ A great deal of the service's energy went into the implementation of decisions at the expense of policy initiation.²⁰⁸ While expertise had grown steadily from 1958 until the merger, it started regressing from 1967 onwards.²⁰⁹ Before drafting legislative proposals, the Commission therefore adopted the custom of consulting groups of experts from national administrations.²¹⁰ According to Leon Lindberg, 117 of such expert groups already existed in 1960, of which 80% were composed exclusively of governmental officials.²¹¹ The total number of government officials involved in the preparation of legislative proposals greatly proliferated from the mid-1960s onwards as the following figure shows.²¹² The number of governmental experts involved in the preparation of Commission proposals thus quickly exceeded the Commission's own permanent staff, which numbered 5,000 in 1969 including translators and administrators.²¹³

²⁰⁴ Noël 1992, 152-153.

²⁰⁵ See Noël 1992, 152-154, 158 and Cini 1996, 56, Coombes 1970, 265-266.

²⁰⁶ See e.g. Hellwig 2004, 49. The number of acts adopted by the Commission quadrupled from 1961 to 1969. See Franchino 2007, 107.

²⁰⁷ Coombes 1970.

²⁰⁸ Coombes 1970, chap 13.

²⁰⁹ Pouillet and Deprez measure expertise as the number of A-level to B-level officials. See Pouillet and Deprez 1976, 31.

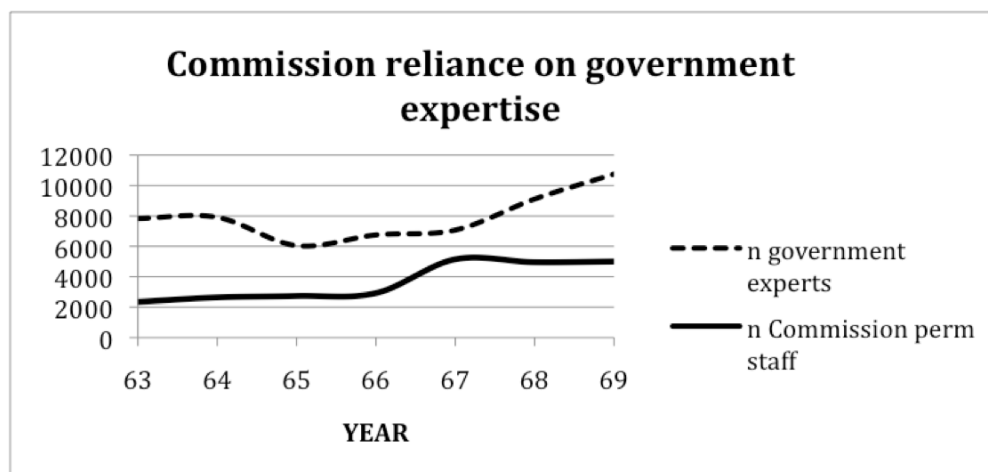
²¹⁰ Lindberg 1963, 57-62. See also Scheinman 1966, 758-762.

²¹¹ See Lindberg 1963, 56.

²¹² Institut für Europäische Politik 1989, 43, Maurer, et al. 2000, 34-40. The drop in 1965 and 1966 is due to France's retreat from the institutions during the "empty chair crisis." France nonetheless participated in decision-making through the "written procedure." See Kaiser 1966, 11-19.

²¹³ Pouillet and Deprez 1976, 28.

Graph 1: Commission's reliance on governmental expertise 1963-1969²¹⁴



Moreover, the Commission had no influence over who was appointed by the national administrations. As we shall see in chapter 5, the national administrations usually delegated the very same officials that would later also conduct negotiations on the very same proposal within the Council. It thus became difficult, as Emile Noël complained, to distinguish between mere consultation and genuine negotiation:²¹⁵

“There is a great temptation for the Commission’s services to try to work out compromise formulae at this stage, even though the national experts consulted take part in these debates as independent persons. Experience (confirming the political prejudices justified by such practice) shows that the procedure is far from satisfactory. Often the same national experts, returning from the Council groups duly armed with instructions, reopen the question of the compromise and the whole discussion has to start again.”²¹⁶

Second, the Commission was not able to prevent national interferences in internal Commission politics. Another obvious departure from promotion on the basis of merit and an example of national influence on the Commission was the growth of the Commissioners’

²¹⁴ Data from Pouillet and Deprez 1976, 117.

²¹⁵ Noël 1973, 127. Leon Lindberg, on the other hand, regarded this practice as “a form of ‘informal co-optation,’ a process whereby the Commission sought to accommodate itself to the sources of economic and political power within the Community by associating them with policy-making” (1963, 284). He thus expected national experts to socialize with their counterparts. Other authors such as Miriam Camps and David Coombes were far more critical and regarded the practice of *engrenage* as a threat to the Commission’s independence. See Coombes 1970, 95: “... the tendency of organizations to adapt to a potentially hostile environment by recruiting and thus neutralizing potential antagonists ... is invariably damaging to the vitality and independence of the organization concerned.” Similarly Camps 1958, 4. An already more pessimistic assessment of *engrenage* can be found in Lindberg and Scheingold (1970, 93), who describe the bureaucratization and lack of leadership on part of the Commission.

²¹⁶ Noël 1973, 127.

personal offices, the *cabinets*. These were primarily composed of a Commissioner's fellow countrymen directly responsible to the Commissioner, who were supposed to serve as a transmission belt between domestic interests and the college. The member states did not shy away from using these ties to assert their national interests and intervene in ongoing Commission service's work.²¹⁷ Fearing degradation of the Commission's supranational character and the working relation between the college and civil servants, Hallstein was keen to keep the size of the *cabinets* small. He restricted them to two members of high grade in the Commissioners' and four in the President's *cabinet*. Commissioner Lemaigen explains this opposition as follows:

“The President was categorically opposed to the numerous cabinets: he said he did not want risk to see the Commissioners become “mediatized” by their immediate collaborators. Beyond doubt, he also considered that because everyone seemed to quietly agree that cabinet members ought to be of the same nationality as the Commissioner, their excessive multiplication risked creating an internal nationalism within the cabinet. Therefore, his main concern was to maintain the collegiality of decision-making and the reinforcement of the community spirit inspiring this collegiality.”²¹⁸

However, Commissioners found various ways to work around this order by seconding fellow countrymen from national administrations.²¹⁹ The size and influence of the cabinets consequently grew considerably toward the end of the decade.²²⁰

In short, the Commission quickly and increasingly turned away from an ideal-typical civil service centralizing policy-relevant expertise. First, the Commission was not able to use its human resources for the preparation of high quality legislation. It therefore adopted the practice of consulting government experts to that effect, the number of which quickly exceeded the size of the Commission's permanent staff. Second, national influence prevented promotion on the basis of merit and occasioned intervention in Commission politics via the Commissioners' *cabinets*. This development came along with a growing horizontal differentiation within the Commission. According to Edouard Pouillet and Gérard Deprez, the different Directorate Generals became ever more diverse in terms of endowment and tasks.

²¹⁷ Coombes 1970, 255. See e.g. Bundesministerium für Landwirtschaft 1967c, Bundesministerium für Wirtschaft 1967, complaining that they are not as successful in using their contacts as fellow member governments.

²¹⁸ Lemaigen 1964, 49-50.

²¹⁹ Coombes 1970, 255, Ritchie 1992, 98-104.

²²⁰ Bitsch 2007, 200. See also Ritchie 1992, 104.

Most noteworthy in this respect is the development of the DG VI (Agriculture), which became what would later be called the “Agriculture Empire.” In contrast to other DGs, it never suffered any shortfall in staff or financial resources. It moreover encapsulated itself from the rest of the Commission by establishing its own internal services (e.g. a legal service, and a directorate for external relations) that allowed it to combine all expertise under one umbrella.²²¹

The Transformative Years 1970-1986

Contemporary observers agreed that the Commission increasingly came to resemble an international secretariat rather than a creative mind.²²² In response to growing complaints about poor quality of legislative proposals,²²³ the Commission appointed an independent review body, the Spierenburg committee, to come up with proposals for administrative reforms. The European Council on its part commissioned the “Three Wise Men”²²⁴ to consider adjustments to the Community institutions and decision-making procedures. Both groups highlighted the fact that the Commission’s resources and internal organization were not suited for the preparation of high-quality legislative proposals.

First, the Commission remained understaffed and unable to put its energy into the preparation of proposals. Although the Commission’s permanent staff increased in absolute numbers in the 1970s and remained the largest Community body, the growth was much lower than that of other institutions.²²⁵ The 1979 Spierenburg Report noted in this regard that the

“(…) total number of Commission employees is smaller than is generally realized. Excluding staff paid from research appropriations, it amounts to 8.300 officials, of whom some 40% are directly or indirectly concerned with linguistic work. Taken as a whole, these numbers do not seem excessive when compared with national central administrations.”²²⁶

²²¹ Pouillet and Deprez 41.

²²² See Siotis 1964, Spinelli 1967 and Coombes 1970, 99.

²²³ See Sasse 1975, 162-163, Weinstock 1981, 50.

²²⁴ Barend Biesheuvel, Edmund Dell, Robert Marjolin.

²²⁵ See Strasser 1979, 322. 1968-1980: Commission: 68%; Council: 177%; EP: 369%.

²²⁶ European Communities 1979, n. 11.

In fact, the Commission was in absolute numbers not larger than the municipal administration of Madrid.²²⁷ The average Commission DG (230 staff in 1979) was usually not larger in size than the average national team. The Commission therefore continued to rely on national experts for the preparation of proposals. Because the Commission did not keep official records, the available data are to be taken with a pinch of salt.²²⁸ Various sources suggest, however, that the number of governmental experts was very high compared to the Commission's rather small permanent staff.²²⁹ According to Rometsch, the Commission's expenses for the consultation of government experts and independent experts increased nearly fourfold from 1972 to 1986. Wolfgang Wessels reports consultation of 10,381 government experts in 1975 and 15,652 in 1985 for the preparation of Commission proposals. Independent scientific experts were used to a much lesser extent.²³⁰ Another Commission official even reports consultation of 37,000 government experts in 1978.²³¹ These differences are probably due to the fact that some government experts served in more than one group.

As mentioned, these experts were usually identical to the governmental experts that would later negotiate exactly the same proposal in the Council Working Groups (WG).²³² Although the Commission was not legally bound by their opinions, the practice was viewed as a potential threat to its task of providing independent, superior expertise.²³³ Accordingly, both the Spierenburg Group and the Three Wise Men cautioned against it. The Three Wise Men demanded:

“(...) the Commission must frame its proposal in a more independent manner. (...) It is sensible and sometimes essential for the Commission's departments to consult national and other experts on the purely technical background to a proposal. But they should not, as so often happens now, be drawn into negotiating with them to find a supposedly acceptable form of the measure.”²³⁴

In addition to this ad-hoc consultation of expert groups, the Commission began from 1977 onwards, to host officials on secondment from employment in member states (*experts*

²²⁷ See, for instance, the discussion in Henig 1980, 41, 44.

²²⁸ See the discussion in Rometsch 1999, 321-331.

²²⁹ See Rometsch 1999, 329-331.

²³⁰ See Wessels 1990, 233. Another unofficial source estimates existence of more than 1,000 groups at the end of the 1970s. Source cited in Erhardt 1983, 61.

²³¹ See Azzi 1982, 100 and Pag 1987, 471.

²³² On this practice see also Amphoux, et al. 1979, 347.

²³³ European Communities 1979, n. 27.

²³⁴ Council of the European Communities 1980, chap. IV

nationaux détachés). These were usually high-ranking officials drawn from the member states' civil services. They were loaned to the Commission for up to three years and remained paid by their employer, though the Commission covered their living expenses in Brussels.²³⁵ According to official figures, the number of seconded experts remained low at around twenty for the first years, and began to rise dramatically from 1985 onwards (see below).²³⁶

Second, the member states continued to influence Commission politics by interfering with recruitment. In particular, the 1979 Spierenburg report drew attention to an increase in internal frictions caused by the cabinet system. As mentioned earlier, cabinets constituted the only Commission structures not multinationally staffed (although one member was supposed to be of a different nationality than the Commissioner). The Spierenburg report criticized the cabinets for usurping functions of and interfering in the appointment of senior officials – a practice that became known as “parachuting.”²³⁷ Cabinet members were usually lateral hires from national administrations or drawn directly from the Commission's civil service, and member states took considerable interest in their composition.²³⁸ Additional posts in the cabinets were often funded by the Commissioner's home administration through secondment or through a system of temporary attachment.²³⁹ From the late 1960s and early 1970s on, cabinets had grown dramatically from an average of four in 1968 to fourteen members in 1972, of which five were senior officials.²⁴⁰

These informal practices vary, however, across issue-areas. Most noteworthy is the very uneven distribution of expertise among individual DGs. The DGs for environment, consumer and health policy employed the lowest number of staff.²⁴¹ The largest policy DGs (excluding DGs for translation and administration etc) was the DG VI (Agriculture) with some 640 staff in 1979 despite the fact that fisheries and food production standards had been

²³⁵ Spence 1994, 73.

²³⁶ Page 1997, 59.

²³⁷ European Communities 1979, 56 and Cini 1996, 111-115. See also Delors 2004, 299, 307.

²³⁸ Michelmann 1978, 482, Peterson 1971, 127.

²³⁹ Donnelly and Ritchie 1994, 43, Wallace 1973, 57. See as an example of national influence on civil service recruitment *Deutsche Vertretung bei den Europäischen Gemeinschaften 1972* and the memoirs of former Commissioner Jean-Francois Deniau (1977, 142-143).

²⁴⁰ Michelmann 1978, 495. See also Krenzler 1974, 76, Pouillet and Deprez 1976, 53.

²⁴¹ See *Europäische Gemeinschaften 1980*, 56, Willis 1982, 9.

separated and became independent DGs in 1977. As Harris et al explain in 1983, the “Agricultural Empire” continued to enjoy a special status within the Commission:

“DG VI (...) is one of the largest [including translation, MK] in the Commission with 10 per cent of total administrative staff and has always had a reputation for separateness. Its internal structure mirrors to a considerable extent the functions of the different Directorates General within the Commission as a whole. Within DG VI there are units dealing with all facets of the agricultural policy.”²⁴²

In short, the Commission veered further away from an ideal-typical European civil service centralizing the expertise necessary for a faithful implementation of the treaty. These shortcomings persisted for two reasons: first, the Commission remained understaffed and was unable to put its efforts into the preparation of proposals of excellent quality. Its heavy reliance on governmental experts in the preparation of proposals testifies to this fact. Second, governments continued to influence Commission politics through recruitment. Agriculture again appears to be an exception from this trend. It never suffered from any shortcomings in human resources, and allowed itself the luxury of expert services. Although the DG VI, too, needed to draw on governmental expertise, it resembled more than any other DG an ideal-typical supranational institution like the one Hallstein had envisioned for the Commission as a whole.

Establishing the Internal Market 1987-1993

Conventional wisdom holds that the presidency of Jacques Delors revived the Commission and, with it, the EC. Indeed, Delors assembled many dedicated people around him²⁴³ and managed to unite the college and the services behind the *grand projet* of the Single Market. Yet he did not address the deeper structural problems that the Spierenburg report had identified in 1979. The Commission remained dependent on government experts and was unable to shake off government influence on internal Commission politics.

The Commission’s inability to centralize superior, independent expertise manifests itself in the continued reliance on external expertise, which intensified during the period 1987-

²⁴² European Communities 1980, Harris, et al. 1983, 16.

²⁴³ In his cabinet and an internal think-tank. See Cini 1996, 183-187, Ross 1994.

1993. When the SEA program increased the tasks of the Commission from 1985 onwards, few if any provisions were made to increase human resources. A 1993 study noted that the Commission, employing only about 12,000 permanent officials (excluding translators), was actually smaller in size than the staff of Edinburgh city council.²⁴⁴ In 1993, DG Agriculture (826) was still the largest policy DG followed by development (766) and external relations (613). For comparison, the DG responsible for the Internal Market employed 430 staff.²⁴⁵ The Commission's permanent officials were still primarily occupied with administrative tasks. Delors' chef de cabinet, Pascal Lamy, explained:

“[We] should have changed the structure of the institution, but we thought it wasn't a priority. The problem is that officials spend too much time managing tasks and not enough time with the tasks themselves. (...) The bureaucratic noise of the house is too loud compared with what it produces.”²⁴⁶

Ironically, the Commission's new mission of completing a genuine Internal Market only served to increase its dependence on government experts.²⁴⁷ Although the DGs responsible for the Internal Market and Competition Policy were boosted in these years, they were still far away from resembling an ideal-typical civil service.²⁴⁸ David Spence explains: “Commission services were faced with the choice between simply not doing the work, or finding other means to secure the necessary staff.”²⁴⁹ In addition to government expert groups regularly consulted in the preparation of proposals, the number of *experts nationaux détachés* increased greatly – more than sixfold to 650 between 1987 and 1993.²⁵⁰ Data for 1992 show that the number of seconded officials was particularly low in the now more important DGs for Internal Market and Competition, as well as in DGs such as Fisheries and Agriculture.²⁵¹ For the Parliament's Committee of Institutional Affairs, this was a reason to worry about the Commission's independence:

“(If) we compare their numbers [of seconded experts, M.K.] to that of A-grade officials [the highest rank in the Commission, M.K.], the proportion of national experts is certainly high: 600 out of 4,100, including 1,400 officials in the lower

²⁴⁴ McGowan and Wilks 1995, 154

²⁴⁵ Page 1997, 32.

²⁴⁶ Lamy, quoted in Grant 1994, 114.

²⁴⁷ Kassim and Wright 1991, 837.

²⁴⁸ For a similar assessment see Grant 1994, 91.

²⁴⁹ Spence 1994, 72.

²⁵⁰ Page 1997, 59.

²⁵¹ For a complete list see Page 1997, 63.

grades of their career bracket. Moreover, most of the experts are assigned to departments involved in drawing up legislative proposals; in some of these departments, indeed, there appears to be a higher number of national experts than Community officials.”²⁵²

In addition to increasing the number of seconded national experts, the Commission also intensified regular consultation of government experts. The number of expert group meetings for the preparation of legislative proposals increased dramatically from 1987 onwards.²⁵³ In 1992, the Commission undertook to keep record and mothball some of these groups. It discovered 635 different expert groups, 180 of which were convened on an ad-hoc basis.²⁵⁴ The EP’s Committee on Institutional Affairs heavily criticized this practice.

“[Where] there are too many national experts in a given sector, they can actually jeopardize the independence of the Commission. More serious still is the case of experts, consulted during the process of drawing up legislative initiatives, who are at the same time Council experts or, worse still, who subsequently participate in the decisions of the Council. In such cases, there can be no doubt that the independence of the Commission is seriously jeopardized.”²⁵⁵

The second major problem affecting the Commission’s ability to centralize independent, superior expertise, member states continued influence over internal Commission politics via cabinets, also persisted throughout 1987-1993. The accession of Portugal and Spain in 1985 had enlarged the college to 17 Commissioners so that disputes over portfolios and competences had become a daily occurrence.²⁵⁶ In addition, Delors’ personal cabinet, regularly invoking the common objective of the Single Market, was regarded as particularly patronizing towards the college and the services. Individual Commissioners that wanted to retain control over their portfolio hence became increasingly dependent on their personal cabinets. As one senior official explained: “Certainly, cabinets are far more powerful now, and that is certainly a consequence of Delors. His own cabinet is very active, and other cabinets are responding.”²⁵⁷ In the late 1980s, the number of senior staff in the Presidency’s cabinet reached twelve (five more than under Delors’ predecessor Thorn) while the number of

²⁵² European Parliament 1993.

²⁵³ Commission des Communautés Européennes 1988, 3. Another official report counts 150 expert group meetings per week in 1989. See Hay 1989, 28.

²⁵⁴ Commission des Communautés Européennes 1992.

²⁵⁵ European Parliament 1993.

²⁵⁶ See e.g. Thalmann 1987, 68-69.

²⁵⁷ Cited in Peterson 1999, 56.

senior cabinet staff of individual Commissioners remained at seven.²⁵⁸ In the following years, however, several Commissioners augmented their official quota of Cabinet posts with additional members financed from national governments or political sources. In 1989, the total number of Cabinet staff on the Commission payroll exceeded 300, that is, 18 members per cabinet on average.²⁵⁹ A close observer of the Delors cabinet, George Ross, remarked that the cabinet system had in fact gotten out of control.²⁶⁰

The growing influence of the cabinets and the disaggregation of the college along national lines constituted a permanent source of annoyance for the Commission service, because individual Commissioners increasingly intervened in civil servants' activities. The Commission's morale was therefore commonly considered particularly low during Delors' presidency.²⁶¹ In 1991, an internal "Screening" report noted the cabinets' negative impact on the Commission's internal cohesion.²⁶² This complaint was repeated three years later in another internal review of the Commission's effectiveness. According to this report, the cabinets had usurped the functions of the Director Generals and the services, monopolized horizontal communication, and intervened heavily in personnel planning. The author describes this development as "one of the most vital errors in the current system."²⁶³

In short, the Delors Commission was not able to remedy the Commission's deeper structural problems. It continued to rely heavily on government expertise through secondment and consultation of government experts. It was also unable to shield itself from national influences, whether from the inside or the outside. The DG Agriculture, however, still remained the best-equipped DG within the Commission. But the DGs for Competition and

²⁵⁸ Endo 1999, 45.

²⁵⁹ Ludlow 1991, 93.

²⁶⁰ Ross 1995, 161.

²⁶¹ One official (cited in Peterson 1995, 477) is reported saying that "relatively young and inexperienced cabinet members bullied the sectoral DGs to an extent never seen before." Edwards and Spence (1994, 14) remark that "...the power of the Delors network, run by his cabinet, turned the upper reaches of the Commission into an '*administration de mission*' as opposed to an '*administration de gestion*.' As such it was able to ride above the concerns of the Commission services and sometimes of their Commissioners, adding a further layer to the separation between the politics of the College and the bureaucracy of the services."

²⁶² Commission des Communautés Européennes 1991a, 4.

²⁶³ See Commission Européenne 1994, 33, 52, 66. Berlin (1987, 47) takes a very critical stance toward cabinets and regards them as a "national bypass" that constituted "both due to their composition and their methods the reintroduction of the national into the communitarian element." Page and Wouters (1995, 454) argue, unconvincingly however, that the cabinet system rather allows Commissioners to cut ties to national administrations.

Enlargement, for which the Commission had gained strong executive and management functions (see next chapter), had also grown in importance in comparison to other DGs and relative to government experts.

European Union Years 1994-2001

The mission to establish a European Single Market only served to conceal the deeper structural problems the Spierenburg report had identified. Once this goal was reached, the Commission's problems in independently drafting proposals of the highest quality resurfaced. Moreover, the 1990s brought several challenges for the Commission. First, although governments increasingly delegated the implementation of tasks to agencies outside the Commission (see chapter 6), the Commission's workload in the daily management of policies increased further as the Treaty of Maastricht provided for additional executive and representative tasks in external relations, enlargement and extra-Community matters. Second, the Commission had to be prepared to absorb many more new members into the college and the civil service. Third, Delors' media savvy and various incidents of mismanagement also generated public skepticism of its democratic legitimacy.²⁶⁴ Its internal organization therefore became a pressing and hotly contested issue in the 1990s.²⁶⁵ Yet member states shied away from endowing the Commission with sufficient resources to centralize the expertise it considered necessary to implement the treaty. Instead, it remained dependent on governmental expertise on the one hand, and unable to fight member states' attempts to influence internal Commission politics on the other.

First, the Commission continued to rely heavily on outside expertise for the preparation of legislative proposals.²⁶⁶ The existing data suggests unequivocally that the Commission's reliance on government experts is vast. Rinus van Schendelen estimates for the end of the decade that

²⁶⁴ The Commission acknowledged these challenges in Commission Européenne 1994, chap 2, European Commission 1998.

²⁶⁵ For an overview of internal reforms see Stevens and Stevens 2006.

²⁶⁶ Again, the data are to be taken with a pinch of salt, because they do not distinguish between government and scientific experts on the one hand, and not all experts are actually registered by the Commission on the other.

“(…) approximately 1,000 expert committees not having any formal power and advising the Commission for either secondary or delegated legislation [under the first pillar, which] represent a part-time assistant bureaucracy of at least 50,000 people, centrally registered as such. (…) It is supposed that another 1,000 expert committees exist, which are not centrally registered but formed by one or the other DG.”²⁶⁷

Also the number of seconded experts remained high at around 700 per year at the end of the decade.²⁶⁸ The above-mentioned internal report strongly criticizes this practice, pointing out the fact that seconded experts are commonly of highest official rank. According to this report, seconded government experts accounted for 30% of the most senior Commission positions.²⁶⁹

Second, the Commission was not able to prevent national influence on internal politics. Prior to the Prodi Commission in 1999, cabinets consisted of six or seven A-grade officials plus a similar number of support staff. The President’s cabinet was about twice the size. In total, over 300 cabinet staff were salaried from the EU budget, and a smaller number from national civil services.²⁷⁰ The Commission’s internal report once again heavily criticized the cabinets for

“interfering with the natural competences of the Director-Generals and, in particular, their systematic meddling in appointments and promotion (…). They disempowered the heads of departments by developing (…) a strong sensitivity for national balances.”²⁷¹

When Prodi assumed office in 1999 he consequently insisted on a shift in the balance of power from cabinets to the Commission services.²⁷² Each cabinet would include staff of at least three nationalities, although this still allowed the cabinets to be of the same nationality as the Commissioner.²⁷³ Commissioner cabinets were furthermore reduced in size to a maximum of six A-grade members.²⁷⁴

²⁶⁷ van Schendelen 2006, 28.

²⁶⁸ Committee of Independent Experts 1999, 101, European Commission 1998. See also Christiansen 1997, 84.

²⁶⁹ Commission Européenne 1994.

²⁷⁰ Nugent 2001, 119.

²⁷¹ Commission Européenne 1994.

²⁷² Agence Europe 1999g, Prodi 1999.

²⁷³ Stevens and Stevens 2001, 85.

²⁷⁴ Peterson 2004, 25.

National influence on internal Commission politics became an ever more contested issue with looming enlargement of three (Northern) and at least another ten (Eastern) members, respectively. Since large member states had the right to appoint two, and small member states one Commissioner, enlargement threatened to increase the college to an unmanageable size, with the effect that Commissioners would constantly intervene in one another's portfolios. Some member states therefore had to concede their right, and small member states with only one Commissioner fought vehemently against this. The Amsterdam IGC in 1996 failed to deliver a satisfying result on that matter. The 2000 IGC finally agreed on the principle of one Commissioner per member state.²⁷⁵ The Austrian Foreign Minister explained poignantly the small member states resistance to losing their representation in the college by pointing out the danger that the Commission may fail to consider national circumstances that might require discretion:

“What matters to us, is to have complete information on the ideas of the Commission, on its actions and its plans. What is important, is that there is somebody within it that understands the situation, the problems and sensitivities at home. This is all the more important with regards to public opinion when the Commission takes unpopular decisions, which sometimes happens.”²⁷⁶

In short, national influence on internal Commission politics could not be prevented, and the Commission remained heavily dependent on government expertise. Given the poor quality of data for this most recent time period, it is very difficult to make strong claims about issue-specific variation in expertise for the preparation of proposals. Yet there is no evidence that Agriculture, Competition and Enlargement lost their comparatively strong role within the Commission. Moreover, anecdotal data and interviews collected for Agriculture contrast with the general trend described above and suggest that this DG was better able than other DGs able to centralize independent expertise. Paul Culley, for instance, a high-ranking Council official, compares informal practices in various issue-areas and describes the agenda setting stage for agricultural matters as follows:

“[Proposals] are formulated by the Commissioner for agriculture in liaison with members of the Commissioner's private office, or cabinet, and the Director General and other senior officials of DG VI (...). Depending upon the

²⁷⁵ It was furthermore decided that the Council would take a unanimous decision once the number of member states reached 27.

²⁷⁶ Agence Europe 2001b.

circumstances of the year and the personalities involved, those initiating and participating in discussions would vary; but it would be a small inner group. Lowly officials in DG VI would only be involved on a need-to-know basis, and discussions with other DGs would be minimized.”²⁷⁷

In an interview conducted at the German Permanent Representation, a German Council official responsible for agricultural matters explained likewise:

“When drawing up the proposal, the Commission is entirely isolated from the Council. The Council has to run after the Commission to get information about its content.”²⁷⁸

Summary

In sum, early hopes that the Commission would become the nucleus of a European civil service, availing itself of centralized expertise independent of national ties, were not met. First, it had to rely heavily on governmental expertise. As Edward Page expressed it:

“EU officials do not have a monopoly or even a plausible claim to the monopoly of expertise on which such professional power may be based. There are acknowledged shortcomings of experts which means that these posts have to be filled by temporary and seconded officials. Moreover, for each specialist in Brussels there are in most cases at least fifteen in the member states.”²⁷⁹

Second, the Commission was never able to fight national influence on its internal politics. Hallstein’s efforts to forestall such attempts notwithstanding, governments gained increasing influence on internal politics as well as on recruitment and promotion, in particular via the cabinet system.

Liberal Regime Theory argues that this is due to a demand for discretion. In issue-areas where governments’ incentives to abide by formal rules are uncertain, governments have to prevent the agenda setter from becoming blind to the circumstances that might require discretion. The theory consequently argues that these informal practices should prevail particularly in those issue-areas where political uncertainty is high. In issue-areas like agriculture where political uncertainty is comparatively low, governments are more at ease

²⁷⁷ Swinbank 1997, 70.

²⁷⁸ Interview #2.

²⁷⁹ Page 1997, 153.

with the centralization of expertise within the Commission. Simple rationalist theories argue, in contrast, that governments prevent the centralization of expertise in predictably sensitive issue-areas, that is, in the CAP. New neofunctionalists expect erratic patterns in the centralization of expertise.

This chapter sought to demonstrate that there is indeed strong variation in the extent to which issue-areas depart from this ideal type. While quantitative data often proved insufficient to clearly gauge issue-specific variation, anecdotal evidence suggests that agricultural matters constitute an exception to the general trend. It was always the best-equipped DG within the Commission and moreover drew on its own expert services and prepared its proposals in complete closure. However, Competition and Enlargement would catch up in the course of the 1990s. All observations except the two for the Common Market in the 1990s were therefore coded “confirming.”

Table 6b: Informal practices in agenda setting and confirmation of Liberal Regime Theory

	Agriculture, Horizontal Issues ²⁸⁰	Common Market, External Relations
1958-1969	YES	YES
1970-1986	YES	YES
1987-1993	YES	NO
1994-2001	YES	NO

Does the Commission Exclusively Determine the Timing of Decision-Making?

Enjoying the monopoly of initiative and the right to withdraw proposals at any time, the Commission is formally able to determine the timing of a decision in order to await politically favorable circumstances for the adoption of proposals that effectively implement the treaty. Yet the Commission quickly lost its grip on timing. First, instead of initiating official negotiations shortly after official submission of the proposals, governments immediately

²⁸⁰ Given that horizontal matters are not subject to everyday decision-making and therefore not dealt with in a single DG, they have been dropped from the analysis.

passed them to the Council substructure of governmental experts where they sometimes lingered several years before they were referred to the Ministers. Second, governments adopted their behavior when in 1980 Parliament suddenly gained control over timing due to an unexpected judgment of the ECJ. They subsequently changed the treaty in such a way as to reconstitute its informal influence on timing and deprive the Commission of its ability to withdraw the proposal from the agenda.

Liberal Regime Theory expects these informal practices to arise in those issue-areas where there is high political uncertainty and, thus, a high demand for discretion. Issue-areas with low political uncertainty like the CAP should feature little time lapse between official submission and the initiation of intergovernmental negotiations. Simple rationalist theories predict exactly the opposite pattern. Finally, new neofunctionalists expect informal practices in timing to arise erratically across issue-areas and over time.

Informal practices indeed vary systematically across issue-areas, with CAP and budgetary matters the typical exceptions to the general trend. First, most agricultural and budgetary matters were subject to strict deadlines that left little room for “parking” proposals in the Council substructure. Second, and as we shall see in detail in chapter 5, the Council substructure of government experts was in fact much less developed in the CAP than anywhere else, to the extent that proposals quickly ascended to the Council level. Third, Parliament was empowered in most common market areas except the CAP where the Commission consequently retained its ability to withdraw and reintroduce its proposal. Thus, the evidence by and large confirms the expectations of Liberal Regime Theory. The empowerment of Parliament, however, also shows that governments may sometimes lose control over the EC’s institutional design.

The Formative Years 1958-1969

We saw above that the Commission regularly consulted government experts for the preparation of proposals. These were usually exactly the same experts, which – once the Council had officially submitted the proposal – discussed the proposal before their Ministers

would take a decision. Chapter 5 describes in much greater detail how governments began to pass proposals through an ever-growing Council substructure of preparatory groups of government experts before they would even officially begin with the first reading. They were thus able to circumvent any possible procedural time limit and defer decisions indefinitely. For now it suffices to know that the Commission was well aware of this loss of influence. Christoph Sasse, a Commission *chef de cabinet* to Commission Vice-President Fritz Hellwig, described the emergence of this practice as follows:

“Constitutional reality diverged [from the treaties]. Instead of a balanced cooperation between both institutions, the Council emerged as center of gravity while the Commission was set back and became a mere satellite. It still prepares proposals with help of governmental experts; yet, if and when the Council deals with them, and with which content they are ultimately adopted, lies only to a very little extent in the Commission’s sphere of influence. The work rhythm is thus not dependent on the Commission’s splendid programs, but contingent on the progress made by national bureaucracies and the permanent representatives.”²⁸¹

Governments were thus able to prevent a decision at a certain point of time. The Commission, however, was formally still able to prevent decisions by withdrawing and reintroducing proposals under more favorable circumstances.

The Transformative Years 1970-1986

The situation would not change until 1980, when an ECJ ruling suddenly empowered Parliament to become a genuine co-legislator and made decisions conditional on its approval. Over the course of the 1960s and 1970s, the governments had gradually granted Parliament a greater say on more and more legislative matters. In 1960, the Council had given in to parliamentary pressure for obligatory consultation of Parliament to be extended to all “very important” problems and committed itself to giving reasons for departing from Parliament’s opinion on Commission proposals.²⁸² After having established a Community system of own resources in the early 1970s and given Parliament a say on parts of the budget, the Council also extended consultation to matters with non-compulsory financial consequences. These included most issues except CAP, for which governments deliberately classified expenses as

²⁸¹ Sasse 1972, 88. [Translation from German by the author].

²⁸² In three successive letters in November 1969, March 1970 and July 1970. See Jacobs, et al. 1992, 179.

compulsory even though it took up the largest share of the budget.²⁸³ CAP decisions with financial implications and the budgetary process were subject to strict deadlines. There was consequently little room to stall a decision.

The procedures in the budgetary area were gradually extended to other policy areas, too. At the Paris summit in 1972, the CoGs instructed the Council and the Commission to reinforce Parliament's powers of control and to improve the relations between the institutions.

²⁸⁴ The Council on its part pledged:

“(...) *except in cases of urgency* not to examine a proposal of the Commission on which the Parliament has been consulted until the opinion of the Parliament has been received, provided that such opinions are given by an appropriate date (...).”²⁸⁵

Governments hence gradually empowered Parliament to make its opinion known at all stages and on most issues. Hearings with the Commission and the Council consequently became more frequent, particularly after the governments had agreed on direct election to Parliament in 1979,²⁸⁶ but the Council was free to proceed, in case the EP was unable to deliver its opinion in due time.²⁸⁷ Parliament had no bargaining power in case the other institutions failed to respond to its views.²⁸⁸

The situation changed abruptly following the ECJ's 1980 *Isoglucose* ruling, in which a piece of legislation was annulled on the ground that Parliament had not been given the chance to pass its opinion on it.²⁸⁹ The ruling thus turned what had emerged as an informal complaisance on most issues except CAP, into a true obligation. Since it had to await Parliament's opinion, the Council was no longer able to determine the timing of a decision. As a consequence, the EP was out of the blue endowed with a *de facto* veto, because although it could not annul a Council decision, it was in principle able to delay it indefinitely. Given

²⁸³ Jacobs and Corbett 1990, 162-165. The budget was divided into compulsory and non-compulsory expenditure, and the EP was only given power to amend the latter to a certain extent. See below in chapter 4. See also Forman 1979, 81 and Fitzmaurice 1978, 216-217.

²⁸⁴ European Communities 1972b, 15.

²⁸⁵ Council declaration October 1973, cited in Jacobs, et al. 1992, 179. Italics added.

²⁸⁶ Oral question time with subsequent debate, for instance, increased tenfold from 1969 to 1979, and again considerably after the first direct election in 1979. See Nord and Taylor 1979, 419, Wallace 1979, 439.

²⁸⁷ Forman 1979, Jacobs and Corbett 1990, 8.

²⁸⁸ For a very critical assessment see Nicoll 1986.

²⁸⁹ European Court of Justice 1980.

that Parliament in principle preferred any decision to the *status quo*, such a threat of delay was far more viable and, thus, powerful than an unconvincing threat to veto a decision at a specific point of time.²⁹⁰

This sudden promotion of Parliament to a serious partner in legislation instantaneously resulted in arduous maneuvering regarding the sequence of moves in decision-making. The EP changed its internal rules of procedure in a way as to be able to reconsider and delay its amendments until it learned about the Commission's opinion on them.²⁹¹ The Council, in turn, ever more frequently took decisions "in principle" or "subject to Parliament's opinion" in order to not provide the EP any reason for delaying the decision.²⁹²

Establishing the Internal Market 1987-1993

This maneuvering was brought to a halt when the SEA formalized the tentative nature of the Council standpoint by introducing a second stage to the procedure. Governments thus turned the credible *veto by delay* into an unviable and conditional *veto by rejection*. The first stage remained as before: Commission proposal, Parliament's opinion (first reading), and Council decision. The Council decision was a preliminary standpoint, which would be discussed in the second stage to be concluded within a three-month timeframe. In this second stage Parliament could now choose to a) accept the preliminary Council standpoint, b) propose amendments (conditional on the Commission's endorsement), or c) reject the common position. As before, the Council could unanimously change and adopt proposals. Thus, instead of just giving an opinion, Parliament was now able to force the Council to find a unanimous agreement if it was to adopt the proposal anyway. But precisely because of its negative character, the threat to veto a decision entirely was hardly viable since Parliament, just like the Commission, usually preferred any agreement to the *status quo*.²⁹³ The Council consequently deprived Parliament of its ability to determine the timing of a decision by delaying it indefinitely.

²⁹⁰ See, for instance, the discussion in Garrett and Tsebelis 1996, 282.

²⁹¹ A good description provide Judge and Earnshaw 2008, 39-40.

²⁹² Jacobs and Corbett 1990, 165-166.

²⁹³ For a similar assessment see Dehousse 1989, 123.

The Treaty of Maastricht introduced a new legislative procedure with yet another reading. What has become known as the co-decision procedure, largely substituted the co-operation procedure described above. In case the Council had not adopted all of Parliament's amendments after the second reading, it now provided for a conciliation procedure. This committee had three months to negotiate a compromise. If it failed to do so, the Council would adopt the text unilaterally unless Parliament rejected it within six weeks by a majority of its members.²⁹⁴ The Treaty of Amsterdam scrapped this last stage and concluded with the conciliation procedure. These formal changes in the Treaty of Maastricht and the subsequent Treaty of Amsterdam enhanced Parliament's bargaining power (as discussed below in chapter 5), but did not change the fact that Parliament was no longer able to delay a decision.

Importantly, the introduction of the conciliation stage deprived the Commission of the formal power to withdraw its proposal. Although largely useless in terms of bargaining power, because the Commission commonly preferred any agreement to the *status quo*, the right to withdraw a proposal under discussion had provided the Commission the power to delay a decision with a view to reintroducing it under more favorable circumstances. In depriving the Commission of its proprietary rights in the proposal, the Council did away with the last obstacle that potentially prevented it from fully determining the timing of a decision.

These developments again vary across issue-areas. The Treaties of Maastricht and Amsterdam introduced the co-decision procedure for most decisions under the first pillar. The CAP, however, remained a notable exception. Most legislation in this issue-area remained based on article 43 of the Treaty, under which the EP is merely consulted on legislation related to compulsory expenditures.²⁹⁵ The Commission is therefore still able to withdraw a proposal under discussion.

²⁹⁴ On the treaty changes see Bieber, et al. 1986 and Bieber 1995, 62.

²⁹⁵ Culley 2004, 195.

Summary

In sum, the governments' informal practice of passing proposals to the Council substructure before starting official negotiations among Ministers permitted them to determine the timing of decisions. When an unanticipated judgment by the ECJ suddenly empowered Parliament to delay decisions by turning the informal practice of parliamentary consultation into an obligation, the Council was quick to undo this development. By adapting their behavior and introducing a second stage subject to a strict timeframe, governments resumed control over the timing of decisions and consequently turned the EP's veto-by-delay into a less powerful conditional veto-by-rejection. In addition, by depriving it of its right to withdraw its proposals during the conciliation procedure, the governments did away with the Commission's ability to influence the timing of decisions through withdrawal.

These developments vary across issue-areas with agricultural and budgetary issues being an exception to this trend. First, most agricultural and budgetary matters were subject to strict deadlines. Second, the Council substructure of government experts was in fact much less developed in the CAP than anywhere else to the extent that proposals quickly ascended to the Council level. Third, Parliament was empowered in most common market areas except CAP, where the Commission consequently retained its ability to withdraw and reintroduce its proposal. All observations were therefore coded confirming except for the one on the Common Market in the 1980s where a short-lived parliamentary influence on timing was observed.

Table 6c: Informal practices in agenda setting and confirmation of Liberal Regime Theory

	Agriculture, Horizontal Issues	Common Market, External Relations
1958-1969	YES	YES
1970-1986	YES	NO
1987-1993	YES	YES
1994-2001	YES	YES

Conclusion: Agenda Setting in the European Community 1958-2001

This chapter sought to demonstrate that governments adopted informal practices around formal agenda-setting rules in order to be able to exercise discretion. The focus has been on three aspects of agenda setting: the agenda setter's ability to impose outcomes by choosing one proposals while withholding possible alternatives; the centralization of expertise; and the control over the timing of a decision. The chapter argues that, although possibly enhancing aggregate welfare through the faithful implementation of the treaty, all these aspects carry with them the danger of inflicting unmanageable, concentrated adjustment costs on domestic groups. Liberal Regime Theory consequently argues that deviations from formal rules are particularly anticipated in those issue-areas where political uncertainty and, therefore, the demand for discretion are particularly high. It predicts more rule-following behavior in issue-areas such as agriculture and horizontal matters in which political uncertainty is low. Simple rationalist theory, in contrast, predicts the opposite pattern, because it expects governments to deviate from formal rules in issue-areas, the prime example being the CAP. Finally, new neofunctionalists expect erratic patterns in informal practices both across issue-areas and over time.

The empirical record partly supports the hypothesis derived from Liberal Regime Theory, because informal practices indeed allowed governments to resume control over the agenda when deemed necessary. They also remained quite stable over time. Moreover, the CAP turned out to be a frequent exception to the general trend. First, the Commission's formal ability to select those proposals that best implement the treaty while withholding possible alternatives from the agenda was gradually weakened by the emergence of the European Council. From the late 1960s and early 1970s, the heads of states and government used this institution in order to set and specify guidelines for all Community policies. These decisions were impossible for the Commission to ignore. Although this informal practice is in line with the theory, there does not seem to be any issue-specific variation in this regard. The observations for agriculture were consequently coded as "disconfirming" across the board. Moreover, in order to give other theories the benefit of the doubt, the observations for other issue-areas were coded "disconfirming," as well.

Second, governments modified the Commission's formal agenda-setting power by denying it the centralization of independent expertise. The chapter demonstrates that the Commission was not able to establish a plausible claim to the monopoly of expertise. It therefore adopted the practice of consulting government experts in the preparation of proposals and employed seconded national officials. These government experts were usually the same experts that would later negotiate the proposal in the Council, and their number largely exceeded the Commission's permanent staff. The Commission was moreover unable to prevent national influence on internal politics, particularly through the *cabinets* system. However, there is strong variation in the extent to which the Commission relied on government experts. Especially the DG responsible for Agriculture, and in the 1990s also Competition and Enlargement were quite large in size compared to other DGs. The observations for CAP were therefore coded as "confirming." Also the observations for other issue-areas were coded "confirming" with the exception of the 1990s, which witnessed the rise of Competition and Enlargement as issue-areas with relatively high, centralized expertise.

Third, informal practices and formal rule changes gradually deprived institutional actors of their formal power to influence the timing of a decision. The chapter demonstrates that institutional actors lost their formal power to determine the timing of a decision in order to await circumstances that are more favorable for the adoption of a proposal that optimally implements the treaty. Since governments refused to discuss proposals without prior preparation, the timing became primarily determined by the work rhythm within the Council substructure. When the 1980 *Isoglucose* judgment by the ECJ suddenly provided Parliament with the opportunity to delay decisions, governments were very quick to resume control by adapting their behavior and introducing formal deadlines. Finally, a formal treaty change scrapped the Commission's right to withdraw proposals and reintroduce them at a later point of time. Since decisions were commonly subject to strict deadlines, and Parliament did not play any role in this field, agricultural and to some extent also budgetary matters remained an exception to this trend. The observations for agriculture were consequently coded "confirming". With the exception of the 1980s, which witnessed the sudden empowerment of Parliament, the observations for other issue-areas were coded "confirming," as well.

The qualitative evidence is more ambiguous, but by and large supports Liberal Regime Theory. The reason is that although small member states tend to be less enthusiastic about the weakening of the Commission’s agenda setting power, there is no evidence that they disagree with the practices in principle. Consider again, for instance, Austria’s insistence on having “complete information on the ideas of the Commission” and “somebody within it that understands the situation, the problems and sensitivities at home.”

Altogether, 13 out of 24 observations (~55%) on agenda setting between 1958 and 2001 fully support Liberal Regime Theory. If the first observable implication were to be dropped from the analysis instead of coding it as disconfirming – since it does not support any theory at all – the success rate of Liberal Regime Theory would rise to 82%. Since it predicts the mirror image, simple rationalist theory is mostly disconfirmed. Furthermore, since the pattern across issue-areas is quite strong, and there is also little variation over time, there is also little evidence for new neofunctionalism.

Table 6d: Informal practices in agenda setting and confirmation of Liberal Regime Theory

	CAP, Horizontal Issues			Common Market, External Relations		
	<i>Proposals</i>	<i>Expertise</i>	<i>Timing</i>	<i>Proposal</i>	<i>Expertise</i>	<i>Timing</i>
1958-1969	NO	YES	YES	NO	YES	YES
1970-1986	NO	YES	YES	NO	YES	NO
1987-1993	NO	YES	YES	NO	NO	YES
1994-2001	NO	YES	YES	NO	NO	YES

CHAPTER 5

Voting

This chapter examines informal practices in voting in order to show that they tend to emerge systematically in those issue-areas where high political uncertainty requires governments to exercise discretion in the application of formal rules. Formal rules provide three different ways for the EC to impose outcomes on individual governments. Although they enable states to implement the treaty in an optimal way, they also harbor the potential to generate distributional shocks that lead to unmanageable interest groups pressure. First, formal rules on majority voting in the Council provide for the possibility to overrule recalcitrant governments. Second, the Commission's formal right to withdraw proposals from negotiations prevents governments from changing proposals in ways that deviate from an optimal implementation of the treaty. Third, parliamentary influence on decisions may signal the overall legitimacy of a decision to the European public, but it may also lead to decision that impose outcomes on individual governments. While these rules enable states to implement the treaty in an optimal way, they also harbor the potential to generate distributional shocks that lead to unmanageable interest group pressure. For all these reasons, Liberal Regime Theory expects governments to adopt informal practices in order to resume control over decision-making and exercise discretion when they deem it necessary. As established before, informal practices are considered particularly necessary in all issue-areas except the CAP and horizontal matters where political uncertainty is particularly low. In addition, the theory predicts that these informal practices will meet with general approval by all governments. The dependent variable and its indicators are depicted in the following table.

Table 7: Formal and informal practices in voting

Formal practices	Votes are cast frequently and openly.	Commission proposals remain unaltered during Council deliberations.	Governments openly display parliamentary influence.
⋮	⋮	⋮	⋮
Informal practices	Governments refrain from calling votes.	Commission proposals are frequently changed during negotiations.	Parliament's participation in decision-making is not openly visible.
Indicators	Voting records	Intensity of negotiations in the Council	Publicity of Council-Parliament negotiations

Simple rationalists, in contrast, predict exactly the opposite pattern of variation to that predicted by Liberal Regime Theory, because they assume that governments eschew formal rules where issues are predictably sensitive. Since large states are better able to shake off formal constraints than are small states, the emergence of these practices should be accompanied by conflicts between large and small member states. New neofunctionalists do not expect informal practices to show any clear pattern across issue-areas. Instead, they are the erratic consequences of inter-institutional conflict. Conflicts both between institutional actors as well as between the governments themselves would provide further evidence.

This chapter will demonstrate that very early after the inception of the Treaty of Rome, governments began to adopt various informal practices in voting. First, open voting is and has always been a rare exception in EC decision-making. Second, Commission proposals are always subject to significant changes. This manifests itself in the gradual development of an enormous Council substructure for the pre-negotiation of proposals. Third, as soon as Parliament's formal influence on decision outcome increased, governments' increasingly dealt with Parliament in the format of so-called informal dialogues.

The variation over time and across issue-areas moreover confirms the hypothesis derived from Liberal Regime Theory. In fact, the variation over time in open voting seems to be far less significant than the variation across issue-areas. In particular, agricultural and budgetary matters are general exceptions to the rule. In addition, the Council substructure, the consensus machinery of the Council, was far less developed in the CAP than anywhere else.

Thus, contrary to the expectations of simple rationalists, the CAP turns out to be a frequent exception to most of these trends. Contrary to the expectations of new neofunctionalists, the variation appears to be systematic. In addition, qualitative evidence suggests that the emergence of these informal practices met with the approval of all governments.

Are Votes Cast Frequently and Openly?

Although formal voting rules provide for the possibility of overruling recalcitrant governments,²⁹⁶ governments have always refrained from open voting and sought to find a consensus instead. Importantly, the variation over time is less pronounced than the quite strong variation across issue-areas. Drawing on official records and qualitative data on open voting assessed in the light of the total number of decisions (see chart below),²⁹⁷ we find that the CAP and to a lesser extent horizontal matters constitute general exceptions to the trend.

²⁹⁶ Since governments can never be sure about another government's future behavior, which is the very reason why they agreed on surrendering national vetoes, governments have an incentive to secure their gains. Moreover, governments in the minority have an incentive to make this instance known in order to signal their negotiation efforts to their constituencies. In equilibrium, we would therefore expect frequent and open voting.

²⁹⁷ A few caveats are in order with regard to the quality of the data. First, there are no official voting records available for the time between 1958 and 1990. Proceedings of Council meetings and the governments' individual positions in decision-making were supposed to be secret, and the Council General Secretariat did not even consider it necessary to keep a record of the number of majority decisions.²⁹⁷ The following analysis draws on semi-official data from different national and the Council archives as well as on contemporary reports from officials. It has to be kept in mind, however, that these reports might not be fully accurate. Second, existing reports sometimes fail to take into account changes in the total number of adopted legal acts (see graph below). These reports are therefore discussed in the light of the Council's actual workload. Third, QMV did not apply to all decisions in the EC. Most available data, however, concern the absolute number of votes rather than votes relative to the number of decisions subject to QMV. It is therefore sometimes difficult to make exact inferences about (issue-specific) willingness to accept majority decisions. Additional qualitative data therefore complement the available information.

Graph 2: Council legal acts 1958-2001²⁹⁸



In other words, governments took much more frequent recourse to Qualified Majority Voting (QMV) on agricultural matters and budgetary decisions than on any other issue. In most other issue-areas, governments' search for consensus is a very strong and surprisingly persistent practice despite formal extensions of QMV and various enlargements of membership. This pattern therefore supports Liberal Regime Theory, which expected agriculture and horizontal issues to be exceptional because political uncertainty and, thus, the demand for discretion are particularly low in these areas. Simple rationalists are disconfirmed, because they make exactly the opposite predictions about patterns of issue-specific variation. These patterns are also not erratic, which disconfirms neofunctionalist expectations.

The Formative Years 1958-1969

The practice of consensus seeking despite the legal possibility of voting emerged very early after inception of the treaty. Conventional wisdom interprets this practice in line with simple rationalist theories as a persistent veto culture triggered by the Gaullist onslaught on supranational decision-making in 1966. De Gaulle precipitated the above-mentioned "empty chair crisis" in order to blackmail other member governments into accepting the re-

²⁹⁸ Data drawn from the Euro-Lex database on 22 January 2009. A Council legal act is defined as secondary legislation adopted by the Council per year. Note that this does not include international treaties.

introduction of national vetoes. The infamous Luxembourg compromise, an extralegal document resolving the crisis between France and her partners, purportedly provides for national vetoes. It states:

“(…) Where, in the case of decisions which may be taken by majority vote on a proposal of the Commission, very important interests of one or more partners are at stake, the Members of the Council will endeavor, within a reasonable time, to reach solutions which can be adopted by all the Members of the Council while respecting their mutual interests and those of the Community (…).”²⁹⁹

It has been argued that governments subsequently refrained from voting at all and pushed through their narrowly defined national interests for the next twenty years to come. They would only return to majority voting during the revivification of European integration in the mid-1980s.³⁰⁰

A closer look at decision-making practices prior to the Luxembourg compromise and the negotiations that led to the Luxembourg compromise casts strong doubts on the conventional wisdom. First, the Council had virtually no experience with majority voting before the empty chair crisis despite the fact that it had already been intended for 88 provisions in 1965.³⁰¹ It was supposed to be extended to only ten further articles on agriculture and trade in 1966. The historical record shows, however, that during the first eight years after inception of the Communities and the adoption of more than 500 decisions by the Council, a total number of only four to ten decisions had been taken against a minority.³⁰² Practitioners spoke accordingly of a *horror majoritatis* governing decision-making in the Council in the first half of the decade.³⁰³ In secret deliberations, France’s attack on majority voting during the “empty chair crisis” in 1965-66 was widely perceived as a pseudo debate on

²⁹⁹ European Communities 1966.

³⁰⁰ The literature is in fact too large to be listed *in extenso*. See therefore the review of the conventional wisdom in Golub 1999, 734-738, Golub 2006, 282.

³⁰¹ See Bundesministerium für Landwirtschaft 1965, Ophüls 1966, 193, Torrelli 1969, 94-96.

³⁰² Depending on whether procedural issues are counted. See Vertretung der Bundesrepublik Deutschland bei der Europäischen Wirtschaftsgemeinschaft 1965a. The Commission Executive Secretary-General, Emile Noël, counts thirteen majority decisions. See Noël 1967b.

³⁰³ Houben 1964, 112-115. See also Noël 1963, 19.

a problem that was “plus théorique que réel.”³⁰⁴ In an internal debate leading to the compromise, for instance, the German Foreign Ministry therefore wondered:

“The rule has always been in practice that decisions are unanimous even in cases where the treaty provides for majority voting. We simply usually negotiate until we have reached consensus.”³⁰⁵

Importantly, in line with Liberal Regime Theory, all governments agreed that majority voting should not on any account jeopardize the national interest. The principal problem the Six faced, however, was to adjudicate over what counted as important and unimportant interests in practice. France insisted that this decision lay with the respective government. The Five, in contrast, argued that this basically amounted to a *de facto* national veto, and that the decision was a collective one.³⁰⁶ The German government regarded this problem as intractable in principle.³⁰⁷

In an in-depth report on the first meeting among Foreign Ministers in Luxembourg, the Dutch FM Joseph Luns refused the French proposal to leave this decision up to the member state in question. Furthermore, and in line with Liberal Regime Theory, he strongly cautioned against putting the practice into writing, arguing that it would become a self-fulfilling prophecy because it might induce domestic groups to demand even more special consideration.

“(The) French formula places governments in a thorny position at the domestic level. We will consequently face strong difficulties resisting all kinds of pressure, which will not fail to demand a veto on this and that national interest, no matter how unimportant.”³⁰⁸

The Six ultimately agreed to disagree about how to proceed in the event that one of them demands concessions. The final Luxembourg Compromise is consequently very ambiguous. It states:

³⁰⁴ Représentation Permanente de la Belgique auprès des Communautés Européennes 1966b: “In reality, the French fear of being minoritized on an important question was tenuous: the Six fought a battle over a faux problem.” [Translation from French by the author]. See also Auswärtiges Amt 1965, Rutten 2006.

³⁰⁵ Auswärtiges Amt 1965 [Translation from German by the author]. See Altling von Geusau 1964, 190, Pryce 1962, 35.

³⁰⁶ Représentation Permanente de la Belgique auprès des Communautés Européennes 1966a.

³⁰⁷ Auswärtiges Amt 1965.

³⁰⁸ Représentation Permanente de la Belgique auprès des Communautés Européennes 1966a.

“II. With regard to the preceding paragraph, the French delegation considers that where very important interests are at stake the discussion must be continued until unanimous agreement is reached.

III. The six delegations note that there is a divergence of views on what should be done in the event of a failure to reach complete agreement.”³⁰⁹

In short, since it had already been an established and undisputed norm to respect national caveats and regularly seek a consensus, it is doubtful that the Luxembourg compromise indeed led to any substantial change in behavior.³¹⁰

A second reason to doubt the Luxembourg compromise theory is that there is no compelling evidence that suggests the emergence of a “veto culture” in the Council. Apart from public statements that reiterate a blockage of decision-making, a number of stronger contemporary sources explain that voting was not entirely abandoned after the Luxembourg compromise and, thus, always remained an option. Almost one year after the compromise, Luns admitted to the European Parliament: “(...) we nonetheless [despite the Luxembourg compromise, M.K.] took numerous votes.”³¹¹ Also Emile Noël remarked in 1968 that majority voting continued on questions of “average importance.”³¹² For him, the reason why governments shy away from overruling others can be explained by the extent of public scrutiny.

“On important matters, implying a real political commitment on the part of the member governments and arousing public interests, the majority/unanimity dispute has no longer any great significance. A unanimous agreement is politically useful, even necessary, for reasons of expediency or prudence (...).”³¹³

According to an unofficial statistic given in 1969 by Torrelli, majority decisions were taken in ten percent of the cases formally subject to QMV.³¹⁴ Importantly, and consistent with Liberal Regime Theory, contemporary sources agree that the votes that did occur were predominantly taken on budgetary and agricultural issues.³¹⁵ Exceptions were usually the

³⁰⁹ European Communities 1966.

³¹⁰ Desmond Dinan (1999, 49) maintains that the Luxembourg compromise rather represented a change in ethos rather than in behavior.

³¹¹ Luns, cited in Kranz 1982, 418.

³¹² See Noël 1968.

³¹³ Noël 1973, 133-134. See also Amphoux, et al. 1979, 123.

³¹⁴ Torrelli 1969, 86.

³¹⁵ For a description of some of these instances see Streinz 1984, 52-73. See also the assessment of the former German Permanent Representative Lahr 1983, 229 and Noël 1976b, 41, Sasse 1975, 136, Ungerer 1989, 98.

decisions to fix prices for agricultural commodities, which usually resulted in a large package-deal.³¹⁶

In short, governments regularly shied away from voting frequently and openly. This behavior has its roots in the early 1960s and does not seem to have changed in response to the infamous Luxembourg Compromise. First, governments had virtually no experience with majority voting before 1966. Second, governments continued to occasionally take majority decisions, which hence remained a viable option. Furthermore, and in line with Liberal Regime Theory, agricultural and budget matters seem to be the exception to the general trend despite the fact that the empty chair crisis was triggered by a conflict over exactly these matters. Qualitative evidence moreover shows that all governments approved of this informal practice. It also suggests that the reason for the informal practice of consensual decision-making is indeed rooted, as Liberal Regime Theory suggests, in the intricacies of domestic politics. Noël, for instance, points to public interest in a decision as the principal reason for refraining from outvoting another government. Luns argues against a formalization of this practice for it would change the dynamics of domestic lobbying.

The Transformative Years 1970-1986

The Council's legislative activity leaped dramatically towards the end of the transition period in 1970. In fact, the total number of legal acts adopted by the Council more than quadrupled between 1966 and 1975. This in combination with upcoming enlargement of the Communities by Great Britain and Denmark in 1973, raised concerns about an imminent blockage of decision-making.³¹⁷ In early 1970, the outgoing Commission President Rey called on the member states to renounce the Luxembourg compromise and return to majority voting in the face of upcoming enlargement. France responded that the compromise had not impeded

Another unverified source from 1989, however, speaks of only six to ten majority decisions between 1966 and 1974, which is very low given that the Council's legislative activity in fact tripled between 1966 and 1970. See De Ruyt 1989, 116.

³¹⁶ Torrelli 1969, 88.

³¹⁷ European Communities 1972a. Parliament's "Vedel" report of 1972, for instance, criticizes "in practice (...) that the principle of unanimity has been generally applied," to the extent that the Commission has lost much of its influence on decision outcomes.

decision-making, since majority decisions were still being taken every day. The German Foreign Minister, Walter Scheel, agreed with Rey on the importance of majority voting. However, in line with Liberal Regime Theory, he also emphasized the importance of the mix of formal rules and informal practices. For him, the ambiguity of the compromise that allowed decisions in the range between a majority and unanimity had permitted the Council to reach optimal decisions:

“Still, we found a felicitous solution in 1966 [the Luxembourg Compromise], a formula that is just vague enough as to enable the Community make important progress. This delicate equilibrium would not have been reached by a simple Council decision. We therefore need to continue to strive for solutions that are acceptable to all of us.”³¹⁸

However, complaints about increasing legislative backlog and chaos in the preparation of meetings grew louder and louder.³¹⁹ Governments consequently began to reexamine their decision-making practices. At the CoGs request in 1972,³²⁰ the Council adopted several technical measures to improve its efficiency. They moreover called on their national administrations to give government experts more flexible instructions in order to take more decisions at lower levels.³²¹ A few months later at the 1974 Paris summit, the European Council urged parties

“(…) to renounce the practice which consists of making agreement on all questions conditional on the unanimous consent of the Member States, whatever their respective positions may be regarding the conclusions reached in Luxembourg.”³²²

We can indeed observe gradual, though not substantial changes in governments’ behavior from 1973 and again from the early 1980s on.³²³ Practitioners reported that

³¹⁸ Conseil des Communautés Européennes 1970 and Auswärtiges Amt 1970

³¹⁹ Bieber and Palmer 1975, 311.

³²⁰ European Communities 1972b.

³²¹ Rat der Europäischen Gemeinschaften 1974b, Rat der Europäischen Gemeinschaften 1974c. This was followed by a joint statement of Council and Commission President, which called for a greater use of abstention. See Council of the European Communities 1974.

³²² European Council 1974. The French Foreign Minister explained that this “Paris Declaration” was supposed to prevent abuse of the norm of consensus-seeking: « Ce texte met donc fin à la pratique abusive qui s’était développée depuis cette date et qui conduisait à soumettre au vote unanime jusqu’au questions qui pouvait être soulevées par tel ou tel expert. » The French Foreign Minister before the Sénat on 20 November 1974, cited in Streinz 1984, FN 260.

³²³ For a detailed description see Kranz 1982, 423.

individual governments increasingly abstained from voting³²⁴ with a view to enabling the majority to amend proposals unanimously. In July 1973, the then Italian Foreign Minister, Aldo Moro, suggested establishing this practice in principle.³²⁵ Emile Noël dates its emergence to 1974³²⁶ and finds that “enlargement did not bring any break in continuity in the functioning of the Council.”³²⁷ The recourse to voting therefore always remained an option as the Commission Director General, Christoph Sasse, notes in 1975:

“It is entirely wrong to think that the Luxembourg compromise had ousted the possibility of majority voting from the delegations’ minds. They are fully aware of the legal provisions.”³²⁸

Governments were also reported increasingly to take explicit recourse to majority decisions toward the end of the decade.³²⁹ In the Tenth General Report on the activities of the EC in 1976, the Commission explicitly noted:

“A number of decisions were taken by majority vote in the Council this year, either because some Member States did not insist on pressing their views or because the Council formally recorded a majority vote.”³³⁰

The General Affairs Council confirmed this trend for 1976 and 1977, respectively.³³¹ A year later, in its Eleventh General Report, the Commission notes that majority voting had become the “standard practice.”³³² It remarked that

“[Since 1975] majority voting in the Council has been extended pragmatically and a political code of conduct has gradually emerged which is now accepted by all the Member States.”³³³

³²⁴ See Henig 1973, 133. Some even claim that majority decisions were more frequent after enlargement. See Everling 1980, 221.

³²⁵ Rat der Europäischen Gemeinschaften 1973.

³²⁶ Noël 1976b, 41. Some of these decisions were taken by a new practice that had developed, the “vote en réserve,” where a government agreed to a decision in principle, but made it subject to confirmation after consultation of his national administrations. The decision only became effective after this vote had been confirmed. See Kranz 1982, 423.

³²⁷ See Noël 1974, 255.

³²⁸ Sasse 1975, 143.

³²⁹ See e.g. the Commission legal advisor, Giancarlo Olmi (1978, 93), who dates emergence of this practice to 1975. Cf. Kovar 1978, 66.

³³⁰ European Commission 1977, 34.

³³¹ European Communities 1977, 10 and European Communities 1978c. Also the Director-General of the Council’s Legal Service, Jean-Louis Dewost (1980, 21, 1984a, 295) observed an increased frequency of majority decisions from 1977.

³³² European Commission 1978, 23.

³³³ European Communities 1978b, 16. See also European Communities 1978a, 12.

Several contemporary practitioners observed an even greater acceptance of majority decisions again from the early 1980s on – a change that is often attributed to a majority decision against the UK in the Agricultural Council despite its explicit appeal to the Luxembourg Compromise.³³⁴ In successive publications, Emile Noël reports such a change in behavior for 1982 and again for 1985.³³⁵ In its answer to a written question on majority voting by an MEP, the Council reveals (for the first time) that the Council took three times as many (about forty) majority decisions in the first half of 1986 than in the same time period of the previous year.³³⁶ According to the German Permanent Representative, Werner Unger, the Council took altogether 93 majority decisions in 1986.³³⁷ Jean-Louis Dewost, the Council's Juris Consult, states: "We have moved from a few isolated votes each year to about ten in 1980, twenty-odd in 1982, about forty in 1984 and again in 1985, and almost eighty in 1986."³³⁸

These numbers still beg the question, however, of how substantial this change really was. First, as the graph on Council legal acts shows, not only the number of majority votes, but also the total number of decisions leaped in the early 1980s.³³⁹ Second, and more importantly, the available data show that majority decisions were largely confined to a few issue-areas. Dewost acknowledges that the observed trend mainly took place in Agriculture and Fisheries, and to some extent commercial policy.³⁴⁰ The German Permanent Representative Ungerer states that majority decisions are much more a rule on budgetary matters than anywhere else.³⁴¹ A snapshot of 1986 shows that 61 of the 93 majority decisions were taken in Agriculture and Fisheries, 18 on matters of external trade and development, three on budgetary questions and only eleven in the remaining issue-areas.³⁴² In relative terms, assessed in the light of the number of decisions taken in each issue-area, agriculture and

³³⁴ At the occasion of the negotiation of annual CAP prices, the UK gave its approval to a proposal contingent on acceptance of a general rebate to the EC budget. The UK was overruled on the grounds that its objections were not directed at the substance of the proposal under consideration. For a description of this instance see e.g. Butler 1986, 99-100, Campbell 1986, 937-8, Swinbank 1989, 310, Teasdale 1993, 571. See also Noël 1987, 49.

³³⁵ Noël 1985a, 149, Noël 1985b, Noël 1987, 49.

³³⁶ Europäische Gemeinschaften 1986, 1989, 105 even reports over one hundred majority decisions.

³³⁷ Ungerer 1989, 98.

³³⁸ Dewost 1987, 168. See also Ulrich Everling (1978), head of the Department for European integration in the German Economics Ministry, and Jean de Ruyt (1989, 116), Counselor to the Belgium Representation.

³³⁹ No data are available on how many of the adopted acts were formally subject to QMV.

³⁴⁰ Dewost 1980, 293.

³⁴¹ Ungerer 1981, 116.

³⁴² Ungerer 1989, 98.

fisheries stand out as exceptions. Majority decisions account for 19% of all agriculture and fisheries decisions in this year, compared to 8% on budget and external relations, and 2% in the remaining issue-areas.³⁴³

In sum, we observe a greater willingness to accept majority decisions from the mid-1970s on. But the observation of a greater willingness to accept majority decisions should not conceal the fact that except for agricultural and budgetary issues, majority voting was still an exception rather than the rule. In line with Liberal Regime Theory, Jean-Louis Dewost explains this phenomenon by appealing to the need to consider the domestic effects of decisions to retain domestic stability:

“[Even though] it is true that the treaty confers competences from the nation-state to the Community, it is currently the national governments who are ultimately responsible for the execution of decisions: It is the governments to which citizens and affected firms turn, and it is the governments that will have to face their reactions – politically or, in extreme cases, to maintain the public order. This explains why it is implicitly acknowledged by all actors of the Community game that it is necessary to strive for a *reasonable consensus* on sensitive issues.”³⁴⁴

Establishing the Internal Market 1987-1993

It was shown above that conventional wisdom regarding the roots of the practice of consensus seeking which, in line with simple rationalist theories ascribed informal practices to the desires of powerful states to circumvent formal rules on sensitive issues, is not supported by the evidence. Another commonplace, based on neofunctionalist theories of the influence of supranational actors, has been that the new Commission and the Single European Act (SEA) triggered a turn-around in the use of majority voting in the Council and put an end to the Luxembourg compromise.³⁴⁵ It was established above that there was a change in voting behavior in the mid-1970s and the early 1980s. We shall now see that, in line with Liberal Regime Theory, these patterns did not change during the 1980s and early 1990s – an

³⁴³ Data drawn from Eur-Lex.

³⁴⁴ Dewost 1987, 174 [Translation from French by the author; *Italics* in the original version].

³⁴⁵ See e.g. Garrett 1995, Tsebelis and Kreppel 1998, 63.

observation that is confirmed by quantitative analyses of decision-making speed during this time.³⁴⁶

The SEA, which was negotiated in 1986 and became effective in 1987, extended QMV to several Internal Market measures, most importantly to Article 100a on the approximation of national provisions.³⁴⁷ At the same time, the Council agreed on a revision of its internal Rules of Procedure with a view to simplifying the opening of voting proceedings.³⁴⁸ The available data show that after a peak in 1987, governments' willingness to accept majority decisions even declined. The total number of majority decisions in fact fell from 93 in 1986, and 96 in 1987 to 78 decisions in 1988.³⁴⁹ Another unofficial statistic reports 61 majority decisions in 1989.³⁵⁰ In fact, in view of the total number of Council legal acts, the actual percentage of majority votes fell substantially. In 1986, governments adopted 12% of all decisions by QMV, and in 1987 the ratio rose to 15%, but subsequently fell to 12% in 1988 and 9% in 1989. Data for the years 1990-1992 are unfortunately not available. Furthermore, since the SEA had extended the scope of majority voting to Single Market matters, we should actually observe an increase in the ratio of majority votes instead.

The qualitative data are contradictory. Enthused by the Single Market project, few contemporary practitioners take issue with the commonplace that the SEA led to a change in voting behavior. For instance, in 1990 the then Director General for Competition, Claus-Dieter Ehlermann, remarked in passing that regarding the achievements of the SEA, it had actually "not resulted in a spectacular increase in the number of majority votes."³⁵¹ In sum, the data cast doubts on the proposition that the SEA triggered a turnaround in governmental decision-making behavior. The search for consensus remained the norm in Council decision-

³⁴⁶ Golub 1999. See also Hayes-Renshaw, et al. 2006, 162.

³⁴⁷ It furthermore added several escape clauses to guarantee that governments' interests would be adequately protected. These clauses consisted of several guarantees on the macro-level such as the general consideration of economic and social cohesions. On the micro-level, escape clauses allowed Member states facing certain difficulties to stagger the implementation of Community rules over a period of time. Their application was restricted to very specific situations and subject to a strict monitoring by the ECJ. See Dehousse 1989, 118-121.

³⁴⁸ Westlake 1995, 134. At the request of the Danish Folketing, the Council began in December 1989 to asterisk those items on the agenda for which the treaty provided majority voting.

³⁴⁹ Ungerer 1989, 98. The data appears accurate: In its answer to a written question the Council stated having taken more than seventy majority decisions within eleven months after the SEA had entered into force, i.e. from July 1987 to May 1988. European Communities 1988.

³⁵⁰ Engel and Borrmann 1991, 147.

³⁵¹ Ehlermann 1990, 1104. Likewise Council official Alan 1992, 79. See also Engel and Borrmann 1991, 150, Hayes-Renshaw and Wallace 2006, 270.

making even in the aftermath of the SEA. There is also no evidence for any change in issue-specific variation in this practice.

The European Union Years 1994-2001

The Treaty of Maastricht again extended the scope of majority voting within the first pillar. The Council Secretariat began to sporadically release data on votes in the Council from 1994 onwards. This section draws on the data sets compiled by Mattila and Lane,³⁵² Heisenberg,³⁵³ and Hayes-Renshaw and Wallace.³⁵⁴ The data usually focus on so-called “contested decisions,” which are defined as decisions in which at least one government abstains or dissents. In line with the definition of formal and informal practices advanced above, the specific focus is on deviations from open voting as formal equilibrium behavior.

Drawing on data released by the Council General Secretariat, Dorothee Heisenberg presents descriptive statistics on the number of open majority votes as a percentage of the total number of legal acts formally subject to QMV from 1994 to 2001. It shows that open voting is indeed a rare exception. On average, governments overruled other governments in only 19% of all decisions taken by the Council between 1994 and 2001.³⁵⁵ This is depicted in the following graph. Note, however, that these numbers aggregate all issue-areas.

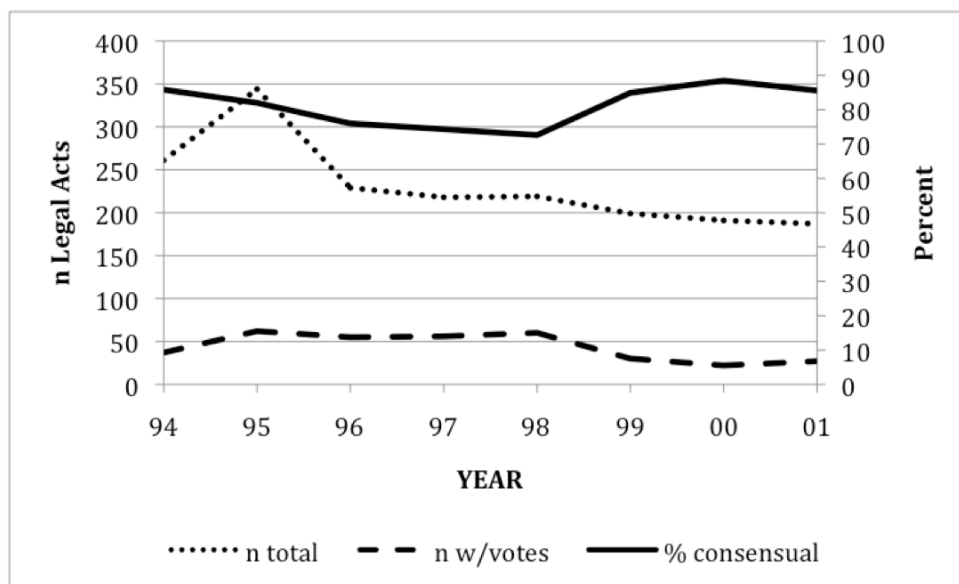
³⁵² Mattila and Lane 2001.

³⁵³ Heisenberg 2005.

³⁵⁴ Hayes-Renshaw and Wallace 2006, Hayes-Renshaw, et al. 2006.

³⁵⁵ See Heisenberg 2005, 72. While the previous section weighed the number of majority decisions against the total number of decisions, these numbers now assess majority decisions in the light of decisions formally subject to QMV.

Graph 3: Consensus decision-making in the Council 1994-2001³⁵⁶



The next graph provides an overview of issue-specific variation in majority votes as a percentage of the total number of legal acts. This analysis draws on data compiled by Mattila and Lane,³⁵⁷ complemented (where the classification of issue-areas is unambiguous) by the data provided by Hayes-Renshaw, Aken and Wallace.³⁵⁸ It shows that the Council generally refrains from open voting in the majority of issue-areas. Agriculture is the striking exception. At least every third legal act is taken against the explicit dissent.³⁵⁹ In more than 60% of the cases, the final decision was taken against an isolated government rather than a coalition of states.³⁶⁰ In line with Liberal Regime Theory, this further testifies to the informal practice of accommodating minorities regardless of their size. Mattila and Lane find, moreover, that three of the four large member states, namely Germany, the UK and Italy, as well as Sweden, are most likely to be overruled, i.e. to cast a negative vote.³⁶¹

³⁵⁶ Heisenberg 2005.

³⁵⁷ Mattila and Lane 2001, 42.

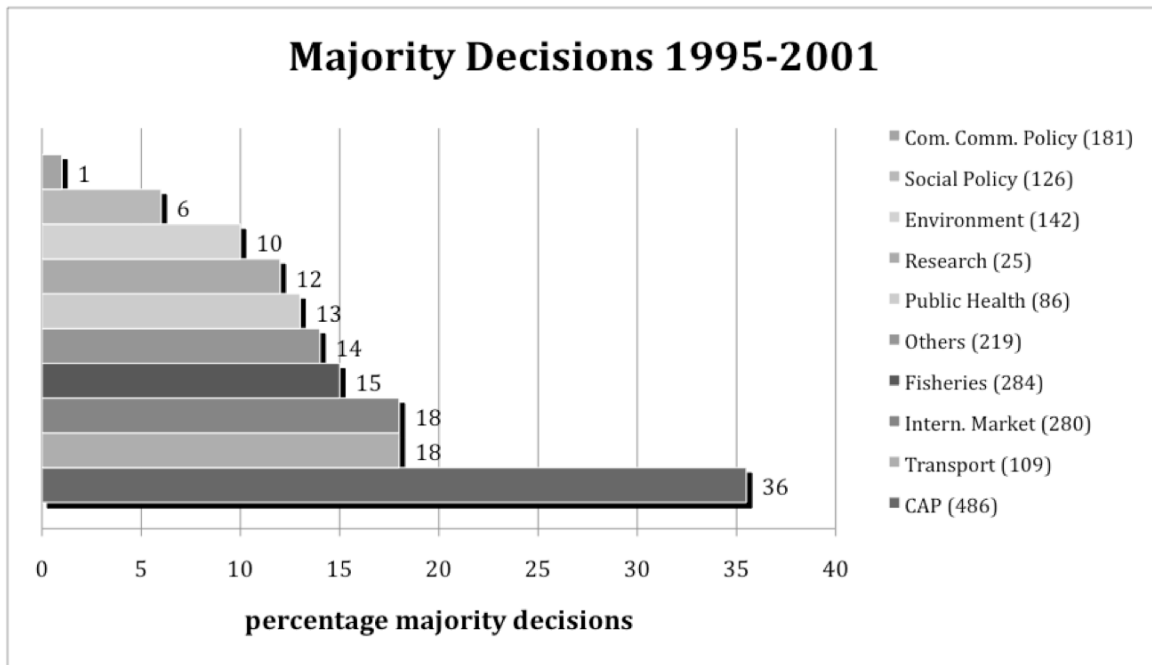
³⁵⁸ Hayes-Renshaw, et al. 2006, 170.

³⁵⁹ There is no conclusive data available for budgetary matters.

³⁶⁰ Mattila and Lane 2001, 43.

³⁶¹ Mattila and Lane 2001, 44.

Graph 4: Consensus decision-making by issue-area 1995-2001



In sum, open majority voting remained a rare exception throughout the 1990s. Council decision-making on agricultural matters strongly differs from this general trend.

Summary

The empirical record strongly suggests that despite some variation over time, consensus decision-making has always been the norm in the Council. As a Council official explains:

“There will never be a decision against a member state if it faces strong problems selling or implementing it. Sometimes several delegations face this problem. We then try to find a compromise.”³⁶²

This section moreover demonstrated that the variation across issue-areas is much stronger than the variation over time. This confirms Liberal Regime Theory, which argued that governments adopt informal practices where political uncertainty and, therefore, the demand for discretion are high. They more regularly follow formal rules otherwise. Agriculture and to some extent also horizontal matters turned out to be frequent exceptions to

³⁶² Interview # 6.

the norm of consensus seeking. Qualitative data also suggest that this informal practice was generally accepted by all member states. There is also more direct evidence for the demand for informal discretion. Practitioners confirm that the dividing line between the search for consensus and the decision to call votes is indeed the need to retain domestic support for the institution.³⁶³ All observations are therefore coded as “confirming.”

Table 8a: Informal practices in voting and confirmation of Liberal Regime Theory

	Agriculture, Horizontal Issues	Common Market, External Relations
1958-1969	YES	YES
1970-1986	YES	YES
1987-1993	YES	YES
1994-2001	YES	YES

Do Proposals Remain Unaltered During the Course of Negotiations?

The Commission was endowed with the formal right to withdraw and resubmit proposals in order to prevent governments from changing them in ways that undermine the best possible implementation of the treaty. Liberal Regime Theory argues that governments change Commission proposals with a view to accommodating governments facing distributional shocks. This practice must therefore be expected to arise where political uncertainty is high. Simple rationalist theories, in contrast, expect governments to adopt informal practices and change Commission proposal substantially where issues are particularly sensitive, as is the case in the CAP. Finally, new neofunctionalists expect such practices to emerge and disappear erratically.

³⁶³ For instance, asked about this dividing line, a former Permanent Representative explains: “Usually, there are only two or three delegations left that have difficulties with a proposal. They worry that a decision will lead people to believe that ‘Europe isn’t that great after all.’ We therefore always try to take the edges off a proposal.” Interview # 3.

Proposals never remain unchanged during the legislative process. The most striking evidence for this is the emergence of a large informal substructure of Council WGs and committees for the preparation of decisions the Council. The Commission initially fought the emergence of this substructure. But it met with general approval from all member states. Importantly, agriculture again stands out as an exception to the general trend. It encapsulated itself from this substructure and was far less decentralized than any other issue-area.³⁶⁴ Thus, the evidence largely confirms the predictions of Liberal Regime Theory.

The Formative Years 1958-1969

As mentioned in chapter 4, shortly after the inception of the treaty, the Ministers increasingly refused to deal officially with Commission proposals right after submission. Instead, they began to refer Commission proposals immediately to their own experts. In addition to this practice permitting control over the timing of decisions to be retained, government experts prepared the decisions in such a way that governments could quickly adopt them. Thus, the Council rapidly developed a large and ever-growing intergovernmental substructure with the Ministers at the top, the *Comité des Représentants Permanents* (COREPER) in-between, and permanent and ad-hoc WGs at the bottom.³⁶⁵ The COREPER split again in two parts: COREPER II was composed of representatives at the ambassadorial level while COREPER I comprised their deputies. The WGs comprised government experts mostly from national administration. As explained in chapter 4, these were usually the very same experts that had already been consulted by the Commission for the preparation of the proposal.³⁶⁶

As complaints about agendas overloaded with technical issues became louder, the Council decided in 1960 that the Permanent Representatives, members of WGs, and the Commission should be given much more flexible instructions on issues that governments

³⁶⁴ Since budgetary and other horizontal questions concern all issue-areas, it was not possible to discern any governmental practices on these matters.

³⁶⁵ For an early description of this practice see Bähr 1963, 92-100, Noël 1963, 21. COREPER was divided into two parts with equal rights: COREPER II, composed of the Permanent Representatives, usually dealt with “political” issues such as question of Euratom and external relations, while COREPER I, composed of the Deputy Permanent Representatives, was in charge of the remaining decisions.

³⁶⁶ For a description of the decision-making practice in general see *inter alia* Altling von Geusau 1966, 235-240, Houben 1964, 97 ff., Lindberg 1963, 53 ff., Noël 1963.

considered less important.³⁶⁷ Hence, although they did not possess any formal decision-making powers, government experts increasingly prepared decisions in such a way that the next higher level was willing to adopt them without further discussion.³⁶⁸ In 1962, these preliminary, consensual decisions reached by COREPER were renamed A-Points.³⁶⁹ These points then appeared as one item on the Ministers' agenda and were usually adopted *en bloc* without debate. Contentious issues that were questioned by the Commission (B-Points) then required directions from the Ministers, and were usually referred back to the experts with instructions.³⁷⁰ COREPER adopted the same procedure:³⁷¹ preliminary decisions adopted by the WGs reporting to COREPER were called "Roman I"-Points whereas contentious items were referred to as "Roman II"-Points. The B/A ratio fell dramatically during the decade from about 1.4/1 in 1964 to 0.6/1 in 1969. In other words, at each session in 1964, Ministers would take two decisions without further debate while discussing three dossiers among themselves. In 1969, they would already take two decisions for each dossier under discussion. These numbers indicate that more and more decisions were indeed reached at lower Council levels.³⁷² The number of Council WGs sessions proliferated greatly and closely mirrored the total number of legal acts the Council adopted at the same time as the following figure shows.

³⁶⁷ Conseils de la C.E.E. et de la C.E.E.A. 1960b and Rat der Europäischen Wirtschaftsgemeinschaft 1960d.

³⁶⁸ Van der Meulen 1966.

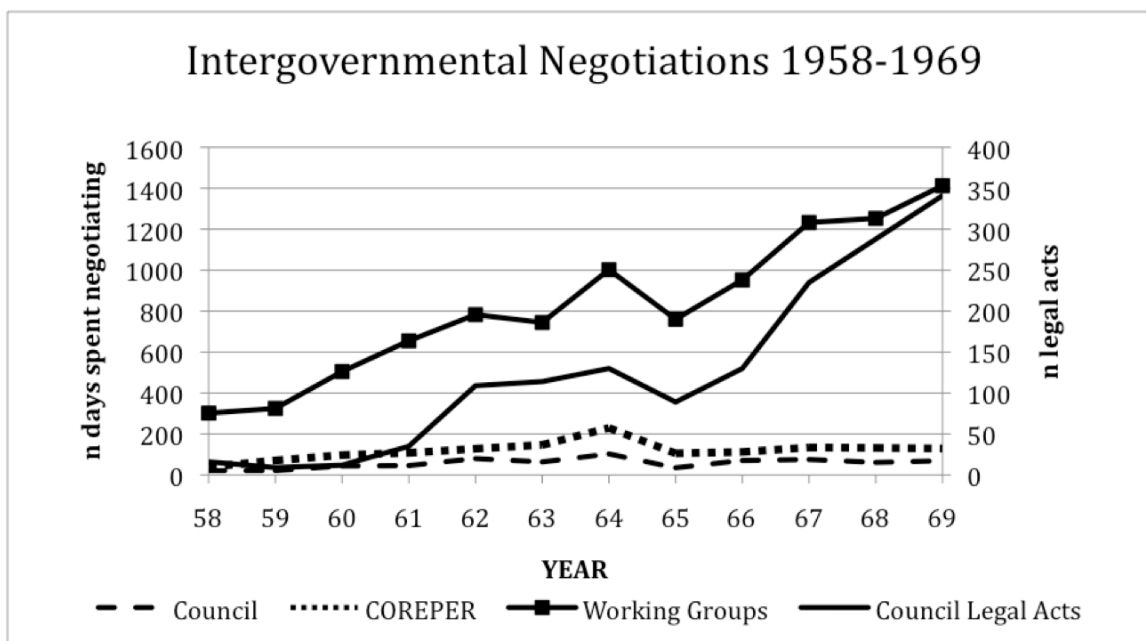
³⁶⁹ Comité des Représentants Permanents 1962.

³⁷⁰ Noël 1967c, 248. See also Van Rijn 1972, 646-650. Rat der Europäischen Wirtschaftsgemeinschaft 1960b, Rat der Europäischen Wirtschaftsgemeinschaft 1960c.

³⁷¹ Virally, et al. 1971, 651-653, 702-704.

³⁷² Data drawn from the CM2 archives.

Graph 5: Intergovernmental negotiations 1958-1969³⁷³



To describe this supposed undermining of the Community method, the German term *Ständige Vertreter* (permanent representative) was in the first half of the decade perverted into *Ständiger Verräter* (permanent traitor) of the spirit of the Rome Treaties.³⁷⁴ In 1968, the German Permanent Representative bragged that

“[it] is not just ‘technical’ decisions COREPER takes; A-Points also include decisions, on which we find agreement within COREPER even despite their great importance.”³⁷⁵

At the same time that the Council decided to confer greater powers to its substructure, it also became more differentiated horizontally. Not only did it meet in more and more different formations. In 1960, it further established a Special Committee for Agriculture (SCA) along with the COREPER, which was tasked with preparing questions concerning agricultural matters.³⁷⁶ In contrast to other high-ranking committees, for instance on external trade or monetary issues, which were subordinated to COREPER,³⁷⁷ the SCA was supposed to

³⁷³ Data drawn from the Council Annual Reports.

³⁷⁴ See the discussion in Bähr 1963, 64. The German Permanent Representative, Dietrich von Kyaw, would later claim this nickname for himself, demonstrating that he frequently overrode instructions from the German government. Interview # 5.

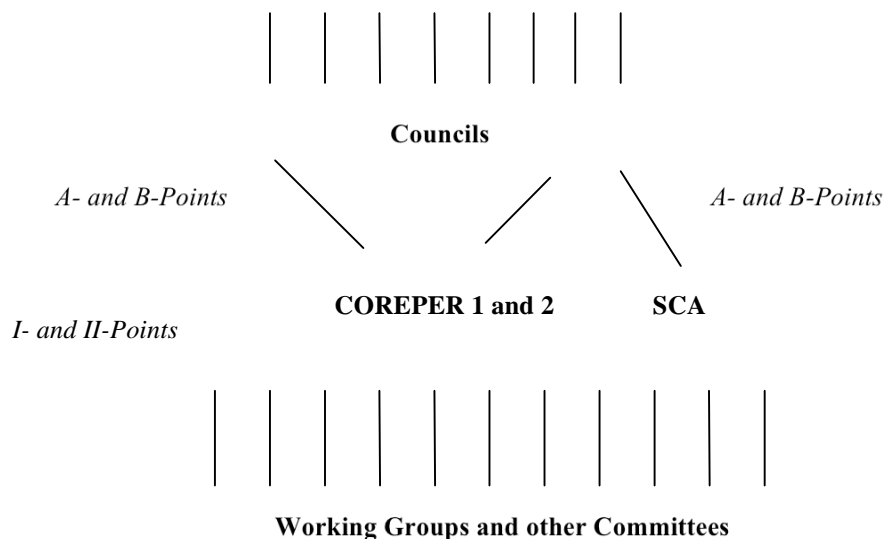
³⁷⁵ See *Vertretung der Bundesrepublik Deutschland bei den Europäischen Gemeinschaften 1968*.

³⁷⁶ *Rat der Europäischen Wirtschaftsgemeinschaft 1960a*.

³⁷⁷ For example, the Article 111 Committee on external trade.

report directly to the Ministers for Agriculture. The establishment of the SCA thus marked a move away from the exclusive management of Council business by the national ministries of foreign affairs and COREPER, since they did not discuss agriculture unless it strongly affected other policies.³⁷⁸ The Council substructure as of 1962 with its horizontal and vertical differentiation is depicted in the following figure.

Figure 7: The Council substructure by 1962



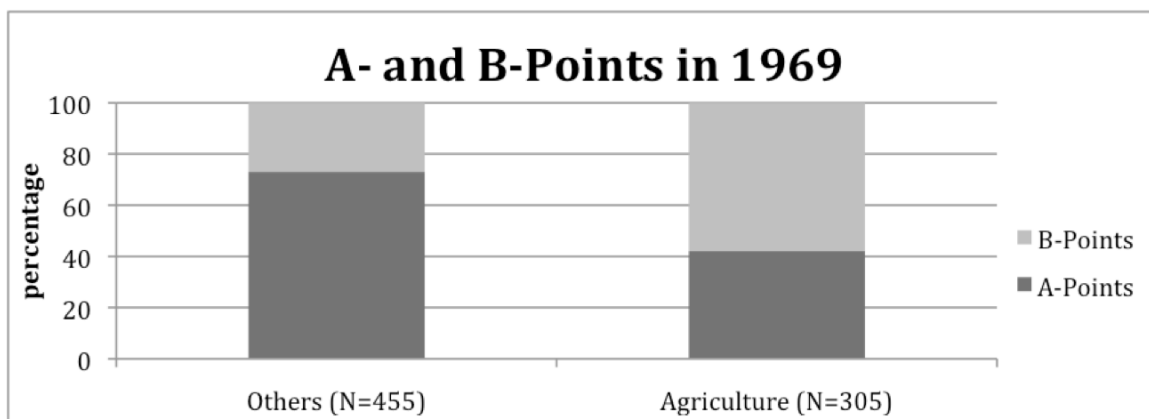
The SCA's relation with Agriculture WGs differed significantly from those between COREPER and its WGs. In contrast to COREPER, it did not adopt the "Roman-I"-point procedure. Every agriculture dossier was therefore destined to be discussed by the SCA. The SCA, in turn, adopted far fewer A-Points than COREPER did. In other words, the Council substructure for agricultural matters was far more centralized than in any other issue-area as the Ministers of Agriculture took most decisions themselves.³⁷⁹ A snapshot of the distribution of A- and B-Points in 1969 illustrates this very different use of the Council substructure.³⁸⁰

³⁷⁸ See Neville-Rolfe 1984, 208.

³⁷⁹ Own data drawn from CM2 archives.

³⁸⁰ It has to be pointed out, however, that the differentiation between COREPER and SCA made an accurate determination of A- and B-point according to issue-areas possible in the first place. A more fine-grained differentiation during data collection was unfortunately not possible.

Graph 6: A- and B-Points in 1969³⁸¹



As a result of the informal change regarding Commission proposals within the Council substructure, the Commission was now increasingly confronted with solid intergovernmental compromises in the Council that sufficed to unanimously adopt the changed proposal. Walter Hallstein was extremely critical of this development and augured already in 1958:

“The first danger is that the responsibilities, which the Treaty unequivocally confers to the Ministers, slip to functionaries to whom they do not belong. (...) The structure of our Treaty would consequently find itself visibly denatured. (...) The second danger is that (...) there is a reallocation of powers to the detriment of the supranational element. As a result of a newly developing habitude we run the risk that an administration develops within COREPER that assumes tasks that – according to the Treaty – belong to the supranational organ, that is, to the Commission.”³⁸²

Other Commissioners also demurred, saying that Ministers had shifted their responsibilities to an unaccountable *Aeropagus* of government experts that rivaled the staff of the Commission.³⁸³ The Commission therefore initially refused to send high-level delegates to meetings within the Council substructure and reserved the right to demand a debate on a par with the Ministers on questions regarding which unanimous agreement had already been reached.³⁸⁴ But it soon realized that this strategy did not bear fruit. It therefore began to

³⁸¹ Culley 1995, 203-204.

³⁸² Walter Hallstein before the European Parliamentary Assembly on 24 June 1958, cited in Virally, et al. 1971, 712. [Translation from French by the author].

³⁸³ On the criticism on part of the Commission see Lemaigen 1964, 85. See also Maas 1960, 133-136, Pryce 1962, 33.

³⁸⁴ Rat der Europäischen Wirtschaftsgemeinschaft 1962. See also Narjes 1998, 114.

establish regular contacts with COREPER.³⁸⁵ Some contemporary authors such as Leon Lindberg initially described the resulting contacts between the Council and the Commission as an inter-institutional dialogue between Council and Commission. At the end of the decade, authors speak more bluntly of constant intergovernmental negotiations.³⁸⁶ Emile Noël describes the Commission weak position in the face of the government experts' search for compromises:

“[Governments] or a clear majority of them take a determined stand against a Commission proposal and endeavor to frame – where necessary on the basis of a ‘compromise from the chair’ – a sort of ‘counter-proposal’ for reference to the Council. True, the Commission proposal will always remain in the Council’s files and the Commission will be able to uphold it before the Ministers, but this prerogative can be rather theoretical if an agreement on quite different lines has already emerged before the Council session.”³⁸⁷

In sum, Commission proposals never remained unchanged during the course of negotiations. As Emile Noël expressed it:

“It would be an exception if a decision was taken on the basis of a Commission Proposal *ne varietur*, that is, that it remained unaltered from the beginning until the end of the debate.”³⁸⁸

Importantly, and in line with Liberal Regime Theory, Commission proposals on sensitive agricultural matters were far less subject to change within the Council substructure than other proposals. As established above, proposals on these matters would also be more readily adopted by majority voting. This informal practice was never questioned by any member state.³⁸⁹

³⁸⁵ Noël and Étienne 1971, 433. For a critical review of the decision-making practice and its effect on the Commission’s institutional position see Houben 1964, 104-107.

³⁸⁶ See Lindberg 1963, 79, Mayne 1968, 33-34 on the one hand, and Altig von Geusau 1964, 197, Houben 1964, 99, 105, Noël 1973, 127 on the other hand. For a very critical assessment see Gazzo 1974, 128.

³⁸⁷ Noël 1967c, 244.

³⁸⁸ Noël and Étienne 1969, 47 [Translation from French by the author] and Noël 1966, 40-42.

³⁸⁹ The COREPER, in particular, was generally regarded as an ingenious invention. Its intimate atmosphere within the COREPER was regarded as conducive to the negotiation of preliminary decisions. As Josef van Meulen, the Belgian Permanent Representative in the 1960s, explained: “The advantages of COREPER become most apparent when tensions arise in the Council of Ministers. Personal ties between the Permanent Representative and the familial atmosphere during meetings create a jovial climate that is naturally more conducive to the search for consensual outcomes. These conversations would at a higher level give the impression that one is not pressing hard enough and not willing to succeed.” This “esprit de corps” persisted through the following years. For a sociological perspective see e.g. Lewis 2005.

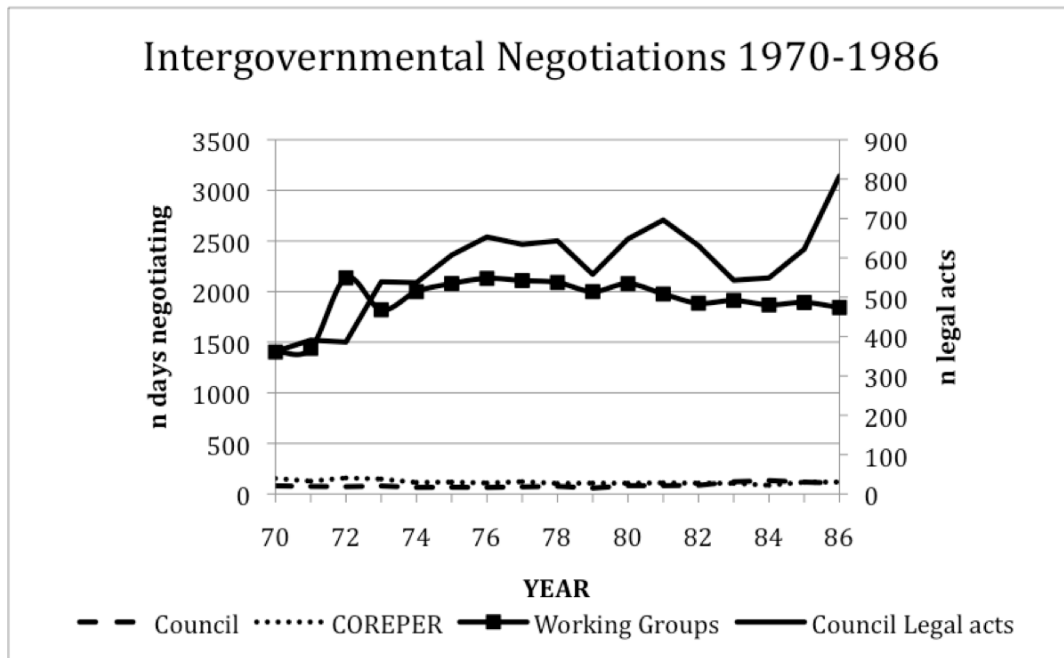
The Transformative Years 1970-1986

Commission proposals remained subject to change by governments throughout the 1970s and 1980s despite the great increase in the Council's workload. Accordingly, the Council substructure grew in proportion, but did not change in substance. Only the institutionalization of the European Council at the beginning of the decade prompted COREPER in 1975 to establish yet another group of government experts. The so-called Antici-Group, named after the Italian Permanent Representative Paolo Antici, was initially supposed to help prepare the CoGs' summits. It soon began meeting on a weekly basis and became another preparatory layer between COREPER II and the WGs.³⁹⁰ A Political Committee of political directors, which was supposed to prepare extramural meetings for the coordination of national foreign policies, remained outside the Council machinery.

As the graph below shows, the involvement of government experts in decision-making, particularly at the WG level, remained at a very high level throughout. Similar to the number of legislative acts, it rose steeply in the early 1970s and remained largely constant thereafter. The figures do not include the number of days spent by "Anticis" so that they are most likely higher from 1975 on. It also shows that the number of legal acts rose steeply between 1984 and 1986, just before the introduction of the SEA without leading to an equivalent increase in negotiation intensity, which corresponds to the short leap in majority decisions at the same time. We shall see in an instance that the two lines quickly realigned after 1986.

³⁹⁰ de Zwaan 1995, 100, Mentler 1996, 107, Westlake 1995, 293.

Graph 7: Intergovernmental negotiations 1970-1986³⁹¹



As the Commission official Christoph Sasse notes, Commission proposals were still generally

“[subject] to constant amendment, leading in turn to increased watering down of the Commission’s right of initiative. [Proposals were] being reduced to mere initial memoranda, serving only as bases for discussion rather than draft versions of laws.”³⁹²

In sum, Commission proposals remained subject to considerable changes in the 1970s and early 1980s, something which is reflected in the continuing use of the Council substructure. There is no evidence for disapproval of this practice by any of the member states, nor for any change in the status of agriculture as an outlier in this respect.³⁹³

³⁹¹ Data drawn from the Council Annual Reports.

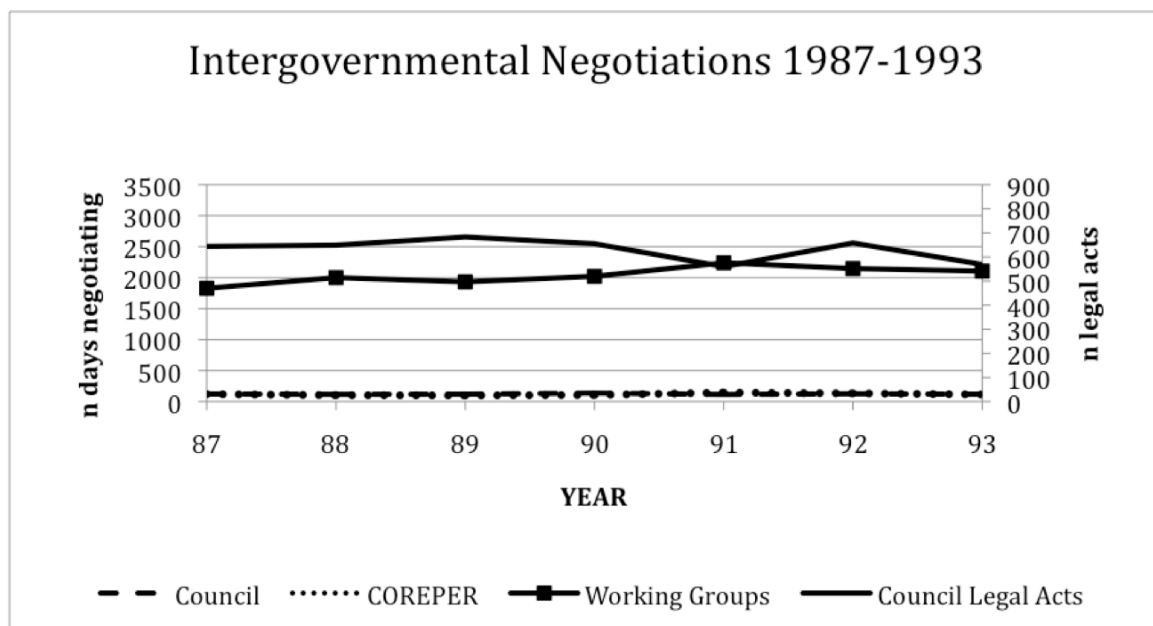
³⁹² Sasse 1975, 137, 143.

³⁹³ Unfortunately, there are no data on A- and B-Points available for this time period. Beyond the organization of the Council substructure, it is therefore not possible to assess more fine-grained variation in its centralization.

Establishing the Internal Market 1987-1993

The SEA did not precipitate any change in the governments' informal practice of unanimously changing Commission proposals within the Council substructure. Government experts' activity remained at a very high level. Also the empowerment of Parliament (see below) through the introduction of the co-operation procedure changed little. The reason is, as we shall see shortly, that it increased its power at the expense of the Commission rather than that of the governments. There were consequently few contacts between MEPs and the Council substructure.

Graph 8: Intergovernmental negotiations 1987-1993³⁹⁴



Although exact data are not available and estimations differ, qualitative data suggest that the percentage of A-Points relative to B-Points also remained very high. Rometsch and Wessels report that “[as] a general rule, 90 per cent of the final texts of legislation or action are decided at that level.”³⁹⁵ The lowest figure is presented by Hayes-Renshaw, Lesquesne and Mayor Lopez, who estimate that about 75% of all decisions COREPER I adopts are A-

³⁹⁴ Data drawn from the Council Annual Reports.

³⁹⁵ Rometsch and Wessels 1994, 213. Christian Engel states in 1992 that “about 80 per cent of all differences in opinion are resolved at the working group level.” Engel 1992, 93.

Points.³⁹⁶ Reliable data are available for 1992-1993 for agricultural matters. Rinus van Schendelen reports a lower number of A-Points (65 per cent) for agricultural questions.³⁹⁷ The substructure in Agriculture must therefore be regarded as much more centralized than that in other policy areas.³⁹⁸

In sum, the SEA changed little in the practice of proposal change, with Commission proposals remaining subject to substantial change within the Council substructure.

The European Union Years 1994-2001

Neither the Treaty on European Union nor the Treaty of Amsterdam changed the design of, or reliance on the Council substructure. Governments added preparatory committees alongside COREPER for those Council formations that remained outside the Communities. In 2002, the Council of Foreign Ministers began holding separate meetings for foreign policies and general issues in the format of the General Affairs and External Relations Council. The Political and Security Committee (PSC) prepared dossiers concerning foreign policies. The Justice and Home Affairs Council comprised Ministers of the Interior, and its agenda was prepared by the so-called K-4 Committee. COREPER also established yet another group of government experts, the so-called Mertens Group, which was supposed to exercise co-ordination function parallel to those of the Antici Group.³⁹⁹ The Council substructure as of 1993 is depicted in the following figure.

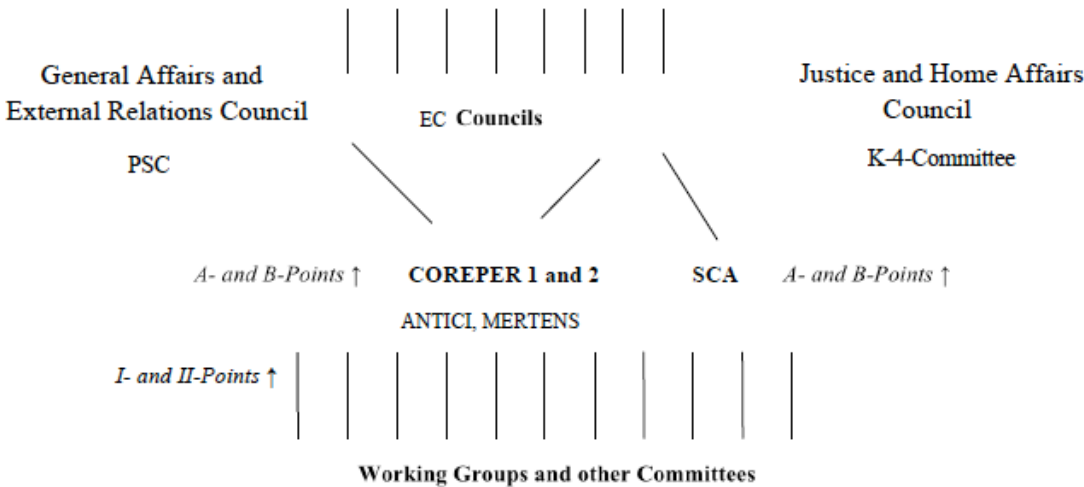
³⁹⁶ Hayes-Renshaw, et al. 1989, 133.

³⁹⁷ van Schendelen 1996, 537.

³⁹⁸ de Zwaan 1995, 157.

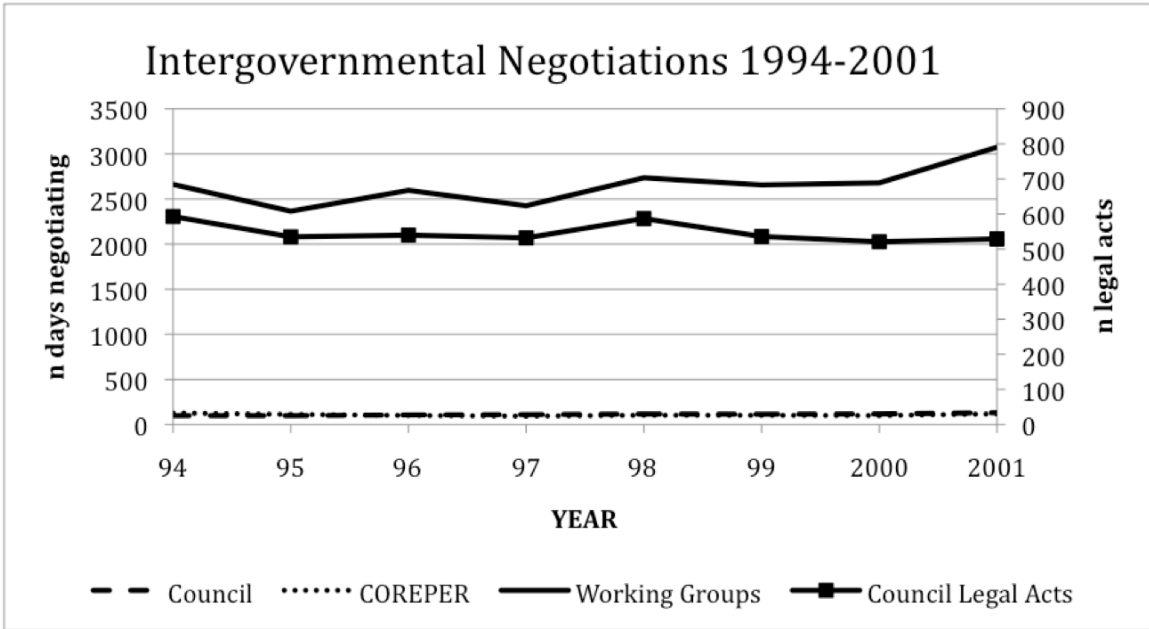
³⁹⁹ See de Zwaan 1995, 100, Westlake 1995, 293.

Figure 8: The Council substructure by 1993



The Council substructure remained very active in the preparation of proposals as the graph on intergovernmental negotiations indicates. The intensity of negotiations still closely mirrors the adoption of legal acts. The divergence from 1999 is probably due to the fact that the Parliament increased its bargaining power vis-à-vis the Council and began to establish contacts with its substructure.

Graph 9: Intergovernmental negotiations 1994-2001⁴⁰⁰



⁴⁰⁰ Data drawn from the Council Annual Reports.

The WGs were still used to a much lesser extent in Agriculture than in any other EC areas. They had very little discretion in the preparation of dossiers, and the next highest level, the SCA, faced considerable obstacles in reaching consensual agreement.⁴⁰¹ As a result, as a German SCA official explains, “the SCA is not very successful in preparing decisions. Most dossiers are political and need to be decided by the Ministers.”⁴⁰² Another CAP official concurs: “My Deputy to COREPER makes references to ‘my mates’, ‘my friends’, ‘we find a way through the barriers to reach agreement’... Agricultural Ministers feel they need to leave the Council feeling they have won concessions, it’s a crude process. So, characteristically, the SCA spokesmen don’t get flexibility in the interest of getting something settled before Council, this is a big difference with my colleagues in COREPER.”⁴⁰³

In sum, Commission proposals never remain unchanged during the decision-making process. This is reflected in governments’ continued reliance on the Council substructure. There is no indication of any change in the status of the CAP as an outlier.

Summary

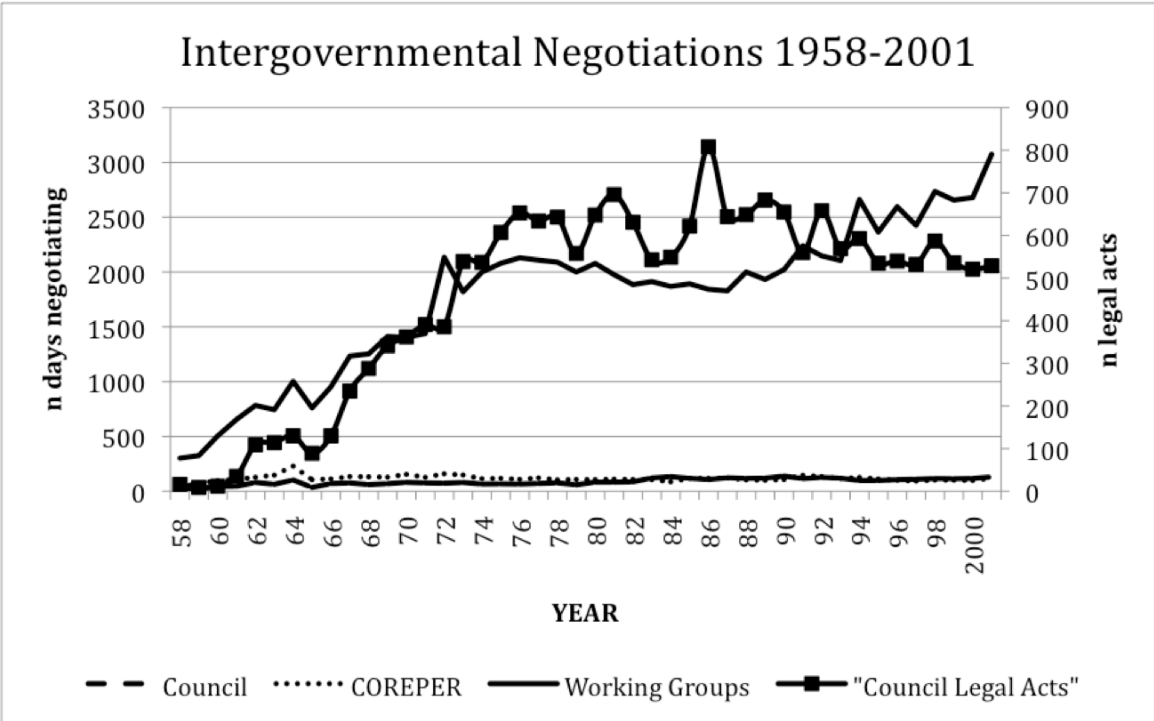
Although the Commission was able to withdraw proposals when it feared that governments would change them in ways that undermined the best possible implementation of the treaty, proposals in fact never remained unchanged during the legislative process. This manifests itself most evidently in the emergence of an enormous Council substructure of government experts tasked with the preparation of decisions. The rate of adoption of legal acts very closely reflects the level of activity of the Council substructure as the following graph shows.

⁴⁰¹ Culley 2004, 204.

⁴⁰² Interview # 1.

⁴⁰³ Council official, cited in Lewis 1998, 134. There are no reliable data available with regard to the number of A- and B-points. A data set compiled by Häge (2008) suggests the opposite, namely that Agriculture Ministers are far less involved in decision-making than COREPER. This stands in contrast to the bulk of qualitative data. The data set is restricted to decisions adopted in 2003 with parliamentary participation and is hence not representative for agriculture, an issue-area where the EP plays little role.

Graph 10: Council legal output and intergovernmental negotiations 1958-2001⁴⁰⁴



Liberal Regime Theory explains this practice by reference to the demand for discretion. It therefore predicts that informal practices emerge where political uncertainty is high and set to remain stable over time. Simple rationalists expect governments to informally change proposals where issues are particularly sensitive, as in the CAP. New neofunctionalists expect erratic patterns in informal practices. The evidence lends credence to Liberal Regime Theory, since the available data suggest substructure was used to a far lesser extent in Agriculture than in any other EC policy area. Moreover, we found no evidence that any governments disapproved of this informal practice. Other theories are unable to explain this pattern. All observations were therefore coded “confirming.”

Table 8b: Informal practices in voting and confirmation of Liberal Regime Theory

	Agriculture, Horizontal Issues	Common Market, External Relations
1958-1969	YES	YES
1970-1986	YES	YES
1987-1993	YES	YES
1994-2001	YES	YES

⁴⁰⁴ Data drawn from Council Annual Reports and Eurlex database.

Is Parliamentary Influence Openly Visible?

Parliamentary influence on decisions may signal the legitimacy of a decision to the European public, yet it may at the same time lead to situations where governments have to accept an agreement that generates a distributional shock in one of the member states. Liberal Regime Theory therefore expects governments to adopt informal practices that implicate Parliament in informal decision-making where political uncertainty is high. In issue-areas where political uncertainty is low, such as agriculture, governments frequently follow formal rules. Simple rationalist theories predict exactly the opposite pattern. They expect governments to eschew formal rules even at the expense of legitimacy where issue-areas are predictably sensitive. New neofunctionalists expect a rather erratic emergence of informal practices.

Focusing on the visibility of Council-EP negotiations, the evidence presented in the following analysis is ambiguous. On the one hand, Parliament's empowerment was accompanied by its increasing implication in informal decision-making within the so-called "trialogue" system. In line with Liberal Regime Theory, these informal practices among governments and Parliament vary across issue-areas, because Parliament is generally most visible in bargaining over budgetary matters. Qualitative evidence moreover suggests that informal contacts between Parliament and the governments provided the latter with the opportunity to exercise discretion.

On the other hand, a number of aspects of the EC's informal practices with regard to voting prevent us from drawing the conclusion that the evidence supports Liberal Regime Theory's predictions. As we shall see in the following analysis, despite its formal empowerment as a co-legislator, Parliament's bargaining power is still considerably weaker than that of the Council, and also weaker than the formal power the Commission used to have. Thus, it is unlikely that it is able to impose outcomes on individual governments when the Council unanimously opposes it. Moreover, Parliament was barely ever involved in decision-making on agricultural matters. It is hence not possible to subject the various theories' predictions about issue-specific variation to a rigorous test. We shall get back to these qualifications at the end of this section.

The Formative Years 1958-1969

The Community Method granted very little legislative power to the Parliament. Governments consulted it on decisions, but they were under no obligation to heed its demands. But even this consultative function was difficult for Parliament to fulfill, because it was usually confronted with laboriously reached compromises at the point of formal discussion in the Council. It therefore demanded a clearer distinction between the decision-making sequences. Already in 1961, a Parliamentarian argued:

“The Council has tried to create a back and forth between it and the Commission, thereby suggesting modifications to the text even before Parliament had had the chance to deliberate on it. [This] is illicit and undue decision-making in cases the Treaty provides for consultation of the opinion of another institution.”⁴⁰⁵

In the course of the 1960s, as described earlier in this chapter, the Council gradually gave in to parliamentary pressure to extend consultation of Parliament to all “very important” problems and committed itself to give reasons for departing from Parliament’s opinion on Commission proposals.⁴⁰⁶

The Transformative Years 1970-1986

In the 1970s, governments increasingly extended the scope of consultation of the European Parliament. The initial spark for this development was a change in formal rules in 1970 and 1975, which established a system of “own resources” finances and granted Parliament a say in the budgetary process. Within a fixed top limit of revenues, expenditure was to be determined jointly by Parliament and the Council.⁴⁰⁷ Importantly, the treaty made a broad distinction between compulsory (“unavoidable”) and non-compulsory (“avoidable”) expenditures. Compulsory expenditures comprised more than 80% of the budget as they included agriculture

⁴⁰⁵ EP debates, cited in Altig von Geusau 1964, 138-139.

⁴⁰⁶ In three successive letters in November 1969, March 1970 and July 1970. See Jacobs, et al. 1992, 179.

⁴⁰⁷ Jacobs, et al. 1992, chap 12. Before that, the Community was like most international organizations financed by national contributions calculated on the basis of relative wealth. It was decided to complement them with “own resources,” that is, Community property, made up of customs duties and agricultural levies on imports from outside the EC as well as a proportion of national receipts from VAT.

spending and financial obligations to third countries.⁴⁰⁸ For this category, the EP's formal power was minimal: it suggested modifications to a Commission proposal, which the Council could easily scrap by a qualified majority. The EP was given more discretion in the establishment and implementation of non-compulsory expenditure: it could reject the budget *in toto*, in which case a version of the previous budget would come into effect and the procedure would start all over again.⁴⁰⁹ The ambiguous distinction between both categories would lead to permanent and open conflict between both institutions in the budgetary process.⁴¹⁰

The Council recognized that Parliament could use its budgetary powers to prevent the implementation of contested legislation. To avoid such situations, the Council decided to extend consultation under the Community Method to decisions with appreciable financial implications.⁴¹¹ In 1975, by means of a joint declaration, both institutions introduced a formal conciliation procedure to iron out major disagreements.⁴¹² Parliament was therefore gradually given the procedural means to make its voice heard not only on budgetary matters, but in fact in most issue-areas except agriculture. However, its *de facto* capacity to change the Commission's proposal was entirely dependent on its endorsement of the amendments it suggested by Commission or the Council: it had no bargaining power if they did not respond to its views. The situation changed dramatically in 1980 (see chapter 3) as the ECJ turned this informal concession into a real obligation. The Court argued:

“The consultation provided for (...) is the means which allows the Parliament to play an actual part in the legislative process of the Community. Such power represents an essential factor in the institutional balance intended by the Treaty. Although limited, it reflects at Community level the fundamental democratic principle that the people should take part in the exercise of power through the intermediary of a representative assembly. Due consultation of the Parliament in cases provided for by the Treaty therefore constitutes an essential formality disregard of which means that the measure concerned is void.”⁴¹³

This judgment amounted to a *veto by delay*. It provided Parliament with the formal right to withhold its opinion and, thus, delay a decision indefinitely. Parliament immediately

⁴⁰⁸ Westlake 1994a, 264.

⁴⁰⁹ For a description see Fitzmaurice 1978, 217, Westlake 1994a, 121-134.

⁴¹⁰ Judge and Earnshaw 2008, 198.

⁴¹¹ Judge and Earnshaw 2008, 36.

⁴¹² European Communities 1975 For a detailed description and evaluation see Forman 1979.

⁴¹³ European Court of Justice 1980.

embraced this power and redrafted its internal rules of procedure in such a way as to create a mechanism for an indefinite postponement of its opinion.⁴¹⁴ Yet the Council changed its practice, too. It split the procedure into two stages by increasingly adopting standpoints “in principle.” Parliament was consequently unable to assess whether the postponement of its opinion would be worthwhile: its veto by delay was thus rendered impotent. Members and officials of the EP argued that this ruse was as a breach

“(…) in spirit and probably of the letter of the isoglucose principle: it is unrealistic to think that in such circumstances Parliament’s opinion will be taken into account by the Council, and it is therefore not surprising that Parliament experiences difficulty on when the Council resorts to such politically and legally reprehensible practices.”⁴¹⁵

In short, Parliament’s power was most visible where it began, namely on budgetary decisions. Its formal power in other issue-areas remained unimpressive.⁴¹⁶

Establishing the Internal Market 1987-1993

The budget remained a source of open friction between Parliament and Council. An informal inter-institutional agreement between both institutions did little to change this situation. Parliament’s attempt to maximize its scope of influence, i.e. the rate of non-compulsory expenditures, met with strong opposition from the Council.⁴¹⁷

Parliament’s *de facto* capacity to influence decisions in other policy areas remained feeble, too. Firstly, as we saw above, because the Council had informally drawn the teeth of the consultation procedure by informally splitting the procedure up into two stages. The SEA formalized this sequence in the framework of the new co-operation procedure, which

⁴¹⁴ Before moving to a final vote on its opinion, Parliament asked the Commission to express its position on preliminary amendments. In case the Commission considered Parliaments amendments insufficiently, it took the liberty to refer its opinion back to the responsible committee for reconsideration.

⁴¹⁵ Jacobs, et al. 1992, 182, Westlake 1994a, 136-137.

⁴¹⁶ Jacobs, et al. 1992, 183-184.

⁴¹⁷ Judge and Earnshaw 2008, 200.

supplemented consultation in the important area of the internal market.⁴¹⁸ Furthermore, it subjected the second stage to a strict timeframe.

In addition, although Parliament was given an impressive formal veto by rejection, it turned out to be quite useless in reality. The new procedure stipulated that Parliament could decide to reject the Council's common standpoint (adopted by QMV) in its entirety by an absolute majority, in which case the Council was only able to reintroduce and adopt it unanimously.⁴¹⁹ The veto was therefore dependent on a parliamentary majority *and* a blocking minority of governments. Yet such a coalition was highly unlikely to form, because blocking minorities in the Council preferred the *status quo* while Parliament as a whole preferred to change the proposal toward a more integrationist outcome.⁴²⁰ Furthermore, the veto was going to be annulled anyway if the Council was able to achieve a consensus. Parliament's threat to formally reject the Council standpoint was therefore not credible at all. Its bargaining power remained very weak.

For this reason, Parliament rather concentrated its efforts on persuading the Commission at a "pre-formal" stage to include its amendments into the proposal.⁴²¹ The Commission, it reasoned, would be more receptive than the Council in order to prevent any obstruction of its pet project, the internal market.⁴²² This cooperation procedure consequently led to an intensification of contacts between the Commission and Parliament rather than between the Council and Parliament.⁴²³ In 1990, these culminated at the initiative of the Commission in a "code of conduct" between both institutions.⁴²⁴ A Parliamentarian describes these contacts as follows:

"When you are handling a big report, the relationship between Commission and Parliament is very intimate and it's not clear who is lobbying who. The theoretical model, which says that the Commission proposes and Parliament discusses and amends, seems to me to be absolutely defective – because a lot of

⁴¹⁸ For an overview and assessment see Earnshaw and Judge 1995.

⁴¹⁹ Jacobs, et al. 1992, 185.

⁴²⁰ Scully 1997, 66.

⁴²¹ In another change of its internal rules of procedure, Parliament in fact restricted itself to not introducing any new substantial amendments in the second stage.

⁴²² Fitzmaurice 1988, 391, Westlake 1994b, 38.

⁴²³ Westlake 1994a, 141-143.

⁴²⁴ Westlake 1994b, Annex 6. See also Judge and Earnshaw 2008, 45, Stacey 2005, 245.

parliamentary influence is actually exercised before the Commission proposal appears.”⁴²⁵

The Council, in turn, remained closed to Parliament. The chairmen of Parliament’s committee in charge were invited to participate at least twice a year in the relevant Council meeting.⁴²⁶ Parliamentarians complained about the lack of contacts to the Council:

“Our main source [besides the newspaper] is the Commission, we always ask the Commission ‘do they have difficulties with this proposal in the Council’; they [then] inform us more informally than formally what is the situation in the Council. We also have some contacts with COREPER where we can get, more often than not on a confidential basis, how far they are going.”⁴²⁷

In short, despite a change in formal rules, Parliament’s *de facto* influence on decisions increased only marginally. Its activities were hardly visible for the public: contacts with other institutions remained informal and were far more intense between the Commission and Parliament at early, non-salient stages than its almost non-existent contacts with the Council. Continuous battles over expenditures rendered its influence on the budget more visible.

The European Union Years 1994-2001

The 1990s brought about various changes in Parliament’s influence on the decision-making process. First, the salience of the budget process would radically diminish. Second, the 1999 Amsterdam treaty would finally endow it with more serious bargaining power.

The budget process remained a source of frictions until in 1999 Parliament and the Council agreed on a clear classification of expenditures. CAP was still excluded from the scope of Parliamentary power, however. According to Laffan and Lindner, this change meant that the budget process

“(…) lost its place in the interinstitutional spotlight and became the domain of budgetary experts, [who] cooperated closely and developed a routine of adopting annual budgets in time and without major tensions.”⁴²⁸

⁴²⁵ Tom Spencer (EPP/UK), cited in Earnshaw and Judge 1997.

⁴²⁶ Jacobs, et al. 1992, 190.

⁴²⁷ Earnshaw and Judge 1997, 555.

⁴²⁸ Laffan and Lindner 2005, 202.

In stark contrast, Parliament's influence in other matters would gradually rise in salience, although, as Jacobs and colleagues remark, simplicity is not the essence of the legislative procedures.⁴²⁹ We have just established that under the cooperation procedure described above, parliament's veto power was contingent on a very unlikely coalition between a parliamentary majority and a blocking minority in the Council. The 1993 "codecision 1" procedure slightly increased Parliament's bargaining power vis-à-vis the Council. First, Parliament was now able to reject a proposal entirely if the conciliation committee failed to attain a compromise. Yet this was a negligible improvement since, as members and officials of the EP explains,

"[in] most cases, Council will know that Parliament will not want to reject a text. Parliament will prefer half a measure to nothing at all, or will not want to be perceived in a negative light as responsible for hold-ups, delays and failures in the legislative procedure."⁴³⁰

Second, the procedure increased Parliament's capacity to make the Commission endorse its amendments. It deprived the Commission of its formal right to withdraw its proposal once it had reached the final stage. As a result, the Commission tried to prevent Parliament from driving the process to the final and supposedly most important stage.⁴³¹ Parliament also changed its internal rules of procedure in 1994 so that adoption of its amendments in the first stages could be deferred if the Commission failed to include them in the proposal, or at least state its opinion on them. As Westlake points out, the "intention [was] clearly to bring additional pressure to bear on the Commission to accept parliamentary amendments."⁴³² Finally, the Treaty of Maastricht provided several measures for Parliament to approve of and cast a motion of censure against the college of Commissioners.

In short, instead of strengthening Parliament's bargaining power vis-à-vis the Council, the codecision I procedure increased its power at the expense of that of the Commission. Parliament consequently concentrated its activity even more on the Commission in order to make it include its amendments in its proposal.⁴³³ Consequently, inter-institutional contacts at

⁴²⁹ Jacobs, et al. 1992, 192.

⁴³⁰ Jacobs, et al. 1992, 191. Garrett and Tsebelis even argued that the new procedure in fact weakened the EP's power. See Garrett 1995, Tsebelis 1994.

⁴³¹ See the discussion in Devuyst 2003, 51, Pollack 2003b, 85.

⁴³² Westlake 1994b, 94.

⁴³³ Westlake 1994b, 93-94.

early stages intensified and institutional linkages expanded.⁴³⁴ In contrast, Parliament's contacts with the Council remained very weak. In a report on the procedure, the *rapporteur* explains:

“In theory the Council is meant to wait for the European Parliament's opinion in the first reading before working on its common position. In practice, the Council working groups tend to operate in parallel with – but separately from – the European Parliament, and much of the detailed work has often been carried out before the European Parliament has completed its first reading. Despite that, there tends to be relatively little contact between the European Parliament and the Council (...).”⁴³⁵

This changed gradually after a change in Parliament's internal rules of procedure. Since its veto was not credible and, thus, not worth much in terms of bargaining power, it committed itself to exercising it even if it meant hurting itself, that is, the *status quo* seemed to be the less attractive option.⁴³⁶ Its bargaining power increased substantially when it indeed carried this threat out in 1994.⁴³⁷ Acknowledging the new situation, governments decided to change the final stage. The 1999 “codecision 2” procedure now provided for face-to-face bargaining between the Council and Parliament with a view to finding an agreement on a joint text. Governments must still be considered predominant, however, since the procedure implied that actors like the EP, which wished to make stronger changes to the status quo than the bargaining partner, were in the weaker bargaining position.⁴³⁸

Parliament consequently shifted its activity toward the Council. Specifically, it demanded more information about ongoing negotiations in the substructure as well as the Minister's direct attendance in its committee hearings.⁴³⁹ However, because the Council remained reluctant to engage in open bargaining with the EP, Parliament had to intensify informal contacts with the Council substructure instead.⁴⁴⁰ From 1994 on, Council representatives and the Commission increasingly met in so-called informal “trialogues” in

⁴³⁴ Judge and Earnshaw 2008, 48.

⁴³⁵ European Parliament 1998.

⁴³⁶ Nicoll 1994, 410. See also Nicoll 1996.

⁴³⁷ Hix 2002, 274.

⁴³⁸ In formal terms, their distance from the status quo determined their bargaining power. Other factors like information or persuasion may, of course, also affect an actor's power in negotiations.

⁴³⁹ Imbeni, et al. 2001.

⁴⁴⁰ As one MEP explained: “Those people who are really doing the job need the contacts and they use the contacts.” Farrell and Heritier 2004, 1205.

attendance of the Commission.⁴⁴¹ These meetings gradually extended to include all decision stages at all levels.⁴⁴² The vast majority of these contacts developed between Parliament and the chairmen of WGs or the Deputy Permanent Representative.⁴⁴³ Ministers would then adopt trialogue decisions as A-points.⁴⁴⁴ The number of legal acts adopted during early stages of the procedure consequently increased rapidly.⁴⁴⁵

This new practice was heavily criticized by smaller parliamentary groups, which faced difficulties keeping track of discussions. In its report on the codecision 2 procedure, Parliament cautioned:

“[There] has been a major growth in agreements early in the legislative procedure (...). [This development should not] lead to the legislative procedure becoming less open and transparent producing results of lower quality, or to any weakening in the balance of power between the two legislators. (...)

Parliament needs to build on what has been achieved during this term, with a view to making the codecision procedure genuinely parliamentary in character. There must be as broad a debate as possible within the institution on the shape of legislation, with all Members having the opportunity to contribute to the formation of Parliament’s opinion. There must also be scope for a wider public to follow the legislative procedure and to be able to understand the divergent positions of the different participants in the process.”⁴⁴⁶

The Council defended the informality of contacts, however. As a Council official explains:

“The [informal trialogues] make it possible to speak more frankly and to explain what the underlying reasons are. You also can say: here is a real problem – we cannot go further on this, please recognize this, but we will yield in another issue, this “give and take” becomes possible.”⁴⁴⁷

In short, Parliament’s influence in decision-making gradually increased throughout the 1990s. The codecision 1 procedure increased its bargaining power largely at the expense of

⁴⁴¹ Formal trialogues take place in the so-called Neunreither Group, which discusses procedural conflicts. The Commission played a more subordinate role. See European Parliament 1999a.” Parliament is now in direct contact with the Council and no longer needs the mediation and filtering role the Commission played in the past to communicate with the Council.”

⁴⁴² Council of the European Union 2000a.

⁴⁴³ Farrell and Heritier 2004, 1198.

⁴⁴⁴ Shackleton and Raunio 2003, 177.

⁴⁴⁵ European Parliament 2004.

⁴⁴⁶ European Parliament 1999b.

⁴⁴⁷ Cited in Farrell and Heritier 2004, 1199.

the Commission. The codecision 2 procedure enhanced its bargaining power vis-à-vis the Council, although the latter must still be considered the dominant bargaining partner. In line with Liberal Regime Theory, we found that Parliament was indeed implicated in informal practices as soon as it gained in power. It began establishing informal contacts with the Council via its substructure of WGs and Committees. These “trialogues” became a “major factor in the equation”⁴⁴⁸ in issue-areas where the “codecision 2” procedure applied, that is, for most articles in the EC except agriculture. Its influence on decision therefore remained largely invisible to the public.

However, we also saw that although governments approved Parliament’s empowerment through formal treaty changes, it was first and foremost the result of this institution’s surprising and successful attempt to informally increase its autonomy. This episode therefore confirms new neofunctionalism. The very fact that these attempts were from the outset put to a halt on agricultural matters can also be interpreted as evidence for simple rationalist theories.

Summary

Parliamentary influence on decisions may signal the overall legitimacy of a decision to the European public, but it can also lead to a situation where governments have to accept an agreement that generates a distributional shock at home. Liberal Regime Theory therefore expects governments to adopt informal practices that implicate Parliament in informal decision-making where political uncertainty is high. In issue-areas where political uncertainty is low, such as agriculture budget, governments more frequently follow formal rules. As before, simple rationalist theories predict exactly the opposite pattern. New neofunctionalists expect a rather erratic emergence of informal practices.

As mentioned in the introduction to this section, the empirical record is ambiguous. It shows that informal contacts between Parliament and Council indeed accompanied Parliament’s empowerment in decision-making in most Community policy areas with high

⁴⁴⁸ Council of the European Union 2000d.

political uncertainty. Its influence was for most of the time much more visible in the budgetary process, an issue-area of low political uncertainty. Yet, this evidence is insufficient to confirm any of the three theories. First, Parliament was barely ever involved in decision-making on agricultural matters so it is difficult to put the theories' predictions about issue-specific variation to a strong test. Second, one might argue that formal rules on parliamentary involvement are less important than any other formal rule in the Community Method, because it is doubtful that Parliament is indeed strong enough to impose an outcome and, thus, unanticipated concentrated adjustment costs on an individual government.

It can also be argued that Parliament's rise in power disconfirms Liberal Regime Theory, because it made make the exercise of discretion more difficult. Although governments generally endorsed Parliament's increase in power, the process leading to it corresponds most closely with new neofunctionalists, who maintain that informal practices emerges due to supranational attempts to enhance their autonomy. The two observations for the common market between the 1980s until 2001 are therefore coded as "disconfirming" for Liberal Regime Theory. Moreover, one might argue that Parliament's exclusion from decisions on the CAP confirms simple rationalist theories, because they emphasize governments' desire to guard their sovereignty on sensitive issues. The corresponding observations for the CAP are therefore also coded as "disconfirming" Liberal Regime Theory. Other observations were dropped from the data set.

Table 8c: Informal practices in voting and confirmation of Liberal Regime Theory

	Agriculture, Horizontal Issues	Common Market, External Relations
1958-1969	N/A	N/A
1970-1986	N/A	N/A
1987-1993	NO	NO
1994-2001	NO	NO

Conclusion: Voting in the European Community 1958-2001

This chapter sought to demonstrate that governments adopted informal practices around formal voting rules in order to exercise discretion. The focus has been on three aspects: majority voting in the Council, the Commission's ability to veto changes to the proposal, and Parliament's influence in decision-making. It was argued that although these aspects may enable a faithful implementation of decisions, they carry with them the danger of imposing concentrated costs on domestic groups. Liberal Regime Theory consequently argues that governments adopt informal practices around those rules, especially in issue-areas where political uncertainty is high. It expects more rule-following behavior in issue-areas where political uncertainty is low, such as in the CAP, and on horizontal matters. Simple rationalist theories, in contrast, predict the opposite pattern, because governments are assumed to deviate from formal rules where issues are predictably sensitive. Finally, new neofunctionalists expect erratic patterns in informal practices.

The empirical record by and large supports Liberal Regime Theory, because informal practices indeed allowed governments to exercise discretion. Moreover, agriculture and, where applicable, horizontal matters turn out to be a frequent exceptions to the general trend. First, governments almost never overruled other governments. Contrary to the conventional wisdom in EU studies, which holds that the Luxembourg compromise imposed a persistent veto culture on Council decision-making, the variation across issue-areas was found to be much stronger than the variation over time. In fact, governments took more frequent recourse to majority voting on agricultural matters, the very issue-area that triggered the Luxembourg compromise, than anywhere else. All observations were consequently coded "confirming." Second, Commission proposals were frequently subject to changes within the Council substructure. Again, the CAP consistently turned out to be an outlier in this respect: it encapsulated itself from other issue-areas and became far more centralized than the substructure in other issue-areas. As a result, Commission proposals were far less subject to changes during Council deliberations. All observations were therefore coded "confirming."

The qualitative evidence also shows that governments were most of the time in agreement over the necessity of these two informal practices. They invariably agreed to the

necessity of accommodating other governments even if formal rules allowed them to overrule recalcitrant governments and secure today’s gains. The same holds true for the Council substructure, in which governments changed Commission proposals in such a way that the Ministers could easily adopt them. The Commission, in contrast, typically viewed the emergence of these informal practices with suspicion.

The third aspect, however, can be interpreted as disconfirming evidence. Although Parliament was indeed implicated in informal decision-making, its empowerment was itself the result of informal practices – a finding that lends support to the new neofunctionalist claim that informal practices are a result of the striving for power of supranational institution. Moreover, it might be argued that the very fact that the Council prevented such informal practices from emerging in the CAP confirms simple rationalist theories.

As a result, 16 out of 20 (80%) observations fully support Liberal Regime Theory. Since it predicted the reverse, simple rationalist theories are largely disconfirmed. Furthermore, since the variation across issue-areas is strong, and there is little variation over time, there is also little general evidence for new neofunctionalism.

Table 8d: Informal practices in voting and confirmation of Liberal Regime Theory

	CAP, Horizontal Issues			Common Market, External Relations		
	<i>Voting</i>	<i>Change</i>	<i>Parliament</i>	<i>Voting</i>	<i>Change</i>	<i>Parliament</i>
1958-1969	YES	YES	N/A	YES	YES	N/A
1970-1986	YES	YES	N/A	YES	YES	N/A
1987-1993	YES	YES	NO	YES	YES	NO
1994-2001	YES	YES	NO	YES	YES	NO

CHAPTER 6

Implementation

This chapter examines informal practices in implementation in order to show that they emerge systematically in those areas where political uncertainty requires governments to exercise discretion in the application of formal rules. The reason is that although formal rules ensure an optimal implementation of the treaty, they carry with them the risk of generating distributional shocks. The centralization of expertise may make an actor blind to the circumstances requiring discretion and subsequently lead to unmanageable interest group pressure. The Treaty of Rome made it possible to centralize the implementation of decisions within the Commission in order to impose measures on governments. Under the treaty, the Commission enjoyed an extraordinarily large room for maneuver (also commonly referred to as discretion), because the treaty provided for no means for the governments to alter implementation measures that were already in effect.⁴⁴⁹ For these reasons, Liberal Regime Theory expects governments prefer informal practices in implementation in order to exercise discretion. Empirical evidence confirms this prediction: member states generally agree on the necessity of informal practices. As established above, the need for discretion is high in all issue-areas except the CAP.⁴⁵⁰ General agreement among member states about the necessity of informal practices provides further evidence in support of the theory.

⁴⁴⁹ The delegation of authority entails at least two consecutive decisions: First, governments decide whether to delegate power to an agent. Second, they decide on the precise extent of discretion of the executive by specifying execution or adding formal or informal control mechanisms. For an overview of the literature on control mechanisms see McCubbins and Schwartz 1984.

⁴⁵⁰ Horizontal measures rarely require implementation. They were hence dropped from the analysis.

Table 9: Formal and informal practices in implementation

<p>Formal practice</p> <p style="text-align: center;">⋮</p>	<p>The Council decides to delegate implementation powers to the Commission.</p> <p>The Commission's discretion is high.</p> <p style="text-align: center;">⋮</p>
<p>Informal practices</p>	<p>Governments refrain from delegating implementation powers to the Commission.</p> <p>The Commission's discretion is low.</p>
<p>Indicators</p>	<p>Quantitative data on agent choice. Quantitative and qualitative on measure narrowing the Commission's discretion.</p>

In contrast to Liberal Regime Theory, new neofunctionalists do not expect informal practices to emerge in any clear pattern. Moreover, since such practices are the product of general conflict, new neofunctionalists expect them to be accompanied by differences among governments as well as between governments and institutional actors. Simple rationalist theory does predict a systematic variation across issue-areas, but in contrast to Liberal Regime Theory, it expects informal practices to arise only where issues are predictably sensitive, such as in the CAP. Simple rationalism, furthermore, expects that conflicts between large and small states will accompany the emergence of informal practices.

This chapter will demonstrate that governments tend to refrain from delegating implementation powers to the Commission and prefer implementation by national administrations instead.⁴⁵¹ Only in limited issue-areas such as agriculture, transport and the common commercial policy, do governments automatically confer implementation powers on the Commission. Furthermore, the Commission's discretion was heavily reduced as a result of

⁴⁵¹ The analysis draws on a data set compiled by Fabio Franchino on delegation in EC law between 1958 and 1993. http://www.socpol.unimi.it/docenti/franchino/page.php?id_page=9§ion=3&lang=eng&style=standard&id_query=. For a discussion of the methodology see Franchino 2007, 79-86. It contains information on both the implementing actor and its overall discretion. First, it lists the number of major provisions within a major law delegating power to either the Commission or national administrations. Second, it measures their overall discretion as the difference between the extent of delegation and the number of constraints mechanisms. The analysis is complemented with qualitative data on delegation and discretion. The data has to be taken with a pinch of salt, because official figures on committees are often confusing and rarely accurate. Buitendijk and van Schendelen 1995, 42.

the emergence of the “Comitology,” a system of government committees overseeing its actions, while the discretion of national administrations became on average higher than that of the Commission and has increased over time. The evidence therefore partly confirms the hypothesis derived from Liberal Regime Theory: in issue-areas of high political uncertainty, governments systematically prefer informal practices that allow national governments to implement policy to purely formal rules conferring implementation powers on the Commission. Qualitative evidence moreover shows that all governments generally accepted these practices. The heavily centralized implementation of policies in the issue-area of competition, however, partly disconfirms the theory.

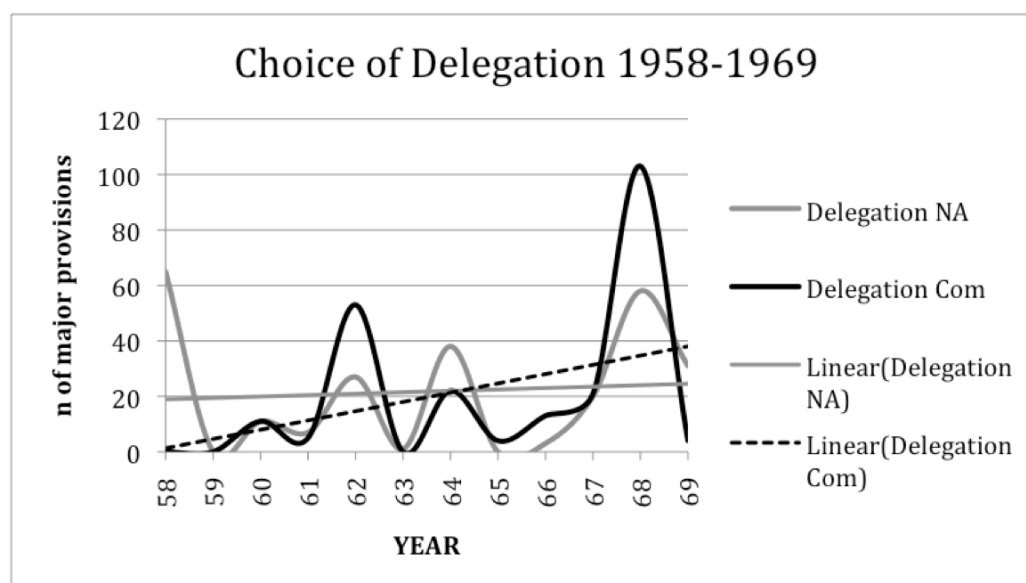
Does the Council Delegate Implementation Power to the Commission?

As mentioned above, the Rome Treaty directly conferred executive powers on the Commission in the areas of agriculture, transport, and the common commercial policy. The latter policy area, however, concerned mandates for the negotiation of trade agreements, which would still be subject to the Council’s explicit approval. The Commission was also subjected to a formal governmental oversight committee (Article 113 committee) that heavily narrowed its discretion in negotiations. In addition to conferring executive power on the Commission in these three specific areas, the treaty’s formal rules provided for the possibility of conferring implementation powers on the Commission in other issue-areas, which would thereby endow the Commission with extraordinarily high discretion. However, most of the time and in most issue-areas, governments in fact refrained from delegating power to the Commission at all. When they endowed it with implementation power, they usually heavily narrowed its discretion – on average more so than they did with national administrations.

The Formative Years 1958-1969

Since the Commission had not yet developed an adequate implementation structure in the first years after the inception of the Treaty, governments initially delegated the implementation of decisions to national administrations. From the early 1960s onwards, however, the Commission was given more and more executive power. This was especially the case in relation to the emerging common market for agricultural products.⁴⁵² The following graph depicts the number of major provisions within major laws that granted implementation powers either to national administrations (NA) or the Commission (Com), from 1958 to 1969. It shows a trend towards an increasingly centralized system of implementation.

Graph 11: Delegation of implementation power in major EC laws 1959-1969⁴⁵³



During these early years of the Community, all governments with the exception of the Dutch felt that the discretion the treaty granted the Commission was too extensive, and that national administrations had too little opportunity to influence implementation. The Commission itself considered that the implementation of the common market in agriculture required a much closer collaboration between national administrations and the Commission.⁴⁵⁴ The treaty (Article 155 TEC *fine*) had not specified how this collaboration would take place.

⁴⁵² Noël 1963, 16.

⁴⁵³ N = 497. Analysis on the basis of Franchino 2007

⁴⁵⁴ Conseil de la C.E.E. 1960. On this debate see Rat der Europäischen Wirtschaftsgemeinschaft 1963.

In summer 1961, the Commission proposed to set up committees composed of government representatives in order to consult with the Commission on important questions. However, the Council decision on the issue in 1962 went far beyond that and introduced the so-called “management committee procedure”, which was considerably more restrictive than the original Commission proposal. It obliged the Commission to submit all decisions to a special governmental committee, which would refer them back to the Council for review if a qualified majority in this committee decided to do so.⁴⁵⁵ In other words, this new procedure implied that the right to adopt implementing measures was only conditionally granted to the Commission. These new informal practices instituted by the Council now provided for the possibility that the decision could revert to the Council and be changed by them at any time.⁴⁵⁶

The same formula was repeated with other legal acts that delegated implementing powers to the Commission on similar terms. The “management committee procedure” was followed in 1968 by an even more restrictive procedure, the so-called regulatory committee, which mainly applied to the common commercial policy and health and veterinary legislation.⁴⁵⁷ The number of these oversight committees increased over the years from ten in 1962 to 49 management and regulatory committees in 1969, most of which were instituted in the CAP.⁴⁵⁸ Moreover, their variations proliferated.⁴⁵⁹ A broad distinction emerged between three main types: advisory committees consulted with the Commission, contributing a role similar to that of expert groups in the preparation of Commission proposals; management committees could block implementation measures; and the most restrictive regulatory committees had to approve every single measure before it became effective. As mentioned before, the system of government committees controlling the Commission in the execution of

⁴⁵⁵ The Council could then change the Commission’s decision again by a qualified majority. In the absence of a negative decision, the Commission’s decision would stand. For the exact wording of the regulation see Bertram 1968, 246. On the decision-making practice of these committees see Nielsen 1971, 551-553.

⁴⁵⁶ Bertram 1968, 247.

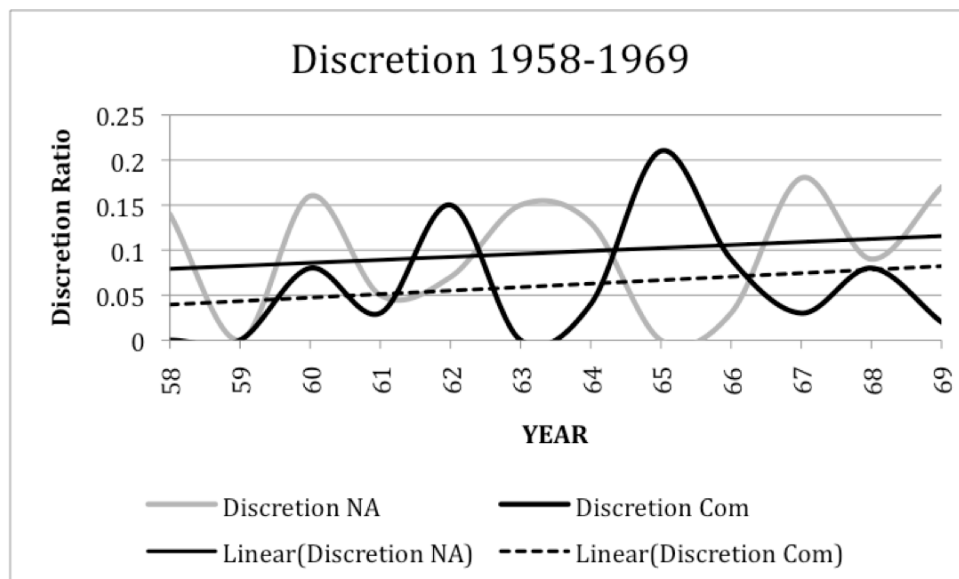
⁴⁵⁷ This procedure required the Committee’s favorable opinion for the proposal to become effective or else the measure would be forwarded to the Council. In one variant of the procedure, the Council could prevent a Commission decision by simple majority if it had failed to reach a decision by QMV (*contre filet*). In addition to the management and regulatory committees, the Council also established a committee for the negotiation of commercial treaties.

⁴⁵⁸ Institut für Europäische Politik 1989, 43.

⁴⁵⁹ For an attempt at classification see Ayrat 1975.

policies became known as the “Comitology.”⁴⁶⁰ As a result, the Commission’s discretion was on average lower than that of national administrations (as the graph below illustrates).

Graph 12: Executive discretion 1958-1969: the Commission vs. national administrations⁴⁶¹



Parliament eyed the Comitology’s emergence with suspicion on the grounds that a restriction of the Commission’s power was against the spirit of the treaties, that it would delay decision-making and would furthermore deprive Parliament of its function of controlling the Commission.⁴⁶² The Council nonetheless decided at the end of the Transformative Years to maintain the Comitology on a permanent basis.⁴⁶³

In sum, the Council increasingly delegated implementation power to the Commission in all issue-areas, particularly in agricultural matters and the common commercial policy. In all these cases, its overall discretion was gradually reduced through a system of governmental oversight committees.

⁴⁶⁰ The Comitology has also been interpreted as a deliberative forum, in which experts seek a reasoned consensus on mostly technical matters. See e.g. Joerges and Neyer 1997. But this theory on the dominant interaction mode in the Comitology need not be an alternative explanation, since it is widely acknowledged that different modes of interaction usually arise at the same time. The constructivist (Habermasian) perspective on deliberation also begs the question of why governments select and constrain certain experts *ex ante*. For a discussion of different perspectives on the Comitology see Pollack 2003a.

⁴⁶¹ N = 497. Analysis on the basis of Franchino 2007.

⁴⁶² The resolution is quoted in Lassalle 1968, 406.

⁴⁶³ European Communities 1969. See also Haibach 2003, 188-189

The Transformative Years 1970-1986

In the 1970s and early 1980s, the Council showed more and more reluctance to delegate any implementation powers whatsoever, and generally prescribed the exact execution of policies in the legislative act, thereby reducing executive discretion. When it delegated implementation power to the Commission, it usually subjected it to the scrutiny of the Comitology. The number and variants of these governmental oversight committees proliferated even further over the course of the 1970s, which gave rise to serious inter-institutional conflicts concerning the inefficiency of and lack of transparency in Community decision-making.

The Council's increased workload at the end of the transition period and in the early 1970s (discussed in chapter 5) gave rise to calls for a more extensive delegation of implementation powers to the Commission. The Belgian Presidency, for instance, complained that the Council had failed to take advantage of many opportunities to delegate: "In numerous cases the Council and its proper organs tend to settle problems in every single detail, even entirely theoretical problems."⁴⁶⁴ In July 1974, the Council officially resolved to make more frequent use of such delegation.⁴⁶⁵ This intention was echoed at the 1974 summit of the European Council in Paris. The CoGs agreed

"on the advantage of making use of the provisions of the Treaty of Rome whereby the powers of implementation and management arising out of Community rules may be conferred on the Commission."⁴⁶⁶

The complaint of the Belgian presidency and the European Council was reiterated in 1979, when the "Three Wise Men" reported that

"[the Council] is simply trying to do too much. (...) The Council attempts to take far too many decisions which are of a minor, technical or recurrent nature."

They consequently recommended delegating implementation powers to the Commission as a rule.⁴⁶⁷ The Council's reluctance to delegate is reflected in the following graph. It shows a general decline in the delegation of decisions to either national administrations or the Commission, which suggests that the Council was indeed specifying the

⁴⁶⁴ *Répresentation Permanente de la Belgique auprès des Communautés Européennes* 1973.

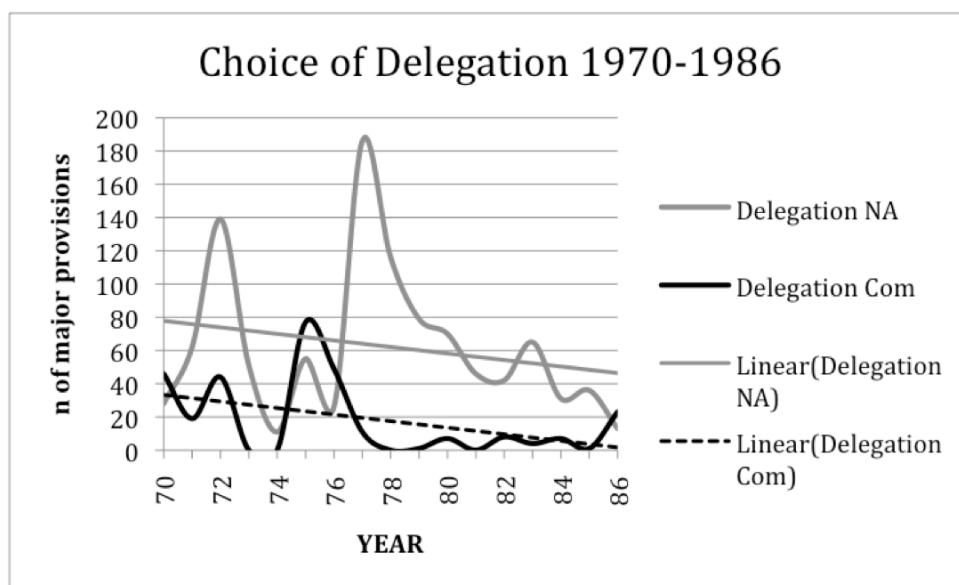
⁴⁶⁵ *Rat der Europäischen Gemeinschaften* 1974a.

⁴⁶⁶ *European Council* 1974, 8.

⁴⁶⁷ *Council of the European Communities* 1980.

implementation of minor decisions within the legislative acts themselves. The graph also suggests that while both forms of delegation declined, governments were on average more willing to delegate implementation powers to their national administrations than to the Commission.

Graph 13: Delegation of implementation power in major EC laws 1970-1986⁴⁶⁸



Furthermore, any act of delegation to the Commission was usually accompanied by some kind of committee controlling its work. An analysis of the Comitology budget lines reveals that the number of committees rose from 56 in 1970 to 218 in 1986.⁴⁶⁹ By this date, about two fifths of the total number of committees were of the most restrictive regulatory type, another two fifths were of the least restrictive advisory variety, and the remaining fifth constituted management committees.⁴⁷⁰ The following figure shows that the Commission's overall discretion ratio consequently decreased between 1970 and 1986, which meant that it had decreasing room for maneuver in implementing decisions. In contrast, the discretion granted to national administration in the execution of policies increased during this period.⁴⁷¹

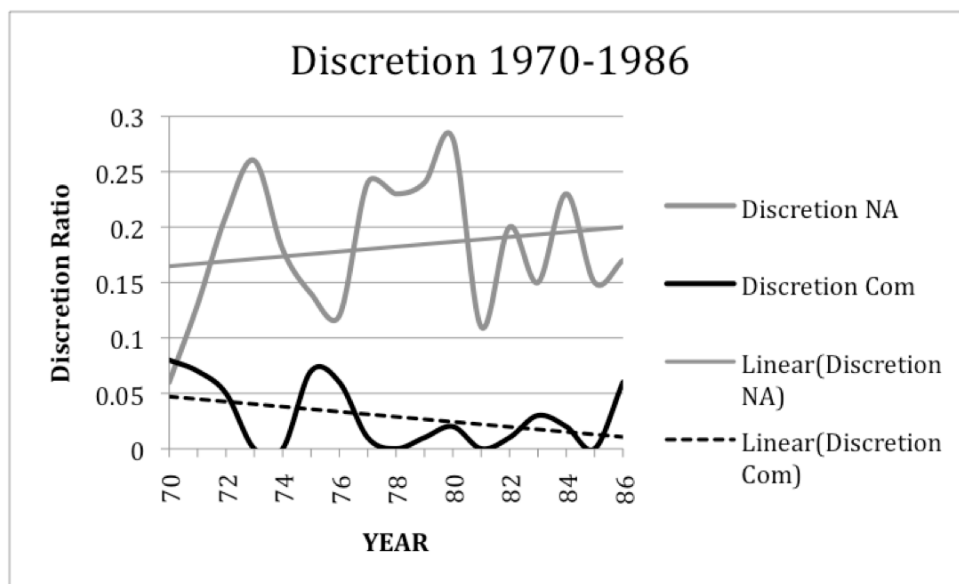
⁴⁶⁸ N = 1353. Analysis on the basis of Franchino 2007.

⁴⁶⁹ Institut für Europäische Politik 1989, 43.

⁴⁷⁰ Institut für Europäische Politik 1989, 45.

⁴⁷¹ Franchino 2007, 102-109.

Graph 14: Executive discretion 1970-1986⁴⁷²



Proponents of the Community Method viewed this trend with suspicion. In 1970, it was alleged that these committees constituted a direct interference in the Commission's right of decision and therefore distorted the Community's institutional balance. But the ECJ in its *Köster* ruling recognized the legality of the Comitology system and found that the treaty authorized but did not oblige the Council to confer powers upon the Commission. It was therefore free to subject the Commission's implementation powers to the Comitology as long as this did not entail conferring the decision-making powers itself on one of the committees.⁴⁷³ But the Commission continued to react against the Comitology, and against the most restrictive regulatory committees in particular, on the grounds that they were ineffective and time-consuming. The EP on its part questioned the Comitology's overall legitimacy and transparency,⁴⁷⁴ on the grounds that no legal criteria existed with regard to the Comitology's functioning, financing, efficiency and the type of procedure to be chosen in a specific policy field. As a result, the number and variety of increasingly obscure procedures multiplied. The EP hence constantly urged for a rationalization of the committees,⁴⁷⁵ because they were "to

⁴⁷² Analysis on the basis of Franchino 2007.

⁴⁷³ European Court of Justice 1970. See also the discussion in Docksey and Williams 1994, 123 and Schindler 1971.

⁴⁷⁴ Haibach 2003, 188.

⁴⁷⁵ On the EP's position with regard to Comitology system see Bradley 1997.

some extent autonomous and no longer fully under the Commission's supervision."⁴⁷⁶ National parliaments assented to this critique.⁴⁷⁷ The pressure to lay down in some form the ground rules to restrict the Comitology system and strengthen the Commission's executive powers mounted in the run-up to the SEA. In their 1983 Solemn Declaration on European Union the CoGs confirmed the "value of making more frequent use of the possibility of delegating powers to the Commission."⁴⁷⁸ In its proposals at the time of the IGC, the Commission made clear that it hoped to be invested with general competence for the implementation of the Single Market.⁴⁷⁹

The SEA only perpetuated the ambiguity surrounding these issues of delegation and discretion. On the one hand, it obliged the Council to delegate to the Commission, rendering national implementation the exception.⁴⁸⁰ The new Article 145 stated that the Council shall

“(...) confer on the Commission, in the acts the Council adopts, powers for the implementation of the rules which the Council lay down. (...) The Council may also reserve the right, in specific cases, to exercise directly implementing powers itself.”

But it went on that “the Council may impose certain requirements in respect of the exercise of these powers.” It thus provided a legal basis for the practice of limiting Commission discretion through the Comitology system.⁴⁸¹ Shortly after governments had adopted the SEA, the Commission submitted a proposal for a Council regulation that clearly defined and streamlined the Comitology system into the advisory, management, and regulatory committee.⁴⁸² As we shall see shortly, governments largely ignored the provisions of the SEA and continued with their old informal practices.

⁴⁷⁶ European Parliament 1983.

⁴⁷⁷ The House of Lords, for instance, complained in 1986 that the range of procedures and variants available defied description and resulted in a considerable waste of time and energy. House of Lords, Select Committee, 1986 Report on the delegation of powers to the Commission, cited in Docksey and Williams 1994, 123.

⁴⁷⁸ European Council 1983, 2.4.

⁴⁷⁹ Dehousse 1989, 127. In addition, the Dooge committee, which subsequently laid the groundwork for the IGC, stated that “[if the Commission] is to carry out fully the tasks entrusted to it, which make it the lynchpin of the Community, its powers must be increased, in particular thought greater delegation of executive responsibility in the context of Community policies.” European Communities 1985.

⁴⁸⁰ See e.g. Ehlermann 1986, 104.

⁴⁸¹ For a discussion of this article see Rometsch 1999, 126.

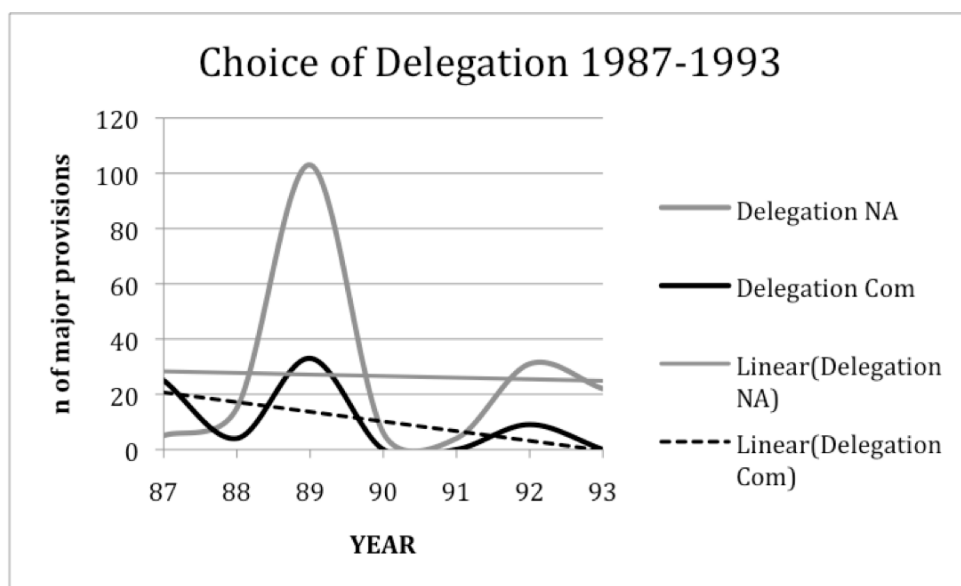
⁴⁸² Commission of the European Communities 1986.

In sum, during the period 1970-1986, the Council became reluctant to delegate any power at all. But when it did so, it increasingly delegated powers to national administrations rather than to the Commission. The Commission's discretion was, moreover, generally narrowed by the Comitology's oversight.

Establishing the Internal Market 1987-1993

Although it obliged the Council to confer powers on the Commission, the SEA did little to change the governments' behavior. The Council continued to delegate to national administrations rather than to the Commission, as the following graph shows.

Graph 15: Delegation of implementation power in major EC laws 1987-1993⁴⁸³



Moreover, the Commission's discretion continued to decline. In July 1987, shortly after the SEA came into force, the Council made its long-awaited "Comitology Decision" on the institutionalization of the committee system. It departed substantially from the Commission's original proposal as well as from Parliament's demands.⁴⁸⁴ The Commission had proposed a simplified structure and the elimination of the most restrictive version of the

⁴⁸³ N = 257. Analysis on the basis of Franchino 2007.

⁴⁸⁴ For an extensive discussion of the deviations see Ehlermann 1988, Meng 1988, 214-220.

regulatory committee.⁴⁸⁵ Parliament had sought measures to become more closely involved and to be kept informed of the activities within the Comitology system.⁴⁸⁶ It had demanded that

“(…) in the interest of not only efficiency but also democracy (…) implementing powers should be transferred to the Commission as frequently as possible and with as few restrictions as possible.”⁴⁸⁷

The Council decision, however, merely formalized the various existing Comitology procedures, but refrained from laying down any criteria to determine which procedure would be chosen in any given situation and when the Council would reserve executive powers for itself.⁴⁸⁸ In practice, governments’ behavior in regard to delegation and discretion remained unaffected.⁴⁸⁹ Following the “Comitology Decision,” when the Commission was endowed with implementation powers, a committee was usually instituted to oversee its actions.⁴⁹⁰ The Commission’s discretion decreased as a result.

⁴⁸⁵ Commission of the European Communities 1986.

⁴⁸⁶ In 1988, the Commission agreed to keep Parliament fully informed of all proposals it submits to Comitology-type committees under the so-called Plumb-Delors procedure. See Jacobs, et al. 1992, 234.

⁴⁸⁷ European Parliament 1986. On the Parliament’s position see also Bradley 1997, Nicoll 1987.

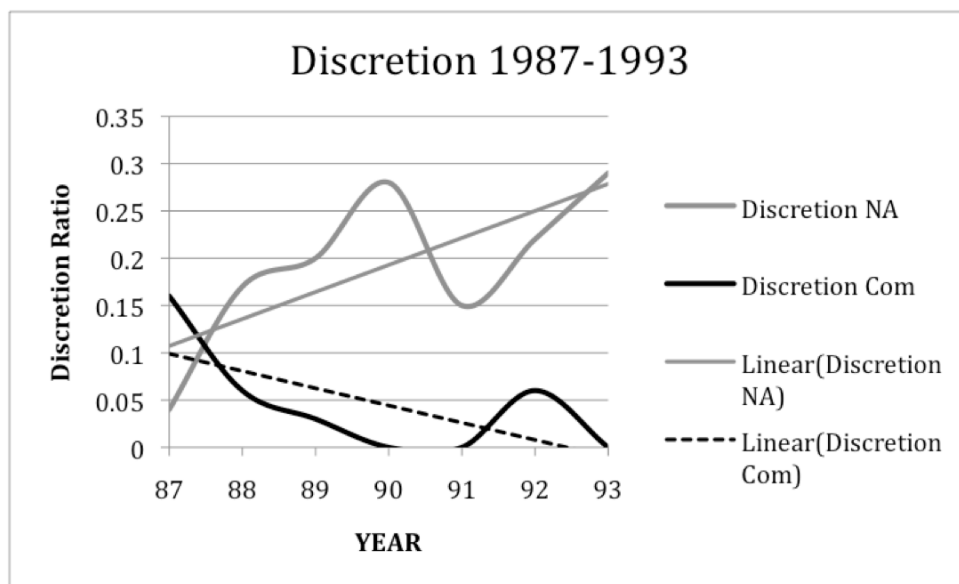
⁴⁸⁸ Council of the European Communities 1987. See also the discussion in Dehousse 1989, 125-128.

⁴⁸⁹ See e.g. Bluman 1989, 68-70 on the Council decision and Vos 1997, 220-222 on ECJ judgments.

In the first two years after the SEA came into force, the Commission had proposed 23 advisory committees and 21 regulatory committees. The Council, however, set up 37 regulatory committees and only six advisory committees. The same pattern holds true for Article 100a issues, where the IGC had pledged to give precedence to advisory committees. While the Commission proposed thirteen advisory and eight regulatory committees, the Council set up 19 regulatory and only three advisory committees. Commission des Communautés Européennes 1989b, Commission des Communautés Européennes 1991b. See also the discussion in Engel and Borrmann 1991, 138.

⁴⁹⁰ Dogan 1997, 39-40.

Graph 16: Executive discretion 1987-1993⁴⁹¹



The ECJ again sided with the governments. Parliament had asked the Court for annulment of the Comitology Decision on the grounds that it infringed the SEA provision. The ECJ, however, held that Parliament's action was inadmissible, and did not address its substance.⁴⁹² The Commission became increasingly frustrated with the governments' behavior. It complained that the Council's reluctance to confer power on the Commission was "in no way justified by the Commission's record in the execution of policies."⁴⁹³ It tried to fight the Council's informal empowerment by regularly choosing legal bases for its legislative proposals that provided for its exclusive executive powers. In 1989, it challenged a Council regulation on the grounds that it provided for a regulatory committee in an area where it, the Commission, held exclusive powers. The ECJ, however, again found in favor of the Council.⁴⁹⁴ The Commission reiterated its criticism in the run up to the Maastricht IGC. It stated that the situation was far from satisfactory, because the developments ran counter to the spirit of the SEA and were likely to compromise the efficiency of Community action.⁴⁹⁵ And it complained more generally about the Council's refusal to delegate implementation powers to it.

⁴⁹¹ Analysis on the basis of Franchino 2007.

⁴⁹² European Court of Justice 1988.

⁴⁹³ See, for instance, Commission des Communautés Européennes 1989a, Commission des Communautés Européennes 1989b, 10, Commission des Communautés Européennes 1991b.

⁴⁹⁴ European Court of Justice 1989. See also the discussion in Bradley 1992, 712.

⁴⁹⁵ Docksey and Williams 1994, 136. See also European Parliament 1990.

“[It] is only in a very few cases that the Council has agreed to a clear delegation of powers to the Commission. For the rest, the latter’s responsibility has been diluted in procedures that either detract from legitimate control by Parliament or are harmful to efficiency.”⁴⁹⁶

In sum, during this period the Council continued in its general reluctance to confer implementation powers on the Commission. When it did so, it usually accompanied them act with a restrictive oversight committee that limited the Commission’s discretion. The number of committees proliferated from 93 in 1975 to 239 in 1985.⁴⁹⁷ The Commission’s discretion decreased steadily over the years under study and was generally much lower than that of national administrations.

The European Union Years 1994-2001

The 1990s witnessed the emergence of new type of executive agent. In late 1993 after the Treaty of Maastricht had entered into force, member governments established eight “European agencies”⁴⁹⁸ tasked with the implementation of EC policies. Most of them dealt with very specific, cross-sectional topics within the broader fields of market economy and social policy.⁴⁹⁹ Several more such agencies would follow in the years to come. Created by an ordinary Council regulation, they were provided with legal personality, governed by a management board mainly composed of member states’ representatives and operated independently of other supranational institutions:⁵⁰⁰ the Commission usually had only organizational or budgetary responsibility for these agencies,⁵⁰¹ and most of them lacked the power of rule-making, enforcement and adjudication normally granted to EC agencies or to the Commission in the implementation of policies. Their principal function was the

⁴⁹⁶ 87/373, cited in Dogan 1997, 44. See also Commission des Communautés Européennes 1989b, 10-12.

⁴⁹⁷ Falke 1996, 137.

⁴⁹⁸ European Environment Agency (EEA), European Training Foundation (ETF), European Monitoring Center of Drugs and Drug Addiction (EMCDDA), European Agency for the Evaluation of Medicinal Products (EMA), Office for Harmonization in the Internal Market (OHIM), Translation Center of the Bodies of the European Union (TC), the Community Plant Variety Office (CPVO), European Foundation for the Improvement of Living and Working Conditions (EFILWC), the European Center for the Development of Vocational Training (CEDEFOP).

⁴⁹⁹ Chiti 2000, 313.

⁵⁰⁰ Kreher 1997, 227.

⁵⁰¹ Egeberg 2008, 246-247.

collection, management and dissemination of information about the procedures and progress of national implementation.⁵⁰²

A similar institutional solution was proposed for the European competition policy, for which the treaty had stipulated a direct conferment of executive power to the Commission. The DG responsible for anti-trust and state aid (DG IV) had become increasingly important in the course of the establishing the Internal Market. But it had also attracted more and more criticism for its aggressiveness and inefficiency in handling cases. In the early 1990s, the idea of establishing a European Cartel Office similar to the German *Bundeskartellamt* was floated by Germany, who had become increasingly hostile towards DG IV. Other member states agreed with Germany's criticism of DG IV, but were rather skeptical about creating an independent agency on the German model.⁵⁰³ However, the prospect of another 12 member states joining the EC, each with formidable competition problems, looked certain to lead to a breakdown of DG IV. Reacting to both governmental criticism and impending overload, the Commission announced in 1999 its intention to decentralize large parts of competition policy. A White Paper on this topic, which the former Director-General for Competition called the "most important policy paper the Commission has ever published in the more than 40 years of EC competition policy"⁵⁰⁴, proposed reforms aimed at massively decentralizing the implementation of the European antitrust policy.

"[The reform] would pave the way for decentralised application of the EC competition rules by national authorities and courts and eliminate unnecessary bureaucracy and compliance costs for industry. It would also stimulate the application of the EC competition rules by national authorities."⁵⁰⁵

In other words, the Commission allowed that anti-trust rules be primarily applied by national competition authorities and adjudicated by national courts. In order to guarantee an effective and consistent Europe-wide application, officials of the national authorities increasingly exchanged information through the Commission website within the so-called European Competition Network. Within the ECN, which was officially established in 2004,

⁵⁰² Majone 1997. See also Chiti 2000, 342." The increasing involvement of the EC authorities in the administrative action, however, has not weakened the role of national administrations. (...) On the contrary, a partial "fusion" between the two orders of authorities has taken place."

⁵⁰³ McGowan and Wilks 1995, 162-164.

⁵⁰⁴ Ehlermann 2000.

⁵⁰⁵ European Commission 1999, 5.

decisions are taken about which national jurisdiction has responsibility for a case. In practice, the first authority to open a case tends to keep it. Where there are more than three countries affected, the case goes to the Commission.⁵⁰⁶ In short, the implementation of the European competition policy was substantially decentralized in the late 1990s, so that national authorities and courts are now initially responsible. Though still under the auspices of the Commission, these national authorities interacted as they did within European agencies, and began sharing information in order to guarantee the coherent application of EC competition law. As a result, the implementation of competition policy, which had been the exclusive competence of the Commission for more than 40 years, was radically decentralized.

In sum, except for the CAP and initially competition policy, during this period governments were generally reluctant to delegate power to the Commission. Implementation power was usually conferred on national administrations, which became increasingly interconnected by means of regulatory EC agencies. From the mid-1990s on, governments became increasingly critical of the Commission's power over competition policy, too. The Commission consequently decided to relinquish most of the power conferred on it by the Treaty to national administrations and courts, and to focus only on genuinely Europe-wide competition cases.

Conclusion

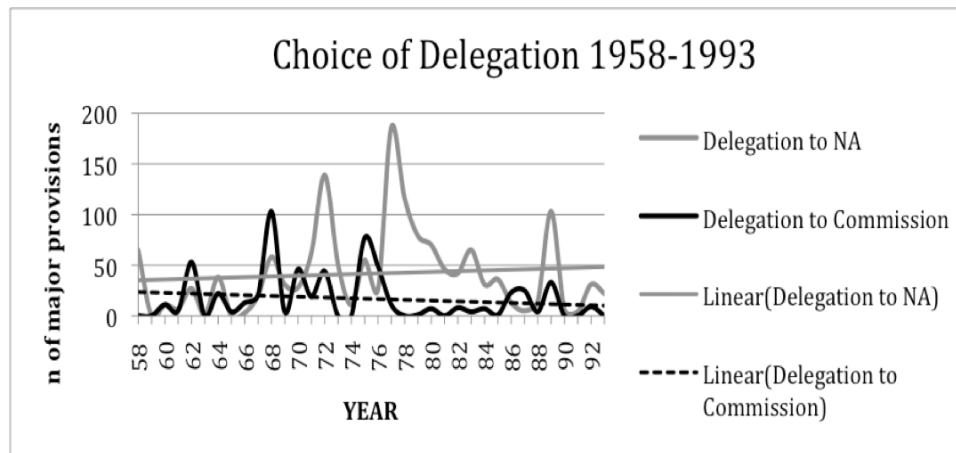
This chapter demonstrates that governments adopt informal practices around formal implementation rules in order to exercise discretion. The Treaty of Rome ostensibly provided for this possibility, and granted the Commission extraordinarily high discretion in fulfilling its task. The chapter argues, however, that although this formal rule may have been intended to guarantee a more faithful implementation of the treaty, it also carried the danger with it to inflict unmanageable, concentrated adjustment costs on domestic groups. Liberal Regime Theory consequently predicts that governments will refrain from delegating power to the

⁵⁰⁶ Wilks 2007, 3.

Commission and will narrow its room for maneuver in areas where the demand for discretion is high. And on the other hand, it predicts that governments tend to follow formal rules where the demand for discretion is low, as it is the case in the CAP. Simple rationalist theories incorrectly predict the opposite variation, while new neofunctionalists expect an erratic emergence of informal practices.

The empirical record by and large supports Liberal Regime Theory. Governments within the EC have indeed refrained from delegating implementation power to the Commission. This trend depicted in the following graph, which shows an increasing reluctance on part of the Council to delegate implementation power to the Commission at all.

Graph 17: Delegation of implementation power in major EC laws 1958-1993⁵⁰⁷



In line with the predictions of Liberal Regime Theory, governments were less hesitant to delegate the implementation of agricultural matters to the Commission. However, contrary to the theory's predictions, the same holds true until the 1990s for the competition policy. As Giandomenico Majone expressed it,

“(...) with some important exceptions in the areas of agriculture, competition, and anti-dumping, the Community has never significantly departed from its traditional mode of decentralized administration.”⁵⁰⁸

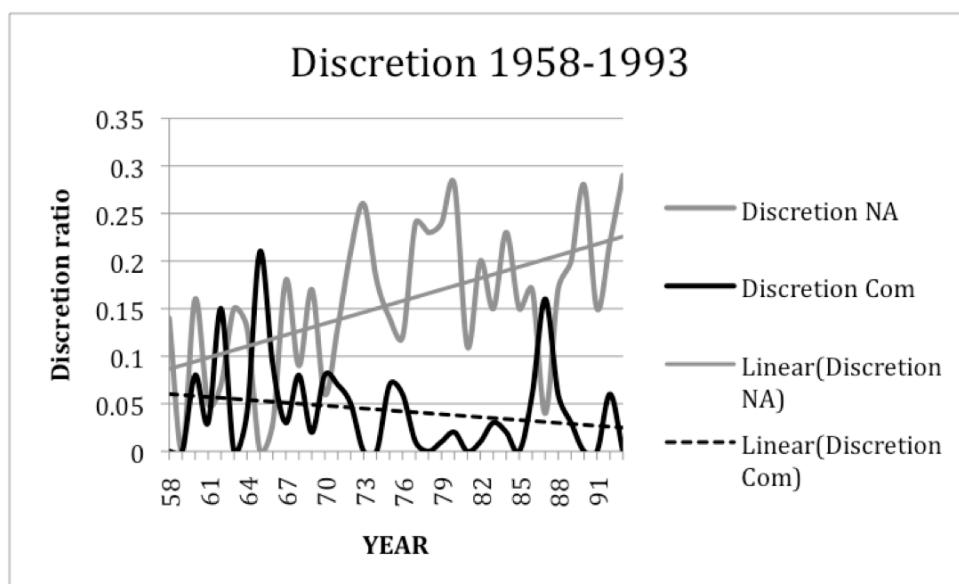
Since 1958, governments steadily narrowed the Commission's discretion, particularly by putting it under oversight of governmental committees within the so-called Comitology.⁵⁰⁹

⁵⁰⁷ N = 2107. Analysis on the basis of Franchino 2007.

⁵⁰⁸ Majone 1997, 263.

Its discretion was thus on average lower than that of national administrations over the entire period 1958-1993, as the following graph shows. In fact, Franchino shows that the Commission's discretion remained highest in issue-areas where national discretion was particularly low, such as in competition, agriculture, and also in the Common Commercial Policy. In other issue-areas concerning the Single Market, the discretion of national administrations was particularly high where the Commission's was lowest.⁵¹⁰

Graph 18: Executive discretion 1958-1993⁵¹¹



The findings are supported by qualitative evidence, which suggests, in line with Liberal Regime Theory, that governments collectively preferred an informal system of decentralized implementation to the alternative of completely centralized implementation. To be sure, they occasionally disagreed over the extent of decentralization, but not about the practice itself. Parliament and the Commission, in contrast, tried to limit the extent of informal implementation powers acquired by governments, but they were to do so, in part because they were unable to secure the support of the ECJ on this question.

In the table below, the observations for agriculture are coded “confirming.” The corresponding observations for the common market, except during the 1990s, are coded

⁵⁰⁹ For a historical overview see Bergström 2005.

⁵¹⁰ Franchino 2007, 165, 176.

⁵¹¹ Analysis on the basis of Franchino 2007.

“disconfirming,” because the Commission was granted substantial implementation power in competition policy. In short, Liberal Regime Theory correctly predicts 5 out of 8 (63%) observations.

Table 10: Informal practices and confirmation of Liberal Regime Theory

	Agriculture	Common Market, External Relations
1958-1969	YES	NO
1970-1986	YES	NO
1987-1993	YES	NO
1994-2001	YES	YES

CONCLUSIONS TO PART I

This part of the analysis sought to demonstrate that governments adopt informal practices around formal rules in order to exercise discretion. After an identification of the important formal rules that enable governments to optimally implement the objectives of the treaties, but that also carry the risk of generating distributive shocks within member states, we traced governments' informal practices across all EC issue-areas and through the history of European integration up to the Nice treaty of 2001. It was demonstrated that informal practices emerged very early after the inception of the EC and remained astonishingly stable over time. They allowed governments to retain control over decision-making and exercise discretion in the application of formal rules whenever they collectively deemed this necessary. As a result, the Commission's formal power was gradually weakened. Although the European Parliament formally gained in influence, its powers would not match those once conferred on the Commission.

Specifically, the analysis focused on seven aspects in agenda-setting, voting, and implementation that risk of imposing sudden concentrated adjustment costs domestic groups. Formal rules on agenda-setting, such as the monopoly of initiative, the control of timing and the centralization of expertise, permit an agenda setter to prepare proposals that promise to faithfully implement the treaty. Formal rules on voting permit governments to overrule recalcitrant partners, allow the Commission to prevent changes to proposals, and enable Parliament to influence the final decision. Finally, formal rules on implementation provide the Commission with the potential to impose a decision on one or more governments. At the same time, however, these formal rules can generate distributive shocks in one or other of the member states, and this can lead to unmanageable interest group pressure from within that state. Liberal Regime Theory consequently expects informal practices arise in those issue-areas where political uncertainty and hence the demand for discretion is high. Conversely, it expects governments to more usually follow formal rules where there is low political uncertainty, such as the CAP and, where applicable, on horizontal matters. Simple rationalist

theories generally expect governments to eschew formal rules where sovereignty costs are predictably high. In other words, they expect informal practices to arise in the CAP – and thus made exactly the opposite prediction to that made by Liberal Regime Theory. New neofunctionalists argue instead that inter-institutional conflict over complex, ambiguous formal rules leads to the emergence of informal practices and, most of the time, supranational autonomy. However, because of the complexity involved in the emergence of inter-institutional conflicts, they predict no systematic pattern but rather an erratic emergence of informal practices across issue-areas and over time.

The empirical record of European integration from 1958 to 2001 largely supports Liberal Regime Theory. For one, contrary to the expectations of new neofunctionalism, informal practices emerged very early after the inception of the Rome Treaty and remained stable over time. The preceding chapters identified seven types of informal practices within the EC: first, governments soon found ways to gradually narrow the Commission's agenda-setting power. For instance, informal meetings between the CoGs within the European Council provided for the possibility of predetermining the agenda and, thus, constraining the Commission in its ability to withhold alternative proposals from the agenda. Second, the Commission was unable to centralize expertise or prevent governments from interfering in internal Commission politics. Third, governments quickly gained control over timing when they began to pass proposals through the Council substructure before initiating the formal decision-making process. Fourth, governments almost never employed formal voting rules to take decisions against a minority, but usually tried to find a consensus instead. Fifth, Commission proposals never remained unchanged during Council deliberations. Sixth, Parliament was implicated in informal practices as soon as it was granted some influence over decisions. Seventh, governments shied away from delegating implementation to the Commission, and moreover gradually narrowed the Commission's discretion through the development of an informal oversight system, the Comitology.

As Liberal Regime Theory predicts, the CAP and horizontal matters are for most of the time an exception to these trends, in that governments more regularly followed formal rules in this particularly sensitive issue-area. For instance, in these areas, governments were much more comfortable with the centralization of expertise. In addition, they more frequently took

recourse to majority voting on agricultural and horizontal matters than on other issues. Finally, governments generally delegated implementation power in CAP to the Commission. Qualitative evidence, moreover, showed that although governments occasionally disagreed about the extent to which an informal practices was employed, they usually agreed on their usefulness in principle. Observations for which the evidence was inconclusive or which also supported an alternative theory were coded as “disconfirming” Liberal Regime Theory. Observations to which no theory applied because a formal rule was not yet effective were dropped from the analysis. In summary, Liberal Regime Theory correctly predicts 37 out of 52 observations, that is, 71% of the overall variation.

Table 11: Informal practices in decision-making and confirmation of Liberal Regime Theory

	CAP and Horizontal Issues							Common Market, External Relations						
	Proposal	Expertise	Timing	Voting	Change	Parliament	Implementation	Proposal	Expertise	Timing	Voting	Change	Parliament	Implementation
58-69	NO	YES	YES	YES	YES	N/A	YES	NO	YES	YES	YES	YES	N/A	NO
70-86	NO	YES	YES	YES	YES	N/A	YES	NO	YES	NO	YES	YES	N/A	NO
87-93	NO	YES	YES	YES	YES	NO	YES	NO	YES	YES	YES	YES	NO	NO
94-01	NO	YES	YES	YES	YES	NO	YES	NO	NO	YES	YES	YES	NO	YES

Liberal Regime Theory argues that informal practices enable governments to exercise discretion in the application of formal rules, while at the same time keeping the credible commitment formal rules epitomize intact. However, one might object that informal practices gradually undermine the credible commitment to European integration if they are overused in the long run. After all, who decides whether a government should receive concessions? And who determines how much discretion should be granted? These are obvious loopholes for opportunistic governments who wish to eschew formal constraints whenever it suits their plans. In other words, the informal norm of discretion generates a classical problem of moral

hazard, with which governments need to deal in order to sustain the norm. This will be the focus of Part II's analysis.

– Part II –

Auxiliary Institutions in EC Decision-Making

INTRODUCTION TO PART II

The previous section of the analysis demonstrated that informal practices vary systematically across issue-areas with the extent of political uncertainty. The reason, according to Liberal Regime Theory, is that some issue-areas are highly susceptible to distributional shock, rendering domestic interest group pressure unmanageable to the extent that states' mutual commitment to cooperation is jeopardized. In these issue-areas, governments consequently adopt informal practices that permit them to exercise discretion in the application of formal rules. Thus, informal practices varied systematically across issue-areas, contrary to the expectations of new neo-functionalists, who instead regard informal practices as the unanticipated, erratic consequences of inter-institutional conflicts. And contrary to simple rationalist theories, which regard informal practices as deviations from commitments that emerge in particularly sensitive issue-areas, we found that informal practices vary with the extent of political uncertainty, as Liberal Regime Theory predicts.

This second analytical section now sets out to examine Liberal Regime Theory's second hypothesis: for informal norms of discretion to be sustainable, auxiliary institutions must accompany them. The reason is that the circumstances that demand discretion may not always be perfectly observable. Governments therefore have an incentive to exploit the norm by exaggerating their demand for concessions in order to cut a better deal than they would otherwise achieve. Thus, the norm of discretion generates behavior that undermines its very purpose. It is therefore only sustainable in combination with auxiliary institutions that prevent this classical problem of moral hazard

This part of the analysis is structured as follows: chapter 7 specifies the hypothesis for the context of European decision-making. Drawing on the economic literature of insurance markets as well as on informational models of Congress, the chapter will argue that the Council Presidency may under certain circumstances be able to prevent the problem of moral hazard. We then deduce three distinct observable implications, which the subsequent chapters

8 to 10 trace and test against alternative theories using a combination of descriptive inference, statistical techniques and process-tracing.

CHAPTER 7

Moral Hazard and Auxiliary Institutions

We have seen so far that states employ informal practices as a means to optimally adapt to unexpected situations in which discretion is required in the face of distributional shocks. The central argument of this chapter is that in order for the informal norm of discretion to be sustainable, governments need to devise auxiliary institutions that prevent the exploitation of the norm when information is incomplete – that is, when not all states have the same information – about the true extent of the distributional shock. Such situations raise the possibility that states will exaggerate the shock in the service of short-term interests, demanding excessive concessions in order to cut a better deal than they would have otherwise. In other words, the norm of discretion requires governments to solve a classical problem of moral hazard.

The argument is developed in six steps. First, we explain why the informal norm of discretion brings about a problem of moral hazard and the demand for auxiliary institutions to cope with it. Drawing on the economic literature on insurance markets, the second step discusses general solutions for the problem of moral hazard such as coinsurance and adjudication. The argument made is that case-by-case adjudication on the basis of situational information is better suited to the particular problem under discussion than other solutions. Drawing on informational models of Congress, the third step argues that in order to guarantee that a sufficient level of discretion is granted, governments delegate the task of adjudication to an actor with an encompassing interest in the norm, that is, another government. The fourth step develops this insight further. It is argued that in order not to concede too much, governments delegate the task to a government that stands to lose from excessive discretion. The fifth section specifies the hypothesis in the context of the EC. It is explained how it can be tested against its main contenders, new neofunctionalism, simple rationalist theories, and classical regime theory. Finally, the sixth step discusses case selection and methods.

Why an Informal Norm of Discretion Generates Moral Hazard

Governments resume control over the legislative process in order to be able to deal with otherwise unmanageable interest group pressure. The reason is that although formal rules enable government to fully implement the treaty, they may also generate sudden, concentrated adjustment costs for domestic groups. This distributional shock induces them to mobilize against cooperation and tempt their governments into defection. As a result, the credible commitment that the formal institution embodies is undermined. Governments therefore seek to nip situations like this in the bud by making concessions that mitigate sufficiently against domestic recalcitrance. This informal norm of discretion among governments was compared to an insurance regime. Just as car insurances disperse one's concentrated costs from a car accident across all insured persons, a collection of governments insure their credible commitment by dispersing excessively high adjustment costs across all of them. The amount of this payment, i.e. the exact level of discretion is critical for the operation of the norm. Too few concessions to a government facing a distributional shock lead to the obstruction of cooperation and undermine the credible commitment. Too many concessions, however, result in deadweight costs for all of them and make the norm unattractive in the long run.

However, deciding on the right level of discretion is difficult, because individual governments are usually better informed about their own domestic situation than other governments are.⁵¹² Governments therefore have an incentive to exploit the norm. They may, for instance, probe other governments in an attempt to find out how much they are willing to concede; they may also deliberately exaggerate the extent of the distributional shock they are facing⁵¹³ with a view to collecting additional private rents from special interest groups; or large states may want to manipulate the terms of trade in their favor. Thus, the informal norm of discretion creates a classical problem of moral hazard. To once again draw the comparison with insurance: the outbreak of fire in one's house may be largely uncontrollable by an individual, but the probability is somewhat influenced by carelessness and, of course, arson.⁵¹⁴

⁵¹² One might object that, empirically, there is little incomplete information among governments. See e.g. Evans 1993, 400. However, although information is not private, the costs for attaining it might not be the same for all governments. It is reasonable to assume that it is more costly to attain information about the demands of foreign interest groups than it is to attain information about domestic interest groups.

⁵¹³ Feenstra and Lewis 1991, 1288. See also Goldstein and Martin 2000, 621.

⁵¹⁴ On this problem see Arrow 1963, 961.

Full coverage may therefore induce the insured to behave even more carelessly or, in an extreme event, to set fire to a house. The informal norm of discretion, just like insurance, may therefore induce behavior that quickly undermines the norm's very purpose. Thus, in order to sustain it in the face of incomplete information, governments need to devise additional institutions to cope with the problem of moral hazard.

Why Moral Hazard Leads to a Demand for Adjudication

The economic literature mentions two possible contract designs that provide solutions for this problem of moral hazard. These are coinsurance and adjudication on the basis of situational information.⁵¹⁵ *Coinsurance*, or incomplete coverage, prevents moral hazard by making the insured bear some costs of a claim. Making the driver share the costs of an accident, for instance, induces him to drive less recklessly. Peter Rosendorff, Helen Milner and others argued that this has been the logic behind the design of escape clauses and other flexibility mechanisms in international trade law. In order to discourage the overuse of escape clauses, governments are to pay a penalty for invoking it. The exact size of the costs, it is argued, must depend on the gains from cooperation relative to the benefits of defection.⁵¹⁶

But this solution is ill-suited when applied to international politics, and to the norm of discretion, in particular. Recall that political uncertainty lies by definition beyond the realm of things states know when designing formal institutions. Governments are consequently unable to set an optimal, formal penalty that efficiently prevents governments from exaggerating the pressure they are facing.⁵¹⁷ Even worse, since the formalization of the credible commitment was supposed to enable private actors to make long-term investments, the formalization of flexibility in combination with inaccurate penalties induces them to act under false premises.

⁵¹⁵ Shavell 1979. Shavell speaks of "observation" instead of adjudication. The causal mechanism is the same.

⁵¹⁶ Rosendorff and Milner 2001, 835. See also Downs and Rocke 1995.

⁵¹⁷ It is commonly argued that penalties for Section 201 in US trade law and Article XIX GATT had in fact been over-estimated with the effect that escape clauses were invoked less often than other comparable mechanisms. See Rosendorff and Milner 2001, 847-850.

Some private actors spend resources on lobbying⁵¹⁸ while others misallocate capital and adjust inefficiently to economic change in false anticipation of discretion.⁵¹⁹

A more promising solution for the problem of moral hazard is *adjudication* on the basis of situational information. Applied to international politics, this translates into the case-by-case collection of information about the true extent of a distributional shock that enables governments to adjudicate on the appropriate amount of discretion.⁵²⁰ The transaction costs involved with this institutional solution are non-negligible, however, because reliable information is costly to attain.⁵²¹ It therefore commonly involves the delegation of adjudication to an agent. In the case of car insurance, for instance, companies often pay experts to assess the cause and exact costs of an accident. On the basis of situational information, the agent then makes a recommendation on the amount of the payment. In insurance markets, competition and certification schemes for experts prevent conflicts of interests and induce a truthful report by the agent. However, such schemes are impractical in this particular case, not least because the discretion is supposed to remain informal. Governments have to find other ways to elicit information about the true extent of a country's distributional shock.

In short, co-insurance as a solution is inadequate when applied to this particular problem of moral hazard under an informal norm of discretion. Case-by-case adjudication on the basis of situational information seems to be the more promising solution. The principal problem, however, remains the truthful revelation of information by the agent.

⁵¹⁸ For a similar argument with a view to explaining institutionalized cooperation instead of flexibility clauses see Mitra 2002.

⁵¹⁹ Kohler and Moore 2001, Maggi and Rodriguez-Clare 1998, Staiger and Tabellini 1987, 824, Staiger and Tabellini 1989.

⁵²⁰ Similarly, Michael Tomz argues for the case of international lending that lenders adjudicate on a state's credit worthiness on the basis of situational information. See Tomz 2007.

⁵²¹ See e.g. the critique of legal theories of efficient breach in Friedmann 1989, 6.

Why Adjudication on Discretion Requires Encompassing Interests

Governments have three principal considerations when exercising discretion: first, accommodating a government too little leads to the obstruction of cooperation and thus subsequently undermines the credible commitment the formal institution embodies. Information on the true extent of domestic adjustment costs is hence to be considered a *common good* for all actors with encompassing interests in the norm. Holding the distributional effect constant, all of them except the claimant benefit from a reduction in uncertainty about the extent of the distributional shock. Second, assuming that formal rules increase aggregate welfare, accommodating too much may generate deadweight loss. Holding the distributional effects constant, all governments therefore prefer to accommodate a government facing a distributional shock only to the extent necessary to render special interests group pressure manageable. Third, the accommodation of other governments has asymmetric distributional effects. The countries that gain most from an unfettered application of formal rules also stand to lose most from giving in to excessive demands for discretion, and *vice versa*.

Governments can choose among three possible agents when delegating the task of adjudication, all of whom place different values on the above three considerations. These are (i) institutional actors without an encompassing interest in the informal norm; (ii) a government that stands to lose from excessive discretion; and (iii) a government that gains from excessive discretion. The first candidate for the job, an institutional actor without an encompassing interest in sustaining the norm of discretion, has also no interest in establishing and conceding the amount of discretion necessary to render special interest groups pressure manageable. This leaves us with governments as agents with encompassing interests as agents. Holding the distributional effects of discretion constant, they are willing to bear the costs associated with granting a minimum amount of discretion.

Why Adjudication on Discretion Requires Bias Against the Claimant

However, any deviation from formal rules has distributive consequences for all governments. The government tasked with adjudication may therefore face incentives to misrepresent information in its favor. Following informational models of Congress, it is suggested that governments increase the amount of available information by delegating the task of adjudication on the basis of situational information to a government that stands to lose from accommodating another government.⁵²² The logic is intuitive.

Recall that when deciding on the extent of discretion, governments need to make sure that they grant neither too much nor too little discretion. We have just established that delegation of adjudication to a cooperating partner enables governments to guarantee that a minimum level of discretion is granted. At the same time, however, they need to make sure that they do not concede too much. A government that stands to gain from a small deviation from formal rules has an incentive to collude with the recalcitrant government and exaggerate the extent of the distributive shock in order to cut a better deal. Other governments are consequently unable to trust and accept the agent's judgment, no matter if correct or not. Therefore, in order to avoid excessive concessions, governments delegate the task of adjudication to a government that stands to lose from a deviation from formal rules. An agent like this can be expected to report accurately about the true extent of the distributional shock in the country demanding discretion, and it will determine just the right amount of discretion necessary to maintain the norm of discretion and, thus, their credible commitment to cooperation.

⁵²² For a discussion of informational models of Congress see Gilligan and Krehbiel 1989, 463, Krehbiel 1991, 82, Krishna and Morgan 2001, 438-439. See also the discussion in Bendor, et al. 2001, 251-252.

Alternative Theories and Testable Implications

The previous discussion of possible institutional solutions for the problem of moral hazard allows us to specify the hypothesis and its alternative in the context of EC decision-making. To recap, Liberal Regime Theory argues that auxiliary institutions accompany the norm of discretion in order to prevent its exploitation. We established that the most adequate solution for this classical problem of moral hazard in international politics is case-by-case adjudication on the basis of situational information. Since institutional actors have no encompassing interest in upholding the norm of discretion, governments delegate this task to a cooperating partner in order to ensure that a sufficient level of discretion is being granted. In order to ensure that it does not concede too much, the agent needs to hold a very different position on the issue under discussion than the recalcitrant government does. It will be argued below that, under certain circumstances, this role can be assumed by the Council Presidency.

Other theories disagree on various counts. First, new neofunctionalists regard informal practices as the result of an erratic inter-institutional power play. They are triggered by institutional actors' attempts to exploit gaps in the interpretation of formal rules, particularly in cases where internal divisions prevent governments from fighting back. Thus, new neofunctionalists would not expect seemingly different informal practices in decision-making and those on the part of the Presidency to coevolve. Yet since institutional actors are assumed to exploit the slightest disagreement among governments, such as those over the degree of discretion, one might argue that the problem of moral hazard in fact provides an opportunity for institutional actors to reassert themselves as mediators among governments. Second, simple rationalist theories conceive of informal practices as a means for powerful states to eschew formal rules on sensitive issues. Small states acquiesce, because they are so dependent on their cooperation on less important issues that they are obliged to keep them on board. Thus, informal institutions such as the Presidency are unable to prevent large states from deviating from formal rules whenever they deem their important interests at stake. Finally, classical regime theorists concur with Liberal Regime Theory that informal institutions solve problems of collective action in decision-making. Yet, they view these problems as primarily rooted in state interaction rather than in the management of state-society relations. Informal

institutions vary accordingly. In short, the four theories emphasize very different factors for the emergence of informal institutions as well as decision-making within them.

Liberal Regime Theory

Liberal Regime Theory argues that when decision-making is governed by an informal norm of discretion, negotiations will center on a government that stands to lose from a deviation from formal rules. The reason is that governments thus ensure that they grant neither too much nor too little discretion to another government claiming to face an imminent distributional shock. There are two ways to accomplish this. First, the task of adjudication on different dossiers is delegated to different governments at the same time. Second, one government is for a certain period of time tasked with adjudicating on a number of dossiers which it prefers to keep largely unchanged.

Which institutional solution is best suited for this role in the context of the EC? As described in the previous analytical part, the formal rules of the EC already provide two actors with a special role in decision-making. First, the European Commission was in charge of drawing up proposals. Its right to change and withdraw proposals at any time makes it a potential candidate for this kind of adjudication among governments. Second, the CP, rotating on a six-monthly basis among governments, was allotted the modest task of organizing meetings in the Council. As argued above, an institutional actor without encompassing interests in the norm of discretion cannot be trusted to grant a minimum level of concession necessary to reduce interest group pressure to a manageable level. This leaves us with the CP, which chairs negotiations for a fixed period of time. In order to ensure that the Presidency does not grant too much discretion, governments need to drop exactly those dossiers from the agenda where the Presidency would gain from conceding too much.

Three observable implications follow: first, governments' informal practices in decision-making over time and across issue-areas coevolve with informal practices on the part of the Presidency. Second, the agenda has a bias towards dossiers the Presidency wishes to adopt largely unchanged, because dossiers where the Presidency and the recalcitrant country

have an incentive to collude with a view to change them in their favor are dropped from the agenda. Third, the Presidency adjudicates on the application of formal rules. Its threat to apply them consequently leads to a change in position on the part of the recalcitrant government.

Hypothesis 2: The informal norm of discretion generates auxiliary institutions to deal with the problem of moral hazard.

- Informal governmental practices in decision-making coevolve with informal practices on part of the Presidency.
- The Council agenda has a Presidency bias. Governments regularly advance issues on the agenda on which the Presidency stands to lose and drop those on which the Presidency stands to gain from excessive discretion.
- Changes to the proposals as well as threats to apply formal rules are made by the Presidency. Recalcitrant governments change their position as a result.

New neofunctionalism

From the perspective of new neofunctionalism, governments and institutional actors are in a constant state of conflict over the interpretation of formal rules. The reason is that institutional actors seek to exploit gaps in the complex set of formal rules in order to enhance their autonomy at the governments' expense. Governments, in turn, fight back when they are able to overcome internal division among them. It was argued above in greater detail (chapters 2 and 3) that new neofunctionalists expect informal practices to emerge erratically over time and across issue-areas, regardless of whether they enhance or recapture institutional actors' autonomy. Accordingly, there should be little correlation between different informal practices in decision-making. Indeed, the Council Presidency has often been interpreted in this vein, that is, as a freak of the nature of European integration. Emil Kirchner, for instance, argued that mainly out of a "desire to maintain national control over EC decision-making"⁵²³ the Presidency is "a body that has grown in status more by default than by design."⁵²⁴

One might argue, however, that the informal norm of discretion in fact provided an opportunity for the Commission. Recall that any conflict of interpretation among governments constitutes a window of opportunity for institutional actors to reassert themselves

⁵²³ Kirchner 1992, 87.

⁵²⁴ Kirchner 1992, 71. Similar Wallace 1985b, 5.

at the governments' expense. Differences over the application of the norm of discretion, for instance, permits the Commission to set the agenda and to offer itself as an honest broker among them. Indeed, mediation among governments was considered the prerogative and indispensable source of influence of the Commission. Ernst B. Haas, the father of neofunctionalism, wrote in 1963:

“[The upgrading of the common interest] takes place on the basis of services rendered by an institutional conciliator with powers of its own, the European executives [i.e. the Commission]; that body is able to construct patterns of mutual concessions from various policy contexts and in so doing usually manages to upgrade its own powers at the expense of member governments.”⁵²⁵

And Walter Hallstein emphasized a year later:

“The Commission is in a central position. Thanks to its independence, it can play the role of an “honest broker” and use its political authority to attain a compromise among the governments.”⁵²⁶

In short, new neofunctionalism would not regard the Council Presidency to be in any way interlinked with other informal practices in decision-making. But it expects the Commission to systematically exploit disagreements among governments in order to assert its interest.

Alternative Explanation 1b: In case of conflict, the Commission plays an autonomous role in decision-making semi-independent from governments.

- Different informal practices on the part of governments do not co-vary over time or across issue-areas.
- The Commission exploits conflicts among governments in order to reassert itself as an agenda setter.
- The Commission exploits conflicts among governments in order to reassert itself as a mediator at the governments' expense.

Simple rationalist theories

For simple rationalist theories, informal practices primarily reflect the abilities of powerful actors to shake off formal rules as well as the inabilities of small states to prevent them from doing so. An informal institution like the Council Presidency will not be an exception. In

⁵²⁵ Haas 1963, 65-66. For a critique see Moravcsik 1999.

⁵²⁶ Hallstein 1964, 551 [Translation from German by the author].

contrast to the expectations of Liberal Regime Theory, an individual government at the helm cannot be expected to be in a position to decide whether large states have to abide by formal rules. For this reason, we would not expect the agenda to feature a Presidency bias.

What kind of behavior can we expect when large states eschew formal rules on sensitive issues? If formal rules indeed lose their effect, intergovernmental negotiations come to resemble decentralized bargaining. Governments consequently seek to coordinate on an outcome that reflects their relative bargaining power. Since the use of force is not a viable option among European countries, this bargaining power will be primarily based on their asymmetric interdependence. In other words, large states with viable alternative options to cooperation within the framework of the Community are in a better bargaining position than small states that are more dependent on the cooperation of their large partners. Decentralized bargaining manifests itself in threats of exclusion and exit from institutionalized cooperation. Credible threats should lead to a change in other actors' bargaining position. In contrast to the expectations of Liberal Regime Theory, the threat to apply formal rules should no longer provoke any such change.⁵²⁷

Alternative Explanation 2b: Decision-making degenerates into decentralized bargaining where governments adopt informal practices.

- The agenda does not show any systematic Presidency bias.
- Governments change their position in response to large states' credible threats of exit or exclusion. Threats to call votes have no such effect.

Classical regime theory

In line with Liberal Regime Theory, classical regime theory regards informal institutions as solutions to problems of collective actions. In contrast to Liberal Regime Theory, however, it views these problems as being primarily rooted in state interaction, and not in the management of state-society relations. Jonas Tallberg recently interpreted the emergence of the Council Presidency along these lines. In his theory of leadership, multilateral bargaining among

⁵²⁷ On bargaining in an institution-free environment see Moravcsik 1998, 60-67 and Voeten 2001.

governments in the Council is subject to various collective action problems that bring about a demand for leadership.⁵²⁸

First, when agendas are “unstable, overcrowded, or underdeveloped,”⁵²⁹ states are unable to reach efficient agreements. The reason is that complex agendas hinder governments in identifying potential agreements while underdeveloped agendas prevent governments from realizing mutually efficient issue-linkages. States deal with this problem of agenda failure by delegating the task of agenda management – that is, agenda setting, agenda structuring, and agenda exclusion – to an agent that enables governments to realize the agenda’s full potential.⁵³⁰ The demand for brokerage stems from the governments’ inability to exchange information. Although complete information would allow governments to attain mutually beneficial agreements (reach the Pareto frontier), governments have an incentive to withhold it, because they fear that it will be used against them in the distribution of the joint gains from cooperation (bargaining along the Pareto frontier). This negotiation failure leads them to delegate the task of brokerage to the Presidency.⁵³¹ In sum, drawing on classical regime theory, Tallberg argues that the problems of agenda and negotiation failure lead governments to delegate the task of agenda management and brokerage to the Presidency. This privileged position, in turn, provides the governments in office the opportunity to manipulate the agenda and negotiations in their favor.

The theory begs one important question, namely why governments delegate these tasks to a cooperating partner rather than to an institutional actor when this government must be expected to exploit its privileged position for its own advantage.⁵³² Tallberg reasons that the Presidency was the only actor available after the Commission had been disempowered in the 1966 empty chair crisis.⁵³³ In the aftermath of the crisis, an increasing complexity in decision-making due to a growing workload and enlargement in the early 1970s then led to the informal emergence of the Presidency as an agenda setter and broker in European decision-making.⁵³⁴ Thus, in contrast to Liberal Regime Theory, classical regime theorists expect the informal

⁵²⁸ Tallberg 2006, 3.

⁵²⁹ Tallberg 2006, 21.

⁵³⁰ Tallberg 2006, 21-24.

⁵³¹ Tallberg 2006, 24-27.

⁵³² Tallberg 2006, 31-33.

⁵³³ Tallberg 2003, 15, Tallberg 2006, 46.

⁵³⁴ Tallberg 2006, 47, 59.

institution of the Presidency emerge systematically with the complexity in decision-making after 1966. Since, from the perspective of classical regime theory, these aspects are abundant in the EC, we would expect little variation in the Presidency's role across issue-areas. Furthermore, all governments should be able to exert the same influence on the agenda and on negotiations regardless of their stance on an issue.

Alternative Explanation 3b: Informal institutions help governments overcome interstate collective action problems.

- The Presidency emerges after 1966 in all issue-areas in response to an increasing workload in the Council.
- All Presidencies manipulates the agenda in their favor.
- All Presidencies manipulate negotiations in their favor.

Summary

In sum, Liberal Regime Theory argues that the informal norm of discretion entails a problem of moral hazard and brings about a demand for a government to adjudicate the right level of discretion. The Council Presidency can under certain conditions assume this function. It was argued that, therefore, the Presidency coevolves with the informal norm of discretion in the Council. The Council agenda will be biased in its favor in order to enable trustworthy adjudication. As a consequence, negotiations center on it and its assessments regarding the application of formal rules. Yet other theories provide different explanations for both the emergence of the Council Presidency as well as actors' behavior in negotiations. The different predictions are summarized in the following table.

Table 12: Hypotheses concerning auxiliary institutions

Dimension Theory	Co-evolution	Council Agenda	Negotiation
New Neofunctionalism	Different informal practices do not co-vary over time or across issue-areas.	The Commission exploits conflicts among governments in order to reassert itself as an agenda setter.	The Commission exploits conflicts among governments in order to reassert itself as a mediator.
Simple Rationalism	N/A	The agenda does not show any systematic Presidency bias.	Governments change their position in response to large states' credible threats of exit or exclusion. Threats to call votes have no such effect.
Classical Regime Theory	The Presidency emerges after 1966 in all issue-areas in response to an increasing workload in the Council.	All Presidencies manipulate the agenda in their favor.	All Presidencies manipulate negotiations in their favor.
Liberal Regime Theory	Informal governmental practices in decision-making coevolve with informal practices on part of the Presidency.	The Council agenda has a Presidency bias. Governments regularly advance issues on the agenda in which the Presidency stands to lose and drop those in which it stands to gain from discretion.	Changes to the proposals as well as threats to apply formal rules are made by the Presidency. Recalcitrant governments change their position as a result.

Method, Case Selection and Plan for the Subsequent Chapters

The following three chapters trace each of these implications using various qualitative and quantitative techniques. Chapter 9 evaluates the claim that governments' informal practices are accompanied by informal practices on the part of the CP. This evaluation is accomplished through a descriptive inference on the basis of new archival material and practitioner reports. It focuses on the variation in informal practices both over time and across issue-areas, and seeks to identify logical connections between them.

Chapter 10 focuses on the implication that the Council agenda features a Presidency bias, because dossiers on which it would gain from excessive discretion are dropped from the agenda. The chapter will argue, therefore, that negotiations on dossiers must on average be expected to take longer if a chairing Presidency is conflicted than they do otherwise. This implication is tested in a multivariate analysis on the basis of an original data set of more than forty dossiers adopted in 2000 and 2001. Two of these cases are subsequently assessed in order to uncover the causal mechanism.

Chapter 11, finally, evaluates the claim that the threat of applying formal rules remains effective and prompts recalcitrant governments to change their positions. This implication is studied in a “least likely” case that favors simple rationalism and new neofunctionalism. This in-depth case study focuses on the Working Time Directive, a Commission proposal set forth in the early 1990s on the Europe-wide regulation of daily, weekly, and annual working hours. There are two reasons for this case selection, one practical, one methodological. First, the informal norm of discretion is supposed to nip political uncertainty in the bud. It consequently reduces conflict in general to the extent that decisions are seldom newsworthy. Negotiation behavior is therefore much more difficult to reconstruct in exactly those instances where the causal mechanism is at work. Second, studying a least likely case may improve the confidence in the explanatory leverage of a theory.⁵³⁵ However, since a single case can be an outlier, whether supporting the theory or not, the number of observations will be increased further within the case by studying and comparing negotiation behavior under successive Council Presidencies.

⁵³⁵ Eckstein 1975, 127. KKV (King, et al. 1994, 209) caution against the use of “crucial case studies” if this implies testing a theory with a single observation.

CHAPTER 8

The Evolution of the Council Presidency

This chapter examines the emergence of the Council Presidency over time and across issue-areas in order to show that it evolved as a direct consequence of the informal norm of discretion. The reason is that the informal norm of discretion brings with it a classical problem of moral hazard in that governments are tempted to demand more discretion than necessary when the truth of their claim is not easily verified. It was argued in the previous chapter that in this situation governments delegate the task of adjudicating on such claims to the Council Presidency. In order to prevent it from colluding with the recalcitrant government, governments will drop issues from the agenda where the Presidency would itself gain from changes to the dossier. The Presidency consequently becomes the center of Council negotiations and adjudicates on appropriate amount of discretion to render special interest group pressure manageable. Thus, the Council Presidency's informal practices in agenda setting and negotiation must be expected to coevolve over time and across issue-areas with the emergence of the informal norms of discretion.

Barely mentioned in the Treaty or the Council's internal Rules of Procedure (RoP),⁵³⁶ the Council Presidency, rotating on a six-monthly basis among governments, indeed assumed more and more informal responsibilities in Council decision-making. However, prominent explanations of this phenomenon differ widely. Since new neofunctionalists regard informal practices as unanticipated and erratic consequences of inter-institutional conflicts over the interpretation of the treaty, they do not expect informal practices in decision-making to coevolve in a systematic manner with those on the part of the Council Presidency. The Presidency is consequently often regarded as a freak of nature, a stopgap for sundry tasks that suddenly popped up and the Commission failed to assume.⁵³⁷ What might be expected from

⁵³⁶ *Conseils de la C.E.E. et de la C.E.E.A.* 1958.

⁵³⁷ Kirchner 1992, 71.

this perspective, however, is that the Commission would nonetheless seek to exploit disagreements among governments, even those about the right amount of discretion, in order to reassert itself as an honest broker among them. Finally, drawing on classical regime theory, Jonas Tallberg argued that the Council Presidency (CP) is a functional response to interstate collective action problems in bargaining. It was deliberately designed in order to cope with an increasing complexity in decision-making. Thus, the CP emerged only in the late 1960s and early 1970s in response to the supposed disempowerment of the Commission in the empty chair crisis in 1966, a subsequent increase in the Council's workload, and the Community's first enlargement. These factors predict an equal evolution of the Presidency across all issue-areas.

The findings in this chapter strongly support Liberal Regime Theory. First, in contrast to conventional wisdom regarding the Presidency, it emerged very early after the inception of the treaty, and concomitant with the emergence of an informal norm of discretion among governments. Although every Presidency brings with it certain styles and interests, these patterns prove remarkably consistent over time.⁵³⁸ Governments' informal practices in agenda setting provided the Presidency the opportunity to create bias on the agenda. Their practices in negotiations put the Presidency in the position to adjudicate on discretion in the application of formal rules. The demise of the Commission and the growing workload of the Council, the factors stressed by classical regime theory, only accentuated what had become standard practice before. Second, the Presidency's role varies systematically across issue-areas. It is far less pronounced in the CAP, which previous chapters established as the issue-area with the lowest demand for discretion.

⁵³⁸ Wallace 1996, 45. One caveat is in order with regard to data. Descriptive studies have unearthed important insights about the CP's tasks where it is particularly active. But to my knowledge, there is no study that identifies issue-specific variation in this regard. The problem was remedied by drawing on archival data from the SCA and conducting personal interviews with former chairmen of the Council and its substructure.

The Presidency and the Agenda

The hypothesis derived from Liberal Regime Theory is that in order to create the conditions conducive to an accurate adjudication on discretion, governments need to create a “Presidency bias” on the agenda. Yet the Treaty of Rome had endowed the Commission with the exclusive right of initiative. It was thus able to influence decision outcomes by submitting proposals when it considered the circumstances for their adoption favorable. We saw in chapter 4 that governments began from the early 1960s onwards to regularly pass Commission proposals to the ever-growing Council substructure of government representatives. The Council agenda consequently ceased to be determined by the Commission’s timing of proposals. This informal practice afforded governments the opportunity to structure the Council agenda according to new priorities.

In line with the expectations of Liberal Regime Theory, the Presidency immediately filled this gap. At the same time that the agenda opened up for new priorities, we observe it to play an increasingly important role in deciding the specific composition of the Council agenda. The COREPER recommended already in 1960 that the “(...) choice of important subjects, which merit discussion in the Council, ought to be conferred to the Presidency, acting in accordance with COREPER.”⁵³⁹ In the following years, the CP outgrew its modest formal role as an organizer of meetings to become an informal driving force behind Community decision-making. Recapitulating the role of the Presidency, the Belgian Permanent Representative, Josef van der Meulen, explains in 1966:

“The Presidency (...) is anything but mere decoration. Not only does it maintain the good order of negotiations. It prepares (...) the work program for the Working Groups with a view to keeping up a progressive examination of all questions. All these Working Groups in fact constitute a considerable machinery that risks becoming paralyzed were it not for the vigilant attention of the President.”⁵⁴⁰

The new task of providing impetus to Council decision-making provided the CP the opportunity to structure the agenda according to its interests. It was able to prioritize issues it preferred and, *ceteris paribus*, let others slide.

⁵³⁹ See Conseil de la CEE et de la CEEA 1960 [Translation from French by the author].

⁵⁴⁰ See 1966, 12 [Translation from French by the author]. For the end of the 1960s/beginning of 1970s see Wallace and Edwards 1976, 540.

According to close observers, the CP usually neglected issues that it either did not care about or which it wished to change in Council negotiations. The reason is, in accordance with Liberal Regime Theory, that while it was expected to respect other delegation's reservations against the Commission proposal, the Presidency's own demands went unheeded. The German Permanent Representative, for instance, explains in 1964: "The Chairman has to contain himself in its demands for consideration of specific national interests."⁵⁴¹ Violations of this norm were considered surprising, inappropriate, and immediately inhibited. "Attempts like this," another internal report on the conduct of the Presidency emphasizes some years later, "would meet with strong refusal."⁵⁴² Given this strong reaction to its demands for changes, the CP stalled these issues where possible until the next government took over. Helen Wallace and Geoffrey Edwards note in the mid-1970s, "the only strategy left to the chair is to block such issues by keeping them off the agenda or by delaying their discussion in a committee."⁵⁴³

In short, the governments' informal practices in decision-making were closely accompanied by informal practices on part of the CP. They consequently emerged very early after the inception of the treaty and, against the expectations of classical regime theorists, before even the empty chair crisis in 1966 and enlargement in 1973. Specifically, the governments' informal practices in agenda setting provided the opportunity to structure the agenda according to new priorities. This prerogative to determine these priorities was conferred on the CP, which consequently stalled issues where either it was disinterested or could not expect to attain concessions. As a result, Council agendas soon developed a Presidency bias. The Commission official and close observer, Thomas Van Rijn, notes in 1973:

"This task [of organizing meetings, MK] gives the Presidency great influence, and it is here that different national characteristics become apparent. It permits putting strong emphasis on certain problems while waiting for others to become "ripe." The

⁵⁴¹ Vertretung der BRD bei der EWG und EAG 1965. Today, the informal "Presidency Handbook" states right at the beginning: "The Presidency must, by definition, be neutral and impartial. It is the moderator for discussions and cannot therefore favor its own preferences or those of a particular member state." Council of the European Union 2001.

⁵⁴² Vertretung der BRD bei der EG 1971. See also Elgström 2003b, 47.

⁵⁴³ Wallace and Edwards 1976, 544. See also Elgström 2003b, 50, Wallace 1985b, 16-17.

very fact that one country occupies the presidency for six months at all levels allows initiatives to be taken and other issues to be concluded as soon as possible.”⁵⁴⁴

In recognition of this development, the Council obligated incoming presidencies from 1973 onwards to publish their work program and timetables for meetings.⁵⁴⁵ This work program became the basis for the “state of the Community” address, in which each incoming CP announced a list of its objectives and priorities to the European Parliament.⁵⁴⁶

As described in chapter 4, the agenda was from the early 1970s onwards increasingly determined by the European Council’s decisions and ongoing Council business.⁵⁴⁷ The CP nevertheless managed to retain its influence on the agenda. For example, governments established contacts with the Commission well before their term in order to ensure a timely preparation of preferred issues.⁵⁴⁸ In addition, the CP invented several more subtle strategies, which it also used in the organization of European Council meetings. In 1986, a confidential FCO document entitled “Guidance on the Exercise of the Presidency” instructed British officials on the respective tactics. It explained: “[The] simplest device will be for the chairman to let the delegation ramble on.”⁵⁴⁹ The document adds that the chairman can delay matters further by setting a meeting for a month later, then canceling it “because another groups needs the meeting room allocated for the next session, and so on.” Asked about it, a British official defended the document:

“Everyone in the community uses the kind of maneuvers or procedures that were mentioned in the paper (...). The only surprising thing is that the British put them on paper.”⁵⁵⁰

By the late 1970s, the CP’s potential influence on the agenda had become a generally accepted fact. In their 1979 Report on the European institutions, the Three Wise Men

⁵⁴⁴ van Rijn 1973, 653 [Translation from French by the author]. See also Noël 1967c, 237.

⁵⁴⁵ See e.g. Amphoux, et al. 1979, 110, de Bassompierre 1988, 24. Several of these delaying tactics even became part of the British governments’ “Guidance on the Exercise of the Presidency.” See Thalmann 1987, 72. See also Dewost 1976, 3, Dewost 1984b, 32.

⁵⁴⁶ Wallace and Edwards 1976, 543, Westlake 1995, 342. This influence over the agenda is reflected in the introduction of a dynamic rotation system in the mid-1980s. It was supposed to ensure that individual member state would not be stuck with holding the presidency during the less busy second half of the year. Hayes-Renshaw and Wallace 2006, 139.

⁵⁴⁷ On these constraints see also Hayes-Renshaw and Wallace 2006, 147-149, Verbeke and Van de Voorde 1994.

⁵⁴⁸ Edwards and Wallace 1978, 82, Wallace 1985a, 463.

⁵⁴⁹ Cited in Maass 1987, 10.

⁵⁵⁰ Maass 1987.

emphasize the Presidency's important entrepreneurial function and recommend strengthening it even further.⁵⁵¹ The Council Jurisconsult, Jean-Louis Dewost, explains likewise in 1984:

“[The] Presidency has assumed [a] delicate role: the generation of political impetus through the revitalization of forgotten dossiers and the provision of new topics that hopefully mobilize political energy. (...) The Presidencies announce programs and present themselves as real motors for the Community, hoping to impose their national interests at the Community level.”⁵⁵²

This phenomenal rise in importance notwithstanding, the Presidency's agenda setting function was barely formalized. In 1988, it was merely decided that each CP should present a more comprehensive work program for its six-month period. In 1993, this procedure was integrated into the Council's internal RoP.⁵⁵³ These practices in agenda setting have hardly changed since. Today, governments begin preparing for the CP up to two years in advance. Presidencies have their own logo, their own websites, and a list of CP priorities announced at the beginning of the term. Recent quantitative studies confirm the Presidency's continuing influence on the agenda. Studying environmental legislation between 1984 and 2001, Andreas Warntjen finds a positive and statistically significant relationship between the importance the CP attaches to an issue and the proportion of pending proposals in this field addressed during a term.⁵⁵⁴ Other governments fully accepted this influence on the Council agenda. Asked about the importance of an adequate balance of interests on the agenda, a former Permanent Representative explained succinctly:

“Nobody cares if the Council agenda adequately balances the governments' various interests. It's simply like that: Governments decide what needs to be decided and what the Presidency thinks is important.”⁵⁵⁵

Consistent with Liberal Regime Theory, and contrary to the expectations of classical regime theory or new neofunctionalism, the Presidency's informal practices in agenda setting vary systematically across issue-areas. We find that the Presidency's role in agenda setting was less pronounced in agriculture, an issue-area with an arguably high workload, but also a

⁵⁵¹ “In improving the Council's performance, the first priority is to strengthen the Presidency in its dual role of organizational control and political impetus.” Council of the European Communities 1980.

⁵⁵² Dewost 1984b, 32 [Translation from French by the author]. See also Wallace 1985b, 5.

⁵⁵³ Tallberg 2006, 50.

⁵⁵⁴ Warntjen 2007.

⁵⁵⁵ Interview # 3.

low demand for discretion in decision-making.⁵⁵⁶ As demonstrated in chapter 5, the Council substructure was not as developed and decentralized in the CAP as it was in other issue-areas. Commission proposals therefore progressed quickly from the WG level to the Agricultural Council,⁵⁵⁷ and as a consequence, there was little room for the CP to leave its imprint on the agenda. CAP officials regularly complained that governments shied away from taking preliminary decisions in the substructure even if the CP considered them ripe for agreement, because dossiers were used as bargaining chips in negotiations among Ministers.⁵⁵⁸ Accordingly, governments tried to avoid any systematic bias – even a Presidency bias – in the agenda of the Agricultural Council. In an internal strategy paper for the German Presidency in 1967, an official responsible for agricultural matters in the SCA complains:

“[Our] work is inhibited by the “package-style” practice in decision-making (...). Many problems remain unresolved, because they are needed as goods to be traded in the moment the really big decisions are being discussed.”⁵⁵⁹

In sum, the evidence largely supports Liberal Regime Theory. Governments’ informal practice of passing proposals through the Council substructure came along with additional informal practices on the part of the CP in agenda setting. Thus, in contrast to new neofunctionalist studies, informal practices coevolve systematically over time and across issue-areas. In contrast to classical regime theory, they emerged in response to the emergence of other informal practices, and not due to the empty chair crisis in 1966 and a subsequent increase in workload. Moreover, they vary systematically across issue-areas with the extent of political uncertainty. A far more centralized Council substructure in the CAP was accompanied by a far less pronounced agenda-setting activity on the part of the CP.

⁵⁵⁶ To be sure, this difference seems to be a matter in degree, since several practitioners report that the Presidency was still able to block unwelcome decisions on agricultural matters. The former Director in the Council Secretariat, Michael Tracy (1985, 90), complains, for instance: “The power of the Presidency to delay or block unwelcome Council business is such that it comes to be accepted that for six month little progress can be expected on such or such item.”

⁵⁵⁷ See also Bundesministerium für Landwirtschaft 1967a.

⁵⁵⁸ For an excellent comparison of practices in agriculture and other issue-areas see Culley 2004.

⁵⁵⁹ Bundesministerium für Landwirtschaft 1967b. See also Bundesministerium für Landwirtschaft 1966, Pearce 1981, 9.

The Presidency and Intergovernmental Negotiations

Consistent with Liberal Regime Theory, but contrary to the expectations of neofunctionalism, governments' informal practice of consensus-seeking in Council negotiations (see chapter 5) was accompanied by an increasing centrality of the CP at the expense of the Commission's authority in intergovernmental negotiations. Already in 1961, Jean Megret, a close contemporary commentator of decision-making practices, observes:

“There has been a very interesting development in the first three years of practical application of the Treaty. More frequently the Presidency finds itself released from its task of expressing its national position as a member of the Council of Ministers. Instead, it devotes itself to the organization of work and the search for a compromise among governments.”⁵⁶⁰

This new role in decision-making was based on three specific practices: increased contacts with recalcitrant delegations, the preparation of compromise proposals, and the prerogative to call votes.

The CP adopted the first practice, the establishment of contacts with recalcitrant governments, very shortly after the treaty had become effective. The above-mentioned analysis of the German 1964 Presidency, for instance, emphasizes the importance of these contacts. The Permanent Representative considered it an invaluable experience to attain information about “motives and problems of individual delegations.”⁵⁶¹ The CP was thereby assisted by the Council Secretariat, which gathered intelligence from the members of Permanent representations or in direct consultation in the capitals of other governments.⁵⁶² Also Emile Noël underscores the importance of this practice in 1966:

“The chairman has a feeling for unformulated desiderata and requests. He knows where positions are reserved. He knows how to take account of and interpret remarks made in confidence.”⁵⁶³

⁵⁶⁰ Mégret 1961, 636, 646 [Translation from French by the author].

⁵⁶¹ Vertretung der BRD bei der EWG und EAG 1965.

⁵⁶² Wallace 1985b, 16. See also Edwards and Wallace 1978, 59, Wallace and Edwards 1976, 537. On the relationship between the Council Secretariat and the Presidency in the 1980s and '90s see Ludlow 1995, 149-156.

⁵⁶³ Noël 1967c, 238 taking account of Noël 1966, 32, Noël 1967c. This practice did not change over time. Helen Wallace explains about two decades later: “Chairmen need to be familiar with the detailed postures of each government and thus to spend a considerable amount of time identifying the reasoning behind publicly enunciated positions. This may require either spending time in advance of meetings gathering intelligence from the members of Permanent Representations, from the Commission and the Council Secretariat, or direct

Its centrality in negotiations did not change even with the EP's rise to power (as described in chapters 4 and 5). The reason is that despite Parliament's gradual promotion to the status of a co-legislator, face-to-face negotiations between MEPs and the Council in full session never occurred.⁵⁶⁴ Instead, governments relied on the CP, which increasingly established informal contacts with the European Parliament, to conduct negotiations on the Council's behalf.⁵⁶⁵

The Presidency's centrality in negotiations was accompanied by a second practice, the preparation of compromise proposals. These suggestions soon became known as "presidency compromises." The term appears in Council documents as early as the early 1960s. For instance, in preparation for the third German Presidency in 1964, the Permanent Representation advises the chairmen of individual Council WGs to prepare possible "presidency compromises" prior to WG meetings.⁵⁶⁶ While the CP fathomed the scope for changes, the Commission in turn tried to defend its proposal. As Noël explains in 1967:⁵⁶⁷

"[The Commission] is more obliged to uphold, even practically on its own, the Simon-pure position, which the Commission has decided is most in accordance with the Community interest. (...) So it is the chair that has the most scope for quietly taking soundings, putting out feelers, and coming forward at the right moment with compromise suggestions – particularly suggestions some distance away from the Commission's original proposal."⁵⁶⁸

By the late 1960s, the "Presidency compromises" had become a fact of Community life.⁵⁶⁹

This did not change when (as described in chapter 5) governments increasingly came to accept majority decisions in the early to mid-1970s. On the contrary, it served to accentuate

consultations in the capital of other governments to clear the ground for the final stage of negotiations." See Wallace 1985b, 16.

⁵⁶⁴ Westlake 1995, 341.

⁵⁶⁵ Council of the European Union 2000d, 15, Hayes-Renshaw and Wallace 2006, 151, 212.

⁵⁶⁶ Vertretung der BRD bei der EWG und EAG 1964

⁵⁶⁷ On this topic see also Wallace and Edwards 1977, 43.

⁵⁶⁸ Noël 1967a, 42, Noël and Étienne 1971, 437-438 and Noël 1967c, 239.

⁵⁶⁹ See e.g. van Rijn 1973, 652 or Commission Directorate-General Christoph Sasse in Sasse 1975, 143-147. Similarly Dewost 1987, 174.

the third informal practice, the Presidency's prerogative to call votes.⁵⁷⁰ Torrelli explains in 1969:

"I am not aware of any case where the Commission would have asked the Presidency of the Council to proceed to a vote when it considered a qualified majority feasible. It is always the Presidency of the Council, which makes this kind of assessment."⁵⁷¹

The Three Wise Men's 1979 report on European institutions approves of this unwritten law:

"Each state must remain the judge of where its important interests lie. Otherwise it could be overruled on an issue which it sincerely considered a major one. It is only when all states feel sure that this will not happen that they will all be willing to follow normal voting procedures. (...) The application of these solutions lies in the hands of the Presidency. The Chairman of the Council is best placed to judge whether and when a vote should be called."⁵⁷²

This task was included in the same year into the first definitive version of the internal RoP, which states that "[the] Council shall vote on the initiative of the President."⁵⁷³ The increasing acceptance of majority decisions in the early 1980s consequently only served to strengthen the Presidency's centrality in negotiations. In 1985, the year in which the total number of majority votes peaked, this development led Noël to complain about the Presidency's growing influence:

⁵⁷⁰ In 1975, for instance, this unspoken law led the then Irish Council President, Garrett Fitzgerald, to the announcement that he would use this prerogative to break with the Council's practice of consensus-seeking. The attempt failed, however, due to lack of B-points subject to QMV on the Foreign Ministers' agenda. The attempt was not repeated by his Italian successor. See Agence Europe 1975, Fitzgerald 1991, 147-148.

⁵⁷¹ Torrelli 1969, 91. Similarly Noël and Étienne: "When there has been a vote, this is because the Council Presidency, after consultation of the Commission, judged that the negotiations had been sufficiently stretched to the effect that the law of majority voting can be rightfully used to provoke hesitant partners to rally round an agreement." Noël and Étienne 1969, 47.

⁵⁷² Council of the European Communities 1980.

⁵⁷³ See Westlake 1995, 134. Although a simple majority could always challenge the decision, this never occurred in practice (Interview # 3). The respective article was changed in 1987 after the entering into force of the SEA. A new paragraph was added to article 5 obliging the President to open voting proceedings on the initiative of a Member State or of the Commission, provided that a majority in the Council so decides. These items were to be indicated on the agenda through asterisks. See de Zwaan 1995, 120. For a discussion see Dashwood 1992. This amendment did not in fact constitute a change. It was rather a change in wording, since it had always been possible to override a Presidency's decisions by a simple majority in the Council. This point is stressed in the 2001 (Council of the European Union 2001) "Presidency Handbook." It states: "[The] Presidency is always in the Hands of the Council... Any procedural question by the Presidency may be challenged by the Council by a simple majority."

“The practices once begun tend to go on: multiplication of the compromises made by the Presidency on all sorts of subjects, thus supplanting Commission proposals, undue resort to bilateral talks, national glorification of the “Presidency of the Community,” although this is a new office with no legal basis.”⁵⁷⁴

Again in line with Liberal Regime Theory, the Presidency’s role in the SCA and the Agricultural Council turns out to be very different. Governments even initially disagreed on whether to adopt the model of the rotating CP for agricultural matters when they established the SCA alongside COREPER. France and the Netherlands, in particular, disliked the model of the rotating CP for this issue-area and pressed for a permanent chairman, preferably the Commission. Eventually, they decided to apply the model of the rotating CP, as well.⁵⁷⁵ Yet, in contrast to other issue-areas, the bulk of decision-making was going to take place among Ministers anyway.

Although it actively took part in Council negotiations, the Presidency’s practices in the Agricultural Council differed from other Council formations in two regards. First, it was the Commission rather than the Council Secretariat that helped the CP to attain information on the delegations’ preferences. To that effect, the Agricultural Council developed two peculiarities, the *tours de capitals* and *confessionals*.⁵⁷⁶ In the *tours de capital*, the CP and the Commission would visit individual ministers to sound out their preferences. In *confessionals*, each Minister would come to the CP and the Commission to tell in confidence what they were able to accept as a compromise. As Culley expresses it, the Commission and the CP then sought to “(...) boil down each delegation’s original shopping list to bottom lines (...).”⁵⁷⁷

Second, instead of trying to uphold its “Simon-pure” position as it did in other issue-areas, the Commission actively prepared compromise proposals, for example, by constructing package deals linking different items on the agenda. The former Director responsible for CAP in the Council Secretariat, Michael Tracy, emphasizes that the Commission itself usually takes the lead in the search for a compromise and table a take-it-or-leave-it proposal.⁵⁷⁸ Also the former Dutch Permanent Representative explains, the final “take-it-or-leave-it package is

⁵⁷⁴ See Noël 1985b, 150.

⁵⁷⁵ Conseils de la C.E.E. et de la C.E.E.A. 1960a, Rat der Europäischen Wirtschaftsgemeinschaft 1960e.

⁵⁷⁶ Moyer and Josling 1990, 58.

⁵⁷⁷ Culley 2004, 205.

⁵⁷⁸ Tracy 1985, 83-84.

presented as a Presidency compromise proposal, [but] it is, as a rule, worked out in close cooperation with the Commission.”⁵⁷⁹ A German SCA official is even more blunt:

“What the governments ultimately adopt might be called a “presidency compromise,” but it is really a proposal made by the Commission.”⁵⁸⁰

In sum, confirming the predictions of Liberal Regime Theory, the practice of consensus-seeking was accompanied by an increasing centrality of the CP in Council negotiations. It established contacts with other governments, tabled compromise proposals and decided on calling votes, and thus upstaged the Commission in its role as the principal mediator among governments. Jean-Louis Dewost directly pinpoints the causal mechanism that Liberal Regime Theory proposes by ascribing the Presidency’s centrality in Council decision-making to the need to adjudicate on the right amount of discretion:

“[Overruling] a minority is just as reprehensible as insisting on accommodation up to the point that it threatens the community interest. (...) Since the normal negotiation process has not allowed [such conflicts] to be prevented, the only alternative to recouring to force is arbitration. (...) These rules of the game have led to the development of a decisive role of a new communitarian organ: the Presidency. It is the Presidency’s responsibility to maintain “normal” political relations within the Community, to try to construct compromises between extreme positions, and at the same time to avert conflict.”⁵⁸¹

Contrary to the expectations of classical regime theory, these practices had already emerged before the “empty chair crisis.” The increasing workload of the Council only served to accentuate these practices. Moreover, the role of the Presidency also varies across issue-areas. Where there is little demand for discretion as in the CAP, the Commission assumes the role as an “honest broker” among governments very much in the way that Hallstein had envisaged for the Commission in general.

⁵⁷⁹ de Zwaan 1995, 119.

⁵⁸⁰ Interview # 2.

⁵⁸¹ Dewost 1983, 78-79 [Translation from French by the author].

Conclusions

This chapter sought to demonstrate that the informal norm of discretion brought about a demand for auxiliary institutions that solve the problem of moral hazard. The reason is that the circumstances that demand discretion are not always perfectly observable in reality. Governments therefore have an incentive to exploit the norm by claiming to be facing unmanageable interest group pressure when this is not the case. Chapter 7 argued in more detail that this auxiliary institution is the CP, which adjudicates on the minimum amount of discretion necessary to bring interest group pressure back to a manageable level. Liberal Regime Theory consequently expected governments' informal practices in decision-making to be closely accompanied by informal practices on the part of the Presidency.

It was argued that new neofunctionalists would not expect any systematic coevolution of seemingly different informal practices. However, they predict that the problem of moral hazard provides an opportunity for the Commission to exploit disagreements among governments and reassert itself as an honest broker among governments. For classical regime theorists, the functions of the CP are rooted in basic interstate collective action problems instead of, as in Liberal Regime Theory, the management of state-society relations: they should vary accordingly. Specifically, this theory expected the CP to emerge across all issue-areas in the late 1960s in response to the empty chair crisis and an increasing complexity in decision-making.

The evidence presented in this chapter strongly supports Liberal Regime Theory. First, it was demonstrated that the Presidency's informal practices in agenda setting and negotiation are inextricably linked to the emergence of the informal norm of discretion in decision-making. In contrast to the predictions of both classical regime theory and new neofunctionalism, the practice of passing Commission proposals through the Council substructure provided the Presidency with an opportunity to structure the agenda according to new priorities. In addition, the practice of consensus-seeking was accompanied by an increase in the importance of the Presidency in intergovernmental negotiations. It established close contacts with other delegations in order to obtain information about their preferences; it was in charge of tabling compromise proposals; and it also increasingly took the decision to call

votes. As a result, and contrary to the expectations of neofunctionalism, the CP increasingly upstaged the Commission in its initial role as an honest broker among governments. Reviewing this development, Paolo Ponzano, a high Commission official, notes in 2000:

“The once very important position of the Commission has gradually been weakened in favor of the Council Presidency, which attained autonomy in suggesting compromises and orienting the Community’s work towards its priorities during the six month term.”⁵⁸²

Second, and in contrast to the predictions of other theories, the role of the Presidency varies systematically across issue-areas. Its influence on the agenda and its adjudicatory role was far less pronounced in the CAP, an issue-area with low domestic uncertainty and regular rule-following behavior.

⁵⁸² Ponzano 2002, 50. See also Ponzano 2000.

CHAPTER 9

The Presidency Bias

This chapter examines the “Presidency bias” on the agenda in order to show that governments regularly drop those issues from the agenda for which the Presidency cannot be trusted to adjudicate on the appropriate degree of discretion. The reason is that governments face a dilemma when exercising discretion in the face of incomplete information about the accuracy of the claim: too little discretion leads to the obstruction of cooperation and ultimately undermines the credible commitment to cooperation. Too much discretion, however, leads to deadweight costs for all parties. It was argued in chapter 7 that in order to guarantee a minimum level of discretion, governments delegate the task of adjudication to an agent with an encompassing interest in the norm – in other words, to another government. But since governments always also have a stake in the outcome, there is a risk that the adjudicating government may collude with a recalcitrant state demanding discretion whenever it itself stands to gain from changes to the dossier under discussion. This chapter shows that governments tend to drop such issues from the agenda. As a consequence, the agenda features a “Presidency bias” towards Commission proposals that the Presidency would prefer to adopt largely the way they are.

Simple rationalist theories predict the reverse. They expect that informal practices will permit large states to eschew their formal commitment whenever they deem their important interests to be at stake. According to such theories, decisions to eschew formal commitment through informal practices will always come from individual large states, rather than from their cooperating partners or an informal institution such as the Presidency, and thus the agenda cannot be expected to show any systematic Presidency bias. Classical regime theory, like Liberal Regime Theory, predicts the agenda will show a Presidency bias, but unlike Liberal Regime Theory, classical regime theory predicts that the agenda will be biased in favor of the CP because the Presidency will be able to manipulate the agenda in its favor by

means of the prerogatives of this office. New neofunctionalists do not make any substantive predictions about the agenda. We shall return to these theories in chapter 10.

This chapter tests these two contrasting predications about the Presidency bias in a quantitative and a qualitative analysis. After a discussion of insights and shortcomings of existing studies of the Presidency's influence in decision-making, an alternative approach to studying the Presidency bias on the agenda is advanced. This approach seeks to establish whether governments drop dossiers from the agenda where the task of adjudication on discretion would put the Presidency in a conflict of interest by focusing on the duration of negotiations. The reason is that negotiations of dossiers that are stalled for the term of a conflicted Presidency must be expected take longer on average than negotiations of dossiers chaired by Presidencies without such a conflict of interest. This correlation is discerned in a multivariate analysis of an original data set of dossiers negotiated in 2000 and 2001. Two randomly chosen dossiers in mini-case studies are subsequently eyeballed in order to uncover the causal mechanism at work.

To foreshadow the findings of this chapter: the evidence strongly supports Liberal Regime Theory. The quantitative study shows a strong positive and statistically significant correlation between a conflicted Presidency and the average duration of negotiations on a dossier. The first mini case study demonstrates that Presidencies facing a conflict of interest are generally regarded as ill-suited to chair negotiations on proposals they dislike. The second mini case study is inconclusive with regard to the Presidency bias, but on a more general level confirms a strong reflex among governments to accommodate governments facing a distributional shock even if these states are in a weak bargaining position and formal rules do not require them to do it.

The State of the Art on the Presidency Bias

Many excellent qualitative studies on the emergence of the Presidency as well as on the styles of different countries at the helm have greatly enhanced our knowledge about the Presidency's

practices and tasks in the EC and at Intergovernmental Conferences.⁵⁸³ They have pointed to various ways in which the Presidency can influence the agenda and steer intergovernmental negotiations. In addition, a number of quantitative studies have more recently begun to study the Presidency's influence in decision-making. They have unearthed statistical evidence that the CP indeed matters, in one way or another, in EU decision-making.

However, the literature suffers from a number of shortcomings that prevent us from drawing clear conclusions from the findings. For example, qualitative studies usually select their cases on the dependent variable by studying the successful, but possibly exceptional interspersions of a government's favored "big projects" onto the Council agenda.⁵⁸⁴ We are consequently unable to assess the explanatory power of the proposed causal mechanism. Quantitative studies that focus on the influence of the Presidency, in turn, commonly struggle with a classical omitted variable bias. The reason is that we lack a baseline theory about European decision-making. In other words, since we do not know what the outcome would have been in the absence of the intervention of the Presidency,⁵⁸⁵ we are unable to draw conclusions about the causal mechanism at work.

For example, Robert Thomson asks whether the legal output during a CP's term is more congruent with its preferences than if it had not held the office. The counter-factual proposition is therefore that the decision outcome would have been substantially different if a government with different preferences had held the office at the time of decision-making. Examining evidence on 70 legislative proposals on the Council's agenda in 1999 to 2000, he finds that decision outcomes are significantly more favorable to the president chairing negotiations at the time of adoption than to other member states. Thomson concludes that governments enjoy additional bargaining power when they are presiding over the final stage of negotiations.⁵⁸⁶ However, he does not sufficiently control for the Presidency's influence on the agenda.⁵⁸⁷ A stronger congruence between the legal output and the Presidency's

⁵⁸³ The literature is too vast to reference it in detail. Seminal works are e.g. Dewost 1984b, Tallberg 2006, Wallace and Edwards 1976

⁵⁸⁴ See e.g. Beach and Mazzucelli 2007, Elgström 2003a, Tallberg 2006. Most existing studies moreover focus on different institutional framework, namely foreign policy and Intergovernmental Conferences.

⁵⁸⁵ See King, et al. 1994, chap 5.2.

⁵⁸⁶ Thomson 2008, 611-612. See also Schalk, et al. 2006.

⁵⁸⁷ He reports that decisions are postponed when the Presidency holds extreme positions. But he does not distinguish between positions coinciding with that of recalcitrant governments and those at the opposite side of

preferences may therefore simply reflect the fact that it stalls dossiers it dislikes so that they are never even discussed. In fact, and in line with Liberal Regime Theory, Andreas Warntjen finds evidence for a Presidency bias on the agenda. Studying environmental legislation between 1984 and 2001, he finds that pending proposals are more likely to be adopted during a term if the CP attaches strong importance to this issue-area.⁵⁸⁸ The study begs the questions, however, how the CP is able to create this bias and why other governments approve of this additional influence. Furthermore, we do not know how substantive the bias is. Since he focuses on a single issue-area, Warntjen cannot assess which dossiers the Presidencies might have sacrificed in return, since it is possible that the Presidency would yield dossiers to which it attaches a similar importance instead of dossiers it dislikes. In other words, it is possible that the extent of the Presidency bias Warntjen discovers for the environmental area varies across all issue-areas.

In short, while these studies offer qualitative and quantitative evidence suggests that the CP in one way or the other makes a difference in EC decision-making, they lack a compelling theory for why this is the case. As a consequence, we know very little about how, and to what extent the Presidency brings about outcomes that would not have occurred otherwise.

Liberal Regime Theory offers a theory that compellingly explains the CP's function in European decision-making. It argues that the key to understanding the Presidency's role is the norm of discretion and the consequent demand for an adjudicator as a solution for the problem of moral hazard. Specifically, it argues that because the Presidency needs to be able to adjudicate on the appropriate amount of discretion, governments enable it to prioritize issues where it faces no conflict of interests. These are those dossiers that the Presidency prefers and wishes to adopt without substantial change. The result is a biased agenda that reflects the chairing government's preferences for integration to a greater extent than if a different country held the office during the same period. The hypothesis can be easily tested. Instead of asking whether the CP advances dossiers it likes, we ask whether it stalls dossiers it dislikes. The central question, then, is whether it takes on average longer – everything else being equal – for

the spectrum. Liberal Regime Theory would expect the Presidency to stall only the former. See Thomson 2008, 604-605.

⁵⁸⁸ Warntjen 2007.

a dossier to be adopted if one of the Presidencies chairing negotiations faces a conflict of interest, that is, if it itself wishes to change the dossier under discussion. This question will be answered through a combination of both quantitative and qualitative techniques.

The Presidency Bias – Quantitative Analysis

As a first step the hypothesis is tested using an original data set of dossiers adopted between 2000 and 2001. This time period was chosen for the practical reason that the Council's electronic register only covers dossiers including agendas and minutes from 2000 on. The data set was narrowed down to Council directives adopted in the second term between the months of July and December of each year. The search in the Eur-Lex database search yields 43 observations. Some Commission proposals go back to 1989 so that the data set includes all possible 15 Council Presidencies. The data are summarized in the annex.

The central dependent variable is the duration of negotiations (**DURATION**) measured as the number of months from the official Commission proposal until the official adoption. The central independent variable (**PRES**) is a dichotomous variable measuring whether or not a country that at one point chairs the negotiation demands changes to the Commission proposal under negotiation. Demands like this are usually documented in newspaper articles (*Agence Europe, European Report*) and can also be found in Council minutes. The variable takes on a value of 1 if there is evidence for such a demand, and 0 otherwise. Another dichotomous control variable was created for the existence of conflict per se (**CONFLICT**). Conflict was measured in the same way as the independent variable, namely by focusing on the existence or non-existence of disputes in the Council. The variable has a value of 1 if conflict can be detected in newspapers or minutes, and 0 otherwise. As explained above, this simple, dichotomous measure for conflict is in fact more accurate and straightforward than a continuous variable measuring the distance of policy positions. The reason is that in the absence of any baseline theory about intergovernmental interaction in the Council, we cannot infer the existence of conflict from the distance of positions.

The duration of negotiations may also be influenced by the formal voting rule, because a recalcitrant government can invariably block a decision under unanimity. If majority voting applies, however, the decision to conclude negotiations lies with the majority or, from the perspective of Liberal Regime Theory, with the Council Presidency. We therefore added a control for the underlying voting rule (**MAJORITY**). This variable has a value of 1 if the legal base of the dossier provides for QMV, and 0 otherwise. Another factor that may increase the duration of negotiations is parliamentary participation in decision-making. A dummy variable was created in order to account for parliamentary participation. **EPINVOLVE** is a dichotomous variable measuring whether or not the legal basis provides for Parliament's participation in decision-making. It takes a value of 1 if it participates, and 0 otherwise. Assuming that Parliamentary involvement increases the duration of decision-making *per se*, another dichotomous variable was created that measured the strength of involvement (**EPSTRONG**). If the legal basis provides for the weaker consultation procedure, the variable takes a value of 0. If the stronger codecision procedure applies, the variable has a value of 1.⁵⁸⁹ Therefore, the basic equation for the first model estimating the relationship between a conflicted Presidency and the duration of negotiations with parliamentary involvement is:

$$DURATION = \beta_0 + \beta_1 PRES + \beta_2 CONFLICT + \beta_3 MAJORITY + \beta_4 EPINVOLVE + \varepsilon$$

Accordingly, the equation for the second model including a variable for the strength of parliamentary involvement is:

$$DURATION = \beta_0 + \beta_1 PRES + \beta_2 CONFLICT + \beta_3 MAJORITY + \beta_4 EPSTRONG + \varepsilon$$

The regression discerned the relationship between the duration of negotiations and a conflicted CP. The models do a good job, explaining more than 60 per cent of the variation, despite the fact that the number of observations is quite small. In both models, one with simple parliamentary involvement and the other with strong or weak parliamentary involvement, the **PRES** variable is correctly signed and in both models shows strong

⁵⁸⁹ I did not control for treaty changes, since procedural changes are largely captured in the parliamentary involvement variables. I also did not control for the number of member states involved in the negotiation for two reasons: First, qualitative studies suggest that the Northern enlargement in 1995 (Finland, Sweden, Austria) did not affect the dynamics of Council negotiations. Second, even if it mattered, it would have affected only one case in the data set.

significance at the 1 per cent level. The results also show that strong Parliamentary involvement on average increases the duration of negotiations. This is not very surprising given that parliamentary involvement requires additional negotiations for the governments. It is *inter alia* in line with the findings of Thomas König and colleagues that parliamentary participation tends to slow down the decision-making process.⁵⁹⁰ Also in line with these studies is the finding that majority voting, too, slightly decreases the duration in cases of strong parliamentary involvement. The existence of conflict *per se* does increase the duration of negotiations. But the effect is not statistically significant and entirely picked up by the other variables.

Table 13: Results of the regression analysis

	Model 1 (epinvolve)	Model 2 (epstrong)
pres	37.0209*** (6.677)	38.6998*** (6.136)
conflict	7.3042 (5.246)	7.2156 (4.848)
majority	-4.9544 (6.873)	-12.9259* (6.846)
epinvolve	14.3327 (10.345)	
epstrong		13.4183*** (4.572)
_cons	9.8023 (12.102)	21.1332*** (6.030)
Number of obs	43	43
Adj R-squared	0.5842	0.6427

* 0.10, ** 0.05, *** 0.01 significance

In a nutshell, the data provide strong evidence for the validity of the hypothesis that the duration of negotiations on a dossier increases significantly – everything else being held constant – when one of the governments at the helm faces a conflict of interest, that is, when it itself wishes that changes be made to the dossier under question.

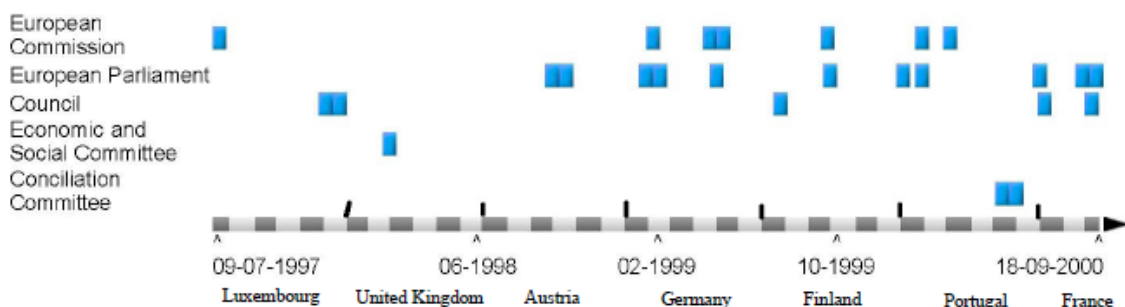
⁵⁹⁰ The literature is too vast to be cited in full. See, for instance, the discussion in McElroy 2006, Schulz and König 2000.

The Presidency Bias – Qualitative Analysis

The statistical analysis detects correlation, but cannot unveil the exact causal mechanisms. To recap, Liberal Regime Theory expects dossiers to linger in the Council substructure instead of being discussed among Ministers whenever a conflicted CP is at the helm. The same dossier should be advanced once a new government assumes this office. Simple rationalist theories do not expect the Presidency to have any such effect.

Two randomly selected cases were therefore “eyeballed” in more depth in order to trace the successive Presidencies’ behavior in each case. The selection rule is simple. The cases studied are the first two cases in the data set that feature conflicted Presidencies. The expectation of Liberal Regime Theory is that successive Presidencies handle the dossiers differently. Conflicted Presidencies let them slide while others actively chair negotiations. Altogether, the two cases comprise nineteen observations of successive presidencies chairing negotiations of dossiers in different issue-areas. The timeline shows the course of negotiations on the Commission proposal. The blue boxes indicate a resolution by one of the legislative actors involved.

The end of life vehicles directive



The negotiation of the so-called “end of life vehicles directive” (ELV) constitutes a kind of natural experiment, because Germany, out of the blue, suddenly turned from a generally favorable into a deeply conflicted Presidency. The ELV directive stipulated take back and recycling duties for the automobile industry. Initially, only Spain and the United Kingdom voiced opposition to the plan while the majority of governments, including Germany, Sweden,

Denmark, and Austria, supported the Commission proposal.⁵⁹¹ During the German Presidency in the first half of 1999, however, the governing coalition of the Social Democratic Party and the Greens (Die Grünen) made a complete U-Turn. Suddenly, they were completely opposed to the act and tried to use their prerogatives as CP to extract concessions from their partners. Thus, one and the same Presidency suddenly turned from a supportive to a conflicted Presidency – an ideal opportunity to observe the operation of the causal mechanism Liberal Regime Theory proposes. In fact, the evidence strongly supports Liberal Regime Theory. Germany's efforts to chair the negotiations were subsequently identified as a clear breach of established norms for the conduct of the CP. The decision was consequently stalled until the following Finnish Presidency.

The European Commission officially submitted its proposal for the ELV directive in July 1997. The proposal constituted a compromise between the Danish Environment Commissioner, Ritt Bjerregaard, and the German Industry Commissioner, Martin Bangemann.⁵⁹² Negotiations in the Council substructure and with the EP did not make much progress under the UK Presidency in the first half of 1998. The Austrian Presidency consequently inherited responsibility to find an agreement among the member states and announced its determination to adopt a common standpoint by December 1998.⁵⁹³ Under its chairmanship, working parties and COREPER prepared a compromise text that all delegations were willing to accept.⁵⁹⁴ Although they had not yet received Parliament's opinion on the proposal, the Council declared itself to have reached a consensus, which was "expected to encourage the adoption of the Council's 'common position' in March" during the German Presidency.⁵⁹⁵ The German Minister for the environment, Jürgen Trittin (Die Grünen), announced that the adoption of this directive would be a key policy goal for Germany's term in charge of EU business.⁵⁹⁶ Indeed, when only two months later the EP also threw its weight behind the Commission proposal, an agreement on the directive seemed to be in reach.⁵⁹⁷ The Ministers were expected to officially adopt this standpoint at their Council meeting in March

⁵⁹¹ Agence Europe 1999b.

⁵⁹² Agence Europe 1997e, European Voice 1997.

⁵⁹³ European Voice 1998.

⁵⁹⁴ Council of the European Union 1998b.

⁵⁹⁵ Agence Europe 1998a, Agence Europe 1998b.

⁵⁹⁶ European Voice 1999e.

⁵⁹⁷ European Voice 1999c.

1999.⁵⁹⁸ Shortly before this meeting, the German delegation announced that it felt confident of sealing the agreement, which had in principle and substance already been reached under the Austrian Presidency.⁵⁹⁹

Surprisingly, the German Chancellor Schröder (SPD) decided to revoke the German delegation's support for the compromise. The reason was a direct intervention by the CEO of Volkswagen, Ferdinand Piëch, who had complained about the extensive adjustment costs the automobile industry was going to face. Schröder invoked his prerogative as Chancellor to define the policy guidelines and instructed Trittin to postpone the scheduled decision in order to reopen negotiations.⁶⁰⁰ His colleagues heavily criticized this decision during a lively discussion at lunch.⁶⁰¹ The Council officially noted that

“(...) a formal decision on the common position on the proposal on end-of-life vehicles (...), in accordance with the consensus of December 1998, had been postponed and would be taken at the Environment Council meeting on 24 and 25 June 1999; the intervening period would be used to finalise the document from a legal-linguistic point of view (...).⁶⁰²

The Commission declared that it

“(...) finds it difficult to understand why such a delay is necessary, given that today's discussion confirmed the consensus reached at the December Council.”⁶⁰³

Shortly before the Environmental Council in June 1999, it looked again as if the Council was going to adopt the common position the Ministers had agreed on in December 1998.⁶⁰⁴ Trittin officially announced that the German delegation would no longer seek to make changes to the text or postpone a decision.⁶⁰⁵ The UK and Spain, however, who had initially opposed the directive, were rumored to have put pressure on the German delegation for it to call a vote in order to jointly and officially reject the proposal. Other delegations reacted strongly to this rumor and regarded this imminent maneuver as an abuse of the Presidency's power. If the German Presidency indeed decided to call a vote, they threatened,

⁵⁹⁸ European Voice 1999b.

⁵⁹⁹ Agence Europe 1999d.

⁶⁰⁰ On the conflict within the German delegation see Wurzel 2000.

⁶⁰¹ Agence Europe 1999f.

⁶⁰² Council of the European Union 1999b.

⁶⁰³ Council of the European Union 1999b.

⁶⁰⁴ Financial Times 1999c.

⁶⁰⁵ Frankfurter Allgemeine Zeitung 1999a.

they would for the first time in the history of European integration overturn this procedural decision as provided for in the Council RoP.⁶⁰⁶

The German delegation consequently decided to avoid any discussion at all by listing it as the 10th item of an already loaded agenda.⁶⁰⁷ Furious demands on the part of the Commission, Finland, Sweden, Denmark and Austria to discuss the topic were “rowdily brushed off.” Trittin then decided to discuss the dossier in a strongly restricted session.⁶⁰⁸ In this session, he demanded concessions for the German car industry and announced his intention to vote against the directive otherwise. Because one television camera was still recording sound, the *European Voice* was able to report the highlights of exchanges between the Ministers:

“Fascinated journalists gathered round the screen as Trittin harangued ministers for refusing to accept his new ‘compromise’ proposal. (...) ‘What are you doing trying to talk us into a compromise when you are the problem?’ asked the Austrian Environment Minister, Martin Bartenstein. Denmark’s Sven Auken was almost screaming with anger and France’s Dominique Voynet boomed: ‘We cannot leave this room to tell the press and the public that we have dropped our trousers for the car industry!’ (...) The only support for Trittin’s trousers came from the UK’s Michael Meacher, who announced he was not performing a U-turn but had been told to reverse his stance by Premier Tony Blair under pressure from Schröder.”⁶⁰⁹

The British delegation asked for the vote to be postponed, and the Spanish delegation announced its intention of abstaining. The Council then noted the impossibility of securing a qualified majority in favor of the text and decided to pass the issue for further discussion on to the Finnish Presidency.⁶¹⁰

The incoming Finnish Presidency vowed to push for a swift agreement on the dossier despite German intransigence on the issue.⁶¹¹ Indeed, after only three weeks of deliberations in the Council substructure, COREPER reached a qualified majority against a recalcitrant German delegation. The December agreement was only slightly modified to delay

⁶⁰⁶ Agence Europe 1999b.

⁶⁰⁷ taz 1999.

⁶⁰⁸ Die Welt 1999a, Frankfurter Allgemeine Zeitung 1999b.

⁶⁰⁹ <http://www.europeanvoice.com/article/imported/car-recycling-backdown-skids-into-tv-trouble/38971.aspx>.

⁶¹⁰ Agence Europe 1999e.

⁶¹¹ European Voice 1999a.

implementation by three years.⁶¹² The Ministers, in turn, decided to avoid an open conflict and debate on the issue and adopted the common position by means of a written procedure.⁶¹³ It was adopted as an A-item at the following Council at the end of June.⁶¹⁴

German car manufacturers immediately announced that they would go to court to block the directive.⁶¹⁵ They initially found support in the two largest groups within the EP, the conservative EPP and parts of the socialist PSE.⁶¹⁶ In its final vote, Parliament indeed tabled various amendments that were intended to lower carmakers' expected costs.⁶¹⁷ The Council found that it was not able to accept all of them,⁶¹⁸ and the Commission also declared that it did not approve of Parliament's amendments.⁶¹⁹ Council and Parliament consequently convened a conciliation committee. It met twice at the end of the Portuguese Presidency and quickly found an agreement, which modified the original text only slightly.⁶²⁰ The Council approved the final directive as an A-item in its meeting in July 2000.

In sum, the case of the ELV directive provides strong support for Liberal Regime Theory. The conflicted German Presidency's attempts to use its prerogatives to avoid publicity, to call a vote and to propose a compromise were considered a clear abuse of the office. In other words, governments clearly agreed that a Presidency that wished to make changes to the text under discussion should not be given the power to decide on the extent of discretion itself. Even Spain and the UK did not seize the opportunity to form a blocking minority in the Council. Instead, they helped stall the decision of a proposal they disliked until the following Finnish Presidency could pick it up. Simple rationalist theories are unable to explain this behavior. Germany, as a large state, particularly with the backing of the UK, should have asserted itself against the coalition of small states. Contrary to the expectations of classical regime theory, Germany was unable to use the office in order to manipulate the agenda.

⁶¹² Die Welt 1999b.

⁶¹³ Agence Europe 1999a, Die Welt 1999c.

⁶¹⁴ Council of the European Union 1999a.

⁶¹⁵ Financial Times 1999b.

⁶¹⁶ Agence Europe 1999c, European Voice 1999f.

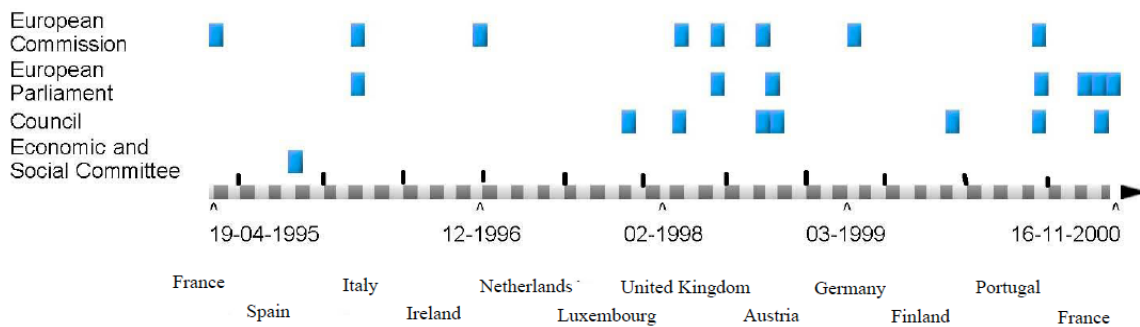
⁶¹⁷ Financial Times 1999a.

⁶¹⁸ Council of the European Union 2000c.

⁶¹⁹ European Voice 1999d.

⁶²⁰ Agence Europe 2000

The in vitro diagnosis directive



The Commission proposal on In-Vitro-Diagnostic medical devices (IVD) was meant to harmonize product standards in order to do away with obstacles to a common market. But because the directive covered products based on human tissue, it raised strong concerns about public health, especially in France and Austria. France was absolutely opposed to the proposal, because it was scarred by a scandal about contaminated blood in France in the 1980s. It fought hard to keep its very high national safety regulations in place for blood-related medical products. Austria was the first country to express broader ethical concerns. The Council consequently split the proposal up into two directives, the one concerning ethically critical and the other non-critical matters. Austria would consequently only chair negotiations on the directive it could support, while other critical parts were stalled through referral to an ethics committee. The negotiations on the in-vitro diagnosis directive partly confirm Liberal Regime Theory. Although the available data cannot shed sufficient light on the behavior of the Presidency, the search for consensus shows more generally the operation of an informal norm of discretion among governments.

Initially, the Commission's proposal for a directive on IVD devices met with the strong approval of producers and European institutions. In November 1995, the Economic and Social Council supported the Commission text and suggested applying it even more broadly.⁶²¹ Also the EP, in March 1996, largely approved of the proposal.⁶²² The Irish Presidency in the second half of 1996⁶²³ as well as the Dutch Presidency in the first half of 1997 felt confident that they were going to make substantial progress towards a political

⁶²¹ European Report 1995.

⁶²² Agence Europe 1996a, Agence Europe 1996c, Financial Times 1996a.

⁶²³ Agence Europe 1996b.

agreement. The Dutch Presidency announced that they were trying to reach a majority for a political agreement at the Internal Market Council in May.⁶²⁴

Yet, the fact that the directive covered medical devices made using substances derived from human tissue attracted more and more controversy. France was again totally opposed to the proposal and fought hard to keep national safety regulations in place.⁶²⁵ It argued that the text constituted a regression in relation to the level of public health protection provided by its own national legislation. Its representatives in the Council WGs consistently demanded stricter public health protection provisions to be included.⁶²⁶ At their meeting in May, the Ministers reached a consensus on several key issues. But France announced that it could not agree on the whole question of human tissues and consequently demanded exclusion from the directive.⁶²⁷ The Austrian delegation, too, raised a number of ethical concerns, which led them not to support the text. The Council therefore decided to postpone the decision in order to search for a possible compromise.⁶²⁸

The following Luxembourg Presidency decided to split the text up into two different directives: One on products made using substances derived from human tissue, and one on other products.⁶²⁹ The governments were thus able to postpone a decision on controversial questions regarding human tissue and concentrate on finalizing the directive covering less controversial products. Luxembourg scheduled a debate on this latter question for November 1997.⁶³⁰ At this meeting, the French objections were overcome after it had received a number of concessions regarding the safety and reliability of the products.⁶³¹ The common position was adopted as an A-point in March 1998 under the British Presidency. Parliament largely agreed with this common standpoint⁶³² so that this non-controversial directive was adopted in October 1998 under the Austrian Presidency.⁶³³

⁶²⁴ Agence Europe 1997d.

⁶²⁵ European Report 1998.

⁶²⁶ Agence Europe 1997d and Agence Europe 1997c.

⁶²⁷ Pharma Marketletter 1997.

⁶²⁸ European Report 1997c.

⁶²⁹ European Report 1997b.

⁶³⁰ Agence Europe 1997b.

⁶³¹ Agence Europe 1997a, European Report 1997a.

⁶³² Europe Environment 1996.

⁶³³ Council of the European Union 1998a

The second directive covering controversial questions regarding human tissues had been left pending. An agreement appeared difficult, as France remained resistant.⁶³⁴ Discussions on this new directive were put off during the British and Austrian Presidency by referring it to an ethics committee. In July 1998, the so-called European ethics group, chaired by the French Noëlle Lenoir, proposed strict general rules for directives concerning human tissue.⁶³⁵ The Council picked up negotiations again in May 1999 under the German Presidency.⁶³⁶ Negotiations progressed rapidly from this moment on, partly because Parliament had decided to abdicate its right to another first reading.⁶³⁷ The Council was able to reach a political agreement at its meeting on 13 and 14 December 1999.⁶³⁸

In sum, this mini case study confirms the theory that the Council tried to search for a compromise proposal despite the fact that a majority was feasible and the Commission proposal had met with general approval by other institutional actors. It is more difficult to find direct evidence for the hypothesis on adjudication. As Liberal Regime Theory predicts, negotiations were indeed put on ice during the Austrian Presidency, which had expressed ethical concerns and wished to change the original Commission proposal. However, given that the directive had already been referred to the ethics committee under the British presidency, it is unclear whether the decision would have been postponed anyway.

⁶³⁴ Medical Device Approval Letter 1998.

⁶³⁵ Reuters 1998.

⁶³⁶ Europe Drug and Device Report 1999.

⁶³⁷ European Report 2000.

⁶³⁸ Council of the European Union 2000b.

Conclusion

This chapter sought to demonstrate that the Council agenda features a bias toward dossiers the Presidency favors adopting unchanged. Liberal Regime Theory explains this on the grounds that a conflicted Presidency, that is, a Presidency that itself prefers to change the dossier under discussion, is unable to deliver a trustworthy judgment. These dossiers are consequently dropped from the agenda. The result is an agenda that reflects the Presidency's preferences to a greater extent than if a different government were in the chair. Thus, in contrast to classical regime theory, the Presidency does not actively manipulate the agenda in its favor. Rather, the bias creates the conditions that are necessary for the Presidency to adjudicate on the appropriate amount of discretion. Simple rational theories, in complete contrast, do not expect the agenda to feature any such bias.

The findings in this chapter again provide strong evidence in support of Liberal Regime Theory. First, and contrary to simple rational theories, the quantitative analysis demonstrated a statistically significant correlation between the existence of a conflicted Presidency and the duration of negotiations in the Council. This was interpreted as evidence that governments drop dossiers over which the Presidency faces a conflict of interest. Second, the mini case study on the ELV directive demonstrated that conflicted Presidencies are regarded as unable to chair negotiations on the dossier in question. This is most clearly expressed in the Austrian Minister's outcry: "What are you doing trying to talk us into a compromise when you are the problem?" Contrary to the expectations of classical regime theory, the German Presidency was not able to manipulate the agenda in its favor. Every time it tried to use its prerogatives in order to avoid a debate, call a vote, or propose a compromise despite the fact that it was in a conflict of interest, it was immediately shown its limits.

CHAPTER 10

The Presidency as an Adjudicator

Liberal Regime Theory argues that because the informal norm of discretion entails a classical problem of moral hazard, governments delegate the task of adjudication on the extent of discretion to the Council Presidency. We established in the previous chapters that the initially modest office of the Council Presidency indeed evolved concomitantly with the emergence of an informal norm of discretion in decision-making. Furthermore, issues regarding which the President is in a conflict of interest when adjudicating the appropriate amount of discretion are regularly dropped from the Council agenda. This chapter examines the Presidency's role in negotiations in order to show that governments accept the Presidency's authority in decision-making. Presidencies that are not in a conflict of interests are expected to become the center of negotiations. They decide on the right amount of discretion and on calling a vote.

Other theories disagree on various accounts. New neofunctionalists regard any disagreement among governments over the interpretation of rules as an opportunity for institutional actors to assert themselves in agenda setting and negotiations at the governments' expense. Simple rationalist theories, in complete contrast, do not expect any institutional actor, be it the Commission or the Council Presidency, to be able to exert any influence whenever a large state considers its vital interests in jeopardy. Thus, a threat to apply formal rules should have no effect on its bargaining positions. Instead, negotiations will be dominated by threats of exclusion and exit. Classical regime theory agrees with Liberal Regime Theory on the importance of the Presidency in intergovernmental negotiations. Yet, it expects all Presidencies to establish authority and manipulate negotiations in their favor regardless of their stance on an issue.

These implications are studied in the example of a "least likely" case, the Working Time Directive. This directive was a proposal in the early 1990s for the regulation of daily, weekly, and annual working time. Despite the fact that a majority in favor of the proposal was

already feasible after a few months, negotiations nonetheless dragged on for several years. Liberal Regime Theory is least likely to apply. First, it concerns a dossier that turned out to be highly sensitive for a large member state. In addition, the concurrent negotiation and ratification of the Treaty of Maastricht provided the UK with the opportunity to realize otherwise less viable threats of exit. Second, new neofunctionalists commonly cite this case to exemplify the Commission's power to exploit conflicts among member states in order to impose outcomes on other governments.⁶³⁹

To foreshadow the findings: given that we are dealing with a difficult case, the evidence is, as expected, ambiguous. By and large, however, it provides supporting evidence for Liberal Regime Theory. Although conflicts among governments indeed provided the Commission with the opportunity to make full use of its agenda-setting power, as new neofunctionalists expected, it was able neither to assert itself in the ensuing negotiations nor to prevent governments from making substantive changes to the proposal. Instead, the successive Presidencies became the center of the negotiations in order to deal with the British claim to be facing a distributional shock. Contrary to the expectations of simple rationalist theories, their occasional threats to call votes did not remain feeble. Most of the time, they prompted the British governments to take on a more conciliatory position. British threats of exit, in turn, usually led to the postponement of the negotiations rather than to substantive concessions. Furthermore, in contrast to the expectations of classical regime theory, the Presidencies' authority varied with its preferences with respect to the dossier under discussion. Presidencies that shared some of the UK's concerns were in general less successful in suggesting concessions than other governments. In the end, governments probably conceded more to the UK than they had originally intended to. Yet the concessions were clearly tailored to return domestic recalcitrance to a manageable level – no more and no less. Thus, the final result cannot be explained without reference to Liberal Regime Theory.

⁶³⁹ See, e.g., Pollack 2003b, chap. 6.

Agenda Setting – an Unfettered Application of Formal Rules

When preparing the “Proposal for a Council Directive Concerning Certain Aspects of the Organization of Working Time”, the Commission made full use of formal rules. In line with new neofunctionalism, it capitalized on conflicts among governments, exploited ambiguities in the interpretation of the treaty, and eschewed the informal practices described in chapter 4. It selectively withheld alternative proposals, ignored governmental expertise on the issue, and tailored the proposals in such a way that a majority in the Council could easily adopt it against a recalcitrant government. The proposal was officially submitted in September 1990.⁶⁴⁰ After a review of the situation in the Community and a justification of the legal basis as a health and safety issue, the Commission made specific proposals regarding the minimum daily and yearly rest period, including annual paid holidays, and various provisions on shift and night work. It also mentioned, but provided no specific proposals for, the maximum length of the working week. Finally, the Commission proposal included the possibility of a very limited number of derogations in cases of *force majeure*, seasonal work or collective agreements. The directive was to be transposed into national law within two years, i.e. by 31 December 1992.

The Commission selectively withholds alternative proposals

At the point of preparation, existing national regulations on working time reflected the diversity of European labor market policies. All member states with the exception of the United Kingdom were following some standard in the regulation of working time. But these provisions varied heavily in content and in terms of the respective role of governments or collective bargaining in setting standards. Various alternative proposals were therefore feasible.

A first alternative to the submitted proposal would have been no proposal at all. There was no binding European Council decision or imminent treaty deadline that required the Commission to take immediate action for the protection of the health and safety at the working place. It could draw, however, on a series of broader declarations of the European Council

⁶⁴⁰ Commission of the European Communities 1990a.

since 1988 regarding the importance of social aspects in the Single Market. The member states had moreover invited the Commission to draw up a Community Charter of Fundamental Social Rights for Workers.⁶⁴¹ The Commission summarized its plans in an action program on the implementation of the charter, which among others proposals put forward the idea of harmonizing member states' legislation on working time by laying down certain minimum requirements.⁶⁴² At the Strasbourg summit in December 1989, all member states except the United Kingdom accepted the Charter as a non-binding declaration, took note of the Commission's action program and vaguely called "upon the Council to deliberate upon the Commission's proposals in the light of the social dimension of the internal market."⁶⁴³ Thus, the Working Time Directive can be considered a proper Commission initiative, although it could and did justify its action on the basis of non-binding declarations on the part of the member states.⁶⁴⁴ The Commission exploited this ambiguity.

A second alternative to the submitted proposal would have been a proposal on a different legal basis. Social regulations would have been possible both under Article 100a (2) and Article 118a SEA. Article 100a (2) covered provisions "relating to the rights and interests of employed persons." Article 118a explicitly covered health and safety provisions. It read:

"Member states shall pay particular attention to encouraging improvements, especially in the working environment, as regards health and safety of workers, and shall set as their objective the harmonization of conditions in this area, while maintaining the improvements made."

An important difference between the two articles was the procedural requirement: Article 100a (2) required unanimous consent whereas Article 118a provided for qualified majority voting in the Council. The Commission chose Article 118a as the legal basis for the Working Time Directive – a choice that was immediately and explicitly disputed by the British government and, according to the British Conservative press, also within the Commission service.⁶⁴⁵ Also Spain and the Netherlands interpreted the choice of legal basis as a political ruse by the Commission to circumvent vetoes.⁶⁴⁶ It was hence considered likely

⁶⁴¹ See the discussion in Cram 1997, 39-42.

⁶⁴² Commission of the European Communities 1989.

⁶⁴³ European Council 1989.

⁶⁴⁴ European Commission 1990.

⁶⁴⁵ *The Independent* 1990c, *The Times*, June 16 1990, *The Economist* 1990c.

⁶⁴⁶ *Financial Times* 1991b, Reuters 1991.

from the outset that Britain would take the Commission to court for misuse of power, although its chances of success were considered marginal.⁶⁴⁷

Third, the Commission could have chosen a different content. As mentioned, national regulations differed markedly with regard to content and the role of government intervention. Different proposals for different majority coalitions were therefore feasible. The DG V under the Greek Commissioner for Social Policy, Vasso Papandreou, chose to propose regulations on minimum daily, weekly and yearly rest periods as well as on night and shift work. It was considered “conservative” in the sense that many member states had similar or even more stringent legislation in force. But it would require considerable legislative change and adjustment costs in the United Kingdom and Ireland, which together were not able to form a blocking minority. By choosing a conservative set of rules, the Commission ensured the existence of a majority in favor of the proposal.⁶⁴⁸ Yet the proposal was heavily debated within the college of Commissioners. The rift ran along both national and ideological lines, as the following indignant passage from the memoirs of Competition Commissioner, Leon Brittan, suggests:

“Week after week in meetings of the Commission, I duly had to act up to the Mr. Gradgrind image by taking on the latest half-baked proposition from the then Social affairs Commissioner Vasso Papandreou, a Greek socialist of the old school. In fairness to Jacques Delors, he too knew that we were frequently being served up economically damaging nonsense of the first order (...) [Jacques Delors] had no sleep at all because of the monstrosity of the latest [working time] proposal that Papandreou had just delivered to him, straight, in his view, from the Socialist International – or, to be strictly accurate, from the Socialist Group in the European Parliament.”⁶⁴⁹

The final vote was consequently contested within the college with 6 out of 17 commissioner openly opposing it.⁶⁵⁰

⁶⁴⁷ The Guardian 1990a, The Independent 1990b, The Independent 1990d, The Times 1990a, The Times 1990b.

⁶⁴⁸ Gray 1998.

⁶⁴⁹ Brittan 2000, 49. Similarly The Economist 1990a.

⁶⁵⁰ The Independent 1990d. The Independent 1990d

The Commission does not draw on governmental expertise

Prior to the publication of the proposal, the Commission provided several justifications for the need for Community action on working time. First, Papandreou argued that the social costs from accidents during shift and night work exceeded economic gains. Second, a minimum regulation was intended to prevent a regulatory race-to-the-bottom among European member states.⁶⁵¹ The final proposal, however, dropped these economic justifications. Citing independent research and a study conducted by the International Labor Organization, it argued in line with the directive's legal basis that unregulated working first and foremost endangered health and safety at the workplace.⁶⁵²

Given the complexity of the issue, and ideological controversies surrounding the proposal, it is not surprising that the independent nature and quality of the proposal was immediately and heavily disputed.⁶⁵³ The British Employment Secretary, Michael Howard, commented:

“The Commission’s proposal starts from the assumption that night work and shift work are damaging to health and safety and need to be regulated. We cannot accept this. There is no evidence that night work and shift work create serious health problems for workers in general and therefore there is no justification for the broad and sweeping controls proposed by the Commission.”⁶⁵⁴

The House of Lords’ Select Committee on the European Communities therefore decided to convene expert hearings on working time. In this meeting as well as in public, European business leaders accused the Commission of “over-hasty presentation and ill-preparation”⁶⁵⁵ as well as of a selective use of biased studies.⁶⁵⁶ Other organizations however, such as for example the British Medical Association, supported the proposal and demanded intervention to monitor excessive working hours by junior doctors.⁶⁵⁷ The Select Committee acknowledged that for some types of work excessive working time could have a bearing on

⁶⁵¹ See Commission of the European Communities 1990b, The Guardian 1990c, The Times 1990b, Agence Europe 1990a, The Times 1990a.

⁶⁵² Commission of the European Communities 1990a.

⁶⁵³ Tsoukalis 1997, 135.

⁶⁵⁴ Dow Jones Factiva 1990.

⁶⁵⁵ Agence Europe 1990b, NRC Handelsblad 1991a, The Independent 1990a.

⁶⁵⁶ The Economist 1990b, The Guardian 1990b.

⁶⁵⁷ Gray 1998, 327.

the health and safety of workers. It recommended a sectoral instead of a global approach as proposed by the Commission.⁶⁵⁸

Importantly, there was criticism that the Commission had failed to consider governmental expertise. In particular, the Select Committee complained that the Commission had eschewed an informal practice that was described in chapter 4, in failing to consult the standing government expert group, the Advisory Committee on Safety, Hygiene and Health Protection at Work. This was considered a clear breach of established procedure, because this group of governmental experts had been explicitly envisaged to assist the Commission in the preparation and implementation of activities in this field. In response to accusations of having disregarded scientific evidence, the responsible DG V subsequently promised to consult governments on the costs to business and inform member states on future proposals before their publication.⁶⁵⁹ The ECJ would later back the Commission in its approach, arguing that, although it was considered good practice to consult national experts, it was not a formal procedural requirement.⁶⁶⁰

Analysis

In proposing Community regulation in the field of working time, the Commission had shaken off informal constraints and exploited conflicts among governments in order to make full use of the formal agenda-setting rules. It did not act irrationally, as one might object. In fact, it remained entirely within the realm of legality under the premise of implementing the treaty's arguably vague objectives. Eschewing the informal norm of prior consultation, it chose to submit one out of several feasible proposals that would establish Community competences in this field. Yet the content of the proposal promised to impose considerable adjustment costs for various member states, and for the United Kingdom, in particular, who would immediately claim to be facing a distributional shock and demand concessions.

⁶⁵⁸ *Europolitique* 1991j, House of Lords 1990.

⁶⁵⁹ *Financial Times* 1991f.

⁶⁶⁰ European Court of Justice 1994. See also *Agence Europe* 1990b and Gray 1998, 354.

Negotiation – the Prevalence of Informal Practices

While the agenda-setting stage features behavior we would expect to arise on the basis of formal rules, the following negotiation stage is rife with informal practices. Instead of voting the British government down, negotiations continued until all governments agreed to a compromise. The Commission proposal was consequently changed several times during the intergovernmental negotiations.

How can we explain the fact that governments refrained from overruling the British delegation? Liberal Regime Theory interprets this phenomenon as the exercise of discretion with a view to rendering special interest group pressure manageable. It therefore expects the Presidency to assume a central role in negotiations in order to adjudicate on the amount of discretion and on the use of formal voting. Moreover, Presidencies that are in a conflict of interest are expected to be less successful in fulfilling this function. Classical regime theorists agree on the importance of the Presidency, but do not expect different Presidencies to vary in their influence. New neofunctionalists, in contrast, expect the Commission to assume the role of a mediator among governments. Finally, simple rationalist theories expect intergovernmental negotiations to degenerate into decentralized bargaining whenever large states consider their important interests at stake. Thus, negotiations should feature effective threats of exclusion and exit, while the Presidency's or other actors' threat to apply formal rules should not have any effect at all.

The Luxembourg Presidency (January to June 1991)

Luxembourg was in favor of the Commission proposal, which largely reflected existing national regulations. Furthermore, the social dimension was a priority on the Luxembourg Presidency agenda. In an exchange of views with the EP in January, the President-in-Office of the Council, Jean-Claude Juncker, announced an acceleration of the study of the directive with a view to adopting it at the end of his term.⁶⁶¹ He also did not consider the controversy about the proposal's legal basis a major problem. Juncker was confident that the CP would

⁶⁶¹ Agence Europe 1991b.

overcome observed and potential opposition when meeting individually with concerned ministers.⁶⁶²

Despite Luxembourg's commitment to a quick resolution of conflicts, negotiations became increasingly bogged down, with the first reading in the EP under the consultation procedure in February instigating major conflicts along ideological and national lines. After a turbulent session, the socialist majority in Parliament recommended 40 amendments for strict measures that went far beyond the Commission's original proposal. The *rapporteur* and the Conservative group within the EP decided not to participate in the committee vote in order to dissociate themselves from a document they considered too "socialistic".⁶⁶³ The Commission was under no obligation to include any amendments into its proposal. Eventually, it incorporated twelve rather moderate amendments in whole or in part that did not jeopardize the majority coalition in favor of the proposal.⁶⁶⁴

Conflicts among governments intensified in the first half of 1991, despite the fact that the Commission had tried to alleviate initial concerns about the directive by promising to be flexible about how the directive was going to be implemented.⁶⁶⁵ Differences between member states' social systems became increasingly noticeable. Rich countries with strong regulation preferred the social program in general and expressed concerns over being undercut by poorer states with weak regulations.⁶⁶⁶ A few weeks after official submission, France therefore demanded that weekly working time be capped at a maximum of 48 hours.⁶⁶⁷ Denmark and Germany moreover opposed the idea of centralized statutory regulations. They insisted on respecting their tradition of collective agreements among social partners at the sectoral level. Poorer member states with weaker social regulation like Greece, Portugal, Spain and Ireland had more general reservations about the Commission's social program. They were concerned that high barriers would impose very high adjustment costs on their economies. Being weakly represented in the Council, they hoped to be able to free-ride on a

⁶⁶² Europolitique 1991i.

⁶⁶³ Agence Europe 1991a, Europolitique 1991h.

⁶⁶⁴ Agence Europe 1991a, Commission of the European Communities 1991.

⁶⁶⁵ Financial Times 1990b.

⁶⁶⁶ Europolitique 1991a.

⁶⁶⁷ Lewis 1998, 371.

vociferous British opposition.⁶⁶⁸ The British labor market with no limit on weekly working time at all was the least regulated market in the EC. In addition to this, large parts of the Conservative party, and to some extent also the British public opposed centralized social regulations for ideological reasons.⁶⁶⁹ Yet the issue of the role of social partners was solved in May and June 1991 when Denmark, Germany, and Ireland agreed on Luxembourg's presidency compromise to accept collective agreements between employers and employees as an alternative to national legislation.⁶⁷⁰ Also Greece and Spain soon signaled willingness to compromise, because the regulations did not go beyond their own standards.⁶⁷¹

The most fundamental and hostile resistance came from the United Kingdom, which along with Portugal and Ireland objected to the 48-hour working week.⁶⁷² As mentioned, the UK had no statutory regulation on weekly working time at all and would therefore have to make fundamental legal changes. The Commission proposal hence immediately took on a very visible profile in British politics. In particular, British employers were universally lined-up against the working time directive. Studies showed that nearly 42 per cent of UK men worked more than 46 hours a week, compared with slightly more than 23 per cent in the EC as a whole.⁶⁷³ The proposed directive therefore promised to be particularly painful for British industry, which said it expected to face adjustment costs worth billions.⁶⁷⁴ Several industries such as mining, civil engineering, farming, baking, construction and deep sea diving demanded complete rejection or at least exemptions from legislation. In addition to this, the directive promised to deepen the divide within the Conservative party over its European policy in the context of the Maastricht negotiations, and a few months before general elections in the UK. Supporters of former Prime Minister Margaret Thatcher's fundamental opposition to deeper integration opposed the directive as a matter of principle. They feared that it constituted precedence for further Europe-wide social regulation, which would gradually compel the UK into accepting bureaucratic and socialist interventionism from "Brussels."⁶⁷⁵

⁶⁶⁸ The Guardian 1991c, The Independent 1991a.

⁶⁶⁹ Polling data indicated that the British public was strongly in favor of the specific measures of the Social Charter, but nonetheless opposed its adoption. See Forster 1999, 83-4.

⁶⁷⁰ Reuters 1991.

⁶⁷¹ The Guardian 1991c.

⁶⁷² Europolitique 1991c, Europolitique 1991f.

⁶⁷³ Financial Times 1991a.

⁶⁷⁴ Financial Times 1990a.

⁶⁷⁵ Forster 1998, 352.

The Commission's ruse regarding the legal basis of the directive and its disregard of the informal norm of prior governmental consultation only seemed to confirm this suspicion. Employment Secretary Michael Howard, a Thatcherite himself, thus sought to prevent the directive from being adopted at all, regardless of its content. He immediately called on business to support his efforts to persuade the Commission to withdraw the directive.⁶⁷⁶ Thus, shortly after submission of the Commission proposal, British employers claimed to be facing an immense distributional shock. Pressure on the British government seemed to assume vast proportions that threatened to become unmanageable. Yet the babble of voices made it difficult to ascertain the real dimension of the problem.

Given that the 48-hour week did not go beyond existing regulations in other member states, a stable qualified majority seemed to be feasible, leaving Great Britain in a minority position.⁶⁷⁷ Yet the Council refrained from overruling the British delegation. Shortly before the Social Affairs Council at the beginning of May 1991, Juncker announced that he was prepared to call a vote to adopt the directive even against British opposition.⁶⁷⁸ Against the expectations of simple rationalist theories, Michael Howard subsequently signaled a more conciliatory approach towards the directive.⁶⁷⁹ He justified this new strategy on the grounds that he had been encouraged by the recent approach of the Commission to consult member governments prior to publication of directives and to accept their help in evaluating the costs and consequences of the proposed measures.⁶⁸⁰ The Luxembourg Presidency subsequently decided to refrain from calling a vote. The issue was referred back to the Council substructure and a final decision postponed until the following Dutch Presidency.

In sum, governments continued negotiations on the working time directive despite the existence of a majority coalition in favor of its adoption. In line with liberal and classical regime theory, negotiations began to center primarily on the Council Presidency instead of the Commission. Even though Luxembourg was in favor of the directive, it decided it would be worthwhile to continue the search for a compromise that the UK government could accept. Its

⁶⁷⁶ The Times 1990c.

⁶⁷⁷ *Europolitique* 1991g, *Europolitique* 1991d

⁶⁷⁸ *Europolitique* 1991b.

⁶⁷⁹ Forster 1999, 85. According to Forster, the FCO persuaded Howard to change his style in the hope that Britain's partners, too, would adopt a more conciliatory approach.

⁶⁸⁰ *Financial Times Business Information* 1991a, *Financial Times Business Information* 1991b.

partners readily accepted its decisions. Contrary to the expectations of simple rationalism, Luxembourg's threat to call a vote resulted in an immediate change of behavior on the part of the British government.

The Dutch Presidency (July to December 1991)

The Dutch delegation, which took over the CP in July 1991, was also in favor of Europe-wide social regulation. Given that its own ceilings on working time did not differ from the proposal, it was also not opposed to the 48-hours week. It was committed to concluding negotiations over the directive by the end of its term in December, although its main emphasis was on the ongoing intergovernmental conferences on Political Union and EMU to be concluded at the Maastricht summit in December.⁶⁸¹

The working time directive remained a highly salient issue in the UK and continued to generate strong domestic pressure against it. When research published in August found that British men were working by far the longest hours in Europe, the British Equal Opportunities Commission seized the opportunity to challenge current labor market policies in the UK in the High Court.⁶⁸² The case failed in early October and the judgment brought about instant criticism from trade unions. Labour pledged that, if elected, it would accept the working time directive and legislate to extend employment rights.⁶⁸³ The controversy about the directive in Britain grew stronger when a few days later Germany, under pressure from its churches and trade unions, demanded the inclusion of a clause to make Sunday a compulsory day off. Although the Dutch quickly diluted this amendment to making Sunday the day of rest 'in principle,'⁶⁸⁴ it prompted fierce reactions, particularly from the British tabloid press in Great Britain.⁶⁸⁵

⁶⁸¹ Financial Times 1991e, NRC Handelsblad 1991b, Van Beuge 1993, 26.

⁶⁸² The Guardian 1991f, The Independent 1991b.

⁶⁸³ The EOC failed in its High Court attempt to eliminate British part-time law. See The Guardian 1991e, The Times 1991a.

⁶⁸⁴ Financial Times Business Information 1991c, The Economist 1991c.

⁶⁸⁵ See the discussion in Financial Times 1991d, The Economist 1991b, The Guardian 1991d, The Times 1991b.

British domestic pressure against the directive intensified in October and November 1991. A small but vociferous minority of Euroskeptic rebels within the governing Tory Party became increasingly feisty when the plans to create a single currency and to add a social chapter to the Maastricht Treaty seemed to become reality.⁶⁸⁶ Employment Secretary Michael Howard was deeply opposed to the idea of social policy at the European level.⁶⁸⁷ In a private meeting with the British Prime Minister, John Major, he made it clear that he would resign if the treaty were to be changed in a more “socialist direction.”⁶⁸⁸ The British government henceforth began to take a tougher stance against the social chapter at the IGC, and Howard renounced his earlier conciliatory position to actively oppose the Working Time Directive. His department issued a report, which claimed that the working directive in its current form would cost £5 billion a year and consequently ruin much of British business. The Commission immediately hit back, arguing that these figures were plucked out of the air.⁶⁸⁹ This disagreement quickly degenerated into an open fight between the British government and the Commission when Social Commissioner Papandreu provoked Howard even further.

“These new rules,” she commented, “will be a great improvement for workers, and for working practices in the UK. The Council will reach its decision by qualified majority voting. Britain will not be in a position to block them.”⁶⁹⁰

The British government riposted that Papandreu could yet “come a cropper,” and warned that she “should not take the decisions of other members of the Community for granted.”⁶⁹¹

The Dutch Presidency decided to postpone a decision on the directive in order not to jeopardize the ongoing treaty negotiations.⁶⁹² In November, it abandoned its ambition to adopt the working time directive until the end of the year and scheduled it for nothing more than preliminary discussion at the meeting of the Social Affairs Council on December 3.⁶⁹³ Since the Dutch Presidency was to be followed by Portuguese and the British Presidencies, which were respectively skeptical and entirely opposed to the directive, it was considered

⁶⁸⁶ Forster 1998, 352.

⁶⁸⁷ The Times 1991c.

⁶⁸⁸ Forster 1999, 87.

⁶⁸⁹ Financial Times 1991d, Financial Times Business Information 1991c

⁶⁹⁰ The Times 1991d.

⁶⁹¹ The Times 1991d.

⁶⁹² Financial Times 1991c, The Guardian 1991b, The Sunday Times 1991a.

⁶⁹³ Financial Times 1991e, NRC Handelsblad 1991b.

shelved for at least a year. At that point, the conditions for its adoption would be more favorable, Commissioner Papandreu would have bowed out of office, the British Parliament would have ratified the Maastricht Treaty, and the British people would have elected the more pro-European Labour party. Subsequent to the decision to renounce the vote, Howard commented that Great Britain had won vital breathing space in the fight over working time.⁶⁹⁴ The talks at the December Social Affairs Council consequently did not go beyond a principled debate about the necessity and purpose of a European Social Policy.⁶⁹⁵ A few days later, Major underscored his opposition to the working time directive, which he argued would impose considerable adjustment costs on the British industry.⁶⁹⁶

A few days later, the British delegation caused a stir at the Maastricht negotiations that served to antagonize even those delegations that had backed its hardline stance against the Social Charter. It refused to accept the Social Charter in its entirety despite the fact that its partners had already watered it down in order to accommodate the UK. The Charter was thus merely attached to the treaty as a protocol with the status of a non-binding agreement among all member governments but the UK.⁶⁹⁷ Nonetheless, the results of the Maastricht negotiations for the time being assuaged Euroskeptical Tories. On 19 December, Major won a vote of approval with a majority of 86 for the deal he had obtained at Maastricht. British ratification therefore seemed a safe bet, since the Labour opposition supported the treaty even more than the ruling Conservative government.⁶⁹⁸

In sum, despite the feasibility of a majority coalition in favor of the working time directive, the vote was once again called off. This time, however, the evidence is more ambiguous. In line with simple rationalist theories, the UK became increasingly uncompromising despite the existence of a majority coalition against it. Yet the Council made no concessions to the British governments. Instead, and conforming to expectations of both classical and Liberal Regime Theory, the Dutch government decided that it would be prudent to call the vote off until the Maastricht Treaty was done and dusted. The majority in the Council readily accepted this decision.

⁶⁹⁴ The Times 1991e, The Times 1991f.

⁶⁹⁵ *Europolitique* 1991e

⁶⁹⁶ The Independent 1991a.

⁶⁹⁷ Forster 1999, 93.

⁶⁹⁸ Best 1994, 245.

The Portuguese Presidency (January to June 1992)

As mentioned, the Portuguese Presidency was expected to shelve the proposal during its term. It had initially been opposed to it, but over time became less skeptical as its own regulations were in several respects even stricter than the compromise proposal under negotiation. The Portuguese government had been furious, however, when Great Britain, behind which it had been hiding during the Maastricht negotiations, left it out in the rain and unilaterally secured an opt-out from the Social Charter. Its officials hence thought out loud about imposing the directive on the UK in revenge for its behavior at the Maastricht summit.⁶⁹⁹ Yet the Portuguese Presidency's intentions remained unclear. It announced that it was determined to adopt the working time directive during its term, and publicly speculated about putting the proposal to a vote at a Council meeting by early April. *The Times*, however, reported that British officials hoped that Portugal would considerably dilute the proposal.⁷⁰⁰

The British government again initially adopted a more conciliatory tone of voice toward the Presidency and specified the concessions it expected from its partners. Michael Howard explained that Britain had given up its fundamental opposition to the directive and was prepared to accept its adoption under certain conditions. In a letter to the Portuguese President-in-office, José da Silva Peneda, he demanded that the directive be very narrowly interpreted:

“If there are to be any restrictions on aspects of working time, these should be required only where it can be demonstrated clearly that, without them, the health and safety of employees are at risk. [This approach] would acknowledge that working time can have a bearing on health and safety in particular circumstances, while avoiding the blanket obligations which would cause so much damage for the competitiveness of EC business.”⁷⁰¹

Several sectors in the UK subsequently began demanding derogations from the directive.⁷⁰² The International Association of Underwater Engineering Contractors and the offshore oil industry, for instance, claimed that limits on weekly working hours would ruin the

⁶⁹⁹ The Guardian 1991a.

⁷⁰⁰ The Sunday Times 1991c. See The Times 1991g. It subsequently decided to postpone the vote until after the British general elections on 9 April. Financial Times 1992e.

⁷⁰¹ The Sunday Times 1991b.

⁷⁰² Financial Times 1992f.

deep-sea diving industry in the UK.⁷⁰³ Also the transport industry demanded derogations.⁷⁰⁴ The Labour Party immediately capitalized on this situation and claimed that Prime Minister Major had blundered by blocking negotiations and not raising these issues earlier.⁷⁰⁵ The list of derogations was discussed at an informal Council meeting in March.⁷⁰⁶ To signal that it remained determined to adopt the directive before the UK took over the CP, Portugal scheduled additional discussions at Council meetings in late April and in June.⁷⁰⁷

But the more conciliatory stance did not alleviate domestic pressure against the directive. On the contrary. The Euroskeptic opposition within the British government became increasingly unmanageable. The British general elections in April 1992 had confirmed the Conservative government in office, although its majority shrunk to only 21 seats. On the one hand, a reshuffling of cabinet initially promised a more cooperative strategy on the part of the British government. It brought Gillian Shephard, who had a reputation of being more liberal and conciliatory than her Thatcherite predecessor, into the position of Employment Secretary.⁷⁰⁸ On the other hand, the narrow majority in Parliament meant that the British government was much more susceptible to its backbencher's vicissitudes than before. It was initially unclear how this new situation would affect British European policy. Germany, optimistic that the British would become more conciliatory, defied Portugal's decision to adopt the directive and called on the Council to refrain from taking a vote. It insisted on giving the new minister a "grace period" during which to fathom the possibilities for compromise.⁷⁰⁹ A spokesman for the Portuguese EC presidency explained: "The Germans made it clear that they would not embarrass Britain by forcing a vote on the occasion of the new minister's first Council meeting."⁷¹⁰ The Portuguese Presidency announced in the same breath that a vote in June remained possible.⁷¹¹ Shephard signaled that she was, just like her

⁷⁰³ Since 85% of all saturation diving in the North Sea was British.

⁷⁰⁴ Europe Information Service 1992.

⁷⁰⁵ Financial Times Energy Newsletter 1992, Lloyd's List 1992a, Lloyd's List 1992b, The Guardian 1992a, The Independent 1992c.

⁷⁰⁶ European Report 1990.

⁷⁰⁷ The Sunday Times 1992c.

⁷⁰⁸ Financial Times 1992b.

⁷⁰⁹ Financial Times 1992d.

⁷¹⁰ Press Association 1992c.

⁷¹¹ Agence Europe 1992b, Financial Times 1992d.

predecessor, willing to accept the directive in principle, but insisted on the fact that it still posed a major problem to the government as it inflicted high costs on the British economy.⁷¹²

Instead of softening, however, the Euroskeptic recalcitrance within the British government became even stronger – a situation that was unlikely to change for the next few years to come. Particularly the rejection of the Maastricht Treaty in the Danish referendum of June 2 fueled Euroskeptic opposition within the British government.⁷¹³ Initially questioned only by a handful of backbenchers, the referendum suddenly made open opposition against Maastricht admissible. The revolt was prominently backed by former Prime Minister Margaret Thatcher, who had opposed the Maastricht Treaty all along on the grounds that it supposedly transformed the EC into a centralized, socialist mega-state.⁷¹⁴ In order to prevent a ratification of the Treaty, Euroskeptics even sought an unorthodox alliance with Labour MPs, who were willing to vote against it because of the British opt-out from the Social Protocol. By the end of June, the British ratification of the Maastricht Treaty, scheduled for November 1992, suddenly seemed to be hanging in the balance.⁷¹⁵

Although the British government never explicitly linked the two issues, it became obvious that the adoption of the directive would render domestic pressure against the treaty beyond control. Against this background, the Portuguese Presidency decided to make several concessions to the British delegation. It suggested making the 48-hour limit optional, including derogations for several industries, and providing the UK with a 10-year grace period for the implementation of this directive.⁷¹⁶ The British government initially rejected the compromise, demanded withdrawal of the directive and announced that it was determined to seek complete annulment in Court. The Portuguese Presidency thereupon announced that it was ready to call a vote.⁷¹⁷ The German government realized that its strategy had not paid off and declared that, even though it preferred a consensus on this matter, it was prepared to overrule the UK.⁷¹⁸ This led the British government to accept the Portuguese presidency

⁷¹² The Guardian 1992b, The Times 1992f.

⁷¹³ Lamont 1999, 199.

⁷¹⁴ Most famously in her Bruges speech in 1988. See also The Independent 1992b.

⁷¹⁵ Best 1994, 261. See also The Times 1992e.

⁷¹⁶ European Report 1992a, Financial Times 1992c, Financial Times 1992g, Financial Times 1992h, Reuters 1992a, The Times 1992c.

⁷¹⁷ The Times 1992d.

⁷¹⁸ The Independent 1992a

compromise. Thus it seemed that the directive would finally be adopted, after two years of arduous negotiations. Shephard tried to present the imminent agreement as a victory:

“In a word, we have won. We have begun the day with a directive to which we were totally opposed. That was completely transformed. We have gotten rid of all the most harmful measures.”⁷¹⁹

The Euroskeptics within the British ruling party, who had opposed the directive as a matter of principle, remained unsatisfied with the deal. They argued that the directive constituted precedence for extending Community competence and made nonsense of the government’s claim that Britain had opted out of the Social Protocol of the Maastricht Treaty. Social regulations would in the future simply be introduced through the backdoor of Article 118a.⁷²⁰

But France did not agree to the proposal. According to the media, the French Minister of Employment (and daughter of Commission President Delors), Martine Aubry, refused to acquiesce to British recalcitrance by accepting the Portuguese presidency compromise. France consequently put the vote off by raising a technical disagreement with Germany over the way the 48 hours were calculated.⁷²¹ The issue was hence referred to a technical committee at the WG level. Since the UK was now going to be at the helm, the directive would remain in the air for at least another six months.

In sum, although a majority coalition in favor of the adoption of the directive was feasible, member governments refrained from taking a vote and made considerable changes to the proposal. The evidence during the tumultuous Portuguese Presidency partly supports the expectations of simple rationalism. Although the threat was never made explicit, it was obvious that the adoption of the directive could also lead to the rejection of the Maastricht Treaty. Yet, contrary to the expectations of simple rationalism, the occasional threats to call a vote remained effective and led the British government to change its bargaining strategy. Also, the concessions did not meet British demands of complete withdrawal. Instead, they were only suited to appeasing British employers, who were generally in favor of the Treaty of Maastricht and could be expected to put a stop to the Euroskeptical opposition. Furthermore, in

⁷¹⁹ Agence Europe 1992d, Press Association 1992b.

⁷²⁰ The Sunday Times 1992b.

⁷²¹ *Europolitique* 1992a, Financial Times 1992a, The Guardian 1992a.

line with Liberal Regime Theory, and contrary to the expectations of classical regime theory, the Portuguese Presidency, whose stance toward the directive had remained vague, had great difficulties asserting its authority. Germany undermined its threat to call a vote. France undermined Portugal's adjudication effort when it withheld its agreement on the Presidency compromise, which it considered too far-reaching. As a result, the decision was once more postponed.

The British Presidency (July to December 1992)

The UK was naturally not interested in adopting the directive in its current form. If it were to take up negotiations again, then it would be only in order to dilute the directive further or even abandon it. This seemed to be the UK's initial strategy when it made the concept of "subsidiarity" the leitmotif of its Council Presidency. Subsidiarity implied that the Union would not take any action unless it was going to be more effective than action taken at the national, regional or local level. Proponents of the Community Method suspected that it was merely an attempt to curb centralized power. Employment Secretary Shephard explained that the concept primarily applied to employment policy. In the same context, she emphasized she was opposed to the directive as a matter of principle.⁷²² The British press consequently rumored that the working time directive was going to be the first "victim" of subsidiarity.⁷²³ An informal Presidency paper on the concept, which was leaked to the EP, indeed called for 30 proposals to be scrapped from the legislative agenda. The working time directive was among them.⁷²⁴

Yet in actuality, the UK Presidency did nothing of the sort. In line with Liberal Regime Theory, it did not capitalize on a viable threat of non-ratification. Instead, it simply shelved the working directive until the only meeting of the Social Affairs Council on December 3, which took place just a few days after the Treaty of Maastricht had passed a first

⁷²² Financial Times 1992i, Press Association 1992a, The Guardian 1992c, The Independent 1992c, Financial Times 1992j.

⁷²³ The Independent 1992c.

⁷²⁴ Agence Europe 1992a, Financial Times 1992k, The Herald 1992, The Times 1992a, The Times 1992b.

motion in the House of Commons.⁷²⁵ The directive was only put on the agenda as a result of the strong insistence of Commissioner Papandreou,⁷²⁶ and moreover was confined to a lunchtime discussion where no decision could be taken.⁷²⁷ Governments simply noted at this occasion that no further negotiations had been held since last June and no progress seemed possible in December. The matter was therefore referred to the future Danish Presidency.⁷²⁸

In sum, instead of trying to capitalize on the Euroskeptic opposition, and despite the Commission's attempts to revive it, the UK Presidency decided not to touch the issue at all. In line with Liberal Regime Theory, this did not come as a surprise for the actors involved. Asked whether the disregard of the dossier by the UK Presidency could be interpreted as "deliberate sabotage", even Commissioner Papandreou gave a denial, saying the UK simply "(...) did their job."⁷²⁹

The Danish Presidency (January to June 1993)

Denmark had initially opposed the directive due to its centralized approach in regulating working hours. But it supported the current compromise, which permitted the collective bargaining of working hours along statutory standards. Shortly after Denmark took over, the new president of the Social Affairs Council, Karen Jespersen, announced that she was going to revive negotiations on the directive.⁷³⁰

Denmark did not take up official negotiations until after the UK had passed the Maastricht Treaty. The British Parliament was expected to hold its final reading on the Maastricht Treaty shortly after the new Danish referendum in May. At an informal exchange of views in April, ministers agreed that the Presidency would begin to organize bilateral contacts with concerned delegations immediately after the decision of the Danish public on

⁷²⁵ The Economist 1991a.

⁷²⁶ Europolitique 1992b, Reuters 1992b.

⁷²⁷ Reuters 1992c.

⁷²⁸ European Report 1992b.

⁷²⁹ Agence Europe 1992c.

⁷³⁰ Europolitique 1993c.

May 18.⁷³¹ After the Treaty had indeed passed both the referendum and the final motion in the House of Commons, the Danish government put the directive back on the agenda for June 1. It seemed that the directive would finally be adopted.

However, another cabinet reshuffle in the UK at the end of May, in which Major sacked the Euroskeptic Norman Lamont and promoted the pro-European Kenneth Clarke to Chancellor of the Exchequer, revived rows over the Tory's European Policy. Euroskeptics within the Conservative party again drew attention to the working time directive and demanded that the Government oppose the directive in its entirety, refrain from its implementation if adopted, and take it to the ECJ.⁷³² Denmark immediately threatened to call a vote. The Council's patience, officials argued, had been tested long enough. Other member states indicated that they were certain that the directive was this time going to be adopted.⁷³³ The UK signaled that it was willing to abstain from the decision to enable a unanimous vote in the Council.⁷³⁴ The Danish Presidency tabled a new compromise proposal that by and large resembled the text proposed by the Portuguese Presidency. Backed by Ireland, the new British Employment Secretary, David Hunt, had had last-minute success at including a derogation for junior doctors.⁷³⁵ France agreed to the compromise. The Council was finally able to adopt its standpoint unanimously with the UK abstaining. Everything that remained to be done for the directive to become European law was for the EP to voice its opinion and for the Council to adopt a final standpoint.

However, the British government reemphasized its complete opposition to the proposal. Hunt announced immediately after the meeting that Britain would challenge the directive in Court and refrain from implementing it until the ruling came through.⁷³⁶ Major supported Hunt. In an aggressive speech at the Copenhagen summit a few weeks later, the Prime Minister accused the Commission of "muddle-headed meddling"⁷³⁷ and singled out the working time directive as a prime example.⁷³⁸ Other EC ministers tried to convince the British

⁷³¹ Agence Europe 1993a, Agence Europe 1993b, *Europolitique* 1993b, *Europolitique* 1993d.

⁷³² *The Guardian* 1993a, *The Independent* 1993b.

⁷³³ *International Herald Tribune* 1993, *The Sunday Times* 1992a.

⁷³⁴ *Financial Times* 1993b.

⁷³⁵ *The Guardian* 1993b.

⁷³⁶ *Daily Mail* 1993, *European Report* 1993a, *Financial Times* 1993a, *The Guardian* 1993c.

⁷³⁷ *The Economist* 1993.

⁷³⁸ *The Guardian* 1993d, *The Times* 1993b.

government to drop the challenge on the ground that Britain had won enough concessions:⁷³⁹ Sunday was ‘in principle’ the day of rest; collective agreements at sectoral and plant level were considered alternatives to central legislation; Britain would have to implement the voluntary 48-hour week only within 10 years; and many sectors such as transport workers, those at sea and junior doctors remained exempt.⁷⁴⁰ The European Commission immediately warned the British government that it would bring infraction proceedings in the Court for non-implementation.⁷⁴¹ Most legal experts believed that the British appeal had no chance of succeeding.⁷⁴²

In sum, instead of making concessions, the Danish government decided to shelve the directive until the House of Commons had ratified Maastricht. When the Treaty was home and dry, it tabled a compromise and announced that it was ready to call a vote. The British government and its partners finally accepted the presidency compromise.

The Belgian Presidency (July to December 1993)

Belgium had been in favor of the directive all along and sought to adopt it unanimously by the end of its term. For that purpose, it had to await the EP’s opinion, and then conclude negotiations in the Council’s second reading. Parliament was furious about the concessions and derogations in the directive.⁷⁴³ In its second reading in October, it proposed a number of amendments, the most important of which was the annulment of the derogation for junior hospital doctors. The Commission reintroduced most of these clauses into the directive. To adopt the new proposal, a qualified majority would suffice. To scrap the changes, the Council needed a unanimous decision.⁷⁴⁴ Now that the UK was no longer able to take the Maastricht Treaty hostage, Parliament’s involvement in decision-making therefore provided other governments the opportunity to back out of the concessions they had made to the UK. A single recalcitrant voice would have sufficed.

⁷³⁹ The Times 1993a.

⁷⁴⁰ The Independent 1993a.

⁷⁴¹ The Guardian 1993c.

⁷⁴² European Report 1993c, *Europolitique* 1993a, The Irish Times 1993.

⁷⁴³ The Herald 1993a.

⁷⁴⁴ The Herald 1993b, The Scotsman 1993.

Yet the Council unanimously changed the Commission proposal back to the form it had taken prior to the EP's amendments. At the meeting of the Social Affairs Council on November 23, the Belgian Presidency proposed a compromise that basically resembled the compromise Portugal had presented a year and a half previously.⁷⁴⁵ Although some member states demurred that Belgium was going too far in its concessions and was wasting an opportunity to get rid of the concessions to the UK, they accepted the Presidency's decision.⁷⁴⁶ After three years of arduous negotiations, the Council therefore definitively and unanimously adopted a European Directive with the UK abstaining.⁷⁴⁷

In sum, although Parliament, with the backing of the Commission, had removed the concessions to the UK, the Council unanimously agreed on scrapping the EP's amendments in order to accommodate the UK. Contrary to the expectations of simple rationalist theories, it did this despite the fact that the British threat of exit had become unviable. Contrary to the expectations of new neofunctionalism, the Commission was unable to capitalize on disagreements in order to assert its interests. In line with Liberal Regime Theory, the decision on the exact amount of discretion was taken by the Belgian Presidency, which in fact preferred a much more progressive outcome than the one it finally suggested. And instead of seizing the opportunity and adopting the new Commission proposal, all member states accepted the Belgian Presidency's decision.

Postlude

The Working Time Directive met with mixed responses. While the European Trade Union Confederation immediately decried the weaknesses of the directive,⁷⁴⁸ Labour and British trade unions cheered the adoption of the directive.⁷⁴⁹ The Commission was also satisfied with the result. The EC's new Social Affairs Commissioner, Pdraig Flynn, called the adoption of

⁷⁴⁵ European Report 1993d, Financial Times 1993c.

⁷⁴⁶ European Report 1993b.

⁷⁴⁷ Council of the European Union 1993.

⁷⁴⁸ Agence Europe 1993c, European Report 1993b.

⁷⁴⁹ PR Newswire 1993, Press Association 1993.

the directive “a milestone on the road towards the creation of a European social policy.” He was confident that the UK’s legal challenge would be unsuccessful.⁷⁵⁰ The British abstention from the final decision, however, upset and surprised its partners. As a deputy who assisted in the negotiations explains:

“We spent a great deal of time trying to accommodate British demands, but then, as you know, they abstained from the final compromise. This breaks an unspoken rule in the COREPER which is ‘if we try to get you on board you will meet us part way.’ So it is not good to then abstain or to vote against something. This is what I meant by a misuse of goodwill.”⁷⁵¹

Although it was widely expected to end in failure, the UK indeed challenged the directive in court.⁷⁵² On 8 March 1994, the United Kingdom brought an action against the Council before the ECJ. First, the United Kingdom contended that the legal base of the directive was defective. Given that the other article already broadly covered provisions relating to the rights and interests of employed persons, it argued that Article 118a on the “health and safety” of workers should be regarded as an exception to these articles and therefore narrowly interpreted. Weekly working time, paid annual leave and rest periods, however, could not be regarded as health and safety measures. The UK considered that Article 118a had been deliberately chosen to avoid unanimity. Second, the UK pleaded that the directive disregarded the principle of proportionality. Article 118a points out that the Council may adopt “minimum requirements.” The adopted measures, however, went far beyond stipulating a minimum requirement for the health and safety of workers. Third, and related to the previous point, the UK argued that the directive had no objective connection with its purported aims, and should therefore be annulled in its entirety. Fourth, the UK complained that the Commission adopted the proposal for the directive without prior consultation of the Advisory Committee on Safety, Hygiene and Health, a procedural defect serious enough to render the directive invalid.⁷⁵³

⁷⁵⁰ Reuters 1993.

⁷⁵¹ Lewis 1998, 364.

⁷⁵² Although attempts to legitimate working time as a health and safety measure had been regularly stonewalled at the governmental and managerial level, British courts had a history of pro-labor judgments in this matter (see Gray 1998, 328) and were therefore expected to side with the ECJ. On strategic interaction between the ECJ, national courts and governments see Alter 2001, chap. 5.

⁷⁵³ See European Court of Justice 1994, Gray 1998, 344-356.

The dust around the working time directive settled for a while until two years later on 12 March 1996 the Advocate-General, Phillipe Leger, published his preliminary opinion in which he dismissed the UK's legal reasoning almost entirely. Importantly, he recommended that Article 118a be interpreted broadly.⁷⁵⁴ Although the opinion was not legally binding, it was considered unlikely that the ECJ would depart from it.⁷⁵⁵ It prompted a wave of political debate within the UK: Euroskeptics suspected that Article 118a now constituted a backdoor through which "Brussels" would impose the Social Chapter onto the UK. Members of cabinet furthermore demanded that the government try to curb the ECJ's power in the ongoing IGC.⁷⁵⁶ Labour, in contrast, cheered Leger's opinion: "This humiliating defeat for the UK government is also a victory for British employees."⁷⁵⁷ The Labour Employment spokesman also pointed out that the government's defeat had been predictable: "Pursuing this case was a waste of time and taxpayers' money."⁷⁵⁸

The new fuss about the working time directive brought the British government into a difficult situation. Since it was still ruling on the basis of a very small majority, it was particularly susceptible to the Euroskepticism of backbenchers. Euroskeptics had become increasingly vociferous when the Commission, following the BSE crisis emanating from Great Britain had imposed a global ban on British beef, with painful costs for British farmers.⁷⁵⁹ At the same time, the Chancellor of the Exchequer Kenneth Clarke reignited controversy about EMU by declaring that Britain might join in 1999. To appease Euroskeptics in his own party, Prime Minister John Major and his cabinet announced that he would openly defy the directive in the case of an adverse ruling by the ECJ.⁷⁶⁰ The Commission immediately threatened to respond by asking the ECJ to impose a substantial fine on Great Britain.⁷⁶¹ Legal advisors moreover warned the government that its defiance would inevitably be challenged in British courts and the government would just as certainly be defeated.⁷⁶² The government

⁷⁵⁴ European Court of Justice 1996b.

⁷⁵⁵ The Herald 1996b.

⁷⁵⁶ The Independent 1996a, The Times 1996.

⁷⁵⁷ The Guardian 1996.

⁷⁵⁸ The Independent 1996b.

⁷⁵⁹ Pollack 2003b, 334.

⁷⁶⁰ Financial Times 1996b.

⁷⁶¹ The Sunday Times 1996.

⁷⁶² Financial Times 1996b. Applicants can bring a so-called Francovich action for damages against the government.

consequently decided to merely delay implementation, even though it could be sued for deliberate delay. In the meantime, John Major and Foreign Secretary Malcolm Rifkind would demand revisions in the ongoing Intergovernmental Conference on the Treaty of Amsterdam.⁷⁶³

On 12 November, the ECJ ruled that the working time directive was valid. It merely scrapped the Sunday clause, arguing that the Council had “failed to explain why Sunday, as a weekly rest day, is more closely connected with the health and safety of workers than any other day of the week.”⁷⁶⁴ Trade unions commented that the judgment was great news for Britain’s overworked employees. Major sent a formal letter to the new Commission President, Jacques Santer, urging him to refrain from proposing new legislation under Article 118a until the dispute was settled in the IGC. Santer replied, however, that the Commission retained its right of initiative.⁷⁶⁵ In addition, Major repeated his threat to block the IGC if Great Britain did not get exemptions from the directive:⁷⁶⁶

“I have made clear to the President of the Commission that I will be insisting on changes at the Intergovernmental Conference (...) to ensure that the social protocol should never again be undermined by presenting social measures under the guise of health and safety. (...) We are going to seek Treaty changes, and without Treaty changes there will be no end to the IGC.”⁷⁶⁷

Eventually, it did not come to a showdown over the working time directive, because the Conservative government was voted out of office in May 1997. At the IGC, the succeeding Labour government retained the provisions of Article 118a and opted into the social protocol, which would henceforth be binding for the UK.

⁷⁶³ Financial Times 1996b, The Herald 1996a.

⁷⁶⁴ European Court of Justice 1996a.

⁷⁶⁵ European Report 1996. See also the discussion in Pollack 2003b, 337.

⁷⁶⁶ Deutsche Presse Agentur 1996a, Deutsche Presse Agentur 1996b.

⁷⁶⁷ The Irish Times 1996.

Conclusions

Making full use of its formal agenda-setting power and eschewing informal practices in agenda setting, the Commission tried to capitalize on conflicts among governments in order to assert its interests. It submitted a proposal that arguably implemented the treaty's objectives and could easily be imposed on a minority in the Council. Yet it also entailed concentrated adjustment costs for British employers, and consequently generated strong domestic recalcitrance in the UK. Despite the fact that a qualified majority in favor of the proposal had been feasible after only a few months, the Council nonetheless regularly put off a vote. Instead, it negotiated for another three years with the aim of attaining a unanimous agreement in the Council. How can we explain this behavior?

This chapter sought to demonstrate that even in this least likely case, decision-making is explained by the norm of discretion, the interpretation of which is the authority of the Council Presidency. To recap, Liberal Regime Theory argues that where governments are subject to unpredictable, unmanageable pressure from special interests, they devise an informal norm around formal rules that permits them to exercise discretion in their application. Thus, they frequently make concessions to governments facing such a situation in order to alleviate domestic pressure. But since the circumstances requiring discretion are ambiguous and not directly observable, governments delegate the task of adjudicating on the appropriate amount of discretion to an agent whose judgment they can trust. It was argued that the Council Presidency assumes this function if it is free of any conflict of interest. Liberal regime therefore predicts that Presidencies which are in no danger of collusion with the recalcitrant government become the linchpin of intergovernmental negotiations. Their threats of applying formal rules should lead to an immediate change in bargaining positions on the part of recalcitrant actors.

Other theories have different predictions for negotiations in the Council. New neofunctionalists expect the Commission to exploit disagreements among governments in order to assert its interests. Simple rationalist theories, in complete contrast, do not expect the Commission or the Council Presidency to exert any influence when the vital interests of a large state are in jeopardy. Rather, threats of exclusion and exit are assumed to govern

negotiations. Classical regime theory agreed on the importance of the Presidency, but expected all governments in this position to have the same authority and the same influence in negotiations regardless of their stance on an issue.

Given that we are dealing with a least likely case, the evidence is expected to be ambiguous, and this is indeed the case. By and large, however, it provides support for Liberal Regime Theory and casts doubt on alternative theories. First, in line with the expectations of new neofunctionalism, the Commission initially exploited conflicts among governments when preparing the proposal. But once the proposal was in the Council's court, the Commission was no longer able to prevent governments from exercising discretion. Second, simple rationalist theories are supported to some extent by the evidence in this case. The UK indeed tried to use its quite credible threat of non-ratification in order to extract concessions from its partners. Yet, most of the time these implicit threats led the Council to postpone the decision rather than to make concessions. It was only when it became obvious after general elections and the failed Danish referendum that the British full-blown opposition to the directive was not going to disappear that the Council decided to make stronger concessions. Thus, governments did not change the proposal back when they were presented with the opportunity to do so after the British threat of non-ratification had become unviable. Third, in line with classical and Liberal Regime Theory, the Presidency played a prominent role in the Council negotiations. Its threat to call a vote commonly led to a change in the UK's bargaining positions. It established bilateral contacts with the British governments and tabled compromise suggestions. But contrary to the expectations to classical regime theory, the different Presidencies were not equally successful in establishing their authority. The Portuguese Presidency with its ambiguous stance on the issues was far less able to assert its authority than other, smaller Presidencies that basically tabled the same proposal.

Overall, the evidence lends support to the liberal interpretation. The Commission proposal imposed unexpected and concentrated adjustment costs on British employers, which immediately pressured their government to oppose the proposal. The British government consequently claimed to be facing a distributional shock and demanded discretion. Domestic pressure against the directive became increasingly unmanageable with an ever more vociferous Euroskeptic opposition within the Conservative government. British intransigence,

indeed, seemed likely to result in defection and an undermining of the recently renewed commitment to the treaty's objectives. In other words, the case required discretion. Therefore, all governments refrained from overruling the British government. As one Council official involved in the negotiations pointed out, any government can suddenly find itself a situation like this:

“Before we vote we want agreement as far as possible. We went to extra lengths to try and bring everyone, including the British, on-board, rather than seek a vote. As I stated earlier, we do this because we know that maybe next time, we might need them.”⁷⁶⁸

However, the never-ending babble of voices made it difficult for the governments to assess the appropriate amount of discretion to alleviate domestic pressure in the UK. This became the task of successive Presidencies, which established contacts with the UK and tabled compromise proposals. The concessions granted never fully met the British governments' demands. Instead, they were tailored to accommodate the demands of British employers, most likely in order to play them off against Euroskeptic backbenchers. In other words, concessions were granted to just such an extent as to render interest group pressure in the UK manageable – no more and no less.

⁷⁶⁸ Lewis 1998, 364.

CONCLUSION TO PART II

The analysis presented in Part II demonstrates that an auxiliary institution, the Council Presidency, systematically accompanies the informal norm of discretion in order to prevent it from being undermined by moral hazard. The reason for this, Liberal Regime Theory argues, is that the circumstances that require discretion may not always be perfectly observable. Governments therefore have an incentive to exploit the norm of discretion in pursuit of short-term interests. They can exaggerate the pressure they face from special interest groups in order to achieve a better outcome for themselves. In other words, the norm of discretion induces behavior that ultimately undermines its purpose of stabilizing cooperation. Thus, governments need to devise auxiliary institutions that are able to deal with this classical problem of moral hazard.

Drawing on the insurance literature in economics, we established that case-by-case adjudication on the basis of situational information provides the most promising solution for this specific problem of moral hazard in international politics. It was argued that, in order to guarantee governments acting collectively neither grant too few concessions nor concede too much, they delegate adjudication to an actor with encompassing interests in the norm on the one hand, and who stands to lose from excessive concessions on the other. In the context of the EC, it was argued, this condition is under certain circumstances met by the rotating Council Presidency. It has an encompassing interest in the norm, which guarantees that it will make concessions that are at a minimum level necessary to render interest group pressure manageable. In order to guarantee that the Presidency will not concede too much, governments ensure that it does not adjudicate on dossiers where it has an incentive to collude with recalcitrant governments.

Three distinct implications follow from these insights, which were examined in light of alternative explanations, using a combination of descriptive inference, statistical techniques and process-tracing. First, Liberal Regime Theory predicts that the informal practices in

agenda setting and negotiations described in Part I coevolve with informal practices on part of the CP. Second, governments ensure that the Council's agenda entails a Presidency bias in order to prevent situations in which the Presidency faces a conflict of interest. Third, governments change their positions in response to the Presidency's judgments and threats to call votes. The alternative explanations failed to predict or explain these trends. New neofunctionalism did not predict any systematic covariation of seemingly distinct informal practices. Rather, it expected that the problem of moral hazard would be an opportunity for the Commission to capitalize on conflicts among governments in order to reassert itself. Simple rationalists did not expect the Presidency to play an important role in negotiations. Since informal practices are a means to eschew the constraints of formal rules, simple rationalism predicted that negotiations would degenerate into decentralized bargaining, in which governments only coordinate on an outcome on the basis of threats of exclusion and exit. Classical regime theorists, finally, correctly assessed the importance of the Presidency, but regarded its functions and influence as rooted in interstate collective action problems, such as an increasing complexity in decision-making in the later 1960s. Accordingly, they failed to predict that the Presidency's role would vary across issue-areas or with its stance on an issue.

The empirical findings presented in this part of the analysis largely support the three major predictions of Liberal Regime Theory. First, governments' informal practices in agenda setting and negotiations did indeed coevolve with the Presidency's practices in the early 1960s. Specifically, the Presidency adopted practices that allowed it to prioritize certain dossiers on the agenda and to adjudicate on the application of formal rules in voting. Furthermore, in line with Liberal Regime Theory's explanation, it was demonstrated that the Presidency's role is far less pronounced in the area of agriculture, where the Council workload is often said to be highest, but the demand for discretion is lowest. The findings thus challenge the conventional wisdom about the CP in EU studies, which goes that it primarily reduces transaction costs in decision-making and emerged largely in the early 1970s in response to an increased workload in the Council.

Second, there is strong evidence for a Presidency bias on the Council's agenda, as predicted by Liberal Regime Theory. On the basis of an original data set of Council directives adopted in 2000 and 2001, the analysis revealed a strong correlation between the duration of

negotiations and situations in which the CP demands to change the proposal itself. This correlation can be interpreted as evidence that the CP regularly stalls issues for the duration of its term for which it is unable to deliver unbiased judgments – that is, proposals the Presidency itself wishes to change. This proposed causal mechanism was traced in two mini-case studies chosen from the data set. The first case, on the ELV directive, provided particularly strong support for Liberal Regime Theory. It almost constituted a natural experiment, because the initially favorable German Presidency made a complete U-turn during its Presidency to become totally opposed to the directive. In line with the theory, its attempts to use its prerogatives in order to avoid a debate, call a vote, or propose a compromise in its favor despite the fact that it was in a conflict of interest causes a stir in the Council, which was most clearly expressed in the Austrian Minister’s outcry: “What are you doing trying to talk us into a compromise when you are the problem?” The issue was consequently postponed until the following Finnish Presidency. The finding about the Presidency bias provides an explanation for another piece of conventional wisdom about the Presidency, namely that small states tend to be “better” chairmen. The reason, from the perspective of Liberal Regime Theory, is that smaller states, which are more dependent on cooperation than large states, usually prefer to leave Commission proposals unchanged. Thus, they are in general also less tempted to grant excessive concessions to recalcitrant governments than larger states are.

Third, while the evidence of in the in-depth case study on the Working Time Directive was more ambiguous, it by and large supports Liberal Regime Theory. In this case, the Commission had capitalized on conflicts among governments in order to make full use of its formal agenda setting powers. It proposed a directive that could easily be adopted by a majority in the Council, but which threatened to provoke unmanageable interest group pressure in Great Britain. The UK consequently claimed to be facing a distributive shock and demanded extensive concessions. Since the UK is a large state, and because the concurrent negotiation and ratification of the Maastricht Treaty provided the opportunity for Britain to realize threats of exclusion and exit, simple rationalist predictions about the degeneration of negotiations into decentralized bargaining were initially proven accurate. Yet implicit threats of non-ratification in this case only led to the postponement of a decision. In line with Liberal Regime Theory, negotiations centered on the Council Presidency, whose threats to call a vote usually resulted in a change of bargaining position on the part of the British government.

Contrary to classical regime theory, this case also indicated that a Presidency that was not free of a conflict of interest had serious difficulties establishing its authority among governments. In the end, the Council made many concessions: but these concessions were tailored to bring British domestic pressure back to a manageable level, rather than to meet all of the UK government's demands. Furthermore, contrary to the expectations of simple rationalist theories, the concessions were not retracted when the British threat of exit had become unviable and the Council had the opportunity to scrap them. This supports Liberal Regime Theory's expectation that they were primarily tailored in order to mitigate domestic interest group pressure. In summary, even this "least likely" case provides strong support for Liberal Regime Theory.

- Conclusion -

CHAPTER 11

Conclusion and Extension

This study began with a puzzle: informal practices abound in international and European governance. But why would governments deviate from the formal rules that they supposedly designed with great foresight? The previous pages provide a comprehensive solution to the puzzle and propose a new way of thinking about how international institutions work in reality.

The central argument of this study is that informal practices in the European Community embed an informal norm of discretion among governments, which permits governments to optimally harmonize interstate cooperation with its uncertain societal demands. Formal rules alone bolster states' mutual commitments by signaling an optimal implementation of the treaty's objective to their cooperating partners and societal actors, but they may prove inadequate when applied indiscriminately. An indiscriminate adherence to formal rules may generate distributional shocks – that is, sudden concentrated costs incurred through cooperation – for domestic groups. Groups thus affected are thereby induced to mobilize against the institution, tempt their government into unilateral defection and thus jeopardize the credible commitment to the institution as a whole. The informal norm of discretion, however, permits governments to collectively authorize temporary deviations from formal rules, while at the same time maintaining the credible commitment to the institution. It remains informal in order to prevent lobbying and inefficient investments in false anticipation of discretion. The mix of formal rules and informal norms consequently embeds international institutions in the societies of its members so as to ensure successful interstate cooperation, to an extent that neither formal rules nor informal norms alone permit.

The study demonstrates that informal practices are of the utmost importance for our understanding of decision-making in the EC. It shows that such practices provide governments the opportunity to resume control over the decision-making process whenever

they deem it necessary, although formal rules in the EC imply otherwise. Informal practices in agenda setting permit governments to predetermine the scope of the agenda and to influence the content and the timing of proposals. Informal practices in voting allow them to change proposals so as to accommodate governments facing distributional shocks. Informal practices, finally, also permit governments to resume control over the implementation of individual decisions. The emergence of the mix of formal rules and informal norms governing decision-making has shifted the EC to an astonishingly stable equilibrium, rendering it responsive to uncertain domestic demands so as to ensure the cooperation of member states. In this process, the Commission forfeited most of its formal powers – powers that have barely been restored by the European Parliament – and governments became the core of the decision-making process.

Four tasks remain for this concluding chapter. The first is to summarize and evaluate the empirical evidence for and against Liberal Regime Theory and its main alternatives. The second is to discuss the positive implications of Liberal Regime Theory for the study of European integration. And third, the argument will be extended beyond the European Union. Finally, we discuss the normative implications of our findings for international cooperation in general and European integration in particular.

Summary and Discussion of the Findings

This study's central claim, that informal practices in decision-making reflect an informal norm of discretion, which permits governments to manage uncertain state-society relations, is at odds with prominent theories of informal institutions in international politics. Simple rationalist theories conceive of informal practices as loopholes in international institutions that permit powerful states to escape formal commitments whenever they deem their important interests to be at stake. For new neofunctionalists, by contrast, informal practices are the result of institutional actors' erratic attempts to exploit ambiguities in formal rules in order to increase their autonomy at the governments' expense. Classical regime theory, finally,

conceives of informal institutions as functional responses to interstate collective action problems rather than to problems stemming from the management of state-society relations.

Liberal Regime Theory has two distinct implications that differ from the alternative theories and more accurately predict the empirical findings of the study. First, informal practices vary systematically with the extent to which governments are uncertain about their counterparts' ability to deal with unmanageable interest group pressure. We referred to this problem as political uncertainty. Second, auxiliary institutions that prevent the problem of moral hazard accompany the informal norm of discretion. We established that case-by-case adjudication on the basis of situational information provides the best solution for this classical problem of moral hazard in international politics, and argued that in the context of the EC, the Presidency is under certain circumstances able to assume this function.

The evidence presented in this study largely confirmed Liberal Regime Theory. Contrary to the expectations of new neofunctionalists, that informal practices emerge erratically across issue-areas and over time, Part I of this study found that they vary systematically across issue-areas and remained astonishingly stable over time. Contrary to the expectations of simple rationalist theories, that informal practices emerge in issue-areas that are known to be particularly sensitive, we found that they vary systematically with the extent of political uncertainty. In all issue-areas but the very sensitive CAP, governments adopted informal practices that allowed them to resume control of the agenda, to regularly accommodate governments facing distributional shocks, and to resume control over implementation. In the case of the CAP, we argued that political uncertainty is exceptionally low because common welfare schemes render domestic pressure entirely predictable in timing and extent, and we found that in this area governments generally ceded to formal rules and eschewed informal practices, as Liberal Regime Theory predicts. Qualitative data about the major divisions in conflicts provided further supporting evidence for Liberal Regime Theory.

A critic might still object that this first test rested to a large extent on the exceptional character of the CAP. Formal rules might simply be more important in this distributive issue-area because they provide governments the opportunity to blame unpopular policies on "Brussels." However, as chapter 2 argues, this objection is unconvincing on several accounts. First, any policy, no matter if distributive or regulatory, has some sort of distributive effects

that makes it unpopular for one group or another. Second, the objection presumes that governments surrendered more sovereignty than absolutely necessary in all issue-areas other than CAP when designing formal institutions. From what we know about the tough, contentious institutional choices in the EC's treaty negotiations, such a claim is *prima facie* implausible. Third, the objection is primarily negative, in that it does not provide an alternative explanation for the emergence of informal practices in the first place. Liberal Regime Theory, in contrast, provides a compelling explanation for the status of the CAP as an anomaly in EC decision-making, arguing that common welfare schemes render state-society in this issue-area exceptionally predictable. Thus, Liberal Regime Theory's account is not undermined by this objection.

The second hypothesis, stating that auxiliary institutions to prevent moral hazard accompany the informal norm of discretion, was evaluated in Part II of the study. Once again the findings largely support Liberal Regime Theory and disconfirm other hypotheses. First, we demonstrated that, contrary to the expectations of classical regime theory and, indeed, conventional wisdom, the emergence of the Council Presidency closely followed the emergence of governments' informal practices in decision-making after the Rome Treaty became effective. The CP thereby upstaged the Commission, which had sought to offer itself as an honest broker among governments. Second, contrary to the expectations of simple rationalists, we found strong evidence for a Presidency bias on the agenda. This was interpreted as evidence that governments ensure that the Presidency does not face a conflict of interest when adjudicating on demands for discretion – that is, in cases where it would gain from conceding too much. This proposed causal mechanism was uncovered in an in-depth case study on the negotiation of the Working Time Directive. In this case, the Commission had capitalized on conflicts among governments and proposed a directive that, if adopted by a majority, promised to generate unmanageable domestic pressure on the British government against European integration. Although a majority in favor of the directive was soon within reach, negotiations dragged on for several years. Chapter 10 argues that the reason for this delay was that governments sought to exercise discretion, while the babble of voices in the UK made it difficult for Britain's partners to assess the true extent of the distributional shock. The Presidency consequently assumed the function of assessing the extent of concessions necessary to render interest group pressure manageable again. Contrary to simple rationalist

predictions, negotiations did not degenerate into decentralized bargaining. Britain's implicit threats of exit usually resulted in the postponement of a vote by the Presidency, while the Presidency's threats to call a vote usually led the UK to adopt a more conciliatory approach. Furthermore, contrary to the expectations of classical regime theory, the case study demonstrates that Presidencies facing a possible conflict of interest had considerably more difficulties establishing their authority than Presidencies where such a conflict could be precluded.

Liberal Regime Theory is far from deterministic, however, and there are notable cases in the study in which the theory's initial expectations were not met. For instance, we saw that the European Council in fact intervenes in all issue-areas regardless of their political uncertainty. As will be discussed shortly, the precise function of the European Council is still open to interpretation. Furthermore, governments did not always retain full control of the EC's formal institutional set-up. It was demonstrated that by obliging the Council to await the EP's opinion, the ECJ unexpectedly endowed Parliament with a veto by delay. And by committing itself to rejecting a disliked Council standpoint even if the alternative is worse, Parliament was able to enhance its bargaining power *vis-à-vis* the Council. However, the governments were quick to regain control from the EP over the timing of a decision. And it is also doubtful that Parliament is able, let alone willing, to impose outcomes on governments that generate distributional shocks. Overall, the theory performs very well on average and explains more than two thirds of the total variation in informal practices in EC decision-making over time and across issue-areas.

Positive Implications for the Study of European Integration

The study has a number of positive implications for further research on European integration. First, the study proves the value of eschewing definitions of institutions as rules, of evaluating the importance of the informal institutions under study in the broader institutional context, and of going beyond ad-hoc explanations by taking alternative theories more seriously. For that

purpose, we proposed testable scope conditions for the emergence of informal institutions as well as an analytical framework for their study. These contributions will help other students of European integration to shed further light on the institutional development of the European Union. The principal advantage of the institutions-as-equilibria approach employed in this study is that it identifies institutions where they actually exist, namely, at the level of behavior. We thus avoid inherent bias and are able to interpret informal practices in a broader institutional context where other studies usually study single practices that seemingly confirm the theory. For instance, it was demonstrated that such tunnel vision led to misinterpretations of the function of the Presidency, the emergence of which can only be understood within the context of the emergence of an informal norm of discretion among governments. The approach also allowed a demystification of the infamous Luxembourg Compromise. Focusing on governmental practices around it, we were able to show that its effect on decision-making was marginal at best, and probably only put into writing what had already become a standard practice.

A second implication of the study is that Liberal Regime Theory may shed further light on the intense debate in European Union studies on the determinants of decision outcomes in the Council. Liberal Regime Theory argues that interaction in the Council is primarily governed by an informal norm of discretion that arises out of political uncertainty. It was argued that the extent to which welfare schemes protect incomes from distributional shocks provides an indirect measure of political uncertainty, because it reduces domestic groups' marginal utility of mobilization and, therefore, the likelihood that a shock translates into unmanageable interest group pressure. This was the reason why Liberal Regime Theory expected the informal norm of discretion to vary predictably across issue-areas, because, for example, the CAP explicitly protected farmers' incomes from any unanticipated changes. Liberal Regime Theory may be used to test other hypotheses concerning variations in political uncertainty – for example, how it may vary over time. For instance, we would expect practices in decision-making on agricultural matters to become more and more similar to other issue-areas as European agriculture becomes increasingly sensitive to the world market. A few steps have recently been taken in that direction, and even greater change can be expected if the EU liberalizes its agricultural policy further in response to an agreement on worldwide reduction of trade barriers among members of the WTO. Furthermore, political uncertainty

may also vary across countries. For example, the likelihood that a domestic group mobilizes in the face of distributional shocks is lower in countries where socioeconomic institutions stabilize incomes. These countries will therefore less frequently demand discretion than countries where welfare schemes are relatively less developed. These hypotheses are testable and may shed further light on decision-making dynamics in the Council.

A third implication of the study, the finding that informal practices shifted the European Community to a different equilibrium than that specified by the treaty, indicates that we also need to reevaluate the reasons behind formal institutional choices. Such reevaluation is necessary because governments cannot be expected to make lasting institutional choices from scratch. Instead, they will evaluate their choices in light of their experiences with the operation of the institutional framework in reality. Formal institutional choices can therefore only be properly understood in light of the existing mix of formal rules and informal practices we described in this study.

That said, the study left a number of institutional developments unexplained. The development of the European Council did not fully confirm Liberal Regime Theory, because there was little variation in its activity across Community issue-areas. Given that all governments ultimately agreed on its usefulness, it does not lend itself to a simple rationalist explanation either. It is probably best explained with reference to both classical and Liberal Regime Theory, namely as an institution that is able to solve interstate as well as state-society collective action problems at the same time. In addition, the emergence of the European Parliament poses a number of questions. For instance, does the European Parliament enable or hinder governments in exercising discretion? How powerful is it really in the face of a constant quest for consensus in the Council? Why did governments empower it in some issue-areas and not in others? We hope that future research sheds further light on these questions.

Positive Implications for the Study of International Institutions

While Liberal Regime Theory was assessed in relations to European integration history, the theory itself is not limited to European institutions. Liberal Regime Theory has three major components with implications for the study of other international institutions. The first of these components is political uncertainty. Political uncertainty is, in turn, contingent on the extent to which formal rules are able to impose outcomes on individual states on the one hand, and on the existence of international or domestic welfare schemes on the other. All other things being equal, the theory expects that informal norms will arise, firstly, when a given group of states deepens its formal commitment, thereby increasing the need for discretion, and, secondly, when a given institution is expanded by new members with a lower government spending in GDP, for which political uncertainty will therefore be higher. Thus, Liberal Regime Theory would expect an informal norm of discretion to arise in the WTO, which has in the last few years accepted a number of developing countries and at the same time strengthened its formal dispute resolutions mechanism. More generally, the theory expects an informal norm of discretion to emerge as international institutions worldwide become more legalized and diverse.

A second component of the theory is the distributive effects of discretion. Drawing on the economic literature on insurance, it was argued that member states alleviate distributional shocks by dispersing the concentrated costs of one member state across all or many of them. This guarantees that the problem is not merely shifted from one member state to another. Informal norms are therefore eminently sustainable in the event of an expansion in membership, because such an expansion allows the division of concentrated costs into smaller components. This explains why informal norms in the European Union do not seem to have been affected by an explosion of members after the most recent “big bang” enlargement by twelve new member states. And it provides further reason to believe that the norm may arise in other international institutions with an expansion in membership.

A final component of Liberal Regime Theory with broad implications is the claim that discretion is optimally informal. The reason is both practical and functional. By definition, the circumstances that require discretion cannot be specified in advance. As a result, the

formalization of discretion conveys ambiguous information to private actors, who might be induced to make inefficient investment decisions as a result. Informality mitigates this effect and must therefore be considered more efficient than formal institutional solutions to political uncertainty. This insight suggests that by focusing on only on formally designed flexibility mechanisms, mainstream research in IPE has unnecessarily truncated the dependent variable by focusing on small institutional details. Liberal Theories, emphasizing the demand for formal and informal institutions managing state-society relations, therefore have significant potential for IPE research.

Normative Implications for European and Global Governance

The insight that informality is a major component of international politics, finally, also raises the question of the legitimacy of European governance. The practices described in this study may confirm the suspicions of skeptics that international institutions are in fact an elitist project. Governments adhere to norms that are not put into writing, and their officials informally participate in decision-making at every single stage of the process. Elite-driven projects like this, skeptics charge, fail to take into account the interests of global economic integration losers, at home as well as abroad.⁷⁶⁹ International institutions hence lack procedural legitimacy and should be reformed in order to provide for broader participation.

Liberal Regime Theory, however, suggests exactly the opposite. European decision-making is responsive to the demands of the losers of economic integration *precisely because* it is driven by governmental elites. The theory indicates that the project would not be optimally responsive to the demands of losers if it were driven by formal rules and non-governmental elites only. Governmental elites ultimately consider both the general welfare of the public as well as inherently uncertain demands of special interests. The informal norm of discretion permits governments to manage this intricate state-society relation in such a way as to strike

⁷⁶⁹ For a critique of the statist view, criticizing the failure to take into account the well-being of the worst-off, see e.g. Pogge 1994.

an optimal compromise between an aggregate increase of welfare on the one hand, and the consideration of those negatively affected by it on the other. This was expressed by the then German Foreign Minister, Walter Scheel, when he discussed the ambiguity of the Luxembourg Compromise with respect to the choice between striving for a compromise and calling a vote:

“(...) we found a felicitous solution (...), a formula that is just vague enough as to enable the Community make important progress. This delicate equilibrium would not have been reached by a simple Council decision. We therefore need to continue to strive for solutions that are acceptable to all of us.”⁷⁷⁰

As a result, institutions governed by an informal norm of discretion fulfill an important procedural criterion of legitimate decision-making without necessarily increasing participation: governments take into account the interests of those who are negatively affected by their cooperation, both at home and abroad, even if formal rules do not require them to do so.⁷⁷¹

One might argue from a deliberative perspective, which emphasizes that the legitimacy of decisions arises out of the process of public deliberation, that even if the informal norm of discretion increases the legitimacy of decisions in comparison to a project driven by non-governmental elites, the project would gain still more in legitimacy if it allowed for broader citizen participation.⁷⁷² Informal practices, however, prevent citizens from actively engaging in the deliberation surrounding the decision-making process. Thus the informal norm of discretion undermines the international institution it was supposed to stabilize, because the opacity it entails ultimately diminishes its long-term legitimacy. Before responding to this objection, it should be noted that informality ought not to be conflated with secrecy. The norm of discretion does not reduce publicly available information, but its tendency to produce consensus can reduce the saliency of an issue by making it less controversial. As the German Permanent Representative, Dietrich von Kyaw, explains:

⁷⁷⁰ Conseil des Communautés Européennes 1970 and Auswärtiges Amt 1970

⁷⁷¹ On this procedural criterion see e.g. Buchanan and Keohane 2006, Woods 2003. Of course, this does not mean that the European Union as a whole takes into account the interests of third countries, which might be negatively affected, as well.

⁷⁷² I thank Ryan Davis for pressing me on this point.

“There is total transparency in Brussels. Everybody can know everything if he wants. The simple problem is that the final decision is so uncontroversial that the media is not interested.”⁷⁷³

The insight that it is not necessarily the availability of information but the saliency of an issue that generates public participation means that we cannot presume that opening institutions up to broader participation will automatically translate into citizens’ active, reflective deliberation, nor consequently into greater legitimacy for a decision.⁷⁷⁴

What the deliberative objection then boils down to is an empirical question about the scope conditions of deliberation at the international level. The argument presented in this study presumes that citizens only participate in decision-making if they are truly interested in an issue. Societies therefore delegate the task of constant representation of their interests at the international level to their governments. This suggests that if one were aiming to enhance the legitimacy of an international institution, one should focus on domestic institutions for the representation of societal interests at the international level. The deliberative objection, in contrast, rests on the assumption that the citizens actively participate in public deliberation if provided with the information and institutional opportunity. Thus, they would suggest a streamlining of institutions with a view to encouraging broader public participation even if it undermines the informal norm of discretion among governments.⁷⁷⁵ The very fact that the informal norm of discretion has remained astonishingly stable despite several treaty revisions aiming at increasing the transparency of the EU’s institutional framework casts considerable doubt on the feasibility of this latter approach. Nonetheless, the deliberative objection ultimately raises a number of empirical questions one would need to address before considering drastic institutional changes. Under what conditions do citizens actively participate in public deliberation? Under what conditions does active participation enhance their trust in institutions? Are these conditions present in the case of the European Union? These questions are promising and important avenues for future research.

⁷⁷³ Interview # 5.

⁷⁷⁴ In fact, the insulation of decision-making on, for instance, monetary matters is standard practice in nation states, and such institutions commonly rank among the most trusted ones in public surveys. For a detailed discussion of the so-called “democratic deficit” of the European Union see e.g. Moravcsik 2008.

⁷⁷⁵ Among them also the present author. See Risse and Kleine 2007.

- Appendix -

Primary Sources

The primary sources used in this dissertation are available at
<http://www.princeton.edu/~mkleine>

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Curriculum Vitae

For reasons of data protection,
the curriculum vitae is not included in the online version

Hiermit erkläre ich gemäß §7 (4) der Gemeinsamen Promotionsordnung zum Dr. phil. / Ph.D. der Freien Universität Berlin vom 18. September 2008, dass ich alle verwendeten Hilfsmittel angegeben und auf dieser Grundlage die vorliegende Arbeit selbständig verfasst habe.

Princeton, 1. September 2009